Natural Law and the Roman Catholic Tradition: The Importance of Philosophical Realism

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Abstract. The intellectual tradition of Roman Catholicism considers natural-law theory as providing the philosophical machinery for articulating concepts central to thinking about moral theory, legal theory, and the social order. The thrust of this essay is to explicate the positions rooted in the writings of Aquinas on natural-law theory, a theory with which a Georgist might find some stimulating similarities. Conditions necessary for natural-law moral and legal theory are considered through an analysis of the central metaphysical concepts together with their historical development and contemporary significance.

Introduction

This essay addresses the wellspring of recent work in natural-law theory rooted in the texts of Thomas Aquinas, especially as illustrated by contemporary English-speaking philosophers. A central theme is the elucidation of the connections of natural-law theory with philosophical accounts associated with Roman Catholicism. The goal is to address those questions that focus attention on the realist and not the post-modernist foundation—in other words, a real order found in nature—for moral, political, and legal theory. Emphasis on analysis and interpretation will be directed towards what might be called the analytic tradition of contemporary Anglo-American philosophy rather than the traditional philosophical school known as Neo-Thomism. What is interesting conceptually is that much recent philosophical analysis in natural-law moral and legal theory extends beyond Neo-Thomism. For example, the late British philosopher,

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American Journal of Economics and Sociology, Vol. 71, No. 4 (October, 2012).

Philippa Foot, once endorsed the moral theory of Aquinas with the following words (1978: 2): "It is my opinion that the *Summa Theologiae* is one of the best sources we have for moral philosophy." The intellectual tradition of Roman Catholicism, however, considers natural-law theory as providing the philosophical machinery for articulating concepts central to thinking about moral theory, legal theory, and the social order. The tradition of natural law has focused attention on the role of human nature and the human person in moral theory. This is in contrast to the two major moral theories that dominated contemporary philosophy in most of the twentieth century: the utilitarianism rooted in John Stuart Mill and the formalism found in Immanuel Kant. Issues derived from natural-law theory include but are not limited to the following: just war theory, crimes against humanity, human natural rights, positive and negative human rights, and self-actualization moral theories. Moreover, these issues are central to the ethical naturalism found in Aristotle's *Nicomachean Ethics* and brought forward in the Roman Catholic tradition through Thomas Aquinas in his *Summa Theologiae, Prima Secundae*, Questions 90–97 (1946)—which is the classical cannon on natural law—and in Aquinas's *Commentary on Aristotle's Nicomachean Ethics* (1964: 2). Aquinas's ethical theory of natural law is grounded on the "order of nature" found in the human person and based upon a realist account of human nature.

The Donnybrook Between Henry George and Archbishop Michael Corrigan

In an essay written principally for an audience familiar with the writings of Henry George, a brief excursion into the ecclesiastical skirmish between the Georgists and several Roman Catholic prelates seems appropriate. This intellectual disagreement notwithstanding, an analysis of natural-law theory can be useful and enlightening for contemporary students of Henry George's writings. George did adhere to a form of natural-law and natural-right theory. In *Progress and Poverty*, George (2006: 186) wrote that "the use of the land" is "a right that is natural and inalienable." George provided, however, little analysis or justification for his theory of natural rights other than that

they are God-given. This would be what contemporary philosophers would refer to as a theory of "Divine Prescriptivism" or "Theological Definism."

The late nineteenth-century annals of the Roman Catholic Church in the United States are replete with the struggles and eventual rancor that developed between Henry George together with Father Edward McGlynn and McGlynn's immediate ecclesiastical superior, Archbishop of New York Michael Corrigan. That a serious battle of social ideas emerged is not to be denied. Contemporary Georgists, it appears, know much about the nineteenth-century disagreement but little about the historical events leading up to this skirmish over revolutionary social ideas. Corrigan was a staunch member of the conservative wing of late nineteenth-century American Bishops; his nemesis was the liberal leaning Archbishop John Ireland of St. Paul. The conservative ecclesiastical leaders often appeared to be ultramontane (strongly emphasizing Papal authority) while the liberals wanted the Roman Church to be more responsive to the social policies not only of modern philosophical and theological writings, but also more conscious of the human enhancement central to the American experience of democracy. These two ecclesiastical wings clashed often over policy matters; two leading issues were the expected Papal condemnation of the Knights of Labor and the establishment of the Catholic University of America in Washington under the direct auspices of the American Bishops. The earlier debates over the role of Papal Infallibility centering on the First Vatican Council in 1869 began fueling these fires. Many American Bishops were opposed to defining this dogma, but Pius IX, who convened Vatican-I, wanted this item to be passed by the assembled prelates in Rome. Pius IX won this round, but not without causing deep alienation and serious consternation among members of his church, especially in parts of Germany, England, and the United States.

An historical query that one might pose judiciously is that had Henry George been running for Mayor in another major or minor American city—possibly St. Paul with Archbishop John Ireland as the reigning Roman Catholic ecclesiastical person in the area, Baltimore under James Cardinal Gibbons, or Peoria with Bishop John Lancaster Spalding in charge—this intellectual and social theory skirmish

between George and the American Roman Catholic Church might not have occurred or at least would have been more modulated. In fact, it was Cardinal Gibbons who, despite the strong urging of Corrigan to the contrary, interceded with the Roman authorities not to condemn officially the writings of Henry George. In many ways, it was an historical accident that this rumbling event occurred in New York City. Personalities did enter into this fray. McGlynn and Corrigan had an intense dislike for one another going back to their mid-century student days in Rome (Morris 1997: 93).

Pius IX was followed by Leo XIII, a forward thinking and judicious successor to St. Peter in Rome. His 1891 Encyclical, *Rerum Novarum*, attempted to straddle the line between capitalism and socialism and to address the social issues of marginalization following from the industrial revolution. A decade earlier, Leo, in one of his first pontifical acts, wrote his famous encyclical, *Aeterni Patris*, in which he called for a renewed interest in the writings of Thomas Aquinas, the significant thirteenth-century medieval philosopher and theologian. From the impetus of this encyclical emerged the philosophical movement often referred to as Neo-Thomism; an important part of this philosophical network was to address the then contemporary social, economic, and political issues regnant in the western world. This follows directly from the philosophical commentaries of Thomas Aquinas on Aristotle's *Nicomachean Ethics* and the *Politics*, in which moral theory is closely related as a foundational inquiry for both economic theory and politics. Leo, however, probably did enunciate a more stringent theory of private property rights than one finds in the texts of Thomas. Nonetheless, it is in considering this close relationship between a moral theory rooted in a theory of the human person from which would develop both an economic theory and a political theory that a contemporary Georgist might consider with some interest the foundational moral principles articulated in natural-law moral and political theory. The thrust of this essay is to explicate in the contemporary idiom the positions rooted in the writings of Aquinas on natural-law theory, a theory with which a Georgist might find some stimulating similarities. Various contemporary articulations of natural-law theory will also be discussed along with differing interpretations.

Contemporary Work on Aquinas: The Connections with Roman Catholicism

At the beginning of an essay on Thomas Aquinas and natural-law theory, one must realize that there is no one singular interpretation of Aquinas's philosophical theories now accepted by most philosophers. For example, the contemporary state of scholarship delving into the philosophical work of St. Thomas illustrates fairly distinct and differing approaches to Aquinas's set of philosophical texts. Recent work falls generically into three categories. First, there are the more traditional Thomists, mostly Roman Catholic philosophers, who assume that significant philosophical insights are found in the metaphysical and moral realism of Aquinas and that these insights need to be explicated and considered afresh by contemporary students of natural-law theory. For the most part, these Thomist philosophers received their academic training in the important schools of neo-scholasticism both in North America and in Western Europe. Most of these philosophers undertook their formative work rooted in classical scholasticism as this philosophical school developed through the first two thirds of the twentieth century. In this group would be Etienne Gilson, Jacques Maritain, Anton Pegis, Joseph Owens, Ralph McInerny, John Wippel, Mary Clark, Benedict Ashley, William Wallace, and the legion of students trained in both North American and European institutes of traditional scholasticism. Most philosophers who identify themselves as "Neo-Thomists" would fit into this category. A sub-set under this generic rubric would be those philosophers following the insights of the Louvain Jesuit, Joseph Marechal, known as "Transcendental Thomists." These Transcendental Thomists attempt to reconcile the philosophical theories of Kant and Aquinas.

A second group are those philosophers called "Analytic Thomists," whose philosophical training and general perspective are rooted in English-speaking Angelo-American analytic philosophy. Recently, John Haldane from the University of St. Andrews in Scotland coined the term "Analytical Thomism." (Philosophers in this group, in addition to Haldane, would be Peter Geach, Elizabeth Anscombe, Anthony Kenny, Norman Kretzmann, James Ross, Brian Davies, Scott MacDonald, John Finnis, Eleonore Stump, John Peterson, and Christopher

Martin, among others. These philosophers can be grouped both generationally and in terms of American or British ancestry and identity.) In contrast to the more traditional Neo-Thomists, this group of philosophers, for the most part, discovered the philosophical texts and the corresponding insights of St. Thomas after studying analytic philosophy, principally within the confines of secular philosophy departments both in England and in the United States and Canada. Not all philosophers in this second group are Roman Catholics, although many are.

Thirdly, there is an emerging group of Cambridge University post-modernists associated with the work of John Milbank and Catherine Pickstock whose work is directed more towards theological issues. Advocates of what they call "Radical Orthodoxy," these theologians propose a re-evaluation of the concept of rationality and of truth in Thomas, which they consider compatible with several post-modernist themes. Milbank and Pickstock's (2001) *Truth in Aquinas* argues for this position. Some recent theological ethics, moreover, exemplifies this post-modernist thrust.

Hence, in English-speaking philosophy, three somewhat distinct groups of contemporary philosophers work seriously with the natural-law texts of St. Thomas: (1) the classical Neo-Thomists (with the Transcendental Thomists as a sub-set); (2) the Analytic Thomists; and (3) the post-modernist students of Aquinas linked to the Radical Orthodoxy movement.

Aquinas as a Philosopher

This essay considers Thomas Aquinas as a philosopher. One discovers significant discussions of philosophical issues connected with more than several issues central to major themes in analytic philosophy. Riding on the coattails of John Wippel's (2000) *magum opus* on Aquinas's metaphysics, it is clear that one can articulate a substantive philosophical approach in Aquinas that is independent conceptually from his theological concerns. Hence, this essay questions the revisionist Aquinian studies position, whose seeds are found in the major writings of the twentieth century Neo-Thomist, Etienne Gilson, suggesting that approaching Aquinas simply as a philosopher separated

from theological matters is misguided conceptually (McInerny 2006). In addition, this essay argues against the Pickstock and Milbank claim that Aquinas's philosophical account of truth is reducible to a theological analysis. Aquinas can be read as a philosopher seeking tough-minded responses to significant philosophical issues. This analysis borrows heavily from what the late Henry Veatch (1971: 4) called "the structural history of philosophy," which attempts to lay bare the presuppositions with which every great philosopher works. In the contemporary dialectic going on in moral and legal theory in analytic philosophy, Aquinas's insights have much to offer. As this essay unfolds, Aquinas will be seen as a significant player in contemporary analytic philosophy's discussions of natural law. Nonetheless, several Neo-Thomist developments in natural law theory will not be neglected.

Aeterni Patris and the Renewal of Natural-Law Thinking in Roman Catholicism

Of principal interest to Georgists will be the principal role that Pope Leo XIII played in the late nineteenth-century resurgence of studies in Thomas Aquinas. Mason Gaffney (2000), for one, considers Leo XIII's social encyclical, *Rerum Novarum*, as particularly directed against the economic positions, especially private property, held by Henry George. Sociologist C. Joseph Nuesse (1985), however, argues that there is little evidence that Leo's encyclical was directed even remotely against the work of George. (See also Benestad 1986.) Accordingly, any discussion of natural-law theory in contemporary Roman Catholicism requires a brief account of the rise of Neo-Thomism in the last quarter of the nineteenth century. On August 4, 1879, Joachim Pecci, who recently had become Pope Leo XIII, published his influential encyclical, *Aeterni Patris*, calling for a re-examination and a restructuring—indeed a restoration—of what he considered to be classical Thomistic thought. Contemporary historians of philosophy realize that medieval philosophy is a broader, more complicated, and more sophisticated category in intellectual inquiry than the freshly elected Pope Leo XIII considered possible. Moreover, Pope John Paul II's 1998 encyclical, *Fides et Ratio*, substantively emphasized the argu-

ments for philosophical realism first articulated by Leo XIII. That is the telling point in these issues—the importance of philosophical realism, especially in moral theory. It is important, therefore, to consider briefly the background out of which Leo XIII drafted *Aeterni Patris* (Boyle 1981).

Understanding the structure and content of *Aeterni Patris* requires coming to terms with the state of nineteenth-century Western European philosophy, when the shadow of Immanuel Kant hovered heavily over the philosophical enterprise. While Kantian theories were, of course, being undertaken within the context of the then recent work of Hegel, nonetheless the transcendental theory of Kant serves as the theoretical backdrop from which one needs to understand the rise of Neo-Thomism. With Kant, what Veatch called "the transcendental turn" is dominant. In using "the transcendental turn," Veatch brought to the forefront of philosophical discussion the radical nature of conceptual dependency that characterizes Kantian philosophy. In other words, the Kantian theory rendered the approach to philosophy dependent on the epistemological categories that structure the human mind. As a result, it was impossible to obtain a philosophical foothold in the nature of external reality. This conceptual dependency marked by the transcendental turn, therefore, entails a denial of both metaphysical and moral realism and depicts a foundationalism common to much modern and contemporary philosophy. One consequence of the transcendental turn is the abandonment of what we might call philosophical realism, which is understanding in some way the nature of external reality. *A fortiori*, this abandonment entails that natural-law theory rooted in any "order of nature" is suspect philosophically. This explains the almost absence of serious work in and entrenched philosophical opposition to natural-law theory in the predominant secular writers in western philosophy during the first three quarters of the twentieth century.

Part of the drive for the renewed interest in the philosophy of Thomas Aquinas in the last part of the twentieth century and now in the early years of the twenty-first rests in philosophical worries—what Aristotle referred to as "*aporia*"—similar to those that Joachim Pecci confronted in the 1870s. There are at least three factors contributing to this renewed interest in Aquinas's philosophy. All three, moreover, are

conjoined with the burgeoning field of contemporary Aristotelian studies. First, there is the general rejection of the foundationalist heritage common to modern philosophy, with its roots in Descartes's *Meditations* and clearly articulated in Kant's two *Critiques*. Foundationalism accepts the Cartesian method found in the *Meditations* where the first philosophical query is an epistemological question—"How do I know that I know?" Secondly, the last third of the twentieth century witnessed the rejection of non-cognitivist positions commonly held earlier in the century. Non-cognitivist theories entailed the denial of any moral objectivity; natural-law theory fell under this critical umbrella. Thirdly, philosophical criticism in analytic philosophy has developed about the rise and entrenchment of post-modernism, with its dismissal of philosophical realism. The challenge of post-modernism to classical natural-law theory is neither an arcane nor idle philosophical question. Writing in the English Dominican monthly, *New Blackfriars*, Pickstock (2000) asked the following question: "How should one respond to the death of realism, the death of the idea that thoughts in our minds can represent to us the way things actually are in the world? For such a death seems to be widely proclaimed by contemporary philosophers." Natural-law theory requires a lively realism contrary to Pickstock's claims.

In *Truth in Aquinas*, Pickstock and Milbank's analysis of Aquinas's concept of truth is an attempt to place St. Thomas in the post-modernist camp. More than several Aquinas scholars raised serious questions about this particular anti-realist interpretation. Oxford philosopher and Aquinas scholar Anthony Kenny (2001: 14) indicated his intellectual concerns with this post-modernist analysis of Aquinas. "Since I have never myself been cast into the abyss of postmodernism, however, it may be churlish of me to sniff at any crumb of comfort that may be offered to those who have suffered that misfortune. But one thing I do know: *Truth in Aquinas* is far from being the truth on Aquinas."

The philosophical maxims that Milbank and Pickstock utilize together with the subjectivity of non-cognitivist moral theories are similar structurally to the transcendental turn that bothered Joachim Pecci in the nineteenth century. This is the denial of philosophical realism required by a study of human nature, which is central to

natural-law theory. These philosophical positions dismiss conceptually any possibility for an ontological discussion of an "order of nature."

Recently, philosophers in the Anglo-American tradition have been attracted to the philosophical realism of Aquinas. A cluster of issues exerted a profound influence on the activity of philosophy in the last part of the twentieth century within which arose significant interest in the moral realism of Aquinas. What has been called "ordinary language philosophy," which was prevalent in the middle part of the twentieth century as developed in the writings and lectures of three prominent British analytic philosophers (Ludwig Wittgenstein, John Austin, and Gilbert Ryle), articulated a set of philosophical positions that challenged the prevailing themes of conceptual foundationalism common to modern and contemporary philosophy. This anti-foundationalism expressed by several mid-century philosophers rendered the philosophical ground, as it were, ripe for a reconsideration of the writings of Thomas Aquinas. Roman Catholic analytic philosophers Peter Geach and Elizabeth Anscombe, who were both students of Wittgenstein at Cambridge, initiated this work. John Haldane (2000a: 38) has expressed this changed direction in philosophy in the following passage: "Our knowledge of the external world is the starting point for philosophical reflection, the task of which is not to *justify* this knowledge but to *explain* it; to give an account of the scope of cognition, its genesis and its operations." In other words, the role of realism was beginning to replace the transcendental nature of contemporary philosophy. This replacement paved the way for a new appreciation of the realist thrust of Aquinas's natural-law philosophy.

In his analytic effort to understand the philosophy of Aquinas, Scott MacDonald (1993: 160) articulated much the same realist theme: "Aquinas does not build his philosophical system around a theory of knowledge. In fact, the reverse is true: he builds his epistemology on the basis provided by other parts of his system, in particular, his metaphysics and psychology." In other words, a realist theory of reality must precede any efforts at epistemology. Put more philosophically, Aquinas adopts both an ontological realism—reality has structured categories—and an epistemological realism—these categories are knowable.

This philosophical order is applicable directly to elucidating Aquinas's theory of natural law based upon some form of an order of nature. In other words, Aquinas accepts as philosophically sound the possibility of understanding reality. Moral theory, then, is a second-order activity based on the metaphysical foundation of the human person, which is the essence or natural kind—the order of nature—of human nature. Haldane argues against any traditionally Kantian foundationalist dimension in Aquinas's epistemology. One notices immediately the differences with Kant. Aquinas rejects what Veatch called "the transcendental turn," which is central to Kantian moral theory and independent of any realist order of nature. Moreover, most metaphysicians in the Roman Catholic tradition have been philosophical realists.

The anti-realism of post-modernism, the non-cognitivist denial of moral objectivity common to emotivism reducing moral judgments to expressions of deeply held emotions, and the transcendental turn characteristic of Cartesian and Kantian foundationalism are coextensive with the set of issues that Leo XIII challenged in 1879. Once *Aeterni Patris* was promulgated, Neo-Thomism developed rapidly as a major force in Roman Catholic philosophy. (The interested reader might consult McCool 1994.) In many ways, Neo-Thomism in its beginnings was a fruitful attempt undertaking serious philosophical analysis. That Neo-Thomism was perceived as somewhat fossilized in the middle part of the last century is a sad story that goes beyond the limits of this inquiry. Following the Second Vatican Council, the growth and development in Roman Catholic philosophical circles of various forms of continental philosophy had the consequence of rendering classical Neo-Thomist work marginal at best and obsolete at worst. Paradoxically, it was the analytic Thomists who helped restore vitality to the philosophy of Thomas Aquinas. It is with these philosophers, moreover, where one finds some of the best new creative work in natural-law moral and legal theory.

Neo-Scholasticism and Natural Law

A mainstay of scholastic work in natural-law theory in the United States in the first half of the twentieth century was the Catholic

University of America. The faculty took as its mission to apply the realist philosophy of Aquinas to the pressing social and political issues of the day, especially as these were being played out in the United States. Ignatius Smith, the Dominican Dean of the School of Philosophy, supported this philosophical dimension of the faculty with enthusiasm. John A. Ryan was a vibrant philosophical voice in this arena for Roman Catholic social and political discussions. Gaffney (2000: 5) notes that some commentators on Ryan judged that he expressed positive leanings towards several of George's positions.

In France, and later in the United States, Jacques Maritain was an advocate of using the philosophical insights of Aquinas in developing a theory of natural law. Maritain exerted efforts at the elucidation of a theory of natural human rights compatible with modern political theory. His *Man and the State* (1951) prompted serious work in natural-law discussions on rights theory. Yves Simon (1965: 7–8) undertook an explanatory role similar to Maritain and offered one of the more thorough accounts in the mid twentieth century of classical natural-law theory. His arguments in *The Tradition of Natural Law* articulate well that philosophical realism is a necessary condition for a consistent theory of natural law. The works of Maritain and Simon brought natural-law theory into secular discussions on major political and legal issues, especially natural-rights theory. Maritain was involved with the United Nations Declaration of Human Rights.

Secular Theories of Natural Law: Hart, Fuller, and MacIntyre

In discussing the renewal of natural-law theory in the mid twentieth century, one must begin with the natural-law writings of H. L. A. Hart (1961) and Lon Fuller (1964). Hart and Fuller contributed substantively to the revival of natural-law jurisprudence by focusing discussions on the Nuremberg trials with the corresponding criminal charges of "Crimes Against Humanity." Central to this revival are Hart's "core of good sense" in natural-law theory and Fuller's account of "procedural natural law." The contributions of Hart and Fuller to the contemporary revival of secular natural-law theory were significant and substantive.

Twenty years later, analytic philosophy and moral theory in English-speaking philosophy charted a new course with the publication in

1981 of Alasdair MacIntyre's remarkable treatise, *After Virtue*. The roots of much of MacIntyre's work lie in Aristotle and Aquinas. Nonetheless, Elizabeth Anscombe's (1958) important article "Modern Moral Philosophy" served as an earlier wake-up call to analytic philosophers. Anscombe indicated what she took to be the theoretical and practical bankruptcy of much analytic moral theory at the time, which was based either on emotivism or utilitarianism. Furthermore, she called for a re-working of philosophical psychology, a re-interpretation of practical reason, and a return to some sense of moral virtue. These three themes, Anscombe argued, were necessary conditions for a constructive renewal of ethical theory in analytic moral philosophy. MacIntyre's philosophical writing followed this general schema. Anscombe and MacIntyre are sympathetic with Mortimer Adler's (1990: 254) bold claim: "Aristotle's *Nicomachean Ethics* is the only sound, practical and undogmatic moral philosophy in the whole Western tradition." Leo XIII and John Paul II—and *a fortiori* Thomas Aquinas—would accept the spirit of Adler's judgment.

MacIntyre exerted significant influence in the resurgence of interest in the moral philosophy of both Aristotle and St. Thomas with *After Virtue* (1981), *Whose Justice, Which Rationality* (1988), *Three Rival Versions of Moral Enquiry* (1990), and *Dependent Rational Animals* (1999). Each monograph is a clarion call for renewed work in Aristotelian ethical theory. What natural law philosopher Russell Hittinger (1989: 449) proposed more than 20 years ago has proven to be accurate:

> MacIntyre has been a pioneer figure in what I have elsewhere referred to as the "recoverist" movement: those who wish to retrieve . . . the common morality of the West. If nothing else, MacIntyre has made this recoverist project professionally respectable. Less than a decade [now over two decades] has passed since its publication, yet many are already prepared to admit that *After Virtue* represents something pivotal.

MacIntyre argues, furthermore, that Aquinas was a premier commentator on Aristotle. MacIntyre's *After Virtue* produced a cottage industry centering on the discussions of virtue ethics. Anscombe and MacIntyre, among others, have argued against placing the virtue ethics of Aristotle and Aquinas into the theoretical dustbin with those theories of ethical naturalism rejected during most of the twentieth century.

The Role of the Human Person in a Teleological Context: Rational Nature, Affective Nature, Social Being

Given the renaissance of natural law in contemporary philosophy (those interested in this recent revival of natural-law theory might consult the author's (Lisska 2007) review essay on eight recent natural-law books), one needs to consider how the moral theory of Aquinas relates to the recent work in contemporary moral philosophy rooted in a theory of natural kinds. A natural kind would be an essence that defines the members of a certain class. Many historians of philosophy argue that the classical canon of natural-law theory is the set of passages in Questions 90–97 from the *Prima Secundae* of Aquinas's *Summa Theologiae*. Four principal points need addressing in order to render meaningful Aquinas's account of ethical naturalism rooted in the works of Aristotle:

1. The foundation of a theory of the human person.
2. The requirement of reason (knowing) as opposed to voluntarism (willing).
3. A theory of obligation.
4. The role of God in natural-law theory.

The concept of a sophisticated teleology rooted in a theory of the human person based on dispositional properties is central to an explication of Aquinas's position. Teleology, from the Greek work "*telos*" meaning "end," refers to the moral actions rooted in human nature. This is the ontological foundation for natural law in the human person, or human nature.

Foundation in the Human Person

Aquinas bases his moral theory, and *a fortiori* his theory of society and of human or positive law and a derivative but not an explicit theory of human rights, on the foundation of the human person as an instance of a natural kind. Aquinas argues that a human person is, by definition, a substantial unity grounding a set of potentialities, capacities, or dispositions. (In his metaphysics, the substantial form is the ontological ground for this set of dispositional properties.) Aquinas

divides these capacities into three generic headings, which serve as the basis of this theory of a natural kind for human persons. This is Aquinas's account of human nature—the human natural kind and "order of nature"—which is based upon the insights of Aristotle's *Nicomachean Ethics* and his *De Anima*.

1. The set of Living Dispositions (what humans share with plants).
2. The set of Sensitive Dispositions (what humans share with animals).
3. The set of Rational Dispositions (what renders humans unique in the material realm).

Thomas's ethical naturalism provides for the moral protection that prevents, in principle, the hindering of the development of the basic human dispositions. Considered schematically, a living disposition is the capacity or drive all living beings possess in order to continue in existence. In human persons, this capacity is to be protected. (While Finnis and Veatch, among others, have developed a theory of human rights from the writings of Aquinas, there is not developed explicitly in Aquinas a theory of rights. The work of Brian Tierney (1997) might be consulted on these issues. However, a right is determined on the foundation of protecting the basic human dispositional properties.) Had humans been created or evolved differently (for example, Aquinas appears to have accepted evolution through the *rationes seminales* of Augustine), a different set of proscriptions would hold. A protection is what it is because human nature is what it is. This analysis is similar structurally to what Hart (1961: 194) in his discussion of the "natural necessities" called the human right to the protection against violence.

In a similar fashion, one of the rational dispositions Aquinas considered is the drive human beings have to know—our innate curiosity to know and to understand. Aquinas suggests that this disposition is only developed when human persons know propositions that are true. Hence, human persons have a "moral claim" to the truth. Again, these basic claims protect what human persons are as human beings. Oxford philosopher John Finnis once argued, for instance, that college faculty have an obligation not to teach that which is known to be false because this fractures the right to true propositions, which right

students as human persons possess intrinsically. Finnis offered the same principle for political, academic, and religious leaders. This is based, Finnis (1998: 160) argues, upon the classic position of "a conception of human dignity and worth, precisely as it bears on the interpersonal act of communication." The moral claim would also hold for political leaders, especially in determining methods for governing society. In this regard, natural-law theory, in principle, responds to political queries about the social order. Aquinas also argues that this disposition is the basis for what he, following Aristotle, referred to as the social nature of human persons. Aquinas rejected the atomistic view of human nature exemplified, for instance, in Hobbes's egoistic account of human nature or indicated in the human isolation of Sartre's existentialism. What is central in Aquinas's theory of natural law, accordingly, is that moral theory rests upon the social nature of human persons together with the obligation of each human agent to act in such a way that one's natural, human ends are fulfilled. This, of course, leads to the attainment of *eudaimonia* or "functioning well" as a human person. Moreover, the necessity of reason as opposed to will is emphasized continually in the writings of Thomas. Throughout his discussion of law-making and moral theory, Aquinas argues that reason, both speculative and practical, is to be employed with vigor. Law is, as Aquinas emphatically states, "an ordinance of reason." A purely voluntarist account, which reduces moral justification to "an act of willing" or "undertaking an action," is, according to Aquinas, incorrect. (In contemporary jurisprudence, both Fuller and Golding defend versions of reason and are opposed to a voluntarist account.) Teleology counts for the development of these dispositional properties that determine the nature of a human person. This is similar to what the twentieth-century psychologist, Carl Rogers (1964: 160–167), referred to as "self-actualization."

The English Dominican, Columba Ryan (1965: 28), once wrote that these three general aspects of human nature are "the good of the individual survival, biological good, and the good of human communication." In his *The Morality of Law*, Fuller (1964: 184–186) argued for communication as a necessary condition for what he called a substantive theory of natural law. The American philosopher of law, Martin Golding (1974: 242–243), referred to the living dispositions as the "basic

requirements of human life," the sensitive dispositions as the "basic requirements for the furtherance of the human species," and the rational dispositions as "the basic requirements for the promotion of [a human person's] good as a rational and social being." In his *Aquinas*, Finnis (1998: 81) writes as follows: "The order Aquinas has in mind is a metaphysical stratification: [1] what we have in common with all substances, [2] what, more specifically, we have in common with other animals, and [3] what is peculiar to us as human beings."

Martha Nussbaum (1993: 263–264) of the University of Chicago, in elucidating themes in Aristotelian moral theory, articulated eight fundamental properties analogous to the Aristotelian analysis: "we can nonetheless identify certain features of our common humanity, closely related to Aristotle's original list." Nussbaum's eight characteristics are mortality, the body, pleasure and pain, cognitive capability, practical reason, early infant development, affiliation or a sense of fellowship with other human beings, and humor. Like MacIntyre, Nussbaum is much concerned that English-speaking moral theory has been caught up in what she takes to be an overly Kantian direction. Rather than posing the "obligation question" first—which is a common Kantian approach—Nussbaum suggests that moral philosophers need to ask the Aristotelian question first: "What kind of lives should we live?" Nussbaum argues that Aristotelian moral theory—and Aquinas's ethical naturalism would fit here also—can provide a necessary corrective to the strict deontological or Kantian approaches to moral theory on the one hand and to utilitarian approaches on the other. Both of these moral theories, until recently, dominated contemporary analytic moral philosophy. Through most of the twentieth century, ethical naturalism as found in Aristotle and Aquinas was not a vibrant component of significant moral discussions in analytic philosophy. But the philosophical landscape has changed.

In his *Natural Law and Natural Rights*, Finnis (1982: 85–92) put forward what he took to be a list of basic human goods: life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion. Finnis, however, argues that this set of basic goods is known by practical reason and is not grounded in a philosophical anthropology (Finnis 1983). The point here is that these theories of ethical naturalism, for the most part, depend upon the

concepts of the human person and practical reason and require the "functioning well" of that person—all of which are rooted in Aristotle's concept of *eudaimonia* or "happiness." Furthermore, for each of these philosophers, with the exception of Finnis, *eudaimonia* is rooted in the natural kind of the human person, which is the metaphysical foundation necessary for moral theory in natural law theory.

Alasdair MacIntyre and Philippa Foot

In his first major discussion of Aristotelian moral theory, *After Virtue*, MacIntyre was chary about committing his theory to any one particular ontological foundation. In *Dependent Rational Animals*, however, MacIntyre reconsidered and defended his return to the metaphysical biology that he rejected in *After Virtue*. Haldane (2000b: 154) wrote about MacIntyre and the metaphysical underpinnings of natural-law theory in the following way:

> There is a further reason to view MacIntyre apart from the other figures mentioned, for until quite recently he has argued that moral philosophy can and should be conducted without reliance upon a general account of human nature of the sort provided by the Aristotelian-Thomistic tradition, and which has within that tradition generally been thought to be essential for ethics. In his most widely discussed book, *After Virtue*, MacIntyre goes so far as to disparage the very idea of what he there terms "metaphysical biology," but in his most recent work, *Dependent Rational Animals*, published almost twenty years later, he retracts this criticism and argues that an idea of the good for an agent cannot be formed independently of having a conception of the kind of being it is.

Haldane focused attention on this metaphysical turn now found in MacIntyre's later works. MacIntyre (1999: x) himself explained this significant change in his position:

> In *After Virtue* I had attempted to give an account of the place of the virtues, understood as Aristotle had understood them, within social practices, the lives of individuals and the lives of communities, while making that account independent of what I called Aristotle's "metaphysical biology." Although there is indeed good reason to repudiate important elements in Aristotle's biology, I now judge that I was in error in supposing an ethics independent of biology to be possible. . . . No account of the goods, rules and virtues that are definitive of our moral life can be adequate that does not explain—or at least point us towards an

> explanation—how that form of life is possible for beings who are biologically constituted as we are, by providing us with an account of our development towards and into that form of life.

MacIntyre is not alone in recommending a return to Aristotelian moral and legal theory. An earlier passage noted Philippa Foot's judgment about the importance of Aquinas's moral theory; in addition, she wrote the following about the significance of the Aristotelian tradition in moral theory (2000: 123):

> What then is to be said about the relation between fact and value? My thesis . . . is that the grounding of a moral argument is ultimately facts about human life—facts of the kind that Anscombe mentioned in talking about the good that hangs on the institution of promising, and of the kind that I spoke of in saying why it was a part of rationality for human beings to take special care each for his or her own future. In my view, therefore, a moral evaluation does not stand over against the statement of a matter of fact, but rather has to do with facts about a particular subject matter, as do evaluations of such things as sight and hearing in animals, and other aspects of their behaviour. . . . Similarly, it is obvious that there are objective, factual evaluations of such things as human sight, hearing, memory, and concentration, based on the life form of our own species. [Likewise] the evaluation of the human will should be determined by facts about the nature of human beings and the life of our own species. . . . [Thus] moral action is rational action, and . . . human beings are creatures with the reason to recognise reasons for action and to act on them.

Twenty years earlier in a passage previously noted, Foot wrote that she considered Aquinas's moral theory important even for secular theories of morality. Haldane (2000b: 152) once noted the importance of Foot's analysis: "Yet it was Foot, an atheist, who most fulsomely acknowledged the value of Thomas's writings for anyone working in moral philosophy." In her introductory remarks written a quarter century ago in *Virtues and Vices*, Foot (1978: 1–2) defended her position on Aristotle and Aquinas in the following way:

> It is certain in any case that the most systematic account [of the virtues] is found in Aristotle, and in the blending of Aristotle and Christian philosophy found in St. Thomas. By and large Aquinas followed Aristotle—sometimes even heroically—where Aristotle gave an opinion, and where St. Thomas is on his own, as in developing the doctrine of the theological virtues of faith, hope and charity. . . . [In addition] in his theocentric doctrine of happiness, he still uses an Aristotelian framework where he can . . . for

> instance in speaking of happiness as man's last end. However, there are different emphases and new elements in Aquinas's ethics: often he works things out in far greater detail than Aristotle did, and it is possible to learn a great deal from Aquinas that one could not have got from Aristotle. It is my opinion that the *Summa Theologiae* is one of the best sources we have for moral philosophy, and moreover that St. Thomas's ethical writings are as useful to the atheist as to the Catholic or other Christian believer.

MacIntyre's and Foot's remarks are important in the contemporary discussions of the renewal of natural-law theory based on the writings of Aristotle and Aquinas. Both suggest the importance of a metaphysically grounded theory of an "order of nature" found in the human person. This position is a necessary condition for explicating a consistent view of natural-law moral and legal theory in Thomas Aquinas.

A Possible Account for a Theory of Obligation

In providing a theory of obligation, one might interpret Aquinas as adopting a "metaphysics of finality." Veatch (1990: 116) uses this concept (which is gleaned from the insights of R. A. Gauthier, the French Dominican commentator on Aristotle and Aquinas, who first addressed the issues of the metaphysics of finality) in several of his works. The ends to be attained are determined by the content of the natural kind of the human person; this differs radically from ordinary teleological theories like utilitarianism. Therefore, the dispositional view of human nature enables Aquinas's version of natural-law theory to provide a justification for a theory of obligation. In other words, these ends ought to be obtained because of the very dispositional structure of human nature. The ends are not arbitrary but are determined by the natural kind of human nature itself. Obligation is rooted in the ends themselves. This is an important claim necessary to explicate conceptually Aquinas's account of teleology. This teleology grounded in the concept of a natural kind comprised of dispositional properties provides an alternative account of teleology to that found in modern utilitarianism.

An important jurisprudential corollary follows from this analysis. The role that this theory of ethical naturalism contributes to successful law-making should be apparent. Any law, which, all things being equal, hinders the development of a natural disposition in a human

person, is inherently unjust. Aquinas provides a set of criteria by means of which a theory of natural rights could be developed, and from that, a justified theory of law.

Human Nature and the Existence of God

In the texts on law in the *Summa Theologiae*, Aquinas does speak of eternal law and divine law. A requisite part of this analysis is to discuss how these concepts fit into the scheme of interpretation put forward in this essay. Briefly put, divine law is revelation or biblical propositions; as such, this theological concept does not apply to a philosophical analysis. Eternal law, on the other hand, is reducible to the divine archetypes in the mind of God. The above analysis suggests that what Aquinas needs for a consistent account of natural law is a metaphysical theory of natural kinds. This is the first question Aquinas must answer in his ontology if he is to develop a theory of natural law. Once he has justified his theory of natural kinds, then a second ontological question arises: Is the individual instance of a natural kind itself ontologically self-explanatory and totally independent, or is it a dependent being? In other words, are Peter, Paul and Mary independent beings in their ontological foundations, or are they existentially dependent beings? Aquinas argues for dependency, but he regards this question of ontological dependency emphatically as a second-order metaphysical question.

It is only at this juncture in Aquinas's metaphysical scheme that God enters. God, as necessary being, provides the answer to this second-order metaphysical question about the dependent character of individuals of natural kinds. However, one could construct a theory of natural law on the basis only of a natural-kind ontology composed of dispositional properties. What Aquinas provides additionally is an explanation in terms of ontological dependency. A naturalist account, so Aquinas would suggest, is not a false moral theory but rather an incomplete metaphysical theory. He can develop a theory of ethical naturalism from his account of a human essence as a natural kind. It is only when one asks about ontological dependency, however, that God as a Source of Existence becomes significant philosophically. Aquinas adopts a consistent metaphysics of natural kinds without an

appeal to a divine being. This alone can serve as the ontological ground for natural law in Aquinas. On a related note, if one asks about an interpretation of scripture passages about human beings made in the image and likeness of God, Aquinas uses the exemplar language manifested in the eternal law that he adopted from Augustine and, *a fortiori*, from Plato. This exemplar language explains the eternal law.

To put this important matter a bit differently, natural-kind theory in Aquinas is based upon the empirical principles he discovered and adopted in the Aristotelian texts, both those that came to Paris from the Islamic translating institute at Toledo and especially those texts that his Dominican confrere, William of Moerbeke, provided for him from the Middle East. This empiricism requires that "*Nihil est in intellectu quod non prius fuerit in sensu*" (nothing is in the intellect that was not first in the senses). This epistemological maxim asserts that human knowers become aware of the content—the concepts—of natural kinds through the empirical process worked out in Aristotle's *De Anima* and in Book Two of the *Posterior Analytics*, which are texts in the philosophy of mind in Aristotle that Aquinas appropriated almost *in toto*. Since moral theory is a second-order activity for Aquinas, as it was for Aristotle, the concept of a human essence first must be determined. Aquinas does not argue that a human knower needs Divine knowledge in order to be aware of essences. Aquinas rejected the theory of Divine Illumination proposed by Augustine and adopted by earlier medieval philosophers.

It is possible, therefore, to defend the theoretical possibility for reconstructing the texts of Aquinas so that a version of natural law makes good philosophical sense without requiring as a necessary condition a position of Theological Definism. Aquinas was, of course, a theologian and a philosopher. The argument proposed in this analysis, however, articulates the "logic" of his argument suggesting that the role of God in natural-law theory is a final ontological question. Aquinas's hylomorphic metaphysics can account for the content of a human essence—the natural kind—without an appeal to the eternal law. There is no need, therefore, to appeal to a divine being in order to understand the content of a human essence. The foundation of natural law depends upon natural kinds, which is a metaphysical issue resolved in terms of Aquinas's metaphysics, not his theology.

Natural Law and the Common Good

One relevant aspect of natural-law theory to contemporary political thought concerns the common good and the role of community in moral and political theory. Aquinas argues that the common good—the commonweal—of a society must be part of the enactment of every positive law based upon the natural law. Finnis renders the common good into English as "the public good." A law is never justified for the private interest of one or a few citizens. Furthermore, the common good or the commonweal of a society must not be neglected arbitrarily through the enactment of a law. Like Aristotle before him, Aquinas believed that a human person, as a social person, achieved her development through the auspices of a society. Donne's claim that "No man is an island" would ring true to Aquinas. The recent work of Michael Sandel (1984: 15–17) and Charles Taylor (1989) on the importance of community hearkens back to Aquinas on the common good. The common good, while based on the concept of human nature, nonetheless is more than the collection of individual goods. It is that set of goods necessary to maintain the fabric of a just society. The rules for governing society are rooted in the development of the human person and contribute to the functioning well of the commonweal of the society. Finnis argues that the elements of the common good are "justice and peace." Finnis (1998: 226–227) elaborates on this concept by suggesting that "peace," "concord—the tranquility of order," and "a sufficiency of at least the necessities of life" are necessary conditions for the common good. Of course, each of these is more than the acquisition of an individual virtue or a specific individual good.

In her political writings based on Aristotelian insights, Nussbaum actively promotes the concept of the social or public good. This is a significant influence of natural law on contemporary political theory. Nussbaum once wrote the following about the importance of Aristotelian insights on the role of government and politics (Magee 1998: 53):

> I think there are a lot of good things [in Aristotle's political theory], and among the good things is an account of the proper function of government or politics as the provision to each citizen of all the necessary conditions for the living of a rich good human life. This view seems to me well worth

> examining today, as an alternative to views that see the job of government in connection with the maximization of utility.

Aquinas adopted these Aristotelian insights on the nature of society and the role of good government. In a different text, Nussbaum (1993: 265) continues her reflections on this theme:

> I discuss an Aristotelian conception of the proper function of government, according to which its task is to make available to each and every member of the community the basic necessary conditions of the capability to choose and live a fully good human life, with respect to each of the major human functions included in that fully good life. I examine sympathetically Aristotle's argument that . . . that task of government cannot be well performed, or its aim well understood, without an understanding of these functionings—[i.e.], the major human functions included in that fully good life.

This second passage is taken from *The Quality of Life*, an anthology Nussbaum jointly edited with the Swedish Bank Prize economist, Amartya Sen. Nussbaum's texts mirror the natural-law suggestions of one scholar (Golding 1975: 31) who asserted that political and legal theory—and I submit, economic theory—must be attentive to "human needs, human purposes, and the human good." Henry George's treatise, it appears, would adopt this position also. Nussbaum's work is similar structurally with several important themes long associated with natural-law moral and political theory. Paul Sigmund (1993: 117) of Princeton University once wrote that Aquinas's ". . . integrated and logically coherent theory of natural law . . . continues to be an important source of legal, political and moral norms," and that Aquinas's "accomplishments have become part of the intellectual patrimony of the west, and have inspired political and legal philosophers . . . down to the present day." Nussbaum, Finnis, and Sigmund address the conceptual importance of considering the role of the common or public good in any attempt to work out a constructive and consistent social and political theory. This is consistent with traditional Roman Catholic social theory. The shadows of Aristotle and Aquinas hover significantly over the philosophical remarks on the nature of society and the rule of law articulated by these contemporary philosophical realists. A Georgist would find several of these positions intellectually compatible.

The Response of Contemporary Jurisprudence to Thomas Aquinas

In natural-law jurisprudence, philosophers in the analytic tradition offer evidence of significant work with the texts of Aquinas. Finnis is probably the most influential contemporary Aquinas scholar writing on natural-law theory. His *Natural Law and Natural Rights* developed a contemporary reconstruction of classical natural-law theory, where he noted (1982: 398): "Most persons who study jurisprudence or political philosophy are invited at some stage to read Thomas Aquinas's Treatise on Law." Finnis appropriated the early insights of the American Neo-Thomist, Germain Grisez. Grisez's (1965) seminal article on practical reason, which appeared in the old *Natural Law Forum*, is an important hallmark in what is called "the new natural law theory." More than any other analytic philosopher, Finnis's work is almost singularly important in bringing Aquinas's treatise on natural law into mainstream twentieth-century jurisprudence. Finnis's *Natural Law and Natural Rights*, conjoined with his *Fundamentals of Ethics* (1983) and his treatise on Aquinas's political theory, *Aquinas: Moral, Political and Legal Theory* (1998), articulate and defend this "new natural law theory." Robert George has published profusely defending Finnis's account of natural law. His *Making Men Moral* (1993) proposes to reconcile natural-law theory with human-rights theories in the American Liberal tradition. George attempts to engage in a philosophical dialectic with the work of Ronald Dworkin, Robert Nozick, and John Rawls, all of whom are among the foremost philosophers of human-rights theory in recent American political philosophy. George suggests that natural-law political theory can assist in developing a more substantive and a less formalist moral and political theory.

In offering a critique of Finnis's theory of natural law, which rejects a philosophical anthropology as a necessary condition, Veatch and McInerny argue that Finnis's account of Aquinas removes the metaphysical foundation for natural law (Lisska 1991). Finnis's theory is reducible to the claim of "Natural law without nature." It appears that the shadow of Kant hovers more heavily on this so-called new theory of natural law than Grisez, Finnis, or George are wont to admit.

Veatch is another non-Thomist twentieth-century philosopher who worked vigorously with the natural-law theory of Aquinas and who

addressed the importance of natural law in developing an adequate account of human rights. His last books were *Human Rights: Fact or Fancy?* (1986) and *Swimming Against the Current in Contemporary Philosophy* (1990). Acknowledging the importance of Thomas Aquinas on his own philosophical work, Veatch (1990: 13) once wrote the following: "May I simply say that my own program ought perhaps to be regarded as amounting to little more than exercises in dialectic, and in a dialectic directed to the overall purpose of trying to rehabilitate Aristotle and Aquinas as contemporary philosophers." This development of rights theory in natural law is an important and significant contribution to contemporary political theory.

Other persons doing important work in this area are two University of Notre Dame faculty, Jean Porter on natural-law theory and David Solomon on virtue ethics. Porter's (1999) *Natural and Divine Law* and *Nature as Reason: A Thomistic Theory of the Natural Law* (2005) provide a historical analysis of the origins of medieval natural-law theory together with suggestions for renewed interest in Aquinas for what she calls Christian Ethics. Christina Trainia (1999) of Northwestern University published *Feminist Ethics and Natural Law*, which proposes an interconnectedness between contemporary feminist ethical theory and natural-law foundations. (Trainia and her Northwestern University colleagues sponsored a cross-disciplinary 1997 conference, "The Character, Influence, and Recovery of Thomist Moral Reasoning," dedicated explicitly to the renewed interest in Aquinas's moral theory.) Eleonore Stump, now of St. Louis University, and Cornell's Scott MacDonald (1999) edited a *Festschrift* for their mentor, Norman Kretzmann, entitled *Aquinas's Moral Theory*. David Braybrooke (2001) from the University of Texas has attempted to understand insights from the natural-law tradition in his re-working of modern political philosophy. These examples illustrate the serious work undertaken of late in natural-law moral theory and jurisprudence by both Roman Catholic and non-Roman Catholic philosophers and indicate that more has occurred recently than one finds during the first three quarters of the twentieth century—Hart and Fuller notwithstanding, both of whom had a deep respect for natural-law jurisprudence in St. Thomas.

While natural-law theory, with particular reference to Aquinas's texts, is often considered a theoretical source for natural rights,

Aquinas does not consider explicitly the concept of natural right. Contemporary philosophers like Veatch, Finnis, and Henrik Syse, however, argue that a philosophical derivation of rights from Aquinas's moral theory is possible. The recent work of Brian Tierney (1997) on the history of rights theory is a significant analysis into this thicket of jurisprudential issues. According to Veatch, one determines a concept of "duty" based on the set of human dispositional properties. Next, a natural right becomes the "protection" of the duties derived from the natural kind of the human person. This proposed derivation, so Veatch suggests in *Human Rights: Fact or Fancy*, limits the present debate on the nature and scope of rights and offers a response to L. W. Sumner's (1986: 20) claim that "the rhetoric of rights is out of control." Veatch argues, however, only for the possibility of "negative rights," which are protections; he is less certain about the derivation in natural-law theory of "positive rights" or "entitlements." A negative right as a protection would be exemplified in the rights to property, life, and liberty. These are, Veatch argues, the "rights not to be interfered with." Positive rights as entitlements, on the other hand, would be exemplified in the rights to education, health care, retirement benefits, and so forth. One might respond to Veatch's position on the issue that natural-law theory only justifies negative rights by arguing that Aquinas's account based on the fundamental dispositions of the human person could justify a limited set of positive human rights. Nussbaum's capabilities theory offers a justification of positive rights. In fact, Nussbaum (2007: 15) uses this approach in her critique of several judgments recently offered by the Roberts's United States Supreme Court. Space constraints, however, limit the explication of this argument here. Nonetheless, it is important to note that in opposition to most modern and contemporary liberal theories of right, in Aquinas's mind the concept of right cannot be separated from the concept of the good. (For a contemporary discussion of a general Thomistic theory of human rights, one might consult Syse 2007.)

While Aquinas in the *Summa Theologia*e (1946: IIa—IIae, Q. 57) discussed *jus naturale* as contrasted with *jus positivum*, any indication of a natural right in the modern sense is either absent from his thought or muddled at best. Aquinas's use of *jus*, nonetheless, is often

translated as "right." This discussion immediately precedes the general analysis of justice or "*justitia*." Aquinas discussed the concept of justice in the following way: "It is proper to justice, in comparison with the other virtues, to direct human persons in their relations with others; this is appropriate because justice denotes a kind of equality." The term "*jus*" derived from "*justitia*" is more properly rendered into English as "the just thing" or "the just state of affairs." Hence, a "*jus*" is a "right thing" that occurs among persons or between persons and things; in other words, it is the "right thing" that takes place in various human situations. In light of this account of justice, Aquinas considers a *jus* that is natural and a *jus* that is positive. A natural *jus* comes about by the very nature of the case while a positive *jus* arises only with common consent, either between individual persons or between the community and its citizens.

In Aquinas's view, accordingly, a *jus* refers to a relational state of affairs that either holds or does not hold. This *objective* sense of *jus* is different conceptually from the *subjective* account of a human right as articulated by later medieval and Renaissance philosophers. For these later philosophers, right evolves into a *subjective* claim that one is due something or one needs to be protected from some action, which corresponds to the modern account of a human right. The sixteenth-century Jesuit, Francisco Suarez, elucidated this concept of individual natural right. He defined a *jus*, which is a right, as "a certain moral power that every human person has, either over her own property or with respect to what is due to her" (Suarez 1612). This "moral power" is a subjective natural right. (Recent scholarship indicates that the concept of a subjective natural right may have developed as early as the fourteenth century in the writings of the Franciscan philosophers and theologians.) Suarez articulated in addition a list of individual natural rights for human agents, which is more rights theory than one discovers in the texts of Aquinas. For Aquinas, on the other hand, *jus* is an *objective*, relational state of affairs; this is fundamentally different from what later philosophers call a "*jus*," which is subjective. Simply put, *jus* in Aquinas is an *objective* relational state; *jus* in later medieval and modern philosophers is a *subjective* claim referring to some quality or action. This distinction indicates significant differences found in the concepts of *objective* and *subjective* rights.

While Aquinas does not articulate a theory of natural rights, nonetheless the contemporary philosopher might propose a derivative theory in which a right might be that which protects the development of the dispositional properties. An example might go like the following: Aquinas argued that a principal living disposition, what Columba Ryan called the "biological good," is the foundation for a sense of continuing in existence. This living disposition is the meta-ethical grounding, so Aquinas argued, for the moral claim that it is immoral to engage in arbitrary killing. Human life, therefore, is to be protected. It follows that killing is an immoral action, not because it violates a divine commandment, but rather because killing frustrates or hinders the continual development of the natural dispositional property to continue in existence—the biological good. This argument reminds one of Hart's (1961: 190–195) concept of "survival" as a natural necessity." Natural-law theory entails that what comprises evil is the repression or destruction of a natural dispositional property. The same natural-law argument applies to the development of sensitive and rational dispositional properties and their opposing repressions or destructions. A human person has, therefore, a *subjective* power or right that protects the possibility of the development of the dispositional properties, which in turn grounds the *objective* right. (For a more thorough discussion of these issues, see Lisska 1996, 2001: ch. 9.)

Aquinas (1946: IIa–IIae, Q. 58, a. 1), like Aristotle, wrote that justice "is a habit whereby a human person renders to each one what is due by a constant and perpetual will." It follows that justice, by its very name and function, implies the concept of equality. Justice, therefore, entails a relation to another; this follows because no entity is ever equal to itself but always to another. Justice is twofold. First, legal or general justice directs human agents towards fulfilling the common good or the public interest of the community or *civitas*. The second category of justice directs the human agent in matters relating to particular goods and specific persons. These two categories of justice are what Aquinas refers to as "commutative justice" and "distributive justice." Commutative justice is concerned with the mutual dealings between two persons, while distributive justice, on the other hand, is concerned with the relations between the community itself—the

civitas—and the citizens in the community. In effect, distributive justice is concerned with the distribution of the common goods of the *civitas* proportionately and fairly to the citizens of the *civitas*. Commenting on the virtue of justice as elucidated by Aquinas, the English Dominican Thomas Gilby (1975: xv) once wrote: "Justice is an analogical value pitched at various levels according as it renders what is due for the common good of the political community (*justitia generalis*), to one private person from another (*justitia commutativa*), and to one person from the political group (*justitia distributiva*)."

Aquinas's account of justice is dependent upon the Aristotelian analysis. Aquinas, it would appear, has some *prima facie* structural links to the contemporary "justice as fairness" doctrine pronounced by John Rawls; Rawls (1972: 85–86) suggested that fundamentally the concept of justice is the "fair dealings" of the citizens in a society with one another and the "fair dealing" of the society itself with the citizens of the society. It would appear that Aquinas was ahead of his time in his Aristotelian analysis of justice as fairness. A Georgist might find the preceding analysis of human rights theory useful theoretically and practically.

Human or Positive Law in the Natural-Law Tradition

For Aquinas, the structure of positive or human law is a straightforward extrapolation from the concepts central to a justified theory of natural law. Positive law is the articulation and promulgation of statutes that provide for the smooth working of a community. Aquinas, following Aristotle, argued for the common good, which is best accomplished through a workable system of law. The purpose of positive law is to establish and enhance the general conditions that make the common good possible. In his *Commentary on the Nicomachean Ethics*, Aquinas (1964: Book V, Lecture 2) wrote: "Laws are passed to ensure the smooth running of the commonwealth." In his short monograph, *On Kingship*, Aquinas discussed the function of positive law: "If by nature, human persons are to live together, then the community they form needs to be ruled. . . . Any organism would disintegrate were there no unifying force working for the common good of all the members" (*De Regimine Principium*, I).

Positive law, for Aquinas, is the set of prescriptions enacted, articulated, and promulgated by the person or persons in charge of the community in order to provide for the smooth functioning of the common good. Golding (1975: 31) once suggested the following insights, noted earlier, about the intrinsic value of considering positive or human law from the natural-law perspective: "The lesson of the natural law tradition is that both [legal effectiveness and legal obligation] involve attention to human needs, human purposes and the human good. Whatever the problems of this tradition, we cannot ignore its lesson in trying to understand the law that is."

Golding articulated the following five principles as necessary conditions for natural law jurisprudence:

1. Laws possess directive power.
2. This directive power is based on reason.
3. The will is subservient to reason; this is in opposition to the voluntarism of the legal positivists.
4. Reason ultimately directs laws for the purpose of the common good and for the good of the individual (this is in opposition to the jurisprudential theory known as legal realism).
5. There is a necessary connection between law and morality.

The influence of Fuller's procedural natural law hovers over Golding's principles. Golding is interested in determining the rules of procedure necessary for a legal justification of working towards an end in the process of law-making. This is the "purposiveness" of law, a theme to which Golding holds as a necessary condition for a theory of natural-law jurisprudence.

In matters concerning the extent and pervasiveness of the legal system, Aquinas, it would appear, might be regarded as a "legal conservative." Sigmund (1993: 220) once noted that "Lord Acton described Aquinas as 'the First Whig' or believer in the limitation of governmental power." In quoting Isidore, Aquinas (1946: Ia–IIae, Q. 95, a. 1, *sed contra*) articulated his own position that the primary purpose of law is to protect the innocent:

> We remember what Isidore once wrote: "Human laws have been made so that human audacity might be held in check by their threat, and also so that the innocent might be protected from those exerting evil; and among those

> capable of doing evil, the dread of punishment might prevent them from undertaking harm." It should be noted, however, that these matters are most important and necessary for human beings. Therefore it is necessary that human laws should be made.

From these texts, it would appear that Aquinas would not accept a legal system that entailed a primary function of law to foster social change or any more modern conceptions of the legal enterprise. In addition, it would seem that Aquinas's interest principally rests in what contemporary jurisprudence would refer to as criminal law and is less concerned about procedural law. Aquinas appears to have no concept of what Hart referred to as secondary rules of law, which provide for the procedures that render law-making possible.

Aquinas undertook most of his philosophical writing on legal matters within the Aristotelian framework, which argued emphatically that all humans are by nature social beings. It follows that, while the promotion of the common good or the public interest is an integral part of the legal system, nonetheless this promotion is, so it seems, always implemented with a legal conservative leaning. Contemporary readers may be surprised in knowing that Aquinas (1946: Ia–IIae, Q. 96, a. 2) argued that any constitutive authority should be careful and cautious about undertaking radical changes in the law or promulgating restrictive laws. "Human law does not forbid all vices, from which virtuous persons keep themselves, but only the more serious vices, which the majority can avoid, and principally those that harm others, and which must be prohibited in order for human society to survive." Later in the *Summa Theologiae* (IIa–IIae, Q. 77, a. 1, ad 1), he wrote that "human law cannot forbid all and everything that is against virtue; it is sufficient that it forbids actions that go against community life." These passages suggest, furthermore, that Aquinas would reject any position entailing excessive moral perfectionism or any semblance of Puritanism in the legal system. The following passage indicates this set of claims: "So also in human government, it is right for those who are in authority to tolerate some evil actions so as not to hinder other goods or to prevent some worse evil from occurring. As Augustine writes in *On Ordination* (II, 4): 'If one suppresses all prostitution, then the world will be torn apart by lust' " (Aquinas 1946: IIa–IIae, Q. 10, a. 11).

In discussing legal matters, Aquinas often referred to the insights found in the writings of Augustine. Aquinas again followed Augustine in arguing that an "unjust law is no law at all." In the *Summa Theologiae*, Aquinas (1946: Ia–IIae, Q. 96, a. 4) articulated this important philosophical maxim central to contemporary jurisprudence:

> A law is unjust when it is contrary to the human good and contrary to the things we have discussed above: either from the end as when a person presiding imposes a law with undue burdens or prescribes a law which does not pertain to the commonweal of the society but rather to his own proper desires and glories. Or even on the part of the author, as when someone makes a law beyond the power commissioned to him. Or also from the very form, for example, as when burdens are dispensed unequally upon members for the community, even if they are ordained to the common good. Cases like this are more like acts of violence than laws, because, as Augustine writes, "A law that is not seen as just is no law at all." Hence, such laws do not oblige in the matter of conscience except perhaps in order to avoid scandal or a disturbance.

Martin Luther King (1963) referred to these passages with such fervor in his *A Letter from a Birmingham Jail*. What Aquinas suggests is that any human law that hinders the development of human flourishing fundamentally is unjust. An unjust law does not meet the criteria for legal justification as developed within the context of the natural-law theory. It follows, therefore, that in Aquinas's mind, neither procedural consistency nor legal precedent is a sufficient condition for a just law.

On the other hand, while Aquinas did argue emphatically that an unjust law is no law at all, given the overall conservative bent of his jurisprudence, he argued that conditions must be severe and exhibit rampant injustice before an unjust law ought to be overthrown and overturned. In *On Kingship* (Nos. 43–44), he enunciated the conditions under which a tyrant might be overthrown:

> Finally, provision must be made for facing the situation should the king stray into tyranny. Indeed, if there is not an excess of tyranny, it is more expedient to tolerate the milder tyranny for a bit rather than by acting in revolt against the tyrant, to become involved in many perils more grievous than the tyranny itself. . . . This is wont to happen in tyranny, namely, that the second event becomes more grievous than the preceding event, inasmuch as, without abandoning the previous oppressions, the tyrant himself thinks up fresh ones from the malice of his heart.

In these discussions, Aquinas resonates clearly with more than several philosophical arguments central to contemporary political theory and jurisprudence.

Renaissance Scholasticism and Natural-Law Theory

Natural-law theory in the Roman Catholic tradition, as applied to a general theory of international law as well as to specific human-rights theory, developed theoretically in the sixteenth century. Renaissance scholastic philosophers, especially the Dominicans Francisco de Vitoria (1492–1546), Domingo de Soto (1494–1560), Bartolemo Las Casas (1474–1566), Domingo Banez (1528–1640), and the Jesuit Francisco Suarez (1548–1617), all developed specific accounts of natural-law moral and legal theory. These Renaissance scholastic philosophers and theologians, mostly followers of the teachings of Aquinas, were important in the development of human-rights theory. All were part of the intellectual brain trust at the School of Salamanca in Spain and participated in a movement often referred to as the "Second Scholasticism." In sixteenth-century Europe, the University of Salamanca became the leading center of the study of Aquinas's works. It is in de Vitoria and Suarez where one finds what has become the modern concept of human-rights theory spelled out in some detail. Suarez's *De Legibus* is an important treatise for the development of human-rights theory. Less well known is the work of Bartolemo Las Casas, the Spanish Dominican friar who, at the time of the Spanish conquests, argued assiduously both in his writings and before the Spanish courts for the justification of fundamental natural rights for the native peoples in the Americas.

The Dominicans of the Salamanca School were concerned, among other pressing philosophical inquiries, to limit the abuses endemic to the emerging colonial movements, especially when Spanish colonization escapades entailed the enslavement of both Africans and Native Americans. The thrust of the Dominican theory limited the circumstances under which other human persons might be enslaved. In effect, these theories could, as Richard Tuck (1979: 49) once argued, "help to undermine the slave trade." Tuck claimed that the welfare of the human person rather than a radical theory of human liberty

characterized the Dominican School at Salamanca. These Dominican Friars articulated the issues central to the Aristotelian concepts of distributive justice and not the set of issues connected with absolute liberty. (This analysis, in turn, placed limits on the concept of human freedom. In essence, this limit follows from an Aquinian rather than a Scotus/Ockham view of free will and its corresponding theory of human action. This once again suggests that the theoretical importance of the intellectualist/voluntarist differences should not be dismissed too easily.)

Prior to the advent of the Salamanca School, Dominican followers of Aquinas, especially Thomas Di Vio Cajetan (1469–1534) and Konrad Kollin (d. 1536), developed a theory of natural law in accord with classical Aristotelian-based Thomism and what they took to be a humanist Aristotelianism developed in the late fifteenth century (Brett 1997: 116). Cajetan wrote an extensive commentary on the complete *Summa Theologiae* of Thomas Aquinas. (So important and influential is Cajetan's commentary on Aquinas's *Summa Theologiae* that the critical Leonine edition of Aquinas's *omina opera* contains Cajetan's commentary published along with the texts of the *Summa Theologiae.*) The jurisprudential contributions of de Vitoria and his successors, most scholars argue, focused on a modern theory of subjective human rights. De Vitoria, who first studied in Paris, was well trained in the classical Thomism then common in Spanish universities. Recent scholarship suggests that the importance of the Second Scholasticism School at Salamanca is not easily placed into either the category of subjective or objective rights. Legal historian Annabel Brett (1997: 124) noted: "[The] doctrine of rights . . . [and] . . . the achievements within political theory in general of the School of Salamanca cannot be fully understood without an appreciation of the complexity of the late medieval heritage of *jus*."

The Influence of Aquinas's Theory of Natural Law

It is difficult to elucidate clearly and evenly the exact contributions that Aquinas's theory of law—especially his account of natural law—have made in the development of western legal and political theory. That Aquinas's theory of law had an effect on the later development of a

theory of international law is generally accepted as correct historically. The Dominican friar, de Vitoria, is often regarded as one of the pioneer thinkers responsible for a theory of international law. De Vitoria's work, *De Indis*, a series of lectures first given at Salamanca in 1532, serves as the harbinger of later discussions on international law. The University of Cambridge's Quentin Skinner argued that de Vitoria, accepting the Aristotelian concept of a "perfect society" acquired from his reading of Aquinas, developed "a courageous and thoroughgoing defense of the Indians in a long essay entitled *De Indis recenter inventis*" (Skinner 1990: 407). De Soto published several of de Vitoria's philosophical lectures on rights theory. Grotius refers to de Vitoria in the *Prolegomena* to his *De jure belli et pacis* and in his *Mare Liberum*; Grotius was also influenced by the writings of Suarez. Suarez's contribution to the analysis of what eventually became the modern concept of individual human right as subjective, it must be remembered, is dependent on the earlier though conceptually different account of *jus* as objective found in the texts of Aquinas's *Summa Theologiae*.

The general influence of medieval natural-law theory on the development of the United States Constitution, especially the "Bill of Rights," is often suggested but difficult to establish. The American jurist, Henry Sumner Maine, once wrote that Thomas Jefferson was influenced by the French philosophers, who in turn had written about human rights in the context of natural law. The English Dominican, Vincent McNabb (1929: 1065) suggested that the especially French concept that "all men are born equal" was coupled with the more familiar English concept that "all men are born free" in the first lines of the Declaration of Independence. In his *The Philosophy of the American Revolution*, Morton White (1978: 23) once argued that Locke, in considering the nature of self-evident principles necessary for his account of natural law, was ". . . indebted—directly or indirectly—to Aquinas for some of the views to be found in the English philosopher's *Essays on the Law of Nature*." Sigmund (1993: 228) suggests that the line of influence of Aquinas on Locke, for instance, was at best indirect and most probably came through the writings of Richard Hooker. Hooker's work, so American historian of moral theory Vernon Bourke (1968: 107) has maintained, is an

"excellent summary of Thomistic ethics." Bourke also notes that Hooker is sometimes referred to as "the Anglican Aquinas."

Thin Versus Thick Theories of Human Nature: A Response to Rawls, Dworkin, and Nozick

This natural-law account based on a metaphysics of natural kinds articulated in this essay suggests a moral and a jurisprudential limit for contemporary-rights philosophers like Ronald Dworkin, Robert Nozick, and John Rawls. All three adopt what might be called a "thin theory" of the human good. Hence, their theories lack any substantive content based on the foundational principles of human nature, which is a theoretical problem with most theories of liberal jurisprudence. Liberalism in jurisprudence, by its very definition, denies any role for substantive content to the fabric of law-making. Without the content that a theory of human person provides, jurisprudence is limited in its attempt at achieving a substantive theory of human rights. Rawls's person who has a passion for counting blades of grass in city squares or Dworkin's beer-drinking TV addict both may be leading a good life—one of "integral human fulfillment," to use a Finnis term—provided they have chosen these ends after mature reflection. A thick theory of human nature espoused by the ethical naturalism in the Aristotelian/Aquinian scheme put forward in this essay requires more than what Rawls, Nozick, and Dworkin's thin theories permit. Henry George, it would appear, would side with Thomas in opposition to the adoption of a "thin" theory of the human good found in contemporary liberal rights theorists.

This natural-law schema provides a set of properties that determine the content of the human good to be attained. Without this content, one falls quickly into the vacuum of formalism. Such formalism is, in many ways, the hallmark of Kantian moral theory, most "good reasons" moral theories, all legal positivism, much legal realism, and most liberal jurisprudence. One might ask what justifies a morally right action for Kant or a set of human rights for Dworkin, Nozick, or Rawls? In the end, it is the exercise of reason itself—what contemporary moral philosophers often refer to as a "good reasons approach" to moral reasoning. What the natural-law position offers, if only in a

broad and general way, is a set of human properties or qualities—human nature—without which a justification of a moral theory or a legal system—including a set of human rights—is sought in vain. Since human nature or essence depends upon the foundational structure of a natural kind, a set of metaphysical claims is a necessary condition towards explicating natural-law theory. In commenting on Rawls's theory of moral justification, Nussbaum (1986: 311) once noted: "Aristotle's view of *phronesis* (i.e., practical reason) cannot avail itself of this strategy . . . [of] value neutral abilities such as imagination, empathy, factual knowledge." Hence, the person of practical reason utilizes more reasoning abilities than "an enumeration of intellectual abilities," which is the paradigm for a "good reasons" theory of moral justification.

Summary Observations

This concludes the discussion of classical and contemporary ontology necessary for understanding a moral theory based on the order found in nature and its connection with the necessary conditions for natural-law theory. The historical accounts of natural law are important aspects of this narrative. This analysis, however, is in accord with classical Roman Catholic philosophy where religious faith and reason are conceptually different yet non-contradictory inquiries. Roman Catholic theology, moreover, has never accepted the theoretical chasm between faith and reason. Hence, this conceptual framework is radically different from much Reformation theology. Furthermore, this essay explains how a concept of teleology might be incorporated into contemporary natural-law theory.

The heritage of ethical naturalism in Roman Catholicism, with its emphasis on natural-law theory as found in Thomas Aquinas, has been re-discovered by contemporary analytic moral philosophers and philosophers of law. Several important issues formulated in the analytic tradition of moral and legal philosophy have their roots structurally aligned with the questions posed so vigorously by Thomas Aquinas in the central tradition of natural-law theory. These metaphysical and moral queries reflect a tradition of moral realism that is important for normative ethical and political theory and for jurispru-

dence. Natural-law theory at its best has a realist foundation based on human persons actually living in the twenty-first century. This moral theory has rationality articulated as a necessary condition and is cognizant thoroughly of the common good or the public interest. This theory, central to the tradition of Roman Catholicism but now witnessing a wider intellectual appeal, is well worth the attention of contemporary philosophers, theoretical political scientists, legal scholars, and philosophers of economic thought. Natural-law theory, once thought to be part of the dustbin of antiquated theories on the nature of law, now provides vibrant excitement in writings found in contemporary moral theory, social and political theory, and jurisprudence. However, ethical naturalism, in order to be grounded in an order of nature, demands a realist ontology of natural kinds. This essay has attempted to spell out the set of conditions necessary for natural-law moral and legal theory through an analysis of the central metaphysical concepts together with their historical development and contemporary significance. Finally, the students of Henry George should be in general agreement with this realist moral theory.

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