

NATURAL LAW AND EARLY MODERN HUMAN RIGHTS

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1. THE CLASSIC ROOTS OF THE ARGUMENT

THE natural law tradition has its roots in the ancient world. One finds very important considerations of the natural law in Aristotle's *Nicomachean Ethics*, Cicero's *De legibus*, and in the works of the Roman Stoics. Indeed, if one understands natural law as a manifestation or an expression of the eternal or divine law, countless references can be found in antiquity.

An excellent description of this early history is found in RÉMI BRAGUE'S 2005 book, *La Loi de Dieu: Histoire philosophique d'une alliance* (Paris: Éditions Galimard 2005). An English translation of this text appeared recently as *The Law of God: The Philosophical History of an Idea*, trans. Lydia G. Cochrane (Chicago: The University of Chicago Press 2007).

Nevertheless, most contemporary discussions of natural law theory (NLT) begin with an examination of Thomas Aquinas' treatment in his *Summa Theologiae*, I-II, questions 90-97. This section of the *Summa* has had an enormous impact in the history of natural law. An English translation of this part of the *Summa* is provided by RICHARD J. REGAN, *Thomas Aquinas: Treatise on Law* (Indianapolis: Hackett Publishing Company, Inc. 2000). Regan also offers the reader a short introduction, notes, and a glossary.

A summary of these questions in the *Summa* is provided by CLIFFORD G. KOSSEL, S. J., "Natural Law and Human Law (I-II, qq. 90-97)" in *The Ethics of Aquinas*, Stephen J. Pope, editor (Washington, D.C.: Georgetown University Press 2002) pp. 169-193. A more complete edition of this text, which includes the Latin original, an English translation, an introduction, and a fine commentary is offered by ROBERT J. HENLE, S. J., *Saint Thomas Aquinas: The Treatise on Law* (Notre Dame: University of Notre Dame Press 1993). Father Henle's edition should be the starting point for anyone not familiar with Aquinas' treatise. A new translation of this text, which will also include questions 98-108 (not included in the Henle edition) is now being prepared by Alfred J. Fredoso. No discussion of Thomas' legal theory, however, is possible without a

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careful examination of Thomas' philosophy. The philosophical commentary provided by Henle, though excellent, is not exhaustive and several other important studies should also be consulted.

2. ON THE METAPHYSICAL BASIS OF AQUINAS' PROPOSAL

Philosophically, Thomas Aquinas grounds morality in being; that is to say, morality has an ontological foundation in his system. Aquinas also understands the natural law in this way. His notion of justice, which goes hand in hand with his doctrine of natural law, is a system in which one considers acts within the context of the right ordering of things. Although there are many scholars who have produced important monographs on this question, few have addressed this issue with the philosophical clarity of LAWRENCE DEWAN, O. P. In his recent book, *Wisdom, Law, and Virtue: Essays in Thomistic Ethics* (New York: Fordham University Press 2008), Father Dewan examines how the order of being shapes the Thomistic notion of natural law. For the modern thinker, these two areas are usually understood as separate and distinct; for Aquinas both are expressions of an ontological morality.

One of the best recent discussions of ethical theory and morality is found in JOHN M. RIST, *Real Ethics: Rethinking the Foundations of Morality* (Cambridge: Cambridge University Press 2002). Rist, a strong defender of Platonic moral theory, provides an excellent analysis of fundamental questions that need to be asked about ethical theories. The first of these is whether or not morality is grounded in reality. Following the Platonic model, Rist argues that a metaphysical foundation is necessary for a valid moral theory. In this same book, Rist addresses the differences between the older pre-modern notions of rights in relation to the common good, and modern notions of human rights. Rist's study also includes an excellent examination of NLT.

Another important examination of NLT and the possibility of providing a foundation for morality in nature is found in HENRY B. VEATCH's, now classic study, *Human Rights: Fact or Fancy?* (Baton Rouge: Louisiana State University Press 1985). Veatch, an advocate of Aristotelian moral philosophy, examines the differences between the earlier teleological view of nature (Aristotelian) with the Cartesian, Kantian, and modern scientific understanding of nature in great detail. He argues that a sound and workable doctrine of natural law is possible only when the older teleological understanding of nature is accepted. Veatch also includes an extensive discussion of the notion of human rights. He distinguishes "negative rights" or those that are necessary for human beings to live as human beings (i.e. rights to life, liberty, and property) from "positive rights" (those additional rights such as rights to food, shelter, a minimum income, etc.) that enable people to live their lives fully as citizens. Veatch shows how "negative rights" are grounded in natural law since these

rights enable human beings to live as nature would have them live. He also examines how all rights (both “negative” and “positive”) must function in relation to a broad notion of the common good. Veatch also argues that only “negative” rights are truly inalienable, since only these rights are required for man to achieve his end as a human being.

3. SUMMARIES AND COLLECTIONS

As one might expect, the bibliography on NLT is vast. There are, however, a few short essays that provide excellent summary discussions of both natural law and human rights. The STEPHEN POPE article, “Reason and Natural Law,” in *The Oxford Handbook of Theological Ethics*, edited by Gilbert Meilaender and William Werpehowski (Oxford: Oxford University Press 2005) pp. 148-167, is one of the most informative essays on NLT.

Another excellent introduction to NLT is provided by ANTHONY J. LISSKA in “On the Revival of Natural Law: Several Books from the Last Half-Decade,” (*American Catholic Philosophical Quarterly*, Vol. 81, no. 4, Fall 2007, pp. 617-642). In this review essay Lisska examines the most important current versions of NLT. Lisska, the author of *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford: Oxford University Press 1996), is, without question, one of the most knowledgeable scholars writing on NLT at this time.

4. FINNIS AND THE RECENT DEBATES ON NATURAL LAW

A key participant in contemporary NLT debates is JOHN FINNIS. Finnis is perhaps the most prominent member of the NLT scholars referred to as the “Grisez-Finnis” school who are characterized by a more comprehensive and ontologically-independent notion of practical reason with its relation to human goods. This theory was first developed by GERMAIN GRISEZ in his article “The First Principle of Practical Reason: A Commentary on the *Summa Theologiae*, Question 94, Article 2.” *Natural Law Forum* 10 (1965) pp. 168-201. In his book, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press 1998) JOHN FINNIS defends a version of Thomistic natural law that makes Aquinas’ teaching compatible with natural, and even modern, notions of human rights.

The work of RUSSELL HITTINGER must also be mentioned. Hittinger, the author of *A Critique of the New Natural Law Theory* (Notre Dame, Indiana: University of Notre Dame Press 1987), offers a substantial critique of the Grisez-Finnis account of NLT. In his 2003 monograph *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, Delaware: ISI Books 2003) Hittinger understands the natural law as an extension of the eternal law maintaining that they are not two laws, but rather one. Natural law inheres in all men as rational creatures created by the divine Law Maker. Hittinger is

especially concerned with issues of legal authority, proper promulgation, and the relationship between the eternal, natural, and positive law.

MARTIN RHONHEIMER, the author of *Natural Law and Practical Reason: A Thomist View of Moral Autonomy*, English trans. Gerald Malsbary (New York: Fordham University Press 2000), though not a member of the Grisez-Finnis school, defends a notion of practical reason compatible, in part, with the notion defended by that group. Rhonheimer differs with Grisez and Finnis on the question of the pursuit of human goods. In fact, Rhonheimer is critical of this aspect of the Grisez-Finnis doctrine. However, Rhonheimer assigns a role to practical reason that is even more comprehensive and autonomous than that defended by Grisez-Finnis.

Many of the key issues of NLT are addressed in the 2004 book, *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives*, edited by JOHN GOYETTE, MARK S. LATKOVIC and RICHARD S. MYERS (Washington, D.C.: The Catholic University of American Press 2004). The most appealing feature of this book is that various contrasting theories are presented alongside one another. In this same volume ROMANUS CESSARIO, O.P. examines the doctrine of natural law from a purely theological perspective in his essay "Why Aquinas locates Natural Law within the *Sacra Doctrina*." pp. 79-93. Father Cessario demonstrates convincingly how the theological understanding of natural law gives the doctrine a richer and more profound meaning.

A fine collection of essays on NLT, edited by ANA MARTA GONZÁLEZ, is published with the title, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Burlington, Vermont: Ashgate Publishing Limited 2008). Many of the key participants in NLT discussions are contributors to this impressive volume.

In his book, *The Problem of Natural Law* (New York: Lexington Books 2007), DOUGLAS KRIES identifies a series of problems that a workable doctrine of Thomistic natural law must overcome before it can gain wide acceptance by modern political thinkers. Among the difficulties that Kries lists are: the problem of clarifying the precise meaning of the term *synderesis* as Thomas Aquinas uses it, the claim that there exists in human beings a universal knowledge of natural law principles, and the vastly different understanding of nature in modern rights theory from that defended in traditional natural law. Kries offers valuable discussions on all of these issues.

5. THE SCHOOL OF SALAMANCA

While there are, indeed, numerous important medieval sources for the tradition of natural law, none has had an impact similar to that of Thomas Aquinas'. The legacy of his doctrine extends to the present time. One of the key moments in the history of NLT and its application is seen in the Early Modern

debates concerning the European conquest of the New World and the status of the native inhabitants of the newly discovered lands. Any discussion of natural law in this period must include a consideration of the thought of FRANCISCO DE VITORIA (c1485-1546), the first great figure from the group known as the “School of Salamanca.” Although Vitoria was not a defender of positive human rights in the modern sense, he did defend the sovereignty and legitimacy of some of the conquered societies. He also argued that the conquering Spanish could not violate the most fundamental negative rights of the native peoples. For the writings of Francisco de Vitoria, the ANTHONY PAGDEN, JEREMY LAWRENCE edition, *Francisco de Vitoria: Political Writings* (Cambridge: Cambridge University Press 1991) provides a fine English translation of Vitoria’s legal works along with a short, but excellent, introduction to the texts. As the editors of this edition point out, “Vitoria himself published nothing during his own lifetime” (p. xvii). These works were read as lectures to groups of professors and students.

The Jesuit theologian, FRANCISCO SUÁREZ (1548-1617) appears at the end of the great epoch in Salamanca. In some ways, his teachings represent the culmination of the thought of that school of Spanish legal theorists. An excellent summary of Suárez’s thought on questions of the application of natural law principles in the debates concerning the Conquest of the New World is found in JOHN P. DOYLE’s essay, “Francisco Suárez: On Preaching the Gospel to People Like the American Indians”, *Fordham International Law Journal*, vol. 15, num. 4, 1991-1992 pp. 879-951. Doyle’s work is especially impressive because he summarizes many difficult texts with clarity and accuracy. An English translation of *De Legibus*, book 2, chapter 6, prepared by ALFRED FREDDOSO is available online (www.nd.edu/~afreddos/courses/301/suarezdelegii6.html). This section of Suárez’s massive work must be considered one of the key texts in the history of NLT.

The starting point for rights theory discussion after the time of Suárez is RICHARD TUCK’s now classic study, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press 1979). Tuck’s work is especially helpful for an understanding of the places Hugo Grotius, John Selden, and Thomas Hobbes occupy in the history of rights theory. These same authors are also examined extensively in Tuck’s *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press 1993).

6. NATURAL LAW AND RIGHTS

Another important book concerning *rights theory* from this period is that of ARTHUR P. MONAHAN, *From Personal Duties Towards Personal Rights: Late Medieval and Early Modern Political Thought, 1300-1600* (Montreal & Kingston: McGill-Queen’s University Press 1994). Monahan’s study gives the reader a

general idea of the nature of change in rights discussions that takes place between the High Middle Ages and 1600. Both Tuck and Monahan stress the importance of Hugo Grotius' *Introduction to the Jurisprudence of Holland* and his masterpiece, *De iure belli*. For both scholars, these two treatises constitute the transition from the older Aristotelian conception of a theory of justice to a system based upon the notion of personal rights.

On the notion of religious liberty or religious "rights" in this same period, Monahan's last book (published posthumously), *The Circle of Rights Expands: Modern Political Thought after the Reformation 1521 (Luther) to 1762 (Rousseau)*, (Montreal & Kingston: McGill-Queen's University Press 2007) should also be consulted.

English translations of many of the key works from the Early Modern period concerning natural law and natural rights have either appeared or are scheduled to appear in the series, *Natural Law and Enlightenment Classics*, published by the Liberty Fund in Indianapolis, Indiana. KNUD HAAKONSEN serves as the General Editor. One can also find modern editions and English translations of many of the most influential texts on legal theory from this period in the *Cambridge Texts in the History of Political Thought* series.