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Response to Francis Oakley

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Professor Francis Oakley has given us a nuanced view of the voluntarist tradition in late medieval theological thought and has argued that the voluntarist tradition was far from betraying reason. Natural law in the voluntarist tradition took a step beyond the Thomistic school by bringing covenant into the discussion. Although he has given us an abbreviated version of the argument, those who might not be convinced by his essay here can turn to his other voluminous publications to follow his thought in all its complexity.[1] His main contention, however, is unassailable: Christian theological thought on natural law contains more than one tradition. The voluntarist tradition had its moral and ethical standards rooted just as firmly in the Christian tradition as in the Thomistic traditon. Professor Oakley's suggestion, at the end of his paper, that we might look again at the voluntarist tradition in Islamic thought—with a knowledge of Arabic—is reasonable. With that said, I would like to consider another aspect of medieval and early modern thought regarding natural law and morality that, except among the respondents, is not represented at this conference: the canonistic roots of natural law, natural rights, justice, ethics, and morality in the Christian tradition.[2]

First, the voluntarist theological tradition has its roots in canonistic thought. Professor Oakley knows this but did not mention it because it was not pertinent to his argument. It has long been known that the work of the leading voluntarist William of Ockham is not comprehensible without knowledge of medieval canonical jurisprudence. The first medieval thinker who distinguished between reason and the will was a canonist named Laurentius Hispanus. Around 1210, he used a phrase from the Roman satirist Juvenal to describe the relationship of the pope and the law; the pope, he said, could substitute his legislative will for reason—*pro ratione voluntas*.[3] However, Laurentius did not imagine an unfettered will, but rather one that had to conform to the public good—*utilitas publica*.[4] Laurentius' concept of legislative authority was incorporated into canonical commentaries and became commonplace in medieval and early modern jurisprudence.[5] When canonists (and theologians) applied Juvenal's aphorism to God's absolute power, they did not lose sight of its connection

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[1] FRANCIS OAKLEY, NATURAL LAW, LAWS OF NATURE, NATURAL RIGHTS: CONTINUITY AND DISCONTINUITY IN THE HISTORY OF IDEAS (2005); FRANCIS OAKLEY, POLITICS AND ETERNITY: STUDIES IN THE HISTORY OF MEDIEVAL AND EARLY-MODERN POLITICAL THOUGHT (1999).

[2] *See* Kenneth Pennington, *Lex naturalis and Ius naturale*, 68 JURIST 569 (2008) (exploring the legal tradition of natural law).

[3] KENNETH PENNINGTON, *Innocent III and the Divine Authority of the Pope*, *in* POPES, CANONISTS AND TEXTS, 1150-1550, at art. III, 6 (Variorum 1993) (1984).

[4] *Id.* at 7.

[5] Kenneth Pennington, *Law, Legislative Authority, and Theories of Government, 1150-1300*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350-C. 1450, at 428-49 (J.H. Burns ed., 1988).

with reason. It is, therefore, no surprise that Francisco de Vitoria, who was no radical but rather immersed in the theological and legal traditions, proclaimed in the sixteenth century: "Divine law is just and is obligatory; it is based on the will of the Legislator—that is God—since it is pro ratione voluntas."[6] If one does not understand the rich background and context of Vitoria's thought, his statement could easily be interpreted as divorcing the divine will from reason.

Second, our modern understanding of natural law is distorted by a shift in the language used by theologians beginning in the twelfth century. The legal tradition always used the term *ius naturale*. Although the term *lex naturalis* can be found in early medieval sources, that term was thoroughly rejected by the jurists—influenced in large part by the terminology they found in Roman law. Christian theologians began to use the term *lex naturalis* in late antiquity. Theologians continued to use this terminology until the twelfth century.[7] By the thirteenth century the worlds of the jurists and theologians had developed a terminological schism. In the *Summa Theologica*, for example, Thomas Aquinas used the term *lex naturalis* two hundred and forty-seven times and *ius naturale* one hundred and seventy-eight times.[8] Aquinas tended to conflate these two terms. However, there is a profound difference in how these two terms can and were understood in the canonistic tradition. For jurists, *ius* meant "law," "right," "justice," and "equity." On the other hand, *lex* meant basically what it means today in English: a rule established by a legitimate legislator. When Pope Benedict XVI drew upon the theological tradition to discuss *lex naturalis* in his talk to the International Congress on Natural Moral Law, he tacitly overlooked a rich canonistic tradition.[9] *Ius naturale* emphasizes rights; *lex naturalis* imposes rules.

Gratian was the first jurist to discuss natural law in the canonistic tradition.[10] He created what I think is one of the most elegant definitions of *ius nautrale* in the European legal tradition. He also shaped the legal discussion of *ius naturale* for centuries. Every canonist studied his formulation until 1917. At the beginning of his *Decretum*, Gratian asked: What is *ius naturale*? His answer was lapidary. *Ius naturale*, he said, is what is found in the Old and New Testament and is based on a fundamental principle of Christian thought: "Do unto others as you would have others do unto you."[11] Natural law was based on God's revealed covenant—although Gratian would not have put it that way, maybe Francis Oakley would. Gratian concluded by stating *ius naturale*—which, we must remember, the jurists would always think of, simultaneously, as a natural law, natural equity, and natural right—establishing that each person is commanded to do to others what he wants done to

[6] PAOLO PRODI, UNA STORIA DELLA GIUSTIZIA: DAL PLURALISMO DEI FORI AL MODERNO DUALISMO TRA COSCIENZA E DIRITTO 204 (2000).
[7] Pennington, *supra* note 2, at 575-76.
[8] *Id.* at 578-84.
[9] *Id.* at 589-91.
[10] *Id.* at 569-73; *Matthew* 7:12.
[11] GRATIAN, THE TREATISE ON LAWS (DECRETUM DD. 1-20) WITH THE ORDINARY GLOSS (Kenneth Pennington ed., Augustine Thompson & James Gordley trans., 1993) (1155-58).

himself and is prohibited from inflicting on others what he does not want done to himself.[12] Gratian focused on two principles embodied in the word *ius*—justice and equity for every human being. The first evidence of Gratian's definition of natural law being used outside his *Decretum* is a letter of Pope Innocent II in 1133.[13] Brian Tierney has shown in convincing detail that later canonists focused on rights established by natural law as a central tenet of their jurisprudence.[14] It is worth remembering that when Gratian incorporated Isidore of Seville's definition of *ius naturale* just a few paragraphs after his own definition of *ius naturale*, each of Isidore definitions was an *ius* not a *lex*.[15] The medieval and early modern canonists created a jurisprudence of *ius naturale* that embodied principles, not *leges*—laws, as defined by the principles of legal positivism. The difference is more than semantic, and it is profound.

[12] *Id.* at 3.
[13] Pennington, *supra* note 2, at 578-79.
[14] BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 (1997).
[15] GRATIAN, *supra* note 11, at 6-7.