ANDREW STONE PORTER

Bellarmine University

DIS/ORDERED LIBERTY: ISLAMIC AND CATHOLIC FEMINIST PERSPECTIVES ON NATURAL LAW AFTER *DOBBS*

And your Lord inspired the bee, saying, "Build yourselves houses in the mountains and trees and what people construct. Then feed on all kinds of fruit and follow the ways made easy for you by your Lord." From their bellies comes a drink of different colours in which there is healing for people. There truly is a sign in this for those who think. -Qur'an 16:68-69[1]

These words from Surah Ah-Nahl ("The Bee") illustrate the Qur'anic view that the natural world is filled with signs that point back toward its divine source, the merciful and beneficent creator who has adorned the world with things to make human beings happy. With our feet resting upon the solid earth, we can trust in the steady sacred presence holding the world in balance. We are able to trace the path from creation to the creator through the use of our reason. Upon reflection we recognize that since God is generous and compassionate toward us, we ought to take God's example as a directive to treat others in a similar way. This insight is shared by the Christian theologian Thomas Aquinas, who described "natural law" as God-given human reason that enables us to discern what is good and evil, and inclines us toward the former. Natural law ethics—what is described in Romans as a law "written on their hearts" (2:15)[2]—invests human rationality with the authority of moral discernment. Natural law thus understood is an empowering idea. Yet as Christian feminist ethicist Cristina Traina argues, natural law carries "a sometimes unsubstantiated reputation for deducing moral arguments from changeless universal moral norms and applying them inflexibly to impossibly diverse situations."[3] The tradition, Traina argues, harbors conflicting "hierarchical" and "egalitarian" impulses. In this essay I identify two competing traditions, a "deductive, authority-based" paradigm and an "inductive, experience-based" paradigm of natural law

[1] Citations from the Qur'an are taken from M.A.S. Abdel Haleem, trans., *The Qur'an* (Oxford: Oxford University Press, 2016).
[2] Citations from the Bible are taken from the NRSV.
[3] Cristina Traina, *Feminist Ethics and Natural Law: The End of the Anathemas* (Washington, DC: Georgetown University Press, 1999), 11.

reasoning. In what follows I consider both premodern Christian and Islamic sources and the contemporary feminist natural law ethics of Traina and Muslim ethicist Zahra Ayubi. I then turn to the political, showing how the two paradigms are present, respectively, in the 2022 Supreme Court decision *Dobbs vs. Jackson Women's Health,* which overturned *Roe Vs. Wade,* and in the dissent to that decision. Writing for the majority, Samuel Alito takes up the question whether a right to abortion is implicit in the nation's conception of "ordered liberty": Alito reasons that the Fourteenth Amendment's reference to liberty cannot be extended to abortion access, because the framers of the 14th Amendment would not have recognized such a right. On the other hand, the dissenting justices argue that the framers intentionally used general language, because they "understood that the world changes" and wanted to leave room for future generations to deliberate regarding the amendment's scope.[4]

Scholars have long recognized the influence of natural law in legal and political discourse around human rights[5]: the tradition has perhaps never been more influential, as the Court today is dominated by a conservative Catholic supermajority. In Islamic and Catholic ethics as in "secular" jurisprudence, the deductive, authority-based tradition has often presumed that the ones empowered to do the ordering are men. This paper argues that to "dis-order" the notion of "ordered liberty" is to recognize the moral authority that resides within the conscience of the individuals, particularly those individuals most impacted—those facing the possibility of unwanted pregnancy in precarious times.

Natural Law in Aquinas

Thomas defines law as an directive of reason which a ruler promulgates to the community to advance the common good (ST I-II, 90.4, 91.1). Now for Thomas the universal community is governed by God, and so "the Divine Reason's conception of

[4] Supreme Court of the United States, No. 19-1392, *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners v. Jackson Women's Health Organization, et al.*, 1 8; Breyer, Sotomayor, and Kagan, JJ., dissenting, Supreme Court of the United States, No. 19-1392, *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners v. Jackson Women's Health Organization, et al.*, 16.

[5] Jacques Maritain, *The Rights of Man and Natural Law,* trans. Doris C. Anson (New York: Gordian Press, 1971 [c1943]; Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters, *Journal of Law and Religion* 14.1 (1999-2000), 77-96; Jack Donnelly, "Human Rights as Natural Rights," *Human Rights Quarterly* 4.3 (1982), 391-405; John Finnis, *Natural Law and Natural Rights,* 2nd edition (Oxford: Oxford University Press, 2011); but see also Pierre Manent, *Natural Law and Human Rights* (Notre Dame, IN: University of Notre Dame Press, 2020).

things," he calls eternal law. God has "imprinted" principles of this eternal law upon all creatures, and especially upon rational human beings who have "a share of the Eternal Reason." This share in the eternal law Thomas calls natural law, and by it human beings are directed toward what is right and toward our proper end, union with God (ST I-II, 91.1-2).

For Thomas the "natural law" can refer to a God-given faculty (reason), which issues precepts (following from the primary directive to do good and avoid evil), which in turn order our inclinations toward what is good. "Law" can refer variously to faculty, precept, and inclination, and it is not always obvious which sense is controlling. But it is clear that the Natural Law is a gift from God which helps human beings rationally to order our inclinations and actions toward the good: "the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light" (ST I-II 91.2).

For Thomas then the natural law has egalitarian and even subversive potential, insofar as a human law which contravenes God's law must not be obeyed (ST I-II 96.4). Indeed, Martin Luther King, Jr. invokes this aspect of Thomas's natural law ethics in his Birmingham Jail Letter to justify civil disobedience.[6] In recent years religious ethicists have begun to reassess the natural law tradition, finding therein surprising resources for marginalized persons as they make claims in defense of their dignity.[7] To be sure, Thomas is not a feminist, but accepts Aristotle's view that women are "misbegotten males" whose chief role is reproduction. Nevertheless, as Traina argues, for Thomas, human nature is designed by God such that our reason directs us toward ends appropriate for the fulfillment of our own and others' natural and supernatural happiness: "It is a short distance from here to the feminist claim that whatever advances genuine flourishing is also morally good," she affirms.[8]

James Keenan concurs that in Thomas's formulation natural law is concerned with the everyday moral decisions by which everyday people acquire and develop the virtues. However, in

[6] King, "Letter from a Birmingham Jail," in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.,* edited by James M. Washington (New York: HarperCollins, 1986), 293.
[7] In addition to Traina's *Feminist Ethics and Natural Law,* see Vincent Lloyd, *Black Natural Law* (Oxford: Oxford University Press, 2016); Craig A. Ford, *Foundations of a Queer Natural Law,* [Doctoral dissertation, Boston College], 2018, https://core.ac.uk/download/pdf/199470157.pdf.
[8] Traina, 10.

Catholic moral theology, by the 17th century natural law has been "pulled away" from this root and "reduced to a set of principles and precepts" that are in the main obsessed with instructing confessors on how properly to classify and prescribe penance for specific categories of sins. Keenan cites Thomas Slater's moral manual which birfurcated the commandment to do good and avoid evil and prioritized the latter: "By Slater's time, moral theology was focused solely on moral pathology and that was progressively determined more by the hierarchy than by the moralist."[9]

The transition from Thomas's inductive, experience-based natural law model to the modern deductive, authority-based model reaches its nadir/zenith with Pope Paul VI's document *Humanae Vitae*, the 1968 encyclical proscribing "artificial birth control":

> No member of the faithful could possibly deny that the Church is competent in her magisterium to interpret the natural moral law. It is in fact indisputable, as Our predecessors have many times declared, that Jesus Christ, when He communicated His divine power to Peter and the other Apostles and sent them to teach all nations His commandments, constituted them as the authentic guardians and interpreters of the whole moral law, not only, that is, of the law of the Gospel but also of the natural law. For the natural law, too, declares the will of God, and its faithful observance is necessary for men's eternal salvation.[10]

The power to interpret the natural law has by now been wrested from the hands of the moral agent and is firmly in the possession of the magisterium. The Pope felt it necessary to ground his authority in the principle of apostolic succession, perhaps because he issued *Humanae Vitae* unilaterally overruling a team of experts he had convened to study the issue. The study commission, which notably included lay married couples, had voted overwhelmingly for a change in Church teaching.[11]

Cristina Traina and Christian Feminist Natural Law

[9] James Keenan, *A History of Catholic Theological Ethics* (New York: Paulist Press, 2022), 254-5, 260.
[10] Pope Paul VI, *Humanae Vitae,* 4, https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.
[11] John McGreevy, *Catholicism: A Global History from the French Revolution to Pope Francis* (New York: W.W. Norton and Company, 2022), 330.

In *Feminist Ethics and Natural Law,* Traina argues that natural law ethics and feminism require one another to fulfill their respective projects. Both traditions embrace the dignity of human persons in integral and interdependent relation to the common good, and both promote human flourishing and moral agential reasoning.[12] Thomas's construal of natural law contains both "egalitarian" and "hierarchical" impulses, the latter tending to justify existing power differentials; thus natural law requires correctives from feminist theory as well as the modern natural and social sciences. Yet, for Traina, Thomas offers a virtue theory and integral humanism that are particularly lacking in deconstructionist feminism, and which are necessary to communicate and cooperate across difference.[13]

The hierarchical impulse has gained strength during an era of "new absolutism" since John Paul II wherein "the vocation of the theologian is to explain and confirm the truths the hierarchy identifies."[14] Yet historically natural law has relied upon an "inductive method" involving "reflection upon experience." For Thomas natural law is "the innate rational inclination to the good" and is accompanied by a human impulse towards cooperation.[15] Natural law basically understands human rational capacity as our God-given common sense, which directs us toward our creaturely and eternal fulfillment.[16]

More recently Traina has written, specifically in the context of abortion debates, that Catholic magisterial theology is stubbornly oblivious to "women's moral experience." Pro-life and pro-choice advocates alike pit the rights of the fetus against women's right to bodily autonomy, producing a "rhetorical stalemate" that, in both cases, ignores the profound and "genuine moral dilemmas" that women with unwanted pregnancies face.[17] She points out that in 2014, 75% of women who had abortions had incomes at twice the federal poverty level or below and that almost half were below the poverty level. These women, argues Traina, "likely perceived themselves being unable to fulfill both their existing responsibilities and their obligations to a new child."[18] Pro-life Catholics advocate the virtue of welcoming an unplanned pregnancy as a romanticized divine "interruption" to

[12] Traina, 1, 81, 111, 114, 150.
[13] Traina, 316, 317, 321.
[14] Traina, 121-22.
[15] Traina, 11, 85.
[16] Traina, 123.
[17] Traina, "Between a Rock and a Hard Place: Unwanted Pregnancy, Mercy, and Solidarity," *Journal of Religious Ethics* 46.4 (Dec. 2018), 659-661.
[18] Traina, 662-63.

human agendas; meanwhile pro-choice advocates ignore the "moral anguish" experienced by many women who have abortions. Both camps seem to ignore that many women with unplanned pregnancies feel trapped "between a rock and a hard place," and Traina laments that our ethics all too often assumes that there are pat right and wrong answers and no "moral remainders."[19] Real people are faced with real dilemmas, and these dilemmas require more than the "mercy" offered by sympathetic advocates like Pope Francis; they require instead "compassionate solidarity" and systemic changes to social and economic structures that impose unjust constraints upon pregnant persons.[20]

Zahra Ayubi and Islamic Feminist Natural Law

Ayubi examines a range of fatwas issued by members of the Assembly of Muslim Jurists of America. Islamic jurisprudence (*fiqh*) is a male-dominated and heteronormative genre; jurists (*faqihs*) "make male control over reproduction seem to be the natural order of God, despite reproductive capabilities residing in female bodies," and despite the Qur'anic idea that women have "unmediated connection with God vis-à-vis the womb." This genre, which according to Ayubi treats women's bodies as "sites of moral danger," must give way to a broader ethical discourse incorporating "multiple epistemologies of Islamic ethics."[21]

In issuing fatwas concerning women's reproductive health, jurists consistently "exert pressure on women to have serial children." One jurist offers unsolicited advice to women advocating IUDs as his preferred method of birth control; another responds to a woman who says she doesn't want children by recommending that she "defer having children until you can overcome those feelings." In still another case a male petitioner complains that he "just cannot put up with" his wife who, he claims, is a bad mother to their two girls, and asks the *faqih* if an abortion is permissible. The jurist answers that the abortion is permissible for the first forty days "for a legitimate cause, such as the woman's fear of not having the capacity to raise the newborn," but that the decision must be mutual. Ayubi, though, worries that the husband may well return to his wife

[19] Traina, 664-66.
[20] Traina, 675-77.
[21] Ayubi, "Authority and Epistemology in Islamic Medical Ethics of Women's Reproductive Health," *Journal of Religious Ethics* 49.2 (June 2021), 245-47.

claiming support from a Muslim jurist and pressuring her to have the abortion.[22]

Missing entirely from the *fiqh* genre, Ayubi contends, is any recognition of women's experience as a site of moral and epistemological authority. She argues that a (non-male-dominated) legal framework should be regarded as one of many approaches to Islamic medical ethics, and commends a "patient-centered Islamic ethical decision making." Responding to an anticipated challenge that such an approach is not sufficiently "Islamic" because not grounded in Qur'an and hadith, Ayubi writes, "Another pathway is philosophical in pondering how experience is intuitive; it is a reflection of God's natural law, human behavior in interaction with God's law."[23]

Ayubi does not here elaborate a feminist theory of natural law, although elsewhere she recognizes that Islamic ethicists invoke natural law to cement patriarchal authority "by ascribing their conception of ideal manhood to natural laws of God's creation."[24] So I infer, then, that along with Traina, Ayubi distinguishes an *inductive* mode of natural law, which privileges experience (specifically women's experience) as a site of moral knowledge, from a *deductive* mode, which begins with the presumption that religious authority figures are uniquely authorized to deduce from scriptural sources an account of the divine natural order and apply it to arbitrate particular cases. Although the latter model has predominated in Islamic ethics, Anver Emon has argued that an Islamic natural law tradition dates to premodern sources.

Emon on the Islamic Natural Law Tradition

In his book *Islamic Natural Law Theories,* Anver Emon acknowledges that the idea of an Islamic natural law might "raise some eyebrows" since natural law is typically taken to be a Christian Western method that regards "reason as a source of law," whereas Islamic jurisprudence is generally understood to derive instead from "authority." Yet Emon surveys a range of premodern Muslim jurists, arguing that they recognized the "ontological authority" of "reason as a source of Sharī'a"[25]

[22] Ayubi, 254-58; 263.
[23] Ayubi, 264-65.
[24] Ayubi, *Gendered Morality: Classical Islamic Ethics of the Self, Family, and Society* (New York: Columbia, 2019), 242.
[25] Anver Emon, *Islamic Natural Law Theories* (Oxford, UK: Oxford University Press, 2010), 1, 3.

alongside scripture and other venerated texts. Emon notes that Islamic legal theory recognizes jurists' authority to "extend and develop the law in light of changed circumstances," as well as in cases where there is no clear scriptural or revelatory text to resolve an ethical question.

The Islamic natural law tradition asserts that "nature is the link between the divine will and human reason." The natural world is "the product of God's purposive creation for the benefit of humanity," and thus people can learn what is good and bad from empirical observation.[26] Emon acknowledges that Islamic scholars who invest reason with the capacity to discern the good independently are often marginalized as "Mu'tazilite rationalists," and that the Islamic natural law tradition confronts an "inherited tradition of *fiqh* that dominates the discourse on Islamic law." Yet the reformist commitments he identifies are also shared by feminist groups such as Sisters in Islam and Women Living Under Muslim Laws. Emon thus concurs with Ayubi and Traina that natural law's recognition of the authority of reason and experience is important for feminist concerns.[27]

Natural Law and Dobbs

The *Dobbs* decision was authored by the Catholic Supreme Court Justice Samuel Alito and was signed by his fellow Catholic Justices Amy Coney Barrett and Clarence Thomas, as well as Catholic-turned Episcopalian Neil Gorsuch, with concurring opinions by Catholic Justice Brett Kavanaugh and Catholic Chief Justice John Roberts. Gorsuch, in fact, completed his dissertation at Oxford under the direction of New Natural Law philosopher John Finnis.

Of course, to show that natural law theory had some bearing on *Dobbs*, it will not suffice to point out that the Supreme Court is dominated by Catholics. Jean Porter points out that "the most important figures" in the development of the idea of human rights, "including Hugo Grotius, Thomas Hobbes, and John Locke, frame their arguments in terms which are recognizably drawn from medieval discussions of natural law."[28] For natural law theorists such as Finnis, Alasdair McIntyre and others, "natural rights should be seen as expressions of the claims and duties which persons have over against one another by virtue of

[26] Emon, 12, 24-25.
[27] Emon, 36.
[28] Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters," *Journal of Law and Religion* 14.1 (1999-2000), 77.

their participation in an objective moral order."[29] And while some have argued that rights language doesn't appear until the fourteenth century, Porter discerns an inchoate theory of natural rights in Thomas Aquinas.[30] For Porter, "later natural rights theories appear as a natural (so to speak) development of the earlier medieval concept of natural law." She notes that this development takes place as thinkers come to recognize "the authority of the individual as a participant in the divine attributes of reason or will."[31] Porter insists that "rights talk matters" because "it confers on individuals the opportunity to assert their own sense of dignity, and where necessary, their own sense of injury before society as a whole."[32]

Insofar as *Dobbs* is an inquiry into the scope of human rights, then, it is in part rooted in natural law theory. But which paradigm is operative? In Samuel Alito's majority decision, clearly the deductive, authority-based paradigm is controlling. Alito asks whether a right to an abortion is implicit in "the Nation's concept of ordered liberty," which "sets limits and defines the boundary between competing interests."[33] According to Alito's originalist reading, "The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."[34] Alito reasons that the Fourteenth Amendment's reference to liberty cannot be extended to abortion access, because the framers of the 14th Amendment would not have recognized such a right: "when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy"; and therefore the extrapolation of such a right from the text is an egregious "doctrinal innovation."[35] Tellingly, Alito writes, "In interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy."[36] That is to say, in Alito's theory of jurisprudence, it is textual authority that takes

[29] Porter, 82.
[30] Porter, 87.
[31] Porter, 89.
[32] Porter, 96.
[33] Supreme Court of the United States, No. 19-1392, *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners v. Jackson Women's Health Organization, et al.*, 1., 3-4.
[34] *Dobbs,* 8.
[35] *Dobbs,* 5, 63.
[36] *Dobbs,* 14.

primacy over the justices' own reasoned deliberation (and certainly over the reasoned deliberation of pregnant persons).

According to the dissenting Justices, Sotomayor, Kagan, and Breyer, the *Roe* and *Casey* decisions held that "respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions."[37] The *Dobbs* decision, they argue, "says that from the very moment of fertilization, a woman has no rights to speak of. A state can force her to bring a pregnancy to term," such that under some laws "a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life."[38] The majority hold that "we in the 21st century must read the Fourteenth Amendment just as its ratifiers did"; but, the dissenters note, those ratifiers were all men, who did not regard women as equals with equal rights; by deferring to their intentions, then, the decision thus "consigns women to second-class citizenship." The dissenters hold a different theory of Constitutional interpretation, arguing that "the Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning."[39]

In terms of Traina's and Ayubi's conception of natural law, Alito's decision represents that version of natural law jurisprudence that I earlier called the "deductive approach based in authority." This paradigm assumes that jurisprudence begins with a set of texts that are taken to be authoritative (scriptural or constitutional), and that must be interpreted according to the original authorial intent which is eternally binding. Later texts also have authority but that authority is derivative of the older texts, which trump the later texts' authority when the two come into conflict. The role of jurisprudence, on this view, is no more and no less than to apply the original intent communicated in the authoritative text to the particular case at hand. (Keenan refers to this method as "low casuistry."[40])

[37] Breyer, Sotomayor, and Kagan, JJ., dissenting, Supreme Court of the United States, No. 19-1392, *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners v. Jackson Women's Health Organization, et al.*, 1.
[38] Breyer, Sotomayor, and Kagan, 2.
[39] Breyer, Sotomayor, and Kagan, 16.
[40] Keenan, 175-76.

The dissent, on the other hand, represents the paradigm I called an "inductive approach based in experience." In this approach, the texts (scriptural or Constitutional) are still taken to be important and normative, but are held to contain general moral principles which must be interpreted contextually, and the application of which may change along with historical circumstances; and the texts are understood as one authoritative source alongside others including the authority of the individual's moral experience. Texts are understood to be products of their particular sociohistorical location and are to be interpreted against that background. The texts are taken to promote a general view of human and creaturely flourishing and to promote human moral agential reasoning as a source of valid moral discernment. Because the texts reflect a moral context that is centuries or millennia removed from our own, in cases where their particular stipulations conflict with modern scientific facts or established cultural or moral norms, their moral authority gives way to that of the moral agent.

Conclusion

The two paradigms of natural law reasoning, what I call the "inductive, experience-based" and the "deductive, authority-based" models of natural law, boil down to a difference in identifying the temporal and agential locus of moral authority. For the deductive model the locus of moral authority is in the past and is identified with a divine or quasi-divine text. For the inductive model the locus of moral authority is located along a dialectic between past and present, between textual authority and individual and collective moral experience. I would argue that the inductive method is in fact more aligned with Aquinas's view of natural law as one resource for moral deliberation which is counterbalanced with divine law or revelation. But of course to invoke Aquinas as an authority here would fly in the face of the inductive paradigm's project. That project, after all, is to recognize the moral authority that resides within the conscience of the impacted individuals. Alito argues that the concept of "ordered liberty" functions to "set limits" in cases of "competing interests"—but a *concept* as such can do no such thing. Someone, after all, must set the concept to work, must do the ordering. The inductive natural law tradition suggests that, given the primacy of personal experience, the persons most directly impacted ought at least to have a seat at the table—or, to mix metaphors, that the person seated on the examining table has thereby earned a seat at the judge's bench.