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NATURAL LAW, THOMISM — AND PROFESSOR NIELSEN

The NATURAL LAW FORUM was founded as a medium for discussion of the validity of legal thinking stemming from the persistent tradition that there are certain rules of justice superior to human customs, the enactments of human legislatures, the chance opinions and possible prejudices of given groups of men. That the name, natural law, has come to be associated with this view is not an unmixed blessing. It is a name that repels many thinkers and it admits of a wide variety of meanings. In any case, the FORUM is open to the expression of expert comment, both for and against the theory of natural law.

Pursuant to this policy, several valuable pieces of criticism have been printed. The contributions by Nakhnikian¹ and Nagel,² in earlier issues, seem to me to have been outstanding in the philosophical category. In the 1959 issue, there appeared a forceful critique written by Kai Nielsen.³ It is to Nielsen's article that my remarks are directed, not in a spirit of rebuttal but of cooperative discussion.

It should be noted in the beginning that Nielsen directs his criticism to the Thomistic theory of natural law and not against other possible versions of the theory. Many of the editors of the FORUM are not Thomists and would insist that there are other bases for natural law thinking than the philosophy of Aquinas. Doubtless Nielsen understands this fully. Indeed, he indicates at several places in his article that he sees some value in the efforts of certain American naturalists to elaborate a theory which might have some affinities with natural law. This should be noted by Thomist readers: Nielsen's critique is not an advocacy of ethical skepticism.

To make a start, I should like to say a word about Thomism as a philosophy. There is, first of all, the thought of Thomas Aquinas — a thirteenth century man. It is very difficult for the historian to determine the precise limits and meaning of this original Thomism. Aquinas was a teacher of Catholic theology at two universities: Paris, a religiously "committed" institution; and Naples, a royal, or state, university. In the course of his studies and teaching, he read and adapted to his use many purely philosophical works. He also used the writings of non-Catholic theologians, both Mohammedan and Jewish. The precise status of what one might call a purely natural philosophy, in the thought of Aquinas, is the source of controversy among Thomists today. Some think it possible to bracket the theology of St. Thomas and to treat the remainder of his thought as one would Platonism, Cartesianism, or Kantianism. Others (including both Gilson and Maritain) insist that Aquinas's philosophy cannot be considered in isolation from his religious convictions. They see him as a "Christian philosopher"—much indebted to his religion for his understanding of reality and of man's problems.

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1. *Contemporary Ethical Theories and Jurisprudence*, 2 NATURAL LAW FORUM 4 (1957).
 2. *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL LAW FORUM 77 (1958).
 3. *An Examination of the Thomistic Theory of Natural Moral Law*, 4 NATURAL LAW FORUM 44 (1959).

The foregoing is written frankly. Not only are non-Thomists puzzled when they try to extricate the philosophy of Aquinas from its theological setting; some Thomists are in a similar quandary. A strong group of modern Thomists will have nothing to do with a so-called philosophy of St. Thomas, separated from its theological context.

There are also twentieth century Thomists who have taken the opposite view. Some think that Thomism is a philosophy much like any other kind of philosophy. Some recent Thomists have developed personal philosophical positions that are related in various ways to the thirteenth century thought of Aquinas. This is not the place for further details on the ramifications of Neo-Thomism; suffice it to say that modern Thomism is far from monolithic.

All of this makes it difficult to discuss Nielsen's critique in a brief paper. I do not know whether he is primarily concerned with natural law as presented in the text of Aquinas, or in the several works of Jacques Maritain, or in the historical exposition by Copleston. If I write from my own view of what Thomism means today (as, in the last resort, I must), then I add a fourth variant.

To illustrate, let us consider the status of physics (philosophy of nature) in Thomism. There is no question that Thomas Aquinas made some use of a type of physics that stemmed very largely from Aristotle's *Physics*. However, there is much room for argument as to the importance of this material in the overall thought of Aquinas. Some people think that his metaphysics is but a projection and extension of this physics. Others (and I am one of them) think that he came to his metaphysical position rather independently of contemporary physical science. This latter group of Thomists tend to agree with Nielsen that medieval physics is outmoded and no sound basis for a theory of law. Maritain has always placed more emphasis on the philosophy of nature than has Gilson, for instance. Father Copleston gives the impression that he would not wish to revive the physics of Aristotle in the twentieth century. My own view is blunt: if Thomistic natural law thinking today requires acceptance of Aristotle's *Physics*, then I do not favor such thinking.

Here we come to the heart of the matter. Probably Nielsen does not see much difference between a medieval physics and a metaphysics. They talk about natures in both. Yet the Thomist metaphysician makes the greatest effort to understand the judgment that being is not confined to bodily existents. The kind of natural law reasoning identified with much present-day Thomism centers on another metaphysical judgment: that there are certain specific "natures" (say, dog, tree, man) which can be understood universally. These natures are not regarded as existing individual things, nor are they fictions of the human mind. What, then, are they? To answer this question is difficult, because of the weight of much modern thinking which tends to discredit the notion of a universal.

Take the judgment: "water freezes at 32 degrees F., under certain conditions of pressure and purity." What is the meaning of "water" in this proposition? Of course it is an object of thought but the point is that the judgment is not arbitrary. The judgment implies that a number of things, recognizable as "waters" in different times and places, behave in this way. If someone finds a new kind of "water" that does not freeze in this way, then he has found a new nature. Much physical science still deals precisely with such natures. This is so of the

descriptive rather than the mathematical sciences. The ordinary chemist is not interested simply in the sulphuric acid in his own bottle. He desires to know certain properties typical of this acid, whenever and wherever it is found. Water is a universal object of study and understanding (and practical use); it is real or thingish, because there are many individual instances of existing "waters." A circle is also a universal object of understanding but it is not real, because there are no instances of circles existing as individual things. This is the reason why physical science is not mathematics.

No Thomist professes to have an exhaustive knowledge of the real "natures" of things. Nor do I know any serious representative of Thomism who claims to be able to deduce the rules of natural law from his knowledge of the "nature" of man. Other natures than that of man are involved in human activity. To put it very briefly: it is a different matter, consciously and deliberately, to drink water, liquor, and sulphuric acid. Our variables are three different liquids that produce different results within the man who performs much the same action in drinking them.

It is practical and morally advisable to know which of these liquids to drink. Such information does not enable us to judge immediately that natural law "tells us" that a man ought to drink water and not acid. Unfortunately, many Catholic writers have fallen into the habit of speaking as if it did. Notice that I have passed over the problem of what to say about drinking liquor: it is obviously much more complicated. Circumstances, other things than the natures of man and liquor, must be known before one could make a practical judgment on it. There are many fringe cases like this, where the average person is frankly puzzled at times in trying to determine what is right. It is not advisable to give the impression that mere adherence to natural law thinking provides immediate and infallible judgments on all moral issues. On the other hand, there are some actions that are, under usual circumstances, suitable for a man to do; and others are not. These homely examples illustrate the first point that I wish to make: "natures"—in the realistic sense suggested above—are important to our understanding of the theory of natural law. More than human nature is involved. And we do not learn about these "natures" from Aristotle's *Physics* but from our own experience of reality.

At this point it may be helpful to distinguish two kinds of knowledge of natural law: a) the way in which most men (not moral scientists) may grasp natural moral law; and b) the way in which a moral expert reflects on, and endeavors to offer a scientific or philosophical explanation of natural law. This distinction is important to our reading of Maritain. He writes, of course, as a moral expert but about what he sometimes calls "natural" (untrained, unreflective, nonphilosophical) moral knowledge. When Maritain speaks of nonconceptual, connatural knowledge, or knowledge by inclination, he is talking about level a) above. He is asserting that the ordinary person grasps certain natural law notions or attitudes in a vague, nonreflective manner. This ordinary grasping is a combination of low-grade cognitive and affective activity. Sometimes it is close to animal feeling. Such a "natural" knower is related to the moral scientist in somewhat the same way that a natural singer is to a trained teacher of singing.

Maritain is trying to describe the bases within the moral agent for his own

moral decisions. Maritain cannot make these ordinary moral experiences any clearer than they actually are in the average person. Consider the so-called *synderesis* principle: *Good should be done; evil should be avoided*. To say with Maritain that this generalized rule is known to all men is not to claim that all, or even most, men can and will state the rule, when called upon to justify their moral decisions. Rather, Maritain's view is (and it is the position of most Thomists) that practically all men show some concern (both affective and cognitive) for right and wrong. I say most men. Some unwary Thomists may say that all men do. However, as Hobbes and Locke and Nielsen, and others, have said, there are some classes of men who do not show that they can discriminate between right and wrong. These atypical people are: very young children, fools, and certain highly sophisticated ethicists. I think we can exclude the first two classes: time will cure the children; and insane people are not regarded as responsible, legally or morally, precisely because they lack an awareness of such values. The professors of ethics are not the ordinary people that Maritain is talking about. I realize that I am passing over the really difficult point, here. Some appeal to what is "normal" is made, consciously or unconsciously, in talking about such exceptions. This introduces the notion of what a nature is for, of finality in natures.

Thomists think that every action and every real thing that exists has some end. This is teleology. It is Aristotle's old theory of final causality. For Aquinas, finality has a different explanation, however, from that given by Aristotle. St. Thomas took it that God is the creator and providential governor of man and his universe. Aristotle did not. In the Thomistic view, God's intelligence directs all natural things and actions, in an orderly way, to their ends, just as an archer aims his arrow at the target. All finite natures have, in this position, a vector quality which God gives to them. This is true of man's nature, too. However, Aquinas thought that men control some of their activities and may direct them toward the end of man, if they wish. Man is free. Otherwise, man would be a physical but not a moral agent.

Now a critic may say: this is belief; we don't know that there is such a God; Aquinas' arguments for the existence of a providential Deity are not convincing. Such criticism would demand a discussion beyond the scope of a journal such as this. The Thomistic reasoning requires a good and thorough knowledge of classical metaphysics. Aquinas's arguments can hardly owe everything to his Christian training. Some parts of these arguments are taken from the pagan Aristotle; some elements are suggested by Mohammedans (Avicenna and Averroes); important forms of the famous "five ways" are found in the learned Rabbi Maimonides. May I say three things about this criticism. First, for anyone who is interested in a modern Thomistic presentation of the arguments for the existence of God, I should recommend a standard book: G. Smith, *Natural Theology* (Macmillan, 1951). Second, the acceptance of the existence of God is vital to a Thomist. Third, if Thomism is correct about God's regulative care of man and the universe, then there should be some observable evidence of this finality in the natures of things. A person who is not sure about God could still look at himself and his world of experience to see whether things exist and work as a Thomist claims they do. In other words, even if we bracket the problem of the

existence of a providential Deity, there is still something that a Thomist can talk about with his colleagues.

Is there evidence of end-directedness in the activities of men and of other things in nature? That there is some such evidence is not usually disputed. The biological and social disciplines make considerable use of purposive analyses. The concept of the "function" of a physiological member is teleological. Oddly, most evolutionary theories introduce some surreptitious notions of purpose. Self-perfectionism is an internal form of teleology: it is the kind of finality that we find in the biology of Aristotle. At one point, Nielsen remarks that anthropology does not back up the Thomistic notion of a purposive human nature. I can hardly think that he is serious about this. Without quoting chapter and verse, I should like to remind him that there is a strong movement in recent American anthropology in this direction. Some of the leading names in the field (Kluckhohn, Malinowski, Kroeber, Redfield, Evans-Pritchard, Montague) see man as a very distinctive nature. Indeed, one of the basic assumptions of anthropology is that man is the only culture-producing animal.

However, there are two great objections to natural finality. One arises from the mathematical sciences; the other from a consideration of chance events. A Thomist has to admit that mathematical physics makes little, if any, use of finality as a means of explanation. This does not surprise him. Classical mathematics had no place for purposes or ends. As early modern science moved from qualitative to more and more quantitative methods of interpretation, it gained in accuracy and simplicity of verification—but it lost something in the process. The price that it paid was the loss of contact with many of the properties of reality that make life worth living. A tree is not the same thing to a mathematical physicist that it is to Joyce Kilmer. But people have to live with Kilmer's tree and not with a mathematical construct. Legal and moral decisions operate on the level of ordinary human experience. This is why morality and legal thinking receive very little help from mathematical science. They have different interests, different values. As far as the criticism of finality, based on mathematicized science, is concerned, my suggestion is that such science deliberately excludes those qualitative aspects of reality in which teleology finds its justification.

The criticism from the evidence of chance deserves serious consideration. Let me say, first, that no man (not even a Thomist!) knows all the causes of a given event. What a man does know is that certain patterns of action, in most cases, produce certain results. Sometimes he finds that a certain line of actions intersects with another causal series (that he has not known about) and gives rise to an unexpected result that can be called a chance event. Still informative is the classic example of the farmer digging a well to get water; he finds a treasure buried by robbers with the intention of hiding the treasure. The discovery is intended by neither the farmer nor the robbers. It is a chance happening but this does not mean that causality is inoperative. In a sense, the example involves too many causes.

To say that most events in nature are fortuitous is, however, quite another matter. As soon as chance begins to be the regular thing, it loses its fortuitous character. The basic assumption of the investigator of nature is that there is some regular pattern to be discovered. When a man tries to govern his own

actions as well as he can (or, in the case of a lawmaker, when he tries to govern the actions of a group of men), his aim is to minimize the unexpected, the chance results. His very program is predicated on the expectation that he can plan for the future and that chance will not, in the long run, predominate. There is not much point to legal or moral thinking, if one takes the opposite view.

There is, finally, a point of criticism that is found throughout Nielsen's appraisal of Thomistic natural law theory: you can't get an *ought* from an *is*. The fact that things exist or happen in a certain way does not mean that they should do so. This is a well-known dilemma in contemporary ethics and value theory.

I think that this difficulty is set up by taking the terms *is* and *ought* (or fact and value) in a narrow, unrealistic sense.

Consider the *ought* part of it, first. This term expresses some sort of obligation or necessity. The necessity implied cannot be absolute, in the sense that agents who come under it must do what is required and cannot do otherwise. One does not tell a man that he ought to obey the "law" of gravity — he cannot avoid it. But the foregoing use of "absolute" in connection with necessity is only one way of employing the term. In the time of Kant (when most philosophers were theists and very conscious of the weight of moral duty) one could talk about an "absolute" moral necessity in a different way. God was there as an absolute lawgiver, dwelling in power and majesty above all men. In such a view, God may function as an absolute Monarch: what He requires *ought* to be done, or else. To many thinkers in the eighteenth and the nineteenth century, the "or else" implied very real sanctions. If you didn't obey God's commands you ended in Hell. This sort of *ought* is compatible with human freedom (and so, is not a type of physical necessity) but it is an obligation imposed on all men whether they choose to recognize it or not. (Parenthetically, it is well to note that the Thomist thinks that God does so command men, and that it is not possible for men to evade moral duty by not thinking of it; but the force of this necessity is lost if God is left out of the picture.)

What Kant did with this has caused trouble in philosophy ever since. He tried to see whether you could retain this strong meaning of the moral ought, even if you ignored sanctions (punishments and rewards), and even if you ignored God as the absolute Lawmaker. He asked the odd question: Can man find within himself a sufficient source for such a duty, such an absolute ought? (This is one of those Irish questions to which Kant was addicted — something like his question: how can we know a thing-in-itself if we define the *Ding-an-sich* as that which is outside knowledge?) Ever since Kant's time, moral philosophers have been plagued by this question: How find an absolute *ought*, if we do away with absolutes?

It seems rather obvious to me that, without God in one's moral view, the moral ought can only represent a conditional necessity. Kant saw this and introduced God as guarantor of the *summum bonum*. Otherwise, ought names an "if A, then B" sequence. Some British writers on ethics ridicule the idea that a moral ought is anything like the statement that a carpenter ought to use a certain tool to achieve a desired result. However, a conditional necessity is difficult to construe in the practical order, unless we introduce the notion of the utility of certain means to achieve a given end. That is probably why most British ethi-

cians have still a lingering respect for social utilitarianism. The good of society is a respectable goal and may be used to decide many moral questions. It does not help, however, with some of the most difficult questions of private morality.

If we bracket the existence of God as moral legislator, then we must reduce our meaning of the moral *ought* to the notion of utility for a certain end. One way of putting this is to admit that no man is forced to work for happiness, or well-being, or self-perfection. Any person may reject the whole concept of working for an end that is suitable to his nature. In doing so, he has repudiated the only basis on which a moral ought can be given a workable meaning, apart from divine law. To me, a naturalistic moral *ought* means that a person must do certain actions and avoid others, or take the consequences of an unfulfilled and imperfect human life. This is a reason for trying to do one's best but it is not an absolute one.

Turning to the other side of the problem: what is the connection between the *is* and such a conditional oughtness? Here again the meaning of our terms and our experience has been unnecessarily narrowed down. In good part due to the influence of Hume (it seems to me), reality has been reduced to a sort of atomic theory of unrelated events. In such a theory, what is given is a collection of sense "facts" that have no real interconnections. If that is the character of the *is*, then I should say that no oughtness arises from it.

But this atomism of sense data is not by any means self-evident or logically established. In the last few generations of English philosophers, it has brought nothing but bankruptcy in practical philosophy. I am getting a little tired of being accused of "dogmatism" because I question the validity of a Humean analysis of man's experience. What is real may very well be closer to the world of the average man-in-the-street than to the sense data of Bertrand Russell. I am not suggesting that philosophers revert to the simplistic position of the common sense school. But I would strongly maintain that the average man's world is not an unreality: it merely fails to tell the whole story. He knows that there are trees, dogs, water, other men, and so on, in his environment. He knows that these things are related to each other, and to himself, in ways that he does not impose by his own thinking. The reality of such relations is very important for practical thinking. If I am the son of a certain man, that is as much a fact as the perception of red. But a relation such as this provides an experiential basis for oughtness. I obviously owe something to my father that I do not owe to other men.

Consider a more simple example. Two boys each own four marbles. One boy takes two of his friend's marbles, and his friend protests. This seems to be a moral claim of a very obvious kind. We have an interpersonal situation comprising several realities that are interrelated. If no other circumstances are added to modify the example, it is clear that the boy *ought* to return the two marbles to his friend. This is the "right thing" to do — what Aristotle called the *justum*. It is not that boys or marbles, considered in isolation, demand such a return. Rather, the governing reality in this case is the fact of possession, based on some reason that can be given to substantiate it. In the example, the effort of the boy to establish a new fact of possession is based on no reason for the transfer.

To know such relations is beyond the realm of sense experience. You do not *see* that a boy owns a certain number of marbles; you must try to understand the

complexus of prior related facts on which his claim is based. The beginning of such knowledge lies in sense experience, but the grasp of the meaning of ownership is an affair of understanding, of reasoning. G. E. Moore made the naturalistic fallacy famous. In doing so, he perpetuated a far more dangerous moral fallacy: the notion that, if good is not a natural property, it must be a nonnatural one. These are not the only alternatives. Good, right, wrong, and other such moral terms name complex relations, not properties. It takes understanding to grasp them. Thomism has a long and perhaps overcomplicated explanation of the working of the human intellect. It differs radically from most modern theories of knowledge. What is essential in it is the claim that man knows on two levels: he senses individuals and he understands universals.

In regard to the philosophy of law, the understanding of universal relations, meanings, implications, tendencies, goods, obligations is of primary importance. So it appears to a Thomist. A law is not a sense "fact"; whatever else it is, a law is some sort of universal. It applies to many possible subjects, in a variety of circumstances. Clearly a theory of knowledge that reduces all human experience to atomized, isolated, unrelated sense impressions cannot give an account of law. Nor can it account for obligation, moral or legal.

I am far from suggesting that Thomism offers a fully developed explanation of all that natural law implies. More attention to the multiple experiences of modern life is needed. More cooperation with social scientists is advisable. Modern Thomists are not yet doing a proper job of making their position clear to their colleagues. Nielsen does a real service in demanding a better presentation of the natural law theory. Of course, communication is a two-way affair; it cannot all be accomplished by Thomists. To me it is encouraging to see a non-Thomist offering a searching criticism of Thomism.

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