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HEALTH, HEALTH CARE, AND RIGHTS: A NEW NATURAL LAW THEORY PERSPECTIVE

SAMUEL GREGG*

INTRODUCTION

The health care debate that dominated American political discussion throughout 2009 and early 2010 was about many things, but one of its more prominent philosophical features concerned the question of whether there is a “right to health care.” Some advocates of the Obama Administration’s health care legislation insisted that it was reasonable to describe health care as a “right.”¹ Opponents expressed skepticism about the validity of this claim. In part this reflected the important role that the language of rights has assumed in modern political discourse. Not everyone regards this development as being without its own blemishes. In 1991, for example, the Harvard legal philosopher Mary Ann Glendon commented that it had become very difficult to analyze or debate any controversial question of law or policy without invoking the concept of rights. The ostensible advantage of rights discourse, she maintained, was that it had the potential to provide a common language for exploring, and perhaps even resolving a range of issues.² Nevertheless, Glendon added:

Our rights talk, in its absoluteness promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. . . . In its insularity, it shuts out potentially important aids to the process of self-correcting learning.

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1. See, e.g., Bernie Sanders, *Health Care Is a Right, Not a Privilege*, *THE HUFFINGTON POST* (June 28, 2009, 4:08 PM), http://www.huffingtonpost.com/rep-bernie-sanders/health-care-is-a-right-no_b_212770.html.

2. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4 (1991).

All of these traits promote mere assertion over reasoning.³

From this standpoint, we might partly understand the contemporary invocation of rights as part of a calculated political effort to shut down discussion (especially when people appear unable to convince others of the correctness of their argument) and force political and legal acceptance of all the claims embodied in the asserted right. In theoretical terms, it also reflects a widespread understanding of rights as “trumps,” to use Ronald Dworkin’s famous metaphor,⁴ which override non-rights-based claims, even if the latter arguably have strong normative content. In itself, however, rights-as-trumps cannot resolve the question of how we adjudicate between claims based upon different rights.

While abuse of a concept such as rights is regrettable, such misuse does not necessarily undermine the validity of rights or the potential of rights discourse to elucidate many difficult moral and policy questions. This is especially true if we can discern a basis for rights that goes beyond either utilitarian premises (which have proved unable to sustain any sufficiently stable concept of rights)⁵ or positive law (which implies that rights are ultimately determined by government fiat).⁶ A prominent alternative to utilitarian and positivist approaches are those theories that belong to the various schools of “natural law.” Natural law thinkers disagree among themselves on many policy matters. Nor do they agree about the precise logic to follow in correctly identifying rights. Nonetheless they all approach rights by reflecting on questions such as the nature of rationality, free will, human action, and human moral flourishing.

Modern manifestations of such thinking embrace a range of figures such as Francisco Suarez, Domingo de Soto, Hugo Grotius, and Samuel von Pufendorf, and, in more recent decades, scholars such as Jacques Maritain, Heinrich Rommen, Joseph Höffner, Martin Rhonheimer, and Alasdair MacIntyre. Over the past thirty years, the new natural law theory (“NNLT”) or new classical natural law theory (most notably associated with John Finnis, Germain Grisez, Joseph Boyle, and Robert P. George)⁷

3. *Id.* at 14.

4. See Ronald Dworkin, *Rights As Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

5. See SAMUEL GRECC, ON ORDERED LIBERTY: A TREATISE ON THE FREE SOCIETY 82 (2003).

6. *Id.* at 64–65.

7. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) [hereinafter NATURAL LAW]; ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999); Joseph Boyle, *Free Choice, Incommensurable Goods, and the Self-Refutation of Deter-*

has emerged as an influential school of natural law thought, partly because of its effort to articulate a fresh understanding of the origin, character, and limits of rights. The purpose of this paper is to explore whether, from an>NNLT standpoint,⁸ there are rights associated with health care, to identify what species of rights they might be, and to outline the primary principles that ought to guide efforts to realize such rights.

DISCERNING RIGHTS:>NNLT, HUMAN ACTION, AND FUNDAMENTAL GOODS

NNLT begins with the observation that all human beings act. Our reason and experience confirm this. Human acts are a clear manifestation of each individual's unity of mind and body. When we act, we understand that our bodies are not types of instruments at the mind's disposal and direction. Human acts prove that we are not disembodied creatures. They demonstrate our essential unity, in all our complexity, as persons. Once, however, we consider the question of what causes us to act, we immediately enter into a debate that has long dominated philosophical discussion. On one side are those such as Thomas Hobbes and David Hume who maintain that while humans possess reason, it is instrumental in character. Hobbes insisted, for example, that "the thoughts are to the desires as scouts and spies, to range abroad and find the way to the things desired."⁹ If Hobbes and Hume are right, then it is impossible for people to know the proper ends of human choice and action through reason. Instead our reason is, as Hume put it, the slave of our passions and purely instrumental in character.¹⁰

NNLT, by contrast, maintains we can make free choices to the extent that we understand and act upon reasons that are not reducible to the emotions.¹¹ Certainly emotions are important to the moral life. The felt strength of an emotion, for instance,

minism, 50 AM. J. JURIS. 139 (2005); Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978); Germain Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae*, 10 NAT. L.F. 168 (1965).

8. This paper does not engage the debate about the new classical natural law theory. This is addressed in numerous studies. See, e.g., GEORGE, *supra* note 7; RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987); John Finnis & Germain Grisez, *The Basic Principles of Natural Law: A Reply to Ralph McInerney*, 26 AM. J. JURIS. 21 (1981); Ralph McInerney, *The Principles of Natural Law*, 25 AM. J. JURIS. 1 (1980).

9. THOMAS HOBBS, *LEVIATHAN* pt. 1, ch. VIII, at 4 (Edwin Curley ed., Hackett Publishing 1994) (1651).

10. DAVID HUME, *A TREATISE ON HUMAN NATURE* bk. 2, pt. 3, § III, at 415 (L. A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1951) (1739–40).

11. GEORGE, *supra* note 7, at 126.

can be a sign of one's commitment to good reasons to act. Aquinas observed that it is sometimes the case that "[d]istorted lusts are opposed to right reason, healthy lusts to wrong reason."¹² It is also true that reason has an instrumental dimension. Reason allows us, for example, to resolve medical problems. But reason also tells us that trying to solve medical questions *is good in itself* because promoting and protecting health is a self-evident reason for action that requires no further explanation. A choice for good health is thus an integral element of human flourishing. Who, after all, could reasonably desire ill health?

This idea is at the root of NNLT's vision of free choice—that is, of human intelligence in action. This is a person's will working as an intelligent response to what he comprehends as an opportunity for action.¹³ The source of human actions, their motivation, are *reasons*—that is, something intelligible. According to Finnis, people make free choices when—having judged that they have a reason or reasons to agree to one possible act, and a reason or reasons to adopt alternative but opposing options for action—they choose one option instead of the others.¹⁴ We thus act freely when we understand that an action is reasonable and seek to establish a concordance between such reasons and ourselves. Once the person formally chooses the possibility, it becomes a plan for action. Putting this into effect is what Aquinas calls "command" [*imperium*].¹⁵ Free choice, from this perspective is, first, the contemplation of possibilities that provide reasons for action; second, the active determination of the value of the object of a possible act; and lastly, the active willing of that act.¹⁶ We cannot, therefore, understand such acts as resulting from the inscrutable workings of emotions or biology. Rather, it is reason that guides the will, for nothing may be the object of our will unless it is known.

But are the objects of human action solely exterior for human beings? Aristotle understood that human action has an

12. THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. II-II, q. 155, art. 1, at 5 (Blackfriars ed. 1972) (1271).

13. "For will belongs to the intellectual order . . . For 'understanding' as such, i.e., the act of intellection, which is moved in a way by an intelligible object, 'is the principle desire.'" THOMAS AQUINAS, *COMMENTARY ON ARISTOTLE'S METAPHYSICS* bk. XII, lesson 7, at 802 (John P. Rowan trans., Dumb Ox Books 1995) [hereinafter *METAPHYSICS*].

14. See JOHN FINNIS, *AQUINAS: MORAL, LEGAL, AND POLITICAL THEORY* 63–78 (Oxford Univ. Press 1998) [Hereinafter *POLITICAL THEORY*].

15. THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. I-II, q. 17, art. 1, at 182–85 (Blackfriars ed. 1966) (1271).

16. For a more detailed differentiation, see *POLITICAL THEORY*, *supra* note 14, at 71.

inner significance for man. The definitive point of human activity, he held, is the act itself.¹⁷ Likewise, NNLT holds that freely chosen actions shape not only the external world, but also the actor himself, giving moral definition to that person. We may describe this difference in terms of the transitive and intransitive dimensions of human acts. Aquinas explained this in the following way:

There are two types of action. One proceeds from the agent and goes out to an exterior thing, which it changes. . . . [This] can properly be called an action [*actio*]. The second type of action does not go out to an exterior thing but remains in the agent as its perfection. Properly speaking, this is called operation [*operatio*].¹⁸

The transitive (external) effect of an act is what occurs outside us as a result of the action. But the intransitive effect of the same act leaves an inner mark on us. While this may not be at the forefront of our minds when we make choices, it is an unavoidable effect of any freely chosen act. This choice lasts within us until we decide to act in a way incompatible with that choice. We thus shape ourselves through our free choices.

The coherence of this understanding of human action depends very much upon what we understand to be a reason for action, or what NNLT calls a “basic good.”¹⁹ In NNLT, *basic* goods are fundamental reasons for human action that require no other reference to another object or purpose because our reason tells us that they are in themselves good for man²⁰—intrinsic elements that inform us of *what we are* as human persons. They differ from those intelligible goods that are essentially instrumental rather than basic. People exercise, for example, to reduce excessive weight. Losing excessive weight is a good reason for acting. But it is only intelligibly good because it contributes to being

17. See ARISTOTLE, *NICOMACHEAN ETHICS* 180 (Christopher Rowe trans., Oxford Univ. Press 2002) (c. 350 BCE).

18. THOMAS AQUINAS, 1 TRUTH 344 (Robert W. Mulligan, S. J., trans., Henry Regnery Company 1952).

19. This section follows closely the respective accounts of GERMAIN GRISEZ & RUSSELL SHAW, *BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF FREEDOM* 64–74 (Univ. of Notre Dame Press 1974) and *NATURAL LAW*, *supra* note 7, at 60–99.

20. Aquinas explained the self-evident nature of these reasons for action in the following manner: “The reason is that a concupiscible good, which is not an intelligible good, is merely an apparent good; but the first good ‘must be an object of will,’ i.e., an object desired by intellectual appetite. For will belongs to the intellectual order and not merely to that of concupiscible appetite. . . . But what is desired by intellectual appetite is desired because it seems to be good in itself.” *METAPHYSICS*, *supra* note 13, at bk. XII, lesson 7, n.2522, at 802.

healthy and staying alive.²¹ The free choice to engage in exercise thus presupposes that human life is a fundamental good to be promoted and protected.²² Life—and good health—is therefore an ultimate reason for a choice. Here, Germain Grisez offers the important clarification that health as a basic good is not a sensible good in the sense of feeling well or free from pain. While health does include these dimensions, it embraces more broadly the functioning of humans as “integrated, psychosomatic wholes. Health is functioning that tends towards growth in maturity, the ability to reproduce, and continuing survival. Its contrary is organic and/or psychic functioning that tends toward stunted growth, the inability to have and raise offspring, and death.”²³

Other basic or fundamental goods include friendship, knowledge of truth, aesthetic experience, and skillful performance in work or play.²⁴ These fundamental goods are also “common goods” insofar as they can be participated in innumerable ways by infinite numbers of persons. This does not mean that we are obliged to participate in every one of these goods in any one of our freely chosen actions. This is impossible. We cannot, for instance, simultaneously study (the good of knowledge) while running a marathon (the good of skillful performance). NNLT acknowledges that our choice of one good over another inevitably means we do not participate in other goods through that particular choice. This is an unintended side effect: we foresee that it will result from our action but we do not choose it. On the other hand, we *can* choose ends that directly violate other basic goods. The Nazi doctor who conducts experiments on prisoners in Auschwitz without their consent and without anesthetic may perform his experiment skillfully. He might even believe he is pursuing the good of knowledge. In doing so, however, the doctor violates the good of life and health. No matter how much new information is yielded through the operation or how skillfully the doctor conducts an operation without anesthetic upon a prisoner, his action directly and intentionally contributes to the destruction of life and/or the severe undermining of health. This renders his action unreasonable and directly promotes the doctor’s moral disintegration.

21. See GRIZEZ & SHAW, *supra* note 19, at 79–84.

22. In some instances, the choice of a basic good can also help realize other basic goods. The good of life, for example, also permits people to care for friends and meet other commitments.

23. Germain Grisez, *Health Care as Part of a Christian’s Vocation*, in ISSUES FOR A CATHOLIC BIOETHIC 151, 153 (Luke Gormally ed., 1999).

24. See NATURAL LAW, *supra* note 7, at 85–90.

HEALTH, THE COMMON GOOD, AND RIGHTS

Health is thus, from an NNLT standpoint, a fundamental good—a self-evident reason for action. The question of how to facilitate participation in the good of health in the conditions of human society is, however, more complicated. First, human beings are inherently social creatures in ways that animals are not. There are consequently limits on our capacity for self-reliance and therefore our ability to pursue the good of health and other fundamental goods by ourselves. Second, some people will make unreasonable choices that damage their health, the health of others, and other fundamental goods. This creates challenges for the human community. Third, although many people will make perfectly reasonable choices to participate in different combinations of the basic goods, including the good of health, some of these individuals' reasonable choices will be incompatible with other individuals' equally reasonable choices.

Private action, rather than state intervention, may offer the best resolution to many of these dilemmas. A family, for instance, can resolve many such conflicts among its members. NNLT theory acknowledges, however, that there are occasions when the need exists for an organization to resolve many such disputes in a formal and authoritative manner for all members of a society. The requirement for such a community becomes more evident as the range of different, sometimes incompatible, possibilities for reasonable choice by individuals and associations continue to expand, thereby making it increasingly difficult to reconcile all choices with each other. This consequently requires decisions concerning the processes, rules, and policies that simultaneously: (1) allow different reasonable choices to be reconciled in a reasonable manner and (2) address problems arising from unreasonable choices. At the same time, NNLT is clear that our flourishing remains vitally dependent upon our capacity and scope to make truly free choices. Hence, NNLT holds that there are limits upon: (1) the extent to which others should assist us and (2) the authority that we may confer upon any one community—including the state—to help coordinate literally millions of unreasonable and reasonable choices.

NNLT holds that the idea of rights can help guide the political community's efforts to reconcile its members' choices.²⁵ Contemporary rights-talk centers primarily on the presumed existence of an association between two or more people. To this extent, recognition of a right means that someone has a duty to

25. *Id.* at 218–219.

another. Others, however, are unsure if this tells us much. Lloyd Weinreb comments, for example, “[t]hat there is a connection between rights and responsibilities is . . . intuitively obvious, but any such intuition fails to disclose its source.”²⁶ From an NNL perspective, identifying such a source involves remembering that to respect human rights involves recognizing that humans have reason and free will; they are thus capable of *knowing* the fundamental goods that provide reasons for action, as well as of *making choices* that facilitate integral human flourishing. We also know that if people are to have any possibility of engaging in such flourishing, then certain minimal conditions must exist. Once we establish that a certain protection or entitlement is required for any person to have any possibility of choosing one or more of the basic goods, we may begin to speak of this essential condition as a right. Indeed, when we situate such rights within a given political community, then, as Finnis observes, they amount to an outline of a political community’s “common good.”²⁷ In short, they describe those conditions that must prevail in a political community if people in that society are to be able to choose freely to participate in the basic goods, which lead to integral human flourishing.

The state’s recognition of such rights does appear to have the potential to resolve some of the problems of coordinating millions of reasonable and unreasonable choices. The religious believer, for example, will regard the state’s recognition and protection of the right of religious liberty as reflecting and protecting his freedom to fulfill his duties toward God. Nevertheless, the same juridical protection of religious liberty as a right means that the state cannot force the non-believer to worship anyone or anything. The same civil recognition of a right of religious liberty thus confers upon believer and non-believer alike certain protections from state coercion regardless of their actual beliefs, while simultaneously enhancing the ability of the believer and non-believer to participate in the good of religion (understood as the good of contemplating whether or not there is an ultimate transcendent source of good that provides a compelling explanation of life and then ordering one’s life accordingly).

The concept of rights as essential features of the political common good acquires further credence once we recognize how violating a person’s rights damages the political community’s common good. If, for example, a person’s right to life is violated

26. Lloyd Weinreb, *Natural Law and Rights*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 278, 286 (Robert P. George ed., 1994).

27. See NATURAL LAW, *supra* note 7, at 214.

by another's intentional act to kill that individual, the common good is undermined. The damage consists of diminishing others' confidence that the safety of their life is relatively guaranteed. Without the legal protection of human life, many people will be afraid, for instance, to work or engage in more than superficial relationships with others. Such circumstances in turn severely hinder our ability to make free choices from a range of reasonable options.

HEALTH AND RIGHTS: NEGATIVE AND POSITIVE

If, as NNLT holds, health is a basic good, and basic goods are the foundation of rights recognized, protected, and/or promoted by the state, then how might health-as-a-fundamental-good translate into the language and logic of rights? Here, it is worth recalling that there is finiteness to people's participation in human health as a good in the sense that everyone's health eventually fails, resulting in death.²⁸ Disease and old age even ravage the capacity of many to act in accordance with practical reason. Despite some people's very best efforts to live healthy lives and the high level of health care available to many, individual extinction ultimately confronts us all, an impasse which renders impossible any further flourishing on our part in this world. From that standpoint, we already begin to see that expressions such as "a right to health" and "a right to health care" require significant qualification.

Yet despite this limitation, it is possible to argue that health as a fundamental good does give rise to certain types of rights. The most obvious of these is a species of *negative rights* associated with health insofar as others have a duty not to intentionally damage our health. Thus the parent who chooses to deny a child food in order to have more resources to spend on, for example, gambling or entertainment, infringes this right. So too does a doctor who intentionally prescribes his or her patients with the wrong medicine in order to "see what happens." Likewise, a person who steals his ailing parent's vital medicine in order to sell it and use the proceeds to buy recreational drugs compounds the wrongness of his act of theft by directly putting his parent's health at risk. In such instances, it is reasonable for the state to act directly to *deter* and *punish* such actions, not least because of the grave damage that permitting such actions does to the common good.

28. This finiteness is true of all the other fundamental goods. At some point, for instance, everyone's capacity to engage in skillful performance will begin to disintegrate.

When it comes, however, to *positive* rights that might arise from health as a fundamental good, the trajectory is less immediately clear. Inasmuch as members of a given political community have a responsibility towards the common good—understood as the conditions that facilitate the flourishing of each and every one of the community's members—each of us have some positive duties to the health care of all the community's members. Sometimes these duties are very clear. A person who, for example, comes across someone who has been hit by a car in the street normally has a positive duty to render some assistance to the injured person. Likewise, parents have a positive duty to provide their children and family with their health care needs consistent with the use of family resources to promote participation in other goods.²⁹

But, we inevitably ask, precisely what and how much does everyone in a given political community owe to everyone else when it comes to their often very different and changing health care needs? Must, for instance, a family sacrifice everything to provide a very elderly relative with a particular treatment that has a two percent success rate, even if it involves destroying that family's ability to materially support its other members' participation in other goods? What does someone living in New Jersey owe to the alcoholic in California whose own actions have directly contributed to the destruction of his health? This is further complicated by: (1) the practical fact of a scarcity of resources in any community, (2) the need for the same resources to serve as a means for people to participate in other goods besides health, and (3) the inevitability that death comes to everyone. In short, while it is possible to affirm "a right to health care," there are many complex prudential questions that the mere assertion or even a well-founded recognition of a right to health care cannot resolve.

NNLT itself recognizes such difficulties of delineating the respective roles of individuals, families, intermediate associations, and the state when it comes to actualizing any positive right. Finnis and George discuss this in the context of considering the derivation of positive law from the natural law.³⁰ Following Aquinas, they argue there are two ways in which this occurs. The first is relatively direct: the recognition of health as a basic good, for instance, prohibits intentional violations of human

29. For NNLT's explanation of how practical reason guides a person's participation in the fundamental goods, see *NATURAL LAW*, *supra* note 7, at 100–27.

30. See *NATURAL LAW*, *supra* note 7, at 284–90.

health by others. The second, however, is not so direct. George points out that the duty to protect health tells us that we need, for example, some system of traffic regulation so as to protect in a proactive fashion (rather than in simply a prohibitive manner) the health of drivers, passengers, and pedestrians. Reflection on the same duty to protect health, however, cannot determine the perfect or ideal system of traffic regulation. Such consideration cannot tell us whether it is better to drive on the left or the right.³¹

More generally, there is a positive right to health care. Humans enjoy a high degree of creativity within the parameters of a certain framework when it comes to giving practical effect to a positive health care right. In George's words, "[a] number of different schemes—bearing different and often incommensurable costs and benefits, risks and advantages—are consistent with the natural law."³² This means that instead of seeking to deduce policies that attempt to give *direct* effect to a positive right to health care, legislators and policy-makers must engage in an activity of the practical intellect of the type that Aquinas called *determinatio*.³³ While the policy-maker cannot identify an ideal system of providing health care that is uniquely correct, he can identify a number of options that meet the test of right reason, even if some of the options may be somewhat incompatible with each other. To illustrate the point, George uses the example of an architect designing a building.³⁴ Even assuming basic usability and safety, and that certain structural elements (such as roofs or doors of a certain height) are in place, a number of acceptable, albeit sometimes incompatible, options for designing the building exist.³⁵ The same is true for realizing positive rights to health care. In practical terms, this means that while, from an NNLT position, we can certainly identify policies that violate the framework underlying a positive right to health care, no one can claim that their particular policy is *uniquely* correct in their capacity to promote such rights.

LIMITED GOVERNMENT AND SUBSIDIARITY

Though the question of actualizing a positive right to health care falls into the sphere of *determinatio*, NNLT does provide us

31. See GEORGE, *supra* note 7, at 108.

32. *Id.*

33. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. II, q. 95, art. 2, at 104–07 (Blackfriars ed. 1970) (1271).

34. See GEORGE, *supra* note 7, at 108–09.

35. *Id.* at 109.

with principles that help identify those instantiations consistent with the promotion of human flourishing and the common good, and those inconsistent with these objectives. One such filter is the inherent limits that ought to bind the activity of the state, which arise from a proper understanding of the nature of the political community and the particular common good it seeks to serve. In short, the activities of the political community—and, more specifically, the legitimate political authorities—are themselves limited by the rationale for a political community, which is to serve the common good of that community.

A particular characteristic of the political community's common good is that it is not the all-inclusive end of its members. Rather, NNLT holds that it is *instrumental* as it assists the flourishing of persons by fostering the conditions that *facilitate*—as opposed to try and directly realize—the free choice of its members to participate in the basic goods and thus engage in human flourishing. In this sense, Finnis argues, the government serves “a common good which is instrumental, not itself basic.”³⁶ The state's ways of serving this end might include, among others, interacting with other political communities, protecting its members from hostile outsiders, vindicating justice by punishing wrongdoers, and defining the responsibilities associated with particular relationships, such as contractual duties. What these activities have in common is that they are all conditions that *assist*—as distinct from directly cause—people to achieve self-mastery. It is harder, for example, to choose to pursue the good of knowledge in a situation of civil disorder. Likewise, we know that the incentives for us to work are radically diminished if there is no guarantee that others or the state will not arbitrarily confiscate our earnings.

The political community's common good thus helps us to define its legitimate authority and limit it. This translates into the state playing a coordination role with regard to (1) those communities, such as families and religious associations, which *directly* instantiate particular basic goods by virtue of their very existence and functioning, and (2) other forms of association, such as business enterprises, whose primary focus as a community is the realization of instrumental goods, such as wealth. But precisely because the state exists to facilitate an *instrumental* good—the political common good—there are limits upon the extent to which it can act. The state itself cannot make a free

36. See John Finnis, *Is Natural Law Compatible with Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 5 (Robert P. George ed., 1996).

choice on the part of a person or group of persons to participate in one or more of the basic goods.

One expression of this understanding of the limited nature and scope of state power comes through the concept of *subsidiarity*. The word itself is derived from the Latin *subsidiūm*, meaning assistance. Aquinas partially formulated this idea when he commented that it is contrary to the proper character of the state's government to impede people from acting according to their responsibilities—except in emergencies.³⁷ NNLT identifies a fuller explanation of subsidiarity in modern Catholic social teaching, such as the definition John Paul II offers in his 1991 encyclical *Centesimus Annus*. He states:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.³⁸

In the same encyclical, John Paul II also insists that:

Such supplementary interventions, which are justified by urgent reasons touching the common good, must be as brief as possible, so as to avoid removing permanently from society and business systems the functions which are properly theirs, and so as to avoid enlarging excessively the sphere of State intervention to the detriment of both economic and civil freedom.³⁹

Higher communities, such as the state, should intervene in the activities of lower bodies therefore with reference to the common good—that is, the conditions that enable all persons to fulfill themselves. Subsidiarity thus combines axioms of *non-interference* and *assistance*. It follows that when a case of assistance and coordination through law or the government proves necessary, the assisting community should accord as much respect as possible to the rightful autonomy of the assisted person or community.

The primary significance of this principle thus lies not so much in the autonomy that subsidiarity confers upon people. Rather, it lies in the fact that this autonomy is essential if people

37. See THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, pt. I, ch. 71, at 238–39 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975).

38. Pope John Paul II, Encyclical Letter, *Centesimus Annus* ¶ 48 (May 1, 1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.

39. *Id.*

are to choose freely any of the basic goods. Subsidiarity has therefore less to do with the potential efficiency gains it may promote than with the need for people to engage in integral human flourishing under their own volition—that is, through acting and doing things for ourselves as the fruit of our own reflection, choices, and acts, rather than having others do them for us. The principle of subsidiarity also reminds us that there are numerous free associations and communities that precede the state and establish many of the conditions that assist people to achieve perfection. They thus have a primary responsibility to give others what they are objectively owed in justice.

A number of factors complicate the state's particular ability to perform its assistance role. One is the knowledge problem. Attempting to determine all the conditions that constitute a political community's common good is a difficult exercise. Though some elements are constant—such as the protection of innocent life—the totality of these conditions is never static. The state authorities cannot know everything about all the conditions that constitute a political community's common good at any one point in time. Governments, legislators, and judges are not, for example, in a position to know the total, ever-changing number and particular character of all the obligations incumbent upon all individuals and associations in a given society. Another significant problem is the fact that the people occupying positions of state authority are not perfect. They are as prone as anyone else to making mistakes of acting outside their area of competence, or even abusing their position for personal interest.

We thus face dilemmas. If we are to flourish as human beings, we need to act under our own volition. Yet we cannot do so if the state constantly preempts our decisions. On the other hand, the absence of certain prerequisites that rely heavily upon state authority for their efficacy, such as rule of law, may unreasonably limit our opportunities for free choice.

When it comes to giving effect to health care rights, NNLT's articulation of the reasons for limiting government power, especially as concretized through the principle of subsidiarity, appear to suggest that proposals that seek to realize these rights practically exclusively through a state-administered system (such as Britain's National Health Service) normally constitute a violation of these principles. Of course, this leaves open the question of the different ways in which the state might assist in the realization of such rights. It does not exclude the possibility that, where no other community is capable of fulfilling health care requirements, the state might have to meet directly certain essential

needs.⁴⁰ But an NNLT standpoint would in most circumstances exclude as an option the state's assumption of near total control of a given nation's health care system.

Instead, subsidiarity implies that the bulk of the state's contribution to giving effect to a right to health care should be indirect and, in many instances, quite remote. These might include policies such as tax-breaks for health care research and the provision of health care services for those without any other means of securing basic health care needs. More remote (albeit arguably essential) contributions might include the provision of laws that establish the basic requirements of public order, without which any provisions of health care by private or public means is extremely difficult. Another could be the state's maintenance of a system of rule of law and enforcement of property rights and contracts, without which free market-orientated approaches to health care, for instance, could not function.⁴¹

The same principles, however, suggest that efforts to give effect to a positive right to health care ought to lie primarily with those communities and associations that are closest to the person in need. The first community, for example, that ought to address the sickness of a child should be the child's family. It is not the primary responsibility of state officials to ensure that a child with a bad cold receives sufficient rest or that an elderly person who has difficulty walking is able to go grocery shopping so as to purchase sufficient supplies of food and medicine. But as Christopher Tollefsen notes, "the state properly has within the scope of its concern all persons within its borders. Consequently it falls to the state to correct for the inevitable gaps in the scope of concern of voluntary associations."⁴² It follows that the state

40. For a discussion of the steps that the state may take to secure the resources needed to fulfill its particular responsibilities to realizing negative and positive rights to health care (including the implications for tax policy), see Joseph Boyle, *Fairness in Holdings: A Natural Law Account of Property and Welfare Rights*, in 18 *SOCIAL PHILOSOPHY & POLICY* 206, 206–26 (2001). For an analysis of the requirements of the different modes of justice (legal, distributive, and commutative), see *NATURAL LAW*, *supra* note 7, at 16–93.

41. NNLT recognizes that a consideration of the empirical merits of different proposals is appropriate. In a case study of a moral dilemma related to health care, Grisez underscores how the implementation of public health care programs has produced significant dysfunctionism in the provision of health care as a result of such programs' distorting impact upon the workings of financial incentives on people's decision-making concerning their perception of their needs and its relationship to the consumption and allocation of resources. See 3 *GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS* 417–18 (1997).

42. Christopher O. Tollefsen, *Welfare Rights vs. Welfare States*, *PUBLIC DISCOURSE* (Nov. 21, 2008), <http://www.thepublicdiscourse.com/2008/11/110>.

may intervene directly, but only when it is clear there is no other association or community in closer proximity to those with a particular health care need, or that all other associations and communities have failed or proved unable to realize the need. Moreover, even in those instances when the state appears to be the only institution capable of meeting the need, the principle of subsidiarity suggests that once a non-state community or association has emerged which is capable of addressing the health care need, then the state ought to begin devolving many of its responsibilities to the new community or association (or to a community that has recovered its capacity to meet the need). If the state sought to remain in control or to exercise primary responsibilities in light of such developments, then it would significantly impede the capacity of individuals and communities to promote or directly participate in the good of health, be it through improving their own health or that of others. Tollefsen captures the essence of the problem when he writes that “a state that resists giving individuals the discretion to make these self-constituting choices as regards the identification and satisfaction of their obligations removes from those individuals a key axis along which they may shape themselves as the persons they should be. Such a state seems, to that extent, unjust.”⁴³

CONCLUSION

Those seeking an explicit endorsement of any number of specific systems of health care provisions from the perspective of NNLT (or, for that matter, the viewpoint of any other natural law theory) are likely to find disappointment instead. Even within the parameters outlined above, NNLT allows considerable scope for acts of *determinatio*. In part this reflects the practical reality that, as Grisez observes, “[n]o system of paying for health care adequately covers every person or every need for professional help.”⁴⁴ Nevertheless, NNLT does set parameters for assessing any system that purports to actualize positive rights to health care. It explicitly rules out outright collectivization of health care in most circumstances, as well as any system that purports to deny *any* role—even extremely remote—for the state in helping to give effect to a positive health care right. The real significance, however, of NNLT for debates about health care rights is that it does provide coherent grounds for (1) identifying negative rights flowing from the good of health, (2) affirming that there are positive health care rights derived from the same basic good, and (3)

43. *Id.*

44. Grisez, *supra* note 23, at 156.

deriving a stable framework of principles to guide moral and policy reflection concerning how to realize both positive and negative rights in light of constraints, such as limited resources and people's need to choose to participate in other fundamental goods alongside the good of health.

