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# *Natural Law and Catholic Moral Theology*

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In his 1958 lectures at the University of Chicago, later published under the title *The Tradition of Natural Law: A Philosopher's Reflections,* Yves R. Simon remarks that the subject of natural law is difficult "because it is engaged in an overwhelming diversity of doctrinal contexts and of historical accidents. It is doubtful that this double diversity, doctrinal and historical, can so be mastered as to make possible a completely orderly exposition of the subject of natural law."[1]

My intention in this essay will be to examine the problem of natural law only *ad intra,* within Catholic moral theology.[2] The essay will have almost nothing to say about any particular issue of justice in the public sphere. It will proffer no "natural law" answers as to what judges ought to do, or how the budget deficit ought to be resolved, or what moral perspective should guide welfare funding. Furthermore, although it might reinforce the suspicion of evangelical Protestants that

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there is something both attractive and repellent about Catholic uses of natural law, it will not try to convince Protestants on any specific disputed issue.

Rather, I will endeavor to show how the concept of natural law became a serious problem in modern Catholic moral theology, and how the papal encyclical *Veritatis Splendor* responds to that problem. My account will be very imperfect indeed, for it will be necessary both to tell a story and to make a number of distinctions along the way, allowing each to illuminate the other. To do both these things at once, and in a brief space, is a difficult task.

### *Three Foci of Natural Law Discourse*

But first, what is a theory of natural law a theory *of*? The question can be approached in three ways. In the first place, natural law can be regarded as a matter of propositions or precepts that are first in the order of practical cognition. Thus, when a theorist reconnects debate about justice back to first principles, from which the mind can lay out properly considered and argued conclusions, he can be said to have (or practice) a theory of natural law. In the second place, natural law can be regarded as an issue of nature or human nature, in which case it is a problem not only of epistemology and logic but also of how practical reason is situated in a broader order of causality. Third, natural law can be approached not only as order in the mind or order in nature but also as the ordinance of a divine lawgiver.

Discourse about natural law can gravitate toward any one or a combination of these three foci: law in the human mind, in nature, and in the mind of God. Contemporary literature on the subject shows there is little or no agreement as to how the three foci ought to be integrated. For there is no general agreement about what should count as a proper problem, much less about what philosophical instruments to apply to it.

Rather than engage in an interminable survey of the methodological problems, I shall begin with an assertion. The theologian is (or ought to be) chiefly concerned with the third of these foci: namely, natural law as an expression of divine providence. As Karl Barth said in *Church Dogmatics,* "Ethics [is] a Task of the Doctrine of God."[3] Whatever else Barth said or thought about natural law, the proposition that moral



theology is a task of the doctrine of God is incontestable. The Christian theologian is interested in who God is, and what God does, as he reveals himself.

Who we are and what we do are questions that can be asked outside of theology, to be sure, and the theologian will be interested in how persons outside the faith pursue such questions. Catholic and Protestant theologians have different attitudes toward these strands (Balthasar says "fragments") of moral inquiry and behavior separated from the living Word of God. While Catholic theologians have perhaps been tempted to overestimation, Protestants have been inclined to underestimation. But the main focus for the theologian *qua* theologian is, as Barth said, the doctrine of God.

## Historical Reflections

Until recently, the proposition that natural law is chiefly a theological issue was uncontroversial in Catholic moral theology. Natural law in the human mind and natural law in nature were regarded as distinct but not architectonic foci. Let us first consider two passages from the Church Fathers.

In the second century, Tertullian took up the problem of divine governance prior to the written law. Like so many other of the patristic theologians of both east and west, Tertullian argued that the law given to Adam (Gen. 2:17) was the natural law: "For in this law given to Adam we recognize in embryo all the precepts which afterwards sprouted forth when given through Moses." After reciting the ten precepts of the Decalogue, Tertullian concludes that the first law is "the womb of all the precepts of God"—a "law unwritten, which was habitually understood naturally, and which the fathers kept."[4] Which of the patriarchs? Tertullian mentions Noah, Melchizedek, Enoch, and Abraham.

This teaching is simple and familiar. Our first parents were given an unwritten law, expressing the rule of law itself: men govern only by sharing in divine governance. Adam and Eve, who understood the law *naturaliter* (naturally), did not keep it. But the patriarchs before Moses adhered to the unwritten law. In this brief passage Tertullian alludes to natural law in the mind and in nature. His principal interest,

however, is the economy of divine laws. As to what men knew or did *post peccatum,* Tertullian commits himself only to saying that the patriarchs were counted "righteous, on the observance of a natural law."[5]

In the fourth century, Gregory of Nyssa proposed:

> . . . that human nature at its beginning was unbroken and immortal. Since human nature was fashioned by the divine hands and beautified with the unwritten characters of the Law, the intention of the Law lay in our nature in turning us away from evil and in honoring the divine. When the sound of sin struck our ears, that sound which the first book of Scripture calls "the voice of the serpent," but the history concerning the tables calls the "voice of drunken singing," the tables fell to the earth and were broken. But again the true Lawgiver, of whom Moses was a type, cut the tables of human nature for himself from our earth. It was not marriage which produced for him his "God-receiving" flesh, but he became the stonecutter of his own flesh, which was carved by the divine finger, for *the Holy Spirit came upon the virgin and the power of the Most High overshadowed her.* When this took place, our nature regained its unbroken character, becoming immortal through the letters written by his finger.[6]

Like Tertullian, Gregory of Nyssa alludes to natural law in the mind. The "intention of the Law," he writes, "lay in our nature in turning us away from evil and in honoring the divine." This is the traditional notion of a *lex indita,* a law instilled in the mind, which later patristic and medieval theologians would call *synderesis.*[7] Gregory also speaks of the order of human nature. Yet it is clear that Gregory's focus is set upon what God does: first in ordering man by nature, second in disciplining men through the written law, and finally in recreating men through the mystery of the Incarnation and Redemption.

These two passages are typical of the patristic thinking on natural law. Issues of epistemology and human nature are distinct but not architectonic foci. Not even moral theology (in our modern sense) is the main focus. Rather, theology proper, the doctrine of revelation, organizes the Fathers' perspective. Chief among the theological themes are (1) the economy of divine laws, (2) the manner in which Christ recapitulates not just Moses but Adam, and (3) generally, getting the story right, which is to say, thinking rightly about Scripture.[8]



As early as the Second Council of Arles (473), the "law of nature" *(lex naturalis)* was defined as "the first grace of God."[9] Beginning in late antiquity, theologians transformed the nomenclature of the lawyers to bring it in line with Christian theology. The Corpus Iuris Civilis divided law generally into *ius naturale, ius gentium,* and *ius civile.*[10] The word *lex* was not reserved for written law (according to the *Institutes of Justinian, scriptum ius est lex*) but was especially associated with imperial pronouncements.[11] The Lex Julia, for example, was the Julian Act.[12] This usage was also adopted by the canonists. *Lex,* Gratian states in the *Decretum,* is a written statute, a *constitutio scripta;* and a *constitutio,* he goes on to explain, is "what a king or emperor has decided or declared."[13] In St. Thomas's *Summa Theologiae,* the *iura* are classified as *leges.* So, rather than the *ius naturale,* we get not only *lex naturalis* but a classification of law according to diverse *leges,* such as *lex aeterna, lex nova, lex Mosaicae, lex membrorum, lex humana,* and *lex vetus.*[14] The term *lex,* which the lawyers reserved for a written edict issued by an imperial lawgiver, had become for theologians a usage emphasizing the divine origin of all law, whether it be instilled in the heart or imparted by written or oral arts.

As regards the being and cause of the natural law, the theological tradition moved steadily away from any anthropocentric or merely naturalistic conception of the *ius naturale.*[15]

### *Misperceptions of Thomas*

The thought of Thomas Aquinas has, of course, become nearly synonymous with "Catholic" doctrine of natural law. It would take volumes to dispel the modern misperceptions and misrepresentations of his natural law theory. Many misperceptions are due to the fact that Thomas, more than the patristic theologians, articulated the epistemological and natural foci with some philosophical precision. Those discussions in Thomas are often lifted out of context and debated as if they were completely independent of theology.

I have no intention of trying to dispel all these misperceptions at their proper level of detail and complexity. Two general points, however, need to be made. First, nowhere does Thomas *define* natural law in anything but theological terms. Indeed, in answer to the objection that for there to be both an eternal law and a natural law was needless

duplication, Thomas responds: "this argument would hold if the natural law were something diverse from the eternal law, whereas it is nothing but a participation thereof."[16] Natural law is never (and I must emphasize *never*) defined in terms of what is first in the (human) mind or first in nature.[17]

Although his modern readers have little inclination to discriminate among the three foci—natural law in the mind, in nature, in the mind of God—or to reflect upon their order of priority, Thomas understood what is at stake in arriving at a proper definition. The fact that we first perceive ourselves discovering or grasping a rule of action does not mean that the human mind is first in the causal order, or in the ultimate order of being. For example, the judge who discovers a rule does not equate the cause of discovery with the cause of the rule—unless, perchance, they are one and the same. In the case of natural law, Thomas defines the law from the standpoint of its causal origin (that is, what makes it a law), not in terms of a secondary order of causality through which it is discovered (the human intellect).

Without the order of priority, we have either nature or the human mind as the cause of the law—not the cause of knowing or discovering, but the cause of the law itself. This would destroy the metaphysical continuity between the various dispensations of divine providence. For if God is to govern, he will have to supersede, if not destroy, the jurisdiction constituted (allegedly) by human causality. Insofar as the natural law is regarded as the foundation of the moral order, and insofar as that is thought to be caused (and not merely discovered) in some proper and primary way by human cognition, God will have to unseat the natural law. Almost all the modern theories of natural law seek to relieve that conflict in favor of what is first in the human mind. Thomas understood what is at stake in giving definitions, and was exceedingly careful not to confuse what is first in human cognition with what is first in being.[18]

In the second place, as we saw earlier, Tertullian used the adverb *naturaliter* (naturally) not to characterize the law but rather to describe how it is known. Nature is not the law but the mode of knowing it. This Latin adverb would eventually find its way into the Vulgate translation of Romans 2:14-15 to characterize what the gentiles know or do without benefit of divine positive law. Thomas Aquinas



frequently uses the same term in order to emphasize the mode of divine promulgation.[19] Natural law is *lex indita,* instilled in the human mind by God, moving the creature to its proper acts and ends. As for his estimation of the efficacy of natural law in the human mind, Thomas never wavered from the judgment that only the rudiments (or the *seminalia,* the seeds) are known by the untutored mind. With regard to the gentiles mentioned in Romans 2:14, those "who having not the Law, did naturally [*naturaliter . . . faciunt*] things of the Law," St. Thomas points out that the words *naturaliter* and *faciunt* indicate that St. Paul was referring to gentiles whose "nature had been reformed by grace [*per naturam gratia reformatam*]." Any other interpretation, Thomas warns, would be Pelagian.[20]

Thomas is well known for having insisted upon the *de jure* possibility of affirming the existence of God by natural reason. His estimation of the *de facto* condition of the human mind led him to make the cautious statement "known by a few, and that after a long time, and with the admixture of many errors."[21] More to the point, however, Thomas explicitly and emphatically denied that the philosophers were able to translate such scraps of theology into virtuous acts of religion. None of the pagan theologies satisfied the natural, not to mention supernatural, virtue of religion.[22]

In his last recorded remarks on the subject of natural law, made during a series of Lenten conferences in 1273, Thomas's judgment is even more stern: "Now although God in creating man gave him this law of nature, the devil oversowed another law in man, namely, the law of concupiscence. . . . Since then the law of nature was destroyed by concupiscence, man needed to be brought back to works of virtue, and to be drawn away from vice: for which purpose he needed the written law." As the critical Leonine edition of 1985 confirms, the words are *destructa erat*—"was destroyed."[23]

How can he say that natural law is destroyed in us? First, he certainly does not mean that it is destroyed in the mind of the lawgiver. As a law, natural law is not "in" nature or the human mind, but is rather in the mind of God. The immutability of natural law, he insists, is due to the "immutability and perfection of the divine reason that institutes it."[24] Insofar as natural law can be said to be "in" things or nature, it is an order of inclinations of reason and will by which men are moved to a common good. While the created

order continues to move men, the effect of that law (in the creature) is bent by sin—not so bent that God fails to move the finite mind, for the fallen man is still a spiritual creature, possessed of the God-given light of moral understanding, but bent enough that this movement requires the remediation of divine positive law and a new law of grace.[25] In fact, Thomas held that God left men in such a condition —between the time of the Fall and the Mosaic law—in order to chastise them.[26] The so-called "time of natural law," which refers, of course, to the historical and moral condition of man, not the precepts of the natural law itself, is not normative for Thomas's ethics. And it is the effort to *make* that condition normative that marks the modern project.

By Thomas's day, natural law theory was being used in debates over jurisdiction between civilians and canonists; it was also being used on at least a partial basis for trying to get right answers about disputed matters of personal conduct. But in Thomas there is little of this. There is only one sustained discussion, extending over several articles, in which Thomas subjects a disputed issue of personal conduct to what could be called a natural law analysis. It is from the very beginning of his career, when he was still a graduate student, in his exposition of the *Sentences of Peter Lombard.* This exposition, which is now appended to the *Summa* and called the "Supplement," contains an extended natural law argument on the problem of polygamy.

Interestingly, the problem was one he could not resolve by using natural law. Thomas ends up saying that polygamy violates no first precept of the natural law. With the ordering of sex to procreation, the polygamist does not violate the natural law. The remainder of Thomas's argument was a tentative one, namely, that polygamy made social life inconvenient, and that it would be difficult for the society of husband and wife to maintain itself properly intact in that kind of an arrangement. His only decisive argument against polygamy is sacramental—Jesus cannot have plural churches, man cannot have plural wives. And so the one serious effort he made to resolve the kind of issue we talk about today—a disputed moral issue—ended somewhat inconclusively on the natural law note. Once he reached that stalemate, he quickly reverted to sacramental theology as a way of resolving the issue.



### *Eclipse of the Theology*

In the modern era, the theology of natural law was moved to the periphery, and was usually eclipsed altogether. The epistemological and natural foci become architectonic. The new sciences adopted the method of resolutive analysis and compositive synthesis. Under this method, the appearances of nature are analytically reduced to the most "certain," which is to say, the most predictable, elements: namely, modes of quantity, such as size, shape, and velocity. Then, through compositive synthesis, the quantities can be rebuilt as mathematical objects. This method was applied beyond physics to humane matters. In *De Homine,* for example, Hobbes takes man as he is, a thing of "meer nature," and reduces the appearances to stable and predictable modes of quantity. Once we have done this, we do not find Presbyterians and Catholics; rather, we find a stimulus-response mechanism that endeavors to augment its power. What is first, then, is natural laws as "lower" laws rendering men amenable to the law of the sovereign. In *De Cive,* man is rebuilt according to rules that are true laws. Hobbes explains: "Politics and ethics (that is, the sciences of just and unjust, of equity and inequity) can be demonstrated *a priori;* because we ourselves make the principles—that is, the causes of justice (namely, laws and covenants)—whereby it is known what justice and equity, and their opposites injustice and inequity, are."[27]

Hobbes, of course, was a materialist. But this method of reduction and recomposition was not tied to materialist doctrines. Continental rationalism and idealism also deployed methods of reduction to what is first in the mind, from which reality can be constructed, modeled, predicted. In the reduction, Hobbes could find only "lower" laws; other Enlightenment thinkers purported to find first principles of justice and equity. Whatever the differences, the trademarks are certainty and predictability, gauged according to what is first in cognition.

Yet the main reason for the eclipse of the theology of natural law was the theologico-political problem. What better way to solve such a problem than to imagine men's appealing to no authority other than what is first in the mind? Virtually all of the Enlightenment "state of nature" scenarios make this move. In Hobbes, Locke, Rousseau, and Kant, man is considered in an "original" position, under the authority of no pope, prince, or scripture. If there is a God, he governs through

no mundane authority. Authority will have to make its first appearance in the covenants of individuals constrained to reach a consensus on the basis of what is (or seems) self-evident. The twelfth-century summist Johannes Faventinus declared: "The streams of natural rectitude flow into the sea of natural law, such that what was lost in the first man is regained in the Mosaic law, perfected in the Gospels, and decorated in human customs."[28] The modern myth of the "state of nature" rejects this scheme of divine pedagogy—not directly, but indirectly, by rendering it superfluous to the quest for first principles of the political order. Indeed, the "state of nature" was meant to be a secular substitute for the story of Genesis. Never a pure science of morality, it was rather a merely useful one, designed for the political purpose of unseating the traditional doctrine of natural law.

The fact that a proposition is pellucid, knowable without logical need of a middle term (e.g., "life is good," which can be grasped without a set of theological inferences or authorities), is supposed reason enough to conclude that logical independence means ontological independence; and the "state of nature" mythology had the aim of representing that independence. Since no orthodox Christian theology holds that God and his orders of providence and of salvation crop up as what is first in untutored cognition, to force natural law into that one understanding is bound to destroy moral theology on the reefs of half-truth. The half-truth is that there are principles of practical cognition that are proximate to the natural functioning of the intellect. But they are only the beginning (the *seminalia*) of practical reason. When the starting points are made autonomous, the human mind declares independence not only from the deeper order of divine tutoring but also from the tutoring afforded by human culture, including human law.

This is why natural rights, for so many modern advocates, turn out to be nothing other than immunities against the order of law. Thus, what began for the Christian theologians as a doctrine explaining how the human mind participates in a higher order of law is turned into its opposite. The natural law becomes "temporal," the temporal becomes "secular," and the secular becomes the sphere in which human agents enjoy immunity from any laws other than those they impose upon themselves.

For a time, Catholics were not confused by the new ideologies of natural law, for these conceptions were expressed by political move-



ments vehemently hostile to the Church. But once political modernity became the "normal" state of affairs, and once the Church found a way to respond to modernity in something more than a purely reactive mode, it was almost inevitable that the new conceptions of natural law would begin to color moral theology.

## Modern Catholic Thought

There is a superficial congruity between the tradition of Catholic moral theology and modernity. Both (in various ways) hold that there is a moral order first in the mind, and that some problems can be reasoned without immediate introduction of premises drawn either from revelation or from a fully worked-out cosmology of nature. The overlap of traditions on this specific point is apt to be misleading. Thomist, Cartesian, and Kantian conceptions of what it means to be "first" in the mind express very different understandings of practical reason, and how practical reason is situated with regard to what is "first" in nature and in ultimate order of being.

But when the focus on what is first in the mind is conjoined with the desperate modern need for consensus, it becomes easy for Catholic uses of natural law theory to cross over into something new. The use of natural law by moral theologians has always been Janus-faced. Natural law can be used to express specifically theological propositions about divine providence, or it can be used to ground or mount arguments about particular disputed issues of conduct.

In modern times, we observe a steady drift toward the latter use, and with it a gradually diminishing sense of the sapiential context afforded by theology proper. Nowhere can this be seen more clearly than in the tradition of modern social encyclicals. As to things that have been declared contrary to nature and/or reason, a short list includes: dueling, Communism, divorce, contraception, Freemasonry, *in vitro* fertilization, and contract theories of the origin of political authority. And this is not to mention the bevy of rights and entitlements that have been declared to be owed to persons under the rubric of justice *ex ipsa natura rei,* by the very nature of the thing. Read carefully, the encyclicals assume that all three foci (law in the mind, in things, and decreed by divine providence) are legitimate and in