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Article abstract

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Tolerance and Natural Law*

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ABSTRACT

Although the practice of tolerance might appear to be endangered by the natural law, closer consideration shows that it is grounded in the natural law. By analysis we find that tolerance is a virtue of the Aristotelian type, founded on the two great pillars of right judgment in the protection of greater ends against lesser ends, and right judgment in the protection of ends against mistaken means, with the second being the more fundamental. While this analysis is new, the insights that it elaborates are old, as can be seen through consideration of the four different ways in which the medieval natural law thinker Thomas Aguinas qualified *the classical idea that the purpose of law is to make men good. We conclude that although the natural law does generate a doctrine of tolerance, it does not produce a liberal doctrine of tolerance. That is, it is not based on neutrality, skepticism, abstract subjective rights, or a harm principle, whether of the generic of the John Stuart Millian variety.*

RÉSUMÉ

Bien que la pratique de la tolérance puisse sembler menacée par le droit naturel, un examen plus approfondi démontre qu'elle est fondée sur le droit naturel. L'analyse de ces questions nous permet de découvrir que la tolérance est une vertu de type aristolélicienne, fondée sur les deux grands piliers que sont le jugement juste dans la protection de grandes fins à l'encontre de moindres, et le jugement juste dans la protection de fins à l'encontre de moyens erronés, le second étant plus fondamental. Quoique cette analyse soit nouvelle, les idées qu'elle exprime sont anciennes, comme cela peut-être constaté en considérant les quatre différentes façons par lesquelles le penseur de droit naturel médiéval, Thomas d'Aquin, a qualifié l'idée classique du but du droit comme étant de rendre l'homme bon. Nous concluons que, bien que le droit naturel génère une doctrine de tolérance, il ne produit pas une doctrine libérale de tolérance. Il n'est pas basé sur la neutralité, le scepticisme, les droits subjectifs abstraits ou l'un des principes élaborés par John Stuart Mill.

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Natural law tradition maintains that the principles of moral reasoning are not only right for all, but knowable to all by the ordinary exercise of human reason. The *foundational* principles, in fact, are not only invariably knowable, but invariably *known*; if they are denied, the problem lies not in the intellect, but in the will — not in true ignorance, but in obstinacy, self-deception, and rationalization. Further, natural law tradition agrees about what these moral principles are. They are the same ones expressed in the Decalogue, and by and large approved by high-minded persons in every time and place : don't murder, don't steal, honor God, care for your neighbor, and so forth. Finally, natural law tradition agrees that the authority of these principles is rooted ultimately in God, for if nature is a creation, then natural law is an indirect but universal revelation. The heavens declare the glory of God, and the firmament shows his handiwork; day unto day utters speech, and night unto night shows knowledge. If even the heavens are so voluble, how much more the deep structure of the created human mind — the fixed part of conscience which is "written on the heart". To be sure, judgments of good and evil may have the force of *prudence* without explicit reference to God, as Hobbes and Grotius famously observed; therein lies the power of pagan natural right. But judgments of good and evil could never achieve the force of law without a lawgiver.

Many fears prevent people from accepting the idea of a natural law. In our culture, such a fear is that if natural law comes in the door, tolerance goes out the window. Underlying this fear is the idea that tolerance is a universal, known moral duty, but that practicing tolerance depends on moral ignorance; if we *knew* what was right, the argument runs, then we would have no choice but to cram it down the throats of other people. I hope it is plain that this argument is incoherent. To say that *anything* is a universal, known moral duty is to assert that it is a natural law. Why we can practice this natural law only by remaining ignorant of the other natural laws is very hard to see. Indeed, without the other natural laws, the natural law of tolerance would seem to be empty, because nobody supposes that we should tolerate everything, yet without the other natural laws we have no way of knowing what should be tolerated and what should not.

If the preceding observations are true, then tolerance cannot be an objection to the natural law, because if it makes moral sense then it is grounded in the natural law. The problem is merely to show how. But we already have a head start on the solution, because we have already noticed that according to our initial intuitions, not everything should be tolerated. The duty of tolerance, then, does not take the form "Tolerate". Rather it takes the form, "Tolerate what ought to be tolerated". What this shows us is that tolerance is not a mechanical duty, but a duty involving judgment. Moreover, we can see that there are two ways to violate it. From one side, we can fail to tolerate what we should — let's call that "narrow-mindedness". From the other, we can tolerate what we shouldn't — let's call that "overindulgence".

It is beginning to look like the duty of tolerance is connected with a virtue — a virtue of the Aristotelian type — the type of virtue that finds a mean between two opposed extremes. Just as courage finds the mean between cowardice and rashness, so tolerance finds the mean between narrowmindedness and overindulgence. Is this the right way to think of it? Let us consider further. According to Aristotle, every virtue of this sort depends on two things. Insofar as it involves making case-by-case judgments, it depends on practical wisdom; insofar as it involves carrying out these judgments, it depends on certain settled habits. The former, practical wisdom, is needed because although the right thing to do con-

forms with certain rules, these rules can never be listed exhaustively; we are always discovering new ones. The latter, right habits, are necessary so that we can channel our emotions in the right directions rather than being overwhelmed by them. In the case of courage, for example, wisdom tells us which risks should be run, and habituation causes us to have just the right amount of pluck balanced by just the right amount of fear.

Can we say such things about the virtue of tolerance, too? Does it also depend on both practical wisdom and a set of settled habits? I think so. To identify the *habits* that are linked with the virtue of tolerance seems odd at first, but only because, in English, we tend to use the word "habits" for habits of the body rather than habits of the heart — for biting our nails or jingling our coins, not for having good manners or keeping our temper. Once we adopt the broader usage, however, it is easy to see that tolerance does depend on habits like patience, courtesy, and self-control.

To characterize the ways in which tolerance calls upon *practical wisdom* takes a bit more work. To have practical wisdom is to know good and evil deeply enough to put into practice the counsel that good is to be done and followed, and that evil is to be avoided. Here, by the way, is where the fearful confusion that I mentioned previously arises. If the known good is always to be done and followed, and the known evil is always to be avoided, then it would seem that evil should always be *suppressed* — *never* tolerated — so that the idea that tolerance is safe only if we are ignorant of good and evil is true after all. What is overlooked in this fearful confusion is that a reason for tolerating evil can arise from the nature of the good itself. For it often turns out that evils are generated in the very act of suppressing evil. When the evil which is suppressed is equaled or exceeded by the evil which is generated in suppressing it, then we ought to tolerate the former evil, not suppress it. In saying this, of course, we do not suppose that all goods and evils are commensurable, or that the good of an action lies only in its results, or that we may "do evil that good may result". One may consider the consequences of things without considering them in the way that consequentialists do.

This paradox — that evil may be generated in the act of suppressing it — is the very basis of tolerance. However, the paradox is more pronounced in some cases than in others. In the less paradoxical case, suppressing an evil promotes one good but injures a different good: For example, it might be held that the suppression of false opinions protects the good of truth, but injures the good of peace. In the more paradoxical case, suppressing an evil promotes a good in one way but injures it in another: For example, it might be held that although the suppression of false opinions promotes the good of truth by removing temptations, it injures the selfsame good of truth by denying in the invigorating challenge of a contest. Each of these cases calls upon a different element of practical wisdom. The first, in which the goods promoted and injured by suppression are different, calls upon *right judgment in the protection of greater ends against lesser ends*; the second, in which the same good is both promoted and injured by suppression, calls upon *right judgment in the protection of ends against mistaken means*. Element two goes more to the heart of the matter. The ends with which a given end comes into conflict — these are largely a matter of circumstance. By contrast, the means by which a given end *cannot, by its nature*, be pursued — these are constant. The tolerant man will be wary of all those ways of defending good things which conclude by devouring their hearts.

The lesson to be learned from all of this is that tolerance is not a suspension of the good; rather it is for the sake of the good. It does not get us off the

hook of moral judgment; rather it puts us on the hook of moral judgment. The natural law does not destroy it; rather it makes it possible. Any interpretation of tolerance which claims to suspend moral judgment will merely practice moral judgment surreptitiously; any theory of tolerance which claims neutrality about what is good will merely bring a view of what is good through the back door. The more honest path is to practice our judgments and speak of our goods in the open.

The analysis I have presented is new. However, the insights I am analyzing are old. To see this, it suffices to consider certain teachings of the classical natural lawyer Thomas Aquinas. Thomas agrees with the ancient idea that the purpose of law is to make men good. Immediately our contemporaries gasp and cry "Intolerant! Enforcement of morality!" But all law enforces some morality. The difference is that Thomas understands morality as including tolerance. That is clear from the subtle ways in which he *qualifies* the idea of making men good.

First qualification (S.T. I-II, Q. 91, Art. 4). All law makes men good, but not all law makes men good in the same way. The discipline of the State aims only at the natural good; by contrast, the discipline of the Church aims also at our supernatural good. True, human law should "foster" the true faith, but this means being friendly and cooperative toward it, not taking its place. This differentiation of functions between Church and State foreshadows the doctrine of subsidiarity. But if we ask why their functions are differentiated in just this way, I think we come back to what I have called the paradox of tolerance : That some ways of promoting the good are actually harmful to the good. For it certainly does harm our supernatural good when the State tries to take God under its wing. One reason is that our supernatural good cannot be *known* by human reason; it requires special revelation, of which the Church is the custodian. Another is that our supernatural good cannot be *attained* by human reason; it requires the grace of God, of which the door is faith in Christ. When the State undertakes the godly work that it cannot possibly accomplish, it almost always does so for the ungodly purpose of usurping our workship for itself.

Second qualification (S.T. I-II, Q. 91, Art. 4). Human law can be made only about those things that human beings can judge. However, says Thomas, human beings can judge only outward acts, which can be seen; they cannot judge the interior movements of the heart, because they are hidden. I confess that I cannot go all the way with Thomas on this point. The law *does* take account of interior movements of the heart when they can be inferred *from* exterior acts. For instance, we distinguish murder from manslaughter by evidence as to the presence or absence of malice. Even if the interior movements of the heart can sometimes be inferred, however, it seems clear that they cannot be inferred well enough to become *direct objects* of human command and prohibition — an observation which was later made by John Locke. Therefore one may be commanded or forbidden by the State to do something or say someting, but not to feel something or believe something. To put it another way, the State can command and forbid specific acts of virtue and vice, but cannot command or forbid virtue and vice *as such*.

Third qualification (S.T. I-II, Q. 96, Art. 3). If human law may command specific acts of virtue, then should it command all such acts? Aristotle had written that legal justice is "complete" justice in the sense that any virtue might become a concern of law — but he had obscurely added that legal justice is complete "not in an unqualified sense, but in relation to our fellow men". Thomas follows Aristotle, but explains the point more clearly. Although any virtue might become a concern of law, nevertheless not every *act* of any virtue might become a

concern of law. The reason is that law may concern itself only with what pertains to the common good, and some acts of virtue pertain only to the private good. For example, the law may take cognizance of truthfulness, but although it may command a public official to speak truthfully before a grand jury, it may not command a teenage girl to write truthfully in her diary. For the State to intrude in such matters would surely do far more harm than good. So much for the fallacy that premodern philosophy failed to recognize a private realm! There is another problem, however. Thomas abstains from the definitional tricks by which J.S. Mill inflated the class of self-regarding acts — tricks like refusing to regard indirect harms as harms. But if we do abstain from the Millian tricks, then it seems likely that there is no such thing as a *purely* self-regarding act. Still, I think we can rescue Thomas's idea. We can still say that the more nearly an act is self-regarding, the stronger the presumption against regulation.

Fourth qualification (S.T. I-II, Q. 91, Art. 4, and Q. 96, Art. 2). If law may not command all specific acts of virtue, then at least may it forbid all specific acts of vice? Again Thomas answers "No", and he gives two reasons. The first reason (Q. 91) is that "while aiming to do away with all evils, it would do away with many good things". For instance, by attempting to suppress greedy profiteering, the law might also do away with honest efforts to make a living. That has certainly been the experience of the socialist states. The other reason (Q. 96) is that "laws imposed on men should [...] be in keeping with their condition", leading men to virtue gradually rather than all at once; imperfect men whose favorite vices have been forbidden will "break out into yet greater evils". For instance, by prohibiting the sale of intoxicating spirits, the law might give glamour to drunkenness and undermine respect for law. This is as neat an explanation as one could wish of the two great branches of tolerance which we have uncovered by analysis, right judgment in the protection of ends against mistaken means and right judgment in the protection of greater ends against lesser ends. Thomas concludes that human laws should forbid "only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others". In the shadow of Mill, the tendency of recent scholars has been to notice the "chiefly" clause but forget the "grievous" clause — to notice that hurt to others is the best *but forget that it is not the only* reason for regarding a vice as sufficiently grievous to suppress. What then is the other reason? We already know that Thomas does not believe in forbidding purely self-regarding acts, so presumably what he is thinking of is the tendency of some vices to destroy our capacities to do good to others — a consideration which the Millian harm principle ignores. I note also that in Thomas's way of thinking, the answer to the question of which vices we may suppress will depend on the level of virtue which the citizens have already achieved. This would render the reduction of tolerance to abstract subjective rights impossible.

I should like to emphasize three points. The first is that command and prohibition are but two facets of the State's activity. Besides commanding and prohibiting, the state also honors and dishonors, taxes and subsidizes, recognizes and refuses to recognize. We have not considered tolerance in any of these realms.

The second point is that so far we have been considering only legal tolerance. Social tolerance is another matter. To be sure, it would rest on the same two great pillars as legal tolerance, right judgment in the protection of ends against mistaken means and right judgment in the protection of greater ends against lesser ends. However, individuals, families, and associations may do things which the State may not. For example, the fact that certain vices should not be forbidden by

law does not mean that the citizens are not to regard them as vices. Indeed, citizens may still express concern about vices in other ways, for instance by withholding their votes from vicious candidates or refusing to associate with vicious persons. One cannot be a bad man and yet a good statesman; one cannot fraternize with bad fellows yet become a good man.

The third point is that religious tolerance raises much deeper questions than I have considered here. The critical step, I suggest, would be to distinguish those things about God that can be known by general revelation — that is to say, by natural reason — from those things about God that can be known only by special revelation — that is, by Holy Scripture. Yet it does not follow that the State may command every religious duty knowable by general revelation, nor does it follow that the State must be indifferent to special revelation.

My analysis, then, is very incomplete. Nevertheless we can draw several important conclusions. If tolerance is to make sense at all, it must be placed in the context of natural law; but although the natural law does produce a doctrine of tolerance, it does not produce a liberal doctrine of tolerance. That is to say, natural tolerance is not based on neutrality or skepticism, which are incoherent anyway; it is not based on abstract subjective rights, which allow no consideration of circumstances; and it is not based on a harm principle, whether Millian or not. We may expect that it will also yield different results in concrete cases.

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