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Natural law, Aquinas and the Magisterium

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Abstract

The Catholic Church claims that its ethical teaching, especially on sex, is based upon natural law. I first show that natural law theories prior to the Middle Ages provide no authority for the Church's teaching on sex. I then examine Aquinas's teaching on natural functions and natural law in the two *Summae*. I suggest that he partly anticipates Enlightenment thinking about law and morals. I compare his theory of natural law with that of Germain Grisez and John Finnis. Finally, I examine the notion of a principle of practical reasoning and indicate how such principles could be formulated to correspond to elements in human nature.

Keywords

Natural Law, Aquinas, Grisez, sexual ethics, practical reasoning

Among the most controversial, today, of the teachings of the Catholic Church, are those that forbid homosexuality, masturbation, sexual intercourse between unmarried men and women, and every form of contraception except the so-called 'safe period'. These prohibitions need defence because the things forbidden are things which people often want to do, and which on the face of it harm no other person or living thing. The Magisterium presents them as derived from natural law. The *Catechism of the Catholic Church*, at least, declares that homosexual acts are 'contrary to the natural law'[1]; that 'masturbation is an intrinsically and gravely disordered action',[2] that 'contraceptive practices whereby the conjugal act is intentionally rendered infertile' are 'intrinsically evil acts,' in that they involve intending 'something which of its very nature contradicts the moral order,[3] that fornication, defined as 'carnal union between an unmarried man and an unmarried

[1] *Catechism of the Catholic Church* (London, Geoffrey Chapman, 1999), s. 2357.
[2] *Catechism* 2352.
[3] *Humanae Vitae* 490–1, quoted in *Veritatis Splendor* 80.

woman',[4] is 'always wrong to choose'[5]; that 'free unions' in which 'a man and a woman refuse to give juridical and public form to a liaison involving sexual intimacy' are contrary to the moral law.[6] And the *Compendium* of the *Catechism of the Catholic Church* (s. 430) tells us that the Magisterium acts 'in the field of morality' because it is its duty to 'preach the faith that is to be believed and put into practice in life. This duty extends to the specific precepts of the natural law.'[7]

Natural law appeals to the Magisterium as a basis for teaching because it is supposed to be based on reason. A.P. d'Entrèves says that through it runs 'a plea for reasonableness in action,' and that it stresses that 'law is an act of intellect'.[8] John Finnis claims that it provides 'principles of practical reasonableness.'[9] In what follows I argue that it is building upon shifting sand to try to base Catholic moral teaching on any theory of natural law. Over the last two and a half millennia many different theories have been presented as theories of natural law. Before the Middle Ages natural law theories give no support to modern Catholic teaching, and often conflict with it. Since then some theories do support Catholic teaching, but the connection with reason is lost. My project may seem churlishly negative and even disloyal in someone who professes the Catholic faith. But bad arguments not only fail to vindicate the positions they are used to defend; they make simple people think those positions indefensible. Every society needs rules, and though I agree with Plato and Aristotle that no rules can prescribe behaviour which is right for everyone in all circumstances, I think the Church's rules of conduct in general admit of rational defence. I do not offer such defence here, but I do suggest some general principles for reasoning about how to behave.

Our word 'law' covers two different things: the laws of nature, which say what actually happens in the natural world, and the laws of human societies, which say what people in those societies ought to do. What philosophers of law and morals mean by 'natural law' is law which tells all human beings what they ought to do, and is somehow derived from laws that say what actually happens. Once that is understood it becomes problematic whether any such law is possible. We cannot either obey or disobey a law which says what happens as a matter of natural necessity. But before we dismiss the concept of natural law as a simple confusion let us see how phrases

[4] *Catechism* 2353.

[5] *Catechism* 1755.

[6] *Catechism* 2390.

[7] *Compendium of the Catechism of the Catholic Church* (London, Catholic Truth Society, 2006), s. 430.

[8] *Natural Law* (London, Hutchinson, 1951), pp. 78, 119–20.

[9] *Natural Law and Natural Rights* (Oxford, Oxford University Press, 2nd edition. 2011), pp. 18, 251.

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like 'natural law' have actually been used. Natural law is mentioned in Greek writing of the classical and Hellenistic periods, in Justinian's sixth century corpus of Roman Law, in the Canon Law of the twelfth century, in Aquinas's second *Summa*, and in the jurisprudence that accompanied the rise of the modern nation state, as well as in the Catholic moral theology of the last hundred years.

The ancient Greeks had a word, *nomos*, that covered the written laws and the unwritten customs of societies, but they did not use that word for the laws of physical or biological nature. Those were covered by their word for nature, *phusis*. Perhaps because they had these two words in place of our one, they did not explicitly draw our distinction between descriptive and prescriptive laws. They distinguished between *nomos* and *phusis*, but did so by saying that *phusis* is what is always and everywhere the same, whereas *nomos* is different in different places. That is plain, for instance, in Fragment 44 of Antiphon the Sophist.[10] He distinguishes *nomima*, things which vary from city to city and are imposed by agreement, from *ta phuseôs*, natural things, which are necessary. The majority of things, he says, that are right according to law are inimical to nature; what law prescribes is no more natural than what it forbids. Laws are bonds upon nature. And he gives as examples of what is natural being born, using mouth and nose to breathe, and using hands to eat, things that are the same everywhere.

Ernest Barker in *Traditions of Civility* says that 'the origin of the idea of natural law' may be traced 'already in the *Antigone* of Sophocles.'[11] The reference is to Antigone's speech at lines 450–60. Asked by Creon whether she knew it has been decreed that her brother should lie unburied, she says:

> It was not Zeus that decreed this to me,
> Nor did that Justice that dwells with the gods below
> Lay such decrees upon human beings.
> I did not judge that your decrees had such strength that you,
> A mortal, might override the unwritten and secure laws of the gods.
> They are not of today or yesterday; they live, I think, for ever,
> And no one knows from where they came.
> I did not intend, through fear of any man,
> To answer for them before the gods.

These are magnificent words; but Antigone has nothing in her mind about nature. What she opposes to Creon's recent decree is the Theban religious custom of burying the dead; and she is not aware, not

[10] Diels/Kranz, *Fragments of the Presocratics* (Dublin/Zurich: Weidmann, 1966), 87 B 44. The fragment is mistranslated in Kathleen Freeman's *Ancilla to the Pre-Socratic Philosophers* (Oxford: Basil Blackwell, 1962), which makes him speak of 'laws' implanted by nature.

[11] Quoted by d'Entrèves, *Natural Law* p. 8.

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having read Herodotus, of the very different customs prevailing in other parts of the world.

The idea of natural law might be better traced back to Heraclitus. He says 'All human laws are nourished by one law, the divine law',[12] and by 'divine law' he probably means not, like Hesiod in *Works and Days* 276, a law given by Zeus but universal natural law. He appears to have been a kind of pantheist. His fragments foreshadow Stoic thinking, but they are oracular, even his unfragmented works were found obscure in the fifth century,[13] and it is hard to know how far his work was influential.

We first find a definite reference to natural law in Thucydides's Melian Dialogue. The Athenian envoys say:

> Of the gods we believe and of men we know for sure that by absolute necessity of nature (*phusis*) they rule where they can; and we, neither having made this law (*nomos*) nor being the first to use it, but taking it as exists and leaving it to abide for ever, make use of it in the knowledge that you and others with the same power would do the same to us. (*History* 5. 105. 2)

This may have been a commonplace among liberal thinkers of the fifth century. Callicles in Plato's *Gorgias* (484 b, 488 b) quotes Pindar to show that it is naturally just and a natural law that the strong should pillage and rule the weak. It is here, I think that the idea first appears that there is a natural law prescribing human conduct, and in its first appearance natural law enjoins ruthless egoism.

Plato not only rejects egoism; he denies that any law can tell all human beings what they ought to do:

> Law can never embrace at once what is best for everyone and lay down accurately what is most right and just. The differences between men and actions, and the fact that nothing ever, so to speak, remains steady in human affairs, do not permit any skill whatever to declare anything simple in any matter that applies to all people at all times. (*Statesman* 294 a 10 – b 6)

Likewise Aristotle: particular actions fall under no set of rules [*parangelia*] but the people acting must themselves look to what the occasion requires, as in medicine' (*Nicomachean Ethics* 2 1104 a1–10). For both, laws are necessary for society but can prescribe only in outline [*tupôi*] and what is best on the whole.

Disreputable in classical times, natural law becomes respectable in the Hellenistic age. Chrysippus said that there is no better approach to good, evil, virtue and happiness than from nature that is common

[12] Diels/Kranz, 22 B 114.

[13] See Diogenes Laertius 2.22 and Jonathan Barnes, *The Presocratic Philosophers* (London: Routledge, 1982), pp. 57–8.

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(presumably to everyone), *hê koinê phusis*,[14] and the fundamental principle of Stoics ethics is to live 'in agreement [*homologoumenôs*] with nature, which is to live virtuously since nature leads us to this.'[15] But 'living in accordance with nature' was expanded to 'living in accordance with *experience* [*empeiria*] of what happens naturally.'[16] The early Stoics do not seem to have used the phrase 'natural law', but they formulated what was later taken to be the basis of natural law in terms of natural 'impulses' or endeavours, *hormai*. *Hormê* is the word Aristotle uses for the natural tendencies of different materials to move towards or away from the centre of the universe – his equivalent of our fundamental forces of attraction and repulsion. The Stoics say:

> The first impulse of an animal is to self-preservation . . . and since reason [*logos*] has been given to rational animals as a more perfect superintendence [*kata teleioteran prostasian*], it becomes natural for them to live according to reason: reason becomes a craftsman [*tekhnitês*] of their impulse.[17]

They appear, then, to have held that what is right for human beings is to use their experience of what happens naturally to guide their impulse to self-preservation. In sexual ethics the early Stoics were remarkably permissive. Zeno favoured communal wives[18] and Chrysippus incest, on the ground that animals have no trouble with it.[19]

The character of the Stoic theory of natural law may have been obscured for later thinkers by another strand in Stoic ethics: what Isaiah Berlin called 'The retreat to the inner citadel.'[20] The ideas he attributes to eighteenth century thinkers all appear in Stoic writings. They are a recurrent theme in Epictetus's *Dissertations*.[21] We should not set our hearts on anything that can be taken from us. External goods like money and social position can be, but not internal goods, not thoughts or qualities of soul, so we should concentrate on them. We should lead simple lives, seeking only those external goods which are absolutely necessary, bread, water, basic clothes etc. Cicero, summarising Stoic doctrine, says that the truly happy man [the *beatus*] is 'safe, unassailable, walled round and fortified, [*tutum,*

[14] *Fragments of the Old Stoics*, ed. H. von Arnim, (Leipzig: 1903–5), 3. 68; A.A. Long and D.N. Sedley, *The Hellenistic Philosophers* (Cambridge: Cambridge University Press, 1990), 60 A

[15] Zeno, in Diogenes Laertius 7. 87.

[16] Stobaeus 2.75.11–2.76.8; Long and Sedley 63 B.

[17] Diogenes Laertius 7. 85–6. See also von Arnim 2. 1002.)

[18] Diogenes Laertius 7. 33.

[19] Plutarch, *Stoic Self-refutations*, 1044 F – 1045 A; Long and Sedley 67 F.

[20] *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958), pp. 19–25.

[21] See, for instance, 2.1–2; 4. 1.

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inexpugnabilem, saeptum atque munitum], so that he has no fears'.[22] This part of Stoic teaching has little to do with natural law, but it appealed to early Christians, as we can see from the Pauline letters Romans 6. 1–14, 7. 14–23, 8.21; 1 Corinthians 7 21–3; Ephesians 4. 17–24. Stoicism nowhere, however, anticipates the Magisterium's prohibitions.

Natural law, under the name of *ius naturale*, is given prominence at the beginning of Justinian's codification of Roman law. His *Institutes* Book 1 section 2 divides law into *ius naturale*, *ius gentium* and *ius civile*. *Ius naturale* is defined as:

> What nature teaches all animals. For this law is not proper to the human race but belongs to all animals that are born in the heavens, on earth or in the sea. From this derives the conjunction of male and female, which we call 'marriage' [*matrimonium*], from this the procreation and education of children; for we see that other animals too have experience of this law.

Ius gentium consists of what is common to all societies that have laws and customs, and *ius civile* is law peculiar to a particular society like the ancient Athenians.

This definition of natural law, which was to be taken up by Aquinas, goes back to Ulpian, a Roman jurist who was killed by praetorian guards in AD 228. Other jurists, however, recognise only a twofold division of law. Gaius, an earlier and more authoritative writer than Ulpian, distinguishes only *ius civile*, laws proper to particular societies, and *ius gentium*, which all societies use and 'which natural reason [*naturalis ratio*] has established among all human beings' (*Digest* 1.1.9). Gaius certainly thought law is 'an act of reason.' Similarly Paulus, a contemporary of Ulpian, distinguishes only 'what is always fair and good, that is natural law, *ut est ius naturale'*, from 'what is useful to all or most people in a particular society, that is civil law, *ut est ius civile*.' It looks as if the threefold division, and the recognition of natural law as something distinct from human law and common to all animals, though it has Stoic roots,[23] is peculiar to Ulpian.

D'Entrèves says that if we want to see what idea of natural law people at any time had, we should consider what they want it for. The early Stoics lived in a chaotic world in which the city-state had collapsed and nothing had yet taken its place. They appealed to natural law because human law, it could be said, had failed them. Chrysippus' famous opening words 'Law is the king of all things,

[22] *Tusculan Disputations* 5.40–1.
[23] Cicero, *De Finibus* 3. 62–8.

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human and divine' express wishful thinking.[24] Their writings have survived only in fragments, and were known to medieval and modern thinkers chiefly through Cicero and Seneca. These Romans tell us what they took to be the Stoic conception of natural law; but the world to which they belonged was different from that of Zeno and Chrysippus. It was an orderly world basking in the rule of law. Roman jurists, d'Entrèves argues, used natural law, not as a refuge for the individual from surrounding anarchy, but to justify applying the laws of a single nation to a worldwide empire embracing many nations with a variety of traditional customs. 'It played a decisive part . . . in elaborating the legal system of an international or rather super-national civilization.'[25] They wanted to present the system not as arbitrary but as reasonable and therefore stable. 'Natural laws,' say the *Institutes* (1.2), identifying them with the *ius gentium*, 'which are observed equally by all nations, being established by a certain divine providence [*divina quadam providentia constituta*], remain always firm and immutable.' They did not, however, suggest (as Antigone might have suggested if instead of being an illiterate Bronze Age princess she had been a graduate of a modern university) that reason could discover a system of law superior 'to positive law, in the sense that, in a case of conflict, the one should overrule the other.' It is significant that, while noting that slavery is 'contrary to natural law' the *Institutes* begins:

> Every law we use pertains either to persons or to actions or to things, and first let us see about persons. . . The main division [*summa divisio*] of the law of persons is this: that all men are either free or slaves. (1. 2–3)

Cicero equates natural law with divine law: 'There is one common master, so to speak, and master of all, god; he is the deviser, judge and enactor of this law.'[26] This identification is not challenged by Justinian's 'divine providence', but by that time (530–3) the Empire was Christian, and this made a difference to the identification. Though Cicero thought that there were divine laws, he did not attribute them to a transcendent source of the natural order. The classical Greco-Roman gods were *parts* of the natural order, and did not go in for legislation; Hellenistic thinkers had the notion of an immanent source of the natural order, and it is with this idea that Cicero is working in the passage just quoted. For him we discover the divine law by investigating the laws of nature including those of psychology.

[24] Von Arnim 3.325, Long and Sedley 67 R; echoed in Cicero's *De Republica* 3. 325 (Long and Sedley 67 S)

[25] *Natural Law*, Ch. 1.

[26] *De Republica* 3. 33. Cicero is here speaking in the person of a Stoic, for his understanding of the god of Stoicism see his *De Natura Deorum* 1. 39.

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Antigone probably just assumed that the duties to blood relations recognised in her city had divine sanction; on her own admission nobody actually knew from where they came. Christians, in contrast, took from Judaism the idea of a transcendent source of the natural order who has promulgated a code of laws that can be found in the Old Testament. In Book 2 of his *Reply to Apion* Josephus says that the Jews believe the laws given by Moses are of divine institution. Christians, though they dispensed with much of Mosaic law, still held authentic the revelation described in Exodus 19–23: divine law is as much of Mosaic law as they retained. This difference did not affect the body of Roman law under Justinian, but it was to have consequences later.

After the *Corpus Iuris Civilis* of the sixth century, natural law makes its next important appearance in the *Corpus Iuris Canonici* of the twelfth. Gratian, the founder of medieval jurisprudence at Bologna, begins his Decree (c. 1140):

> The human race is ruled by two things, natural law and custom [*mores*]. The law of nature is what is contained in the [Mosaic] Law and the Gospel, by which each person is commanded to do to others what he wishes to have done to himself, and forbidden to do to others what he wishes not to have done to himself.[27]

D'Entrèves claims that medieval jurists wanted the notion of natural law to establish: 'a system of natural ethics', the 'cornerstone' of which, they thought, 'must be natural law. This new function for the idea of the law of nature is nowhere more apparent than in the teaching of St Thomas Aquinas.'[28] He calls it a 'new' function because for the Roman jurists natural ethics was the basis of natural law. Natural law being the laws that all known societies accepted, and societies making laws reasonable for their circumstances, where laws coincided they must be reasonable for everyone. But those laws that are common to all human societies are too few and general to form a basis for an ethical system. But if natural law is identified with Mosaic law, it already constitutes a complete ethical system, covering everything in the life of a relatively simple Middle Eastern nation. The price paid for this, though D'Entrèves does not remark on it, is that natural law ceases to be 'an act of intellect'; it is God's will as revealed to Moses.

What d'Entrèves says of medieval jurists is true of the Magisterium today; the International Theological Commission recently drew up a document entitled '*In Search of a Universal Ethic: A new look at the Natural Law*;[29] but Aquinas, it seems to me, bases his moral

[27] *Distinction* 1, quoted by Aquinas *ST* 1a 2ae q. 94 a. 4.
[28] *Natural Law,* p. 38.
[29] London: Incorporated Catholic Truth Society, 2012.

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philosophy more upon the *Nicomachean Ethics* of Aristotle, just translated into Latin for the first time, than on any concept of natural law. He does not use the word *ius*, which has an ambiguity I shall discuss in a moment, but the word *lex*, a word that implicitly suggests a legislator. In the *Summa contra Gentiles* he does not speak of natural law at all, but only of divine law, *lex divina*. In the *Summa Theologiae* he does speak of a *lex naturalis*, and argues (1a 2ae q. 94 a. 2) that it has more precepts than one. These, he says, have an order corresponding to three natural inclinations. The first is one common to everything, inanimate objects included. It is to continue in existence. The second is one common to all animals, and here he quotes Ulpian, 'the natural conjunction of male and female, and the education of children.' The third is proper to rational beings: to seek the truth about God and live in society. Aquinas does not actually formulate any precepts corresponding to these 'inclinations'. He accepts, however, Aristotle's definition of goodness as 'what all things aim at' (*Nicomachean Ethics* 1 1094a3), according to which thinking something good is not thinking it has a property, goodness, but rather having it as a positive objective, as something to cause or preserve which we act, or lest we prevent or destroy which we refrain from acting, and thinking something bad is having it as a negative objective, something to prevent which we act and lest we cause which we refrain. Good, he says is that which is to be done and pursued [*faciendum et persequendum*], and bad that which is to be avoided [*vitandum*]. No doubt he thought that if nature inclines us to stay alive, have sexual intercourse and rear children, and learn about God and live in society, nature prescribes that these things are to be done.

But what nature? How exactly should we understand his list of natural inclinations? He allows (*ad* 2), following Plato (*Republic* 4), that human soul has several parts,[30] but his inclinations correspond not to parts of the soul but to parts of nature as a whole. The first anticipates Spinoza's *conatus*, 'Everything, so far as it can, endeavours to persist in its existence' (*Ethics* 3. 6), and Newton's First Law, that bodies in motion keep moving uniformly and bodies at rest stay put. Ulpian, as d'Entrèves says (p. 25), seems to have in mind 'something like the general instinct of animals.' Here, then we have statements of what actually happens, first in the whole of nature, and then among sentient beings, or at least those familiar to Ulpian's society; and the third 'inclination' can be understood in the same way: rational beings do seek knowledge of God and form societies. But inanimate objects do not endeavour to obey Newton's law; no precept of

[30] The parts he mentions, the *concupiscibilis* and the *irascibilis*, are Plato's *epithumêtikon* and *thumoeides*.

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natural law can be derived from this first 'inclination'. Many animals do aim (though some philosophers would question this) at sexual intercourse and rearing offspring. They do not know, however, that intercourse can result in procreation or think it good to rear offspring, and when Aquinas speaks of parts of the soul, which according to Plato have each its own characteristic forms of desire and aversion, he says that their desires pertain to natural law only 'insofar as they are regulated by reason' (ad 2). Only if regulated by intelligence and brought [*reducuntur*] to a reasoned pursuit of objectives, do the desires of these parts, and *a fortiori* those of non-rational animals, correspond to precepts of natural law. Aquinas can hardly mean to found a system of ethics on Newton's law and animal instinct.

What may give people the idea that Aquinas derives a system of ethics from natural law is that he does, in the *SCG* 3 122, derive a system of *sexual* ethics from the notion of a natural *function*, a system that coincides with the current Catholic teaching. The notion of a function (Aquinas uses the Latin word *finis*, 'end', but the concept is expressed in Greek by *ergon*, 'work') is problematic. Plato, starting from the functions of artefacts, defined a thing's function as 'what it alone or it better than anything else can do' (*Republic* 1. 352 e). Today we take as the function of an artefact what it was made for, and as the function of a natural organ or process, what it was naturally selected for. This fits well with Catholic teaching, since it makes the function of an organ or process its contribution to the organism's having offspring like itself. The function, then, of semen (which Aquinas calls a 'part' of the human body) and of ejaculation is clearly procreation. Aquinas infers [*ex quo patet quod*] that stimulating or permitting this process to occur in such a way that conception cannot result is the worst of sexual offences, worse even than rape of a virgin still in *patria potestas*. The inference looks invalid. The most that follows is that doing this is silly if you are attempting procreation, and even that is doubtful once *in vitro* fertilisation is possible.

Aquinas tries to bolster his inference by saying that although procreation is 'superfluous' [*superfluum*] for the conservation of individuals it is necessary for the propagation of the species; so although the good of individuals is 'not much impeded' by sex *contra naturam*, it still fights against something naturally good [*repugnant bono naturae*], namely the conservation of the species. Aquinas omits to say to whom the conservation of the human species is good. A species is not itself a living thing, and cannot be benefited. In fact procreation is necessary for the conservation of families and larger societies, and benefits individuals as social beings, members of societies; but Aquinas does not make this point, and not every individual act *contra naturam* impedes the preservation of the agent's family or

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larger society; in some circumstances additional procreation may impede it.

In *ST* 1a 2ae q. 93 a. 6 Aquinas argues that we are subject to eternal law in two ways. Like non-rational creatures we are subject to the creator's physical laws, the laws that govern acting and being affected causally; when pricked we bleed. But as rational beings we are also subject 'by way of knowledge', that is, we get to know these laws and act upon our knowledge. The Stoics, I suggested, thought that a wise man would use knowledge of the laws of nature to achieve his objectives as a private individual. If a wise couple want a child, they will apply their knowledge of human biology in choosing for intercourse the fertile period of the woman's cycle; if they don't, but desire sexual pleasure (as the Magisterium now says they may), they apply it in using contraceptives. On the face if it this is the only way in which we can use knowledge of the laws of nature. But we use knowledge of human prescriptive laws in two ways. We still use it in pursuing our various objectives. Knowing that it is a law of England that motorists drive on the left, I use this knowledge when stepping onto a road. But motorists also use it in obeying it; and we all use our knowledge of the laws of our society in living according to them. Aquinas thought that what happens of natural necessity does so because God wants it to, and this may have led him to assume that the only right way to use knowledge of the laws of nature is in obeying them. In fact, as I said at the start, we cannot either obey or disobey the laws of nature. But once we have discovered the natural function of some organ or process we can remove impediments to its achieving its natural function and refrain from introducing such impediments. Though that is not obeying any law of nature Aquinas may have felt it the next best thing.

If this was indeed how Aquinas derived his sexual ethics from reflections on nature he was (unconsciously no doubt) anticipating a fresh change in the understanding of natural law. The seventeenth century saw a forest of writings on *ius naturale*: Suarez,[31] Grotius[32] and Pufendorf[33] wrote substantial treatises, and natural law comes into Hobbes's *Leviathan* and Spinoza's *Theologico-Political Treatise* and *Political Treatise*. The differences between these authors and their predecessors in antiquity are many and large. The idea that there is a natural law relating to all animals is rejected.[34] So is Aristotle's insistence, preserved by Aquinas, that there is a formal

[31] *De Legibus*, 1619.
[32] *De Iure Belli ac Pacis*, 1625.
[33] *De Iure Naturae et Gentium*, 1672.
[34] Pufendorf, *De Iure Naturae* 2. 3. 2.

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difference between mathematical reasoning and reasoning about right and wrong.[35] And there are two dramatic shifts of balance.

The first is in the relation of law to what is right and wrong. Earlier thinkers mostly held that what law prescribes is right, always or for the most part, independently of its being prescribed, and what it forbids is wrong independently of being forbidden.[36] Enlightenment thinkers, in contrast, hold that nothing is right or wrong independently of being enjoined or forbidden by law. 'Morally good', says Locke, 'is only the conformity or disagreement of our voluntary acts to some law *whereby good or evil it drawn on us from the will and power of the lawmaker.*'[37] The lawmaker may be God, who, being our maker, has the right (sic) to impose on us what laws he pleases,[38] or 'the commonwealth', or public opinion. The doctrine that what makes an action wrong is its being forbidden by a law sanctioned by penalties beyond the natural consequences of the act is defended both by the Protestant thinkers Pufendorf,[39] and Hobbes[40] and, Finnis concedes,[41] by the Catholic Suarez and Vazquez.

The second shift is in the relation of law to rights. Ancient and medieval authors had no word for rights as distinct from laws; the Latin word *ius* and the Greek *dikê* covered both. Societies recognised specific rights, property rights, parental and matrimonial rights, rights to do or to refrain from doing certain things. But these were sanctioned by laws. Rights are held against specific people, who have corresponding duties that are legally enforced. If I have a right to draw water from your well, you have a duty to let me draw it. We hold the right to life against other human beings, (not, of course, against sharks or bacteria,) in that they have a duty to refrain from killing us which our society enforces. Enlightenment thinkers make rights prior to laws. 'Right' says Hobbes, 'consists of liberty to do or forebear,' and 'the right of nature, which writers commonly call *ius naturale*, is the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which in his own judgement he shall conceive to be the aptest means thereto.'[42]

[35] Grotius, *De Iure Belli* 1.1.10; Pufendorf, *De Iure Naturae* 1. 2, and see Barbeyrac's *Historical and Critical Account of the Science of Morality*, Ch. 2.

[36] On divine commands, Plato, *Euthyphro* 10–11; on human laws, D'Entreves p. 115, *ius quia iustum.*

[37] *Essay* 2. 28. 5; my emphasis.

[38] *Essay* 2. 28. 8.

[39] *De Iure Naturae* 1. 2. 6–7.

[40] *Leviathan* 1. 6.

[41] *Natural Law*, p. 45.

[42] *Leviathan* 1. 14.

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This idea goes back to Suarez[43] and Grotius,[44] and is confirmed, though he is not uncritical of Hobbes, by Pufendorf.[45] The effect of Hobbes's equating natural law with natural right is to bring it back to the natural law of the Athenian Envoys and Callicles.

It is used, however, in other ways. According to the new conception of law, what a law commands is right because it is prescribed by a law-giver, and the law-giver has the 'right', the freedom and power, to prescribe what he pleases. Early writers used this to justify positive laws because they thought God or the head of state who prescribes them has the power to do so. But as the light of the Enlightenment brightens, it becomes questionable whether God does lay down these laws, whether, indeed, the God of Moses exists at all. The power of a head of state to legislate as he pleases is challenged, and the new conception of law is then used to justify revolution. Legislation flows from the arbitrary will of the people, so today we recognise as binding only laws laid down by democratically elected legislators. We have also come to think of legislation not as creating rights that ought to exist but as sanctioning natural rights that already exist independently of legal sanction.

These shifts of balance in jurisprudence can be traced to two innovations elsewhere in philosophy. One, mentioned just now, concerns forms of reasoning. Non-philosophers who have any general idea at all of reasoning about what should be done conceive it precisely as inferring what they ought or ought not to do from what, so far as they can ascertain, is the case. There is no suggestion in Plato or Aristotle that this is not just what practical reasoning, as distinct from reasoning in mathematics, is. Although it was left to Hume in the eighteenth century to say explicitly that an 'ought' cannot validly be inferred for an 'is', such ideas are often operative in people's thinking before they are formulated, and I suspect that philosophers were beginning to doubt whether an 'ought' could validly be inferred from an 'is' at least from the seventeenth century when Descartes made mathematical reasoning, which is purely deductive, the paradigm for all rational thought; perhaps even from the thirteenth, when Western Europe rediscovered mathematics.[46]

The second innovation is the development of the concept of the will. Ancient philosophers had no concept of a faculty of will. Sentience and intelligence seemed to them faculties sufficient to account for all human behaviour. Desire and aversion were equated with thinking things in one way or another good and bad. All action and

[43] *De Legibus* 1. 2. 5.
[44] *De Iure Belli* 1. 1. 3-6
[45] *De Iure Naturae* 2. 2. 3.
[46] See Alexander Murray, *Reason and Society in the Middle Ages* (Oxford: Clarendon Press 1978).

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inaction could be interpreted in terms of what the agent thought to be the case and judged best in that situation. But it appears that people often do what they think wrong, and refrain from doing something even though they want to do it. Hence the idea developed that to explain human behaviour, besides sentience and intelligence we must recognise a faculty of which the ancients knew nothing, a faculty of will. The ancients recognised something for which Latin authors used the word *voluntas*; but although this is the word seventeenth century writers use as the Latin for 'will', it did not originally mean a faculty, but rather what we today mean by 'desire', or by 'will' only in the sense in which we speak of doing someone else's will – as in 'Thy will[47] [*thelêma*] be done' or doing something against one's will. The new faculty of will has the executive function of enabling us to pass from thought to action. We can think that it would be good to do something unpleasant, or pleasant to do something bad, but to act or refrain from acting we must exert the will in a free choice, free in that it is not determined by our judgement of what is good or pleasant. And it is this arbitrary choice that becomes the basis for law and morals. The only thing nobody can object to is acting as you choose, and the free exercise of will through the electoral process establishes law.

The Magisterium claims that its prohibitions about sex derive from natural law, and Germain Grisez,[48] followed by John Finnis,[49] has tried to support this claim by propounding a theory of natural law alternative to Enlightenment theory. 'Theoretical reflection,' says Grisez (pp. 64–5), reveals an open list of 'natural objects of human inclination', for example preserving life, mating and raising children, 'developing skills and exercising them in play and fine art', – I suppose he means chess and painting in water colours – seeking truth, consorting with other human beings and obtaining their approval, and establishing 'good relationships with unknown higher powers.' We don't *infer* from our being inclined to these things that we should pursue them, but 'practical insight' or 'intelligence' just 'prescribes' them as intrinsic goods to be pursued. Since they are 'incommensurable', no one of them should be sacrificed to any other; each, as Mill would say, counts for one and none for more than one (pp. 68–9). Though reason does not tell us to pursue any one of them all the time, it does forbid us ever to 'act directly against' any of them, ever to act to prevent one. These writers do not tell us whom these so called 'goods' benefit or how they are beneficial; they write

[47] *Thelêma*, Matthew 6.11
[48] Germain Grisez, *Contraception and the Natural Law*, (Milwaukee: Bruce, 1964).
[49] John Finnis, *Natural Law*, pp. vii, 53, 55, 76

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as though something could be good in itself without being good for anyone or anything.[50]

They claim that this theory is Thomistic, but it differs substantially from that of *ST* 1a 2ae q. 94 a. 2. Aquinas, as I said, formulates three 'inclinations', corresponding more or less to the distinction between the laws of physics, the instincts of animals, and the purposes of conscious and intelligent human beings. Grisez's open list of goods and Finnis's catalogue of precisely eight such items seem to be compiled on no principle; they are just things Grisez and Finnis like. Unlike Aquinas they confuse an animal's instinct to preserve its own life with an inclination to preserve life wherever it is found (Grisez p. 90; Finnis p. 86). And there is no suggestion in Aquinas about his natural tendencies as there is about their goods, that each counts for one and none for more than one.

Grisez needs careful dialectical footwork to show that, although it is not always good to pursue 'the procreative good', though it can be good to refrain from intercourse because of something (the woman's ovulation) that would make it procreative, and to have intercourse in spite of something (the infertile period) that would prevent it from being procreative, it is always bad to *act* to prevent procreation. He says: 'the obligating force of affirmative principles increases as we move toward realization' (p. 88). 'If intercourse is carried on to the point where procreation might follow unless we act to prevent it, then the full force of obligation falls upon us' (p. 90). 'By engaging in sexual intercourse' a man 'has brought upon himself the full obligating force of this good' (p. 102). The precept, it seems, gradually descends upon lovers like the net Hephaestus in *Odyssey* 8. 267–367 prepares for Ares and Aphrodite.

Grisez also claims that contraception injures 'the unconceived child' (p. 94). He may take that idea from *ST* 2a 2ae q. 154 a. 3 where Aquinas says fornication is 'against the good of the child that will be born'. If so, he confuses being born with being conceived. Fornication, for Aquinas, is making a woman pregnant *and then abandoning her*, and that, he declares, injures her unborn child. Unborn children exist and can be harmed. Unconceived children do not and cannot.

Whatever we may think of Grisez's 'obligating force', the thread which d'Entrèves found running through pre-medieval natural law theory theories – 'a plea for reasonableness in action,' – is not picked up. Grisez and Finnis both accept Hume's principle that an 'ought' cannot be derived from an 'is'.[51] It follows immediately, in Hume's

[50] Unlike Xenophon's Socrates (*Memorabilia* 3. 8. 3) but like G.E. Moore in *Principia Ethica* (Cambridge University Press 1908), s. 50.

[51] Grisez, p. 50; the principles of practical reason are 'fundamental prescriptions', p. 61; 'we are careful not to commit the usual error of inferring from a preferred set of

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words, that actions 'cannot be reasonable or unreasonable'.[52] They say that their precepts are dictated by reason, but that seems to be just assertion; we are not told why we should act to bring their 'goods' into existence; we are supposed to intuit this and if our intuitive powers do not extend that far we must be deficient in practical reason.

> The basic human inclinations [says Grisez, p. 64] of whose existence and place theoretical reflection thus assures us, become the source of the primary principles of practical reason not by theoretical reflection but by practical insight. The act of practical insight itself cannot be performed discursively or communicated linguistically.

Grisez admits that his theory is intuitionist; he denies it is a command theory on the ground that prescriptions are not the same as commands, but this seems to be a distinction without a difference. To defend it he says: 'The imperative contains motive force derived from an antecedent act of will'[53] But even if there are such acts as acts of will, 'Procreation is to be pursued' is still a form of command.

Finnis's belief that his theory of natural law provides 'principles' of 'practical reasonableness' seems to me confused. For such a principle ought to be one for reasoning from what appears to be the case to what we ought to do, and Finnis agrees with Hume that we cannot do this at all. Aquinas does say 'The precepts of natural law stand to practical reason as the first principles of demonstrations stand to theoretical reason' (*ST* 1a 2ae q. 94 a 2) But his principles seem to be axioms based on conceptual analyses. His theoretical principle is 'It is not possible at the same time to assert and to deny.' This, which is 'founded upon the definition [*ratio*] of being and not-being' comes from Aristotle's 'It is impossible for the same thing simultaneously to belong and not belong to the same thing' (*Metaphysics* Γ 1005b19-20). Aristotle, operating with a logic of terms rather than propositions, takes this as an axiom as 'Not both *p* and not-*p*' could be taken as an axiom of propositional logic. Aquinas's practical principle is that 'good is to be pursued and bad avoided,' and he takes it from Aristotle's definition of good, quoted earlier, as 'that at which all things aim.' This belongs not to practical reasoning but to metaethics or metaphysics.

Principles for deriving 'ought' from 'is', if they are analogous to rules of inference in deductive logic, should be rules like Modus

facts to an illicit conclusion that these facts imply obligation', p. 65. Similarly Finnis, pp. 37, 47.

[52] *Treatise of Hume Nature*, ed. L.A. Selby-Bigge (Oxford: Clarendon Press 1888), p. 458.

[53] 'The first principle of practical reason' in *Aquinas*, ed. Anthony Kenny (London: Macmillan, 1970), p. 375.

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Ponens, Modus Tollens and the Rule of Assumptions.[54] Such rules can, in fact, be derived from human nature. I give three examples:

(1) From a fact *f* you can infer that an action *a* would be good (or have it as an objective) if, given *f*, *a* is necessary or conducive to your survival as an individual organism.

(2) From a fact *f* you can infer that *a* would be good if, given *f*, *a* would be in accordance with the customs of your society.

(3) From a fact *f* you can infer that *a* would be good, if there is some living thing *x*, such that given *f*, *a* would conduce to the survival of *x* as an individual organism, or to *x*'s life as a member of *x*'s society, or to *x's* acting to benefit some other individual *y*.

Three points may be made about these rules. First, they are not general rules from which specific rules can be deduced. Rule 1 is not equivalent to 'Do (or you *ought* to do) what conduces to your survival as an individual.' Rule 2 is not equivalent to 'Follow the customs of your society.' If we make them rules of conduct, we open them to challenge. Why stay alive rather than commit suicide? Why conform to the customs of your society? We also move from practical inference, which is from what is the case to what would be good, to deductive inference from one good thing to another. We are hoping to validate an inference by adding the rule that validates it to the premises. Lewis Carroll showed the futility of this for deductive inference in *What the Tortoise said to Achilles*. My rules validate practical inference. 'I'm burying this corpse,' says Antigone, 'because it's my brother's.' That's no reason,' protests Creon. If Antigone replies: 'In our society it is,' she claims her inference is valid by rule 2. If Creon persists 'Why belong to any society?' he is asking for a reason for reasoning like this. We cannot have a reason for reasoning generally and reasoning like Antigone is what it is to reason practically as a social being.

Secondly, these rules allow us to pass from a premise starting 'It is the case that . . .' to a conclusion starting 'It would be good to' or 'It would be bad to' They do not permit us to pass to a conclusion beginning: 'It would be best to' or 'It would be best not to'. The conclusions they license are not indicative statements, but nor are they orders or prohibitions settling finally how people should act. They enable us to see behaviour as intentional. When I do something you may wonder if my action was intentional or inadvertent, even automatic like hiccupping. You can think 'If so and so was the case,

[54] See, for instance. E.J. Lemmon, *Beginning Logic* (London : Nelson, 1965), pp. 9–12.

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or he thought it was, then he had a reason for doing it and we can understand his action as action for that reason.' But a circumstance can be a reason without being an overriding reason. Often we have reasons for and against a course of action. If there are crocodiles in a pool, that is a reason for not jumping in, but it might not be an overriding reason if an infant child has just fallen in. When we have reasons for and against a course, these principles of practical reasoning cannot enable us to discern what is *best*; if they could, then, *pace* Plato and Aristotle, there could be laws laying down what is best for everyone on all occasions. In fact to discern what is best we need what the Greeks called *phronêsis* and medieval writers *prudentia*.

Thirdly, though these rules of practical inference are reached by considering human nature they do not correspond to the three areas of nature to which Aquinas relates his 'inclinations': physical objects generally, sentient beings generally, and rational beings. Some writers today confuse purpose with biological function or evolutionary advantage. They assume that any action that actually helps the agent to survive and reproduce is really self-interested.[55] There is no need to attribute this confusion to Aquinas. The rules for practical inference correspond to 'inclinations' of rational beings as such, Aquinas's smallest area.

Rule 1 corresponds to the desires we have as individual living organisms. The courses of action we judge good by Rule 1 are beneficial to us as intelligent individuals. Rule 1 is accepted in practice by everyone; it is the only rule accepted by philosophers who are psychological egoists and by economists working with Mill's economic theory.

Rule 2 corresponds to the desires we have as social beings. Enlightenment thinkers imagined we come together in societies in our own interest as individuals. There is no suggestion in Genesis 1-3 that we are essentially social beings, and Hobbes and Rousseau, brought up on Genesis, could picture the first human beings as exactly like us except that they lived solitary lives. The idea that we are essentially social has developed only recently, with understanding of the cooperative nature of animals and the importance of language for rationality. How much our intelligence depends upon language has been confirmed by neurologists, while the importance of society for language is stressed by Wittgenstein. If we are social by nature, action judged good by Rule 2 will be reasonable for us as social beings, independently of what is good for us as individual organisms.

[55] This tendency is documented by Mary Midgley in *Are You an Illusion?* (Durham: Acumen 2014).

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This, of course, is what gives rise to the practical conflicts that end in heroism and tragedy.

Rule 3 corresponds to inclinations we have to benefit other individuals, whether or not they belong to our society, whether or not, even, it is possible for us to have society with them. It is hard to have society with a butterfly, a snail or a sperm whale, yet people profess concern for them. We can aim at the good of another individual even when our action conflicts with the laws of our society and our own safety. This inclination will have been familiar to Aquinas from Aristotle's account of friendship and from theological accounts of *agapê*, though he may not have distinguished it from our inclination to society.

No existing theory of natural law formulates these principles. They correspond, however, to strands or dimensions in the nature of intelligent animals.[56] To that extent they can be called 'natural' principles or principles of 'natural law'.

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[56] I think they correspond in part to Plato's parts of the psyche: see my 'Trisecting the Psyche', *Philosophical Writings* (1996) pp. 92–106; and also Anthony Kenny, 'Mental Health in Plato's *Republic*', *Proceedings of the British Academy* 1969, Anthony Price, 'Plato and Freud', in Christopher Gill, ed., *The Person and the Human Mind* (Oxford: Clarendon Press, 1990) and Myles Burnyeat, ''The Truth of Tripartition', in *Proceedings of the Aristotelian Society* 106 (2006), pp. 1–22.

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