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■ Also in this issue: “Ulpian’s Influence on Aquinas,” by Rev. Benedict M. Guevin ■

REVISING THE *ERDs* FOR THE 21ST CENTURY

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For decades the *Ethical and Religious Directives for Catholic Health Care Services* have served as a unique source of guidance for Catholic health care ministries in the United States. The *ERDs* cogently distill and apply key elements of the Catholic moral tradition to modern health care delivery. Since 1948, when a document bearing the title *Ethical and Religious Directives* was first published, the *ERDs* have undergone major revision only twice, in 1971 and 1995.

Given the historical precedent for major revision roughly every two decades and the significant changes in health care, the Church, and society since the early 1990s, another revision of the *ERDs* is in order and should be anticipated.¹ While it cannot be predicted when a major revision might be called for or completed, we should prepare to make the most of a once-in-a-generation revision.

This article introduces a series of reflections on the current status of the *ERDs* and on how they could and should be revised. This initial article will provide an overview of key features of the *ERDs* as a whole—their history, content and structure, authorship and authority, and functions. Subsequent articles in *Ethics & Medics* will survey the *ERDs* part by part to review the guidance that now exists and to discuss what changes are necessary. I hope these reflections stimulate additional thought and discussion on the topic.

History of the *ERDs*

The first document to bear the title *Ethical and Religious Directives for Catholic Hospitals* contained fifty-six directives in total—forty-three on issues relating to ethics in medicine and thirteen on the religious care of patients.² After minor revisions in 1955, these initial *ERDs* were endorsed by a resolution of the US bishops and remained in effect until 1971.³

The first major revision of the *ERDs* was published in 1971, occasioned by changes in US health care financing and delivery (following the creation of Medicare and Medicaid in 1965) and in the Church after the Second Vatican Council. This period also was a time of tremendous social and political upheaval in the United States. Apart from authorship, however, the *ERDs* did not change

significantly. The number of directives was consolidated from sixty to forty-three, but their overall structure remained in place. Ethical and religious directives were each given their own sections. Ethical directives were then broken into four parts: general principles, procedures affecting human life, procedures affecting reproductive organs, and other procedures.

Indeed, it was the lack of significant change that disappointed some within Catholic health care and occasioned sharp protests from increasingly dissident theologians, who urged the Church to be more flexible on matters of surgical sterilization and contraception. Appeals to Rome and tussles over the proper interpretation of the *ERDs* occupied the rest of the 1970s. During this period, the US bishops maintained the 1971 *ERDs* as written and continued to uphold perennial Church teachings on respect for life and human sexuality. However, the dynamics involved in the 1971 revision influenced the second major revision, which was published in 1995.

The 1995 *ERDs* represent the most thoroughgoing revision ever conducted. The most distinctive change was a new six-part structure, which provided a broad framework within which to address emerging issues in health care and to supply explanatory context for the Church’s ethical guidance. Although there have been three partial revisions since then—part 6 has been revised twice, and dir. 58 was revised once—everything else in terms of structure and content in the current, sixth edition (2018) dates from 1995.⁴

Structure and Content

The major subject areas covered in the 1995 *ERDs* include (1) social accountability and organizational ethics, (2) pastoral and spiritual care, (3) the professional–patient relationship and certain clinical issues in health care, (4) issues in care at the beginning of human life and procreation, (5) issues in care for the seriously ill and dying, and (6) an entirely new topic addressing collaborative arrangements and major organizational relationships in the delivery of health care.

Within this broader structure, the number of directives increased from forty-three to seventy (and to seventy-seven in the 2018 *ERDs*). The new explanatory content in the 1995 *ERDs* can be found partly in a lengthier preamble and general introduction but mostly in the new introductory sections written for each of the six parts.

Without a doubt, the multi-part structure of the *ERDs* is here to stay. At issue is whether six parts will remain enough or if more sections should be added to address new issues, such as the migration of much clinical care to outpatient settings, or to provide a greater focus for a range of issues in organizational ethics. While there should be significant continuity in the formulation of key principles (e.g., the wording of dir. 47 has remained practically unchanged since 1948), many areas of health care have changed

considerably. It will be essential to identify current issues (such as gender transitioning) that must be addressed.

Authorship and Authority

The 1948 *ERDs* were written in significant part by moral theologian Gerald Kelly, SJ, under the auspices of the Catholic Hospital Association. They were considered advisory in nature and used on a voluntary basis. The influence of the *ERDs* increased after 1955 when the bishops of the United States passed a resolution officially endorsing them. What distinguished the 1971 *ERDs* was that, for the first time, the author and publisher was the National Conference of Catholic Bishops (NCCB), a role that its successor organization, the United States Conference of Catholic Bishops (USCCB), has retained to the present day. One of the goals of the change in authorship was to create a more consistent national standard of ethical guidance, a necessity since some bishops were known to countenance a less strict application of some moral norms. This raises the issue of the authority of the *ERDs*.

It can be surprising to discover that the *ERDs*, as such, have no authoritative status, because the USCCB, as a national bishops conference, does not possess teaching authority. Understanding the true source of the *ERDs*' authority throws light on their current status and on how they might better function in the future. The most important source of *doctrinal* authority in the *ERDs* is found in the moral tradition of the Church, in magisterial teachings, and in moral norms and resources such as the principle of double effect. The source of *canonical* authority in the *ERDs* is derived from the authority of the local ordinary over ministries of the Church, particularly when he promulgates the *ERDs* as law in his diocese.

However, in virtue of his authority as teacher and shepherd, a local bishop can do more than promulgate the *ERDs*. He can also provide authoritative interpretations and even issue more specific directives to better serve his diocese. Exercising these options might help to resolve a tension that arises from trying to formulate directives broadly enough to provide consistent national guidance while supplying the specificity that is needed to provide clarity on key moral issues.

Process

It appears that the work of revision prior to the 1971 edition was conducted largely within the NCCB. The second major revision of the *ERDs* was different. Completed in 1995, the process took place over six years and incorporated input from bishops, Catholic health care ministries, moral theologians, and Catholic ethics institutes.⁵ It is safe to conclude that a future revision of the *ERDs* will be similarly broad-based.

While the USCCB does not solicit input from the public, many can help with the process of revision. Scholars can publish articles

on key topics, which may exert influence on those involved in the revision process. Leaders in organizations in line to be consulted—Catholic health care systems, The National Catholic Bioethics Center, the Catholic Medical Association, the National Association of Catholic Nurses, and so on—can provide input.

All the above and more have an interest in the revision of the *ERDs*. Not only will they guide the operations of Catholic health care organizations for the foreseeable future, but they are explicitly offered as a support for individual Catholic health care professionals and can even serve as a resource for the laity in understanding and applying Catholic moral principles in health care decision-making.

Functions

The traditional functions of the *ERDs* are clearly defined in the preamble to the 1995 edition—to reaffirm authentic ethical standards of behavior in health care and to provide authoritative guidance on certain contemporary moral issues. The *ERDs* have functioned well in these regards, providing a relatively consistent national standard. Beyond this, however, they can and should function in new ways. The *ERDs* contain not only negative moral norms proscribing certain actions but also positive norms recommending what goods Catholic health care ministries should support. Careful consideration should be given to choosing those goods or goals for which distinctive Catholic witness in health care is most needed in our own challenging times.

Catholic health care ministries and Catholic health care professionals face many new challenges, from expanding medical technologies to an increasingly aggressive secular culture. The next revision of the *ERDs* should provide the resources necessary to advance the witness of Catholic health care in the twenty-first century.

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Notes

1. There have been several revisions to the *ERDs* over time, including minor changes in 1955 and three changes since 1995. See John F. Brehany, "The Ethical and Religious Directives: Origins, Structure, and Implementation," in *Catholic Health Care Ethics: A Manual for Practitioners*, 3rd ed., ed. Edward J. Furton (Philadelphia: National Catholic Bioethics Center, 2020), 4.1. However, the 1948, 1971, and 1995 editions of the *ERDs* are the most important and reflect more significant changes.
2. US Conference of Catholic Bishops, "Ethical and Religious Directives for Catholic Hospitals," *Linacre Quarterly* 15.3–4 (July 1948): 1–7.
3. Orville N. Griesse, *Catholic Identity in Health Care: Principles and Practice* (Braintree, MA: Pope John Center, 1987), 1–17.
4. Brehany, "Ethical and Religious Directives," 4.5n1.
5. Kevin D. O'Rourke et al., "A Brief History: A Summary of the Development of the *Ethical and Religious Directives for Catholic Health Care Services*," *Health Progress* 82.6 (November–December 2001): 20.



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ULPIAN'S INFLUENCE ON AQUINAS'S NATURAL LAW

Rev. Benedict M. Guevin, OSB



Ulpian is one of the great names in Roman jurisprudence to whom Justinian, in his sixth-century codification of Roman law, was most indebted. Whatever may have been the sources for Ulpian's definition of natural law, including its possible parallels in Pythagorean or stoic philosophy, its authority was both enhanced and confirmed by its appearance at the head of the *Digest* and *Institutes* of Justinian (*Corpus iuris civilis*). St. Thomas Aquinas integrates this definition of the natural law into his discussions of sexual ethics: "That which nature teaches all animals."¹ Aquinas probably retrieved Ulpian's definition of the natural law by way of both the *Corpus iuris civilis*, Roman law as compiled and codified by Emperor Justinian from 529–534, and *legistica* tradition, traditional Roman law which predated Justinian's codification. Both were sources of debate in many universities during the twelfth and thirteenth centuries.²

In the thirteenth century, when *tractatus de legibus* had become an integral part of theology, we find acceptance of Ulpian's definition, described as the natural law in the wide sense, in William of Auxerre's *Summa aurea* and in the teachings of Roland of Cremona. The Franciscan tradition, represented by Alexander of Hale's *Summa fratris Alexandri* and St. Bonaventure's *Commentary on the Sentences*, also retrieves Ulpian's definition; Bonaventure eulogizes him for it.

Yet surprisingly, Aquinas's own teacher, St. Albert the Great, had no use for Ulpian. In both the *Summa de bono* and the *Commentary on the Nicomachean Ethics*, Albert rejects Ulpian's definition, insisting that the natural law belongs to the specific, rational aspect of human beings and not to any nature that we may share with other creatures.³ He reiterates this insistence on the rational nature of the natural law in his later *Ethica*. Despite Albert's rejection, Aquinas found a place for it both in his systematic treatment of the law in *Commentary on the Ethics* and in the *Summa theologiae*.³ This is most manifest in his treatment of sexuality.

Aquinas on Sex

In *Summa theologiae* (ST) I.90–102, Aquinas discusses the meaning of humans' being "made to God's image," addressing "the original state of condition with respect to sex," in q. 98. He raises the objection that before sin, there was no copulation:

It is in fleshly copulation that man becomes most like animals, because the pleasure is so violent; hence the esteem in which continence is held, by which men refrain from this sort of pleasure. But it is because of sin that man is compared to the animals in the Psalm: *When man was in honour he did not understand; he was compared to beasts and became like them* (Ps. 48:13). So before sin there would have been no fleshly copulation of male and female.⁵

In reply, Aquinas makes several important assertions:

Animals lack reason. So what makes man like animals in copulation is the inability of reason to temper the pleasure of copulation and the heat of desire. But in the state of innocence there would have been nothing of this sort that was not tempered by reason. Not that the pleasurable sensation would have been any the less intense, as some say, for the pleasure of sense would have been all the greater, given the purity of man's nature and sensibility of his body. But the pleasure urge would not have squandered itself in so disorderly a fashion on this sort of pleasure when it is ruled by reason. It is not demanded by this empire of reason that the pleasurable sensation should be any the less, but that the pleasure urge should not clutch at the pleasure in an immoderate fashion; and by "immoderate" I mean going beyond the measure of reason. Thus a sober man has no less pleasure in food taken moderately than a greedy man; but this pleasure urge does not wallow so much in this sort of pleasure.⁶

Aquinas takes up the question of sex more extensively in ST II-II.153–154. In q. 141, he defines the essence of virtue in general as that which sets human beings toward the good. The good means living according to reason. Temperance does this; its very name expresses a temper measured by reason. Aquinas then states,

By its nature each thing is bent on what fits it. And so human beings naturally crave an enjoyment that matches them. As such they are intelligent beings; consequently those pleasures are appropriate to man in keeping with reason. On these temperance puts no restraints, though it does on those that are against reason. Clearly this is to agree and not to clash with the burden of human nature (*inclinacioni naturae humanae*). Which is not to deny that temperance is against the grain for merely animal nature uncomplying with reason (*Contrariatur tamen inclinacioni naturae bestialis non subjectae rationi*).⁷

The function of temperance is not to put a restraint on the pleasure corresponding to human nature. Rather, it is to bring reason to bear on those inclinations that human beings have in common with animal natures that do not have reason. If human beings are to live virtuously, the inclinations they experience (toward eating, drinking, procreation, that is, passions needed for the survival of the individual and the species) must be brought under the aegis of reason. The failure to do so leads to vice.

Having presented the vice of lust in general in q. 153, Aquinas turns his attention to its specific kinds in q. 154. By way of a general comment, he writes, "The sin of lechery [lust] consists ... in a person applying himself to sex pleasure not according to right reason. This may come about either because of the nature of the act in which pleasure is sought or, when this is rightful, because some due conditions are not observed."⁸

In other words, lust may conflict with right reason on two accounts. The first is when the act is of its nature incompatible with the purpose of the sex act (*vitium contra naturam*).⁹ This means any sex act from which generation cannot follow (e.g., bestiality, masturbation, and oral or anal sex). The second is when an act is of its nature in conflict with right reason with respect to the other party in one of two ways: (1) within the proscribed bounds of consanguinity or affinity (i.e., an incestuous act), and (2) with respect to the guardian. (For example, if the husband acts outside right reason, then we have adultery. If the father or mother does so, then we have seduction if no violence is present; and if violence is present, then we have rape.)¹⁰



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In articles 11 and 12 of q. 154, Aquinas draws out the full implication of these two points. Because of the controversy engendered by these articles, it is worth citing the salient passages in full:

First, outside intercourse when an orgasm is procured for the sake of venereal pleasure; this belongs to the sin of self-abuse, which some call unchaste softness. Second, by intercourse with a thing of another species, and this is called bestiality. Third, when a person of the same sex, male with male and female with female, to which the Apostle refers (Rom. 1:26), and this is called sodomy. Fourth, the natural style of intercourse is not observed, as regards the proper organ or according to other rather beastly and monstrous techniques.¹¹

For Aquinas, human intercourse is penile-vaginal with the deposit of semen in the vagina. He distinguishes between two categories of lust. First, in sins against nature (*contra naturam*), this natural process does not occur (e.g., masturbation, sodomy, fellatio, cunnilingus, contraception, and bestiality). Second, in sins according to nature (*secundum naturam*), the act of penile-vaginal intercourse with the deposit of semen occurs, but some distinctive human aspects of sexuality are threatened or violated (e.g., fornication, adultery, rape, and incest).¹²

Of these two, those against nature are worse because they are an affront to God, the ordainer of nature.¹³ The question is this: To what kind of nature is Aquinas referring in this distinction? A close reading of Thomas on sexuality uncovers—whether we like it or not—a strong biological orientation. Beginning with article 11, Aquinas has found a place for Ulpian's definition of the natural law in terms of what human beings and animals have in common.¹⁴

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Notes

1. Justinian, *Digests*, bk. 1, *Justice and Law*, 1.3. *Ius naturale est quod natura animalia omnia docuit*. For an excellent discussion, see Michael Crowe

and Odon Lottin, *Le droit naturel chez Thomas d'Aquin et ses prédécesseurs* (Bruges, Belgium: Charles Beyaert, 1931).

2. see Michael Crowe, "St. Thomas and Ulpian's Natural Law," in *St. Thomas Aquinas 1274-1974: Commemorative Studies*, vol. 1, ed. Armand Maurer (Toronto: Pontifical Institute of Medieval Studies, 1974), 261-282. During the twelfth and thirteenth centuries, two definitions of the natural law, persisting in an uneasy relationship, obtained among civil lawyers: the specifically human natural law (sometimes called *ius gentium*) and Ulpian's definition. The latter was to prevail.
3. Albert the Great, "De iustitia," in *Opera omnia ad fidem codicum manuscriptorum edena* vol. 27, *Summa de bono* (Münster: Aschendorff Publishing, 1951), 265-266. "Non enim consentimus in distinctionem quam quidem possuerunt, scilicet quod ius naturale multis modis dicatur et uno modo sit commune nobis cum brutis. . . . Cum igitur lex sit ius nec possit ius esse, ubi lex non est, non erit ius naturale nisi solius hominis . . . haec distinction nec artem nec rationem habet, sicut est mos decretistarum ponere distinctiones."
4. Notably, in *Commentaria in libros sententiarum* 4.33.1.1, Aquinas, in spite of his use of Ulpian, gives more importance to the rational nature of the person. For a fuller treatment of Aquinas's use of Ulpian in both the *Summa* and the Commentary, see also Crowe, *Thomas Aquinas*, 272-281.
5. Thomas Aquinas, *Summa theologiae* (*ST*), trans. Edmund Hill (London: Blackfriars, 1964), I.98.2 obj 3.
6. Aquinas, *ST* I.98.2 corpus.
7. Aquinas, *ST* II-II.141.1 ad 1.
8. Aquinas, *ST* II-II.154.1 corpus.
9. Aquinas, *ST* II-II.71.2 ad 1. All vice is unnatural according to Aquinas because it is contrary to the natural human inclination toward the good found in virtuous living.
10. Here, Aquinas is arguing according to the physiology of his time according to which the man alone is the agent, the woman the patient. The distinction is not essential to his argument and will be ignored hereafter, since both men and women are capable of these acts.
11. Aquinas, *ST* II-II.154.11 corpus.
12. Vincent Genovesi, *In Pursuit of Love: Catholic Morality and Human Sexuality*, 2nd ed. (Collegeville, MN: Liturgical Press, 1996), 119.
13. Aquinas, *ST* II-II.154.12 obj 1-4.
14. Aquinas, *ST* II-II.57.3. We can see Ulpian's influence on Aquinas in *IV Sententiae* 33.1.1.4. "*Ius naturae est quod natura omnia animalia docuit;*" and *Commentary on the Nicomachean Ethics*, bk. 4 lect.12, corpus.

