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The Nature of the Law and the Role of Citizenship

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First of all, I want to thank you for being here tonight to join with me in thinking about something that has been important to me for almost half a century (and I am sure to most of you)—the law. One fundamental question about the law concerns a core issue: what is its essence? In short, what is it about? By tackling in this brief hour this subject, I am hopeful that these thoughts will spur your own reflections on the law and why it is vital to us and to our society. The points I shall make to you may be placed into two complementary categories: the first deals with the essence of the law itself, i.e., what is it that makes the law the law; the second concern deals with the role of the citizen—as law-maker, administrator, judge, other official, or voter—in defining what the law is and what its content should be. At the outset, these two groups are inextricably related to the vitality of our republican democracy.

From my perspective, I know that these two interrelated topics

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deserve a treatment far more profound than can be offered in today's presentation. But in this hour, I hope to specify and briefly develop several elements that are needed for the task of responsibly addressing the two categories which I have just identified. Let me begin by tackling the law's essence. What is it? How do we begin?

I.

From an historic perspective we can think of some of the earliest legal systems that dealt with the regulation of human conduct from the ancient Jewish law that derived from the Mosaic law; the law of Hammurabi; the legal systems of ancient Greece and Rome; and, the law of the Church. As we think of these ancient systems of codified principles and how they were applied to the lives of those who lived in the legal systems supported by these laws, we should see that there is something common that underpins each of them. What is this common denominator? As a teacher of the law and as a former practitioner of the law, I have been working on an understanding of this theme for some time. As a result of my ongoing reflection, I have concluded that there is a purpose or an objective that appears to be at the heart of the matter of why we have law and the juridical institutions that participate in its existence. While I agree with Professor Michael Olivas that we teachers of the law are also “in want of a purpose,”¹ much of what he said when addressing the topic dealt with the preservation of the profession of teaching the law. While I have some sympathy with this enterprise, I must also be candid and assert that there is something more, there has to be something more to the teaching of the law because there is something more to the law than the preservation of the profession that teaches it and the profession which practices it.

And what the “it” is is the subject of this lecture. Regardless of who we are as individuals, each of us has a sense of the law and what it is about. For those who have businesses that are regulated by the state and its legal institutions, their livelihoods are intersected by the law. For those who earn income, their revenue is regulated by the law. For most who want to do something in the public square—from speech, to publication, to operating a motor vehicle—their lives and the law are inseparable. But if the law is seemingly inescapable from human existence, what can be said about its essence, its nature? Does it have something to do with logic, or to borrow from the famous line of Oliver Wendell Holmes, does it have something to do with experience rather

1. Michael A. Olivas, *Ask Not For Whom the Law School Bell Tolls*, 41 WASH. U. J.L. & POL'Y 101, 101 (2013).

than logic?² In an important way, it deals with both. Allow me to explain my position.

Since the beginning of human history, the making and application of law has been a part of civilization. Typically as we think about the history of the law—law designed to protect the citizenry and the society—we see two things that precede the law’s drafting and promulgation. The first item is, when all of the jokes about law are put aside (for example, the line misattributed to Bismarck that laws are like sausage, it is better not to see them being made),³ we ascertain that the law begins with the activity of human intelligence. In candor, while each of us may have differing opinions about the merits of what the thinker is thinking and what is the measure of intelligence behind the thinking, we need to acknowledge that the human intellect is at work as laws are formulated. The second element follows, but it is trickier to evaluate: this human intelligence has the capacity to comprehend the intelligible world or universe that surrounds us. But what does the intelligence comprehend, and how is the object of the comprehension being registered? For the time being, we can see that there is something about the law that makes it a synthesis of this intelligence comprehending the intelligible reality: the human mind acknowledges the need for authoritative normative direction that responds to some matter of concern to society. This is what is or should be at the heart of the law-making enterprise. But we are still not at the essence or nature of the law itself. More work is in order.

Of course, we should recognize that the measure of intelligence and its effectiveness in comprehending what is needed by the way of law to respond to the needs of society is not always the same for everyone. Something is still missing as we consider the possibility that some laws which are the product of a great deal of thought have problematic if not evil consequences. For example, we may recall the Fugitive Slave Law or the Nuremberg Laws.⁴ There is no doubt that much thought went

2. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881) (“The life of the law has not been logic: it has been experience.”).

3. See Peter L. Strauss, *The Courts & The Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 265 n.92 (1998) (noting that regardless of whether Bismarck made this statement, many agree to its message).

4. See U.S. CONST. art. IV, § 2, cl. 3 (including the return of escaped slaves as a component of entitling citizens of each state to the privileges and immunities of citizens in the several states); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (mandating that states return escaped slaves and imposing criminal sanctions for individuals who helped slaves escape); INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 96–111 (Deborah L. Schneider trans., 1991) (describing the theoretical underpinnings for and the process of creating the Nuremberg Laws).

into their design. As we think about such problematic or evil laws, we can identify the need for the law-making process to take account of the moral implications of the law that will be produced. Human intelligence and its perception of the moral concerns of society are essential to the law-making enterprise and to the law itself. The same human intelligence, which has a crucial role in the making and interpretation of the law, has the capacity to recognize that the law is more than just a way of making and applying laws—norms—to many aspects of human existence. It is more than a system of achieving certain political results. It is a system that is integral to human society, which often goes by the name of the rule of law and is dedicated to achieving the common good. We know the rule of law as the norms and the system of governance including the making, interpretation, and application of the norms by which we live in civil society. But the theme of today's presentation is to obtain a better understanding of what is the law itself, that is, its nature/essence. Hence, there is need to take into consideration its moral dimension. After all, the result and impact of the law will tell us a great deal about its nature.

This issue raises the question that has intrigued the members of the human family since ancient times: this issue is the quiddity, or the "whatness" of the law. In a more contemporary way, we can think of quiddity (whatness) as addressed by a series of questions such as: what is the law about; what is it supposed to do; and why do we need it?

In offering an initial response to these and related questions, we might think of Thomas Aquinas's first principle of the law which takes into consideration moral concerns: do that which is good and avoid that which is evil.⁵ The Swiss Jesuit theologian Viktor Cathrein (1845–1931) offered a similar insight when he stated that the law is "the light of reason inherent in us by nature, through which we perceive what we ought to do and avoid."⁶ Saint Paul of Tarsus presented another useful formulation by acknowledging that the fundamental quality of the law is that which God has inscribed on our hearts.⁷ In relying on the work of John Courtney Murray, my take about what is at the heart of the making of norms, which are the laws for society, is this: the law is premised on the two assumptions that I have already mentioned, viz., (1) the human person is intelligent, and (2) human intelligence is capable of

5. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, at pt. I-II, q. 94, art. 2 (Fathers of the English Dominican Province trans., 1952), *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD 1, 221–22 (Robert M. Hutchins et al. eds, 1952).

6. HEINRICH ROMMEN, *THE NATURAL LAW* 181–82 (Thomas R. Hanley trans., 1949) [hereinafter ROMMEN, *THE NATURAL LAW*].

7. *Romans* 2:15.

comprehending intelligible reality so that the governance of society by the rule of law proceeds in a rational, moral, and just fashion.⁸ And now I have added a third area for consideration: the moral factor or dimension.

It is necessary to evaluate what I have presented so far. Knowing that I have begun, but not completed a process of explaining the nature of the law, we must consider whether the essence of the law is a command; is it a suggestion; is it a grant of something to someone; or, is it something else? Is it an obligation, duty, or responsibility? Is it a right to be claimed by one and satisfied by another? Is it the mechanism for attaining whatever is good and avoiding whatever is evil?

One way of sorting out answers to these questions is by returning to the emphasis I just placed on the synthesis of the intellect comprehending the intelligible reality given the context of the common good and the accompanying moral evaluation. We probably agree that the human person is an intelligent creature. Notwithstanding different measures of how this intelligence is distributed and exercised, we probably also agree that each person is gifted with a degree of reason. Notwithstanding the subjectivity that can compromise human reason, it also remains within the capacity of the human person to think and comprehend beyond one's self to understand the subject matter that is the focus of the reason in an objective manner. In short, what I am suggesting here is that the individual person has the capacity in reasoning to understand the matter from the perspectives of others as well as the perspective of one's self. This is the fundamental aspect of the moral question—the distinction between good and evil—to which I have alluded. Moreover, this is the basis for contending that the human person is intelligent and has the capacity for thinking and acting objectively, i.e., beyond self-interest, in order to achieve what is good and right and to avoid what is not.

With this objective intelligence at work, the human mind has the aptitude to comprehend the events and needs of the world that necessitate the making and application of norms that promote human flourishing and the common good. By the common good, I mean this: it is the achieving and preservation of the good for the individual *and* the good for of all members of the same society. The good for anyone cannot be considered without simultaneously considering the good for

8. See JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 109* (1960) (describing the presupposition of the doctrine of natural law as: “[T]hat man is intelligent; that reality is intelligible; and that reality, as grasped by intelligence, imposes on the will the obligation that it be obeyed in its demands for action or abstention”).

others. The norms necessary for advancing the common good are the basis of the positive human law that are essential to any society so that the common good may always be the objective of the law. Why? The answer is uncomplicated: the law serves all rather than some members of society. Certainly there are corruptions of legal systems where the common good is not the goal of the law, its making, or its application and adjudication. But objective intelligence sways the law-maker from this tragic result which is contrary to the law's nature.

An illustration of a corrupt legal system is the totalitarian state whose values are typically characterized by furthering the interests of the ruling party rather than the common good.⁹ It is emblematic that in the totalitarian legal system the will (the desire) outstrips or outpaces the crucial role of the unbiased intellect as I have described it. Although the will is a vital part of human nature (most people have goals and desires), it must nonetheless be tempered by the intellect, which is guided by objective reason. If it is not, the will can generate an appetite that is destructive to the person whose will is the directing force and to those who are affected by this will's exercise.

A will that is guided by the discerning and objective intellect is needed to direct both the person and society toward goals that are both useful and essential to achieving the common good. By way of example, the Preamble of the United States Constitution offers a critical perspective into the will desiring the common good by asserting as objectives: the forming a more perfect union, the establishing justice, the insuring domestic tranquility, the providing for the common defense, the promoting the general welfare, and the securing the blessings of generations for the existing as well as future generations.¹⁰ These aspirations are attainable when the law that is the product of the Constitution is guided by objective reason. I hasten to add here that the Preamble to the basic law of the United States reflects inspiring objectives that are applicable beyond the shores of the land where this law was intended to apply.

But now we must contend with the question, where does the objective reason come into play? We begin by looking at something foundational to the Constitution, viz., the Declaration of Independence. In this document we see objective reason in operation. Its foundation is a

9. See J. L. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* 43–49 (1970) (noting how members of the controlling party that “claim to know and to represent the real and ultimate will of the nation . . . [have] a blank [check] to act on behalf of the people, without reference to the people's actual will”).

10. U.S. CONST. pmbl.

claim to the natural law—or as Jefferson termed it, “the Laws of Nature and of Nature’s God”—which present truths about the human person and human society that are self-evident.¹¹ This is objective reason contemplating the common good. Moreover, this is the nucleus of the nature of law! Through the use of objective reason, the door to truth will open, thereby making that which is self-evident accessible to those who exercise objective reason. But how does the person seeking objective reason find it? Is it something attained in law school or the elite universities? Well, it is attainable by anyone who cultivates fidelity to the cardinal virtues, for they direct the human person toward the life that is concerned about the common good.

It is through the exercise and application of the cardinal virtues (prudence/wisdom, temperance/forbearance, courage, and justice) that the human person tempers the will through objective reason. In short, these virtues prevent the person and the societies of persons from seeking objectives that are contrary to the natural law and its practical objective, the common good. These virtues are ingrained in many people; moreover, they are essential to human societies and their success in caring for their members. Additionally, these virtues exercise an important role in the formulation of law, which will be used to guide and regulate the society in the endeavors directed toward achieving the common good. As the virtues build the character of the human person, the persons thus affected will be much more inclined to consider not only self-interest but also the interests of one’s fellow human beings. The virtues prepare the human person to be both good citizen and good neighbor who sees the society in which he or she lives as the place where the common good can become a reality. This is why the Declaration of Independence asserts that prudence is the mechanism to regulate inclinations; however, the human will—the desire—can often be strong but is not tethered to the objective reason of prudence and wisdom.¹² It is this objective reason that is the key to preventing governments and their laws from becoming despotic so that “the Laws of Nature and of Nature’s God” are not compromised. In order to avoid this compromise, Jefferson penned that the “Supreme Judge of the world” was the appeal to which objective reason would be made and heard.¹³ By way of relevant digression, we do not hear very often such words today.

11. THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).

12. As the Declaration states, “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes.” *Id.*

13. *Id.* at para. 6.

The Declaration and the Constitution recognize the importance and the role of the law and the rule of law. In their respective fashions, these texts disclose something about the law's nature by considering the purposes for which the laws generated by right and objective reason and promulgated by the lawful human authority are ordained. One of these goals is to restrain the will that is misled by an appetite that puts aside objective reason. Another is to promote the common good as the Preamble of the Constitution declares.¹⁴ Now the skeptic may conclude that what I have just stated is not only a lofty goal, but an unrealistic one as well. To justify this position, the skeptic may adduce that the human person is an imperfect being living in an imperfect world that is characterized by imperfect institutions. While the skeptic may correctly acknowledge the existence of human imperfection, which I do not contest, I add that the human person and human institutions can move toward improvement, a movement directed by human intelligence and virtuous conduct.

The foundation of this response to the skeptic is established upon the presumption that the human person is intelligent. While everyone has different measures of intelligence, the hallmark of the human being is that he or she possesses and uses this aptitude. In addition, most everyone has the capacity to distinguish between what the "is" is and what could make the "is" better. This is the distinction between being and oughtness made by Heinrich Rommen.¹⁵ Put simply, this is the distinction between the "is" and the "ought." But the distinction does not end here because the question must be asked: how does one know that there is something that is the "is" from something that is the "ought"?

Understanding what something is—what it is about, if you will—is crucial to virtually any human endeavor including the law. If I need to make a small repair to replace a screw on my eyeglasses, I look for a small screwdriver rather than a hammer. Upon thinking about what needs to be done, I recall that there is a tool designed for this very function. While I acknowledge that there are many tools that are useful to human activities, the screwdriver, because of what it is, is the instrument that will properly assist me. Its essence or nature is something that I comprehend, and the tool's essence enters the choice I

14. See U.S. CONST. pmbl. ("[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common [defense], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .").

15. See ROMMEN, *THE NATURAL LAW*, *supra* note 6, at 161–62 ("[E]very attempt to establish the natural law must start from the fundamental relation of being and oughtness, of the real and the good.").

make in selecting the instrument to assist me in completing my project.

However, as I survey the other projects that I need to tackle, I might consider whether the screwdriver of any size or type (e.g., Philips, flathead, etc.) is the tool I need. I may reach the conclusion that the work now facing me requires a different tool because I realize that the screwdriver is unsuitable for the new work that is ahead of me. I consider the other tools that are available, but I conclude, because of my thinking about what needs to be done, that those tools in my tool chest are unsuitable for the task. I realize that there ought to be a tool which is suitable, and I realize that my neighbor has such a device which I borrow. This consideration of the “is” and the “ought” enable me to conclude the ontology of the tools that are available. This understanding of ontology or essence/nature, further provides the catalyst for concluding that for some future work, I may have to develop a new tool that is fitting to the undertaking ahead of me.

This scenario has applicability to the nature of the law. Through critical thinking that is an element of human intelligence, I come to see that there is an essence or nature of the things that surround human existence. I further realize that other people have the same or similar capacity to reach analogous conclusions. This is possible because in these circumstances the person, regardless of who he or she is, can think about what needs to be done and extends this thought process beyond what is immediately within his or her thoughts. In other words, the person goes beyond the knowledge of the personal self and thinks more deeply and more objectively about the matter under contemplation. The appeal of self-interest so attractive to most persons begins to diminish, and it is objective human intelligence that enables the person to see this. In short, the objective thought process enables the individual to reach some truth about the essence of thing and its being and determines whether it will satisfy the need which presents itself or if something else must be pursued to fulfill the need.

As human intelligence has the capacity for understanding what something is and what something is not, this intelligence possesses the additional aptitude for determining if the object under study lacks something essential to its nature and objective. We therefore know what must or ought to be done in order to remedy any deficiency which may exist. Thus, we can also make the is/ought distinction regarding the precepts of law. If this perspective seems plausible, we have the capacity to see what the law is and what it is not. If the law fails to meet reasonable expectations, we may well see the course needed to remedy this deficiency as well.

On many occasions, our rational nature may acknowledge that the

law fulfills its objectives satisfactorily. However, there may be occasions when we know that the law, or an element of it, is insufficient for the task; moreover, our intelligence may demonstrate that the law as it “is” is ill-suited for the circumstance to which it is being applied. In this kind of circumstance, we can further recognize that the law ought to be doing something that it is not. In other instances, we may see that it is being expected to do something beyond its competence. The human person has the capacity to know and accept these conclusions insofar as the person’s nature is characterized by reason which comprehends that there is a final cause—goal—of the law which is not only not being achieved but also is being frustrated because of the law itself. These points are essential to the good governance of human society.

A longstanding principle of good government and good governance is the notion of subsidiarity. Subsidiarity is the name given to the concept that decisions—which would include the need for and the making of new norms—should be made at the level where they will be applied. This concept is experienced by most people in their formative years in the context of family life where the human person first experiences norms and law. Here we see parental intelligence comprehending the intelligible reality of their family circumstances and developing norms internal for the prudent regulation and direction of family life. Immediately beyond the nuclear family, we see the same principle at work in the village, town, or city. Once again, the intelligence of office holder and citizen combine for discussion and debate that generate the norms by which this local community will conduct its interpersonal relations. In a similar fashion, albeit more cumbersome because of the magnitude of the territory, the same process occurs at the regional (i.e., state) and national levels.

However, here we begin to see a growing rift between the citizen and the office holder. Some of the rift is attributable to the multitude of citizens and the capacity or incapacity of the office holder to engage in personal discussion with the citizen. But another element of the rupture is due to the fragmentation of the society and what I will call the professionalization of the office holder. By the professionalization of the office holder I mean that he or she is viewed as the expert not only in the making of law and its administration, but also in the sense of being more capable of deciding what the members of society need and what they do not.

As the important collaborative nature of the bond between citizen and office holder becomes less evident under these circumstances, the balance between the intellect and the will is altered. It may be that there is still a relation between the intellect and the will; however, the

composition of who supplies the intellect and the will has changed. A part of this change is attributable to the sizes of the population and the territory over which the law will apply. But a part of this transformation is also attributable to the self-perception that the office holder knows better than the citizen who is then consigned to the restricted status of the governed. While the wills of citizens are varied, can the same be said of the office holder? My point here is that the office holders will generally have a different set of objectives constituting their will than those of the citizens: the prime one would be staying in office. This is a concern for, but probably not an objective of, the citizen who is interested in societal improvement. Although the office holder likely has some concern about the welfare of the governed, the official can easily have a different take on the moral concerns of the law than would those whose lives are guided and regulated by the laws which are made.

Of course, both citizens and office holders can be divided by disagreement concerning the objectives of the law. However, the citizens will usually experience the law's impact more quickly than the office holders who may well excuse themselves from the law's ambit. If you doubt my contention, you might inventory the laws made by Congress in which it often excuses itself from the law's application.¹⁶ Some citizens may well get what they want in a newly enacted law, but other citizens will probably not be so fortunate—probably because their lobbying efforts were less effective. However, the office holder who makes the law has the final say in crafting the language that will become the norm. This is where the distinction between the “is” and the “ought” of the law becomes all the more important.

Whatever laws are made, their content is the law's being; the content becomes the “is.” But there would be little guarantee that the laws that are promulgated are what is needed by the society for its general welfare, its domestic tranquility, its mutual defense, and its enjoyment of true justice. If I may borrow from Thomas Aquinas's first principle of the law (seeking the good and avoiding the evil)¹⁷ and ask a question: has the pursuit of doing what is essential for the common good been compromised by the accommodation of special interests? If this is the case, the balance between the discerning and objective intellect and the satisfaction of a proper will has been disturbed. If I may borrow again

16. See, e.g., Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U. L. REV. 3, 18 n.55 (1992) (including a catalogue of self-granted Congressional exemptions).

17. AQUINAS, *supra* note 5, pt. I-II, q. 94, art. 2, at 221–22.

from my fellow Jesuit Viktor Cathrein, the natural moral law (which he defines as “the light of reason inherent in us by nature, through which we perceive what we ought to do and avoid”¹⁸) has been discounted. It may also be that the process of defining the ought has been transformed insofar as determining what ought to be done now takes more stock of self-preservation than attainment of the common good.

What is the response to this predicament regarding the “ought”? In the final analysis, the “ought” offers a path to securing the common good. Here I must emphasize the role of the “moral” in the concept of the natural moral law since what is moral pertains to the common good. What is moral and what is not must acknowledge the importance and the primacy of the common good. Both the intellect and the will have crucial roles to play in its attainment. The intellect by speculative reason can identify and weigh the merits or lack thereof of the content of the norms to be promulgated that advance the common good. The intellect is the means of evaluating the “is” and the “ought.” The will, on the other hand, exercises the determination to ensure that what has been defined by the superior intellect as the “ought” will be attained. To assist this important project, which is vital to the project of democracy, is, as Heinrich Rommen explained it, the identification of material content of the human (positive) law that will advance the common good from the “rational, free, and social” nature of man.¹⁹

This human or positive law should to be the product of the natural law if the primacy of the common good is to be respected and protected. Without this lifeline, the law will be whatever the law-maker wants, and as history has amply demonstrated, this can be most problematic. The nobility of the law is put into serious risk if it is the product of positivism where the will escapes from its vital link to the intellect and makes whatever law the law-maker wants without any further consideration of the moral concerns of the law-making enterprise. Despotism throughout much of recent human history have justified their reigns not solely by brute force, but by brute force that is justified by the law of positivism. As Rommen reminds us in his monumental work on the nature of the state, the dictators of the modern age were “masters of legality” and used the law, as Hitler did, to come to power by the democratic process of majority vote.²⁰ The antidote to this inevitably disastrous approach has its source in the Book of

18. See ROMMEN, *THE NATURAL LAW*, *supra* note 6, at 181–82 (quoting VIKTOR CATHERIN, S.J., 2 *MORALPHILOSOPHIE* 344 (4th ed. 1904)).

19. *Id.* at 186.

20. HEINRICH ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 212–13 (1945) [hereinafter ROMMEN, *CATHOLIC THOUGHT*].

Wisdom: love justice, you who are rulers of the earth.²¹ But how does one know what justice is?

Once again, the combination of the intellect and the will supply an answer which resides in the nature of the human person who is both intelligent and virtuous. If the intellect and the will are the common heritage of the members of the human family, so is virtue. The elements of virtue, particularly the cardinal virtues (courage, justice, forbearance/temperance, and prudence/wisdom), are the building blocks upon which the objective intellect and the healthy will are established and exercised. It is this human edifice where the natural moral law claims its home: the human person whose will and intellect founded upon virtue will make norms that are just, prudent and wise, temperate, and courageous because this person's existence is established on these qualities.

II.

This brings me to the sub-heading of today's lecture: the role of citizenship in defining the nature of the law. Some may think of the law as commands; others may think of the law as duties; still others may think it a body of rights and protections to these claims. But the law's final cause or objective is the means by which people justly live their individual lives in common with their neighbors, whoever they may be. The essence of the law is geared to right relationship in this common life, and this truth about the law introduces the essential subject of citizenship. Liberty that is ordered by the law is the fashion in which it is embraced by the citizen and office holder alike, for both know what the law is and also what it ought to be when the common good is at stake. Each member of these two classes inhabits the *res publica* and shares the common denominator as a member of the society. It is their common rational being that helps them sort out what is essential to ordering human liberty by means of the law. In the final analysis, Rommen's definition of the law is appropriate here: the law is a "general rule of reason which is directed to the common good, emanates from public authority, and is duly promulgated."²² It takes an authentic freedom to recognize this, and each person by his or her reason can comprehend the distinction between the authentic freedom that is essential to the law and unrestrained license.

In the context of Rommen's definition of the law, attention needs to be placed on the public authority for this is the intersection of the

21. *Wisdom* 1:1-3.

22. ROMMEN, *THE NATURAL LAW*, *supra* note 6, at 195.

responsibilities of the citizen and of the office holder. In our federal republic, the office holder comes from the citizenry; moreover, the office holder exercises a trust on behalf of the citizenry. It is the prudence/wisdom, courage, temperance/forbearance, and justice of the citizen and the office holder who, by the exercise of the intellect and reason, can see that the law is the means by which the common good is achieved and sustained. If the law is an act of reason, it is right reason that is formed by the virtues that make any person—as citizen or as office holder—recognize that the law is, first and last, the means by which the common good is the objective of the just society. The law will ultimately fail if it is about preserving the position of a particular person or group; however, it will succeed if it is directed to achieving the common good which takes into account the life, liberty, and pursuit of happiness of everyone. As Thomas Aquinas reminds us, it is this pursuit of what is good, what is just that “directs man in his relations” with others.²³

For the citizen who may become office holder and who then has a particular role in the formulation of the human law, the ability to know what is good and what is just is dependent on his or her intellectual and moral formation. An essential part of this formation is to understand that the human person lives in relationship with everyone else. This element of authentic human formation, moreover, alerts each person to the fact that while he or she has rights (rights that emerge not from the state but from their innate and inviolable dignity as a human being), everyone, by the exercise of objective reason, must simultaneously acknowledge that everyone else must have the same capacity to the same or similar claims. In short, this critical formation pairs right with responsibility.

It is the practice of virtue that enables the person to understand and acknowledge the synthesis of right and responsibility in one’s personal life as it is lived in community—in relation—with others. This point is the foundation of what can be termed the essential element of justice that is founded on the natural moral law: the *suum cuique*, to each his or her own. Of course, what is due each member of the human family cannot be fully and finally determined until the due of others with whom this person is in relation is considered. With recognition of the *suum cuique* comes the application of norms that are conscious of the twinning of right and responsibility. The virtuous person has the capacity to know this by the exercise of courage, prudence/wisdom,

23. ST. THOMAS AQUINAS ON LAW & JUSTICE: EXCERPTS FROM SUMMA THEOLOGICA, pt. II-II, q. 58, art. 5, at 1437–38 (Neill H. Alford, Jr. et al. eds., 1988).

justice, and forbearance/temperance. No one can properly claim a right without acknowledging the responsibilities that attend the right.

It has been said that virtue directs the acts of the human person toward the common good.²⁴ With the virtuous person directing the formulation and application of the human law, the natural moral law is observed. It has been said that an evil law is no law at all.²⁵ One need not think too long or hard to realize the truth of this claim. Surely in recent times, the despotic, totalitarian states of the world have brought hardship, suffering, and annihilation to tens of millions of human subjects. Therefore it is crucial to remember that for the most part these states did what they did not in the absence of law but with its evil surrogate in the form of a destructive positivist law. These were legal systems with laws based not on objective reason and moral consideration but, rather, on an intensified will that takes account of the interests of the controlling party (e.g., National Socialist, Communist, Fascist) and little or nothing else.

The natural moral law is founded on the premise of the common good. The positivist law is founded on other suppositions, which find a home in Supreme Court decisions such as *Dred Scott v. Sanford*²⁶ and *Buck v. Bell*.²⁷ I hasten to add that this is not a comprehensive but only illustrative list. Positivist law can also be found in legislation such as those examples already mentioned, e.g., the Fugitive Slave Act and the Nuremberg Laws. To recall the Hart and Fuller engagement of the 1950s and 1960s (their debating whether there is a separation between law and morality),²⁸ the virtuous person recognizes that the law, when true to its vocation, is a moral enterprise. As Rommen contended, “law and morality are not separated.”²⁹ While some laws may be facially neutral regarding moral concerns, (for example: making a law to regulate on which side of the street motorists drive), there is often a

24. JEAN-YVES CALVES & JAQUES PERRIN, *THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII* 148 (J.R. Kirwan trans., 1961) (referring to a letter from Cardinal Gasparri, the Secretary of State, to M. Duthoit, the President of the *Semaines Sociales* in 1928).

25. AQUINAS, *supra* note 5, pt. I-II, q. 96, art. 4, at 233.

26. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

27. 274 U.S. 200 (1927).

28. Compare H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (defending the Positivist school of jurisprudence), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (criticizing Professor Hart’s thesis as essentially incomplete, in part, because it ignores the internal “morality of order” that is necessary to create law).

29. ROMMEN, *THE NATURAL LAW*, *supra* note 6, at 212.

moral concern originating within their underlying intent (e.g., regulating motorist conduct in order to protect them, their passengers, and other users of public ways). With the exception of private bills that become law through the legislative process, virtually all law that is legislated is done so for reasons that have some grounding in moral implications.

Thus, laws made by human institutions, which ignore or contradict moral considerations are suspect. Laws that are immoral are all the more dubious. For law to be legitimate it must be directed to the common good; thus, it requires a moral foundation.³⁰ If the task of the law, then, is to combat or at least avoid that which is evil in society and to seek and preserve that which is good (specifically the common good), there is a need *for* the freedom for the citizenry and the public officials to recognize and do what is necessary to secure this objective. This freedom is not a negative one, i.e., freedom *from*; rather, it is a positive freedom *for*. But some exercises of freedom can have an imbalanced appetite that directs disproportional energy to acquiring or achieving objectives that are incompatible with the common good. Moreover, some notions of freedom and liberty are problematic as they can set the claims of individuals in diametrical opposition to one another. One major illustration of this is the dicta from *Planned Parenthood v. Casey* in which the plurality opinion asserts that, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³¹ This is not a recommended method for achieving the common good through the juridical mechanisms of society; rather it is a recipe for anarchy. While their objective was likely something else, the Supreme Court plurality did not recognize that this formulation sets conflicting views of liberty on a collision course without providing a means for preventing the confrontation. However, the natural moral law proposes a different course.

With the foreknowledge that the law is a moral enterprise, the natural moral law acknowledges the importance and vitality of liberty; however, it also recognizes that liberty, if it is true to its vocation, must be ordered by always taking account of liberty’s complementary responsibilities. And the likely agent for fashioning the order of liberty is the natural moral law and its objective of achieving and sustaining the common good. When the law is true to its nature, it has the capacity to order properly the liberty of persons, not to curtail a natural right which they have, but to ensure that it remains authentic and robust for all

30. *Id.* at 213 (“All law requires a moral foundation.”).

31. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

rather than some members of society. The nature of the law, as I have explained it, has the antidote and counterpoint to the fallacy about liberty presented by the dicta of *Planned Parenthood v. Casey*.

It is this nature of the law that ensures the freedoms we all desire are sought by a properly formed will. This regulatory and protective function of the nature of the law is an exercise of the objective reason upon which the human intellect relies. This reliance, furthermore, accentuates human consciousness and the rational process so that the claiming of rights for me is never divorced from simultaneous responsibilities to thee. Resident within these processes, then, is the guarantor that the common good will not be undermined but will be promoted and protected.

As I have reminded past audiences in this lecture series,³² we are all citizens of two cities: the City of God and the City of Man. Today I concentrate on the second citizenship just mentioned. For within this citizenship—which is a natural right—there is also a natural duty. This natural duty contains the obligation to ensure that the law seeks the common good rather than iniquity. The citizens of the City of Man are not inert bystanders who must remain by the sidelines when the office holder takes the law into the direction of positivism and away from the common good that is built on the natural moral law. The citizens are and must remain active participants in securing the common good as their authentic individual good is inextricably related and complementary to the common good. Here we are reminded of an important thought often attributed to Edmund Burke: “All that is necessary for the triumph of evil is that good men do nothing.”³³

Regardless of the source of this counsel, its posture and substantive content ring true. Democracy and the rule of law that undergirds it are not easy tasks to build and sustain; they are hard work and require the participation of people of good will who know and exercise their rights and responsibilities in a manner that reinforces the quest for the common good. That is why the citizens interested in the existence and support of democracy and the rule of law realize that they must make their own contribution to the law’s sustenance. To follow the Burkean admonition, they must do something so that evil will not triumph. In a

32. See, e.g., Robert John Araujo, S.J., Inaugural Lecture of the John Courtney Murray Chair: John Courtney Murray S.J.: A Citizen of Two Cities (April 27, 2010), in 42 *LOY. U. CHI. L.J.* i, ii (2010).

33. See EDMUND BURKE, *THOUGHTS ON THE CAUSE OF PRESENT DISCONTENTS* (1770), reprinted in 1 *SELECT WORKS OF EDMUND BURKE* 69, 146 (Liberty Fund ed., 1999) (“When bad men combine, the good must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle.”).

similar fashion, we must consider why doing something is critical to the law and its nature and the common good that they support. Heinrich Rommen's fellow German, the Lutheran pastor Martin Niemöller, supplies further thought on this. Like Rommen, he was arrested by the Nazis but also escaped execution. After the Second World War, Niemöller would often discuss what happened in his beloved Germany by saying that: the Nazis first came for the socialists and communists, but he did not speak out because he was not one of them; then they came for the trade unionists and the Jews, but again he did nothing because he was neither of them; finally, when they came for him, "no one was left to speak for me."³⁴ As I have stated, democracy, the rule of law, and sustaining the nature of the law involve commitment, diligence, and effort. If nothing is done, as Pastor Niemöller asserted, the darkness that can envelope the world will prevail—at least for a while. And during that time, much that is good (including the common good) can be lost.

With conscious and concerted effort by the virtuous person and citizen, what is at stake, i.e., the common good, will not be forgotten or compromised. The virtuous citizen, like the virtuous office holder (would that we have more!), possesses the capacity to exercise the freedom needed to memorialize and practice what is essential to the law's nature. It is the law's nature that directs the society where this nature's authenticity is cherished by sustaining the environment for seeking and keeping the common good. Each person possesses an inclination toward the common good. This precious disposition can be compromised, but it cannot be removed from the objective reason of the person by the state even though its practice can be inhibited by the state. So, the virtuous citizen ought not to neglect the freedom to do what is necessary for the common good. Freedom that is pursued for whatever the individual self desires is an exercise of the will detached from the intellect. Moreover, it is a liberty that is disordered rather than ordered. And when disordered liberty is at bay, we will come to know their distortion of freedom by another of its names: chaos.

Let us not forget, then, that it is the nature of the law to see that this disarray remains at bay! We can do something in this regard if we are true to the vocation of virtuous citizenship by nurturing a society whose lodestar is the natural moral law.

34. See Harold Marcuse, *Martin Niemöller's Famous Quotation: "First They Came for the Communists . . ."*, U. CAL., SANTA BARBARA, DEPARTMENT HIST. (Feb. 28, 2013), <http://www.history.ucsb.edu/faculty/marcuse/niem.htm> (explaining the Martin Niemöller position regarding the piecemeal erosion of the prerogatives of citizens by the National Socialist Party).

Thank you very much!