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Natural Law and the Nominee

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Natural law is both familiar and strange. In its long history it has accumulated enough shadings to be a part of several conversations at the same time -- among theologians, philosophers, judges, lawmakers, social reformers, people on the street. Natural law is an integral element of our American political tradition, but it can be fraught with threats to liberty, perhaps especially for women. The Declaration of Independence contains three strands of natural law thought: sweeping transcendent claims, the enunciation of natural human dignity, and specific rules of natural morality. All three generate controversy on theoretical grounds. All have practical consequences that are troublesome.[1]

The ringing phrase "The Law of Nature and of Nature's God," inscribes the most fundamental -- and most abstract -- natural law idea into our national consciousness. The most elevated of natural law theories explain the way in which morality is a part of the universe itself. They usually run philosophy and religion together so that they are really indistinguishable. The writers of the Declaration appeal to a moral authority so great that it legitimizes the political rebellion the document announces; no merely human authority can withstand such power. This transcendent kind of natural law claim provides a basis for civil law, but it also suggests that civil law can be overridden. It is the most abstract and also the most powerful kind of natural law.

The middle level of natural law is articulated in the Declaration's often quoted phrase, ". . . that all men are created equal, that they are endowed by their creator with certain unalienable rights." While still abstract, this middle kind of natural law assertion is more firmly within the realm of human investigation. In this context we find the most familiar

natural law vocabulary, the language of rights developed in the late 17th century and associated with English philosopher John Locke.

This central category, abstract but not transcendental, is the area where most discussion of natural law in legal theory takes place. The Bill of Rights takes its name and content from this kind of natural law and has enshrined appeals to natural rights in the American tradition. A characteristic reverence for this kind of language has recently popularized discussion of the "rights" of animals, the "rights" of nature, etc. Such new applications of what is essentially old language show the vitality of a certain kind of natural law theory. Nevertheless, the language of rights is at best metaphorical when taken out of the context of civil law, from which it sprung.

The third strand of natural law in the Declaration, the most specific, is the kind which tells us what human behavior is natural (and therefore moral) and which is not. It is established in the phrase, " . . . that among these are life, liberty and the pursuit of happiness. . ." This is the area of greatest difficulty, not only historically and theoretically, but also with regard to a specific nominee to the high court like Judge Clarence Thomas.[2] Here the airier elements of natural law come down to earth. Despite frequent assertions to the contrary, even in natural law the influence of history and culture is unavoidable. More than we sometimes think, claims to what is natural -- and therefore naturally moral -- must be adapted over time. Thus, for example, John Locke (and more recently, Pope Leo XIII) thought that private property was a matter rooted in the law of nature. With greater caution, the writers of the Declaration confined themselves to the far vaguer formula we all know. They did not assert a natural right to property but rather to the "pursuit of happiness."

The problem with this third line of thought -- specific rules -- is in the determination of what is natural. It is easy to become too specific and describe particular behavior as

natural -- and therefore good -- when it is actually only what we are used to, the actions that "come naturally" to us, even though they are shaped unavoidably by our class, race, gender, and so forth. If we do that, we elevate the practices we grew up with, or which are unquestioned in our particular society, into nature itself. The unreflective judgments of people on the street can thus become enshrined in high sounding moral theories. If these opinions and prejudices were simply the matter of street corner and dinner table conversation, they would be of little interest to us. But they are not. They have politically powerful advocates. Personal moral convictions are easily transformed into judgments about how everyone should behave, and natural law seems to facilitate this transformation.

Citizens, of course, will differ on definitions of moral behavior. And each of us has the right to promote his or her morality according to the democratic political process. It is not the valid application of democracy that is troublesome here. But in choosing justices for the Supreme Court, we are deciding who shall be the final interpreters of what the law means. We should take care that we are not inviting interpretations of the law which short-circuit the democratic process in the name of inappropriate ideas of natural morality.

II

Nowhere has the danger of turning prejudice into law been more real than in the matters of human sexual and reproductive behavior. A brief history exposes the background of this danger. Concepts similar to our notion of natural law can be found in many different cultures. Our present-day usage goes back to ancient versions in both Greek and Roman cultures. The Greek Stoics held a variation of transcendent natural law -- it provided them with an understanding of the reason in the universe and a belief that morality was a part of the nature of things. The Roman version, much more juridical and less philosophical, institutionalized a universal "law of nature" that underlay the diversity

of laws among the many peoples of the empire. This law of nature was very vague, and often seems to have been a combination of what we would call due process and a generous dose of common sense.[1]

Natural law was not a widely used category in the middle ages until relatively late. It is rightly associated with the most important intellectual of the era, St. Thomas Aquinas. He used natural law as a bridge between the churchy, authority-based morality of the time and an ethic based more on ordinary experience. It was both traditional and reasonable. It was a daring move and had far-reaching effects. St. Thomas's understanding of natural law was that it is our human, intelligent, "sharing" in the "eternal law" of the universe.[2]

But along with his convictions about the moral nature of the universe, he found room in his system for an application that has been invoked ever since as a justification for all sorts of highly questionable prescriptions about sexual and reproductive morality. When dealing with human sexuality, St. Thomas invoked a phrase that came to him from Roman times, the saying of a second century Roman jurist named Ulpian, that natural law included "what nature teaches all animals."[3]

Even to us, so many years later, this formula has a familiar ring. But underneath its apparent clarity, it actually tells us nothing. In nature, a wide variety of mating habits abound. And animal behavior in other respects -- with regard to aggression, for example-- is not normative for humans. We have difficulty specifying what in nature justifies the exclusive emphasis upon the possibility of reproduction in each and every sexual act that became the meaning of the phrase in the Medieval Christian tradition. Moreover, this emphasis on reproduction was made the justification for lifelong monogamy, for the submission of women to men, and for absolute prohibitions of various kinds of sexual activity that abound in observable nature even though nature does not follow these rules. What the phrase was taken to mean was much more specific than the words themselves

would indicate -- an early example of the problems of natural law interpretation. What got added to natural law as a result of this formula, in fact, was what the interpreter wanted to add, the sexual/marital system in which men had more rights than women, and sexuality was entirely oriented toward reproduction, a system that is often called simply "patriarchy." Arguably, patriarchy is consistent with the social world of feudalism, in which power seemed to flow downward from God to the King, and continued descending down through the lower, clearly defined divisions in which human beings were organized -- the very world view the Declaration of Independence would declare unnatural. But in medieval times this pattern was the standard for everyone.

The medieval understanding of human sexuality continued to be normative even here in the United States until very recent times. A world in which women were not allowed to vote and were expected to stay out of public life, where divorce was difficult and women had little recourse against an abusive or philandering husband, where laws prohibited contraception as well as adultery and fornication, not to mention homosexuality -- these were all a part of the natural order of things that came down to us from our historical forebears.

Ideal natural law, not the nature that could be observed, pushed this morality into something much more absolute than the evidence suggests. What was natural was not merely recommended or praiseworthy, but became a rule which allowed no blameless exceptions. Natural sexual behavior was supposed to be perfect in a way not found in nature and not forced on people in other areas of human behavior. The impossibility of reading this system back into observable nature was simply ignored. The goal of procreation -- increasingly with emphasis on the very minimum, namely conception -- was eventually taken by church authorities to be the single-minded aim of nature. From this decision about the purpose of sexuality it was possible to define normal human sexual

activity. Each and every sexual act was justified or condemned according to whether it could be seen as leading to the impregnation of a woman. All other sexual morality fell into place around this simplification.

Even this brief summary of medieval sexual morality would be superfluous except that this understanding of human life continues to influence the law in the United States even today. Slogans like "a woman's place is in the home" harken back to this medieval moral system and the belief that patriarchy is what "nature itself" teaches us.

Cases that come before courts bearing on these issues involve the rights of women -- in matters of rights to economic and legal equality, fairness and equal opportunity in the workplace, as well as with issues of rights to privacy and the right to bodily integrity. The emphasis on women's gender roles and the importance of childbearing has not led the natural law tradition to be sensitive to such rights.

Indeed, the idea of women's rights is highly suspect within the religious traditions most likely to talk the language of natural law. The leadership of the Roman Catholic church publicly opposes virtually any changes that would alter the familiar patriarchal sexual morality outlined above. In many people's minds it is identified with natural law thinking and its use of that tradition deserves at least a mention here. Two recent examples illustrate the persistence of natural law reasoning in the sense of specific rules about sexual and reproductive morality and the status of women. In 1987 the Vatican issued a policy statement on Human Life and Reproduction that banned all forms of artificial fertilization, even for married couples.[4] Using deductive reasoning, the document relies upon "the natural moral law" to arrive at its conclusions, a use of medieval methodology that was criticized widely, even by mainstream Catholic commentators. For example, the document states that medical technology cannot be a substitute for the "conjugal act" but must rather be an aid to it. Commentators were quick to notice that only one possibility fulfilled the

stringent conditions the Vatican set out. The husband's sperm could be used in one (and only one) kind of technology to assist fertility, as long as both contraception and masturbation were avoided. The obligation imposed by "natural moral law" could be met if the husband's sperm were to be gathered in a specific way: sexual intercourse in which a perforated condom is used. To avoid masturbation, intercourse must take place; to avoid contraception, an "unnatural sex act," in which a barrier to reproduction has been used, the condom should be defective. (The use of condoms even to avoid the spread of disease is not permissible in official Catholic teaching.) The regulations reveal how little the medieval thinking involved has changed.

In a second context, the U.S. Catholic bishops have been trying for several years to write a national policy on the rights of women in the church. In formulating the pastoral letter, the prelates gathered testimony from women in their dioceses. The bishops have been hampered again and again by the Vatican, and their document has gone through a number of drafts, each less egalitarian that the former.[5] During a recent summons to Rome for further consultations on the matter, the U.S. bishops were told that if they must write such a statement, they should rely more upon the tradition -- the very natural law tradition we have been talking about -- and less upon the real life testimony of actual women. In that tradition, women have had no real power, not even nuns manage their own lives. The exclusion of women from economic or political power in the secular world has been extended within the church to exclusion from becoming priests and, unofficially, from all forms of leadership roles. Asking women's opinions about such treatment would lead to predictable demands for change; therefore their opinions should not be heard, Rome must have thought. As we see, natural law provides some partisans a way to bypass the procedures of democratic lawmaking in the religious sphere. Rather than learning from experience and from evaluating evidence, they seem able to leap effortlessly to the right

conclusion. And then conclusions arrived at in this manner are often presented in secular contexts as universal and natural rather than as the partisan statements they are.

In fact, official Roman Catholic teaching can serve as an example of the problems associated with natural law in many people's minds. The Catholic use of natural law contrasts sharply with the use in the Declaration of Independence. Instead of questioning the past in the light of the best reasoning in the present, the opposite occurs too often: the past is given special authority as more natural than the present. Moreover, the administrators of the church often write and speak as though they had special access to the law of nature and special privileges to be its interpreters. Transcendent natural law is seen as reinforcing the specifically religious elements of the Catholic tradition and extending the authority of church officials to all humanity. Natural rights and dignity have occasionally been called upon in new ways to establish the rights of workers, but more often than not these rights are seen as proving that the way things have been done over the centuries are in accord with nature itself.

These errors do not characterize all Catholic uses of natural law, but such usage is frequent enough. It is the kind of natural law thinking that worries those who recognize the strengths of natural law but who also see that it can be used to resist change and to preserve the authority of those who already have power. No application of natural law is immune to abuse.

III

Many people, not only Catholics, think of natural law only as specific rules. Judge Thomas's present relation to the Catholic church is unknown, but a good deal of his education took place in Catholic schools and in a Catholic seminary. When he refers to natural law, we should reflect on the context in which he is likely to have learned about it.

Questions that must be answered about the candidate's adherence to natural law theory then become clear. What exactly are the human rights that natural law explains? Are there such rights that override the body of civil law? What are they? What is the relationship between secular law and the natural law? Does Judge Thomas's adherence to a natural law standard mean that he can -- or even must -- disregard the duly constituted laws of the land in order to preserve the natural law as he understands it? The possibility of judicial activism in defense of a natural law must be probed.

Knowing the judge's position is especially vital in light of the many cases facing the court involving the rights of women, especially in the context of reproduction, the rights of gay people, issues regarding sterilization, issues of discrimination based on pregnancy, and the like. The tendency to describe some actions as natural and others as unnatural -- and to try to turn these descriptions into law -- continues in our society, even outside the context of Roman Catholicism. In some such cases, parties have claimed a right to privacy or some other right grounded in their dignity as persons. The climate of decision-making in such cases is made more emotional and less rational because of the claim that homosexual behavior is unnatural or the assumption that pregnancy is natural and moral while abortion is not.

Along with the problem of knowing in too much detail, there is the problem of knowing too certainly. Among its many uses, natural law calls us to behave according to a morality written in the nature of things. It also tells us that any law that is not in accord with nature is provisional, suspect, even immoral. As is commonly said in the natural law tradition, "An unjust law is no law at all." Here the usually cool voice of human reason speaks with the fiery urgency of the biblical prophets. This truly revolutionary use of the law of nature is, in fact, the use to which the founders put it in 1776; the law of nature entitled them to declare their independence from England. Such an example may lead us

to forget that appeals to nature have been used for other, undesirable purposes. True, Martin Luther King, Jr. used natural law arguments to explain that segregation violated a higher law. But his opponents had exactly contrary convictions, that nature did not intend races to interact as equals. The Greek philosopher Aristotle, in a lapse from his usual reliability as a guide to ethical behavior, concluded that non-Greeks -- Barbarians, they were called -- were naturally inferior to Greeks, were "natural slaves" in fact.[1] This assertion has been cited by racists through the centuries.[2] Nothing human is beyond corruption; natural law theory is no exception.

The majesty of natural law has been the source of a certain dynamism in the American political tradition. Belief in natural law has even served as a source of hope for improvement in the future. But in case after historical case we are reminded that it does not lift us out of our ordinary human condition. A decade after writing the reverberating words of the Declaration of Independence that insist so stirringly on human equality, Thomas Jefferson was all too aware of the limitations of that document. Thinking about slavery, he wrote "I tremble for my country when I reflect that God is just."[3] It was not the prospect of the Christian Last Judgment that worried him -- countries have no standing in that vision -- but natural consequences, ones that would, in time, include the Civil War, and that continue with us to this day.

After all, no matter how revolutionary and "natural" they wanted to be, the Founders were locked into the mindset of their own time and place. The "all men" that the Creator had endowed with such "unalienable rights" as "liberty" turned out to be, sad to say, only white males. Indeed, not even all white males. It was only the ones who belonged to the propertied class who would be given the vote in the original constitution thirteen years later. We can learn a great deal about the limitations of natural law, whether dealing with political equality or sexual morality, by noticing the context in which it entered American

political life. The road to universal suffrage and human equality stretched out on a strife-torn and bloody road ahead of the Founders, though they did not know it. The road stretches out ahead of us still. The Declaration of Independence thus turns out to be an exemplary natural law document not only in its strengths, but also in its weaknesses.

In assessing the qualifications of Judge Thomas for the Supreme Court, it will not be enough to gauge whether or not he believes in natural law as a lofty generalization. We need much more specific information about what his adherence to a natural law philosophy actually means. Does Judge Thomas believe that human dignity extends equally to women as well as men? Or does he believe the opposite, that women have a special responsibility to stay at home and raise children and that economic and social equality would undermine their natural childraising mission? Does he believe that he can decide on the basis of abstract theory that abortion is wrong? Where does he, in fact, differ from the natural law sexual morality that is so controversial in our society? Abstract adherence to a natural law perspective can seem as American as the Fourth of July. The nominee should be asked to go beyond such abstractions to explain the real impact of natural law convictions on his understanding of individual rights. What does he really think of the natural sexual morality and natural gender roles?

It is not natural law as such that is the problem here. In fact, the enforcement of these pre-modern roles does not deserve to be included within natural law today. They are no more natural than the theories of the divine right of kings that flourished at the same time as that earlier, less democratic use of natural law. We should not elevate to the Supreme Court judges who would defend a medieval understanding of human beings in the guise of an otherwise honorable tradition.

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NOTES

SECTION I.

1. Among the many books on natural law available, three could usefully serve as further introduction. John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* (Garden City: Doubleday Image, 1964), remains the classic work combining the best of the American and the Catholic versions of the tradition. A.P. D'Entreves, *Natural Law* (2nd Edition; London: Hutchison, 1970), is a useful historical introduction to the philosophical issues, while Paul Sigmund, *Natural Law in Political Thought* (Lanham, MD: University Press of America, 1982), provides the orientation its title promises. In addition, see Anthony Battaglia, *Toward a Reformulation of Natural Law* (New York: Seabury, 1981), for a fuller version of the author's position.

2. Judge Clarence Thomas's ideas on natural law are set out in his lecture at the Heritage Foundation, June 18, 1987, "Why Black Americans Should Look to Conservative Policies."

SECTION II.

1. An angry but accurate history of Roman Catholic sexual ethics and its roots in the ancient and medieval worlds is provided by Uta Ranke-Heinemann, *Eunuchs for the Kingdom of Heaven: Women, Sexuality, and the Catholic Church* (New York: Doubleday, 1990).

2. The quotations from St. Thomas are from *Summa Theologica* I-II, Q.91, A.2 and Q.94, A.3. In the second of these he quotes Ulpian without naming him.

3. On the difficulties of getting from Ulpian's understanding of nature to medieval sexual ethics, see John Boswell, *Christianity, Social Tolerance and Homosexuality* (Chicago: University of Chicago Press, 1981).

4. The full text of the Vatican document banning "artificial reproductive methods was published in *The New York Times*, March 11, 1987. The next day, "Catholic medical authorities" were quoted explaining the use of a "condom deliberately pierced with holes" to avoid the ban as described. "It shows how precise is the Catholic teaching," said one authority. (*New York Times*, March 12, 1987, p. B-11). Jesuit Richard A. McCormick was not the only Catholic to "find such casuistry debasing and repugnant" (*America*, March 28, 1987, p. 248).

5. On the Vatican's attempts to derail the U.S. Bishops' pastoral letter on women, and its advice to the bishops, see *The National Catholic Reporter*, June 7, 1991, p.6.

SECTION III

1. Aristotle draws his conclusion about natural slaves in *The Politics*, 1254a-1255b.

2. Lewis Hanke, *Aristotle and the American Indian* (Bloomington: Indiana University Press, 1959), describes the use of these ideas in sixteenth century Spain and America.

3. Jefferson's well-known statement was made in the only book he published, *Notes on the State of Virginia* (1787), in Query XVIII, "Manners."