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# On what a theory of natural law is supposed to be

*¿Qué se supone que es una teoría de la ley natural?*

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**Resumen:** Una teoría puede llamarse, propiamente, teoría iusnaturalista si funciona como una teoría, si tiene el contenido que se espera, o si presenta una interpretación convincente de alguna teoría generalmente reconocida como perteneciente a la tradición de la ley natural. Puede decirse, entonces, que una teoría lo es, de la ley natural: si incluye referencias a esta para 'contextualizar' la ley humana; si anuncia una teleología natural providencial como fundamento de una ley que se presenta como dada, antes de cualquier convención; o, si cabe reconocer en ella una interpretación plausible del *Tratado de la Ley*, tomista, lugar tradicional para el análisis filosófico de la ley natural. Pero la «Nueva Ley Natural», expuesta por primera vez en *Ley Natural y Derechos Naturales* (LNDN), de John Finnis, no cumple ninguno de estos requisitos. Por ello, es mejor considerar LNDN como una contribución al debate sobre «la ley y la moralidad» en lugar de una teoría iusnaturalista. Esta obra sólo presenta, al igual que otras muchas escritas en el siglo XX, un «método para la ética». Si ello es así, el trabajo filosófico necesario para una recuperación contemporánea, convincente, de la ley natural, queda pendiente de realización.

**Palabras clave:** derecho natural, teleología, Tomás de Aquino, Finnis.

**Abstract:** A theory may properly be called a theory of natural law, if either it functions as such a theory is expected to function; or it has the expected content; or it is a plausible interpretation of a theory generally acknowledged to be in the tradition of natural law. It functions as such a theory if it supports appeals to natural law intended to 'contextualize' human law. It has the expected content, if it adverts to providential, natural teleology as the basis for a law given to us prior to convention. It would clearly be located in the tradition, and rightly accounted as such a theory, if it were a plausible interpretation of Aquinas' Treatise on Law, which is the locus classicus for the philosophical treatment of natural law. But the 'New Natural Law', first expounded in *Natural Law and Natural Rights* (NLNR) of John Finnis, meets none of these criteria. NLNR seems best construed, then, as a contribution to the «law and morality» debate, not a theory of natural law. It gives merely another 'method of ethics' along with the many others put forward in the 20<sup>th</sup> c. If so, the philosophical work needed for a persuasive, contemporary revival of natural law still remains to be done.

**Keywords:** natural law, teleology, Aquinas, Finnis.

I begin with some remarks, from the point of view of history of philosophy and history of ideas, on what the role of a theory of natural law has been in the Western tradition. Next, I consider how the appeal to nature has been practically speaking essential to natural law's playing this role. Then I offer some less obvious observations about the appeal to nature specifically within the thought of St. Thomas Aquinas. I conclude by with some brief

remarks about John Finnis's account of natural law as set against this tradition. The purpose of this investigation is simple: is the putative theory of natural law found in *Natural Law and Natural Right*, despite its title, even rightly counted as a theory of natural law? If not, we should look somewhere else.

## I. THE APPEAL TO NATURAL LAW

Historically, the appeal to natural law has been a contextualizing move, which has the tendency of limiting the authority of that which it is contextualizing. By a contextualizing move, I mean the introduction of a larger framework, which leads to the reinterpretation of what used to be regarded as the total framework. A good example from the history of science would be the shift from the Aristotelian to the Copernican model of the solar system. What used to be taken as the totality, the earth surrounded by basically concentric spheres, constituting the entire 'cosmos', got reinterpreted as simply a part of the larger totality, the solar system, in which the earth orbited by the moon was one among several planets themselves orbiting around the sun<sup>1</sup>. It is essential when making a contextualizing move like this that phenomena of the 'local' system, previously be thought to be 'total', be adequately or even better explained within the larger framework. Thomas Nagel has argued that all major developments in science have a similar character, the contextualizing of what had previously seemed to be total<sup>2</sup>.

As a side point, consider that it is difficult to see how a contextualizing move can be undertaken without introducing different and presumably fuller commitments as to how things are. In the move from the Aristotelian to the Copernican solar system, the Aristotelian commitment to quintessence had to be rejected, for sure. Admittedly, at first the Copernican system was simply a mathematical construct, but this appeared to be a weakness. Soon

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<sup>1</sup> KOYRE, A., *From the Closed World to the Infinite Universe*, Johns Hopkins Press, Baltimore, 1957.

<sup>2</sup> NAGEL, T., *The View from Nowhere*, Oxford University Press, Oxford, 1986, pp. 13-27. For him, moral philosophy too progresses, in a way, by moving from a first-person point of view in which the agent's needs and claims seem to be total (egoism) to an impersonal point of view, in which the agent is one among many equal agents (philosophical altruism). Moral progress is through the contextualization of egoism. *Cfr.*, NAGEL, T., *The Possibility of Altruism*, Princeton University Press, Princeton, 1979, pp. 13-17.

of course it was recognized that Kepler's laws and then Newton's law had to be brought in, to explain the movement of the other planets, and eventually even the geology and weather of the other planets become known<sup>3</sup>. Certainly in mathematics<sup>4</sup>, to take another example, progress often takes the form of realizing that what used to be thought of as the only case («geometry») is in fact a special case («Euclidean geometry») of a more general framework («geometries»)<sup>5</sup>.

Natural law similarly has been used to contextualize human authority. One of the earliest appeals to natural law, in the *Antigone*, shows this well. Creon the king appears to his citizens to be the total authority for them, but Antigone contextualizes his authority by appealing to unwritten laws derived from the gods (II., 493-498), thereby introducing a broader notion of lawfulness, such that her burial of her brother now becomes lawful in this broader sense, whereas Creon's decree becomes unlawful:

οὐδὲ σθένειν τοσοῦτον ὥοιμην τὰ σὰ  
κηρύγμαθ', ὅστ' ἄγραπτα κἀσφαλῆ θεῶν  
455 νόμιμα δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν.  
οὐ γάρ τι νῦν γε κἀχθέξ, ἀλλ' αἰεί ποτε  
ζῆ ταῦτα, κοῦδεῖς οἶδεν ἐξ ὄτου 'φάνη.

Nor did I think that your decrees were of such force, that a mortal could override the unwritten and unfailing (ἄγραπτα κἀσφαλῆ) statutes given us by the gods. For their life is not of today or yesterday, but for all time, and no man knows when they were first put forth (II., 453-457)<sup>6</sup>.

One sees in the *Antigone* characteristics which prove true repeatedly in the political history of the West. The appeal to natural law limits state authority; it vindicates 'liberty' by making space for actions which are 'lawful' prior to and apart from human authority; it (surprisingly) supports the priority of claims of a subsidiarity authority, in this case the household, over the claims of

<sup>3</sup> KUHN, T., *The Copernican Revolution*, Mass., Harvard University Press, Cambridge, 1957.

<sup>4</sup> NAGEL, T., *The View from Nowhere*, *op. cit.* See NAGEL, T., *The Possibility of Altruism*, *op. cit.*

<sup>5</sup> For more interesting cases, *cf.*, LAKATOS, I., *Proofs and Refutations*, Cambridge University Press, Cambridge, 1976.

<sup>6</sup> SOPHOCLES, *Oedipus the king. Oedipus at Colonus. Antigone*, translated by Storr. F., vol. 1, Heinemann, W. (The Loeb Classical Library), New York, 1912. The translation here is by JEBB, R.C., *Sophocles, The Plays and Fragments*, Part III, The Antigone, Cambridge University Press, Cambridge, 1891 (2nd Edition).

the apparently higher authority; and it expresses religious conviction, and in doing so it vindicates some form of religious liberty, admittedly a rudimentary type of religious liberty in the case of the *Antigone*. Note too that once the unwritten law has been publicly appealed to as a basis for lawful action, it acquires a solidity and greater authority, as if the appeal has precedential value. Not that he was a revolutionary, but surely Sophocles intended his play to encourage similar appeals to unwritten law, especially claims pertaining to piety within the household: if citizens of Athens after watching the play did so, this would be a success, not a failure. Moreover, since Antigone speaks of the *laws* of the gods, not the single precept or commandment of the gods, by implication she opens up space for similar actions of more fundamental lawfulness, in opposition to human authority, involving matters other than the proper burial of one's kin. We also see in Antigone arguably the first appearance of the concept of the *martyr*, namely, of someone who witnesses to the reality of some claim placed upon her by the gods, by being prepared to die if necessary at the hands of a contravening human authority: «You, you with your face bent to the ground», Creon asks, «do you admit, or deny that you did this?» «I declare it and make no denial», Antigone boldly asserts (II., 441-3).

Note also in passing that it was not possible for Antigone to contextualize Creon's authority without relying upon broader commitments than those necessary to underwrite Creon's claims: that there are gods, that blood bonds imply obligations of piety, and so on.

I want to say that all these characteristics are essential to the appeal to natural law: limitation of human authority; opening a space for lawful liberty; appropriate support for subsidiary institutions as in some sense prior to political society as a whole; reliance upon and vindication of religious liberty; an increase in our stock of theoretical commitments, or at least the potential for such; and martyrdom. A purported theory of natural law needs to be measured against them. Indeed, it is unclear what value a theory of specifically natural law would have, apart from accounting for these things.

St. Thomas Aquinas' treatment of natural law in the *Summa Theologiae* (*ST*) evinces a contextualizing move also. That it does so is one of the most obvious facts about his discussion. The very first thing that he does<sup>7</sup>, is to give

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<sup>7</sup> AQUINAS, T., *ST*, Ia-IIae, q. 90. Translations from this work are generally from the following: *Summa Theologica*, Benzinger Brothers, New York, 1947. However, I sometimes modify the translation.

a definition of law and by implication of lawfulness. Then he argues, in effect, that human law, which some might have thought to be all of law, is only one of four types of law<sup>8</sup>. Actually, it has the least authority among all four. It follows that there are more basic and more important types of lawfulness than following human law.

Of course, he is working in a tradition in which it is taken for granted that the Church, with its ecclesiastical law, is a separate authority existing side-by-side with the state and, in cases of conflict, over it. In the tradition, as well, the Law of Moses was inherited, and the example of martyrs of that law in *Maccabees* was esteemed – those who refused to obey human authority when it was contrary to that Law<sup>9</sup>. Most importantly, Christ had contextualized all human authorities, and his law of charity and the law of his gospel articulate most clearly what lawfulness is<sup>10</sup>. The law of Christ also had its martyrs, thousands of them, who refused to obey human law in cases of conflict<sup>11</sup>.

Whereas Antigone had spoken indefinitely about the several unwritten laws of the gods, for Aquinas, it is clear: the natural law is a naturally given body of law, given to us all through our power of reason, just as basic principles of logic and mathematics are given to us all, and its content is the same as the Decalogue. The Decalogue was given to Moses by God on Mt. Sinai, but that act was simply an authoritative restatement of what God had already given to all human beings in their nature as rational beings:

... the precepts of the Decalogue are the first precepts of law<sup>12</sup>,  
 ... among the first precepts of law, which are the precepts of the decalogue<sup>13</sup>,  
 ... the Decalogue consists of the precepts which man has directly from God<sup>14</sup>.

<sup>8</sup> AQUINAS, T., *ST, op. cit.*, Ia-IIae, q. 91.

<sup>9</sup> *Vid.*, 2 Maccabees, chapter 7.

<sup>10</sup> *Vid.*, Matthew 28:16-20, John 19:11.

<sup>11</sup> Although martyrdom in the central sense is witnessing unto death to the truth of faith, nonetheless, any testimony to God's law may be the cause of martyrdom, to wit: «since every lie is a sin... avoidance of a lie, to whatever truth it may be contrary, may be the cause of martyrdom inasmuch as a lie is a sin against the Divine Law (*divinae legi contrarium*)» (*ST, op. cit.*, Ia-IIae, q. 124, a. 5, ad. 2).

<sup>12</sup> AQUINAS, T., *ST, op. cit.*, Ia-IIae, q. 122, a. 1, r.: «*praecepta Decalogi sunt prima praecepta legis*».

<sup>13</sup> *Ibid.*, a. 5, ad. 2; also a. 6, ad. 3: «*inter prima praecepta legis, quae sunt praecepta Decalogi*».

<sup>14</sup> *Ibid.*, q. 100, a. 3, r.; sc.: «*Illa ergo praecepta ad Decalogum pertinent, quorum notitiam homo habet per seipsum a Deo*».

... the precepts of the Decalogue are those which the people received from God immediately... hence [they] need to be such as the people can understand at once<sup>15</sup>.

This is an important point. The natural law is a code of law. That it is so, is important in this move of contextualization. In such a move the larger framework must include things of the same kind as that which is contextualized. The Copernican solar system includes Jupiter and its planets, which is the same kind of thing as the earth and its moon. The larger framework of law which Aquinas introduces, includes the natural law, which is the same kind of thing as human law: it consists of precepts which forbid, command, or permit, which have an order and a structure.

John Locke's «Second Treatise» contextualizes in the same way, although to appreciate this well, one needs to read it together with the «First Treatise». The two together presuppose that there is some fundamental law, God's law, which is exhibited either in a revealed divine command, or through the natural law. The «First Treatise» rules out the former as the source of political authority, the «Second» explains how it can be the latter. Of course, there are many differences between Locke's treatment and the prior tradition, so much so that it remains an open question among interpreters whether in the end he offers nothing beyond Hobbesianism. But this at least seems correct: if his account does revert to Hobbesianism, it is because he almost completely rejects natural teleology. Such a consideration raises the question, which we shall examine shortly, of to what extent any account of natural law worth affirming must depend upon natural teleology.

It also worth noting perhaps that Lockean natural law and natural rights do not depend on any ethical theory, or even any explication of individual morality. Locke famously believed that laws of ethics comparable to laws of geometry might be formulated and expressed, but he nowhere succeeds in doing this, and the two «Treatises» never depend upon or even advert to the existence of such a theory<sup>16</sup>. Nor does Aquinas' discussion, apparently.

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<sup>15</sup> AQUINAS, T., *ST, op. cit.*, Ia-IIae, q. 100, a. 5, r.: «*Illa ergo praecepta ad Decalogum pertinent, quorum notitiam homo habet per seipsum a Deo*».

<sup>16</sup> «I am bold to think, that Morality is capable of Demonstration, as well as Mathematics: since the precise real Essence of the things moral Words stand for, may be perfectly known; and so the Congruity, or Incongruity of the Things themselves, be certainly discovered, in which consists perfect knowledge», LOCKE, J., *An Essay Concerning Human Understanding* (based on the fourth edition), Niddithck, P.H. (ed.), 3.11.16, Oxford University Press, Oxford, 1975.

But to return whence we digressed, when we come next to the United States Declaration of Independence, something of the modern paradigm of the appeal to natural law, we may observe that another development has taken place, helped no doubt by Locke's contribution. We saw that Antigone had appealed in a public way to the unwritten laws of the gods – at least, she stated her case to others expecting them at least to recognize the plausibility of what she was claiming. In Aquinas, it is an important feature of his view that the laws of nature are *per se nota*, «known in and of themselves» which was typically construed in English as «self-evident». Anything self-evident is presumably also simply evident<sup>17</sup>. Thus it came to be thought that this body of separately existing and pre-existing law provided a publicly accessible basis of appeal, for the claim that actions that ostensibly were unlawful were actually lawful, whereas the putatively lawful actions were actually not lawful.

It begins: «When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation»<sup>18</sup>. It goes on immediately to list truths from the law of nature which it takes to be «self-evident», that is, which the signers of the Declaration are confident will be accessible to the readers of that document, including «whenever any form of government becomes de-

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<sup>17</sup> Yet Aquinas denied this inference. Something *per se nota* might be evident only «to a few» (see *ST*, *op. cit.*, Ia-IIae, q. 94, a. 2, r.). What we call 'self-evident' or 'evident', he would call *per se nota communiter omnibus*, 'known in and of itself, commonly so, for everyone.' For him, to say that a proposition is *per se nota* is a claim about the content of that proposition relative to the abilities of the person conceiving it. Thus God's existence is *per se nota* and yet knowable only to God. Therefore, it is a mistake to take the term to mean, as Finnis does, underived. Aquinas says explicitly that a theorem of geometry, which is derivable, may nonetheless be *per se nota* to a savant (*ibid.*). Likewise, he holds that the Decalogue is derived from the two commandments of charity (*cf.* *ST*, *op. cit.*, Ia-IIae, q. 100, a. 3, r.). Yet Finnis relies on this misreading, the equivalence of *per se nota* with underived, when he denies that for Aquinas, natural teleology can be the basis of the first principles of natural law: «The are not inferred from facts. They are not inferred from metaphysical propositions about human nature... nor are they inferred from a teleological conception of nature... They are not inferred or derived from anything. They are underived» (FINNIS, J., *Natural Law and Natural Rights*, Oxford University Press, Oxford, 2011 (first edition, 1980), p. 34). The natural law is *per se nota* for Aquinas, Finnis says, therefore it cannot be derived from anything!

<sup>18</sup> «Declaration of Independence: A Transcription», National Archives, Engrossed Declaration of Independence, National Archives Identifier 1419123, Congress of the Confederation (3/2/1781 – 3/4/1789), <https://www.archives.gov/founding-docs/declaration-transcript>.

structive of these ends, it is the right of the people to alter or to abolish it, to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness», which, in its first part, justifies the nullification of British laws as not lawful, and, in its second, explains why the signatories are lawful in acting as they do.

As a final example of contextualization, consider the language of Rev. Martin Luther King Jr.'s «Letter from a Birmingham Jail»:

one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that «an unjust law is no law at all».

Now what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality<sup>19</sup>.

«The moral law or the law of God» is the broader framework with a «man-made» law such as segregation must square with. All of the characteristics of the appeal to natural law that we see already in the *Antigone* are present in this famous letter also<sup>20</sup>. I will not pursue the argument here. Rather, I wish simply to point out that instead of using the language of 'self-evidence', King finds a quality of the law of God which he thinks is self-evident, and states as though it is self-evident: «Any law that uplifts human personality is just». Well, surely that is so. Who would gainsay it? He might just as well have said «it is self-evident that segregation statutes are unjust». That is, it would be wrong

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<sup>19</sup> KING, JR. M.L., «Letter from a Birmingham Jail», April 16, 1963 (facsimile reproduction, The Martin Luther King, Jr. Research and Education Institute, Stanford University, [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf), p. 7).

<sup>20</sup> *Ibid.*, «We can never forget that everything Hitler did in Germany was 'legal' and everything the Hungarian freedom fighters did in Hungary was 'illegal.' It was 'illegal' to aid and comfort a Jew in Hitler's Germany». He describes his own action as «civil disobedience», but he cites the martyrs as his exemplars, «the early Christians who were willing to face hungry lions and the excruciating pain of chopping blocks, before submitting to certain unjust laws of the Roman empire» (*ibid.*, p. 7).



to conclude from this example that the appeal to natural law is an attempt to overturn a duly enacted statute by one person's dogma or personal philosophy. It would be right to see that someone who appeals to natural law believes he is appealing to a publicly assessable standard of justification – whether he uses the language of «self-evident» or, in this case, very different language.

Can we say in a preliminary way whether *Natural Law and Natural Rights* (NLNR) gives an account of natural law such that natural law can be appealed to in the way noted, and such that an appeal to it would have the characteristics we have identified? It seems fair to say that NLNR, at least in its main holdings, does not aim to state a theory designed to play the role we have described. If we look at the matter, again, from the history of philosophy and of ideas, it seems instead a contribution to the «law and morality» debate. The requirement of this debate, supposing one wanted to reject the detachment of law from morality, or law's 'neutrality', would be to show how law must be responsive to morality, while having its own autonomy – not being reduced to or swallowed up in morality. Viewed in this way, the contribution of NLNR is to argue that law, although separate from morality, must flow from morality, properly conceived. Its main concern would be to establish a kind of closeness of law and morality, rather than to set morality against law<sup>21</sup>.

Conceived in this way, the main move in the argument of NLNR is to pivot the debate over «law and morality» away from «theories of ethics» – as, since Sidgwick, it has been thought that there are various theories and 'methods' of ethics; that fundamental ethical disagreements are founded in different theories; and that there are no rational means for deciding upon the correct or true method and resolving these disagreements. Rawls similarly thought he had to pivot the debate about fundamental law away from theories of ethics, and from utilitarianism in particular: thus, in «justice as fairness» he construes fundamental law in relationship to an ideal contract for participants in politi-

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<sup>21</sup> Many passages from NLNR can be cited in support of this claim. But consider that in the section on 'Lex iniusta non est lex', Finnis shows little sympathy with the claim. The maxim «is pure nonsense, flatly self-contradictory, or else is a dramatization of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term 'law'» (FINNIS, J. *Natural Law and Natural Rights*, *op. cit.*, p. 362). The burden of the discussion there is to show that «the tradition explicitly... accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses», *ibid.*, p. 364.

cal society, not in relation to a morality<sup>22</sup>. Finnis takes a different approach: he looks for something more fundamental than law or morality (so to speak), in which both are to be rooted. This is «practical reason». His theory of natural law is really a theory of practical reason, as of necessity pursuing basic goods subject to constraints provided by some basic postulates of practical rationality. Given that this is the purpose *NLNR*, it is not very much interested in contextualizing positive law. Its goal rather is to bring concerns over morality into the mainstream of philosophy of law, by finding a purported common basis for both. Hence one sees a constant tendency in *NLNR* to present natural law as, in the main, supportive of existing law and convention<sup>23</sup>. For the purposes of *NLNR*, which is to establish natural law as a mainstream account in the philosophy of law, natural law must be made to appear a highly responsible theory in support of law, not potentially revolutionary in upshot.

Understand that these observations are not of themselves criticisms of *NLNR* but simply an attempt to locate that work correctly within the histories of diverse concerns and disputes.

## II. THE APPEAL TO NATURE IN THE APPEAL TO NATURAL LAW

In this section II wish to consider briefly how the appeal to nature has been practically speaking essential to natural law's playing its role of contextualization. We have seen that the appeal to natural law has historically had various associated characteristics as well. So then, how do these get supported or underwritten by appeals to nature? Regard this section as a surveying of *endoxa* in the manner of Aristotle<sup>24</sup>.

I shall introduce my remarks under a series of headings. Once again, I understand what I say here as failing within the history of philosophy and history of ideas. It may be the case that the ideas and assumptions I detail here are no longer defensible. As for now, I make no judgment along those lines. I am simply remarking on what people used to think, in the tradition, when they appealed to natural law. Whether the appeal to natural law can have a similar force when

<sup>22</sup> RAWLS, J., «Justice as Fairness», *The Journal of Philosophy*, vol. 54, October, 1957, pp. 653-662.

<sup>23</sup> That is why in the section on unjust law Finnis is more concerned to soften natural law's capacity to nullify human law than sharpen or emphasize it.

<sup>24</sup> *Cfr.*, OWEN, G.E.L., «*Titbenai ta phainomena*», in *Aristote et les problèmes de méthode*, Mansion, S. (ed.), Publications Universitaires de Louvain, Louvain, Belgium, 1961, pp. 83-103.

these elements are removed, is another way of stating exactly the question that is at stake. The headings indicate the various traits that have been thought to pertain to nature, and it will be seen that these traits generally correspond to, and serve to underwrite, the traits which have been thought to attach to natural law.

### II.1. *Nature as a secondary cause*

If natural law is a system of law which, like human law when properly formulated for the common good, expresses the providence of God for human beings, such that in following this providence through these laws we flourish – then how is this system of natural law discerned? This becomes the same question as how the providence of God is discerned. As a matter of the history of ideas and history of philosophy, again, it was thought to be discerned in nature understood as a system of secondary causes. «This universe, therefore», says Cicero in *De Legibus*, «forms one immeasurable Commonwealth and city, common alike to gods and mortals. And as in earthly states, certain particular laws, which we shall hereafter describe, govern the particular relationships of kindred tribes; so in the nature of things doth an universal law, far more magnificent and resplendent, regulate the affairs of that universal city where gods and men compose one vast association»<sup>25</sup>. Of course human nature itself on this conception would be a principal means of discerning the natural law.

### II.2. *Nature as a higher authority than human authority*

In the ordinary conception which we have of the system of nature, nature appears to be something which is above us, not below us. True, the earth is below us, and we know now that it consists of layers, and that it is largely molten and thus in motion; it has its own homeostasis, for instance. Nonetheless, in ordinary consciousness, what is below us is regarded as but a platform and treated of as indifferent and the same for all persons, no matter where they are situated on the surface of the earth, in relation to which ‘nature’ looks to be above us: the trees, the mountains, and especially the sky,

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<sup>25</sup> CICERO, M.T., *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws*. Translated from the original, with Dissertations and Notes in Two Volumes (vol. 2), by Barham, F., Edmund Spettigue, London, 1841-1842, [https://oll.libertyfund.org/title/cicero-treatise-on-the-laws#Cicero\\_0044-02\\_128](https://oll.libertyfund.org/title/cicero-treatise-on-the-laws#Cicero_0044-02_128) (17/10/2020).

sun, and stars. «When I consider thy heavens, the work of thy fingers, the moon and the stars, which thou hast ordained; What is man, that thou art mindful of him? and the son of man, that thou visitest him?»<sup>26</sup> The Psalmist does consider the dirt, rocks, and undersea trenches. Similarly, the natural law is conceived of as something which comes down from above, as Sophocles puts it in *Oedipus Rex*:

My lot be still to lead  
The life of innocence and fly  
Irreverence in word or deed,  
To follow still those laws ordained on high  
Whose birthplace is the bright ethereal sky  
[ὄψιποδες, οὐρανίαν δι' αἰθέρα τεκνοθέντες]  
No mortal birth they own,  
Olympus their progenitor alone<sup>27</sup>.

Nature is a parable, as John Henry Newman remarked – at least, it is taken to be so in ordinary consciousness<sup>28</sup>. Thus, any authority which was regarded as originating in this system comprising the «heavens, the moon and the stars», was regarded as a higher authority than the human and therefore capable of superseding it. This is why mountains were commonly taken to represent authority, such as Mt. Olympus in the quotation above, Mt. Horeb in the Old Covenant, or Mt. Tabor in the New: mountains are the highest points on earth.

Of course, one wants to say on this view that the discarding of the Aristotelian theory of the earth as at the center of the universe did not change how nature continues to present itself to us *in the manner of a parable*: we have not ceased to experience nature as stretching out «above» us and, furthermore, it can be argued, we are *meant* to experience and interpret it as «above». That nature serves as a parable, and that we tend to interpret it as a parable, are both by nature as well<sup>29</sup>. It is still natural to say, after all, *Pater Noster qui es in caelis*.

<sup>26</sup> Ps. 8:3-4, King James Version.

<sup>27</sup> SOPHOCLES, *Oedipus the king. Oedipus at Colonus. Antigone, op. cit.*, lines 863-868.

<sup>28</sup> NEWMAN, J.H., *Apologia Pro Vita Sua*, Henry Frowde, Oxford University Press, London, 1913, p. 128.

<sup>29</sup> Our imaginations and natural dispositions when looking upon nature are themselves part of the system of nature.

### II.3. *Nature as presupposed by convention*

Nature looks to be prior to human art and human conventions, and, as prior, it cannot be superseded by these, it is thought, and we should not attempt to replace it with these. G.K. Chesterton once expressed a similar intuition in his criticism of a scheme for the government to raise all children: «The actual effect of this theory is that one harassed person has to look after a hundred children, instead of one normal person looking after a normal number of them. Normally that normal person is urged by a natural force, which costs nothing and does not require a salary; the force of natural affection for his young, which exists even among the animals. If you cut off that natural force, and substitute a paid bureaucracy, you are like a fool who should pay men to turn the wheel of his mill, because he refused to use wind or water which he could get for nothing. You are like a lunatic who should carefully water his garden with a watering-can, while holding up an umbrella to keep off the rain»<sup>30</sup>. These fascinating remarks are found in the same chapter as his famous image of a fence or gate erected across a road<sup>31</sup>.

Classically, nature looks to be prior to convention *in language*, since conventional signs such as words cannot be established without natural signs such as pointing. Nature also appears to be prior in the case of many *skills*: for example, medical skill is generally taken to be best construed as a matter of assisting rather than replacing natural processes of health and healing.

Aristotle only seems to be formalizing this insight in his famous discussion in *Physics* II., 8 : «as a rule, art completes what nature cannot bring to a finish, while it imitates her»<sup>32</sup>. Again, acquired skills seem derivative upon natural talents: «For the goodness or efficiency of a flute-player or sculptor or craftsman

<sup>30</sup> CHESTERTON, G.K., «The Drift from Domesticity», *The Thing*, Sheed and Ward, 1929, p. 160.

<sup>31</sup> In that passage, Chesterton comments: «The gate or fence did not grow there. It was not set up by somnambulists who built it in their sleep. It is highly improbable that it was put there by escaped lunatics who were for some reason loose in the street. Some person had some reason for thinking it would be a good thing for somebody. And until we know what the reason was, we really cannot judge whether the reason was reasonable». Now, a U.S. Supreme Court Justice, Neil Gorsuch, has referred to this passage, in his dissent in *Artis v. District of Columbia*, 583 U.S., 2018: «Chesterton reminds us not to clear away a fence just because we cannot see its point. Even if a fence doesn't seem to have a reason, sometimes all that means is we need to look more carefully for the reason it was built in the first place. The same might be said about the law before us».

<sup>32</sup> ARISTOTLE, *Physics*, II, 8, 199a, 15-17 (*vid.*, *Physica*, Ross, D. (ed.), Oxford University Press, Oxford, 1951). ὁλως δὲ ἡ τέχνη τὰ μὲν ἐπιτελεῖ ἃ ἡ φύσις ἀδυνατεῖ ἀπεργάσασθαι, τὰ δὲ μιμεῖται.

of any sort, and in general of anybody who has some function or business to perform, is thought to reside in that function; and similarly it may be held that the good of man resides in the function of man, if he has a function. Are we then to suppose that, while the carpenter and the shoemaker have definite functions or businesses belonging to them, man as such has none, and is not designed by nature to fulfil any function?»<sup>33</sup>.

#### II.4. *Nature as known to all, because operating the same for all*

Aristotle takes universality and universal operation to be a mark of natural justice in his famous discussion: «Political Justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not... a law of nature is immutable and has the same validity everywhere, as fire burns both here and in Persia»<sup>34</sup>. It is for this reason that the chapter on natural law in Sir John Fortescue's famous treatise in praise of the laws of England is the shortest in his work. Here is the chapter just about in full: «The Laws of England, as far as they agree with, and are deduced from the Law of Nature, are neither better nor worse in their decisions than the laws of all other states or kingdoms in similar cases. For, as the philosopher says, in the fifth of his Ethics, 'The Law of Nature is the same, and has the same force all the world over.' Wherefore I see no occasion to enforce this point any farther...». Fortescue's editor at this point directs us to the *De Legibus* of Cicero, where one finds a marvelous passage along the same lines: «This law we are neither allowed to disannul, nor to diminish; nor is it possible it should be totally reversed; the senate or the people cannot free us from its authority. Nor do we need any other explainer or interpreter of it besides ourselves. Nor will it be different at Rome and at Athens, now and hereafter; but will eternally and unchangeably affect all persons in all places: God himself appearing the universal master, the universal king (III.22)»<sup>35</sup>. That the law of nature is the same everywhere

<sup>33</sup> ARISTOTLE, *Nicomachean Ethics*, I, 7, 1097b, 26-30, in *Aristotle in 23 Volumes*, vol. 19, translated by Rackham, H., Harvard University Press, Cambridge, MA, 1934.

<sup>34</sup> *Ibid.*, V, 7, 1134b, 15-26.

<sup>35</sup> CICERO, M.T., *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws*, op. cit., [https://oll.libertyfund.org/titles/545#Cicero\\_0044-02\\_539](https://oll.libertyfund.org/titles/545#Cicero_0044-02_539) (10/17/2020).

assists in the contextualization which the appeal to nature wishes to effect: for example, a citizen in a Germany, obliged by local law to betray a Jewish acquaintance *here*, could reason that such an action was rightly regarded as unjust everywhere else, just as it was recognized as unjust only a few years earlier even in Germany<sup>36</sup>.

So, to summarize the argument to this point, the appeal to natural law is meant to be a contextualizing move, and traditionally the appeal to nature has assisted in this, because of a variety of conceptions we have of nature: human agency is tertiary if natural agency is secondary; human authority is lower if authority by nature is higher; human projects are conditioned if they presuppose pre-existing and underlying natural arrangements; and the merely human is local if the natural is universal. All of these themes involving the invocation of nature are highly salient in the tradition of natural law: one could provide many other quotations from Hooker, Cicero, or the American Founders to prove the point.

These are by far the most important conceptions identified with nature and the natural in the tradition. But to round off the discussion it should be noted that the following themes have also had some importance.

## II.5. *Nature as first expressed in institutions subsidiary to political society*

«The friendship between husband and wife appears to be a natural instinct; since man is by nature a pairing creature even more than he is a political creature, inasmuch as the family is an earlier and more fundamental institution than the State, and the procreation of offspring a more characteristic of the animal creation», so says Aristotle<sup>37</sup>. The remark indicates how an ordering believed to exist by nature – families as prior to political society<sup>38</sup> – can serve to underwrite claims of limitations on the law of political society, thereby con-

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<sup>36</sup> Pope PIUS XI in his encyclical letter of March 14, 1937, *Mit Brennender Sorge*, made a similar point in this way: «None but superficial minds could stumble into concepts of a national God, of a national religion; or attempt to lock within the frontiers of a single people, within the narrow limits of a single race, God, the Creator of the universe, King and Legislator of all nations before whose immensity they are 'as a drop of a bucket' (Isaiah xI, 15)», n. 11, [http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_14031937\\_mit-brennender-sorge.html](http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge.html)

<sup>37</sup> ARISTOTLE, *Nicomachean Ethics*, *op. cit.*, VIII. 12.

<sup>38</sup> See also in this regard the organic development of political society out of households described by Aristotle in *Politics*, I.1.

textualizing it (Locke differs from Aristotle in this respect by regarding only individuals as prior to the state.) Madison of course uses a similar consideration in favor of religious liberty: the Madisonian argument is that, by nature, individuals exist in relation to God prior to their relationship to one another in political society. That is why Madison can summarize his argument with the assertion that the free exercise of religion is «the gift of nature»<sup>39</sup>. This is how state authority is contextualized by him in relation to religious practices and associations which in principle pre-exist the state.

## II.6. *Nature as the well-spring of life and new life*

Religious liberty as supported by natural law has especially been underwritten by the appeal to nature, because of the conception of nature as being the source of our lives and the good things we enjoy, putatively as a secondary cause. Not surprisingly, one sees this theme highlighted as well in Cicero. «Nature», he writes in *De Lebigus*, «attentive to our wants, offers us her treasures with the most graceful profusion. And it is easy to perceive that the benefits which flow from her are true and veritable gifts, which Providence has provided on purpose for human enjoyment, and not the fortuitous productions of her exuberant fecundity. Her liberality appears, not only in the fruits and vegetables which gush from the bosom of the earth, but likewise in cattle and the beasts of the field. It is clear that some of these are intended for the advantage of mankind, a part for propagation, and a part for food. Innumerable arts have likewise been discovered by the teaching of nature; for her doth reason imitate, and skilfully discover all things necessary to the happiness of life»<sup>40</sup>. Cicero's interlocutor at this point interrupts and complains that his discourse has wandered far from an account of natural law. Cicero replies that human sociality and human reason are correctly regarded as among nature's provisions for human life. It follows for him that the first duty of rational life in making use of the gift of reason is to render thanks for this gift. That a

<sup>39</sup> MADISON, J., «Memorial and Remonstrance», n. 15, 1785. Available at the United States National Archive, <https://founders.archives.gov/documents/Madison/01-08-02-0163>

<sup>40</sup> CICERO, M.T., *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Larws, op. cit.*, [https://oll.libertyfund.org/titles/545#Cicero\\_0044-02\\_131](https://oll.libertyfund.org/titles/545#Cicero_0044-02_131) (10/21/2020).



rational being should give thanks to the rational being who gave him the gift of reason then becomes for Cicero the general form of the most basic law of nature<sup>41</sup>.

## II.7. *Nature as a teleological system with rewards, punishments, and unintended consequences*

In the tradition, human faculties, motives and emotions constitute a teleological system as well – what used to be called «the moral constitution of man»<sup>42</sup> – within the larger system. They have an arrangement, direction, and natural purport which tend to prevail, no matter what our decisions and intentions may be.

Leo Tolstoy's *Anna Karenina*<sup>43</sup> is an astonishing representation of this traditional view. The motto on its frontispiece is, «Vengeance is mine, I will repay», a quotation from Deuteronomy 32:35. What does this mean? Anna believes that she can ignore the natural law with impunity, leaving her husband and children behind, and joining with Count Vronsky, as she wills. But whatever she intends, she is filled increasingly with bitter emotions and despair, and in the end, she commits suicide by throwing herself under the train – compelled by her own nature to inflict a punishment on herself, even though society through its laws did not. She suffered this fate despite the fact that she never anticipated it at the start, and even though it could appear, as it does throughout much of the novel, that societal disapproval of adultery is a mere human construct.

But Anna Karenina is just one clear example of this viewpoint, from literature. In philosophy, one might cite Plato's portrait of the tyrant in *Re-*

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<sup>41</sup> We would take an additional step and say that the duty to render thanks implies a freedom to do so. Thus, we see in the line of thought a justification too for religious liberty.

<sup>42</sup> So, Joseph Butler: «The inward frame of man, considered as a system or constitution: whose several parts are united, not by a physical principle of individuation, but by the respects they have to each other; the chief of which is the subjection which the appetites, passions, and particular affections, have to the one supreme principle of reflection or conscience. The system or constitution is formed by and consists in these respects and this subjection. Thus, the body is a system or constitution; so is a tree; so is every machine» (BUTLER, J., *Fifteen Sermons Preached at the Rolls Chapel*, Sermons II and III, «Upon Humane Nature», Botham, W. (ed.), London, 1726, p. 46).

<sup>43</sup> TOLSTOY, L., *Anna Karenina*, translated by Louise and Aylmer Maude, Wordsworth Editions, Ltd, London, 1997, p. 1.

*public* X<sup>44</sup>, who is wretched despite getting everything that he wants and thinks good. Or again one might cite Lincoln's Second Inaugural Address: «If we shall suppose that American slavery is one of those offenses which in the providence of God must needs come but which having continued through His appointed time He now wills to remove and that He gives to both North and South this terrible war as the woe due to those by whom the offense came...», and, «if God wills that [the war] continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk and until every drop of blood drawn with the lash shall be paid by another drawn with the sword as was said three thousand years ago so still it must be said 'the judgments of the Lord are true and righteous altogether»<sup>45</sup>. So this is a common theme too in the natural law tradition: that the natural law carries with it rewards and punishments that manifest themselves inexorably, despite our intentions.

This claim serves to contextualize unjust human law in the way we see in Lincoln's speech – by setting before the mind and heart a larger outlook, a magnanimous and deep outlook, within which the evil associated with the unjust law is constrained, frustrated, and ultimately punished.

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So far, I have offered as it were phenomenological remarks about our actual practices in the appeal to natural law, in relation to the history of ideas and history of philosophy. Now, obviously, mainstream academic culture in the West, as a whole, has had little sympathy with the tradition I have been discussing, since roughly the end of the Second World War. It rejects the foundations for that tradition: (a) that the universe has a providential law-like character; (b) that «nature is in the class of causes that work for an end»<sup>46</sup>; (c) that goodness is real and in things; (d) that human nature exists and can be known; and (e) that human nature considered as a «moral constitution» is of a piece with a teleological system which includes the wider natural world.

Therefore, those who would support that tradition have two choices. The first and most obvious would be to support those rejected foundations. This

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<sup>44</sup> PLATO, *Republic*, IX, 571a-580a (*vid.*, *Plato in Twelve Volumes*, vols. 5 & 6 translated by Shorey, P., Heinemann, W. (ed.), Harvard University Press, Cambridge (MA), 1969).

<sup>45</sup> See the transcription of the speech at the U.S. National Park Service site, <https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm>

<sup>46</sup> ARISTOTLE, *Physics* II, 8, 198b, 10: «ἡ φύσις τῶν ἕνεκά του αἰτίων».

task I believe is mainly pedagogical and cultural: we carry it out by founding good institutions (including families) based upon good practices of education. It is not a matter mainly of philosophical argument, because someone who holds to the tradition holds also that its foundations will generally be «obvious» to someone who is well-educated in mind and in character. But insofar as one were to take up philosophical argument, as some should, then obviously one would aim to defend theses (a) through (e), philosophically, with recourse to good supporting work in the natural and social sciences. This is what an account of natural law should attempt to do, as a starting point, given the tradition.

The other choice would be to put that tradition aside, which is the approach of *NLNR*. It is important to understand that *NLNR* in doing so does not prescind from this tradition, in the way for example that a mathematician might find it a challenge to derive a theorem from more economical assumptions than usually allowed. Rather, it thoroughly rejects the tradition, explicitly so. It asserts the impossibility of deriving ‘ought’ from ‘is’<sup>47</sup>; it rejects all arguments akin to the ‘perverted faculty argument’ as misguided<sup>48</sup>; it scoffs at the idea of ‘following nature’<sup>49</sup>; and it scorns appeals to natural teleology<sup>50</sup>.

That it does so is perhaps most clear from how it handles claims about goodness. In Aristotle and in the classical tradition, that something is good or bad is a claim about the world<sup>51</sup>. For example, that an apple is rotten and therefore bad is a claim about the world: it is a claim that the apple fails to have what it should have, given the sort of thing it is supposed to be (That an apple is supposed to be in a certain way is a claim about the world too). In the same way, it is a claim about the world that a human being who possesses the virtues is a good human being. Since a rotten apple is bad, *ceteris paribus* it is rationally

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<sup>47</sup> Surprisingly we are told that «Aristotle and Aquinas would readily grant that ought cannot be deduced from is», FINNIS, J., *Natural Law and Natural Rights*, *op. cit.*, p. 46.

<sup>48</sup> *Ibid.*, p. 47.

<sup>49</sup> *Ibid.*, p. 49.

<sup>50</sup> See the text in footnote 16 above.

<sup>51</sup> «As the good denotes that towards which the appetite tends, so the true denotes that towards which the intellect tends. Now there is this difference between the appetite and the intellect, or any knowledge whatsoever, that knowledge is according as the thing known is in the knower, whilst appetite is according as the desirer tends towards the thing desired. *Thus, the term of the appetite, namely good, is in the object desirable*, and the term of the intellect, namely true, is in the intellect itself», *ST*, *op. cit.*, I, q. 16, a. 1, r. My emphasis.

to be avoided<sup>52</sup>. We can reason in this way – in the Aristotelic-Thomistic tradition – because of the very nature of the transcendental predicate «good» as compared with «being», «one», «true», or any of the other predicates which hold of anything whatsoever: good of its nature has a relation to appetite. To say, of something which is, that it is good, is to say that *ceteris paribus* it is reasonably to be sought: indeed, this is the very idea expressed by what Aquinas calls the first principle of practical reason, that good is to be pursued, evil to be avoided<sup>53</sup>. This principle links goodness in the world to desire and choice in the agent<sup>54</sup>. Curiously, then, the very principle which Aquinas articulates to provide a bridge between «facts» (involving goodness) and «values» (involving rational appetite) is cited by the *NLNR* in denying that anyone can draw inferences from facts to values!<sup>55</sup>

Indeed, the general philosophical framework of *NLNR* is Cartesian. It holds that the first principles of practical reason are first-person principles, not third-person laws, and it identifies a claim's being *per se nota* with its being believed with certainty, from its being intuited with a reflexive immediacy; as in Cartesianism, teleology in nature is either impossible or not knowable.

True enough, *NLNR* asserts that God (or rather an uncaused cause, «D»)<sup>56</sup>, may plausibly be introduced as an explanatory construct, after the purported account of natural law has been set down and accepted; therefore, natural as a secondary cause and natural teleology may perhaps be introduced as well, derivatively, after that point. But «D» and nature as introduced in this way can do no independent explanatory work, as they are simply interpretations of the theory. *NLNR* presents as it were a practical argument for the existence of «D» along the lines of Kant's second *Critique*: «D's» existence is a postulate which is required for the full intelligibility and stability of practical reason. Natural teleology accordingly might be introduced, at best, as another postulate of practical reason, but it cannot be a basis or starting point, or source thereof, for practical reason.

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<sup>52</sup> Unless there were some incidental use of a bad apple – say, serving as an example of something bad in fact – with respect to which it could be accounted good rather than bad.

<sup>53</sup> AQUINAS, T., *ST*, *op. cit.*, Ia-IIae, q. 94, a. 2, r.

<sup>54</sup> Just as the principle of non-contradiction should be understood as a principle which bridges what is (or is not), and what is to be reasonably affirmed (or denied).

<sup>55</sup> *Vid.*, FINNIS, J. *Natural Law and Natural Rights*, *op. cit.*, pp. 34, 45, 62, which depends upon GRISEZ, G., «The First Principle of Practical Reason: A Commentary on the *Summa Theologiae*, 1-2, Question 94, Article 2», *Natural Law Forum*, vol. 10, n. 1, 1965, pp. 168-201.

<sup>56</sup> *Vid.*, FINNIS, J., *Natural Law and Natural Rights*, *op. cit.*, p. 387.

I take these last remarks to be uncontroversial and agreed upon explicitly in Chapter XIII of *NLNR*. But the upshot for our purposes is that *NLNR* is bereft of the usual resources which enable a theory of natural law to play the role that has traditionally been looked for in an appeal to natural law. As mentioned, it does not merely prescind from this fuller view, it discards it and therefore is discontinuous with the tradition and indeed with all prior accounts of natural law.

If so, and if the kind of thing something is, is related to its function, then arguably *NLNR* would be called a theory of natural law only through equivocation.

### III. THE APPEAL TO NATURE WITHIN THE ACCOUNT OF NATURE LAW IN ST. THOMAS AQUINAS

Suppose we were to read St. Thomas on natural law by, for the moment, skipping over the famous text on natural inclinations (*ST, op. cit.*, Ia-IIae, q. 94, a. 2, henceforth “94.2”), returning to it only at the end, once we grasp the whole structure in basic outline: What would we see? Arguably this procedure would be best for discerning what role Aquinas intended that article to play. As we shall see, it also helps us to discern two other ways in which natural law for Aquinas is natural, namely, natural law helps to explain how virtue is natural; and natural law is meant to import into itself certain law-like orderings which come from our non-rational nature. What I mean by this last assertion will become clear below.

If *NLNR* were anything like a correct account of practical reason for Thomistic moral theology at least, one would expect the Second Part of the *Summa*, which is largely dedicated to practical reason, to unfold the way *NLNR* does (in Part II, chapters III-V), *viz.*, by first identifying basic goods and postulates of practical reason, and then by construing the virtues as those traits that enable us to pursue basic goods appropriately, given these postulates. After all, this would be the sound and systematic way to reason practically, on such an account.

However, Aquinas does nothing like this. Rather, somewhat conservatively, he follows the classical tradition, and in particular, Aristotle’s *Nicomachean Ethics*. Like Aristotle, he begins in *ST*, Ia-IIae<sup>57</sup>, by giving a definition

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<sup>57</sup> AQUINAS, T., *ST, op. cit.*, Ia-IIae.

of happiness (*beatitudo*, εὐδαιμονία) as, in effect, a complete life in accordance with the virtues<sup>58</sup>, and then he turns in *ST*, IIa-IIae<sup>59</sup>, to an examination of the various virtues and their parts, as constituting such a life. Call such a procedure the «classical line of argument leading from happiness to the virtues». He is obliged to develop the subject in this way, he thinks, because he holds that, in practical reason, the end that one wishes to attain is the starting point, and the end for human beings is *beatitudo* (God), which they can only attain by becoming virtuous<sup>60</sup>. Virtue, then, is something like the penultimate end, which precedes the ultimate end. Hence, he spends most of his treatise on practical reason explaining what the virtues are, and what are the opposed vices, which are to be avoided.

But Aquinas is the great synthesizer. He wanted to synthesize, with this «classical line of argument leading from happiness to the virtues», the tradition of natural law. He correctly discerned that the former was weak for neglecting the role of law. Actually, his aim in synthesizing was even broader: he wished to synthesize talk of natural law and natural justice, which he found in Aristotle, Cicero, and others in the tradition, with the Old Law of the Israelites, which St. Paul said was written on people's hearts (Romans 2:15); with the Two Great Precepts of Charity from the New Testament<sup>61</sup> – with this scheme of the cardinal virtues and their parts<sup>62</sup>. Of all these, the virtues are the primary thing, not least in exposition, as he says in the prologue to the *ST*, II-IIae<sup>63</sup>. Law is in the service of virtue; it is for the sake of virtue. That is why, for each of the seven main virtues, law is introduced almost as an afterthought, in the form of the precept or precepts appropriately assigned to that virtue.

<sup>58</sup> Strictly, God is happiness or rather 'objective' happiness for St. Thomas. A complete life in accordance with the virtues is, for Aquinas, only imperfect happiness (*cf.*, AQUINAS, T., *ST*, Ia-IIae, q. 5, a. 5, r.), and only happiness considered subjectively, not as regards its object (*ibid.*, q. 3, a. 1, r.).

<sup>59</sup> AQUINAS, T., *ST*, *op. cit.*, Ia-IIae.

<sup>60</sup> *Ibid.*, q. 90, a. 2, r. : «the first principle in practical matters, which are the object of the practical reason, is the last end».

<sup>61</sup> AQUINAS, T., *ST*, *op. cit.*, IIa-IIae, q. 44.

<sup>62</sup> He is also concerned with integrating with these the gifts of the Holy Spirit.

<sup>63</sup> «It should first be remarked that, if we were to treat virtues, gifts, vices and commandments separately, we would have to say the same thing many times over. For, if you were adequately to treat the commandment 'Do not commit adultery', you would have to examine adultery, which is a particular sin, and to understand it you must understand the opposite virtue. Therefore, it will be a briefer and quicker to treat together the virtue and the gift corresponding to it, along with the opposite vices and the affirmative and negative commandments».

Of course, to synthesize the classical tradition of the virtues with what had been handed down about law, he needed first to synthesize the latter. To do so, he simply identified the primary precepts of the natural law with the Decalogue – to say that the Decalogue is written on men’s hearts, then, is to say that its precepts are naturally known by all<sup>64</sup>. He held also that the Decalogue may be deduced from the Two Precepts of Charity: love of God, and love of one’s neighbor as oneself<sup>65</sup>. Finally, he brought any other precepts which someone might want to claim are naturally given (*e.g.*, show respect to elders) into relation to the Decalogue, by treating them as secondary precepts of the natural law, which are naturally known to ‘the wise’ but not to everyone.

Note that the putative basic goods of *NLNR* and its postulates of practical reason play no role whatsoever in this synthesis: more than that, there is no space for them to play any role. Aquinas explicitly says on multiple occasions that the precepts of the Decalogue are the *per se nota* primary precepts of the natural law (*e.g.*, «man is not to murder man»). Such precepts simply cannot be first-person resolutions involving basic goods (*e.g.*, «knowledge is to be pursued by me»), which lack essential traits of law.

But after he has synthesized the tradition on law, he needs to put it into relation to the classical line of thought leading from happiness to the virtues. His main step in this regard is to say that natural law explains how it is that the virtues are natural. There was a tension on this question, in the materials he was working with. John of Damascene taught explicitly that virtue was natural and vice unnatural. Although Damascene is just about the only authority Aquinas cites for this view, he rightly takes Damascene’s view to correspond to an important intuition in Christianity and in classical moral philosophy as well, *viz.*, that human beings are meant to develop into virtuous adults, and that this is true of us not by convention but by nature:

«Bear in mind, too, that virtue is a gift from God implanted in our nature, and that He Himself is the source and cause of all good, and without His co-operation and help we cannot will or do any good thing... While then we

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<sup>64</sup> That is, to be precise, among those who are not hindered in character by vice, ignorance, or bad culture.

<sup>65</sup> *Vid.*, *ST, op. cit.*, Ia-IIae, q. 100, a. 2, ad. 1. He understands Jesus to have taught this explicitly, citing in his *Catena Aurea* the comment on Matthew 22:40 by Rabanus Maurus: «For to these two commandments belongs the whole decalogue; the commandments of the first table to the love of God, those of the second to the love of our neighbour» (AQUINAS, T., *Catena Aurea*, translated by NEWMAN, J.H., John Henry Parker, London, 1842, p. 764).

abide in the natural state we abide in virtue, but when we deviate from the natural state, that is from virtue, we come into an unnatural state and dwell in wickedness (Μένοντες οὖν ἐν τῷ κατὰ φύσιν ἐν τῇ ἀρετῇ ἔσμεν, ἐκκλίνοντες δὲ ἐκ τοῦ κατὰ φύσιν παρὰ φύσιν ἐρχόμεθα καὶ ἐν τῇ κακίᾳ γινόμεθα)» (*De Fide Orth.*, II. 30)

«For the virtues are natural qualities, and are implanted in all by nature and in equal measure (φυσικαὶ γὰρ εἰσιν αἱ ἀρεταὶ καὶ φυσικῶς καὶ ἐπίσης πᾶσιν ἐνυπάρχουσιν), even if we do not all in equal measure employ our natural energies. By the transgression we were driven from the natural to the unnatural. But the Lord led us back from the unnatural into the natural. For this is what is the meaning of ‘in our image, after our likeness’» (*De Fide Orth.*, III.14)<sup>66</sup>

On the other hand, Aquinas’s main authority in ethics, Aristotle, had a famous discussion where he concluded that the moral virtues are not by nature, because, if they were, then no human beings could be habituated to act viciously – as nothing which is meant by nature to be one way can, by training, habitually go in an opposite way. And, yet for all, that Aristotle does not say that human nature is entirely indifferent to virtue. In a famous expression he says that the virtues complete or perfect our natural endowment: *Neque igitur natura neque praeter naturam, fiunt virtutes. Set innatis quidem nobis suscipere eas, perfectis autem per assuetudinem*<sup>67</sup>.

Aquinas as is his wont splits the difference and says that human character is such that it can go one way or the other, but that the precepts of the natural law naturally known to all prompt each individual to become virtuous and prompt societies to inculcate virtues. So, natural law for him gives the proper interpretation of Aristotle’s maxim and makes it consistent with Augustine at the same time, as in this formulation:

In the appetitive powers, however, no habit is natural in its beginning, on the part of the soul itself, as to the substance of the habit; but only as to certain principles thereof, as, for instance, the first principles of law common to all (*ius commune*) are called the «nurseries of the virtues» (*seminalia*

<sup>66</sup> JOHN OF DAMASCUS, *Exposition of the Orthodox Faith*, vol. IX, *A Select library of Nicene and post-Nicene fathers of the Christian church. A new series*, Schaff, P. (ed.), Scribner’s Sons, New York, 1925, pp. 738, 776. See *De Fide Orthodoxa*, or *Expositio Accurata Fidei Orthodoxae*, in Migne, J.P., *Patrologia Graeca*, Volume 94, Apud fratres Garnier (ed.), Paris, 1864, pp. 972-976, 1015.

<sup>67</sup> The Latin of the *Etica vetus* which Aquinas would have used. Aristotle’s language was: «οὐτ ἄρα φύσει οὔτε παρὰ φύσιν ἐγγίνονται αἱ ἀρεταί, ἀλλὰ πεφυκόσι μὲν ἡμῖν δέξασθαι αὐτάς, τελειούμενοις δὲ διὰ τοῦ ἔθους» (*vid.*, *Nicomachean Ethics*, *op cit.*, II., 1, 1103a, 24-6).



*virtutum*). The reason of this is because the inclination to its proper objects, which seems to be the beginning of a habit, does not belong to the habit, but rather to the very nature of the powers<sup>68</sup>.

So, this is the first additional way in which nature and the natural, for Aquinas, are important in his account of natural law. He sees natural law itself as teleological. It is in us for a purpose and goal. That goal is virtue. And its presence in us, together with that goal, give the sense of Aristotle's claim that virtues, although not themselves by nature, bring to perfection our natural endowment.

Yet this resolution leads to its own difficulty. If natural law is meant to prompt towards the virtues, and if the Decalogue gives the primary precepts of natural law, why then does the Decalogue deal solely, it seems, with matters that fall under the virtue of justice, rather than with all the virtues? As he puts it in the *Summa*, «the intention of a lawgiver is 'to make the citizens virtuous in respect of every virtue', as stated in *Ethic.* ii, 1. Wherefore, according to *Ethic.* v, 1, 'the law prescribes about all acts of all virtues.' Now the precepts of the decalogue are the first principles of the whole Divine Law. Therefore, the precepts of the decalogue do not pertain to justice alone»<sup>69</sup>.

His response is that first principles of law are precisely those which all of us assent to immediately (*statim*). They have to be the most obvious practical precepts: «But the nature of that which is to be done (*debitum*), appears most obviously in justice, which is of one towards another. Because in those matters that relate to himself it would seem at first glance that man is master of himself, and that he may do as he likes: whereas in matters that refer to another it appears, with obviousness, that a man is under obligation to render to another that which is his due. Hence the precepts of the decalogue must needs pertain to justice. Wherefore the first three precepts are about acts of religion, which is the chief part of justice; the fourth precept is about acts of piety, which is the second part of justice; and the six remaining are about justice commonly so called, which is observed among equals»<sup>70</sup>.

In his *Sentences* commentary, Aquinas makes it clear that he thinks that an individual's practical reason develops organically, and over time, from these naturally given and most obvious first principles. That is why, he says, the precepts

<sup>68</sup> AQUINAS, T., *ST, op. cit.*, Ia-IIae, q. 51, a. 1, r.

<sup>69</sup> *Ibidem*.

<sup>70</sup> AQUINAS, T., *ST, op. cit.*, II-II, q. 122, a. 1, co.

of the Decalogue give the most serious offense rather than the least. If they were intended to give a complete legal code, then they would say, for example, «do not strike a neighbour», because it follows that if striking a neighbour is forbidden, then surely murdering him is. The one is deductively contained in the other. Yet it does not follow, if murdering him is wrong, that striking him is not. Does this mean that the Decalogue is badly stated, and therefore that its expression of the natural law is inept on this point? Aquinas comments: «Although the prohibition of the lesser evil is not included in that of the greater evil, in the manner of a syllogism (*via syllogistica*)... nonetheless it is included in the same way as those things which develop in stages out of natural seeds are contained in seed-like principles (*in rationibus seminalibus continentur*). For just as nature brings forth great trees from small seeds, so too law, from things that are present in the beginning and are easy, moves forward towards other things, which are typically more difficult and more perfect. And it is for this reason that a legislator through his prohibition of adultery prohibits simple fornication, and, through his prohibition of false testimony prohibits any kind of mendacity, and through his prohibition of theft prohibits every kind of illicit gain, and likewise for the other cases»<sup>71</sup>.

But this resolution itself leads to yet another difficulty. If the first principles of natural law are meant to grow organically into the virtues, and if to have the virtues is to have habits which enable someone to act in accordance with reason in different circumstances and conditions, and if when we act in accordance with reason, there is always some concomitant precept that we are following in the act (*e.g.*, «hold your ground», a precept which commands, enjoining courage, in circumstances in which courage is needed, or «don't lash out at him», a precept which forbids, enjoining meekness, in circumstances which arouse anger), then why don't all such precepts count as the «law of nature» for that person, since human beings are by nature rational? This is the difficulty that St. Thomas raises in *ST, op. cit.*, Ia-IIae, q. 94, a. 3: «whether all acts of all the virtues are done under the natural law».

The difficulty may have seemed unaccountable, even to perceptive readers, before we realized that Aquinas, as we have seen, is devoted above all to

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<sup>71</sup> AQUINAS, T., *Super Sent.*, III., d. 37, q. 1, a. 2, qa. 1, ad. 2 (*vid.*, XIV, Moos, M.F. (ed.) (P. Lethieulleux, Parisiis, 1956, p. 1356). Se, añade, a continuación lo que aparece ahora en el texto de la cita 6. See also and especially his discussion of how the Decalogue prompts to virtue: «It pertains to law to make men good, wherefore it behooved the precepts of the Law to be set in order according to the order of generation, the order, to wit, of man's becoming good» (AQUINAS, T., *ST, op. cit.*, IIa-IIae, q. 122, a. 2, r.).

the «classical line of thought from happiness to the virtues» and that, moreover, he regards the precepts of natural law as playing a kind of pedagogical role, coaxing us teleologically towards full virtue. His reply, therefore, is that all the virtues considered in their particular manifestations do fall under natural law in this organic sense. But if we mean, rather, which *kinds* of virtuous acts fall under the natural law, then we must count only those to which nature inclines us at first (*natura primo inclinatur*). Through this phrase, it should be clear at this point, he is intending here to point us forward to his discussion of why only just acts, falling under the virtue of justice solely, are enjoined by the natural law<sup>72</sup> (in *ST*, IIa-IIae, q. 122).

Recall at the beginning of this section we said that the best way to assess the purport of the famous article on natural inclinations in 94.2 was to look first at the overall shape of Aquinas' treatment of natural law, as if 94.2 did not exist, and then to return to it only after we had a good grasp of the whole. After taking such an overview, we see that Aquinas understands the natural law as part of God's providential ordering for the human race, in the sense that it prompts or inclines us to acquire the whole of virtue, by prompting or inclining us at first to act justly in the most obvious ways.

In q. 94.2, Aquinas says that a human being is a rational animal which is a substance. As having such a nature, it has three forms, rational, animal, and substantial. Since a form imparts an inclination to a thing which has it, a human being accordingly has three natural inclinations, a rational, an animal, and a substantial inclination. Corresponding to each of these, in the same order, he says, are precepts of the natural law.

We now know how to interpret the third of these, the rational inclination: for a human being to have a natural, rational inclination to act – as we understand from the bigger picture – is to be prompted, by those *per se nota* primary precepts of the natural law which are expressed in the Decalogue, to act justly in the most rudimentary way in relation to God and man, as to be led, through the providence of God, towards the acquisition of complete virtue, and therefore *beatitudo*.

In 94.2, Aquinas uses this language to describe this inclination: «There is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society; and in this respect, whatever pertains to this incli-

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<sup>72</sup> *Cfr.*, AQUINAS, T., *ST*, *op. cit.*, IIa-IIae, q. 122.

nation belongs to the natural law». Does this language fit our interpretation? Yes it does. Interpreters have long wondered about this strange description of this third inclination – why just this mention of God and society? It seems too fragmentary a statement of natural law obligations, and yet the other two inclinations he also describes in the article do not seem, together with it, to constitute anything like the full moral law. But the way out of this difficulty is to understand the mention of God in this description to refer to the content of the first tablet of the Decalogue, and the mention of society to refer to the content of the second tablet. Aquinas has found a phrase which economically, and suitably enough for his purposes there, is designed to evoke the entire Decalogue. In the article, that sentence concludes: «And in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination», and we can now interpret this language as gesturing towards the development of the initial inclination of practical reason towards complete virtue. Indeed, in the article which follows, Aquinas will himself as it were give a gloss on this sentence, when he maintains, as we saw, that the act of any virtue is in accordance with the natural law as linked to this rational inclination.

But then what about the other two natural inclinations in the article? Why does Aquinas even mention them at all? If the rational inclination accounts for the entire life of virtue, because it originally prompts towards this, and then is meant to develop into this, what are these other two inclinations, and why should they be considered as somehow involving natural law at all?

Here it is important to understand that Aquinas understands natural law to be a system or body of law, an ordering, which begins from certain rudimentary indications or promptings, and which is meant to develop organically in the lives of virtuous persons. Now, he noticed that there were two ‘systems’ (as we might call them) of natural order, which are given to us not in virtue of our being rational, but in virtue of our being animals or simply through being an existing substance, which aims to keep itself in existence, like any other substance. Let us call these ‘the system of ordered self-love’, and ‘the system of ordered procreation.’ The existence and operation of these systems is clearly presupposed by the Decalogue: ‘do not steal’ has sense, only if there is property already, but we rightly acquire property by right, only by the natural law connected with this system of ordered self-love; and ‘do not commit adultery’ has sense, only if there is marriage, and we aim to by right procreate within exclusive and indissoluble relationships, only in accordance with the natural law connected with the natural system of ordered procreation.

The existence of these two other systems – besides the distinctively rational system expressed in the Decalogue – is pointed to elsewhere in Aquinas' work, specifically when he considers whether some kind of action is contrary to nature. In fact, in his corpus, we find only three types of actions described as *contra naturam*: those which go against self-preservation, like suicide; those which go against procreation, such as deliberately non-procreative venereal acts; and those which go against reason. As regards the first, he says that suicide is unlawful «because everything naturally loves itself, the result being that everything naturally keeps itself in being, and resists corruptions so far as it can. Wherefore suicide is contrary to the inclination of nature (*contra inclinationem naturalem*), and to charity whereby every man should love himself. Hence, suicide is always a mortal sin, as being contrary to the natural law (*contra naturalem legem*) and to charity»<sup>73</sup>. As regards the second, he says in his famous discussion of the 'parts' of the vice of lust, that a venereal act can be wrong from simply being unreasonable, given our sexual constitution, it can also be wrong from additionally being directly against nature, «because it is inconsistent with the end of the venereal act. In this way, as hindering the begetting of children, there is the 'vice against nature' (*vitium contra naturam*), which attaches to every venereal act from which generation cannot follow»<sup>74</sup>.

That procreation should take place only within marriage, given our natural sexual constitution, he explains in a way that serves as a good overall description of what I have called 'the natural system of ordered procreation': «Now simple fornication implies an inordinateness (*importat inordinationem*) that tends to injure the life of the offspring to be born of this union. For we find in all animals where the upbringing of the offspring needs care of both male and female, that these come together not indeterminately, but the male with a certain female, whether one or several; such is the case with all birds: while, on the other hand, among those animals, where the female alone suffices for the offspring's upbringing, the union is indeterminate, as in the case of dogs and like animals. Now it is evident that the upbringing of a human child requires not only the mother's care for his nourishment, but much more the care of his father as guide and guardian, and under whom he progresses in

<sup>73</sup> AQUINAS, T., *ST*, II-II, q. 64, a. 5, r. On the system of self-love see also ID., *Quaestiones de quolibet* V, q. 3 a. 2, r., *Commissio Leonina*-Éditions du Cerf, Roma-Paris, 1996: «Potissimum autem in genere amoris hominum est amor quo quis amat seipsum».

<sup>74</sup> *Id.*, AQUINAS, T., *ST*, *op. cit.*, IIa-IIae, q. 154, a. 1, r.; *ibid.*, a. 11, r.

goods both internal and external. Hence, human nature rebels against an indeterminate union of the sexes (*ideo contra naturam hominis est quod utatur vago concubitu*) and demands that a man should be united to a determinate woman and should abide with her a long time or even for a whole lifetime. Hence it is that in the human race the male has a natural solicitude for the certainty of offspring, because on him devolves the upbringing of the child: and this certainly would cease if the union of sexes were indeterminate. This union with a certain definite woman is called matrimony; which for the above reason is said to belong to the natural law (*ideo dicitur esse de iure naturali*)<sup>75</sup>.

A similar good overview may be found in *Summa contra gentiles* (SCG)<sup>76</sup>, «That matrimony should be indivisible». One sees very clearly that Aquinas believes that ‘right reason’ needs to endorse and then interpret this ‘system of ordered procreation’, importing it as it were into a unified body of natural law:

«... generation is the only natural act that is ordered to the common good, for eating and the emission of waste matters pertain to the individual good, but generation to the preservation of the species. As a result, since law is established for the common good, those matters which pertain to generation must, above all others, be ordered by laws, both divine and human. Now, laws that are established should stem from the prompting of nature (*ex naturali instinctu procedant*), if they are human; just as in the demonstrative sciences, also, every human discovery takes its origin from naturally known principles... So, since there is a natural prompting (*instinctus naturalis*) within the human species, to the end that the union of man and wife be undivided, and that it be between one man and one woman, it was necessary for this to be ordered by human law»<sup>77</sup>.

Although he speaks of human law here, he means human law as endorsing and interpreting natural law. Right reason discerns the natural inclination, sees what is required by it, and affirms precepts on that basis – integrating these seamlessly into a larger framework, just as Aquinas’ discussion of the ‘parts’ of lust is integrated into his larger account of temperance and the other virtues.

Now we are in a position to see the point of 94.2. It really is about whether there is one natural law or three. In a sense, it is a typical problem which arises in an Aristotelian philosophical framework as to whether a term is being

<sup>75</sup> AQUINAS, T., *ST, Quaestiones de quolibet, op. cit.*, V, q. 3 a. 2, r.

<sup>76</sup> AQUINAS, T., *ST, SCG*, translated by Bourke, V.J., III, Ch. 123, New York, Hanover House, 1955-57.

<sup>77</sup> *Ibidem*.

used univocally or equivocally. The threat of equivocality arises in the very next article, q. 94, a. 3, Are all the acts of all the virtues in accordance with natural law?<sup>78</sup> No, says an important objection: «Every sin is opposed to some virtuous act. If therefore all acts of virtue are prescribed by the natural law, it seems to follow that all sins are against nature: whereas this applies to certain special sins» (obj. 2). Indeed, as we have seen, only suicide and some parts of lust are referred to as *contra naturam*.

Aquinas' answer in 94.2 is, in effect, that 'natural law' has a unified sense because of focal meaning. Admittedly, there are three systems of natural ordering related to natural inclinations, but for all that there are not three natural law. These become unified, because they all involve an endorsement by right reason of a natural inclination, through the application of the fundamental precept, «good is to be done, evil is to be avoided»: «All these precepts of the law of nature have the character of a single natural law (*omnia ista praecepta legis naturae... habent rationem unius legis naturalis*), inasmuch as they flow from a single first precept», he says in the *ad. 1*. Note the move from the plural ('precepts') to the singular ('a single'). With this solution in hand, then, it is easy for him to respond to the aforementioned threat of univocity: «By human nature we may mean either that which is proper to man – and in this sense all sins, as being against reason, are also against nature, as Damascene states: or we may mean that nature which is common to man and other animals; and in this sense, certain special sins are said to be against nature; thus contrary to sexual intercourse, which is natural to all animals, is unisexual lust, which has received the special name of the unnatural crime» (*ad. 2*).

To sum up our results in this section. In the previous section we considered various respects in which the appeal to natural law in the tradition involved an appeal to nature, and we showed in how many ways, and how extensively, the latter played the role of supporting the former. In this section we discovered two additional ways in which natural law involved an appeal to nature for Aquinas.

First, in Aquinas' account of natural law, the Decalogue is construed as the expression of those initial promptings of practical reason with which we are endowed by nature, which are designed in God's providence to lead us to acquire complete virtue. That is to say, for Aquinas, the natural endowment of natural law explains in what sense it is correct to say that virtue itself is natural for us.

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<sup>78</sup> 94.3 is a much more important article for understanding Aquinas on natural law than 94.2.

Second, in Aquinas' account of natural law, the framework of natural law – which grows organically as someone grows in virtue, and which is most fully articulable by a mature and wise person who has attained to full virtue – actually incorporates into itself, by recognizing, endorsing, and interpreting them, two 'systems of natural order', which arise in us, and have a claim on us, on account of the non-rational aspects of our nature (although they are deeply rational in God's providence), namely, the system of ordered self-love, and the system of ordered propagation.

#### IV. IS THE NEW NATURAL LAW A THEORY OF NATURAL LAW?

The natural law of modern theorists such as Grotius and Locke is largely shorn of its associations with a teleological view of nature, and yet a remnant of that view does remain in their accounts, insofar as they rely on our intuitions about the right to self-defense, which from a Thomistic perspective gets its force from the natural system of ordered self-love. If by nature each thing is inclined to care for itself more than any particular other thing, then each thing has a right to use force sufficient to keep itself in existence, even at the cost of the existence of another which is an aggressor. The notorious right which each person has to punish offenses against the natural law, in Locke's system, is best construed as an extension of this right to self-defense. Not surprisingly a political society conceived of as coming into existence on such a slim basis will lack robust conceptions of a common good, and of law as directed towards the acquisition of complete virtue, while, quite notably, it will also lack any sense of a natural system of ordered procreation. A political society which takes no care for subsidiary institutions or for the family is the expected result, and which we are witnessing.

The New Natural Law of John Finnis and others completely disclaims natural teleology and attempts to construct a theory of natural law without it. It has often been objected that such a theory is neither natural, *ex hypothesi*, nor a theory of law, as its starting points (basic goods and postulates of practical reason) are not law-like but, at best, judgments of the reason of an individual binding on his own actions only, such as 'knowledge is to be pursued by oneself'<sup>79</sup>.

I have been intent on arguing in this paper, with a different argument, that the *NLNR* is not a theory of natural law. There are only three grounds, I have maintained, on which it could be so regarded: it functions the way that

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<sup>79</sup> FINNIS, J., *Natural Law and Natural Rights*, *op. cit.*, p. 60.



such a theory is expected to function; or it has the expected content; or it is a plausible interpretation of a theory generally acknowledged to be in the tradition of natural law. We have found that appeals to natural law in the tradition are so bound up with the appeal to nature, that a theory which disclaims natural teleology altogether, such as that developed in *NLNR*, seems to lack resources for playing that role: it seems incapable of supporting appeals to natural law which serve to contextualize human law. Rather, *NLNR* proposes an ethical theory, and a mere ethical theory has no power to do so.

Moreover, the *NLNR* is not a plausible interpretation of the tradition, and, especially, it fails strikingly as an interpretation of Aquinas. What Aquinas identifies as the first principles of practical reason, those expressed in the Decalogue, are ignored as candidates for the natural law by *NLNR*. Instead *NLNR* takes a list of basic goods and postulates of practical reason to be these first principles. However, these, besides the fact that they lack the requisite character of being per evident to all, are nowhere found in the text. The text in which they are supposed to be discoverable, the famous 94.2, deals with something else entirely and gives no support to the project of *NLNR*. 94.2 in fact deals with the interpretation and endorsement of systems of natural teleology, which, as we have seen, *NLNR* strenuously, persistently, and explicitly rejects as irrelevant to natural law.

Should *NLNR* at least be congratulated for drawing the attention of the discipline of legal philosophy to the tradition of natural law? This does seem to be an accomplishment – but only if that discipline has turned to look at Aquinas, or to other figures in the genuine tradition of natural law, more intently than it would have done otherwise. But it is not clear that it has.

One might argue, rather, that the general effect of *NLNR*, among those most disposed to receive it favorably, has been to promote a flawed theory of ethics, which distracts from those questions of the virtues and of natural teleology which call for attention and reasoned support in any genuine account of natural law. Most importantly, at a time when many sense a great conflict between accounts of political society which affirm objective purposes and standards, and those that reject it, *NLNR* gives the impression of taking completely the wrong side.

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