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J.C. Murray and the Natural Law: Comments on a paper by Professor Thomas Berg

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Who's Responsible for the Natural Law? Comments on Thomas Berg's "John Courtney Murray and Reinhold Niebuhr: Natural Law and Christian Realism"

Patrick McKinley Brennan

People say the darnedest things. But who said the following thing: "God applies the natural law"?¹ Not Charles Darwin; not Oliver Wendell Holmes, Jr.; not Harold Laski; not even Richard Posner. Who said it? Associate Justice Antonin Scalia of the United State Supreme Court, in connection with the lecture he gave at the Gregorianum in 1996. There is no surprise in Justice Scalia's disqualifying the judge from being a front-line implementer of the natural law, but, even assuming that Justice Scalia spoke somewhat facetiously at the Greg, are we not shocked to hear that God, not man, implements the natural law? It is, after all, the law of our given natures, which it is ours freely to realize; or so the tradition has taught. The question I would pose is how we reached such a state affairs, a state of affairs in which the rational creature imputes to God completion of the work with which God charged the creature by nature and with grace. Neither Father John Courtney Murray, S.J., nor Reinhold Niebuhr went so far.

I would begin by making an important distinction that, as John Finnis has observed, is frequently overlooked. The natural law is one thing; theories of the natural law are another.² But whatever the difficulties of constructing theories of natural law, and history shows them to be estimable, and whatever the possible sources of error in trying to know the natural law, and again history shows them to be perennially estimable—the consequences—or, at least, the *natural* consequences—of

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¹ Associate Justice Antonin Scalia, The Common Christian Good, Speech at the Gregorianum University Law Symposium on The Left, Right, and the Common Good (June 13, 1996), <http://www.learnedhand.com/scalia.htm>.

² JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 18-19 (1980).

our failures to get the natural law right are these, as captured by Jacques Maritain:

Men know [the natural law] with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere. . . . That every sort of error and deviation is possible proves in the determination [of what the natural law requires] merely proves that our sight is weak and that innumerable accidents can corrupt our judgment. . . . All this proves nothing against natural law, any more than a mistake in addition proves anything against arithmetic. . . .³

The failure to implement the natural law is a failure to become in fact what we already are in essence; to fail to fulfill the law God naturally promulgates in us is to render ourselves what we should not be. God may apply a supernatural balm to our natural failures (as by forgiveness, excuse, or *meritum de congruo*), but the failure to fulfill the natural law is not just a forensic event: it is an ontic shortcoming or harm.

Sound theories of the natural law can help us recognize the natural law so that we can give it (prudent) effect in our living; ill-conceived theories of the natural law, by contrast, can have the unintended consequence of not only (fatally) misleading us as to particulars, but also of convincing some folks to throw out the baby with the bath water. In some of the passages quoted by Professor Berg, Niebuhr is reacting against a decadent version of natural law theorizing, the one associated with the Latin manuals of theology that, for all their forgotten greatness, do sometimes seem to owe more to geometry than they do to human nature and our participation by way of the natural law in the eternal law that is God's dynamic providence. Is Murray guilty of this sort of natural law theorizing? Overall and at the end of the day, almost certainly not; but sometimes Murray offered a version of natural law that sounds disarmingly (or alarmingly, depending on one's perspective) rationalist, more in the model of Spinoza than of St. Thomas.⁴

But there is another Murray: the Murray whose natural law owes more than a little to Bernard Lonergan and, particularly, his notion of "historical consciousness" or "historical mindedness." This notion Lonergan, and with him Murray, contrasts with "classicism" or "classical mindedness." This is the Murray who was committed to ferreting out

³ JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW*, 63 (Doris C. Anson trans, 1971).

⁴ See e.g., John Courtney Murray, *Freedom of Religion I: The Ethical Problem*, 6 THEOLOGICAL STUDIES 229, 229-86 (1945).

and judging emergent insights, and, more broadly, to what J. Leon Hooper calls, in discussing Murray's appropriation of Lonergan, "the contingent nature of all historical judgments or affirmations. . . ."⁵ Lonergan in 1966 sent Murray a requested copy of his paper "The Transition from a Classicist World View to Historical Mindedness,"⁶ but already in the immediately preceding years the two Jesuits had corresponded on this topic of concern to Lonergan. This was a topic on which the two were corresponding right up to the moment of Murray's untimely death.⁷ It may well be, as John Finnis argued in his Gilson Lecture of 1992, that Lonergan underappreciated the extent to which the tradition was *in fact* historically conscious, aware that not logic but dynamic inquiry drives doctrine and its development.⁸ But Lonergan, and with him Murray, does break out into a mode of inquiry and justification that is not captured at all in the notions of natural law caricatured and rejected by Niebuhr. Robin Love is no doubt right that Niebuhr would have been surprised by certain Catholics' approach to ethics after Vatican II. But already in 1960 Murray was no ahistorical rationalist (as concerns the natural law).⁹

Murray sometimes echoed the tradition caricatured by Niebuhr; other times, particularly in connection with reading the signs of the times as to religious liberty, Murray seems to have embraced Lonergan's transposition of the tradition, though occasionally he seems to go, without benefit of argument, beyond where Lonergan would have thought possible.¹⁰ In any event, the question posed by Professor Berg is less about Murray (or Niebuhr), and more about what we can learn about the

⁵ J. LEON HOOPER, *THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY* 139 (1986).

⁶ Bernard Lonergan, *The Transition from a Classicist World View to Historical Mindedness*, in BERNARD LONERGAN, *A SECOND COLLECTION*, 1 (William F.J. Ryan & Bernard J. Tyrell, eds., 1974).

⁷ See HOOPER, *supra* note 5, at 125.

⁸ John Finnis, The Etienne Gilson Lecture, 'Historical Consciousness' and Theological Foundations (1992).

⁹ See JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 320-32 (1960).

¹⁰ See, e.g., *id.* at 248 n.19. For an encapsulation of the series of conceptions of the natural law Murray advanced, see J. Leon Hooper, S.J., *Theological Sources of John Courtney Murray's Ethics*, 57 *THEOLOGICAL STUDIES* 19, 32 n.40 (1996) ("Finally, by 1964 natural law has become a set of affirmations that 'emerge' from particular historical societies as an 'intention of nature' or a 'dictate of reason.'"). For a statement of Lonergan's mature position on the natural law, see Michael Novak, *Bernard Lonergan: A New Approach to Natural Law*, in 41 *PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION: THE NATURE OF PHILOSOPHICAL INQUIRY*, 246-49 (George F. McClean & Valerie Voorhies, eds. 1967).

natural law. Will the real natural law please stand up? We miss it at our individual and collective peril. The burdens on people trying to work out natural law as understood by Lonergan and sometimes Murray are not those that befall a geometer. Professor Berg quotes Murray as saying that “experience” is the most powerful argument; but Murray should have gone on to say, with Lonergan, that experience is a start, and only correct interpretation and judgment, followed by consistent action, are sufficient; and those additional acts of correct interpretation and judgment are a contingent human achievement in a way that brute experience simply is not.¹¹ To perform these acts properly (or even adequately) requires nothing short of what Lonergan calls conversion.¹² Though Lonergan intends that term in a sense broader than the usual one, the reader can be certain that ‘conversion’ is not a word that Murray would have deployed in *We Hold These Truths*. Without conversion, however, knowledge of the natural law tends to escape us; or at least that was Lonergan’s view.

And this brings me back to where I started. Part of the reason Justice Scalia leaves the natural law to God, I think, is that he’s even less sanguine than Lonergan was about whether we can get it right. But where Scalia goes wrong, I submit, is in thinking that there is an available alternative: as Maritain reminds, we run the risk of error here as elsewhere, and not trying only assures failure. Professor Berg’s is a salutary reminder that we should marshal the best resources we have, and the convergence on a critical realist natural law may be just that, though our best resources may also include, if not our personal conversions, then at least our theology. I myself am increasingly of the view that moral philosophy, in order to be *effective* as concerns human living, must be (as Maritain says) “subalternated” to theology.¹³

I should conclude here by noting a related aspect of this problem as it dogs Murray and, I fear, dooms liberalism and, at least in the long run,

¹¹ For a careful exposition of Lonergan’s gnoseology, see JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN’S PHILOSOPHY* (1997).

¹² BERNARD LONERGAN, *METHOD IN THEOLOGY*, 107, 130-31, 338 (1972).

¹³ On Maritain, see Patrick McKinley Brennan, *Jacques Maritain: Philosopher of Law, Politics, and All That Is*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* (John Witte Jr. & Frank S. Alexander eds. 2006), 75, 105. For an account of the natural law that stresses both natural law’s promulgation by God and the historically-and communally-mediated mode by which we come to know that law and then give it to ourselves, see PAMELA HALL, *NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS*, 23-44 (1994).

those who live under it.¹⁴ The frequent co-traveler of the right to religious liberty is indifferentism. With the *cura religionis* rusticated, the always-fragile psychic resources necessary to keep people searching for and living by the truth are increasingly scarce. And might they even be forbidden? In 1941 Niebuhr opined that “no toleration is possible without a measure of provisional skepticism about the truth we hold.”¹⁵ Does a required *principled* provisional skepticism about the truth we hold disable the body politic from implementing the natural law as we discover it? It at least takes the wind out of the collective sail. Perhaps God does in fact implement the natural law, but that’s a memo I did not receive.

¹⁴ See generally Frederick G. Lawrence, *Murray and the Ambiguities of Liberalism*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION (J. Leon Hooper, S.J., & Todd Davit Whitmore eds., 1996).

¹⁵ REINHOLD NIEBUHR, 2 THE NATURE AND DESTINY OF MAN, 239 (1941).