

The Incipient Probabilism of Francisco de Vitoria

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MANY APPEAL TO Francisco de Vitoria (ca. 1483–1546) for their grand narratives of moral and political modernity. The place he occupies in the doctrine of natural rights and international law are well-documented.¹ Within these genealogies, Vitoria is often used to bridge the medieval tradition and the modern world. Some interpret him as a conservative reader of St. Thomas, while others interpret him as a progressive thinker. In a recent article, Luis Valenzuela-Vermehren acknowledges how the past century of scholarship has failed to adequately comprehend the Thomistic cast of Vitoria's thought, leading in turn to intractable disputes regarding his place in the tradition.² To remedy the current state of affairs, Valenzuela-Vermehren argues that one must distinguish the basic tenets of the relevant Thomistic teaching in order to understand Vitoria in context. In his article, Valenzuela-Vermehren recapitulates a standard interpretation of Thomistic natural law theory to contend against what he holds are unfounded claims regarding Vitoria's place in the development of international law. Interestingly though, after Valenzuela-Vermehren expositis the Thomistic doctrine, he simply claims it for Vitoria, and then critiques contemporary construals.³ He does not engage directly or adequately with Vitoria as an independent thinker (even suppositionally), nor does he

¹ See, for instance, Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids, MI: Eerdmans, 2001).

² Luis Valenzuela-Vermehren, "Creating Justice in an Emerging World: The Natural Law Basis of Francisco de Vitoria's Political and International Thought," *Ideas y Valores* 66 (2017): 39–64.

³ See Valenzuela-Vermehren, "Creating Justice," 57.

make an adequate textual study of Vitoria's reception of St. Thomas.

While it is certainly helpful to know the relevant Thomistic teaching in which Vitoria was steeped, this method appears to presume an essentially conservative approach on the part of Vitoria. Furthermore, it effectually precludes the identification of what may be a subtle reappropriation of Thomistic terms and concepts at work in Vitoria's theology. In the following, I will argue for a sense in which Vitoria is progressive in his appropriation of St. Thomas. But, rather than attempt to show this in a thorough-going or exhaustive manner, I will simply supply one interpretative building block in what is a much larger project. I will show that Vitoria contributed to the genesis of probabilism, a moral theory foreign to the thought of St. Thomas. Based on this particular proof, I hope to problematize the overly facile use of Vitoria as an interpreter of St. Thomas in the fashioning of grand narratives in contemporary discourse. By grasping one sense in which Vitoria is original, we can better appreciate the novelty of his thought more broadly and so approach contemporary debates with the requisite care.

In recent literature, historians and theologians typically cite Bartolomeo de Medina, O.P. (1522–1580), as the originator of probabilism, or at least as the theologian who gave it a standard formulation.⁴ In what follows, I concede the importance of Medina. I simply intend to shine the spotlight one generation earlier, in order to shed some light on the role played by his professor who occupied a position of considerable influence both within the School of Salamanca⁵ and in the deliberations of Spain's international crisis of conscience.⁶

⁴ Daniel Schwartz, "Probabilism Reconsidered: Deference to Experts, Types of Uncertainty, and Medicines," *Journal of the History of Ideas* 75 (2014): 373–93, at 376.

⁵ Though there is scholarly debate as to what constitutes the School of Salamanca, Francisco de Vitoria is unanimously considered its founder; see Simona Langella, *Teología y ley natural: Estudio sobre las lecciones de Francisco de Vitoria* (Madrid: Biblioteca de Autores Cristianos, 2011), 47–48. Having occupied la Cátedra Prima de Teología for twenty years (1526–1546), he exercised enormous influence through the wide-ranging pursuits of his distinguished students. When Vitoria died, nearly thirty of his former students were serving as professors in the Spanish-speaking world. See André Azevedo Alves and José Manuel Moreira, *The Salamanca School* (New York: Continuum International, 2010), 14.

⁶ Probabilism derives from a tradition of commentary on St. Thomas's teaching regarding conscience. As will appear in what follows, *Summa theologiae* [ST] I-II, q. 19, aa. 5–6, on erring conscience was the *locus theologicus* from which generations of moral theorists took their departure. Consequently, it is not insignificant that Vitoria's doctrine arises in the context of a national crisis of

In what follows, I will first give a summary explanation of probabilism. Then, I will highlight certain features of Vitoria's formation which laid the groundwork for probabilism in his thought. Finally, I will examine certain texts which illustrate Vitoria's departure from St. Thomas, and thus the originality of his approach to the Thomistic tradition.

Probabilism

Probabilism describes two things. First, it names a genus of moral systems which resolve cases of conscience; this genus includes laxism, probabilism, aequiprobabilism, probabiliorism, and rigorism. Used in a narrower sense, probabilism is a species within the aforementioned genus that names "the moral system which holds that, when there is question solely of the lawfulness or unlawfulness of an action, it is permissible to follow a solidly probable opinion in favor of liberty even though the opposing view is more probable."⁷ The following observations treat of probabilism in the generic sense except when noted otherwise.

Probabilistic reasoning begins with uncertainty. For St. Thomas,⁸ intellectual uncertainty comes in three main forms: doubt, suspicion, and opinion. A doubting mind is suspended between two opposing positions, not inclining toward either. With opinion, the mind inclines toward one of the opposing positions with fear of erring. Suspicion is a weak form of opinion.⁹ How then ought one to proceed when in doubt or when holding

conscience. Scholars have not failed to note this point. See Francisco Castilla Urbano, *El Pensamiento de Francisco de Vitoria: Filosofía Política e Indio Americano* (Barcelona: Editorial Anthropos, 1992), 41. See also Teófilo Urdániz, O.P., "Síntesis Teológico-Jurídico de la Doctrina de Vitoria," in Francisco de Vitoria, *Relectio de Indis o Libertad de los Indios (Corpus Hispanorum de Pace)*, ed. Luciano Pereña and M. Perez Prendes (Madrid: Consejo Superior de Investigaciones Científicas, 1967), xlii–cxliii, at lxi. In addition to the question of the "duda indiana," the imperial court appealed to Vitoria in other momentous cases of conscience, such as, for instance, in the case of the "putative" marriage of Henry VIII and Catherine of Aragon; see Ernest Nys, "Introduction," in Francisco de Vitoria, *De indis et de iure belli relectiones*, trans. John Pawley Bate, ed. James Brown Scott (Washington, DC: Carnegie Institution, 1917), 71.

⁷ John Hart, "Probabilism," in *The Catholic Encyclopedia*, vol. 12 (New York: Robert Appleton Company, 1911), 441–46, at 441.

⁸ Here I advert to the teaching of St. Thomas as a representative medieval backdrop to the moral systems of the sixteenth century and as the specific thinker with whom Vitoria engages in his commentatorial exposition of moral theology.

⁹ St. Thomas Aquinas, O.P., *ST II-II*, q. 2, a. 1: "But some acts of the intellect have unformed thought devoid of a firm assent, whether they incline to neither side, as in one who 'doubts'; or incline to one side rather than the other, but on account of some slight motive, as in one who 'suspects'; or incline to one side yet with fear

to a particular course as a matter of opinion?

In the case of true doubt, when the mind cannot give assent to either position, St. Thomas (in concert with the whole medieval tradition) taught that one is bound to adopt the safer course.¹⁰ This unequivocal preference for the safer course (*via tutior*) led contemporary authors to term this approach a “medieval tutorism.”¹¹ Here, there is no question of the rigorist tutorism proper to the age of the moral systems.¹² The philosophical and theological underpinnings of this stance are innocent of those which inform the latter. On this point, Marie-Michel Labourdette, O.P., observes: “For the modern tutorism, the highest category is security, as for laxism it is liberty. For St. Thomas and ‘medieval tutorism,’ the highest category is truth.”¹³ With “medieval tutorism,” a kind of primordial love of the truth situated within the objective order of things, specifically within the eternal law, forms the bedrock of practical reason.¹⁴ Thus the obligation of sincer-

of the other, as in one who ‘opines’” (all English translations of *ST* is from the Dominican Fathers).

¹⁰ In cases where St. Thomas addresses the question of resolving doubt in danger of sin, he consistently commends the practice of choosing the safer path. See, for instance, *In IV sent.*, d. 21, q. 2, a. 3, ad 3; d. 38, q. 1, a. 3, q1a. 1 ad 6; *ST* I-II, q. 96, a. 6, ad 2; II-II, q. 147, a. 4; III, q. 83, a. 6, ad 2; *Quodlibet* VIII, q. 6, a. 3.

¹¹ See Odon Lottin, O.S.B., “Le tutorisme du XIII^e siècle,” *Recherches de théologie ancienne et médiévale* 5 (1933): 292–301.

¹² See Thomas Deman, O.P., “Probabilisme,” in *Dictionnaire de théologie catholique*, vol. 13/1, ed. A. Vacant and E. Mangenot (Paris: Letouzey, 1936), cols. 417–619, at 418: “On chercherait en vain du probabilisme à cet âge de la théologie” (“One looks in vain for probabilism in this period of theology [medieval theology]”). All translation are mine unless otherwise noted

¹³ Marie-Michel Labourdette, O.P., *Cours de Théologie Morale*, vol. 2, *Les Actes Humains (IaIIae 6-48)* (Toulouse: Self-Published, 1961), 170: “Pour le tutorisme moderne, la catégorie suprême est la sécurité, comme pour le laxisme elle est la liberté. Pour s. Thomas et le ‘tutorisme médiéval,’ la catégorie suprême est la vérité.” He continues in the same place: “Si elle [la vérité] est atteinte même sous les espèces du probablement vrai, de l’opinion au sens fort, elle prévaut sur la sécurité, parce qu’elle l’implique beaucoup mieux. On ne parle de la sécurité toute seule que lorsque la vérité se soustrait à l’esprit de toute façon, même dans l’approximation d’une probabilité véritable à laquelle on pourrait adhérer” (“If the truth is reached, even under the aspect of probably true (of opinion in the strong sense), it prevails over security, because it [opinion] implies it [truth] far better. One does not speak of security by itself except when the truth is already withdrawn from the mind, even in the approximation of a real probability to which one could adhere”).

¹⁴ See Labourdette, *Actes Humains*, 156: “La bonté morale est conçue comme une conformité avec un ordre objectif fondé sur Dieu; c’est cela qui prime. Il y a une vérité que l’homme ne fait pas, qui est indépendante de lui, elle détermine un ordre dans lequel l’homme doit s’insérer et dont il n’est pas le centre et la mesure”

ity in the matter of listening to and following one's conscience (a principle that exercises some influence within the reasoning of the moral systems) is normed by the extra-mental reality at stake.¹⁵ Objective conformity to the divine law remains the standard of moral goodness, which conscience is bound to apply, not to repurpose. Within this context, the preference for the safer course is a matter more of philosophical realism than of good faith. Thus, in cases of true doubt, since the mind and heart simply do not incline more to one course than to another, the prudential course lies through the upholding of the precept which manifests the objective standard of moral integrity. As Thomas Deman, O.P., explains:

To say that we doubt is to say that we fear sin on the one hand: there would be no other means of dissipating this fear except by resolving the doubt. But, if we suppose that it persists, the fear of sinning is indissolubly attached to it [the decision]. What, in these circumstances, do we choose for this part . . . what is there to say? That we accept the risk of sinning is to have already sinned, as henceforth the will consents to evil; it should not run the risk should it wish (whatever the cost) to avoid evil.¹⁶

Thus, in matters of doubt, one ought to adopt the safest prudential course for moral flourishing, for in risking sin, one thereby falls prey to it.

In the case of opinion, the particular prudential reasoning at stake assumes a different shape. For St. Thomas, opinion arises from a probable (*probabilis*) proposition.¹⁷ In the classical conception, formulated by Aris-

("Moral goodness is conceived as a conformity with an objective order founded under God; this is primary. There is a truth which man does not make, which is independent of him; it determines an order in which man must insert himself and of which he is neither the center nor the measure").

¹⁵ See Labourdette, *Actes Humains*, 152.

¹⁶ Deman, "Probabilisme," 424–25: "Dire que l'on doute, c'est dire que l'on craint d'un côté le péché: il n'y aurait aucun autre moyen de dissiper cette crainte que de résoudre le doute. Mais, si l'on suppose qu'il persiste, la crainte de pécher y est indissolublement attachée. Que, dans ces conditions, l'on opte pour ce parti, qu'est-ce à dire? Qu'on accepte le risque de pécher et c'est pécher déjà, puisque dès maintenant la volonté consent au mal; elle ne courrait pas le risque si elle voulait, quoi qu'il en coûtât, éviter le mal."

¹⁷ Teófilo Urdániz, O.P., "La conciencia moral en Sto. Tomas y los sistemas morales," *Ciencia Tomista* 79 (1952): 529–76, at 557: "El objeto de este asentimiento opinativo es lo verosímil, la proposición probable" ("The object of the assent of opinion is the verisimilar, the probable proposition").

tote and received by St. Thomas, the probable serves as an adequate motive for action—one proper to dialectical knowledge (*epagoge*).¹⁸ Though dialectical knowledge lacks the same quality of probity as that proper to demonstrative knowledge, it is still “accepted by everyone or by the majority or by the philosophers—i.e. by all, or by the majority, or by the most notable and illustrious of them.”¹⁹ Thus, opinion affords a quasi-knowledge of the probable position with an attendant quasi-certitude and can thereby inform prudential action. Labourdette observes: “An opinion in the proper sense is, lacking certitude, a right [*juste*] and adequate [*suffisante*] rule of action. One is no longer in doubt; one is in nowise obligated to tend to what is ‘surer.’ The truth, attained adequately under the aspect of probability, prevails over the fear of sinning.”²⁰ Teófilo Urdániz teases out a significant consequence of this understanding:

On this construction, only the absolutely or relatively most probable opinion commands assent and from this flows an important consequence: The true opinion in each matter ought to be unique and will concern the most probable or the most solidly and uniquely probable part. The mind is only determined by the most probable and strongest reasons, and, having been determined by them, cannot assent with probability to the contrary opinion.²¹

Thus, according to St. Thomas (in his reading of Aristotle), when one has an opinion, he is not free to adhere to the opposite course. By virtue of the fact that an opinion is probable, the contrary opinion is improbable. Urdániz writes of St. Thomas’s construal, “the opinionative judgment is the correct

¹⁸ Aristotle, *Topica* 1.1.100a30–b23, in *The Basic Works of Aristotle*, ed. Richard McKeon (New York: Modern Library, 2001).

¹⁹ Aristotle, *Topica* 1.1.100b22–23.

²⁰ Labourdette, *Actes Humains*, 161: “Eh bien, s. Thomas reconnaît parfaitement qu’une conscience ‘probable,’ c’est-à-dire une opinion au sens propre, est, à défaut de certitude, une juste et suffisante règle d’action. On n’est plus dans le doute, on n’est nullement obligé d’aller au ‘plus sûr.’ La vérité, suffisamment atteinte sous les espèces de la probabilité, prévaut sur la crainte de pécher.”

²¹ Urdániz, “Conciencia,” 557: “Ahora bien, esta aprobación no puede merecerla sino la opinión absolutamente probable o relativamente más probable que su contraria. De ahí una consecuencia importante. La verdadera opinión deberá ser única en cada materia y será acerca de lo más probable o de la parte sólida y únicamente probable. El entendimiento no se determina sino por razones más verosímiles y fuertes, y, ya determinado por ellas, no puede asentir con probabilidad a la sentencia contraria.”

and prudent norm of conscience in such a case and corresponds to the most or uniquely probable opinion alone.”²² Thus, opinion is a kind of imperfect recognition of the truth tending unto certitude by adherence to the probable.²³ This entails a realist approach to matters of contingent and under-determined moral agency. The intellect cannot defect from this tendency without perverting its own internal laws and inclination to the truth.²⁴

This understanding of opinion and probability changed in the second Scholasticism. A subtle repurposing of terminology tracks with a general reinterpretation of moral probity. Albert Jonsen and Stephen Toulmin write of this time:

The ideas of “opinion” and “doubt” had become confused: several propositions could be designated as probable in cases in which none of them could command unquestioning assent. The comparison of “more and less probable” opinions that would have been inconceivable to medieval authors had become legitimate because “probable” had come to mean “plausible” or “possibly true.” As a result, many opinions about a subject could be called “probable”—that is, capable of eliciting assent, albeit hesitant.²⁵

“Probable” (*probabilis*), here, had come to mean justifiable, plausible, or credible. To say a moral position or argument was probable was to answer

²² Urdánoz, “Conciencia,” 557–58: “El juicio opinativo es la norma recta y prudente de conciencia en tal caso y corresponde sólo a la opinión más probable o únicamente probable.” See also Albert R. Jonsen and Stephen E. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 165–75, esp. 165–66: “This probability was the quality of a proposition—its ‘verisimilitude’—which made it worthy of assent. In this sense only one of two contrary propositions could be probable; this one determined assent and commanded moral action.”

²³ See Labourdette, *Actes Humains*, 164–65: “Dans la certitude, l’esprit atteint son objet propre, le vrai, et il s’en nourrit; dans l’opinion, il tend à la certitude, en adhérant à ce qui lui paraît probablement vrai. Mais s’il adhère, ce n’est qu’à raison de ce rayonnement de vérité. Le probable n’est qu’un acheminement vers la vérité; il ne nourrit l’esprit et n’a de titre à diriger l’action que par cette approximation de la vérité.” (“In certitude, the mind reaches its proper object—the true—and is nourished by it; in opinion, it [the mind] tends to certitude, adhering to that in it which appears probably true. But, if it adheres to it, this is only because of this radiation of truth. The probable is only a way to the truth; it neither nourishes the mind nor is it fit to direct action except by its approximation of the truth”).

²⁴ See Urdánoz, “Conciencia,” 558.

²⁵ Jonsen and Toulmin, *Abuse*, 166.

the question of whether it had reasons to back it.²⁶ And while these reasons certainly included the internal criteria of philosophical and theological argumentation, they came to be associated primarily with the testimony of authority.²⁷

This refashioned notion of probability was then deployed in the resolution of difficult cases of conscience.²⁸ The moral systems held generally that, when the law is certain, one must abide by it; but when it is unclear whether the law exists or applies, there may be grounds for freedom. Probabilists adopted juristic maxims concerning ignorance of law, and interpreted doubt along the lines of an obstacle to promulgation, and thus to obligation.²⁹ Commands bind by virtue of some knowledge of the

²⁶ M. W. F. Stone, "The Origins of Probabilism in Late Scholastic Moral Thought: A Prologomenon to Further Study," *Recherches de théologie et philosophie médiévale* 67 (2000): 114–57, at 117: "In modern European languages, such as English or French, to say that something is 'probable' tends to imply that the odds are in its favour, and to say that something is 'probably the case' means that it is more likely to be true. The technical medieval Latin term *probabilis* (probable), however, did not possess such meanings. Instead, something was *probabilis* in so far as it was 'approved of' by the judgements and verdicts of acknowledged authorities (*auctoritates*). Further to this, something was *probabilis* in that it 'held for the most part' or was 'provable' or 'arguable,' that is, something for which there was a good argument, or two or more good arguments." (*Nota bene*: Stone has been shown to be guilty of serial plagiarism; I cite his work with this caveat.)

²⁷ Though probabilists initially attempted to uphold both forms of justification, the internal was quickly absorbed into the external. See Jonsen and Toulmin, *Abuse*, 167–68: "The first Jesuit to espouse probabilism, Gabriel Vazquez (1551–1604), immediately separated the two components of this view: an opinion could be intrinsically probable—that is, founded on 'excellent arguments'—or extrinsically probable—founded on the authority of 'wise men.' (*Commentaria in II-II*, LXII, iv). This logical distinction, inspired perhaps by the theologians' need to have a proper word for every notion, subsequently led to a conceptual split that badly damaged the thesis. In understanding the notion of extrinsic probability, the 'authority of wise men' gradually became the 'preponderance of experts'; and the weight of scholarly opinion, in the modern sense of 'heads counted,' replaced the weight of reason and argument."

²⁸ As mentioned earlier, St. Thomas's exposition of the erring conscience is the *locus classicus* for expositions of probabilism. A cursory glance at the relative disproportion between the space St. Thomas affords the matter (a mere three articles in the entire *Summa theologiae*) and the extended treatises in the subsequent tradition bespeaks novelty of teaching.

²⁹ Augustin Lehmkühl gives an excellent summary of the principle here described—*lex dubia non obligat*—in his *Theologia moralis*: "A law which has not been promulgated is not a law in the full and strict sense, and does not impose an obligation. But when there is a solidly probable opinion in favour of liberty, the law has not been sufficiently promulgated, since there has not been the requisite manifesta-

precept,³⁰ they argued, and thus a defect in knowledge prevents the application of law, leaving liberty in possession.³¹ Operating on these principles, moral theorists devised what were called “practical” or “reflex” principles which helped the confounded individual to navigate doubtful cases with good faith. The reflex principles were intended to help one advance from speculative incertitude to practical certitude. Effectively, it “permitted” you to act upon a probable opinion without fear of sin. In every choice, there is a safer position (which favors law) and a less safe position (which favors freedom). Moral theorists thus asked the question: how probable must the less safe position be to afford one practical certitude of choosing it without sin?³² At what point can one pursue the course of liberty—the less safe opinion?

Probabilism in the narrower (specific) sense teaches that the less safe opinion need be only probable. Bartolomeo de Medina formulated the doctrine: “It seems to me that, if an opinion is probable, it is licit to follow it, even though the opposite opinion is more probable.”³³ To evaluate relative probability, moralists made recourse to a hierarchy of authorities: Scripture, Tradition, Magisterium, decretals, councils, Fathers, Scholastic theologians, modern moralists, and philosophers were all consulted in their respective rank and file. The theological sources were then compiled in the summary positions of the modern moralists. The moralists then digested the data of revelation and presented it in the paradigm of casu-

tion of the mind of the legislator. Hence when there is a solidly probable opinion in favour of liberty, the law is not a law in the full and strict sense, and does not impose any obligation” (1:176–78, cited in Harty, “Probabilism,” 433–44). One must note further that this doubt embraces both doubts of law and doubts of fact (which can be reduced to the former).

³⁰ This principle is taken from Aquinas, *De veritate*, q. 17, a. 3: “Nullius ligatur per praeceptum aliquid nisi mediante scientia illius praecepti.” Though the principle saw wider application in the employ of probabilist theorists, the context suggests merely that law binds by agency of conscience taken in the first acceptance of the term, that is, by some knowledge or awareness [*notitia*] thereof—a requirement in no way demanding speculative certitude. (Leonine ed., cited in Urdánoz, “Conciencia,” 564–65).

³¹ This “principle of possession”—*in dubio melior est conditio possidentis*—paired with the aforementioned “principle of promulgation” to form the intelligible core of the probabilist system (see Jonsen and Toulmin, *Abuse*, 169–70).

³² This presumes that all reasonable steps have been taken to abolish lingering doubt by studied argument and consultation with authorities. The reflex principle applies if, after the aforementioned inquiry, speculative incertitude perdures.

³³ Bartolomeo de Medina, O.P., *Expositio in summae theologiae partem* I-II, q. 19, a. 6, as cited in Jonsen and Toulmin, *Abuse*, 164.

istry. From these resources, the probabilist needed to garner the testimony of “five or six theologians notable for prudence and learning” who adhered independently to the doctrine in order to follow the less safe position.³⁴ And this is just what came to be known as a “probable” position.

Opposing theorists scrambled to claim the support of recognized authorities in the tradition—including, of course, St. Thomas Aquinas. In the transposition of traditional sources which followed, St. Thomas’s moral theory was recontextualized within an alien framework. Subsequent generations—and Dominicans especially—described his teaching as “probabiliorist.” And though one might make such a case, St. Thomas’s theory simply does not fit the mold of the moral systems. St. Thomas sees potency in practical matters as a metaphysical fixture in moral reasoning. Matter is a principle of unintelligibility, and the concrete singular cannot afford speculative certitude. That said, the will is naturally inclined to the good. Thus it can only be motivated by what the intellect presents as good—objective perfection and sure satisfaction. Following well-formed opinion is just the prudential outgrowth of the teleological orientation of intellect and will. It follows for St. Thomas that, in matters of strict doubt, one simply cannot act against the concerned precept lest he risk holding the law in contempt. And so, while St. Thomas acknowledges the difficulties attendant upon practical incertitude,³⁵ they are not nearly as vexing for him as they are for later moral theorists.

Now, given this backdrop of the moral systems as compared to the moral edifice of St. Thomas Aquinas, we turn to Francisco de Vitoria’s formation and methodology as the immediate context for original features of his thought.

The Formation of Francisco de Vitoria

The most significant tradition in Vitoria’s theological formation was his systematic training in St. Thomas Aquinas. While at the University of

³⁴ Harty, “Probabilism,” 441.

³⁵ See *ST* II-II, q. 70, a. 2: “We must not expect to find certitude equally in every matter.’ For in human acts, on which judgments are passed and evidence required, it is impossible to have demonstrative certitude, because they are about things contingent and variable. Hence the certitude of probability suffices, such as may reach the truth in the greater number, cases, although it fail in the minority.” See also *ST* II-II, q. 47, a. 9, ad 2: “Equal certainty should not be sought in all things, but in each matter according to its proper mode.’ And since the matter of prudence is the contingent singulars about which are human actions, the certainty of prudence cannot be so great as to be devoid of all solicitude.” Both of these passages are cited in Urdániz, “Conciencia,” 554.

Paris (1508–1523), his most beloved professor was a Belgian Dominican Peter Crockaert—a convert to Thomism from nominalism.³⁶ Crockaert and Crockaert’s mentor, Gil Charronelle—also a Dominican friar—were the Parisian faction in a trans-continental revival of Thomistic teaching which included the efforts of Konrad Köllin, Silvestre de Ferrara, and Tommaso de Vio Cardinal Cajetan.³⁷ Francisco de Vitoria was to play his part in Spain.

Vitoria’s Thomistic formation was evidenced especially in his choice of classroom textbook. Vitoria chose to substitute the *Summa theologiae* of St. Thomas Aquinas for the *Sentences* of Peter Lombard as the text for his commentary. Vitoria was not the first to make this move. In 1491, Charronelle began lecturing from the *Summa* in Paris; the substitution was warmly received. Crockaert continued the practice, and Vitoria brought it to Salamanca.³⁸ But whereas Charronelle and Crockaert taught the *Summa* in the Dominican studium at San Jacques, Vitoria was lecturing in the university, and his substitution contradicted the university statutes.³⁹ Regardless of university law, Vitoria taught the *Summa* part by part on a rotating cycle for twenty years at the University of Salamanca until his death in 1546.

The second main influence on Vitoria’s theological formation was Renaissance humanism. Vitoria is said to have adopted from humanism a certain critical spirit and method. Vitoria counseled his students to test all authorities, even the great teachers. Melchior Cano remarked that Vitoria dissented from the thought of St. Thomas in places where the Angelic Doctor’s teaching appeared improbable or otherwise untenable.⁴⁰ At the same time and somewhat paradoxically, though, Vitoria had something of the humanist appreciation for the authority of the sources (especially that of Scripture) over and against the subtle distinctions proposed by reason. Vicente Beltrán de Heredia, O.P., posits that a humanist formation led Vitoria to argue more from authority than through dialectical reasoning, or at least to afford authority a certain preference. Beltrán de Heredia reads Vitoria as charting a middle course between the sophistic complexification

³⁶ Bruno de San José, O.C.D., *El Dominico Burgalés: P. Mtro. Fray Francisco de Vitoria y Compludo (1483–1546)* (Burgos, ES: Tip. “El Monte Carmelo,” 1946), 150–51.

³⁷ Langella, *Teología y ley natural*, xix.

³⁸ Ramón Hernández Martín, O.P., *Francisco de Vitoria: Vida y pensamiento internacionalista* (Madrid: Biblioteca de Autores Cristianos, 1995), 39.

³⁹ Vicente Beltrán de Heredia, O.P., *Francisco de Vitoria* (Barcelona: Editorial Labor, S. A., 1939), 43–44.

⁴⁰ Cited in Hernández Martín, *Francisco de Vitoria*, 87–88.

of so-called decadent Scholasticism, on one hand, and an uncritical adoption of theological sources of dubious authority, on the other. Beltrán de Heredia writes, "Vitoria advocates, above all, recourse to the sources of revelation and to their authorized interpreters, because in addressing this order of knowledge, reason and discourse must be subordinated to what a higher authority teaches."⁴¹ Reasoning must be circumscribed within the compass of authority. Only thus, he argues, can it learn its bounds and forestall a gradual slide into the sophistic and subjective.

The third and final theological influence on Vitoria was nominalism. While at the University of Paris, he encountered a rich variety of the age's finest philosophers, theologians, and canonists. During his first four years of letters, Vitoria assisted at the lectures of Juan de Celaya, who taught in the Collège de Coqueret.⁴² Juan de Celaya was a student of John Mair, who, alongside Jacob Almain, was at the forefront of nominalism in the late medieval / early modern period. Vitoria did not ultimately throw in his lot with the nominalists, though their influence can be recognized in his work, particularly in the practical, positive, and jurisprudential shape it assumed. In his relectio *De indis*, Vitoria wades into what had previously been accounted jurisprudential waters. But, for Vitoria, theology and jurisprudence share a close kinship and the disputed question of dominion and justice in the Americas required recourse to both. And so Vitoria reserved the judgment of the matter—a judgment touching on divine law and right—to churchmen schooled in both theology and canon law:

It is not the province of lawyers, or not of lawyers alone, to pass sentence in this question. Since these barbarians we speak of are not subjects [of the Spanish Crown] by human law [*iure humano*], as I shall show in a moment, their affairs cannot be judged by human statutes, but only by divine ones, in which jurists are not sufficiently versed to form opinion on their own. And as far as I am aware no theologian of note or worthy of respect in a matter of such importance has ever been called upon to study this question and provide a solution. Yet since this is a case of conscience, it is the business of

⁴¹ Vicente Beltrán de Heredia, O.P., "Orientación humanística de la teología vitoriana," *La Ciencia Tomista* 72 (1947): 7–27, at 10: "Vitoria [propugna] ante todo el recurso a las fuentes de la revelación y a sus autorizados intérpretes, porque tratándose de ese orden de conocimientos, la razón y el discurso, por ser humanos, han de subordinarse a lo que enseña una autoridad superior."

⁴² Langella, *Teología y ley natural*, 2.

the priests, that is to say of the Church, to pass sentence upon it.⁴³

In theory and practice, Vitoria sought to unite both strains in his work. For Vitoria, this vocation to interdisciplinary competence stemmed from the nature of the theological enterprise. The subject of theology is God and the things of God. Given the Christian understanding of creation, this is materially all-embracing. Theology is a science of totality.⁴⁴ As Vitoria himself put it in the relectio *De potestate civili*, “the office and call of a theologian is so wide, that no argument or controversy on any subject can be considered foreign to his profession.”⁴⁵ For Vitoria, this coordination of disciplines led him to bring theology to bear on contemporary issues of ethics, politics, and jurisprudence in a wide variety of contexts.⁴⁶ As a result, scholars have noted that his theology assumed an undeniably practical shape.

Now, with these sources of originality in mind—the Thomistic revivalism, the humanist bent, and the nominalistic practicality—it remains to approach Vitoria’s work to examine how the novelty of his formation and method unfolds in an original moral doctrine.

Textual Analysis

Others have already characterized Vitoria as a proto-probabilist.⁴⁷ Though

⁴³ Francisco de Vitoria, O.P., *De indis*, in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 238.

⁴⁴ See Urbano, *Pensamiento*, 40–41.

⁴⁵ Vitoria, *Political Writings*, 3.

⁴⁶ Speculation on this point risks tendentiousness, but certain facts emerge. Compared, for instance, with St. Thomas Aquinas, Vitoria’s doctrine was decidedly more political in its import. One may tend to forget that St. Thomas devoted only two treatises to the subject of politics (*De regno* and *In libros politicorum*) and finished neither work. And though St. Thomas himself did enter the contemporary debates of his day (cf. *Contra impugnantes*, *Contra retrahentes*, *De perfectione*, *Contra errores graecorum*, etc.), he is most well-known and typically regarding as a non-occasional, that is, sapiential theorist, whose doctrine applies equally well across generations. Vitoria, by comparison, is decidedly better known as a man of his time.

⁴⁷ See: A. Lanza, *Theologia moralis*, vol. 1, *Theologia moralis fundamentalis* (Turin, IT: Mareitti, 1949), no. 373; Lucius Rodrigo, *Tractatus de conscientia morali*, vol. 2 (Santander, ES: Sal terrae, 1956), no. 410. For the best and most authoritative treatment of probabilism and its history, as well as the present approach and controversies on the theme, see Deman, “Probabilisme.” All of the above are cited in Teófilo Urdániz, O.P., “Introducción a la primera reelección De los Indios Recientemente Descubiertos,” in *Obras de Francisco de Vitoria: Relecciones Teológicas*, ed. Teófilo Urdániz, O.P. (Madrid: Biblioteca de Autores Cristianos, 1960), 491–640, at 517.

his article does not focus exclusively on Vitoria, J. de Blic offers a convincing argument to this effect in his “Barthélémy de Medina et les origines du probabilisme.”⁴⁸ In his article, de Blic disputes the historiographical and philosophical arguments of Marie-Michel Gorce, O.P., on the subject of Bartolomeo de Medina.⁴⁹ According to Gorce, Medina did not originate probabilism and, in fact, was entirely innocent of the theory in his formation, doctrine, and instruction.⁵⁰ In response, de Blic examines Medina’s moral theory both on its own terms and in dialogue with his forebears in the Order and at the University of Salamanca (Prierias, Cajetan, Cano, Soto, Vitoria, et al.). In his response, de Blic demolishes Gorce’s textual literalism and demonstrates how probabilism gradually coalesced at Salamanca over the course of two generations—a movement in which Vitoria played no small role.

Faced with this evidence, some scholars have tried to exculpate Vitoria from the charge of full-blown probabilism by claiming him as a probabiliorist. Urdániz makes one such attempt.⁵¹ In his introduction to the *De indis*, Urdániz acknowledges that Vitoria’s prologue to the work suggests a form of argumentation proper to the embryonic moral systems.⁵² He contends though that the argumentation in the body of the relectio is probabiliorist.⁵³ This view serves as a helpful foil to what follows. I will

⁴⁸ J. de Blic, “Barthélémy Medina et les origines du probabilisme,” *Ephemerides Theologicae Lovaniensis* 7 (1930): 46–83, 264–91, 481–82.

⁴⁹ M.-M. Gorce, O.P., “Barthélémy de Medina,” in *Dictionnaire de théologie catholique*, vol. 10/1, ed. A. Vacant and E. Mangenot (Paris: Letouzey, 1928), cols. 481–85.

⁵⁰ De Blic, “Barthélémy Medina,” 46: “Dans un des dernières livraisons du *Dictionnaire de Théologie catholique*, le R. P. Gorce consacre quatre colonnes à la question de la part de Medina dans les origines du probabilisme moral. Quoi qu’on en pense généralement, cette part, selon lui, est nulle. A l’école dominicaine de Salamanque, où il avait été disciple avant d’enseigner à son tour, Medina n’a trouvé le probabilisme ni tout fait ni en voie de formation.” (“In one of the last volumes of the *Dictionnaire de Théologie catholique*, R. P. Gorce devotes four columns to Medina’s role in the origination of moral probabilism. Whatever one thinks in general, this role, according to him, is practically null. At the Dominican school of Salamanca, where he had been a student before himself teaching, Medina did not encounter probabilism—neither in its mature form nor in germ.”).

⁵¹ Urdániz, “Introducción,” 516–18 and 540–41.

⁵² Urdániz, “Introducción,” 516: “El maestro refleja ya el comienzo de las especulaciones que van a dar lugar a la formación de los sistemas morales, en especial del probabilismo y el probabiliorismo” (“The teacher already evinces the beginnings of the speculations that are going to lay the groundwork for the formation of the moral systems, especially those of probabilism and probabiliorismo”).

⁵³ Urdániz, “Introducción,” 517: “El suyo, pues, es el tuciorismo probabiliorista común dentro de la línea tradicional de Santo Tomás y su escuela” (“His, then, is

endeavor to show that Vitoria is situated between a medieval conception of prudential practical reason and a modern conception proper to the moral systems. While I tend to think that Vitoria is a probabilist and not a probabiliorist, this question is less important than the more fundamental question of his influence on the mode of moral reasoning common to both.

Text 1: *Commentary on Summa theologiae [ST] I, q. 1, a. 8 (from the ordinary lectures of 1539–1540; Archivo Histórico Dominicano de la Provincia de España, Ms. 2)*⁵⁴

Text: With these things in place from Saint Thomas in the second reply of the present article and also in *ST* II-II, q. 1, a. 10, some common places [*loca*] can be assembled for theological argumentation. The first and most powerful [*potissimus*] and most special [*magis proprius*] is Sacred Scripture. The second special [*proprius*] and solid [*firmus*] place is the authority of the whole Church universal in things of faith and morals. The third, which is also special [*proprius*] and more firm [*firmitus*], is a general council gathered solemnly. The fourth is a local council, but it is still *a probable place* [*probabilis locus*]. Fifth is the authority of the holy doctors, which is *a probable place*. . . . Sixth is the authority and definition of the Pope, for this is a solid place in matters of faith and good morals. Seventh is the common consent of theologians. Eighth is natural

the standard probabiliorist tutorism within the traditional line of St. Thomas and his school”). Earlier in the same essay (516–17), he qualifies the sense in which Vitoria is a probabiliorist: “Su exposición y doctrina son claras: no es lícito ni tiene el hombre libertad para poner actos con dudas acerca de su moralidad o licitud. . . . En consecuencia, Vitoria declara que en todos los casos dudosos hay obligación de salir de esas dudas acerca de si la acción es buena o pecado y formar conciencia recta consultando a los sabios y peritos. . . . Afirma que en las dudas no es lícito exponerse a cometer pecado, o a inferir injuria, y en general tutor pars est sequenda, a no ser que se esté en pacífica posesión del derecho o medien otras presunciones legítimas” (“His exposition and teaching are clear: neither is it licit nor has man liberty to posit acts when he has doubts concerning their morality or liceity. . . . As a result, Vitoria declares that in all doubtful cases one is obliged to move beyond these doubts (concerning whether the action is good or sinful) and to form an upright conscience by consulting wise persons and experts. . . . He affirms that when in doubt, it is not licit to expose oneself to the commission of sin or to the infliction of injury, and that, in general, the safer course should be chosen, unless one is in serene possession of justification or other legitimate suspicions intervene”).

⁵⁴ See Simona Langella, *La Ciencia Teológica de Francisco de Vitoria y la Summa Theologiae de Santo Tomás de Aquino en el Siglo XVI a la luz de Textos Inéditos*, trans. Juan Montero Aparicio, O.C.D. (Salamanca, ES: Editorial San Esteban, 2013), 410. The translation of the text is my own.

reason. Ninth, the authority of the philosophers.

In this response, Vitoria is commenting a text which describes the place of faith and reason in theological argumentation: Is *sacra doctrina* a matter of argument? In the reply to the second objection, St. Thomas distinguishes between the character of divine and human authorities. St. Thomas describes the relative authorities of Scripture, the doctors of the Church, and of the philosophers and how theology can make use of the philosophers “as extrinsic and probable arguments.”⁵⁵ In commenting this passage, Vitoria focuses especially on authority and probability as he gives a systematic enumeration and valuation of the sources of theological argumentation or theological places (*loci theologici*). The standard for their rank order is their relative probability. Theological places are described in order as most powerful, most special, special, firm, probable, and so on. These *loci theologici* are especially important in Domingo de Soto and Melchior Cano,⁵⁶ but the humanistic preoccupation with authority described earlier is already taking shape in Vitoria.⁵⁷ Simona Langella writes:

The common theological places permit one to classify the principles of the faith, those which, in virtue of their probative force, are converted into a source of the certain resolution of the questions which are presented to the theologian. The theologian, then, has two basic tasks: the first is to identify the sources—or places—of theology; the second is to order them in accord with their [respective] value in order then to use them to the maximum.⁵⁸

So, though a minor text, the yield of this first installment is plain. The calculus of authority appears as a conscious development of Thomistic

⁵⁵ *ST I*, q. 1, a. 8: “Sed tamen sacra doctrina huiusmodi auctoritatibus utitur quasi extraneis argumentis, et probabilibus” (Leonine ed.).

⁵⁶ Ramón Hernández Martín, O.P., “Originalidad de Francisco de Vitoria,” *Ciencia Tomista* 141 (2014): 199–220, at 211–12.

⁵⁷ V. Muñoz Delgado, “Lógica, ciencia y humanismo en la renovación teológica de Vitoria y Cano,” *Revista española de teología* 38 (1978): 205–71, at 249, as cited in Langella, *Teología y ley natural*, 92.

⁵⁸ Langella, *Teología y ley natural*, 92: “Los lugares comunes teológicos permiten clasificar los principios de la fe, los cuales, en virtud de su fuerza probatoria, se convierten en fuente de solución segura de las cuestiones que se presentan al teólogo. Este último tiene, pues, dos tareas fundamentales: la primera es localizar las fuentes—o lugares—de la teología, la segunda es ordenarlas de acuerdo con su valor para poder después utilizarlas al máximo.”

doctrine. The apparatus of extrinsic justification is beginning to coalesce, and it portends the advent of probabilistic reasoning. So while there is no evidence of the full-blown probabilism of a Suárez or Caramuel,⁵⁹ the heightened importance accorded to the relative merit of authorities should not be overlooked.

Text 2: *Introduction to the relectio De indis (written for the academic session of 1537–1538 and delivered in 1539)*⁶⁰

1. But *where there is some reasonable doubt [de quo dubitari merito] as to whether an action is good or bad, just or unjust, then it is pertinent to question and deliberate*, rather than acting rashly without any prior investigation of what is lawful and what is not. These things which have both good and bad on both sides are like many kinds of contracts, sales, and other transactions; if undertaken without due deliberation, on the mere assumption that they are lawful, they may lead a man into unpardonable wrongdoing. In that case a plea of ignorance will be invalid; it is obvious that the man's ignorance was not invincible, since he failed to do everything he could to consult beforehand what was lawful or not.

2. It follows that *for an action to be good in cases where a person has no other means of certainty, it is a necessary condition that he act in accordance with the ruling and verdict of wise men*. This is defined as one of the necessary conditions of a good action in the second book of the *Nicomachean Ethics* (1106b36—1107a2); hence a person who does not consult wise men in cases of doubt can have no excuse. *Furthermore, even when the action is lawful in itself, whenever reasonable doubts arise about its lawfulness in a particular case recourse must be had to the opinion of wise men, and their verdict must be followed, even though they may judge wrongly*. Thus, if a man fails to consult the experts about a contract of doubtful legality, he undoubtedly acts wrongfully. It makes no difference whether or not the contract is legal in itself; if he believes it to be legal merely on his own whim and judgment, and not on the authority of the wise, he acts wrongly. Similarly, *if a man does consult wise men on a doubtful case, and then*

⁵⁹ See Jonsen and Toulmin, *Abuse*, 168. Here they note that, with the later Jesuits, the calculations deployed to reckon relative authority had assumed absurd proportions: "Caramuel even quantified the authority of the experts: one professor holding a distinguished chair prevailed over four lesser professors, and so on."

⁶⁰ De Vitoria, *De indis*, in *Political Writings*, 234–37.

disregards their verdict, he acts wrongly, even if the action is in itself lawful. . . . In matters which concern salvation there is an obligation to believe those whom the Church has appointed as teachers, and in cases of doubt their verdict is law. Just as a judge in a court of law is obliged to pass sentence according to the evidence presented, so in the court of conscience every man must decide not according to his own inclination, but by logical arguments on the authority of the learned. To do otherwise is impudent, and exposes one to the danger of sin, which is itself sinful. . . .

3. Now in doubtful cases, I say, we must consult those whom the Church has appointed for the purpose: that is, the prelates, preachers, confessors, and jurists versed in divine and human law, since in the Church "God hath set the members every one of them in the body as it hath pleased him," some the feet and some the eyes, and so on (1 Cor 12:18); He "gave some apostles, and some prophets, and some evangelists, and some pastors and teachers" (Eph 4:11). And it is written: "the scribes and the Pharisees sit in Moses' seat: all therefore whatsoever they bid you observe, that observe and do" (Matt 23:2-3). So too Aristotle exhorts us in the first book of the *Nicomachean Ethics* with these lines from the poet Hesiod:

He who neither knows, nor lays to heart
Another's wisdom, is a useless wight.

Therefore it is not enough in conscience for a man to judge by himself whether his actions are good or bad. In cases of doubt he must rely on the opinion of those authorized to resolve such doubts. It is not sufficient for businessmen merely to abstain from those contracts which they know to be illegal, if at the same time they continue to make contracts of dubious legality without consulting the experts. . . .

4. *Therefore, anyone who has first consulted wise men on a doubtful course of action, and has obtained a verdict that it is lawful, may subsequently undertake that course of action with a clear conscience, at least until such time as an equally competent authority pronounces a conflicting opinion which reopens the case, or leads to a contrary verdict.* Here, at any rate, the transgressor's innocence is clear, since he did everything in his power to act lawfully, and his ignorance was therefore invincible.

5. From all this we may deduce the following propositions:

First, in every case of doubt there is a duty to consult with those competent to pronounce upon it, since otherwise there can be no *security of conscience*, regardless of whether the action concerned is really lawful or unlawful.

Second, if the upshot of the consultation with wise men is a verdict that the action is unlawful, their opinion must be respected; and anyone who disregards it has no defense in law, even if the action is in fact lawful in itself.

Third, if on the other hand the verdict of the wise is that the action is lawful, anyone who accepts their opinion may be *secure in his conscience*, even if the action is in fact unlawful.

In this passage, Vitoria describes how the judgments of modern moralists and jurists bear upon the individual in difficult cases of conscience. Vitoria is here addressing the plight of indigenous peoples in the Spanish colonies of the New World. With his beloved Spain caught in the grip of a desperate crisis of conscience, Vitoria outlines a ground-plan for resolving moral disagreement. He begins with the phenomenon of doubt. He advocates that one resolve his doubt by an appeal to authorities. Certain oddities in his exposition stand out.

Vitoria claims that the preponderance of authorities can vitiate the otherwise good and well-formed conscience of a moral agent: "Even when the action is lawful in itself, whenever reasonable doubts arise about its lawfulness in a particular case recourse must be had to the opinion of wise men, and their verdict must be followed, even though they may judge wrongly." He develops this thought in what follows. Indeed, appeal to authority is so essential that it mitigates against the agent's independent status as a moral reasoner: "In the court of conscience every man must decide not according to his own inclination, but by logical arguments on the authority of the learned." He indicates further that a clear conscience depends more on authorized sanction than on the refinement of moral knowledge by the prudent exercise of right practical reason: "Anyone who has first consulted wise men on a doubtful course of action, and has obtained a verdict that it is lawful, may subsequently undertake that course of action with a clear conscience, at least until such time as an equally competent authority pronounces a conflicting opinion which reopens the case, or leads to a contrary verdict."

Without descending too much into the details of a fully articulated casuistry, one can begin to appreciate the consequences of these tendencies. First, preference is given to extrinsic justification over intrinsic phil-

osophical or theological coherence. Though the text certainly appreciates and deploys philosophical and theological argumentation, the insistence on authority in the prologue is critically important for understanding what follows. This is an assemblage of authorities within the work of an authority. As a result, the emphasis shifts away from the integral virtuous formation of the independent human agent. The approach tends unto an unwarranted intellectualism as the rise of conscience occludes the importance of prudence. As a result, it is no surprise to find a disproportionate insistence on the good faith of a clear or secure conscience over and against fruitful engagement with the objective moral order.

It deserves mentioning as well that Vitoria has ascribed much greater importance to doubt. And in the midst of doubt the individual moral agent (or the colonial power) is paralyzed by the conflict of seemingly intractable arguments. These probable opinions have created a marketplace of options among which opportunistic conquistadors can choose selectively. In an attempt to impose order on the conflict, Vitoria has begun to formulate norms for choice in difficult cases of conscience. An immature notion of reflex principle is in the works and a practically unassailable appeal to authority has assumed noticeably greater importance.

Text 3: *Summa sacramentorum Ecclesiae, no. 178 (a commentary on Sentences IV published by Thomas de Chaves, O.P. [Pinciae, 1561])*⁶¹

Text: It is asked whether a confessor could absolve a penitent contrary to his own opinion.

1. For instance, take a case concerning which there are two opinions whether something is usurious or not: as when someone sells his harvest for a certain day, when he should pay the amount it will be worth in the month of May [*qui vendit frumentum ad certum diem, ubi solvat quanti valebit in mense maii*]. Certain persons say that it is illicit; and I believe thus. Others nevertheless say that it is not illicit. There are probable arguments [*probabilitates*] for both. I am nevertheless of the opinion that it is illicit, and the penitent holds that it is not illicit, and so he confesses that he sold his harvest in this manner, and that he has the intention of doing so again, because he heard learned men [*viros doctos*] saying that it was licit. The doubt is what should this confessor do who holds it to be a mortal sin? Can he never absolve him against his own opinion?

⁶¹ De Blic, "Barthélémy Medina," 56–57 (the translation of the text is my own).

2. Here is another example. A judge, following the opinion of Saint Thomas, puts to death a man whom he knows to be innocent for a fact, who has nevertheless been proved guilty. His confessor is of the opinion of Nicolas of Lyra, who holds it not to be licit. Can the judge absolve the man while willing to persist in his opinion?

3. It is a great question, and Conrad, that celebrated teacher, advances it in the final question of his treatise *De contractibus*.

4. *And above all, this question has a place when both opinions are probable [probabiles]. For if the opinion of the penitent is not probable [non habet probabilitatem], he [the confessor] ought not to absolve him, because his ignorance is not invincible, but vincible.* As if I were to hold the opinion that no one can possess many benefices at the same time; if the opposite proposition is not probable (as perhaps it is not), it is clear that I ought not absolve him, because I think him to be in *mortal sin, which is not excused by invincible ignorance*.

5. *But what should he do when both opinions are probable and have each their own champions?*

6. *I respond that, whether [the confessor] is his [the penitent's] own priest or not, he is bound to absolve him in such a case.* Thus holds Paludanus, *Sent.* IV, d. 17, q. 2, a. 1; and Godfredus, *Quodlibet* IX [q. 16].

7. Thus, it is proved. *Plainly, such a penitent is in grace; and the confessor has probability [probabilitatem] that he [the penitent] is in grace, because he knows his opinion to be probable; therefore, he ought not deny him absolution.*

This text presents what later became a classic case of probabilistic reasoning: Can a confessor absolve a penitent contrary to his own opinion? In this somewhat convoluted example, the penitent has committed an act that may be mortally sinful, but there is some uncertainty. Furthermore, he has heard certain learned men say that the act is licit; effectively, he has a probable reason (in the modern sense) to justify the practice. The confessor is of the opposite opinion; in his estimation, the act is objectively sinful, and therefore must be confessed with firm purpose of amendment. The penitent places the case before the present confessor with the intention of continuing the practice. The question arises, can the confessor validly absolve the penitent?

Vitoria concedes from the start that both positions are probable. We saw earlier that, for St. Thomas, “probable” describes the object of opinion. In matters of opinion, only one term can be affirmed with the quasi-certainty of dialectical knowledge. Here, the incipient modern notion is at work. “Probable” names a position with reasons, regardless of their relative strength vis-à-vis the contrary. What is more, Vitoria introduces the language of invincible and vincible ignorance. When the penitent holds to a position lacking probability, he suffers from vincible ignorance. In the explanation that follows, invincible ignorance is made to do some heavy lifting. If one performs a gravely sinful act on account of a probable opinion regardless of its strength, he is deemed invincibly ignorant, and therefore does not incur the mortal sin. If one performs a gravely sinful act on account of an improbable opinion, this ignorance is vincible, and therefore culpable, and so incurs the guilt. Here, probable opinions (even when counterposed to more probable opinions) excuse from sinful actions by thwarting full knowledge. Again, one notes the emphasis on good faith or security over and against the priority of the objective moral order by the repurposing of moral categories.

And though Vitoria would have been bound to a certain brevity in his exposition, it is fascinating that the passage lacks any reference to the formation of conscience. As will be seen in the next passage, an erroneous conscience binds, but not absolutely. It binds only so long as it lasts and so long as it is believed to be true.⁶² There thus remains the possibility of developing or changing an erring conscience. What is more, a will conformed to an erring conscience is not thereby good. As Labourdette notes: “St. Thomas does not say . . . that the will conformed to an erroneous conscience is good, but only that it is not bad. . . . It does not have, for all that, the power of producing moral goodness. What it does produce is

⁶² See Labourdette, *Actes Humains*, 159: “Tous les moralistes, certes, diront toujours qu’il y a de l’une à l’autre cette différence que la conscience droite oblige par soi et pour toujours, la conscience erronée seulement tant qu’elle dure et parce qu’elle est crue droite; il reste le devoir de la changer. Mais en fait, tant qu’elle dure, les moralistes modernes en viennent à évaluer pratiquement l’une à l’autre, en admettant que suivre une conscience invinciblement erronée peut être bon” (“Indeed, all moralists will say that there is this difference between the two, namely that upright conscience obliges per se and always, and the erroneous conscience only insofar as it perdures and because it is believed to be upright; it remains obligatory to change it. But, actually, insofar as it perdures, modern moralists of conscience have come practically to equate the one with the other when they suggest that following an invincibly ignorant conscience can be good”).

the involuntary [which] suppresses all notion of morality, good or evil.”⁶³ Within the Thomistic understanding, conscience exists to make known the eternal law and to apply it within the realm of practical reasoning. An act contrary to the natural law is objectively sinful, and an erroneous conscience cannot change the eternal law. Rather, conscience is responsible for conforming to this ultimate standard of the obligation it produces. As Labourdette writes:

Conscience has a subordinated role regarding the eternal law and the truth of things. It is not [conscience] that produces goodness any more than it does *not* produce obligation. Its primordial duty is to be true, to conform us to the divine order. That it should be in error, this will be at least a failure and often already a fault, because each ought to do everything in order to avoid this type of error. There is thus a fundamental duty, anterior even to that of following one’s conscience, to do everything in order that one’s conscience be true, objectively true. In this sense, before being responsible before our conscience, we are responsible of our conscience.⁶⁴

Another noteworthy omission is the absence of any mention regarding the duty of the confessor to judge, educe contrition, and furnish more probable reasons. And so, whereas one might expect to see Vitoria encourage the confessor to instruct and admonish, instead the probable opinion proffered by the penitent exercises a normative role in the forum of conscience. The quasi-certainty of the confessor has been abandoned without prejudice to his formation as a minister of the sacraments and judge of consciences as his judgment gives way before the good faith of the penitent.⁶⁵

⁶³ Labourdette, *Les Actes Humains*, 157: “Même dans le cas d’une erreur totalement involontaire et innocente, s. Thomas ne dit pas . . . que la volonté conforme à la conscience erronée est bonne, mais seulement qu’elle n’est pas mauvaise. . . . elle n’a pas pour autant la vertu de produire la bonté morale. Ce qu’elle produit, c’est l’involontaire et . . . l’involontaire supprime toute raison de moralité, bonne ou mauvaise.”

⁶⁴ Labourdette, *Les Actes Humains*, 159: “La conscience a un rôle subordonné par rapport à la loi éternelle et à la vérité des choses. Ce n’est pas elle qui fait la bonté, pas plus qu’elle ne fait l’obligation. Son devoir primordial est d’être vraie, de nous conformer à l’ordre divin. Qu’elle soit dans l’erreur, ce sera au moins une défaillance et souvent déjà une faute, car chacun doit tout faire pour éviter ce genre d’erreur. Il y a ainsi un devoir fondamental, antérieur même à celui de suivre sa conscience, c’est de tout faire pour que la conscience soit vraie, objectivement vraie. En ce sens, avant d’être responsable devant sa conscience, on est responsable de sa conscience.”

⁶⁵ See de Blic, “Barthélémy Medina,” 283: “Il peut arriver en effet qu’un homme

Text 4: *Commentary on ST I-II, q. 19, a. 5 (from a reportatio of a course taught in 1539; Ms. Vat. Lat. 4630, fol. 124v–125v)*⁶⁶

1. Whether the will is good when abiding by erring reason? [*“Utrum voluntas concordans rationi erranti sit bona?”*)] . . .

2. But it is still doubtful, having settled that an agent acting against his conscience sins, *whether it is a sin to act against doubt*: that is to say, if someone should have some doubt in a moral matter, whether he sins by acting against such a doubt.

3. I respond that something can be called dubious in two senses.

4. *First, when one has an opinion concerning something, which opinion is called a doubt.* And concerning this I posit the conclusion that one may well act against a doubt, that is, against a probable opinion. *Because it stands that a literate man should think over two probable opinions; then, whatsoever opinion he follows, he does not sin, and nevertheless he acts contrary to a probable opinion.* Ergo . . . Second, I say that, if someone thinks over one probable opinion and another improbable opinion, by acting against the probable opinion he sins because he acts against the prudential dictate which he ought to have [done] [*quia agit contra dictamen prudentiale quod debet habere*].

5. *But according to the second sense, there can exist some doubt as whenever the intellect does not incline more strongly unto one part than unto another, nor does it have assent [habet assensum] according to either part, such that it does not incline more strongly unto one part than to another. And concerning such case the conclusion is that he who acts against such a doubt sins: that is, he who acts in that concerning which he is doubtful, sins; for this reason, namely, that he opposes himself suchlike to the peril of sinning mortally [quia*

instruit et capable de juger des choses morales se trouve en présence de deux opinions opposées, dont chacune lui paraît probable. Dans ce cas, quelque parti qu'il adopte, il ne pèche pas, bien qu'il agisse contre une opinion probable" ("It can happen effectively that a man both learned and capable of judging moral matters finds himself ranged about by two opposing opinions, each of which appears probable to him. In this case, whichever one he adopts, he does not sin though he acts against a probable opinion").

⁶⁶ De Blic, "Barthélémy Medina," 55–56 (the translation of the text is my own).

ille talis opponit se periculo peccandi moraliter]. For he is doubtful whether this is licit; therefore, if he performs [*operator*] it, he acts evilly, because he performs suchlike against his conscience. It is proven. For he does not have a judgment [*judicium*] that this should be acted or is licit, and nevertheless he performs it. Therefore, he performs [it] against a doubtful conscience [*Ergo operatur contra conscientiam dubiam*].

6. But it is argued against this: it follows that such a solution yields a *perplexus* in some case. It is proven [thus]. There is a case in which he is altogether doubtful [*omnino dubius*] whether this [woman] is his wife or not. The woman asks for the [marriage] debt. It follows that such a case then is a *perplexus*. It is proven [thus]. If he renders the debt, he acts evilly, in that he acts against a doubt [*eo quod agit contra dubium*]; therefore, he sins if he renders [it]. But if he does not render [it], also it seems that he should sin suchlike because he does injury to this woman concerning whom he doubts whether she is his wife and who licitly asks; therefore he does injury to her, having established that she does not ask evilly. Ergo.

7. A similar case can be given in this: there is a woman who doubts whether it is licit to lie in order to defend her husband. What should she do? If she lies, she sins. If she speaks the truth, she also sins because this woman does injury to her husband in that there is a doubt whether she is bound to speak the truth. Therefore.

8. *We respond that in these doubtful cases, we can follow the moral standard, namely that less evil should be chosen from two evils, but known evil should never be chosen.* I want to say: the woman doubts whether she is bound to lie in order to defend her husband, but the woman knows that if she lies without being bound to, she sins mortally [manuscript corruption: *forte, venialiter*]; *nevertheless if she is bound to lie in order to defend her husband and she does not lie, she knows the sin to be mortal, because it is a great injury to her husband* [*tamen si teneretur mentiri pro defendo marito et non mentiretur, scit esse mortale, quia est magna injuria marito*]. In this case, I say that she ought rather to lie because by not lying she sins mortally; but by lying in a case of doubt, she sins venially; and therefore less evil should be chosen between two evils. Ergo. And therefore through this [standard] is normed several [cases] which can come about [*Et ideo* [?] *per hoc regulentur aliquot que possunt evenire*].

9. But nevertheless when someone is thus doubtful, as according to both parts there were equal sin, then, whatsoever one does, he does not sin because it is reckoned to him as invincible ignorance. But plainly these cases never occur.

The articles in the *prima secundae* on doubtful or erring conscience soon became the *locus classicus* for full-length treatises on the newly formulated moral systems. The text taken here from Vitoria's ordinary lectures is rather brief by comparison to later theorists. That being said, certain emphases of those later accounts are already evident.

In the *Summa theologiae*, St. Thomas settles upon the conclusion that erring conscience binds but does not excuse. All choice, St. Thomas teaches, is informed by an intellectual component with which the appetitive or volitional component moves, more or less, in concert. Thus the good is chosen as apprehended, and the will is good only insofar as it conforms to the rule of reason. In the case of erring conscience, a defect introduced by the intellect conditions the will in a somewhat strange fashion. Since the will is bound by the intellectual component which informs its motion, it would seem that error would excuse from sin. And yet, it does not. The conscience binds, but does not excuse. The moral agent with a malformed conscience appears to be trapped—a moral phenomenon called *perplexus* or *perplexitas*.

Now, St. Thomas was fully aware of *perplexus*, and avoids it in the case of erring conscience. The bound erring conscience does not qualify for *perplexus simpliciter*, but only *secundum quid*. One can always have recourse to the further formation of conscience. St. Thomas sees no need to devise a conceptual structure for exculpating one “forced” to choose between two evils. Rather he indicates the way forward through growth in the virtue of prudence.⁶⁷

In Vitoria's commentary, the emphasis in the investigation of erring

⁶⁷ See St. Thomas Aquinas, *De veritate*, q. 17, a. 4, ad 8: “One whose conscience tells him to commit fornication is not completely perplexed, because he can do something by which he can avoid sin, namely, change the false conscience. But he is perplexed to some degree, that is, as long as the false conscience remains. And there is no difficulty in saying that, if some condition is presupposed, it is impossible for a man to avoid sin; just as, if we presuppose the intention of vainglory, one who is required to give alms cannot avoid sin. For, if he gives alms, because of such an intention, he sins; but, if he does not give alms, he violates the law” (trans. James V. McGlynn, S.J. [Chicago: Henry Regnery, 1953]).

conscience has subtly shifted. First, Vitoria begins with a reworked concept of doubt, a term that does not appear once in St. Thomas's treatment of *ST* I-II, q. 19. For St. Thomas, a truly doubtful conscience, inclining neither more to one position or the other, ought to take the safer course. Vitoria acknowledges that he is using doubt in a modern sense, and so gives two definitions. Interestingly, his first definition of doubt describes the setting of probabilistic reasoning, as when one weighs more and less probable opinions. Vitoria states that, in any difficult case of conscience, one almost inevitably ends up acting against a probable opinion (provided reasons are arrayed on both sides), and so he must elect to act against a probable opinion. Otherwise, a *perplexus* would arise. And yet, in a place where one would expect a probabiliorist read, he appears decidedly probabilist: "Because it stands that a literate man should think over two probable opinions; then, whatsoever opinion he follows, he does not sin, and nevertheless he acts contrary to a probable opinion." The paradigm of moral agency is the literate man, and his discovery of conflictual probable opinions leaves him radically free. The second definition of doubt given in the next paragraph holds for a more traditional sense, quoting a text from St. Thomas: "There can exist some doubt as whenever the intellect does not incline more strongly unto one part than unto another."⁶⁸ In commenting this sense of doubt, Vitoria appears to uphold the traditional position, claiming that one ought not to risk mortal sin if there is indeed true fear thereof.

At this point, he introduces the complication of *perplexus*, citing two discrete cases. Paragraph 6 details the example of a man and a woman. The woman is asking the man to render the marriage debt, but he does not know if this is his wife. Paragraph 7 details the example of a woman who does not know whether she should lie to defend her husband. In paragraph 8, Vitoria proposes a fascinating novelty: "We respond that in these doubtful cases, we can follow the moral standard, namely that less evil should be chosen from two evils, but known evil should never be chosen." Rather than demonstrating that the *perplexus* is only apparent or *secundum quid*, he concedes that one should choose the lesser evil among two evils ("scilicet quod minus malum est eligendum de duobus malis"). This beggars belief as an exposition of St. Thomas's text. The unity of the moral life as envisioned by St. Thomas forbids this type of moral tragedy.⁶⁹ Evil

⁶⁸ *ST* II-II, q. 71, a. 4, ad 3. Not insignificantly, this article speaks to the phenomenon of an uncertain judge.

⁶⁹ See Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: Notre Dame University Press, 1981), 142–45. and parallel passages in Alasdair MacIntyre, *Whose Justice?*

cannot be the object of a human act except when perceived as an apparent good. Only good (or the appearance thereof) motivates appetite. There are grounds for arguing here that, in Vitoria's understanding, it is the object as *comparatively less-evil* which engages the moral agent. When he applies the principle, the incongruity is even starker. In one of his test cases, Vitoria concedes that one can lie permissibly, an action St. Thomas held to be *malum in se*. Vitoria goes so far as to say that one can be circumstantially bound to lie, and the omission thereof constitutes grounds for a mortal sin (see paragraph 8). The subsequent explanation relies heavily on the notion that venial sin is to be preferred to mortal, and that doubt is equivalent to invincible ignorance (a subject treated earlier). Here, Vitoria's repurposing of concepts has led to conclusions that reveal an incipient probabilism.

This important text highlights the connection between preoccupation with epistemic doubt and probabilism. Recourse is made to the literate man, the expert of moral knowledge. Competency for decision-making is professionalized. The shift toward authority and away from the interior coherence of philosophical and theological argumentation gives his reasoning a positivistic and very practical shape. He has wrestled with the question of lying in a violent and ruthless age. But one cannot help but wonder if the practicality has compromised some of his fundamental moral theory.

Text 5: *Commentary on ST II-II, q. 47, a. 4 (from the ordinary lectures of 1534–1535)*⁷⁰

1. Aristotle in *Nicomachean Ethics*, book 6, enumerates the intellectual virtues and says that opinion is not a virtue. The reason—he says—is that it pertains to the ratio of virtue that it is not indifferent to good and to evil; but opinion is of this sort because sometimes it is true and sometimes it is false: therefore it is not an intellectual virtue. And nevertheless prudence is nothing other than opinion. It is proven thus, because prudence turns upon [*versatur circa*] the judgment of contracts, namely whether they are licit or illicit, and in this matter there is no evidence to be had, for prudence does not advance [*procedit*] by evidence. For it is evident that one should not kill. Nevertheless if [someone] wants to take my cloak, it is not

Which Rationality? (Notre Dame, IN: Notre Dame Press, 1988).

⁷⁰ Francisco de Vitoria, O.P., *Comentarios a la Secunda Secundae de Santo Tomás*, vol. 2, *De Caritate et Prudentia* (qq. 23–56), ed. Vicente Beltrán de Heredia, O.P. (Salamanca: Biblioteca de Teólogos Españoles, 1932), 357–60 (the translation of the text is my own).

evident whether it is licit to kill him or not, but is rather a matter of opinion [*sub opinione*]; and nevertheless opinion is not a virtue: therefore neither is prudence . . .

2. Having supposed that opinion is sufficient for acting well morally, I say to the argument (which says that opinion is not a virtue) that Aristotle does not deny that some opinion is not a virtue, because it does not pertain to the ratio of opinion that it is true [*de ratione opinionis non est quod sit vera*]; and if it is true, it will be a virtue. And it pertains to the ratio of knowledge that it is a virtue, because all suchlike perfects the intellect. But if opinion is false, it will not be a virtue. So, since it pertains to the ratio of prudence that it is not false, therefore it is a virtue.

This passage gives an objection and its response. An incautious reading invites any number of genre errors. One must note first that specious reasoning used in objections is often refuted in the responses; but, when the author fails to refute every aspect of the objection, that does not necessarily mean he has conceded the point(s). In the objection (paragraph 1), Vitoria syllogizes in the following way: virtue inclines always to good; opinion can incline to both good and evil; therefore opinion is not a virtue. Prudence, as a species of opinion (a point taken for granted), is therefore not a virtue. In the response, Vitoria does not challenge the assumption that prudence is a species of opinion. He argues though that Aristotle allows for opinion to be virtuous provided it inclines to the good; now—for Vitoria—prudence is just such an opinion, and therefore qualifies as a virtue.

It is interesting to see how Vitoria depreciates the epistemological value of prudential knowledge. As mentioned earlier, dialectical knowledge, though admittedly less certain than science/knowledge in the strict sense, nevertheless occupies a rank above the “contentious” knowledge (*doxa*) described by Aristotle in the first chapter of the *Topics*.⁷¹ To reduce prudence to the category of opinion—a move that St. Thomas never makes—fails to appreciate prudence’s basis in indefectible first principles (*synderesis*). These first principles—identified alternately with the ends of the moral virtues and the roots of the natural law—incline man to the apprehended good in a way far beyond what mere opinion can muster.⁷²

⁷¹ Aristotle, *Topica* 1.1.100b23–26.

⁷² See *ST* II-II, q. 47, a. 6.

Clearly, prudence is far less robust in Vitoria's understanding than in that of St. Thomas. The changes acknowledged in the discussion of the previous texts have come home to roost. As conscience and its complex apparatus begin to grow, a concomitant withering of prudence has begun.

Summation of Textual Evidence

These passages have served to highlight the ways that Vitoria's moral theory betrays an incipient probabilism. In the course of the exegesis, certain departures from a classically Thomistic understanding appeared. Vitoria places authority in a position of prominence. He also makes theological proof to rely more on external authority and less on argumentation. He cedes to authority more significant determinative power and may in the process have undermined the integrity of the virtue of prudence and practical moral reasoning. In addition, the focus on resolving doubtful conscience over and against the virtuous formation of practical reason shifts emphasis away from a traditional conception of morality to that of a more therapeutic probabilist rationalization.

Conclusion

And so, while the traditional narrative credits Bartolomeo de Medina with the inception of probabilism, there is ample reason to identify some of its essential contours in the teaching of his esteemed professor. Vitoria certainly plays his part in the transition from high Scholasticism to the probabilist moral systems. In Vitoria, the theological worlds of sixteenth-century Europe met, mingled, and took new shape. By a novel fusion of nominalist, humanist, and Thomist principles and emphases, Vitoria contributed to laying the groundwork for what came, in time, to be an entirely new tradition of moral theory. And so, in contrast to what overly facile descriptions of his Thomistic caste of mind might suggest, Vitoria is decidedly his own man. Whether his moral theory in general is more original than many imagine falls outside the scope of this essay. At the very least, there are reasons to believe that his place in the formation of probabilism is indicative, and that, as a result, he can only be used to bridge the medieval and modern worlds with requisite care and caution. N.V