# PRIMA GRATIA

## Review of *The First Grace: Rediscovering the Natural Law in a Post-Christian World* by Russell Hittinger

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The informing vision of this important and subtly argued book is that man is not left to himself; there is no place on the planet, period of history, domain of conduct, or region of the mind where he can be separated from the relentless providence of God. Although faith is the first grace in the order of redemption, the first grace in the broader order of providence is natural law, and this first grace is irrevocable. In our rebellion we may be given up by God to our passions, but even this is not the same as to be thrown outside of His authority; it is a disciplinary penalty of the same natural law that we defy. According to Russell Hittinger, the theory of natural law once knew such things. It sprouted and flourished in the garden of theology, rooted deeply in the doctrines of creation and providence. For complicated reasons, the grounds-keepers of our time walled off the garden, but not before taking cuttings from the flourishing theory, potting them, and turning them into a house plant. The author wants to set things right.

Hittinger says that his essays investigate "problems that arise once natural law is understood as free-floating with regard to authority, whether human or divine." The statement suggests three purposes for writing: To reorient natural law theory with respect to divine authority, to reorient it with respect to human authority, and to survey the symptoms of its late disorientation. Thus, in chapters one and two, he lovingly replants the theory of natural law in the garden of theology. In chapters three and four, he takes down the garden's enclosing wall, rejecting the idea that theology should be isolated from the study of statecraft or jurisprudence. In the remaining seven chapters, he returns to the window-sill to examine the potted cuttings, finding that when uprooted from its proper soil, the theory of natural law either withers or turns toxic. Although Hittinger writes from within Catholicism, Protestants have not been forgotten; a secondary motive in writing is to persuade his evangelical readers that the separation of theology from Catholic thought about natural law has developed "only recently, and as an aberration." Along the way, he discusses not only the paradox that "contemporary Catholic thinkers who have no aversion to theology as such are reluctant to predicate 'law' properly of natural law," but also the endeavor of the papal magisterium to reassert the older tradition.

The four essays of section one, "Rediscovering the Natural Law," are so tightly-knit that they could stand as a short book on their own, and I foresee them becoming a staple of graduate seminars. He first observes that natural law theory can be viewed as a theory of

order either in the mind, in "things," or in the mind of God. Historically, the tradition has viewed the first and second foci as subordinate to the third. We are creatures; our human design and situation are not law itself, but rather the effect and the witness of law. Not only were our inclinations designed by the Creator, but our intellects reflect him in a yet more eminent way, for He governs rational beings differently than animals: We "participate" in the eternal law by which His providence governs the universe -- receiving it, understanding it, and going on to make more law. Unfortunately, if we attempt to isolate the theory of natural law from its theological basis, not only do we become unable to understand the natural law *as law*, but we lose sight of why the first principles of mind and things should matter. Our minds and urges seem laws unto themselves. The permanent features of our situation seem mere brute facts -- to be endured or, if possible, got around.

Even if we view the three foci rightly, says Hittinger, one may ask three kinds of questions about natural law: Philosophical, like whether there really is a natural law, political, like how to distribute constitutional responsibilities to give natural law the fullest possible effect, or jurisprudential, like whether judges may appeal to the natural law directly. Debaters lamentably confuse the categories, reasoning for example that *if* there is a natural law (category one), then such things as rule of law, division of powers, and judicial restraint (categories two and three) go out the window. Against such confusion, Hittinger maintains that natural law demands the rule of law; prudence suggests that the rule of law is assisted by division of powers; and such division necessitates judicial restraint. Such corrections form part of a more general argument about how diverse authorities participate in a constitutional order under natural law. A paradox is that while prohibiting one use of natural law, judicial restraint requires another. No judge should usurp legislative power in its name, but apart from it, legislative intent cannot be fully ascertained.

In several instances one might question the author's decision to place a topic in section two, "Natural Law and the Post-Christian World," rather than section one. In particular, chapter five investigates the dangers of trying to protect natural rights by inserting them in constitutions without explaining what they mean. But if Hittinger is right (as I think he is), then under-specification is dangerous in *any* world. The rationale for the placement of the chapter appears to be that in post-Christian jurisprudence, when natural rights are viewed as an "authority-free zone," the danger becomes still more acute. I think this rationale is sufficient, though it might have been more clearly explained.

In most of Section Two, the selection of chapters is more clear. Chapter six considers another instance of under-specification -- the alleged right to assisted suicide as an instance of the alleged general right to privacy -- in order to find out how far we can demand a right "to be left alone" yet remain "civilized." Paradoxically, at the same time that such a right weakens the *rationale* for the state by privatizing "judgments that indisputably belong to public authority," it inflates the *liberty* of the state by implying that "some individuals [are] beyond the pale of common protections from the government itself."

In chapter seven, where Hittinger considers the attitude of the U.S. Supreme Court

toward religion, he finds that although the Court makes inconsistent legal arguments, the real and consistent basis of its decisions is the *extra*-legal view that religion is "divisive, coercive, irrational," and resistant to objective definition. Hittinger's contribution to the controversial *First Things* symposium, "The End of Democracy?", can be found in chapter eight, where he point out that the Supreme Court itself raised the symposium's explosive question: It has "self-consciously staked its own legitimacy, and indeed the legitimacy of the constitutional 'covenant,'" on an entirely novel view of itself as the exemplar of the general will. In chapter nine, Hittinger explores Christopher Dawson's view that liberalism has been replaced and inverted by a technological order whose central feature is the replacement of the distinctive human act by the machine. For the book, the significance of this development is the practical challenge that it poses to the theory of natural law -- a challenge for which there is "no history ... no precedent."

The capstone of the volume, chapter eleven, chronicles and celebrates the "decisive shift" of late nineteenth and twentieth-century Catholic natural law theory toward a new understanding of the relation between the state and the body politic -- a shift which Hittinger finds parallelled in some Protestant thought of the period. Although previous theorists like Tocqueville had offered arguments in defense of civil society, most of them praised it only in instrumental terms -- for its contribution to the good of the state. In the new view, it was that state that came to be seen as the instrumental good, its purpose "to protect the flourishing of societies other than the state itself." This required a deepening analysis of the *intrinsic* value of the various kinds of bond in civil society. Remarkably, shows Hittinger, Pope Leo XIII's brief for the associational rights of laborers in the encyclical *Rerum Novarum* "relies directly" on Thomas Aquinas's thirteenth-century brief for the newly formed mendicant orders in *Contra impugnantes* -- a document Hittinger convincingly presents as "the first, or at least one of the first, systematic defenses of civil society." As Hittinger summarizes Thomas's argument, "to prevent free men and women from associating for the purpose of communicating gifts is contrary to the natural law. It is tantamount to denying rational creatures the perfection proper to their nature, and denying to the commonweal goods it would not enjoy were it not for free associations."

The contribution of the book to Catholic moral theology should be plain, but it should be read at the other end of the churchyard as well. For some time, evangelicals have been seeking high and low for the materials of a public philosophy. Although they find the idea of natural law attractive, the only sort of natural law theory which Scripture-sensitive Protestants could embrace would be the sort that Hittinger champions -- one that acknowledges its rootedness on the providence of God. At the same time, such acknowledgment raises a problem for both evangelicals and Catholics. Just how persuasive to the public can a "public philosophy" be if it is rooted in considerations that large parts of the public reject? This, I suspect, is the *reason* why "even contemporary ... thinkers who have no aversion to theology as such" hesitate to let it touch the theory of natural law. Yet there is a possible response to such hesitation. The case for public use of natural law theory is not that it constitutes a form of public speech, but that it offers theoretical guidance for public speech. One need not burden one's neighbor with the *theory* of what is first in mind, things, and the mind of God -- but one

had better know what is first in the neighbor's mind.

Another complication of the relation between theology and natural law turns up in chapter nine, which scrutinizes the liberty of religion through the lens of the Vatican II text *Dignitatis Humanae.* In Hittinger's view, the document builds a two-story house -- grounding religious liberty *in general* on the dignity of man made in God's image, but grounding the liberty of the Church *in particular* on its divine redemptive charter. What strikes me is that both points appeal not to natural but to revealed theology. Of course natural theology has nothing to contribute to the second floor; it is silent about the Church. As to the first floor, it might be able to explain why human beings should be free to seek God, "if haply they might feel after him, and find him" (Acts 17:27) -- but post-Christian people find it hard to say what kinds of "feeling after" the "finding" might require. When religious liberty might mean almost anything, it threatens to mean almost nothing, so it is not surprising that the Church is at pains to refute theoretical errors like the so-called "neutrality" of liberalism or the *curius regio* doctrine that the Church is "an organ of the state."

Why Hittinger puts this argument in section two is plain enough. But if one considers the deep and general importance of his underlying proposition, it deserves to be featured more prominently. In effect, he is claiming that by the light of natural reason, some natural rights turn out to be under-specified; to come into their own, they need the further light of special revelation. John Paul II put the general case for the mutual dependence of faith and reason in *Fides et Ratio,* but until now, natural law theorists have hardly begun to consider its implications. This potentially explosive idea demands rethinking the whole relationship of faith to public life.

In short, the only difficulty of this brilliant and penetrating work of theology and philosophy is that it requires another -- the sooner, the better.