Whether or not they come to agree entirely on the highest philosophical and/or religious premises of a public morality, many of them will agree (as they already do) on a range of moral goods that furnish society with goals of public as well as private life. They are listed above: life, health, nourishment, material well-being, love, community, respect, friendship, marriage, family, knowledge, truth, meaning, and whatever other objects can reasonably be taken as natural human goods. These are the goals that can be the organizing principles of life, both for individuals and communities.

Many conservative reviewers criticized George Will's book, *Statecraft as Soulcraft*, when he published it in 1983 because they thought he was proposing that government take on the role of forming the moral character of the citizens. His point was a more subtle one, namely, that governmental policies in fact affect the moral character of citizens, and both government and the citizens ought to be aware of that and judge the policies accordingly. But the citizens cannot be effective critics of the moral effect of public policies unless a sufficient number of them have commonly held moral standards and are not rendered inarticulate by contemporary skepticism and relativism. They need, in short, the kind of solid moral convictions furnished by natural law or something very much like it.

It is emphatically not necessary to convince the skeptics and relativists, or to persuade the rugged individualists before we can proceed. The democratic process does not depend on unanimity, and individual rights, valuable though they are, do not always trump the claims of community. In this country the democratic process operates, insofar as the courts will permit it, on the assumption that among the people there is what the Middle Ages called the *major et sanior pars*, the larger and sounder part that is qualified to govern, not because it is larger but because it is presumed to be normally saner and sounder. It is the conscience of that part of the people that advocates of natural law must appeal to.

Natural Law and Constitutional Law

–by Gerard V. Bradley

A distinguishing feature of the natural law, as Catholics have always understood it, is the set of exceptionless negative moral norms, including that against intentionally killing the innocent. These norms constitute the superstructure of the Christian moral life. They also serve as a ramp to heaven for non-Christians. As the Holy Father made so powerfully clear in the encyclical *Veritatis Splendor* [*VS*], when we preach the Gospel we preach the good news of salvation through Jesus. "It is precisely on the path of the moral life that *the way of salvation is open to all.*" [*VS* §3, emphasis in original] The moral truth is thus the path to salvation for those who,

through no fault of their own, have not embraced the faith. The importance of the exceptionless negative moral norms to individuals, it seems to me, can hardly be exaggerated.

What is their relation to social and political life? Is the Catholic exercising public authority somehow shielded from their force? Are they inapplicable to political decision making? Is, at least, the statesman charged with care of a polity *in extremis* exempt from them?

No.

Pope John XXIII wrote more than three decades ago in *Pacem in Terris* [*PT*]: "The same law of nature that governs the life and conduct of individuals must also regulate the relations of political communities with one another... Political leaders are still bound by the natural law... and have no authority to depart from its slightest precepts." [*PT* §§ 80-81] And more recently Pope John Paul II writes in *Veritatis Splendor*: "*When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone.*" [*VS* §96] In what seems to me the most arresting statement in Catholic teaching on the limits of political authority, the Pope wrote, the "poorest of the poor" and "the master of the world" are equally bound by the exceptionless moral norms. "Before the demands of morality we are all absolutely equal."

Some might think that these papal statements represent some kind of individual "clean hands" policy, that they reveal an extreme concern that Christians not sully themselves in the dirty but necessary business of hard political action. But this view is mistaken. These strict statements are *not* explicitly or implicitly addressed only to Catholics, or even to all Christians. They are addressed to all. Like the exceptionless negative moral norms themselves, they express moral truths, applicable to everyone. Second, the norms are not obstacles borne by the scrupulous *to* realization of a just political order. Pope John Paul II could hardly be clearer that observance of them *by* public authority is essential to political justice:

> These [exceptionless negative moral] norms in fact represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of genuine democracy, which can come into being and develop only on the basis of the equality of all its members, who possess common rights and duties. [*VS* §96]

These norms form the backbone of any coherent account of inalienable human rights, including the right not to be intentionally killed, the right not to be lied to by public officials, the right to be free of treatment as a subhuman thing or piece of property (the secure moral basis for prohibition on slavery, as well as the foundation for evaluating various reproductive technologies whereby a human person is at least initially brought into existence with the status of a manufactured *thing*).

This universal applicability of the exceptionless norms establishes the (radical) moral equality of all persons. By declaring basic human goods (the backbone of the exceptionless norms) absolutely immune from direct attack, Catholic social teaching insures that no one whosoever may rightly be made an instrument of the purposes of another—not of the Cabinet, the "community," or the "great man."

Now, this teaching does not imply or entail that public authorities may do *nothing* that ordinary individuals may not. Some actions may be rightly chosen only by legitimate public authority (e.g., the decision to declare and carry on a war). But that does not imply a separate set of "public" moral principles, and there is none.

There is in the tradition a usage, notably in *Dignitatis Humanae*, of "public morality." But there and elsewhere in the tradition, the reference is to the moral ecology of public spaces (schools, etc.). It presupposes rather than supplants morality as such. Again, there is no separate public morality in the sense of different basic action guiding norms.

It seems to me (though the matter is hardly free from doubt) that the Holy Father in *Evangelium Vitae (EV)* moved to assimilate the teaching on capital punishment *to* the norm which prohibits intentional killing, a norm which has traditionally been understood to apply to private conduct. To be sure, the tradition of Church teaching has (at a minimum) tolerated the practice of capital punishment. It has also been common understanding that by "sanctity of life" was meant the preservation of innocent life from intentional attack. Those eligible for execution due to misdeeds were excluded from the class of protected innocents.

The development which *EV* portends, at least in my reading of it, is towards a meaning of "innocence" as "nonaggressive," in the precise sense of presently constituting no continuing threat to the safety of others. As the Pope suggests in *EV*, the development of secure prisons over the last century or so in developed countries means that criminals may be punished and be "innocent" in this particular moral sense. Only on the assumption that all non-aggressors in this (active, present) sense have a right not to be intentionally killed by anyone—including the hangman—can we make adequate sense of the Pope's considered judgment that contemporary prisons have dramatically decreased the proper occasions for execution to "very rare, if not practically non-existent."

* * *

How should (can?) one integrate the natural law, as so authoritatively taught by the Church, into our constitutional corpus? How should (can?) the Holy Father's teaching on capital punishment—that it be very rare—be treated by the

Catholic judge who determines that the positive law in our society authorizes this or that presently harmless convicted murderer? The precise answer to that question, and others like it (concerning the positive law on, say, abortion and euthanasia) depends upon a careful application of the principles of formal and material cooperation in evil acts, as well as upon sound application of the norms against giving scandal and against lying. The Catholic lawyer and judge must not lie about what they believe the positive law to be, in order to (by misrepresenting the positive law) bring it into line with moral truth. Put differently, the real question in such situations is determining what *exactly* a person wills and is otherwise doing (i.e. what foreseeable effects he is responsible for) in a given situation.

I wish here to consider the more general question of the interaction of natural law and constitutional law. The defender of the exceptionless negative moral norm, as expounded in *VS*, finds this paradox: the language and substance of natural rights and natural justice (and, occasionally, natural law) inhabits opinions arguing *in favor of* abortion, sodomy, suicide, pornography, contraception–all acts violative of the natural law. The critics of these decisions, by and large, speak positivistically of law, and tend to deride natural law, when they mention it at all. The hallmark of these theories of judicial review—prototypically, "originalism"—even seems to be Hugo Black's notion that natural law has no role in constitutional interpretation. Constitutional law is entirely a matter of drawing conclusions from the conventional legal materials. Courts never *make* law. They *find* it and apply it. As Justice Scalia wrote in the 1989 *Michael H.* case, "[a] rule of law that binds neither by text, nor by any particular, identifiable tradition is no rule of law at all." [491 U.S. at 127] More recently, Justice Scalia pointedly questioned Harry Blackmun's renunciation of the death penalty, chiding Blackmun for referring "often" to "intellectual, moral and personal" perceptions but never to "the text and tradition of the Constitution." According to Scalia "[it] is the latter rather than the former that ought to control." [ll4 S.Ct. 1127]

I think that natural law has less to do with constitutional law than liberals claim, and more than conservatives allow. In the dominant conservative polemic against decisions like *Roe v. Wade*, friends of the moral tradition (like Scalia) have taken aim at judicial philosophizing, which they brand "imposition" of "personal preferences" by unelected, robed guardians. The constitutional theorist cannot rule out, *a priori*, the possibility of judicial philosophizing. Sometimes sound constitutional law depends entirely upon sound unrestricted practical reasoning. Perhaps the clearest example is one that both Blackmun and Scalia deny. They think that "person," as used in the Fourteenth Amendment's Equal Protection Clause should be defined by reference solely to conventional legal materials. I would argue that the word "person," as used in the Equal Protection Clause, is transparent for the metaphysical truth of the matter about the personhood of the unborn.

The matter of who is a subject to whom and what duties of justice are owed by some to other members of a community is at the heart of a society's justice. It is a question which is most unforgiving of wrong answers. A society (like ours) which leaves millions of human persons (the unborn, and seemingly, the infirm) bereft of the homicide law's protection can hardly be considered just. A society (like ours) which treats the underlying questions (the humanity of the unborn, the sacredness of life) as opaque to the truth, as matters to be resolved in the public arena by reference to legal fictions and the interests of stronger or dominant groups, promises no real possibility of reform of that injustice.

* * *

I wish to conclude with reference to another example of our law's emerging opacity to truth, the matter of same-sex "marriage." A Hawaii Supreme Court decision of May 5, 1993 promised, given an appropriate record, to legalize homosexual marriage. When that takes place, whether these "marriages" will have to be recognized in other states under the Full Faith and Credit Clause of the Constitution will be the critical question. If so, Hawaii will be to gay marriage what Nevada used to be to divorce.

The opinion is full of mischief. Like many others before it, the Hawaii court got much mileage from a mid-1960s Virginia trial court's defense of that state's anti-miscegenation law, eventually declared unconstitutional by the Supreme Court in 1967 in the case of *Loving v. Virginia*. The lesson taken from the *Loving* episode seems to be a general aversion to any claim that marriage is not entirely plastic, malleable—that it is not just a legal fiction. The Hawaii Attorney General incorporated into his argument portions of an earlier Kentucky court opinion upholding a statute like Hawaii's, which issued marriage licenses only to couples comprised of man and woman:

> Marriage was a custom long before the state commenced to issue licenses for that purpose...[M]arriage has always been considered as a union of a man and a woman...It appears to us that appellants are prevented from marrying, not by the statues of Kentucky or the refusal of the County Clerk...to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined...In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

The Hawaii Supreme Court's response to this argument from the true nature of

marriage contains the following remarks: "circular and unpersuasive," an "exercise in tortured and conclusory sophistry." "The facts in *Loving*" (the miscegenation case!) "discredit" and "unmask the tautological" nature of the argument.

Some states have already enacted laws that effectively deny recognition to same-sex marriages. Many others likely will. The Supreme Court will eventually have to resolve the matter, and I doubt the decisive inquiry will have much to do with the doctrine of Full Faith and Credit. At least it need not: no matter what that doctrine turns out to be, these protective state laws are subject to another attack, fatal to the laws if successful, under the Due Process or Equal Protection Clause: do laws recognizing that marriage is intrinsically heterosexual lack a "rational basis"? This question, I submit, is a constitutional one that can only be resolved by a judicial consideration of the metaphysical truth about marriage. I fear that a majority of Justices will fail to even raise that question.

As a matter of metaphysical truth, marriage—the union of one man and one woman—is the principle of legitimate sexual activity. That sodomy is wrong, and exactly why, are matters central to any society's understanding of family, marriage, upright sexual behavior and, indeed, of the nature of the human person. That is to say, they are matters central to any society's self-understanding. Make no mistake about it: there is no possibility of a "public" neutrality on these questions. A diversity of views on these matters may exist in a stable society, but that does not mean that those exercising public authority to care for the common good either can or should remain neutral on these matters, or act only on some fragmentary answer which is a consensus or melding of all the extant views. Legal philosopher Joseph Raz, who does not agree that sodomy is always wrong, writes, "[S]upporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it."

What if the Supreme Court, in the decision treating the same-sex marriage question, judges the moral truth opaque, or off-limits? The more strictly legal argument would look something like the following. Most Americans still agree with the view of Justice John Harlan, in *Poe v. Ullman* (1961):

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well a laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis.

The distillate of our tradition of laws governing marriage and sex could (as of 1961 at least) be fairly expressed as: marriage is the principle of legitimate sexual activity. Since the 1960s this integrating principle has been battered and obscured by practices, among married and unmarried alike, which are not reconcilable with the rigorous statement and consistent application of the norm that marriage is the principle of upright sexual activity. It does not follow (and I think it is not the case) that so many people reject the principle.

People do not accept all that is entailed by their premises. Few are aware of all that their premises lead to, and many do not know much of what is entailed. Many people contracept, but the same people are sure that "gay marriage" is impossible. Now is their opportunity to see what premises are necessary to defend what they *still hold to be true*: that marriage is the more or less permanent and exclusive union of one man and one woma and that this relationship is the principle of all sexual morality. Once the two coherent accounts of sexual morality are fully sketched—and only then—can the American people decide. They can also see what is presupposed and entailed by acceptance of "gay marriage."

The vast majority of Americans who oppose legal recognition of "gay marriage" do so because they think it is wrong, even impossible. Not just impossible for them, in their private circle, but objectively impossible: no one can enter into a "gay marriage," just as no one can be Babe Ruth, no matter how much they might wish or believe themselves to be the Bambino.

This argument, consistent with, but not explicitly an appeal to, the truth of the matter about marriage, *might* gain five votes on the Supreme Court. It is an argument which appeals most of all to a Justice's sense that *this* revolution in social mores, if it is to come at all, ought not come the way that the abortion revolution did, through the courts.

Natural Law and the Limits to Judicial Review

–by David F. Forte

As Aristotle bluntly put it, "He who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast."[1] The Massachusetts Constitution of 1780 directs that the powers of government must be separated "to the end it may be a government of laws and not of men."[2] And Chief Justice John Marshall declared, "The government of the United States has been emphatically termed a government of laws, and not of men."[3]

Today, no one disputes that judges must uphold the rule of law. Every judge claims that as a sacred duty.