Abstract
We are accustomed to think of the natural law as being more or less equivalent to a universal morality, whether this is seen as grounded in nature in some general sense, or more specifically in the deliverances of practical reason. There is another way of approaching the natural law, however, according to which it is identified with a specific moral tradition which cannot be adequately understood apart from some account of its historical development and social location. This paper defends the latter approach. It proceeds by way of an examination of one phase in the development of the natural law tradition, namely, its formulation as a systematic moral theology in the early scholastic period. Scholastic reflection on the natural law follows the pattern of a tradition-based form of moral reasoning, and even though the scholastics did not understand their moral reflections specifically in those terms, their concept of the natural law is congruent with a modern understanding of it as a tradition of inquiry.

There are (at least) two ways to look at the natural law. Seen from one perspective, the natural law is more or less equivalent to a universal morality, whether this is seen as grounded in nature in some general sense, or more specifically in the deliverances of practical reason. Seen from another perspective, the natural law is a specific tradition which cannot be adequately understood apart from some account of its historical development and social location.

It is important to add this latter qualification, because almost no one denies that there is a tradition of reflection about the natural law. The question, however, is whether the natural law can be formulated and defended apart from this tradition, whether, to put it another way, there is a universally valid natural law morality that can be abstracted from its history. Probably most defenders of the natural law would answer yes to this question. Consider, for a typical and elegant example, the remarks of Ernest Barker:

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it was among the Stoic thinkers of the Hellenistic age that the [natural law] first attained a large and general expression; and that expression . . . became a tradition of human civility which runs continuously from the Stoic teachers of the Porch to the American Revolution of 1776 and the French Revolution of 1789. Allied to theology for many centuries . . . the theory of Natural Law had become in the sixteenth century, and continued to remain during the seventeenth and eighteenth, an independent and rationalist system, professed and expounded by the philosophers of the secular school of natural law.1

The details of Barker's narrative would be widely contested today. Yet most defenders of the natural law would agree with his overall account of the natural law as something that has developed from its classical and theological origins to become, in Barker's felicitous phrase, 'an independent and rationalist system'. As Joseph Boyle says, 'natural law theory is committed to the significant tradition independence of moral knowledge', because, as he goes on to explain, 'moral norms are found among the principles of practical reasoning, and . . . these principles are goods which all humans know and are interested in'.2 The so-called 'new natural law theory developed by Germain Grisez, John Finnis and their collaborators, including prominently Joseph Boyle himself, offers the best-known example of this approach today.

And on first blush it does not seem that the natural law can be defended on any other terms. After all, for centuries the idea of the natural law has been associated with a universal morality. The idea of a natural law embedded in a historically determined tradition may strike us as intolerably paradoxical. Moreover, it is difficult to see why anyone would want to defend such a view of the natural law. After all, most theories of the natural law are motivated by a desire to establish a basis for morality or — more rarely — law which is independent of personal and social contingencies, and the idiosyncratic and distorted judgments that they produce. How can this be done, except by an appeal to universal standards of moral judgment?

Yet even though such a project may appear to be paradoxical and wrong-headed, nonetheless in this article I will suggest an alternative way of looking at the natural law, considering it precisely as a historically situated tradition of moral inquiry. In doing so, I am motivated by two


The natural law as a tradition of moral inquiry

c onsiderations. The first will be presupposed rather than argued in this article. That is, in my view the cumulative weight of arguments against a strong universalist view of morality is by now overwhelming. Too many considerations point to the conclusion that moral systems are dependent in a variety of ways on the particular convictions and practices of the communities out of which they emerge. This does not necessarily imply that moral judgments have no basis at all in realities that are independent of our collective and individual judgments. Indeed, one of the attractive features of the version of the natural law that I will present here is its focus on the variety of ways in which pre-conventional aspects of human life give rise to, and place constraints upon, our moral practices. Nonetheless, I agree with those who have recently argued that the ideal of a universally valid morality, which is both specific enough to have practical force and compelling to all rational persons, is a chimera.3

The second consideration is more positive. That is, I am convinced that the tradition of natural law reflection is valuable and worthy of retrieval even if it does not provide us with a universally valid, tradition-independent moral code. In fact, I would make a stronger claim – the tradition of the natural law is valuable precisely as a theological tradition, that is to say, valuable in and for its religious particularity. Of course, this tradition is not Christian in origin, but as I will try to show in what follows, it has been irreversibly shaped by centuries of Christian reflection.

I will proceed by way of examining one phase in the development of the natural law tradition, namely, its formulation as a systematic moral theology in the early scholastic period. As I will try to show, scholastic reflection on the natural law follows the pattern of a tradition-based form of moral reasoning, and even though the scholastics did not understand their moral reflections specifically in those terms, their concept of the natural law is congruent with a modern understanding of it as a tradition of inquiry. I will then contrast the scholastic concept of the natural law with its early modern successor, in order to bring out the differences between a tradition-based approach to the natural law and an approach which construes the natural law as a universally valid moral theory. I will then conclude by commenting briefly on the contemporary significance of the natural law tradition.

3 Over the past 30 years, a number of philosophers have argued that the rejection of a strong moral universalism need not imply relativism tout court, or even the rejection of every kind of natural grounding for morality; I have been particularly influenced in this regard by the arguments of John Kekes, ‘Human Nature and Moral Theories’, Inquiry 28 (1985), pp. 231–45, and Alasdair MacIntyre, Whose Justice? Which Rationality? (Notre Dame, IN: The University of Notre Dame Press, 1988).
In this paper, I focus on the natural law tradition as it developed through the work of scholastic canon lawyers and theologians in the twelfth and thirteenth centuries. During this period we also find discussions of the natural law among scholars of civil law, but for a variety of reasons, the idea of a natural law does not play a central role in their work. Similarly, those men of affairs whose political writings have come down to us (for example, John of Salisbury) did not generally draw on the natural law as an organizing concept for their thought. Canon lawyers and theologians, in contrast, gave a central place to this concept in developing their legal and moral systems. In the process, they transformed an ancient tradition of reflection, mediated to them through both classical and Christian sources, into a distinctively theological tradition of moral reflection.

What does it mean to speak of the natural law, or any other extended reflection on moral issues, as a tradition of moral inquiry? The first part of an answer to that question is implied by what has just been said. That is, reflection on the natural law is a tradition in the sense that it is *traditio*, something that is handed down from one generation to another, in such a way that the earlier stages of development are taken as more or less authoritative starting points for reflection in later stages. Although I would not claim that this is necessarily the case, this process of transmission will normally be mediated through texts, and that is certainly so in the present case. The tradition of the natural law as the scholastics received it was mediated through a wide variety of texts, all of them considered authoritative, although only one of them, namely scripture, was taken to be supremely authoritative. In addition to scripture, these included the writings of the church fathers, especially but not only Augustine, and a wide variety of classical authors, including Aristotle, the Roman jurists collected by Justinian, a number of other Roman and Hellenistic philosophers, and most importantly of all among the non-Christian sources, Cicero. At the

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6 The emphasis on Cicero may be surprising, in view of a widespread tendency to assume that the medieval conception of the natural law is fundamentally Aristotelian, but in my view this assumption is mistaken. For a very helpful discussion of Cicero’s influence in this period, see Cary J. Nederman, *‘Naturae, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought’*, *Journal of the History of Ideas* 49 (1988), pp. 3–26.
same time, the tradition of the natural law inherited by the scholastics was
not simply a heterogeneous collection of sources; it had already been
shaped through an ongoing process of textual transmission and comment-
tary, with later authors appropriating, expanding, and correcting their
forbears. Hence, the unity of this tradition was provided first of all by a
process of deliberate transmission, even though what was deliberately
transmitted was not a tradition per se, but authoritative texts and the
insights that they were thought to contain.

At the same time, the scholastics were not simply the passive recipients
and transmitters of a received textual tradition. The eleventh and twelfth
centuries comprised a period of rapid social change and institutional
reform, culminating in the flowering of intellectual life commonly known
as the Renaissance of the twelfth century. The scholastics were the im-
mediate heirs of these changes and were largely responsible for rationalizing
and consolidating them. In order to develop a new social theology adequate
to what was in many ways a new society, the scholastics drew heavily on
earlier stages of the natural law tradition, reformulating it in the process in
ways that still shape our moral and social thought.

This brings us to a second way in which scholastic refection on the
natural law should be understood as a tradition. That is, this refection was
genuinely innovative, while at the same time its innovative character was
expressed through reflection upon and reformulation of accepted sources.
The scholastics developed their concept of the natural law through a
selective appropriation and reinterpretation of classical and patristic texts.
They speak, therefore, in the language of their classical and patristic forbears
— but it would be a mistake to assume that they always mean what these
forbears meant. Ancient claims took on new meanings when they were
asserted in the light of new social conditions, and different strands of
thought were drawn together in ways that their originators could not have
foreseen, much less intended.

To summarize: when I speak of scholastic refection on the natural law as
a tradition, I am first of all pointing to the fact that this reflection depends
on authoritative sources and is developed in self-conscious continuity with
those sources, and secondly, that it is at the same time innovative, largely
although not exclusively in response to the changing social conditions that
form its context. So far, however, I have said nothing that would necessarily
be inconsistent with the history of natural law reflection suggested by
Barker or Boyle. That is, it might be said that while reflection on the natural
law certainly reflected the contingent starting points and social contexts of
medieval (and for that matter, classical) thinkers, it was nonetheless guided
by universal rational principles, which are increasingly recognized as such
and abstracted from the particular texts and circumstances that occasioned
this reflection – occasioned it, but did not fundamentally shape it.

Yet there is a further respect in which scholastic reflection on the natural
law reflects its character as a tradition of inquiry, and in taking note of this
aspect, we do depart from the view that the natural law comprises a
universally valid set of moral norms, accessible to all rational persons. That
is, scholastic reflection on the natural law is grounded in, and fundamen-
tally shaped by, a commitment to one particular text as the supremely
authoritative source for reflection. That text is of course scripture, and its
status in scholastic reflection on the natural law gives that reflection a
perspectival character that is not consistent with the theoretical view of the
natural law held by most of its proponents today.

I have elsewhere argued extensively for the scriptural and theological
character of the scholastic concept of the natural law, and I can only
summarize the main lines of that argument here.7 For the scholastics, the
natural law is fundamentally a scriptural doctrine. It would be misleading to
say that scripture is the primary source for scholastic reflection on the
natural law, since by the time they receive it, the natural law tradition is
already a Christianized tradition in which scripture and other sources are
inextricably intertwined. However, the scholastics turn to scripture both to
justify appeals to the natural law, and to guide them in their appropriation
and reformulation of the tradition they have received. It would likewise be
misleading to assume that the relation between scripture and the other
sources of their received tradition is one-sided, in such a way that scriptural
texts always determine the contours of the natural law as the scholastics
understand it. Their reading of scripture was itself shaped by wider assump-
tions about the natural law, which were in turn formed by a multifaceted
tradition of reflection on the natural law. Nonetheless, in its warrants and in
its overall contours, the scholastic concept of the natural law was pro-
foundly shaped by scripture.

Yet how is this consistent with the pronounced universal strains in the
natural law tradition itself? And what are we to make of the claim, which
the scholastics themselves endorse, that the natural law is grounded in
human reason? From our perspective, these claims might seem to generate
an intolerable tension with the scriptural, and therefore the culturally
specific, warrants of the scholastic concept. For this reason, when modern
commentators consider those scholastic authors whose concept of the
natural law is most clearly scriptural, they are indeed likely to dismiss them
as confused, or at best as inchoate stages on the way to the telos of theoretical

7 In Porter, Natural and Divine Law, pp. 121–86.
clarity. And it is true that the scholastics do not seem to notice, or much less to address, the implied tension between the scriptural and the universal elements of the natural law as they understood it.

Yet what appears to us to be a paradox, or an outright inconsistency, did not appear in the same light to the scholastics, precisely because of the specific features of the scriptural concept of the natural law that they developed. For them, scripture is the supreme and definitive expression of divine wisdom, but not the only such expression – natural processes and human reason are likewise reflections, albeit fragmented and ambiguous expressions, of God’s wisdom. The intelligibilities inherent in pre-rational nature and human reason are thought to be universally present in all of creation, and they can be partially understood on their own terms, even though they can only be fully grasped through the lens of scriptural revelation. In other words, reason itself is understood in scriptural terms; although they would not have put it in these terms, the scholastics offered a perspectival interpretation of a universal phenomenon, the functioning of God’s wisdom through nature and human reason. By the same token, on this view human interpretations of scripture presuppose innate capacities for reason and judgment that are themselves God-given. Human reason and scripture are isomorphic, in such a way that reason enables us to comprehend and interpret scripture even as scripture completes and corrects the deliverances of reason.

The point that should be underscored is that this distinction is itself justified and expressed in scriptural terms. One of the earliest examples of such a move is found in the synthetic collection of canon laws known as Gratian’s Decretum, which opens with the words:

The human race is ruled by a twofold rule, namely, natural law and custom. The natural law is that which is contained in the law and the Gospel, by which each person is commanded to do to others what he would wish to be done to himself, and forbidden to render to others that which he would not have done to himself. Hence, Christ [says] in the Gospel, ‘All things whatever that you would wish other people to do to you, do the same also to them. For this is the law and the prophets.’

8 Gratian, Decretum Gratiani Emendum et Notationibus Illustratum una cum Glossis (Rome: In aedibus Populi Romani, 1582; originally c.1140), D.1, introduction. All translations of Gratian are my own. However, I checked my translations against Augustine Thompson’s; see Gratian: The Treatise on Laws (Decretum DD. 1–20), with the Ordinary Gloss, Augustine Thompson, translator of Gratian, and James Gordley, translator of the Gloss, with an introduction by Katherine Christensen (Washington, DC: Catholic University of America Press, 1993).
Similarly, those scholastics who identify the natural law with a capacity for rational discernment appeal to scriptural warrants. This, after all, is for them nothing other than conscience or synderesis, which St Paul identifies as the law that is written in the human heart, by which the peoples of the world act and on the basis of which they will be judged. In this they follow the lead of their patristic authorities, particularly Ambrose and Jerome.\(^9\)

This line of interpretation is further developed through the appropriation of yet another scriptural motif, which becomes central to the scholastic conception of the natural law, namely the motif of the human person as created in the image of God. Here again the scholastics were guided by their patristic forbears, who had long identified the image in its primary sense with the human capacity for rational self-direction. Seen from this perspective, the natural law is an expression of the divine image in which we are all created. Hence, just as every mentally normal adult, man or woman, good or bad, naturally possesses some capacities for moral discernment and action, so every human being necessarily possesses some capacity for moral discernment, or alternatively, some inclination towards moral goodness, which is tantamount to the natural law. While this capacity (or inclination) has been dimmed and distorted by sin, it cannot be extinguished, as we are frequently reminded, even in Cain himself.

This does not mean that the scholastics had no sense at all of the tension between the universal and the particular as they appropriated an earlier tradition of natural law reflection. However, for them this tension was felt most acutely in the context of seeming changes over time. Again and again, they return to traditional natural law dicta according to which all persons are equal, and material goods are held in common by all — two respects in which the supposedly universal and supremely authoritative natural law has manifestly been changed by the law of nations. Scripture itself generated similar problems. After all, the righteous patriarchs had many wives, seemingly in contravention of a natural law precept of monogamy, and — still more troubling — God commanded Abraham to sacrifice Isaac, in contravention of the natural law precept safeguarding the innocent.

In order to address these challenges, the scholastics once again worked through an intelligent appropriation and interpretation of a received tradition, for which scripture provided the interpretative key. Their fundamental move was to distinguish among the many different senses of the natural

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law, in such a way that the natural law in its primary or controlling sense was understood in terms of a very general precept, or else in terms of a fundamental capacity for moral discernment. In either case, the natural law was interpreted as being primarily a principle of order, which was then expressed in different levels of specific precepts. As these became more particularized, they allowed for a greater range of modifications, in accordance with the specifics of a particular society or situation. This does not imply that the natural law has no moral content, as some scholars have recently suggested.\(^{10}\) The scholastics also hold that in a secondary sense, the natural law is comprised of moral rules, generally, those that can be derived from the Golden Rule and summarized by the Decalogue. Nonetheless, the equation of the natural law in its primary sense with a general principle or a capacity for moral judgment, rather than a set of rules, permitted the scholastics to maintain the universality and supremacy of the natural law, while at the same time allowing for a considerable degree of variation in specific moral codes.

So far, we have focused on more theoretical aspects of scholastic reflection on the natural law. When we turn to an examination of their specific applications of this tradition, we see yet another respect in which their reflection should be understood as a tradition. That is, the scholastics did not hold that the specific precepts of the natural law can all be deduced from first principles, in such a way that we could arrive at one and only one set of specific moral norms that express the practical precepts of the natural law. In part, this reflects their willingness to allow for a multiplicity of legitimate senses for the term ‘natural law’, even when they also identify or presuppose one primary sense of the term. Understood in this comprehensive way, anything that can be considered to be a pre-conventional ground of human institutions and practices can be considered as a kind of natural law. Correlatively, specific precepts are said to be related to the natural law in diverse ways: sometimes they are regarded as derivative from, or specifications of, more general principles, but they can also be considered as more or less adequate instantiations of an ideal, or as contingent instantiations of principles that could just as well be instantiated in a variety of other ways. Particular precepts and customs are said to ‘pertain’ to the natural law, rather than necessarily deriving from it:

\(^{10}\) For a recent influential example, see Daniel Mark Nelson, *The Priority of Prudence: Virtue and Natural Law in Thomas Aquinas and Its Implications for Modern Ethics* (University Park, PA: Pennsylvania State University Press, 1992). However, Nelson does acknowledge that for Aquinas, the natural law does at least give rise to the precepts of the Decalogue; see p. 112.
The natural law is nothing other than the law of reason or obligation, insofar as nature is reason. When, however, I say that nature is reason, it is possible to understand it more as nature, or more as reason, or equally as nature and reason. If however it is taken as nature, then it would be the principle of actions pertaining to the continuance and well-being of the one in whom it is, and of the rational consideration of those things which pertain to the well-being of the individual, as for example, food, clothing, a house, a bed, the care of health and the procuring of medicine, and other things of this sort which we seek for ourselves through rational consideration. Similar to these are those things pertaining to the well-being of the species, such as a wife and children, and care and provision for each of them. For when reason is said to be nature, and more nature than reason, I do not exclude reason. And because the law does not establish injury, I always assume right reason with regard to these things. On this account, the desire of gluttony and adultery and stealing would not be in accordance with the natural law nor according to nature spoken of in this way, because right reason is that which is rationally discerned about natural things, that is to say, things pertaining to nature, through the natural law.11

The point that I want to emphasize is that this approach to moral reasoning allows for an approach to the formation of moral norms that is ‘analogical or, as we may say, interpretative and associative’, rather than deductive.12 In this respect too the scholastic approach to natural law is consistent with a contemporary understanding of the natural law as a moral tradition. This does not imply that scholastic natural law arguments for specific moral conclusions were arbitrary, or in some other way pseudo-rational. The starting points from which the scholastics argued could not be rendered consistent with any conclusion whatever, but they did under-determine their conclusions, in such a way as to provide room for social and historical factors to shape those conclusions in fundamental ways. Let me offer two examples of ways in which contingent factors entered into scholastic formulations of natural law principles. In each case, what is at stake is the principle of equality, which played a significant, albeit constrained, role in scholastic social thought.

When we think about the practical implications of a moral ideal such as equality, we tend to assume that these can somehow be derived from the ideal itself, if not through strict deduction, then through some process of

11 Albert the Great, De Bono 5.1.2; Aquinas uses similar language in his often-cited remarks on the natural law in the Summa Theologiae 1–2.94.2.
12 Aronovitch, ‘Reflective Equilibrium or Evolving Tradition?’, p. 408.
making explicit what is implicit in it. But even if this assumption is sometimes justified, it is not completely accurate in this case. The scholastics did not just develop the ideal of natural equality from – so to speak – the top down. They also elaborated the practical meaning of this ideal in and through a process of reflection and reform directed towards the central institutions of their society, particularly marriage and religious life. These reforms were not driven by considerations of equality taken alone, although such considerations did play some role; rather, they reflected a complex variety of theological commitments, taken together with other ideological and practical concerns. But as these institutions were transformed, they tended to be rationalized through appeals to an ideal of equality, and by the same token, they became themselves part of the concrete meaning of equality as a social norm. As such, they helped to shape a complex practical norm of equality which was intelligible in terms of a basic ideal, but which also incorporated theological considerations (among others) which the norm of equality analyzed in abstraction would not necessarily have generated.

The first of these has to do with the reforms of marriage that began in the late eleventh century and continued throughout the period we are considering. Initially, these reforms appear to have been motivated by a growing conviction that marriage is a true sacrament, which ought to be under the control of the church. Probably they were also given impetus by the desire of church leaders to secure their independence from the extended families that dominated much of European society at that time. These reforms were resisted, as we would expect, yet they were remarkably successful, so much so that by the end of the period we are considering, marriage was almost entirely governed by ecclesiastical law.

In order to defend and implement these reforms, scholastic canon lawyers developed an analysis of marriage on the basis of which valid marriages could be distinguished from invalid unions and conflicts among spouses and other interested parties could be adjudicated. Perhaps the most important aspect of this analysis is its appropriation of the Roman doctrine that consent makes marriage. We find two main schools of thought on this issue among scholastic canonists and theologians. According to the first of these, which traces back to Gratian, the legal validity of marriage requires

13 For a comprehensive history of these reforms, see James A. Brundage, Law, Sex, and Christian Society in Medieval Europe (Chicago: The University of Chicago Press, 1987), pp. 176–486.

14 For an extensive discussion of the different positions on the requirements for the validity of a marriage, see ibid., pp. 235–42 (on Gratian’s view), 256–78 (on Peter Lombard and his followers), and 333–8, 430–43 on subsequent developments.
both the consent of the partners, and sexual intercourse. However, this view raised difficulties, not least the theological difficulty that it calls into question the legitimacy of the marriage between Mary and Joseph. These difficulties led a growing number of canonists and theologians in the later twelfth and thirteenth centuries to adopt a variant of the view taken by Peter Lombard, that the validity of marriage depends solely on the consent of the two parties.

Although this doctrine seems to have been motivated largely (if not exclusively) by rather abstruse theological considerations, it had an immediate and far-reaching practical effect – namely, to remove almost all restraints on the freedom of two individuals to marry. If the existence of a marriage depends solely on the consent of the two parties involved, then not only is the formation of marriages taken out of the control of the families of the two parties, it is taken out of the direct control of the church as well. On this view, even a secret agreement between two parties, concluded without benefit of church ceremony, establishes a valid marriage that can claim ecclesiastical protection. Secret marriages were condemned as illicit, but the validity of secret marriages was nonetheless recognized and enforced throughout this period.

Now here is a telling point. This doctrine of consent was not derived in the first instance from reflection on an ideal of equality; to a large extent, it was generated by theological concerns which from our standpoint are likely to seem marginal at best. Yet once it was in place, this doctrine laid the foundations for a highly significant development of the more general ideal of natural equality. The doctrine that the mutual consent of a couple is sufficient to establish a valid marriage functioned as a powerful safeguard for the right to marry; as such, it opened up a space in which people could act freely in a matter of fundamental importance, whatever their place in a social hierarchy. This implication, in turn, was made explicit by direct assertions of the rights of those in a state of servitude to marry, as we find in Gratian’s Decretum. Although this view was contested, it was subsequently incorporated into church law in 1155 by a decree of Pope Hadrian IV, Dignum est, which unequivocally affirmed the right of unfree persons to

15 Michael Sheehan suggests that the doctrine that consent makes marriage was in fact adopted as a safeguard for the right of unfree persons to marry, which would imply that this view was attractive in part because of its consistency with wider commitments to equality. Even if this is the case, however, my point is that this doctrine was not derived from, or justified on the grounds of, the commitment to equality. See Michael M. Sheehan, CSB, ‘Theory and Practice: Marriage of the Unfree and the Poor in Medieval Society’, Mediaeval Studies 50 (1988), pp. 457–87.
16 Gratian, Decretum, C.29, q.2.
marry without the approval of their masters.\textsuperscript{17} Near the end of the period we are considering, Aquinas explicitly grounds the right to marry in an appeal to natural equality. Because all persons are equal with respect to the possession and exercise of sexual capacities, he explains, these capacities comprise a natural constraint on the obligations of obedience that one person can place on another. For this reason, no one can be forced either to marry at all, or to foreswear marriage.\textsuperscript{18}

Let me turn to a second example of the way in which the concrete development of equality was shaped by specifically theological considerations. As is well known, St Francis’s vision for the community that grew up around him included an ideal of absolute poverty, which carried connotations of humility and surrender of power as well as asceticism. In order to be put into effect, this ideal required a distinction between the possession of material goods and their use, since to renounce the latter would have been suicidal. While the Franciscans made use of what they needed to sustain their life and work, the ownership of these goods was left in the hands of a patron, or of the church itself. As the Franciscan ideal of radical poverty came under attack, this distinction was likewise increasingly called into question.\textsuperscript{19}

At first glance, this may seem to be a purely parochial argument. However, it had far-reaching social implications, because the Franciscan defense of their ideal of poverty had the effect, probably unintentional, of reinforcing tendencies towards social mobility and greater equality within society as a whole. The Franciscans defend their position (in part) by claiming that through their renunciation of ownership, they are simply recapturing the way of life appropriate to the natural human being. Understood in this way, the Franciscan ideal of radical poverty can be construed as

\textsuperscript{17} On this and subsequent church legislation on the marriage of unfree persons, see Antonia Bocarius Sahaydachcy, ‘The Marriage of Unfree Persons: Twelfth Century Decretals and Letters’, in De Jure Canonico Medii: Festschrift fur Rudolf Weigand, Studia Gratiana 27 (1996), pp. 483–506. As Sahaydachcy goes on to show, Dignum est was subsequently challenged, but the popes consistently upheld the validity of the marriages of unfree persons.

\textsuperscript{18} Aquinas, Summa Theologiae 2–2.104.5.

an effort to live in accordance with the primeval natural law, as Bonaventure explains:

Nature itself, whether as originally constituted or as lapsed, provides this way [the counsel of poverty] in a distinctive fashion. For the human person was made naked, and if he had remained in that state [that is, unfallen], he would not have appropriated anything at all to himself; and indeed, the human person as fallen is born naked, and dies naked. And therefore this is the most upright way, that, not turning away from the limit to which nature is able to endure, one goes about poor and naked.20

On a first reading, Bonaventure’s claim here is likely to strike us as a piece of naive naturalism. But seen in context of the debate in which he is engaged, his remarks take on another complexion. What we have here, I believe, is a deliberate, theologically informed construal of the natural that serves to highlight the conventional status of possessions, rank and power, and, in short, all the accouterments of culture that keep some in a position of subordination to others. Bonaventure does not intend by this to deny the legitimacy of culture, as his remarks elsewhere in this treatise indicate; he is simply clearing a space, as it were, for asserting the legitimacy of an alternative way of life. But in the process of doing so, he underscores the conventional status and therefore the contingency of relations of social inequality.

Thus, the implications of the Franciscan defense of poverty went well beyond the internal affairs of a particular mendicant order. To quote Richard Tuck, ‘if it was possible for some men to live in an innocent way, then it should be possible for all men to do so’.21 The full implications of the Franciscan ideal may not have been apparent during the thirteenth century, but they became clearer as debates over this ideal developed in the fourteenth. We hear further echoes of the Franciscan ideal in the radical English revolution of the seventeenth century; consider these words of William Everard, Gerard Winstanley and other leaders of the so-called Diggers, writing in 1649:

In the beginning of time, the great Creator, Reason, made the earth to be a common treasury . . . For man had dominion given to him over the beasts, birds, and fishes. But not one word was spoken in the beginning, that one branch of mankind should rule over another . . . But since human flesh . . . began to delight himself in the objects of

20 Bonaventure, Quaestiones disputatae de perfectione evangelica 2.1.
21 Tuck, Natural Rights Theories, p. 22.
the creation more than in the Spirit Reason and Righteousness... then
he fell into blindness of mind and weakness of heart...

And hereupon the earth, which was made to be a common treasury
of relief for all, both beasts and men, was hedged into enclosures by the
teachers and rulers, and the others were made servants and slaves. And
that earth that is within this creation made a common storehouse for all,
is bought and sold and kept in the hands of a few; whereby the great
Creator is mightily dishonored; as if he were a respecter of persons,
delighting in the comfortable livelihood of some, and rejoicing in the
miserable poverty and straits of others. From the beginning it was not
so...²²

By now, of course, we have come to the modern period. Let me turn to a
brief consideration of what happens to the natural law tradition at this
point.

The more radical thinkers in the English civil war are not usually
considered as figures in the natural law tradition, or indeed as participants
in the development of modern moral thought. Yet in spite of their strange-
ness – perhaps because of it – they foreshadow the development of the
natural law tradition in the modern period. Consider the passage I have just
quoted. On the one hand, we hear the distinctive voice of the scholastics
here, not only in the affirmation of a renunciation of ownership, but also in
the repetition of such medieval commonplaces as ‘the earth is a common
treasury’. On the other hand, the scholastic account of the natural law is
reconfigured as a deliverance of reason – even though it is also presented,
correctly, as a scriptural doctrine!

This pattern recurs throughout the more sober writings of the modern
natural lawyers. On the one hand, most of these authors identify themselves
explicitly as Christian thinkers, and present their moral and political
writings as efforts to draw out the implications of Christian thought for the
changing social conditions of their time. Let me offer a few examples:

Near the middle of Leviathan, Thomas Hobbes declares that ‘I have
derived the Rights of Sovereign power and the duty of subjects hitherto,
from the Principle of Nature only... But in that I am next to handle, which
is the Nature and Rights of a Christian Commonwealth, whereof there
depends much upon supernatural revelations of the will of God, the
grounds of my discourse must be, not only the Natural word of God, but

²² William Everard, Gerrard Winstanley et al., The True Levellers’ Standard Advanced (1649),
excerpted in The Puritan Revolution: A Documentary History, ed. Stuart E. Prall (New York:
also the Prophetical.'23 He then goes on to make his claim good through an extended exegetical display of the scriptural grounds for a Christian political theory, which will extend and complete his general account of the natural law. Similarly, John Locke's natural law theory as set forth in the Second Treatise of Government is preceded by a First Treatise which argues through extensive scriptural exegesis that kings do not have an unlimited right of dominion over their subjects.24 For a third example, consider Hugo Grotius, who after his famous remark that the natural law would have force even if God did not exist, immediately goes on to say that 'Hence it follows that we must without exception render obedience to God as our Creator, to Whom we owe all that we are and have; especially since in manifold ways, He has shown Himself supremely good and supremely powerful, so that to those who obey Him he is able to give supremely great rewards, even rewards that are eternal, since He himself is eternal'.25

There is some tendency to view these and similar remarks as insincere or self-protective posturing. I see no reason to regard them as such, but even if they were, that would not affect the point I am trying to make — that in the public discourse of the early modern period, there was no apparent incongruity between natural law and theological arguments; rather, these were seen as reinforcing and extending one another.

Nonetheless, there is a fundamental difference between modern natural law thinkers and their medieval forbears. It is signaled by Hobbes's remark that 'I have derived the rights of sovereign power . . . from the principle of nature only', as well as by Locke's way of structuring his two treatises and Grotius's claim that God's authority confirms what reason independently establishes.26 In each case, what is operative is a particular account of reason and revelation, according to which these are two mutually compatible, complementary, but ultimately distinct sources for moral knowledge.

26 Locke follows his exegetical First Treatise with a philosophically argued Second Treatise on political authority, published as pp. 299–478 in the Laslett edn (see n. 24 above); for Grotius's often-cited claim that the laws of nature can be derived from reason alone, and would therefore hold even if God did not exist, see Schneewind (ed.), Moral Philosophy, p. 92.
Reason does its work, and then revelation steps in to confirm, correct and supplement the moral code first generated by reason.

Here again, we see an innovative reading of a tradition being framed in traditional language, and so it is worth underscoring that this is an innovation. The scholastics had also said that the natural law is a product of reason. Yet at the same time, they interpreted reason itself in theological, and ultimately scriptural, terms. That is why they did not hesitate to draw on scripture as well as rational argument in order to determine the concrete content of the natural law, and it is also why they did not attempt to derive a system of natural law thinking out of purely natural data or rationally self-evident intuitions.

In contrast, the modern natural lawyers attempted to do precisely that. Now for the first time we see the emergence of the ideal of a genuine scientific knowledge of morality, which in the words of Samuel Pufendorf 'rests entirely upon grounds so secure, that from it can be deduced genuine demonstrations which are capable of producing a solid science. So certainly can its conclusions be derived from distinct principles, that no further ground is left for doubt.'

Note that by now, the natural law has come to be seen as primarily a set of specific rules that can be derived with certainty from first principles. This further separates the modern appropriation of the natural law tradition from its medieval version, since now the universality of the natural law is recast as a universality of scientific norms, not the universality of a human capacity.

It would take us too far afield to examine in detail the social and intellectual factors leading to the modern recasting of the natural law tradition. The question it raises for us is, what are we make of it? Did the modern natural lawyers succeed in freeing the natural law from its theological presuppositions by clearly displaying the rational justification for what had heretofore been defended in a confused fashion on theological grounds? Or was the modern reformulation of the natural law itself a confused attempt to defend theologically distinctive claims through supposedly universally valid rational arguments? One’s views on the status of the natural law will turn on the answers to these questions.

I think it is fair to say that most defenders of the natural law today would claim that the modern natural lawyers were essentially right, at least in their basic aspirations. That is, most contemporary natural law theorists would agree that it is possible to establish a natural law morality through rational reflection alone, without any necessary reference to particular religious or

other traditional beliefs. Seen from this perspective, the scholastic account of the natural law would appear as an early, relatively unsophisticated presentation of principles that can be formulated and defended on rational (which is to say non-theological) grounds. Hence, the story of the natural law tradition is basically a story of more or less steady progress from obscurity to clarity, and—what comes to the same thing, on this view—from tradition-bound reflection to rational theory.

I would disagree with this view on a number of grounds, but most fundamentally, I would tell the story of reflection on the natural law in a different way. As I see it, modern natural law theorists, for all their very considerable merits, were unclear about one fundamental point. That is, they were not clear whether their basic commitments were religious or purely rational in origin. In fact, I don’t think the medieval scholastics were fully clear on this point either. But this ambiguity had a greater impact on modern thought, precisely because the moderns had a greater stake in presenting the natural law as a comprehensive, definitive and rationally compelling system of specific rules. Hence, they regarded these basic principles as natural or rational givens, and seen from this perspective, the specifically theological origins of these principles receded from view.

The issue in question might be formulated as follows: Does the history of reflection on the natural law reflect the development of a moral theory that can be justified on rational grounds, without reference to specific theological commitments, or other socially specific claims? Or does this history reflect the development of an account of morality that depends in some integral way (not necessarily in every respect) on theological or other particular commitments? Most defenders of the natural law would take the former view, whereas I am arguing for the latter view.

This is one of those disputes that cannot be conclusively settled through an examination of the historical evidence, because it is precisely a dispute over the way in which that historical evidence is to be evaluated. It is not difficult to trace the lines of development within the natural law tradition, but how are these to be evaluated? For example, when Gratian begins his Decretum by asserting that the natural law is found in both the OT and the NT, is this a regrettable confusion, an early stage on the way to Thomistic clarity, or is it a concise statement of a distinctively scriptural approach to the natural law? By the same token, is Pufendorf’s claim that the natural law can be formulated as a ‘solid science’ an articulation of a valuable ideal, or an expression of a regrettable and impoverishing confusion? These

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28 The idea of an evaluative history has many antecedents, but I am taking it from Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1984, 2nd edn); see in particular pp. 1–5 and 265–72. The claim that Gratian is a confused
questions cannot be answered without some assessment of the relevant arguments. As is so often the case, in order to write the history of the natural law one has to be, at least provisionally, something of a natural lawyer.

Yet the history of natural law reflection can at least suggest that one interpretation of the natural law is more plausible than another. To turn to the issue at hand, it will always be possible to argue that the history of natural law reflection consists in a sometimes confused yet progressive development of a universally valid theory of morality. The specific moral claims embodied in that reflection can almost always be construed as expressions of more universal principles, provided that one is prepared to move one’s analysis to a sufficiently high level of abstraction. Appeals to particular warrants, for example scripture, can be construed as early and confused efforts to establish what is later put on more solid rational foundations, or else they can be taken to illustrate the point that we sometimes arrive at valid conclusions by means of dubious and adventitious arguments. Yet the more closely we examine the development of natural law reflection in its rich particularity, the less plausible this kind of reductive analysis appears to be.

To offer just one example, I would argue that the ideal of equality as it has been appropriated within Europe and its former colonies has been decisively shaped by its development within a distinctively Christian construal of the natural law. Of course, this ideal is not Christian in origin, nor is it limited to historically Christian societies. But neither is it universal, in the sense of emerging in every known culture — there seems to be no such ideal in classical Hinduism, for example. More importantly, the specific meaning of the ideal of equality in our society has been fundamentally and irretrievably shaped by theological considerations. The idea that respect for equality is fundamentally tied to respect for the body, and for those intimacies in which we are all most similar to one another, can be traced to the medieval development of norms of sexual equality with respect to marriage; these norms, in turn, are themselves not just expressions of a predecessor to Aquinas, and that the modern natural lawyers represent a regrettable decline from him, are both taken from Michael Crowe, The Changing Profile of the Natural Law (The Hague: Martinus Nijhoff, 1977), pp. 75 and 223–45. Although I am in general agreement with Crowe’s assessment of the modern natural law, it will be apparent that I do not share his generally dim view of Gratian and Aquinas’s other predecessors.

general commitment to equality, but have also been shaped by what appear to us to be adventitious theological considerations. In the same way, the idea that equal regard should in some way discount differences in status and power owes its origins, at least in part, to the Franciscan ideal of a human society in which we are all ‘poor and naked’, stripped of possessions, prerogatives, and all the social markers of our place in a hierarchy of power. These ideas are so familiar to us that we are likely to take them for granted, to assume that they are self-evident, and to forget their historically specific origins. It is on just such an assumption that the modern ideal of a purely rational natural law depends for its plausibility — its ultimately specious plausibility.

In contemporary discussions of the natural law and related issues, for example the existence or otherwise of a universally valid morality, we have an unfortunate tendency to set up sharp dichotomies. Either we can develop a specific moral system out of the givens of human nature or the deliverances of practical reason, or we have nothing but moralities, that is, purely contingent codes of conduct. Either we can establish a purely Christian morality grounded in the distinctive narratives of our tradition, or we must fall back on the universally valid morality of the Enlightenment. Given such dichotomies, it might appear that if the natural law tradition is in some irreducible way a theological tradition, then it can offer no opening to dialogue with those whose traditions are different. Any contemporary Christian ethic based on a retrieval of this tradition would necessarily be sectarian, with nothing to offer to public discourse in our pluralistic society.

Yet the history that we have just been tracing indicates that matters are more complex than these dichotomies would suggest. The tradition of the natural law is not a distinctively Christian tradition, if only because it is clearly pre-Christian in its origins. Yet it is adopted by early Christian thinkers for specifically theological reasons, and transformed by this appropriation into a distinctively Christian doctrine. The subsequent history of this tradition complicates the picture still further, because in the later modern period, it does begin to be understood and promoted as a purely rationalistic morality. Still later, it begins to be understood as a rationalistic tradition that happens to be, as it were, in the guardianship of a religious tradition — and that leads to a further complexity, that the natural law tradition is pressed into service as a point of entry into public discourse for religious, specifically Catholic, voices.

By the same token, the natural law tradition does reflect a genuinely reasonable reflection on real tendencies of human nature — or so I would argue. Yet at the same time, it rests on a selective construal of human nature, according to which some aspects of that nature are given great
normative weight, while others are de-emphasized or even discouraged. Similarly, it is a reasonable morality, but reason should be seen as operating within parameters set by this theological construal of what is normative in human nature. Hence, while this tradition cannot be said to generate a universally valid morality that would be recognized as such by all rational persons, neither is it so fundamentally tradition-bound as to be unintelligible to those in other traditions. Because it is grounded in a construal of our shared humanity, and shaped by genuine, albeit contextualized, moral reasoning, we have every reason to expect it to be intelligible even to those whose religious and cultural traditions are quite different from our own. And of course, within our own culture the natural law tradition has deeply shaped our common morality, even though it has long been explicitly repudiated by most moral philosophers. (Parenthetically, the idea of a purely Christian morality, which is self-contained, self-justifying and unintelligible to everyone else, seems to me to be as unrealistic as the Enlightenment ideal of a universal morality that is its mirror image.)

Hence, even though the natural law is a historically specific tradition of inquiry, it does offer points of entree into public discourse, both in our own society and in the wider forum of the world community. It does not offer us a universally valid morality, or even a systematic program for moral inquiry. Nonetheless, it does offer us starting points for dialogue, together with a set of moral ideals to which we are committed, and which we can offer to others as attractive and persuasive ideals.

This brings me to what must be my final point. This interpretation of the natural law tradition implies that some of the central social ideals of our culture, particularly the ideal of equality, bear ineradicable traces of theological reflection. This view is likely to be resisted from two opposite directions – by those who are committed to the ideal of a purely secular society, and by those who see contemporary secular society as fundamentally at odds with Christian values. My response to both sets of interlocutors is simply this, that historically this view cannot be sustained. While there is plenty of room for dispute over details, the profound influence of Christian thought on what we think of as secular liberalism is undeniable.

What are we to make of this? In The Desire of the Nations, Oliver O’Donovan observes that the idea of Christendom, that is to say, ‘the idea of a professedly Christian secular political order’, must be seen in the context of the church’s understanding of its mission to the world. He adds:

The church is not at liberty to withdraw from mission; nor may it undertake its mission without confident hope of success. It was the missionary imperative that compelled the church to take the conversion of the empire seriously and to seize the opportunities it offered. These were not merely opportunities for power. They were opportunities for preaching the gospel, baptizing believers, curbing the violence and cruelty of empire, and, perhaps most important of all, forgiving their former persecutors.  

My point in quoting this passage is not to advocate a return to ‘the Christendom idea’, nor is that O’Donovan’s own point. But I would claim that the Christian appropriation of the natural law tradition developed within the context of this idea, and as such it reflects the missionary impulse that O’Donovan identifies. By the same token, we as Christians still have a stake in defending this tradition as a part of that same missionary impulse – which is still a part of the mission of the church, although it now takes different forms. The natural law tradition offers one way of articulating a Christian vision of the moral life, and as such it has much to offer us in our efforts to understand and proclaim the gospel anew.

[31 Ibid., p. 212.]