



LAW, PERSON, and COMMUNITY

*Philosophical, Theological, and
Comparative Perspectives on Canon Law*

JOHN J. COUGHLIN

OXFORD

Law, Person, and Community

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Em.mo Cardinali
Raimundo Leoni Burke,
sub cuius ductu et magisterio
studia iuris canonici perfecit Auctor,
hoc quaecumque opus
grati animi affectu
D.

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PREFACE AND ACKNOWLEDGMENTS

As a Franciscan in my first year of theological studies in 1980, I was introduced to the concept of Christian anthropology or the understanding of what it means to be a human being. It was delightful to study the traditional material associated with the tract on creation. The study invited one to contemplate the goodness of creation and affirmed the Franciscan optimism about life. I was also pleased to learn that no less a theologian and philosopher than the illustrious Dominican, Thomas Aquinas, shared this optimism about the possibilities for the human person. In the words of Etienne Gilson, “St. Bonaventure, St. Thomas Aquinas, Duns Scotus, and . . . St. Francis of Assisi himself—one and all were men who looked benignly on matter, respected their bodies, extolled its dignity, and would never have wished a separate destiny for body and soul.”¹ During my time as a student in law school, I began to think that legal systems also reflect and shape certain anthropological understandings. I first wrote about this interest while I was a law clerk and then a doctoral student.² Since I became a teacher of law and theology, an aspect of my attempts at scholarship has focused on comparative understanding of the human person in diverse legal systems.³

1. ETIENNE GILSON, *THE SPIRIT OF MEDIAEVAL PHILOSOPHY* 169 (A. H. C. Downes trans., University of Notre Dame Press 2011).

2. See John J. Coughlin, *Common Sense in Formation for the Common Good*, 66 ST. JOHN'S L. REV. 261, 295–303 (1992); and *ADMINISTRATIVE JUSTICE AT THE SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA AND THE UNITED STATES SUPREME COURT: A COMPARATIVE STUDY* 249–296 (Gregorian University Doctoral Dissertation 1994).

3. See, e.g., John J. Coughlin, *Law and Theology: Reflections on What It Means to be Human from a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609–628 (2000); *Pope John Paul II and the Dignity of the Human Being*, 27 HARV. J.L. & PUB. POL. 65–79 (2003); *Canon Law and the Human Person*, 19 J.L. & RELIGION 1–58 (2003–2004); *The Human Being, Catholic Social Teaching and the Law*, 1 J. OF CATHOLIC SOCIAL THOUGHT 313–333 (2004); *Sacrifice, the Common Good, and the Catholic Lawyer*, 3 UNIV. OF ST. THOMAS L.J., 6–20 (2005); *The Foundation of Human Rights and Canon Law*, in *INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND HIS CRITICS* 251–272 (Lawrence S. Cunningham ed., University of Notre Dame Press 2009).

This book represents a further endeavor to express my thoughts about the anthropology of canon law from philosophical, theological, and comparative perspectives.

Many kind and brilliant souls, including Nicholas P. Cafardi, John C. Cavadini, Fr. James Conn, S.J., John Finnis, Richard W. Garnett, Mary Ann Glendon, Mary Ellen O'Connell, Cyril J. O'Regan, John H. Robinson, and Robert E. Rodes, Jr., read and commented on various parts of the text. While I am the beneficiary of their generosity in improving my work, the responsibility for any opinions, errors, or inaccuracies in this book is mine alone. Debi McGuigan Jones and John Gerardi assisted by proofreading the text. Jessica Picone and Michelle Lipinski of Oxford University Press were most patient as I penned this manuscript soon after the publication of an earlier book *CANON LAW: A COMPARATIVE STUDY WITH ANGLO-AMERICAN LEGAL THEORY* (Oxford University Press 2011). As he did with my previous book, Jim Lee, Ph.D. (Cand.), in the Notre Dame theology program, read the entire manuscript with erudite attention. If it were not for the pains of all of the above persons, the book would contain many more substantive and stylistic errors than remain.

Some of the ideas and themes of this book have also appeared in my previous presentations and publications. Chapter 1 incorporates ideas from my article *Canon Law and the Human Person*, 19 *JOURNAL OF LAW AND RELIGION* 1–58 (2003–2004). Chapter 4 largely replicates *Canonical Equity*, 30 *STUDIA CANONICA* 403–435 (1996). Some of the material in chapter 5 is based upon *The Foundation of Human Rights and Canon Law*, in *INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND HIS CRITICS* (Lawrence S. Cunningham ed., University of Notre Dame Press 2009). In chapter 6, I have also included some paragraphs from *Marriage and Mulieris Dignitatem*, 7 *AVE MARIA LAW REVIEW* 349–363 (2009). Chapter 7 copies a few sections of *Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 *ST. JOHN'S LAW REVIEW* 261–327 (1992). While none of these articles is reproduced entirely in this book, the material that I have relied upon is included with the permission of the respective publications.

In a particular way, I wish to thank the community at the Notre Dame Law School. Teaching large canon law classes of law students at Notre Dame has afforded me the opportunity to discuss my ideas with faith-filled, intelligent, and keenly interested groups of students. Presenting my work to faculty colleagues at colloquia has also assisted to sharpen my focus. Summer grants from the law school served as an incentive to complete this work. Notre Dame truly has an embarrassment of riches in its faculty and students for which I remain most grateful. I also express my gratitude to the Most Reverend Kevin C. Rhoades, the Bishop of Fort Wayne-South Bend, for

granting this book his *Imprimatur* and to Monsignor Michael Heintz, Ph.D., for serving as the censor who read the text and issued the *Nihil Obstat*.

Finally, this book is dedicated to His Eminence Raymond Cardinal Burke, who presently serves as the Prefect of the Supreme Tribunal of the Apostolic Signatura in the Vatican. When I was a student at the Gregorian University, Cardinal Burke kindly and patiently served as the director of my doctoral dissertation. From the fortuitous moment when I first met him at a humble trattoria in Rome, I knew that the then Monsignor Burke was an exceptionally intelligent, cultured, and holy priest. It was a grace to work under his tutelage.

Feast of Saint James
July 25, 2011
New York, NY

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ABBREVIATIONS

AAS	ACTA APOSTOLICAE SEDIS.
AM. J. COMP. L.	American Journal of Comparative Law.
AM. J. JURIS	American Journal of Jurisprudence
ASS	Acta Sanctae Sedis.
B. C. L. REV.	Boston College Law Review.
C.	<i>Causa</i> , DECRETUM MAGISTRI GRATIANI (CONCORDIA DISCORDANTIUM CANONUM). In CORPUS IURIS CANONICI. Vol. I. Friburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u.Verlagsanstalt, 1959.
CATH. U. L. REV.	Catholic University Law Review.
CCEO	CODEx CANONUM ECCLESIA RIUM ORIENTALIM AUCTORITATE IOANNIS PAULI II PROMULGATUS (Die 18 mensis octobris anno 1990), 82 AAS 1033–1363 (1990).
CIC-1917	CODEx IURIS CANONICI PII X PONTIFICIS MAXIMI IUSSU DIGESTUS. BENEDICTI PAPAE XV AUCTORITATE PROMULGATUS (Die 27 mensis maii anno 917), 9 AAS II, 3–521 (1917).
CIC-1983	CODEx IURIS CANONICI AUCTORITATE IOANNIS PAULI PP. II PROMULGATUS (Die 25 mensis ianuarii anno 1983), 85 AAS II, 1–317 (1983).
Clem.	<i>Clementinae</i> . In CORPUS IURIS CANONICI. Vol. II. Friburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u.Verlagsanstalt, 1959.
CLSA PROCEEDINGS	Canon Law Society of America Proceedings.

CLSA-1985	James A. Coriden, Thomas J. Green, and Donald E. Heintschel, eds. <i>THE CODE OF CANON LAW, A TEXT AND COMMENTARY</i> . COMMISSIONED BY THE CANON LAW SOCIETY OF AMERICA. New York and Mahwah, N.J.: Paulist Press, 1985.
CLSA-2000	John P. Beal, James A. Coriden, and Thomas J. Green, <i>NEW COMMENTARY ON THE CODE OF CANON LAW</i> , COMMISSIONED BY THE CANON LAW SOCIETY OF AMERICA. New York and Mahwah, N.J.: Paulist Press, 2000.
CLSGB & Ireland	<i>THE CANON LAW, LETTER, AND SPIRIT, A PRACTICAL GUIDE TO THE CODE OF CANON LAW</i> . PREPARED BY THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND IN ASSOCIATION WITH THE CANADIAN CANON LAW SOCIETY. Edited by Gerard Sheehy, et al. Collegeville, MN: Liturgical Press and Michael Glazier, 1996.
D.	<i>Distinctio</i> , DECRETUM MAGISTRI GRATIANI (CONCORDIA DISCORDANTIUM CANONUM). In <i>CORPUS IURIS CANONICI</i> . Vol. I. Friburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
DUKE L.J.	DUKE LAW JOURNAL
ECC. L. REV.	Ecclesiastical Law Review.
Extra. Ioannis	<i>Extravagantes Ioannis XXII</i> . In <i>CORPUS IURIS CANONICI</i> . Vol. II. Friburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
Extra. Com.	<i>Extravagantes communes</i> . In <i>CORPUS IURIS CANONICI</i> . Vol. II. Friburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
<i>Gaudium et spes</i>	Sacrosanctum Concilium Oecumenicum Vaticanum II. Constitutio pastoralis de ecclesia in mundo huius temporis, <i>Gaudium et Spes</i> (Die 7 mensis decembris anno 1965), 58 AAS 1025–1120 (1966).
HARV. L. REV.	Harvard Law Review.
ILL. L. REV.	Illinois Law Review.
J. CONTEMP. HEALTH L. & POL'Y	Journal of Contemporary Health Law and Policy.

JURIST <i>Lumen Gentium</i>	The Jurist. Sacrosanctum Concilium Oecumenicum Vaticanum II. Constitutio Dogmatica de Ecclesia, <i>Lumen Gentium</i> (Die 21 mensis novembris anno 1964), 57 AAS 5–89 (1965).
MICH. L. REV. NAVARRA-2004	Michigan Law Review. EXEGETICAL COMMENTARY ON THE CODE OF CANON LAW, PREPARED UNDER THE RESPONSIBILITY OF THE MARTIN DE AZPILCUETA INSTITUTE, FACULTY OF CANON LAW, UNIVERSITY OF NAVARRE. Edited by Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña. Montreal: Wilson & Lafleur, 2004.
NOTRE DAME L. REV. N.Y.U. L. REV. OTTAWA-1993	Notre Dame Law Review. New York University Law Review. CODE OF CANON LAW ANNOTATED. LATIN-ENGLISH EDITION OF THE <i>CODE OF CANON LAW</i> AND ENGLISH LANGUAGE TRANSLATION OF THE 5TH SPANISH LANGUAGE COMMENTARY PREPARED UNDER THE RESPONSIBILITY OF THE INSTITUTO MARTÍN DE AZPILCUETA. Edited by E. Caparros, M. Thériault, and J. Thorn. Montréal: Wilson & Lafluer, 1993.
PERIODICA	Periodica de re Canonica. From 1927 to 1991, the title was PERIODICA DE RE MORALI, CANONICA, LITURGICA.
PG	Migne, J. P. PATROLOGIAE CURSUS COMPLETUS, SERIES GRAECA. Paris: 1857–1866.
PL	Migne, J. P. PATROLOGIAE CURSUS COMPLETUS, SERIES LATINA. Paris: 1844–1855.
R.R.Dec RUTGERS L. REV. ST	Rota Romana, Decisiones seu sententiae RUTGERS LAW REVIEW St. Thomas Aquinas, SUMMA THEOLOGICA. SANCTI THOMAE AQUINATIS. OPERA OMNIA, LEO XII, P.M. Romae: Ex Typographia Polyglota S. C. De Propaganda Fide, 1882. Vol. 4–12. English Translation by the Fathers of the English Dominican Province. Westminster, MD: Christian Classics, 1981.
TANNER	Tanner, Norman P., S.J. <i>Decrees of the Ecumenical Councils</i> . London and Washington, D.C.: Sheed & Ward and Georgetown University Press, 1990.

U.C. DAVIS L. REV.	University of California at Davis Law Review.
UCLA L. REV.	UCLA Law Review.
U. TOL. L. REV.	University of Toledo Law Review.
VI	<i>Liber Sextus</i> . In CORPUS IURIS CANONICI. Vol. II. Frieburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u.Verlagsanstalt, 1959.
WISCONSIN L. REV.	Wisconsin Law Review.
X	<i>Liber Extra, Quinque Libri Decretalium Gregoriani IX</i> . In CORPUS IURIS CANONICI. Vol. II. Frieburg, A., ed. Editio lipsiensis secunda. Graz: Akademische Druck-u.Verlagsanstalt, 1959.
YALE L.J.	Yale Law Journal.

Introduction

Why engage in a study of such a seemingly esoteric subject as the theory of canon law? Would not one's time and energy be better spent in advancing some apparently more relevant and pragmatic project? For instance, how about studying the operation of hedge funds in the market economy or the technology to produce a better cell phone? What is the possible value in studying a theory in the absence of statistical verification based on the model of scientific method and the hard sciences? Without disparaging the pragmatic, functional, or empirical, I would like to respond by suggesting that knowledge is a fundamental good and remains deeper than that which is empirically verifiable. Aristotle points out that curiosity for knowledge is a basic part of human flourishing. "For it is owing to their wonder that men both now begin and at first began to philosophize . . . since they philosophized in order to escape from ignorance . . . and not for any utilitarian end."¹ Prior to introducing the specific goals of this study, please permit me to recall the approach to knowledge developed by the medieval canonists.

Starting in the eleventh century, the Catholic Church gave rise to the great university centers in places such as Paris, Oxford, and Bologna.² The medieval universities had significant faculties of canon and civil law.³ The members of the medieval universities did not define the value of knowledge

1. ARISTOTLE, *METAPHYSICS* 982b12, in 2 *THE COMPLETE WORKS OF ARISTOTLE, THE REVISED OXFORD TRANSLATION* 1554 (Jonathan Barnes ed., Princeton University Press 1985).

2. See JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION, CANONIST, CIVILIANS, AND COURTS* 221–222 (University of Chicago Press 2008).

3. See G. R. EVANS, *LAW AND THEOLOGY IN THE MIDDLE AGES* 49–51 (Routledge 2002). BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION, CANONIST, CIVILIANS, AND COURTS*, 219–282.

primarily in terms of its functional utility. It was not that the medieval lawyers failed to respect facts and accuracy. To the contrary, they developed an academic methodology that entailed the meticulous study of facts and detail, that drew distinctions between a vast array of cases based upon logic, and that embraced a form of intellectual asceticism in which the desire for truth trumped the emotions.⁴ The canonists understood that facts and accuracy are characteristics of the truth, of what is real, of the opposite of what is false.⁵ For example, the medieval legal theorists accepted the need for divisions in the field of law due to its complexity. Not only was a fundamental distinction between canon and civil law in the interest of the advance of knowledge, but for each of the two domains, the medieval legal scholars developed further specification such as the law of property, contracts, wills, family, and crimes. They also understood the importance of distinguishing substantive from procedural law, as well as public from private law.⁶ Describing the medieval canonists, R. H. Helmholz observes: “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.”⁷ The medieval methodology formed not only the basis of canon law but also of the Western legal tradition.⁸

The scholars of the medieval universities, however, were not content to identify facts, draw distinctions, and recognize legal principles. Their respect for factuality, accuracy, and specification led them to ask about the essence of things. They wanted to learn all that they could about what was at the very core of being.⁹ Their search for knowledge was directed toward the truth. Their concern with particulars led them to the universal. Although they established a methodology on the basis of the autonomy of academic

4. See EVANS, *LAW AND THEOLOGY IN THE MIDDLE AGES*, 151.

5. See Laurent Lafforgue, *Does Basic Research Have a Meaning?*, Public Lecture delivered at the University of Notre Dame, May 20, 2011.

6. See HAROLD BERMAN, *LAW AND REVOLUTION 199–269* (Harvard University Press 1983).

7. R. H. HELMHOLZ, *THE SPIRIT OF THE CLASSICAL CANON LAW* 397 (University of Georgia Press 1996).

8. See BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION, CANONIST, CIVILIANS, AND COURTS*, 8, 492; HELMHOLZ, *THE SPIRIT OF THE CLASSICAL CANON LAW* xi; BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 151–155. Cf. Robert E. Rodes, Jr., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND, THE ANGLO-SAXONS TO THE REFORMATION* 99 (University of Notre Dame Press 1977), which points to the pastoral and eschatological goals of church law, and argues that the medieval canon law “was not in the usual sense a legal system.”

9. See ROMANO GUARDINI, *THE END OF THE MODERN WORLD* 25–26 (ISI Books 1998).

disciplines, the medieval thinkers were aware of the danger of the fragmentation of knowledge. A common metaphysics in which a providential God was the creator of all things enabled the medieval scholars to embrace the unity of knowledge and truth. Their metaphysical perspective meant that all things deserved to be studied because all things shared a universal source.¹⁰ In carefully recognizing particular facts and meticulously drawing distinctions, the medieval scholars believed that knowledge per se was good and that all knowledge was derived from a universal truth at the very essence of reality.¹¹ That this universal truth, this metaphysical reality, was the proper domain of theology did not trouble the medieval scholars in their particular academic disciplines. Every particular discipline with its own facts was of value because it helped in understanding universal truth.¹² The unity of knowledge and truth also endowed the medieval scholar with a certain humility. No one scholar or discipline, no matter how factual or accurate, could ever completely comprehend, articulate, or exhaust the divine mystery of universal truth.

The medieval vision about the unity of knowledge and truth contrasts with the relativism, utility, and skepticism of our own age. It was not modern scientific method but contemplation that was the heart of the medieval vision. Romano Guardini describes the medieval understanding of knowledge and truth:

The roots of all truth were given by authority: the roots of divine truth by Scripture and the Church; of natural truth by the thought of antiquity. These foundations for religious and natural truth were painstakingly penetrated, and when fully understood they acted as the bases for interpreting whatever truths could be grasped through immediate experience. From this fusion of natural and supernatural truths, there grew a new and deeper understanding of the world and of all reality.¹³

Although my book does not focus on medieval canon law, the medieval understanding confirms Aristotle's view that knowledge is a good per se, and that it is neither dependent on its pragmatic utility nor limited to empirical verification. In light of this epistemology, I hope that this study of

10. See ETIENNE GILSON, *THE SPIRIT OF MEDIAEVAL PHILOSOPHY* 229–247 (A. H. C. Downes trans., University of Notre Dame Press 2011).

11. See ETIENNE GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 39–41 (IGNATIUS PRESS 1999), and ETIENNE GILSON, *MEDIAEVAL UNIVERSALISM AND ITS PRESENT VALUE* 14 (Sheed & Ward 1947).

12. See BONAVENTURE, *DE REDUCTIONE ARTIUM AD THEOLOGIAM*, in *5 DOCTORIS SERAPHICI S. BONAVENTURAE OPERA OMNIA* 319–325 (Collegium S. Bonaventurae Quaracchi 1882–1889).

13. GUARDINI, *THE END OF THE MODERN WORLD*, 24.

the theory of canon law will represent a modest contribution to the acquisition of knowledge. It is also helpful to have recalled medieval legal theory as it continues to inform contemporary canon law which is the focus of this study. Specifically, this study explores the concepts of law, person, and community in canon law. The title of the book is not intended to imply that law enjoys a priority over person and community. Rather, the title derives from the fact that this is a study of canon law from theological, philosophical, and comparative perspectives which promises to disclose something about the interrelation of law, person, and community.

I. LAW

What might the study of the theory of canon law tell us about the nature of law? The origins of the word “canon” may be traced to the Council of Nicea in 325, when the decrees of the council were stated in legal form known by the Greek *κᾶνών*. This word means a measure or rule that binds in conscience and through the use of authoritative censure. Ecclesiastical law thus became known as canon law. Canon law is a religious system of law, and has a theological content not present in modern secular law. Otto Kahn-Freund observed in his inaugural lecture as the Professor of Comparative Law at Oxford, that “comparative law is not a topic, but a method . . . [o]r . . . a variety of methods for looking at law, and especially of looking at one’s own law.”¹⁴ Likewise, Konrad Zweigert and Hein Kötz argued that the “basic methodological principle of all comparative law is functionality.”¹⁵ Nonetheless, the method and functionality of comparative law yields substantive knowledge about the concept of law.

In comparison to the modern notion of a statute, the “sacred canons” differ in at least two ways which I mention only briefly for the purpose of this introduction. The first difference pertains to the purpose of each. One might associate functionality, efficiency, uniformity, and predictability with a modern statute. While canon law does not ignore these modern characteristics, the canons often aim to direct and educate the persons and communities that are part of the church. The second difference concerns enforcement. Modern statutory law is backed by the threat of coercion for its violation. Although many canons are concerned with norms of conduct,

14. Kahn-Freund, *Comparative Law as an Academic Subject*, 62 L. QUARTERLY REV. 41 (1966). See also Georges Langrod, *Quelques Réflexions Methodologiques sur la Comparaison en Science Juridique*, 9 REVUE INTERNATIONALE DE DROIT COMPARÉ 353 (1957).

15. KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 32–43 (Tony Weir trans., Clarendon Press of Oxford University 2nd ed. rev. 1992).

they often carry no expressed sanction in law. Much more than modern statutory law of the secular state, the canons rest upon moral authority rather than coercion.¹⁶ The fact that canon law functions as a legal system largely on the basis of voluntary compliance adds an interesting dimension to the discussion of the fundamental question: “What is law?”

The canons are sometimes referred to as sacred on account of the claim that they stem from divine law, and thus God is considered the ultimate source of canon law and of its authority to bind. Canon law is also said to derive from natural law. Natural law theory adopts the viewpoint of practical reason as the basis for imposing legal and moral obligations.¹⁷ Natural law does not equate law with morality. It holds that there is an overlap between law and morality, and that the positive law must be in conformity with natural and divine law. This classical understanding continues to be operative in contemporary legal theory. For example, the work of John Finnis might be described as a secular theory of law in the classical meaning. Rooted in the theory of law developed by Thomas Aquinas, Finnis highlights the centrality of practical reason in defining natural rights and responsibilities. This “new natural law” theory does not deny, but is also not dependent on, divine revelation. The medieval scholars also recognized a distinction between religious and secular realms and the jurisdictional competency of each realm. The recognition of a secular realm as distinct from the religious does not necessarily require the denial of God or the supernatural. The natural law theorists posit a moral basis to law derived from practical reason, and this moral basis remains distinct from, but consistent with, the moral basis for law derived from theological sources.

In contrast, legal positivism intentionally excludes moral considerations from the theory of law. Legal positivism assumes that law must enjoy autonomy from other possible sources of normativity. For the legal positivists, the separation between law and morality is essential to law’s autonomy. Brian Leiter states: “All positivists accept what we may call the Separation Thesis (what the law *is* and what the law *ought* to be are separate questions).”¹⁸ Legal positivism is not an attempt to eradicate moral considerations from human deliberation. The legal positivists adopt an intrasystemic expository point of view that seeks some norm by which laws may be recognizable as

16. See ERIC WALDRAM KEMP, *AN INTRODUCTION TO CANON LAW IN THE CHURCH OF ENGLAND* 32, 56 & 81 (Hodder and Stoughton 1967).

17. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 388–410 (Clarendon Press of Oxford University 1986); and ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 60–66 (Oxford University Press 2001).

18. See Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *HARTS’ POSTSCRIPT, ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 355, 356–357 (Jules Coleman ed., Oxford University Press 2001).

valid within the legal system. This is sometimes referred to as a rule of recognition. In contrast, the theory of canon law is not limited to an intrasystemic expository viewpoint, but draws on external sources including sacred scripture, natural law, theology, and history. The prominence of legal positivism during the twentieth century coincided with a countervailing tendency to emphasize the role of theology among certain theorists of canon law. Legal positivism is at odds with theological approaches to canon law such as that espoused by Eugenio Corecco.¹⁹ The theological approach to canon law may in some part represent a reaction to positivism in modern legal theory. The theological approach to canon law stresses theology, faith, and the supernatural in the face of the denial of the religious as an aspect of public order and law. By juxtaposing differing responses to the question, “What is law?,” my goal is to rely on comparative methodology in the hope that it clarifies the response to this fundamental question. I suggest that a deeper level of comparative exploration involves not simply facts but values as it touches upon conceptions of law, person, and community, which form the bedrock of any system of law.²⁰

II. PERSON

Does the study of the theory of canon law reveal anything about what it means to be human? Again, here I am only introducing a few ideas that will be the subject of more extensive exploration throughout this study. Canon law reflects a theological understanding of the human person. The primary source of this understanding is biblical. The Gospels attribute an anthropocentric focus to the law. To paraphrase the words of Jesus: “The law was made for man, and not man for the law.”²¹ Genesis records that God calls the human person into being. In the order of being, the human person remains always the creature of God, and at the same time, God places the human person in a position immeasurably higher than the rest of material

19. See EUGENIO CORECCO, *THE THEOLOGY OF CANON LAW: A METHODOLOGICAL QUESTION* 145–148 (Francesco Turvasi trans., Duquense University Press 1992).

20. See, e.g., Charles Lefebvre, *Equity in Canon Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY* 93–109 (Ralph A. Newman ed., Établissements Émile Bruylant 1973); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW, AMERICAN FAILURES, EUROPEAN CHALLENGES* (Harvard University Press 1987); JAVIER MARTINEZ-TORRON, *Derecho angloamericano y derecho canónico, las raíces canónicas de la common law* (Facultad de Derecho Universidad Complutense 1991).

21. See Mark 2:27 (“The Sabbath was made for man, not man for the Sabbath.”). See also JOHN P. MEIER, *4 A MARGINAL JEW: RETHINKING THE HISTORICAL JESUS, LOVE AND LAW* 281–285 (Yale University Press 2009).

creation. In this theological understanding, the human person is created in the image of God. The human person shares characteristics of both material and spiritual creation. As the person is produced from the stuff of the earth, all human activity depends on the body. Through the body, the human being, in somatic activity, shares many characteristics with the other animals. However, in the hierarchy of being, the soul of the human person distinguishes the human creature with reason and free will from the rest of material creation. As a unity of body and soul, the human being “acts both as the voice of the earthly order and the incarnation of the spiritual.”²² The theological understanding holds that nature is fallen and the human person disordered as a consequence of original sin. However, as Ian Islop, O.P., described it: “life is not defined in terms of the merely natural, but rather the merely natural in human life is ordered towards a trans-natural goal.”²³ The theological understanding maintains that the ultimate end of the human person remains eternal life with the Creator.

The human person may experience canon law in negative and positive ways.²⁴ On the one hand, canon law acts as a limitation upon personal freedom and autonomy. It may be associated with the arbitrary imposition of authority on the part of one who exercises the governing power. As a form of institution, canon law might sometimes be viewed as self-serving and repressive.²⁵ According to this view, the law is seen merely as the instrument of the will of the one with power.²⁶ This criticism argues that canon law dampens creativity, spontaneity, and charism. On the other hand, law is essential to ecclesiastical order, peace, and prosperity. In light of the social nature of the human person, canon law respects the dignity of the human person by protecting individual rights while at the same time advancing the common good. It deals with the coordination of resources, interests, and rights in a just manner. It sets the conditions in which the human person may find a sense of participation, membership, and solidarity in the religious community.²⁷ It can encourage a sense of identity for the person through participation in something larger than the self. By maintaining continuity with the past, the tradition of canon law may provide security in

22. IAN HISLOP, O.P., *THE ANTHROPOLOGY OF ST THOMAS* 5 (Blackfriars Oxford 1950).

23. *Id.* at 7.

24. See CORRECO, *THE THEOLOGY OF CANON LAW: A METHODOLOGICAL QUESTION*, 1–4.

25. See AVERY DULLES, *MODELS OF THE CHURCH, A CRITICAL ASSESSMENT OF THE CHURCH IN ALL ITS ASPECTS* 39–41 (Doubleday 1974).

26. See LEONARDO BOFF, *CHURCH: CHARISM AND POWER* 51 (John W. Diercksmeier trans., Crossroad Press 1986).

27. See Karol Wojtyła, *Participation or Alienation?*, in *PERSON AND COMMUNITY, SELECTED ESSAYS* 181–207 (Theresa Sandok, O.S.M. trans., Peter Lang 1993).

a precarious present and hope for the future.²⁸ Through fidelity to its inner meaning, canon law serves a symbolic function that communicates the supernatural destiny of the human person. The ultimate significance that canon law attributes to the end of the human person as a profoundly spiritual being is not necessarily shared by contemporary secular legal theory. I shall suggest that this absence in secular legal theory raises a question about the moral foundation for the law's power to bind.

III. COMMUNITY

What does the study of canon law disclose about the worldwide religious community known as the Catholic Church? Neither a nation state nor a democracy, the church might be described as a community of the Christian faithful with a definite external juridical structure. The Catholic Church presently comprises approximately one billion members or over one-sixth of the world's population. The medieval principle held that where there is society, there is law (*ubi societas ibi est ius*). The supreme law of the church is the salvation of souls (*salus animarum suprema lex*).²⁹ The church seeks to fulfill its mission by preaching Jesus Christ as Lord and Savior, dispensing the sacraments, promoting peace and justice, and engaging in charitable services. The church is a universal community that transcends language and culture. It is a community based upon the search for God and not on a social contract. The universal church presided over by the pope, as bishop of Rome, consists of one Western church and twenty-two particular Eastern Catholic churches. The universal church consists of 2,782 dioceses, each of which is a community presided over by a bishop and consisting of ordained clergy, religious women and men, and laity.³⁰ Each diocese is further divided into parish communities. Religious women and men live in a consecrated state according to the charism of their communities, and they serve some aspect of the church's salvific mission. The universal church is, in fact, a vast entity of particular rites, dioceses, parishes, schools, universities, hospitals, shelters, orphanages, and other charitable institutions and organizations such as Catholic Charities, Catholic Relief Services, and Caritas International. By the means of such local, national, and international bodies,

28. See DULLES, *MODELS OF THE CHURCH, A CRITICAL ASSESSMENT OF THE CHURCH IN ALL ITS ASPECTS*, 39. See also JOSEPH RATZINGER, *PRINCIPLES OF CATHOLIC THEOLOGY, BUILDING STONES FOR A FUNDAMENTAL THEOLOGY* 86–87 (Ignatius Press 1987).

29. See Canon 1752, *CIC-1983*.

30. See *ANNUARIUM STATISTICUM ECCLESIAE* 2007, 18–25 (Liberia Editrice Vaticana 2009).

the church offers aid to the family, the infirm, the disabled, the poor, the refugee, the oppressed, the elderly, and virtually any other human being or community in need of corporeal or spiritual assistance. The church fulfills its mission and supreme law in a communal context.

In the theology of the church, the word “community” enjoys both natural and supernatural meanings. First, the natural human community arises from the social nature of the human person. The community affords the individual person the opportunity for participation, membership, and solidarity with others in a common endeavor. The word community signifies a deeper level of interpersonal relationship and personal commitment than merely associational relations that typify other types of society.³¹ Second, the community involves reciprocity between the individual member and the common good. The individual sacrifices some degree of personal freedom in order to be a member of, and to contribute to, the community. The common good flows back, enhancing the individual. Sometimes the enhancement is in terms of material goods, but more importantly, the reciprocity sets the conditions in which the individual may become a more human person.³² Third, in its supernatural dimension, the religious community is salvific. The church does not consider itself to be merely a human institution but a community “purchased and paid for” by the blood of Christ.³³ In 1943, Pope Pius XII described the church as “the Mystical Body of Christ.”³⁴ The Second Vatican Council described the church with images such as the People of God, Body of Christ, and Sacrament of Salvation.³⁵ Salvation is never a purely private experience. The revelation recorded in the Gospels is public. The salvific aspect of the faith community leads to the mission that involves the continuing proclamation of divine revelation. Canon law reflects the understanding that the religious community is, for natural and supernatural reasons, a vital aspect of human flourishing. In this study, I shall ask whether the law of the secular state supports this understanding of the religious community.

31. See KAROL WOJTYŁA, *THE ACTING PERSON* 276–280 (A. T. Tymieniecka trans., D. Reidel Publishing 1979).

32. See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 76 (University of Notre Dame Press 2006).

33. I Corinthians 6:20.

34. Pius Pp. XII, *Litterae Encyclicae Mystici Corporis Christi* (Die 29 mensis iunii anno 1943), 17, in 35 AAS 191–248 (1943).

35. See *Lumen Gentium*, 1, 9–17; *Gaudium et spes*, 11, 45.

IV. AN OVERVIEW OF THIS STUDY

The first four chapters of this book examine the Catholic understanding of the human person as critical to the metaphysical basis of canon law. Chapter 1 sketches the elements of the anthropology that underpins canon law. After describing the twentieth century Catholic anthropological project, the chapter identifies certain anthropological elements and relates them to specific canons. Chapter 2 explores the theological dimension of canon law's anthropological foundation. It considers the theological justification of canon law, and argues that canon law is an ordinance of faith and an ordinance of reason. Chapter 3 continues this exploration by probing the relation between canon law and natural law. From the perspective of comparative law, the chapter raises the epistemological questions of the fact/value distinction and of what counts as reason. Chapter 4 relies on the example of canonical equity to illustrate how canonists attempt to integrate transcendent truths with historical circumstances. Considered together, the four chapters observe that canon law represents an understanding of law in which the making of positive law integrates natural and divine law in the changing historical situation. The transcendental and historical consciousness of canon law is grounded in the anthropological perspective that posits a universal human nature shared by each particular human being, who has the capacity to develop the self in accord with particular circumstances. The comparison of canon law and legal positivism further suggests that each approach to law functions with a different concept of reason and metaphysical understanding of the human person.

With the description of Catholic anthropology now set forth, chapters 5 and 6 consider the role of development in canon law. Based upon Cardinal Newman's rules for the development of doctrine, chapter 5 examines the issue of papal power in canon law. Chapter 5 also considers the inclusion of fundamental rights in the *CIC-1983* as a twentieth-century example of development in canon law. Chapter 5 proposes that canon law's metaphysical basis serves as a more solid foundation for fundamental rights than its mere recognition through the positive law of the state. The chapter concludes with a comparison between the rules for the development of canon law and H. L. A. Hart's secondary rules of a complex legal system. Chapter 6 presents personalism in the canon law of marriage as another twentieth-century example of development in canon law. The development of personalism may be traced to Augustine's three basic goods of marriage and the centrality of free consent in the medieval understanding of marriage. Chapter 6 claims that the twentieth-century theory and jurisprudence of personalism reflect the rules for the development of canon law. In its

historical development from antiquity to medieval times to the present, personalism claims a transcendent anthropological basis.

Chapters 7 and 8 discuss the anthropology of canon law in terms of the relation between religion and the public order. The anthropology of canon law gives rise to certain assumptions about the relation between church and state. The chapters suggest that these assumptions differ from those of the modern secular state. Chapter 7 starts by contrasting the assumptions of canon law with those of the modern secular state about the relation between church and state. It then explores the original intent of the First Amendment from the anthropological perspectives of the Amendment's framers. The chapter concludes by discussing how the strict-separationist approach to cases of public aid to religious schools not only resulted in an incoherent body of United States Supreme Court jurisprudence during the second half of the twentieth century but also betrayed the predominant anthropological perspective of the framers of the First Amendment. Chapter 8 assesses the so-called neutral rules approach to First Amendment jurisprudence and property disputes within hierarchical churches. The chapter asks whether contrary to the alleged neutrality, the Supreme Court's rules actually serve to punish churches that adopt hierarchical rather than congregational structures of governance. As hierarchical churches often base their government structure on profoundly held religious beliefs, the question about neutral rules is whether this judicially constructed legal approach diminishes rather than safeguards the exercise of religious freedom guaranteed by the First Amendment. From the comparative perspective, chapters 7 and 8 highlight a more fundamental issue about what the loss of the classical anthropological understanding has meant to the law of the modern secular state especially in terms of religious freedom and the spiritual nature of the human person. On the basis of theological, philosophical, and comparative perspectives, this book concludes with observations about law, person, and community.

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