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## NATURAL LAW, HISTORY AND POLITICS

James Drane\*

**Abstract:** The basic philosophical vision and ethical principles of Catholic Natural Law claim universality. Natural Law thinking aspires to objectivity and universality and at the same time is open to the continuing influence from history and politics. The background principles of positive law historically go by the name of Natural Law. Suffering and injustice contribute to a vision both of the structure of human existence and of what we mean by humane law and ethics. When we confront a cultural crisis, Natural Law, looks not to the past but to the future. Few people today talk of the ethical dimensions of social realities in terms of Natural Law. This is true both in the Church and in the State. In bioethics, the principles rooted in the universal structure of human life have to provide direction and regulations on the playing field of contemporary life and medicine. A liberal Catholic perspective tries to keep in play the universal and the particular aspects of Natural Law reasoning.

**Keywords:** Natural law, suffering, injustice, future, natural law's reasoning

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### LEY NATURAL, HISTORIA Y POLÍTICA

**Resumen:** La visión filosófica básica y los principios éticos de la Ley Natural Católica demandan universalidad. El pensamiento de la Ley Natural aspira a la objetividad y universalidad y, al mismo tiempo, está abierto a la continua influencia de la historia y la política. Los principios que yacen en la base de la ley positiva históricamente reciben el nombre de Ley Natural.

El sufrimiento y la injusticia contribuyen a una visión, tanto de la estructura de la existencia humana como de lo que entendemos por una ley y una ética humanas. Cuando enfrentamos una crisis cultural, la Ley Natural no mira hacia el pasado sino que hacia el futuro. Es poca la gente que hoy en día habla de las dimensiones éticas de las realidades sociales en términos de Ley Natural. Esto vale tanto para la Iglesia como para el Estado. En bioética, los principios enraizados en la estructura universal de la vida humana tienen que proporcionar dirección y regulación en el campo de juego de la vida y de la medicina contemporáneas. Una perspectiva católica liberal intenta mantener en juego los aspectos universales y particulares del razonamiento de la Ley Natural.

**Palabras clave:** Ley natural, sufrimiento, injusticia, futuro, razonamiento de la Ley Natural

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### LEI NATURAL, HISTÓRIA E POLÍTICA

**Resumo:** A visão filosófica básica e os princípios éticos da Lei Natural Católica buscam a universalidade. O propósito da Lei Natural aspira a objetividade e universalidade e, ao mesmo tempo, permanece aberto à contínua influência da história e da política. Os princípios que repousam na base da lei positiva recebem historicamente o nome de Lei Natural.

O sofrimento e a injustiça contribuem para uma visão, tanto da estrutura da existência humana como aquilo que entendemos por lei e ética humana. Quando enfrentamos uma crise cultural, a Lei Natural não olha para o passado mas sim para o futuro. Atualmente é incomum que se considere as dimensões éticas das realidades sociais tendo como referência a Lei Natural. Isto vale tanto para a Igreja quanto para o Estado. Em bioética, os princípios com origem na estrutura universal da vida humana têm que proporcionar direção e normas no âmbito das variáveis da vida e da medicina contemporânea. Uma perspectiva liberal católica tenta manter presente os aspectos universais e particulares das razões da Lei Natural.

**Palavras chave:** Lei natural, sofrimento, injustiça, futuro, razões da Lei Natural

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The idea of an objective structure to human nature which serves as a foundation for ethical judgment is not peculiar or unique to Catholic thinking. We find similar assumptions operating in most serious philosophical anthropologies. Certainly, the classical philosophers held the view that human nature and human reason are the ground for a universal ethics. The same is true, if not always overtly expressed, even in modern philosophy. Philosophers of human existence either implicitly (Nietzsche) or explicitly (Hegel) argue for the trans-historical validity of their philosophical views. Jaspers is a good example of a thinker who is sensitive to the historical relativity of his images, and yet presumes to articulate insights into the human condition which transcend his time and culture. He makes the point again and again that the image of human being which he proposes is comprehensible only in connection with the influences and events of his own lived experience. At the same time his philosophical discourse strained for a validity that reached beyond his particular personal or historical condition. He defended human reasoning about morality and what it means to be human no matter when or where the human being lives. He was trying to argue for what we call a Natural Law perspective.

Freud was not appreciably different from Jaspers in this respect. Critics have called attention to the strongly cultural and narrowly historical dimension of Freud's reasoning but Freud himself intended to make a claim about the human condition no matter where or when it comes to be. Freud wanted his theoretical insights and moral standards to have universal validity and an impact on history beyond his age. Looked at from the perspective of psychohistorians, Freud intended to be a socio-ethical revolutionary. Marx is an all too obvious example of the same transhistorical

objectives and claims. Movements in philosophy like Structuralism and Existentialism are rooted in particular experiences, and yet they too strive to articulate insights into the human condition and human morality which are universal.

To emphasize the inevitability of the historical/transhistorical polarity in philosophical anthropology we can look at a Catholic theory of human existence that grounds a clearly transhistorical ethics. Natural Law theory, at least according to many of its interpreters, is universal in the sense that its basic vision and moral directives have validity beyond historical change. Catholic Natural Law presumes to be an articulation, first of the nature of human reality and then of perennial ethical principles based on a universally valid anthropology. The basic philosophical vision and ethical principles of Catholic Natural Law claim universality.

Natural law procedures and methodologies presumably can be used to arrive at ethical directives in ever changing historical and cultural contexts. This all-important objectivity about the human condition, however, sometimes is exaggerated so as to eliminate historical change in moral teachings. Sometimes, claims are exaggerations because human beings evolve, and so does human understanding and ethical judgment. Natural Law anthropology does ground universal ethical standards, but it also evolves. Natural Law thinking aspires to objectivity and universality and at the same time is open to the continuing influence from history and politics.

The Natural Law concept has its historical roots in Greek culture and philosophy. First, we see the concept expressed in theater, especially in the works of Sophocles (497-406 B.C.). In *Antigone*, for example, his

main character insists upon her moral duty to bury her brother (Polyneices) even though the king (Creon) ordered that the body be left unburied. Which law prevails? Is it the will of the king which is the prevailing community law? Or is there a higher law reflected perhaps in traditional custom but grounded ultimately in an understanding of human being and the moral requirements founded on that understanding? Sophocles' point is that human nature and human reason are the ground of ethical duties which have to be recognized wherever human beings gather in community. Later, philosophers like Aristotle and Plato would argue explicitly that nature rather than convention is the foundation of both law and morality. Centuries later, St. Thomas would express this same notion by saying that if our natures were different, our moral obligations would be different. For over two thousand years, the greatest minds in Western culture agreed that there are universal laws based on human nature against which the laws of a particular king or ruler or legislature have to be judged.

Natural Law ethics begins with an attempt to work out, with the exclusive tools of human reason, the constituents of humanness: a defensible philosophical anthropology. That anthropology has to take account of the fact that human beings are rational and free and must use both capacities to create an inner-self. Natural Law theory is based on a human nature and experience that is both rational and creative. Principles and laws which promote and protect human rationality, creativity and dignity are then derived from the philosophically articulated human structure. Socio-political conditions fall within the realm of the human and are therefore open to rational investigation and rational assessment just as individual personalistic phenomena are.

For reasons of preliminary clarification, we can speak of Natural Law as an attempt to construct a civic law and ethical principles from the interchange between a human capacity for freedom and rational reflection on one hand and the objective reality of human existence in its socio-political dimensions on the other. That which more often than not provides a powerful illumination of the ethical and legal derivatives from human existence, is suffering. Our notion of what belongs to human nature and is constitutive of nature-driven moral and legal directives comes more often than not from contact with the absence of certain conditions. Suffering and injustice contribute to a vision both of the structure of human existence and of what we mean by humane law and ethics.

My objective is to concentrate on two aspects of Natural Law - its historicity and its broad social function. Focus on the historical character of Natural Law is a basic background constituent of any liberal Catholic perspective. It is required to balance off an exaggerated rationalism which we often find embedded in official Catholic moral teachings. This is true of teachings about sexuality as well as about socio-political matters.

In the U.S. legal tradition certain human rights such as life, liberty, and pursuit of happiness are believed to be self-evident. What is proposed as self-evident in our founding documents reflects the classical Greek and Medieval Christian Conviction that certain ethical principles are founded on human nature and are revealed by human reason alone. It is also true that the ethical principles/rights of the U.S. Constitution are the result of a long historical development. Natural Law arguments made by Catholic thinkers also introduce contingent, historical elements into their definitions of what are claimed to be self-

evident, perennial principles.<sup>1</sup> Medieval Natural Law's notions of justice, for example, reflect the classical view that moral principles are universal. On the other hand, the content of the moral principles is shot through with presuppositions from feudal social order.<sup>2</sup>

The moral principle or human rights declared in the U.S. constitution have their historical content and origins in the Enlightenment and owe their existence to the hard work of certain founding fathers. The moral principles in the Universal Declaration of Rights adopted by the United Nations in 1948 have similar intellectual roots and had their own political advocates. Because the UN declaration is more recent, it is easier to identify persons like Eleanor Roosevelt without whom there would be no universal declaration of moral rights today.<sup>3</sup> Universal human rights presuppose a universal human nature which grounds the rights, but there is also an historical and political dimension to the rights declarations.

Natural Law thinking itself has a strong historical and political dimension. It is related to "the law" in the sense of the positive law by which society is ruled. Because human beings are social, their communities must be held together by laws which may be either good or bad. One type of bad law would legalize not the moral values based on human nature but

demands from particular interests inimical to human dignity, justice, equality, etc. (For example, Creon's law that Polyneices not be accorded a decent burial, but rather be left to rot).

The structure of human nature is far from self-evident, but certain nature-driven moral claims can be identified over long historical and political periods (the sanctity of life, justice, equality, truth). Human being shows itself to be structured, and a universal human structure is the foundation out of which value claims arise and universal principles are defended. A vision of human being and certain abstract moral principles based on that structure serve as guides and standards for positive law. Natural Law argues from an objectively given structure of human life to universal ethical principles and ideals. Good positive laws give concrete legal form to the universal principles and ideals. Bad law suppresses or ignores them.

Natural Law arguments are difficult to make in our post-modern intellectual environment. In a post-modern vision, there is no objective and structured human nature which is accessible to human reason and which can ground universal moral values. The only universal commitment of human being in the post-modern view is individual freedom. The individual person is not an example of a universal human nature, but a product of freedom. "I am whatever I want to be. And I can change whatever I have become".

Philosophically, the post-modern vision of human being is one of a radical freedom best described as pure will, indeed as will without limits. Consequently, there are no universal moral standards. The UN Declaration of Universal Rights or uniform moral standards for the entire world makes no sense in post-modernism. Each government, like each indi-

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<sup>1</sup> For St. Thomas, the hierarchical view of the natural order was self-evident. A more contemporary, scientific model, however, gives a very different rational view of the natural order, and a different content of justice.

<sup>2</sup> cf. Niebuhr R. *Christ and Culture*. New York: Harper and Row; 1951: 145. Niebuhr makes this same point in his book *The Responsible Self, An Essay in Christian Moral Philosophy*. New York: Harper and Row; 1963.

<sup>3</sup> The role of Eleanor Roosevelt in the Universal Declaration of Human Rights is the subject of a recent book of Glendon M. *A World Made New* NY: Random House; 2001.

vidual does whatever it likes. Will and force is all that matters. When President George W. Bush declared that he would do whatever is in the best interest of the U.S. and not what is best for all human beings and the environment, he was providing a clear example of post-modern thinking.

Joined to a world system based on will and force is a tendency of individuals and nations alike to see themselves as victims. Paradoxically, individuals and nations, after all, have an objective structure imposed from outside: i.e., the structure of victimhood. In the incident of a Chinese fighter plane crashing with a U.S. spy plane, (March 2001), the discourse which followed was the discourse of victims. Each side claimed to be the victim. The worry created by the discourse was that either side would move toward world destruction based on their victimhood claim. Victims whose behavior is reled by will and force create a very dangerous world. It makes sense to take a serious look at an older, more humane and more civilized philosophical and ethical perspective called Natural Law.

### Historicity in natural law

It was Gian Battista Vico (1668-1744) who first drew attention to the way human beings acted in history as the surest route to understanding human nature.<sup>4</sup> The most reliable image of human being is known only through the history of cultural expressions.<sup>5</sup> John Courtney Murray, a paradigmatic Catholic

liberal and the most convincing contemporary exponent of Catholic Natural Law theory, insisted as well, that the Natural Law cannot be articulated independently of historical input. We must inquire into “the real man who grows in history amid changing conditions of social life, acquiring wisdom by the discipline of life itself, in many respects only gradually exploring the potentialities and dignities of his own nature”.<sup>6</sup> Historical evolution brings to light new necessities in human nature which, according to Father Murray, struggle for expression and form. The Liberal Catholic perspective on Natural Law expressed by Father Murray amounts to a gradual historical development in our knowledge of human nature. Consequently, for him there is development and an historical dimension in all aspects of Natural Law morality.<sup>7</sup>

Historicity and evolution in Natural Law ethics es much more pervasive than conservative Catholic moralists and Church hierarchs have been willing to admit. Not only does our knowledge of human nature grow with historical experience, but human nature itself, by reason of its freedom and its capacity to intervene into nature with technology, develops and changes, requiring an ever-changing enunciation of the moral content of Natural Law principles. Conservative Catholic moral

<sup>4</sup> Vico G. *The New Science*, trans. T.Bergin and M.Fisch. NY: Anchor Books; 1961: par. 331 et al.

<sup>5</sup> Cassirer E. *An Essay on Man*. New Haven CT: Yale University; 1951. Cassirer examines the major forms of human enterprise, i.e. history, art, maths, science, etc. Showing these cultural expressions to be founded in the unique, symbolic nature of man.

<sup>6</sup> Murray JC. *We Hold These Truths*. Barnhart, MO: Theological Book Service; 1986: 33. The book consists of a series of essays by the late Fr. Murray on issues facing a pluralistic society, the solutions to which Murray works out by using the methodology of Natural Law. The last essay, “The Doctrine Lives” is an important contemporary statement of Natural Law theory.

<sup>7</sup> The historical roots of human being as free and self-creative are biblical: It was Abraham who defined himself by his free decisions and who initiated the inclusion of freedom in the definition of human being. It took many centuries before this freedom was politically recognized in documents of the French and American revolutions and included in a Catholic Natural Law vision.

theologians and Church officials would have us believe that all Catholic moral teachings, even those most obviously culturally conditioned, are perennial and changeless.<sup>8</sup>

In what way does our knowledge of human nature as well as human nature itself develop? What does it mean to talk about evolving rights and principles of morality? Reason can support, without qualification, both the inclusion of freedom as a human right and a proscription against killing other human beings. Historically, however, that same reason made a number of exceptions to this latter.

Natural Law principle. For many centuries in the West the killing of heretics and witches was looked upon as being altogether reasonable, indeed a holy thing. Today, no one would justify or defend such acts. We continue to kill criminals in the U.S. but this will surely appear to our descendants just as cruel and unjust as the burning of witches in Salem and the killing of heretics in post-Constantine Christianity. The society from which the criminal springs bears some responsibility. This altogether reasonable more modern Natural Law position developed gradually as humans developed in history and it pushes toward constitutionalization in different societies. Natural Law-based positive laws and social policies, and Natural Law-based moral teachings both evolve, but the process is slow.

The developmental character of the Natural Law principle, "Give to every man his due" (*sum cuique tribueri*) offers us an example of Natural law evolution and historicity. An assessment of what belongs to a person (*sum*) is ever changing, not only

because of the changing conditions in which he/she lives, but also because humans change with their conditions. (*Yo soy yo y mis circunstancias*). Private property has been defended in the Catholic social teachings as belonging to all human beings by Natural Law. This moral teaching is based on the supposition that property is acquired by human effort and is necessary for a decent human life. But the teaching is obviously historically conditioned.

This Natural Law moral teaching makes very good sense in an agricultural society and an underpopulated world. Does it continue to make sense when great masses of factory workers do not have access to property or the available property is already acquired? Suppose a community lives on an island and after some time, all available property is privately owned. If private property belongs to every person who toils, then should not every worker have such property? If property is required for human beings to live a decent life, then those who came along after the limited amount of land was divided have as much right in the abstract as all others in the community. "Giving to every man what is his due" at this point in the historical development of an island community would require the dissolution of the privately-owned property in favor of some sort of socialization. Otherwise, increasingly larger number of persons in the group would be deprived of rights. The principle of justice or equality does not change, but a development in social relations not only changes the content of justice and equality but also gradually contributes to the emergence of different human rights and of a somewhat different human being.

In advanced technological societies, the function once performed by private property has been taken over by institutions like Social Security or by the participation of workers in the ownership and control of

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<sup>8</sup> The worst/best examples of this perspective we find in the ultra Orthodox Catholic societies working to return to Church culture in pre-Vatican II days, and in the continuing inquisitorial practices of some Vatican offices.

industry. As a result of historical development, both in human beings and in society, the concept of *sum* (what is due in justice) changes. The formal principle remains, but the content becomes different. It was often argued before the Soviet collapse that owning private property, which was natural right in one period, might be a violation of that same right in another period, if it could be shown to work against both the individual and the common good.

Natural Law therefore, is not a “given” code, permanently “out there” for all rational minds to see, but rather, as St. Thomas insisted, something to be discovered historically by a slow and torturous wrestling with an ever-changing reality.<sup>9</sup> Part of the ever-changing reality is human nature itself and Natural Law must reflect these changes. As soon as we try to stop the process and declare that certain concrete moral directives are forever binding, we run the risk of placing Natural Law at the service of created interests and the establishment.

Natural Law would better be understood as a rational striving after an understanding of what is right and good, but never fully achieved; a continuing search for moral meaning that has content but not in a finished form; a search for moral principles that have functions, but the functions sometimes are different.<sup>10</sup>

The good, the true and the just to which Natural Law points is an historical good, truth

and justice conditioned by socio-cultural factors and tied to changing concrete situations. It is never truth, a goodness, or a right, “given” in the sense of a static atemporal reality “out there” somewhere in the abstract and changeless world of eternal forms. It is, however, precisely this latter mistaken notion that has created a way of understanding Catholic ethics and moral reachings which encourages passive acceptance of past solutions and leads to the widespread impression that the official Church is out of contact with reality. Only by recapturing a more liberal vision can Natural Law ethics contribute to the on-going search for a dynamic, historical, and yet unrealized moral good. Only by recapturing a liberal Catholic perspective on Natural Law can Church authorities recapture the respect of other Christians for its moral teachings and even the respect of faithful practitioners of the Catholic faith.

### Political functions of the natural law

A fleshed-out Natural Law concept cannot be arrived at independently of its functions, including political functions. Continuing the effort to develop a Natural Law theory which is historical and empirical, we must look into how Natural Law functioned in politics.<sup>11</sup> By showing how Natural Law actually functioned in history, we may gain a broader view of the Natural Law concept and see its relevance for the contemporary challenges created by new bio-technologies, the majority of which will require a legal and political response based on sound ethical principles and careful ethical analysis (e.g. cloning, genetic engineering, etc.)

A) In primitive societies, there was no real distinction between moral life, social life,

<sup>9</sup> cf. St. Thomas Aquinas. *Nicomachean Ethics*. Book 1.3. “What pertains to moral science is known mostly through experience”. St. Thomas makes the same point about the changeableness and developmental character of Natural Law in his treatment of the subject in *Summa Theologica*, First Part of the Second Part, Q94, Art. 2, 4, 5.

<sup>10</sup> Theilicke H. *Theological Ethics*. Philadelphia: Faters Press; 1966: 429.

<sup>11</sup> cf. Aranguren JL. *Ética y Política*. Madrid: Ediciones Guadarrama; 1963.



and the law. Consequently, there was no conceptual difference. Everything we understand by these categories was subsumed under custom or mores, including social usage, moral practices and lived precepts. There was just one reality, which Hegel called the simple ethical substance which was anterior to the development of subjectivity, individual conscience, and law.<sup>12</sup> Both individual moral norms and juridical precepts were part of one ethical reality. Only when positive law, formally considered, was constituted as a separate entity written and promulgated were the conditions established for different functions of Natural Law theory, first among which is the heuristic. Natural Law served to fill the gaps in the positive law, which was always the law of a certain people. Each such law had its *lagunae*, areas that were not covered in the written code. These gaps were filled by human reasoning power which considered particular circumstances and general principles like justice.

B) Law is primarily an institution of a particular people. When a community with its particular laws entered into contact with a foreign group and established trade and cultural relations, the second historical function of the Natural Laws came into existence. The Natural Law idea served as a sort of international law to meet needs which particular codes of the related groups did not cover. Natural Law in the form of *Jus Gentium* performed a suppletory function; this time however, not of gaps within a certain particular code, but gaps caused by relating one code to another. In this instance, Natural Law transcends the precinct of the positive law of a particular group to fill a very important international function.

This latter function was first directed to areas not covered in Roman law, but it reached its fullness in the Middle Ages and thereafter in the sixteenth and seventeenth centuries.<sup>13</sup> In the Roman period, *Jus Gentium* addressed those behaviors which were considered right or wrong despite customs of the particular cultures which made up the Roman Empire. The Middle Ages were governed by a positive legal code which amounted to a constitutionalized Christianity. In the latter context, *Jus Gentium*, directed itself to the problems centering around Jews and Arabs in medieval society, who had certain rights not based on membership in the Christian community.<sup>14</sup> In the sixteenth century, the same problem arose, this time however, regarding the indigenous people of the newly discovered continent.<sup>15</sup> Legal

<sup>13</sup> For the scholastics, all of whom preoccupied themselves with the question of law generally and Natural Law in particular, the precepts of *Jus Gentium* were considered part of the Natural Law and valid for the ordering of the community of peoples. *Jus Gentium* was the quasi-positive law of the international community. Its fundamental axiom was *pacta sunt servanda* and it covered areas such as war, truces, trades, treaties, envoys, etc.

<sup>14</sup> For an interesting account of the situation of both Arabs and Jews in medieval society, cf. Castro A. *The Structure of Spanish History*, trans. E.L. King. Princeton, NJ: Princeton University Press; 1954. The original Spanish title was *España en su Historia (Cristianos, Moros y Judios)*.

<sup>15</sup> A famous debate took place in Spain (Valladolid) between Bartolome de Las Casas, a Dominican friar known as the Apostle to the Indians and Juan Gines de Sepulveda. The year was 1550'. Las Casas had written an account of the cruelties visited upon the Indians by Spanish colonizers. His work caused a controversy which led to the debate with Sepulveda, a famous classical scholar. It was the latter's contention that the Spaniards had a right to subjugate the savages because they were a lower order of nature. Las Casas refuted these arguments with others based on the Scriptures and on rational arguments taken from St. Thomas and others. Las Casas saw in the Indians signs of humanness which demanded decent treatment, even though they were uncivilized and unchristianized. Oddly enough, among the many concrete suggestions he made, one was to bring Africans as slaves to take over the tasks which the Indians were being required to do. c.f. *Tratados de Fray Bartolome de Las Casas*. México-Buenos Aires: Fondo Cultural Económica; 1965. Grotius is often hailed as the Father of Natural Law. At a time when the religious solidarity of Europe was destroyed, he tried to substitute an intellectual solidarity. He tried to introduce the rule of law even in wartime (the Thirty Years War, 1618-1648), and after the religious foundations of civil peace had crumbled.

<sup>12</sup> Hegel G. *The Phenomenology of Mind*. NY: Harper Torch Book Edition; 1967.

relationship with dissident churches and between states with differing legal structures concerned Grotius who gave responses to these problems based on the Natural Law idea.<sup>16</sup> Historically, Natural Law filled the function of safeguarding the peaceful togetherness of different peoples, a function that in today's multicultural American society is a serious challenge.<sup>17</sup>

C) A third historical function stems from the fact that positive law is never a reality entirely enclosed within itself but, rather, the projection of a *Weltanschauung* from which it derives its sense and to which, from time to time, it must appeal. The positive law is founded upon meta-juridical principles which are rooted in this *Weltanschauung*. The background principles of positive law, in the sense of the springs or roots from which particular concrete laws flow, historically go by the name of Natural Law. Every system of positive law is dependent upon a vision of the world which underlies and grounds a legal system. It is precisely this vision and its derived moral principles which allied Military judges used as a base to condemn Nazi bioethical abuses at Nuremberg. The Nazi doctors and researchers were certainly not guilty of any violations of their own positive law code.<sup>18</sup> Certainly they

could not have been judged by American positive laws. What the judges and later the United Nations did was to elevate meta-juridical principles of Western positive law systems to transcultural and universal status. The Nuremberg judgments and the Nuremberg Code which initiated contemporary bioethics were based upon a Natural Law presupposition.

D) The fourth and fifth historical functions of Natural Law arise on the occasion of a cultural crisis. When the generally accepted mores and precepts of a community lose their coherence and appeal, a crisis arises. Natural Law can and historically has, in such circumstances, begun to function in either a reactionary or a progressive way. In the first case (fourth function), the ways of the past (old laws) are considered natural (*physis*) as opposed to the new formulae (*nomos*) seen as products of a particular will imposed upon the people. The old law and old ways are looked upon as given and immutable. They are seen as laws of nature, an immutable Natural Law.

This same point of view and function is seen over and over again in Catholic moral teaching. In the papal commission called by John XXIII to review the Church's moral teaching about birth control, the commissioners by and large agreed that change was justifiable and right in light of changed circumstances. A few conservative theologians (and two cardinals who supported them) argued that change was impossible because the Church's older moral teachings based on Natural Law are both infallible and immutable.

E) The progressive (fifth) function arises out of the same historical situation. Reformers have always pointed to a vision of society which is more just than the existing one (e.g. Martin Luther King Jr.). They point, also, to a law that is more just and more rational, thereby invalidating the existing law and justifying its

<sup>16</sup> De Juri Belli et Pacis, (1925) which was reproduced photographically and translated by Kelsey FW. and others for *The Classics of International Law*. London: Oxford Univ. Press; 1917.

<sup>17</sup> The issue of the togetherness of different people for contemporary Americans is addressed by Marty M. *The One and The Many: America's Struggle for the Common Good*. Cambridge MA: Harvard University Press; 1997. The different peoples in today's America are many. The challenge to togetherness and indeed to the survival of American society is tribalism. Race, language, gender, ethnicity, economics, nationality, culture, and religion tribally organized and lived are all potential enemies of civic oneness and social togetherness. Marty addressed these challenges and the steps which Americans who make up these groups need to take in order to stay one nation, free, communicating, and sharing with one another.

<sup>18</sup> cf. Bosch W. *Judgment on Nuremberg*. Chapel Hill, NC: University of North Carolina Press; 1970.

destruction. Here Natural Law, as opposed to the positive code in force, looks not to the past but to the future. The Stoics for example, looked to an international society without slavery, founded on what they considered the Natural Law. The importance or the effectiveness of this function of the Natural Law concept is not the question.<sup>19</sup> Natural Law in the Stoic's viewpoint was utopian, minoritarian, individualistic and completely ineffective when confronted with the socio-economic conditions of a particular culture. It does, however, offer us an historical example of the fifth, progressive, future-oriented function of the Natural Law. The revolutionary moral claims of the French middle-class were considered Natural Law principles. Natural Law moral principles supported inalienable rights which were denied by the Monarchy, thereby depriving that regime and its laws of legitimacy.

These moral teachings gained positivity when they became constitutionalized in the U.S., France, and in other Enlightenment regimes. Eighteenth century Natural Law theory was revolutionary and future-oriented. It provided us with a clear example of the anticipatory and pre-positive character of Natural Law, as well as its progressive orientation. Afterwards,

during the nineteenth century, a reaction against the French revolution set in and again it was the Natural Law which was the rallying cry of moral philosophers and political theorists calling society back to the anterior juridical order (traditionalism with its notion of Law as arising historically and not invented by Enlightenment ideologies).<sup>20</sup>

The historical functions of Natural Law could all be understood as diverse ways of keeping positive law open. Natural Law opens up positive law a) to the totality of culture (especially its meta-juridical background principles and ideals); b) to the whole human society in the sense of the entire world (gentes) and thereby pushing toward a viable international law; c) to history a: to the past so that positive law will not become rootless, abstract or close in upon itself, b: to the future in the sense of poignant positive law toward more progressive social possibilities rather than to situations dictated by existing power blocs.

### Natural law theory for today

The idea of Natural Law functioning in various ways is as important in Catholic moral teaching as it is in secular law and politics. In American culture, we are still imprisoned in the Kantian division between law (heteronomous and exterior) and morality (autonomous and interior). Legal positivism aggravates the situation by separating law from its socio-cultural roots and making it an entity functioning in splendid isolation from

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<sup>19</sup> The primary thrust of Stoicism was toward the creation of individual self-sufficiency and virtue. The metaphysics of Stoicism, however, provided the foundation for a world-state idea and a corresponding International Law which was a Natural Law. They believed in the oneness of all nature and the identification of God and reason and nature. All men then were the sons of God and belonged to a world community which transcended political divisions. Right reason, teaching humans what is right and wrong, was the constitution of the world society. By the law or by reason all men were equal, slaves and free, Greeks and barbarians. Although social reform was secondary consideration of the Stoics, their idea of the Natural law was potentially a ground for social reform and improvement. Chrysippus insisted that a slave should be treated as a "laborer hired for life" which did represent an advance over Aristotle's idea of the slave as a living tool.

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<sup>20</sup> Pius IX's Syllabus of Errors is an example of the reactionary function. His long list of errors were judged to be erroneous based not on scripture, but on human reason's conclusions about morality in the social order. His reactionary view of Natural Law morality was considerably influenced by the fact that Enlightenment governments stripped him of his Papal states and confined him to semi-imprisonment in the Vatican.

everything. To escape the distortion which accompanies either view, we need to recover the connection between law and morality.

Our secular American culture shows several different moral or ethical levels. a) An autonomous and individual morality (insofar as such is possible). b) Intimately connected with this is a cultural or community morality. c) A heteronomous morality usually religious (Jewish or Christian), but possibly scientific or humanistic. d) A Natural Law functioning, as we have tried to show, as a quest for rationally definable individual and social moral directives. e) Positive laws (penal law, government regulations, rights legislation) which are constitutively moral. f) Positive law that is merely technical, but insofar as it establishes order (a value), is not completely devoid of moral content.

To this list, we can add a social morality which is an ethics inscribed in the very juridical and administrative institutions of the state. This is a concrete ethics as opposed to one that is abstract and purely academic. The discipline called social ethics is an important part of Catholic moral teachings, which addresses itself specifically to political institutions and economic entities. It crosses many of the established disciplines which study the social reality. The emphasis of social ethics is on the effects of public cultural structures on all human beings rather than on individual persons' intentions and personal feelings. As such, it could be termed neoutilitarian. Evident beyond dispute is the fact that an individual or personal ethics, based on individual autonomy or good will, turns out to be ineffective for the solution of bioethical problems today, most of which have a strong social or legal dimension.

The Church and State today must both become more ethical realities: a Church and

state not just of law but of justice and respect for human beings and human dignity. As a nation formed in the liberal tradition, we are a nation of law, but we are also a nation struggling to give more ethical substance to our social structures and institutions and laws. As a Church which is called to reflect the behavior of Jesus, we must give more ethical substance to our Church structures, procedural rules, our public institutional image, and our institutional practices (e.g. the way the Vatican Congregation for the Doctrine of Faith investigates and disciplines activists and academicians).

This ethical level already exists in the sense that there are social structures inside and outside the Church and State with a built-in ethical content. This dimension on the moral landscape, however, did not just fall out of the sky. In the State, the positive ethical content of our social structures have been the result of gargantuan efforts by labor unions, civil rights groups and other, to inscribe ethical values into social structures and positive law. In the Church, whatever changes have been made to make the Church's structures, laws, and practices more ethical have resulted from gargantuan efforts by Catholic reformers, principally liberal Catholics.

Few people today talk of the ethical dimensions of social realities in terms of Natural Law. Terminology like human rights, civil rights, right to dissent, right of free speech, right to a decent wage, work-place protection rights to compensation for injury, are more in vogue than the old-fashioned Natural Law language. As a matter of fact, however, this whole process of asserting and fighting for a more ethical reality in our ecclesiastical and secular institutions is a parallel to the eighteenth century revolutionary movements inspired by Natural Law concepts. In our time, as them, the drive is toward a concrete social ethic, con-

crete ethical laws and structures, and ultimately an ethical culture community. Now, as then, we struggle with what we have described as the progressive or revolutionary function of Natural Law; the raising of ethical ideals to the level of positive juridical institutionalization. In bioethics, definable ethical standards on most of the major issues have to be translated into law or at least have to influence law. Classical Natural Law theory has a role to play in contemporary bioethics.

When Natural Law is mentioned, people tend to think of the Catholic Church and an objectively based ethical theory. As a sad matter of fact, however, today's Church has distinguished herself primarily as an exponent of Natural Law as it relates to individual issues in sexual morality.<sup>21</sup>

Church authorities have been eloquent, unequivocal and very detailed in spelling out the individual obligations which they see following from Natural Law theory as it applies to birth control and abortion. Today they are not anywhere near as eloquent or unequivocal on demands for freedom or on social justice. In instances in which Church administrators address social problems, frequently they become exponents of what we have spoken of as the fourth or reactionary function of Natural Law.

There was a time in the U.S. when Church leaders fought for a new social order with more justice and freedom for workers, the forgotten, and the oppressed. They are much less disposed to do so today. In Latin America, where the established order is often an established injustice and cruelty, Catholics who

advocate change are politically margined and punished both by higher secular and ecclesiastical powers (e.g. Liberation theologians and leaders of independent Church communities). The Catholic Church has kept Natural Law theory alive, and some Catholic moral theologians have employed the concept to push for needed reforms. The hierarchy, unfortunately, has in most cases espoused and supported a narrow version of this ethical tradition. Linking the term, Natural Law, to indefensible, traditionalistic positions has been regrettable and explains its fall into disuse. Nevertheless, as I have tried to show, there is a continuing need to keep positive law open to rational reflection on historical, cultural, political, social and religious influences; and to the progressive/revolutionary functions of Natural Law. This is true both in the Church and in the State.

## Conclusion

Natural Law aspires to juridical positivity. In itself, it is more moral than juridical, but potentially, intentionally and anticipatorily, it is law of the future, a prefiguration of a future juridical order. Its animating force, the source of its power, is not the individual who has been, with rare exception, incapable of doing anything to change social realities for the better. Natural Law, in its futuristic and progressive expressions, is a social force, incarnate in certain pressure groups and objectified in an ideology. Catholic liberals like Gary Wills and James Carroll and Sister Joan Chittister push for needed ethical reforms by revealing Church failures and scandals and by giving expression to a vision of more moral Church structures and practices. This vision inspires groups that work for change. Painful as this is, it is our moral embarrassment which most

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<sup>21</sup> Pope Paul VI attracted extensive international attention to the use of Natural Law theory with his much criticized encyclical *Humane Vitae*.

clearly reveals the needed new moral order. This vision inspires groups that work for change. This is Natural Law theory in operation.

Natural Law is a moral direction and exigency which is based on reason but points toward legal status. It prefigures social forms which are anticipatory of socio/juridical structures. Natural Law's direction toward juridical institutionalization culminates in its *Jus Gentium* function; with the juridical recognition of natural rights by all nations and all people. The movements toward European unity, drive for freedom of oppressed races and people, the UN declaration of rights, international courts to judge crimes against humanity are all realizations of the Natural Law in its progressive and its *Jus Gentium* functions.

What has been accomplished up until now in the development of International Law has depended for its inspiration on unexpressed Natural Law presuppositions. International ethical standards in medicine point toward constitutionalization of a basic Natural Law vision and of Natural Law primary principles. In almost every case, principles like sanctity of life, justice and freedom create pressure to change inhuman and immoral practices. Arguments for these changes are based on reason. Reasoning has been clarified by Thomas Aquinas and John Courtney Murray, by Freud and Hegel and other formidable theoreticians. Contemporary appeals to reason have been made by any number of international organizations. All this suggests an implicit Natural Law reasoning that is radically historical and politically functional, a Natural Law which justifies, legalizes and strengthens certain enduring universal principles. This type of Natural Law reasoning is characteristic of a liberal Catholic way of seeing and judging.

### **Postscript: Natural law and bioethics**

There is an historical, cultural, political dimension to most bioethical problems. This is obvious and hardly a matter of great controversy. And yet there is a transhistorical, transcultural, transpolitical dimension that is not so obvious and is commonly denied by secular bioethicists. A Catholic liberal bioethical perspective attempts to keep these two elements in dialogue. Conservative Catholic moralists tend to focus on the universal elements and try to offer quick and immediate solutions to complex problems based on traditional teachings which they claim are international and infallible. Secular moralists deny transcendent elements and reduce every issue to changing physical, cultural, historical components. Conservatives think that traditional teachings are right and unchangeable no matter what the new and changing circumstances. Universal values and transhistorical directives exist, but these can guide ethical decision making about particular issues only in dialogue with historical, cultural and political contexts.

Natural Law thinking supports transcultural and universal bioethical directives but employs them in continuing tension with particular contexts. To employ a baseball metaphor, a team uses universal rules, standards, directives and objectives but they are always related to a particular field, this or that opponent, these particular conditions. In bioethics, the principles rooted in the universal structure of human life have to provide direction and regulations on the playing field of contemporary life and medicine. In developing countries, the playing field is permeated by poverty, malnutrition and unavailable therapeutic medicines. What do the universal Natural Law principles of justice and equality tell us? The messages in the sense of

particular right or wrong judgments are different in different contexts. In all contexts or on all playing fields the principles operate, but the way they play out is very much influenced by the different teams and different fields.

Equality, justice, freedom, truth, integrity, beneficence, caring, all these universal ethical elements are involved in the bioethics game. But the particular moves which they generate, the needs which they address, and the

conclusions to which they point are different. Health care has to be just and beneficent, caring and respectful of autonomy, but what these principles dictate is very different on different playing fields. The universal Natural Law principles will require very different particular moves depending on the other team and the field on which the game is played. A liberal Catholic perspective tries to keep in play the universal and the particular aspects of Natural Law reasoning.