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Human Rights Theory Rooted in the Writings of Thomas Aquinas

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Abstract. This essay is an analysis of the theory of human rights based on the writings of Thomas Aquinas, with special reference to the *Summa Theologiae*. The difference between a *jus naturale* found in Aquinas and the theory of human rights developed by the sixteenth century scholastic philosophers is articulated. The distinction between objective natural rights—"what is right"—and subjective natural rights—"a right"—is discussed noting that Aquinas held the former position and that later scholastic philosophers beginning with the Salamanca School of the Second Scholasticism developed the latter position. The subjective theory of rights evolved into the modern and contemporary account of individual human rights. The essay ends with an argument suggesting that Aquinas's theory of objective human rights can serve as the ontological foundation for a robust theory of both positive and negative subjective natural rights.

Keywords: Thomas Aquinas, Francisco Suarez, John Finnis, Henry Veatch, Ralph McInerny, Martha Nussbaum, human nature, natural kind, natural law, objective human right, subjective human right, *jus naturale*, *jus positivum*, positive right, negative right, ontological realism, epistemological realism.

In the tradition of human rights theory, scholars often look to the texts of Thomas Aquinas, especially those passages in which Aquinas discusses *lex naturalis*[1], *jus naturale*, and *jus positivum*,[2] as foundation stones for the development of human rights in western political theory.[3] While this scholarly suggestion is correct as far as it goes, nonetheless the story of rights theory rooted in Aquinas is more nuanced than what one sometimes finds in political philosophy writings. This essay is an attempt to sort out several conceptual complexities that arise when discussing how Aquinas's texts contributed to the development of human

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[1] The classical Aquinas text on natural law and rights is *The Summa Theologiae*, *Prima Secundae*, QQ. 90–96.

[2] Rights theory is discussed in the *Secunda Secundae*, Q. 57; the virtue of justice and the vice of injustice are discussed in QQ. 58 and 59.

[3] The *Summa Theologiae* is divided into four parts: The *Prima Pars*, the *Prima Secundae*, the *Secunda Secundae*, and the *Tertia Pars*.

rights theory and practice. To begin, one needs to distinguish between rights that are called "objective" and those rights central to Enlightenment philosophy that are often referred to as "subjective." Secondly, an important distinction arises between rights that are considered as "negative" versus those referred to as "positive." Thirdly, there is the further conceptual difference between "natural" rights and "positive" rights. While there is some conceptual overlap within these categories, nonetheless these sets of concepts are distinct to a large extent, thus requiring substantive analysis.

The final part of this essay is an attempt to reconcile these six categories suggesting how the moral and political theory of Thomas Aquinas offers an account of natural human rights that is both objective in the state of reality as well as being subjective in the case of properties or characteristics of human persons, while at the same time providing the possibility for articulating a theory of both negative and positive rights. As this essay unfolds, the narrative will suggest how these concepts have been used in both historical and contemporary philosophical analysis and how an attempt at conceptual reconciliation might go forward.

Historical Roots of Natural Law Theory in Greek and Roman Philosophy

Scholars suggest that natural law's rich history began with Sophocles's powerful theatrical work, *Antigone*; in refusing Creon's command not to bury their brother whose mortal remains lay mortified on the battlefield, Antigone argues that a higher law transcends edicts of earthly rulers like her brother. Creon is often characterized as a legal positivist anticipating Justinian's Code: "What please the prince has the force of law." With the wisdom of a nascent natural law philosopher, Antigone rejected this account. While Antigone identified natural law with the will of the gods—a voluntarist conceptual confusion that has played havoc with later natural law theory—nonetheless this theatrical work set the stage for developing foundational moral principles placing limits on a ruler's commands. An important corollary to this Greek theatrical production is the beginning stages of a theory of natural rights.

Fred Miller has suggested that Aristotle first sowed the seeds for a politically relevant natural law theory.[4] Aristotle's ethical naturalism requires a metaphys-

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[4] Fred Miller, *Aristotle's Philosophy of Law*, Chapter Four, [in:] *A History of Philosophy of Law: From the Ancient Greeks to the Scholastics*, edited by Fred D. Miller, Jr., Volume 6 of *A Treatise of Legal Philosophy and General Jurisprudence*, edited by Enrico Pattaro, University of Bologna, Springer Publishing, Dordrecht 2007, p. 79–110; for a different perspective on this issue, the interested reader might consult Tony Burns, *Aristotle and Natural Law*, Continuum International Publishing Group, New York 2011.

ical theory of a human essence or natural kind. Unlike modern and contemporary empiricists and nominalists, Aristotle grounded his moral theory on essential properties central to human nature. In his *Categories*, Aristotle distinguished between essential or sortal properties and accidental or incidental properties. Aristotelian moral theory depends on the development of dispositional properties that determine human nature. If the essential properties of an individual refer to an empty class, then natural law theory—in the mind of Aristotle and his medieval follower, Aquinas—will be moribund from the beginning. In opposition to the current anti-realism common to contemporary post-modernist philosophy following Kant, Aristotle and Aquinas worked within the context of ontological and epistemological realism. It follows that the most plausible versions of natural law theory appear to be impossible theoretically without philosophical realism as a necessary condition.

After Aristotle, in adopting a rational order of the world, the Stoic philosophers contributed to the early mix in the development of natural law. The roots of Stoicism are found in Heraclitus, who postulated a fixed order in the universe. Cicero, in particular, is credited with an early version of natural law theory. Aquinas too was influenced by the structure of Stoic moral theory. Martha Nussbaum chides Aristotle for ignoring moral and political equality that, she suggests, is found in the Stoics. Nussbaum argues that Aristotle granted citizenship in the *polis* only to male Greek citizens, entailing that slaves, women and children were placed in an inferior status. Accordingly, Nussbaum modifies her Aristotelianism by incorporating the concept of "human equality" exemplified in the Stoics. Most historians of philosophy agree that the Stoics condemned slavery since each human person participates in the universal "brotherhood of mankind." In Nussbaum's writings, Aristotle provides the content for her political theory and theory of human rights—the historical roots of her "Capabilities Approach"—while the Stoic concept of "universal brotherhood" entails that human rights belong necessarily to all persons.

The analysis proposed in this essay suggests that there is no singular canonical reading of Aquinas on natural law or a theory of derived natural rights. In English language philosophy, for example, one might suggest that at least three distinct groups of contemporary philosophers and theologians work assiduously with Aquinas's texts: (1) the classical neo-Thomists (with Transcendental Thomists, Gilsonian Thomists, and Augustinian Thomists as sub-sets); (2) the analytic Thomists (with Wittgensteinian Thomists and Analytical Thomists as subsets); and (3) the post-modernist Thomists linked to the Radical Orthodoxy

movement.[5] These distinctions follow Thomas O'Meara's position that "there has never been one Thomism,"[6] and Alasdair MacIntrye's judgment that in the literature one finds "too many Thomisms."[7] Fergus Kerr once wrote that the "reception of Aquinas's work has been contentious from the beginning."[8] Hence, a singular, "orthodox" natural law or natural rights reading of Aquinas is fraught with historical and theoretical difficulties. Moreover, in discussing Aquinas on the philosophical method utilized in the *Summa Theologiae*, Vivian Boland has argued that Aquinas's articles exhibit a dialogical inquiry rather than an authoritarian, monological treatise. "Each article . . . (is) a short, formalized dialogue: space is given to a range of voices, there is an appeal to one or more authorities, there is time for the teacher to present his own understanding, as well as responding to the earlier speakers in the dialogue"[9]

In reading the texts of Aquinas in the *Secunda Secundae* of his monumental *Summa Theologiae*,[10] one immediately discovers that the concept of "*jus*" is central to the analysis. Written near the end of Aquinas's abbreviated but productive scholarly life (1226-1274),[11] the *Summa Theologiae* is the incorporation of Aristotelian philosophical insights—modified by the Hebraic and Islamic philosophers—into the developed theology of the Christian Fathers and Doctors of the Church, especially Augustine. The challenge contemporary philosophers face is reconstructing Aquinas's natural law theory and a possible theory of human rights so that the resulting analysis is consistent and comprehensive.

Aquinas's conceptual analysis of *jus*, which often appears in English translations as "right," immediately precedes the general account of justice or "*justitia*."

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[5] For a fuller discussion of these contemporary divisions in Aquinas studies, the interested reader might consult the author's review of Ralph McInerny's *Praeambula Fidei: Thomism and the God of the Philosophers*, in the Notre Dame on-line „Philosophical Reviews" 19.08.2007. Furthermore, Radical Orthodoxy is a post-modernist theological movement emanating from Cambridge University theologians who adopt an internalist theory of mind in order to grasp religious claims; Anthony Kenny is particularly critical of this use of Aquinas's philosophy of mind.

[6] Thomas F. O'Meara, *Thomas Aquinas: Theologian*, University of Notre Dame Press, Notre Dame, IN 1997, p. 155.

[7] Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry*, Duckworth, London 1990, p. 58.

[8] Fergus Kerr, *Varieties of Interpreting Aquinas*, [In:] Kerr, *Contemplating Aquinas*, University of Notre Dame Press, Notre Dame, IN 2007, p. 27.

[9] Vivian Boland, O.P., *Kenny on Aquinas on Being*, „New Blackfriars" 84 (991) 2003, p. 389.

[10] Thomas Aquinas, *Summa Theologiae*, IIa–IIae, Q. 57, articles 1–4.

[11] The exact year of Thomas's birth has been contested for centuries. Simon Tugwell suggests that sufficient evidence indicates 1226 is the correct year. Some documents state that Thomas was forty-eight when he died in 1274. Jean-Pierre Torrell places 1225 as the appropriate year of Thomas's birth.

The term "*jus*," which in Aquinas's account is derived from "*justitia*," is more correctly rendered into English as "the just thing" or "the just state of affairs." Hence, a "*jus*" is a "right thing" or a "correct or right state of affairs" that occurs among persons, between persons and things, or between citizens and the state or government. Accordingly, it is the "right thing" that takes place in various human situations emphasizing the role of relations. 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."[12]

In his treatise considering Aquinas on natural law, human rights, and political theory, John Finnis suggested that Aquinas appropriated the conceptual schema for justice found in Aristotle's *Nicomachean Ethics*.[13] Finnis, moreover, argued that Aquinas's account of justice is limited because he attempted to accommodate all aspects of justice into Aristotle's schema. Aquinas, following Aristotle, wrote that justice "is a habit whereby a human person renders to each one what is due by a constant and perpetual will."[14] 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 or with another. According to Aquinas's reading of Aristotle, 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 Aristotelian "*polis*." The second category of justice directs the human agent in matters relating to particular goods and specific persons. Aquinas refers to these two categories of justice as "commutative justice" and "distributive justice." Commutative justice is concerned with the mutual dealings between at least 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 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

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[12] Thomas Aquinas, *Summa…,* IIa–IIae. Q. 57, a. 1.

[13] John Finnis, *Aquinas: Moral, Political and Legal Theory*, Oxford University Press, Oxford 1998, p. 187–188.

[14] Thomas Aquinas, *Summa…,* IIa–IIae. Q. 58, a. 1.

person from another (*justitia commutativa*), and to one person from the political group (*justitia distributiva*)."[15]

Nonetheless, in these discussions of *jus* in Aquinas's texts, one must remember that Aquinas himself did not develop a theory of individual human rights. While Aquinas discussed *jus naturale* as contrasted with *jus positivum*, any indication of a natural right in the modern sense of an individual right is either absent from his thought or confused at best.[16] Finnis once wrote: "Though he never uses a term translatable as 'human rights,' Aquinas clearly has the concept."[17] The sixteenth century Jesuit, Francisco Suarez, on the other hand, did elucidate the concept of an individual natural right as a "moral power," which is a subjective natural right.[18] In addition, Suarez articulated a list of individual natural rights for human agents, which is more rights theory than one discovers in the texts of Aquinas.

Since Aquinas's account of justice is dependent conceptually on the Aristotelian analysis, it would appear that this theory has *prima facie* structural links to the contemporary "justice as fairness" doctrine articulated by John Rawls; Rawls suggested, it will be recalled, that fundamentally justice is the "fair dealings" of the citizens in a society with one another (analogous to *justitia commutativa*) and the "fair dealings" of the society itself with the citizens of the society (analogous to *justitia distributiva*).[19] In the context of contemporary political rights theory, it would appear that Aquinas's account, with his Aristotelian analysis of justice as fairness together with the connection of one individual with another individual and one or more individuals with the community, is a precursor of Rawls's position on justice.

Objective and Subjective Human Rights

In light of this Aristotelian account of justice and the at least *prima facie* similarities with Rawls's position, one mustarticulate how Aquinas distinguishes a *jus* that is natural and a *jus* that is positive. Both kinds of *jus* are rooted in the Aristote-

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[15] Thomas Gilby, *Introduction*, [in:] Thomas Aquinas, *Summa Theologiae*, New Blackfriars Edition, Vol. 37: "Justice", McGraw-Hill Book Company, New York 1975, p. xv.

[16] Thomas Aquinas, *Summa Theologiae*, IIa–IIae, Q. 57.

[17] John Finnis, *Aquinas*, p. 136.

[18] 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. Brian Tierney suggests, moreover, that early on texts of the canon lawyers of the twelfth century recognized a subjective view of human rights. Cf. Brian Tierney, *The Idea of Natural Right*, The Scholars Press, Atlanta 1997, p. 193.

[19] John Rawls, *A Theory of Justice*, Oxford University Press, Oxford 1972, p. 85–86.

lian analysis of the human person as an individual of a natural kind. A natural *jus* comes about by the very nature of the case while a positive *jus* arises only with common consent, either between private individuals or between the community and its citizens. Nonetheless, a positive right is not reducible to the "command of the sovereign" common to legal positivism. Both positions are substantive, realist claims about the state of affairs. In Aquinas's view, a *jus* refers to a relational state of affairs that either holds or does not hold. This *objective* sense of *jus*, what the Germanic tradition refers to as "*objekives Recht*," is different conceptually from the account of a human right as articulated by later medieval and Renaissance philosophers. In the writings of these later philosophers, right evolves into a *subjective* claim indicating that one possesses a personal property entailing that one is due something or one needs to be protected from some action. This *subjective* right as an individual property or characteristic found in the person, which the German scholars refer to as "*subjektives Recht*," corresponds to the modern account of a human right. For Aquinas, on the other hand, *jus* is an *objective*, relational state of affairs, which is fundamentally and conceptually a different account from what later philosophers call a "*jus.*" This distinction between *objective* and *subjective* rights is often found in recent scholarship discussing later medieval and modern theories of natural right. In considering this conceptual difference, Henrik Syse suggests that an *objective right* is "what is right" in contrast to a *subjective right*, which is "a right." Syse continues with this analysis: "The 'subjective' use implies using *right* as a noun, thus meaning something one 'has' or 'owns' and by which one can claim something. The 'objective' use of right, on the other hand, implies using 'right' in an adjectival sense, meaning 'that which is right.'"[20]

Renaissance Scholasticism and Natural Law Theory

Natural law theory in the Aristotelian tradition, as applied to a general theory of international law as well as to a specific, individual human rights theory, developed theoretically in the writings of philosophers associated with Renaissance scholasticism. In sixteenth century Spain, the University of Salamanca emerged as the leading center of the study of Aquinas's works. 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

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[20] Henrik Syse, *Natural Law, Religion, & Right*, St. Augustine's Press, South Bend, IN 2007, p. 4–6. Syse's monograph is one of the better accounts of medieval and early modern theories of human natural rights.

accounts of natural law moral, political and legal theory. These Renaissance philosophers and theologians participated in a movement often referred to as the "Second Scholasticism." They contributed substantively to the development of modern and contemporary human rights theory. In de Vitoria and Suarez one discovers the modern concept of human rights spelled out in some detail; in Suarez's *De Legibus* a natural *jus* is defined as "a certain moral power that every human person has, either over one's own property or with respect to what is due to one."[21] This "moral power" is a subjective natural right, differing from Aquinas's objective *jus*, which is a relational state of affairs fundamentally different from a "moral power." Simply put, *jus* in Aquinas is an *objective* relational state; *jus* in later medieval philosophers—and modern philosophers—is a *subjective* power referring to some quality possessed by a human person.

Among several pressing philosophical inquiries, the Dominicans at Salamanca were concerned with limiting the abuses of 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 human persons might be enslaved. In effect, these theories could, as Richard Tuck once argued, "help to undermine the slave trade."[22] 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, well trained in the classical Thomism then common in Spanish universities, articulated the issues central to the Aristotelian concepts of distributive justice and not the set of issues connected with absolute liberty,[23] or what philosophers like Rawls refer to as "liberties." One principal impetus for the subjective position on human rights was the protection of the possibility of freedom of the will with its corresponding "liberty of choice."

Accordingly, the jurisprudential contributions of de Vitoria and his successors at Salamanca, most scholars argue, focused attention on the structure of a subjective rights theory that eventually evolved into the modern theory of human rights. It should be noted, however, that recent scholarly debate hovers over whether this Salamanca school illustrated a retrieval of the Aristotelian/Aquinian

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[21] Francisco Suarez, *De Legibus*, Bk. I, 2.

[22] Richard Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge University Press, Cambridge 1979, p. 49.

[23] 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.

conception of objective right, or whether this group of scholastic philosophers continued with the nominalist and voluntarist subjectivism attributed to the fourteenth century Franciscan philosophers from the time of Duns Scotus and William of Ockham. 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. As Annabel Brett once wrote: "(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*."[24] In discussing Aquinas's analysis of *jus*, Michel Villey and Ralph McInerny argued that Aquinas's account of *jus* should be understood within the context of Roman law and not in the context of modern rights theory.[25] When the Salamanca philosophers developed their intellectualist position rooted in Aquinas, one philosophical adversary was Protestant theories of natural law that reduced philosophical propositions to statements found in the scriptures. In response to this Protestant position, the Second Scholasticism philosophers argued that since all human persons did not know the scriptures and moreover that divergent interpretations of biblical texts existed, any universal conception of natural law moral and political theory would be impossible. In opposition to the general thrust of Protestant theology, the Salamanca philosophers, attuned to the insights of Thomas Aquinas, supported the important conceptual distinction between philosophy and theology.

A Contemporary Reformulation of Aquinas's Theory of Natural Right

Aquinas bases his moral theory, and *a fortiori* his theory 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's moral and political theory is, in effect, a second order inquiry in which Aquinas builds his moral theory upon his philosophical anthropology of the human person. An ethical naturalist, Aquinas constructs a realist "metaphysics of morals" but not a Kantian transcendental version. He develops his ontology of human nature first. Secondly, from this philosophical anthropology flow moral principles and norms—and objective rights—indicating that his meta-philosophy is ontologically realist

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[24] Chapter Three of Annabel Brett's significant study is a developed analysis of the account of objective right within the tradition of Thomist philosophy. Annabel Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought*, Cambridge University Press, Cambridge 1997, p. 124.

[25] Ralph McInerny, *Aquinas on Human Action*, Catholic University of America Press, Washington, D.C. 1992, p. 212. Roman law, and its ecclesiastical expression found in canon law, influenced significantly Aquinas's conceptual analysis of law.

without being Cartesian foundationalist. Scott MacDonald articulated this anti-foundationalist theme found in Aquinas in the following way: "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."[26] This same meta-theory holds for Aquinas's natural law theory rooted in an order of nature. As a second order activity, moral theory is based on a metaphysical foundation, which is the essence or natural kind of the person. Aquinas avoids adopting what Henry Veatch once called "the transcendental turn," which is paradigmatic to Kantian moral theory and independent of any realist order of nature.[27] Aquinas's philosophical dialectic is akin to recent ontological questions exemplifying the rubric of "truth-making," arguing that truth claims are not metaphysically primitive but rather metaphysically grounded. Hence, if a proposition is true, it is true in virtue of some thing. These contemporary metaphysical positions are at least analogically similar to Aquinas's meta-philosophy.[28]

In order to grasp Aquinas's ethical naturalism, one needs to understand his concept of a natural kind. This analysis of natural kind metaphysics suggests an interesting connection between Aristotelian realism and contemporary analytic philosophy. Michael Ayers observed that late twentieth century philosophical work illustrated similarities with the Aristotelian elucidation of natural kinds: "there is some awareness that the (Kripke/Putnam) view (on natural kinds) is not so new as all that, since it is not at all unlike Aristotelian Doctrine."[29] In rejecting empiricism, Ayers also wrote that the evidence of modern biology suggests that a species, as a natural kind, "is a far cry from the radical arbitrariness that Locke (and most Empiricists) took to infect all classifications."[30] Aquinas's essence is structurally similar to the "metaphysically necessary" that Saul Kripke discussed in *Naming and Necessity*.[31] MacIntyre's later defense of his earlier rejected Aristotelian "metaphysical biology" illustrates the realism resonating in recent renditions of natural law.

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[26] Scott MacDonald, *Theory of Knowledge*, [in:] Norman Kretzmann and Eleonore Stump, *The Cambridge Companion to Aquinas*, Cambridge University Press, Cambridge 1993, p. 160.

[27] Using contemporary philosophical categories, Aquinas's ethical naturalism is never anti-realist and internalist but realist and externalist.

[28] For a discussion of these recent issues, the interested reader might consult E.J. Lowe and A. Rami (eds.), *Truth and Truth-Making*, Acumen, 2009.

[29] Michael Ayers, *Locke versus Aristotle on Natural Kinds*, "Journal of Philosophy" 78 (5) 1981, p. 248.

[30] Ibidem, p. 267.

[31] Saul Kripke, *Identity and Necessity*, [in:] Milton K. Muniz (ed.), *Identity and Individuation*, New York 1971, p. 144–146.

Aquinas argues that a human person is, by definition, a synthetic necessary unity grounding a set of potentialities, capacities, or dispositions, which is a dispositional and not a rigidly fixed analysis of a natural kind. A disposition is a structured causal set of properties that leads toward the development of the property in a specific way. The dispositional structure of an acorn, for example, is organized biologically to produce an oak tree and not a cherry tree. In Aquinas's metaphysics, the substantial form is the ontological ground for dispositional properties. Aquinas divides these dispositional properties or 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"—that is based upon the insights of both Aristotle's *Nicomachean Ethics* and *De Anima*.[32]

> 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).

Central to an explication of Thomas's moral and political theory is a sophisticated ontological teleology rooted in a theory of dispositional properties found in human nature. One finds this theory of human nature articulated in Aristotle's *De Anima* and developed in Aquinas's *Commentary* on this psychological treatise. What is interesting textually and substantively is that Thomas composed his *Commentary on Aristotle's On the Soul* (*Sententia Libri De anima*) at the time he was writing the *Prima Pars* of the *Summa Theologiae* on the nature of the human person. In a similar vein, Aquinas authored the *Prima Secundae* of the *Summa Theologiae*—containing his discussion of "*lex naturalis*"—at the same time he wrote his *Commentary on Aristotle's Nicomachean Ethics* (*Sententia Libri Ethicorum*). That these two Aquinas treatises have conceptual similarities with the respective parts of the Aristotelian corpus should not be surprising.[33]

In Aquinas's theory, a final cause is a teleological goal that is built into the very dispositional structure of a human natural kind, which Rene-Antoine Gauthier calls "The Metaphysics of Finality." This account of teleology differs radically from the standard consequentialist paradigm common to contemporary moral and political theory. The development of the human dispositional proper-

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[32] Thomas Aquinas, *Summa…*, Ia–IIae, Q. 94, a. 2.

[33] Aquinas used at least two sources for his Aristotelian texts: those which came to Paris from the Islamic translating institute at Toledo and especially those texts that his Dominican confrere, William of Moerbeke, acquired in Constantinople.

ties leads to what Aquinas called *felicitas* or *beatitudo*, which are the Latin terms for Aristotelian *eudaimonia*. The virtues in turn are the acquired means enabling each human agent to exercise those actions leading to *felicitas* or *beatitudo*. Contemporary Aristotelians translate *eudaimonia* as "flourishing;" Aquinas would accept this translation. This is the foundation in human nature for what Aquinas calls the natural moral laws, and it is upon this ontological foundation that one develops a realist theory of natural rights.

This discussion has suggested that Aquinas only hints that from these natural properties rooted in human nature might be developed a theory of subjective natural rights. Contemporary philosophers like Veatch, Finnis, McInerny and Syse, among others, argue that a philosophical derivation of rights from medieval moral theory is possible by proposing that a subjective right might be that which protects the objective development of the dispositional properties or basic human goods. Thomas's ethical naturalism, accordingly, provides the possibility for developing a realist theory of subjective natural rights. These subjective natural rights, while somewhat limited from the breadth of modern theories of human rights, offer a theoretical means for the moral protection that prevents, in principle, the hindering of the development of the basic human dispositions. This set of moral protections does not, however, separate conceptually the "right" from the "good," which most contemporary liberal theories of human rights propose; hence, one would not have a natural right to undertake flagrantly immoral actions.

In particular, Veatch's derivation argues that the concept of "duty" based on the set of human dispositional properties justifies a natural right as the "protection" of the duties derived from human nature.[34] An example might go like the following: Aquinas argued that a principal living disposition of human nature is the foundation for a sense of continuing in existence, what Columba Ryan once referred to as the "biological good." This disposition is the foundation for the moral claim that it is immoral to engage in arbitrary violence and killing. Human life, therefore, is to be protected. It follows that direct killing and wanton violence are immoral actions, so Aquinas argues, not because both violate a divine commandment or a human law, but rather because killing and violence frustrate or hinder the continual development of the natural dispositional property to continue in existence—the biological good. This argument reminds one of H. L. A. Hart's

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[34] Henry Veatch, *Human Rights: Fact or Fancy?*, Louisiana State University Press, Baton Rouge, LA 1985.

concept of "survival" as a "natural necessity."[35] Natural law theory entails that the ontological root of evil is the repression or destruction of a natural dispositional property of human nature. Given this foundation in human nature, one would have a *subjective right*—a moral power—to protect one's self from wanton violence. This devolves into a right of self-defense.

The same natural law argument as a root explanation of human rights applies to the development of sensitive and rational dispositional properties and their opposing repressions or destruction. One of the rational dispositions Aquinas considered as central to human nature is the drive human beings have to know—the innate human curiosity to know and to understand. Of course, this claim is reminiscent of Aristotle's initial line in the *Metaphysics*. Aquinas suggests that this disposition is only developed (or in Aquinas's terminology, "actualized") when human persons know propositions that are true. Hence, human persons have a "moral claim" or subjective right to the truth. Again, these basic claims protect what human persons are as human beings. Finnis once argued, for instance, that college faculty have an obligation not to teach that which is known to be false, because false statements violate the subjective right to know true propositions, which right students as human persons with a rational disposition possess intrinsically. Finnis offered the same principle for political, academic, and religious leaders. This subjective right to the truth is based, Finnis argues, upon the classic position of "a conception of human dignity and worth, precisely as it bears on the interpersonal act of communication."[36] 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. In his *The Morality of Law*,[37] Lon Fuller argued for the rational act of communication as a necessary condition for his substantive natural law theory. Aquinas also argues that this rational 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 illustrated, for instance, in Hobbes's view of human nature or indicated in Sartre's existentialism. A set of social, subjective rights follows from this rational disposition.

Following the insights of Suarez, a human person has, therefore, a subjective power or right as a noun that protects the possibility of the development of the dispositional properties; these latter are the adjectival, objective properties

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[35] H.L.A. Hart, *The Concept of Law*, Oxford University Press, Oxford 1961, p. 90–95.

[36] John Finnis, op. cit, p. 160.

[37] Lon Fuller, *The Morality of Law*, Yale University Press, New Haven, CT 1964, p. 84–86.

of the "right thing" or "right relations" in the human person upon which the subjective rights as nouns are developed. In his contemporary natural rights theory, Veatch, however, argues for only "negative rights" and rejects "positive rights" or "entitlements." A negative right as a protection would be exemplified in the rights to property, life, and liberty; these are "rights not to be interfered with," which are reducible to "rights as protections." Hart suggests that his "natural necessities" serve as the grounding for the protections of "persons, property and promises." Positive rights as entitlements, on the other hand, would be, for example, rights to education, health care, retirement benefits, and so forth. With her "Capabilities Approach," Nussbaum adopts a modified Aristotelian position on positive rights. Nussbaum once wrote in *The Quality of Life*:

> 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.[38]

Following Nussbaum, one might respond to Veatch's limiting natural rights by suggesting that the fundamental human dispositions could justify a limited set of positive rights. This proposed derivation of natural rights, it would appear, offers a definitional stop to the debate on the nature and scope of rights and responds to L.W. Sumner's claim that "the rhetoric of rights is out of control." [39]

It follows that natural rights theory is contrary to most liberal theories of right, which accept only what might be called a "thin theory of the human good;" a thin theory rejects the ontological underpinning of natural kind theory. Accordingly, as noted above, natural law theory argues that the concept of right cannot be separated from the concept of the good,[40] which is in harmony with Veatch's

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[38] Martha Craven Nussbaum, *Non-Relative Virtues*, [in:] Nussbaum and Amartya Sen (eds.), *The Quality of Life*, Clarendon Press, Oxford 1993, p. 265.

[39] L.W. Sumner, *Rights Denaturalized*, [in:] R.G. Frey (ed.), *Utility and Rights*, Basil Blackwell, Oxford 1986, p. 20.

[40] For a contemporary discussion of a general Thomistic theory of human rights, one might consult Syse. Joseph Tomain's *Creon's Ghost: Law, Justice, and the Humanities*, Oxford University Press, 2009, covers the history of natural law and rights through the lenses of philosophy, literature and classical studies.

position that natural rights are dependent upon natural law and not independent of a moral foundation. In opposition to natural law theory, contemporary liberalism in jurisprudence, by its very definition, denies any role for substantive content to the fabric of lawmaking or rights justification. For example, Ronald Dworkin, the foremost rights theorist in late twentieth century Angelo-American philosophy, once wrote: "government must be neutral on what might be called the question of the good life."[41] Without the content that a theory of a human person provides, jurisprudence is limited in its attempt at achieving a substantive theory of human rights.

A negative natural right is merely a protection from some happening; for example, freedom of speech, religion, or what Rawls would call our "liberties." A negative right is a right not to be interfered with. A positive human natural right, on the other hand, is a right to some benefit, or what above is referred to as an entitlement. With her capabilities approach, Nussbaum adopts a modified position on positive rights arguing that rights protect and enhance the capabilities central to the human person.[42] One does not find, however, a fully developed theory of individual positive or negative human rights in the writings of Aquinas. [43] In opposition to the voluntarist tradition, Aquinas emphasized continuously the prominence of reason and not will. Scotus and Ockham, however, alter this direction by emphasizing the role of will and foster voluntarism as central to natural law. Throughout his discussion of law-making and moral theory, Aquinas argues that reason, both speculative and practical, are to be employed with vigor. Law is, as Aquinas states, "an ordinance of reason." A purely voluntarist account according to Aquinas is faulty.[44] Natural rights follow from this "ordinance of reason."

Aquinas the Philosopher

Given that Thomas Aquinas is known as a theologian and as a philosopher, one philosophical query immediately comes to mind: Is Aquinas undertaking a philosophical analysis or is his work fundamentally theological in nature and character. Gauthier has argued that Aquinas cannot be regarded as a reputable

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[41] Ronald Dworkin, *Liberalism*, [in:] *A Matter of Principle*, Harvard University Press, Cambridge, MA 1984, p. 191.

[42] Nussbaum, *Constitutions and Capabilities: 'Perception' Against Lofty Formalism*, "The Harvard Law Review" 2007, p. 15. Nussbaum considers the "Capabilities Approach" in several of her writings.

[43] For a more thorough discussion of these issues, see Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*, The Clarendon Press, Oxford 1996; 2001, Chapter 9 *passim*.

[44] In contemporary jurisprudence, both Fuller and Golding defend versions of reason and are opposed to a voluntarist account.

commentator on Aristotle because Aquinas worked within a theological framework. Mark Jordan, in principle following Gauthier, once wrote the following: "In short, no single work was written by Aquinas for the sake of setting forth a philosophy. Aquinas chose not to write philosophy."[45] In opposition to this theological reductionism, McInerny has suggested that this position is what one might call "Continental Thomism," with its principal interlocutors being Etienne Gilson, Henri de Lubac and Marie-Dominique Chenu. While respectful of Gilson, nonetheless McInerny argues that "Gilson ended by so confining Thomas's philosophy to a theological setting that it is difficult to see how philosophy so understood could be shared by nonbelievers."[46] McInerny insists that Aquinas rejects what Gilson firmly adopted: "the guiding role of the text from *Exodus* (with) the consequent need to ground the analysis in scripture and faith."[47] He further argues that according to Gilson, Aquinas's philosophy "is swallowed up by Theology" with the consequence that "Thomas's metaphysics is dependent on revelation and faith"[48]

The English Dominican, Simon Tugwell, with the theological principles of Gauthier in mind, provides probably the best succinct analysis of the complex issues regarding Aquinas as a philosopher, a theologian, or a hybrid intellectual. At the end of the wide-ranging analysis developed in this essay, it is worth considering the following rendition of this set of issues:

> Gauthier argues that Thomas' concern was always theological, even in his "philosophical" writings, but his critics have pointed plausibly enough to signs that Thomas did have a serious philosophical purpose and that he was interested in clarifying Aristotelian philosophy in its own right. Probably there is no real contradiction between the two positions. As we have seen, Thomas' own theology drove him to recognize the importance of philosophy as a distinct discipline, if only because philosophical errors that might threaten faith need to be tackled philosophically. But his philosophical interests were not just apologetic. He was surely sincere in believing that the theological attempt to understand faith is essentially at one with the universal human attempt to understand reality. In his last years, as we have noted, the philosophers seem to have been more enthusiastic about

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[45] Mark Jordan, *Theology and Philosophy*, [in:] Norman Kretzmann and Eleonore Stump (eds.), *The Cambridge Companion to Aquinas*, Cambridge University Press, Cambridge 1993, p. 233.

[46] McInerny, *Praeambula Fidei: Thomism and the God of the Philosophers*, Catholic University of America Press, Washington, D.C. 2006, p. 159.

[47] Ibidem, p. 149–150.

[48] Ibidem, p. 155.

Thomas than many of his fellow theologians were; it is quite likely that he in return found the philosophers more congenial than some of the theologians. He believed that the best way to discover the truth is to have a good argument, and in this he was being true to the tradition of Albert and indeed St. Dominic.[49]

This author adopts Tugwell's enlightened analysis. MacIntyre argues, furthermore, that Aquinas was a premier commentator on Aristotle, and Nussbaum in particular endorsed this position when discussing Aquinas's philosophy of mind. Moreover, this interpretative position is in opposition to those contemporary moral philosophers and theologians who argue specifically that Aquinas's moral philosophy can only be understood as a form of theological definism. Christopher Kaczor and Leo Elders, among others, have refuted this narrow theological interpretation concerning ways to read Aquinas as illustrated by Gauthier and Jordan, among others.[50] In the contemporary dialectic being pursued in several areas of analytic philosophy, especially in natural law moral and legal theory and now in the philosophy of human rights, Aquinas's insights have much to offer. This essay has introduced, the author trusts, Aquinas as a significant player in contemporary analytic legal theory devoted to the issues of substantive human rights theory.

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[49] Simon Tugwell, *Introduction*, [in:] *Albert and Thomas*, The Paulist Press, 1988, p. 257–258.

[50] Christopher Kaczor, *Thomas Aquinas's Commentary on the Ethics*: Merely an Interpretation of Aristotle?, "American Catholic Philosophical Quarterly" 78 (3) Summer 2004, p. 253–278; Leo Elders, *The Aristotelian Commentaries of St. Thomas Aquinas*, "The Review of Metaphysics" LXIII (1) Issue # 249, 2009, p. 29–53.

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