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Some Reasons for a Restoration of Natural Law Jurisprudence

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INTRODUCTION

The growing influence of utilitarianism and legal positivism in American jurisprudence today and the decline of natural law have produced an ominous shift in the foundation of our legal system. This shift is illustrated by various courts' approaches to momentous legal issues of the Twentieth Century such as abortion and euthanasia. Ultimately, legal positivism is unacceptable as a jurisprudential framework because it provides no inherent limits on the power of the state and no basis for determining what is just. In contrast, the natural law provides a jurisprudential framework that both guides and limits the civil law. It therefore is both a practical and a necessary alternative to legal positivism.

I. LEGAL POSITIVISM AND THE LAW

Although very few law schools require the subject, those of us who teach jurisprudence may be forgiven for regarding it as the most important course in the curriculum. While formal study of it is not widely required, American law schools do teach a philosophy of law. Though usually implicit, that philosophy pervades the curriculum and competent observers have long voiced concern about its effect on the legal profession. More than a decade ago, Dean Roger C. Cramton described "the ordinary religion of the law school classroom," as "a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending

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toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry."[1]

"Law teachers and law students of 1984," said Professor Harold Berman in a regrettably unnoticed address, "are more one sided, and more mistaken, in their view of the nature of law than were their predecessors in any other period of American history."[2] Professor Berman's explanation of the root of the crisis is worth extended quotation:

> In American law schools today, reference is rarely made to the sources of our legal tradition in the religious convictions of our ancestors, both Jewish and Christian. It is simply not mentioned that, historically, all the legal systems of the West emerged in response to a belief in the lawful character of the universe and in the fundamental purpose of law to guide men and women to salvation . . . .
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> Admittedly, these historical truths, which are not taught today, were also not generally taught in American law schools one hundred or one hundred and fifty years ago. But then they were taught in the homes and in the churches. They were taken for granted. They were part of the public philosophy. Indeed, throughout the nineteenth and into the first decades of the twentieth century American lawyers learned their law chiefly from Blackstone, who wrote that "[T]he law of nature . . . dictated by God himself . . . is binding . . . in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all force and all their authority, mediately or immediately, from this original."
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> Only in the past two generations, in my lifetime, has the public philosophy of America shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a historical to a pragmatic theory . . . . Rarely does one hear it said that law is a reflection of an objective justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect at best the community sense of what is expedient; and more commonly it is thought to express the more or less arbitrary will of the lawmaker . . . .
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> The triumph of the positivist theory of law—that law is the will of the lawmaker—and the decline of rival theories—the moral theory that law is reason and conscience, and the historical theory that law is an ongoing tradition in which *both* politics *and* morality play important parts—have contributed to the bewilderment of legal education. Skepticism and relativism are widespread . . . .
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> . . . The traditional Western beliefs in the structural integrity of law, its ongoingness, its religious roots, its transcendent qualities, are disappearing not only from the minds of law teachers and law students but also from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law itself is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. The

1. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED. 247, 262-63 (1978).

2. Berman, *The Crisis of Legal Education in America*, 26 B.C.L. REV. 347, 348 (1985).

> historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse. . . .
>
> It may be impossible to restore the ancient Judaic and Christian foundations of our legal tradition. But it is important, first, to recognize that it is the disappearance of those religious foundations that gives power to the convictions of the utopian nihilists—power possibly to overcome the superficial utilitarianism of the liberal establishment. . . .
>
> . . . We shall not achieve social justice without a strong sense of legality, and we shall not recover a strong sense of legality without an integrative jurisprudence that finds the sources of our law not only in politics, but also in history, in human nature, and in the universe itself.[3]

Dean Cramton and Professor Berman are quoted here, not to imply their support for the positions taken in this essay on issues they did not address, but rather because they described well the utilitarian, positivistic philosophy that dominates the American legal profession. "[P]erhaps the most consistent expression of analytical positivism in legal theory" is Hans Kelsen's "pure theory of law."[4] Legal positivism "contemplates the form of law rather than its moral or social contents, . . . it confines itself to the investigation of the law as it is, without regard to its justness or unjustness, and . . . it attempts to free legal theory completely from all qualification or value judgments of a political, social, or economic nature."[5] Legal positivism offers no rationale for arguing that a law can be void for injustice rather than merely unwise or unconstitutional. "[J]ustice," according to Kelsen, "is not ascertainable by rational knowledge at all . . . . From the standpoint of rational knowledge there are only interests and conflicts of interests . . . . Justice is an irrational ideal."[6] According to Kelsen, "law is . . . a system of coercion-imposing norms which are laid down by human acts in accordance with a constitution, the validity of which is presupposed, if it is on the whole efficacious. 'Constitution' in this definition means a norm (or plurality of norms) laid down by human acts which regulate the method of creation of other norms."[7] Kelsen acknowledged that with respect to:

> [T]he norms of morals . . . all the individual norms can be derived from the basic norm by an operation of thought, namely, by deduction from universal to particular. With legal norms the case is different. These are not valid by virtue of their content. Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm. A norm becomes a legal norm only because

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3. *Id.* at 348-52 (emphasis in original).
4. E. BODENHEIMER, JURISPRUDENCE 285 (1940).
5. *Id. See also*, J. WU, FOUNTAIN OF JUSTICE 42 (1955).
6. Kelsen, *The Pure Theory of Law*, 50 L. Q. REV. 474, 482 (1934).
7. J. STONE, LEGAL SYSTEM AND LAWYERS REASONINGS 106 n.34 (1964) (quoting Kelsen, *Was ist ein Rechstakt*); *See also* Clark, *Hans Kelsen's Pure Theory of Law*, 22 J. OF LEGAL EDUC. 170, 172 (1969).

> it has been constituted in a particular fashion born of a definite procedure and a definite rule . . . . The individual norms of the legal system are not to be derived from the basic norm by a process of logical deduction. They must be constituted by an act of will, not derived by an act of thought.[8]

A. Abortion: A Case Study in the Application of Legal Positivism in the Law

A clear application of positivist theory in American law is *Byrn v. New York City Health and Hospitals Corp.*,[9] where the New York Court of Appeals upheld the permissive 1970 New York abortion law. The court first found as a fact that the unborn child is a living human being upon conception: "It is human . . . and it is unquestionably alive."[10] The court went on to rule that the unborn human being could legitimately be defined as a nonperson by the legislature. Significantly, the court relied on Hans Kelsen as authority for its position:

> What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g., Kelsen, General Theory of Law and State, pp. 93-109 . . .).[11]

In its 1973 abortion decision, *Roe v. Wade*,[12] the Supreme Court took the same approach, ruling that, whether or not the unborn child is a human being, he is not a person for purposes of the fourteenth amendment.[13] The legal debate generated by Roe has treated as irrelevant the question of whether or not the fetus is a human being.[14] Instead, the Court has simply side-stepped the issue by declaring that a fetus is not a person. The proponents of abortion can deny but they cannot disprove

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8. Kelsen, *The Pure Theory of Law*, 51 L. Q. REV. 517, 517-18 (1934) (a continuation of Kelsen, *supra* note 6). Kelsen also wrote: "Therefore any kind of content might be law . . . . The validity of a legal norm may not be denied for being (in its content) in conflict with that of another norm which does not belong to the legal order whose basic norm is the reason for the validity of the norm in question." H. KELSEN, PURE THEORY OF LAW 198 (M. Knight trans. 1967).

9. 31 N.Y. 2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

10. *Byrn*, 31 N.Y.2d at 200, 286 N.E.2d at 888.

11. *Id.* at 202, 286 N.E.2d at 889.

12. 410 U.S. 113 (1973).

13. The Court continues to follow at least this aspect of its *Roe* holding: "No member of this Court has ever questioned the holding in *Roe* . . . , that a fetus is not a 'person' within the meaning of the Fourteenth Amendment." Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040, 3083 n.13 (1989) (Stevens, J., concurring and dissenting).

14. On the beginning of human life at conception, i.e., fertilization, see *The Human Life Bill, 1981: Hearings on S. 158 before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong. 1st sess. 7-23 (1981) (testimony of Dr. Jerome Lejeune, Professor of Fundamental Genetics, University of Rene Descartes, Paris, France); W. HAMILTON and H. MOSSMAN, HUMAN EMBRYOLOGY 14 (4th ed. 1972); L. AREY, DEVELOPMENTAL ANATOMY 55 (7th ed. 1974); K. MOORE, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 1 (2d ed. 1977).

that the unborn child is a human being at every stage of development and, if they doubt that it is so, they are unwilling to give the benefit of that doubt to life rather than to death.

B. Selective Reduction: A Further Ethical Dilemma From the Positivist Approach

One striking recent disclosure demonstrates the sham character of the denial of life by proponents of abortion. It also illustrates the degrading tendency of a legal philosophy which reduces law to an exercise of will, utilitarian and indifferent to the content of the norm it imposes. That disclosure is the confirmation that selective abortion of multiple children in the womb has become accepted medical practice. The lack of legal controversy generated by this tells as much about the legal profession as the practice itself does about the medical. In the New England Journal of Medicine, six physicians last year published a study entitled, "Selective Reduction of Multifetal Pregnancies in the First Trimester."[15] They stated the problem that gave rise to this technique and tabulated the results:

> The number of pregnancies complicated by multiple gestation has been increasing as a result of the relatively widespread use of ovulatory drugs and in vitro fertilization. In pregnancies with multiple gestations, adverse outcome is directly proportional to the number of fetuses within the uterus, primarily because of an increased predisposition to premature delivery . . . . One option these patients may consider is selective reduction to a smaller number of fetuses in an attempt to increase their chances of delivering infants mature enough to survive without being irreversibly damaged by the sequelae of marked prematurity.
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> We report our experience with 11 patients who had a total of 12 multifetal pregnancies. Two of the patients had each conceived six fetuses, one had five, five had four, and four were carrying triplets. The number of fetuses was reduced to two in 11 pregnancies, and three in 1 pregnancy. All the procedures were performed between weeks 9 and 13 of gestation. Three procedures were done by transcervical aspiration of one or more sacs, and the remaining nine were accomplished by transabdominal intrathoracic injection of potassium chloride. Seven of the patients have had healthy twins, one has had a healthy single infant, and four had no liveborn infants.[16]

The authors described the technique in terms that leave no doubt that what is involved is the intentional and direct killing of a human being:

> When the procedure was performed transabdominally, . . . a linear-array ultrasound transducer in a sterile sheath was used to establish the

15. Berkowitz, *Selective Reduction of Multifetal Pregnancies in the First Trimester*, 318 NEW ENG. J. MED. 1043 (1988).

16. *Id.* at 1043.

> relation of all the sacs to each other. Under direct ultrasonic visualization, with the transducer held by the operator, a 20-gauge needle was introduced into the thorax of one of the upper-most fetuses. Whenever possible, the needle tip was placed directly into the fetal heart. Two to 7 mmol of potassium chloride was then injected, and the fetal heart was monitored visually for asystole. If cardiac activity persisted, 5 to 10 ml of sterile saline was injected next to the heart in an attempt to disrupt cardiac function by extrinsic pressure. After asystole had been observed for 60 seconds, the needle was removed. The procedure was then repeated in one or more additional fetuses if necessary. Each insertion of a needle through the maternal skin was performed with a new needle. The only criterion for the selection of a fetus was its proximity to the patient's abdominal wall, and the os immediately adjacent to the internal os was automatically excluded . . . . Before being discharged, each patient underwent a second scanning; if cardiac activity was observed in a fetus that had been subjected to a termination procedure, the patient was scheduled to undergo the procedure again one week later.[17]

The dead child is absorbed by the mother's body. The authors conclude that "a good time to perform first-trimester reduction procedures is between the 11th and 12th weeks of gestation."[18] They advise against delaying the procedure beyond the 12th week. One reason is that "the longer a patient waits to undergo a selective reduction, the greater may be the psychological difficulty of making the decision. Candidates for the procedure invariably undergo multiple ultrasound examinations that provide visual contact with their fetuses; this can evoke the type of emotional bonding that normally begins to develop after birth."[19] If the injection does not kill the targeted baby on the first try, the procedure is repeated. "We arbitrarily chose to wait one week before repeating the procedure in any patient, and were successful on each of the three occasions when that was necessary in this series. It is obviously necessary to map the location of each sac carefully at the time of the procedure so it will be possible to identify a specific fetus later."[20] A New England Journal of Medicine editorial endorsed the procedure in an analysis that epitomizes the application of utilitarianism to issues of life and death:

> The ethical ramifications of selective-reduction procedures are certainly complicated. Those with the view that abortion under any circumstances is wrong will find selective reduction ethically unacceptable. Those who think that abortion may be appropriate under special circumstances must wrestle with the concept of sacrificing some fetuses so that others can survive.
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> The legal aspects of selective reduction are not complicated. A woman who wishes to interrupt her pregnancy before the fetus or fetuses are viable can now do so, whatever her reasons. This procedure simply

17. *Id.* at 1044.
18. *Id.* at 1045.
19. *Id.* at 1046.
20. *Id.* at 1046.

represents a variation of first-trimester termination of pregnancy.[21]

Hard cases make bad law. The woman who is pregnant with six unborn children, none of whom will likely survive unless some are killed by "reduction," is deserving of sympathy as well as support. Nevertheless, it does not follow that she ought to have the right to kill any of her children.[22] The utilitarian approach, of course, imposes no real barrier to such killing. "Dr. John C. Fletcher, an ethicist at the University of Virginia who is an Episcopal priest, finds pregnancy reductions of triplets or more to be acceptable. He said that since even pregnancies involving triplets frequently results [sic] in babies that are premature and have serious medical problems, reducing them to twins satisfies the ethical principle of least harm for the most potential good."[23] No one familiar with the development of legalized abortion from hard-cases-only to abortion on request can reasonably expect that the selective reduction procedure will be limited to hard cases. Dr. Ronald Wapner of Jefferson Medical College in Philadelphia acknowledged that "he had reduced a pair of healthy twins to one 'at the patient's request.' "[24] And "Dr. Schulman, the director of the Virginia Genetics Institute, who has not been asked to perform the procedure, said he would do any reduction that a patient wanted. 'Basically, my view is that it's the patient's choice,' he said. 'As a physician, I don't see that it is my responsibility to say it's O.K. to reduce triplets to twins but not twins to singletons, especially because if I were doing abortions, I'd be reducing singletons to nothing.' "[25]

While "selective reduction" has generated some ethical debate,[26] there has been no significant legal debate because the legality of the procedure in all cases is regarded as settled by *Roe v. Wade* and its progeny. The acceptance of "selective reduction" confirms the jurisprudential bottom line. When the physician describes how the "20-gauge needle" bypasses one child to seek the heart of his brother or sister, it is time to close the debate and to admit that the event is an execution. If the law authorizing that execution of the innocent is a valid law, then it should be acknowledged that a law of absolutely any content could be a valid law in the United States. Its proponents would justify "selective reduction" as a remedy for hard cases. However, such justifications offer false security:

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21. Hobbins, *Selective Reduction—A Perinatal Necessity?*, 318 NEW ENG. J. MED. 1062, 1063 (1988).

22. "The authors (of the 'selective reduction' article) conclude that 'in any society in which abortion is available on demand, the selective reduction procedure requires no additional rationale.' Sad but true. The logic of the physician as killer as well as healer is difficult to restrict, as Hippocrates warned us 2500 years ago. The only way for medicine to recapture its soul, as a group of bioethicists recently warned, is 'to repudiate any and all acts of direct killing by physicians.' " Eugene F. Diamond, M.D., Letter, 319 NEW ENG. J. MED. 950 (1988).

23. N.Y. Times, Jan. 25, 1988, at A1, col. 6; *see also*, American Medical News, March 11, 1988.

24. N.Y. Times, Jan. 25, 1988, at A1, col. 6.

25. *Id.*

26. *See* Letters in 319 NEW ENG. J. MED. 949 (1988).

The prevailing jurisprudence offers no basis whatever for restricting the practice to hard cases. The intentional, direct killing of innocent human beings ought never to be justified. But the "selective reduction" development illustrates beyond the possibility of dispute that positivist jurisprudence is so paralyzed that it cannot stop short of sanctioning obvious discretionary execution. This was already the lesson of *Roe*. Now, "selective reduction" forecloses any pretense of debate on the point. The recent decision in *Webster v. Reproductive Health Services*,[27] merely indicates that the Supreme Court may look favorably on some unspecified legislative restrictions on abortion. In light of the apparently unanimous acceptance by the Court of the non-personhood of the unborn child, *Webster* provides no constitutional defense against "selective reduction" or any other kind of abortion.[28]

Roe v. Wade, of course, established the right to procure and to perform the intentional, direct killing of innocents as a constitutional right. The essential holding in *Roe* is that the unborn child is not a person for purposes of the fourteenth amendment. The Court conceded that if the unborn child is a person in terms of the fourteenth amendment, the case for abortion "collapses."[29] The Court indicated in a note that, if the unborn child is a person, the state could not allow abortion even to save the life of the mother.[30] The Court ruled, however, that whether or not the unborn child is a human being, "the word 'person,' as used in the fourteenth amendment, does not include the unborn."[31] The effect of the ruling, therefore, is the same as would be an explicit decision that an acknowledged human being is a non-person. If you are a person, that does not mean that you have *every* constitutional right. A person younger than 35 years does not have the right to be elected and serve as President. But, if you are not a person, you do not have *any* constitutional rights, including the right to live. A states' rights position on abortion is premised on the non-personhood of the unborn child; if an innocent person is subject to execution whenever the legislature authorizes it, he is, in that most important respect, a non-person. As Justice Stevens observed in *Webster*, "[e]ven the dissenters in *Roe* implicitly endorsed [the holding in *Roe* that 'a fetus is not a person'] by arguing that state legislatures should decide whether to prohibit or to authorize abortions . . . . By characterizing the basic question as 'a political issue' (in *Webster*), Justice Scalia likewise implicitly accepts this holding."[32]

27. 109 S. Ct. 3040 (1989).
28. *Id.* at 3083 n.13 (Stevens, J., concurring and dissenting).
29. *Roe*, 410 U.S. at 156-57.
30. *Roe*, 410 U.S. 157-58 n.54.
31. *Roe*, 410 U.S. at 158.
32. *Webster*, 109 S. Ct. at 3083 n.13. (Stevens, J., concurring and dissenting).

C. *Euthanasia: the Utilitarian Ethic and the Social Acceptability of Killing*

Of course, if the unborn child can be defined as a non-person so as to allow his execution at the discretion of others, so can his elder brother or his grandmother. Not surprisingly, the extension of this principle is already far advanced. Case law has established the right of the physician and family members to withhold or withdraw artificially supplied nutrition and hydration from an incompetent patient even where that patient has not requested such and even where the patient is "awake and conscious."[33] The Council of Ethical and Judicial Affairs of the American Medical Association has approved the withdrawal of artificially supplied nutrition and hydration from comatose or vegetative patients who are not terminally ill:

> Even if death is not imminent but a patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis, and with the concurrence of those who have responsibility for the care of the patient, it is not unethical to discontinue all means of life-prolonging medical treatment.
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> Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition, or hydration. In treating a terminally-ill or irreversibly comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained.[34]

In *Matter of Conroy*,[35] the court said:

> In the absence of trustworthy evidence, or indeed any evidence at all, that the patient would have declined the treatment, life-sustaining treatment may still be withheld or withdrawn from a formerly competent person like Claire Conroy if a third, pure-objective test, is satisfied. Under that test, as under the limited-objective test, the net burdens of the patient's life with the treatment should clearly and markedly outweigh the benefits that the patient derives from life.

Claire Conroy was "awake and conscious" but was expected to die within a year. In the case of *In re Peter*,[36] however, the New Jersey court said "the one-year life-expectancy test and the limited-objective and objective tests set forth in *Conroy*"[37] would be limited to " 'elderly, formerly competent patients' like Claire Conroy 'who . . . are awake and conscious and

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33. Matter of Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); Gray v. Romeo, 709 F. Supp. 325 (D.R.I. 1989) (upholding such termination as a civil right enforceable under 42 U.S.C. § 1983); Brophy v. New Eng. Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986); *but see* Cruzan v. Harmon, 760 S.W.2d 408 (Mo. Sup. Ct. 1988), *cert. granted*, 57 U.S.L.W. 3859 (U.S. July 3, 1989); Westchester County Medical Center v. Hall, 72 N.Y.2d 517, 531 N.E.2d 607 (1988).

34. *Text of Opinion on Withholding Treatment*, American Medical News, Mar. 28, 1986, at 1.

35. 98 N.J. 321, 366, 486 A.2d 1209, 1232 (1985).

36. 108 N.J. 365, 529 A.2d 419 (1987).

37. *Id.* at 374, 529 A.2d at 424.

can interact with their environment to a limited extent.' "[38] The *Peter* court authorized the withdrawal of life-support, including nutrition and hydration, from "persistently vegetative" patients even if they have an indefinite life expectancy. "For this kind of patient, our 'focal point . . . should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of . . . biological vegetative existence.' "[39]

Significantly, the *Conroy* court not only rejected the distinction "between the termination of artificial feedings and the termination of other forms of life-sustaining medical treatment,"[40] but also said that "we reject the distinction that some have made between actively hastening death by terminating treatment and passively allowing a person to die of disease as one of limited use in a legal analysis regarding such a decisionmaking situation . . . . [T]he line between active and passive contuct in the context of medical decisions is far too nebulous to constitute a principled basis for decisionmaking."[41]

Since the law has begun to authorize passive withholding of nutrition and hydration, i.e., starving and dehydrating a patient to death, it requires no great prescience to see that the next step will be active killing on the request of the victim or for his own good if he is incompetent. This outcome was foreshadowed in *Brophy v. New England Sinai Hospital*,[42] where the court approved the withdrawal of a feeding tube from a patient in a persistent vegetative state. "The withdrawal of the provision of food and water," said Justice Lynch in dissent, "results in particularly difficult, painful and gruesome death; the cause of death would not be some underlying physical disability like kidney failure or the withdrawal of some highly invasive medical treatment, but the unnatural cessation of feeding and hydration which, like breathing, are part of the responsibilities we assume toward our bodies routinely. Such a process would not be very far from euthanasia, and the natural question is: 'Why not use more humane methods of euthanasia if that is what we indorse?' "[43]

Sixteen states provide convicted murderers a relatively painless execution by injection.[44] There seems little doubt that the same benefit will be extended to those whose death is already authorized by "passive" starvation and dehydration. One indication of this progression is the quiet legitimization of assisted suicide for AIDS victims:

> Brian Smith supervises 60 volunteers at the San Francisco chapter of Shanty, which provides counseling to help AIDS patients deal with their grief. When patients want to talk about suicide, "and most do," he

38. *Id.* (citation omitted).
39. *Id.*
40. *Conroy*, 98 N.J. at 372, 486 A.2d at 1235.
41. *Id.* at 369-70, 486 A.2d at 1233-34.
42. Brophy v. New Eng. Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986).
43. *Id.* at 444, 497 N.E.2d at 641 (Lynch, J., dissenting).
44. AMNESTY INTERNATIONAL PUBLICATIONS, UNITED STATES OF AMERICA: THE DEATH PENALTY Appendix 1 (1987).

> said volunteers suggest that patients talk with their doctors. "Most doctors will recite the Hippocratic oath," he said. "Then they will look their patient in the eye and say, 'If you get really sick, I will provide the means necessary to stop the pain.' That's understood code around here. Everybody knows that enough morphine will kill you."[45]

The AIDS epidemic, according to Dr. Robert McAfee, a trustee of the American Medical Association, has "brought about a more frequent and open debate among physicians" as to the ethics of helping patients commit suicide.[46] One rationale for the role of the physician as minister of death was voiced by Dr. Earl E. Shelp, a Southern Baptist minister from Houston who teaches a seminar on AIDS and a course on medical ethics at Dartmouth College: "This notion that a physician's obligation to patients only and always involves prolonging their lives is to misunderstand the richness of the therapeutic relationship. Medicine is also about the dignity of death. Ultimately all of us are going to die."[47]

It would be unrealistic to expect physician-assisted suicide to be the terminal point of the movement toward euthanasia.[48] As long ago as 1970, *California Medicine*, the journal of the California Medical Association, editorially described "A New Ethic for Medicine and Society":

> It will become necessary and acceptable to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought. This is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic and political implications for Western society and perhaps for world society.
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> The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort

45. N.Y. Times, May 24, 1989, at 1, col. 2.

46. *Id.*

47. *Id.*

48. *See* Doerflinger, *Assisted Suicide: Pro-Choice or Anti-Life, in Mercy, Murder & Morality: Perspectives on Euthanasia*, 19 HASTINGS CENTER REPORT 16 (Special Supplement, Jan.-Feb. 1989).

> of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.[49]

The new ethic has progressed to the point where "killing" is no longer "socially abhorrent." In utilitarian terms the killing of the unwanted or defective unborn, retarded children, vegetative or merely incompetent elderly and some others makes sense. The persistently low fertility and birth rates,[50] the rising cost of medical and custodial care for the elderly and the handicapped,[51] and the escalating cost of caring for AIDS patients[52] provide incentives for permitting the active killing of some classes of patients. A first step would be to allow, for example, the AIDS victim to choose to die, including an assisted death by injection or other active means. If, however, he chooses to remain alive during the natural course of the disease, that decision could be some evidence of legal incompetence which would permit the decision to be made for him.

The dominant legal philosophy practically invites these results.[53] The denial of personhood, which is explicit in *Roe v. Wade* with respect to the unborn child, is implicit in the allowance of starvation and dehydration of the incompetent and the predictable legitimization of active euthanasia of some target classes. If your life is subject to termination at the discretion of another, you are, to that extent, a non-person. The Supreme Court appeared to concede in *Roe* that, if the unborn child is a person the state would be obliged to protect his life and the state could not allow abortion even to save the life of the mother.[54] As Justice Stevens stated in his concurrence in *Thornburgh v. American College of Obstetricians and Gy-*

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49. Editorial, *A New Ethic for Medicine and Society*, 113 CAL. MED. 67, 67-68 (Sept. 1970).

50. *See* B. WATTENBERG, THE BIRTH DEARTH (1987); N.Y. Times, Feb. 1, 1989, at 1, col. 6; Washington Times, June 10, 1987, at D4, col. 6.

51. *See* Koop, *Mercy Murder and Morality: Perspectives on Euthanasia*, 119 HASTINGS CENTER REPORT, (Special Supplement Jan.-Feb. 1989); Wanzer, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG. J. MED. 844 (1989); Wilkes & Schuchman, *What Is Too Old*, N.Y. TIMES MAG., June 4, 1989, at 58.

52. N.Y. Times, May 19, 1989, at 7, col. 5; Washington Times, Oct. 26, 1987, at A1, col. 3; Insight, Aug. 25, 1986, at 54.

53. "I see no reason," wrote Justice Oliver Wendell Holmes, "for attributing to man a significance different in kind from that which belongs to a baboon or a grain of sand." Holmes, *Natural Law*, 32 HARV. L. REV. 40, 252 (1918). Justice Benjamin Cardozo described Holmes as "the great overlord of the law and its philosophy" and "for all students of the law and for all students of human society the philosopher and seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages." B. CARDOZO, MR. JUSTICE HOLMES 20, 5 (F. Frankfurter ed. 1931). Holmes claimed that "the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force." Holmes-Pollock Letters, 2:36. *But see* Hoffheimer, *Holmes, L.Q.C. Lamar, and Natural Law*, 58 MISS. L.J. 71, 82-83 (1988), for an interesting analysis concluding that Holmes "rejected natural law while retaining some of its chief features . . . . Holmes also expressed basic attitudes traditionally associated with transcendental natural law theory." *See also*, Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

54. Roe v. Wade, 410 U.S. at 157-58 n.54.

necologists,[55] "unless the religious view that a fetus is a 'person' is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."[56] Personhood inherently includes a right to the protection of the law, especially with respect to the right to live.

D. Following in the Footsteps of the Holocaust

In its denial of personhood to innocent human beings and in its renunciation of the duty of the law to protect innocent lives, the American legal orthodoxy is following the model of the jurisprudence of Nazi Germany. This analogy is not meant to minimize the status of the Holocaust as a unique historical event. However, it would be unrealistic to ignore the signs that we have introduced into our law and medical practice the principles which underlay the Nazi exterminations. In his 1949 analysis of the involvement of the German medical profession in the Nazi euthanasia program, Dr. Leo Alexander wrote:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.
>
> The question that this fact prompts is whether there are any danger signs that American physicians have also been infected with Hegelian, cold-blooded, utilitarian philosophy and whether early traces of it can be detected in their medical thinking that may make them vulnerable to departures of the type that occurred in Germany . . . . Physicians have become dangerously close to being mere technicians of rehabilitation.[57]

Shortly before his death in 1984, Dr. Alexander commented with respect to the American situation that "[i]t is much like Germany in the 20's and 30's—the barriers against killing are being removed."[58] The basic principle of "selective reduction" of multiple fetuses and other forms of

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55. 476 U.S. 747 (1986).

56. *Id.* at 779 (Stevens, J. concurring).

57. Alexander, *Medical Science Under Dictatorship*, 241 NEW ENG. J. MED. 39, 44-45, (1949).

58. Stanton, *The New Untermenschen*, HUM. LIFE REV. 1985 at 77, 82.

legalized abortion is precisely the principle that underlay the Nazi decrees that deprived Jews of rights and ultimately subjected them to extermination. It is the principle that an innocent human being can be declared to be a non-person and subjected to execution at the discretion of others. Under *Roe v. Wade* the unborn child, as a non-person, is as legally defenseless as were the victims of Nazi exterminations. *Webster v. Reproductive Health Services*,[59] indicates that state legislatures will be allowed to provide some as yet unspecified protection of the unborn child, but the child still has no constitutional protection if the legislature decides to authorize his execution by abortion. One difference between the two classes of victims is that the Jews, Poles, Gypsies and other Nazi victims were killed directly by officials of the State. The unborn children are killed usually by private persons who are enabled to act as executioners by a decree of the State, i.e., *Roe v. Wade*, which withdrew from those victims the protection of the law which otherwise would have prevented their execution. The distinction is not significant, because in both cases it was the action of the State which decreed that the members of the victim classes would (in Nazi Germany) or could (in the United States) be killed. Whether the end comes in a gas chamber or at the point of "a 20-gauge needle," the essence of the act, an execution of an innocent, is identical.

Legalized abortion in the United States has already resulted in the deaths of four times as many innocent people as were killed in the Holocaust. Legalized abortions in this country are usually estimated at about 1.3 to 1.5 million a year.[60] This figure, however, does not include early abortions caused by the intrauterine device and some so-called contraceptive pills. Such early abortions have been estimated at between 6.4 and 8.8 million each year in this country.[61] They are effectively beyond the reach of the law except for licensing restrictions on the abortifacients. Every abortion, however, at whatever stage, kills a human being. Even if we exclude early abortifacients from consideration, the differences between the victims of abortion and the victims of the Holocaust still relate mainly to age, self-sufficiency and place of residence. Formerly, another difference was that the victim of abortion was unseen and effectively unknown. But ultrasound technology has changed that, as indicated above in the reluctance of physicians to perform "selective reduction" procedures after the 12th week of gestation because, "Candidates for the procedure invariably undergo multiple ultrasound examinations that provide visual contact with their fetuses; this can evoke the type of emotional bonding that normally begins to develop after birth."[62]

The experience of this century shows that utilitarianism and legal positivism offer no hope for a restoration of a principled respect for the right to life or for any other rights. The reason for this inability is reli-

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59. 109 S. Ct. 3040 (1989).

60. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, 70-71; Chicago Tribune, July 4, 1989, § 1, at 5, col. 1.

61. *See* J. KIPPLEY, BIRTH CONTROL AND CHRISTIAN DISCIPLESHIP (1985).

62. Berkowitz, *supra* note 15, at 1046.

gious and it is attributable largely to the acceptance of the philosophy of the Enlightenment, which rejected not only the Church but also revealed religion in general, the objective moral law and the capacity of the intellect to know truth. Man himself became the autonomous arbiter of right and wrong, that is, he made himself god.[63] The law here is a reflection of society. Francis Canavan, S.J., described "the present stage of Western culture" as "the fag end of the Enlightenment."[64]

> [A]s the autonomous individual of liberal theory lost his faith in divine revelation and in the ability of reason to perceive a natural moral order, he became an independent self, a subject of rights rather than of obligations, and a sovereign will bound by no law to which he himself had not consented. In the end, he became a bundle of appetites, because his will, lacking any anchorage in a divinely-created moral order, was submerged in and identified with his desires. That, too, is a kind of individualism, but a different kind from the freedom of the sons of God, . . .[65]

In Germany, "the spirit of the Enlightenment . . . degenerated in . . . the nineteenth century into a materialistic and thereby more coarse way of thinking. As a result, legal thinkers lost the inner power even to visualize the possibility of an archetypal and morally binding ideal of justice above the positive legal order. With all its deficiencies, the medieval concept of order did at least assume as well as recognize as its logical presupposition a higher form of justice, namely, the notion of a natural and divine right. The late nineteenth century in its materialistic and voluntaristic tendencies, on the other hand, concurred with Rudolf von Jhering that law is but the 'child of power.' According to this new positivistic jurisprudence, the legislator, and he alone, *creates* the law. Everything prior to legislative enactment is at best 'custom,' but never true law. Thus, law and right became wholly identified, and bare 'legality' takes the place of substantive justice as an ideal."[66] Under the Weimar Republic (1918-1933), "the greatest obstacle to the recognition of natural law was the doctrine of positivism which equated right and might to begin with and, hence, assigned to the legislator full discretion as to the detailed content or provisions of the law, to the point of injustice, indeed to the point of complete, high-handed arbitrariness."[67] "Positivism has," said Gustav Radbruch, "disarmed the German jurists against law of an arbitrary and criminal content."[68]

Perhaps the most important lesson taught by the German experience is a an affirmative one: "the necessity of universal higher standards of

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63. *See* H. ROMMEN, THE NATURAL LAW 75-109 (1947).

64. Canavan, *Commentary*, CATHOLIC EYE, 2 (Dec. 10, 1987).

65. Canavan, *Commentary*, CATHOLIC EYE, 2 (Mar. 17, 1988).

66. Von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L.F. 106, 107 (1959) (emphasis in original).

67. *Id.* at 109.

68. Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L.F. 1, 11 n.26 (1959) (citation omitted).

objectively valid suprapositive principles for the lawmaker."[69] As Heinrich Rommen noted:

> From the middle of 1946 on, a revival of natural law thinking took hold of the intellectual world, especially the jurists and the members of the constituent assemblies of the *Lander* . . . . Naturally the 'system of injustice' had produced conversions, as it were, to natural law much earlier; but the Nazi authorities would not permit an open discussion. At the same time, all attempts at passive and active resistance to the regime were necessarily grounded on natural law ideas or on divine law, for legal positivism as such could offer no foundation . . . . It was a favorable circumstance, too, that Protestant theologians—not so much of course Karl Barth and his disciples, but those influenced by Emil Brunner's *Justice* (1943) and his earlier *Das Gebot und die Ordnungen*—had returned to natural law thinking because of the obvious substantive illegitimacy of Hitler's legality and his open paganism. Thus ended the long estrangement of Protestant theology from natural law.[70]

Numerous German lawyers and courts explicitly resorted to the natural law in writings and judicial decisions after the war. Among the most influential was Gustav Radbruch. A criminal lawyer, philosopher of law, and minister of Justice during the Weimar Republic, Radbruch was one of the best-known jurists in Germany. Dismissed and condemned to silence by the Third Reich, he now came forward to deny positivism—a conversion reminiscent of Paul on the road to Damascus—for he himself had previously been among the defenders of positivist views—in these terms:

> For the soldier an order is an order; for the jurist, the law is the law. But the soldier's duty to obey an order is at an end if he knows that the order will result in a crime. But the jurist, since the last natural law men in his profession died off a hundred years or so ago, has known no such exception and no such excuse for the citizen's not submitting to the law. The law is valid simply because it is the law; and it is law if it has the power to assert itself under ordinary conditions. Such an attitude towards the law and its validity [i.e., positivism] rendered both lawyers and people impotent in the face of even the most capricious, criminal, or cruel of laws. Ultimately, this view that only where there is power is there law [*Recht*] is nothing but an affirmation that might makes right [*Recht*]. [Actually] law [*Recht*] is the quest for justice . . . if certain laws [*Gesetze*] deliberately deny this quest for justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful [*ihnen den Rechtscharakter absprechen.*][71]

In response to the claim by physicians who had participated in "ex-

69. *Id.* at 5.
70. *Id.*
71. Von Hippel, *supra* note 66, at 110-11 (citation omitted).

perimental killings" that their actions were sanctioned by the laws of the Third Reich, an appellate court at Frankfurt declared:

> Law must be defined as an ordinance or precept devised in the service of justice [citing Radbruch]. *Whenever the conflict between an enacted law and true justice reaches unendurable proportions,* the enacted law must yield to justice, and be considered a "lawless law [*unrichtiges Recht*]." An accused may not justify his conduct by appealing to an existing law if this law offended against certain self-evident precepts of the natural law.[72]

In another case, the defendant, a Nazi officer, had summarily shot a soldier who was absent without leave. The defendant relied on the so-called Katastrophen-order of Hitler empowering any member of the armed forces to kill instantly any deserter. The court found the defendant liable for the payment of tort damages to the victim's mother. The court held that the *Katastrophen*-order had not been validly promulgated but then went on to say:

> Even if the *Katastrophen*-order had been promulgated in due form it could not have become law [*Recht*]. For the positive *legislative act* is intrinsically limited. It *loses all obligatory power if it violates the* generally recognized principles of international law or the *natural law* [*Naturrecht*], *or if the contradiction between positive law and justice reaches such an intolerable degree that the law, as unrichtiges Recht, must give way to justice.*[73]

II. Natural Law As an Alternative to Legal Positivism

A. *Some Ancient Views of Natural Law*

The idea of a natural law, knowable to the intellect, which determines the validity of human law, is not only not a sectarian Catholic teaching. It is not even a Christian invention. Aristotle observed that "there is such a thing as Natural Justice as well as justice not ordained by nature."[74] Marcus Tullius Cicero described "Law" as "the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite."[75] He said that "right is based, not upon men's opinions, but upon Nature."[76] And, "Socrates was right when he cursed, as he often did, the man who first separated utility from Justice; for this separation, he complained, is the source of all mischief."[77] Cicero continued: "But the most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations . . . . But if the principles of

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72. Von Hippel, *supra* note 66, at 111 (emphasis added) (quoting 2 Suddeutsche Juristen Zeitschrift, 321 (1947)).

73. Rommen, *supra* note 68, at 11 (emphasis added) (citation omitted).

74. Aristotle, Nicomachean Ethics 133 (T. Erwin ed. 1985).

75. M. Cicero, Laws, in The Great Legal Philosophers 44 (C. Morris ed. 1959).

76. *Id.* at 45.

77. *Id.* at 46.

Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace."[78] According to Cicero:

> [W]hat is right and true is also eternal, and does not begin or end with written statutes . . . . From this point of view it can be readily understood that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements, put into effect anything but "laws." It may thus be clear that in the very definition of the term "law" there inheres the idea and principle of choosing what is just and true . . . . Therefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good.[79]

B. The Need For a Relationship of the Natural Law to a Moral Code

Although the natural law is not a sectarian dogma, it would be a mistake to regard natural law jurisprudence as merely one secular, philosophical theory among others. Reliance upon a higher law makes little sense if one is unable to identify the lawgiver and the purpose of that law. Thus Cicero identified "the true and primal Law" as "the right reason of supreme Jupiter."[80] In the Christian view, natural law and God's law are rightly and necessarily considered together. In *Robin v. Hardaway*,[81] in 1772, George Mason argued before the General Court of Virginia, against a slavery statute, that:

> All acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; Whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of Justice.[82]

Today, if he argued in such terms, George Mason might be laughed out of court. At least he would hardly be confirmed by the Senate for appointment to the federal bench. Neither would William Blackstone.[83]

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78. *Id.* at 48.
79. *Id.* at 51.
80. *Id.*
81. 2 Va. (2 Jefferson) 109 (1772).
82. *Id.* at 115; *see also* Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 2 NOTRE DAME L. REV. 258 (1960); C. MANION, KEY TO PEACE, 30 (1950); Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43 (1960).
83. For further discussion, see *supra* note 3 and accompanying text.

Nevertheless, it should be clear, after nine decades of the twentieth century, that a regime which denies the spiritual nature and eternal destiny of man can offer no coherent security for rights, including the right to live. If man is merely matter, with no destiny beyond the grave, there is no intrinsic reason for any absolute limits on what society and the State can do to him. The only intelligible basis for asserting absolute, inalienable rights against the State is that man is an immortal, spiritual creature, with an eternal destiny, made in the image and likeness of God whose law governs all. There are absolutes, which even the State and lawyers cannot change. "Resourceful western legal scholars," said Aleksandr Solzhenitsyn,

> have now introduced the term "legal realism." By legal realism, they want to push aside any moral evaluation of affairs . . . . At the present time it is widely accepted among lawyers that law is higher than morality—law is something which is worked out and developed, whereas morality is something inchoate and amorphous. That isn't the case. The opposite is rather true! Morality is higher than law! While law is our human attempt to embody in rules a part of that moral sphere which is above us, we try to understand this morality, bring it down to earth and present it in a form of laws. Sometimes we are more successful, sometimes less. Sometimes you actually have a caricature of morality, but morality is always higher than law. This view must never be abandoned. We must accept it with heart and soul. It is almost a joke now in the western world, in the 20th century, to use words like 'good' and "evil." They have become almost old-fashioned concepts, but they are very real and genuine concepts. These are concepts from a sphere which is higher than us.[84]

C. *Christianity and the Natural Law—Not Only a Catholic Concept*

The law today, in the name of freedom, is liberated from any subordination to a higher law, including especially a higher law of God. One reason for rejection of the Christian view as enunciated by Mason, Blackstone and others[85] is a misconception that the model for a Christian view of the law is something like the regime of the Ayatollah Khomeini. Hans Kelsen, in criticizing "[p]hilosophical absolutism," the "metaphysical view that there is an absolute reality, i.e., a reality that exists independently of human knowledge"[86] argued that "[t]olerance, minority rights, freedom of speech, and freedom of thought, so characteristic of democracy, have no place within a political system based on the belief in absolute values. This belief irresistibly leads—and has always led—to a situation in which the one who assumes to possess the secret of the absolute good claims to have the right to impose his opinion as well as his will

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84. Address by Aleksandr Solzhenitsyn, to AFL-CIO, June 30, 1975 (IMPRIMIS 1,8 (Sept. 1975)).

85. For discussion of their views, see *supra* note 3 and accompanying text.

86. Kelsen, *Absolutism and Relativism in Philosophy and Politics*, 42 AM. POL. SCI. REV. 906 (1948).

upon the others who are in error. And to be in error is, according to this view, to be wrong, and hence punishable."[87] St. Thomas Aquinas, however, argued that human law is framed "for the common good of all the citizens."[88] The purpose of human law "is to lead men to virtue, not suddenly, but gradually."[89] The human law, according to Aquinas, should promote virtue, but it should not require the observance of every virtue and it should not forbid every vice; if it did, the law might be "despised" and "greater evils" might result.[90]

Unfortunately, affirmation of the natural law as a part of the law of God is perceived by some as a sectarian Catholic position. However, Professor John T. McNeill of Union Theological Seminary, discussing the views of Luther, Melanchthon, Zwingli and Calvin concluded that,

> There is no real discontinuity between the teaching of the Reformers and that of their predecessors with respect to natural law. Not one of the leaders of the Reformation assails the principle. Instead, with the possible exception of Zwingli, they all on occasion express a quite ungrudging respect for the moral law naturally implanted in the human heart and seek to inculcate this attitude in their readers. Natural law is not one of the issues on which they bring the Scholastics under criticism. With safeguards of their primary doctrines but without conscious resistance on their part, natural law enters into the framework of their thought and is an assumption of their political and social teaching . . . . For the Reformers, as for the Fathers, canonists, and Scholastics, natural law stood affirmed on the pages of Scripture."[91]

D. Thomas Aquinas' Explanation of the Natural Law

1. A model for both Christian and non-Christian

The most systematic exposition of the natural law in the context of Christian belief is that of St. Thomas Aquinas (1225-1274). Aquinas wrote from the Catholic view. Nevertheless, as one Evangelical author noted, "Aquinas' perspective on human law became a major component of Christian tradition . . . . "[92] In what is commonly called his Treatise on Law,[93] Aquinas used abundant Scriptural quotations to establish and support his positions. On self-evident truths, "Aquinas' view is drawn directly from the apostle Paul."[94] While he emphasized the role of reason,

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87. *Id.* at 913.

88. T. AQUINAS SUMMA THEOLOGICA [hereinafter S.T.] I, II, Q. 96, art. 1 (*infra* references to the Summa Theologica are taken from ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Benziger ed. 1947)).

89. *Id.* at art. 2.

90. *Id.*

91. McNeill, *Natural Law in the Teaching of the Reformers*, 27 J. OF RELIGION 168 (1946).

92. L. BUZZARD & P. CAMPBELL, HOLY DISOBEDIENCE 125 (1984).

93. T. AQUINAS, S.T., I, II, Q. 90-97.

94. G. Amos, Defending the Declaration: How the Bible and Christianity Influenced the Declaration of Independence 120 (Wolgemuth & Hyatt ed. 1989) (unpublished

the revelational component is essential to St. Thomas' treatment of law. His discussion of law is a comparatively brief part of the *Summa Theologica*, which is essentially a work of theology. Indeed, the Treatise on Law is only a part of Aquinas' formal treatment of law, since it is followed by his discussion of the moral, ceremonial and judicial precepts of the Old Testament.[95]

Application of the natural law is not limited to those who accept Catholic teaching. Christians generally tend to profess similar moral values. The natural law can also effectively serve those without Christian moral values by providing an acceptable jurisprudential framework. The natural law approach ought to be attractive to those who seek an answer to unrestrained utilitarianism and positivism whether or not they accept the theistic foundation posited by St. Thomas. To appreciate the significance of Aquinas' treatment of human law, however, one must consider it in context with his discussion of God, creation, the nature of man, redemption, etc., and in light of the Catholic tradition in which he wrote.

2. *The Thomistic view of human reason and truth*

Unlike empiricists, positivists and others, St. Thomas affirms that the intellect can know the essences of material things presented to it by the senses.[96] As one commentator summarized:

> Each person has his own intellect which has two functions: it abstracts essences from sense-perceived individuals; this abstracted essence is then intelligible; it is impressed on the passive intellect. On reflection the passive intellect understands that one essence belongs to many individuals, forming a class which can again be further unified by still more abstract ideas into wider classes. Abstraction terminates in the idea of being which includes God, the only self-existent Being. "I am who am."[97]

3. *The necessity of revelation*

Through reason, we can know the truth. The universal skeptic, on the other hand, claims that he is sure that he can never be sure of anything. The empiricist claims that the only things we can know are those that can be empirically verified, although that statement itself cannot be empirically verified. St. Thomas, however, recognizes limitations on human reason and acknowledges that unaided human reason is not enough for salvation. In the very first question in the *Summa Theologica*, St. Thomas asks "Whether, besides Philosophy, any further Doctrine is Required?" He answers, Yes, in a passage important enough to quote in

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manuscript).

95. T. AQUINAS, S.T., I, II, Q. 98-105.

96. *See* F. WILHELMSEN, MAN'S KNOWLEDGE OF REALITY: AN INTRODUCTION TO THOMISTIC EPISTEMOLOGY (1988).

97. C. HAGERTY, THE PROBLEM OF EVIL 18 (1978).

full:

> It was necessary for man's salvation that there should be a knowledge revealed by God, besides philosophical science built up by human reason. Firstly, indeed because man is directed to God, as to an end that surpasses the grasp of his reason: *The eye hath not seen, O God, besides Thee, what things Thou hast prepared for them that wait for Thee* (Isa. lxiv. 4). But the end must first be known by men who are to direct their thoughts and actions to the end. Hence it was necessary for the salvation of man that certain truths which exceed human reason should be made known to him by divine revelation. Even as regards those truths about God which human reason could have discovered, it was necessary that man should be taught by a divine revelation because the truth about God such as reason could discover it, would only be known by a few, and that after a long time, and with the admixture of many errors. Whereas man's whole salvation, which is in God, depends upon the knowledge of this truth. Therefore, in order that the salvation of men might be brought about more fitly and more surely, it was necessary that they be taught divine truths by divine revelation. It was therefore necessary that, besides the philosophical science built up by reason there should be a sacred science learned through revelation.[98]

4. The limitations of human reason

Obviously reason cannot of itself provide complete knowledge of God; if it could we would ourselves be God. Nevertheless, Aquinas affirms that through reason we are able to know that God exists and we can know his attributes to some extent. Aquinas' five proofs for the existence of God illustrate his use of reason in this respect.[99] Through reason we can

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98. T. AQUINAS, S.T., I, Q.1, art. 1.

99. In addition to the proofs from motion, causation, perfection and design, Aquinas advanced the proof from necessity or contingency:

> that which does not exist only begins to exist by something already existing. Therefore, if at one time nothing was in existence, it would have been impossible for anything to have begun to exist; and thus even now nothing would be in existence—which is absurd. Therefore, not all beings are merely possible, but there must exist something the existence of which is necessary. But every necessary thing either has its necessity caused by another, or not. Now it is impossible to go on to infinity in necessary things which have their necessity caused by another, as has been already proved in regard to efficient causes. Therefore we cannot but postulate the existence of some being having of itself its own necessity, and not receiving it from another, but rather causing in others their necessity. This all men speak of as God.

T. AQUINAS, S.T., I, Q. 2, art. 3.

As aptly expressed in the film version of *The Sound of Music*, "Nothing comes from nothing, nothing ever could." The point Aquinas makes with these proofs is that not only is belief in God reasonable, it is unreasonable not to believe in God. One who denies the existence of God must be prepared to say that an endless chain of movers is possible without a prime mover; that an infinite chain of causes is conceivable without an uncaused first cause; that something can come from absolutely nothing; that there is no ultimate and absolute standard of perfection; and that the marvelous workings of the human brain, for example, could occur through blind chance without intelligent design.

also know certain attributes or perfections of God, e.g., that he is one, infinite, perfect, simple, eternal, personal, omnipresent, omniscient, omnipotent and all-perfect.[100] Through reason we can know that we are composed of a body and a spiritual soul.[101] The spiritual nature of the human soul is seen in our ability to perform the spiritual functions of abstraction and reflection. Since death is the breaking up of a being into its parts, the spiritual soul, which has no parts, is immortal in its nature.[102] We depend on revelation to know the supernatural mysteries of the Trinity, creation, and salvation.[103]

5. The natural law and human reason

The natural law, as explained by Aquinas, relates to the Christian belief that God gives to each person sufficient grace to be saved, but that each one has to make the same choice faced by Adam and Eve: to obey or to disobey God. Just as the maker of an automobile has built into it a certain nature and gives directions for its use so that it will achieve its end, so God has given directions to man in revelation and the natural law. Revelation includes the Old Testament and the New Testament, which St. Thomas calls the divine law. In addition to the eternal law, which is "the very Idea of the government of things in God the Ruler of the universe,"[104] and the divine law of revelation, there is the natural law. Man, a rational creature, "has a share of the Eternal Reason, whereby [he] has a natural inclination to [his] proper act and end: and this participation of the eternal law in the rational creature is called the natural law."[105] The "light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine Light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal

100. T. AQUINAS, S.T., I, Q. 1-43.

101. *Id.* at Q. 75-89.

102. *See* P. BRISTOW, THE IMMORTALITY OF THE SOUL, POSITION PAPER 182, 89-92 (1989). God, of course, could annihilate the soul and we rely on revelation for the assurance that He will not.

103. *See generally*, T. AQUINAS, S.T., I, Q. 44-119. The fact that the Trinity is beyond human power to understand does not mean that it is inconsistent with reason. God conferred on the first human beings the supernatural gift of sharing in the life of the Trinity in eternal happiness. All they had to do was to choose to love and obey God. But they disobeyed. When they sinned, they lost that supernatural gift and did not have it to hand down to us. They also lost their preternatural gifts of freedom from death, integrity, etc. We come into the world, therefore, subject to death and suffering. We lack the integrity and self-control that were given to Adam and Eve; instead we have concupiscence, an inclination to evil. Most important, we come into this life without the supernatural gift of sanctifying grace; we have no right to Heaven and no way to get there, except that Christ has restored to us the opportunity to choose eternal happiness. In His mercy and love, God promised man a second chance. God, the Second Person of the Trinity, took on human nature (the Incarnation) so that he, as man, could make reparation for the sins of man and so that, as God, his reparation would be sufficient satisfaction for the infinite offense against God.

104. T. AQUINAS, S.T., I, II, Q. 91, art. 1.

105. *Id.* at art. 2.

law."[106] The natural law is therefore a rule of reason, promulgated by God in man's nature, whereby man can discern how he should act so as to achieve his end of salvation.

6. Understanding the natural law—human inclinations determined by the nature of man

What are the commands of this natural law and how are they known? We should first distinguish the speculative reason from the practical reason. The object of the speculative reason is being, while the object of the practical reason is the good. The first principle of the speculative reason is the principle of contradiction, that a thing cannot be and not be at the same time under the same aspect. Or, "That the same thing cannot be affirmed and denied at the same time."[107] This principle is self-evident. It cannot be doubted by any rational person. A pen may be a cylinder, black, four inches long, metal, etc. But in terms of its penness, either it is a pen or it is not a pen. It cannot be both. It cannot be both a pen and a giraffe.

The first self-evident principle of the practical reason is that "good is to be done and pursued, and evil is to be avoided."[108] The good is that which is in accord with the nature of the thing. Everything has a nature, built into it by its manufacturer. Man is no different in this respect. The essential nature of man is unalterable since it is a reflection of the unalterable divine essence.[109] According to St. Thomas, "all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance."[110] The basic inclinations of man are:

1. To seek the good, which is ultimately his highest good which is eternal happiness.
2. To preserve himself in existence.
3. To preserve the species, that is, to unite sexually.
4. To live in community with other men.
5. To use his intellect and will, that is, to know the truth and to make his own decisions.[111]

These inclinations are put into man's nature by God to help him attain his final end of eternal happiness with God. Conclusions are drawn from these inclinations by deduction: Good should be done; this action is good; this action should be done. St. Thomas notes, however, that "because of concupiscence or some other passion . . . evil persuasions . . . or

106. *Id.*
107. *Id.* at Q 94, art. 2.
108. *Id.*
109. H. ROMMEN, THE NATURAL LAW 50 (1948).
110. T. AQUINAS, S.T., I, II, Q. 94, art. 2.
111. *See* T. DAVITT, ST. THOMAS AQUINAS AND THE NATURAL LAW, IN ORIGINS OF THE NATURAL LAW TRADITION 26, 30-31 (Harding ed. 1954); Rommen, *supra* note 68, at 49; T. AQUINAS, S.T., I, II, Q. 94, art. 2.

. . . vicious customs and corrupt habits," people may err in their deductions of the secondary principles of the natural law.[112] Homosexual activity, he points out, is not considered sinful among some people, although St. Thomas explicity condemns it as "the unnatural crime."[113]

To be culpable for committing a wrong, one must know it is wrong and choose to do it. We generally have neither the right nor the capacity to judge the subjective, moral culpability of anyone. Various circumstances may diminish subjective culpability. But the presence or lack of subjective culpability cannot change the objective character of the act. Suppose you saw your friend, Freddy, with the hood of his car up, holding a can of oil in one hand and a can of molasses in the other, and you asked, "What are you doing?" Freddy answers, "Trying to make up my mind, which one to put in my car, oil or molasses." If you were a real friend of Freddy, what would you say? Would you say, "Freddy, how do you *feel* about it?" No, what you would say is, "Freddy, you should do good by your car. And the good is that which is in accord with the nature of the thing. Oil is good for cars. Molasses isn't." "Yeah, but this is a Chevy." "Freddy, it doesn't make any difference. Cars are all the same." "Is that right? Well, who are you to tell me what to do with my car?" "If you don't believe me, Freddy, look in the glove compartment at the manufacturer's directions." (That is what the natural law and the Ten Commandments are—a set of manufacturer's directions.) So Freddy looks at the owner's manual and sees, on page 10, "Use oil—Do not use molasses." Freddy says, "That's what it says, alright. But wait a minute. Whose car is this? It's my car. (It's my body, etc.) They can't push me around. I'll do what I want with my own car." So Freddy puts in the molasses. He is sincere. He is liberated. He is pro-choice. And he is a pedestrian. Why? Because, whether we are talking about automobiles, human beings or society, the natural law is the story of how things work. We do no favor, for example, to the person contemplating abortion when we encourage her to decide according to her feelings. We cannot throw rocks at her, whatever she decides. Her subjective disposition is for resolution between herself and God. But we lie to her when we pretend that abortion can ever be anything but an objective evil.

7. *The relationship of the human law to the natural law*

According to St. Thomas, the human law is the fourth type of law, in addition to the eternal law, divine law and the natural law. Human law, an integral part of God's plan, is designed to promote the common good and help man attain his highest end of happiness with God. The human law is derived from the natural law. It may be derived by conclusion, as the law that one must not kill is a conclusion from the basic principle that we should do harm to no man. It may also be derived by determination, as, for example, "[t]he law of nature has it that the evildoer should

112. T. AQUINAS, S.T., I, II, Q. 94, art. 6.
113. *Id.* at Q. 94, art. 3, Q. 94, art. 6.

be punished," but the human law decrees whether the punishment should be "in this way or that way" by fine, imprisonment, or other penalty.[114] Human law is framed "for the common good of all the citizens."[115] "The purpose of human law is to lead men to virtue, not suddenly but gradually."[116] Yet, even though the law should promote virtue, it should not prescribe every virtue or forbid every vice lest by its unenforceability the law be "despised" and "greater evils" result.[117]

> Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits *murder*, theft and suchlike.[118]

If human laws are just, they have the power of binding in conscience. But if a human law "deflects from the law of nature," it is unjust "and is no longer a law but a perversion of law."[119] St. Thomas explains that a law may be unjust in two ways:

> *[F]irst, by being contrary to human good* . . . either in respect of the *end*, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the *author*, as when a man makes a law that goes beyond the power committed to him; or in respect of the *form*, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws; because, as Augustine says (De Lib. Arb. i.5), a law that is not just, seems to be no law at all. Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matth. v. 40, 41 . . . .
>
> *Secondly, laws may be unjust through being opposed to the Divine good*: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law; and laws of this kind must nowise be observed, because, as stated in Acts v. 29, we ought to obey God rather than men.[120]

On the issue of whether a law authorizing abortion would be unjust, Aquinas, of course, knew nothing of the ovum and the process of fertilization and gestation. His lack of modern scientific knowledge led him and others at that time to conclude that ensoulment took place, not at conception, but some time later, probably forty days for males and eighty

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114. *Id.* at Q. 95, art. 2.
115. *Id.* at Q. 96, art. 1.
116. *Id.* at art. 2.
117. *Id.*
118. *Id.* (emphasis added).
119. *Id.* at Q. 95, art. 2.
120. Id. at Q. 96, art. 4 (emphasis added).

days for females. He concluded that abortion was not homicide until that point, although he regarded abortion at every stage as a grave sin.[121] St. Thomas flatly denied that there can be any right intentionally to kill the innocent. "Therefore it is in no way lawful to slay the innocent."[122] There is no doubt that Aquinas today would regard any law allowing abortion as an unjust law.[123] If a physician were ordered to perform an abortion, Aquinas' concept of the law which is unjust as contrary to divine good would require that physician to disobey at all costs.[124] Aquinas places human law in the framework of the plan of God who wants man to achieve eternal happiness by choosing to love and obey Him:

> Human law and, therefore, the state exist to promote the common good and thereby to help man achieve his end of eternal happiness with God. The state is not a necessary evil, nor is it a mere contrivance of the majority or some mythical social compact. Rather it is good because it is an integral part of God's plan. But the state is not an end in itself; it is an instrument to help man achieve his end. St. Thomas, of course, had not experienced the modern state, but his discussion of the human law provides the basic principles to govern the state in any age. Aquinas, therefore, directly contradicts the secularist and the positivist by grounding his theory of law on the reality of God. Only in this way can human law be limited. Otherwise, if God is not recognized, the state becomes god.[125]

Aquinas differs from the positivists and secularists also "in his view of the nature of law. The positivist and the secularist reduce law to an act of will by the one in control. It is true that there is an element of will in the law (every law is a command), but, as St. Thomas affirms, something more is needed. In order that 'what is commanded may have the nature of law, it needs to be in accord with some rule of reason.' This requirement proceeds from the fact that 'the whole community of the universe is governed by Divine Reason.' The divine will cannot act separately from

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121. *See* G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS 154-55 (1970); J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1, 22-26 (1970); Gerber, *When is the Human Soul Infused?*, 22 LAVAL THEOLOGIQUE ET PHILOSOPHIQUE 234, 236 (1966); T. AQUINAS, S.T., III, Q. 68, art. 2; Heany, *Aquinas and The Humanity of the Conceptus*, 15 HUMAN LIFE REV. 63 (1989); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3083 n.13 (Stevens, J., concurring and dissenting).

122. T. AQUINAS, S.T., II, Q. 64, art. 6.

123. As Pope John Paul II said at the Capitol Mall in Washington, D.C., on October 7, 1979, "no one ever has the authority to destroy unborn life." 18 ORIGINS 277 (Oct. 18, 1979).

124. Catholic teaching on the natural law forbids all direct abortions even those sought to save the life of the mother. *See* Second Vatican Council, *Pastoral Constitution on the Church in the Modern World*, no. 51; *Declaration on Procured Abortion*, (Congregation for the Doctrine of the Faith, 1974). This conclusion does not apply to procedures—such as the removal of an ectopic pregnancy or a cancerous uterus—which do not directly destroy the unborn child, which seek to preserve the child if possible, and which result in the death of the child only as an unintended consequence of an independently justified operation. *See Ethical and Religious Directives for Catholic Health Facilities* (National Conference of Catholic Bishops, 1971).

125. C. RICE, BEYOND ABORTION 34 (1979).

the divine reason because 'God cannot be at variance with himself.'[126] The essence of law therefore pertains to reason. This is true of the natural law and human law as well as the eternal law and revelation."[127]

St. Thomas wrote in the Catholic tradition,[128] in which the teaching authority of the Church includes the mission to declare the meaning of the natural moral law in its applications.[129] St. Thomas also firmly accepted the teaching authority of the Church.[130]

The acceptance or non-acceptance of the teaching authority of the Pope as the Vicar of Christ and visible arbiter of the meaning of the natural law is probably the most important difference between the Catholic approach and the approaches of other Christians to the natural law.

E. The Functions of the Natural Law

1. The constructive function

The natural law has two functions with respect to human law, which might be called the "constructive" and the "critical." In its "constructive" role, natural law serves as a guide for the enactment of laws to promote the common good. Natural law principles relating to economic, social and political justice ought to be a familiar part of public discussion on such issues as the family, employment relations and the prevention of racial and other discriminations. For example, the harmful effects of permissive divorce, especially on the children of the marriage, are widely noted.[131] Legislators should therefore consider restrictions on divorce so as to strengthen the family as a divinely ordained natural society entitled to the protection of the State.

This "constructive" role of the natural law includes Aquinas' limitation that the human law should not try to enforce every virtue or prohibit every vice. The natural law in this respect is a prescription for limited government. The "constructive" function of the natural law is at least as important as the "critical." In that "constructive" mode, the natural law argument can make a significant contribution as a guide for how things

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126. H. ROMMEN, THE NATURAL LAW 51 (1948).

127. C. RICE, *supra* note 125, at 34-35.

128. Ambrosetti, *The Spirit and Method of Christian Natural Law*, 16 AM. J. JURISPRUDENCE 290 (1971).

129. The teaching Church, consisting of the Pope and the bishops in union with him (Second Vatican Council, *Dogmatic Constitution on the Church*, Nos. 22-25; Dogmatic Constitution on Divine Revelation, No. 10), has repeatedly affirmed its prerogative to define the moral norms of the natural law. *See* Pope John Paul II, Discourse to the International Congress of Moral Theology April 10, 1986; *Instruction on Procured Abortion* (Congregation for the Doctrine of the Faith) (1974).

130. "Therefore," he wrote, "no one who assents to the opinion of any teacher in opposition to the manifest testimony of Scripture or in opposition to what is officially held in accordance with the authority of the Church can be excused from the vice of being in error." AQUINAS, QUAESTIONES QUODLIBETALES III, Q. 4, art. 2 (trans. A. Freddoso, Univ. of Notre Dame, unpublished).

131. *See* Wallerstein, *Children After Divorce: Wounds That Don't Heal*, N.Y. TIMES MAG., Jan. 22, 1989, at 18.

really ought to work according to the manufacturer's directions.

It would be a mistake, however, to suppose that natural law "pretends to be some sort of magic formula that furnishes handy answers for whatever practical legal questions may arise."[132] Rather, in its "constructive" function the natural law provides, not a cookbook series of recipes but a reasonable guide to principles and general objectives. In the Catholic tradition, further specification of those principles and objectives is provided by the teaching Church, for example, on the "family wage," bioethics, in vitro fertilization, etc.[133]

2. The critical function

The second function of the natural law is the critical function. In that critical function, the natural law, unlike positivism, provides a reason to draw a line and criticize an action of the state as unjust and even void. That is why Rosa Parks was right when she refused to step to the back of the bus in Montgomery, Alabama, on December 1, 1955.[134] When the Nazis moved against the Jews, German lawyers were "disarmed," in Radbruch's phrase, by "positivism."[135] It is interesting to speculate as to what might have been had the German legal profession responded to the early Nazi injustices with firm and principled denunciation.

The natural law principles advanced by George Mason, Blackstone, Aquinas and others are supra-constitutional. The question is not whether unconstitutional law-making power is assumed by a dictator, by a Supreme Court as constitutional interpreter, by a Congress, or by a majority of the people. The issue is whether there is a higher law which sets bounds to what the legal system, however it is structured, can do even through constitutional provisions. The natural law argument can serve, in the legislative process and the media, to forestall the enactment of unjust laws or constitutional amendments.

The first reaction to the assertion of a claimed right to kill innocent human beings should be to say that the recognition of such a right would be unjust as well as a violation of the fifth and fourteenth amendments to the Constitution. *Roe v. Wade*, however, in effect established the right to kill as a constitutional right. Assuming that the Supreme Court is correct in its claim that its decisions are the supreme law of the land,[136] the issue remains whether the Constitution itself is subject to a higher law. If a constitutional amendment, for example, were adopted which required the confiscation without trial of the property of members of a particular race, would it be a valid law? A natural law adherent should respond in the negative:

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132. T. DAVITT, *supra* note 111, at 45.

133. *See* Pope John Paul II, *Laborem Exercens*, No. 19 (1981); Congregation for the Doctrine of the Faith, INSTRUCTION ON BIOETHICS (1987).

134. J. WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-55, at 61-73 (1987).

135. For further discussion, see *supra* note 68 and accompanying text.

136. Cooper v. Aaron, 358 U.S. 1 (1958).

> A law on citizenship in connection with the so-called Nuremberg anti-Semitic legislation of 1935 declared that German citizens of Jewish origin who lived at that time outside the country or in the future fled or emigrated would automatically lose their German citizenship and their property would be forfeited to the State. After the war many claimed the restoration of property thus illegitimately confiscated. The court recognized these claims and said: "These laws of confiscation, though clothed in the formal rules of the legality of a law, cannot be considered as a genuine *Rechts*-norm as to content . . . . This is an extremely grave *violation of the suprapositive principle of equality before the law* as well as of the suprapositive guarantee of property (Art. 153 Weimar Const.)"[137]

The natural law, however, is not a hunting license empowering judges to impose their own morality to invalidate legislative decisions in genuinely debatable cases. Natural law theory would be especially limited in this respect in the United States where the Constitution itself incorporates some basic natural law principles, e.g., due process and equal protection, under which laws contrary to them could be violative of the supreme enacted law so that there would be no need for recourse to a supra-constitutional higher law. *Roe v. Wade*, for example, is wrong first, and sufficiently in legal terms, because it is a misinterpretation of the fourteenth amendment. One case, however, in which a supra-constitutional invocation of the natural law might have been arguably appropriate is *Brown v. Board of Education*.[138] There is evidence to support the conclusion that the fourteenth amendment was intended to allow officially segregated public schools.[139] If one accepted that conclusion and also found that public education today is sufficiently similar to that of 1868 to be governed by the intent of the fourteenth amendment on the subject, one could still argue that officially imposed racial segregation in schools (or elsewhere) is void because it is inherently unjust to an "intolerable degree," so as to violate the supra-constitutional standard of the natural law. A human law, according to Aquinas, may be unjust as "contrary to human good" when "burdens are imposed unequally on the community."[140] A similar approach could have been appropriate in the *Dred Scott* case,[141] in which the Supreme Court held that freed slaves and their free descendants could not be citizens and said that slaves were property rather than persons. Even if the Court there correctly interpreted the technical intent of the Constitution, the decision is insupportable because it attempts to break the inseparable connection that must exist, in any free and just society, between humanity and personhood. Although the Constitution is "the supreme law of the land," as a human law, it must

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137. Rommen, *supra* note 68, at 14 (emphasis added) (quoting 16 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZWILSACHEN 94 (1951)).

138. 347 U.S. 483 (1954).

139. *See*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

140. T. AQUINAS, S.T., I, II, Q. 96, art. 4.

141. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

itself be subject to the higher law. If a constitutional amendment were adopted to require the disenfranchisement of persons of a certain race or religion, there would seem little doubt that a judge would have the right and the duty to declare the amendment itself unlawful and void. Nevertheless, this responsibility offers no warrant for "non-interpretive" judges to roam at large over the constitutional landscape, acting as a "continuing constitutional convention" in disregard of the constitutional text and the evident intent of its framers.[142] Only rarely would a judge be entitled or obliged to rely on supra-constitutional principles to refuse to uphold or enforce an enacted law. As the German courts indicated after World War II, judges should take this step only when the conflict between the law or precedent and justice is "intolerable" or "unendurable." Such a conflict could occur in the context of *Roe v. Wade*, since that ruling authorizes the execution of a certainly innocent human being.[143] Unfortunately, however, to analyze the options open to a judge in a case involving supra-constitutional standards would require a separate article or book and would be beyond the limited scope of this article.

A wider recognition of the natural law as part of the law of God would serve as an incentive to the enactment of just laws as well as a brake on the enactment of unjust ones. However, arguments based on the natural law and the divine law will have little effect in a society that recognizes neither. It is not enough to argue the natural law case in academic terms. A restoration of societal respect for that law and for the divine law—a conversion—is needed before the natural law case will prevail in the public arena. We do appear to be in the early stages of a reaction to the positivistic jurisprudence which has deprived innocent life of any principled protection against extinction. This reaction, however, is less evident in the law schools than it is on the streets. One indication is the expansion of the abortion rescue movement. More than 30,000 persons have submitted to arrest in the past year as a result of their participation in non-violent efforts to close abortuaries and thereby to save the unborn children scheduled for abortion.[144] The movement originated primarily as an initiative of Evangelical and other Bible Christians. It has since included large numbers of Catholics and others. Although the prudential justifications for the rescue movement are debatable,[145] it is founded in explicit reliance on the natural law as an aspect of the law of God. "I am willing to be arrested for breaking a law," said one rescue participant, "because I'm obeying a higher law, the law of God. We are saving human lives."[146] And Roman Catholic Bishop Austin Vaughan justified his in-

142. *See* R. BERGER, GOVERNMENT BY JUDICIARY 2 (1977).

143. *See* R. HEKMAN, JUSTICE FOR THE UNBORN (1984); Hekman, *Judging: By What Standard?*, 4 CHRISTIAN LEG. SOC. Q. 19 (1983).

144. N.Y. Times, June 23, 1989, at 6, col. 4; Newsletter, In Defense of Life (Christians United Against Abortion) 6 (June-July 1989).

145. C. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U.L. REV. —, — (1989).

146. 3 THE RESCUER 2 (July-Aug. 1988).

volvement in rescues on the ground that, "The things that are decided by governments are not always right. We can't go along, passively accepting them . . . . The biggest threat to our country, faced with this, is complacency and toleration. The longer you live with something bad along side of you, you get used to it. I don't mean you accept it, but you no longer get excited. We can't afford to have that happen. That's an enormous disaster. Not just for the babies who are killed, not just for the people doing to (sic) killing, it's an enormous disaster for all of us. Our standards of what is important and vital wind up being eroded more and more as times goes on."[147]

CONCLUSION

Every state has to have a God, an ultimate authority. It is increasingly obvious that the root issue posed by contemporary legal philosophy is religious: Who is God, the real One or the State? "Law, we must remember," said Rev. Rousas J. Rushdoony, "is a form of total war; . . . The modern state, by asserting its sovereignty, affirms that all things are under its jurisdiction, and it must therefore, like God, control all things."[148] The main reason why so much has gone wrong with the law in the twentieth century is the reason given by Aleksandr Solzhenitsyn for the consequences of Soviet Communism:

> Over half a century ago, while I was still a child, I recall hearing a number of older people offer the following explanation for the great disasters that had befallen Russia: "*Men have forgotten God*; that's why all this has happened."
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> . . . And if I were called upon to identify the principal trait of the entire twentieth century, here too, I would be unable to find anything more precise and pithy than to repeat once again: *Men have forgotten God.*[149]

It should give us pause when we reflect that, in numbers involved and in the degree of impact on the victim, legalized abortion is a worse evil than was slavery. God is merciful. But He is also just. We could with profit reflect on the remarks of George Mason, in the Constitutional Convention of 1787, arguing against the continuation of the slave trade.[150] "Every master of slaves," said Mason, "is born a petty tyrant. They bring the judgment of Heaven upon a country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes and effects providence punishes national sins, by national calamities."[151]

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147. 2 THE RESCUER 4 (June 1988).

148. Rushdoony, *The State As An Establishment of Religion*, in FREEDOM AND EDUCATION: PIERCE V. SOCIETY OF SISTERS RECONSIDERED 37, 42 (Kommers & Wahoske ed. 1978).

149. Aleksandr Solzhenitsyn, *Templeton Lecture*, London Guild Hall, May 10, 1983 IMMACULATTA 6 (Sept. 1983) (emphasis in original).

150. H. HILL, GEORGE MASON: CONSTITUTIONALIST 210, 216-17 (1938).

151. *Id.* at 203; *see also* H. MILLER, GEORGE MASON: GENTLEMAN REVOLUTIONARY 294

Law students, unfortunately, are presented jurisprudential options mainly within the parameters of the Enlightenment, positivist view. They ought at least to have the opportunity to consider all the options, including the arguments for acceptance of "the laws of nature and of nature's God." This is so because the prevailing American legal theory is at a dead end. In its concept of law as merely an exercise of will and in its functional definition of personhood, it offers no prospect for restoration of the role of the law as guarantor of the inviolable rights of the innocent. It is hopeless because it has forgotten its roots and the Lawgiver. But there is a solution. It is simple. "What Moses brought down from Mount Sinai," said Ted Koppel at the 1987 Duke University commencement, "were not the Ten Suggestions; they are Commandments. Are, not were."[152]

(1975). The pertinence of Mason's observation is undiminished by the possibility that he spoke from motives of self-interest; when he made the statement he owned over 200 slaves and Virginia and Maryland had a surplus of slaves who would have become more valuable if further importation of slaves were prohibited. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 370 (M. Farrand ed. 1911); E. White, *Another Look at Our Founding Fathers and Their Product: A Response to Justice Thurgood Marshall*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 73, 96-97 (1989).

152. Media Watch, April, 1989, 6, 7.