

2003

## Canon Law and the Human Person

John J. Coughlin  
*Notre Dame Law School*

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Religion Law Commons](#)

---

### Recommended Citation

John J. Coughlin, *Canon Law and the Human Person*, 19 *J. L. & Religion* 1 (2003-2004).  
Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/726](https://scholarship.law.nd.edu/law_faculty_scholarship/726)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# CANON LAW AND THE HUMAN PERSON

Rev. John J. Coughlin, O.F.M.†

## I. INTRODUCTION

This article explores the unity of law and theology in the 1983 *Code of Canon Law* [hereinafter *CIC-1983*].<sup>1</sup> The unity has remained critical since canon law emerged in the ancient Church.<sup>2</sup> From the origins of the primitive Christian communities through the patristic era, the Church manifested a tension between charism and office, spirit and law.<sup>3</sup> The medieval canonists achieved a great synthesis of the reason of law and faith of theology.<sup>4</sup> The unified theory helped to form the basis

---

† Professor of Law, Notre Dame University School of Law. J.C.D., J.C.L., Pontifical Gregorian University; J.D., Harvard Law School; Th.M., Princeton Theological Seminary; M.A., Columbia University; B.A., Niagara University. The author wishes to thank Monsignor William J. Toohy, Esq., and Professors John Finnis, M. Cathleen Kaveny and John Mansfield for their many helpful suggestions.

1. *Codex Iuris Canonici auctoritate Ioannis Pauli Pp. II promulgatus* (Die 25 m. ianuarii a. 1983), 75 *Acta Apostolicae Sedis* [hereinafter *AAS*] II, 1-317 (1983). Canon law attempts to set the optimal conditions for the social order of the ecclesiastical community and its individual members. Ioannes Paulus Pp. II, "Constitutio Apostolica *Sacrae Disciplinae Leges*" (Die 25 m. ianuarii a. 1983), 75 *AAS* II, xi (1983) (Canon law "looks towards the achievement of order in the ecclesial society, such that while attributing a primacy to love, grace and charisms, it facilitates at the same time an orderly development in the life both of the ecclesial society and of the individual persons who belong to it."). English translations of the *CIC-1983* and the Apostolic Constitution *Sacrae Disciplinae Leges* are taken from *Code of Canon Law Annotated: Latin-English Edition of the Code of Canon Law and English-Language Translation of the 5th Spanish-Language Edition of the Commentary Prepared under the Responsibility of the Instituto Martín de Azpilcueta* (Ernest Caparros, Michel Thériault & Jean Thorn eds., Wilson & Lafleur Limitée 1993).

2. Eugenio Corecco, *The Theology of Canon Law: A Methodological Question* 4 (Francesco Turvasi trans., Duquesne U. Press 1992) (discussing canon law's historical development and concluding that "[t]he problem of the unity of law has become central to the Christian philosophy of law and to the theology of canon law.").

3. This is not to suggest that the tension was unhealthy or has not continued to be an important factor in the life of the Church to the present time. Yves Congar, *I Believe in the Holy Spirit* vol. 2, 11 (David Smith trans., Seabury Press 1983) (discussing the tension between charism and institution); Henri de Lubac, *The Splendour of the Church* 85-125 (Michael Mason trans., Paulist Press 1956) (discussing the tension between the visible and invisible aspects of the Church); Stephan Kutner, *Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law*, in *Studies in the History of Medieval Canon Law* 351, 356-357 (Variorum 1990) (observing that, while the medievals first developed a systematic approach to canon law, the primitive and ancient Church from its institution was both a spiritual communion and corporate society with the existence of a sacramental and jurisdictional law).

4. Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*, at 343 (Scholars Press 1997) ("The idea of natural rights grew up . . . in

of the Western legal tradition.<sup>5</sup> The Reformation focus on *sola fide* (faith alone) tended to sever the unity.<sup>6</sup> With the Enlightenment, reason was declared independent from the unproven dogma of faith.<sup>7</sup> Modern Western legal theory developed in accord with Enlightenment thought.<sup>8</sup> As a result of canon law's function in the life of the Church, the continuing issue of the unity has produced two interrelated principles.<sup>9</sup> Theology without law leaves the ecclesiastical community bereft of an ordered life. Law without theological meaning surrenders its moral

a religious culture that supplemented rational argumentation about human nature with a faith in which humans were seen as children of a caring God.”); and R.H. Helmholz, *The Spirit of Classical Canon Law* 398 (U. Ga. Press 1996) (medieval canon law “was designed to guide Christians toward right conduct as well as to establish an objective order with definite legal consequences”).

5. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 85-254 (Harv. U. Press 1983) (describing how the eleventh and twelfth centuries' “renaissance” in the study of law lead to a system of canon law that formed the basis of the Western legal tradition); James A. Brundage, *Medieval Canon Law* 4 (Longman 1995) (noting that canonical private and public law contributed to the most basic institutions of modern constitutional government); and Marcia L. Colish, *Medieval Foundations of the Western Intellectual Tradition 400-1400* at 326-351 (Yale U. Press 1997) (discussing the many ways in which medieval culture and law contributed to the economic and political theory of the Western intellectual tradition).

6. Corecco, *supra* n. 2, at 85 (describing Luther's doctrine of the two separate kingdoms, one of which is ruled by faith and the other by reason). From the Reformation, a polemic developed concerning the nature of the early Church. Reflective of the polemic, the German historian Rudolph Sohm had advanced the thesis that prior to the twelfth century the Church was a theological and spiritual rather than legal and juridic community. However, Stephan Kuttner observed: “When Sohm failed to see the operation of the ‘legal’ element in the earlier canon law, this is due in part to his denial . . . of the existence of a sacramental and a jurisdictional aspect in the law of the primitive and the ancient Church.” Kuttner, *supra* n. 3, at 356-357.

7. Since the time of the Enlightenment, religion and faith have been increasingly seen as private matters best retired from the realm of public discourse. David Tracy, *Blessed Rage for Order: The New Pluralism in Theology* 4-10 (Seabury Press 1979) (describing the process of “secularization” of Western society beginning with “the Enlightenment's demand for freedom from oppressive authorities and freedom for autonomous, critical, rational thought”); and Hans-Georg Gadamer, *Truth and Method* 241 (Seabury Press 1982) (discussing the Enlightenment critique of the traditional assumptions based on Christianity and the Bible).

8. This is consistent with the thought of Walter Ullmann, who argues that the view of individuals with autonomous and individual rights was an Enlightenment idea, foreign to the Middle Ages. In contrast, Brian Tierney suggests that the medieval canon law contains the origins of individual rights theory. Helmholz, *supra* n. 4, at 306 (describing the respective positions of Ullmann and Tierney); and John Finnis, *Aquinas: Moral, Political, and Legal Theory* 133-138 (Oxford U. Press 1998) (discussing the meanings of *ius* in the medieval theologian Thomas Aquinas). While the discussion is important, the point above is that modern Western law developed primarily in accord with Enlightenment political theory. The empirical approach of thinkers such as Locke and Hume did not depend on the traditional religious sources and beliefs. See generally Frederick Copleston, *A History of Philosophy: Modern Philosophy: From the French Enlightenment to Kant* vol. 6, 1-4 (Image Books 1994) (discussing the empiricism of French and English eighteenth-century thought).

9. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* 170 (Liturgical Press 1992) (describing the “organic connection” between canon law and theology as an “ontological fact”).

persuasiveness and deteriorates into rigid legalism.

Vatican II required a new universal law for the Church that avoided the pitfalls of both antinomianism and legalism. The Preparatory Commission for the *CIC-1983* described canon law as a “sacred symbol.”<sup>10</sup> When he promulgated the new Code, His Holiness John Paul II termed the legislation “the final document of Vatican II.”<sup>11</sup> Affirming the unity of law and theology, the Supreme Legislator has drawn attention to the concept of “theological anthropology.”<sup>12</sup> The phrase signifies the endeavor to uncover the fundamental elements of what it means to be human.<sup>13</sup> In exploring the unity of law and theology, this article focuses on the relationship between canon law and theological anthropology. While obviously not intended as a repudiation of mainstream legal theory, the article also suggests that the unity may offer comparative insight to the secularity of the modern project.

### A. Theological Anthropology

Aware of the Enlightenment critique, a twentieth-century form of Catholic thought focused upon the elements of theological anthropology.<sup>14</sup> Theological anthropology recognizes the human person

10. Pontifical Commission for the Revision of the Code of Canon Law, 11 *Communicationes* 67, 79 (1979) (“In the mystery of the Church the law has the function of a sacred symbol that signifies and promotes the spiritual life of Christians.”).

11. Giovanni Paolo II, *Il Diritto Canonico inserisce il Concilio nella nostra vita*, 15 *Communicationes* 128 (1983) (“[u]ltimo documento conciliare”).

12. Ioannes Paulus Pp. II, “Allocutiones: I. *Ad Rotae Romanae Auditores coram admissos* (Die 5 m. februarii a. 1987),” 79 *AAS* 1453, 1454-1458 (1987) (stating that canon law must flow from the essential elements of theological anthropology); “Allocutiones: XII, *Ad Romanae Rotae Auditores simul cum officialibus et advocatis coram admissos, anno forensi ineunte* (Die 25 m. ianuarii a. 1988),” 80 *AAS* 1178, 1180-1181 (1988) (urging that canon law should reflect an “integrated concept of the person” in accord with theological anthropology, which strives to enhance both natural and transcendent values); Richard Barrett, *The Philosophical Presuppositions of the Code*, 89 *Periodica* 491, 522-523 (2000) (observing that Pope John Paul’s focus on theological anthropology offers the possibility of a coherent foundation and starting point for canonical discussion); and Gianfranco Ghirlanda, *Il diritto nella Chiesa mistero di comunione: Compendio di Diritto Ecclesiale* 15-29 (Cinisello Balsamo 1990) (describing the “anthropological foundation” of canon law).

13. Theological anthropology adopted the methodological turn to the subject. *Man (Anthropology)* in *Encyclopedia of Theology* 880 (Karl Rahner ed., Seabury Press 1975) (theological anthropology is “man’s explanation of himself”).

14. E.g. Henri de Lubac, *Catholicism: Christ and the Common Destiny of Man* 326 (Lancelot Sheppard & Elizabeth Englund trans., Ignatius Press 1988) (suggesting that the social character and unitary nature of Catholic dogma does not diminish but enhances the human person); Congar, *supra* n. 3, at 66 (recalling his thought on the eve of Vatican II that “Christian anthropology includes a whole theology of man’s image being reshaped”); Karl Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity* 24-115 (William V. Dych trans., Seabury Press 1978) (focusing on the experience of the human person as essential to communicating revelation in the modern world); and Hans Urs von Balthasar, *A Theological*

as an irreducible unity of body and soul.<sup>15</sup> Contrary to any reductionistic understanding, the human person is more than mere biology or rationality.<sup>16</sup> The body, intellect and will comprise a dynamic whole of the human person as “spirit-in-flesh.”<sup>17</sup>

---

*Anthropology* 43-102 (Sheed & Ward 1967) (suggesting that the language of God is perfectly expressed in the “human wholeness” of Christ). This is not to suggest that these twentieth-century theologians were consciously working in concert as part of a larger systematic project. To be sure, they were writing from diverse perspectives, and there are significant differences in their thought. Some of the theological contributors to the endeavor found that their work was met with censure from ecclesiastical authority. A shift transpired at Vatican II (1963-65), when the 1965 document *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World*, in *Vatican Council II: The Conciliar and Post Conciliar Documents* 903, 913-914, 917-918 & 922-924 (Austin Flannery ed., Liturgical Press 1992), incorporated the turn to the human subject. Étienne Fouilloux, *The Antepreparatory Phase: The Slow Emergence from Inertia (January, 1959-October, 1962)*, in *History of Vatican II* vol. 1, 72-132 (Giuseppe Alberigo & Joseph A. Komonchak eds., Orbis Books 1995) (discussing the influence of theological experts which set the stage for the theological renewal at Vatican II); and Giacomo Martina, *The Historical Context in Which the Idea of a New Ecumenical Council Was Born*, in *Vatican II: Assessment and Perspectives Twenty-Five Years After (1962-1987)* vol. 1, 3 (René Latourelle ed., Paulist Press 1988) (describing the historical evolution of the theological thought and official reaction in the years leading to Vatican II). This shift was solidified with the papacy of John Paul II, and theological anthropology now constitutes a standard feature of Catholic thought.

15. The new form of Catholic thought was rooted in the tradition especially in the work of St. Thomas Aquinas. Thomas Aquinas, *Summa Theologica* I-II, 109, 1 & 2 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) [hereinafter *Summa Theologica*] (discussing the relationship between the human soul and body); *Summa Theologica* I, 76, 89 (discussing the unity of the human being as body and soul); and Étienne Gilson, *The Christian Philosophy of St. Thomas Aquinas* 196 (L.K. Shook trans., Random House 1956) (“The union of soul and body is so close that the soul compenetrates or envelops the body to the point of being wholly present in each of its parts.”). St. Thomas built his theological and philosophical system on Aristotle’s cosmology and, on the basis of these assumptions, he articulated a theory of the human person. Modern philosophy and science called into question many of the ancient and medieval assumptions. In response, twentieth-century theological anthropology was an attempt to retrieve the validity of the faith experience by adopting the modern starting point of the human subject. Catholic philosophical thought also contributed to the new understanding of the human person. E.g. Karol Wojtyła, *The Acting Person* 134-135 (Andrzej Potocki trans., D. Reidel Publ. Co. 1979) (elucidating the “specifically human” from a phenomenological perspective); Bernard J.F. Lonergan, *Method In Theology* 13-20 (Seabury Press 1979) (describing a “transcendental method” as a basic pattern of human consciousness and knowing); and *Gaudium et Spes*, *supra* n. 14, at 914 (“Man, though made of body and soul, is a unity.”).

16. Finnis, *supra* n. 8, at 177-180 (discussing the root of human dignity as the dynamic unity of body and soul in the human being). Theological anthropology endeavors to avoid the pitfalls of determinism, empiricism and idealism. Biological, social and economic determinists afford an abbreviated understanding of human freedom. In the tradition of Descartes, empiricist or analytical philosophers draw a sharp distinction between body (external world) and cognition (interior world). In contrast, idealists adopt the Kantian approach of abstract categories. From the perspective of Catholic thought, these various approaches fail to express the full possibilities for the human person. Wojtyła, *supra* n. 15, at vii (stating that the author’s approach runs contrary to the trends of modern philosophy since Descartes).

17. St. Thomas distinguished between the intellect and will as the powers of cognition and appetite in the human soul. *Summa Theologica*, *supra* n. 15, at I, 77, 1 & 5. In comparison, Duns Scotus thought the distinction not to be real but only formal. Scotus apparently wanted to avoid a faculty psychology. Richard Cross, *Duns Scotus* 83-84 (Oxford U. Press 1999). Consistent with

The intellect has the capacity for consciousness of sensation, understanding, imagination, reflection and judgment.<sup>18</sup> The faculty of the will enables one as a person to constitute oneself through intentional action.<sup>19</sup> The interrelatedness of the faculties facilitates self-possession.<sup>20</sup> The self-possessed person fulfills the requirement of interiority that one know oneself. Through self-knowledge, the person discovers a love for the truth. The person exercises the will in response to the understanding of value gained through the intellect. As one cannot share what one does not first possess, the self-possessed person is able to share one's self in solidarity with others. The person transcends self in order to trust others and something greater than self.<sup>21</sup> The three anthropological elements—intellect, will and transcendence—are essential constituents of the spiritual dimension of the human being.

Love of the truth and the capacity to trust dispose the human person to the revelation of divine mystery.<sup>22</sup> Theological anthropology is situated within the context of salvation history.<sup>23</sup> The Biblical story commences with the goodness of the creation and the dignity of the

the Scotistic caution, the ideas of intellect and will are considered here as traditional analytical categories, and obviously not intended as exhaustive descriptions of humanness. Rahner, *supra* n. 14, at 32 (discussing the horizon for the human person as spirit and flesh); and Gilson, *supra* n. 15, at 207-248 (describing the human faculties of intellect and will as moving the person toward beatitude, the supreme good and transcendental last end).

18. Lonergan, *supra* n. 15, at 53 ("Progress proceeds from originating value, from subjects being their true selves by observing the transcendental precepts, Be attentive, Be intelligent, Be reasonable, Be responsible.").

19. Wojtyła, *supra* n. 15, at 134-135 (describing the act of the will as the person's response to the appeal of values).

20. In Thomistic thought, the will is in reason (*voluntas est in ratione*). Frederick C. Copleston, *Aquinas* 212 (Penguin Books 1955) (In Thomistic thought, a nature, such as "human nature," is a way of being which does not possess its state of accomplishment instantly but is designed to reach it through progression.)

21. Lonergan, *supra* n. 15, at 104 ("Man achieves authenticity in self-transcendence."). A distinction may be drawn between individualism and personalism; and Wojtyła, *supra* n. 15, at 264-267, 272-273 (describing the distinction between individualism and personalism). According to Wojtyła, "[i]ndividualism sees in the individual the supreme and fundamental good . . ." *Id.* at 273. While individualism denotes that the human person acts primarily to advance self-interest, personalism refers to the constitution of the human person through acting in solidarity with others. Personalism posits the human person as created not for self-interest but for self-transcendence. See generally Emmanuel Mounier, *Personalism* xv-xxviii (Philip Mairet trans., Routledge & Paul 1952) (describing the origins and characteristics of modern personalist thought).

22. Von Balthasar, *supra* n. 14, at 155-176 (discussing the significance of salvation history for theological anthropology).

23. *Gaudium et Spes*, *supra* n. 14, at 903, 913-914, 917-918 & 922-924 (delineating the Biblical context of theological anthropology); and Luigi M. Rulla, Franco Imoda, & Joyce Ridick, *Anthropology of the Christian Vocation: Conciliar and Postconciliar Aspects*, in *Vatican II: Assessment and Perspectives Twenty-Five Years After (1962-1987)* vol. 2, 402 (René Latourelle ed., Paulist Press 1988) (summarizing the Biblical anthropology present in the Vatican II document *Gaudium et Spes*).

human person made in the image and likeness of God.<sup>24</sup> It next describes the fallen state of creation and the lapsarian situation in which humanity finds itself.<sup>25</sup> The narrative depicts an inner dialectic between the ideal self of the supra-lapsarian human being and the actual self of the fractured person who aspires to be whole.<sup>26</sup> The dialectic between the aspirational and actual finds resolution in the Incarnation through which the divine and human are integrated.<sup>27</sup> Finally, the incompleteness of the present situation anticipates the consummation of history. Ultimate fulfillment can be discovered in nothing less than self-transcendence through openness to the omniscient, omnipotent, immutable and all-loving divine being.<sup>28</sup>

The fresh anthropological perspective was also stimulated by concerns about some of the major political and economic realities of the twentieth century.<sup>29</sup> While the century witnessed enormous advances in

24. *Gaudium et Spes*, *supra* n. 14, at 913-914 (recalling the Biblical doctrine that the human person is created in the image of God); and Joseph Ratzinger, *The Dignity of the Human Person*, in *5 Commentary on the Documents of Vatican II* 121-122 (Herbert Vorgrimler ed., Herder & Herder 1969) (The doctrine of humanity in God's image is not only a doctrine of creation but must be understood in light of Christology.).

25. *Gaudium et Spes*, *supra* n. 14, at 914; Hans Urs von Balthasar, *The Christian State of Life* 91-92, n. 21 (Mary Frances McCarthy trans., Ignatius Press 1983) (contrary to the Aristotelian approach of St. Thomas Aquinas, St. Bonaventure correctly considers the natural goodness of the original state of humanity that subsequently takes on lapsed nature); and Karl Rahner, *The Theological Concept of Concupiscentia*, in *Theological Investigations* vol. 1, 347 (Cornelius Ernst trans., Helicon Press 1974) (in theological meaning, the technical term "concupiscence" refers to the fact that the human person, after the Fall, no longer possesses a perfect control of the drives and emotions).

26. *Gaudium et Spes*, *supra* n. 14, at 914 (describing the human person as divided between a "high calling" and "deep misery" as a result of original sin); and von Balthasar, *supra* n. 14, at 43-72 (discussing the inherent conflict and perfectibility of the human person).

27. *Gaudium et Spes*, *supra* n. 14, at 922-924 (teaching that Christ is the "new man"); and *Summa Theologica*, *supra* n. 15, at I-I, 95 (This human nature was understood as created to be good, then deformed by original sin, and redeemed by Christ who took on human nature and so perfected it.). The Franciscan school posited that even without the original sin, the Word would still have become Incarnate, not to redeem, but to perfect humanity. Edward Schillebeeckx, *Christ the Sacrament of the Encounter with God* 13-20 (Sheed & Ward 1963) (describing the integration of the fullness of Christ's humanity and divinity as the source of Redemption); and Karl Rahner, *supra* n. 14, at 212-321 (discussing the Incarnation in relation to the humanity and divinity of Christ).

28. *Gaudium et Spes*, *supra* n. 14, at 938 (placing human action within the context of eschatology); Joseph Ratzinger, *Principles of Catholic Theology: Building Stones for a Fundamental Theology* 171-190 (Mary Frances McCarthy trans., Ignatius Press 1987) (discussing the importance of one's concept of history for a correct understanding of Catholic eschatology); and Gilson, *supra* n. 15, at 351-356 (The philosophy of St. Thomas "continues nature into supernature," and posits the destiny of the human person, body and soul, as beatitude.).

29. John Paul II, *Sollicitudo Rei Socialis* 20-26 (1987) in *The Encyclicals of John Paul II* (J. Michael Miller ed., Our Sunday Visitor 2001) (describing the Marxist and capitalist political realities of the twentieth century). The personalists and John Paul II are seeking to articulate a new Catholic metaphysics that integrates the ideas of objective truth and responsible freedom.

science and technology, it was also marred by war, genocide and the devaluation of human life.<sup>30</sup> In response, twentieth-century Catholic thought called for social and legal structures that set the optimal condition for human development.<sup>31</sup> On the one hand, Catholic social theory steadfastly opposed Marxist regimes in which state collectivism obscures the dignity and rights of the individual human person.<sup>32</sup> At the same time, the theory has been critical of the capitalist market economies, which can function in the absence of moral values contrary to the common good.<sup>33</sup> From the perspective of Catholic personalism, both sets of circumstances result in the alienation and isolation of the individual person.<sup>34</sup>

### B. Law and the Human Person

Posing the anthropological question in relation to law draws attention to a quite fundamental, if somewhat overlooked, issue at the core of legal theory.<sup>35</sup> The relationship between a society's understanding of what it means to be human and law is a complex one, not easily susceptible to analysis.<sup>36</sup> Every system of law reflects the

This effort is in response to the twentieth-century pattern of ideological institutions imposing their own metaphysics upon society. The racism and genocide of Nazi and Marxist ideologies were products of skewed metaphysical understandings. A critique can be made of the liberal democracies and market economies when radically autonomous individuals are encouraged to adopt an unlimited consumerist mentality in the face of the starvation and poverty of the nations of the Third World. Richard C. Bayer, *Capitalism and Christianity: The Possibility of Christian Personalism* 37-68 (Georgetown U. Press 1999) (suggesting a "Christian Personalist" perspective in response to the failures of the market economy).

30. John Paul II, *Centesimus Annus*, in *The Encyclicals of John Paul II* (J. Michael Miller ed., Our Sunday Visitor 2001) (reviewing the world conditions of the twentieth century and the response of papal social teaching).

31. John Paul II, *supra* n. 29, at 5-10 (discussing the originality of twentieth century papal social teaching); and John Paul II, *supra* n. 30, at 4-11.

32. John Paul II, *supra* n. 29, at 20-21 (faulting Marxist government and economy); and John Paul II, *supra* n. 30, at 26-27 (discussing the fall of Marxist regimes in 1989).

33. John Paul II, *supra* n. 29, at 28 (criticizing the capitalist society of "consumption" and "consumerism"); and John Paul II, *supra* n. 30, at 31-35 (linking the validity of private property to a just distribution of goods).

34. Bayer, *supra* n. 29, at xv (suggesting that the response to "statism is not further emphasis on the isolated individual, but an expanded understanding of the human person which accounts for human agency in the context of our varied social communities.").

35. This article is intended neither as a complete account of theological anthropology nor as the resolution of the array of philosophical problems raised by the relationship between anthropology and legal language. Corecco, *supra* n. 2, at 4 (The issues raised by the relationship include, *inter alia*, the validity of natural law, free will and determinism, particular and universal, contingent and transcendent, and the destiny of the human person.). Rather, the article sketches in broad strokes the unity of theological anthropology and canon law.

36. John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal. L. Rev. 847, 856-857 (1984) (suggesting that diverse understandings "of



deeper assumptions about the human being of the society that it regulates.<sup>37</sup> At the same time, the law of a given society shapes the development of the deeper societal assumptions.<sup>38</sup>

Law based upon liberal political theory, for example, interacts with certain anthropological assumptions. First, mainstream legal theory places a premium on the values of fairness, equality and neutrality in affording access to the economic and social institutions of society.<sup>39</sup> Second, it also emphasizes the protection of individual autonomy to pursue licit private ends through subjective legal rights.<sup>40</sup> Third, its

human nature, human destiny and the meaning of life" are critical to understand constitutional law); and Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* 9 (Harv. U. Press 1987) (a society's law tells a deeper story about the meaning of the human person).

37. Kevin M. Crotty, *Law's Interior: Legal and Literary Constructions of the Self* 2 (Cornell U. Press 2001) (the concept of "self" is law's interior); and Charles Taylor, *Sources of the Self; The Making of the Modern Identity* 495-521 (Harv. U. Press 1989) (modern identity shapes our view of individual rights and public institutions).

38. Ronald William Dworkin, *The Rise of the Imperial Self: America's Culture Wars in Augustinian Perspective* 78-79 (Rowman & Littlefield Publishers, Inc. 1996) (suggesting that laws in democracy have fostered the self-understanding of the "expressive individualist" characterized by diversity and autonomy).

39. On the notions of equality, see e.g. John Rawls, *A Theory of Justice* 511 (Belknap Press of Harv. U. Press 1971) (describing equality "as it applies to the respect which is owed to person irrespective of their social position"); and Ronald Dworkin, *Taking Rights Seriously* 180 (Harv. U. Press 1977) ("We might say that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them."). Concerning the rules that translate the political values, see Rawls, *supra* n. 39, at 274-284 (Some government regulation is necessary to maintain a just distribution of resources in society so that all individuals are permitted to compete as equals in the economic sphere.); and Robert Nozick, *Anarchy, State, and Utopia* 213-231 (Basic Books 1974) (certain inequalities such as intelligence and ability are innate, and the good society requires a minimum of government regulation). The separation of politics from law is an essential element of law based on liberal theory. For a radical critique of this doctrine, see Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1153-1155 (1985) (arguing that the legal process cannot be neutral as it is impossible to separate it from politics). Cf. Roberto Mangabeira Unger, *Knowledge and Politics* 63 (Free Press 1975) (stating that liberal theory's claim of neutrality gives rise to a fatal contradiction as it renders it unable to arrive at "a coherent understanding of the relations between rules and values in social life").

40. The classical liberal theory was fashioned in the thought of certain eighteenth-century philosophers. See e.g. John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* 248, 330-333 (Peter Laslett ed. 1988) (stating that the value of the state resides in large part in preserving the freedom of the autonomous individual to pursue licit private ends, and to afford a neutral forum for the resolution of disputes); and John Stuart Mill, *On Liberty*, in *Utilitarianism, Liberty and Representative Government* 95-96 (repr. in *Selected Writings of John Stuart Mill* (Maurice Cowling ed. 1968)) ("[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"). For more modern explanations of autonomy and freedom in liberal theory, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* 18-31 (Oxford U. Press 1997) (discussing "republican liberty," which means "freedom from domination"); and Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 28-30 (U. Chi. Press 1995) (comparing liberal theory's "negative liberty" of freedom from government interference and "positive liberty" of the individual's right of political participation and suggesting the borders

language is secular in the context of a pluralistic society.<sup>41</sup> Significant benefits accrue to individuals and society as a result of the interaction between law and the assumptions of liberal theory.<sup>42</sup>

Given liberal theory's secular character, the *CIC-1983* may at first glance seem a somewhat awkward and even irrelevant comparative partner. However, it is precisely the theological character of canon law that renders it a counter language in the comparative study.<sup>43</sup> The purpose of the counter language is both descriptive and prescriptive. Descriptively, it sharpens the anthropological horizons of each of the systems of law. On the basis of the unity of law and theology, the counter language also offers a critique. The purpose is not to suggest that mainstream legal theory and its obvious benefits ought to be abrogated in favor of religious law. Rather, the comparison with canon law recalls an account of the human good that may have become obscure in the project of mainstream legal theory.<sup>44</sup> The anthropological assumptions that underpin mainstream legal theory tend to neglect the spiritual dimension of human existence.<sup>45</sup>

In discussing the unity of law and anthropology in the *CIC-1983*, this article has three sections. The article first considers the relation

between negative and positive conceptions of liberty are often unclear). For a statement of the role of the judiciary and individual rights, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1202 (1982) (Consistent with traditional liberal theory, the courts function to curtail government intrusions into the realm of individual autonomy through a set of fundamental constitutional rights.).

41. This process of secularization is evident in the application of liberal political theory from the origins of the United States constitutional government. It was stated plainly by the United States Supreme Court in *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"). But see Michael W. McConnell, *The Origin and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-1449 (1990) (tracing the secular and religious reasoning behind the adoption of the religion clauses in the first amendment).

42. Charles Taylor, *A Catholic Modernity?*, in *A Catholic Modernity? Charles Taylor's Marianist Award Lecture* 25-37 (James L. Heft ed., Oxford U. Press 1999) (suggesting that the secular critique of Christianity has resulted in a humanism which has ironically advanced basic Christian values, but that this humanism is now itself threatened as a result of the loss of the transcendent).

43. E.g. John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 783-784 (1997) (explaining his "proviso," which is an injunction to present only "proper political reasons" as opposed to comprehensive religious doctrines into public discourse).

44. As the Western legal tradition owes a debt to the medieval canon law, the exclusion of theological language constitutes a dislocation from history. Berman, *supra* n. 5, at 520-527 (concluding that the revolution in papal authority and canon law starting in the third quarter of the eleventh century formed the basis of the modern Western legal tradition).

45. This is not to suggest that in a more comprehensive comparative study, canon law would not profit from the reciprocity of liberal theory's counter language. The purpose of this article is limited to the exploration of the unity of canon law and theological anthropology and, therefore, to its function as a counter language.

between the *CIC-1983* and the intellect. It describes canon law's internal *ratio* (organizing principles), suggesting that canon law is endowed with an objectivity rooted in theological anthropology. The next section explores the understanding of free will in the *CIC-1983*. It indicates that the *CIC-1983* contains an understanding of free will, not based merely upon individual autonomy, but also upon individual fulfillment through participation with others. In discussing the relation between the *CIC-1983* and the anthropological elements of intellect and will, the article discloses the law's purpose to foster transcendence. The final section of the article employs the counter language to raise a series of questions about the mainstream approach to law. While the critique of liberal theory is not new, perhaps the anthropology that underpins canon law may offer some modest comparative insight.

## II. INTELLECT: REASON AND FAITH

In his encyclical *Fides et Ratio*, Pope John Paul II observed that the spiritual dimension of human existence calls for the correct balance in the intellect between reason and faith.<sup>46</sup> The equilibrium between reason and faith sets the conditions in which the intellect's love for truth prospers.<sup>47</sup> On the one hand, the balance is disturbed by an excessive rationalism.<sup>48</sup> Due to skepticism concerning the horizons of human knowing, rationalism denies the possibility of the apprehension of supernatural truth in the intellect. It consequently displays a tendency to

---

46. John Paul II, *Fides et Ratio*, in *The Encyclicals of John Paul II* (J. Michael Miller ed., Our Sunday Visitor 2001) (urging the unity of reason and faith); and Lonergan, *supra* n. 15, at 103 ("The question of God, then, lies within man's horizon. Man's transcendental subjectivity is mutilated or abolished, unless he is stretching forth towards the intelligible. There lies within his horizon a region for the divine, a shrine for ultimate holiness. It cannot be ignored.").

47. Lonergan, *supra* n. 15, at 105 ("As the question of God is implicit in all our questioning, so being in love with God is the basic fulfillment of our conscious intentionality.").

48. From a philosophical perspective, "reason" enjoys a long development in the history of ideas. When he speaks of reason in the encyclical, Pope John Paul II means to reinvigorate the idea from its roots in Greek and Roman antiquity as it was later developed by the medieval thinkers such as Thomas Aquinas and Bonaventure to its modern expression in the thought of personalist philosophers such as Gilson and Maritain. All of these thinkers posited the objectivity of the truth as it is perceived in the mind of the reasonable and knowing subject. The rich historical development of the concept also includes the influence of Cartesian and Kantian approaches which tend to emphasize pure reason as a disembodied idea. More modern approaches as those of Nietzsche, Husserl and Heidegger argue for the incompleteness of these cognitive models on the basis of the linguistic, psychological and sociological complexity of reason. During the twentieth century, Fr. Copleston described the historical narrative of the development of the idea of reason through the ages and produced a multi-volume *magnum opus*, which detailed these various approaches. Frederick Copleston, *A History of Philosophy: Greece and Rome* vol. 1, 4-8 (Image Books 1993) (discussing the history of philosophy as the perennial search for truth).

underestimate the legitimate role played by faith as a way of human knowing in the quest for truth. Certain forms of existentialism, historical relativism and absolute evolutionism exhibit this tendency.<sup>49</sup> On the other hand, fideism also skews the balance. Fideism devalues the role played by natural reason in the pursuit of truth.<sup>50</sup> It fails to recognize the critical role played by reason in developing a proper apprehension of divine mystery. This dis-equilibrium can be detected in Biblical and doctrinal fundamentalism.<sup>51</sup> In the face of these tendencies, the Pontiff has maintained optimism about a partnership between reason and faith.<sup>52</sup>

Pope John Paul's academic background in phenomenology remains an interpretative key for understanding his optimism.<sup>53</sup> Phenomenological analysis describes the human person as "being in the

49. John Paul II, *supra* n. 46, at 54 ("Pope Pius XII warned against mistaken interpretations linked to evolutionism, existentialism and historicism.")

50. James Tunstead Burtchaell, *The Dying of the Light: The Disengagement of Colleges and Universities from Their Christian Churches* 828-850 (W.B. Eerdmans Publ. Co. 1998) (in the historical development of American higher education, the emphasis on faith as a private religious experience rendered it immune from rational analysis and diminished its role in both Protestant and Catholic colleges).

51. John Paul II, *supra* n. 46, at 55:

One currently widespread symptom of this fideistic tendency is a 'biblicism' which tends to make the reading and exegesis of Sacred Scripture the sole criterion of truth . . . .

Other modes of latent fideism appear in the scant consideration accorded to speculative theology and in disdain for the classical philosophy from which the terms of both the understanding of faith and the actual formulation of dogma have been drawn.

52. *Id.* at 32 (Describing faith and reason as the wings of an eagle, John Paul stated: "[W]hat is sought is *the truth of the person*—what the person is and what the person reveals from deep within.").

53. Husserl was the leading proponent of phenomenology, and there were many subsequent developments of his thought. Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy* 145 (David Carr trans., Nw. U. Press 1970) (describing intentionality as essentially hermeneutical since it is connected with understanding human experience); Martin Heidegger, *Being and Time* 188-195 (John Macquarrie & Edward Robinson trans., SCM Press 1962) (discussing intentionality's function in the interpretation of textual and other symbolic materiality); and M. Merleau-Ponty, *Phenomenology of Perception* viii-ix (Colin Smith trans., Humanities Press 1962) (suggesting that science is a "second order" hermeneutical expression of the basic experience of the world). Wojtyla's habilitation thesis at Lublin University focused on Max Scheler's philosophy as a phenomenological basis for a retrieved Christian ethics. This was an attempt to integrate the objectivity of Thomism with the emphasis on human experience in modern thought. Although he ultimately rejects phenomenology as an inadequate explanation of the objectivity of reality, Wojtyla argued that phenomenology represents a method for probing human experience. He was especially interested in the role played by emotions in support of moral action. Robert F. Harvanek, *The Philosophical Foundations of the Thought of Pope John Paul II*, in *The Thought of Pope John Paul II: A Collection of Essays and Studies* 1 (John M. McDermott ed., Editrice Pontificia Università Gregoriana 1993) (describing the Thomist and phenomenological philosophical strains in the thought of John Paul II).

world.”<sup>54</sup> The analysis rejects the Cartesian dualism between mind and body.<sup>55</sup> According to this critique, the disembodied concept of the intellect, which is present in the works of political theorists such as Locke and Hume, is too limited.<sup>56</sup> The phenomenologists maintain that that the human person is not a disembodied Cartesian spirit but an embodied subject.<sup>57</sup> Phenomenology also eschews idealist Kantian approaches, which attempt to explain human reason by positing abstract categories, types or forms. As with the empiricists’ limited notion of the intellect, idealist abstractions do not adequately explain the basic and concrete experiences of life.<sup>58</sup> Instead, phenomenological analysis examines the multi-faceted levels of somatic, emotional, intellectual and moral aspects of human experience.

While careful not to accept a primarily subjective view of the human person, Wojtyla shared the phenomenologists’ rejection of the mind-body dualism and of an overly cognitive approach to human knowing. He relied on phenomenological method to analyze the valid function of the body and emotions in the perception of value. In approaching the human person as constituted through action, Wojtyla sought to employ phenomenological method as an affirmation of

54. Heidegger, *supra* n. 53, at 78-90 (describing the human person as “Being-in-the-world”); Merleau-Ponty, *supra* n. 53, at 79 (adopting Heidegger’s description); and Patrick A. Heelan, *Space Perception and the Philosophy of Science* 12 (U. Cal. Press 1988):

[T]he individual human subject . . . [is] identical at all times with a Body that he or she uses or experiences; that Body is inserted into its experienced setting, a World (for that subject), within which it is both a noetic subject, and an object through which physical causality flows freely without interference or pause.

The human person forms a coherent sense of self by objectifying and ordering the contents of the interior life through the intellect, will and body. Cf. Lonergan, *supra* n. 15, at 8-9 (discussing the objectification of the self through consciousness and intentionality).

55. Heelan, *supra* n. 54, at 3-8 (describing the phenomenological critique of the Cartesian dualism); and Andy Clark, *Being There, Putting Brain, Body and World Together Again* 33 (MIT Press 1997) (observing that the mind involves a complex interaction of brain, body and world to form the most ingrained elements of intellectual self-image).

56. Heelan, *supra* n. 54, at 3 (rejecting as too limited the epistemological approach of Locke, Berkeley, Hume, E. Mach, J.S. Mill and B. Russell in which to perceive is to be in a pictorial representation that matches physical reality). The interior life of the human person involves a complex array of conscious and unconscious sensations, drives, feelings, perceptions, thoughts, memories and meanings; and Lonergan, *supra* n. 15, at 9 (describing the empirical, intellectual, rational and responsible levels of consciousness).

57. The human person as “being-in-the-world” both intentionally acts as a causal agent and is acted upon by the perceived object. Wojtyla locates the full expression of the human person in the intentional and specifically the moral act. His central thesis is that as a human person one constitutes oneself through action. Wojtyla, *supra* n. 15, at 149-150 (human fulfillment is discovered in action).

58. Although he concurs with the phenomenologists’ criticism, Wojtyla placed importance on Kant’s second categorical imperative that one must not use another human person as a means to an end. Karol Wojtyla, *Love and Responsibility* 25-34 (H.T. Willetts trans., Ignatius Press 1993) (discussing the meaning and implications of the use of another person).

Thomist objective morality.<sup>59</sup> This methodological approach is evident in the thought of John Paul II when he describes the human person as characterized by a love for truth and a capacity to trust. In the Pope's thought, these human characteristics enable the partnership between reason and faith. This section examines the relation between the *CIC-1983* and the intellect's capacity for reason and faith as forms of human knowing.

### A. Canon Law and Practical Reason

The phenomenologists' critique of the mind-body dualism and idealist abstraction is consistent with the anthropological foundation of the natural law tradition.<sup>60</sup> St. Thomas Aquinas defined law as an "ordinance of reason for the common good, made by him who has care of the community, and promulgated."<sup>61</sup> Law must be first and foremost an "ordinance of reason" that flows from the human intellect.<sup>62</sup> Practical reason identifies and applies reasons for choice.<sup>63</sup> It would be incomplete to describe practical reason as a merely cognitive and abstract mental function of the intellect. Rather, practical reason relies on the harmony of the somatic, emotional and higher cognitive functions.<sup>64</sup> The process of practical reason might be compared to a

59. John J. Conley, *The Philosophical Foundations of the Thought of John Paul II: A Response*, in *The Thought of Pope John Paul II: A Collection of Essays and Studies* 23, 27-28 (John M. McDermott ed., Editrice Pontificia Università Gregoriana 1993) (stating that in his insistence that certain acts are intrinsically wrong, the Pope's explanation uses phenomenological analysis to support neo-scholastic positions).

60. Ratzinger, *supra* n. 28, at 87 (discussing the anthropological foundation of tradition).

61. *Summa Theologica*, *supra* n. 15, at I-II, 90, 4 ("quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata").

62. *Id.* at I, 79, 8 ("[I]t is clear that in man reason and intellect are the same power.").

63. St. Thomas drew a specific distinction between the practical and speculative intellects. *Summa Theologica*, *supra* n. 15, at I, 79, 11 ("The speculative and practical intellects are not distinct powers . . . . For it is the speculative intellect which directs what it apprehends . . . ; while the practical intellect is that which directs what it apprehends . . . to operation."); and John Finnis, *Natural Law and Natural Rights* 101 (Clarendon Press 1986) (describing "practical reasonableness"). It is the practical intellect that grasps the first principles of natural law or practical reason. *Summa Theologica*, *supra* n. 15, at I-II, 91, 2 ("It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law."); and Martin Rhonheimer, *Natural Law and Practical Reason: A Thomist View of Moral Autonomy* 243 (Gerald Malsbary trans., Fordham U. Press 2000):

When we realize that there is a 'plan' (a *ratio*) that underlies the divine government of the world, and that this *ratio gubernationis* is called the eternal law, then we can understand what it means to say that the natural law is a participation of the eternal law in the rational creature.

Theological anthropology is essentially an endeavor in speculative reason but drawing upon a practical stamp in the eternal law.

64. Örsy, *supra* n. 9, at 176-177 (discussing the Thomistic definition of law as meaning an ordinance of practical right reason). The intellect functions to yield "right reason." This is a

maestro who conducts a great symphony orchestra. The maestro invests his entire self, communicating with the various members and sections of the orchestra through his hands, face and body language to create the complex language of a unified and coherent piece of music. In the identification and choice of natural goods, practical reason requires a similar investment of the body and soul. The anthropological argument for natural law encompasses the whole person who is conscious of self, others and tradition.

A quick sketch of the anthropological approach starts with the self as conscious subject aware that the human body is located in time and space.<sup>65</sup> Breathing, eating, drinking, sitting, standing, crawling, running, seeing, touching, and sleeping are but a few of a long list of sensate experiences known in the intellect as a result of the attributes and limits of the body.<sup>66</sup> Awareness of the body coincides with the individual desire for freedom of action. The desire involves a complex interaction of many levels of conscious and unconscious human experience. The self's primitive desire for survival and the feelings associated with it interact with more highly developed feelings, thoughts and values. The self does not want to be constrained with regard to bodily action.

Self-consciousness coincides with consciousness of others. The social nature of the human situation leads to awareness of universal concepts regarding bodily freedom and restriction.<sup>67</sup> To illustrate, we generally do not want another human person to stop us from breathing, and we realize that we owe a reciprocal duty in this regard. The movement from want to morality depends on the recognition of an intermediate grasp of first practical principles. The common understanding that two human bodies cannot occupy the same space and time requires practical principles about human relationships. The reciprocity of consciousness between the individual and the other is not Gnostic.<sup>68</sup> Even the exercise of intellectual freedoms, such as freedom

---

general term, which means reason free from bias, self-interest and misdirected emotion. Cf. Robert P. George, *In Defense of Natural Law* 104 (Clarendon Press 1999) ("Right reason is reason unfettered by emotional or other impediments to choosing consistently with what reason fully requires.").

65. Lonergan, *supra* n. 15, at 17 ("[C]onscious and intentional operations exist and anyone that cares to deny their existence is merely disqualifying himself as a non-responsible, non-reasonable, non-intelligent somnambulist.").

66. Umberto Eco, *Five Moral Pieces* 21 (Alastair McEwen trans., Harcourt 2001) ("I am convinced that there certainly are notions common to all cultures, and that they all refer to the position of our body in space."); and Lonergan, *supra* n. 15, at 9 (A transcendental set of intellectual functions characterizes the human person as one with the capacity for the conscious awareness of sensation, thought, understanding, judgment and action.).

67. Eco, *supra* n. 66, at 21 (discussing "universal concepts regarding constriction").

68. Karl Rahner's theology has been critiqued on the ground that it does not give adequate

of expression, relies upon in some way or another the activity of the human body.<sup>69</sup>

The universal concepts of bodily freedom are rooted in practical reason. The self knows that to survive and prosper in the social context certain parameters and rules associated with them must be respected. Practical reason recognizes fundamental rights and responsibilities inherent to human nature.<sup>70</sup> This is not simply a recognition based upon self-interest. In the embodied intellect, practical reason understands the basic good(s) or truth(s) about self in relation to others. The ensuing dialog between reason and truth motivates the self to consider the significance of the common good and to value self-sacrifice. Practical reason encourages the individual to rise above self and value the common endeavor. It confirms the natural goodness of the human person.

The acknowledgement of certain rights and responsibilities transcends the present moment of individual consciousness. The operation of memory in the intellect generates a unity that is trans-temporal and trans-spatial.<sup>71</sup> Over the course of time, a common fund of knowledge accumulates.<sup>72</sup> This history, preserved by memory, has an inseparable connection to tradition. In the intellect, memory generates custom and tradition, which form the context of human relationships.<sup>73</sup> Practical reason depends on tradition for information upon which to reach choices about life in the concrete historical situation. Tradition is like the score of music without which the maestro could not lead the

consideration to the role of the human body. Hans Urs von Balthasar, *The Glory of the Lord: A Theological Aesthetics* vol. 2, 322, n. 302 (John Riches ed., Andrew Louth, Francis McDonagh & Brian McNeil trans., Ignatius Press 1984) (criticizing Rahner's interpretation of Bonaventure's doctrine of the interior or spiritual senses on the ground that it fails to respect the unity of the human and the divine, flesh and spirit).

69. George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 45-59 (Basic Books 1999) (observing that the linguistic study demonstrates reason to be dialogical rather than purely literal due to its dependence on metaphors drawn from the embodied reality of the intellect).

70. Clark, *supra* n. 55, at 53-82 (observing that all material organisms depend on exchanges of energy, air, food, seed and waste products with other material organisms so that the boundaries between organisms are relational in character).

71. Heelan, *supra* n. 54, at 157-158 (human knowing involves a perception, often prior to consciousness, that is not independent of human culture and history).

72. Lonergan, *supra* n. 15, at 43 (discussing the progress of human knowledge through successive generations).

73. Ratzinger, *supra* n. 28, at 87:

[I]t is as memory that intellect proves itself *qua* intellect; memory generates tradition; tradition realizes itself in history; as the already existing context of humanity, history makes humanity possible—for without the necessarily transtemporal relationship of person to person, humanity cannot be awakened to itself, cannot express itself.



orchestra to produce great art.

A critical awareness of historical development enhances the translation of tradition into law.<sup>74</sup> Tradition contains not only the foundation of human culture, but is also “contaminated” with aspects of inhuman alienation.<sup>75</sup> The fashioning of law involves a multifaceted process in which the present situation interacts with the legal tradition. If law is to set the optimal conditions for individual and communal development, it needs to reflect those aspects of tradition that correspond to its anthropological foundation.<sup>76</sup> This calls for the purification of tradition through practical reason. In the critical process, the recognition of natural rights and responsibilities remains essential to maintaining the connection with law’s anthropological basis. The Thomistic definition of law contemplates practical reason based on the whole of human experience. The definition is consistent with the anthropological foundation of natural law that consists of the human person who is in relation to others and possession of a critical awareness of tradition.

Certain contemporary proponents of the natural law tradition emphasize that the basic principles of natural law are self-evident.<sup>77</sup>

74. Gadamer, *supra* n. 7, at 290-294 (discussing the significance for legal history to the interpretation and refashioning of law in the present by the jurist).

75. Ratzinger, *supra* n. 28, at 89 (“Tradition, which is by nature the foundation of man’s humanness, is everywhere mingled with those things that deprive him of his humanity. The basis of man’s humanness—tradition—is contaminated.”).

76. Gadamer, *supra* n. 7, at 249 (discussing tradition as dynamic and open to historical development).

77. E.g. Germain G. Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2*, in 10 *Natural L. Forum* 168, 192 (1965) (“From man’s point of view, the principles of natural law are neither received from without nor posited by his own choice; they are naturally and necessarily known, and a knowledge of God is by no means a condition for forming self-evident principles”); Finnis, *supra* n. 63, at 85-90 (describing the basic goods); and George, *supra* n. 64, at 231:

Following Aquinas, proponents of the new classical theory identify a plurality of basic human goods, including life and health, knowledge and aesthetic appreciation, excellence in work and play, and various forms of harmony within each person and among persons (and their communities) and between persons (and their communities) and any wider reaches of reality.

There remains a debate, among contemporary proponents of natural law theory, about the extent of the independence of practical reason. The critics object to the approach of Finnis on the ground that the emphasis on the independence of practical reason seems to betray the Thomistic synthesis and adopt Kantian de-ontology. E.g. Russell Hittinger, *A Critique of the New Natural Law Theory* 198 (U. Notre Dame Press 1987) (suggesting that the methodology focused on practical reason runs the risk of adopting Kant’s argument for the autonomy of moral obligation from metaphysics.). *Contra* George, *supra* n. 64, at 45 (observing that “the basic goods are not extrinsic to the persons by and in whom they are instantiated, but, are, rather, intrinsic aspects of human well-being and fulfillment”). The consequence of the alleged split between law and ontology, it is argued, opens the retrieved theory of natural law to the attacks of skeptics who reject the self-evident quality of the basic human goods. Hittinger, *supra* at 198 (criticizing

John Finnis, for example, identifies life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion as self-evident basic human goods.<sup>78</sup> Practical reason functions to derive intermediate moral principles derived from the basic goods and specific tertiary norms deduced from the intermediate principles.<sup>79</sup> The transition from the basic goods to rights occurs in a variety of ways. Sometimes the basic goods are more or less directly translated into positive law.<sup>80</sup> Book II of the *CIC-1983*, contains the so-called *lex ecclesiae fundamentalis*. The fundamental law of the Church enumerates many rights, which can be identified as part of the natural law.<sup>81</sup> The rights of the Christian faithful to free speech,<sup>82</sup> association

theorists who attempt "to recover natural law theory by way of shortcuts"). Cf. Lyold L. Weinreb, *Natural Law and Justice* 115 (Harv. U. Press 1987) (arguing that the basic human goods are not self-evident and instead reflect the personal beliefs of the theorists who identify them). *But see* Finnis, *supra* n. 8, at 29-31, 86-94, 102 (explaining that the basic human goods and first practical principles are in accord with an "anthropological account of persons as human," but need not necessarily be deduced from such an account); and John Finnis, *Fundamentals of Ethics* 20-23, 25 (Georgetown U. Press 1983).

78. Finnis, *supra* n. 63, at 85-90. Professor Finnis does not necessarily intend this list with an exhaustive exclusivity. Life, for example, might be said to be a complex basic good that includes marriage, procreation and the education of children. Finnis, *supra* n. 8, at 82, 143-154.

79. George, *supra* n. 64, at 102 (identifying the three sets of principles of which natural law consists). For a discussion of the transition from basic goods to rights, *see* Finnis, *supra* n. 8, at 103-140.

80. According to Saint Thomas Aquinas, the legislator translates the transcendent principles of natural law into the historically specific rules of positive law through the practical intellect in two ways. The first way consists in a direct conclusion from premises. *Summa Theologica*, *supra* n. 15, at I-II, 95, 2; Finnis, *supra* n. 63, at 284-290 (noting that the requirements of practical reason, as for example the prohibition of killing, are derived from particular fundamental values, e.g. life, and that law is either directly deduced from principles of practical reason or from construing *determinations*); and George, *supra* n. 64, at 102-111 (observing that natural law consists of three sets of principles, first, those concerning basic human goods, second, intermediate principles directing human choice and action, and third, fully specific moral norms). Aquinas says the second way in which the legislator translates the transcendent principles of natural law into positive law involves *determinations*. *Summa Theologica*, *supra* n. 15, at I-II, 95, 2. John Paul II, *Veritatis Splendor*, in *The Encyclicals of John Paul II* (J. Michael Miller ed., Our Sunday Visitor 2001) (affirming the significance of fundamental goods to the moral life).

81. Tierney, *supra* n. 4, at 69 (describing the natural rights theory present in the thought of the medieval canonists); and James H. Provost, *The Obligations and Rights of All the Christian Faithful*, in *The Code of Canon Law: A Text and Commentary* 134 (James A. Coriden, Thomas J. Green & Donald E. Heintschel eds., Paulist Press 1985) (referring to the sixth principle for the revision of the Code that called for the protection of fundamental human rights on the basis of natural law).

82. *CIC-1983*, Canon 212 § 3:

They have the right, indeed at times the duty, in keeping with their knowledge, competence and position, to manifest to the sacred Pastors their views on matters which concern the good of the Church. They have the right also to make their views known to others of Christ's faithful, but in doing so they must always respect the integrity of faith and morals, show due reverence to the Pastors and take into account both the common good and the dignity of individuals.

and assembly,<sup>83</sup> education of children,<sup>84</sup> expression of research,<sup>85</sup> and fundamental due process<sup>86</sup> are all rights inherent to the dignity of each human being. Their validity transcends the mere statute to claim a basis in the transcendent principle of natural law that recognizes human dignity.<sup>87</sup>

The expressed inclusion of the particular list in the *CIC-1983* exemplifies the direct translation of the transcendent basic goods in response to historical development. A formal list of rights was not part of the *1917 Code of Canon Law* [hereinafter *CIC-1917*].<sup>88</sup> The new feature represented a response to the historical development of rights language starting with the Bill of Rights of the United States Constitution and culminating in the United Nation's Universal Declaration of Human Rights.<sup>89</sup> In light of the historical development of rights language, the Preparatory Commission for the *CIC-1983* recognized the need to incorporate into the revised statute an expression of fundamental human rights.<sup>90</sup>

Practical reason also enables the embodied intellect to derive intermediate principles and tertiary norms from the first principles that

83. *CIC-1983*, Canon 215 ("Christ's faithful may freely establish and direct associations which serve charitable or pious purposes or which foster the christian vocation in the world, and they may hold meetings to pursue these purposes by common effort.")

84. *CIC-1983*, Canons 217:

Since Christ's faithful are called by baptism to lead a life in harmony with the gospel teaching, they have the right to a christian education, which genuinely teaches them to strive for the maturity of the human person and at the same time to know and live the mystery of salvation.

226 § 2 ("Because they gave life to their children, parents have the most serious obligation and the right to educate them. It is therefore primarily the responsibility of christian parents to ensure the christian education of their children in accordance with the teaching of the Church.")

85. *CIC-1983*, Canon 218 ("Those who are engaged in fields of sacred study have a just freedom to research matters in which they are expert and to express themselves prudently concerning them, with due submission to the magisterium of the Church.")

86. *CIC-1983*, Canon 221 § 1 ("Christ's faithful may lawfully vindicate and defend the rights they enjoy in the Church, before the competent ecclesiastical forum in accordance with the law.")

87. Finnis, *supra* n. 8, at 176-180 (discussing the natural basis of individual human dignity); and Tierney, *supra* n. 4, at 55-77 (suggesting that the concept of an individual right is already present in the work of the medieval canonists).

88. *Codex iuris canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus* (Die 27 m. Maius a. 1917), in 9 *AAS* II, xix-xxxviii (1917). This Code was in effect from 1918 until 1983.

89. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 173 (Random House 2001) (observing the Universal Declaration "harvested the wisdom" of the various rights documents). This is not to suggest that the idea of human rights was somehow extrinsic to prior Catholic theology and law. Finnis, *supra* n. 8, at 136 ("Though he never uses a term translatable as 'human rights,' Aquinas clearly has the concept.")

90. Provost, *supra* n. 81, at 134-136 (describing the development of the list of fundamental rights or *lex ecclesiae fundamentalis* in the various drafts leading to the *CIC-1983*).

direct us towards intelligible fundamental goods.<sup>91</sup> Procreation, for example, constitutes an aspect of the natural good of marriage. Reflection upon this fundamental good leads to the intermediate principle that parents are the primary educators of their children.<sup>92</sup> Various canons of the *CIC-1983* express the tertiary norms derived through practical reason from the intermediate principle.<sup>93</sup> Canons 796-806 specify the freedom of parents in selecting and establishing schools, as well as the obligation of the state to assist them in this matter.<sup>94</sup> A series of canons concerning the Sacraments emphasize the role of the parents as the primary religious formators of their children.<sup>95</sup> Several canons pertain to the role of parents in representing minor children in ecclesiastical courts.<sup>96</sup> Another set of canons safeguards the right of

91. As the second way or *determinationes* demands more creativity than the first, Aquinas draws an analogy to the "craftsman," who sets-out to build a house. *Summa Theologica*, *supra* n. 15, at I-II, 95, 2; George, *supra* n. 64, at 108-109 (translating the Latin word *artifex* as "architect"); and *id.* at 102 (suggesting that natural law consists of three sets of principles: basic human goods, intermediate principles and specific moral norms, all of which depend on practical reason). Consistent with the Thomistic metaphor, the legislator is like the craftsman who understands the general form of house and must implement it in a practical specification. *Id.* at 109 ("[T]he legislator (including the judge to the extent that the judge in the jurisdiction in question exercises a measure of law-creating power) makes the natural law effective for his community by deriving the positive law from the natural law.").

92. Finnis, *supra* n. 63, at 86-87 (describing procreation and education as included in the category).

93. *CIC-1983*, Canon 793 (parents have the right and obligation to educate their children, and Catholic parents have the duty and right to select the institutional means by which Catholic education can be imparted); and *Provost*, *supra* n. 81, at 162-163 ("[T]here is a veritable bill of parental rights and obligations scattered throughout the revised Code.").

94. *CIC-1983*, Canon 796 (parents should value schools and parents, and teachers should have a cooperative relationship with regard to children's education); Canon 797 (parents must enjoy "real freedom in their choice of schools"); Canon 798 (parents should entrust their children to schools that afford Catholic education, and when this is not possible, parents must provide the Catholic education outside the school); Canon 799 (the laws of society should provide for religious and moral education in schools in accord with the conscience of the parents); Canon 800 (the Church has the right to establish and administrate schools); Canon 801 (religious communities play a special role in sponsoring Catholic schools and religious education); Canon 802 (the diocesan bishop is responsible to establish schools in which Christian education occurs, including professional, technical and special education schools); Canon 803 (Catholic schools are sanctioned by ecclesiastical authority and responsible to teach Catholic doctrine); Canon 804 (Catholic religious formation and its media are subject to the authority of the Church); Canon 805 (the diocesan bishop has the authority to appoint and remove religion teachers in Catholic schools); and Canon 806 (the diocesan bishop has the "right to watch over and inspect" Catholic schools in his jurisdiction).

95. *CIC-1983*, Canons 851, 2°, 855, 857, 867-868, 874 (Baptism); Canon 890 (Confirmation); Canon 914 (Eucharist); Canons 1063, 1071 § 1, 6° (Marriage); and Canon 835 § 4 (in general, parents share in the sanctifying mission of the Church by providing Catholic formation).

96. *CIC-1983*, Canon 1478 (§ 1 provides that parents represent their children before an ecclesiastical tribunal, § 2 allows for the appointment of a guardian in cases when the rights of a child conflict with those of the parents, and § 3 permits the direct testimony of minors in certain situations); and Canon 1548 § 2, 2° (recognizing testimony privilege based on consanguinity and

parents to form associations to enhance their educational efforts and more generally to promote family life.<sup>97</sup> These canonical provisions exemplify the creativity by which practical reason is used to enact specific statutory provisions that protect family life and the rights of parents in regard to children.<sup>98</sup> They represent responses to the concrete historical situations in which the omni-competent state threatens to usurp the fundamental role of parents.<sup>99</sup> Derived from practical reason, they attest to the anthropological foundation of natural law that underpins the *CIC-1983*.

### B. The Theological Context of Fundamental Rights

The inner meaning of canon law recognizes that the capacity for human knowing extends beyond pure rationality. Reliance on scientific method carries with it a necessary skepticism about the hypothesis to be verified. The healthy skepticism, however, would defeat the very purpose of the method if it limited the parameters of evidence to that which is acquired by way of personal verification.<sup>100</sup> The explosion in specialized technological information requires that the investigator accept truths accumulated by other persons.<sup>101</sup> Without this kind of trust, the resulting pervasive skepticism would only serve to inhibit the advance of understanding, knowledge and insight. Belief and trust are

affinity).

97. *CIC-1983*, and Canon 796 § 2 (in cooperating with teachers in the education of children, parents may form associations); and Canons 298-299 (concerning the right of Christian faithful in general to form associations).

98. George, *supra* n. 64, at 108 (suggesting that "in making *determinationes*, the legislator enjoys a kind of creative freedom").

99. During the twentieth century, the dominant role of the state in the education of children was typical of both the liberal democracies and communist states. It stood in contrast to the Catholic position. Provost, *supra* n. 81, at 162:

In its struggle with civil authorities who wish to take over schools and monopolize the educational enterprise, the Church has insisted that parents are the primary educators of their children and therefore have the primary right and duty to determine how that education will be carried out.

John J. Coughlin, *Common Sense in Formation for the Common Good—Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 St. John's L. Rev. 261, 282-289 (1992) (discussing the constitutional recognition of the natural-law right).

100. Additional factors, such as creativity, intuition, serendipity and conclusions based on limited samples and statistical probability, are examples of mental process often employed in science that go beyond pure reason. Thomas S. Kuhn, *The Structure of Scientific Revolutions* 52-65 (3d ed., U. Chi. Press 1996) (discussing the emergence of scientific discoveries).

101. John Paul II, *supra* n. 46, at 32 ("[B]elief is often humanly richer than mere evidence, because it involves an interpersonal relationship and brings into play not only a person's capacity to know but also the deeper capacity to entrust oneself to others . . .").

necessary even to scientific method.<sup>102</sup>

Recognition of the healthy limits of skepticism suggests that the intellect has a natural capacity to trust in forms of truth greater than the yield of pure rationality. The knowledge gained about self and others through the intentionality to maintain human relationships further exemplifies the capacity of the intellect. Such knowledge depends on the trust of one person in another.<sup>103</sup> The capacity to love another, whether in marriage or friendship, can only be developed by surrendering part of oneself to another.<sup>104</sup> It is that form of human knowing which is the fruit of intimate and enduring relationship. It involves a trust that transcends requirements of scientific rationality. In the absence of such trust, the capacity of the intellect would be severely limited.

Faith, as a form of knowing, also depends upon trust and self-surrender. The requirement of interiority is not to lead to a self-centered introspection, but to self-transcendence.<sup>105</sup> The search for truth points to something beyond and greater than the individual.<sup>106</sup> In the interior life, it raises the questions of infinity, mystery, communion, the sacred source of creation, the limit of self and the holy beyond.<sup>107</sup> Religious experience represents a response to these kinds of questions. The experience points beyond the limits of the self, and suggests that human quest for transcendence may be satisfied only through openness to sacred mystery.<sup>108</sup>

From a theological perspective, the natural capacity of the intellect to pose the questions is perfected through the supernatural gift of faith. The narrative of revelation elicits in the hearer a response of longing for the transcendental of divine mystery. It is the intentionality of the

102. Lonergan, *supra* n. 15, at 42 ("Science is often contrasted with belief, but the fact of the matter is that belief plays as large a role in science as in most other areas of human activity.")

103. John Paul II, *supra* n. 46, at 32 (discussing the love for truth as leading to the interpersonal trust "to enter into a relationship with them which is intimate and enduring").

104. *Id.* ("Human perfection, then, consists not simply in acquiring an abstract knowledge of the truth, but in a dynamic relationship of faithful self-giving with others."). Wojtyla, *supra* n. 58, at 126 (describing love as the gift of "one's whole self").

105. *Summa Theologica*, *supra* n. 15, at I-II, 3, 4 ("[T]he essence of happiness consists in an act of the intellect: but the delight that results from happiness pertains to the will."); and Gilson, *supra* n. 15, at 353 ("The very essence of beatitude, therefore, consists in an act of the intellect; and it is only the delight which accompanies it that can be considered as an act of the will.")

106. Wojtyla, *supra* n. 15, at 36-41 (describing self knowledge and self consciousness).

107. Rahner, *supra* n. 14, at 44-89 (describing the human person in the presence of absolute mystery).

108. *Summa Theologica*, *supra* n. 15, at I-II, 1, 6 ("Man must, of necessity, desire all, whatsoever he desires, for the last end."); and Gilson, *supra* n. 15, at 352 ("It is actually impossible that man's last end be the human soul or anything belonging to it . . . . [M]an's beatitude is in God alone, who is the first and universal good, the source of all other goods.")

trusting subject to reveal oneself to, and accept the revelation of, the personal all loving Being.<sup>109</sup> Faith is an ultimate response to questioning raised in the intellect by reason. It is a natural form of human knowing that is animated by love for the truth.<sup>110</sup> At the same time, faith involves a surrender of self in response to the revelation of supernatural mystery.<sup>111</sup>

The intellect's capacity for reason and faith implies a connection between the two forms of knowing. Faith seeks understanding through speculative reason concerning the meaning of revelation and religious experience.<sup>112</sup> Reason realizes that it depends on faith to comprehend what transcends its natural limits. This balance between reason and faith is reflected in the sources of the *lex ecclesiae fundamentalis* of the *CIC-1983*. Canon 211 of the fundamental rights of the Church exemplifies the balance. The canon recognizes the right and obligation of all the baptized to spread the gospel.<sup>113</sup> Natural law may be identified as a source of the fundamental right recognized in the canon. The right belongs to the broader religious freedom enjoyed by every human being and not only the baptized.<sup>114</sup> In identifying the source of this fundamental natural right as the "very dignity of the human person," Vatican II implicitly recognized practical reason or the anthropological foundation of rights and duties.<sup>115</sup>

109. Lonergan, *supra* n. 15, at 105-106:

Being in love with God, as experienced, is being in love in an unrestricted fashion. All love is self-surrender, but being in love with God is being in love without limits or qualifications or conditions or reservations. Just as unrestricted questioning is our capacity for self-transcendence, so being in love in an unrestricted fashion is the proper fulfillment of that capacity.

110. John Paul II, *supra* n. 46, at 16 (describing the human person as the one who loves the truth).

111. The notion of mystery was confronted by the Enlightenment critique as well as the progress of science. In response, twentieth-century theological anthropology attempted to retrieve a concept of mystery that would no longer be discredited. *E.g.* Rahner, *supra* n. 14, at 60-61 (suggesting that the term "mystery" needs to "be understood, deepened, and then gradually shown to be identical with the word "God").

112. *Summa Theologica*, *supra* n. 15, at I-II, 3, 5 ("Happiness consists in an operation of the speculative rather than of the practical intellect."); and Gilson, *supra* n. 15, at 354 ("The most perfect power of the intellect is the one whose object is the most perfect, that is whose object is the essence of God. This essence is the object of the speculative not of the practical intellect.").

113. *CIC-1983*, Canon 211 ("All Christ's faithful have the obligation and the right to strive so that the divine message of salvation may more and more reach all people of all times and all places.").

114. *Declaration on Religious Liberty: On the Right of the Person and Communities to Social and Civil Liberty in Religious Matters*, "Dignitatis Humanae," in *Vatican Council II: The Conciliar and Post Conciliar Documents* 799, 800-804 (Austin Flannery ed., Liturgical Press 1992).

115. *Id.*

Canon law, however, is more than an ordinance of practical reason.<sup>116</sup> When applied to canon law, the *communitas* of the Thomistic definition of law refers to the ecclesiastical community of the Catholic Church.<sup>117</sup> The *lex ecclesiae fundamentalis* is incorporated into the canons at the beginning of Book II of the *CIC-1983*, under the title "The People of God." Section 1 of Canon 204 defines the People of God as those who are members of the Church through the sacrament of baptism.<sup>118</sup> This placement situates the fundamental rights and responsibilities, such as that of Canon 211, within the theological context of *communio*.<sup>119</sup>

Theological reflection on Christian revelation has endowed the concept of *communio* with a deep meaning. The baptized members of the Christian community understand themselves to have a direct relationship to the Paschal Mystery of Christ. *Communio* requires that the individual members and the community itself continually die to the disorder of selfishness and be transformed into a new creation through the grace of Christ.<sup>120</sup> Fundamental rights and responsibilities emerge from the theological reality that the Church, more than a collection of individuals, is a community formed by Christian faith.

116. Corecco, *supra* n. 2, at 137 ("The ultimate end of the canonical order is not simply that of guaranteeing the *bonum commune ecclesiae*, but of realizing *communio*."). Örsy, *supra* n. 9, at 58 ("Canon law originates with and remains tightly bound to a hierarchy of values, human and religious.").

117. *Summa Theologica*, *supra* n. 15, at I-II, 90, 4, (defining law as an "ordinance of reason for the common good, made by him who has care of the community, and promulgated.").

118. *CIC-1983*, Canon 204 § 1:

Christ's faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God. For this reason they participate in their own way in the priestly, prophetic and kingly office of Christ. They are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfil in the world.

119. Robert J. Kaslyn, *Book II: The People of God, Introduction*, in *New Commentary on the Code of Canon Law* 241, 242-245 (John P. Beal, James A. Coriden & Thomas J. Green eds., Paulist Press 2000) (the fundamental rights or *lex ecclesiae fundamentalis* are situated in the theological context of *communio*); Joseph Ratzinger, *Congregatio pro Doctrina Fidei, Litterae ad Catholicam Ecclesiam Episcopos de aliquibus aspectibus Ecclesiae prout est Communio (Die 28 m. maii a. 1992)*, in 85 *AAS* 838 (1993) (explicating the dogmatic implications of *communio*). To mention only a few of the theologians and canonists who concur on this point, see Zenon Grocholewski, *Aspetti teologici dell'attività giudiziaria della Chiesa*, 110 *Monitor Ecclesiasticus* 489, 492-495 (1985); Hans Urs von Balthasar, *In the Fullness of Faith: On the Centrality of the Distinctively Catholic* 67-91 (Graham Harrison trans., Ignatius Press 1988); Angel Anton, *Postconciliar Ecclesiology, Expectations, Results and Prospects for the Future*, in *Vatican II: Assessment and Perspectives Twenty-Five Years After (1962-1987)* vol. 1, 407, 416-420 (René Latourelle ed., Paulist Press 1988); and David L. Schindler, *Heart of the World, Center of the Church: Communio Ecclesiology, Liberalism, and Liberation* 7-31 (W.B. Eerdmans Publ. Co. 1996).

120. Ghirlanda, *supra* n. 12, at 30-45. (Etymologically, the Latin word *communio* derives from the Greek word *koinonia*, which means a communion, fellowship or sharing in common.).



Practical reason and theological reflection serve as the sources of fundamental rights and duties in Book II of the *CIC-1983*.<sup>121</sup> When the Supreme Legislator placed these natural rights in the faith context of *communio*, it only enhanced their claim. An injury to a fundamental right not only detracts from the natural social order. Theologically, it is understood as an injury to the injured individual and as damaging the fabric of *communio* itself. The law has a symbolic function that transcends pragmatic rationality to teach the community about natural and supernatural truths.

A symbol constitutes an indissoluble unity of an outward, external language and an inner meaning or *intellectus*.<sup>122</sup> In accord with the anthropological insight concerning the human intellect's capacity for truth, this deeper *intellectus* of canon law involves a synthesis of both reason and faith.<sup>123</sup> The language of canon law manifests an inner meaning or *intellectus*, which corresponds to the capacity of the intellect to know natural and theological truth.<sup>124</sup> The symbolic value of canon law reminds us of the possibility for balance between faith and reason in the intellect. Eviscerated of its inner meaning, legal language loses its symbolic function. It is reduced to the dry bones of historical circumstance absent transcendent value. Without its ground in the truth about the human person, law runs the risk of denying the full possibilities of human intellect.

121. Walter Kasper, *The Theological Foundations of Human Rights*, 50 *Jurist* 148, 157 (1990) (discussing the natural law and theological tradition as the foundation for human rights).

122. Gadamer, *supra* n. 7, at 67-73 (a symbol emerges organically and appeals to aesthetic consciousness to point beyond itself).

123. Ladislav Orsy, *Theology and Canon Law: An Inquiry into their Relationship*, 50 *Jurist* 402 (1990) (summarizing some of the numerous theories about the relationship between canon law and theology). As illustrative of the theories, see e.g. Klaus Mörsdorf, *Schriften zum kanonischen Recht* (W. Aymans, K.T. Geringer & H. Schmitz eds., 1989) (canon law is a theological discipline with a juridical method); Corecco, *supra* n. 2, at 96-107 (canon law should not be defined so much as *ordinatio rationis*, but rather as *ordinatio fidei*); Wilhelm Bertrams, *De relatione inter episcopatum et primatum. Principia philosophica et theologica quibus relatio iuridica fundatur inter officium episcopale et primatiale* (1963) (canon law studies the external juridic realities of philosophical and theological truths); Eduardo Labandeira, *Tratado de Derecho Administrativo Canónico* 48-49 (1988) (given the sacramental character and special mission of the Church, canon law, in its existence and authoritative interpretation, remains always subject to ecclesiastical authority); Pio Ciprotti, *Stato attuale e prospettive della giustizia amministrativa canonica*, 98 *Monitor Ecclesiasticus* 354 (1973) (canon law may be considered as a proper object of juridical science); and Ghirlanda, *supra* n. 12, at 15-45 (canon law reflects the mystery of hierarchical communion in the Church).

124. Von Balthasar, *supra* n. 14, at 162-163 (describing the historical):

longing to move from the letter to the spirit, from the institution and the sacrament to the *intellectus* within them . . . a growing awareness that the 'peoples' could only take from the Church (and its mission) its 'form' if they found in the form that *intellectus* which would impart to it, beyond its naked factualness, an inner necessity of salvation history.

### C. Transcendental and Historical Method

Theological anthropology maintains that the intellect has the capacity to comprehend certain truths, which transcend time and culture.<sup>125</sup> This contrasts with the more modern view that no metaphysical truth about the human person continues throughout history.<sup>126</sup> The modern doctrine of historicity has led to the conclusion that law rests not on metaphysical truth but upon the specific temporal and cultural circumstances in which it is produced.<sup>127</sup> In the words of Hegel, it rejects the truth of the tradition as “a heavenly truth alone, a Beyond.”<sup>128</sup> Contrary to the Hegelian characterization, theological anthropology finds in the human person an inner dialectic between the transcendent and historical that is animated by the love for the truth.

In the twelfth century, Gratian’s *Decretum* was the product of a dialectical method that set the standard for the future development of canon law.<sup>129</sup> The modern objection argues that the recognition of

125. Armand Maurer, *St. Thomas and Historicity* 26 (Marquette U. Press 1979) (noting that St. Thomas held there is one eternal truth, which is the truth of the divine mind, while later thinkers such as Duns Scotus, Suarez and Descartes posited the doctrine of eternal truths); and Gilson, *supra* n. 15, at 302 (suggesting that with regard to moral truths from which laws are derived “there are no universals in morals except principles. When it is a question of deciding upon any voluntary action whatsoever, a whole set of principles becomes necessary plus detailed discussion of all the circumstances which meet in it.”). This is not to deny the existence of the universality of objective moral norms. Both practical reason and revelation recognize specific and negative norms. For example, the negative prohibition, “Thou shalt not kill,” is part of the Decalogue and a basic principle available through the natural order of practical reason.

126. Maurer, *supra* n. 125, at 2 (“Nietzsche opened the way to a revolution of metaphysics by asserting the death of God and at the same stroke historicizing metaphysical truth.”). Prior to Nietzsche, David Hume had engendered skepticism about the possibilities of moving from the empirical “is” to the moral “ought.” David Hume, *A Treatise of Human Nature* 302 (David Fate Norton & Mary J. Norton eds., Oxford U. Press 2001); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 57-59 (2d ed., U. Notre Dame Press 1984) (defending the transition from is to ought on the ground that the nature and function of the human person are interrelated concepts); and Gerald V. Bradley, *Natural Law*, in *Christian Perspectives on Legal Thought* 277, 282-286 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., Yale U. Press 2001) (discussing the interrelation between practical and speculative reason).

127. Unger, *supra* n. 39, at 193-194 (observing the general trend of modern social theory to reflect the view that “the very notion of a unitary human nature dissolves at the touch of history’s magic wand”).

128. Maurer, *supra* n. 125, at 32, citing Hegel’s *Lectures on the History of Philosophy* vol. 3, 52 (E.S. Haldane & Frances H. Simson trans., Routledge & Paul 1898).

129. *Concordia discordantium canonum. Decretum Magistri Gratiani*, in *I Corpus Iuris Canonici*, (Aemilius Friedberg ed. 1959); Brundage, *supra* n. 5, at 47-49 (Gratian’s dialectic became the standard that “demonstrated concretely how abstract legal principles could be applied to resolve the messy disputes that continually arise between real people in the real world.”); and Berman, *supra* n. 5, at 602, n. 11 (The *Corpus Iuris Canonici* was established officially in 1580 by Pope Gregory XIII, as consisting of the following decretals: (1) Gratian’s *Decretum* (c. 1140); (2) Pope Gregory IX’s *Decretales* (1234); (3) Pope Boniface VIII’s *Liber Sextus Decretalium* (1298); (4) Pope Clement V’s *Clementinae* (1305-1314), and those decretals issued by the Council of

immutable truths precludes a system of law from incorporating new insights.<sup>130</sup> Yet, Gratian culled scriptural texts, canons of ecumenical and local councils, decrees of the Popes, rules contained in various penitentials, the rediscovered Justinian body of Roman law and virtually any other source that pertained to some aspect of law.<sup>131</sup> He collected thirty-eight hundred canonical texts reconciling the contradictions or indicating those that he found to be irreconcilable, offering generalizations and sometimes harmonizing the generalizations.<sup>132</sup> The dialectical methodology endowed canon law with an enduring formula for the inclusion of both transcendent truths and historical development.<sup>133</sup>

---

Vienne (1314), and transmitted to the universities by Pope John XXII in 1317. In addition, although not an official part of the text, John XXII's *Collectio Viginti Extravagantium* and the *Extravagantes Communes* (1316-1364) are usually considered to be part of the *Corpus Iuris Canonici*).

130. Unger, *supra* n. 39, at 194 ("The claim that human nature is independent of history has striking political implications: the limits of man's nature restrict the power of his striving to transform his experience."); and cf. Maurer, *supra* n. 125, at 32 (Contrary to the criticism of Thomistic epistemology as removed from history, St. Thomas advanced an understanding of truth that integrated the universal and transcendent with the temporal and historic such that it permitted the possibility for development and new insight in human knowledge.).

131. Gratian built on the collections of earlier decretalists, particularly those of Burchard, Bishop of Worms (1012) and Ivo, Bishop of Chartres (1095). Burchard made one of the earliest attempts to compile all the laws of the Church into a single book. He arranged his vast collection not chronologically but according to various subjects such as the Sacraments, crimes, spiritual and corporal works of mercy, and the contemplation derived from ascetic life. See J.P. Migne, *Patrologiae Cursus Completus, Series Latina*, [hereinafter *PL*] 140, 539-1058 (1844-1855). Like Burchard, Ivo compiled a vast collection of laws with commentary in order to unite canon law "into one body." *Id.* See Migne, *PL* 166, 47. An analysis of the canonists and theologians upon whom Gratian relied is provided in Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* 2, n. 3 (U. Cal. Press 1972).

132. Berman, *supra* n. 5, at 143-148, 151 (Gratian's method "revolutionized the science of law."); and John P. Dawson, *The Oracles of the Law* 114-117 (U. Mich. 1968) ("The primary task of the jurists as they conceived it was to provide solutions for cases that had arisen or might arise, testing and revising their central ideas by observing their effects on particular cases." The Roman jurists had been primarily concerned with "the consistent and orderly treatment of individual cases . . . [and] [t]heir whole impulse was toward economy, not only in language, but in ideas"); and Charles Lefebvre, *Equity in Canon Law*, in *Equity in the World's Legal Systems: A Comparative Study* 93 (Ralph A. Newman ed., Etablissements Emile Bruylant 1973) ("Canon law asserted its superiority over Roman law by reason of the greater attention given by canon law to particular circumstances, and especially to the Christian concept of the nature of man."). Cf. Robert E. Rodes, Jr., *Ecclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation* 66 (U. Notre Dame Press 1977) (suggesting that even as theology afforded the "roots" of canon law, the method and substance of the new canon law was appropriated directly or indirectly from the Roman jurists).

133. Berman, *supra* n. 5, at 204-205 (Although it manifests transcendent characteristics, canon law also possesses the characteristic of "organic development." The ability of the medieval canonists to assimilate both immutable principles and historical circumstance into the corpus of law became the foundation of the western legal tradition.).

As an important feature of the methodology, the canonists distinguished between divine, natural and positive law. According to Gratian, divine law is the will of God manifested in Revelation, especially the Sacred Scripture.<sup>134</sup> Natural law also reflects the divine will, but in distinction to revelation, it can be discerned through the right use of human reason.<sup>135</sup> Positive law is man-made law, which must always be in harmony with divine and natural law.<sup>136</sup> Further, custom must yield both to natural law and positive law.<sup>137</sup> On the basis of these categories, Gratian distinguished between immutable principles of eternal validity and elements of law that had been suggested by the particular circumstances of time, place and persons.<sup>138</sup> The immutable principles give law the force to bind. No mere positive law or human custom may serve as the source of this inner force.

The methodology of the *CIC-1983* rests upon the science of law, but places it at the service of theology and faith.<sup>139</sup> The process for the revision of the *CIC-1983* required working through an enormous body of legal tradition and theology, drawing careful distinctions among laws, precedents and customs, proficiency in reasoning by analogy, and formulating broad general theories without sacrificing attention to detail. This method, first honed by the medievals, remains essential to modern canonists.<sup>140</sup> It is a dialectical method that reflects some of the most fruitful skills of the human intellect.<sup>141</sup> Canonists continue to employ the method to yield a corpus of law grounded in immutable truth and open to the possibilities of history.

134. *Id.* at 144-145 ("Divine law is the will of God reflected in revelation, especially the revelation of Holy Scripture.").

135. D. 9 c. 1. Corecco, *supra* n. 2, at 35-38 (By positing the "connaturality" of reason and faith, St. Thomas "eliminated the possible pantheistic elements concealed in identifying natural with divine law, as had been done by Isidore of Seville and Gratian.").

136. D. 9 c. 1.

137. D. 11 p. 1 cc. 1-4.

138. D. 9 dicta post c. 9.

139. Ioannes Paulus Pp. II, *Sacrae Disciplinae Leges*, *supra* n. 1, at 53:

As the Church's fundamental legislative document, and because it is based on the juridical and legislative heritage of revelation and tradition, the Code must be regarded as the essential instrument for the preservation of right order, both in individual and social life and in the Church's zeal.

Corecco, *supra* n. 2, at 134 ("The 'theologization' and 'sacramentalization' of canon law do not lead to its 'de-juridization' because the normativity that issues from the Church is an unambiguous index of juridical authenticity.").

140. Helmholz, *supra* n. 4, at 397:

Whether one looks at their ability in mastering the relevant authorities, their proficiency in reasoning by analogy, their skill in analyzing precedents, their talent in drawing legal distinctions, or their energy in working through a large body of law, the canonists seem scarcely inferior to modern lawyers.

141. Lonergan, *supra* n. 15, at 128-130 (describing dialectical method).

#### D. The Objectivity of Canon Law

There remains the question of the relation between the natural and supernatural in canon law.<sup>142</sup> First, canon law accepts the independence of reason from faith as a way of knowing. Although the fundamental rights of Book II of the *CIC-1983* are ascribed to all the Christian faithful, these natural rights and responsibilities precede Baptism and belong to the basic dignity of the individual human person.<sup>143</sup> The responsibility of parents as the primary educators of their children, for example, does not depend on membership in the Church but instead on the prior natural order.<sup>144</sup> In accord with Christian anthropology, the basic rights and responsibilities articulated in the *CIC-1983* may be derived independently from theology on the basis of the natural goodness of the human person.<sup>145</sup> In this sense, the natural law constitutes an independent objective moral order based upon practical reason.

Second, the canonical tradition has long considered natural rights and responsibilities to inhere in the subject. They are subjective in the

142. Although Gratian placed the natural and divine law at the interior of positive law, he did not resolve the problem raised by the relation between natural and divine law. Corecco, *supra* n. 2, at 38 (referring to the Patristic concern that the identification of the natural and divine law tended to attribute pantheistic elements to the theory of law). St. Thomas clarified the relation by distinguishing between the natural and supernatural, and positing the “co-naturality” of reason and faith. *Id.* (“By making this distinction, St. Thomas preserved both the rationalistic element of Stoic natural law theory and the religious and sacral one of the Judeo-Christian tradition.”). John Paul II, *supra* n. 46, at 1 (describing reason and faith as “two wings” requiring the coordinated action of both to discover the truth).

143. Book II of the *CIC-1983*, Canon 204, introduces the section on the fundamental rights with a description of the Christian faithful as those who are incorporated into Christ and the Church through Baptism.

144. The United States Supreme Court has consistently recognized the natural right. *Meyer v. Neb.*, 262 U.S. 390, 400 (1923) (stating that parents have a “natural duty” to educate their children); and *Pierce v. Socy. of Sisters*, 268 U.S. 510, 535 (1925):

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Prince v. Mass.*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply not hinder.”); and *Wis. v. Yoder*, 406 U.S. 205, 232 (1972):

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

145. Philippa Foot, *Natural Goodness* 51 (Clarendon Press 2001) (discussing human goodness as *sui generis*, which gives rise to the understanding of right and wrong and rights and responsibilities).

sense that the principles are intrinsic to the human intellect and known by individual persons.<sup>146</sup> The objectivity of natural law means that it stands as an external measure of what is right and just for all persons. It is known in its basic and derivative principles through the use of practical reason. At the same time, practical reason is but one capacity of the faculty of the human intellect. This capacity can never be separated from the dynamic unity of the human being.<sup>147</sup> Practical reason does not function as absolutely independent from the speculative methodology of Christian anthropology. Rather, it is an essential element of that anthropology. Natural law is “natural” because it is a universal anthropological trait. For the same reason, it has an ontological ground, as an inherent capacity of the human intellect. The inclusion of the fundamental rights affirms the ontological ground of natural law and the relationship between law and anthropology.

Third, canonical methodology admits no inherent opposition between practical reason and faith.<sup>148</sup> The methodology of canon law depends upon practical reason. At the same time, it is informed by an understanding of the nature and ends of the human person gained through faith. The natural realm is seen as complementary to, and enhanced by, the supernatural.<sup>149</sup> From the perspective of Biblical anthropology, the goodness of nature disordered by sin needs redemptive grace in order for the beauty of creation to be fully illuminated.<sup>150</sup> In personalist thought, the supernatural does not abrogate the natural, but builds upon it in order to perfect it.<sup>151</sup>

146. Brundage, *supra* n. 5, at 155 citing Hugguccio, *Summa decretorum*, 50 c. 25 v. *iubeo*. (The medieval canonists had long held that the natural law formed an objective moral order that was available through human reason to each individual human being and through which the human person constituted oneself by acts of the human will. The medieval canonist, Hugguccio (d. 1210), for example, insisted that the *ius naturale* constituted both an objective norm and a subjective faculty of the human soul.)

147. Saint Thomas concluded that through the intellect’s use of right reason, and especially so when enlightened by grace, a set of universal and transcendent moral principles is available to each human person. *Summa Theologica*, *supra* n. 15, at I-I, 75 (discussing how the natural ability of the intellect to know any truth and of the will to act for any good is perfected by grace).

148. Corecco, *supra* n. 2, at 140 (“[A]lthough he defines the law as *ordinatio rationis*, [St. Thomas] considers such a definition valid not only for human and natural law, but also for the *lex aeterna* and the *lex divina*.”).

149. *Id.* at 144-145:

If it is possible, in the philosophy of law, to work with a notion of law that is metaphysically conceived as *ordinatio rationis*, by applying the *analogia entis*, then the proper analogy in theology is that of faith . . . . The existence of the *analogia* between *ratio* and *fides* is justified by the fact that, in both cases, a cognitive process is involved.

150. Von Balthasar, *supra* n. 14, at 27-30 (discussing sinful time and the time of grace).

151. In Thomistic thought grace is not in opposition to nature, but grace builds upon nature and so perfects it. Corecco, *supra* n. 2, at 37-38 (quoting the Thomistic principle “*gratia perficit, non destruit, naturam*”).

The design of the fundamental rights articulated in Book II of the *CIC-1983* reveals the legislator's intent to maintain the connection with Christian anthropology. The design utilizes natural law principles as the fundamental building blocks of a section in Book II, which is entitled "The Rights and Responsibilities of All the Christian Faithful." The design thus acknowledges the natural goodness of the human person in respecting the embodied intellect's ability to know natural truth. The design also respects the possibilities for faith and revelation in the fullness of the experience of what it means to be human. The law is anthropological in that it reflects the proper balance between natural and supernatural truth.

### III. WILL: SELF AND TRANSCENDENCE

In the phenomenological analysis of human knowing, the intellect's capacity to understand the good is complemented by the faculty of the will. The will affords the person the intentionality to act in accord with the good.<sup>152</sup> Respect for free will requires that the individual not be confined by authoritarian restrictions. However, the freedom enjoyed by the will is not simply a negative freedom in that the person is free from the absence of constraint.<sup>153</sup> Rather, it is a positive freedom in that it moves the will to act for the good identified by the intellect.<sup>154</sup>

The capacity for human knowing entails willingness to entrust oneself to a body of knowledge accumulated by others.<sup>155</sup> The Thomistic definition requires that law be promulgated by one who has care for the community.<sup>156</sup> Given its optimism about the possibilities for the interior life, Catholic theology has never advocated a radically autonomous subjectivity. Rather, it has embraced the function of the proper authority as critical in directing the free choice for the good.

152. *Summa Theologica*, *supra* n. 15, at I, 82, 1; and Gilson, *supra* n. 15, at 236-238 (describing the faculty of the will in Thomistic thought).

153. Gilson, *supra* n. 15, at 244 (noting the tendency of some "philosophers [to] limit human liberty to this absence of constraint").

154. Cf. Unger, *supra* n. 39, at 84:

Freedom may be defined positively or negatively in liberal thought. Positively, it is the power to pursue one's goals without human interference. Negatively, it is the condition in which one does not have to submit to someone else's will. The positive and the negative definition[s] are interchangeable, given the qualification attached to the former, 'without human interference.'

155. John Paul II, *supra* n. 46, at 32 (speaking of the human person and the trust in knowledge acquired by others).

156. *Summa Theologica*, *supra* n. 15, at I-II, 90, 4, (defining law as an "ordinance of reason for the common good, made by him who has care of the community, and promulgated").

Ecclesiastical law flows from the authority of the magisterium to guide individuals and communities about the true nature of human freedom.<sup>157</sup> The teaching authority of the Catholic magisterium safeguards the developing deposit of Catholic wisdom, which contains the objectivity of truth.<sup>158</sup>

In contrast, if all truth is ultimately historical, then nothing transcendent or essential to the human person remains throughout history.<sup>159</sup> An image of the person emerges in which the concept of self is invented through the exercise of the radically autonomous will according to the subjective preference of the individual. Any philosophical truth or law based upon it is the product of human self-invention.<sup>160</sup> The notions of good and evil, the truth about humanity, are not something fixed and abiding, but are determined by the will of individuals in specific historical and cultural circumstances.<sup>161</sup> The basis of law is not an objective moral order discovered in the interior life, but the power of individuals to implement and enforce their will upon others.<sup>162</sup> This section explores the understandings of the human will and freedom that underpin the *CIC-1983*.

### A. The Will and Self

The focus on humanity's self-making emerged in modern and not medieval thought. The language of the legal right (*ius*), however, which was developed by the medieval canonists, implicitly recognized the dignity of the individual person.<sup>163</sup> Christian thought had long adopted

157. *CIC-1983*, Canon 747 (stating that the Church has been entrusted with the "deposit of faith" and that it must be free to preach and teach the truth of the faith).

158. *CIC-1983*, Canons 749 §§ 1 & 2, 750, 752 (defining the role of the College of Bishops with the Roman Pontiff at its head in the teaching of moral truth).

159. Maurer, *supra* n. 125, at 3 ("Contrary to the older view of man as possessing a permanent nature underlying his historical and cultural changes, the more recent philosophy of man refuses him a fixed and abiding nature. Nothing essential or substantial to man remains throughout his history.").

160. *Id.* at 2 (Nietzsche expressed this view when he described truth as "the will to power.").

161. Taylor, *supra* n. 37, at 453 (describing Nietzsche's view of the self as tied to the need to "overcome the force of morality and find the strength to rise above its demands").

162. Crotty, *supra* n. 37, at 157-159 (emphasis omitted) (suggesting that irrational factors undercut the reasonableness and legitimacy of the law that thinkers such as Habermas and Rawls ascribe to the "will-formation" that should take place "throughout a free society, in discussions, reports, debates by and among citizens."); and Unger, *supra* n. 39, at 85 (arguing that modern political philosophy conceives of laws that enable the pursuit of private ends as one of the main ways to establish freedom).

163. Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J. L. & Relig. 163, 164-167 (through ascribing an objective and subjective meaning to *ius*, the medieval canonists developed a "concept of each human being as a person, entitled to consideration as a person, capable of moral discernment and self-determination").



the Jewish doctrine, contained in the *Book of Genesis* of the Hebrew Bible, which held that every human being was created in the "image and likeness" of God.<sup>164</sup> From this starting point, the canonists attributed to every human person a set of natural rights and obligations that could be known through the use of "right reason."<sup>165</sup> In medieval law, the meaning of *ius* gradually evolved to signify, not an objective entity alone, but a power, faculty, reason or will inherent in the human person.<sup>166</sup> The medieval canonists used the word equivocally. *Ius* indicated an objective right order, which found expression through a body of law, and a subjective power, which constituted an aspect of human personality.<sup>167</sup> The canonists' attention to the language of fundamental rights and responsibilities, however, was not focused on individual subjectivity. Recognizing the essentially social nature of the human being, the canonists discussed *ius naturale* in the context of communities and corporate groups.<sup>168</sup> The legal theory of the medieval canonists can only be said to have anticipated the modern notion of will.

Again, the phenomenological analysis of Karol Wojtyla responds to the modern problem. Retrieving the medieval notion, Wojtyla accepts that the human person is endowed with a permanent nature or essence.<sup>169</sup> He also affirms the personalist position that the human person possesses the capacity for openness to being, even to the mystery of divine being.<sup>170</sup> At the same time, Wojtyla agrees that the human person

164. Gen 1:26; and Gilson, *supra* n. 15, at 345-346 (discussing the quality of being in the image of God).

165. See Brundage, *supra* n. 5, at 155 citing Hugguccio, *Summa decretorum*, 50 c. 25 v. *iubeo* (Hugguccio insisted that the *ius naturale* constituted both an objective norm and a subjective faculty of the human soul.).

166. Tierney, *supra* n. 4, at 19 (The canonists, for instance, transformed the Roman notion of *action* or *suit* by treating it as a "subjective *ius*.").

167. Tierney, *supra* n. 163, at 171 (The canonists defended certain fundamental rights through the use of natural law concepts. The rights to private property, marriage, procedural safeguards in litigation, free consent to agreements, and privacy of conscience in the internal forum were among those natural rights that helped to define the social order of the medieval world. The canonists drew charters of rights to be exercised by local communities, guilds, colleges, churches and the emerging city-states.).

168. Tierney, *supra* n. 163, at 164 (identifying three characteristics of medieval anthropology and canon law: (1) "the concept of each human being as a person, entitled to consideration as a person, capable of moral discernment and self-determination"; (2) "the church not just as a collection of separate individuals but as a corporate community, sustaining a life of its own, apart from the secular power . . ."; and (3) "a . . . more subtle yet significant aspect . . . the relation between the individual Christian and the church conceived of as a united whole, a mystical body").

169. Wojtyla, *supra* n. 15, at 77 (discussing the term "nature" in the actual human being as an ontological reality that points to the essence of human nature).

170. *Id.* at 184-186 (discussing the unity of the corporeal and spiritual in the human person).

constitutes one's self through action.<sup>171</sup> The act of the will, according to Wojtyla, has consequences that are not sufficiently explained by a mere theory of human agency.<sup>172</sup> Not only does an act of the will direct a human subject to a value, but through this act in a certain sense: "I become my own creator."<sup>173</sup>

Wojtyla sees no incompatibility between the traditional notion of a fixed human nature and the modern conception of self-determination through free will.<sup>174</sup> Every human person, Wojtyla observes, is a "someone" from the beginning of life in the metaphysical sense.<sup>175</sup> Every individual, therefore, enjoys an inalienable dignity as a result of the fact that the individual possesses transcendent human nature.<sup>176</sup> The human person does not create him/herself in the metaphysical sense.<sup>177</sup> In his or her specific historical circumstances, the individual, nonetheless, constitutes him/herself through individual acts of the free will.<sup>178</sup> One realizes oneself as "more of a somebody" in a distinctly personal and subjective manner.<sup>179</sup> In acquiring intellectual, moral and aesthetic qualities, one constitutes oneself as a fuller, self-possessed human being. While the human person's rationality and freedom flow from an abiding essence, an individual enjoys at the same time the ability to develop oneself through self-mastery.<sup>180</sup>

The Christian tradition holds that the human person is endowed with free will to choose between good and evil.<sup>181</sup> Free will depends on

171. *Id.* at 265 (action has both an ontological and axiomatic significance in that "the person performing the action . . . fulfills himself in it"); and Karol Wojtyla, *The Personal Structure of Self-Determination*, in *Person and Community: Selected Essays* 187, 191 (Theresa Sandok trans., Peter Lang 1993) ("Action accompanies becoming").

172. Wojtyla, *supra* n. 171, at 191:

Self-determination reveals that what takes place in an act of will is not just an active directing of the subject toward a value. Something more takes place as well: when I am directed by an act of will toward a particular value, I myself not only determine this directing, but through it I simultaneously determine myself as well.

173. *Id.* ("I am also in some sense the 'creator of myself.'")

174. Karol Wojtyla, *The Human Person and Natural Law*, in *Person and Community: Selected Essays* 181 (Theresa Sandok trans., Peter Lang 1993) (describing the alleged conflict between nature law and the human person as illusory).

175. Wojtyla, *The Personal Structure of Self-Determination*, *supra* n. 171, at 192 ("in the ontological sense the human being is a 'someone' from the very beginning").

176. Karol Wojtyla, *On the Dignity of the Human Person*, in *Person and Community: Selected Essays* 177, 179 (Theresa Sandok trans., Peter Lang 1993) (The dignity of the human person is confirmed in the revelation that we are "created in 'the image and likeness of God.'").

177. Wojtyla, *supra* n. 15, at 72-74 (discussing the ontological basis of action).

178. *Id.* at 68 ("man creates himself in acting").

179. Wojtyla, *The Personal Structure of Self-Determination*, *supra* n. 171, at 192.

180. Wojtyla, *supra* n. 58, at 200 (discussing the human person's ability to develop in virtue through self-mastery of the sensual and emotional spheres of the interior life).

181. *Summa Theologica*, *supra* n. 15, at I, 83, 1; and Gilson, *supra* n. 15, at 156, 244 (defining

the judgment of conscience.<sup>182</sup> The human conscience is both intimately personal to each individual and the interior font of transcendent moral principles.<sup>183</sup> The primacy of conscience means that the individual may be neither forced to act contrary to his/her conscience nor prevented from acting in accord with it.<sup>184</sup> From a Biblical perspective, the anthropological capacities of reason, intentionality and conscience are created good but disordered by evil.<sup>185</sup> The human mind is often a tangle of conflicting judgments about how the person ought to act. For the self-possessed person, the formation of conscience remains an ongoing and life-long project.<sup>186</sup> The formation enables one to assume responsibility for past acts. The process also entails the recognition that the subjective conscience itself may be incomplete or erroneous.<sup>187</sup> The primacy of individual conscience must always be respected. Nevertheless, formation of conscience, devoid of selfishness, pride, resentment and other human weaknesses, profits from the light of external sources of natural and supernatural wisdom.

### B. Canon Law, Individual Dignity and the Common Good

The *CIC-1983* safeguards the integrity of each individual person by upholding the primacy of conscience.<sup>188</sup> The choice of a state of life, for example, may never be coerced.<sup>189</sup> This is particularly true in the case of marriage as the individuals must be free to consent to the natural and sacred covenant.<sup>190</sup> A series of canons details the factors that mitigate and/or remove individual freedom to consent.<sup>191</sup> The individual right to

evil as the absence of good and discussing the freedom of the human will).

182. John Paul II, *supra* n. 80, at 54 (discussing the link between freedom and conscience).

183. *Id.* at 54-60 (describing conscience as the individual's "inner sanctuary" and the witness to the "universal and objective norm of morality").

184. *Gaudium et Spes*, *supra* n. 14, at 916 (describing conscience as "man's most secret core, and his sanctuary").

185. Von Balthasar, *supra* n. 14, at 43-72 (comparing the imperfectability of the person with the action of grace).

186. John Paul II, *supra* n. 80, at 64 (discussing the formation of conscience).

187. *Id.* at 62 (describing erroneous conscience).

188. *Gaudium et Spes*, *supra* n. 14, at 916-917 (the primacy of conscience means that in the conscience the human person encounters a law implanted by God).

189. *CIC-1983*, Canon 219 ("All Christ's faithful have the right to immunity from any kind of coercion in choosing a state in life.").

190. Ladislav Örsy, *Marriage In Canon Law: Texts and Comments, Reflections and Questions* 61 (M. Glazier 1988) (discussing the significance of free consent to Catholic marriage).

191. These factors recognized in the *CIC-1983* include, *inter alia*, a minimum age requirement (Canon 1083), abduction (Canon 1089), lack of the sufficient use of reason (Canon 1095, 1°), grave lack of understanding concerning the essential matrimonial rights and obligations (Canon 1095, 2°), psychological factors that render a person incapable of assuming the essential obligations of marriage (Canon 1095, 3°), error of person (Canon 1097), deceit or fraud (Canon

privacy also demonstrates concern for individual integrity.<sup>192</sup> Canon law draws a distinction between the internal and external fora. The internal forum is recognized precisely to respect individual privacy. All information that falls within the parameters of the internal forum must be kept secret. For example, in the internal forum of sacramental confession, the priest-confessor must keep as inviolate the identity of the penitent and the matters revealed.<sup>193</sup> A direct violation of the seal of confession results in an automatic excommunication.<sup>194</sup> Novices and seminarians are free to confess to any priest, and their ecclesial superiors should not ordinarily hear their confessions.<sup>195</sup>

Although canon law respects individual dignity, the emphasis of the rights language in the *CIC-1983* is not the proclamation of subjective rights per se. Canon law views rights in conjunction with corresponding responsibilities.<sup>196</sup> The approach to free speech demonstrates the balance. Section 3 of Canon 212 stipulates that the speech right is to be exercised with regard for: (1) the integrity of faith and morals; (2) the appropriate reverence due to pastors; (3) the common good; and (4) the

1098), force or fear (Canon 1103). For critical analysis of the way in which Church tribunals sometimes apply these factors, see Robert H. Vasoli, *What God has Joined Together: The Annulment Crisis in American Catholicism* 46-65 (Oxford U. Press 1998) (arguing that tribunals in the United States have in general adopted a liberal "pastoral approach" to annulments which does not respect the intent of the canonical legislation).

192. Francisco Javier Urrutia, *Internal Forum—External Forum: The Criterion of Distinction*, in *Vatican II: Assessment and Perspectives Twenty-Five Years After (1962-1987)* vol. 1, 634 (René Latourelle ed., Paulist Press 1988) (discussing the theological and canonical criteria for the distinction between the fora).

193. *CIC-1983*, Canon 983 § 1 ("The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.").

194. *CIC-1983*, Canon 1388 § 1 ("A confessor who directly violates the sacramental seal[ ] incurs a *latae sententiae* excommunication reserved to the Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offence.").

195. *CIC-1983*, Canon 985:

The director and assistant director of novices, and the rector of a seminary or of any other institute of education, are not to hear the sacramental confessions of their students resident in the same house, unless in individual instances the students of their own accord request it.

Canon 246 § 4 requires that seminarians and novices be free to choose their own spiritual directors.

196. Tierney, *supra* n. 163, at 171 (The medieval canonists' attention to the language of fundamental rights and responsibilities was not focused on individual subjectivity. Recognizing the essentially social nature of the human being, the canonists discussed *ius naturale* in the context of communities and corporate groups. They defended certain fundamental rights through the use of natural law concepts. The rights to private property, marriage, procedural safeguards in litigation, free consent to agreements and privacy of conscience in the internal forum were among those natural rights that helped to define of the social order of the medieval world. The canonists drew charters of rights to be exercised by local communities, guilds, colleges, churches and the emerging city-states.).

dignity of persons. The first two of the qualifications, regard for faith and morals and respect for pastors, claim an obvious theological justification. At the same time, they are also warranted by the natural law. Proper regard for the integrity of faith and morals contributes to the common good. Respect for pastors is consistent with the fourth qualification of the dignity of persons.

The third qualification is identical to the common good requirement of the Thomistic definition of law.<sup>197</sup> Vatican II defined the common good as: "the sum of those conditions of social life which allow groups and their individual members relatively thorough and ready access to their own fulfillment."<sup>198</sup> The notion of canonical rights is never strictly subjective or absolute. It transpires in a social context in which individuals may discover fulfillment. No individual possess a legal right to act in a manner that detracts from the sum of conditions of the common life. When all four of Canon 212's qualifications are considered as a whole—individual dignity, the common good, faith and the moral life—they may be said to contain the essential philosophical and theological values in the Christian understanding of what it means to be human. The four qualifications pertain to the exercise of all rights in the Church. They attest to the unity of law and theology.

### C. Faith and Community

Wojtyla notes that membership in society is not synonymous with the participation through which the human person experiences fulfillment.<sup>199</sup> The linguistic distinction between the terms "society" and "community" reflects the difference between associational relationships and relationships that entail a deeper level of personal commitment and fulfillment.<sup>200</sup> Membership in the Church involves this deeper level of personal commitment and fulfillment. It entails the willingness of the baptized person to entrust him/herself to the community and accept the

---

197. *Summa Theologica*, *supra* n. 15, at I-II, 90, 4, c. (defining law as an "ordinance of reason for the common good, made by him who has care of the community, and promulgated").

198. *Gaudium et Spes*, *supra* n. 14, at 927-928.

199. Pursuant to contemporary Catholic social teaching, such participation is only possible in those subsidiary structures that facilitate the formation of genuine community. In Catholic social thought, subsidiary structures are considered a necessary condition for the creation of community. Moreover, it is recognized that the human person, as a social being, gravitates for authentic fulfillment to such subsidiary structures. Pope Pius XI formulated what has become the classic statement of the principle of subsidiarity. Pius Pp. XI, "Litterae Encyclicae *Quadragesimo Anno* (Die 15 m. maii a. 1931)," 23 *AAS* 177 (1931).

200. Wojtyla, *supra* n. 15, at 278 ("Within the community we find the human being, with all his dynamism, as one of its members . . . 'society' objectivizes the community or a number of mutually complementary communities.").

wisdom of an accumulated tradition.<sup>201</sup>

Catholic faith is never merely a private religious experience. Book II of the *CIC-1983*, entitled *The People of God*, reflects the anthropological assumption that participation is necessary to individual fulfillment. The principles of individual equality and ecclesial hierarchy permeate the canons.<sup>202</sup> The principle of equality recognizes the domain of the individual. The person acts as a subject to constitute him/herself through the intentionality of the will. Book II starts with Canon 204-207, which establish the criteria for membership in the Church. Canon 208 states that all the baptized enjoy "a genuine equality of dignity and action" in forming the "Body of Christ." Through Baptism, each member of the Church participates in the priestly, prophetic and kingly office of Christ.<sup>203</sup> Following the opening canons concerning membership, Canons 209-223 next enumerate the individual rights enjoyed by all the baptized. The placement of the *lex ecclesiae fundamentalis* immediately after the canons on membership evinces the legislative intent to link the fundamental equality of all the baptized with individual rights and responsibilities.

The complementary principle of hierarchy functions to safeguard an ancient but dynamic faith tradition. Section II of Book II concerns the hierarchical nature of the Church. Canon 330 affirms the belief that Christ formed the original apostolic *communio* with Peter at its head and intended the bishops as apostolic successors.<sup>204</sup> They are vested with hierarchical office to teach, sanctify and govern in the Church.<sup>205</sup> The

201. John Paul II, *supra* n. 46, at 31-34 (describing the movement from trust in knowledge acquired by others to Christian faith).

202. J. Hervada, *Commentary on Book II*, in *Code of Canon Law Annotated: Latin-English Edition of the Code of Canon Law and English-Language Translation of the 5<sup>th</sup> Spanish-Language Edition of the Commentary Prepared under the Responsibility of the Instituto Martin de Azpilcueta* 185 (Ernest Caparros, Michel Thériault & Jean Thorn eds., Wilson & Lafleur Limitée 1993) (discussing the principles of radical equality and variety as the two basic principles of Book II of the *CIC-1983*).

203. *CIC-1983*, Canon 208 ("Flowing from their rebirth in Christ, there is a genuine equality of dignity and action among all of Christ's faithful. Because of this equality they all contribute, each according to his or her own condition and office, to the building up of the Body of Christ.")

204. *CIC-1983*, Canon 330 ("Just as, by the decree of the Lord, Saint Peter and the rest of the Apostles form one College, so for a like reason the Roman Pontiff, the successor of Peter, and the Bishops, the successors of the Apostles, are united together in one."). According to Catholic belief, Christ originally entrusted the faith to the Twelve Apostles with the mission to teach, sanctify and govern. *CIC-1983*, Canon 331 focuses on the divine institution of the Petrine ministry as the head of "the College of Bishops, the Vicar of Christ, and the Pastor of the universal Church here on earth."

205. *CIC-1983*, Canon 375 § 1 ("By divine institution, Bishops succeed the Apostles through the Holy Spirit who is given to them. They are constituted Pastors in the Church, to be the teachers of doctrine, the priests of sacred worship and the ministers of governance.")

“sacred power” of pastors is not intended as one stemming from personal ambition but the holiness of the objective hierarchical office. The pastor’s humble service respects the individual Christian’s experience of Christ.<sup>206</sup> As a result, the experience is nurtured, deepened and shared in the context of the “one, holy, catholic and apostolic Church.”<sup>207</sup>

Pursuant to Book II, a variety of smaller communal units afford the context in which one lives Catholic faith. The most common of these canonical structures is the parish. Canon 515 defines the parish as a portion of the people of God established within a diocese and entrusted to the care of a priest as pastor.<sup>208</sup> Pursuant to the principle of radical equality, each member of the parish community receives the same fundamental call to a life of faith and holiness.<sup>209</sup> The canonical and sacramental structure of the local parish community invites the individual believer to deepen the spiritual dimension of life. Love for truth leads the individual to enter into a dialog with the faith tradition. The dialog is an encounter with the holy mystery of a perfect love. Participation in the faith community elicits a deepening level of trust. Spiritual solidarity with other members of the faith community fills an individual believer with peace, joy and faith.

The priest shares in the bishop’s pastoral office of service to the local community.<sup>210</sup> Book II recognizes the parish priest as the Minister

206. *Dogmatic Constitution on the Church, “Lumen Gentium,”* in *Vatican Council II: The Conciliar and Post Conciliar Documents* 350, 381-387 (Austin Flannery ed., Liturgical Press 1992) (teaching that the hierarchical offices of bishop and priest are ministerial examples of the self-emptying of Christ, which is the example for all Christians; St. Bonaventure, *Lignum Vitae* 7, in 8 Doctoris Seraphici S. Bonaventurae opera omnia, edita studio et cura pp. Collegii a S. Bonaventura 72 (Quaracchi ed. 1882) (“So complete was his humility, that He who was perfect justice subjected himself to the Law.”).

207. *CIC-1983*, Canon 369 (second emphasis added):

A diocese is a portion of the people of God, which is entrusted to a Bishop to be nurtured by him, with the cooperation of the *presbyterium*, in such a way that, remaining close to its pastor and gathered by him through the Gospel and the Eucharist in the Holy Spirit, it constitutes a particular Church. In this Church, the *one, holy, catholic and apostolic* Church of Christ truly exists and functions.

Avery Dulles, *The Catholicity of the Church* 131-133 (Clarendon Press 1985) (discussing the marks of the Church).

208. *CIC-1983*, Canon 515 § 1 (“A parish is a certain community of Christ’s faithful stably established within a particular Church, whose pastoral care, under the authority of the diocesan Bishop, is entrusted to a parish priest as its proper pastor.”).

209. *CIC-1983*, Canon 529 § 2 (“The parish priest is to recognise and promote the specific role which the lay members of Christ’s faithful have in the mission of the Church . . .”).

210. *CIC-1983*, Canon 519:

The parish priest is the proper pastor of the parish entrusted to him. He exercises the pastoral care of the community entrusted to him under the authority of the diocesan Bishop, whose ministry of Christ he is called to share, so that for this community he may

of the Word, Sacrament and Pastoral Charity.<sup>211</sup> Canons 528 and 529 express the relationship between the individual and parish priest. The language of the canons urges the priest to: proclaim the entirety of the word, nourish by devout liturgical celebration, collaborate with the faithful, promote social justice, lead in prayer, strive to know the faithful entrusted to his care, share in their anxieties and fears, comfort the sick and dying, prudently correct, solicitously restore to the sacraments, foster family life and seek out the poor, suffering, lonely and exiled.<sup>212</sup> The language of the canons portrays an image of the parish priest in which the priest respects, assists and guides the individual parishioner. Consistent with this image, the law requires the priest to recognize and promote the mission of the laity in the Church especially by fostering their religious associations.<sup>213</sup> The priest's vocation is nourished by his participation in the lives of the individuals, families and associations that comprise the community entrusted to his pastoral care.

The parish represents an in-between point on a spectrum of associational relationships. The family remains the most fundamental of the communities that engender participation and solidarity. Reciprocity

carry out the offices of teaching, sanctifying and ruling with the cooperation of other priests or deacons and with the assistance of lay members of Christ's faithful, in accordance with the law.

211. *CIC-1983*, Canon 528 § 1 ("The parish priest has the obligation of ensuring that the word of God is proclaimed in its entirety to those living in the parish."); § 2 ("The parish priest is to take care that the blessed Eucharist is the centre of the parish assembly of the faithful. He is to strive to ensure that Christ's faithful are nourished by the devout celebration of the sacraments . . ."); Canon 529 § 1, *infra*, n. 212; and Joseph A. Janicki, *Parishes, Pastors and Parochial Vicars*, in *The Code of Canon Law: A Text and Commentary* 415 (James A. Coriden, Thomas J. Green & Donald E. Heintschel eds., Paulist Press 1985) (identifying the parish priest as the Minister of Word, Sacrament and Pastoral Charity).

212. *CIC-1983*, Canon 529 § 1:

So that he may fulfil his office of pastor diligently, the parish priest is to strive to know the faithful entrusted to his care. He is therefore to visit their families, sharing especially in their cares, anxieties, and sorrows, comforting them in the Lord. If in certain matters they are found wanting, he is prudently to correct them. He is to help the sick and especially the dying in great charity, solicitously restoring them with the sacraments and commending their souls to God. He is to be especially diligent in seeking out the poor, the suffering, the lonely, those who are exiled from their homeland, and those burdened with special difficulties. He is to strive also to ensure that spouses and parents are sustained in the fulfillment of their proper duties, and to foster the growth of christian life in the family.

213. *CIC-1983*, Canon 529 § 2:

The parish priest is to recognise and promote the specific role which the lay members of Christ's faithful have in the mission of the Church, fostering their associations which have religious purposes. He is to cooperate with his proper Bishop and with the *presbyterium* of the diocese. Moreover, he is to endeavor to ensure that the faithful are concerned for the community of the parish, that they feel themselves to be members both of the diocese and of the universal Church, and that they take part in and sustain works which promote this community.



occurs between these two fundamental forms of religious solidarity. True to the form of associational relationships, these fundamental experiences of solidarity symbolically communicate the goodness of transcendence. The parish does not exist as a self-sustaining unit but rather as a part of the diocese and the universal Church.<sup>214</sup> The free choice to cede a degree of autonomy endows the individual believer not only with an individual moral participation but a corporate identity. As a portion of the Christian faithful, the parish reflects the original *communio* of the Twelve around the Lord.<sup>215</sup> One participates not only on the local level but also in a much larger historical reality. Solidarity with the members of the local community coincides with solidarity with the universal Church.<sup>216</sup>

The definition of the parish in Canon 515 then represents the canonical attempt to express the mystery of *communio* in terms of the radical equality of all the faithful and hierarchical constitution of the universal Church. The principle of equality means that all of the baptized participate fully in the call to holiness. It complements the principle of hierarchy that understands office in the Church, not as a matter of secular power or prestige, but of humble service in promoting the historical continuity of Catholic faith. Canon law's attention to equality, an ordered ecclesial life and the continuity of faith attests to a balanced concept of freedom.

The concept of freedom in the *CIC-1983* can claim both philosophical and theological justifications. Philosophically, the canonical structures are intended to facilitate the human person's participation in the communal project.<sup>217</sup> This stands in opposition to a

214. John A. Renken, *Parishes and Pastors in New Commentary on the Code of Canon Law* 673, 676 (John P. Beal, James A. Coriden & Thomas J. Green eds., Paulist Press 2000) ("The parish is a part of the particular church, not an autonomous entity."); and James A. Coriden, *The Parish in Catholic Tradition: History, Theology and Canon Law* 101-103 (Paulist Press 1997) (discussing the parish as part of the diocese).

215. *CIC-1983*, Canons 368, 369 (confirming that the universal church is present and operative in the particular churches located throughout the world, each of which is presided over by a bishop, and that the parish community is entrusted to the pastoral care of a priest, who cooperates in the apostolic ministry of the bishop, to mediate the economy of salvation to the members of the local community).

216. Ratzinger, *supra* n. 119, at 843 (indicating about *communio* that the Church is greater than the sum of its parts). A debate has ensued between Cardinal Ratzinger and Cardinal Walter Kasper concerning the autonomy of the local churches especially, as expressed in pastoral practices. For a summary of this discussion, see Walter Kasper, *On the Church* America 8 (Apr. 23-30, 2001) (arguing for greater flexibility) and Joseph Ratzinger, *The Local Church and the Universal Church* America 7 (Nov. 19, 2001) (stressing the unity of the Church in the centrality of the universal Church).

217. Wojtyla, *supra* n. 15, at 280-281 (discussing participation in the community and the common good).

merely negative concept of human freedom, which defines freedom as the absence of constraint on the individual. While such a conception may yield the optimal conditions for the autonomous individual to pursue subjective ends, it tends to give rise to alienation rather than participation and solidarity.<sup>218</sup> The personalism of canon law yields a theory of rights grounded in the idea that human freedom carries with it responsibility.<sup>219</sup> It is a positive freedom to choose and act in accord with what is good, just and charitable. It holds that the more one engages free will in accord with the inner spirit of the law, the more true freedom one enjoys. Canon law admits no intrinsic opposition between the freedom of the human person and the participation in the common endeavor. To the contrary, it recognizes that authentic human freedom lies, not in the exercise of unlimited personal autonomy, but in the fulfillment of the ontological dignity of each individual to participate freely in human community.<sup>220</sup>

Theologically, such participation offers the hope of sanctification as a member of the "Mystical Body of Christ."<sup>221</sup> In attempting to fathom the meaning of the theology of the Mystical Body, St. Bonaventure observed that the cross is absolutely the key to everything.<sup>222</sup> For Bonaventure, the blood and water, which flowed from the open side of the crucified Jesus, symbolize the origin and growth of the Church.<sup>223</sup> At the core of the theological language is the faith claim of an intimate nexus between the mission of Christ and the foundation of the Church.<sup>224</sup> To be a member of the Mystical Body is both to possess an individual moral integrity and a corporate identity in the communion of the "one bread, one body."<sup>225</sup> The canonical

218. *Id.* at 296-297 (identifying the roots of alienation).

219. *Id.* at 281-282 (discussing "personalism" in reference to the common good).

220. *Id.* at 122 (describing the function of free will in self-possession and human action).

221. Pius Pp. XII, "Litterae Encyclicae *Mystici Corporis Christi* (Die 29 m. iunii a. 1943)," 35 *AAS* 193-248 (1943) (teaching about the nature of the Church through the image of the Mystical Body of Christ); and Tierney, *supra* n. 163, at 164 (discussing the importance to the image of the Mystical Body in the medieval church and law).

222. St. Bonaventure, *De triplica Via, alias Incendium amoris* ch. 3, § 3, in 8 *Doctoris Seraphici S. Bonaventurae opera omnia*, edita studio et cura pp. Collegii a S. Bonaventura 14 (Quaracchi ed. 1882) ("All things are manifested in the cross.").

223. St. Bonaventure, *Lignum Vitae*, 7, in 8 *Doctoris Seraphici S. Bonaventurae opera omnia*, edita studio et cura pp. Collegii a S. Bonaventura 72 (Quaracchi ed. 1882) (locating the origins of the Church in the blood and water of Christ's wounded side).

224. *Lumen Gentium*, *supra* n. 206, at 2, 3 & 4 (describing the kenotic self-emptying of the trine God to the sending of the Incarnate Word into human history to the mission of the Church).

225. I Cor 10:17. See Tierney, *supra* n. 4, at 70, n. 90, citing D. 86 c. 21; D. 42 *ante* c. 1; C. 12 q. 1 c. 2; and D. 47 c. 8 (The medieval canonists recognized as a requirement of membership that the rich share at least from their abundance with the poor. They crafted statements of binding moral obligations such as: "Feed the poor. If you do not feed them you kill them"; "A man who

structures are intended to reflect the theological belief that every member is called to live this Mystery in humble service and self-sacrificial love.

These philosophical and theological perspectives reflect a balance of negative and positive freedom. Canon law attempts to protect individual liberty through the recognition of fundamental rights especially with regard to privacy, reputation and conscience. This validity of the negative freedom from authoritarian constraint depends on its integration with the positive value of freedom. The human will finds fulfillment not through radical autonomy but through the individual dignity discovered in participation and solidarity. Canon law aims to set the conditions in which the individual becomes more fully human by exercising the will to develop intellectually, morally, aesthetically and spiritually.

#### D. Canonical Equity and the Salvation of Souls

While theological anthropology expresses optimism about the faculties of reason and will, it also affirms the doctrine of original sin.<sup>226</sup> The doctrine maintains that the human faculties of reason and will are limited and imperfect.<sup>227</sup> The anthropological appreciation of a fallen human nature in need of redemption endows canon law with a finite quality that is grounded in the imperfection of human reason and will.<sup>228</sup> Given the imperfections of nature, grace is necessary in order for the human person to understand the fullness of truth and to act in accord with the good.<sup>229</sup> No mere human effort can suffice. Although the law

keeps more for himself than he needs is guilty of theft"; "The use of all things that are in the world ought to be common to all"; and "No one may call his own what is common, of which if he takes more than he needs, it is obtained by violence . . . . The bread that you hold back belongs to the needy, the clothes that you store away belong to the naked."); and Brian Tierney, *Origins of Natural Rights Language: Texts and Contexts, 1150-1250*, in *Rights, Laws and Infallibility in Medieval Thought* 639 (Variorum 1997).

226. *Summa Theologica*, *supra* n. 15, at I-II, 81, 1 ("According to the Catholic Faith we are bound to hold that the first sin of the first man is transmitted to his descendants by way of origin."); and von Balthasar, *supra* n. 14, at 87-101 (discussing the effect of original sin as humanity's inability to accept divine love, which love offers the only hope for human wholeness).

227. *Summa Theologica*, *supra* n. 15, at I-II, 83, 2 (stating that original sin causes disorder in the soul, first reaching the will and then proceeding to the intellect).

228. Von Balthasar, *supra* n. 14, at 207 (suggesting that the fallen nature of the intellect and will are still capable of producing reason and freedom but not the ultimate act of self-transcendence without supernatural assistance).

229. *Summa Theologica*, *supra* n. 15, at I-II, 109, 1-2 (The first article posits that the person may know the truth through natural means, but needs grace to know truth which surpasses natural knowledge. The second article states that the disordered nature of the human person after the Fall is in need of grace in order to desire an act for the good); and Gilson, *supra* n. 15, at 343 ("Grace does not suppress nature . . . so also theology does not suppress philosophy . . . they add to them

aims to set the optimal conditions for human self-transcendence, no merely human law can achieve salvation.<sup>230</sup>

With the final words of the *CIC-1983*, the Supreme Legislator envisions that the law will be applied “observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law.”<sup>231</sup> The juridic principles of equity and the salvation of souls point to the transcendent end of the human person. Their inclusion in the law indicates the legislative intent to maintain the unity of law and theology.

Gratian identified equity with the transcendent values of the natural law.<sup>232</sup> Building on Gratian’s thought, Hostiensis (ca. 1200-1271) described canonical equity as “justice tempered by sweet mercy.”<sup>233</sup> He expanded the notion of canonical equity to include both natural justice and evangelical mercy.<sup>234</sup> Equity points to the limits of the law. The unity of law and theology is never perfect. Therefore, the application of the law in certain instances falls short of its ecclesial purpose. Canonical equity attempts to bridge the gap.

Canonical equity, may be written or unwritten. Written equity occurs when the statute expressly requires an application of equity.<sup>235</sup> Canon 19, for example, provides that canonical equity fill the *lacuna legis*.<sup>236</sup> In addition, the *CIC-1983* includes six other instances of

and they bring them to perfection.”).

230. Robert Song, *Christianity and Liberal Society* 219 (Clarendon Press 1997) (discussing the loss of transcendence and the burden it places on “earthly politics”); and Corecco, *supra* n. 2, at 134 (“[C]anon law goes to the very level of the ultimate and supernatural destiny of human beings and their salvation.”).

231. *CIC-1983*, Canon 1752 (“In cases of transfer, the provisions of can. 1747 are to be applied, always observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law.”).

232. D. I, c. 7; and Maurice Amen, *Canonical Equity Before the Code*, 33 *Jurist* 256, 266 (1973) (Equity for Gratian meant that which would constitute the supreme ideal of justice.).

233. Commentaria in V Decretalium Libros, I, c. 11, X, *De transactionibus*, I, 36 (1581); and Charles Lefebvre, *Natural Equity and Canonical Equity*, 8 *Natural L. Forum* 122, 123 (1963) (Hostiensis attributed the phrase to St. Cyprian.).

234. Lefebvre, *supra* n. 233, at 123 (suggesting that canonical equity’s “Christian impress” distinguishes it from natural equity); Charles Lefebvre, *Hostiensis, maître de l’équité canonique*, 28 *Ephemerides Iuris Canonici* 11-20 (1972) (attributing the special characteristics of the canonical equity to Hostiensis); and John J. Coughlin, *Canonical Equity*, 30 *Studia Canonica* 403, 406-418 (1996) (comparing Hostiensis’ notion of canonical equity to that of natural equity in the thought of St. Thomas and Suarez).

235. Charles Lefebvre, *Equity in Canon Law, in Equity in the World’s Legal Systems: A Comparative Study* 94-103 (Ralph A. Newman ed., Etablissements Emile Bruylant 1973) (comparing the functions of written and unwritten equity).

236. *CIC-1983*, Canon 19 (emphasis added):

If on a particular matter there is not an express provision of either universal or particular law, nor a custom, then, provided it is not a penal matter, the question is to be decided by taking into account laws enacted in similar matters, *the general principles of law*

expressed equity in the statute.<sup>237</sup> Unwritten canonical equity informs discretionary decisions and corrects the unjust application of law.<sup>238</sup> For those vested with discretionary authority, unwritten equity serves as a general interpretive principle.<sup>239</sup> It is an aspect of the legislator's intent, identified as a general interpretative principle in Canon 17.<sup>240</sup> In the face of an unjust result, canonical equity also permits one vested with governing power to correct the injustice on the ground that it would not comport with the legislator's intent.<sup>241</sup>

Canon law presumes that certain qualities remain characteristic of the mind of the lawgiver. Consistent with the Christian understanding of the human person, these characteristics include the intention to conform to the natural law through the use of right reason, to be intelligent and humane, to act in conformity with the common good and, above all else, to put on the charity and love of Christ.<sup>242</sup> Christian anthropology is ultimately discovered in the person of Christ. The promise of the interrelation between canon law and anthropology is only fulfilled to the extent that it reveals Christ's perfect truth, justice and love. The strong role of canonical equity renders the canon law with a dynamic quality in developing and interpreting legal principles in accord with the Christian understanding of what it means to be human.<sup>243</sup> It

*observed with canonical equity*, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned authors.

237. *CIC-1983*, Canon 221 § 2 (a judge must apply the law in accord with equity); Canon 271 § 3 (natural equity must be observed in an agreement between bishops to move a cleric from one diocese to another); Canon 686 § 3 (equity and charity must be observed in imposing excommunication on a religious); Canon 702 § 2 (equity and evangelical charity must be observed by a religious community in providing financial assistance to a member who has been dismissed); Canon 1148 § 3 (urging justice, Christian charity and natural equity concerning the wives of a man, in a polygamous marriage, who receives baptism); and Canon 1752 (requiring the application of canonical equity to the transfer of a pastor).

238. Charles Lefebvre, *Équité*, in *Dictionnaire de Droit Canonique* vol. 5, 394 (Letouzey et Ané 1953) (Canonical equity supplements and corrects the strict application of the law when it would conflict with the equitable characteristics of the mind of the lawgiver.).

239. Örsy, *supra* n. 9, at 60-63 (discussing canonical equity as an interpretative principle).

240. *CIC-1983*, Canon 17 (emphasis added):

Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator.

241. *Summa Theologica*, *supra* n. 15, at I-II, 96, 6 (When the enemy is in pursuit of the defenders of a besieged city, equity would permit the opening of the city gates, contrary to the strict application of law, as such an interpretation comports with the general welfare of the city and the mind of the lawgiver.).

242. Lefebvre, *supra* n. 132, at 100 (describing the presumed characteristics of the mind of the lawgiver to be reasonable and humane).

243. Örsy, *supra* n. 9, at 60 ("[C]anon law must always remain fully integrated with, and dependent on, religious and human values.").

thus serves as an animating principle that functions to prevent the dead letter of the law from obscuring its inner meaning.

From the personalist perspective, it is, however, the primacy of the principle of *salus animarum* (the salvation of souls), which ultimately demonstrates the transcendent purpose of the canon law.<sup>244</sup> The *CIC-1983* makes readily evident the concern for the salvation of souls in the administration of the sacraments to those *in periculo mortis* (in danger of death).<sup>245</sup> Filled with "effusive charity," the parish priest is to be solicitous in aiding the dying by "restoring them with the sacraments and commending their souls to God."<sup>246</sup> When his or her own minister is not readily available, even a Christian who is not in full communion with Rome may receive the sacraments from a Catholic minister. The Christian in danger of death must request the sacraments and indicate a catholic understanding.<sup>247</sup> The principle of the salvation of souls, in fact,

244. Helmholz, *supra* n. 4, at 395 (concern for *salus animarum* was one of the principal characteristics of medieval canon law).

245. In addition to the canonical provisions discussed in this paragraph above, see *CIC-1983*, Canon 865 § 2 (an adult in danger of death, who has manifested in some way the desire, may be baptized even with only some knowledge of the principal truths of the faith); Canon 867 § 2 (an infant in danger of death is to be baptized immediately); Canon 868 § 2 (an infant in danger of death is baptized licitly, even if the Catholic or non-Catholic parents are opposed to it); Canon 891 (a minor in danger of death who has not reached the age of discretion may be confirmed in the Latin Church); Canon 883, 3° (any priest may administer the Sacrament of Confirmation in a danger of death situation); Canon 913 § 2 (in danger of death, even a child who has not been prepared through catechesis may receive first communion as long as the child is able to distinguish the Eucharist from ordinary food); Canon 921 § 2 (a person in danger of death may receive the Eucharist even when they have previously partaken of the Sacrament on the same day); Canon 961 § 1 (a priest may administer general absolution when there is danger of death and there is no time to hear the individual confessions of the penitents, such as in the case of war or other extreme emergency); Canon 977 (a priest may validly absolve an accomplice, who is in danger of death, of a sin against the sixth commandment of the Decalogue); Canon 1068 (in the absence of any contrary indications, it is sufficient that the parties, who desire to be married and are in danger of death, assert the lack of impediments to their celebration of Matrimony); Canon 1079 §§ 1-3 (establishing the conditions when the bishop, parish priest or confessor may dispense parties in danger of death from ecclesiastical impediments to Matrimony); and Canon 1116 § 1, 1° (when the requisite sacred minister cannot be present or approached without grave inconvenience, persons in danger of death may enter into marriage as long as there are two witnesses).

246. *CIC-1983*, Canon 529 § 1 (emphasis added):

So that he may fulfil his office of pastor diligently, the parish priest is to strive to know the faithful entrusted to his care. He is therefore to visit their families, sharing especially in their cares, anxieties and sorrows, comforting them in the Lord. If in certain matters they are found wanting, he is prudently to correct them. *He is to help the sick and especially the dying in great charity, solicitously restoring them with the sacraments and commending their souls to God.* He is to be especially diligent in seeking out the poor, the suffering, the lonely, those who are exiled from their homeland, and those burdened with special difficulties. He is to strive also to ensure that spouses and parents are sustained in the fulfillment of their proper duties, and to foster the growth of christian life in the family.

247. *CIC-1983*, Canon 844 § 4:

permits the dying Christian to receive the sacraments from any priest. This includes the priest who lacks faculties or jurisdiction to administer the sacraments, even one who has incurred a *latae sententiae* (non-pronounced) censure such as excommunication or interdict.<sup>248</sup> A priest who lacks the proper faculties to hear confessions may validly absolve a penitent, *in periculo mortis*, when the penitent requests, even if an approved priest is present.<sup>249</sup>

The *CIC-1983* does not limit the principle of *salus animarum* to those in danger of death. In determining whether or not to suspend the execution of a decree, a superior must insure that the salvation of souls suffers no harm.<sup>250</sup> The bishop must keep it in mind when transferring a pastor to another parish or position.<sup>251</sup> The salvation of souls is the basis for the Church's right and obligation to address the social order in the proclamation of moral values and the protection of fundamental human rights.<sup>252</sup> The principle guides the priest in the hearing of all

If there is a danger of death or if, in the judgement of the diocesan Bishop or of the Bishops' Conference, there is some other grave and pressing need, catholic ministers may lawfully administer these same sacraments to other christians not in full communion with the catholic Church, who cannot approach a minister of their own community and who spontaneously ask for them, provided that they demonstrate the catholic faith in respect of these sacraments and are properly disposed.

248. *CIC-1983*, Canon 1335:

If censure prohibits the celebration of the sacraments or sacramentals or the exercise of a power of governance, the prohibition is suspended whenever this is necessary to provide for the faithful who are in danger of death. If a *latae sententiae* censure has not been declared, the prohibition is also suspended whenever one of the faithful requests a sacrament or sacramental or an act of the power of governance; for any just reason it is lawful to make such a request.

249. *CIC-1983*, Canon 976 ("Any priest, even though he lacks the faculty to hear confessions, can validly and lawfully absolve any penitents who are in danger of death, from any censures and sins, even if an approved priest is present.").

250. *CIC-1983*, Canon 1736 § 2:

In others [sic] cases, unless within ten day [sic] of receiving the petition mentioned in can. 1734 the author of the decree has decreed its suspension, an interim suspension can be sought from the author's hierarchical Superior. This Superior can decree the suspension only for serious reasons and must always take care that the salvation of souls suffers no harm.

*CIC-1983*, Canon 1737 § 3:

Even in those cases in which recourse does not by law suspend the execution of the decree, or in which the suspension is decreed in accordance with can. 1736 § 2, the Superior can for a serious reason order that the execution be suspended, but is to take care that the salvation of [souls] suffers no harm.

251. *CIC-1983*, Canon 1752 ("In cases of transfer, the provisions of can. 1747 are to be applied, always observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law.").

252. *CIC-1983*, Canon 747 § 2 ("The Church has the right always and everywhere to proclaim moral principles, even in respect of the social order, and to make judgements about any human matter in so far as this is required by fundamental human rights or the salvation of souls.").

confessions.<sup>253</sup> In its recognition that the human person is a spiritual being, the principal is inherently anthropological. It constitutes a manifestation that the law of the Church aims to facilitate a social order in which the spiritual nature of the human person flourishes. As with canonical equity, it is based upon the belief that law has not the power to perfect the human intellect and will.

The eschatological dimension in Christian anthropology conveys that law on its own cannot bring about the "kingdom to come."<sup>254</sup> The eschatological insight holds that justification in the here and now, as well as the consummation of time which is yet to come, are dependent on divine love.<sup>255</sup> From the perspective of the canonists, it is not that the law should be abrogated. Rather, given the fallen nature of reality, the vital function law plays in the community is inherently limited.<sup>256</sup> The recognition of law's limitations in the here and now, and its ultimate inability to establish the kingdom to come, endows canon law with a quality that functions to point beyond itself. The law's necessary but imperfect justice serves as a reminder of the fallen human condition and need for redemption by a source external to and above the human effort of law. Law plays a symbolic function to affirm the spiritual dimension of human existence.

#### IV. LIBERAL THEORY AND THE COMPARATIVE COUNTER LANGUAGE

The unity of law and theology serves a comparative function with regard to mainstream legal theory's internal morality and concept of freedom. The comparative function of the counter language raises a series of critical anthropological questions. Does law based on liberal legal theory doubt the capacity of the intellect to comprehend natural and supernatural truth? If yes, has it lost its claim to an objective moral basis grounded in the human person? Does the focus on subjective

253. *CIC-1983*, Canon 978 § 1 ("In hearing confessions the priest is to remember that he is at once both judge and healer, and that he is constituted by God as a minister of both divine justice and divine mercy, so that he may contribute to the honour of God and the salvation of souls.").

254. Song, *supra* n. 230, at 219 ("Without an eschatology which transcends and fulfils history, the human aspiration for permanence and stability may translate itself into the project of seeking the Kingdom of God on earth.").

255. Ioannes Paulus Pp. II, *Sacra Disciplinae Leges*, *supra* n. 1, at 51 ("[T]he purpose of the Code is not in any way to replace faith, grace, charisms, and above all charity in the life of the Church or of Christ's faithful.").

256. *Id.*:

[T]he Code rather looks toward the achievement of order in the ecclesial community, such that while attributing a primacy to love, grace and the charisms, it facilitates at the same time an orderly development in the life both of the ecclesial society and of the individual persons who belong to it.



autonomy in liberal legal theory militate against the formation of the human person through participation and solidarity? Consistent with the invention of self through the subjective will, has legal theory lost a balanced perspective of rights and responsibilities in relation to the common good? Do the anthropological assumptions that underpin mainstream legal theory neglect the spiritual dimension of human existence?

Prior to raising the anthropological questions, it is necessary to clarify the function of the counter language. First, the counter language is simply intended as a stimulus for examination. It is not intended to suggest that the law of the modern secular democracy adopt the anthropological assumptions of canon law. Second, in examining the philosophical basis of law based upon liberal theory, it would be erroneous to assume that the law simply reflects a direct translation of the theory. A large variety of factors and contingencies influence legislators and judges in shaping the law. These factors are not limited to any one person's thought or any single philosophical theory. The ideas of the liberal theorist have influenced and continue to influence the development of law. However, the complex array of philosophical values that underpin the law of the liberal state reflect the multifaceted processes that yield specific legislative enactments and judicial opinions. Third, although theological anthropology emphasizes community and the individual's realization through it, the counter language is not intended to eliminate the individual. The coercive power of the modern state requires continuing vigilance for individual integrity and autonomy. The counter language is intended as a possible balance to the exaggerated claims sometimes raised on behalf of autonomy, equality and secularity.

#### A. The Intellect and Law's Power to Bind

Due to its recognition of the equilibrium between faith and reason in the human intellect, canon law affords a counter language to law based on a less optimistic assessment of the capacities of the human intellect. The rights language of canon law is grounded in both the natural and supernatural goodness of the human person. The language respects the natural capacities of the intellect to understand fundamental rights and responsibilities. It also acknowledges the function of faith in illuminating the intellect to understand truth. Just as the human intellect has the capacity to know natural and supernatural truth, the *CIC-1983* represents an effort to transpose these truths into canonical language. In an irreducible unity, its outward form expresses a deeper *intellectus* of

the law as objective even as it is open to historical development. Absent the anthropological ground of canon law, one may ask what constitutes the moral predicate of the law. In other words, from where does the law's power to bind come?<sup>257</sup>

Lon Fuller argued that positive law has its own internal morality.<sup>258</sup> A proponent of natural law, Fuller provided a typical liberal account of the rule of law when he suggested that laws must be (1) general in scope, (2) made in public, (3) not retrospective, (4) clear in meaning, (5) enacted in conformity with approved procedure, (6) possible to enforce, (7) stable and (8) enforced fairly.<sup>259</sup> This description of the rule of law guarantees certain zones of freedom through neutrality, equality and fairness. Fuller's description, however, offers at best only a partial account of the internal morality of law. To limit law's morality to the principles of neutrality, equality and fairness may separate law from other aspects of substantive morality such as the basic goods and first principles of practical reason.<sup>260</sup>

Fuller's theory was at least in part a response to the "legal realist" school of thought.<sup>261</sup> The origins of legal realism may be traced to Oliver Wendell Holmes, Jr., who repudiated the formalism of the English common law and drew a sharp distinction between law and morality.<sup>262</sup> The distinction suited the needs of the radically autonomous

257. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 148-149 (1977) (posing the question by contrasting a "public-interest model" with an "economic or public choice model." The former "depends . . . on a belief in the reality of public or objective values and ends for human action," while the latter regards "all substantive values or ends as strictly private and subjective.").

258. Lon L. Fuller, *The Morality of Law* 153 (Yale U. Press 1964) ("In presenting my analysis of the law's internal morality I have insisted that it is, over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy.").

259. *Id.* at 46-94 (discussing the qualities that render an internal objectivity to the rule of law).

260. George, *supra* n. 64, at 113 ("[T]he strict observance of legal forms by such rules cannot guarantee that the laws . . . will not be substantively unjust.").

261. *American Legal Realism* xiii-xiv (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., Oxford U. Press 1993) ("The heart of the [Legal Realist] movement was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence."); and John Henry Schlegel, *American Legal Realism and Empirical Social Science* 8 (U. N.C. Press 1995) (noting the Realists' focus on empirical legal research and their attempt to convert policy preferences into law).

262. Oliver Wendell Holmes, Jr., *The Common Law* 1-2 (Little, Brown 1923) ("The life of the law has not been logic: it has been experience. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient."); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 461-462 (1897); and Karl N. Llewellyn, *The Bramble Bush, On Our Law and Its Study* 12 (Oceana Publications 1951) ("It is much more common to approach the law as being a *set of rules of conduct*, and most thinkers would say rules of *external* conduct to distinguish them from the rules of morality.").

individual, who was not bound by traditional morality. The realist school called for the abrogation of the common law, with its deep roots in natural justice and English custom and tradition, in favor of statutory provisions, judicial precedent and administrative regulation.<sup>263</sup>

Roscoe Pound further developed the sociological implications of Holmes' legal realism. Pound rejected the abstract content of formal legal principles and advocated a methodology in which law continually interacts with the prevalent political, economic and social circumstances of a given society.<sup>264</sup> Along similar lines, H.L.A. Hart argued that the judges create law, in difficult or "indeterminate cases," based on the conventional social rules accepted by the given society.<sup>265</sup> Hart concluded that the internal legal authority of any societal norm ultimately rested upon the external social values that are held by the majority of the population.<sup>266</sup> A different line of liberal thinking may be found in the work of Ronald Dworkin, who suggested that when judges decide cases they transcend conventional agreements and base their decisions on "the soundest theory of the law."<sup>267</sup> It would seem, however, that even Dworkin's soundest theories based on the "pedigrees of precedents" are recognized as such not on account of objectivity but rather the subjective preference of jurists.<sup>268</sup> The counter language

263. Wilfrid E. Rumble, Jr., *American Legal Realism: Skepticism, Reform, and the Judicial Process* 48-55 (Cornell U. Press 1968) (describing the realists skepticism about the formal rules of the common law tradition); and cf. Morton J. Horwitz, *The Transformation of American Law, 1780-1860: The Crisis of Legal Orthodoxy* 30 (Harv. U. Press 1977) (suggesting that by 1820 the shift in American jurisprudence from an understanding of law "as an eternal set of principles expressed in custom and derived from natural law" to an understanding of law as an "instrument of policy" was well underway).

264. Roscoe Pound, *The Need for a Sociological Jurisprudence*, 19 Green Bag 607, 611 (1907) ("The modern teacher of law should be a student of sociology, economics, and politics as well."); and *American Legal Realism*, *supra* n. 261, at 232-236 (discussing legal realism and the sociological jurisprudence).

265. H.L.A. Hart, *The Concept of Law* 113 (Oxford U. Press 1961) ("[R]ules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.").

266. *Id.* at 105:

Statements of legal validity made about particular rules in the day-to-day life of a legal system whether by judges, lawyers or ordinary citizens do indeed carry with them certain presuppositions. They are internal statements of law expressing the point of view of those who accept the rule of recognition of the system.

267. Dworkin, *supra* n. 39, at 17 (describing law as "a set of special rules identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed."); and E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 Mich. L. Rev. 473, 474-475 (1977) (describing the difference between the positions taken by Hart and Dworkin).

268. Ronald Dworkin, *Law's Empire* 256 (Belknap Press Harv. U. Press 1986) ("Different judges will disagree about each of these issues [of interpretations of precedent in difficult cases] and will accordingly take different views of what the law of their community, properly

serves a comparative analytical function with regard to liberal theory's account of the *intellectus* of the law.

First, a question may be raised about the objectivity of the law.<sup>269</sup> When justice relies principally on mere consensus, whether of society as a whole, or of some specialized group, whatever standard happens to prevail at a given historical moment and circumstance becomes the reason of what is good, right and just. The result may be a language of legal rights that ignores the natural and supernatural goodness of the human person. During the twentieth century, the oppressive laws of Facist and Marxist ideologies demonstrated the danger of law subject to manipulation based on subjective preference. It may be argued that such a danger does not apply to law based upon liberal theory. Liberal theory calls for a government of limited powers. Moreover, there can be no disputing that it has set the conditions for advances in terms of equality of opportunity for participation in the political process and competitive market. Important as these values may be, they fail to offer a full account of the human good. Access to the market and political process are only aspects of a much larger human good. The unrestrained desire for financial gain can easily obscure important human values. The need for a prosperous market economy may override concerns such as education, healthcare, the arts and the environment. The law may encourage a reductionistic image of the human person as producer and consumer.

Perhaps most importantly, the law's objectivity depends on its recognition of exceptionless moral norms that prohibit intrinsic evil. The immense evils perpetrated during the twentieth century verify the need for certain specific and negative prohibitions. Such absolute norms admit no privileges for any individual or state.<sup>270</sup> The limitation of law's *intellectus* to autonomy, equality and government neutrality falls short of the fullest possibilities for the human person. It runs the risk of abdicating an internal and stable moral logic upon which positive law can be predicated and against which standard it can be measured. The counter language suggests that the objectivity of law requires an *intellectus* that fosters a proper balance of individual rights and responsibilities grounded in the nature of the human person.

---

understood, really is.”).

269. Robert P. George, *What is Law? A Century of Arguments*, *First Things* 23, 29 (Apr. 2001) (discussing the importance of the “objectivity” of law).

270. John Paul II, *supra* n. 80, at 96.

Second, the *intellectus* of mainstream legal theory often neglects the spiritual nature of the human person.<sup>271</sup> John Rawls, for example, admits at most a quite limited role for theological values and language in public discourse.<sup>272</sup> Rawls' so-called "legitimacy principle" about the tightly guarded secular parameters of reasoned public discourse may deprive legal theory of a complete and balanced language. One can readily appreciate the hesitancy about adopting the "comprehensive worldview" of a particular religion or secular ideology in a democratic and pluralistic society.<sup>273</sup> Such legitimate concerns, however, do not require that public discourse reject aspects of traditional theological language.<sup>274</sup> The exclusively secular language of liberal theory neglects potential linguistic allies.<sup>275</sup> Rawls' theory of justice stresses the importance of the "difference principle" which is consistent with distributive justice.<sup>276</sup> The argument for a system of distributive justice is, of course, no stranger to the Catholic theological tradition.<sup>277</sup> The idea that the larger society has an obligation to the powerless and poor is

271. E.g. Rawls, *supra* n. 43, at 781 (asking whether it is even possible "for citizens of faith to be wholehearted members of a democratic society who endorse society's intrinsic political ideals and values"); and John Rawls, *Political Liberalism* 147-149 (Colum. U. Press 1996) (defining public reason as an "overlapping consensus," and arguing that political power may not be exercised on the basis of controversial religious values). Cf. Song, *supra* n. 230, at 225-226 (suggesting that revelation offers a theological critique of liberalism); and Paul J. Weithman, *Citizenship and Public Reason* 125, in *Natural Law and Public Reason* 156-162 (Robert P. George & Christopher Wolfe eds., Georgetown U. Press 2000) (rejecting John Rawls' position that citizens in the public forum ought not to make appeals to religious comprehensive world views).

272. Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith*, in *Natural Law and Public Reason* 171, 177-178 (Robert P. George & Christopher Wolfe eds., Georgetown U. Press 2000) (criticizing Rawls for not recognizing that persons with comprehensive religious worldviews may dissent from the doctrines of political liberalism, not on selfish grounds, but because they believe the liberal doctrine to be morally wrong).

273. Rawls, *Political Liberalism*, *supra* n. 271, at 243:

What public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of public political values, it being understood by everyone that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values.

274. Michael J. Perry, *The Idea of Human Rights, Four Inquiries* 11-41 (Oxford U. Press 1998) (suggesting that human rights language must ultimately rest on a religious foundation).

275. Rawls, *Political Liberalism*, *supra* n. 271, at 137 (arguing that the liberal principle of legitimacy requires that questions of basic justice and constitutional law need to be settled by principles and ideals upon which all citizens may be reasonably expected to endorse).

276. Rawls, *supra* n. 39, at 76-80 (describing the difference principle as requiring distribution to the least advantaged).

277. *Summa Theologica*, *supra* n. 15, at II-II, 61, 1 (describing distributive justice); *Gaudium et Spes*, *supra* n. 14, at 975-976 (discussing the need for distributive justice in society for the just distribution of material goods); and Finnis, *supra* n. 63, at 165-177 (describing distributive justice from a philosophical perspective with notations to Catholic theology and social teaching).

also not foreign to theological discourse.<sup>278</sup> Theological language would serve to reinforce this fundamental conception of justice. The law's recognition of the validity of theological language corresponds to the capacity of the intellect for reason and faith as complementary forms of human knowing.

Finally, the *intellectus* of the law based on mainstream theory may result in the perception that the law's power to bind is conferred by political power alone. Such a perception tends to reduce the law's persuasive force to the coercive power of the state. The counter language recognizes the role played by both reason and faith in the law's justification. The process in which natural law tradition interacts with historical consciousness corresponds to the capacity of the intellect. As is the case for the individual person, law finds coherency through an integration of the memory with the needs of the present moment. Faith enhances what reason requires for the persuasiveness of the law. The unity of law and theology endows the law with a transcendent justification for individual compliance with the law. Deprived of an internal morality grounded in the intellect's capacity for reason and faith, law encounters difficulty in embodying the deepest ideals and aspirations of the culture. It is unlikely to move the individual will to choose the common interest over self-interest. The internal reason of the law, thus, has an important relationship to the exercise of individual will.

### B. The Will and Human Fulfillment

Consistent with the anthropological analysis, the *CIC-1983* manifests an understanding of human freedom that integrates an abiding human nature with the capacity for self-determination. Canon law is intended to safeguard those social structures that set the optimal conditions in which the individual may discover fulfillment through participation and solidarity. Canon law recognizes the natural human need for participation and solidarity as well as the spiritual desire for communion. It attempts both to protect individual rights and articulate values that remain central to communal life. The counter language's integration of negative and positive accounts of human freedom contrasts with liberal theory's propensity to define freedom in terms of the absence of constraints on individual autonomy. When freedom is conceived of primarily in negative terms, rights language tends to foster an image of the individual who is in possession of unrestricted freedom

---

278. *E.g. Gaudium et Spes*, *supra* n. 14, at 972-973 (recognizing the right to work and to remuneration that affords a dignified livelihood for individuals and families).

to pursue private ends.<sup>279</sup>

This linguistic tendency is perhaps nowhere more obvious than in the growing conflict between the individual and the family.<sup>280</sup> The primacy of the subjective self is evident in the frequency of divorce with its negative consequences for the objective social reality of marriage and family.<sup>281</sup> It is also a constitutive aspect of the “substantive due process” right designed by the United States Supreme Court. In *Griswold v. Connecticut*, the Court struck down a state statute that criminalized the use of contraceptives “for the purpose of preventing conception.” Appealing to the sacredness of marriage, the Court described the statute as “repulsive to the notions of privacy surrounding the marriage relationship.”<sup>282</sup> The privacy right protecting the distribution and use of contraceptives was extended to non-married individuals in *Eisenstadt v. Baird*.<sup>283</sup> This legal reasoning then supplied the justification for the right of a woman to have an abortion in *Roe v. Wade*.<sup>284</sup> Thus, the privacy right, which the Court initially justified on the “sacred character” of marriage, was extended to include constitutional protection for individuals to distribute and use contraception outside marriage as well as to perform and have abortions.<sup>285</sup>

The transition in reasoning from *Griswold* to *Eisenstadt* and beyond represents a movement from a balanced concept of freedom to a negative one. The counter language comports with the part of *Griswold* that recognizes the natural and sacred values of family life. Marriage

279. John Paul II, *supra* n. 80, at 32 (“The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil.”).

280. Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* 10 (Doubleday 2000) (indicating that married persons, who have not been divorced, and their children tend to be better off in terms of physical and emotional health as well as financial status than divorced spouses and their progeny); and Judith Wallerstein, Julia Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* 294-316 (Hyperion 2000) (on the basis of a twenty-five year longitudinal study of divorce, concluding that the “divorce culture” yields long term negative consequences for individuals, families and society).

281. Waite & Gallagher, *supra* n. 280, at 187-188, citing *Bureau of the Census, Statistical Abstract of the United States: 1997 Table 145* (117th ed. 1997) (noting the statistical indication that during the last years of the twentieth century the national divorce rate has leveled-off at approximately fifty percent of all marriages and may be slightly declining).

282. 381 U.S. 479 (1965).

283. 405 U.S. 438 (1972).

284. 410 U.S. 113 (1973).

285. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the majority of the Court refused to extend the privacy right to homosexual activity in that such activity was neither “implicit in the concept of ordered liberty,” nor “deeply rooted in this Nation’s history and tradition.” By a five to four vote, the Supreme Court reversed its holding in *Bowers*, in the 2003 case *Lawrence v. Tex.*, 123 S.Ct. 2472 (2003).

and family life remain the most fundamental forms of participation and solidarity in human experience. These social structures correspond to a positive conception of freedom at the foundation of the societal order. In *Eisenstadt*, the Court apparently was unable to distinguish the natural and sacred positive values from the subjective choice of an individual. Equality required that freedom be defined negatively as the absence of government constraint on the autonomous individual. The Court's concern for autonomy precluded a consideration of the traditional natural and theological justifications for considering marriage as deserving of preferential treatment. The principles of autonomy and equality were reinforced by government neutrality, which in the Court's view prevented the legislative from endorsing other substantive values.

Apart from whether the particular decisions in this line of legal reasoning are ultimately just, the judicial reasoning that underpins the decisions calls into question the pedagogical function of the law. The lesson taught by the Court's reasoning suggests the sovereignty of individual choice against competing substantive values. Such a teaching tends to diminish concern for the common good. From the anthropological perspective, it reflects a concept of the human will in which individual autonomy trumps all other principles. It creates a dynamic between the individual and the state that diminishes the function of mediating structures, such as the family, the most natural and basic form of human association.<sup>286</sup> The constitutional language of individual privacy has led to a re-definition of the family's very nature and meaning.<sup>287</sup> Law rooted in the absolute sovereignty of the will defines social institutions in accord with subjective individual preference. Its account of the human good is predisposed to be limited to the concepts of equality, autonomy and neutrality. Any fuller account of the human good is likely to offend some subjective preference. The result is primarily a negative conception of freedom.

The secular doctrine of the will's sovereignty and the negative conception of freedom contrasts with the traditional theological

---

286. Christopher Lasch, *Haven in a Heartless World: The Family Besieged* 146-147, 188-189 (Basic Books 1995) (arguing that excessive individualism weakens the family and consequently undermines one of the principal sources of societal cohesion).

287. The trend toward redefinition of marriage through the recognition of the legal right was apparent in *Baker v. Vi.*, 744 A.2d 864 (Vt. S.Ct. 1999), where the Vermont Supreme Court held that a same-sex couple may not be deprived of the statutory benefits and protections afforded to heterosexual married couples pursuant to the Common Benefits Clause of the Vermont Constitution. In *Goodridge v. Dept. of Pub. Health*, 2003 WL22701313 (Mass. 2003), the highest court in Massachusetts held that prohibiting the granting of marriage licenses to same-sex couples violated the Commonwealth's constitution.



understanding of free will. The unity of law and theology reflects optimism about the possibilities with realism about the limitations of the human will.<sup>288</sup> The truth about the human situation contained in the theological doctrine of a fallen human nature in need of redemption forms one of the anthropological foundations of the Western tradition.<sup>289</sup> The doctrine of original sin serves as a reminder that law itself is at least partially necessary on account of the reality of evil.<sup>290</sup> Legal theory split from the theological doctrine may fail to acknowledge the limitations inherent to the human situation. It is thus prone to be burdened by unrealistic expectations for building a perfect culture in the here and now.<sup>291</sup> Ideals meant to express the aspirations of a culture are reduced to immediate pragmatic demands that the legal system cannot possibly attain. Transcendental ideals may be met with cynicism and despair about government power rather than hope for the future.<sup>292</sup>

As a further consequence of the negative language of human freedom, the natural reciprocity between rights and responsibilities fades from consciousness in the discussion of legal rights theory.<sup>293</sup> A danger lies in a distortion of the correct proportions in the relations between the individual and society. When the *intellectus* of the law knows only a negative concept of freedom, the law lacks the necessary language to form the societal will to act for the human good. Ultimately, it may yield not human freedom but individual and societal wills that are deprived of the natural social structures, which are necessary for genuine human fulfillment.<sup>294</sup>

288. *Summa Theologica*, *supra* n. 15, at I-I, 95, 1 & 2 (discussing creation of the human person in the state of grace lost through sin); and Gilson, *supra* n. 15, at 176 (referring to the "radical metaphysical optimism" of St. Thomas's understanding).

289. Berman, *supra* n. 5, at 166-185 (describing the Judeo-Christian theological doctrines of original sin, judgment and atonement and their implications for Western law).

290. Von Balthasar, *supra* n. 25, at 105-119 (describing how early Christian thinkers conceived of the private ownership of property as a consequence of the Fall until Thomistic thought gradually replaced this historical notion of natural law with one based upon a more abstract concept of nature).

291. Song, *supra* n. 230, at 219 ("Without an eschatology which transcends and fulfils history, the human aspiration for permanence and stability may translate itself into the project of seeking the Kingdom of God on earth.").

292. *Id.* at 218-219 (describing the "religion of progress" as the "manic reaction to the despair" of modern society that has lost the transcendent).

293. This is not to suggest that only a negative definition of human freedom is operative in liberal theory. In his highly regarded statement of liberal theory, John Rawls argues in favor of distributive justice. Rawls, *supra* n. 39, at 310-315 (arguing that in a well-ordered society, "a just scheme gives each person his due").

294. According to the principle of subsidiarity of Catholic social teaching, the state ought not to appropriate to itself that which can be accomplished by smaller natural associations of individuals, groups and communities. For the classic statement of the principle, see Pope Pius XI, *Quadragesimo Anno*, in *Seven Great Encyclicals* 125, 147 (William J. Gibbons ed., Paulist Press

The analysis of the negative conception of freedom points to a general contradiction in mainstream legal theory. The theory focuses on equal opportunity for the autonomous individual to compete in a fair market and participate in the political process.<sup>295</sup> Yet, in order to advance the conditions that secure the neutral market and open politics, the liberal state also depends on individual sacrifice—sometimes of heroic proportions. Legal theory's negative definition of freedom as the absence of constraint lacks the positive meaning to justify the transcendence of self-interest. In contrast, the theological language of self-transcendence embodies the paradoxical human wisdom that genuine human fulfillment cannot be separated from self-transcendence.<sup>296</sup>

## V. CONCLUSION

The unity of canon law and theological anthropology reflects the search for truth at the core of the human intellect. Love for the truth requires an understanding of practical reason that encompasses the integration of somatic, emotional and intellectual functions. In manifesting the intellect's power to comprehend basic human goods and derivative principles, the *CIC-1983* attests to the natural goodness of the human person. The *CIC-1983* encourages a course of human action in accord with the natural rights and responsibilities that are ontologically grounded in the human person. The fundamental rights and responsibilities are enhanced by the *CIC-1983*'s recognition of reason and faith as complementary forms of human knowing. The inner meaning or *intellectus* of the *CIC-1983* is intended to set the optimal conditions in which human nature is perfected by grace. The *intellectus* serves as a counter language to law based upon liberal theory. Canon law respects the abiding character of the human person throughout history even as it requires a keen awareness of the human person who acts in history to create meaning. The modern legal project is inclined to respond to secular historical circumstance alone. The counter language raises a question about the law's objectivity and consequently its power to bind.

---

1963).

295. E.g. Nozick, *supra* n. 39, at 167-174 (arguing against distributive justice in the liberal state on the ground that once anyone has justly acquired property it would be unjust for the State to deprive the property holder for the purpose of aiding other persons).

296. E.g. von Balthasar, *supra* n. 14, at 275-304 (discussing the Christian Mysteries of death and resurrection as the paradigm of self-sacrifice).

The unity also promotes the capacity of the human will for trust of others and something greater than the self. Canon law's balance between negative and positive understandings of freedom encourages the human person to exercise the will for participation and solidarity with others. As exemplified by its regard for local communities such as the parish, the *CIC-1983* posits a harmony between individual dignity and the common good. Law informed by a balanced account of the human good fortifies the will to act in accord with the good in solidarity with others. Canon law's positive language seems to offer a more complete account of human freedom than that contained in liberal theory, which tends to focus on liberty as the absence of constraint. Law is elevated by the recognition of religious values and, in particular, through the theological understanding of individual self-transcendence.

In attributing much significance to the transcendent, the *CIC-1983* contains within its corpus the recognition of its function as a sacred symbol. Its sacramental character of truth and trust points to the fullest possibilities for the individual and community. The unity of canon law and theological anthropology corresponds to the nature of the human person as a dynamic whole, body and soul. Certainly, it remains impossible to transpose perfectly the inner meaning into the legislative text. Law alone cannot accomplish salvation. The canonists, nevertheless, enjoy a tradition of fashioning law with an intelligent and creative commitment to theological anthropology. That law aims to foster the love for truth and capacity to trust which are essential to the human person's spiritual progress. As a result, the unity of law and theology elicits self-possession and self-transcendence. The unity suggests something about the purpose of law. Law ought to promote the highest spiritual dimension of human action. Perhaps, the vision of the *CIC-1983* lies beyond the reach of modern legal systems predicated upon liberal theory. Nonetheless, the anthropological vision offers a challenge and stimulus to the mainstream legal thought.