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WHAT MAKES PRACTICAL REASON LAW-LIKE?

MICHAEL J. WHITE*

ONE of the many signal services performed by John Finnis in his magisterial *Natural Law and Natural Rights*¹ is his destruction of a number of myths concerning the relation—supposedly “according to the natural law tradition”—between natural law and positive law. In these relatively brief comments, I propose to explore the relation between two other species of law (*lex*) distinguished by Aquinas: *lex aeterna* and *lex naturalis*. I shall suggest that Professor Finnis’s notion of practical rationality can most plausibly be conceived of as law-like only if his particular notion of *practical reasonableness* (about which more later) stands in a heteronomous relation to something like Aquinas’s *lex aeterna*. I shall also maintain that such a heteronomous relation seems to presuppose a metaphysical perspective that is, in some sufficiently broad sense, teleological. In order to forestall any possible misunderstanding, I emphasize that I am using the adjective “heteronomous” in its etymological sense: “subject to a standard external to itself” and *not* in the specifically Kantian sense of “acting in accordance with one’s desires *rather than* in accordance with reason or moral duty.”

For the ancient philosophical antecedents of Aquinas’s conception of *lex aeterna*, we need to look to Stoicism, and perhaps Stoicizing Platonism, rather than to Aristotle. However orderly, intelligible, and immutably necessary Aristotle’s world (at least the supralunary part of it) may be, Aristotle exhibits no inclination to regard that order, intelligibility, and immutable necessity as a function of anything like *nomos* (the Greek term rendered as “(positive) law”, “custom,” or “convention”). For, whatever cosmic potency his deities may exercise as unmoved movers, and whatever wisdom they may possess as thought thinking itself, this power and this knowledge is not analogized to the power and knowledge of human rulers governing their *poleis* (“civic communities”) by the rule of positive law.² For one thing, the Aristotelian deities do not engage in any form of practical activity; for another, they do not share in what Aristotle calls the *ethikai arêtai*, the moral virtues (nor, of course, in the moral vices).

The requisite analogy *is* certainly found, however, among the Stoics and those whom they influenced. The idea of divine reason pervading the

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1. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford Univ. Press, 2d ed. 2011) (1980).

2. While it is true that Aristotle, at *Rhetoric* I, 13 famously speaks of “natural justice” and “universal law” as a “natural law,” it is not clear that he means to indicate more in these terms than a supposedly universal empirical agreement with respect to a certain “core” of moral and legal issues. Unlike Plato before him and the Stoics after him, he does not, in any extant text, spell out a metaphysical or theological *rationale* for this moral/legal agreement concerning core issues.

universe and ruling it as a *cosmopolis*, in an orderly, intelligible, and immutably necessary manner, is at the heart of Stoic physical theory. As Cicero, wearing his Stoic hat in his work *De legibus* (*On the Laws*) puts it:

[W]hen that same mind [which has pursued the path of “perceiving and recognizing the virtues”] examines the heavens, the earth, the sea, and the nature of all things, and perceives where those things have come from and to where they will return, when and how they are due to die, what part of them is mortal and perishable, and what is divine and everlasting; and when it almost apprehends the very good who governs and rules them, and realizes that it itself is not a resident in some particular locality surrounded by man-made walls, but a citizen of the whole world as though it were a single city; then, in the majesty of these surroundings, in this contemplation and comprehension of nature, great God! how well it will know itself, as the Pythian Apollo commanded . . .³

It is this cosmic Reason-with-an-upper-case-’R’ that Cicero invokes in his definition of law:

[L]aw is the highest reason, inherent in nature [*lex est ratio summa, insita in natura*], which enjoins what ought to be done and forbids the opposite. When that reason is fully formed and completed in the human mind, it, too, is law.⁴

I take it that the reason that is “formed and completed (*confirmata et perfecta*) in the human mind” is Cicero’s version of law as practical reason as *lex naturalis*, in Aquinas’s sense. But it is clear that Cicero believes that practical reason in this sense is heteronomous. It does not, as it were, define itself; rather, it is grounded in the “*ratio summa, insita in natura*.”

St. Thomas introduces his conception of *lex aeterna* in the second article of the so-called “Treatise on Law”:

[A] law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence. . . that the whole community of the universe is governed by Divine Reason (*tota communitas universi gubernatur ratione divina*). Wherefore the very idea of the government of things in God the Ruler of the universe, has the nature of law.⁵

3. CICERO, *Laws*, in *THE REPUBLIC AND THE LAWS* 61119 (Niall Rudd trans., Oxford Univ. Press 1998).

4. *Id.* at 103.

5. THOMAS AQUINAS, *SUMMA THEOLOGIAE* I^{ae} II^{ae} q. 91, a. 1 (Marietti Editori Ltd. 1952).

God's providential rule of the universe is glossed by Aquinas in terms of the notion of *rationes* ("reasons"—or "types" in the translation by the English Dominican Fathers⁶), which bear a strong resemblance to Platonic *ideai* ("Ideas", "Forms") and Stoic *logoi spermatikoi* ("rational seeds"):

Just as in every artificer there pre-exists a type [*ratio*] of the things that are made by his art, so too in every governor there must pre-exist the type of the order of those things that are to be done by those who are subject to his government. And just as the type of the things yet to be made by an art is called the art or exemplar of the products of that art, so too the type in him who governs the acts of his subjects, bears the character of a law Wherefore as the type of the Divine Wisdom, inasmuch as by It all things are created, has the character of art, exemplar or idea; so the type of Divine Wisdom, as moving all things to their due end, bears the character of law. Accordingly the *lex aeterna* is nothing other than the type of Divine Wisdom, as directing all actions and movements.⁷

Indeed, in this article, Aquinas quotes Augustine's *De libero arbitrio* to the effect that *lex aeterna* is the "highest reason" (*summa ratio*), using exactly the Latin phrase that Cicero uses in the *De legibus*. The significant difference, of course, is that for Aquinas and Augustine, eternal law is *summa ratio in Deo existens* (the highest reason existing in God). In other words, *lex aeterna* is *insita in sapientia divina* (inherent in the Divine wisdom) rather than, as Cicero would have it, *insita in natura* (inherent in nature).

However, Cicero, Augustine, and Aquinas agree that law as *summa ratio* is not inherent in human practical reason. For Cicero, *this summa ratio* is established (*confirmata*) in the human mind by what, in effect, is the Stoic process of *oikeiōsis* (a Stoic technical term: "sociation," "appropriation as one's own," "developing a moral perspective") the ideal culmination of which—perhaps only attained by that *avis rara* the Stoic sage—is described as follows:

Once the mind, on perceiving and recognizing the virtues, has ceased to serve and gratify the body, and has expunged pleasure as a kind of discreditable stain; and once it has put behind it all fear of pain and death, and entered a loving fellowship with its own kind, regarding as its own kind all who are akin to it by nature, and once it has begun to worship the gods in a pure form of religion, and has sharpened the edge of moral judgment, like that of the eyes, so that it can choose the good and reject its opposite (a virtue that is called "*prudentia*" from "*providendum*")—

6. See THOMAS AQUINAS, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province trans., Benziger Bros. 1948).

7. AQUINAS, *supra* note 5, at I^{II}ac q. 93, a. 1.

what can be described or conceived as more blessed than such a mind?⁸

For Aquinas, the “rational creature”:

[H]as a share of the eternal *ratio*, whereby it has a natural inclination to its proper act and end: and this participation of the *lex aeterna* in the rational creature is called *lex naturalis*.⁹

Does Aquinas, then, *identify* the “participation” of *lex aeterna* in the rational creature—which he here calls “*lex naturalis*”—with human (practical) reason? It seems that the answer is negative. To begin with, as Patrick Brennan has reminded me, Aquinas suggests that God acts as an “extrinsic principle moving to good (*principium exterius movens ad bonum*)” through both grace and the *lex aeterna*. Aquinas also interprets an Aristotelian habit (*habitus*) as “that by which one acts, when one wills to do so.”¹⁰ While human reason is a power (*potentia*), “habits are qualities or forms adhering to a power, and inclining that power to acts of a determinate species.”¹¹ Among the habits of reason is *synderesis*: “so the first principles of actions, which are naturally imposed on us, do not pertain to a special power, but to a special natural habit, which we call *synderesis*.”¹² Aquinas nonetheless holds that, in the primary and proper sense, natural law is *not* a *habitus* but, rather, “something decreed through reason, in the way that a proposition is a certain operation of reason.”¹³

I wish to explore the hypothesis that Aquinas intends us to understand that the source of those first principles of natural law that we apprehend by *synderesis* is *lex aeterna*, understood as a manifestation of *divine* reason. I shall further suggest that the salient feature by which human practical reason can *become* natural law is precisely the heteronomy of these principles—the fact that human practical reason does not itself *construct* these principles through its own operation, to so speak, but rather *receives* them “naturally” (*naturaliter*).

One very common account of practical reason, deriving from David Hume, maintains that practical reason is concerned exclusively in devising the necessary or most efficient means to externally given ultimate ends. According to the Humean account “reason alone can never produce any action, or give rise to volition . . . Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”¹⁴ In radical reaction, Immanuel Kant concludes that

8. CICERO, *supra* note 3, at 118–19.

9. AQUINAS, *supra* note 5, at I^aII^{ae} q. 91, a. 2.

10. *Id.* at q. 50, a.1; *cf.* q. 94, a. 1.

11. *Id.* at q. 54, a. 1.

12. *Id.* at I^a q. 79, a. 12.

13. *Id.* at I^aII^{ae} q. 94, a. 1.

14. DAVID HUME, A TREATISE OF HUMAN NATURE II.iii.3, at 414–15 (L. A. Selby-Bigge ed., Oxford Univ. Press, 2d ed. 1978).

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practical reason *can* be the source of ends. Moreover, for these ends to be “moral,” they *must* be capable of being expressed in universal principles that the practical reason of the individual human agent himself or herself legislates:

Thus morality consists in the relation of all action to the making of laws whereby alone a kingdom of ends is possible. This making of laws must be found in every rational being himself and must be able to spring from his will. The principle of his will is therefore never to perform an action except on a maxim such as can also be a universal law, and consequently such *that the will can regard itself as at the same time making universal law by means of its maxim*.¹⁵

St. Thomas surely agrees with Kant—*contra* Hume—that practical reason can itself both discern and impose certain kinds of categorical first principles. But, for the reasons I have adduced, I do not believe that he agrees with Kant that natural law is autonomously *legislated* by human practical reason; rather, human practical reason *discerns* the requirements of what Finnis terms “practical reasonableness” as a result of the “participation of the *lex aeterna* in the rational creature.”¹⁶

The basic forms of human good enumerated by Finnis are life, knowledge, play, aesthetic experience, sociability (friendship), religion, and practical reasonableness:

Moreover, there are countless aspects of human self-determination and self-realization besides the seven basic aspects which I have listed. But these other aspects, such as courage, generosity, moderation, gentleness, and so on, are not themselves basic values; rather, they are ways (not means, but modes) of pursuing the basic values, and fit (or are deemed by some individual, or group, or culture, to fit) a man for their pursuit.¹⁷

“So it is,” Finnis concludes,

[T]hat the practical principles which enjoin one to participate in those basic forms of good, through the practically intelligent decisions and free actions that constitute one the person one is and is to be, have been called in the Western philosophical tradition the first principles of natural law, because they lay down for us the outlines of everything one could reasonable want to do, to have, and to be.¹⁸

15. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 101 (H. J. Paton trans., Harper Torchbooks 1964).

16. AQUINAS, *supra* note 5, at I^{II}ac q. 91, a. 2.

17. FINNIS, *supra* note 1, at 90–91.

18. *Id.* at 97.

I do indeed believe that it is quite plausible to regard *six* of Finnis's aspects of the good (excluding practical reasonableness) as fundamental principles of "human self-determination and self-realization" and to regard the free, determinate participation in them as constitutive of "the person one is and is to be." These are *substantive* goods. It is in the particular "blend", as it were, of one's participation in them that one uses one's practical reason to match one's talents, opportunities, limitations, and peculiar inclinations (and aversions) in determining what *sort* of life one will live.

But what of the good of "practical reasonableness?" As Finnis notes, this is more of a *procedural* than substantive good. It is

[P]articipated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out.

The principles that express the general ends of human life do not acquire what would nowadays be called a "moral" force until they are brought to bear upon definite ranges of project, disposition, or action, or upon particular projects, dispositions, or actions. How they are thus to be brought to bear is the problem for practical reasonableness. "Ethics", as classically conceived, *is* simply a recollectively and/or prospectively reflective expression of this problem and of the general lines of solutions which have been thought reasonable.¹⁹

I suggest that it is precisely with practical reasonableness, so conceived, that practical rationality takes on the heteronomous character that makes it law-like. With respect to the substantive aspects of the human goods, human freedom permits different "mixes." As Finnis notes, "[a] certain scholar may have little taste or capacity for friendship, and may feel that life for him would have no savour if he were prevented from pursuing his commitment to knowledge." He adds that, nonetheless, it would be "stupid or arbitrary" for such a person "to think or speak or act as if these [friendships, life 'quite apart from truth-seeking and knowledge'] were not real forms of good."²⁰

The situation strikes me as different with respect to the good of practical reasonableness, however. With respect to the moral constraints that it imposes, it would be nonsensical for a person to plead that, while he recognizes that practical reasonableness is one of the "real forms of the good," he nonetheless has little personal "taste or capacity" for it and, hence, intends to accord it only minimal significance in the living out of his life. I suggest that practical reasonableness in Finnis's sense bears a more than superficial likeness to the Stoic (and Ciceronian) conception of *to kalon* or the *honestum*, that is, the distinctively *moral* good. Two promi-

19. *Id.* at 100–01 (emphasis added).

20. *Id.* at 105.

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nent questions in the ethical theorizing of later antiquity are the following: Is the *honestum* (“[moral] virtue,” “rectitude,” “[moral] goodness”) an ultimate good or is it, at most, a means? If it is a final or ultimate good as opposed to a means, is it the *only* ultimate good; or, rather, is it only one ultimate good along with some other “natural” goods? In the discussion of these questions, as Julia Annas says, “the view that it [the ultimate end] is getting natural goods *and* virtue is ascribed to Aristotle and the ‘Old Academy’ tradition.”²¹ And on one Ciceronian interpretation, the Stoic doctrine that, while the only ultimate good is the *honestum*, there is a class of things that are naturally (and correctly) “preferred” (*proëgomena, prae-posita*), amounts to the same thing (Cicero, *De finibus* IV, 42ff.).

However, once one has conceptualized practical reasonableness (conceived here as the *honestum*) as procedural rather than substantive, it becomes almost obvious that there must be other, substantive human goods. To live *honeste* is categorically necessary; but one cannot live a *human* life if one resolves that “living virtuously” is *all that matters* in living one’s life—that there are no other non-instrumental ends of human motivation. “Doing the virtuous thing in the circumstances” would seem to depend on one’s having other, substantive motivations and final ends of action that supply the possibility and the context, so to speak, of doing *those things* virtuously. Furthermore, it seems that leading at least a reasonably virtuous life is compatible with living a life that is otherwise stunted by (perhaps) insufficient attention to other fundamental substantive human goods in one’s “life plan.”

A fascinating case is that of the heiress Huguette Clark, daughter of a robber baron and sometime senator from Montana, who died not long ago at the age of 104. I obviously am not aware of the extent of Ms. Clark’s moral virtuousness. But it was reported that she was munificent to the very few people who were close to her and contributed generously to many philanthropic causes. It seems to be at least consistent with the public information about her that she lived what could be described as a morally blameless life. Since the late 1980s, she had lived in seclusion and under fictitious names in several New York City hospitals.

By the late 1930s, Mrs. Clark had disappeared from the society pages. Most if not all of her siblings had died; she lived with her mother at 907 Fifth Avenue, painting and playing the harp. Her mother died there in 1963.

For the quarter-century that followed, Mrs. Clark lived in the apartment in near solitude, amid a profusion of dollhouses and their occupants. She ate austere lunches of crackers and sardines and watched television, most avidly “The Flintstones.” A housekeeper kept the dolls’ dresses impeccably ironed.

21. Julia Annas, *Introduction to CICERO, ON MORAL ENDS* xxv (Julia Annas ed., Raphael Woolf trans., Cambridge Univ. Press 2001).

And so ran the rhythm of Mrs. Clark's life until the day she left for the hospital and checked herself in. Fittingly for someone who worked so hard to remain an enigma, her reasons were best known only to her. They seem to have been born, relatives have suggested in news accounts, of her dual desire for exquisite solitude and exquisite care.²²

It seems almost superfluous to comment that, however great may have been Mrs. Clark's participation in moral reasonableness in the narrow sense—that is, however, *honeste* she may have lived—her life seems to be deficient in terms of its practical rationality. And what appears to be wanting is sufficient personal commitment to a reasonable range of the *other*, substantive human goods. Can one retain one's "happiness" (in the narrow, Stoic sense of one's moral goodness or *honestas*) during a lifetime consisting largely of imprisonment with occasional torture on the rack? Perhaps. If so, one can probably also retain it while surrounded by expensive dolls, eating sardines, and watching "The Flintstones" in an elegant Fifth Avenue apartment. But obviously something is amiss in both cases.

What is amiss, of course, is the element of practical rationality that is involved in the *self-determination* of a reasonable human life—or perhaps the opportunities to exercise that element of rationality. Perhaps partly because of the variety of apparent options open to many persons in the affluent and socially mobile world of contemporary "first-world" societies, the element of rational self-determination has figured largely in Rawlsian liberal political theory in concepts such as one's subjective "comprehensive conception of the good." Rawls's notion of reasonableness, while notably "thinner" than that of Professor Finnis, is an essentially moral notion of reciprocity: "the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse."²³ While the commitment to the value of this sort of reciprocity is certainly an element of practical reasonableness, it is not the sum and substance of it.²⁴

I am inclined to believe, *malgré* Kant, that the constraints of practical reasonableness in the specifically moral sense of that phrase are no more susceptible to individual "balancing," in their relation to other substantive aspects of the human good, than they are to individual construction or self-imposition. I propose that the heteronomous character of the *moral aspect* of practical rationality is essential in imparting to practical rationality its law-like character. The conception of "imposing a law on oneself" or "legislating for oneself" I take to be at best a potentially misleading metaphor—rather like "promising oneself," "forgiving oneself," or perhaps even "apologizing to oneself."

22. Margalit Fox, *Huguette Clark, Reclusive Heiress, Dies at 104*, N.Y. TIMES, May 25, 2011, at A1.

23. JOHN RAWLS, *POLITICAL LIBERALISM* 51 (Columbia Univ. Press 1993).

24. Cf. FINNIS, *supra* note 1, at 105–09.

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If the *honestum*, practical reasonableness in Finnis's sense, is a categorical but procedural good—a good which is not, as it were, internally fabricated by human rationality reflecting on the *other*, substantive aspects of the human good—then it must in some sense be imposed from without.” Aquinas, as we have seen, holds that it is grounded in the *lex aeterna*. Finnis makes the plausible suggestion that the *participatio* of the *lex aeterna* in the rational creature, which Aquinas identifies with natural law, ultimately cashes out in terms of the two ideas of *causation* and *similarity*:

A quality that an entity or state of affairs has or includes is participated, in Aquinas's sense, if that quality is *caused by a similar* quality which some other entity or state of affairs has or includes in a more intrinsic or less dependent way.²⁵

I would add the idea of *hierarchy*, which I think is implicit in the phrase “has or includes in a more intrinsic or less dependent way.” By this term, I intend both a natural hierarchy of value and obligation external to the human person and a certain authority *ipso facto* imposed on rational beings by their recognition of that hierarchy.

So, to conclude, it seems to me that, insofar as practical reason assumes a law-like character (which would result in something like Aquinas's conception of practical reason as natural law), it must derive that character heteronomously—from an external cause that itself exemplifies rationality and stands in an hierarchical order that gives that cause a natural authority over the individual person's practical rationality. While this is obviously a heavily metaphysical concept, I believe that it is broad enough to include the God of Judaism, Christianity, and Islam, the Good/Forms/Demiurge of Plato, and the cosmically immanent Reason of Cicero and the Stoics.

Of course, a very different and probably nowadays statistically more prevalent metaphysics is poetically described by Bertrand Russell: from no rational perspective can the universe be regarded as anything more than an “alien and inhuman world” that is “purposeless, . . . void of meaning” and the “outcome of accidental collocations of atoms [and, in some of its local aspects, of evolutionary processes].”²⁶ From such a metaphysical perspective, one certainly might construct a conception of human practical rationality. But such a conception could never, I submit, possess the distinctively *law-like* character of Aquinas's natural law or Finnis's practical rationality.

To my mind, Professor Finnis has succeeded in establishing that the relation between natural law and positive law (*lex humana*) should not be conceptualized as the relation of blue-print to completed edifice:

25. *Id.* at 399.

26. BERTRAND RUSSELL, *A Free Man's Worship*, in *MYSTICISM AND LOGIC AND OTHER ESSAYS* 41 (Barnes and Noble Books 1981) (1917).

These “general principles of law” are indeed principles. That is to say, they justify, rather than require, particular rules and determinations, and are qualified in their application to particular circumstances by other like principles. Moreover, any of them may on occasion be outweighed and overridden (which is not the same as violated, amended, or repealed) by other important components of the common good, other principles of justice Still, the general principles of law which have been recited here, do operate, over vast ranges of legislative *determinationes*, to modify the pursuit of particular social goods.²⁷

Neither, it seems clear, does *lex aeterna* stand in relation to natural law as blue-print to edifice. Yet, just as natural law properly exercises a heteronomous constraint on positive law, so I submit *lex aeterna* stands as an external constraint on practical reason, a constraint that imparts to practical reason its law-like character.

But what do I mean by “law-like character?” The short but intentionally ambiguous answer is that something has a law-like character just in case it possesses a sufficient resemblance to what I take to be law in its paradigmatic sense—that is, human positive law. I take it that human positive law presents, in Aristotelian terms, the manifestation of law that is most clear *to us* as “being law.” And I believe that Aquinas would agree. However, he also holds that all the kinds of law that he considers in the “Treatise on Law” fully exemplify the same concept. That is, he believes that the noun “*lex*” is used synonymously in all the cases of positive law, eternal law, natural law, and divine law, although I believe that he has some trouble in evising plausible arguments for this claim in the case of eternal and natural law.

In contrast to Aquinas, Professor Finnis suggests that “law” is used analogously, with positive law providing the prime analogate. While I am not taking a position on this issue, I do maintain that what I have termed the heteronomous character of law is important to understanding not only the nature of positive law but that of other kinds of law—or of “law” in its analogous senses, particularly the nature of practical reason conceptualized as natural law. I would also suggest that the recognition of a law-like character of practical reason is a necessary first step in seeing ourselves in a *creaturely* mode (and, ultimately, in coming to understand our divine filiation). But it is only the *first* step in that much longer journey, which it is not my business to discuss here today.

27. FINNIS, *supra* note 1, at 288.