

NATURAL LAW: THE FIRST GRACE¹

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“Natural law thought can never be understood as outside history and neutral either philosophically or theologically. We only approach the world through a specific language and discourse, through a genealogy.”



1. *The desideratum: A post-dualist account of natural law*

The prospects of natural-law thinking can seem dim indeed, in spite of some recent able defenses.² Nevertheless, or perhaps precisely because of this, it is incumbent upon contemporary Catholic intellectuals to make their contribution to the modest revival of the natural law tradition such defenses represent. It seems to me that, in order to be fruitful, this contribution must avoid two extremes. On

¹Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, Del., 2003), xi–xii, incorporates a fifth-century Christian phrase into the title of his book to emphasize that from early in the Christian tradition natural law was seen as an expression of grace, not as something autonomous from grace or revelation, as often it has been presented in recent centuries. This is a point central to the present analysis.

²My “The Gay Middle Ages: A Response to Professor Boswell,” *Communio: International Catholic Review* 8 (Spring, 1981): 119–38, gives an idea of the political issues that complicate current reception of natural law thinking. Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind., 1987), is useful in sorting out recent expositions of the natural law.

the one hand, it should not simply return to the older “manual” tradition of construing natural law, lest it underwrite a new dualism between nature and grace.³ On the other hand, granting that the new, very striking, insights of John Paul II’s theology of the body should serve as a platform for a post-dualist recovery of natural law, we must not fall in with the oft-heard claim that these insights are so new that the first twenty-three centuries of the natural law tradition offer nothing useful in comparison, as if it were only now that we had understood the true dimensions of this subject.⁴ To be sure, John Paul II’s idea of nuptial-sacramental bodiliness *does* represent a significant development beyond previous thought. Still, the argument of the present essay is that the advances and clarifications made possible by focus on the nuptial meaning of the body more deepen than replace certain strands of earlier natural law thinking. For Aquinas, as we will see below, natural law is not independent of God and grace, since the Creator has placed in man a desire for happiness, truth, and goodness, that is, a natural desire for God, and therefore nature and grace are “pre-tuned” to each other.⁵

³For a more expansive presentation of the manual tradition, see Servais Pinckaers, *The Sources of Christian Ethics*, trans. from third ed. by Mary Thomas Noble (Washington, D. C., 1995), 254–79.

⁴It might also be said that sometimes those working on the contemporary theology of the body have seemed insufficiently aware of what actually has been said in Christian history about the body: Adam G. Cooper, *The Body in St. Maximus the Confessor: Holy Flesh, Wholly Deified* (Oxford, 2005), is an example of a work that deserves a wide reading, dealing as it does with the theology of the body and the corporeal aspects of anthropology, and attacking as it does the notion that the Greek Fathers in general held to an anti-material, overly Platonized, asceticism. See the review of this book by Valerie A. Karras in *Church History* 76 (2007): 826–28. I have sketched some of the issues in “Twelfth-Century Humanism Reconsidered: The Case of St. Bernard,” *Studi Medievali*, 3a Serie, 31, 1, 1990: 27–53. M. D. Chenu, “The Spirituality of Matter,” *Faith and Theology*, trans. Denis Hickey (New York, 1968), 106–11, is an example of earlier discussion of some of these issues.

⁵Servais Pinckaers, *Morality: The Catholic View*, trans. Michael Sherwin (South Bend, Ind., 2003), 30; Pinckaers, *The Sources of Christian Ethics*, 400–56. Robert A. J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville, Tenn., 2001), defines nature for St. Paul as “the material creation around human beings and the bodily design of humans themselves, guiding us into the truth about the nature of God and the nature of human sexuality respectively” (391). This captures how much of the early Christian tradition saw man within nature, and the structure of humans as giving insight both into the nature of God and of human

Among others, Alasdair MacIntyre has powerfully shown that there is no such thing as philosophical or theological thinking independent of all tradition. This means that natural law thought can never be understood as outside history and neutral either philosophically or theologically. We only approach the world through a specific language and discourse, through a genealogy. Indeed, an important part of my argument in what follows is that, before the Enlightenment, nature itself was not viewed as opposed to culture and history.⁶ In any case, I am convinced that we need to approach the subject of natural law historically, which is what I propose to do in the following pages.

Before going on, however, let me pause briefly to anticipate the trajectory of the present article. My tracing of the historical unfolding of natural law is necessarily selective due to limitations of space. Though I would like to end the historical discussion with Aquinas, I want to spend most of my time on some less familiar aspects of the natural law tradition. (Even my brief examination of Thomas will focus on what is perhaps unfamiliar territory.) This is one of the reasons why I have chosen to devote so much attention to the Stoic heritage, in its Zenonian form, of the natural law tradition. After having examined this heritage, moreover, I will go on to discuss the somewhat complicated relations between law, philosophy, and theology in medieval legal thinking, focusing in particular on Ulpian and Gratian. It is against this backdrop of what in some senses is a highpoint of the Christianization of the Stoic heritage that I will return to Aquinas to conclude my brief tour of the history of natural law thinking; in particular, I will be concerned to underscore the connection between theocentrism and the body in Thomas' account of the natural law, using his discussion of same-sex intercourse as an illustrative example. It should become apparent by the time I reach the conclusion of the essay how even the less familiar sources of natural law thinking that I will marshal in what follows bear out my thesis as to the simultaneous theocentric and

sexuality.

⁶Joel Kaye, *Economy and Nature in the Fourteenth Century: Money, Market Exchange, and the Emergence of Scientific Thought* (Cambridge, 1998), esp. chs. 6–7. See the comparison of medieval and Newtonian worldviews in Amos Funkenstein, "Maimonides' Political Theory and Realistic Messianism," *Miscellanea Mediaevalia* 9 (1977): 81–103 at 88ff. On the absence of the nature/culture pair in the middle ages, see an amusing review by James A. Schultz, *Speculum* 77 (2002): 975–77.

embodied character that constituted even the remoter corners of natural law thinking long before John Paul II.

2. The Stoic heritage

Admittedly, a great variety of positions have been described throughout history under the rubric “natural law.” I propose, though, that we take the central ideas of a natural law position to be: 1) the human good is universal and unchanging, 2) the human good is knowable, or partially knowable, to humans, 3) humans are obliged to live by that good which they can recognize.⁷ None of these ideas is unproblematic, but if we take them to be the criteria of a natural law position, then such positions existed, as in Plato or Aristotle, before they had received the name “natural law.”⁸ That term was coined by the Stoics. The Stoics did not hold a single or uniform natural law position, but their early discussions are critical.

Many Stoic writers distinguished between the natural as 1) anything in accord with our animal nature (following our instincts or desires, “doing what comes naturally”), and the natural as 2) what

⁷Arthur O. Lovejoy, *Primitivism and Related Ideas in Antiquity (A Documentary History of Primitivism and Related Ideas*, gen. eds. A. O. Lovejoy et al., vol. 1 [all published, but see George Boas, *Essays on Primitivism and Related Ideas in the Middle Ages* (New York, 1966), 7, 87–88, 91–92, 94, on the appeal to nature] (Baltimore, 1935), ch. 3, “Genesis of the Conception of ‘Nature’ as Norm,” and “Appendix: Some Meanings of ‘Nature,’” remain classic treatments, along with Lovejoy’s “Nature as Norm in Tertullian,” *Essays in the History of Ideas* (Baltimore, 1948), 312–22. In addition see Simon Goldhill, *Foucault’s Virginité: Ancient Erotic Fiction and the History of Sexuality* (Cambridge, 1995), esp. ch. 2, which provides a useful orientation to the various meanings of “nature and the natural” (see index) in ancient thought as they bear on sexuality. In general Goldhill’s readings are to be preferred to Martha Nussbaum’s. Robert Sokolowski, *Christian Faith and Human Understanding: Studies on the Eucharist, Trinity, and the Human Person* (Washington, D. C., 2006), 214–33, “What is Natural Law? Human Purposes and Natural Ends,” is a profound defense of the idea that natural law “is the ontological defense of ends over purposes” (226, using a definition of Francis Slade).

⁸Paul E. Sigmund, *Natural Law in Political Thought* (Cambridge, Mass., 1971), makes this point especially strongly by centering his first chapter (“Natural Law in Greek Thought”) on Aristotle, who did not use the expression “natural law.” In general see Felix Flüchiger, *Geschichte des Naturrechtes*, 1. Bd.: *Altertum und Frühmittelalter* (Zurich, 1954) (all published), which has an extensive treatment of the pre-Stoic background, and goes through Aquinas.

is in accord with our rational nature. Zeno of Citium (ca. 335–ca. 263) was one of those who defined the natural in the latter sense. Plants lack the “impulse” animals possess, that is, the animals’ drive to satisfy, for instance, thirst, but animals lack the reason humans possess: “when reason by way of a more perfect leadership has been bestowed on the beings we call rational, for them life according to reason rightly becomes the natural life. For reason supervenes to shape impulse scientifically.”⁹ A few lines further on Zeno writes of “life in accordance with nature, or, in other words, in accordance with our own human nature.”

This was the critical distinction which separated Zeno from those less sophisticated Stoics who took “following nature” simply to mean following instinct. The Zenonian account of natural law, then, made it clear that not all instincts are created equal. It is necessary to scrutinize them in the context of social life, in which human nature is fully unfolded. Of course, this does not mean that the natural law simply describes what a group or groups of people happen to do. Just as an entire group being mistaken about some mathematical truth does not touch that truth, an entire people practicing cannibalism is no argument in cannibalism’s favor, or for moral relativism. The natural law describes the moral law man should follow, and not necessarily what man actually does.

Of course, Stoic ideas of self-reliance could easily lead to an ancient form of individualism or false autonomy. In this the ideal became a self-fulfillment which, though recognizing the ways in which men are embedded in the cosmos and in social relations, might, in spite of a strong sense of duty, struggle in the direction of self-perfection against all that was external. But, in some degree, from the first the emphasis on self-fulfillment was counterbalanced in Stoic thinking by the idea that the universe man lives in is ordered, has laws, and is governed by a divine, if impersonal, principle (one can call it Zeus), the best characterization of which is “reason.” True, God has no meaningful existence for the Stoics apart from the rational order of nature, and is neither personal nor transcendent. Even so, there is for Stoicism a rational order of nature that has a divine quality, and man is part of it. It was this, at least for Zenonians, that gave meaning to the command “follow nature.”

⁹Quotations are from the Loeb Classical Library translation of *Lives of Eminent Philosophers*, VII, vol. 2, trans. R. D. Hicks (Cambridge, Mass., 1979), 195.

Thus, although Zeno continued to regard the body itself as simply sub-rational, not as mediating or shaping rationality—a great limitation of Stoicism generally—he did regard natural law as a self-expression of the divine, as *The Law of God*, to use the title of a recent book.¹⁰ Though with Zeno we have an underdeveloped understanding of the human person, and little explicit reflection on the human body—but also no explicit soul-body dualism—nature, for him, is not an independent entity, but something in some sense separate from God, yet also intimately belonging to him.

Romans who studied law were often of a Stoic persuasion, and Cicero (106–43) gave the natural law a classic expression in *The Commonwealth*, III, 22:¹¹

There is a true law, right reason in accord with nature; it is of universal application, unchanging and everlasting; It is wrong to abrogate this law and it cannot be annulled. . . . There is one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, God, who is the author of this law

Right reason is a moral faculty permitting man to understand what is in accord with his (rational) nature. Law is not created by men for their own utility, nor does it express their will, but is something they apprehend, learn, and obey.¹² Moreover, the link between God, reason, and the natural law could not be clearer. Seneca (ca. 4 B.C.–65) was equally Zenonian in holding that *natura* could be another name for either *deus* or *divina ratio*. This was in some sense an anticipation of the medieval Christian lawyers, who wrote “*Natura, id est deus*” to express the idea that though we may treat nature separately from God, in considering nature we are

¹⁰Rémi Brague, *The Law of God: The Philosophical History of an Idea*, trans. Lydia G. Cochrane (Chicago, 2007), considering Stoicism, but not Zeno.

¹¹Trans. Sigmund, *Natural Law*, 22. R. W. and A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, 6 vols. (vols. I–IV are by A. J. Carlyle; Edinburgh and London, 1903–62), I, 34–35, denies that the Roman lawyers were simply of one philosophical school, or even understood philosophy well enough to espouse one school as opposed to others. The Carlyles’ volumes are of enduring value for their treatment of the natural law from Cicero to about 1600.

¹²Carlyle, *Mediaeval Political Theory*, I, 38.

ultimately considering God.¹³ This is a precious insight that, purified by a proper distinction between God and creation and nature and grace, gives us a key to a post-dualistic understanding of nature. More on that anon.

Thus, though the “reason” of Stoicism is not the personal God of Christianity, and the universe of Stoicism is not created *ex nihilo* and not therefore the gift of God it is in Christian thought, Zeno already affirmed in effect that man is defined by an objective order and web of relationships. However much maligned, then, Stoicism, at least in its Zenonian form, anticipated the Christian idea, highlighted by the *ressourcement* theologians of the twentieth century, that nature’s inner rationality is simultaneous with openness to God—even though Christianity crucially qualified this idea by introducing the notion of creation out of nothing and a corresponding distinction (but not dualistic separation) between nature and grace.

It was, I would argue, thanks to the Stoic anticipations of a theocentric natural law (however inadequate those anticipations were) that Stoic natural law ideas could pass in modified form into Christian thinking: For example, Tertullian (ca. 160–235) speaks of nature as our first school and of God as first known through nature; Lactantius (ca. 250–ca. 325) emphasized that the eternal law of nature expresses the sovereignty of God; and Theodore of Mopsuestia (350–428), who saw man as having natural knowledge from the beginning, has been described as giving the natural order a certain salvific function.¹⁴ One could multiply these examples of Patristic reception and transformation of Stoic natural law thinking. Rather than do so, however, I would like to focus instead on another highpoint of this transformative appropriation in medieval legal thinking.

¹³Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton, 1964), 504–05 (Seneca), 537ff., 551–52. Placentinus, an Italian civilian (student of the civil law) who died in 1192, thought that in Ulpian’s description of the natural law, considered below, nature was the equivalent of God: Carlyle, *Mediaeval Political Theory*, II, 29.

¹⁴Carlyle, *History of Mediaeval Political Theory in the West*, vol. 1, 5–6, 104. Ewart Lewis, *Medieval Political Ideas* (New York, 1974), 2 vols., translates many texts on natural law: see II, 657, index under “natural law.” For Theodore see Joanne McWilliam Dewart, *The Theology of Grace of Theodore of Mopsuestia* (Washington, D.C., 1971), 49–55, 59–63.

3. Interrogating the lawyers: Ulpian and Gratian

Since at least the time of Glaucon's insistence in book two of Plato's *Republic* that justice is only a convention, there had been those throughout the ancient world who followed Carneades (214–129/8) in attacking Stoic epistemology and in denying the very idea of natural law, insisting that all law is merely rooted in utility (needless to say, one does not have to hold to Stoic epistemology to subscribe to a theory of the natural law).¹⁵ Of course, as the example of Cicero suggests, many philosophers were aware in at least a general way that there was a congruence between Stoic accounts of natural law (at least in its Zenonian form), and Aristotle's affirmation of natural theology and natural law. Here we begin to see what will eventually become the Thomistic synthesis beginning to take shape.

As we know, the synthesis was long in coming, in part because of the confusion introduced by the lawyer Ulpian (+228), who arguably did more to muddy the philosophical waters than anyone else. In a highly influential definition which passed into Justinian's (527–65) *Digest* and *Institutes*, Ulpian unhelpfully defined the natural law as (*Digest*, I. i. 1):¹⁶

that which all animals have been taught by nature From it comes the union of man and woman, and therewith the procreation and rearing of children; we find in fact that animals in

¹⁵I have treated Glaucon in "John Rawls and the Flight from Authority: The Quest for Equality as an Exercise in Primitivism," *Interpretation: A Journal of Political Philosophy* 21 (1994): 419–36 at 425–27.

¹⁶Sigmund, *Natural Law*, 26 (I have modified Sigmund's translation). For the Latin text as passed on by Isidore of Seville, see his *Etimologias*, V, 4, ed. Jose Oroz Reta, 2 vols. (Madrid, 1982), I, 510. *Isidore of Seville's Etymologies*, 2 vols., trans. Priscilla Throop (Charlotte, Vt., 2005), I, gives another English translation. Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Imerius bis Accursius und von Gratian bis Johannes Teutonicus* (Munich, 1967), though covering a briefer period, is the most significant history of the natural law in the middle ages since the Carlyles, and is based on a wider reading of source materials: see 12–17, on Ulpian and Justinian, and 283–306, for the canonists' treatment of marriage as grounded in nature. Carlyle, *Mediaeval Political Theory*, I, ch. 3, is on the Roman lawyers' treatment of natural law; and ch. 9 is on the Church Fathers' treatment of natural law (mostly on the distinction between pre-lapsarian and lapsarian man; otherwise emphasizing that we find the same variety of opinion and positions among Christian as among non-Christian thinkers). See Carlyle, *Mediaeval Political Theory*, I, 106–10, and Sigmund, *Natural Law*, 32–34.

general, the very wild beasts, are marked by acquaintance with this law.

This text enshrines a serious departure from Zeno's, or even Cicero's, identification of natural law and reason. Instead, Ulpian regresses to something like the definition of the natural law as anything in accord with our animal nature.¹⁷ Most of what the text says implies an identification of "the natural" with animal instinct, though to link the union of man and woman with "the procreation and rearing of children" presumably introduces the second Stoic position, in which what is in accord with reason defines the natural.¹⁸ Ideas which the more astute of the Stoics had tried to separate are here jumbled together, as they would be in many medieval texts.

The middle ages inherited most of the ancient definitions of law, and both canon and—after the revival of Roman law from the eleventh century—civil lawyers commonly understood the distinctions between the natural law as instinct and as reason.¹⁹ Nevertheless, we need to take account of a further influence: Patristic and early medieval thought often identified the natural law with biblical teaching ("the Law and the Gospel"). This identification was important for our purposes because it indicated the road the medieval canonists took to achieve a more uniform understanding of natural law than the civil lawyers, with their inheritance of largely pre-Christian texts, were able to achieve.²⁰

The single most influential canonical collection of the middle ages, Gratian's *Decretum*, the first edition of which was written about 1140, began by defining natural law as "what is contained in the Law

¹⁷Sigmund, *Natural Law*, 26.

¹⁸Christian writers generally viewed marriage, as distinguished from sacramental marriage, as a natural institution, predating Christianity: Pierre Toubert, "L'institution du mariage chrétien, de l'antiquité tardive à l'an mil," in *Morfologie sociali e culturali in Europa fra tarda antichità e alto medioevo*, 2 vols., Settimane di studio del Centro italiano di studi sull'alto Medioevo, 45 (Spoleto, 1998), vol. 1, 503–49 (with Discussion, 551–53) at 514–15, and Teresa Olsen Pierre, "Marriage, Body, and Sacrament in the Age of Hugh of St. Victor," in *Christian Marriage: A Historical Study*, ed. Glenn W. Olsen (New York, 2001), 213–68.

¹⁹Carlyle, *Mediaeval Political Theory*, II, 30.

²⁰Weigand, *Naturrechtslehre*, 17–121, treats the medieval Roman lawyers, and 121–446, the canonists.

and the Gospel.”²¹ The natural law in a view such as Gratian’s was something coming from and leading back to God. Needless to say, to identify the natural law with the Bible was in an obvious sense quite different from anything found among pre-Christian writers. Nevertheless, if one thinks about it, this identification could be viewed as a development of central insights going back to the early Christian appropriation and re-working of Zenonian Stoicism.²² In any case, the point that concerns us for the moment is the view of canonists like Gratian and his successor Rufinus that the natural law concerns only the human race (not all animals), and is grounded in the divine command that men do good and avoid evil. This was a conscious rejection of Ulpian’s definition of natural law as animal instinct.²³ Let us examine the background to this shift in a little more detail.

Cicero was the first to use the expression *ius gentium*, and henceforth the development of the idea of a “law of nations” was

²¹Our knowledge of “Gratian” and the composition of the *Decretum* has been revolutionized by Anders Winroth, *The Making of Gratian’s Decretum* (Cambridge, 2000). A summary of Winroth’s complicated argument informs my “Canon Law,” to be published in *The Oxford Guide to the Historical Reception of Augustine*, general director, Karla Pollmann, ed. Irena Backus and Arnoud Visser (Oxford). There are translations of Gratian’s central texts in Sigmund, *Natural Law*, 48–51, and (to be preferred, though a translation of the Roman, 1582, edition) Gratian, *The Treatise on Laws (Decretum DD. 1–20)*, trans. Augustine Thompson, *with the Ordinary Gloss*, trans. James Gordley, intro. Katherine Christensen (Washington, D. C., 1993), 3–7, 15–16, 21–22, 24–26, 28–29. Weigand, *Naturrechtslehre*, 121–40, is on Gratian and his sources.

²²Note, moreover, that it was not just that the Ten Commandments might be viewed as specifications of what reason has taught all men; even the Stoic affirmation of a divine reason and order that fills the universe could be seen as further explicated in biblical Law and Logos. St. John, for instance, seems to have used *logos* deliberately in addressing predominately Greek-speaking, Hellenized converts with some knowledge of the Stoic tradition to present the order of the universe as explicated in the biblical tradition and found in Christ. This Hellenized audience presumably understood John to be referring to the creation as coming from the mind of God. When today a thinker such as Servais Pinckaers insists that the Beatitudes extend the pathways opened in the Ten Commandments to “be perfect, as your heavenly Father is perfect,” he still takes this stance. See Pinckaers, *Morality*, 8.

²³Carlyle, *Mediaeval Political Theory*, II, 103: II, Part II, ch. 3, is on Gratian’s and Rufinus’ understanding of the natural law. See also Carlyle, *Mediaeval Political Theory*, III, 87–91.

often closely linked to the idea of natural law.²⁴ Both ideas could be variously defined. For Cicero the *ius gentium* was more a philosophical than a legal term, and referred to the common elements of all legal systems, somewhat as in the middle ages (with some exception for England), the term *ius commune* was used to speak of the shared legal inheritance of the European countries.²⁵ For his part, Gratian, though with the other medieval canonists he accepted the tripartite division of law laid out by Ulpian, Isidore, and the *Institutes* of Justinian (natural law, civil law, and law of nations), subordinated this to a twofold division between Natural or Divine Law, on the one side, and custom. He was not the first to do this, but for him natural and divine law were the same.

Rufinus took this to mean that the natural law is something implanted in men to lead them to the good and away from evil. Implied is an equation of the first principle of the natural law, “do good and avoid evil,” and the Golden Rule. With man weakened by the First Sin, the natural law was reestablished by the Decalogue and completed by the Gospel. It was in this context, in fact, that Rufinus formally repudiated Ulpian’s identification of natural law with animal instinct, noting that while the ancient lawyers did speak of the natural law as common to all animals, the canonists restrict the term to mankind. The *ius naturale* consists of the moral law’s general principles, which are directly derived from God and precede all positive law, ecclesiastical or secular.²⁶

How much contrast in the understanding of the natural law there was between the civil and canon lawyers is a matter of debate.²⁷ Still, though the civilians might from time to time entertain

²⁴Sigmund, *Natural Law*, 24.

²⁵*Ibid.*, 25.

²⁶Weigand, *Naturrechtslehre*, 144–48, is on Rufinus. For both Gratian and Rufinus, see Carlyle, *Mediaeval Political Theory*, II, 102–08. Carlyle goes on to discuss canonistic treatment of why not all in the Law is any longer obeyed, and why conditions contrary to the natural law are allowed to exist. For theological treatment of parallel questions, see John Boler, “Aquinas on Exceptions in Natural Law,” in *Aquinas’s Moral Theory: Essays in Honor of Norman Kretzmann*, ed. Scott MacDonald and Eleonore Stump (Ithaca, N.Y., 1999), 161–204.

²⁷Modern scholars seem to agree that the students of the civil law in the high middle ages never were able to achieve a common definition of natural law: all the variety of definition of the ancient period remained. But A. J. Carlyle claimed that the situation among the canon lawyers was quite different. Since the Carlyles

more Ulpian-like definitions of the natural law than did the canonists, the civilians also understood and used definitions which like those of the canonists restricted the natural law to rational beings. They could agree that the natural law was “that body of moral principles which is always and everywhere recognized by men’s reason as binding.”²⁸

Though Cicero identified the *ius gentium* and the *ius naturale*, important subsequent lawyers thought the law of nations fell short of, or even contradicted, the natural law.²⁹ Indeed, the idea that natural law could be used to attack evil or irrational custom was as old as natural law thinking itself, but, especially from the time of the Gregorian Reform of the eleventh century, the canonists drew on natural law ideas to provide arguments for reform of Church and society. The civilians tended to write in support of kings and emperors, but they were also interested in the use of law to change society. In a Europe trying to recover from the deep decentralization of early medieval life, the attack on undesirable practices could be placed in the service of the developing national states, and often took the form of justification for the rationalization of life, for attack on arbitrary custom and local law, even perhaps for the drive toward centralization on which the forming nation-state depended. It has not usually been noted, but the use of the natural law in the late middle ages and early modern period to undergird ideas of a law of nations most apt to what humans are, or to undergird universal human rights, stands in historical descent from the earlier medieval attempt, going back at least to the Carolingian period but especially prominent from the twelfth century, to make life more uniform and “rational” in everything from coinage to the *ius commune*.³⁰

wrote, there has been continuing discussion of how uniform the canonical tradition was, with some, on the basis of more evidence than the Carlyles considered, claiming that canon law was more diverse and less harmonious than the Carlyles suggested. See Weigand, *Naturrechtslehre*, 138.

²⁸Carlyle, *Mediaeval Political Theory*, II, 31.

²⁹Sigmund, *Natural Law*, 25.

³⁰*Ibid.*, 38. I refer not to the “common law” of the Anglo-Saxon tradition, but to the idea of a shared European or Christian legal inheritance.

4. Thomas Aquinas and the canonists

Gratian and Rufinus, then, give us a theonomic account of natural law that represents a certain high-point in the Christianization of Zenonian ideas about the law of nature. Nevertheless, one of the signal contributions of Thomas Aquinas would be to retain the theonomy of natural law while reconciling this with a greater emphasis on both the relative autonomy of natural law and its inscription in bodiliness. Let's begin with the latter point.

As is well known, for Aquinas there are four kinds of law: eternal, natural, divine, and human. The eternal law is God's plan for the universe. Divine law, by contrast, is that revealed in the Two Testaments. But, whereas the divine law is God's revelation of the moral law in Scripture, the natural law is God's commands as found in nature, though, as Thomas is quick to point out, commanding belongs to reason, not to voluntaristically understood will.³¹ Law expresses reason for the purpose of justice.³² Natural law, then, is a sharing in the eternal law specific to being human: it may be termed providential because it is a rational creature's provision for itself and others. As such, natural law is to be distinguished from human law, which contains both the *ius gentium* and the *ius civile*, and the application by human reason of the natural law to particular circumstances.

Note, then, that, whereas for the canonists the Scriptures are the first location of the natural law, for Thomas, of course without denying the ultimate origin of the *ius naturale* in God, the order of nature has been distinguished from revelation, and, so far as we are concerned, is the first *locus* of the natural law.³³ We might say that

³¹Sigmund, *Natural Law*, 37–38, and see 52–54. See also Michael Bertram Crowe, "Aquinas and Natural Law: Terminology and Definitions in the Late 12th and Early 13th Centuries," in *Sprache und Erkenntnis im Mittelalter*, 2 vols., ed. Jan P. Beckmann (Berlin, 1981), II, 614–21. There are several useful essays on Aquinas in *San Tommaso e la filosofia del diritto oggi* (Rome, 1974).

³²Carlyle, *Mediaeval Political Theory*, V, 40–41, 44.

³³Sigmund, *Natural Law*, 38. Mark D. Jordan, "Ideals of *Scientia moralis* and the Invention of the *Summa theologiae*," in *Aquinas's Moral Theory*, ed. MacDonald and Stump, 79–97, has illuminating things to say about the absence in Aquinas of "moral philosophy" understood as "a complete *scientia moralis* possessed by unaided reason" (79). Cf. Thomas S. Hibbs, "Divine Irony and the Natural Law: Speculation and Edification in Aquinas," in *Thomas Aquinas*, ed. John Inglis (Burlington, Vt., 2006), 213–23; J. de Finance, "Droit naturel et histoire chez S. Thomas," *San Tommaso e*

the canonists' conception was more dominantly theological or undifferentiated, and in this sense we can see that Thomas's view allows for a universe in which a natural order has sufficient integrity to be read by man without immediate recourse to revelation.³⁴

Far from unlinking natural law from the God of revelation, however, Thomas's distinction between divine law and the natural law brings to full articulation an idea that had long been developing, namely that the path to holiness revealed in Scripture is not a positivistic decree only fideists can accept, but has a purchase on the inner rational structure of human nature.³⁵ Thomas's account of the relation between natural and divine law, it seems to me, reveals its deepest meaning when read against the background of his doctrine, rediscovered in our day by Henri de Lubac, that nature, as such, desires a fullness that it can attain only within the context of gracious elevation to the *visio beatifica*.

Once this is seen, then we can say that Thomas did not so much reject the canonists' intuition about the divine aspect of the natural law, but brought to it a set of distinctions that, far from robbing it of its power, actually radicalized it. Thomas thereby gives us a way of retrieving the special concern of the canonists to show the ways in which the natural is also divine, a concern that is particularly useful to us, living on the other side of a period in which a two-story universe of nature and grace dominated, in which grace was seen more as something building on nature than as something present to or at the heart of nature all along the way.

So much for the theonomic aspect of natural law. What about its inscription in bodiliness? Aquinas, synthesizing a great deal of earlier thought, teaches that God has given man "natural

la filosofia del diritto oggi (Rome, n.d.) 104–28. Holly Hamilton-Bleakley, "Marsilius of Padua's Conception of Natural Law Revisited," in *The World of Marsilius of Padua*, ed. Gerson Moreno-Riaño (Turnhout, 2006), 125–42, in comparing Aquinas and Marsilius, gives some idea of the issues involved in "secularization."

³⁴As suggested above, one of the prolonged debates has been between those who read Thomas in a manual, neo-Thomist, or neo-Kantian fashion, denying that from the first grace is at the heart of nature, and those who read him in what now is called *ressourcement* fashion, denying the existence of "pure philosophy." On these distinctions see Hittinger, *First Grace*, and his *Critique of the New Natural Law Theory*.

³⁵Pinckaers, *Morality*, 96–109, on this and the following. Pinckaers argues that moralities of obligation have their value, being historically essential, for instance, for the moral formation of peoples (109).

inclinations” which are guides to his human fulfillment. These are hierarchically organized so that the natural law is composed of precepts relating to man’s inclination to preserve himself, shared with all living things; his drives to such things as sexual union, shared with all animals; and his specifically human needs, as for society, knowledge, or God.³⁶

It is important to stress, however, that, for Thomas, even what we share with non-human animate beings takes a specifically human coloring. Thomas differs sharply in this respect both from Ulpian and from Kant: The natural law is *not* a matter of following our sub-rational inclinations, for the simple reason that even those sub-rational inclinations are made to be integrated by reason in certain characteristic ways—even though they cannot achieve that integration on their own. In what follows, I will take just one example of the practices Aquinas sees as opposed to nature, same-sex intercourse, partly because it is of current interest, and partly because it shows the nuance of which Thomas is capable. Aquinas took up Aristotle’s *Nicomachean Ethics* 7.5.3–5 in *Summa theologiae* II, I, 31, 7, in asking the question “are some pleasures non-natural?”³⁷ I have considered this passage elsewhere insofar as it concerns Aristotle himself: here I would like briefly to discuss what Aquinas made of it.³⁸

5. Thomas on same-sex intercourse

It is crucial for our purposes to note that the heart of Thomas’s argument on same-sex intercourse is an analysis of the

³⁶Sigmund, *Natural Law*, 40.

³⁷Both for the Latin text and translation in what follows, I am using the Blackfriars edition of Thomas Aquinas, *Summa theologiae*, vol. 20: *Pleasure (Ia2ae. 31–39)*, ed. Eric D’Arcy (London, 1975), 23–24.

³⁸Olsen, “Gay Middle Ages,” 128–30. Janet E. Smith, “Thomas Aquinas on Homosexuality,” in *Homosexuality and American Public Life*, ed. Christopher Wolfe, intro. William Kristol (Dallas, 1999), 129–40, though using such terms as “homosexuality” anachronistically, also considers John Boswell’s analysis of Aquinas (see above, note 2); see 131 on the naturalistic fallacy. What follows is taken from an unpublished manuscript on medieval sodomy, but see Anthony C. Daly, “Aquinas on Disordered Pleasures and Conditions,” *The Thomist* 56 (1992): 583–612. See also on Aquinas’s treatment of “unnatural acts,” Rhonheimer, *Natural Law*, as at 94–95, 94–138 (58–175 is on Aquinas’s concept of the natural law).

ontological structure of humans. Aquinas attends precisely to those things in man which are “irrational” but “natural” in an animal sense. Now, because everything in man partakes in some way of that which is highest and most distinctive to man, reason, it can not be assumed that simply because some appetite is a part of the human, it must be expressed in whatever way it wishes, or any way at all.³⁹ If it is to be a fully human appetite, it must be expressed in a rational way, and natural law is the study of what that rational way might be.

Note, however, that the converse is also true. When the sense appetites are in fact integrated as they should be, they are not simply dominated from the outside, but, as it were, obey willingly from the inside. Why? Because, in man, the sensual appetites, while not rational, are nonetheless ontologically ordered to a certain type of integration by reason appropriate to man as an embodied intellect. And this ordering, while not simply read off of the sense appetites as they happen to be in any given individual, is not simply the creation of a reason dualistically separated from the sensitive life of man, either. Rather, it gives content to the natural law as a task for human reason to discern and enact.

For Aquinas, as for many medieval thinkers, anal intercourse was a manifestation of *luxuria* or concupiscence. Vice against nature, defined as any act not open to generation, is one, the most serious, of the six forms of *luxuria*, according to the *Summa* at 2, 2, 154.⁴⁰ For this reason, it is instructive to consider Aquinas’s account of *delectatio*, pleasure, in *Summa theologiae* II, I, 31, 7. For this examination, being specifically about the various forms pleasure takes, natural, unnatural and connatural, seems to bear out the thesis that, for Aquinas, the ontological structure of pleasure typical of members of the human species, though not necessarily its psychological manifestation in given individuals, calls for a certain type of integration, and thus

³⁹In *quattuor libros sententiarum*, in vol. 1 of *Opera omnia*, ed. R. Busa, 7 vols. (Rome, 1980), 4 d. 33, q. 1, a. 1 ad 4, quoted and translated in Hugh White, *Nature, Sex, and Goodness in a Medieval Literary Tradition* (Oxford, 2000), 24–25, is central to Thomas’s position.

⁴⁰ST 2, 2, 154, 11: “vitium contra naturam consistit circa actus ex quibus non potest generatio sequi.” See Brigitte Spreitzer, *Die Stumme Sünde: Homosexualität im Mittelalter* (Göppingen, 1988), 41, and 146 for the text used here and in the following. Cf. the discussion of ST 2, 2, 154 a. 12 ad 1 and its Augustinian background in White, *Nature, Sex, and Goodness in a Medieval Literary Tradition*, 45–46.

gives reason's task of rationalizing the appetites a certain spin or direction that is relevant to our understanding of the content-ful aspect of natural law.

Arguing against those who think that "there are no unnatural pleasures," that is, who think that if pleasure exists it is by definition natural, Thomas cites the passage from Aristotle already noted, which he takes to be distinguishing between healthy and unhealthy pleasures. The latter Thomas defines as those contrary to nature.

Aquinas says that what defines man or places him in a species (rational animals) in relation to all the other animals is intellect. In this sense of "nature," "those pleasures are called 'natural' in a human being which arise from his being rational." Thus taking pleasure in contemplating truth or practicing virtue is natural. In the other sense of "natural," the natural is contrasted with the rational. It designates that which we share with the animals, rather than that which differentiates us from them. In this sense the naturally pleasurable is whatever aids physical preservation, things such as food, sleep, or sex. Either kind of pleasure may, absolutely speaking, be unnatural, though, relatively speaking, such a pleasure from some point of view might be called natural:

For it sometimes happens that one of the principles which is natural to the species as a whole has broken down in one of its individual members; the result can be that something which runs counter to the nature of the species as a rule, happens to be in harmony with nature for a particular individual . . . something which is 'against human nature,' either as regards reason or as regards physical preservation, may happen to be in harmony with the natural needs of *this* man because in him nature is ailing. He may be ailing physically . . . or from dispositional disorder, as some find pleasure in eating earth or coals. He may be ailing psychologically (*ex parte animae*), as some men by habituation come to take pleasure in cannibalism, or in copulation with beasts or with their own sex, or in other things not in accord with human nature.

Thomas seems to be following Aristotle in his idea that an individual may so habituate himself to something unhealthy that he takes it to be natural.⁴¹ Like the medical writer Peter of Abano a few

⁴¹In the light of such a text, Mark Jordan seems wrong categorically to assert that when Aquinas speaks of sodomitic vice, he is talking about something that "is

decades later, he can conceive of conditions contributory to a person taking delight in anal stimulation as a habit or “second nature.”⁴² Thomas’s idea, then, is that something that is against nature, in this case against the preservation of the species, might be done with such frequency by a person that it would seem natural to him. That is, although such an act does not actually thus become natural, we might speak of it as connatural, because it has become so familiar that it seems to be natural. The common twelfth-century distinction between *primitiva* and *secunda* or *altera natura* may also very well lie in the background here, along with its ultimately classical sources in both Aristotle and Cicero.⁴³ Writers such as John of Salisbury had distinguished between man’s *primitiva natura*, given by God, and *mos*, the achievement, for good or ill, of human effort. They then had noted that *mos* can be so ingrained as to be virtually ineradicable. In Salisbury’s words, citing Cicero, “Use is second nature, from which escape is very difficult.”⁴⁴

This is how Thomas viewed things against nature which through frequent commission had come to seem natural. He clearly views anal intercourse as against nature, but he sees such intercourse

precisely not a physiological disposition or its behavioral consequences”: Mark D. Jordan, “Homosexuality, *Luxuria*, and Textual Abuse,” in *Constructing Medieval Sexuality*, ed. Karma Lochrie, Peggy McCracken, and James A. Schultz (Minneapolis, 1997), 24–39 at 33, but see his admission on 31. A fairer statement would be that, though Aquinas has no single or universal explanation of why people indulge in sodomitic behavior, he thinks some do this precisely because of a physiological disposition.

⁴²Joan Cadden, “Sciences/Silences: The Natures and Languages of ‘Sodomy’ in Peter of Abano’s *Problemata Commentary*,” in *Constructing Medieval Sexuality*, ed. Lochrie, McCracken, and Schultz, 40–57 at 46. It seems to me that the editors of this volume too starkly contrast Abano’s and Aquinas’s views, x. See also the illuminating discussion in Joan Cadden, “‘Nothing Natural is Shameful’: Vestiges of a Debate about Sex and Science in a Group of Late-Medieval Manuscripts,” *Speculum* 76 (2001): 66–89 at 76. Cadden notes that Peter specifically rejects Avicenna’s position that passivity is not caused by nature.

⁴³Cary J. Nederman, “Aristotelian Ethics and John of Salisbury’s Letters,” *Viator* 18 (1987): 161–73 at 163–65, and “Nature, Ethics, and the Doctrine of ‘Habitus’: Aristotelian Moral Psychology in the Twelfth Century,” *Traditio* 45 (1989–90): 87–110 at 99–102.

⁴⁴John of Salisbury, *The Letters of John of Salisbury*, 2 vols., vol. 2: *The Later Letters* (1163–1180), ed. W. J. Millor and C. N. L. Brooke (Oxford, 1979), 144: “*Usus altera natura est . . . a quo difficillium est avelli.*”

as a kind of psychological ailment, something pertaining to the soul—*ex parte animae*. He seems to see the practice of anal intercourse as grounded in a mental disposition, a corruption in which a bad habit becomes connatural. Although never mentioned, Aristotle's idea that at least some men practice "unnatural sex" because habituated to it from youth seems not far from Thomas's mind. Thomas's discussion of the possible connaturality of anal intercourse illustrates very well the way in which he could develop the content of the natural law with great specificity.

6. *In conclusion: from Thomas to John Paul II*

The study of the nature of man was a subject of continuing discussion in the ancient and medieval world, and at points touched discussion of what it meant to see man as a creature living under natural law. While these two discussions were not necessarily integrated or fructifying, Aristotle had already made the point, ultimately central for our subject, that the human soul is the cause of the body, above all in the sense that "the soul gives the body its first order or meaning."⁴⁵ If we ponder the implications of this statement, then we are led to acknowledge that the ontological structure of the sense appetites, though not necessarily their individual psychological manifestation, provides a certain content to the natural law for humans—precisely by demanding from reason a certain pattern of integration appropriate to an embodied intellect. It seems to me that, when combined with the theonomic understanding of natural law—which is inscribed within nature's constitutive openness to grace—then we can say that the natural law tradition is inwardly capable, indeed, desirous, of a post-dualistic retrieval in light of John Paul II's development of the nuptial symbolics of the human body. I have looked at less familiar aspects of the natural law tradition to show how even its remotest corners are open to recapitulation within a theology of the body. The ancient perceptions that man is a social or relational being can then be developed into the idea that

⁴⁵David L. Schindler, "The Significance of World and Culture for Moral Theology: *Veritatis Splendor* and the 'Nuptial-Sacramental' Nature of the Body," *Communio: International Catholic Review* 31 (Spring, 2004): 111–42, at 119.

the body is embedded in a tissue of relations which constitute both personal being and identity.

It is true that body-soul dualism, coupled with nature-grace dualism, played a role in a lot of natural law thinking between, say, Trent and Vatican II. Nevertheless, it is simply not fair to say that only now do we see that the “nature” of “natural law” cannot be simply “pure nature” or “natural reason,” but must embody a theologically informed version of these things. Rightly understood, a proper distinction between nature and grace is a *sine qua non* of an “intrinsic” account of the relation between them. That the history of natural law was entangled at times with improper dualisms does not mean that natural law is an idea past its time, but rather suggests that it is an idea which needs the same discriminating retrieval that “grace and nature” and “person” have been receiving.

That discriminating retrieval has been marvelously pursued in such pontifical documents as *The Catechism of the Catholic Church* (1992) and *Veritatis splendor*. The former presents moral theology in a much more complete fashion than did the manual tradition, reasserting the centrality of the person as the image of God, and the natural desire for happiness. The *Catechism* also shows the foundations of the moral law in the Ten Commandments and the natural law, ordered to the New Law, specifically to the teaching of the Sermon on the Mount, and breaks down the separation that had grown up in the modern period between spiritual and moral theology.⁴⁶ *Veritatis splendor*, against many recent moral theologians who had said something different, reasserted the permanence and universality of moral law.⁴⁷ Such documents point the way to an understanding of natural law both appreciative of past achievement and open to new synthesis. □

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⁴⁶Pinckaers, *Morality*, 59–60. See also Pinckaers, *Sources of Christian Ethics*, 134–67.

⁴⁷Pinckaers, *Morality*, 46–48, 52–55, 61.