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# Beyond Apologies: Children, Mothers, Religious Liberty, and the Mission of the Catholic Church

David M. Smolin



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## BEYOND APOLOGIES: CHILDREN, MOTHERS, RELIGIOUS LIBERTY, AND THE MISSION OF THE CATHOLIC CHURCH

DAVID SMOLIN\*

### I. INTRODUCTION

#### *A. Fulton v. City of Philadelphia: A Religious Liberty Victory Made Possible by Legal and Secular Respect for the Mission of the Church to Vulnerable Children and Families*

*Fulton v. City of Philadelphia* was a rare unanimous United States Supreme Court victory for religious liberty within the contentious space of religious liberty in conflict with LGBTQ+ rights and equality.<sup>1</sup> The case also provided a unanimous stamp of approval from the Supreme Court for the work of Catholic Social Services (“CSS”) with vulnerable children and families.<sup>2</sup>

The majority opinion of Chief Justice Roberts, joined by Justices Barrett and Kavanaugh, as well as the three liberal Justices Breyer, Kagan, and Sotomayor, described the conflict as follows:

Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.<sup>3</sup>

The wording of this opening paragraph indicated that it was the actions of Philadelphia in ending a part of the City’s contractual relationship with CSS, rather than the stance of CSS in regard to certifying same-sex married couples, that was in effect on trial.<sup>4</sup> Religious liberty effectively flipped the script. The City’s actions were ultimately

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\*Harwell G. Davis Professor of Constitutional Law; Director, Center for Children, Law, and Ethics, Cumberland School of Law, Samford University. The author acknowledges the excellent research assistance of Gaby Ruiz and Haleigh Chambliss, and Nathan Smolin’s very helpful comments on a prior draft. The views expressed herein are solely the responsibility of the author.

<sup>1</sup> See 141 S. Ct. 1868 (2021).

<sup>2</sup> See *id.* at 1881–82.

<sup>3</sup> *Id.* at 1874.

<sup>4</sup> See *id.*

adjudicated as infringing on religious liberty, while the actions of CSS were shielded from review by religious liberty.<sup>5</sup>

There were important sympathetic facts for CSS: CSS had never in fact turned away a same-sex married couple.<sup>6</sup> If a same-sex couple had approached CSS, CSS would have referred them to the more than twenty other agencies open to same-sex married couples, at least one of which was especially qualified to support same-sex couples as foster parents.<sup>7</sup> The City acknowledged that the work of CSS had “long been a point of light in the City’s foster-care system.”<sup>8</sup>

Most likely, as I have argued at length elsewhere, removing CSS from the foster care system would have harmed the City’s foster care children, and the principle that agencies like CSS should be removed from their work in the foster care systems on a national basis would have been even more harmful.<sup>9</sup> As the Court concluded, “including CSS in the program seems likely to increase, not reduce, the number of available foster parents.”<sup>10</sup> Further, rejecting the religious liberty claim of CSS may have led to rejecting parallel religious liberty claims by foster parents excluded from fostering any child due to their religious beliefs.<sup>11</sup> Such a result eventually could result in a catastrophic decrease of available foster parents, profoundly harming the children for whom the system was created.<sup>12</sup>

Despite my agreement with the result in *Fulton*,<sup>13</sup> it is important to note the extraordinary nature of CSS’s religious liberty claim. CSS sought to exercise its religious mission to children and families within a governmental foster care system, and indeed, to be paid for doing so, while at the same time being exempt from a part of the City’s non-discrimination policies.<sup>14</sup> Upon examination, this kind of claim goes beyond many other religious liberty claims. CSS was not merely asking to be left alone to exercise institutional autonomy and self-governance, as were the church schools in *Our Lady of Guadalupe School v.*

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<sup>5</sup> See *id.* at 1882.

<sup>6</sup> See Brief for Petitioner at 9, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 2836494.

<sup>7</sup> *Id.* at 36.

<sup>8</sup> *Fulton*, 141 S. Ct. at 1882.

<sup>9</sup> See David M. Smolin, *Kids Are Not Cakes: A Children’s Rights Perspective on Fulton v. City of Philadelphia*, 52 CUMB. L. REV. 81, 118–35 (2022) [hereinafter Smolin, *Kids Are Not Cakes*].

<sup>10</sup> *Fulton*, 141 S. Ct. at 1881–82.

<sup>11</sup> See Smolin, *Kids Are Not Cakes*, *supra* note 9, at 83, 126–27, 134–35; cf. *Blais v. Hunter*, 493 F. Supp. 3d 984, 996 (E.D. Wash. 2020).

<sup>12</sup> See Smolin, *Kids Are Not Cakes*, *supra* note 9, at 132–33, 149–50.

<sup>13</sup> See *id.* at 112–13, 126–27, 132–33.

<sup>14</sup> See *Fulton*, 141 S. Ct. at 1874–76.

*Morrissey-Berru*.<sup>15</sup> CSS was not merely asking to be considered on an equal basis with secular service providers for government service contracts, as was involved in *Bowen v. Kendrick*,<sup>16</sup> or asking to be eligible on an equal basis with secular organizations for a public benefit, as in *Trinity Lutheran Church of Columbia, Inc., v. Comer*.<sup>17</sup> CSS was asserting a right to exercise a religious mission within a secular governmental system while maintaining practices inconsistent with the policies of that secular governmental system.<sup>18</sup>

Such a strong religious liberty claim is probably only going to be upheld by secular courts when there is an underlying respect for both the religious mission involved and for the secular value which the religious organization brings to its role with the government. Both were apparent in the Court's opinions. The Court's respect for the religious mission of the Catholic Church to vulnerable children and families was found in the Court's historical treatment of the Church's mission:

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. During the 19th century, nuns ran asylums for orphaned and destitute youth. When criticism of asylums mounted in the Progressive Era, the Church established the Catholic Children's Bureau to place children in foster homes.<sup>19</sup>

The concurring opinion of Justice Alito, joined by Justices Gorsuch and Thomas, took the history of the Church's mission to vulnerable children back to the "earliest days of the Church," thus providing a much longer historical sweep.<sup>20</sup> Justice Alito also provided Jewish and Protestant examples of religious mission to vulnerable children, noting that "Jews and Christians regard this as a scriptural command . . ."<sup>21</sup>

Both the majority opinion and Justice Alito's concurrence noted that religious and private organizations were the primary actors assisting vulnerable children until well into the twentieth century.<sup>22</sup> Thus, as to Christian churches, there is a two millennia history of involvement on behalf of vulnerable children that is being challenged by the actions of the City in excluding CSS from its role in the foster care system.

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<sup>15</sup> See 140 S. Ct. 2049, 2055, 2069 (2020).

<sup>16</sup> See 487 U.S. 589, 593–94, 598, 610–11 (1988).

<sup>17</sup> See 137 S. Ct. 2012, 2017–18 (2017).

<sup>18</sup> See *Fulton*, 141 S. Ct. at 1876.

<sup>19</sup> *Id.* at 1874–75 (citations omitted).

<sup>20</sup> See *id.* at 1884 (Alito, J., concurring).

<sup>21</sup> *Id.* at 1884–85.

<sup>22</sup> See *id.* at 1874–75 (majority opinion); *id.* at 1884–85 (Alito, J., concurring).

The Justice's essentially positive history of the Church's mission indicates a positive respect and appreciation for the Church's religious mission to vulnerable children and families.

The Court's respect for the current secular value of the role of the work of CSS, and similar religious agencies, comes in the context of the cooperative role of government and private organizations that developed in the twentieth century. While the government's role became much more prominent, governmental child protection systems nonetheless continue to rely on private religious and secular agencies and on private persons and families.<sup>23</sup> Justice Alito described the government's modern role as a "licensing system."<sup>24</sup> Chief Justice Roberts's majority opinion similarly noted that the City's "foster care system depends on cooperation between the City and private foster agencies like CSS."<sup>25</sup> Most of the actual day to day care of children provided through the government's foster care system is provided by and through families, frequently recruited, evaluated, trained, and supported in significant part by private agencies.<sup>26</sup> Modern child welfare standards view family-based care as the primary form of care necessary for most children living away from their families, as is the case with children removed by child protection services due to abuse or neglect.<sup>27</sup> Institutional and congregate care is viewed as often being harmful to children<sup>28</sup> and as appropriate only for a small minority of children.<sup>29</sup> Hence, fundamentally, the government needs families willing to take children into their homes on a temporary basis—indeed, hundreds of thousands of families nationally. Further, many of the children in

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<sup>23</sup> See *id.* at 1885 (Alito, J., concurring).

<sup>24</sup> *Fulton*, 141 S. Ct. at 1885.

<sup>25</sup> *Id.* at 1875 (majority opinion).

<sup>26</sup> U.S. DEP'T. OF HEALTH AND HUM. SERVS., ET AL., AFCARS REP. NO. 29 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/TP9J-5FTP>]; DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW 497 (7th ed. 2020).

<sup>27</sup> See ABRAMS ET AL., *supra* note 26, at 438–42; Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 252 (2018).

<sup>28</sup> See *What are the outcomes for youth placed in congregate care settings?*, CASEY FAMILY PROGRAMS (June 29, 2022), <https://www.casey.org/what-are-the-outcomes-for-youth-placed-in-congregate-care-settings/> [<https://perma.cc/8JK4-VHZJ>]; Teresa Wiltz, *Giving Group Homes a 21st Century Makeover*, PEW CHARITABLE TRS.: STATELINE (June 14, 2018, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/06/14/giving-group-homes-a-21st-century-makeover> [<https://perma.cc/TD6V-B35S>].

<sup>29</sup> See Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/Res/64/142 (Dec. 18, 2009); Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 252 (2018).

group homes or other specialized forms of care are in non-governmental settings.<sup>30</sup>

The Court's opinion came in a context where even the City, whose actions to end CSS's role in evaluating prospective foster parents precipitated the litigation, admitted the secular value of CSS's work.<sup>31</sup> The City expressly stated that CSS had "long been a point of light in the City's foster-care system."<sup>32</sup> The City also insisted that it was continuing to contract with CSS for other roles in the foster care system that did not involve CSS evaluating prospective foster parents.<sup>33</sup> In a context where even the City acknowledged in word and deed the secular value of the services CSS provided, it was easy enough for the Court to do so.

### *B. Credibility Gaps*

American society, however, does not have an entirely positive view of either the religious mission of the Catholic Church toward vulnerable children and families, or of the secular value of such work. Indeed, the reputation and credibility of the Catholic Church has suffered significantly in recent decades and produced significant credibility gaps and significant distrust. These credibility gaps, if allowed to fester, would likely undermine religious liberty claims across time. If the Church's mission to vulnerable children and families is not respected as both a religious mission, and also as providing services of secular value to the society, strong religious claims like that upheld in *Fulton v. City of Philadelphia* will, in the future, fail.

Some of these credibility gaps arise from conflicts between some of the official teachings of the Roman Catholic Church and the dominant views in law and society, for example in regard to same-sex marriage, contraception, abortion, and divorce. Other credibility gaps have arisen through profound failures of the Church to live up to shared values of the Church and broader society. The most prominent example would be the clergy sex abuse scandal, which has profoundly damaged the Church both internally and externally.<sup>34</sup>

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<sup>30</sup> See Wiltz, *supra* note 28.

<sup>31</sup> See *Fulton*, 141 S. Ct. at 1882.

<sup>32</sup> *Id.*

<sup>33</sup> See Brief for City Respondents at 8, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 2836494.

<sup>34</sup> See *Americans See Catholic Clergy Sex Abuse as an Ongoing Problem*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/religion/2019/06/11/americans-see-catholic-clergy-sex-abuse-as-an-ongoing-problem/> [https://perma.cc/6Y2L-EMDZ]; see also sources cited *infra* note 327.

This paper focuses on another set of credibility gaps that have arisen when church-related persons and institutions intentionally and systematically separated children from mothers, fathers, families, and communities. Such separations have occurred primarily in regard to indigenous communities and unmarried parents and their children.<sup>35</sup> The revelations of such cruel and scandalous practices by both Catholic and Protestant institutions have over recent decades also contributed to an important credibility gap, again particularly related to the mission of the Christian churches toward vulnerable children and families. This is the topic of this paper.

In the spring of 2022, Pope Francis met at the Vatican with representatives of the First Nations of Canada in private and public attempts to heal the wounds of the Church's participation in the infamous indigenous residential schools in Canada.<sup>36</sup> In late July of 2022, Pope Francis traveled to Canada on a self-described "penitential pilgrimage" specifically to apologize for the Catholic Church's involvement in the indigenous residential school system in Canada.<sup>37</sup> The Pope's work to close this credibility gap is deeply significant. This article is intended to support that work, both as to indigenous communities and in regard to the similarly wrongful treatment of single mothers and their children in multiple countries.

For the Church to close these credibility gaps with society, it must also close its internal credibility gaps. The Church must understand not only that certain practices were and are wrong, but also why they are wrong—in terms that are consistent with the faith.

Hence, much of this article is a theological examination of what went wrong in regard to two now prominent wrongs: the residential schools for Indigenous children in Canada, the United States, and

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<sup>35</sup> See *infra* notes 55–56 and accompanying text.

<sup>36</sup> Pope Francis, Meeting with Representatives of Indigenous Peoples in Canada, Address of His Holiness Pope Francis (Apr. 1, 2022), <https://www.vatican.va/content/francesco/en/speeches/2022/april/documents/20220401-popoli-indigeni-canada.html> [<https://perma.cc/AWK6-QUF3>]; Mary Annette Pember, *Pope Francis apologizes for churches' role in Canadian Indian residential schools*, INDIAN COUNTRY TODAY (Apr. 1, 2022), <https://indiancountrytoday.com/news/pope-apologizes-for-canada-residential-schools-but-what-about-us> [<https://perma.cc/7X4S-9PBH>].

<sup>37</sup> Deborah Castellano Lubov, *Pope: Promote rights of indigenous peoples in Canada*, VATICAN NEWS (July 28, 2022, 12:55 AM), <https://www.vaticannews.va/en/pope/news/2022-07/pope-meets-authorities-diplomats-indigenous-in-quebec-francis.html> [<https://perma.cc/K4CR-9N2X>]; Jason Horowitz, *Papal visit to Canada*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/live/2022/07/25/world/pope-francis-canada-visit> [<https://perma.cc/D8UY-A4Z2>]; Paul Elie, *Pope Francis's "Penitential Pilgrimage" to Canada's Indigenous Communities*, N.Y. TIMES (July 26, 2022), <https://www.newyorker.com/news/daily-comment/pope-franciss-penitential-pilgrimage-to-canadas-indigenous-communities> [<https://perma.cc/XL9R-NVHH>].

Australia, and the treatment of single mothers and their children in Canada, the United States, Ireland, the United Kingdom, and Belgium. The theological journey is necessary to the religious liberty claims for internal reasons—fidelity to the faith—and for external reasons—credibility to society so that society can see and understand that the Church has learned and is learning from her mistakes.

The secular and religious, as well as the legal and theological, aspects are also deeply intertwined. For example, the New Testament apparently references the Roman law concept of adoption to illustrate a theological message.<sup>38</sup> Over time, those intertwined Roman legal conceptions and Christian theological conceptions attached to the same term—adoption—came into secular modern law and public policy in various ways which adapted and perhaps distorted both Roman law and Christian theological understandings.

Hopefully, the historical, theological, and legal material below will contribute to a positive vision of religious liberty which provides a strong foundation for the Catholic Church to work cooperatively with secular governments for the benefit of vulnerable children and families. This cooperation hopefully will be conducted in ways that maintain the religious integrity of Catholic organizations and persons while also serving the common good of society.

## II. CHILDREN AND THE MISSION OF THE CHURCH

Jesus put children at the center of the mission of the church.<sup>39</sup> He famously insisted on their access to him: “Let the little children come to Me, and do not forbid them; for of such is the kingdom of heaven.”<sup>40</sup> He insisted that unless his disciples “bec[a]me like children, [they] w[ould] never enter the kingdom of heaven.”<sup>41</sup> For Jesus, children are not just vulnerable dependents in need of nurture and protection—they also point us toward the true paths of discipleship.<sup>42</sup> Saint Therese of the Child Jesus, whose short life made her the youngest person ever recognized as a doctor of the Church, would nearly two millennia later develop these scriptural roots into “spiritual childhood” as a pathway to God.<sup>43</sup>

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<sup>38</sup> See Section IV(c).

<sup>39</sup> See Matthew 19:14.

<sup>40</sup> See Matthew 19:14.

<sup>41</sup> Matthew 18:3.

<sup>42</sup> See *infra* notes 44–46 and accompanying text.

<sup>43</sup> See ST. THERESE OF LISIEUX, STORY OF A SOUL xii–xiii 112–13, 192–200 (trans. John Clarke, 3d Ed. 1996); *St. Therese: Doctor of the Church*, SOCIETY OF THE LITTLE FLOWER



According to Jesus, his disciples must repent or “turn” in order to move toward spiritual childhood.<sup>44</sup> Jesus was responding to one of the earliest examples of clericalism and ambition in the Church: the disciples were arguing over who was the “greatest in the kingdom of heaven” when Jesus called a child into their midst and told the disciples they must become “like little children.”<sup>45</sup> Spiritual childhood is necessary to prevent disciples from becoming, in the words of Pope Francis, ecclesiastical careerists and climbers.<sup>46</sup>

Jesus is fiercely protective of his “little ones,” declaring that for those who harmed them, “it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea.”<sup>47</sup> These are truly frightening words for a church whose clergy, religious and laity, have all too often profoundly harmed Jesus’s little ones by deed and neglect. We have a choice: either receive children in Jesus’s name, and thereby receive Jesus, or else harm Jesus’s children and become deserving of Jesus’s wrath.

Amidst the divisions in the Catholic Church, there are few who would deny that the modern Catholic Church, including especially priests, religious and bishops, have failed children in very serious ways. Of course, great attention has been given, and rightly so, to sexual abuse. But the issues go far beyond this. The recent discovery of graves of indigenous children who were under the care of Catholic institutions in Canada,<sup>48</sup> and the earlier discovery of the graves of the children of single mothers at institutions in Ireland,<sup>49</sup> point toward additional serious problems.

While few dispute the failures, the causes are deeply disputed and perceived through the conflicting frameworks of the progressive-conservative divide in Catholicism. Some Catholics maintain that the

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(Dec. 19, 2020), <https://www.littleflower.org/therese-facts/st-therese-doctor-of-the-church/> [https://perma.cc/EJ2W-KH4Y].

<sup>44</sup> *Matthew* 18:3.

<sup>45</sup> *Matthew* 18:1–3 (New International Version).

<sup>46</sup> See Cindy Wooden, *Pope Francis to new priests: Be servants, not careerists*, AMERICA THE JESUIT REVIEW, (Apr. 26, 2021), <https://www.americamagazine.org/faith/2021/04/26/prayer-be-poor-new-priests-pope-francis-240541> [https://perma.cc/4BMF-C5Z3].

<sup>47</sup> *Matthew* 18:6; see St. Therese of Lisieux, *supra* note 43, at 113.

<sup>48</sup> Ian Austen, ‘Horrible History’: Mass Grave of Indigenous Children Reported in Canada, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/world/canada/kamloops-mass-grave-residential-schools.html> [https://perma.cc/Q3VH-RHNS].

<sup>49</sup> Jamie Grierson, *Mass grave of babies and children found at Tuam care home in Ireland*, THE GUARDIAN (Mar. 3, 2017), <https://www.theguardian.com/world/2017/mar/03/mass-grave-of-babies-and-children-found-at-tuam-orphanage-in-ireland> [https://perma.cc/65CY-MA9L].

Church failed during the emergence of the sexual revolution to maintain sufficient continuity and fidelity to the teachings of the Church.<sup>50</sup> The Church bent too much to the world. For other Catholics, the problem comes from the Church's maintenance of a primarily celibate, all-male priesthood and a punitive and rigid sexual morality.<sup>51</sup> Some, including Pope Francis, blame a church culture of "clericalism" which enabled abusers to escape accountability.<sup>52</sup>

This essay will not address the most prominent issues in the interminable Catholic debates over human sexuality and gender, such as the communion for divorced and remarried Catholics, the blessing of same-sex unions/marriage, contraception, and the opening of the priesthood to women and more regularly to married persons. This article will also not assess the ways in which the Church and Catholic institutions have changed their approaches to the protection of children in response to the sexual abuse scandals.

Instead, this article focuses on several areas that have not been as commonly addressed: the protection of the parent-child bond—particularly, the mother-child bond—and the intersection of gospel and law/morality.

Close examination of these areas can produce a combination of repentance and yet confidence. The problem here is not that the Church needs to compromise with the world, but rather that the Church needs to be more faithful to God in adhering to the full implications of the Catholic faith. The Church has wounded not only children, mothers, and families but also herself; in order to recover, she must be more deeply what and who she is.

### III. ABORTING MOTHERHOOD

Catholics are particularly devoted to Mary, the Mother of Jesus, the Mother of God, the Mother of the Church.<sup>53</sup> From this devotion,

<sup>50</sup> See Thomas Reese, *The Catholic story, conservative vs. progressive*, NATIONAL CATHOLIC REPORTER (Jan. 8, 2016), <https://www.ncronline.org/blogs/faith-and-justice/catholic-story-conservative-vs-progressive> [<https://perma.cc/A77F-XE53>].

<sup>51</sup> See *id.*

<sup>52</sup> Cindy Wooden, *Clericalism: The culture that enables abuse and insists on hiding it*, AMERICA: THE JESUIT REVIEW (Aug. 22, 2018), <https://www.americamagazine.org/faith/2018/08/22/clericalism-culture-enables-abuse-and-insists-hiding-it> [<https://perma.cc/PR9V-7DXM>]; Pope Francis: *Letter to the People of God*, VATICAN NEWS (Aug. 20, 2018) <https://www.vaticannews.va/en/pope/news/2018-08/pope-francis-letter-people-of-god-sexual-abuse.html>, [<https://perma.cc/NQ5N-4V96>].

<sup>53</sup> See, e.g., Catechism of the Catholic Church, para. 487–507, 963–75 (2d. ed. 1997) [hereinafter *Catholic Catechism*]; CARL A. ANDERSON & EDUARDO CHÁVEZ, *OUR LADY OF GUADALUPE* 121–22 (2009).

one would expect a particular respect for motherhood and for the mother-child relationship.

Yet, Catholic institutions, clergy, religious, and laity, were deeply involved in the international “baby scoop era” in which single pregnant women in Australia, Belgium, Canada, Ireland, New Zealand, the United Kingdom, and the United States were pressured and coerced to relinquish their children through intermediaries to unknown strangers.<sup>54</sup> This coercive and cruel treatment of the unwed mother and her child is also expressed in the industrial schools and mother and baby home scandals in pervasively Catholic Ireland.<sup>55</sup>

Similarly, Catholic institutions are deeply implicated in practices of separating indigenous children from parents and families in Australia, Canada and the United States.<sup>56</sup>

The question is who counts as a mother. Unmarried women did not truly count as mothers. Indigenous women practicing non-Christian faith traditions did not count as mothers. Because those women did not count as mothers, their children did not fully count as human beings. The children of unmarried women were “illegitimate” or

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<sup>54</sup> See INT’L SOC. SERV. ET AL., RESPONDING TO ILLEGAL ADOPTIONS: A PROFESSIONAL HANDBOOK 35–39, 187–88 (Christina Baglietto, Nigel Cantwell & Mia Dambach eds., 2016); Senate Community Affairs References Committee, Parliament Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Report, Feb. 29, 2012) [hereinafter *Commonwealth Contribution*], [https://www.aph.gov.au/parliamentary\\_business/committees/senate/community\\_affairs/completed\\_inquiries/2010-13/commcontribformerforcedadoption/report/index](https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2010-13/commcontribformerforcedadoption/report/index) [<https://perma.cc/SQ2L-VNV2>]; *Who Are We?*, ORIGINS AUSTRALIA (FORCED ADOPTION SUPPORT NETWORK), <http://www.originsnsw.com/> [<https://perma.cc/CB26-9CZF>] (last visited May 23, 2023); *Flemish bishops apologize for forced adoptions*, CATHOLIC CULTURE (Nov. 25, 2015), <https://www.catholicculture.org/news/headlines/index.cfm?storyid=26798> [<https://perma.cc/2K7G-9JKG>]; *CHA delivers formal apology for forced adoptions*, CATHNEWS (Sept. 26, 2011), <https://cathnews.com/cathnews/2566-chadelivers-formal-apology-for-forced-adoptions> [<https://perma.cc/FK3C-6XDA>] (describing Opening Statement of Martin Lavery, CEO of Catholic Health Australia, to the Senate Community Affairs Committee Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices).

<sup>55</sup> See, e.g., GOV’T OF IR, DEPARTMENT OF CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, FINAL REPORT OF THE COMMISSION OF INVESTIGATION INTO MOTHER AND BABY HOMES (2021); *Update: December 17th, 2021*, CLANN: IRELAND’S UNMARRIED MOTHERS AND THEIR CHILDREN: GATHERING THE DATA (Dec 17, 2021), <http://clannproject.org/> [<https://perma.cc/2MQH-RXWM>].

<sup>56</sup> See Mary Annette Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-board-ing-schools/584293/> [<https://perma.cc/HG82-65FD>].

“bastard children,” tainted by their very births.<sup>57</sup> The children of indigenous peoples were “savages,” or “uncivilized barbarians.”<sup>58</sup>

Within this context, brutal separation of children from their mothers and mother tongues became sanctified as a benevolent and saving act.<sup>59</sup> The children needed to be reborn, removed from the taint of their illegitimate births or barbarian peoples.<sup>60</sup> Being “born again” meant a profound change of identity and the necessity of cutting ties with original family and original culture.<sup>61</sup>

This way of thinking was a particular temptation for Catholics because it superficially appeared to implement Catholic values. Catholics do focus on the two-parent marital family as the normative and best place for children to be raised.<sup>62</sup> Catholics do teach that human sexuality finds its proper place within marriage.<sup>63</sup> Catholics do see being raised in the “true faith” as an intrinsic spiritual benefit, as the Church is the pathway to God and baptism a significant sacrament of the Church.<sup>64</sup> From these perspectives, many presumably believed they were acting in accordance with the Christian and Catholic faiths when they cruelly separated children from their mothers, families, and cultures.

A pro-life church that insists that life begins at conception and that a pregnant woman is already a mother must be taught not to abort motherhood. Aborting motherhood is the sin and offense of denigrating and severing the mother and child relationship due to the marital status, poverty, or religious identity of the mother. The Church should see this recurrent and systemic sin as an offense against God, and also as deeply

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<sup>57</sup> See Adela Suliman, *Unmarried pregnant women abused in church-run homes in Ireland to get record-breaking compensation*, WASH. POST (Nov. 17, 2021, 9:26 AM), <https://www.washingtonpost.com/world/2021/11/17/ireland-mother-baby-homes-compensation-scheme/> [https://perma.cc/NLV3-MJMT]; David Smolin, *Aborting Motherhood: Adoption, Natural Law, and the Church*, 11 J. CHRISTIAN LEGAL THOUGHT 30, 30–32 (2021).

<sup>58</sup> See *Impact of the ‘Doctrine of Discovery’ on indigenous peoples*, U.N. DEP’T OF ECON. AND SOC. AFFS. (June 1, 2012), <https://www.un.org/en/development/desa/newsletter/desa-news/dialogue/2012/06/3801.html> [https://perma.cc/Y24J-UQ87]; Deborah Castellano Lubov, *UN rights expert hails Vatican’s rejection of ‘Doctrine of Discovery’*, VATICAN NEWS (April 11, 2023), <https://www.vaticannews.va/en/world/news/2023-04/un-expert-hails-vaticans-rejection-of-doctrine-of-discovery.html> [https://perma.cc/4CHP-RT7Q].

<sup>59</sup> See Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 461 (2022).

<sup>60</sup> See *id.* at 457–65.

<sup>61</sup> See *id.*; Smolin, *Aborting Motherhood*, *supra* note 57.

<sup>62</sup> See Catholic Catechism, *supra* note 53, para. 372.

<sup>63</sup> See *id.* para. 2360–62.

<sup>64</sup> See *id.* para. 890, 897, 1213.

contrary to the Church's devotion to Mary as the Mother of God, Mother of the Church, and the New Eve.

The deliberate, callous, and systematic practices of separating children from their mothers, the negligent care of children leading to mass graves, the suppression of languages and cultures, the physical and sexual abuse, and the practices constituting cultural genocide are not some accidental by-products of a bygone age. They reflect a failure of the Catholic Church and Catholic institutions to apply Catholic understandings to recurrent human issues. It is not enough that these wrongs are less repeated when the Church is less powerful in a worldly sense. It is not enough that these things are so obviously wrong to us today. Rather, the Church must understand *why* these actions were wrong so they will not be repeated.

Hence, this article now reviews some of the theological errors that caused Catholic and Protestant churches to act in blatant ways against children and mothers and families. The primary focus of this article is Catholic understandings and actions, as I have written elsewhere about Protestant evangelical perspectives.<sup>65</sup> Obviously, however, there are very substantial areas of overlap among the various Christian theologies and perspectives, including of course shared scriptures.

IV. PROVIDING FOR VULNERABLE FAMILIES AND CHILDREN, AND FOR THE POOR, IS DEEPLY ROOTED IN SCRIPTURE AND TRADITION; BY CONTRAST, THE MODERN CONCEPTION OF FULL SEVERANCE ADOPTION IS CONTRARY TO SCRIPTURE AND NOT DEEPLY ROOTED IN TRADITION.

#### *A. Defining Full Severance Adoption*

The first part of this thesis is not controversial. The many Old Testament scriptures about care of the poor and vulnerable<sup>66</sup> are reinforced in the teachings of Jesus as recorded in the gospels,<sup>67</sup> in the letters of Paul,<sup>68</sup> and in the letter of James.<sup>69</sup> Catholic tradition has elaborated extensively on these scriptural foundations. As the Catechism of the Catholic Church states, “The Church’s love for the poor . . . is

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<sup>65</sup> See generally David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 REGENT J. INT’L L. 267 (2012) [hereinafter Smolin, *Orphans and Adoption*].

<sup>66</sup> See *Deuteronomy* 14:28–29, 15:7–11; *1 Samuel* 2:8; *Psalms* 35:10, 41:1, 72:12–14; *Proverbs* 19:17, 22:9, 16.

<sup>67</sup> See *Matthew* 25:31–36; *Luke* 6:20; *Matthew* 11:4–5.

<sup>68</sup> See, e.g., *Galatians* 2:10.

<sup>69</sup> See *James* 1:27; 2:1–7, 14–17.

a part of her constant tradition.”<sup>70</sup> The Old Testament also repeatedly invokes the necessity of assistance and protection for the widow and orphan,<sup>71</sup> themes addressed also in *James* and, as to widows, in *Acts* and in the Pauline letters.<sup>72</sup>

The conventional view is that adoption is an important way of expressing the Church’s care for orphans as well as “[t]he church’s love for the poor.”<sup>73</sup> My premise is that the conventional wisdom on this point is wrong, particularly given the kind of adoption practiced in America and many other nations in the twentieth and twenty-first centuries. The use and acceptance of this kind of adoption has contributed to the grave errors made by the Church in relationship to children, families, and the poor.

Adoption in the United States involves a set of legal procedures which accomplish the formal, legal transfer of parentage and parental responsibility of a child from the child’s original family to an adoptive family.<sup>74</sup> In the United States, adoption is “full,” which means that adoption requires the legal severance of the adoptee’s relationship to everyone in the adoptee’s original family not adopted with the child.<sup>75</sup> The child becomes a legal stranger to original father and mother, and also a legal stranger to siblings, grandparents, cousins—the entire family tree.<sup>76</sup> The adoptee is then fully incorporated into the family tree of the adoptive family. Adoption involves a change in the legal identity

<sup>70</sup> Catholic Catechism, *supra* note 53, para. 2444.

<sup>71</sup> See *infra* Section IV(D).

<sup>72</sup> See Smolin, *Orphans and Adoption*, *supra* note 65, at 295; *James* 1:27; *Acts* 6:1–6; 1 *Timothy* 5:3–16.

<sup>73</sup> See Catholic Catechism, *supra* note 53, para. 2444.

<sup>74</sup> See ABRAMS ET AL., *supra* note 26, at 253–55, 311; 3 MADELYN FREUNDLICH ET AL., ADOPTION AND ETHICS 1 (2001); see *Massachusetts Adoption of Children Act, 1851*, ADOPTION HIST. PROJECT, <https://darkwing.uoregon.edu/~adoption/archive/MassACA.htm> [<https://perma.cc/62ZT-5ST6>] (last visited February 22, 2023) [hereinafter *Massachusetts Adoption*]; *Adopted Child’s Right to Information as to Biological Parents*, STIMMEL, STIMMEL & ROESER, <https://www.stimmel-law.com/en/articles/adopted-childs-right-information-biological-parents> [<https://perma.cc/RZ58-UEGM>] (last visited February 22, 2023).

<sup>75</sup> See *Fact Sheet: Adoption: “Simple Adoption” versus “Full Adoption:”*, INT’L SOC. SERV. ET AL., (Jan. 2007), [https://www.iss-ssi.org/2007/Resource\\_Centre/Tronc\\_DI/documents/FactSheetNo30ENG.pdf](https://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/FactSheetNo30ENG.pdf) [<https://perma.cc/N8P6-V64C>] (explaining in comparative law terms the differences between simple and full adoption) [hereinafter *ISS, simple/full adoption*]; ABRAMS ET AL., *supra* note 26, at 253–55, 311; *Massachusetts Adoption*, *supra* note 74.

<sup>76</sup> See *Massachusetts Adoption*, *supra* note 74; see *Adopted Child’s Right to Information as to Biological Parents*, *supra* note 74; FREUNDLICH ET AL., *supra* note 74, at 112–14.

and name of the adoptee.<sup>77</sup> Entry into the new family is built on erasure of the child's original family relationships. As adoption developed in the mid-twentieth century, full adoption also required closed records and secrecy, such that even the adoptee was not permitted to know the adoptee's original identity and family.<sup>78</sup> Such secrecy has been relaxed substantially in practice and to some degree in law in more recent years, but adoption remains, in legal terms, full severance adoption.<sup>79</sup> For the remainder of this paper, unless otherwise stated, the term "adoption" refers to full severance adoption.

For much of the modern history of adoption, full severance adoption was both a legal fiction and also a psychological and biological fiction. Adoptees and adoptive parents were expected to live their lives *as if the child had been born to the adoptive parents*. The adoptees who first conducted birth searches were seen as betraying their adoptive parents, and thus were caught between the natural desire to know who they were and their loyalty toward their adoptive parents and family.<sup>80</sup> Birth parents were supposed to live their lives as if they had never given birth.<sup>81</sup> The legitimacy of the adoptive parents' status as parents was built on the elimination of the natural parents and family not only in law but also in life. As will be seen below, full severance adoption as a lived experience has often been used to exploit rather than heal, and often has detracted from human flourishing. Full severance adoption as a lived experience and expectation is contrary to our human nature.

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<sup>77</sup> See ABRAMS ET AL., *supra* note 26, at 623; FREUNDLICH ET AL., *supra* note 74, at 12–13; *Massachusetts Adoption*, *supra* note 74; *Adopted Child's Right to Information as to Biological Parents*, *supra* note 74.

<sup>78</sup> FREUNDLICH ET AL., *supra* note 74, at 12–13; Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS UNIV. LAW REV. 367, 368 (2001); Elizabeth J. Samuels, *The Strange History of Adult Adoptee Access to Original Birth Records*, 5 ADOPTION Q. 63, 63 (2001).

<sup>79</sup> See ABRAMS ET AL., *supra* note 26, at 303–07; Danielle Shapiro, *Adoption*, HATCH INSTITUTE (Jan. 9, 2015), <https://humanparts.medium.com/adoption-f216eac05c58> [<https://perma.cc/SD2P-V2QG>]; *State Adoption Laws*, AMERICAN ADOPTION CONGRESS, <https://americanadoptioncongress.org/state.php> [<https://perma.cc/M3T3-XBPF>] (May 29, 2018) (showing which states seal or restrict adoption records).

<sup>80</sup> For example, see BETTY JEAN LIFTON, *TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER* 132 (1975).

<sup>81</sup> See ANN FESSLER, *THE GIRLS WHO WENT AWAY* 9 (2006); LORRAINE DUSKY, *HOLE IN MY HEART* 34–35 (2015).

### *B. Adoption in the Old Testament*

It has been commonly recognized that adoption is contrary to many interpretations of Islamic Law (Sharia).<sup>82</sup> Islam instead provides for orphan children through the practice of “Kafala” in which a child is raised in a new family without changing the child’s identity.<sup>83</sup> Hence, in Kafala, the child remains a member of, and identifies with and by, his or her original family, even as the child is cared for in another family. Adoption is generally viewed as contrary to Sharia.<sup>84</sup>

What is less recognized is that adoption is equally contrary to Old Testament laws, practice, and custom.<sup>85</sup> There is no law or practice of adoption in the Mosaic Code. Jewish tradition, including the Talmud, verifies the interpretation that Jewish law lacks any law or practice of adoption. Instead, Jewish tradition provides for a foster-care or guardianship like arrangement in which a family cares for another’s child without changing the child’s name, identity, and family history—a practice perhaps not much different from kafala in Islamic law.<sup>86</sup>

The purported examples of adoption in the Old Testament support the incompatibility of adoption with the law and teachings of the Old Testament. The Moses narrative is a preeminent example. According to the Biblical account, Moses is born into the tribe of Levi in the midst of a genocidal infanticide of Hebrew baby boys ordered by Pharaoh.<sup>87</sup> Moses’s mother hides Moses and then famously places him into a basket, placing the basket in the reeds at the river’s edge.<sup>88</sup> Pharaoh’s daughter and her maids discover Moses, whom Pharaoh’s daughter recognizes as one of the condemned Hebrew children.<sup>89</sup> Pharaoh’s

<sup>82</sup> Ali Raza Naqvi, *Adoption in Muslim Law*, 19 ISLAMIC STUDIES 283, 287–92 (1980).

<sup>83</sup> See Convention on the Rights of the Child art. 20(3), Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3 (1989) (recognizing that Islam has a separate doctrine—Kafala—apart from adoption to provide for children separated from their parents).

<sup>84</sup> See Naqvi, *supra* note 82, at 288–89; Convention on the Rights of the Child, *supra* note 83.

<sup>85</sup> For a fuller treatment of the term “adoption” in the Old and New Testaments and “orphan” in the Old and New Testaments, see Smolin, *Orphans and Adoption*, *supra* note 65, from which this subsection and the following two subsections are partially adapted.

<sup>86</sup> Michael J. Broyde, *Adoption, Personal Status and Jewish Law*, in THE MORALITY OF ADOPTION 128–47 (Timothy P. Jackson, ed. 2005); Daniel Pollack et al., *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693, 696 (2004).

<sup>87</sup> See Exodus 1:16–22; 2:1–2; Convention on the Prevention & Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. ii, 102 Stat. 3045, 3035, 78 U.N.T.S. 227, 280 (entered into force Jan. 12, 1951) (defining genocide).

<sup>88</sup> See Exodus 2:3.

<sup>89</sup> Exodus 2:5–6.



daughter chooses to save Moses out of compassion or pity.<sup>90</sup> Moses's sister, who had been watching over Moses in the river, appears and offers to find a nurse for Moses.<sup>91</sup> Pharaoh's daughter agrees, and Moses's sister brings Moses's mother, who is hired by Pharaoh's daughter to nurse her own child.<sup>92</sup> When Moses is older, his natural mother brings "him to Pharaoh's daughter and he became her son."<sup>93</sup> The scriptural text never uses the term adoption, so it is difficult to know if it was a formal legal adoption under Egyptian law or custom, or was just an informal relationship.<sup>94</sup>

It is ironic that some perceive the adoption of Moses as somehow providing a positive precedent in support of modern practices of adoption. Moses was not an orphan at all. The only reason his parents did not raise him was the genocidal decree of death for male Hebrew children, and the same family that decreed his death ultimately took him in "as a son."<sup>95</sup> All of this points to the many unjust circumstances in which children have been wrongly taken from their families in the modern world, including the treatment of indigenous children and the children of single mothers. While it is true that Pharaoh's daughter saved Moses's life, the circumstances are profoundly unjust and coercive. The text better serves as a warning against adoption, pointing toward the unjust and coercive contexts in which children are taken from their parents and family. Further, an arrangement in which the adoptive mother gives the child to the natural mother to nurse hardly seems compatible with modern adoption practices.

Regardless of how one perceives the acts and motives of Pharaoh's daughter, the scriptural narrative ultimately hinges on Moses's rejection of his adoptive identity. The New Testament describes this rejection of adoptive identity as one of the positive marks of Moses's faith, stating: "By faith Moses, when he was come to years, refused to be called the son of Pharaoh's daughter; Choosing rather to suffer affliction with the people of God, than to enjoy the pleasures of sin for a season . . ."<sup>96</sup>

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<sup>90</sup> *Exodus* 2:6.

<sup>91</sup> *Exodus* 2:4–7.

<sup>92</sup> *See Exodus* 2:8–9.

<sup>93</sup> *Exodus* 2:10.

<sup>94</sup> For information on formal legal adoption under Egyptian law or custom, see FACTS AND DETAILS: FAMILIES, KINSHIP, HOUSEHOLDS, INHERITANCE AND CHILDREN IN ANCIENT EGYPT, <https://factsanddetails.com/world/cat56/sub365/entry-6125.html> [<https://perma.cc/Y8KN-4D2V>] (last visited on Mar. 19, 2022).

<sup>95</sup> *See Exodus* 1–2.

<sup>96</sup> *Hebrews* 11:24–25.

Moses returned as an adult to his birth family, with his sister Miriam and brother Aaron playing important roles as Moses leads Israel out of slavery.<sup>97</sup> The story of Moses is in essence an anti-adoption story. Moses can only fulfill his important role in salvation history by rejecting his adoptive identity and returning to his own family and people.

Equally compelling is the story of Esther, who, being a wife of the Persian King bravely intercedes at the risk of her life for the survival of her people.<sup>98</sup> Esther's parents had died, so Mordecai, a relative (depending on the translation, either a cousin or uncle), took her as a daughter.<sup>99</sup> Neither the Hebrew text nor Greek Septuagint (LXX) included the word "adoption," but the Latin term of adoption is inserted in the Vulgate.<sup>100</sup> Whether termed an "adoption" or not, the book of Esther consistently refers to Esther as the daughter of her natural father, reciting also the relationship between her natural father and her "adoptive" father Mordecai.<sup>101</sup> For example, Esther 2:15 refers to "Esther the daughter of Abihail the uncle of Mordecai, who had taken her for his own daughter."<sup>102</sup> This practice is what one would expect within the familial, patriarchal, and tribal family structure of the Old Testament Jews. At the death of the parents, a family member takes up the parental responsibility and role, but nonetheless, the child continues to be identified as the child of her original father. Whether one inserts the word adoption as does the Vulgate, or like the Hebrew original text omits the term adoption, the result is the same. The Jews did not practice the full severance adoption practiced in modern American and Western law.

<sup>97</sup> See *Exodus* 4:14–16; 7:1–2 (showing how God appoints Aaron, identified by God as Moses's brother, as Moses's spokesman); *Exodus* 15:20–22 (showing Miriam as the sister of Aaron); *Numbers* 20 (showing death of Miriam and Aaron); *Micah* 6:4 (recounting the redemption of Israel from Egypt, stating "I sent before thee Moses, Aaron, and Miriam.").

<sup>98</sup> See generally *Esther*.

<sup>99</sup> See *Esther* 2:7; see also *infra* note 100 (showing that some Protestant English versions, following the Hebrew, say that Esther was Mordecai's uncle's daughter, so that Mordecai and Esther were cousins, whereas in the Vulgate they are apparently uncle and niece).

<sup>100</sup> *Esther* 2:7. The Hebrew Bible is available at <http://www.mechon-mamre.org/p/pt/pt3301.htm> [<https://perma.cc/L4V7-CS89>]; Douay-Rheims version with Vulgate, available at <http://www.latinvulgate.com/verse.aspx?t=0&b=19> [<https://perma.cc/E77Y-8KJD>]; English Septuagint version, available at <http://ecmarsh.com/lxx/Esther/index.htm>; Greek Septuagint version, available at [http://bibledatabase.net/html/septuagint/17\\_002.htm](http://bibledatabase.net/html/septuagint/17_002.htm) [<https://perma.cc/P3N4-RSNK>]; Greek, Vulgate, and English text versions available at [www.newadvent.org/bible](http://www.newadvent.org/bible) [<https://perma.cc/M6CW-45X2>].

<sup>101</sup> See *Esther* 2:15, 9:29.

<sup>102</sup> *Esther* 2:15.

Esther, like Moses, in a critical moment of decision must recall her family identity and identification with the people of God, despite having been incorporated into a foreign people with a foreign faith who were threatening the very existence of her people.<sup>103</sup> Haman, the King's most powerful official and advisor, planned to destroy the Jewish people on a specific date in the near future.<sup>104</sup> Mordecai, Esther's cousin and adoptive father, learns of the plot and sends word to Esther, telling her to intercede for the Jews with the King.<sup>105</sup> Esther responds to Mordecai by reminding him that approaching the King uninvited was subject to the death penalty unless the King chose to extend his golden scepter, and that she had not been called in to see the King for thirty days.<sup>106</sup> Mordecai responded to Esther:

Do not think that because you are in the king's house you alone of all the Jews will escape. For if you remain silent at this time, relief and deliverance for the Jews will arise from another place, but you and your father's family will perish. And who knows but that you have come to your royal position for such a time as this?<sup>107</sup>

Like Moses, Esther must value the fate of her birth family and people over the comfort and protection she has within the family of those who threaten and oppress her birth people. Like Moses, Esther must be willing to risk her life in order to confront the pagan King. Like Moses, Esther must remember her primary loyalty to the family of her birth, despite having been welcomed into the comfort of the palace of a great pagan ruler.

The role of adoption in the two stories is somewhat different in that Moses was taken into the palace of the oppressor by adoption, while Esther is taken as a daughter by her cousin and then taken into the palace of the oppressor people through being taken into the harem of the King and then "winning" the competition to be the next Queen.<sup>108</sup> Nonetheless, it would be very strange to view the Book of Esther as support for full severance adoption by strangers. Rather, Esther shows how the extended family is supposed to function in times of tragedy by providing a "father" within, rather than without, the family, tribe, and people. Esther is also a reminder that the "adoptee" is expected to retain a primary identity to her own original family and people with her

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<sup>103</sup> See generally *Esther* 3–7.

<sup>104</sup> See *Esther* 3.

<sup>105</sup> See *Esther* 4.

<sup>106</sup> *Esther* 4:10–11.

<sup>107</sup> *Esther* 4:13–14.

<sup>108</sup> *Exodus* 1–2; *Esther* 2:1–18.

loyalty to her “adoptive” father being a natural extension since her birth father and adoptive father anyway are close relatives.

### *C. Adoption in the New Testament*

“Adoption” as a term or practice in the New Testament is unrelated to modern practices of full adoption of orphan children. As a matter of terminology, the gospels never use the Greek term for adoption.<sup>109</sup> Ultimately, the only explicit New Testament use of the term adoption is limited to five uses in three Pauline letters: Romans 8:15, 8:23, 9:4; Galatians 4:5; Ephesians 1:5. None of these references describe or recommend a practice of families adopting orphan children. The Greek term used, *huiiothesia*, literally means something like to put in the place of a son<sup>110</sup> and thus can be translated as “sonship” or as adoption.<sup>111</sup> Four of the passages in question describe the relationship of a Christian to God in Christ, while one describes the Israelites.<sup>112</sup>

The Pauline usages of *huiiothesia* are all in letters to primarily Gentile groups of early Christians living under Roman law: indeed, three of the five are in Paul’s letter to the church in Rome.<sup>113</sup> Logically, Paul is here referring to adoption (if adoption is what he is addressing) under Roman law and practice.<sup>114</sup> The reference is unlikely to be Jewish given the audience and given the lack of a law or practice of adoption among the Jews.<sup>115</sup>

Roman adoption law was not concerned with the care of orphan children, or even of children at all. Adoption under Roman law generally involved wealthy men who lacked a male heir or were dissatisfied with their natural male heir.<sup>116</sup> The purpose of adoption was family continuity for the adopters, not the best interests of children. Those adopted usually were young adult males, who often who were already related to the adopter by blood or marriage.<sup>117</sup> The goal was to pick a

<sup>109</sup> See TREVOR J. BURKE, *ADOPTED INTO GOD’S FAMILY: EXPLORING A PAULINE METAPHOR* 22 (D. A. Carson ed., 2006).

<sup>110</sup> *Id.* at 21–22.

<sup>111</sup> See, e.g., DOUGLAS J. MOO ET AL., *ROMANS, GALATIANS* 47 (Clinton E. Arnold ed., 2007).

<sup>112</sup> See *Romans* 8:15, 8:23, 9:4; *Galatians* 4:5; *Ephesians* 1:5.

<sup>113</sup> *Romans* 8:15, 8:23, 9:4.

<sup>114</sup> See MOO ET AL., *supra* note 111, at 47; see also Smolin, *Orphans and Adoption*, *supra* note 65, at 287–95.

<sup>115</sup> See *id.*

<sup>116</sup> See BURKE, *supra* note 109, at 65–66.

<sup>117</sup> See BRILL’S NEW PAULY, *ENCYCLOPAEDIA OF THE ANCIENT WORLD* 147 (Hubert Cancick et al. eds., 2002) [hereinafter BRILL’S NEW PAULY] (“Prospective adoptive sons were initially sought among relatives.”).

young man of known character and within the social world of the adopter, whose suitability for becoming the head of a great family could be assessed. Men generally were the adopters, and the wife of the adoptive father usually did not participate in the adoption.<sup>118</sup> The adoptees did not need to be orphans. Adoption under Roman law did involve a change in the legal identity of the adoptee, but commonly a form of the adoptee's original family name was adapted and retained as a part of the new name.<sup>119</sup> Adoption was a social promotion for the adoptee, not a secret, and the adoptee could maintain social relationships with his original family.<sup>120</sup>

Significantly, at the time of Jesus and Paul, it was common for Roman emperors to use adoption to designate the next empower. Adoption was more like a will or a way of picking a successor. Thus, Octavius, known later as Augustus, was adopted by his great-uncle, Julius Caesar, posthumously through Julius Caesar's will in 44 BC.<sup>121</sup> Augustus Caesar is the Emperor in Luke 2:1 who decrees that the Roman world be registered, causing Joseph to bring the pregnant Mary to Bethlehem immediately before the birth of Jesus.<sup>122</sup> Augustus would later adopt his stepson Tiberius, who was also married to his daughter, thereby designating Tiberius the next emperor.<sup>123</sup> Tiberius was the great-uncle and adoptive grandfather (and sometimes listed as the adoptive father) of the next emperor, Gaius Caligula.<sup>124</sup> The notorious Nero became emperor through adoption when his great-uncle and stepfather, the emperor Claudius, adopted him.<sup>125</sup> Thus, designations of imperial succession through adoption occurred in the period before Paul wrote the books of Romans, Galatians, and Ephesians.<sup>126</sup>

In this context, Paul's use of "adoption" as a metaphor for the Christian's relationship to God is clear. Paul is telling these Gentile Roman Christians that the honor of being the adopted child of God is

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<sup>118</sup> SUZANNE DIXON, *THE ROMAN FAMILY* 40–41 (1992).

<sup>119</sup> See BRILL'S NEW PAULY, *supra* note 117, at 146–47.

<sup>120</sup> See *id.* at 147.

<sup>121</sup> See Jesse Greenspan, *8 Things You May Not Know About Augustus*, HISTORY (Aug. 19, 2014), <https://www.history.com/news/8-things-you-may-not-know-about-augustus> [<https://perma.cc/F6NJ-U6FA>].

<sup>122</sup> See Luke 2:1–6.

<sup>123</sup> See Frederik Pohl, *Tiberius*, BRITANNICA, <https://www.britannica.com/biography/Tiberius> [<https://perma.cc/3K9G-FVMH>] (last visited Feb. 19, 2023).

<sup>124</sup> See *Caligula*, BRITANNICA, <https://www.britannica.com/biography/Caligula> [<https://perma.cc/6L5J-BHZA>] (Jan. 20, 2023).

<sup>125</sup> Arnaldo Dante Momigliano, *Claudius*, BRITANNICA, <https://www.britannica.com/biography/Claudius-Roman-emperor> [<https://perma.cc/B4YN-P3K3>] (last visited Feb. 19, 2023).

<sup>126</sup> BRILL'S NEW PAULY, *supra* note 117, at 148–51.

greater than the honor of being adopted by the emperor.<sup>127</sup> Further, the inheritance that the Christian has in Christ is far greater than those who inherit the empire and officer of emperor. This makes sense of these texts. Consider, for example, Romans 8:15–17, which is both typical and also the longest text, providing more explanation:

For ye have not received the spirit of bondage again to fear; but ye have received the Spirit of adoption, [*huiiothesia*] whereby we cry, Abba, Father. The Spirit itself beareth witness with our spirit, that we are children of God: And if children, then heirs; heirs of God, and joint-heirs with Christ; if so be that we suffer with him, that we may be also be glorified together.<sup>128</sup>

It is important in properly “hearing” these scriptures to understand that as originally heard by the Roman gentile Christians, the word “child” in these texts refers primarily to adults. Since Romans practiced adult adoption, these texts do not even hint at any practice in relationship to young children. This is also underscored by the Roman family law context. Fathers under Roman law were the “*pater familias*” (father of the family) and possessed the “*patria potestas*” (fatherly powers) over their children until the father’s death, regardless of the age or marital status of the “child.”<sup>129</sup> Hence, the term “child” in these texts does not particularly point to a minor or person under a certain age, but rather to the parent-child relationship—and particularly to the parent-child relationship after the child was an adult.<sup>130</sup>

Paul uses Roman adoption, for a Roman audience, as an analogy to the Christian’s relationship to God.<sup>131</sup> The analogy teaches that there is no greater honor and glory than being a child of God and no greater inheritance than what will be given to the children of God in Christ. Since the Jews lacked a law or practice of adoption, the adoption analogy to illustrate a person’s relationship to God is restricted in scripture to contexts that are overwhelmingly Roman in cultural context—primarily being of course the letter of Paul to the church in Rome.

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<sup>127</sup> For contrasting views on the significance of the Imperial Cult as background to the early church and the writings of Paul, see PAUL AND EMPIRE: RELIGION AND POWER IN ROMAN IMPERIAL SOCIETY 145–46 (Richard A. Horsley ed., 1997) and SEYOON KIM, CHRIST AND CAESAR: THE GOSPEL AND THE ROMAN EMPIRE IN THE WRITINGS OF PAUL AND LUKE 6 (2008).

<sup>128</sup> *Romans* 8:15–17.

<sup>129</sup> GEOFFREY S. NATHAN, THE FAMILY IN LATE ANTIQUITY 24 (2000).

<sup>130</sup> See, e.g., BURKE, *supra* note 109, at 63–65; DIXON, *supra* note 118, at 40–41; NATHAN, *supra* note 129, at 24–28.

<sup>131</sup> See *Romans* 8:15–17.

Scripture far more widely and pervasively uses the natural parent and child relationship as a metaphor for a person's relationship with God. Hence, the pervasive naming of God as "Father,"<sup>132</sup> Jesus as the "Son of God,"<sup>133</sup> the doctrine of the Trinity,<sup>134</sup> and also the occasional comparison of God to a mother.<sup>135</sup>

Regardless of how these few New Testament texts on adoption are interpreted, they are all about the relationship of human beings to God. While they rely on the practice of adult men adopting young men as an analogy, none of them directly describe a particular adoption of one human being by another. To put it more directly: there is not a single instance in the New Testament of anyone being directed to adopt another human being as a recommended practice. There are no examples in the New Testament of adults adopting children. There is no portrayal of adoption as a solution to a problem of orphans or vulnerable young children. All of this is distinctly missing, despite the much higher death rates of the ancient world in which there would have been far more literal orphans (where both parents are dead) than in our modern world.<sup>136</sup>

The few examples that are sometimes given to the contrary are hardly apt. Some call Joseph the "adoptive" father of Jesus, but this is a misdescription. By marrying Mary before the birth of Jesus, Joseph is the marital father of Jesus,<sup>137</sup> and in law and practice there would not have been any need for adoption—which anyway was not practiced among the Jews.<sup>138</sup> Of course, the Holy Family is quite unique, and the boy Jesus makes plain that while Joseph is his human father, he must be "about his Father's work," underscoring the special Fatherhood of God in relationship to Jesus.<sup>139</sup> But to call the Joseph-Jesus relationship an "adoption" is to stretch the meaning of adoption to a breaking point. Indeed, as to full severance adoption, it would be offensive for Joseph then to adopt Jesus, as that would require purporting to cut off Jesus's relationship with his other Father—God Himself! But even if

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<sup>132</sup> E.g., *Isaiah* 63:16, 64:7; *1 Corinthians* 8:6.

<sup>133</sup> E.g., *1 John* 5:5.

<sup>134</sup> *Matthew* 28:19 (showing that God is the Father, Son, and Holy Spirit).

<sup>135</sup> See *Isaiah* 42:14, 49:15, 66:13; *Hosea* 13:8; *Matthew* 23:37; *Luke* 13:34.

<sup>136</sup> See *Mortality*, BRITANNICA, <https://www.britannica.com/science/mortality-demography> [<https://perma.cc/G7K9-RAQ6>] (Feb. 9, 2023) ("In ancient Greece and Rome the average life expectancy was about 28 years; in the early 21st century life expectancy averaged about 78 years in most industrialized countries.").

<sup>137</sup> See, e.g., *Matthew* 1:16 (setting forth the genealogy of Jesus through Joseph, the "husband of Mary, of whom was born Jesus.").

<sup>138</sup> BRILL'S NEW PAULY, *supra* note 117, at 147.

<sup>139</sup> See *Matthew* 1:20–21; *Luke* 2:41–49.

I am wrong on this point, this would be a precedent at most for step-parent adoption, which is quite different from the kinds of adoptions in which the child is taken from the mother. If Mary had been treated as were the single or indigenous mothers of modern history, the baby Jesus would have been taken away from her and placed in a “more suitable” home.

Even more strained would be Jesus’s words on the cross as an example of adoption: “When Jesus saw his mother there, and the disciple whom he loved [understood to be John] standing nearby, he said to her, ‘Woman, here is your son,’ and to the disciple, ‘Here is your mother.’ From that time on, the disciple took her into his home.”<sup>140</sup>

Aside from the symbolic interpretation in which these words point to Mary as the mother of the Church,<sup>141</sup> the actual arrangement is a form of widow care. In the patriarchal context of the time, Mary as a widow needed an adult male to provide for and protect her. Jesus, as Mary’s son, is fulfilling his obligations to care for his widowed mother by transferring the obligation at his death to John. Whatever we call this, it has nothing to do with the care of young orphan children.

The New Testament indeed directly addresses the practical problems of widow care while saying virtually nothing about orphan care.<sup>142</sup> The reasons why are addressed as we turn to the term “orphan” in both the Old Testament and New Testament.

#### *D. Orphans and the Fatherless in the Bible*

The Hebrew word “Yatom” is used forty-two times in the Old Testament.<sup>143</sup> The term can be translated either as “fatherless” or as “orphan.”<sup>144</sup> The translation of fatherless best fits many of the texts where the mother is alive and caring for the child, but the father is dead or absent.<sup>145</sup>

In the Hebrew Bible the Yatom (“fatherless” or “orphan”) is closely associated with the word “almāna,” which means widow.<sup>146</sup> The two terms appear *together* frequently in the law, Psalms, prophetic books, and in Job and Lamentations.<sup>147</sup> Generally, these passages

<sup>140</sup> *John* 19:26–27.

<sup>141</sup> See Catholic Catechism, *supra* note 53, para. 963–75.

<sup>142</sup> See, e.g., *Acts* 6:1–6; *1 Timothy* 5:3–16.

<sup>143</sup> See HAROLD V. BENNETT, INJUSTICE MADE LEGAL 48 (2002).

<sup>144</sup> See *id.* at 49–50; JAMES STRONG, THE NEW STRONG’S EXHAUSTIVE CONCORDANCE OF THE BIBLE 61 (1990).

<sup>145</sup> See BENNETT, *supra* note 143, at 48–50.

<sup>146</sup> *Id.* at 23.

<sup>147</sup> See *Psalms* 68:5; *Job* 31:16–18; *Lamentations* 5:3–5.



assert God's protection of the widow and fatherless, and corollary obligations to assist, rather than exploit, the widow and fatherless.

The fundamental point is that the phrase "widow and orphan" or "widow and fatherless" are generally a family unit created by the death or absence of a husband and father.<sup>148</sup> Exodus 22:22–24 makes this particularly clear:

You shall not afflict any widow or fatherless child. If you afflict them in any way, and they cry at all to Me, I will surely hear their cry; and My wrath will become hot, and I will kill you with the sword; your wives shall be widows and your children fatherless.<sup>149</sup>

Within the patriarchal ancient world, the woman's lack of a husband and the child's lack of a father rendered the family unit particularly vulnerable, creating risks of starvation and exploitation.<sup>150</sup> Thus, in scriptural texts, God declares His role as the protector and provider of this vulnerable family unit and demands that His people imitate Him by protecting and assisting the widow and fatherless.<sup>151</sup> Within the Mosaic Law, assistance to these vulnerable family units was not merely a matter of discretionary charity but was a mandatory duty to be systematically carried out from specific sources (the tithe and gleaning).

The New Testament Book of James repeats and references these frequent Old Testament texts, famously stating: "Pure religion and undefiled before God and the Father is this, To visit the fatherless and widows in their affliction, and to keep himself unspotted from the world."<sup>152</sup> While this text is often quoted as supporting the modern adoption of "orphans," the text does not at all mention adoption.<sup>153</sup> The book of James is often viewed as reflecting a Jewish-Christian perspective<sup>154</sup> and here should be read to view, as in the Old Testament, the fatherless and widow as a vulnerable family unit.

Of course, there are also circumstances where both parents die (as happened to Esther), and the child is hence an "orphan." However, the Biblical texts appear to have less concern for this circumstance, presumably because the solution was clear: within the extended family and tribal structure of Israel, such a child would presumably be raised by

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<sup>148</sup> See *Deuteronomy* 10:18, 24:17, 19, 20; *Psalms* 68:5.

<sup>149</sup> *Exodus* 22:22–27 (New King James Version).

<sup>150</sup> See BENNETT, *supra* note 143, at 23–56; Robert L. Hubbard, Jr., *The Go'el in Ancient Israel: Theological Reflections on an Israelite Institution*, 1 BULL. FOR BIBLICAL RSCH. 3, 14–15 (1991).

<sup>151</sup> See, e.g., *James* 1:27.

<sup>152</sup> *James* 1:27.

<sup>153</sup> See *James* 1:27.

<sup>154</sup> See DONALD GUTHRIE, NEW TESTAMENT INTRODUCTION 722–59 (4th ed. 1990).

extended family members, as was Esther.<sup>155</sup> For both the Old Testament and New Testament, there is much more focus on widows and the circumstance of a widow with children, and there is almost no focus on the literal double-orphan. Indeed, the New Testament word for orphan or fatherless (“*orphanos*”), which can also mean “bereft,” is used only twice in the entire New Testament<sup>156</sup>—once in the James text just quoted,<sup>157</sup> and once in John 14:18, where Jesus, in the last supper discourse, promises not to leave the apostles as “orphans.”

In the patriarchal structures of ancient Israel, and in the New Testament era, the most likely pathway for younger widows, with or without children, would be re-marriage.<sup>158</sup> Paul addresses this at some length.<sup>159</sup> The widow’s children were also foundational to her future; if she had a daughter, the daughter could marry, a role fulfilled by Naomi’s loyal daughter-in-law Ruth in the book of Ruth.<sup>160</sup> (In the instance of Ruth the act was extraordinary because she was a widowed daughter-in-law and a foreigner—acts so extraordinary as to merit Ruth being one of the few women specifically mentioned in the New Testament genealogies of Jesus.) If the widow had a son, he would eventually grow up and protect and provide for her, as presumably did Jesus for Mary until at his death he assigned the role to John.<sup>161</sup> Paul in the New Testament creates another solution, which would be extended in the early church, in which a widow who does not remarry is supported by the church and engages in particular forms of service and ministry for the church.<sup>162</sup>

These options for assisting widows are also illustrated in the compassionate responses of the prophets Elijah,<sup>163</sup> Elisha,<sup>164</sup> and ultimately Jesus in the New Testament.<sup>165</sup> Elijah encounters the widow Zarephath during a drought and miraculously provides for the widow and her young son through the miracle of the flour and jar of oil that do not run

<sup>155</sup> See Section IV(B).

<sup>156</sup> See Strong’s G3737 - *orphanos*, BLUE LETTER BIBLE, <http://www.blueletterbible.org/lang/lexicon/lexicon.cfm?Strong=G3737&t=KJV> [https://perma.cc/4PFQ-WXPZ] (last visited Mar. 24, 2022) (translating *orphanos* to “bereft (of a father, of parents)” or “orphaned”).

<sup>157</sup> James 1:27.

<sup>158</sup> See 1 Timothy 5:1–16.

<sup>159</sup> See 1 Timothy 5:1–16.

<sup>160</sup> See Ruth 1:8–19, 3:13.

<sup>161</sup> See John 19:26–27.

<sup>162</sup> See 1 Timothy 5:3–16.

<sup>163</sup> See 1 Kings 17.

<sup>164</sup> See 2 Kings 4:1–7; 2 Kings 4:8–37.

<sup>165</sup> See Luke 7:11–17.

out.<sup>166</sup> Then, when the son died, Elijah prays to God, who resurrects the son.<sup>167</sup> Elisha, Elijah's successor, encounters a widow whose sons are about to be taken by a creditor who will enslave them in payment for debts.<sup>168</sup> Elisha miraculously provides for the widow through the miracle of the jars of oil, allowing her to sell the oil, repay her debt, and keep her sons.<sup>169</sup> In the New Testament, Jesus similarly encounters a widow with a just-deceased son and responds by resurrecting the son.<sup>170</sup>

It is striking that there is not a single example in the Old Testament or New Testament of a recommended practice of taking a child from a widow, single mother, or poor family, and then giving that child to another family to raise. The message is clearly to assist the widow and orphan as a family unit.

#### *E. Adoption in Catholic and Western Legal Traditions*

Formal, full adoption of "orphan" children of the kind referenced in contemporary law and practice also is not deeply rooted as a practice in church tradition, nor in the societies influenced by Catholic tradition. Like in prior sections of this article, the term "adoption" refers specifically to formal legal adoption that employs the legal fiction that adoptees are not related to their original family members, fully severing the relationship with the original family, while fully placing the adoptee in the adoptive family tree.<sup>171</sup>

The early church confronted a culture in which abandonment and exposure of newborn babies was common. Indeed, the father ("pater familias") had the legal right to kill or abandon his newborn children: infanticide and exposure of newborn children was viewed as ethical and legal.<sup>172</sup> The church's confrontation with these practices occurred over hundreds of years. Yet, it is not at all clear that adoption, in the modern sense, was a primary response of the church or societies influenced by the church. So, while we tend to conceptualize adoption as a natural solution to the situation of an orphan, this was not so for most of church history—at least in terms of full severance adoption.

<sup>166</sup> 1 *Kings* 17:13–16.

<sup>167</sup> 1 *Kings* 17:17–23.

<sup>168</sup> *See* 2 *Kings* 4:1–2.

<sup>169</sup> *See* 2 *Kings* 4:5–7.

<sup>170</sup> *Luke* 7:11–17.

<sup>171</sup> *See supra* Section IV(A).

<sup>172</sup> *See* BURKE, *supra* note 109, at 63–64; NATHAN, *supra* note 129, at 24; DIXON, *supra* note 118, at 40–41; W.V. Harris, *Child-Exposure in the Roman Empire*, 84 *J. ROMAN STUDIES* 1, 1 (1994); Michael Obladen, *From Right to Sin: Laws on Infanticide in Antiquity*, *NEONATOLOGY* 56–59 (2016).

A part of the initial reason was that adoption in Roman law, as noted above, generally was not relevant to children at all. Roman adoption typically was adoption of young men by older men.<sup>173</sup> There were two forms which, over time, developed into the concepts of “full” adoption (involving a full severance of the original parent-child relationship) and “simple” adoption (where the legal relationship between the child and original family persists, for example as to inheritance rights).<sup>174</sup> Neither form, however, was used for young children, and neither form typically involved mothers at all—and usually not daughters.<sup>175</sup> Even when abandoned children were picked up by strangers, their fate was not one of adoption. Instead, abandoned babies were picked up and raised as slaves, or at best, informally cared for through practices more akin to foster care without adjudication of a formal adoption.<sup>176</sup>

European legal systems, and those derived from them, of course divide into common law and civil law jurisdiction; it appears that neither jurisdiction had a mechanism for formal full, legal adoption of infants or young children until relatively recent times. Full severance adoption did not exist in the common law.<sup>177</sup> The United States was the first common law country to create a general law of full adoption of minors in 1851.<sup>178</sup> England did not adopt its first general law of full adoption until 1926.<sup>179</sup> On the civil law side, European states did not permit full adoption of minor children until various dates in the twentieth century, while earlier permitting full adoption of adults.<sup>180</sup>

From this point of view, full severance adoption of infants and young children built around the legal fiction of treating adoptees as though they had been born to their adoptive parents is a modern innovation. The primary history of formal legal adoption in multiple cultures, from ancient Rome to India, China, and Japan was adoption of young men (or adolescent males) to fulfill the needs of the adoptive

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<sup>173</sup> See BRILL’S NEW PAULY, *supra* note 117, at 146–52.

<sup>174</sup> See *Fact Sheet*, *supra* note 75 (explaining the differences between full and simple adoption).

<sup>175</sup> See BRILL’S NEW PAULY, *supra* note 117, at 146–52.

<sup>176</sup> See Harris, *supra* note 172, at 8–9.

<sup>177</sup> See Jean-Francois Mignot, *Child Adoption in Western Europe, 1900-2015*, HAL OPEN SCIENCE 4–5 (2019).

<sup>178</sup> See KERRY O’HALLORAN, *THE POLITICS OF ADOPTION* 201–02 (Springer 2006); Mignot, *supra* note 177, at 4.

<sup>179</sup> O’HALLORAN, *supra* note 178, at 22.

<sup>180</sup> See Mignot, *supra* note 177, at 4–5.

family for an heir.<sup>181</sup> Full adoption as a solution for orphan children is a modern innovation.

The question of canon law and adoption is complex and beyond the scope of this article. Telling that story requires discussing further the problem of infants abandoned by single mothers, and the responses of the Church and societies influenced by the Church. Some find in the history of canon law an anti-adoption (of children) theme in earlier times, while others find the opposite. Sorting that out will have to wait another day.

The Church's concern with vulnerable children, including orphans, is deeply embedded within scripture and tradition. Taking orphans and abandoned children into various forms of care and protection, including being taken into families, has long been practiced within the Church. However, the specific practice of full severance adoption, with the use of a legal fiction, is not deeply embedded into scripture or tradition.<sup>182</sup>

Why does this matter? One answer is found in the development of full severance adoption as a recommended and often coerced practice for single mothers, leading to the stark injustices of the "baby-scoop era."<sup>183</sup> Another answer is found in the difficulties of trying to live the legal fiction that persons are not related to their biological family of origin and trying to live the legal fiction that a mother is not related to a child she has gestated and birthed.<sup>184</sup> Attempting to live these legal fictions distort our human nature and detract from human flourishing. Solutions for the problems of vulnerable children and families must heal rather than further wound and exploit. Unfortunately, full severance adoption has too often created additional wounds and injuries.

## V. STIGMATIZING, HIDING, AND SEVERING THE UNMARRIED MOTHER-

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<sup>181</sup> INT'L SOC. SERV. ET AL, *supra* note 54, at 188.

<sup>182</sup> See Section IV.

<sup>183</sup> See *supra* notes 54–56 and accompanying text; *infra* notes 184–198 and accompanying text.

<sup>184</sup> See LIFTON, *supra* note 80, at 171–85; DUSKY, *supra* note 81, at 35–40; FESSLER, *supra* note 81, at 9–10.

CHILD RELATIONSHIP IS A COUNTER-PRODUCTIVE WAY TO UPHOLD  
THE SANCTITY OF MARRIAGE, SEXUAL MORALITY, AND THE SANCTITY  
OF HUMAN LIFE.

*A. Adoption and the Single Mother*

Modern adoption law in common law and civil law countries, as indicated above, is an innovation that began in America in 1851 with the first adoption law in a common law country and then spread and developed.<sup>185</sup> That development, particularly in the twentieth century, was in response to the question of the unwed or single mother.<sup>186</sup> In that sense, adoption as it developed in the United States was generally *not* a solution to the literal double-orphan—the child with both parents dead; rather, modern adoption law developed as a solution to the child with two living, but unmarried, parents.<sup>187</sup>

This explains the peculiar obsession with secrecy in the twentieth century history of adoption law. If a child lost both parents to death, whoever cared for the child—whether relatives, friends, or strangers—normally would want to preserve for the child as much information as possible about his or her original parents. Under those circumstances, the children often anyway would have had memories of their original parents prior to death. Secrecy under the circumstances of liberal orphans would be inappropriate to the proper task of preserving for the children the knowledge and memories of their original parents.<sup>188</sup>

However, when adoption was conceptualized as a solution to the problem of unmarried and living parents, secrecy was viewed as paramount.<sup>189</sup> A eugenics-based mindset had infected society and the social work and medical professions, according to which unwed mothers were labeled with derogatory terms such as “imbeciles,” “feeble-minded,” “imbeciles,” or “sexual delinquents.”<sup>190</sup> Negative consequences such

<sup>185</sup> See *Massachusetts Adoption of Children Act, 1851*, *supra* note 74; E.W. CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 7 (1998).

<sup>186</sup> See REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK 1890–1945*, at 19–21 (1993).

<sup>187</sup> See *supra* section III; see also CARP, *supra* note 185, at 7; KUNZEL, *supra* note 186, at 19–21; FESSLER, *supra* note 81, at 9; see, e.g., *Massachusetts Adoption of Children Act, 1851*, *supra* note 74.

<sup>188</sup> See LIFTON, *supra* note 80, at 180–81.

<sup>189</sup> See Josephine Reeves, *The Deviant Mother and Child: The Development of Adoption as an Instrument of Social Control*, 20 J.L. & Soc’y 412, 420 (1993); LIFTON, *supra* note 80, at 180–81.

<sup>190</sup> *Buck v. Bell*, 274 U.S. 200, 205–07 (1927) (labeling unwed mothers “imbeciles” and “feeble-minded”); KUNZEL, *supra* note 186, at 52 (referring to the labeling of unwed mothers as “feeble-minded” and “sexual delinquents”); see Reeves, *supra* note 189, at 413–15.

as forced sterilization or imprisonment could attach to these labels.<sup>191</sup> Under these circumstances, an unmarried birth mother was supposed to be grateful for the opportunity to pretend she had never given birth. The children were labeled “illegitimate” and viewed as tainted under the twisted eugenics mindset which spoke—as Justice Holmes infamously did in *Buck v. Bell*—of those unfit to reproduce and of inherited criminality.<sup>192</sup> Adoption shielded the child from this taint and stigma, as even if it were known the child was adopted, the exact circumstances could be kept hidden, even from the adoptee and adoptive family, with such knowledge held privately by intermediaries and the state.<sup>193</sup> Adoptive parents were implicitly promised that they could be a “normal family,” which meant that their children would have no family ties or known taint beyond the adoptive family. Given the eugenics and stigma-based mindset of the time, secrecy was essential to adoption conceptualized as a solution to unmarried parenthood. All of this required so profoundly severing the mother and child link that it would be as if the mother had never given birth to the child—the child was not aborted, but the mother-child relationship was to be aborted.<sup>194</sup>

Adoption as a solution to the problem of the unwed mother, rather than as a solution to orphans, thus defines the statistical high points of adoption which occurred in the mid-twentieth century.<sup>195</sup> A global “baby-scoop era” from approximately 1945 to 1980, including Australia, Belgium, Canada, Ireland, New Zealand, and the United Kingdom, involved single mothers being pressured and even forced to relinquish their children through intermediaries to strangers.<sup>196</sup> In the United States alone, an estimated 1.5 million single women relinquished their children for adoption between 1944 and 1975.<sup>197</sup>

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<sup>191</sup> See *Buck*, 274 U.S. at 205–07; KUNZEL, *supra* note 186, at 53; Reeves, *supra* note 189, at 413, 416.

<sup>192</sup> See 274 U.S. at 205–07.

<sup>193</sup> Reeves, *supra* note 189, at 420.

<sup>194</sup> See INT’L SOC. SERV. ET AL, *supra* note 54, at 54.

<sup>195</sup> See, e.g., FESSLER, *supra* note 81; Cecilia E. Donovan, Unpublished Thesis, *Taking Matters Into Their Own Hands: Social Workers and Adoption Practices in United States Maternity Homes*, UNIV. OF COLORADO, 1, 30–31, 35–36 (Apr. 3, 2019); Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 MICH. J. GENDER & L. 33, 35 n.2 (2013).

<sup>196</sup> See, e.g., INT’L SOC. SERV. ET AL, *supra* note 54, at 35, 187–88; Senate Standing Committees on Community Affairs, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Report, March 2012) [hereinafter *Commonwealth Contribution*].

<sup>197</sup> See Penelope L. Maza, *Adoption Trends: 1944–1975*, THE ADOPTION HIST. PROJECT, <https://darkwing.uoregon.edu/~adoption/archive/MazaAT.htm> [https://perma.cc/3PWG-M5X4] (last visited Mar. 30, 2022).

The narratives of women who regret losing their children to adoption echo [in specific ways] the narratives of women who regret their abortions. There is the same sense of being pressured by difficult circumstances, manipulative intimates, and powerful strangers into an irredeemably painful “choice.” There is the same denial of one’s nature as a woman and a mother, and of one’s relationship to a child. There is the same gnawing . . . regret . . . [sometimes] twisted into a self-loathing that can make it difficult to deem oneself worthy of life or love. There is the same difficulty with special anniversaries, such as the child’s birthdays (real in adoption but only projected in abortion). There is the same sense of trauma that makes it difficult to follow the promised path of being “freed” by the abortion/adoption for a “normal” life; instead, all too often it is as though a part of the woman was left dead back at the hospital. There are the same difficulties about having and loving another baby: the struggle to overcome depression and trauma in order to be fully present for and worthy of the mother’s later-born children. There are strangely similar accounts of the clinical settings, with detached medical providers who remove fetuses [or] babies seemingly as though the mother were a piece of unfeeling flesh; of metal stirrups and drugs that blur one’s consciousness; and being acted upon rather than acting; of losing the baby, often in adoption without even being permitted to lay eyes upon one’s own child.<sup>198</sup>

Legally, unmarried fathers lacked parental rights and the capacity to block adoptions of their children before the Supreme Court’s 1972 case of *Stanley v. Illinois*,<sup>199</sup> with later cases providing loopholes under which many adoptions could still be processed without even providing notice to unmarried fathers.<sup>200</sup> Men, while lacking rights, of course often escaped the social stigmas and responsibilities for fathering children outside of marriage with the weight of church and societal condemnation and stigma falling on women.

While the law, in theory, required unmarried mothers to consent to adoption, there is overwhelming documentation that for many women—including especially many churched young women—the pressures were overwhelming. Priests, ministers, parents, relatives,

<sup>198</sup> Smolin, *Aborting Motherhood*, *supra* note 57, at 31–32; see DAVID REARDON, ABORTED WOMEN, SILENT NO MORE 116–30 (1987); ROSALIND P. PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 109, 133 n.7 (rev. ed. 1990); FESSLER, *supra* note 81, at 9–11; Karen Wilson Buterbaugh, *Adoption—Not By Choice*, ECLECTICA (Aug. 2001), <https://babyscoopera.com/adoption-articles/adoption-not-by-choice/> [<https://perma.cc/KWE8-QT4X>].

<sup>199</sup> 405 U.S. 645, 646, 658 (1972).

<sup>200</sup> See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 251, 261–65 (1983); Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES (Mar. 19, 2006), <https://www.nytimes.com/2006/03/19/us/unwed-fathers-fight-for-babies-placed-for-adoption-by-mothers.html> [<https://perma.cc/D53D-78N6>].



doctors, nurses, social workers, and friends sent the message that the only and best pathway was to hide the pregnancy and birth and secretly relinquish the child for adoption.<sup>201</sup> The motherhood of these women was systematically repudiated by church and society, leading them to believe that they could not regard themselves as the mothers of the children they bore. Whether denigrated and shamed as uniquely fallen sinners—as seems to very frequently have been the case—or treated more gently as fellow redeemed sinners, the message was clearly that they must forever hide their pregnancies and births. Their motherhood could only be a shameful thing, suppressed and unacknowledged.<sup>202</sup>

After an inquiry in Australia revealed an estimated 150,000 forced adoptions of children of single mothers,<sup>203</sup> Catholic Health Australia, representing seventy-five Catholic hospitals, issued a national apology.<sup>204</sup> The inquiry had described women being “drugged and shackled to beds”<sup>205</sup> and prevented from seeing or holding their newborn infants, sometimes through having “a pillow or sheet . . . placed over their heads.”<sup>206</sup> Mothers whose children were targeted for adoption were told that they could not oppose the decision and were not told of their rights to revoke consents. Catholic Health Australia admitted that wrongful practices had been “regrettably common” in many maternity hospitals across Australia.<sup>207</sup> Admitting that prior adoption practices had “‘devastating and ongoing impacts’ on [mothers, fathers, children and] families,” Catholic Health Australia acknowledged “the pain of separation and loss felt then and felt now for the mothers, fathers,

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<sup>201</sup> See FESSLER, *supra* note 81, at 9; Clara Daniels, *A Mother's Story*, 2 J. CHRISTIAN LEGAL THOUGHT 23, 23–25 (2012) (recounting a narrative of a more recent adoption that mirrors those which occurred during the baby-scoop era).

<sup>202</sup> E. Wayne Carp, *Jean Paton, Christian Adoption, and the Reunification of Families*, 2 J. CHRISTIAN LEGAL THOUGHT 20, 20–22 (2012); Daniels, *supra* note 201, at 23–25.

<sup>203</sup> See *Commonwealth Contribution*, *supra* note 196, at 8; see also Department of Social Services, *Forced Adoption Practices* (Austl.), <https://www.dss.gov.au/ourresponsibilities/families-and-children/programs-services/forced-adoption-practices> [https://perma.cc/WSC9-9URK].

<sup>204</sup> *CHA delivers formal apology for forced adoptions*, CATHNEWS (Sept. 26, 2011), <https://cathnews.com/cathnews/2566-cha-delivers-formal-apology-for-forced-adoptions> [https://perma.cc/9M9J-JTSJ] (describing Opening Statement of Martin Lavery, CEO of Catholic Health Australia, to the Senate Community Affairs Committee Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices on Sept. 28, 2011).

<sup>205</sup> See *Forced Adoption Practices*, *supra* note 203.

<sup>206</sup> See *Commonwealth Contribution*, *supra* note 196.

<sup>207</sup> *Australia hospitals apologize for forced adoptions*, NDTV (July 15, 2011), <https://www.ndtv.com/world-news/australia-hospitals-apologize-for-forced-adoptions-462724> [https://perma.cc/C5CW-93AN].

children, families and others involved in the practices of the time.”<sup>208</sup> The government of Australia issued an official national apology on March 21, 2013.<sup>209</sup>

There were of course timely and important Catholic voices that objected to the eugenics mindset, such as GK Chesterton in England.<sup>210</sup> Indeed, Pope Pius XI in 1930 issued a broad condemnation of eugenics and of forced sterilization in his encyclical, *Casti Connubii*.<sup>211</sup>

Nonetheless, many Christians, Catholic and Protestant, interpreted Christian sexual morality as justifying what became the systemic practices of the baby scoop era, with the cruelty of the eugenics perspective transformed into purportedly Christian and Catholic disdain for the fallen woman and her baby. It is not too difficult to see how many of the faithful, believing that children where possible should be raised in the context of a permanent marriage and believing that sex ideally should be limited to such marriages, saw secret full severance adoption, and the removal of the scandal of single mothers with children, as the best and even a humane solution. Although in some ways this may be an understandable mistake, it is a mistake with profound negative consequences for the many individuals and families impacted.

These mistakes have also profoundly injured the witness of the Church. Today, many quite understandably perceive the baby scoop era and other cruel practices toward unwed mothers and their babies (including the industrial schools, Magdalene laundries, and mother and baby homes in Catholic Ireland) as proof of the inherent viciousness of traditional religion and Christian sexual morality. Coupled with the evident hypocrisies of the clergy sexual abuse scandals, a church which should be known as an advocate and defender of children is instead perceived as a cruel exploiter. In this context, apologies, while important, are not enough. It is necessary to understand what went wrong and reform it.

The next sections thus try to clarify the errors in these ways of approaching the single mother and unmarried parents.

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<sup>208</sup> See *CHA delivers formal apology for forced adoptions*, *supra* note 204; see *Church to say sorry for forced adoptions*, SBS NEWS (Feb. 25, 2015, 1:01 PM), <https://www.sbs.com.au/news/article/church-to-say-sorry-for-forced-adoptions/u1g11pbg4> [<https://perma.cc/W596-EBX3>].

<sup>209</sup> See *Forced Adoption Practices*, *supra* note 203. This paragraph is adapted from Smolin, *Aborting Motherhood*, *supra* note 57, at 32.

<sup>210</sup> See generally G.K. CHESTERTON, *EUGENICS AND OTHER EVILS* (1922).

<sup>211</sup> See *CASTI CONNUBII, ENCYCLICAL OF POPE PIUS XI ON CHRISTIAN MARRIAGE*, VATICAN, [https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19301231\\_casti-connubii.html](https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html) [<https://perma.cc/73KM-A9RV>].

*B. Mary and the Single Mother*

Mary famously was an unwed pregnant woman. This delicate topic is addressed in the Gospel of Matthew:

When his mother Mary had been betrothed to Joseph, before they came together she was found to be with child of the Holy Spirit; and her husband Joseph, being a just man and unwilling to put her to shame, resolved to [send her away] quietly. But as he considered this, behold, an angel of the Lord appeared to him in a dream, saying, "Joseph, son of David, do not fear to take Mary your wife, for that which is conceived in her is of the Holy Spirit; she will bear a son, and you shall call his name Jesus, for he will save his people from their sins."<sup>212</sup>

Of course, the texts of the New Testament and Church Doctrine claim that Mary was a virgin when she became pregnant miraculously through the Holy Spirit.<sup>213</sup> Mary was without fault or sin in these events. Indeed, her reaction to the annunciation by the angel Gabriel is a model of trusting faith in God: "Behold, I am the handmaid of the Lord; let it be to me according to your word."<sup>214</sup> Of course in Catholic teaching Mary is not just sinless in relationship to the conception of Jesus but is also the first human since Adam and Eve to be born free from original sin (the Immaculate Conception).<sup>215</sup> Mary's Immaculate Conception can be connected to Jesus inheriting from her a human nature unstained by sin.<sup>216</sup>

Nonetheless, despite the lack of any sin or fault, Mary's situation was outwardly scandalous. It is interesting that Joseph is viewed as a "just man" because he was "unwilling to put her to shame" even when he erroneously believed Mary was pregnant from another man.<sup>217</sup>

Of course, the situation of an unmarried pregnant woman or unmarried mother is normally quite different given the uniqueness of Jesus' virgin birth. Nonetheless, can the narratives and doctrines related to Mary inform us about this situation?

Putting aside some forms of Assisted Reproductive Technology (ART), mothers became pregnant through sexual intercourse. Indeed, given Catholic objections to IVF and many forms of ART, it is in general Catholic teaching that women should become mothers through sexual intercourse.<sup>218</sup> Given the prominence of the example and place

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<sup>212</sup> *Matthew* 1:18–21.

<sup>213</sup> *Luke* 1:26–38; Catholic Catechism, *supra* note 53, para. 484–511.

<sup>214</sup> *Luke* 1:38.

<sup>215</sup> Catholic Catechism, *supra* note 53, para. 966, 2177, 2853.

<sup>216</sup> *See id.* para. 490–93.

<sup>217</sup> *See Matthew* 1:19.

<sup>218</sup> John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, USCCB, <https://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive->

of Mary as a mother—the Mother of Jesus, the Mother of God, the Mother of the Church—this model of a virgin (and in Catholic doctrine, ever or perpetual virgin) mother creates complexities.<sup>219</sup> Catholic mothers are not going to be like Mary in their relationship to sexuality. Mary’s virginity is rather seen as a representation of her special and specific relationship to God, and as ultimately pointing toward humanity’s ultimate “nuptial union” with God in Christ.<sup>220</sup>

The treatment of marriage as a sacrament orientated toward procreation, child raising, and the faithful love of the couple implies that sex within marriage is not a concession to human weakness and sin but a positive good.<sup>221</sup> The Church does not intend marriage to be sexless. Hence, if mothers are to look to Mary as a model of their motherhood, they must recognize that Mary’s virginity is not a literal model for them, even if it has some applicable spiritual significance.

John Paul II’s theology of the body further indicates that for Catholics, the biological, which includes the division into male and female and then human sexual expression, is related in important ways to natural law.<sup>222</sup> Catholics are not Gnostics who believed the physical to be inherently sinful.<sup>223</sup> Catholics are not among those who see spirituality primarily as a matter of ignoring the body and the biological.<sup>224</sup> The original creation was good; even though the fall profoundly impacts human nature and creation, in redemption human nature is restored, not eliminated.<sup>225</sup> Christianity teaches the “resurrection of the body,” and

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technology/begotten-not-made-a-catholic-view-of-reproductive-technology [https://perma.cc/CTB9-6VJN]; see *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, (1987), [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) [https://perma.cc/42EC-LLYN].

<sup>219</sup> See Catholic Catechism, *supra* note 53, para. 484–511.

<sup>220</sup> See John Paul II, *The Holy Spirit and Mary: Model of the Nuptial Union of God with Humanity* (Christopher West trans., 1990), <https://tobinstitute.org/the-holy-spirit-and-mary-model-of-the-nuptial-union-of-god-with-humanity/> [https://perma.cc/5SY8-S4M2].

<sup>221</sup> Catholic Catechism, *supra* note 53, para. 1601–17.

<sup>222</sup> See generally JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY (trans. Michael Waldstein 2006). For resources, see *What is the Theology of the Body*, <https://theologyofthebody.net/> [https://perma.cc/QD2K-NYVW].

<sup>223</sup> See Catholic Catechism, *supra* note 53, para. 285.

<sup>224</sup> See *id.* para. 285, 364; see also Tommy Shultz, *Body Bad, Spirit Good*, DIOCESAN (Oct. 25, 2019), <https://diocesan.com/body-bad-spirit-good/> [https://perma.cc/2UZY-L78Z].

<sup>225</sup> See *Genesis* 1:10, 18, 24–27, 31; Catholic Catechism, *supra* note 53, para. 385–421.

while we cannot fully grasp what that will mean, it means that the body is not inherently sinful.<sup>226</sup>

The single pregnant woman, of course, is in a different situation than the married woman in that the woman became pregnant through sexual intercourse outside of marriage. The blunt question is whether women who became mothers through sexual intercourse outside of marriage are fully mothers? Are children conceived and born outside of marriage more deeply stained with original sin than children conceived and born within marriage? While these may be insulting questions to ask, the treatment of unmarried women and their children by church and society in multiple countries during the baby-scoop era makes these necessary questions. Church, society, state, and social work treated the single mother as less than a mother and her child as tainted. It is not enough to be shocked at the cruelty of this treatment. It is also necessary to show that it was wrong within Catholic and Christian frameworks.

Another context for the question is the proper concern for the decline in marriage within church and society with significant accompanying harms of many kinds, including to children and to the intergenerational transmission of the faith.<sup>227</sup> The social stigma accompanying single births presumably was viewed once as a deterrent to such births and as guiding people toward marriage as the proper place for childbearing. Is such social stigma therefore necessary for a revitalization of marriage, at a time when (in the United States, for example) approximately forty percent of births are to unmarried women?<sup>228</sup> Put another way: is it worth sacrificing the mother-child bond in the interests of preserving the social norm of birthing and raising children within marriage?

There are indications that these are not just questions for the past. A 2017 survey of Catholic women in the United States asked whether “[u]nwed Catholic parents feel welcome in my parish?”<sup>229</sup> Responses included:

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<sup>226</sup> See Catholic Catechism, *supra* note 53, para. 988–1019; Apostle’s Creed, <https://www.usccb.org/prayers/apostles-creed> [<https://perma.cc/SZK7-LKQN>].

<sup>227</sup> See, e.g., Helen M. Alvaré, *If We Took the Scriptures on Marriage Seriously*. . . , 11 J. CHRISTIAN LEGAL THOUGHT 18, 20–23 (2021); Helen M. Alvaré, *Families, Schools, and Religious Freedom*, Liberty & Law Center Research Paper No. 22–05, at 24–26 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4119844](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119844) [<https://perma.cc/2X36-XNH4>]; MARY EBERSTADT, HOW THE WEST REALLY LOST GOD 107–14 (2013).

<sup>228</sup> See *Unmarried Childbearing*, CDC, <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [<https://perma.cc/W256-CFEK>] (Jan 23, 2023).

<sup>229</sup> MARK M. GRAY & MARY L. GAUTIER, CATHOLIC WOMEN IN THE UNITED STATES: BELIEFS, PRACTICES, EXPERIENCES, AND ATTITUDES 78 (2018).

Not at all: 17.9%  
 A little: 23.3%  
 Somewhat: 33.9%  
 Very much: 24.9%<sup>230</sup>

Where only one quarter felt that it was “[v]ery much” true that “unwed Catholic parents feel welcome in my parish,” it would seem that the views of the past are not completely absent.<sup>231</sup> Indeed, far more (more than forty percent) think unwed mothers are “[n]ot at all” welcome or only “[a] little” welcome in their parishes.<sup>232</sup>

I would propose the following answers to these questions:

1. As a theological matter, children born outside of marriage have no taint or personal guilt for the circumstances of their birth and are no more subject to original sin than any other child. Thus, the Catechism of the Catholic Church makes it clear that all infants, while free of personal fault, are subject to original sin, and the Church does not teach any gradation of degree of original sin based on the actions of the parents or the circumstances of birth. Indeed, from the standpoint of the doctrine of original sin, the only parents whose actions count are Adam and Eve, the Biblical parents of all humanity.<sup>233</sup> This concept of a child who, at birth, is more sinful or tainted than other children, is an anti-Christian idea that has wrongly been permitted to seep into the Church through a false veneer of piety.
2. Further, the church in general will and does baptize children born outside of marriage. Pope Francis specifically addressed the issue in 2016, stating that the denial of baptism to the children of single mothers was “a form of ‘pastoral cruelty.’”<sup>234</sup> As a civil matter, the church officially opposes discrimination against non-marital children, stating: “All children, whether born in or out of wedlock, enjoy the same right to social protection, with a view to their integral personal development.”<sup>235</sup>
3. As a theological matter, unmarried mothers are fully mothers. The mother-child bond is created by God and protected by

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<sup>230</sup> *Id.*

<sup>231</sup> *See id.*

<sup>232</sup> *Id.*

<sup>233</sup> *See* Catholic Catechism, *supra* note 53, para. 396–409.

<sup>234</sup> Kaya Oakes, *How the Catholic Church can help single mothers*, AM. MAGAZINE (Jan. 11, 2019), <https://www.americamagazine.org/faith/2019/01/11/how-catholic-church-can-help-single-mothers> [<https://perma.cc/LLK8-RZPL>].

<sup>235</sup> The Holy See, Charter of the Rights of the Family art. 4(e) (1983).

God as a matter of human nature and natural law, regardless of whether the mother is married.

4. Despite the differences between Mary's virginal motherhood and that of married and unmarried mothers, Mary brings an enhancement of the dignity of all mothers. Mary is the New Eve, and her descendants may be a part of the new humanity. Mary plays a role "in relation to the Church and to all humanity."<sup>236</sup> Mothers join Mary in being mothers of the new humanity created by the birth of the second Adam, Jesus. Mothers cooperate with God in the creation of the next generation who, since the time of Jesus, constitute a new humanity—a restored and redeemed humanity.

### *C. Scandal and the Single Mother*

This leads to the question of public scandal. Church and society have often viewed the unwed mother as creating a public scandal that undermines morals and the norm of sex and procreation within marriage. Scandal is harmful because it becomes a negative example that may lead others into sin.<sup>237</sup> This concern with scandal perhaps motivated efforts to have single pregnant women "disappear" mysteriously before they "showed" as pregnant, relinquish their children for adoption, and then reappear as if they had never been pregnant. Publicly punitive approaches, as evidenced in Ireland and elsewhere, in which mothers and children were sent away to institutions,<sup>238</sup> perhaps were designed to send a public message of condemnation.

There are a number of responses to the public scandal problem:

1. Practically Speaking, the Most Likely and Successful Way of Avoiding Public Scandal for a Pregnant Single Woman is an Abortion.

Dr. John Kleinman, director of the Nathaniel Centre, which is the Catholic Bioethics Center in New Zealand, and an agency of the New Zealand Catholic Bishops Conference, explains the problem as follows:

Some time ago I found myself on the fringes of a group of Catholics discussing the impending birth of a baby to a teenage girl. I detected just the faintest whiff of scandal in the air — nothing said, but plenty implied. I quipped: "Isn't that great." Faces turned, eyes probing. "Isn't it great that she is keeping the baby? Most girls and their

<sup>236</sup> Catholic Catechism, *supra* note 53, para. 968.

<sup>237</sup> *Id.* para. 2284–87.

<sup>238</sup> See *supra* note 54–56 and accompanying text.

families would have organi[z]ed an abortion.” . . . Ironically, for those who identify as Catholic, greater courage may be required if they find themselves fighting not only a prevailing negative cultural attitude but, sadly, the critical judgements of the very community that should provide unquestioning, unconditional support. These judgements are no less damaging for being non-verbal. Consider the story of Katrina who, at [nineteen], found herself unexpectedly pregnant:

*“To say this news was unexpected would be an understatement. I went into shock . . . Mark cried . . . To us, this was a disaster. Everything we had planned, everything we were working towards was shattered . . . We knew our parents would be severely disappointed and that mine might actually disown me. We were both from religious families and most of our friends were religious — WE were religious. We felt that all our friends were likely to judge or even not be our friends anymore. We didn’t know what to do. Keeping the baby would mean potential ostracism from our friends and Church community. Not having the baby would mean going through with a termination, but escaping all the shame and our lives trotting on as planned . . .”*

As Catholics we need to honestly ask: ‘How many young single Catholic women and their partners and/or families would feel like Katrina did about her faith community — whether parish or school?’ John Paul II writes in *Evangelium Vitae*: “As well as the mother, there are often other people too who decide upon the death of the child in the womb.” Many Catholics have probably never considered that our parishes and/or schools may well fall under that category.<sup>239</sup>

If the Church is serious about its anti-abortion position,<sup>240</sup> creating social contexts where the hidden sin of abortion is felt to be necessary for avoiding social and church condemnation is counter-productive.

## 2. A Single Pregnant Woman in the Church Who Goes Through with a Pregnancy is also Providing Positive Teaching and Example.

Society, medicine, and law increasingly present sexual acts as unrelated to procreation, in both directions: sex unrelated to procreation and procreation unrelated to sex. Contraception and abortion are supposed to guarantee sex without procreation and ART provides procreation without sex. Indeed, Stanford bioethicist Henry Greely predicts that within twenty to forty years, most people in rich countries will choose to create children through ART; in listing the issues this would create, Greely does not even mention how it might change humanity

<sup>239</sup> John Kleinsman, *Single Mothers are Saints*, NATHANIEL CENTRE, <http://www.nathaniel.org.nz/single-mothers-are-saints> [<https://perma.cc/5WS6-LDTR>] (last visited on Mar. 30, 2022) (footnotes omitted).

<sup>240</sup> See, e.g., Catholic Catechism, *supra* note 53, at para. 2270–75; POPE JOHN PAUL II, *EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* (1995).



and the human experience if most children were created artificially in a clinic.<sup>241</sup>

By contrast, Catholicism teaches an inherent relationship between sexuality and procreation, which is the root of the official teachings prohibiting artificial contraception and many forms of ART. The theology of the body provides additional teaching on the spiritual and moral significance of the biological connection between sex and procreation.<sup>242</sup> The Church tries to help couples and individuals experience a lived connection between their fertility and their sexuality, in part through the emphasis on natural family planning. In the process of natural family planning, the woman and the couple become more aware of the woman's body, sexuality, cycles, and procreative potential.<sup>243</sup>

A young woman bringing her child to term reinforces the church's teachings. It will come as no surprise to our youth and young adults that some have sex outside of marriage, and hence that element of scandal can hardly be shocking under current circumstances. What is most shocking when a single woman becomes pregnant is the reminder that sex and procreation are naturally linked. It would be ironic if, through the concern with scandal, the Church, like the world, would be more scandalized by a pregnant woman than any other aspect of human sexuality. We should not be like the mass culture which glamorizes sex merely for the experience but treats pregnancy and childbirth as disasters and obscenities.

Carrying a child to term is not only a rejection of abortion, but also an acceptance of responsibility. The woman who accepts responsibility for her child is teaching in a profound way that sex can lead to pregnancy and that the right thing to do when that occurs is to accept the responsibility for the child—appropriately aided by family and community. (I will below discuss the choice at that point between keeping the baby or placing for adoption.)

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<sup>241</sup> HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* (2016); Philip Ball, *Designer babies: an ethical horror waiting to happen?*, *GUARDIAN* (JAN. 8, 2017), <https://www.theguardian.com/science/2017/jan/08/designer-babies-ethical-horror-waiting-to-happen> [<https://perma.cc/Y8QB-NB34>].

<sup>242</sup> See *supra* notes 222–226 and accompanying text.

<sup>243</sup> See Joseph B. Stanford, *The Current State of Science in Natural Family Planning in HUMANA VITAE, 50 YEARS LATER, EMBRACING GOD'S VISION FOR MARRIAGE, LOVE AND LIFE* 177–78 (Theresa Notare ed., 2019); see generally *NFP Resources*, NATIONAL CONFERENCE OF CATHOLIC BISHOPS, <https://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/new-nfp-resources> [<https://perma.cc/3SMF-BEUM>] (last visited Feb. 23, 2023); COUPLE TO COUPLE LEAGUE, <http://cceli.org/> [<https://perma.cc/BZ2K-5DKY>] (last visited Feb. 23, 2023).

Another positive teaching that follows from a single woman's pregnancy is that children are inherently a "gift from the Lord."<sup>244</sup> Our culture teaches that the only good and welcome child is a planned child conceived under ideal circumstances. A single woman carrying a child to term reminds us that children are still a blessing from the Lord when they come at the "wrong time" or in the "wrong way." This is a lesson relevant to the married as well as the unmarried.

The Papal Encyclical *Donum Vitae* says in regard to children born from ART: "Although the manner in which human conception is achieved with IVF and ET cannot be approved, every child which comes into the world must in any case be accepted as a living gift of the divine Goodness and must be brought up with love."<sup>245</sup> Surely the same teaching applies to children conceived and born outside of marriage. The Church's disapproval of the manner in which the child is conceived should never be allowed to overshadow the fundamental teaching that children are indeed a gift of God.

Acceptance of the single pregnant woman also counters the sexist script that has been lived far too long, in which unmarried fathers usually escape stigma and notice while scorn and shame fall upon the women. While this differential treatment may occur because of the public nature of a pregnancy as compared to the hidden nature of the father's role, the public scandal justification itself has become another public scandal—the scandal of a church that proclaims the equality of women and men and yet subjects women alone to such brutal social stigma. This sexist script is not one that should be continued in a church that has taught for some two thousand years that in Christ "there is neither male nor female"<sup>246</sup>—in other words, the equal worth and dignity of women and men. Speaking of the equality of the sexes rings hollow when the Church practices such selective shaming for actions which equally belong to men and women—the conception of a child outside of marriage. The scandal of sexism in the Church outweighs the scandal of knowing that some are engaging in sexual activity outside of marriage—which again, can hardly be a surprise.

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<sup>244</sup> *Psalm* 127:3.

<sup>245</sup> Pope John Paul II, *Congregation for the Doctrine of the Faith: Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, in *DONUM VITAE* Part II, B, 5 (Feb. 22, 1987), [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) [<https://perma.cc/S72S-NMNG>].

<sup>246</sup> *Galatians* 3:28.

*D. Adoption, Abortion, and the Single Mother Today*

As noted above, during the baby-scoop era, many single mothers—and especially churched single mothers—were coerced into placing their children for adoption.<sup>247</sup> Nonetheless, the question remains as to the role of adoption for single mothers and unmarried parents, assuming such coercion is eliminated.

First, under current circumstances placing a child for adoption normally would not succeed in avoiding the public scandal of a pregnant single woman. So long as people see or become aware of the pregnancy, the problem of scandal exists. The past practice of going away for months to avoid scandal is much less likely to be successful in our interconnected world, as people who “go away” for a time are usually expected to stay in contact through cell phone, social media, etc. It would take an enormous effort and set of lies to pull off the “girls who went away” scenario today that was practiced in the 1950s.<sup>248</sup> The ethical problem of lying will be addressed below; the first issue is simply that few will have the capacity to pull off such a complete disappearing act today.

Second, current statistics tell us that the vast majority of women in “crisis pregnancies,” including single mothers, do not choose adoption. Remove the coercion and pressure, and most women who go through with a pregnancy, even in difficult circumstances, choose to keep the child. I first became aware of this many years ago when I was in law school, and my wife Desiree volunteered for a pro-life center that counseled women in crisis pregnancies—generally pregnant single women. In her experience, women either chose an abortion or chose to keep the child—no one chose adoption. The statistical picture is not quite as stark, but close: it appears that less than one percent of single pregnant women who do not marry before birth choose to place the child for adoption. While we do not have exact statistics, it appears that less than 20,000 voluntary infant placements for adoption take place per year.<sup>249</sup> Yet, about forty percent of births, about 1.5 million women a year, are to unmarried mothers.<sup>250</sup> Abortions have

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<sup>247</sup> See *supra* text accompanying note 54.

<sup>248</sup> See FESSLER, *supra* note 81, at 9; see Cecilia E. Donovan, Thesis, Taking Matters into Their Own Hands 51–52 (2019), [https://www.colorado.edu/history/sites/default/files/attached-files/donovan\\_thesis.pdf](https://www.colorado.edu/history/sites/default/files/attached-files/donovan_thesis.pdf).

<sup>249</sup> See Jessica Arons, *The Adoption Option 2*, CTR. FOR AM. PROGRESS (Oct. 18, 2010), <https://www.americanprogress.org/article/the-adoption-option/#:~:text=Yet%20adoption%20is%20a%20pregnancy,for%20the%20past%2020%20years> [<https://perma.cc/SJ4A-Y4PX>].

<sup>250</sup> CDC, *supra* note 228; Kiley Hurst, *Rising share of Americans see women raising children on their own, cohabitation as bad for society*, PEW RSCH. CTR. (Mar. 11, 2022),

significantly declined by as much as fifty percent from the high points several decades ago, depending on the measure, but there are still more than 800,000 abortions annually.<sup>251</sup> Eighty-five percent of abortions are performed on unmarried women.<sup>252</sup> Hence, most single pregnant women choose childbirth over abortion, but very few choose adoption. The Canadian experience seems to be similar with proportionally very few women choosing to place a child for adoption.<sup>253</sup>

The question of how the Church and society further reduce abortions is made more complicated by the Supreme Court overruling *Roe v. Wade*<sup>254</sup> and *Planned Parenthood v. Casey*<sup>255</sup> in *Dobbs v. Jackson Women's Health Organization*.<sup>256</sup> Prior to *Dobbs*, the majority of abortions were performed on women in their twenties who were raising other children, often poor and without a reliable partner, rather than on the naïve young teen, although of course the latter still occurs.<sup>257</sup> The teen pregnancy rate is in fact lower than it has been in decades.<sup>258</sup> By 2020, the majority of abortions were already medication abortions, a

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<https://www.pewresearch.org/fact-tank/2022/03/11/rising-share-of-americans-see-women-raising-children-on-their-own-cohabitation-as-bad-for-society/> [https://perma.cc/5P36-D98P].

<sup>251</sup> See generally Katherine Kortsmit, et al., *Abortion Surveillance — United States, 2019*, 70 CDC MMWR 9, 1–2 (Nov. 26, 2021), <http://dx.doi.org/10.15585/mmwr.ss7009a1> [https://perma.cc/6P84-S6KC]; Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017> [https://perma.cc/88MU-3GS6]; Rachel K. Jones et al., *Abortion incidence and service availability in the United States, 2020*, GUTTMACHER INST. (Nov. 2022), <https://www.guttmacher.org/article/2022/11/abortion-incidence-and-service-availability-united-states-2020> [https://perma.cc/HWB4-FV2W].

<sup>252</sup> See *id.* at 6.

<sup>253</sup> See *Why Few Pregnant Women Choose Adoption*, Position Paper No. 41, ABORTION RIGHTS COAL. OF CAN. (July 2017), <https://www.arcc-cdac.ca/media/position-papers/41-Why-Few-Women-Choose-Adoption.pdf> [https://perma.cc/5FFM-UJ8A].

<sup>254</sup> 410 U.S. 113 (1973).

<sup>255</sup> 505 U.S. 833 (1992).

<sup>256</sup> 142 S. Ct. 2228, 2279 (2022).

<sup>257</sup> See, e.g., Margot Sanger-Katz, Claire Cain Miller, & Quoc Trung Bui, *Who Gets Abortions in America*, N.Y. TIMES, (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html> [https://perma.cc/MW9K-W9YB]; *Abortion Demographics*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/united-states/abortion/demographics> [https://perma.cc/6C7M-CYNH].

<sup>258</sup> *Reproductive Health: Teen Pregnancy*, CDC, <https://www.cdc.gov/teenpregnancy/about/index.htm> [https://perma.cc/TN3Z-5VWV] (last visited on Mar. 30, 2022).

proportion likely to increase over time.<sup>259</sup> The options of medication abortions, one's ability to travel to other states, and the fact that abortion rates were already higher in states with liberal abortion laws suggest that the patchwork of abortion restrictions appearing post-*Dobbs* may only reduce abortions nationally by perhaps around ten percent.<sup>260</sup>

Ultimately, larger statistical reductions in abortions will come primarily from persuading women in crisis pregnancies to keep their children, rather than by enacting prohibitions of abortion. Those acts of persuasion presumably would be impacted as much by practical assistance as by mere words or rhetoric.

Similarly, we cannot expect adoption to play a statistically significant role in reducing the number of abortions, even if adoption remains a pathway in a statistically small number of cases. Every life matters, and ethically done, adoption is an option. What it means to do adoption ethically is a large topic that may help keep adoption viable as an option for some single women and unmarried parents. But the vast majority anyway will not choose it.

Many pro-life Christians are surprised or saddened by how little adoption is used as a solution to crisis pregnancies. These reactions represent a failure to appreciate the natural law perspectives of the Christian faith.<sup>261</sup> Christians should understand that God created humanity to flourish through a series of bonded relationships<sup>262</sup> and that the mother child bond, which typically starts during pregnancy, is one of those relationships.<sup>263</sup> By the time women give birth, relinquishing the child and ending their mothering relationship to the child would be excruciating for many. From a natural law perspective, such separations of mothers and children violate God-created human nature.<sup>264</sup> It is the secular world that tries to insist that an unborn child is not a person and the pregnant woman not yet a mother; the Church should know better. While more recent trends toward open adoption may alleviate

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<sup>259</sup> See Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions* (Feb. 24, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> [<https://perma.cc/UJL3-4FTD>].

<sup>260</sup> Margot Sanger-Katz, Claire Cain Miller, & Quoc Trung Bui, *Most Women Denied Abortions by Texas Law Got Them Another Way*, N.Y. TIMES (Mar. 6, 2022), <https://www.nytimes.com/2022/03/06/upshot/texas-abortion-women-data.html> [<https://perma.cc/E2UM-D7QJ>] (showing that Texas's abortion ban only reduced abortions by about ten percent due to a combination of medication abortion and travel to other states.).

<sup>261</sup> See *Romans* 2:14–16. This verse is a foundational scriptural text on natural law.

<sup>262</sup> See, e.g., *Genesis* 2:18 (“It [was] not good for man to be alone.”).

<sup>263</sup> See, e.g., *Isaiah* 66:13 (“As a mother comforts her child, so I will comfort you.”).

<sup>264</sup> See Smolin, *Aborting Motherhood*, *supra* note 57, at 38; Smolin, *Orphans and Adoption*, *supra* note 65, at 272–74; Kate Waller Barrett, *Maternity Work: Motherhood a Means of Regeneration*, in *FOURTEEN YEARS' WORK AMONG "ERRING GIRLS"* 52, 58–59.

some of the starkness of the choices involved, most will want to mother their own child.

Adoption may also violate another fundamental principle of the faith, which is that human beings are each unique and non-fungible.<sup>265</sup> Children do not have a right to “a” mother and father—they have a right to *their* mother and father. Adoption, at best, is built on the tragedy of a child losing their actual parents. Adoptive parenting relationships are also real, but no matter how wonderful those adoptive relationships are, they can never negate that real loss. Just as a widow or widower who remarries may enjoy a wonderful remarriage but still mourn his or her first spouse, we should expect and understand the fundamental losses involved in even the best adoptions.<sup>266</sup>

Hence, we can and should reform adoption, and our understandings of adoption, to make adoption more ethical, plausible, and congruent with Christian faith.<sup>267</sup> But doing so will still leave adoption only marginally relevant to the situation of the single pregnant woman, as without coercion only a very small percentage of unmarried parents will choose adoption.<sup>268</sup>

So, what would it mean to reform adoption to make it more in accord with natural law understandings? As to mothers, the law must be adapted to the reality that the woman who places her child for adoption is and will always be a mother of that child even if a mother through adoption will provide most of the day-to-day mothering. The situation of fathers is more complex for the obvious reason that fathers do not gestate and give birth to children. Yet, we know even from ART that for many children of sperm donors, there is often great significance in knowing about and even knowing their biological father even though, in law, this was to be regarded as no more than the “donation” (meaning purchase) of anonymously sourced biological materials.<sup>269</sup> Biological fatherhood also matters.<sup>270</sup> Adoptees should have a right to

<sup>265</sup> See, e.g., *Isaiah* 64:8; *Psalms* 139:13–14.

<sup>266</sup> *Helping Adopted Children Cope with Grief and Loss*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/adoption/adopt-parenting/helping/> [https://perma.cc/5NE7-UQQQ] (last visited Feb. 25, 2023).

<sup>267</sup> See Smolin, *Aborting Motherhood*, *supra* note 57, at 39; Smolin, *Orphans and Adoption*, *supra* note 65, at 272–74.

<sup>268</sup> Sydney Trent, *Women denied abortion rarely choose adoption. That’s unlikely to change*, WASH. POST (Jul. 18, 2022, 7:00 AM), <https://www.washingtonpost.com/dc-md-vi/2022/07/18/adoption-abortion-roe-dobbs/> [https://perma.cc/WFX3-VQQN].

<sup>269</sup> Lauren Gill, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1727–28, 1237 (2013).

<sup>270</sup> See Sarah Zhang, *The Children of Sperm Donors Want to Change the Rules of Conception*, ATLANTIC (Oct. 15, 2021),

identifying information about their original parents, siblings, and family members as a part of their basic human right to origins.<sup>271</sup>

There are situations where, because of extreme abuse and neglect, a natural parent is dangerous to a child and a more complete separation is necessary.<sup>272</sup> But that does not apply to most voluntary placements and, in fact, does not apply to many children removed due to neglect given that much neglect occurs due to the disorganized life and unresolved life issues of the parents. Many place their children or have their children taken away because they are not in a position to be safe or adequate day to day parents but still possess a deep love for their children—and the children for the parents.<sup>273</sup>

While the “both/and” or “additive” approach in which both biological and adoptive parent-child relationships are acknowledged as “real” may sound strange to some, it is quite familiar to most who have adopted or fostered older children, participated in open adoptions (which now constitute the majority of voluntary infant placements in the United States),<sup>274</sup> have been stepparents, or have been stepparents who have adopted. There are also legal traditions and customary practices globally that reflect variants of the “both/and” approach.<sup>275</sup>

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<https://www.theatlantic.com/science/archive/2021/10/do-we-have-right-know-our-biological-parents/620405/> [<https://perma.cc/XB3B-7JDR>]; see also *Resources, WE ARE DONOR CONCEIVED*, <https://www.wearedonorconceived.com/resources-page/resources/> [<https://perma.cc/7W2M-X3EN>] (last visited Feb. 25, 2023) (providing a compilation of resources for donor-conceived individuals).

<sup>271</sup> See G.A. 44/25, Convention on the Rights of the Child, art. 7–9 (Nov 20, 1989); CLAIRE INDRAWATI ACHMAD, CHILDREN’S RIGHTS IN INTERNATIONAL COMMERCIAL SURROGACY: EXPLORING THE CHALLENGES FROM A CHILD RIGHTS, PUBLIC INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE 58–63 (C. Achmad 2018); CHILD IDENTITY PROTECTION, PRESERVING “FAMILY RELATIONS”: AN ESSENTIAL FEATURE OF THE CHILD’S RIGHT TO IDENTITY 55–56 (2022) (discussing the policy behind ensuring children’s access is protected through preservation of and access to records from an international perspective).

<sup>272</sup> See CHILD WELFARE INFORMATION GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT (2019).

<sup>273</sup> See *Overview Out-of-Home Care*, CHILD WELFARE GATEWAY, <https://www.childwelfare.gov/topics/outofhome/overview/> [<https://perma.cc/3MEE-8YY2>] (last visited Feb. 25, 2023).

<sup>274</sup> DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, OPENNESS IN ADOPTION 6–7 (Donaldson Adoption Inst. 2012), [https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2012\\_03\\_OpennessInAdoption.pdf](https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2012_03_OpennessInAdoption.pdf) [<https://perma.cc/VK5E-ETVA>].

<sup>275</sup> See Claudia Fonseca, Diana Marre, & Beatriz San Roman, *Child Circulation in a Globalized Era: Anthropological Perspectives*, in THE INTERCOUNTRY ADOPTION DEBATE 157, 167 (Robert L. Ballard, Naomi H. Goodno, Robert F. Cochran, Jay A. Milbrandt eds., 2015); Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 36 L. & SOC’Y REV. 397 (2002); Claudia Fonseca, *Patterns of Shared Parenthood Among the Brazilian Poor*, 21 Soc. Text 111, 113–15 (2003); RIITTA HÖGBACKA, GLOBAL FAMILIES, INEQUALITY, AND TRANSNATIONAL ADOPTION (Palgrave Macmillan 2016).

There are already movements in law and practice toward variants of the “both/and” approach, but they are incomplete and exist in a context where many adoptees still struggle to find the most basic information about their identity due to closed-record laws or the difficulties of birth searches in intercountry adoption.<sup>276</sup> This is not the place for a complete analysis. The main point here is that adoption law in the United States and many other societies unfortunately was shaped by expectations and views contrary to a natural law understanding of parent-child relationships, and the task of reforming it has started but is quite incomplete. It would be helpful if the Church were to participate fully in those reform efforts.

### *E. Lies and the Single Mother*

#### 1. Adoption, ART, and Lying About Lineage

The modern construction of adoption is built on a series of lies—lies validated by the state in officially falsified documents.

The central fraudulent document is the new “birth certificate” issued by the state which lists the adoptive parents and not the original parents.<sup>277</sup> There is nothing wrong with treating the adoptive parents as “real” parents and as legal parents; adoptive parents are real parents who do real “parenting.” The problem is pretending that the adoptive parents are the birth parents of the adoptee, which then requires the erasure of the birth parents. A birth certificate purports to be a vital statistics document that lists the woman who gave birth to the child; instead, it becomes a legal fiction.

As an example, consider the birth certificates for our family’s adoptive daughters, biological sisters from South India who had already spent most of their childhood with their original family and then three years in two orphanages before coming into our family as much older adoptees. The birth certificates issued by the state of Alabama upon our adoption is called a “Certificate of Foreign Birth” and under “mother” lists my wife, Desiree. Our daughters’ dates of birth and place of birth in India are listed on the certificate. The certificate appears to state that my wife gave birth to our daughters in South India

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<sup>276</sup> See Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 164–67 (2015); Caroline B. Fleming, Note, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 465 (2005).

<sup>277</sup> *FAQ: Original Birth Certificates*, ADOPTEE RIGHTS LAW CENTER, <https://adopterightslaw.com/faq-adoptee-original-birth-certificates/> [https://perma.cc/T3G3-7C5T ] (last visited Feb. 20, 2023).



on a certain date. This always bothered Desiree. It was laughably false: Desiree has never been to India, let alone on the date of birth listed, a decade or more before we ever met our daughters; Desiree gave birth to one of our sons in the United States within two months of purportedly giving birth in India. I am also listed as the father. Looking at my wife and I, it is obvious that our South Asian daughters are not genetically related to us.

These lies distort rather than affirm the relationships created by adoption. My wife and I are proudly parents of our adoptive daughters and grandparents of their children—relationships created by adoption. But we are also relatives of our daughters' family in India, over time generating me the name of "grandpa" to my daughters' brother's children. Our adoptive children remain also members of their original family: the daughter of their mother, sister of their brother, aunt to their brother's children. Our identity in relationship to our adoptive children is enriched, rather than undermined, by their links to their original family. The situation is a bit akin to what happens when one of our children marries, as our child's spouse not only becomes a part of the family, but we also become related to their family. Certainly, it is not required that those "marrying into" a family deny their ties to their family of origin.

Further, once the government systematically creates officially falsified documents, other lies become commonplace. Thus, for example, the dates of birth of our daughters in India are entirely made up. Once we found their family in India, we learned that their "official" birthdays are significantly different from the real dates of birth. In our case, tragically, this set of lies was built upon a further set of lies: the lies that claimed that the birth father was dead (a falsified death certificate) and that their mother had consented to the adoption (she was an illiterate woman and whatever documents she "signed"—she did not know how to write her name—she could not read; she never intended to place her children for adoption).

Of course, not all adoptions have false dates of birth, falsified death certificates, and falsified consents. Nonetheless, at the heart of modern American adoption law is the legal presentation of the adoptive parents as if the child had been born to them, through an officially falsified birth certificate. The secrecy traditionally accorded the original birth certificate in effect was a way of trying to make the truth inaccessible, even to the adoptee.

The regularization of these lies in adoption law became a precedent used to justify lies in contexts, such as IVF and commercial

surrogacy using IVF, that the Church opposes.<sup>278</sup> For example, under many state laws in the United States, commercial surrogacy arrangements require that only the intended parents be listed on the original and only birth certificate.<sup>279</sup> The woman who gives birth is not listed on the birth certificate.<sup>280</sup> Indeed, there may not even be a woman on the “birth certificate” at all, let alone a woman who gave birth.<sup>281</sup> Even if one approves of commercial surrogacy as a pathway to parenthood for same-sex male couples, the point here is the acceptance of officially falsified “birth certificates.” The erasure of the woman who gave birth in adoption is made more complete in surrogacy, given the lack of an original birth certificate listing the person who gave birth. Once you open the law to fictionalization and lies, it is hard to know the stopping place.

## 2. The Bible and Truth-Telling About Lineage, Even (and Especially When) Scandalous

The Bible, on the other hand, reflects a determination to acknowledge biological realities in lineage, even if they might be viewed as embarrassing or a public scandal. Indeed, the scriptures appear especially keen to reveal scandalous aspects of lineage. Take, for example, the genealogy of Jesus as presented in the Gospel of Matthew.<sup>282</sup> The genealogy is patriarchal, in most instances listing fathers and not mothers.<sup>283</sup> However, the genealogy nonetheless chooses to list the mothers precisely in those circumstances that might have been considered scandalous or at least different from the norm.

The first mother listed in Jesus’s genealogy is Tamar, who, as described in Genesis chapter 38, became a mother under particularly scandalous circumstances.<sup>284</sup> Judah, the son of Joseph and name-sake of the tribe of Judah, which will include David and ultimately Jesus,

<sup>278</sup> See *supra* note 218.

<sup>279</sup> E.g., N.H. REV. STAT. ANN. § 168-B:12 (2015).

<sup>280</sup> See *id.*

<sup>281</sup> E.g., UNIF. PARENTAGE ACT § 811(a) (NAT’L CONF. OF COMM’R ON UNIF. STATE L. 2017); N.H. REV. STAT. ANN. § 168-B:12 (2015); ACHMAD, *supra* note 271, at 79–81; CAL. FAM. CODE, § 7962; *Establishing Parentage in Surrogacy: How It Works in California*, SURROGATE PARENTING SERVS. (Sept. 28, 2021), <https://www.surrogateparenting.com/blog/establishing-parentage-in-surrogacy-how-it-works-in-california/#:~:text=Once%20the%20agreement%20is%20signed,instead%20of%20the%20surrogate's%20name> [https://perma.cc/92EN-2L7R].

<sup>282</sup> See, e.g., *Matthew* 1:1–16 (describing the genealogy of Jesus from Abraham through Mary’s husband Joseph).

<sup>283</sup> See *Matthew* 1:1–16.

<sup>284</sup> See *Genesis* 38.

arranged a marriage between Tamar and his first born.<sup>285</sup> Through a succession of scandalous circumstances, Tamar ends up married and then widowed to Judah's first two sons, and promised to the third.<sup>286</sup> When Judah fails to give the third son to Tamar in marriage, Tamar takes matters into her own hands.<sup>287</sup> She apparently knows that Judah, now a widower, has a habit of hiring prostitutes. Tamar dresses as a prostitute and Judah indeed hires her and sleeps with her, without recognizing her as his daughter-in-law.<sup>288</sup> The twins born to this union between widower father-in-law and widowed daughter-in-law include Perez, who continues the messianic line.<sup>289</sup>

The second mother named in the genealogy is Rahab, a prostitute in Jericho who assisted the Hebrew spies, betraying her city, in exchange for saving the lives of her parents, siblings, and family.<sup>290</sup> Even viewed positively as a convert, how many among the churchied would want to highlight that their genealogy included a prostitute—and in Jewish terms, a foreigner.

The third mother named in the genealogy is Ruth, the Moabite convert and faithful widowed daughter-in-law of the widow Naomi.<sup>291</sup> After the death of Naomi's husband and her two married sons, Naomi is left without descendants.<sup>292</sup> Her now widowed daughter-in-law Ruth refuses to leave Naomi and famously declares to Naomi: "where you go I will go, and where you lodge I will lodge. Your people shall be my people, and your God my God. Where you die I will die, and there will I be buried."<sup>293</sup> Later, Ruth marries Boaz,<sup>294</sup> the "kinsman-redeemer," a relative of Naomi who, in marrying Ruth, inherits the obligation to carry on the family name of Naomi's dead husband.<sup>295</sup> The marriage of Boaz and Ruth produces a son, Obed, the grandfather of famed King David.<sup>296</sup> In the book of Ruth, the widowed Naomi, whose sons have died childless and thus who has no biological descendants, is symbolically given Obed to nurse, presumably to symbolically give

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<sup>285</sup> *Genesis* 38:6.

<sup>286</sup> *Genesis* 38:7–11.

<sup>287</sup> *Genesis* 38:13–14.

<sup>288</sup> *Genesis* 38:13–18.

<sup>289</sup> *Genesis* 38:27–29.

<sup>290</sup> *See generally* *Joshua* 2.

<sup>291</sup> *See* *Ruth* 1.

<sup>292</sup> *Ruth* 1:3–5.

<sup>293</sup> *Ruth* 1:6–17.

<sup>294</sup> *Ruth* 4:13.

<sup>295</sup> *Ruth* 4:9–10.

<sup>296</sup> *Ruth* 4:15–17.

her descendants.<sup>297</sup> Yet, the New Testament narrative names Ruth, rather than Naomi, as the mother of Obed, preferring the biological mother to the mother by legal fiction.<sup>298</sup>

The final mother named in Jesus' lineage, apart from Mary herself, is the "wife of Uriah," mother of Solomon, named in the Old Testament as the famous Bathsheba.<sup>299</sup> The New Testament genealogy thus recalls the Old Testament narrative in which King David sleeps with Bathsheba, the wife of Uriah, and then arranges the death of Uriah to cover up his adultery.<sup>300</sup> Solomon was the second child of King David and Bathsheba, conceived after Uriah and their first child were dead and after Bathsheba had become David's "wife."<sup>301</sup> Yet, the genealogy refuses to pass over the matter, insisting on reminding us of the prior wrongs of adultery and murder by stating that "David was the father of Solomon by the wife of Uriah,"<sup>302</sup> even though by the time Solomon was conceived Bathsheba was no longer Uriah's wife.

The difference between the Old Testament and New Testament approaches to lineage, and common approaches in the church, is startling. In the scriptures, truth telling and biological lineage is paramount. While there are some legal fictions, in the family tree they seem to count for little, with the biological lineage being recorded as official, regardless of how scandalous the circumstances. By contrast, among many respectable church families, the "skeletons in the family closet" are well-hidden.

There are presumably multiple reasons for the scriptural approach to lineage, some of which may be specific cultural expressions that are no longer applicable. Norms that should still be applicable include the significance of biological lineage, the significance of truth-telling, and a worldview that comprehends the realities of profound human brokenness even among the devout.

### 3. Significance of Biological Lineage

The significance of biological lineage was addressed in more detail in the earlier discussions of adoption in the Old and New Testaments. To put it briefly: the biological physicality of human procreation—from sexual intercourse to pregnancy to childbirth, nursing, and

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<sup>297</sup> See *Ruth* 4:16–17.

<sup>298</sup> *Matthew* 1:5.

<sup>299</sup> *2 Samuel* 11:2–3; *1 Kings* 1:11.

<sup>300</sup> *2 Samuel* 11:1–15.

<sup>301</sup> *2 Samuel* 12:11–25.

<sup>302</sup> *Matthew* 1:6.

the physicality of providing for the needs of a helpless baby and young child—are features rather than bugs of God’s design for humanity. The Church should understand that a woman is already a mother by the time she gives birth, and hence women who suffer miscarriages or undergo abortions or place children for adoption were already mothers—and always will be mothers of those particular children.<sup>303</sup>

#### 4. Significance of Truth-Telling

The Eighth Commandment forbids bearing false witness against your neighbor.<sup>304</sup> The Catechism of the Catholic Church interprets the norm broadly as forbidding “misrepresenting the truth in our relations with others,”<sup>305</sup> placing the norm in the context of the revelation of God as the source of Truth and Jesus Christ as bearing witness to truth and being “the Truth.” The Catechism quotes Augustine in defining a lie as “speaking a falsehood with the intention of deceiving.”<sup>306</sup>

At the same time, the Catechism warns against actions that would damage the reputation of others, including disclosing, “without objectively valid reason . . . another’s faults and failings to persons who did not know them . . .”<sup>307</sup> Further, the Church usually does not require public confession of sin, providing instead a sacrament of private penance.<sup>308</sup> It is clear that not everyone needs to know everyone else’s faults, and we do not need to inform everyone else of our own faults.

What we have learned over time with the modern practice of adoption and ART is that lies, or even a failure to disclose, as to information central to personal identity, is profoundly harmful. Knowing the identity of our parents and other family members is constitutive of who we are, as created by God. The particularity of our uniqueness as created by God is significantly situated within our lineage. Our biological lineage is only one part of our identity, but it is an important part, linking us beyond our parents to multiple generations of ancestors and family members.

Pope Francis’s statement on “the end of historical consciousness” in *FRATELLI TUTTI* (On Fraternity and Social Friendship) is relevant here:

[T]here is a growing loss of the sense of history, which leads to even further breakup. A kind of “deconstructionism”, whereby human

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<sup>303</sup> See sources cited *supra* note 198.

<sup>304</sup> *Exodus* 20:16.

<sup>305</sup> Catholic Catechism, *supra* note 53, para. 2464.

<sup>306</sup> *Id.* para. 2482 n.280.

<sup>307</sup> *Id.* para. 2477.

<sup>308</sup> See *id.* art. 4.

freedom claims to create everything starting from zero, is making headway in today's culture. The one thing it leaves in its wake is the drive to limitless consumption and expressions of empty individualism. Concern about this led me to offer the young some advice. "If someone tells young people to ignore their history, to reject the experiences of their elders, to look down on the past and to look forward to a future that he himself holds out, doesn't it then become easy to draw them along so that they only do what he tells them? He needs the young to be shallow, uprooted and distrustful, so that they can trust only in his promises and act according to his plans. That is how various ideologies operate: they destroy (or deconstruct) all differences so that they can reign unopposed. To do so, however, they need young people who have no use for history, who spurn the spiritual and human riches inherited from past generations, and are ignorant of everything that came before them."<sup>309</sup>

Hence, lies, or even failures of disclosure, about lineage destroy and deconstruct personal identity, leaving us "shallow, uprooted and distrustful" as Pope Francis expresses.<sup>310</sup>

##### 5. Realities of Human Brokenness Even Among the Devout

The Bible, in testifying to God, makes plain the brokenness of humanity, including those identified as among the people of God at any particular point in time. Indeed, apart from Jesus and Mary, most of the heroes and heroines of the Bible are shown to be profoundly flawed. Abraham and Sarah lose faith in God's promises of an heir and hence arrange for Abraham to conceive a child with Hagar—despite which Abraham is particularly described as an example of a faithful man who believes in the promises of God.<sup>311</sup> King David, described as a man after God's own heart,<sup>312</sup> is an adulterer and murderer<sup>313</sup> who, as expressed in Psalms attributed to him, is often in despair.<sup>314</sup> Moses has a temper which leads him as a young man to murder an Egyptian,<sup>315</sup> and which even as an old man, impacts his role as God's appointed leader of His people.<sup>316</sup> The apostles often fail to understand Jesus's words,<sup>317</sup>

<sup>309</sup> Pope Francis, *Fratetelli Tutti*, para 13 (2020).

<sup>310</sup> *See id.*

<sup>311</sup> *See Genesis 16; Hebrews 11:8.*

<sup>312</sup> 1 *Samuel* 13:14; *Acts* 13:22.

<sup>313</sup> 2 *Samuel* 11:3–5, 22–25; 12:9–10; 15.

<sup>314</sup> *See, e.g., Psalms* 13, 19, 38–41.

<sup>315</sup> *Exodus* 2:11–22.

<sup>316</sup> *See Exodus* 32:19; *Numbers* 20:7–12.

<sup>317</sup> *See, e.g., Matthew* 16:5–12; *Mark* 9:31–32; *Luke* 18:31–34.

vie for position and power among themselves,<sup>318</sup> and fall asleep when Jesus needs them to be present with him in his time of trial.<sup>319</sup> Peter, understood in Catholicism as the first Pope, denies even knowing Jesus three times<sup>320</sup> after promising to go with Jesus to “prison, and to death.”<sup>321</sup> Saul/Paul, as a devout Jew persecuted unto death the people of God, approving the stoning of the martyred Stephen.<sup>322</sup> In Acts, leaders of the New Testament church dispute with one another to the point of breakdowns in relationships and plans.<sup>323</sup> Paul’s letters to the churches reveal congregations strongly divided into factions<sup>324</sup> and guilty of shocking forms of sexual immorality (a man sleeps with his father’s wife),<sup>325</sup> desecrating the Lord’s Supper with disorder to the extent that “one is hungry, and another is drunk.”<sup>326</sup>

Of course, in more recent times, we have been disheartened to learn of the most profound flaws of some of our clergy, a small percentage in horribly abusing children, some priests abusing nuns, and a significant proportion of Bishops failing to take appropriate actions in response to learning of those abuses.<sup>327</sup>

The treatment of single mothers inside the Church must be evaluated in this light of what we know about human brokenness, even among our leaders and role models. From that perspective, the extreme shaming, pressure to separate mother and child, and punitive measures in the twentieth century in Ireland, Australia, the United States, Belgium, and elsewhere were grossly disproportionate and inappropriate.<sup>328</sup> The young women so shamed by the modern church were of course among the most vulnerable and powerless in church and society, and their children of course were entirely helpless and innocent of

<sup>318</sup> See Luke 9:46–48, 22:24–27; Matthew 20:20–28.

<sup>319</sup> See Matthew 26:36–46.

<sup>320</sup> See John 18:13–27.

<sup>321</sup> Luke 22:23.

<sup>322</sup> See Acts 8:1–2.

<sup>323</sup> See Acts 15:36–41.

<sup>324</sup> See, e.g., 1 Corinthians 1:10–17.

<sup>325</sup> See 1 Corinthians 5:1.

<sup>326</sup> 1 Corinthians 11:21.

<sup>327</sup> See generally OFF. OF ATT’Y GEN., COMMONWEALTH OF PA., REPORT I OF THE 40<sup>TH</sup> STATEWIDE INVESTIGATING GRAND JURY (2018); Aurelien Breeden, *Over 200,000 Minors Abused by Clergy in France Since 1950, Report Estimates*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/world/europe/france-catholic-church-abuse.html> [<https://perma.cc/BM4E-STYP>]; Rose Gamble, *Vatican women’s magazine condemns sexual abuse of nuns by priests*, TABLET (Feb. 1, 2019), <https://www.the-tablet.co.uk/news/11319/vatican-women-s-magazine-condemns-sexual-abuse-of-nuns-by-priests> [<https://perma.cc/KP6A-EHSB>].

<sup>328</sup> See *supra* note 54 and accompanying text.

anything other than existing. The anger felt toward the Church in places like Ireland is not misplaced, although to be fair the Church did not act alone.

The intersection of the brokenness of humanity and the hierarchical structures of church, society, and state poses particular problems. Given a fallen humanity, it must be expected that most human hierarchies will shield themselves from accountability even as they create accountability structures for those beneath them. Single mothers were not more punished because they were more guilty than single fathers, nor were they more punished because they were more guilty than clergy who abused children but were wrongly protected by their bishops. Single mothers were more punished because they were simultaneously more visible with their pregnancies and children, and less powerful.

#### VI. OUR LADY OF GUADALUPE, INDIGENOUS MOTHERS, AND THEIR CHILDREN

The recent discovery of hundreds of dead bodies at residential schools for indigenous children in Canada—schools run by Catholic religious orders—is a reminder of another massive wrong against children, their mothers, and families, in which the Catholic Church played a prominent role.<sup>329</sup> A typical news article summarizes the scope of the problem:

From the 19th century until the 1970s, more than 150,000 Indigenous children were forced to attend state-funded Christian schools, the majority of them run by Roman Catholic missionary congregations, in a campaign to assimilate them into Canadian society. The Canadian government has admitted that physical and sexual abuse was rampant in the schools, with students beaten for speaking their native languages.<sup>330</sup>

Like the baby-scoop era victimizing single mothers, the egregious wrongs against indigenous children, families, and societies were international in scope, including not only Canada but also the United States and Australia.<sup>331</sup> The roles of Catholic and Protestant churches and organizations varied; the Catholic Church operated approximately 65 of the 171 residential schools in Canada, with the Anglican Church

<sup>329</sup> Jim Morris, *Report: Over 600 bodies found at Indigenous school in Canada*, AP NEWS (June 24, 2021), <https://apnews.com/article/canada-67da8a8af88efc91e6ffc64630796ec9> [<https://perma.cc/BW49-HT9P>].

<sup>330</sup> *Id.*

<sup>331</sup> *See id*; *Pope apologises to Aboriginal people*, IRISH TIMES (Nov. 23, 2001), <https://www.irishtimes.com/news/pope-apologises-to-aboriginal-people-1.338673> [<https://perma.cc/X4P8-9MX6>].



operating 32, nondenominational Christian 27, and Presbyterian Church 10.<sup>332</sup> A recent count of residential schools in the United States indicates that 84 out of 367 were Roman Catholic (including 4 Jesuit schools), with about 72 spread between 13 different Protestant denominations.<sup>333</sup> The Catholic Bishops of Australia in the 1990s apologized for the Church's role in removing aboriginal children from their families, with Pope John Paul II also apologizing in 2001.<sup>334</sup> Pope Francis of course apologized during his penitential pilgrimage to Canada in July 2022,<sup>335</sup> while the Catholic Bishops of Canada had issued an apology statement in September 2021.<sup>336</sup> The various Anglican, Presbyterian, and United Church in Canada have all issued apologies as well.<sup>337</sup>

As in other such wrongs, government and society was also significantly at fault—the Church did not act alone. Indeed, the Church-run residential schools were carrying out government policies, and the government of Canada has both apologized and also been engaged in a truth and reconciliation process.<sup>338</sup> It is notable that the Canadian

<sup>332</sup> See *NCTR Archives*, NAT'L CTR. FOR TRUTH AND RECONCILIATION, <https://archives.nctr.ca/actor/browse?page=5&sort=alphabetic&sortDir=asc&entityType=840> [https://perma.cc/T5C3-ZEEQ] (last visited Feb. 20, 2023) (archives of the National Centre for Truth and Reconciliation, University of Manitoba).

<sup>333</sup> See *American Indian Boarding Schools by State*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., <https://secureservercdn.net/198.71.233.187/ee8.a33.myftpupload.com/wp-content/uploads/2021/06/NABS-Boarding-school-list-2021-acc.pdf> [https://perma.cc/S6YV-6T6X] (last visited Mar. 30, 2022).

<sup>334</sup> See *Pope apologises to Aboriginal people*, *supra* note 331; ANDREA SMITH, INDIGENOUS PEOPLE AND BOARDING SCHOOLS: A COMPARATIVE STUDY 12–14 (2009); Michael Perry, *Catholic Church apologises for Aborigines' "Stolen Generation,"* IRISH TIMES (July 20, 1996, 1:00 PM), <https://www.irishtimes.com/news/catholic-church-apologises-for-aborigines-stolen-generation-1.69113> [https://perma.cc/5GJE-CATZ].

<sup>335</sup> See sources cited *supra* note 37.

<sup>336</sup> See *Statement of Apology by the Catholic Bishops of Canada to the Indigenous Peoples of This Land*, CANADIAN CONF. CATH. BISHOPS (Sept. 24, 2021), <https://www.cccb.ca/letter/statement-of-apology-by-the-catholic-bishops-of-canada-to-the-indigenous-peoples-of-this-land/> [https://perma.cc/7SHG-JAC9].

<sup>337</sup> See *The Apologies*, UNITED CHURCH OF CANADA, <https://united-church.ca/social-action/justice-initiatives/reconciliation-and-indigenous-justice/apologies> [https://perma.cc/7XRH-M6HL] (last visited Feb. 21, 2023); *Apology to Native People*, ANGLICAN CHURCH OF CANADA (Aug. 6, 1993), <https://www.anglican.ca/wp-content/uploads/2011/06/Apology-English.pdf> [https://perma.cc/47PP-SPQW]; *A Statement Regarding Residential Schools*, PRESBYTERIAN CHURCH IN CANADA (June 15, 2021), <https://presbyterian.ca/2021/06/15/moderator-joint-statement/> [https://perma.cc/86UV-WQX6].

<sup>338</sup> See *Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system*, GOV'T OF CANADA (June 11, 2008), <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655> [https://perma.cc/PA69-TY6J]; *Canada's Indian Residential School Apology*, CHRISTIAN ABORIGINAL INFRASTRUCT. DEVS.,

government recently agreed to pay 31.5 billion USD—yes, billion, not million—for harming indigenous children and families in the state run child welfare system from the 1990s to the present, including money to repair the system.<sup>339</sup> The settlement will impact some 200,000 children and indigenous families.<sup>340</sup> Hence, it appears that even after the residential school system was ended, the state profoundly failed indigenous children and families in the state-run child welfare system.

Nonetheless, the fact that the Church is not alone in failing indigenous children and families is little comfort for an evaluation of the Church's extensive failures. This is particularly true because of the religious justifications and motivations for the Church's wrongs. The Church participated in large-scale systems designed to separate children from their families to convert the children to Christianity. The Church was part of an assimilationist policy that would purportedly "civilize" the indigenous children, in part through Christianizing them.<sup>341</sup> Indigenous peoples would be forcibly prevented from passing on their language, culture, and religion to their children by the forced removal of the children, and by forbidding the separated children from speaking their own language and engaging in any of their cultural practices.<sup>342</sup>

In legal terms, these practices could be viewed as one part of a set of actions that together constituted either genocide, cultural genocide, or both.<sup>343</sup> The Genocide Convention defines genocide as follows:

In the present Convention, genocide means any of the following acts committed with  
intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as  
such:

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[https://caid.ca/canada\\_apology.html](https://caid.ca/canada_apology.html) [<https://perma.cc/9Y5E-7UJT>] (last visited Feb. 21, 2023); *infra* notes 342–348 and accompanying text.

<sup>339</sup> Catherine Porter & Vjosa Isai, *Canada Pledges \$31.5 Billion to Settle Fight Over Indigenous Child Welfare System*, N.Y. TIMES (Jan. 4, 2022), <https://www.ny-times.com/2022/01/04/world/canada/canada-indigenous-children-settlement.html> [<https://perma.cc/LCW5-WANJ>].

<sup>340</sup> *Id.*

<sup>341</sup> *Residential Schools of Canada*, HARVARD DIVINITY SCHOOL (Jan. 26, 2023, 4:02 PM), <https://rpl.hds.harvard.edu/religion-context/case-studies/violence-peace/residential-schools-canada> [<https://perma.cc/JDJ8-9ZGT>].

<sup>342</sup> *Id.*

<sup>343</sup> *See Pope Francis: It Was a Genocide Against Indigenous Peoples*, VATICAN NEWS (July 30, 2022, 9:47), <https://www.vaticannews.va/en/pope/news/2022-07/pope-francis-apostolic-journey-inflight-press-conference-canada.html> [<https://perma.cc/QXT8-TDQQ>].

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>344</sup>

The indigenous groups impacted by these policies in Canada, the United States, and Australia would count as “national, ethnical, racial or religious group[s].”<sup>345</sup> The assimilationist policies were designed, it seems, to eliminate, in whole or part, these indigenous groups as separate groups within these societies. The transfer of indigenous children to the residential schools, and (as sometimes also occurred) to non-indigenous families, would count as forcible transfers of children from one group to another. The residential schools did not exist in isolation, but as linked to other actions beyond the scope of this essay, could be seen as a part of an overall pattern constituting genocide under the Convention.<sup>346</sup>

“Cultural genocide,” an important legal concept which extends beyond the literal reach of the Genocide Convention,<sup>347</sup> is clearly applicable. The residential school systems were clearly designed to “take the Indian out of the child,” in words attributed to Sir John A. Macdonald, Canada’s first prime minister.<sup>348</sup> The American version of the concept associated with the residential school system is grimmer still: “Kill the Indian, and save the man.”<sup>349</sup> The residential school systems were

<sup>344</sup> Convention on the Prevention & Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. ii, 102 Stat. 3045, 3035, 78 U.N.T.S. 227, 280 (defining genocide).

<sup>345</sup> *See id.*

<sup>346</sup> *See* Fannie Lafontaine, *How Canada committed genocide against Indigenous Peoples, explained by the lawyer central to the determination*, CONVERSATION (June 11, 2021, 12:11 PM), <https://theconversation.com/how-canada-committed-genocide-against-indigenous-peoples-explained-by-the-lawyer-central-to-the-determination-162582> [<https://perma.cc/SDR7-HE4A>]; *supra* notes 343–344.

<sup>347</sup> *See* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, UNITED NATIONS, <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-ENG.pdf> [<https://perma.cc/MW8A-4HS5>] (last visited Feb. 22, 2023); ELISA NOVIC, *THE CONCEPT OF CULTURAL GENOCIDE* 5 (Oxford University Press, 1st ed. 2016).

<sup>348</sup> Canadian Press, *Canada’s tragic residential-school reckoning could grim harbinger for U.S.*, LETHBRIDGE NEWS (June 27, 2021, 5:03 AM), <https://lethbridgethegenewsnow.com/2021/06/27/canadas-tragic-residential-school-reckoning-could-be-grim-harbinger-for-u-s/> [<https://perma.cc/2NEJ-WRER>].

<sup>349</sup> *See id.*

clearly designed to prevent the transmission of indigenous languages and cultures to the next generation, which precisely constitutes cultural genocide.

The Church has long been an educator; religious orders and church-related institutions have founded and run schools, residential and non-residential, for hundreds of years.<sup>350</sup> Providing both secular and religious elements of education is well within the mission of the Church and should continue to be emphasized. It is no small detail, however, that children are forcibly taken to schools without the consent of their parents, that children are forbidden to speak in their native language, and that intent of the schools is to so separate children from their families and cultures as to destroy a culture. Moreover, the reports of brutal forms of physical and sexual abuse, and much neglect, of the children in the indigenous schools suggest that negative attitudes toward the indigenous peoples bled over into brutalization of the children themselves, despite the purported mission to save those children. It is difficult to “save” those whom you despise. While there may be controversies over where to draw the line between appropriately aiding in the transformation of a culture, and forcibly destroying a culture, the practices in Canada, Australia, and the United States are indefensible and clearly on the “forcible destruction” side of that line.

If one takes the miracles and messages and image of our Lady of Guadalupe seriously, the Church was long ago given a gift of a completely different approach to the evangelization of indigenous people as they encounter the Christian faith. Indeed, even if one viewed the image as a mere act of human creativity, it would represent a completely different approach to evangelization than found in the indigenous boarding schools. Whether by divine decree or human agency, the representation of Mary in the guise and dress of an Aztec princess with accompanying culturally meaningful messages, and the choice of indigenous convert Juan Diego Cuauhtlatoatzin to receive the messages and miraculous image found on his tilma (cloak), represents an evangelization through the transformation of culture rather than through obliteration of culture.<sup>351</sup> The method of evangelization represented by Our Lady of Guadalupe is more in accord with what more recent church

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<sup>350</sup> See John W. O'Malley, *How the First Jesuits Became Involved in Education*, in *THE JESUIT RATIO STUDIORUM* 56, 56 (Fordham University Press, 2000).

<sup>351</sup> See ANDERSON & CHÁVEZ, *supra* note 53, at 39–40 (quoting Benedict XVI, *On the Way to Jesus Christ*, at 74).

documents call inculturation.<sup>352</sup> The Catholic Church canonized Juan Diego in 2002, which implicitly accepts Our Lady of Guadalupe as a genuine apparition of the Virgin Mary.<sup>353</sup>

The miraculous image appeared shortly after Cortes led Spanish forces and native Tlaxcalan soldiers to conquer and destroy Tenochtitlan, the Aztec capital.<sup>354</sup> The Aztecs, for their part, had been subjugating other indigenous peoples, and the Aztec religion included large-scale and horrific forms of human sacrifice.<sup>355</sup> Thus, the messages and image of Our Lady of Guadalupe were directed to a time and place traumatized with extreme violence, some of it done in the name of the Aztec religion and some of it done in the name of Christ. Cortes undermined the faith of the population in the brutal Aztec religion by force of arms,<sup>356</sup> but this use of force had not engendered much faith in Christ among the people. According to the traditional narrative, it was the image of the Virgin Mary as an indigenous woman and princess, and her messages given directly to two indigenous men, Juan Diego Cuauhtlatatzin and his uncle Juan Bernardino, which created the context in which large-scale conversions to the Catholic faith occurred: an estimated nine million conversions and baptisms in fifteen years.<sup>357</sup>

Beyond the issue of inculturation, there is the emphasis on the motherhood of Our Lady of Guadalupe. The image portrays her as pregnant—already a mother.<sup>358</sup> She repeatedly insists that she is a mother—the Mother of God, the mother of Juan Diego her “youngest son,” and the “compassionate Mother . . . of all the people that live together in this land, and also of all the other various lineages of men.”<sup>359</sup>

Indeed, when Juan Diego is distracted and afraid because of his uncle’s severe illness, the Lady affectionately comforts him in motherly fashion: “Am I not here, I who have the honor to be your mother?”

<sup>352</sup> See *id.* at 40; INTERNATIONAL THEOLOGICAL COMMISSION, *Faith and Inculturation*, [https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1988\\_fede-inculturazione\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1988_fede-inculturazione_en.html) [<https://perma.cc/X92C-VQWJ>] (last visited Feb. 23, 2023).

<sup>353</sup> See ANDERSON & CHÁVEZ, *supra* note 53, at 3.

<sup>354</sup> *Id.* at 5–6.

<sup>355</sup> Larry Holzwarth, *Details Showing the Brutality of the Aztec Empire in Mesoamerica*, HISTORY COLLECTION (Dec. 13, 2018), <https://historycollection.com/details-showing-the-brutality-of-the-aztec-empire-in-mesoamerica/14/> [<https://perma.cc/R9SZ-5RZ8>].

<sup>356</sup> Alexia Dovas, Research Paper, *Why Did the Aztecs Convert to Catholicism, Following the Conquest of the Spaniards in 1521*, 37 LAMBDA ALPHA J. MAN 65, 65–66 (2007).

<sup>357</sup> See ANDERSON & CHÁVEZ, *supra* note 53, at 71–72.

<sup>358</sup> Katie Yoder, *Why is Our Lady of Guadalupe patroness of the unborn?*, CATHOLIC NEWS SERVICE (Dec. 11, 2022), <https://www.catholicnewsagency.com/news/249853/why-is-our-lady-of-guadalupe-patroness-of-the-unborn> [<https://perma.cc/VRN5-VWGV>].

<sup>359</sup> See ANDERSON & CHÁVEZ, *supra* note 53, at 9, 11, 15–16 (1st ed. 2009).

Are you not in my shadow and under my protection? Am I not the source of your joy? Are you not in the hollow of my mantle, in the crossing of my arms?"<sup>360</sup>

The mother-son relationship between the indigenous mother Our Lady of Guadalupe and her indigenous children (Juan Diego and "all the people that live together in this land") expresses the inherent dignity of indigenous mothers and their children, and the inherent value of those mother-child relationships.<sup>361</sup> It is more than a tragedy that Catholic religious orders, institutions, and persons systematically violated that dignity hundreds of years after the apparitions and image of Our Lady of Guadalupe.

There are further indications that Our Lady of Guadalupe may point toward a pathway of reconciliation for the colonizing Europeans and indigenous peoples who together would play predominant roles in creating the modern peoples of Latin America. The self-proclaimed name "Guadalupe" appears to refer to a Marian shrine and apparition in Spain, connecting the indigenous image of the Virgin Mary with a prior Spanish apparition.<sup>362</sup> That Spanish shrine houses a purportedly miraculously found statue of a "black Madonna"—a portrayal of a dark-skinned or black Virgin Mary.<sup>363</sup> This lineage suggests a multi-layered attempt at racial and ethnic reconciliation amidst the violent confrontations between European and indigenous cultures that is formative to the region.

Perhaps one reason Our Lady of Guadalupe has not resonated more broadly is that she is viewed as belonging primarily to Latinos or Hispanics, and as not particularly relevant to Anglo-Catholics.<sup>364</sup> In more recent years, Anglo-Catholics have often been exposed to Our Lady of Guadalupe due to Latino immigration to the United States and

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<sup>360</sup> *Id.* at 179 app. A.

<sup>361</sup> *See id.* at 16–17; *St. Juan Diego*, CATHOLIC NEWS AGENCY, <https://www.catholicnews-agency.com/saint/st-juan-diego-409> [<https://perma.cc/WR3A-BGXH>] (last visited Feb. 22, 2023).

<sup>362</sup> ANDERSON & Chavez, *supra* note 53, at 22.

<sup>363</sup> *See generally* Elisa A. Foster, *Out of Egypt: Inventing the Black Madonna of Le Puy in Image and Text*, 37 *STUDIES IN ICONOGRAPHY* 1 (2016); Jeanette Favrot Peterson, *The Virgin of Guadalupe, Extremadura, Spain*, CTR. FOR THE STUDY OF MATERIAL & VISUAL CULTURES OF RELIGION (2014), <https://mavcor.yale.edu/conversations/object-narratives/virgin-guadalupe-extremadura-spain> [<https://perma.cc/V3BK-LZSX>].

<sup>364</sup> *See* Raul A. Reyes, *Our Lady of Guadalupe Is a Powerful Symbol of Mexican Identity*, NBC NEWS (Dec. 12, 2016, 4:24 AM), <https://www.nbcnews.com/news/latino/our-lady-guadalupe-powerful-symbol-mexican-identity-n694216> [<https://perma.cc/WAX5-HHPN>].

the presence of Latinos in Catholic Churches in the United States.<sup>365</sup> Perhaps if the message of Our Lady of Guadalupe had spread to Anglo-Catholics, the residential school abuses would not have occurred in Australia, Canada, and the United States.

Of course, a single set of miracles, whether valid or not, cannot in itself resolve profound human divisions. *One cannot point to Our Lady of Guadalupe to avoid confrontations with difficult histories.* Rather, Our Lady of Guadalupe points to the presuppositions necessary to healing, justice, and positive transformation of society.<sup>366</sup> Clearly, those presuppositions of the dignity and worth of indigenous children, mothers, fathers, and families—and frankly the dignity and worth of mothers who are not white—need to penetrate more deeply into Anglo-Catholic culture, if that culture is to serve complex multi-ethnic and multi-racial cultures.

In a different context, I have personally experienced the difficulties that some apparently experience in fully crediting dark-skinned women as mothers. Our family's adoptive daughters, as mentioned above, were taken illicitly from their mother when they were much older, a fact that took us years to fully uncover and verify. Without assistance from the agencies involved or from governments, but with the generous assistance of Indian social activist and author Gita Ramaswamy,<sup>367</sup> we were able to locate and reunite our adoptive daughters with their mother in India. A professional filmmaker recorded the first reunion, capturing the heartbreaking grief of the mother, and the gulf created between mother and children by the years apart. Yet, when I have had occasions to show the video to others, I have noticed some have a puzzling inability to fully process the significance of what the video shows so plainly—a grieving mother reuniting with her stolen daughters. I have also seen a tendency to justify it all in the end: "Aren't they better off?," "Aren't you good parents?" I have wondered whether, if she were a white, middle class, American mother whose children had been wrongfully taken from her, the responses would be different. From that experience, I have had occasion to appreciate the significance of portraying the greatest mother figure in all Catholicism as a dark-skinned woman.

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<sup>365</sup> E.g., Chaz Muth, *Our Lady of Guadalupe shouldn't be viewed as just a Mexican tradition*, CATHOLIC NEWS SERVICE (Dec. 10, 2015), <https://georgiabulletin.org/news/2015/12/33746/> [<https://perma.cc/TD96-HNVZ>].

<sup>366</sup> See Reyes, *supra* note 364.

<sup>367</sup> Rohini Hensman, 'The Memoir of a Lapsed Revolutionary' Intertwines the Personal With the Political, WIRE (June 23, 2022), <https://thewire.in/books/gita-ramaswamy-land-guns-caste-woman-memoir-review> [<https://perma.cc/ZSA3-Q358>] (reviewing Gita Ramaswamy's memoir of a lifetime of social activism).

## VII. ABUSES OF POWER

The Church's wrongs against children and against mothers have all been abuses of power. The baby-scoop, Irish mother and baby homes, industrial schools, and Magdalene laundries involved the powerful weight of church, state, and society allied against relatively powerless single mothers and their children.<sup>368</sup> The indigenous residential schools involved powerless children and indigenous peoples who had become politically, culturally, and economically subservient.<sup>369</sup> Clergy abuse of children involves abuse of positions of spiritual and religious authority.

The worst periods of these abuses also occurred at times when Christianity, as compared with today, had greater cultural influence in the affected societies, particularly as to matters of human sexuality, marriage, and family life. Of course, the position of the Catholic Church in each of these societies varied. In the United States, Protestantism historically has been dominant, with the Catholic Church an often-despised, largely immigrant church.<sup>370</sup> Supreme Court opinions have noted the "pervasive hostility to the Catholic Church and to Catholics in general" common in the nineteenth century.<sup>371</sup> The 1921 murder of Father Coyle in Birmingham, Alabama, for conducting a wedding between a Puerto Rican Catholic and a white convert bride, by the father of the bride, and the acquittal at trial, represented a high point of anti-Catholic feeling.<sup>372</sup> The Ku Klux Klan, which was virulently anti-Catholic, paid for the successful legal defense of the killer, which included the future Supreme Court Justice Hugo Black.<sup>373</sup> Justice Black

<sup>368</sup> Gerry O'Shea, *Ireland's shameful crimes against its youth*, IRISH CENTRAL (Jan. 29, 2021), <https://www.irishcentral.com/opinion/others/irelands-shameful-crimes-youth> [https://perma.cc/3KMK-2RLB].

<sup>369</sup> See Pember, *supra* note 36.

<sup>370</sup> See JAMES T. FISHER, COMMUNION OF IMMIGRANTS: A HISTORY OF CATHOLICS IN AMERICA 43–68 (Oxford Univ. Press 2000); Catherine A. Brekus, *Catholics in America*, CHRISTIAN HISTORY MAGAZINE (2012), <https://christianhistoryinstitute.org/magazine/article/catholics-in-america> [https://perma.cc/HT3N-FHLR].

<sup>371</sup> *Espinoza v. Mont. Dept. of Rev.*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 120 S. Ct. 2530, 2551–52 (2000)) (first citing L. JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 69–70, 216 (1987); and then citing John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, MICH. L. R. 279, 301–05 (2001)).

<sup>372</sup> See SHARON DAVIES, RISING ROAD: A TRUE TALE OF LOVE, RACE, AND RELIGION IN AMERICA 85–86 (OXFORD UNIV. PRESS 2010).

<sup>373</sup> See Greg Garrison, *Killing of Birmingham priest in 1921 remembered at cathedral*, AL.COM (Jan. 29, 2019), [https://www.al.com/living/2018/08/killing\\_of\\_birmingham\\_priest\\_i.html](https://www.al.com/living/2018/08/killing_of_birmingham_priest_i.html) [https://perma.cc/65EW-KXZE]; see generally DAVIES, *supra* note 372.



himself joined the Ku Klux Klan two years later, and then in 1925 submitted a letter of resignation when he decided to run for the Senate.<sup>374</sup> His Klan membership became an issue when he joined the Court and led to suspicions of ongoing anti-Catholicism.<sup>375</sup> Even the election of John F. Kennedy, the first Catholic President, in 1960 was an indication of Catholicism's vulnerable place in American society, as indicated by Kennedy's famous speech on the significance of his faith to a group of Protestant ministers in Houston.<sup>376</sup> The speech was a success and yet a humiliation first in that it was necessary, given the continuing anti-Catholicism of the time, and also a humiliation in the extent Kennedy went in promising not to be influenced in any way by his religious faith. Perhaps Justice Scalia's famous originalist interpretative method, like Kennedy's speech, continues Kennedy's bargain of entry into power at the cost of intellectual and spiritual self-mutilation, as Scalia in effect eliminated the Catholic natural law understanding of the law from his interpretative method.<sup>377</sup>

Of course, the situation in Ireland was quite different, with Catholicism quite dominant culturally during the times of the mother and baby homes, industrial schools, and Magdalene Laundries. Catholicism was associated with nationalist aspirations and independence from Anglican England and played a particularly dominant role demographically and culturally during much of the twentieth century.<sup>378</sup> Even the last census of 2016 showed more than three quarters identified as Catholics, with only small percentages identified as any kind of

<sup>374</sup> Daniel M. Berman, *Hugo L. Black: The Early Years*, 8 CATH. U. LAW REV. 103, 103–04 (1959).

<sup>375</sup> DAVIES, *supra* note 372, at 283–84; see Todd C. Peppers, *Justice Hugo L. Black, His Chambers Staff, and the Ku Klux Klan Controversy of 1937*, SUPREME COURT HISTORICAL SOCIETY (Apr. 27, 2021), <https://supremecourthistory.org/scotus-scoops/justice-hugo-black-ku-klux-klan-controversy-1937/> [<https://perma.cc/646S-5U6W>].

<sup>376</sup> See *Transcript: JFK's Speech on His Religion*, NPR (Dec. 5, 2007), <https://www.npr.org/templates/story/story.php?storyId=16920600> [<https://perma.cc/7AUB-VLBZ>].

<sup>377</sup> See Anthony Giambrone, *Scalia v. Aquinas: lessons from the saint for the late, great justice*, AM. MAG. (Mar. 21, 2016), <https://www.americamagazine.org/issue/who-judge> [<https://perma.cc/CE7E-VDSY>].

<sup>378</sup> See, e.g., MARY KENNY, *THE WAY WE WERE: CENTENARY ESSAYS ON CATHOLIC IRELAND* (2022); *100 Years On: The Partition of Ireland Explained*, U. ROCHESTER (May 10, 2021), <https://www.rochester.edu/newscenter/partition-of-ireland-explained-477342/> [<https://perma.cc/69XA-5NZM>]; *Census of Population 2016 – Profile 8 Travelers, Ethnicity and Religion: The Proportion of Catholics in Ireland, 1881 to 2016*, CENT. STAT. OFF., <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rrc/#:~:text=In%202016%20Roman%20Catholics%20accounted,84.2%20per%20cent%20in%202011> [<https://perma.cc/B7BJ-KH7Y>] (last visited Jan 26, 2023) [hereinafter *The Proportion of Catholics in Ireland*].

Protestant.<sup>379</sup> The very powerful role of the Catholic Church in Ireland has made the scandals of clergy abuse and the various scandals concerning the treatment of single mothers and their children particularly important and even more painful, necessitating a Papal apology for the “crimes” of the Catholic Church in Ireland.<sup>380</sup>

Globally, the Catholic Church perhaps has been in a “defensive crouch” since the successive events of the Protestant Reformation and the emergency of the enlightenment and modernism.<sup>381</sup> Perhaps the Catholic Church’s participation in the baby-scoop era and the mistreatment of indigenous children and families emerged in part from that defensive crouch. Elements of the Church seemed all too happy to work with the eugenics and racist mindsets that fueled modern abusive practices, perhaps because it allowed the Church a greater sense of relevance to be working in sync with the state and society. Perhaps a culturally vulnerable church found empowerment in the worst possible way, by exercising extreme power and control in abusive ways over those who were discarded and despised by society. There is after all something bizarre about Catholicism, a predominate religion for hundreds of years of indigenous and mestizo peoples of Latin America, so cruelly assisting a program of cultural genocide against the indigenous peoples of Canada and the United States. There is something strange about Catholicism—a religion shaped by Jesus’s teachings on forgiveness, which includes penance among the seven sacraments—treating an unwed birth as a virtually unforgivable sin.

Perhaps one cause of the disempowerment and cultural displacement of Christianity in so many societies is that God found the churches unworthy of the power and influence they had exercised. It has become a commonplace throwaway line of uncertain attribution that a society is judged by how it treats its most vulnerable.<sup>382</sup> There is ample reason to believe, however, from scripture and tradition that God judges

<sup>379</sup> *The Proportion of Catholics in Ireland, 1881 to 2016*, *supra* note 378; Eimear Flanagan, *Papal Visit: Ireland’s Catholic Church in Graphs*, BBC NEWS (Aug. 21, 2018), <https://www.bbc.com/news/world-europe-45220259> [<https://perma.cc/8UCF-NR63>].

<sup>380</sup> See KENNY, *supra* note 378; Nicole Winfield & Helena Alves, *Pope Francis apologizes for Catholic Church’s past ‘crimes’ in Ireland*, GLOBAL NEWS (Aug. 26, 2018, 1:50 PM), <https://globalnews.ca/news/4410364/pope-francis-apologizes-ireland/> [<https://perma.cc/3PPY-8ASA>].

<sup>381</sup> See MASSIMO BORTHESI, *THE MIND OF POPE FRANCIS: JORGE MARIO BERGOGLIO’S INTELLECTUAL JOURNEY* 146–47 (Barry Hudock trans., 2017).

<sup>382</sup> Alexander Atkins, *Famous Misquotations: A Civilization is Measured by How it Treats its Weakest Members*, ATKINS BOOKSHELF (Feb. 21, 2018), <https://atkinsbookshelf.wordpress.com/2018/02/21/famous-misquotations-a-civilization-is-measured-by-how-it-treats-its-weakest-members/> [<https://perma.cc/HP95-H9AH>].

societies and persons by treatment of the most vulnerable.<sup>383</sup> There is ample reason to believe that God judges us based on our treatment of children and mothers.

The world needs God, and God is made known in significant part through the Church. The Church can and does teach pathways of human flourishing. One can hope then that the cultural exile of Christian churches in many parts of the West will not be permanent. But the process of repentance and reformation cannot be skipped. It is important to understand that the Church did not err in these instances because it was too Catholic or too “conservative” or even too “liberal”—whatever those terms mean. The Church erred because the Church was not acting in accordance with the faith as revealed in scripture and tradition.

The Church has been gifted with unique spiritual, theological, and human resources to deal with humanity as it is, with all of our flaws, and yet dignified by the image of God, and with transformational possibilities in the age of the second Adam, Jesus, and the new Eve, Mary. The Church has reason to repent, but no reason to be in a “defensive crouch.” The Church has reason to contemplate more deeply what the faith requires, so that her actions may be in accordance with her mission to humanity.

#### VIII. CONCLUSION

In *Fulton v. City of Philadelphia*, Justice Alito’s concurring opinion, as noted in the introduction, viewed the City’s relationship to private agencies as “essentially a licensing system.”<sup>384</sup> Justice Alito went on:

As is typical in other jurisdictions, no private charitable group may recruit, vet, or support foster parents in Philadelphia without the City’s approval.<sup>385</sup>

Justice Alito, presumably unknowingly, exaggerated. It is true that Catholic Social Services (“CSS”) cannot fully participate in assisting children in the foster care system without being licensed by the City and contracted with the City.<sup>386</sup> In addition, CSS obviously could not get paid for doing this work without contracting with the City—and being paid is important because such work in the foster care system is time-consuming, difficult, and requires experience and expertise.

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<sup>383</sup> See, e.g., *Proverbs* 21:13; *Matthew* 25:31–46; *James* 1:27; Catholic Catechism, *supra* note 53, para. 2443–49.

<sup>384</sup> *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring).

<sup>385</sup> *Id.*

<sup>386</sup> See *id.* at 1885–86.

However, it is not literally true that CSS could not “recruit” foster parents without being licensed by the City. Any private group or individual is free to recruit foster parents and point them toward the official pathways toward applying to be foster parents, without themselves being licensed by the government. It also is not fully true that it is necessary to be licensed by the City to “support” foster families. There may be some supportive roles that are best accomplished by licensed agencies that are fully informed about the foster child and have that official role of support as a delegated duty from government. However, in general, foster families function best surrounded by supportive networks of family, friends, and religious or other communities that intentionally support those families, and clearly most participants in such supportive networks are not licensed by the government.

The Christian nonprofit “The CALL” plays an extraordinary role in the foster care system in Arkansas, while relating to the government in a somewhat different way than CSS does in Philadelphia.<sup>387</sup> The CALL was an *amicus curiae* in *Fulton*, and described its work as follows in its statement of interest:

The CALL has recruited and trained two-thirds of all foster families in Arkansas; those families have adopted 1500 children, and care for 18,000 children in foster care . . . The CALL does not certify foster families or place children. The CALL works closely with the Arkansas Department of Children and Family Services to provide state-mandated pre-service training and continuing education for foster families, free of charge. The CALL also provides wrap-around services and support for foster families in Arkansas.<sup>388</sup>

The large-scale work The CALL performs for Arkansas’s foster care system does not come cheap, and its annual report indicates an annual budget of more than \$2 million.<sup>389</sup> Yet, it appears that the money comes primarily from fundraising which produces donations from individuals, churches, corporations, and events, rather than coming from the government.<sup>390</sup>

It is apparent that the CALL has a positive and cooperative relationship with the government in Arkansas, as evidenced by providing

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<sup>387</sup> See Brief of the Coalition for Jewish Values, The Call, Lifeline Children’s Services, Faithbridge Foster Care, Prof. Elizabeth Kirk, and Prof. David Smolin as *Amici Curiae* in Support of Petitioners, at 1, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123). Obviously this author was also an *amicus curiae* on this same brief.

<sup>388</sup> *Id.*

<sup>389</sup> See THE CALL 2019: 2019 FINANCIAL POSITION ANNUAL REPORT, THE CALL ARK. (2019), <https://thecallinarkansas.org/img/reports/2019/2019%20financial%20information.pdf> [<https://perma.cc/G4JE-CKY4>] (last visited Jan. 26, 2023).

<sup>390</sup> *Id.*

“state-mandated” training.<sup>391</sup> Indeed, Governor Asa Hutchinson in his weekly address demonstrated effusive esteem for the group as he discussed the challenges of providing foster care during the COVID-19 pandemic:

One challenge unique to COVID-19 is the understandable fear that a child placed into a foster home has been exposed to the coronavirus. Foster parents must consider the risk of accepting a child with the virus. At least one child placed in a home has tested positive. But as Lauri Currier, executive director of The Call indicated, the family took the positive test in stride. As Lauri said, they did what these families do. They took care of the child and the other members of the family. They self-quarantined. The Call is a faith-based organization whose members find and train foster families and supports them spiritually and financially. The Call is the largest nonprofit in Arkansas that is devoted to assisting foster children and families. As members of The Call began to comprehend that COVID-19 was going to be a problem, they determined the virus wouldn’t stop their work. The county coordinators work closely with their families and know their needs. Volunteers bought and delivered meals and other necessities so the families could stay at home. The Call conducts regular mandatory training sessions for families that want take in foster children. The leaders weren’t willing to let the limit on the size of gatherings put the training on hold. They developed a virtual program and trained 173 people, which represented about 85 families. Our social-distancing requirements meant canceling the annual Walk for the Waiting fundraiser at War Memorial Stadium. But the three sponsoring organizations — The Call, Immerse, and Project Zero — refused to cave to the illness. They organized neighborhood walks, and last weekend, they raised a hundred-and-six thousand dollars.

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Family challenges don’t stop for pandemics. New children in need of care arrive regularly. But those who are there to help children in the foster-care system haven’t let the pandemic stop them. As Lauri Currier of The Call said, kids’ lives are at stake. They can’t put their work on hold. Thanks to people such as Lauri and our childcare workers and many others whose names we’ll never know, the needy children in Arkansas are finding a safe place to go and lots of love when they get there.<sup>392</sup>

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<sup>391</sup> See Brief of the Coalition for Jewish Values, The Call, Lifeline Children’s Services, Faithbridge Foster Care, Prof. Elizabeth Kirk, and Prof. David Smolin as *Amici Curiae* in Support of Petitioners, *supra* note 387, at 1.

<sup>392</sup> Asa Hutchinson, *Governor’s Address: Foster Families Answering The Call*, ARK. MONEY & POLITICS (May 8, 2020), <https://www.armoneyandpolitics.com/governors-address-foster-families-answering-the-call/> [<https://perma.cc/9AWJ-J58T>].

It is of course precisely this positive cooperation between the government and private religious groups in support of foster children that the Supreme Court's decision in *Fulton* protects. Yet, it is important that many of these roles can be achieved without being licensed by the government and without contracting for payment from the government. A part of religious liberty is the legitimation of diverse models of cooperation between religious actors and government.

So long as groups like CSS and the CALL are held in such esteem by much of society and by the courts, their religious freedom claims to work cooperatively with government in assisting vulnerable children and families will continue to be successful. However, the negative histories of the Church's roles in indigenous residential schools and in the mistreatment of single mothers and their children raise an important caveat. The Church should work cooperatively with governmental and other systems only as long as doing so does not compromise fundamental beliefs and values of the Church. The Church cannot trade mission for money, or mission for relevance. The religious liberty of the Church is a means to effectuate the mission of the Church.

The abusive indigenous residential schools were projects of the governments of Australia, Canada, and the United States within the frameworks of cultural genocide initiated by those governments.<sup>393</sup> The Church failed to play its proper prophetic role of protecting vulnerable peoples from harms directed by governments and majoritarian domination, and instead, it allowed itself to become enlisted in these nefarious state projects. For those who complain when the Church is out of step with society and the state, the residential schools are an example of what can go wrong when the Church marches in lockstep with the state. If the Church had exercised religious liberty to implement the Church's mission in this instance, rather than implementing the state's warped agenda, much good could have been done.

Similarly, the mistreatment of single mothers and their children in many countries, and accompanying distortion of the concept of adoption, were driven in significant part by secular developments in medicine, social work and psychiatry in the mid-twentieth century.<sup>394</sup> Once again, the Church on the whole failed to play its proper prophetic role of protecting the vulnerable. Instead, the Church became enlisted in secular and governmental projects that exploited the vulnerable. This is yet another example of what can go wrong when the Church marches in lockstep with the state and developments in secular professions such

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<sup>393</sup> See *supra* Part III notes and accompanying text.

<sup>394</sup> See *supra* Part V notes and accompanying text.

as medicine, psychiatry, and social work. (This is not intended to denigrate these important professions from which the Church can learn much; however, the history of professional stances on issues such as single mothers, eugenics, etc., indicates that such professions sometimes have supported profoundly harmful practices.) Here, again, if the Church had exercised religious liberty to carry out the Church's proper mission as to single mothers and their children, much good could have been done.

In both instances, there are clear indications that the Church had the opportunity, positive examples, and spiritual resources to get these issues correct. All that is embodied in Our Lady of Guadalupe—the narrative, the image, the interactions of the persons involved, and the evangelization that resulted—would have suggested a very different treatment of indigenous peoples and their cultures than what occurred in the nineteenth and twentieth centuries in Australia, Canada, and the United States.<sup>395</sup> Similarly, I have documented elsewhere how at least one major religious organization in the United States worked to help single mothers keep their babies, only to see this very organization succumb to secular trends and later become another vehicle of the baby-scoop era.<sup>396</sup> Blaming these failures on the mindset of the times would be a grievous avoidance of responsibility.

The Church must be diligent to ensure that religious liberty does not become a pathway by which the Church's mission is corrupted by temptations of power, money, or the esteem of elites and government. Such limits, however, will not be found within the secular legal doctrines of religious liberty or First Amendment law but must be maintained by the Church and religious agencies in using prudential wisdom amidst complex cultural contexts. In that sense, this article is NOT a call to erect a strong "wall of separation"<sup>397</sup> to protect the Church from being corrupted by the state since such walls, in practice, often are proposed to artificially limit the Church's mission and to exclude religion from important roles in society, harming both the Church and society. Through the First Amendment, the United States has rejected the model of an established Church that predominated in Europe, but the Supreme Court in recent years has wisely refused to accept broader notions of

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<sup>395</sup> See *supra* Part VI notes and accompanying text. Of course, the history of the interactions between Christian Europe and the indigenous peoples of the "new world" indicate that Christian societies got this profoundly wrong from the outset. The point here is that there were much better models available to the church long before the abusive practices of the residential schools.

<sup>396</sup> See generally David Smolin, *Aborting Motherhood*, *supra* note 57.

<sup>397</sup> DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 17 (2002).

separation of Church and state that would attempt to create a wall of separation between religion and society or that would prevent government and religious organizations from acting cooperatively to serve the common good.<sup>398</sup>

CSS and the CALL have found ways to work with government and maintain the mission, and that is a good thing for church, society, government, and foster children. But there may be times when the values conflicts between church, society, and government are so great that such a win-win scenario becomes impossible. If that occurs, the Church will find that there are innumerable ways to assist vulnerable populations, including foster children, without being contracted with the government for official roles within governmental systems. Religious liberty in that sense does not dictate the choice of religious agencies to work with or separately from the government in such spheres. In the end, it is the mission of the Church, which is and should be determinative.

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<sup>398</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 236, 239–40 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Mitchell v. Helms*, 530 U.S. 793, 801, 803–04, 808 (2000); *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988); *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2017–19 (2017); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2251, 2254, 2262–63 (2020); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).