Abortion and Law:
The Crisis of Reason in Western Jurisprudence

Nikolas T. Nikas*†

I. Introduction

The practice of human abortion, the intentional termination of the life of an unborn child in utero at the behest of one or more people who see the child as a burden or unwanted, is undoubtedly one of the most profound issues affecting Western Civilization[1] today.

---

*Nikolas T. Nikas is president and general counsel of Bioethics Defense Fund (BDF). J.D., Arizona State University College of Law, 1986; M.A., government and international relations, University of Notre Dame, 1981; B.A., government and international relations, University of Notre Dame, 1979. BDF is a public-interest legal and educational organization whose mission is to put law in the service of life by addressing issues such as abortion, biotechnologies that commodify human life, end of life issues, and healthcare rights of conscience (www.bdfund.org).

†This paper was originally published in *Protection of Human Life in Its Early Stage: Intellectual Foundations and Legal Means*, Aleksander Stepkowski, ed., AD FONTES, Vol. 10 (Peter Lang Edition: 2014). It is a modification of oral comments delivered at the University of Warsaw in September 2012. The author offers this paper as a public interest attorney who delivers addresses as part of the public education mission of Bioethics Defense Fund. The author is not a professional scholar; he expresses his gratitude for the inspiration and ideas that form the foundation of this synthesis to his former graduate school professor, the late Gerhart Niemeyer, and from the writings of the popes, professors and giants of political philosophy cited in these footnotes. Any omission of attribution is unintentional. It is the author's hope that by better understanding the philosophical defects underlying the regime of legalized abortion, practical legislation will be devised and action courageously undertaken to restore legal and cultural protection to innocent human life in the womb.

[1] As used in this paper, the term Western covers that civilization that had its remote origins in the Judeo-Greco-Roman worlds, took on its "decisive character" in Europe over the 1,000 years after the Fall of the Roman empire, spread over the last 500 years to the Americas, and later impacted virtually the entire globe. *See, e.g.*, Christopher Dawson, THE MAKING OF EUROPE (Sheed & Ward 1946); James Schall, THE REGENSBURG LECTURE (St. Augustine Press 2007)(appending Benedict XVI's Regensburg Lecture), p. 81.

Whether abortion[2] should be sanctioned, or, if already legalized, should be prohibited, is a crucial policy question that implicates science, morality and, ultimately, law. Since the science of human embryology establishes that a unique human being comes into existence at the "moment of sperm-egg fusion,"[3] and because most countries denominated Western still give at least a superficial nod to the moral claim that the innocent should be protected[4], the issue of abortion as a legal question takes on critical importance.

Is a law permitting abortion just or unjust? Since, until modern times, "an unjust law" was considered "no law at all,"[5] the issue of the rightness or

---

[2] The questions surrounding abortion, important in its own right, also raise similar scientific, moral and legal concerns about other related bioethical challenges such as human cloning, destructive human embryo research, *in vitro* fertilization, disability-selective abortion, eugenic postnatal infanticide, physician-assisted suicide, gene enhancement and designer babies, to name but a few. This article will discuss only the issue of abortion. According to the World Health Organization, every year in the world there are an estimated 40-50 million abortions. In 2008, there were an estimated 43.8 million induced abortions worldwide. WHO, *Safe and Unsafe Abortion,* http://apps.who.int/iris/bitstream/10665/75174/1/WHO_RHR_12.02_eng.pdf

[3] *See, e.g*., Maureen L. Condic, PhD, *When Does Life Begin*: *A Scientific Perspective* (Westchester Institute 2008), http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf

[4] While the impact of the Judeo-Christian worldview has greatly receded in Europe, the womb of Western Culture, and is possibly receding in the Americas too, it is still widely held that the innocent should be protected, at least outside of the womb. *See, e.g.*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 ("Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.")

[5] See discussion on Cicero and Aquinas, *infra*. The particular phrasing was famously used by the American civil rights advocate, the Rev. Dr. Martin Luther King, Jr, who penned these words while incarcerated in a Birmingham, Alabama jail for protesting the manifest evil of racial segregation. *See*, Martin Luther King, Jr., *Letter from a Birmingham Jail* (16 April 1963), *available at* http://mlk-kpp01.stanford.edu/kingweb/popular_requests/frequentdocs/birmingham.pdf ("One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all'").

wrongness of permissive abortion laws implicates fundamental questions about the essence of law and how society discovers what is just or not so that it may act accordingly. How does a society seeking justice answer this compelling question?[6]

Because the understanding of the nature of law has changed over the centuries, especially the role of human reason in law and culture, a legal resolution of the abortion issue is much more difficult to achieve today. It is the thesis of this paper that human nature and reason, ordered to reality and informed by medical science, demonstrate the manifest injustice of a civilized society allowing legalized abortion, and that once sanctioned by the law, abortion becomes the gateway for other acts of dehumanization of one human being by another. It is to these crucial questions of law and reason that this paper now proceeds[7].

II. Law as Reason

Philosophy was born in "wonder"[8] when men and women first looked around at the world and realized that something existed that they did not make, and that they were "ignorant" about the causes of things. Based on Aristotle's teaching that "wisdom is knowledge about certain principles and causes," Aristotle, *Metaphysics*, 982a1-2, the wisest man was one who

---

[6] For an insightful analysis of this subject, *see* Pope Benedict XVI *Address to the German Parliament* (22 September 2011), http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html.

[7] The abortion issue in law and policy is extremely complicated, and this paper makes no claim to exhaust the topic. Indeed, this paper simply touches on and identifies important areas for further in-depth analysis.

[8] *See* Plato, *Theaetetus*, 155d ("This sense of wonder is the mark of the philosopher. Philosophy indeed has no other origin…."); *see also* Aristotle, *Metaphysics*, 982b12, trans. W.D. Ross ("For it is owing to their wonder that men both now begin and at first began to philosophize."). All references to Aristotle's works are from R. McKeon (ed.), THE BASIC WORKS OF ARISTOTLE (New York: Random House 1941).

looked for "first principles," *Id*., 982a20-26, or the "essences" of things.[9] In other words, the lovers of wisdom eventually, and inevitably, sought out and discovered "nature."

What was right or true "by nature" (Gr. "*physis*") was set apart from those things that were customary or conventional or what "the law," by agreement, mandated (Gr. "*nomos*"). Consequently, the idea of a "natural law" seemed like an oxymoron. If "nature," the essence of things, solely apart from any agreement, was what, upon rational reflection, revealed the existence of first principles, and if "law" was merely conventional or the end result of agreement, then the two seemed never to be understood properly in one concept. Indeed, how could something that existed solely by agreement be related to something that existed inherently apart from such agreement?

However, the first intimations of a natural law understanding can be discerned in the writings of Plato (*see, e.g*., *The Republic* and *The Laws*) and Aristotle (*see, e.g.*, *Ethics, Politics, Rhetoric*).[10] Aristotle's *Rhetoric* contains an embryonic theory of "natural law":

> It will now be well to make a complete classification of just and unjust activities. We may begin by observing that they have been defined relatively to two kinds of law … particular law and universal law. … Universal law is *the law of nature*. For there really is, as everyone to some extent divines, *a natural justice and injustice* that is *binding on all men*, even on those who have *no association or covenant* with each other.

Rhetoric, 1373b1-9 (emphasis added).

---

[9] For a discussion of the origins of philosophy, nature, law and natural right, *see* Leo Strauss, NATURAL RIGHT AND HISTORY (U. of Chicago Press 1965), especially Chapter III. The author of this paper is indebted to the ideas set forth therein.

[10] See, e.g., Heinrich A. Rommen, THE NATURAL LAW, trans. Thomas R. Hanley (Indianapolis, 1998). See also, Hadley Arkes, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 45 (Cambridge, 2010). Aristotle had pointed out that what separates human beings from animals is the ability "to declare what is just and unjust; they could give reasons over matters of right and wrong." *Id.* (citing Aristotle, *Politics*, 1252a-3a).

It would take the Romans, however, and their genius for law, to set forth the fullest and most robust definition of the law in the classical world and to make crystal clear the central role of reason and nature:

> True law is right *reason* in agreement with *nature*, universal, consistent, and everlasting. …. There will not be one law at Rome and another at Athens or different laws now or in the future. There is now and will be forever *one law, valid for all peoples and all times*…. Whoever does not obey this law is trying to escape himself and to *deny his nature* as a human being.

Cicero, *De Republica*, 3.22.33, Loeb Classical Library 211 (Cambridge: Harvard Univ. Press, 1951)(emphasis added).

This definition is remarkable. First, Cicero defines law in terms of right "reason" as opposed to the will of the lawmaker.[11] Second, he rejects the view, widely accepted even in our own time, that all moral truth, and the law that codifies it, is relative.[12] Finally, he directly ties the obligation to follow the law to the obligation to act consistent with one's human nature. In other words, on things that matter, true law is related to reason, universal as to all times and places and tied to human nature from which it derives its ability to bind consciences.

---

[11] Compare this understanding with Thrasymachus in Plato's REPUBLIC who famously stated "the just is nothing else than the advantage of the stronger." *Republic*, 338c. In other words, "might makes right." Or, Thucydides's account of the Athenian navy's justification for the invasion of the island of Melos against the objections of the Melians: "since you know as well as we do that right, as the world goes, is only in question among equals in power, while the strong do what they can and the weak suffer what they must." THE PELOPONNESIAN WAR, 5.89). All references to the works of Plato are from E. Hamilton & H. Cairns (eds.), THE COLLECTED DIALOGUES OF PLATO (10th ed. 1980)(Princeton University Press, 1961).

[12] Compare this with this famous insight from the late Allan Bloom: "[t]here is one thing a professor can be absolutely certain of: almost every student entering the university believes, or says he believes, that truth is relative. … The relativity of truth is not a theoretical insight but a moral postulate, the condition of a free society, or so they see it. They have all been equipped with this framework early on, and *it is the modern replacement for the inalienable natural rights* that used to be the traditional" American grounds for a free society. Allan Bloom, THE CLOSING OF THE AMERICAN MIND, 25 (Touchstone 1987)(emphasis added).

From Cicero, it was not a far conceptual leap to the Christian understanding of law, nature, reason and justice set forth by St. Augustine ("there is also a law in the reason of a human being who already uses free choice, a law naturally written in his heart"),[13] and, most prominently, by St. Thomas Aquinas:

> And so from the four traits that have been mentioned, we can put together a definition of law. Law is (a) an ordinance of reason, (b) for the common good, (c) made by one who is in charge of the community, and (d) promulgated.

Thomas Aquinas, *Summa Theologiae*, I-II, Q. 90, Art. 4, trans. Alfred J. Freddoso.

Of these four elements, the requirement that law be an ordinance of reason is the most significant. Thomas Aquinas again:

> For 'law' (*lex*) is derived from 'to bind' (*ligare*), since law obligates (*obligare*) one to act. Now the rule and measure of human acts is *reason*, which … is the first principle of human acts. For it belongs to *reason* to order things to their end . . . .[14]

For Aquinas, man, the "*rational* creature," participates in "eternal *reason*," therefore, "it is clear that natural law is nothing other than a participation in eternal law on the part of a *rational* creature."[15]

And, what is the relationship between the natural law and human law? Aquinas explains:

---

[13] Augustine, Letter 157; *See also*,, Augustine, *On Eighty-Three Diverse Questions*, 53 (2) ("a natural law [*naturalis lex*] is, so to speak, inscribed upon the rational soul, so that in the very living out of this life and in their earthly activities people might hold to the tenor of such dispensations."). As to justice and government, Augustine famously stated, "Justice being taken away, then, what are kingdoms but great robberies?" Augustine, CITY OF GOD, Bk IV, par. 4.

[14] *Id.*, Q. 90, Art. 1 (emphasis added).

[15] *Id*. at Q.91, Art. 2 (emphasis added).

> [L]aw is a dictate of practical reason. … [and] proceed[s] from given principles to given conclusions. … [S]o too from the precepts of natural law … human reason must proceed to determine certain matters in a more particular way. And these particular determinations, devised by human reason, are called human laws.[16]

And, what are we to make of human law that fails to square with the natural law? Aquinas elaborates multiple times:

> Human law has the character of law to the extent that it is in accord with right reason. … However, to the extent that human law departs from reason, it is called 'unjust law' (*lex iniqua*) and has the character not of law but a certain sort of *violence*.[17]

> Since a tyrannical law is not in accord with reason, it is not a law absolutely speaking, but is instead a kind of *perversion* of law.[18]

> As Augustine says in *De Libero Arbitrio* 1, 'a law that is not just does not seem to be a law at all.' Hence, something has the force of law to the extent that it shares in justice. Now in human affairs something is called just by virtue of its being right according to the rule of reason. But … the first rule of reason is the law of nature. Hence, every humanly made law has the character of law to the extent it stems from the law of nature. On the other hand, if a humanly made law conflicts with the natural law, then it is no longer a law, but a *corruption* of law.[19]

> Laws that are humanly made are either just or unjust. If they are just, then they have their power to oblige in conscience. … [Unjust] laws [normally] … do not bind in conscience … [20]

---

[16] *Id*. at Q. 91, Art. 3.

[17] *Id.* at Q. 93, Art. 3 (emphasis added).

[18] *Id.* at Q. 92, Art. 1 (emphasis added).

[19] *Id*. at Q. 95, Art. 2 (emphasis added).

[20] *Id.* at Q. 96, Art. 4. Aquinas does mention that in some situations an unjust law might be followed to avoid scandal, as long as the law followed was not inherently evil.

As one noted commentator has summarized: "St. Thomas rightly concludes that the positive law may not conflict with the natural law. So far as it conflicts with the latter … it is not law at all and cannot bind in conscience."[21]

Within this context arises the question of whether a law authorizing the termination of the life of an innocent unborn human being is in violation of "the laws of reason, or the canons of logic."[22] In other words, does legalized abortion violate the natural law, known in some sense to all men and women because all human beings share a common human nature?[23]

U.S. President Abraham Lincoln, once a self-taught country lawyer who understood the natural law implicitly, imagined himself in the following conversation with the owner of black slaves in pre-Civil War America:

> You say A. is white, and B. is black. It is *color*, then: the lighter having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your

---

[21] H. Rommen, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY, trans. Thomas R. Hanley (Indianapolis: Liberty Fund 1998), p. 49. *See also*, Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (Harvard, 1983), p. 253 ("The analytical integration of canon law … proceeded from a belief that underlying the multiplicity of legal rules and procedures was a set of basic legal principles … . [and] that the underlying legal principles had not only a logical aspect, being subject to *reason,* but also a moral aspect, being subject to *conscience*. … [and] a political aspect … a standard by which to judge and correct, and, if necessary, to *eliminate* particular existing laws.")(emphasis added).

[22] Hadley Arkes, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS, *supra* n. 10 at 60.

[23] Despite doing evil, all people understand basic principles of right and wrong at some level. Even a thief does not like to be stolen from; even a mafia hit man is repulsed by the unlawful killing of his own family. As Aquinas held, the first principle of the Natural Law known to reason is "do good, avoid evil." Aquinas, *Summa Theologiae Treatise on Law*, *supra*, at Q. 94, Art. 2 ("Therefore, the first precept of law is that good ought to be done and pursued and that evil ought to be avoided. And, all other precepts of the law of nature are founded upon this principle… ").

> own. You do not mean *color* exactly? – You mean that whites are *intellectually* the superiors of blacks, and therefore have the right to enslave them? Take care again. By this rule, you are to be the slave to the first man you meet, with an intellect superior to your own. But say you, it is a question of interest; and, if you can make it your *interest*, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.[24]

As jurisprudence scholar Hadley Arkes has noted about this argument:

> Lincoln offered, in the most concentrated form, a model of principled reasoning: There was nothing one could cite to disqualify the black man as a human being, and the bearer of rights, that would not apply to many whites as well. There was an apt lesson to be drawn in pointing out that nowhere, in this chain of reasoning, was there an appeal to faith or revelation. Lincoln's argument could be understood across the divisions of religion or race or class – it could be understood by Catholics or Baptists, by geologists or carpenters, and even by people unburdened by a college education. It could be understood then by ordinary people, using the wit of rational creatures … For the natural law to function as law, it has to be accessible, fairly commonly, to those creatures of reason who walk among us.[25]

Applying the reasoning of Aquinas and Lincoln to legalized abortion, it is nearly impossible to justify it with the common arguments of "choice" and "autonomy."

---

[24] Hadley Arkes, CONSTITUTIONAL ILLUSIONS, *supra* n. 10 at 60-61 (citing *The Collected Works of Abraham Lincoln*, ed. Roy P. Blaser (Rutgers University Press, 1953,) Vol. II, p. 222-223).

[25] Hadley Arkes, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS, *supra* at 61. "As Aquinas observed, the divine law we know through revelation, but the natural law we know through that reason that is natural to human beings, accessible to ordinary people as creatures of reason." *Id.*

As to Aquinas's understanding that unjust laws are no laws at all, it is difficult to see how laws that justify the killing of innocent human beings[26] do not violate the most basic rules of reason and justice. Protection of innocent human life does not have to be taught to people; they simply grasp it in the core of their reason and conscience. All laws that allow legalized abortion are inherently unjust, violate the basic cannons of reason and the natural law and are, in essence nothing but acts of "perversion," "violence" and "corruption."[27]

If the common argument of "autonomy"[28] justifies the private use of violence against an innocent human being, then nothing, in principle, prevents the seeker of abortion from also having private violence used

---

[26] As state above, given the empirical scientific evidence, there can be no reasonable argument that disputes that abortion terminates the life of a unique human being. Those who insist on calling the developing human child anything less than a member of the human species are the obscurantists, who cling to an unreal world of their own making in order to justify the unjustifiable to the detriment of women who later learn the truth. *See, e.g.,* Monte Harris Liebman, M.D., *Fetal Development Information: An Essential Element of Informed Consent,* Association for Interdisciplinary Research in Values and Social Change, ABORTION DECISION MAKING, 3(1) (Spring 1990), *available at* http://lifeissues.net/writers/air/air_vol3no1_1990.html)(last visited September 10, 2013)("Before her abortion while three months pregnant, Julie Engel recalls asking an abortion counselor: 'What does a three month fetus look like?' 'Just a clump of cells', she answered matter of factly. Years later she saw some pictures of fetal development. 'When I saw that a three month old 'clump of cells' had fingers and toes and was a tiny, perfectly formed baby, I became really hysterical. I'd been lied to and misled.'")

[27] *See* n. 14-17, *supra.*

[28] "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." *Planned Parenthood v. Casey*, 505. US 833, 980 (1992). This statement has been criticized for its untrammeled view of freedom as license, for its assumption that people can ignore reality and create their own vision of utopia, and for its self-refuting quality: if my liberty and concept of existence and meaning says I should oppose abortion, and your view of liberty allows it, then on what grounds can our two subjective, and opposing, views of liberty be reconciled. In short, they cannot. At least not by citing the "mystery of life" passage. This high sounding statement, in the end, rings hollow. For a harshly critical analysis of the *Casey* decision, *see* Michael Stokes Paulsen, *The Worst Constitutional Decision Of all Time*, 78 Notre Dame Law Review 995 (2003).

against him or her as an act of another's autonomy. If the common argument of "family burden," whether financial or psychological, justifies the termination of an innocent human being's life, then one's burden on others or society can justify similar elimination.[29] And if the common justification of "viability," is the touchstone based on the ability of the unborn child to survive on its own, well then every type of infanticide or outright homicide could be justified for every born child until they reach an age when they do not need parental care.[30]

---

[29] Arguments about burden also support the push for physician-assisted suicide and euthanasia. Indeed, one former Governor of Colorado, Richard Lamm, caused an uproar when in 1984 he stated that elderly, terminally-ill people have "a duty to die and get out of the way." He later explained he was only talking about not having the terminally ill lingering on excessive medical care that needlessly prolonged the dying process. Still, it is morally reprehensible to even suggest anyone has a "duty to die." Although not all medical treatment of an extraordinary level is morally required, the utilitarian ethos prevalent in Western culture virtually guarantees some people will be coerced into dying early. *See* Associated Press, *Governor Lamm Asserts Elderly, if Terminally Ill, Have "Duty to Die,* NY Times, March 29, 1984.

[30] Princeton professor Peter Singer has advanced arguments for infanticide of born infants: "The fact that a being is a human being … is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. This conclusion is not limited to infants [with] disabilities … no infant – disabled or not – has as strong a claim to life as beings capable of seeing themselves as distinct entities, existing over time." Peter Singer, *Practical Ethics* 169 (2d ed., Cambridge Univ. Press 1997).

Of course, there is no principled reason why homicide of dependent children cannot be justified at even later ages of development if the ability to survive on one's own is the valid measure for legal protection to operate. What five-year old, what ten-year old, or indeed, what teenager can truly care for himself or herself without the added support of family, friends or the community at large? If the ability to survive is the touchstone of protection, many homeless, jobless adults could arguably fall outside society's safety net based on the sweep of such an argument. Fortunately, human reason, conscience and the natural law set forth limits understandable to rational beings who seek to know the truth of what is.

As understood by Lincoln and the classical-Christian worldview, nature and reason[31] point the way to a humane and flourishing legal order, one that protects the innocent, the vulnerable, and the stranger in our midst.

But what about arguments based on a legal order whose foundation is not human nature and reason, but will? Where does a legal regime based on the will of the sovereign take society? Does such a juridical order support abortion? Is it a valid order? What does history tell us about the success of such endeavors? It is to these questions, that we now turn.

III. Law as Will

If modernity can be defined, or explained, at least in part, as the rejection of the classical-Christian philosophical worldview[32], then that rejection, as a matter of political philosophy begins emphatically with Machiavelli, continues with Hobbes, Locke, and Rousseau, and, arguably, has accelerated into modern times. Hobbes deserves pride of place in this rejection; his philosophy rejected classical metaphysics, classical political philosophy and classical natural law.[33] However, even prior to this fundamental divergence from the classical political understanding, another rejection occurred in Western Civilization, one deriving from theology. It is an interesting aspect of intellectual history that a seemingly arcane dispute by clerics about the nature of the divinity would impact, and act as a catalyst for, the legal rejection of the classical role of reason in the law.

---

[31] "Christianity has never proposed a revealed law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to *nature and reason* as the true sources of law. . . ." Pope Benedict XVI, Address to the German Parliament, *supra* n. 6 (emphasis added).

[32] While undoubtedly many scholars have made similar observations, the author first became aware of this definition of modernity in a history class lecture in the Fall of 1981 by Robert J. Loewenberg, then a professor of history at Arizona State University.

[33] *See, e.g.*, Rommen, *supra* n. 21 at 73: "The entire theory of Thomas Hobbes (1588-1679) amounts at bottom to a denial of the natural law. ... The English thinker ... pictured the state of nature as a savage, lawless condition of war of all against all, as chaos. Here we have another illustration of the relationship between epistemology and moral philosophy." Hobbes's most influential work was The Leviathan, *infra* n. 42

It is beyond the scope of this paper to go into a detailed discussion of this theological debate.[34] Suffice it to say that during the 13th Century in the West (and even earlier in the Islamic world), a dispute arose between those who believed God's omnipotence, and, therefore, his will was unlimited, even to the extent of not being bound by his previous promises and others who believed God could not act contrary to his very nature: because God is pure goodness, he would not act, indeed, could not act, contrary to his fundamental and inherent goodness and nature.

This, as it turned out, was not some esoteric debate. Those who believed God's will was absolute, even clerics honored by the Church for their holiness, such as Blessed Dun Scotus (1265-1308), held that man could only know God's *voluntas ordinata* or ordained will. Under this view, God "could have done the opposite of everything he has actually done."[35]

As one scholar has observed:

> For Dun Scotus morality depends on the will of God. A thing is good not because it is corresponds to the nature of God or, analogically, to the nature of man, but because God so wills. Hence the *lex naturalis* could be other than it is even materially or as to content, because it has no intrinsic connection with God's essence, which is self-conscious in His intellect.[36]

The effect of this theological "voluntarism" (Latin, *voluntas* meaning "will") is a "capricious God" who is "not even bound by truth and goodness."[37] The other effect is to instill a necessary relativism in the world. One would never know if the rules established by God would change day by day if he so willed them to be changed.

---

[34] For a good introduction to this debate, *see* Rommen, *supra* n. 21, at 51-61.

[35] James Schall, *supra* n. 1 (analyzing in depth Pope Benedict XVI's Regensburg Lecture)

[36] Rommen, *supra* n. 21 at 51.

[37] Schall, *supra* n. 1 (citing Pope Benedict's Regensburg Lecture).

This theological voluntarism eventually interacted with the philosophical nominalism of William of Ockham (1287-1347). Nominalism is the philosophical position that universals do not exist, only particulars.[38] Because Ockham only believed there were particulars, not universals, he denied, or doubted it could be known, that any "teleological orientation toward God is inherent in all creation and especially in man. The unity of being, truth and goodness does not exist for him. Moral goodness consists in mere external agreement with God's absolute will, which, subject to his arbitrary decree, can always change."[39]

Why does this matter and how does this affect law in the twenty-first century? As one commentator noted:

> Man sins, therefore, because and only so far as a positive law, by which he is bound, stands over him. God, on the other hand, cannot sin because no law stands above Him, not because it is repugnant to His holiness. Hence there exists no unchangeable *lex naturalis*, no natural law that inwardly governs the positive law. Positive law and natural law … stand likewise in no inner relation to each other. The identity of this thought structure with *The Prince* of Machiavelli, with the *Leviathan* of Hobbes, and with the theory of will of modern positivism (the will of the absolute sovereign is law, because no higher norm stands above him) is here quite obvious.[40]

In short, theological voluntarism and philosophical nominalism paved the way for legal positivism and were, in a very real sense, its intellectual forebears.[41] The reference to Hobbes above is key. In Hobbes' political

---

[38] "As all being is founded on the mere absolute will of God without participation in His essence, so all oughtness or obligation rests solely on the same absolute will. Oughtness is without foundation in reality, just as universals are merely vocal utterances (*flatus vocis*) and not mental images of the necessary being of the ideas in God. In this way [Ockham] arrived at a heightened supernaturalism, but only to deprive almost completely the natural order of its value." Rommen, *supra* n. 21 at 52-53.

[39] Rommen, *supra* n. 21 at 52-53.

[40] *Id*. at 53.

[41] It is, of course, far beyond the scope of this paper to discuss and analyze the complex intellectual history that led from voluntarism and nominalism to legal

philosophy, the only way to protect men from returning to the insecurity, fear and violent death commonplace in the state of nature, where there is a constant war of all against all and where the life of man is "solitary, poor nasty, brutish and short," is to ensure that the sovereign's power is absolute.[42]

As one commentator has observed:

> "What mattered was that the sovereign should be absolute, so that there could be no other authority (e.g. a religious one) to which men might appeal to justify their rebellion. The sovereign must be the final arbiter in all matters of law, morals and religion. All chains of command must ascend to him like a pyramid. The liberty of the subject consisted only in those things which were not forbidden by law, *law being simply the command of the sovereign*.[43]

This clear rejection of the natural law understanding that law is fundamentally reason, not will, was adopted and adapted over the centuries, sometimes unconsciously, even by some of those who supported democratic political orders: it was the will of the majority alone that created law and legal rights. Nothing was higher than this will. Thus came about the separation of law and morality, positive enactments of the sovereign over natural law, reason and justice.

---

positivism. Suffice it to say, that today's dominant legal positivism can be traced back to Hobbes, who was preceded by theorists of voluntarism and nominalism which themselves trace back to the Sophists.

[42] Thomas Hobbes, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL (Collier Books edition)(Macmillan 1962), p. 100-101, 113-114 ("Hereby it is manifest, that during the time men live without a common power to keep them all in awe [i.e. the state of nature], they are in that condition which is called war; and such a war, as is of every man, against every man. … [and] the life of man [is] solitary, poor, nasty, brutish and short. … To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power [i.e. the absolute sovereign], there is no law; where no law, no injustice. … [T]herefore where there is no commonwealth, there nothing is unjust").
[43] Richard S. Peters, Introduction to Hobbes' LEVIATHAN, *supra* n. 42 at 11 (emphasis added).

In American jurisprudence, one of the most vivid examples of legal positivism can be found in the 1857 U.S. Supreme Court case, *Dred Scott v Sandford*.[44] In that case, the US Supreme Court was confronted with the question of whether a black slave, who sued for his freedom under the U.S. Constitution, could be considered a free member of the political community with full rights. A majority of the Court answered that question with a resounding "no." The Court responded that slaves "had for more than a century before been regarded as beings of an inferior order, and altogether unfit … and so far inferior they had no rights which the white man was bound to respect."[45]

In so holding, the Court severed the connection between positive law and morality: "[it] is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of [slavery laws]."[46] Thus, under the influence of a certain kind of legal positivism, the Supreme Court did not allow itself to consider the ultimate moral question: the rightness or wrongness of chattel slavery.[47]

Decades later, Justice Oliver Wendell Holmes, Jr., a well-respected American jurist and Justice of the U.S. Supreme Court, who had fought in the Civil War for the Union forces, famously quipped, "I always say, as you

---

[44] *Dred Scott v. Sandford*, 60 US 393 (1857).

[45] *Id.* at 407.
[46] *Id.* at 405.

[47] One year after *Dred Scott,* Abraham Lincoln, during one of his famous debates with Stephen Douglas, responded to the view that morality has no role in deciding the slavery question: "When Judge Douglas says 'he don't care whether slavery is voted up or down' [in the territories of the United States that wanted to become new States] … he can thus argue logically if he don't see anything *wrong* in it; … He cannot say that he would as soon see a *wrong* voted up as voted down. When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing *wrong* in the institution; *but if you admit that it is wrong, he cannot logically say that anybody has a right to do wrong.*" Sixth Debate with Stephen A. Douglas, at Quincy, Illinois, October 13, 1858 in The Collected Works of Abraham Lincoln, p. 256-257 (Roy P. Basler ed., New Brunswick: Rutgers) (vol. III 1953), cited in Hadley Arkes, FIRST THINGS (Princeton, 1986), p. 24; *Cf.* Plato's *Crito*, 49d where Socrates states "it is never right to do wrong."

know, that if my fellow citizens want to go to Hell I will help them. It's my job."[48] He had also declared several decades after the Civil War: "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[49]

Thus, it should not come as a surprise that when Holmes was a much older man still serving on the U.S. Supreme Court, he upheld a coercive Virginia eugenic law that allowed the forcible sterilization of certain people deemed to "sap the strength" of the state to prevent society from being "swamped with incompetence."[50] He opined:

> It is better for all the world, if instead of waiting to execute *degenerate* offspring for crime, or let them starve for their *imbecility*, society can prevent those who are *manifestly unfit* from continuing their kind. … *Three generations of imbeciles are enough*.[51]

This morally bankrupt decision was cited by some of the defendants at the Nuremberg Trials as justification for their war crimes. *See* Harry Brunius, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY (New York: Knopf, 2006), p. 17-18 ("At the Nuremberg Trials after the war, Nazi doctors defended their actions by citing American precedents, as well as the majority decision of Oliver Wendell Holmes, Jr." in *Buck v Bell*). The leap from coercive use of governmental power severed from the natural law, to a totalitarian regime's merging of legal positivism and eugenics seems now, in retrospect, to be almost inevitable.

Modern day Western democracies are also not immune to such deformation of human dignity: "[i]t is commonly acknowledged that

---

[48] Oliver Wendell Holmes, Jr., Letter to Harold J. Laski (March 4, 1920).

[49] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 Harvard Law Review 457 (1897)(Graduation address given in 1897 at commencement of Boston University Law School)

[50] *Buck v Bell*, 274 U.S. 200, 207 (1927).

[51] *Id*. (emphasis added).

democracy which is not founded on the common moral recognition of what is good or evil easily turns into open or thinly disguised totalitarianism."[52] Indeed, combined with wide-spread moral relativism and legal positivism, it is difficult to disagree that society is "building a *dictatorship of relativism* that does not recognize anything as definitive and whose ultimate goal consists only of one's own ego and desires."[53]

Thus, the mix of legal positivism, moral relativism and humankind's ever increasing mastering of science and technology brings us back to the question posed at the opening of this paper, should the practice of human abortion, performed by medical professionals, be legalized or remain legal in jurisdictions where it has already been permitted? Put another way, does legally sanctioning the forcible taking of a human being's life *in utero* promote a just political and legal order consistent with human nature and the natural order of being? Or does such a law of private violence undermine human dignity and lead to further dehumanization? Whether law looks to Socrates or to Lincoln almost 2,500 years later, it is still proper to say: "that it is never right to do wrong."

IV. Law and "Self-Limited" Scientific Reason

While it is beyond the scope of this paper to address fully, the truncation of reason in modern natural science is critical to understanding the role of law in ensuring ethical science and humane medicine. By relying only on verification or falsification through experimentation, natural science – a synthesis between Cartesianism and empiricism – rests on a "self-limitation of reason" that negatively impacts the legal order, among other things.

In his widely misunderstood Regensburg Lecture, then Pope Benedict XVI provided a helpful analytical insight into our present situation. If science is only reduced to practical reason,

> then it *is man himself who ends up being reduced*, for the specifically human questions about our origin and destiny, the

---

[52] Pope John Paul II, *Centesimus Annus,* par. 46 (1991). See also Pope John Paul II, *Evangelium Vitae*, par. 70 (1995) ("For this very reason, the value of democracy stands or falls with the … values which it embodies and promotes.").

[53] Joseph Cardinal Ratzinger, Homily at the Mass Opening the 2005 Papal Conclave

> questions raised by religion and ethics, then have no place within the purview of collective reason as defined by 'science', so understood, and thus must be relegated to the realm of the subjective. The subject then decides, on the basis of his experiences, what he considers tenable in matters of religion, and *the subjective 'conscience' becomes the sole arbiter of what is ethical.*[54]

Political theorist James Schall adds to Pope Emeritus Benedict's insights:

> Modernity is basically the claim … that the first principles of reason are themselves subject to will. Contrary to Aristotle, they do not 'bind' reason to *what is*. Modernity, in its philosophic sense, means that we are bound by nothing. There is no order in things or in the mind, for that matter, that would ground any order. There is only the order we ourselves make and impose on things. This view of modernity was developed, in large part, to protect us from the notion that truth obliges us.[55]

Thus, law viewed fundamentally as "will" allows unjust acts to be permitted under the rubric of an individual's subjective "choice." And a truncated reason, whose horizons are narrowed by the scientific method detached from the natural law, allows a person to "define one's own concept of existence, of meaning and the mystery of human life," as stated by the U.S. Supreme Court in reaffirming the essential holding in *Roe v. Wade,* even at the expense of another's fundamental dignity and life.[56]

Ultimately, man's technology, derived from a self-limiting practical reason, will allow unlimited imposition of his will on the material world, even someday soon to his own "self-manipulation" and "self-mutilation".[57]

---

[54] Benedict XVI, Regensburg Lecture, par. 48, *supra* n. 1, at p. 142-43 (emphasis added).

[55] James Schall, The Regensburg Lecture, *supra* n. 1 at 106.

[56] *Planned Parenthood v. Casey*, 505. US 833, 980 (1992), *supra* n. 28.

[57] Joseph Cardinal Ratzinger, Christianity and the Crisis of Cultures (Ignatius Press, 2006), chap. 2.

Or as C.S. Lewis once said: "[w]hat we call Man's power over Nature turns out to be a power exercised by some men over other men with Nature as their instrument."[58]

V. Conclusion

Should Western nations legally permit the intentional termination of a pregnancy, when science tells us that the child *in utero* is a human being and that termination results in the death of that human being? If law is properly understood as an ordinance of reason for the common good, then the answer provides itself. No sovereign, whatever its make up, should be able to pass laws that violate the fundamental natural moral law.

The killing of an innocent human being violates that natural law in the most profound way and is manifestly unjust. A law, or a judicial decision, allowing it is indeed "no law at all." If however, countries opt to treat law as nothing but the will of the lawmaker, then such legal positivism, combined with the self-limitation of scientific reason detached from the natural law, will eventually and inexorably lead to human cloning, human-animal hybrids, discriminatory disability-selective abortion, post-natal eugenic infanticide, and physician-assisted death of the elderly and infirm, with no principled way to stop these fundamental violations of human dignity.

As demonstrated by over forty years of constitutionally protected abortion in the United States, when human life and dignity are not protected in the abortion arena, then the floodgates of the Brave New World open up and lead to greater horrors yet. The opportunity for Poland and other similarly situated nations to follow the broad horizons of reason, nature, justice and order is here, and the opportunity to protect and defend life is now. *Carpe diem*!

---

[58] C. S. Lewis, THE ABOLITION OF MAN (B&H Publishing Group, 1943).