

9-11-2013

A Defense of Thomistic Natural Law

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September 11, 2013 By: Dr. Howard P. Kainz, PhD

If there is any other moral theory besides natural law that provides even better guidance for major and common life decisions, then this theory should be proposed, and natural law should take the proverbial back seat.



Natural law theory has a long and distinguished pedigree in the Western world, beginning in ancient Greece, where major philosophers refer to a certain law or laws superseding human laws. Anaximander, Pythagoras, Heraclitus, and Anaxagoras propounded theories of cosmic harmony and the way that humans should, or do, participate in it; and Hippias (ca. 460-390 B.C.) spoke about a divine law that can never and nowhere be superseded. Plato in his *Republic* and *Laws* speaks of an ideal “divine” law existing prior to all human affairs; and Aristotle, in offering advice to defense lawyers in his *Rhetoric* gives examples of civil and criminal cases where the lawyer could cite generally recognized but unwritten “universal” laws which have priority over the state-sanctioned laws which their clients are accused of breaking.

Natural law attained a certain preeminence in Christianity due to St. Paul’s invocation (*Romans* 2:14-16, 21-24) of a “law engraved on the hearts” of pagans who had never heard of Jewish laws, and Paul’s favorable contrast of such unbelievers with Jews who disobey the laws laid down in the Ten Commandments – Jews who “preach against stealing, yet steal; forbid adultery, yet commit adultery,” etc.

St. Paul may have been influenced by Stoic philosophers who held sway in his time, and extolled a supreme law of nature for all peoples. Among the Stoics, Cicero offered the first and strongest explicit defense of a law which:

cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our

own conscience. It is not one thing at Rome, and another at Athens; one thing today and another tomorrow, but in all times and nations this universal law must for ever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer.

Cicero's concept of natural law was connected, of course, with his ideal of human participation in a harmonious and finely-tuned universe, presenting individuals and societies with an exemplar for ideal moral decision-making and conduct. In our own era of the "Big Bang" theory of cosmic explosion, and Darwinian theories about the evolution of the earth and living species, notions about human coordination with the "rhythms of nature" may seem overly idealistic or even poetic – although for some nature-lovers this idea still has appeal.

During the Middle Ages, Roman jurists like Ulpian and Gaius distinguished natural law from civil law and the "law of nations." Canonists of the Church, like Gratian and Rufinus, developed the theory of natural law even further, including incipient concepts of natural rights, as Brian Tierney shows in his excellent book, *The Idea of Natural Rights*.

St. Thomas Aquinas (1225-1274), and other Scholastics, brought these efforts to final fruition. Aquinas, in his *Summa theologiae* 1^a2^{ae}, Q. 94, discusses the general self-evident principle of ethics, "good is to be done, and evil avoided. In article 94:2, he shows how this general principle takes on flesh, so to speak, in three concrete precepts of the natural law:

The order of precepts of the natural law exists according to the order of natural inclinations ... (1) Every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law ... (2) Those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth ... (3) Man has a natural inclination to know the truth about God, and to live in society: 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.

These three precepts are not original with Aquinas, but were also held by predecessors, such as William of Auxerre and Roland of Cremona, and cited by subsequent scholastics, such as Francisco Suarez, S.J. (1548-1617), who writes, along the same lines, but with a slightly different emphasis:

Man is (as it were) an individual entity, and as such has an inclination to preserve his own being, and to safeguard his own welfare; he is also a being corruptible – that is to say, mortal – and as such is inclined towards the preservation of the species, and towards the actions necessary to that end; and finally, he is a rational being, and as such is suited for immortality, for spiritual perfection, and for communication with God, and social intercourse with rational creatures. Hence, the natural law brings man to perfection, with regard to every one of his tendencies and, in this capacity, it contains various precepts – for example, precepts of temperance and of fortitude, relating to the first tendency

mentioned above; those of chastity and prudence, relating to the second tendency; and those of religion, justice and so forth, relating to the third tendency.

During the French Enlightenment, Montesquieu (1689-1775), in *The Spirit of the Laws*, describes the basic inclinations of the “law of nature” along the same lines as Aquinas: “the preservation of one’s being” and “seeking for nourishment”; “the attraction arising from the difference of sexes”; and the “advantage of acquired knowledge” and the “desire of living in society.”

Without doubt, the third precept, which has to do with the special exigencies of *rational* beings, is the most important natural law mandate. It is this third precept that was reiterated by Protestant natural-law theorists, such as Grotius (1583-1645), Cumberland (1631-1718), and Pufendorf (1632-1694), who emphasized the natural altruism of humans and, like Aquinas, the necessity of developing rational and harmonious social structures.

It is often asserted that David Hume (1711-1776) “upset the apple cart” for natural law with the following pithy statement, widely taken out of context, in his *Treatise of Human Nature*, about not deriving an “ought” from an “is”:

{Morality} consists not in any *matter of fact* which can be discovered by the understanding ... Can there be any difficulty in proving that vice and virtue are not matters of fact, whose existence we can infer by reason? ... {However,} in every system of morality which I have hitherto met with ... the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find that, instead of ... *Is*, and *Is not*, I meet with ... *ought*, or an *ought not*... This *ought*, or *ought not* ... should be observ’d and explain’d... A reason should be given ... how this new relation can be a deduction from others, which are entirely different from it.

This prohibition (popularly called “Hume’s Guillotine”) is interpreted by many contemporary philosophers as interdicting any further attempts to make moral judgements based on essential aspects of human nature. As an example of this interpretation, Immanuel Kant (1724-1804) would stand out as one of the first practitioners of Hume’s caveat. Kant, in his moral philosophy, proposed his “Categorical Imperative” (CI) as the general format for proper ethical reasoning: Employing the CI, the ethical decision-maker must dismiss all human inclinations, and, purely on the basis of the cerebral deliberations of practical reason, formulate only those “maxims” which one would be willing to stand as a universal norm for all humans. This formula has been widely criticized by modern philosophers. For example, R.M. Hare shows that, with a little tweaking, a hypothetical Nazi could devise a CI which would justify him in exterminating Jews.

Nevertheless, Darwin’s theory of natural selection of the species, coupled with various theories of the evolution of *homo sapiens* from the hunter-gatherer stage, have led to a conception of human nature as almost infinitely variable. This assumed variability seems to stand in the way of any attempts by moralists to derive some reasonably stable moral norms based on human nature.

Thus many contemporary ethicists try, like Kant, to adhere religiously to Hume's "Guillotine," focusing only on moral conclusions that can be derived from pure practical reason alone, without any distracting attention to the "facts" of human nature or the welter of human inclinations.

Philosophers are an ornery bunch, however, and many of them have tried to beat Hume at his game, by showing ways in which "oughts" can be, and are indeed, derived from "is." But probably the best refutation of the supposed is-ought Guillotine comes from Hume himself, who, if one reads a little further in the *Treatise*, shows how he thinks the task of deriving "oughts" should take place:

See if you can find that matter of fact, or real existence, which you call vice. In whichever way you take it, you find only certain passions, motives, volitions, and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflection into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object. The fact that we feel a strong repugnance against murder leads us to conclude that murder is wrong.

In other words, there are facts ... and there are facts. Hume was against deriving moral principles from certain "external" facts. Alasdair MacIntyre points to a tract read by Hume as a young man in a Presbyterian household, *The Whole Duty of Man*, which tried to deduce moral duties from Christian "facts" about creation of the world and man. I have suggested in my 2004 book, *Natural Law: an Introduction and Reexamination*, that Hume's reaction was triggered by Ralph Cudworth (1617-1688) and Samuel Clarke (1675-1729), proponents of "rational morality" deducing moral truths from metaphysical and religious "facts."

But Hume was *not* against derivation from "internal" facts. Quite the contrary, his moral theory is based on internal facts; and, because of that, he is frequently categorized as a "moral-sense" theorist. Moral-sense theory, insofar as it is concerned with basic human tendencies, has some affinity with natural law theory. As Frederick Copleston, S.J., concludes in Volume 5 of his *History of Philosophy*:

{Hume's} insistence on the original constitution or fabric of human nature suggests that this nature is in some sense the foundation of morality or, in other words, that there is a natural law which is promulgated by reason apprehending human nature in its teleological and dynamic aspect.

In the 20th century, some unsettling developments led to a re-consideration of the existence of a natural law. In 1945-46, the Nuremberg trials, in which the victors in WWII condemned and executed Nazi officials who arguably were following the laws of their country, raised the question, "on the basis of what law are we judging them?" Is there some superior law, or are there superior laws, to which even the properly legislated laws of the nations have to be subject? For infractions of *these* higher laws can "law-abiding" citizens of those nations be condemned?

Proponents of such an overarching law began to speak out. Lon Fuller, Jerome Frank, and others voiced renewed support of natural law, and skepticism about the prevailing hegemony of “legal realism.” The Universal Declaration of Human Rights adopted by the U.N. in 1948 may be seen as an additional movement for clarifying laws and rights that stand above all national and civil enactments.

In the Catholic Church during the 60s, new cultural strains added to the quest for information about eternal and universal laws which might trump the positive laws enacted by regimes, and even democratic polities. The emergence and popularity of the contraceptive pill, combined with the invocation of natural law against contraception by Pope Paul VI, led to renewed debates by theologians and philosophers concerning the validity of natural law. The widespread opposition of theologians, priests and prelates, as well as lay Catholics, to Pope Paul VI’s 1968 encyclical against contraception, *Humanae vitae*, is still fresh in the memory of many older Catholics. Dissident theologians published a full page ad in the New York Times advising Catholics to just follow their conscience, and not be concerned about the overly negative restrictions in the encyclical.

But then, in an attempt to dispel the confusion and defend Catholic tradition, a “New Natural Law” theory arrived on the scene, championed by Catholic “analytic” philosophers – John Finnis, Germain Grisez, and others. Depending on reason and logical analysis alone, and purporting to avoid any dependence on the facts connected with human nature, they devised a set of seven basic, self-evident values from which moral norms could be safely derived: (1) knowledge; (2) life; (3) play; (4) aesthetic experience; (5) sociability (friendship); (6) practical reasonableness (applying one’s intelligence to problems and situations); and (7) religion and pursuit of ultimate questions about the cosmos and life.

They came to the defense of the Pope with a robust brief for defending reproductive sexuality, against the inroads of the contraceptive mentality. Finnis, in a 1970 article, *Natural Law and Unnatural Acts*, in the *Heythrop Journal*, argued:

What, in the last analysis, makes sense of the conditions of the marital enterprise, its stability and exclusiveness, is not the worthy and delightful sentiments of love and affection which invite one to marry, but the desire for and demands of a *procreative* community, a family. Some sexual acts are (as types of choice) always wrong because of an inadequate response, or direct closure, to the basic procreative value that they put in question.

This “new” natural law style of thinking is arguably connected with the second “self-evident” value – namely, life – proposed by Finnis; but Finnis, in his discussion of the value of “practical reasonableness,” presents it as a demonstration of the way that this “6th value” must be coordinated with respect for other “basic values.” He takes as one example, the position of the Catholic Church regarding contraception:

The principal bearer of an explicit theory about natural law happens, in our civilization, to have been the Roman Catholic Church ... That Church has stringently elaborated the implications of the seventh requirement {of the sixth value – namely, that practical

reasonableness should embody respect for *every* basic value in every act}, as those implications concern the basic values of life (including the procreative transmission of life), truth (including truth in communication), and religion. And it has formulated those implications in strict negative principle, such as those declaring wrongful any killing of the innocent, any anti-procreative sexual acts, and lying and blasphemy.

The New Natural Law theory offers to many an approach to moral decision-making, based on important values; but, because of its lack of interest in facts about human nature, constitutes a break with the tradition and history of natural law discussed above. Most importantly, the claim to self-evidence of the seven pivotal values (and their subdivisions) is less than persuasive. I became somewhat skeptical about this in reading the chapters concerning each of the self-evident values, in Finnis' book, *Natural Law and Natural Rights*. When, for instance, one reads the relatively long chapter (20 pages), full of arguments, about the value of knowledge, one begins to wonder about the purported "self-evidence" of this value: What are we to conclude ethically from knowledge-valuation? That education is important? That knowledge is to be sought for its own sake? That we should not do anything until we have sufficient knowledge of consequences?

Similar excogitations could result regarding the interrelationships between the seven "basic values": One could, for example, argue *in favor* of contraception from a reflection on Finnis' sixth value, practical reasonableness – the desire of spacing offspring in view of economic contingencies, social frameworks, etc.

Like other critics, I have come to view New Natural Law as an interesting moral theory, which may give some guidance for people of good will in making moral decisions, but is not strictly a natural law theory.

Traditional natural law theories, beginning with an analysis of major human inclinations, lead to a philosophical examination of what it means to be a human being, a member of the animal species, and, most importantly, a rational animal. An interesting characteristic of the three precepts of natural law defined by Aquinas, and others, is that they are also, at one and the same time, natural *rights*. As Brian Tierney points out in *The Idea of Natural Rights*, self-preservation is one of the chief intuitively obvious duties discussed, over and over again, by medieval and late medieval thinkers; but it is also considered an inalienable right. The dual nature of self-preservation as a duty *and* a right is frequently brought up in commentaries on the ideas of William of Ockham and Jean Gerson. Thus, the medievalists defended, for example, giving a starving person the moral right to steal from the rich; and the moral right of a person whose life is threatened to kill the aggressor, if necessary.

This dual duty/right aspect is common to all three precepts of natural law: The duty of self-preservation is likewise the right of self-preservation; the duty of conscientious reproduction is also the right of reproducing (now restricted or prohibited for millions by totalitarian governments); and the duty of seeking the truth and building up rational societies is also the right of knowing the truth and contributing to the development of a rightly organized society. Other inclinations do not have this characteristic. The tendency to have power over others is not the right to do so; the tendency to be promiscuous is not the right to be so; the tendencies to lie or steal are not rights to do so.

Jeremy Bentham, the 18th century champion of utilitarian moral theory, criticized natural law as a theory which was so vague and indeterminate that almost anything could be justified by an appeal to “nature.” Stephen Buckle, in his article on “Natural Law” in the *Cambridge Companion to Ethics*, complains that natural law cannot go beyond a few generalities concerned with being “rational.” However, in Aquinas’ theory, each of the three precepts intuitively generates very specific duties.

No extensive ratiocination is necessary to realize that self-preservation obligates individuals to take care of their health, not overeat, avoid drunkenness, refrain from unnecessary risks, work to earn subsistence, not overwork, and avoid greed – just to mention a few of the obvious implications. The precept about procreation and nurturance of offspring should lead the thoughtful person, without too much hair-splitting, to take sex seriously, avoiding casual liaisons, avoiding a contraceptive mentality, caring for physical and spiritual well being of offspring, even into adulthood, cooperating with even difficult spouses in raising offspring, except where violence, etc. infringes on one’s rights or the rights of one’s children, and possibly even working to overcome anti-reproductive policies of oppressive governments. Finally, as mentioned above, the precept to pursue the truth, both in the theoretic and practical realms, is the most important for humans, and indicates that everyone, according to their capacities, should educate themselves on all important issues, especially regarding God and religion, examining both sides to avoid bias; that voters should inform themselves on issues and candidates in democratic societies; that all should contribute according to their talents and opportunities to their neighborhood or community; and so forth.

Some contemporary values seem to contradict each of the three natural law precepts, and need to be considered: (1) Suicidal tendencies can be understood as desires to escape what appear to be intolerable suffering, either physical or mental or emotional; and seem to contradict the self-preservation instinct, and sometimes require heroic resistance. But with these tendencies the desire for self-preservation is still there, but thought to be no longer possible because of the loss of a sense of health or well-being. And there is, of course, no mandate to use extraordinary measures to stay alive when natural death is imminent. (2) The problem of “overpopulation” is a mythical problem, as I have argued elsewhere, along with many others (see e.g. www.pop.org), and a very strange myth in a world where numerous countries are now facing a demographic winter. In any case, one does nothing for the world by contraception, although personal increases in wealth and lifestyle may result from childless marriages. (3) Most importantly, contradictory theories and relativism in morals may discourage many from even trying to pursue the truth. How can we ever know the truth when there are so many contradictory theories about the cosmos and the world? How can we be sure about right and wrong when there are such rampant disagreements about basic life choices? But this is the wrong question. The important thing is to *seek* the truth, both in theoretical and practical matters; this is a lifelong pursuit, and ordinarily will result in some successes.

Christianity, with the Decalogue and the Golden Rule, receives welcome support from natural law theory, but of course, goes seriously beyond it with its commandment of love even of enemies, of going the “extra mile,” of forgiveness, of lending without asking for repayment, etc. So natural law has built-in limitations. If there is any other moral theory besides natural law that

provides even better guidance for major and common life decisions, then this theory should be proposed, and natural law should take the proverbial back seat.

The chief alternate choices of moral theories at present seem to be reduced to two: Kantian moral theory, depending on moral “universalizability” is taught in most courses on ethics now in our colleges and universities. But I am not the only one who has found it almost impossible, after ignoring (according to Kant’s requirement), my inclinations, to come to good, solid ethical decisions in the crossroads of life by deliberating whether I could, without self-contradiction, will everyone in the world to make the decision I am contemplating.

Probably the most popular ethical theory today, for public officials as well as for private citizens who have never heard of the theory, is utilitarianism, which instructs us to always do what will procure the greatest amount of happiness for the greatest number of people. If we were clear on what the greatest “happiness” consists of, and what sort of happiness the greatest number of people are looking for, it would be easier to apply the theory. But, as it stands, noted utilitarian theorists like Peter Singer, and ordinary practicing utilitarians like Barak Obama, strangely find even things like infanticide to be moral. We may react to such things like the observers of the Nuremberg Trials, wondering whether there might be some basic, maybe unwritten, universal laws that trump some of the strange avatars of moral laws that come on the scene and seem to be considered authoritative by masses of “experts.”