VINCENT J. SAMAR
Attorney at Law
3534 North Lake Shore Drive #1D
Chicago, Illinois 60657

(312) 248-4192

August 16, 1991

Senator Joseph Biden
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

Enclosed please find copies of an article I wrote on why Clarence Thomas's natural law views are incompatible with constitutional protections for women and gays. Would you please distribute a copy to each member of the judiciary committee and enter one into the official record. Thank you.

Sincerely,

Vincent J. Samar

THE PROBLEM WITH SUPREME COURT NOMINEE CLARENCE THOMAS' NATURAL LAW VIEWS

by Vincent J. Samar*

I. INTRODUCTION

Supreme Court nominee Clarence Thomas adopts the judicial philosophy known as Natural Law theory. The theory can be used to provide a basis for deciding whether a particular constitutional interpretation is just and therefore whether it is properly part of the constitution. In its traditional formulation, the theory is at odds with privacy rights for gays and lesbians and choice for women. Additionally, the theory is unsound on its own merits and better theories are available.

II. BACKGROUND

On the surface, Thomas's views on constitutional interpretation appear expansive. In two law review articles,[1] he says that the institution of slavery and the doctrine of "separate but equal" education were wrongful because they violated the higher law principle of equality as found in the Declaration of Independence. The Declaration is looked to as the framer's embodiment of Locke's concept of natural right. However, nothing in either of these articles suggests any broader expansion of constitutional equality to other than racial minorities and, even then, never under the guise of affirmative action. More importantly, Thomas's natural law views suggest that the constitution may not protect privacy or equal protection rights for gays and lesbians or abortion for woman.

In his latter article, Thomas trys to clarify the priveleges and immunities clause of the Fourteenth Amendment by stating that the fundamental rights of the Declaration ("those of life, liberty and property") were "given to man by his Creator, and did not simply come from a piece of paper."[2] (Interestingly, Thomas does not use "life, liberty or happiness". Instead, he follows an earlier draft of Jefferson's that borrowed on Locke's use of "property", suggesting that Thomas views property rights on par with life and liberty rights.)

In the earlier article, Judge Thomas offers an interpretation of these fundamental rights. He avoids Jefferson's more open ended reliance on "self-evidence" in favor of a paraphrase of St. Thomas Aquinas. "A just law is a man-made code that squares with the moral law or the law of God.... An unjust law is a human law that is not rooted in eternal law or natural law."[3] This is the only method Judge Thomas mentions.

III. NATURAL LAW

In contradistinction to the randomness associated with modern evolutionary and quantum theories, Aquinas's 14th Century theory of natural law presupposes a purposive deterministic view of the universe. Even from a secular reading, the theory provides that morality requires conformity of human actions with

the widest design of nature. For instance, the most important moral rule is that human action conform to what all nature has in common--namely, continuation in existence.[4] Consequently, rules against murder are justified, but also rules prohibiting abortion. The latter is justified under the interpretation that termination of a pregnancy is not in conformity with continuation of the species.

The second most important rule is for human action to conform to what all animal nature has in common--that being, procreation and the rearing of offspring.[5] Consequently, rules that protect the privacy of marital relations but allow states to prohibit adult consensual homosexual (or nonprocreative heterosexual) "sodomy" are justified.

Least important on the list is what conforms only to the unique nature of man.[6] While this natural law principle would support rules protecting religious freedom (something animals have no part in), it would not recognize the legitimacy of arguments such as the one David A, J, Richards makes that humans express sexuality for love, recreation or procreation.[7]

IV. PROBLEMS WITH NATURAL LAW

Principally, there are two types of problems with natural law theories: conceptual and logical.

A. Conceptual:

Here the problem is with defining the word natural. Is natural to mean statistically average, found among lower animals, oriented to preserving the species, oriented to uniquely human nature, or moral. With respect to interpreting "natural" to mean statistically average, the argument leads to the ridiculous conclusion that it is morally better to be a "C" student than an "A" student, since being a "C" student is more average of what most students are. With respect to found among lower animals, the theory would have to give up its prohibition against homosexuality since "[v]irtually every animal whose activity has been studied in detail shows some forms of homosexual behavior."[8]

As to preserving the species, studies show that in nonindustrial societies, gay men often provide home support which aids close relatives to reproduce efficiently.[9] In industrial societies, the issue of one parent care is not unusual and lesbians or gays could be allowed to adopt or become parents in their own right. Clearly, gays and lesbians have contributed and are a part of human culture.[10]

The last possibility of saying that unnatural is immoral begs the question.[11] Even if homosexuality were unnatural, that would not by itslf show that it is immoral? The problem is one of going from an is to an ought.

B. Logical:

Aquinas's version of natural law claims that "one must not kill" may be derived from the natural law principle that "one should do harm to no man."[12] No mention is made of any exceptions for killing the guilty nor could the theory on its own

merits support such a claim. Yet, Aquinas allows human law to specify the death penalty based on a determination of the natural law principle that "the evil-doer should be punished."[13] The trouble is that relating human law to natural law in this way creates rather than avoids inconsistencies.[14] Indeed, the same inconsistency occurs with Jefferson's list of natural rights as indicated by his own acceptance of capital punishment.

V. A BETTER APPROACH

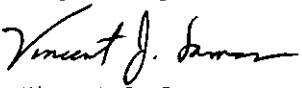
While it is not my intention to engage in comparative theory, I do think it is important to show that not all judicial theories are subject to the same questionable results as natural law. In contrast to Aquinas, Ronald Dworkin's theory tells the judge to give deference to the best principle based on considerations of fit and political morality.[15] Fit means that the judge must develop a theory of the settled case law, constitutional provisions and requisite statutes that not only is coherent but is able to provide determinative answers in hard cases. In the abortion case, for example, the principle that the unborn is not a person fits better with other parts of our law and also our sense of how related issues should be decided than does the alternative.[16] We would probably not want a mother held criminally liable if due to negligence she has a stillbirth. Nor is it likely that we would want IUDs and birth control pills that act as abortifacients outlawed? My own theory on privacy shows that the Supreme Court was mistaken in not extending the coverage of the constituional right to privacy to protect adult consensual homosexual activity in the home.[17]

On the issue of political morality (and this applies only if fit does not produce a determinative result), the point is to show which theory of law better recognizes the rights people actually have. A right to control one's part in procreation finds support in the principle of a society truly committed to individual liberty and dignity. It closely relates to other privacy decisions, and serves to guarantee the moral, social and economic freedom of women, gay people and others.[18]

VI. CONCLUSION

For the aforesaid reasons, whatever other considerations might exist, the United States Senate should seriously question Judge Clarence Thomas as to his judicial philosophy. If indeed he holds to the natural law theory of St. Thomas Aquinas, he should not be confirmed.

Respectfully submitted,



Vincent J. Samar

NOTES

*Vincent J. Samar is instructor of law at the Illinois Institute of Techniology, Chicago/Kent College of Law and a lecturer in philosophy at Loyola University of Chicago. A practicing attorney, he is a former political candidate for 46th Ward Alderman and a long time activist in Chicago's Gay and Lesbian communities.

1. "The Higher Law Background of the Priveleges and Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Public Policy 63-70 (Winter 1989); "Toward a "Plain Reading" of the Constitution--The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 691 (Fall 1987).

2. 12 Harv. J. of L. and Pub. Pol'y at 68.

3. 30 How. L. J. at 697.

4. Summa Theologiae I-II, Q. 94, A. 2.

5. Ibid.

6. Ibid.

7. David A. J. Richards, Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization (Totowa, N.J.: Rowman and Littlefield, 1982), p. 38.

8. Michael Ruse, "The Morality of Homosexuality" in Philosophy and Sex Robert Baker and Frederick Elliston eds. rev. ed. (Buffalo, N.Y.: Prometheus Books, 1984), p. 379.

9. Ibid. pp. 380-81.

10. Ibid. p. 381.

11. Ibid. pp. 381-82.

12. Summa Theologiae I-II, Q. 96, A. 2.

13. Ibid.

14. Alan Gewirth, Reason and Morality (Chicago: University of Chicago Press, 1978), p. 279.

15. Ronald Dworkin, "Hard Cases," 88 Harvard Law Review (1975).

16. _____, "The Great Abortion Case," The New York Review of Books (June 29, 1989), pp. 49-54.

17. Vincent J. Samar, The Right to Privacy: Gays, Lesbians and the Constitution (Temple University Press, 1991), Ch. 2.

18. Dworkin, "The Great Abortion Case."