

Michael Vacca*

Natural Law as Guardian of the Human Person

Abstract

Natural law “manifests as a duty the natural demands of man’s being, which are summed up, in short, in obtaining his natural ends.” These ends are the fulfillment of natural inclinations, i.e., the inclination towards preserving one’s life, the inclination towards the “conjugal union of man and woman,” the inclination towards union with God, the inclinations towards “political society” and association, and the inclination towards knowledge. Thus, the fulfillment of the inclination to preserve one’s life is to preserve one’s life. Natural law is then a rational rule of natural inclinations that (1) prescribes that these inclinations need to be fulfilled, and (2) indicates the measures necessary to fulfill these inclinations. Human nature is not then static, but dynamic—a constant striving after the fulfillment of man’s inclinations, and ultimately, a striving after man’s ultimate end, God himself.

Annotasiya

Təbii hüquq insanın varlığının öz təbii tələblərini həyata keçirməsi, qısaca, öz təbii sonluqlarına çatması ilə bağlı vəzifə kimi əks olunur. Bu sonluqlar təbii meyillərin həyata keçirilməsinə söykənir, məsələn, fərdin həyatını qorumağa meyili, fərdin qadın və kişinin mədəni birliyinə meyili, tanrı ilə birləşməyə meyil, siyasi cəmiyyət və birləşməyə meyil, biliyə olan meyil. Beləliklə, fərdin həyatını qorumağa olan meylinin həyata keçməsi ilə hasil olan nəticə bir insanın həyatını qorumaqdır. Təbii hüquq (1) həyata keçirilməsi gərəkli olan meyilləri göstərən və (2) meyilləri həyata keçirmək üçün əhəmiyyət ölçülərini müəyyən edən təbii meyillərin rəasional qaydasıdır. İnsan təbiəti static deyil, dinamik olduğundan xaraktercə meyillərini həyata keçirdikdən sonar yenilərinə çalışır.

Introduction

The relevance of natural law for human relations is a frequent subject of debate within the legal community. This paper will argue that natural law protects the dignity of the human person in the various dimensions of his or her life.¹ To this end, this paper is divided into four sections that detail how the natural law functions to protect the human person. Preceding these sections is a brief description of the natural law. Section I then discusses natural law in relation to modern science, section II discusses the natural law’s application to the relationship between the individual and society,

* He graduated from Hillsdale College with a B.A. in English and Political Science, holds a J.D. from Ave Maria School of Law, and is a licensed attorney in Michigan. I wish to thank Professors Jane Adolphe and Ligia Castaldi, without whom this article would not exist.

¹ The human person is a body/soul unity, *Compendium of the Social Doctrine of the Church*, ¶ 127, that has various dimensions, *id.* at 124. The two dimensions that are most significant for this paper are the rational and relational dimensions.

section III discusses natural law as it pertains to faith and reason in the public debate, and section IV discusses natural law's relation to human law.²

I. What Is Natural Law and Why Does It Matter

Natural law "manifests as a duty the natural demands of man's being, which are summed up, in short, in obtaining his natural ends."³ These ends are the fulfillment of natural inclinations,⁴ i.e., the inclination towards preserving one's life, the inclination towards the "conjugal union of man and woman," the inclination towards union with God, the inclinations towards "political society" and association, and the inclination towards knowledge.⁵ Thus, the fulfillment of the inclination to preserve one's life is to preserve one's life. Natural law is then a rational rule of natural inclinations that (1) prescribes that these inclinations need to be fulfilled, and (2) indicates the measures necessary to fulfill these inclinations.⁶ Human nature is not then static, but dynamic⁷—a constant striving after the fulfillment of man's inclinations, and ultimately, a striving after man's ultimate end, God himself.⁸

This summary of natural law also serves to show the relevance of natural law in society. Above all, the relevance of natural law emerges from the critical recognition that the natural law is not a rule of reason detached from the human person, but a rule of reason that begins with the human person.⁹ The natural law's prescription that natural human inclinations must be fulfilled, and its indication of certain measures necessary to fulfill these inclinations build upon human nature itself. This fact is critically important because when a concern for the human person is removed from law, the law becomes dehumanizing. Thus, natural law functions to protect the human person by recognizing the obligations that proceed from human nature.¹⁰

A. Natural Law and the Modern Sciences

Challenges to natural law often begin with the assertion that human reason can only grasp certain conclusions derived from empirical

² International Theological Commission, *The Search for Universal Ethics: A New Look at the Natural Law* ¶ 35.

³ Javier Hervada, *Critical Introduction to Natural Law*, 129 (Trans. Mindy Emmons. Wilson & Lafleur 2006).

⁴ See Jacques Maritain, *Natural Law: Reflections on Theory and Practice*, 43 (St. Augustine's Press 2001).

⁵ Hervada, *supra* note 3, at 131.

⁶ *Id.* at 132.

⁷ See International Theological Commission, *The Search for Universal Ethics: A New Look at Natural Law*, ¶ 64.

⁸ "Catechism of the Catholic Church," ¶ 1.

⁹ See Hervada, *supra* note 3, at 129.

¹⁰ See *Compendium of the Social Doctrine of the Church*, ¶ 140.

observation performed using the scientific method, and certain abstract mathematical truths.¹¹ The natural law is neither a scientific truth, nor abstract mathematic truth, so human reason cannot grasp it, even assuming that it exists.

The attractiveness of this position is the certainty that it provides. Also, the admission that one does not know the truth can be a form of humility. But in reality, there is no certainty that comes from reducing all truth to scientific and mathematical truth. And while it may be humble to recognize that there is a truth one does not know, there is still a need to remain open to truth at all times.¹² Most importantly, the reduction of all truth to scientific and mathematic truth is very consequential to the human person, and to the diminished regard for his dignity.

B. The Dependency of Modern Science on Philosophy

The first problem with this belief reducing all truth to scientific and mathematical truth is that scientists and scholars develop a propensity to “think that the modern sciences¹³ are a closed system sufficient unto themselves and exclusive of all else.”¹⁴ This thinking sidelines philosophy as “vague, feeling-oriented, and subjective.”¹⁵ But a brief example can demonstrate that scientists presuppose certain philosophical distinctions that are necessary for them to arrive at scientific conclusions.

Suppose that a scientist tests a chemical solution to determine whether or not it is acidic. Based upon certain calculations, he concludes that it is acidic. Moreover, he affirms that the acidity of the solution is a scientific truth. But without the principle of non-contradiction,¹⁶ there is no basis to conclude that merely because something is acidic, it cannot also be non-acidic at the same time. Thus, the scientist relies upon a philosophical, metaphysical principle to reach “scientific truth.” Philosophy is truly the science behind modern science.¹⁷

Consequentially, refusal to recognize philosophical, metaphysical truths impoverishes the human person in multiple ways. Firstly, as briefly mentioned, people are encouraged to acknowledge “scientific truths” that are merely beliefs. Man desires to know the Truth, and such

¹¹ David Hume, *An Enquiry Concerning Human Understanding*, Harvard Classics Volume 37 (Collier and Son, 1910).

¹² See John Paul II, *Fides et Ratio*, ¶ 44: “Whatever its source, truth is of the Holy Spirit.”

¹³ Note that modern sciences refer to empirical, verifiable sciences such as chemistry, biology, and physics.

¹⁴ Anthony Rizzi, *The Science Before Science: A Guide to Thinking in the 21st Century*, 19-20 (IAP Press 2004).

¹⁵ *Id.* at 18.

¹⁶ A commonly recognized metaphysical principle that a thing cannot both be and not be at the same time.

¹⁷ Rizzi, *supra* note 14, at 18.

misrepresentations cannot satisfy the genuine search for Truth. Moreover, denying the human being access to philosophical, religious, and historical truth¹⁸ impedes the search of men for the Truth that will set them free.¹⁹ Secondly, people become moral relativists because any attempt to philosophically reason to a correct resolution of a moral problem is impossible if all truth is scientific and mathematical truth. Moral decisions about whether to harm another human being or engage in sexual activity become matters of preference, instead of right and wrong.

C. The Science of Law

The second problem is particular to law. If all truth is scientific and mathematical truth, then law must be taught as science since it does not concern abstract, mathematical reasoning. And if law is taught as science, the methods of science will be applied. Thus, Langdell devised the case method to study law scientifically.²⁰ According to the case method, by studying the cases in a given area of law, a limited number of pre-existing legal principles can provide an answer to a legal problem.²¹ The critical thing to notice about the case method is that the task of discovering the law is limited to pre-existing principles that may not be in accord with human nature. The case method leaves no room for the application of legal principles to human nature once such principles have been deduced from prior cases. Consequently, the human person becomes part of a legal experiment, rather than the center of legal analysis.

For example, *Garrett v. Arkansas Power & Light Co*²² applies a common law analysis to determine the duty owed by an electric company to a 17-year old boy, Tommy Garrett, who was injured while coming into contact with a live electric wire as he was climbing a light pole owned by the electric company. The court uses a common law distinction with significant implications for the human person: the invitee/licensee distinction. A licensee, unlike an invitee, "is not entitled to any affirmative act of protection."²³ Consequently, concluding that a person is a licensee significantly lessens the duty owed to him. Because the companies were uninterested in Tommy's presence on the land, the court thus determined that he was a licensee, and not an invitee.²⁴

¹⁸ The birth, life, death, and resurrection of Jesus Christ are historical truths. See Stanley L. Jaki, *The Savior of Science*, 186 (Regnery Gateway 1988).

¹⁹ *John* 8:32 (Catholic Revised Standard Version).

²⁰ Edmund M. Morgan, *The Case Method*, 4 *Journal of Legal Education* 379, 379 (No. 4) (Summer, 1952).

²¹ See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* in *JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS*, 369 (Gottlieb et al., LexisNexis 2006).

²² 218 Ark. 575; 237 S.W.2d 895 (Ark 1951).

²³ *Id.* at 586.

²⁴ *Id.*

Therefore, under common law, neither the electric company nor the company that owned the land had any affirmative duty to remove the live wire to prevent Tommy's injury.

Applying the case method, roughly analogous to the scientific method, the Supreme Court of Arkansas described the common law, and then applied that law to the facts of this case. But it is critical to notice that neither the common law nor the application of the law to the facts involved any discussion about the dignity of Tommy as a human person. The very distinction between licensees and invitees turns upon factors such as business motivation that completely ignore the equal dignity of all persons, whether they intend to engage in a business transaction or not. The court as a matter of common law uncritically accepts this distinction, far removed from the reality of the human person. From this point forward, Tommy's status as a licensee determines the duty or lack of duty owed him, rather than his status as a human person. Insofar as the Supreme Court of Arkansas did not consider Tommy's humanity, its decision is dehumanizing.

D. The Human Person's Capacity to Know the Natural Law

But the human person necessarily knows the essential content of the natural law. "He discovers that he is fundamentally a moral being, capable of perceiving and of expressing the call that . . . is found within all cultures: 'to do good and avoid evil.'"²⁵ This precept is the foundation for all other precepts of natural law.²⁶ The subsidiary precepts simply identify particular goods as part of the overall good of the human person.²⁷ The overall good of the human person is not, however, apprehended solely by the mind, but also by the heart, the spirit,²⁸ and the affectivity of the human person.²⁹ Accordingly, the person formulates precepts that are morally binding because they allow him to actualize certain goods and attain to happiness.³⁰ Therefore, the natural law is not an external law that forces one to conform to the demands of the social order, but an internal law that allows one to fulfill the interior demands of one's own nature.³¹ This is why obeying the natural law leads to freedom, and not slavery.

²⁵ International Theological Commission, *The Search for Universal Ethics: A New Look at Natural Law*, ¶ 39.

²⁶ Maritain, *supra* note 5, at 62.

²⁷ *The Search for Universal Ethics*, ¶ 41.

²⁸ For practical purposes, "spirit" means "soul."

²⁹ *The Search for Universal Ethics*, ¶ 44.

³⁰ *Id.*, ¶ 45.

³¹ *Id.*, ¶ 59.

E. Why Knowledge of the Natural Law Matters and How Natural Law Harmonizes with Scientific Truths

Consequently, the human person's capacity to know the natural law is the capacity to know what is good for the human person. This means that the authentic good of the human person can be the basis for all law. Moreover, the authentic good of the human person can only be ensured by a society that acts in accord with the natural law, thus respecting the dignity of the human person. Moreover, this knowledge of natural law does not render scientific and mathematical truths superfluous, but allows them to become part of the integral good of the human person. For example, the statistical evidence³² demonstrating that children function better in marriage as opposed to single sex households or unstable mother/father households³³ further substantiates the natural law truth that the good of procreation requires the prior good of marriage between a man and a woman.

II. The Individual in Relationship with Society: A Practical Application of Natural Law

The second challenge to natural law identified by the International Theological Commission concerns the relationship between the individual and society. Certain conceptions of this relationship prevalent in modern society contradict natural law and violate the dignity of the human person.

A. What Does It Mean to Call a Human Person an "Individual"?

The human person is social by nature and even more, has a relational dimension that is "capable of communion with [others] on the level of knowledge and love."³⁴ In fact, the self-realization of the human person depends upon this communion.³⁵ If then the term "individual" merely refers to a single person in relationship with others, this definition is in harmony with the nature of the human person, and consequently, in harmony with natural law. But if "individual" refers to a completely autonomous subject that only has relationships with others to the extent that he/she consents to those relationships, and if man is merely sociable instead of social and relational, then the "individual" ceases to be a human person.³⁶

But the autonomous view of the individual is, nonetheless, attractive because a person is seemingly enabled to control every facet of their life, including their relationships. This control appears to be a means of attaining

³² The presumption here is that statistical evidence is typically generated using a scientific methodology.

³³ Pitirim Sorokin, founder and first chair of the Sociology Department at Harvard, "From remotest past, married parents have been the most effective teachers of their children."

³⁴ *Compendium of the Social Doctrine of the Church*, ¶ 149.

³⁵ *Id.*, ¶ 149.

³⁶ Charles Rice, *50 Questions on the Natural Law*, 266 (Ignatius Press 1999).

happiness. But happiness, the complete actualization of the human person, cannot be attained through controlling one's own life, but only through the sincere gift of self to others and to God.³⁷

1. *The Social Contract and the Ensuing Violation of Human Dignity*

Social contract theorists have shifted the focus of political philosophy from the nature of the human person to the origin of the human person. For Rousseau, the state of nature was "simple, uniform and solitary."³⁸ For Hobbes, it was "solitary, poor . . . nasty, brutish, and short."³⁹ In either case, the individual in the state of nature is the fully autonomous individual that enters into relationship with others only by consent. Consequently, the creation of civil society involves a group of autonomous individuals agreeing to give up certain rights in exchange for the benefits of civil society.⁴⁰ For Rousseau, in particular, the individual will is completely submerged in the will of the collective society—the general will.⁴¹ Paradoxically, the social contract theory, by disregarding the nature of the human person, oscillates between extreme individualism where autonomous individuals create their own moral code and collectivism, or the complete absorption of the individual in the society.⁴² Both extremes violate human dignity.

2. *Why Radical Individualism Leads to a Violation Human Dignity*

When men are isolated from others and from God, they become the arbiters of what is right and what is wrong.⁴³ For instance, the pro-choice mentality has its foundation in social contract theory.⁴⁴ The mother is necessarily in a relation with her child, but this relation is contingent on her consent to continue that relation because the mother can abort her child at any time.⁴⁵ But not all human relationships are predicated on consent. A child, for example, does not choose his/her parents.. Relationships are part of human nature itself.⁴⁶ To make interpersonal relationships *subject* to individual consent is to deny the human person the right to be a human

³⁷ See *Compendium of the Social Doctrine of the Church*, ¶ 34. See also Luke 17:33.

³⁸ Rousseau, *Discourse on the Origin and the Foundations of Inequality among Men*, from *The Discourses and Other Early Political Writing*, 137-38 (Ed. Victor Gourevitch, Cambridge University Press 1997).

³⁹ Thomas Hobbes, *Leviathan* 92 (Barnes and Noble 2004).

⁴⁰ Eg., Rousseau, *supra* note 38, at 173.

⁴¹ Michel Schooyans, *Democracy in the Teaching of the Popes: Preliminary Report*, 32.

⁴² Not all social contact theories contradict Catholic social doctrine, but only those theories that claim that the authority to rule comes from the people, as opposed to claiming that while political authority itself comes from God, it is the people that decide who exercises that authority. Leo XIII, *Diuturnum*, ¶ 6.

⁴³ See *Genesis* 3:22.

⁴⁴ Rice, *supra* note 36, at 266.

⁴⁵ *Id.*

⁴⁶ *Id.* at 267.

person—that is, the right to be in relation with others. The self-realization of the human person is impossible in a society governed by radical individualism.⁴⁷

B. Why Collectivism Leads to a Violation of Human Dignity

When the human person is completely subsumed into society, he/she loses his personality and becomes “nothing more than an individual part” of society or the state.⁴⁸ Under this formulation, the person is a means to serve the common good of society. One does not have any rights vis-à-vis society, and countless numbers of human persons can be exploited in the name of the “common good.” Even the killing of persons can be justified as a means of pursuing the “common good.” Yet the common good of society only exists for the sake of the human person.⁴⁹ And the end of every person is God, so he transcends the state and society.⁵⁰ Consequently, under collectivism, the person’s freedom to seek God is compromised by his complete allegiance to the state. Just as the self-realization of the person was impossible in a society governed by radical individualism, so it is impossible in a collectivist society.

C. The Preeminent Example of Individualism in Modern Society

The pre-eminent example of individualism in society is a kind of moral relativism known as ethical subjectivism—this philosophical position holds that morality is relative to individuals.” There is no objective moral truth. Any reference to objective truth is immediately countered with the assertion: “Stop trying to impose your morality on me.” But this statement itself imposes a particular morality on a person—a relativistic worldview that renders all moral discussions a matter of opinion.⁵¹ There is no neutrality with respect to moral issues. Applying the metaphysical principle of non-contradiction, a moral opinion is either right or wrong; it cannot be both right and wrong at the same time. There may be elements of truth in wrong opinions, but the opinion itself, when considered in its totality, either reflects the truth about the human person and is right, or mischaracterizes the human person in some particular and is wrong.

Given that ethical subjectivism is prevalent in society, there appears to be a real contradiction between the position that morality is relative to individuals and the moral presuppositions that are necessary to create a society. A society can be defined as a group of persons bound “by a principle of unity.”⁵² And yet, ethical subjectivism makes it impossible for a

⁴⁷ *Compendium of the Social Doctrine of the Church*, ¶ 149.

⁴⁸ Hervada, *supra* note 3, at 41.

⁴⁹ *Compendium of the Social Doctrine of the Church*, ¶ 170.

⁵⁰ *Id.*, ¶ 47.

⁵¹ See *The Search for Universal Ethics*, ¶ 8.

⁵² *Compendium of the Social Doctrine of the Church*, ¶ 149.

society to agree upon a moral principle of unity because such a principle presupposes an objective source of morality.

The criminal code of our society, for example, punishes rape and murder. In a society governed by ethical subjectivism, the punishment of these crimes is completely arbitrary and it would be equally permissible to reward men for raping women and killing other men. The very moral foundations of society, that it is wrong to take innocent human life and sexually violate other persons, are denied by moral relativists. Moreover, any principle of unity that is significant enough to hold society together has moral implications that require individuals to accept an objective source of morality. The very idea of a humane society that protects the life, liberty, and property of men⁵³ is impossible when ethical subjectivism is the guiding principle for society.

D. The Preeminent Example of Collectivism in Modern Society

With reference to collectivism, the most pre-eminent contemporary form in the United States disguises itself as “democracy.” After delivering an address at the Gregorian University in Rome, Justice Antonin Scalia said, “The whole theory of democracy . . . Is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines, that there are certain minority positions that deserve protection.”⁵⁴ This statement embodies the collectivist form of “democracy.” Under Justice Scalia’s formulation, persons who are in the minority become simply part of the larger society. Their rights are not unalienable rights that derive from God, but contingent rights that derive from the will of the majority. Thus, “democracy can vote itself into tyranny.”⁵⁵ Thomas Jefferson had a very different understanding of the republican form of government the Founders of America sought to secure.⁵⁶

As a result of the collectivist form of “democracy,” the killing of unborn human beings is a policy judgment made by the legislature, which presumably reflects the will of the majority. As Justice Scalia affirms, “If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it.”⁵⁷ But if the state can pass a law allowing for the killing of unborn babies provided that the majority consents, there is no right to life. In order for any right to exist, there must be a duty upon all persons to protect that right, including the

⁵³ *The Declaration of Independence*, available at

<http://www.ushistory.org/declaration/document/index.htm> (last visited 2 March 2018).

⁵⁴ Harry Jaffa, *Storm over the Constitution*, 115 (Lexington Books 1999).

⁵⁵ *Id.* at 116.

⁵⁶ Thomas Jefferson, *Notes on the State of Virginia*, 160 (Bedford/St. Martin’s 2002).

⁵⁷ Jaffa, *supra* note 54, at 115.

majority.⁵⁸ Thus, the killing of an entire class of human beings is justified under “democracy.” And “democracy,” as Justice Scalia understands it, also justifies the decision of the majority of the German people that “Hitler would be the voice of the people.”⁵⁹ A collectivist form of democracy poses a grave risk to the lives of all people in the state that adopts it.⁶⁰

E. Natural law Applied: How The Proper Relationship between the Individual and Society Protects the Dignity of the Human Person

To arrive at the proper relationship between the individual and society, the analysis must begin with the human person. In particular, the relationship between the individual and the state does not completely express the relational nature of the human person. In fact, there are several social relationships such as that between the individual and the family that “respond more immediately to the intimate nature of man.”⁶¹ To prevent the individual human person from being submerged in the state, there must be autonomous, intermediate social groups between the individual and the state.⁶² The family or a civic organization, for example, has a proper autonomy that the state should respect.⁶³

Thus, a multiplicity of social groups prevents any single group from submerging the individual, and allows the human person to relate with others in a rich variety of ways, as a lover, a father, a mother, an instructor, a friend, an advisor, a counselor, a citizen, and a co-worker. The proper relationship between the individual and society is then based on a “healthy social pluralism.”⁶⁴ This “social pluralism” is in accord with the nature of the human person who has various needs and various means of relating with others to fulfill those needs. Consequently, the relationship between the individual and society that is mediated through various social groups is a natural law principle. The human person is fulfilled because, unlike individualism, he can engage in relationships with others, and unlike collectivism, he does not lose his autonomy.

⁵⁸ *Compendium of the Social Doctrine of the Church*, ¶ 156.

⁵⁹ Jaffa, *supra* note 54, at 116.

⁶⁰ See Schooyans, *supra* note 41, at 22, 30.

⁶¹ *Compendium of the Social Doctrine of the Church*, ¶ 151.

⁶² *Id.*

⁶³ *Id.*, ¶ 214.

⁶⁴ Social pluralism refers to a multiplicity of social groups that intervene between the individual and the state.

III. Faith and Reason in the Public Debate: What We Can Learn from the Natural Law

The third challenge to natural law is the exclusion of faith from the public debate. Central to the resolution of legal problems within a society are the antecedent beliefs about how society should decide moral issues. This is because law and morals are inextricably intertwined.⁶⁵ Frequently, rational approaches to moral issues are contrasted with faith-based approaches. But this distinction wrongly presupposes that faith-based approaches are not rational. Although natural law is a rule of reason, a proper application of natural law does not exclude faith from the public debate over moral issues. By accommodating faith and reason, the natural law protects the human person from the errors of rationalism, reason alone, and fideism, faith alone.

However, there are benefits to rationalism and fideism that should be recognized. Rationalism allows the human person to search for the truth through the intellect. This is a noble and worthy endeavor. Rationalism also provides a seemingly objective means of searching for the truth that does not depend on a privileged experience of faith. Consequently, it appeals to the human desire for certainty. Fideism, in contrast to rationalism, grants the human person the freedom to act in accordance with what he/she believes is true. Fideism involves a distrust of human reason, and prefers to seek the Truth by trusting God and others. This simple way of approaching God avoids the pitfall of intellectual pride—an excessive confidence in human reason.

A. Faith is Rational, and a Necessary Part of Living in This World

As easily demonstrated by common examples, people act on faith everyday of their lives.⁶⁶ When a person wakes up in the morning, he sometimes jumps out of bed trusting that the floor is still there. Again, many people have never seen the Indian Ocean, but they are so convinced that it exists that it would require a great deal of work to persuade them otherwise. Neither of these common examples of trust or faith is considered irrational.⁶⁷ Faith is part of everyday life that does not become irrational merely because religion is involved.⁶⁸

⁶⁵ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*” IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 211 (Gottlieb et al., LexisNexis 2006).

⁶⁶ John Henry Newman, *Sermon 15: Religious Faith Rational* IN PAROCHIAL AND PLAIN SERMONS, 125 (Ignatius Press 1997).

⁶⁷ See *Id.* at 126.

⁶⁸ *Id.*

B. Rationalism: The Harmful Consequences of Excluding Faith

The necessity of faith can be deduced from a common human experience: the person whose conscience tells them something is wrong, but has difficulty explaining why it is wrong to another person. If that person is required to act on strictly rational grounds that can be explained to another person, he or she will violate their conscience. This is the first harmful consequence resulting from rationalism.

Suppose Luke is a farmer without any formal education. His conscience tells him that using contraception with his wife is wrong, but because he has not been trained to reason properly, he cannot rationally explain why contraception is wrong to his wife. He is a devout Catholic and accepts that contraception is wrong because that is what the Roman Catholic Church teaches. Should Luke use contraception and violate his conscience merely because he cannot rationally explain his position to his wife? The very nature of conscience requires Luke to obey his conscience.

Essentially, conscience is binding because it is God's messenger instructing a person how to act rightly.⁶⁹ Therefore, a person must be free to act in accordance with their conscience, even if their conscience is informed more by faith than by reason. This does not deny that the faculty of conscience involves the use of reason, but only asserts that the moral authority of conscience is not contingent upon the ability to explain moral issues in strictly rational terms. Rationalism, the exclusion of faith as a basis for acting in society, carries the inherent risk that a person will not be able to act in accordance with their conscience.⁷⁰ Rationalism thus compromises human freedom—the unimpeded search for Truth.⁷¹

The second harmful consequence resulting from rationalism is that even if the human person discovers that a given principle is true through mere reason, there is no encouragement to act in accord with that principle. As Father Wojciech Giertych explains, "The reason may see, even clearly, the truth of a moral challenge, and yet the person may refrain from adhering to it, precisely because what is missing is the moral stamina that would permit the creative and mature free choice of the *verum bonum* [true good]."⁷² The

⁶⁹ John Paul II, *Veritatis Splendor*,

¶ 58, available at

http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html (last visited April 30, 2010).

⁷⁰E.g., John Rawls's theory of public reason is a rationalist approach that denies freedom of conscience. Kent Greenawalt, *Private Conscience and Public Reasons*, 108 (Oxford University Press 1995).

⁷¹ Human freedom has an "essential and constitutive relationship to truth." John Paul II, *Veritatis Splendor*, ¶ 4.

⁷² Father Wojciech Giertych, *Lateran University Conference: Legge Morale Naturale: problemi e prospettive*, 9.

only thing that can provide this moral stamina or encouragement is faith. The spiritual life “illuminates the mind, opening it to the mysterious perspective of encountering God and it strengthens the will enabling it to persevere in its attachment to the true good.”⁷³ Moreover, the spiritual life can move the heart to express love for God and others in conformity with the truth. In effect, rationalism excludes the one thing necessary to act in accord with the truth, God’s grace. Since rationalism does not allow a person to act in accord with the Truth, it prevents the human person from flourishing.⁷⁴

C. Fideism: The Harmful Consequences of Excluding Reason

While rationalism is not fully consistent with human nature because it ignores critical aspects of the human person, i.e., the conscience, the will, and the heart, fideism also ignores critical aspects of the human person, including the faculty of reason. A particular type of fideism called voluntarism recognizes only the will. “God is understood to be only power or a will that transcends reason.”⁷⁵ Consequently, under voluntarism, “reason is subservient to will” and “total obedience becomes the highest virtue.”⁷⁶

For example, some Muslims which believe that the will of Allah is supreme whether or not it is rational adhere to a form of voluntarism.⁷⁷ Moreover, because these Muslims believe that Allah is the only God,⁷⁸ everyone must obey the will of Allah. No one can object that it is more rational to allow people freedom of religion or that using violence to enforce the will of Allah is irrational. Since Allah’s will is supreme, there is no clear right and wrong because everything is potentially right if Allah wills it.⁷⁹ Thus, the mere proclamation that this or that is the will of Allah can lead to the most abhorrent violations of human dignity, i.e., terrorist acts that kill innocent lives. So it is not religion that leads to violence, but only exclusivist religions that adhere to voluntarism by recognizing only the will.

⁷³ *Id.* at 10.

⁷⁴ See John Paul II, *Veritatis Splendor*, ¶ 87.

⁷⁵ James V. Schall, *The Regensburg Lecture*, 47 (St. Augustine’s Press 2007).

⁷⁶ *Id.*

⁷⁷ Not all Muslims subscribe to voluntarism.

⁷⁸ *The Koran*, Sura XL—The Believer, available at http://books.google.com/books?id=OB_gAAAAMAAJ&printsec=frontcover&dq=Koran&source=bll&ots=BSIEBLE8ZT&sig=2TNbCqwJ4Mp_eED_Aipzf5u8SF8&hl=en&ei=CnnUS9SfNYOI8wTL7pyFDw&sa=X&oi=book_result&ct=result&resnum=16&ved=0CFUQ6AEwDw#v=onepage&q=one%20God&f=false (last visited 2 March 2018).

⁷⁹ Schall, *supra* note 76, at 48.

D. The Contribution of Natural Law: How the Compatibility Between Faith and Reason Protects the Human Person

To demonstrate how the compatibility between faith and reason protects the human person, the example of marriage suffices. By looking at the biology of men and women, it is evident that there are sexual differences between the two. Moreover, the “sexual difference renders union possible.”⁸⁰ It is, therefore, reasonable to assert that “same-sex marriage” does not exist because there can be no sexual union between a man and a man or a woman and a woman. If some contend that while there is no sexual union between two men, there is, nevertheless, a possibility of union on a deeper level, the obvious response is that any such union between a man and a man is impoverished because it cannot physically express itself through sexual union. The union between a man and a woman is manifested in their sexual union, and that is a visible sign that there is, in fact, a real union present. For same-sex partners, the impossibility of sexual union is a clear indication that there is no real union present. Thus, strictly viewing marriage from a rational point of view, “same-sex marriage” is a legal or social construction that does not actually exist.

This rational understanding of marriage does not, however, exclude faith. The Catholic faith confirms that marriage only exists between a man and a woman.⁸¹ What is knowable through reason is confirmed by faith in Christ and His Church. Even more, the Church teaches that the “sacramentality of marriage originates” in the “spousal love of Christ for the Church, which shows its fullness in the offering made on the cross.”⁸² So marriage is a reflection of Christ’s union with the Church. Just as Christ is faithful to his Church, so a husband must be faithful to his wife, and she to him. This adds new meaning to marriage because, through the eyes of faith, marriage becomes a cooperation in the saving work of Christ. So faith enriches reason, and gives what is knowable through reason a deeper meaning. Moreover, by exercising faith in Christ, the human person draws strength and refreshment to be a better husband or a better wife. Thus, faith gives the human person the strength to act in accordance with their marriage vows. This then is how faith and reason work together to benefit the human person.

As Pope John Paul II relates, “Faith and reason are like two wings on which the human spirit rises to the contemplation of truth.”⁸³ “Grace does not destroy nature but heals it, strengthens it, and leads it to its full realization. For this reason, even if the natural law is an expression of

⁸⁰ Jane Adolphe, *St. Paul in Dialogue with Modern Day Pagans: “Same-Sex Marriage” and World Peace*, 3.

⁸¹ *Compendium of the Social Doctrine of the Church*, ¶ 219.

⁸² *Id.*

⁸³ John Paul II, *Fides et Ratio*, preface.

reason common to all men . . . it is not external to the order of grace.”⁸⁴ In fact, the natural law confirms what is knowable through faith in Christ, thus providing the human person with reasons for his or her faith. There is, then, a sense in which the natural law as a rule of reason can help to build one’s faith in Christ. This faith is necessary for the human person to live in accordance with the truth—Christ Himself.⁸⁵ Reason, however, checks this faith to ensure that it is compatible with the human person. In particular, the human person, through reason, recognizes that human nature is the “bearer of an ethical message,” that it “establishes an implicit moral norm.”⁸⁶ Reason then “actualizes” this norm to ensure that what is known through faith does not violate the very nature of the human person.⁸⁷ Thus, the natural law as a rule of reason works together with faith for the protection of the human person.

IV. Natural Law and Human Law

The fourth challenge to natural law identified by the International Theological Commission is the abuse of power “which juridical positivism conceals.”⁸⁸ Legal positivism draws a distinction between what law is and what law ought to be. The classic formulation by John Austin relates, “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”⁸⁹ The “assumed standard” to which Austin refers could hypothetically refer to any higher law, but it certainly includes natural law. Thus, the claim of legal positivism is that positive laws are valid because they are posited by humans, irrespective of whether they conform to natural law. Tyranny and the worst forms of human exploitation can thrive under this conception of law.

However, there are several characteristics of legal positivism good for human beings. Firstly, legal positivism encourages respect for the law. This respect for law is necessary to have order and peace in society. Legal positivism also provides certainty regarding what conduct is permissible under the law, at least in theory. Even if a person believes that a law is unjust, he or she knows the essential content of the law, and can be certain a given action will not cause him or her to violate that law. The reason this

⁸⁴ International Theological Commission, *The Search for Universal Ethics: A New Look at the Natural Law*, ¶ 101.

⁸⁵ *John* 14:6.

⁸⁶ International Theological Commission, *The Search for Universal Ethics: A New Look at the Natural Law*, 23.

⁸⁷ *See Id.*

⁸⁸ *Id.*, ¶ 35.

⁸⁹ John Austin, *The Province of Jurisprudence Determined*, Lecture V, 157 (W.E. Rumble ed. 1995) (1832).

certainty is merely theoretical is precisely because the composition of courts change, and this can cause an ideological shift in the court's jurisprudence. Nevertheless, the relative certainty legal positivism provides helps to ensure that law does not become capricious. Finally, legal positivism recognizes that laws need to be formulated by human persons, that people have a vital role in legal systems. Natural law theorists can agree with this proposition because the belief that human law derives from a higher authority is fully compatible with the belief that human laws must be mediated through human institutions. Legal positivism is right to recognize that laws are formulated by human persons, and the recognition of this relation between law and the human person may help to keep the law focused on the person, so that the law will hopefully remain fully human.

A. Why Legal Positivism Does Not Adequately Protect the Human Person from Harm, and the Need for Positive Law to Reflect the Natural Law

However, legal positivism does not ensure that the human person remains at the center of law. The rulers who make the law may exploit the people, or in the case of a democracy, the majority may oppress the minority. Because fallen human beings can create inhuman laws, there is need for a law of the human person—a law that necessarily reflects human nature. The only such law is natural law. But in order for natural law to be effective, positive laws must be in accord with natural law. The way to keep the human person at the center of law is to ensure that positive law is in conformity with the law that perfectly reflects the human person—the natural law.

Consequently, positive laws not in conformity with natural law do not have the nature of law. Instead of being a “dictate of reason for the common good,”⁹⁰ such “laws” are, in actuality, the mere exercise of power. When positive law ceases to be in accord with the natural law—when positive law ceases to be moral—it becomes a power game because the quest for power is all that remains.⁹¹ So a positive “law” not in accord with natural law is not a bad law; it is no law at all.

B. How Positive Law Reflects the Natural Law, and the Difference Between Positive and Human Law

Although the protection of the human person requires that positive law reflect natural law, there are two primary ways in which this can occur. “The first way is as conclusions are derived from [p]rinciples. The second

⁹⁰ St. Thomas Aquinas, *Summa Theologiae*, Qu. 90, Art. 4, c. IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 183 (Gottlieb et al., LexisNexis 2006).

⁹¹ See *Id.*, Qu. 95, Art. 2, c., at 185.

way is through determination of certain generalities”⁹² To illustrate the distinction, the natural law principle that innocent human life is to protected can be manifested in human positive law as a conclusion that necessarily follows this principle, or as a specific determination prudentially designed to give effect to the natural law principle. A law that prohibits murder, the intentional killing of innocent human life, is a conclusion from the natural law principle because murder, by definition, violates the natural law principle, and so it must be prohibited by positive law. In contrast, a law that sets the speed limit on a road at 50 miles per hour is not a direct conclusion from the natural law principle that innocent human life deserves protection. Instead, it is a prudential judgment that a speed limit of 50 miles per hour will give effect to the natural law principle. This is what Aquinas means when he writes that the positive law can reflect the natural law as a “determination of certain generalities.”⁹³

Since positive law sometimes reflects natural law, there is a distinction between positive law and human law. Aquinas himself suggests that there is such a distinction when he uses the phrase “human positive law.”⁹⁴ The phrase implies that human law encompasses more than positive law. In particular, human law encompasses positive and natural law. The manifestation of natural law in positive law means that natural law and positive law are interrelated. Human law in the United States, for example, is one system of law, positive and natural.

4/C: The Harmful Consequences of Legal Positivism for the Human Person

If one accepts the proposition that positive laws not in conformity with natural law are valid laws, and that valid laws must be obeyed, then any valid law harmful to human beings must be obeyed. A law that provides for the torture of seven year-old children must be obeyed because it was posited as a law by the appropriate human institution. So too, the Nazis who operated the concentration camps were merely acting in accordance with the law, so they should not be punished for killing millions of innocent people. It thus emerges that anything can be done to the human person so long as it is posited by the appropriate institution as a law.

C. The Natural Law’s Protection of the Human Person: What Can Be Learned from the International Military Tribunal at Nuremberg

If, however, the only valid positive laws are those that reflect natural law, the human person is protected from any harm. This is best evidenced by the Trial of the Major War Criminals Before the International Military Tribunal

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

at Nuremberg. The defendants charged with various human rights violations argued that “there can be no punishment of crime without a pre-existing law.”⁹⁵ The Tribunal responded with this language: “[T]he attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”⁹⁶ Since then human beings can be punished for violating the natural law, the fact that they were acting pursuant to positive law does not absolve them of responsibility for their actions. The Nuremberg Trial clearly evidences the proposition that positive law should not be obeyed unless it is in accord with natural law, because this is the only way to protect the human person from being exploited.

Conclusion

As evidenced by the various facets of natural law examined throughout this paper, the natural law offers comprehensive protection to the human person. Through seeking the natural law, we discover the various dimensions of the human person, and the legal, social, political, psychological, and economic conditions needed for the human person to flourish. There can be no substitute for well-reasoned discussions about the nature of the human person and the corresponding content of natural law. Until judges, lawyers, and legal scholars recognize that law cannot simply avoid philosophical and religious discussions about the human person, the dignity of the human person will never be secured by the rule of law.

⁹⁵ *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg* (14 November 1945-1 October 1946) IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 865.

⁹⁶ *Id.*