Common Truths

New Perspectives on
Natural Law

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Chapter 5
Theories of Natural Law in the Culture of Advanced Modernity

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Ours is a culture dominated by experts, experts who profess to assist the rest of us, but who often instead make us their victims. Among those experts by whom we are often victimized the most notable are perhaps the lawyers. If you as a plain person take yourself to be wronged and you wish to achieve redress, or if you are falsely accused and you wish to avoid unjust punishment, or if you need to negotiate some agreement with others in order to launch some enterprise, you will characteristically find yourself compelled to put yourself into the hands of lawyers—lawyers who will proceed to represent you by words that are often not in fact yours, who will utter in your name documents that it would never have occurred to you to utter, and who will behave osten-
sibly on your behalf in ways that may well be repugnant to you, so guiding you through processes whose complexity seems to have as a central function to make it impossible for plain persons to do without lawyers.

Plain persons, that is to say, can only hope to learn what the content of our law is from those who have undergone a specialized professional training. Plain persons are thereby made recurrently dependent upon lawyers and, if their interests in what the fundamental content of law is are more theoretical, upon professors of law. The thought that, instead, professors of law and lawyers need to learn what the fundamental content of law is from plain persons and that all plain persons—even including lawyers and professors of law, insofar as they remain plain persons—have within themselves the capacity to understand and to recognize what the fundamental content of law is (a resource more basic than anything that can be taught at any law school) is a thought that is alien to everything dominant and fashionable in our contemporary culture. But just this thought is central to older conceptions of natural law and especially to the conception that modern Thomists inherit from Aquinas.

On this Thomistic view, we all of us—except in certain exceptional, albeit very important, types of situations—know what the fundamental precepts of the natural law are and that they are true: that it is true that we ought not to take innocent life, that we ought to tell the truth and to keep promises, that we ought to respect the property of others, although not quite unconditionally, and so on. We also all know, on this Thomistic view, that all positive laws that conform to what reason requires by way of justice—

and only laws that conform to reason and justice are genuine laws—either give expression to these precepts or provide for their application to a variety of concrete situations. We as plain persons know, on a Thomistic view, what must seem a surprising amount.

Yet this is not all. It is not just that exponents of these conceptions of natural law claim that plain persons all have within themselves an authoritative knowledge of the content of law. They also claim that plain persons are all in agreement as to the fundamentals of law and morals. But no fact seems to be plainer in the modern world than the extent and depth of moral disagreement, often enough disagreement on basic issues. So that once again we find a remarkable difference between how matters are or were conceived by the exponents of these older views of natural law and the beliefs dominant in modern cultures. It follows that we should not expect those older conceptions of natural law to continue to flourish in the modern world. And they do not. What we find instead, for the most part, are very different theories of natural law, theories that have come to terms in greater or lesser degree with cultural modernity.

I am going to argue that these latter theories all fail and that they fail in just those respects in which their adaptation to what is distinctively modern in modern culture is most evident. Such theories propose an understanding of natural law that is in the sharpest contrast to the understanding of it proposed in the high Middle Ages by Aquinas and revived in the last hundred years by his Thomistic followers, most notably by Jacques Maritain. The Thomistic account of natural law which is of course still held by a minority of our contemporaries, including
me is, on the view that I am going to take of it, unlike its modern rivals precisely in that it is on the one hand, as I shall contend, true and, on the other hand, unacceptable by the dominant standards of modernity.

It must at first sight seem paradoxical and even perhaps insulting to suggest that out of a range of rival views on a particular subject-matter, the more nearly one of such views approaches to the truth, the less likely it is to be acceptable to modern persons. And an obvious objection at once arises. If knowledge of natural law is indeed a resource of plain persons, then how can it be the case that anyone at all should reject the precepts of the natural law? Or, to put matters another way, if it is the plain person who is the authority, and if we are all more or less plain persons, then surely the rejection of a particular account of natural law by some significant set of plain persons ought to be sufficient to show that that account is false. These are important questions and any defensible account of natural law will have to provide some adequate way of responding to them. But such a response must come at the end of my inquiry. Where should that inquiry begin? Clearly it should commence with a statement of what I mean by a theory or account of natural law.

Every account of natural law, no matter how minimal, makes at least two claims: first, that our human nature is such that, as rational beings, we cannot but recognize that obedience to some particular set of precepts is required, if we are to achieve our good or goods, a recognition that is primarily expressed in our practice and only secondarily in our explicit formulation of precepts; and, second, that it is at least one central function of any system of law to spell out those precepts and to make them mandatory by providing for their enforcement. But in specifying these claims further, natural law theorists disagree among themselves in important ways. They differ concerning the extent and nature of the claims they make about human nature. They differ in their conceptions of human rationality. They differ consequently as to why it is rational, given our nature, to obey the relevant set of precepts. They differ concerning what those precepts are to which obedience is thus required. And they differ about the function of law.

Let me begin with a distinctively modern theory of natural law, a minimal theory, advanced and defended by that most distinguished of recent legal theorists, H. L. A. Hart (1907–92). Hart was in most respects a legal positivist, and this fact makes it striking that he should have advanced anything even resembling a theory of natural law. For, traditionally, legal positivists have rejected any conception of natural law, and indeed some of the founders of legal positivism, such as Jeremy Bentham and John Austin, made their rejection of natural law central to their theorizing. What then is legal positivism?

A legal positivist distinguishes sharply between questions about what a legal system is and what makes some particular rule a law in some particular legal system, on the one hand, and questions about what it is for a law to be just or unjust, on the other. What makes a law a law in a particular system is no more than that it has been enacted by an appropriate authority. The question of whether a particular rule is or is not a law is then a quite different question from that of whether it would be just
or unjust to enforce that same rule. Justice is one thing, legality another. Traditional natural law theorists, including Aquinas, had argued that a certain conformity to justice is a necessary condition of any rule or precept being genuinely a law. Such theorists had looked back to Aristotle, who had argued that in any legal system we can distinguish between that which is natural, that is, binding upon all human beings as human beings, and that which is merely conventional, local and peculiar to this or that particular legal system, binding only those under its authority. They had also followed Aristotle in recognizing the authority of unwritten laws, that is, of laws not acknowledged within some particular legal system by having been enacted, but nonetheless binding upon human beings. Legal positivists are of course committed to denying that there can be such unwritten laws, and it might well seem that all legal positivists would have to deny any distinction whatsoever between the natural and the conventional. But matters are a little more complicated than this, as Hart’s theory of natural law demonstrates.

In his book *The Concept of Law*, Hart developed a thesis deriving from Hobbes and Hume, according to which it is certain very general features of nature and of our human nature that make law necessary and that determine a minimal function for any legal system. It is a fact about the nature of human beings that they seek to preserve their own lives, and it is also a fact that they are limited in their regard for others, that they are limited in their own strength of will, and that they are as individuals roughly equal to each other in natural strength. The resources human beings need are also limited, and we are all more or less vulnerable to harms and dangers arising both from other humans competing for scarce resources and from nature. We therefore need enforceable laws as a protection against violence; we need a power capable of securing social stability; and we need rules that regulate the distribution of resources. Given that human beings have the goal of self-preservation and that their situation is otherwise thus, that systems of law should have this type of content is a matter of “natural necessity,” and not just of convention.

Hart also argued that if there are any moral rights, then there is one natural right, the equal right of all human beings to be free. The details of his argument do not matter so much for our present purposes as do two features of his conclusion. The first is that his claim is a purely conditional one; it does not assert that anyone in fact has any natural rights. The second is that, even if they do possess such a natural right, Hart’s conclusion is consistent with the natural right to freedom being a right only to the most minimal freedom.

There is an important parallel between Hart’s argument concerning natural rights and Hart’s arguments for his particular conception of natural law. In both cases the only premises from which he believes we can argue soundly are such as to deny us any substantive moral content in our conclusions. Just as we are provided with no grounds for believing that there actually are any natural rights, so the function of legal systems, according to Hart’s account of natural law, could be adequately discharged by fundamentally unjust legal systems. All that is required for adequate discharge of function is that some human group should have met its needs for the preservation of
life, for security, and for stability in the distribution of property by instituting a system of law. Such a group could allow its laws to sanction the persecution of minorities or the protection of slavery without those laws falling in any way to discharge their proper function for that particular group. So Hart's theory of the natural function and core content of law does not provide a standard for evaluating legal systems except in terms of their effectiveness or ineffectiveness in certain limited ways.

Hart thus remains a legal positivist in that he separates questions about what the law is for a particular group from questions about how and why it would be just for that group to act in one way rather than another. (We should of course notice that Hart himself was second to none in asserting that laws ought to be in conformity with justice; justice had no better friend than Herbert Hart.) But there are sufficient grounds for rejecting such versions of legal positivism on just this issue, and these grounds also provide a reason for concluding that Hart's theory of natural law is inadequate. What are they? Consider the kind of claim that spokespersons for any particular legal system seem bound to make to those over whom that system claims jurisdiction. Can we in fact realistically imagine such spokespersons saying, "This legal system is entitled to authority over you, but do not expect to receive justice from it" or perhaps "Considerations of justice happen to be irrelevant in this legal system"? Such remarks are of course entirely intelligible, if uttered either by someone criticizing some particular legal system or by some legal theorist, perhaps one making a point in favor of legal positivism. But such remarks would be markedly odd and puzzling, if uttered by official representatives of some particular legal system. I want to suggest that this puzzling character arises from a characteristic of legal systems that we commonly and rightly use to distinguish them from another very different type of system.

We make laws providing penalties for performing certain types of action and for failing to perform others only if and when we believe that there are good reasons, prior to and independent of our lawmaking, for judging it to be good or right that such types of action should be done or left undone. We also believe that those good reasons by themselves provide sufficient grounds for people in general to perform or to refrain from performing the relevant types of action. When by enacting laws we attach penalties to failure to perform or to refrain from performing, we provide additional grounds for those insufficiently motivated by such good reasons because of some deficiency of character. But our assumption is that anyone whose moral character was sufficiently educated would not need the motivation afforded by those additional sanctions for obeying the law.

Contrast with this a situation where either there are no good reasons for those subjected to it to obey the laws, apart from the penalties prescribed by those same laws, or those who make and enforce the laws do not care whether there are such reasons or not. Such a system is by intention and in effect purely coercive. Those who exercise authority in and through it rely exclusively upon and are seen to rely exclusively upon threats of force and the use of force. One example of such a system is the German Government-General of Occupied Poland between 1939 and 1945; another is that enforced by Al Capone during his reign of terror in parts of Chicago. It is
important for theoretical and explanatory as well as moral reasons to distinguish such systems from legal systems. But legal positivists and Hart, insofar as he is a legal positivist, albeit a somewhat atypical one, have in the past ignored the theoretical importance of this distinction.

A contemporary heir of legal positivism, however, need have no difficulty in recognizing the importance of this point; and Neil MacCormick, whose philosophy of law is strongly indebted to Hart’s, has spelled it out in some detail speaking of “the essential moral aspiration of law-giving,” while also continuing to insist that “for moral reasons we should seek to avoid confusing legal and moral issues, and that we should abstain from using the law simply to enforce whatever we hold to be of moral value.” It is worth noting that few, if any, theorists of natural law have held that we should use law “to enforce whatever we hold to be of moral value.” This shift in ground—perhaps only in emphasis—from Hart to MacCormick is highly significant. For if the question of how we are to understand the relationship between law and morality is primarily a moral question, then perhaps it is the case that a theory of natural law need be no more than a theory that first explains how the relationship between law and morality is to be understood from some particular systematic moral standpoint and then provides grounds for ascertaining that standpoint rather than to its rivals. By a systematic moral standpoint I mean not only a set of moral judgments about different types of action, but also a set of philosophical judgments justifying the ascription of authority to the standards to which those moral judgments appeal. Indeed, this type of theory of natural law is now widely current. Consider two very different examples of just such a theory.

For Lloyd L. Weinreb, the relevant understanding of morality is one that focuses on the notion of the personal responsibility of individuals, asking what conditions must be met if someone is to be regarded as a responsible person. His answer begins from the assertion that “rights are specifications of a morally constituted individual,” and he goes on to conclude that “[h]aving his rights, a person is responsible for his actions. But also, a person is not (properly regarded as) responsible unless, with respect to the conduct in question, he has his rights.” What particular rights are recognized within any particular society will depend on a number of factors. But each of us can appeal to those rights whose recognition accords responsibility to persons in arriving at our own “coherent vision of personal freedom.”

Weinreb distinguishes his position from that of legal positivists by arguing that the nature of appeals to rights provides a ground for denying the positivist contention that legal obligation is one thing, moral obligation quite another. We can require of a legal system that it should not disregard the fact “that it is intelligible and correct to regard a person as endowed with rights.” Weinreb takes his theory to be a natural law theory, but he has no illusions about how different his standpoint is from that of many ancient and medieval natural law theorists. He is curtly dismissive of the ontological claims about the foundation of law in nature and human nature advanced either by Greek philosophers or by Christian theologians. And he does not think that a sound theory of rights can
yield an identifiable set of natural rights that can be justly claimed by any rational person. But Weinreb maintains that in appealing to the nature of human beings as responsible persons as the basis for evaluations of legal obligation, he is extending one strand in traditional natural law theory, and it is hence that he derives his claim to be a natural law theorist.

By contrast, Michael S. Moore begins by asserting not only that the “justness of a norm is necessary to [but not sufficient for] its status as law,” or as he puts it elsewhere, that “law cannot be too unjust and still be law,” but also that moral propositions, including propositions about justice, are to be understood in terms of some version of contemporary moral realism. So he says that “moral facts are as factual as any other fact” and that a moral property “not only gives us reason to believe that it exists, like any other property,” but also “gives rational actors an objective reason to act.” Being a moral realist is, in Moore’s view, a necessary condition for being a natural law theorist. Hence all natural law claims would have to be denied, if moral realism were refuted.

Moore then proceeds to discuss the functions that law has. The feature of his discussion to which we need to attend is his conclusion that the purpose and function of particular statutes must be understood consistently with the thesis that “laws must be obligating to be laws” and that laws “must be just to be obligating.” Everything that makes Moore’s thesis a natural law thesis depends on his moral realist claim that there is one true objective account of justice. Moore is well aware that radical disagreements about justice in our culture are persistent, and he never suggests that his version of moral realism can provide the resources for resolving such disputed questions. His claim is only that there is indeed some fact of the matter about which the participants in those disputes are disagreeing. And Moore is also well aware that all versions of moral realism, including his, are regarded as highly debatable within contemporary philosophy.

But this conjunction of moral and philosophical disagreements perhaps creates more of a difficulty for his type of standpoint on natural law than he acknowledges. The difficulty is one that arises equally for Weinreb’s view and for any other view according to which a right understanding of natural law amounts to no more than this, that legal obligation is partially founded on moral obligation and that the relevant set of moral obligations are those upheld by that particular theorist. As to what that relevant set is and as to why it should carry weight in legal matters, this type of theorist is in irresolvable disagreement, not only with other natural law theorists of the same type, but also with a wide range of exponents of rival contemporary moral philosophies.

Why do such disagreements matter? They matter because they deprive appeals to natural law of what was traditionally one of their two central features, features that gave such appeals their distinctive point and purpose. What the natural law was held to provide was a shared and public standard, by appeal to which the claims of particular systems of positive law to the allegiance could be evaluated. But a shared and public standard of this kind must be one that is able to secure widespread, if not universal, rational assent. The other central feature of traditional appeals to natural law is that to which I alluded at the outset, that its appeals are to the judg-
ments of plain persons and not to those of professional specialists. Hence a condition of appeals to natural law not being empty and vain is that they should secure the widespread rational assent of plain persons. The moral views advanced by such theorists as Weinreb and Moore notably fail to secure agreement, not only at the level of philosophy by their fellow theorists, but more importantly at the level of practical judgment by many plain persons.

To this it is open to such contemporary theorists to reply that older, traditional forms of natural law theory failed precisely because they too could no longer secure either philosophical or moral assent, so that contemporary theory of this kind is at least in no worse a condition than traditional theory. This is an important rejoinder, for it suggests the possibility that nothing worth calling a natural law theory may be viable anymore. So how should those of us who regard a substantive conception of natural law as indispensable respond to this damaging suggestion? We have, I believe, only one way to proceed.

No theory of natural law can any longer be regarded as defensible that does not satisfy two conditions, over and above its provision of an account of the content of the natural law and of the kind of authority that its precepts possess. Those two conditions are, first, that it must furnish an adequate explanation of the failure of the natural law to secure widespread assent in some cultures, especially in the cultures of advanced modernity such as our own, and, second, that it must identify the grounds for assent to the precepts of the natural law, which are in fact available to all rational persons, even in our own culture, even if those grounds are in very large part either flouted or ignored.

An acknowledgment of the importance of the first of these two conditions, even if not a fully adequate one, has recently been made by some adherents of another very different contemporary influential theory of natural law, that advanced by Germain Grisez and John Finnis. This theory was originally developed in part as an interpretation of the thought of Aquinas. But its differences from Aquinas's standpoint, especially as that standpoint has been understood by most modern Thomists, are as noteworthy as its resemblances. It does not, for example, rely upon an Aristotelian conception of essential human nature, defining goods in terms of the flourishing of such a nature and of the satisfaction of its various, hierarchically ordered inclinations. Instead it defines integral human fulfillment in terms of respect for and the achievement of a set of basic goods. It does not understand human individuals as essentially parts of larger wholes—of the family and of political community, for example—wholes apart from membership in which the human individual is incomplete. According to the Grisez/Finnis theory, individual goods are not understood in terms of a prior notion of the common good. Instead their theory defines the common good in such a way that the common good is nothing other and nothing more than one aspect of the set of fundamental human goods.\(^{15}\)

The notion of a determinate and well-defined set of basic human goods is thus fundamental to this theory and to its central claim that the goodness of these goods
is evident. No intelligent human being is unable to grasp that these particular goods are goods that are to be valued for their own sake and as final ends. John Finnis has listed them as the goods of life, of knowledge, of play, of aesthetic experience, of sociability (friendship), of practical reasonableness, and of religion. These goods are incommensurable; they cannot be weighed against one another. The precepts that enjoin us to respect and to achieve them are exceptionless in what they prohibit as well as in what they enjoin. How do we know which goods to include in the list of goods? Reflection upon each of them and upon our own relevant experiences will, so it is claimed, show that we could not intelligibly deny them their status as such goods. Inquiry into the empirical findings of anthropology and psychology will confirm that others treat these goods as having just this status; and arguments designed to show that these are not basic goods all fail.

These considerations have not in fact seemed compelling to many critics of Grisez and Finnis. Even less compelling has been the claim that, because these goods are incommensurable and because all of them must be respected, no one of them can ever be sacrificed, or needs to be sacrificed, for the sake of another. To such critics, one reply, proposed by Joseph Boyle, is that the errors of those who deny what Grisez, Finnis, and Boyle take to be evident truths about the basic goods and their incommensurability can in fact be plausibly explained. But it is at this point that their theory needs an important resource that Thomists have inherited from Aquinas: Aquinas’s revised and unified Aristotelian account of human nature and of human flourishing. Grisez, Finnis, and other exponents of their position emphasize that their view—that our knowledge of human goods is not and cannot be derived from our knowledge of human nature, but rather is knowledge of what is self-evident to intelligent persons—does not mean that the goods of which they speak are not fulfilling of human nature. But they do repudiate all arguments of the form: Human nature’s essential and ordered inclinations are such-and-such; the achievement of so-and-so would be the achievement of that to which human nature is inclined and ordered; therefore so-and-so is a good for human nature; and therefore we ought to respect and to achieve so-and-so. Thomists, by contrast, assert what Grisez and Finnis deny, that there are sound arguments of this form, arguments whose conclusions coincide with those uninferrable and evident judgments that, in Aquinas’s view, every rational person makes for himself, judgments concerning the truth of the precepts of the natural law. But of what advantage is it to Thomists that they are able to invoke a revised Aristotelian conception of human nature in support of their natural law claims?

One answer likely to be suggested is that it can be of no advantage at all but only a source of disadvantage. Since this particular conception of human nature is widely rejected in modern culture, to annex to a set of already controversial theses about natural law an even more controversial claim—that human nature is very much what Aristotle and Aquinas said that it is—may seem to make the cause of commending and justifying the Thomist’s view of natural law an even more hopeless one. But this pessimistic response ignores one crucial resource that the Thomist’s account of human nature provides. What that
account does enable us to understand is why, if the Thomist’s view of natural law is true, we should expect that under certain types of circumstance it will be widely rejected. An Aristotelian Thomism has implicit within it a theory of moral and legal error, a theory that explains why what is at one level evident to every plain person may nonetheless be expected to be ignored or flouted by significant numbers of those same plain persons, let alone by legal theorists and moral philosophers.

What then is the Thomistic account of the natural law and how, in a Thomistic view, is that law grounded in human nature? I follow Jacques Maritain’s exposition of it in Man and the State\textsuperscript{19} and La personne et le bien commun.\textsuperscript{20} Two ideas are central to that exposition. The first is that the precepts of the natural law are those rules of reason which a human being obeys, characteristically without explicitly formulating them, when that human being is functioning normally. Natural law, says Maritain, “is the ideal formula of development of a given being.”\textsuperscript{21} When we are functioning normally, we find ourselves inclined in certain directions and toward certain ends. The precepts of the natural law tell us what are or would be deviations from those directions.

The second central idea—like the first, it is primarily Aquinas’s and only secondarily Maritain’s—is that human beings are essentially sociable, that I achieve whatever I achieve as an individual by being and acting as an individual who is bound to others through a variety of familial, social, and political relationships expressed in joint activity aimed at achieving our common good. My good therefore is the good of someone who is a part of an ordered set of social wholes. My own good can only be achieved in and through the achievement of the common good. And the common good is that toward which we are inclined when we are functioning normally and developing as we should be. The precepts of the natural law thus direct us toward the common good.

What then is it to know the natural law, if we are functioning normally and are developing in a way that at least approximates our ideal development? Here I go beyond Maritain, although remaining close to Aquinas, by replying that it is to inquire of ourselves and of each other “What is my good? What is our common good?” and to answer these questions by our actions and our practices as much as by our judgments. The life that expresses our shared human nature is a life of practical inquiry and practical reasoning, and we cannot but presuppose the precepts of the natural law in asking and answering those fundamental questions through our everyday activities and practices. Generally and characteristically, the social relationships through which we are able to learn how to identify our individual and common goods correctly and adequately are those relationships governed and defined by the precepts of the natural law. I have to learn about my good and about the common good from family and friends, but also from others within my own community, from the members of other communities, and from strangers; from those much older than I and from those much younger. But how can I have relationships of adequate cooperative inquiry and learning except with those whom I can trust without qualification? And how can I trust without qualification, unless I recognize myself and others as mutually bound by such precepts as those that enjoin that we never do violence of any
sort to innocent human life, that we always refrain from theft and fraud, that we always tell each other the truth, and that we always uphold justice in all our relationships. Throughout a life spent asking and attempting to answer questions about our own good, usually practically, but sometimes theoretically, we are recurrently vulnerable to a variety of harms and dangers from other human beings as well as from the vagaries of our natural environment. It is this vulnerability that makes obedience to the natural law necessary for the normal and right functioning of human nature.

Yet what often does and always can function well is always liable to function badly on occasion. Just as functioning well for human beings partially consists in individuals understanding themselves in a particular way, as engaged together with family, friends, and others in a shared discovery of what their individual goods and their common good are, so the malfunctioning of human nature is characteristically expressed in some kind of systematic misunderstanding. In the cultures of advanced modernity, and most notably in contemporary North America, the form often taken by this misunderstanding is one in which the individual is misconceived as someone who has to choose for himself what his good is to be. This conception of the sovereignty and central importance of individual choice is generated by several different but mutually reinforcing features of our dominant contemporary social and moral modes. Consider just one of these.

During our upbringing, morality is commonly presented to us in terms of two distinct sets of principles, self-regarding principles and other-regarding principles.
natural law—that is, if they try to decide between those competing claims from the standpoint of an isolated nonsocial individual for whom there can be no such thing as the common good—then they will find themselves with no resource for decision, beyond their own individual choices. On a Thomistic view, it is to be expected that under certain social conditions in which adequate moral education is unavailable, the place of individual choice in the moral life will be misunderstood in precisely the way it has been misunderstood in the dominant cultures of advanced modernity.

The exercise of individual choice thus understood, that is, not choice as governed by principles but choice as prior to and determining our principles, is often identified in the contemporary world with the exercise of liberty. Liberty is therefore thought to be threatened whenever it is suggested that the principles that ought to govern over our actions are not in fact principles that are up to us to choose, but principles that we need to discover. But since a Thomistic understanding of natural law commits those who possess it to asserting that human nature is such that rational practical principles are antecedent to and govern choice in rational well-functioning human beings, and that therefore those principles have to be discovered, not chosen, any defense of a Thomistic understanding of natural law is very easily construed as a threat to liberty.

While the Senate was engaged in considering the nomination of Clarence Thomas to the Supreme Court, a rumor circulated that Thomas held something close to a Thomistic view of natural law—a rumor for which there was and is no foundation whatsoever in any judgments of Justice Thomas—and Senator Joseph Biden at once expressed the fear “that natural law dictates morality to us, instead of leaving matters to individual choice.” Senator Biden’s instantaneous reaction, presupposing as it did widespread agreement among the general public with his own view, was a symptom of just that kind of social and moral attitude that needs to be understood in Thomistic terms.

Senator Biden, of course, was correct in supposing that he was articulating what would be felt—and ‘felt’ is the right word—by a very large number of North Americans. Such modern persons are all too likely to reject any Thomistic understanding of natural law, and most of all what that understanding, or more fundamentally the account of human nature upon which it relies, says to them about their own condition, as one giving expression to a distorted view of the moral life. It therefore turns out to be the case, as I wrote earlier, that if my arguments are sound and my conclusions are true, then many people will reject them. Notice, however, that for so doing you will pay a certain price.

What these people will have deprived themselves of is the only account of natural law that not only is able to explain its own rejection, but also justifies plain persons in regarding themselves as already having within themselves the resources afforded by a knowledge of fundamental law, resources by means of which they can judge the claims to jurisdiction over them of any system of positive law. In the United States today, we inhabit a society in which a system of positive law with two salient characteristics has been developed. At a variety of points, it invades the lives of plain persons, and its tangled com-
plexities are such that it often leaves those plain persons no alternative but to put themselves into the hands of lawyers. It is notorious that ours has become a society of incessant litigation, in which plain persons can all too rarely hope to resolve matters of dispute by appeal among themselves to evident and agreed moral principles—for the loss of an adequate understanding of the natural law has resulted in a widespread belief that there are no such principles—but instead must resort to the courts and therefore to lawyers. Of course, in any society, there cannot but be some need for positive law and for litigation as a last resort. But it is an index of great moral deprivation in a culture when litigation so often becomes a first resort. Perhaps it has done so because the dominant culture of North American modernity is iminical to any adequate conception of the natural law.\textsuperscript{23}

\section*{Endnotes}

2. Ibid., 195.
5. p. 129.
6. See on this Aquinas, \textit{Summa Theologiae} 1a–2a, q. 96, a. 2.
9. Ibid., 298–299.
11. Ibid., 199.
12. Ibid., 190–192.
13. Ibid., 195–196.
23. I am indebted to Martin P. Golding and Paul Weithman for constructive criticisms of earlier drafts of this essay.