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Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution

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REDISTRIBUTING PROPERTY: NATURAL LAW, INTERNATIONAL NORMS, AND THE PROPERTY REFORMS OF THE CUBAN REVOLUTION

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I. INTRODUCTION

Property lies at the heart of the story of the Cuban Revolution. In the years immediately following the rise of Fidel Castro, Cubans (particularly in rural areas) who had previously lived in abject poverty found their situation greatly improved as a result of the redistributive measures undertaken by the new government. On the other hand, hundreds of thousands of middle-class Cubans fled to the United States and elsewhere, leaving behind virtually all of their property: family homes, businesses, farms, clothes, cars, and photographs. Unable to carry their belongings with them, most of the Cuban refugees left with, as the Cuban saying goes, "one hand in front and one hand behind." Many Cuban émigrés have

rebuilt their lives, replacing their lost homes with new ones and establishing new roots in the United States and elsewhere. Many, however, retain a strong desire to recover properties that were lost.

In addition to the Cubans who were affected, both for better and for worse, American companies that had been doing business on the island for decades suddenly found themselves nationalized or "intervened." The adverse effects of the Cuban government's reforms on property belonging to U.S. nationals (largely U.S. corporations), helped to shape the U.S. policy response to the new Cuban government. The decades-old U.S. embargo against Cuba, imposed out of anger over the harm to these property interests on the island, remains in place to the present day, still justified by the demand that the Cuban government compensate American citizens who lost property as a result of its reform efforts.[1]

The study of the Cuban revolution's property reforms, and the subsequent conflict between the United States and Cuba over compensation, reveals an area of confusion within the international law. International law, which has been characterized since the Enlightenment by its increasing tendency towards positivism, is incapable of giving a clear answer to the question of whether or not the Cuban government wronged the U.S. nationals or the Cuban people as a result of its property reforms. The absence of consensus regarding state practice on the issue of compensation for expropriated private property, and the resulting lacuna within customary international law, points towards the desirability of a different approach to property issues within the international law.

Some might argue that the issue of international standards for property reform is a moot one. Despite conflicts in the 1970s and 1980s over the responsibilities of formerly colonized states towards foreign-owned property,[2] the post-Soviet era has seen the growth of a consensus around liberal markets and property rights.[3] Nevertheless, as the recent economic crisis in Asia demonstrates, it may be too early for the neoliberals to cry absolute victory. The sudden and violent dismantling of several years of economic progress in that region has led some states to question their commitment to the principles of economic liberalism.[4] A prolonged economic crisis in the developing world could quickly reignite the question

1. *See* Cuban Liberty and Democratic Solidarity (Helms-Burton) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified in scattered sections of U.S.C.).

2. The debate within the United Nations over the New Economic Order was typical of these conflicts.

3. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 458 (1995).

4. *See, e.g.*, Michael Zielenziger, *Asian Confidence in Free-Market Weak, Rise of New Era of Protectionism Feared by Analysts*, THE ARIZONA REPUBLIC, Sept. 4, 1998, at E3 ("Asia is losing confidence in the free-market medicine [of] the IMF and the United States . . . .").

of how and when states may expropriate the property of foreign nationals.

This Article compares two different models of international law: the classical international model, which is characterized by its focus on states, its lack of concern for how states treat their own citizens, and its pervasive positivism; and the human rights model, which is characterized by its interest in entities other than states (especially individuals), its desire to regulate the way a state treats even its own citizens, and by its embrace of moral discourse. The rise of the human rights model in the years following the Second World War represents a direct challenge to the classical international law model. The former's moral outlook and willingness to peer within state boundaries finds no precedent within the classical system.

Most analyses of property issues under international law assume the appropriateness of the classical international law model. This Article will argue, however, that the human rights model is the correct one for exploring the problems raised by property redistribution. This human rights approach takes the form of a set of minimum, international standards for the state's treatment of private property that can be augmented—but not reduced—by international consensus. Because they are formulated in the language of human rights, these minimum standards apply to both nationals and aliens within the expropriating state. In searching for a source for the content of the human property rights, this Article opts for the natural law tradition.[5] Not only does the Thomistic tradition of natural law provide the most secure basis for human rights, it is also able to reconcile the human rights model to the classical international law model.

A thorough evaluation of the Cuban Revolution's property reforms requires an understanding of the historical context from which those reforms emerged. Part II of this Article, therefore, provides a brief overview of Cuban history, with an emphasis on the patterns of Cuban property-ownership in the years leading up to the Cuban revolution. It discusses the content of the various reforms of the property system undertaken by the revolutionary government and explains the recent changes promulgated in the wake of the disintegration of the Soviet Union. While the earlier reforms collectivized most (but not all) Cuban property,

5. By natural law, I refer principally to the Aristotelian tradition of thought developed by Saint Thomas Aquinas in the 13th century. This notion should be distinguished from the vague, and often confused, conception of natural law that seems to prevail within international law scholarship. International law scholars often speak of the history of modern international law as characterized by a conflict between natural law and positivism. *See, e.g.*, MARTII KOSKENNIEMI, FROM APOLOGY TO UTOPIA, at xiv (1989) (describing the tendency of international legal theory to take the form of debates between "naturalism" and "positivism"); James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT'L L.J. 327, 330 (1985) (describing the debate between "naturalism" and "positivism"). It is far from clear, however, that by "naturalism" those international law scholars are referring specifically to the Thomistic version of that wide category of theories.

the post-1989 policies have amounted to a significant shift towards the liberalization of Cuba's property system.

In Part III.A, the process of evaluating the justice of the Cuban property reforms begins by contrasting two different conceptions of international law: the classical international law model and the human rights model. In Part III.B, an exploration of the international law of expropriation shows that the classical international law model is incapable, on its own terms, of producing a non-arbitrary set of international norms to govern property reform. This inability points towards a deeper problem within the positivistic model of classical international law: its impotence when confronted with ambiguity within its identified "sources." As a result, this Article adopts the human rights model as a promising means for developing the norms required for an evaluation of the Cuban property reforms.

In Part III.C, I argue that the human rights model is most at home within a natural law conception of international law. This argument begins with an overview of the Thomistic theory of natural law. It continues with the historical observation that the modern conception of international law, including the notion of universal human rights, emerged from within the context of a natural law ethic. It argues that the positivistic notion of international law is unable to bear the normative weight required to rationally justify international obedience to its terms and is, in fact, somewhat incoherent. The positivistic model of international law is a particularly weak basis for the construction of a system of universal human rights. Finally, the argument concludes by discussing why other ethical theories are unable to do the job of serving as the foundation for either international law in general or human rights law in particular and explaining why the traditional objections to natural law are unpersuasive. The natural law theory is able to justify both an obligation to respect customary international law and a determinate set of universal human rights. A natural law approach to international law would posit a series of universal human rights derived from the natural law, overlaid by a structure of norms rooted in international custom, the *ius gentium*.

After thus laying the groundwork, Part III.D proceeds to analyze the problem of expropriation from the natural law perspective. The first step in this undertaking requires the elaboration of a natural law theory of human rights in property. After setting out the basic structure of a natural law theory of property—based upon the notion of human dignity—the Article applies the theory of property for dignity in Part IV to the three groups most affected by the Cuban property reforms: Cubans who remained in Cuba after the revolution, Cubans who left Cuba, and North Americans who owned property in Cuba at the time of the revolution. The result is a mixed one, with some of the Cuban property reforms (for example, those taking property from U.S. corporations) largely falling

within the bounds of the minimum standards mandated by natural law and others (for example, those eliminating small businesses) going beyond what the natural law permits.

II. PROPERTY IN CUBAN HISTORY

A. *Introduction*

The story of the Cuban revolution begins long before 1959. As with so many historical events, it is impossible to interpret the abrupt changes of that year without a clear understanding of the preceding history. Developing such an understanding will allow an evaluation of the Cuban reforms that is sensitive to the Cuban context and that avoids overly simplistic answers. Although obviously limited by constraints of space, this Part seeks to provide an outline of the historical context necessary for a sufficiently nuanced assessment of the justice of the reforms in Cuban property relations that followed Fidel Castro's rise to power.

The most striking feature of the 1959 Revolution, when studied within the broader context of Cuban history, is its ultimate continuity with earlier movements for change in Cuban society. Indeed, the causes of the Cuban revolution stretch back into the Spanish colonial era; they were nourished by decades of bloody struggle for independence and over a half-century of neo-colonial domination by the United States. From this story emerge three recurring themes that characterize Cuban history prior to the revolution: first, constant foreign domination (up to 1898, Spanish, and after 1898 North American); second, striking inequality in the distribution of wealth; and finally, repeated frustration by the United States of attempts to alter either of these two conditions. The interplay of these three themes strongly influenced the course of Cuban history, affecting many of the decisions taken early in the years following the triumph of the 1959 Revolution.

B. *The Colonial Era*

Cuban economy and life have always been dominated by the rhythms of its agricultural system.[6] No other sector of the Cuban economy has had as profound an influence on the structure of Cuban society. The social system that Cuban revolutionaries set out to reform in 1959 had its ultimate origins in the agricultural and economic policies of the Spanish colonial regime.

Over the century prior to the Cuban war for independence, Spanish colonial policy encouraged the formation of large agricultural estates and

6. *See* DUDLEY SEERS ET AL., CUBA: THE ECONOMIC AND SOCIAL REVOLUTION 67 (1964).

helped to destroy small-scale farmers.[7] In the province of Matanzas, Havana-based absentee landlords forced small tobacco farmers from their land to establish large-scale sugar monoculture.[8] Land ownership throughout Cuba became extremely concentrated, leading to the creation of an enormous population of landless agricultural workers.[9] A large number of farmers worked the land in lease arrangements, called the *colono* system, whereby they agreed to pay a fixed percentage of their agricultural output (usually in sugar) to the landowner in exchange for the right to work the land.[10] Although scholars have hesitated to assign the label of "*latifundia*" to the land regime under Spanish rule, Laird Bergad argues that extreme concentration of land ownership was well underway prior to Cuban independence.[11]

The benefits of Cuban agricultural development were quite unevenly distributed. Small planters, who made up nearly three quarters of the population of Matanzas, for example, earned only one to two percent of the total income in the province.[12] Instead, most of the income from sugar production flowed to elites, who tended to live in urban areas, particularly Havana.[13] This steady draining of profits from the rural to the urban areas of Cuba helped to create a deep urban-rural divide in the standard of living which continued to characterize the Cuban social structure until the 1959 revolutionary reforms.[14] As Bergad observes, "Sugar may have generated fortunes for the elite of Havana, but by the end of the nineteenth century most of the people in [rural] Matanzas . . . entered the twentieth century having enjoyed few improvements in their collective condition."[15]

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7. *See* LAIRD W. BERGAD, CUBAN RURAL SOCIETY IN THE NINETEENTH CENTURY: THE SOCIAL AND ECONOMIC HISTORY OF MONOCULTURE IN MATANZAS 12-13 (1990). Technological factors, such as the use of steam power in sugar mills and the establishment of railroads, also encouraged the development of large-scale agricultural production to achieve economies of scale. *See* LOWRY NELSON, RURAL CUBA 88 (1970); SEERS ET AL., *supra* note 6, at 75.

8. *See* BERGAD, *supra* note 7, at 14, 141, 159. According to Bergad, elites did not rest "until every area of . . . [Matanzas] was under their control." *Id.* at 15.

9. *See id.* at 281-83.

10. *See id.* at 264, 278-80. Landowners typically retained close to 50% of the agricultural output of such *colono* land. *See id.* at 280.

11. *See id.* at 289-92 (admitting that the concentration of land ownership achieved under Spanish rule did not rise to the level of *latifundia*, but arguing that the Spaniards created the necessary preconditions that allowed such a system to emerge under U.S. economic domination in the 20th century).

12. *See id.* at 163.

13. *See id.* at 159, 337 (arguing that sugar money was steadily siphoned out of the Matanzas province to the Havana-based elite).

14. *See* SEERS ET AL., *supra* note 6, at 95-97 (describing the gap between Cuba's urban and rural populations).

15. BERGAD, *supra* note 7, at 337.

C. *The Cuban War for Independence*

Cuba's status as the last Spanish colonial possession in the Western Hemisphere served the dual role of creating a heightened sense of Cuban nationalism and strengthening the resolve of the Spanish government to retain control of Cuba at almost any cost.[16] The second half of the nineteenth century was punctuated by repeated, and often bloody, attempts to free Cuba from Spanish colonial rule.[17] Unlike the leaders of other Latin American independence movements, the leaders of the Cuban War for Independence sought not only to free Cuba from foreign rule, but also to transform the structure of Cuban society.[18] Louis A. Pérez observed that the belief "that the sources of oppression in Cuba were more internal than external, and, further, that the forms of oppression were more social than political, served as the central premises around which armed separation took definitive shape between the 1880s and 1890s."[19] Local elites, as much as Spaniards, were the targets of the revolutionaries, who sought to remake Cuban society into a nation of small landholders through a deliberate policy of land redistribution.[20]

The social goals of the revolutionary leaders sparked fears among local elites about their ability to retain a privileged position within an independent Cuban society. This fear, which had distinctive racial overtones, led them to appeal to the United States for protection.[21] In 1896, one year after the outbreak of the war, 100 planters, lawyers, and

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16. *See* LOUIS A. PÉREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION 103 (1988) [hereinafter CUBA] (noting that the independence of the continental Spanish possessions increased the symbolic importance of Cuba within the dwindling Spanish empire); RAMON EDUARDO RUIZ, CUBA: THE MAKING OF A REVOLUTION 19 (1968) (discussing the role of Spanish rule in the creation of a tradition of Cuban nationalism).

17. *See* CUBA, *supra* note 16, at 158.

18. *See* Roberto Fernández Retamar, *The Modernity of Martí*, *in* JOSÉ MARTÍ: REVOLUTIONARY DEMOCRAT 1, 6 (Christopher Abel & Nissa Torrents eds., 1986) [hereinafter MARTÍ] (describing South American independence leaders as conservatives and Cuban revolutionary leaders, particularly Martí and Maceo, as "radicals"); CUBA, *supra* note 16, at 160. Some Cuban scholars have sought to portray Martí, the ideological father of the Cuban war for independence, as a sort of proto-Marxist. *See* Jorge Ibarra, *Martí and Socialism*, *in* MARTÍ, at 83. However, his social vision seems to have been more properly characterized as corporatist. *See* Gerald E. Poyo, *José Martí: Architect of Social Unity in the Émigré Communities of the United States*, *in* MARTÍ, at 16, 20 ("Martí's vision of the new revolutionary movement, then, brought together all classes and races behind a movement dedicated to an independent Cuban republic based on principles of social justice for all."). Thus, Martí was able to attract adherents from among both workers and factory-owners, the poor and the affluent. *See id.* at 21, 23; CUBA, *supra* note 16, at 160 (discussing the revolutionary movement's broad appeal).

19. CUBA, *supra* note 16, at 159.

20. *See id.* at 161-64.

21. *See id.* at 174. Many of the leaders of the revolutionary army were men of color. *See id.* at 160.

industrialists in Cuba petitioned the United States government to intervene.[22] They hoped that the United States would be better able to protect their property-interests than had the Spaniards,[23] and many overtly hoped for the U.S. annexation of Cuba.[24] Their hopes were fulfilled in 1898, and the United States intervened when all signs pointed towards an imminent Cuban victory.[25] Although U.S. involvement was brief and the United States forces lost only around 100 soldiers[26] (as compared to tens of thousands of Cuban dead[27]), the United States claimed responsibility for the victory and sought to discredit the Cuban revolutionaries as incapable of either winning or exercising their own sovereignty.[28]

There were many motives for the U.S. intervention in the Cuban independence struggle. The United States had long harbored desires to annex the island, which it saw as a natural extension of its own territory.[29] Although annexation of Cuba was politically impracticable[30] (and, for many Americans, racially undesirable[31]), the United States saw true Cuban self-government as out of the question and instead favored a tutelary regime under U.S. domination.[32] Cuban independence was seen as beyond the abilities of an inferior race,[33] and U.S. imperial domination over the

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22. *See id.* at 174.

23. *See id.*

24. *See* JULES R. BENJAMIN, THE UNITED STATES AND THE ORIGINS OF THE CUBAN REVOLUTION 46 (1990).

25. *See* CUBA, *supra* note 16, at 175. *But see* JAIME SUCHLICKI, CUBA: FROM COLUMBUS TO CASTRO AND BEYOND 79 (1986) (implying that the Cuban forces were at a stalemate with the Spaniards at the moment of U.S. intervention in 1898). Although they disagree on the ability of the Cuban army to win independence without the assistance of the United States, both Suchlicki and Pérez agree that the motives for U.S. intervention were less than altruistic. *See* CUBA, *supra* note 16, at 177-78; SUCHLICKI, *supra*, at 79.

26. *See* RUIZ, *supra* note 16, at 21.

27. *See* CUBA, *supra* note 16, at 167.

28. *See id.* at 179. Leaders of the Cuban independence movement were even excluded from Spain's surrender ceremonies in Santiago. *See* BENJAMIN, *supra* note 24, at 53.

29. *See Benjamin*, *supra* note 24, at 7-9. John Quincy Adams had earlier said, that

> if an apple severed by the tempest from its native tree cannot choose but to fall to the ground, Cuba, forcibly disjoined from its unnatural connection with Spain... can gravitate only toward the North American Union, which by the same law of nature cannot cast her off from its bosom.

Id. at 8.

30. *See id.* at 50 (discussing the Senate's passage of the Teller Amendment, which stated that the United States disclaimed any desire to exercise sovereignty over Cuba).

31. *See id.* at 17.

32. *See* CUBA, *supra* note 16, at 177.

33. *See id.* at 180. United States General Samuel B.M. Young said of the Cubans, that they "are a lot of degenerates .... They are no more capable of self-government than the savages of

Caribbean was practically considered a given.[34] Thus, the United States occupied Cuba militarily, refusing to withdraw until Cuba amended its constitution to include a provision, the infamous Platt Amendment, allowing the United States to intervene whenever it thought intervention necessary to protect Cuban independence.[35]

The U.S. decision to intervene in the Cuban War for Independence had several long-term effects on the subsequent course of Cuban history. First and foremost, it laid the groundwork for continued U.S. colonial domination of Cuba. Second, it served to preserve the extant colonial social order.[36] Third, it facilitated the penetration of the Cuban economy by U.S. capital.[37] Finally, the U.S. denial of true independence to Cubans created, among Cubans, a heightened sense of nationalism that tended to express itself in harshly anti-American terms.[38]

D. *Era of Neocolonial Domination (1902-1959)*

The period between the end of the U.S. occupation of Cuba in 1902 and the Cuban Revolution in 1959 was one of consistent U.S. domination of events on the island. Historians in Cuba often refer to this as the period of the "pseudo-republic." The half-century between occupation and revolution saw an entrenchment of economic inequality in Cuban society and an extension of U.S. domination into almost every sphere of Cuban life.

The concentration of land ownership that began under Spanish

Africa." *Id.* at 180. In contrast, the United States believed that "[t]he 'better classes,' the propertied, the educated, the white... wanted close and permanent ties with the United States." *Id.* at 181. This interpretation of elite sentiment was probably fairly accurate, because white propertied elites did in fact view U.S. intervention as a deliverance from expropriation at the hands of reform-minded revolutionaries. *See id.* at 182. This perception tended to break down along racial lines, with whites far more in favor of U.S. intervention than blacks. *See* RUIZ, *supra* note 16, at 25.

34. *See* WALTER LAFEBER, THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD SINCE 1750, 196-97 (1989).

35. *See id.* at 197. Cubans rightly interpreted the Platt Amendment as a denial of true sovereignty. *See* RUIZ, *supra* note 16, at 33 (noting that the Platt Amendment reduced Cuba to a state of vassalage). In response, the Cubans marked its adoption with a torch-light protest. *See* PÉREZ, *supra* note 16, at 187.

36. *See* BENJAMIN, *supra* note 24, at 71 (arguing that Washington D.C. served as the guarantor for Spanish property rights after 1898, preventing the achievement of any of the independence movement's social goals); *see also* CUBA, *supra* note 16, at 192 ("The United States had not only rescued and revived the moribund colonial order, it had also assumed responsibility for its protection and preservation.").

37. *See* BERGAD, *supra* note 7, at 324; NELSON, *supra* note 7, at 94; CUBA, *supra* note 16, at 195-97; RUIZ, *supra* note 16, at 40; Louis A. Pérez, Jr., *Insurrection, Intervention and the Transformation of Land Tenure Systems in Cuba, 1895-1902*, 65 HISPANIC AM. HIST. REV. 229, 254 (1985).

38. *See* RUIZ, *supra* note 16, at 39.

colonial rule continued after 1902. As sugar production increasingly dominated the Cuban agricultural economy, land ownership became concentrated in fewer and fewer hands.[39] Small landowners sold their land to *centrales* (large sugar-mills) and became tenant farmers or landless rural laborers.[40] By the mid-1920s, *centrales* owned twenty percent of the total area of Cuba.[41] By the eve of the revolution, land ownership had been even further concentrated, such that 0.1% of all Cuban farms accounted for twenty percent of agricultural land, and eight percent of the farms controlled 70% of the land.[42] If historians hesitated to assign the label of "*latifundia*" to the colonial land-tenure system,[43] few failed to do so with the regime that evolved in the years leading up to the 1959 revolution.[44]

A high percentage of the land in the hands of large-landholders was severely underutilized and farmed using inefficient methods. The largest estates cultivated only about ten percent of their acreage, while the smallest tended to cultivate a higher percentage.[45] Much of the uncultivated land was simply held in reserve by large landholders for times when sugar prices rose.[46] Scant resources were dedicated to agricultural research and sugar planters made few investments in technical improvements that would increase agricultural output.[47]

In addition to extreme inequality in land tenure patterns, pre-revolutionary Cuban society was characterized by highly unequal distribution of wealth and resources, especially along a rural-urban axis. Although on the aggregate level, Cubans were among the wealthiest people in Latin America, the numbers hid an enormous divide between the standard of living of the wealthiest and the poorest Cubans, with the latter concentrated in rural areas.[48] Conditions for rural Cubans before the

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39. *See id.* at 42 (discussing the emergence of sugar monoculture in the period after independence and its dominance by American bankers, managers, and technicians).

40. *See* NELSON, *supra* note 7, at 94-103. Cuban economic organization has been described as agrarian, but on a "capitalist" model. *See* BERGAD, *supra* note 7, at 21-22. The landless laborers who emerged in the wake of the concentration of land-ownership have thus been categorized as a rural wage-workers, rather than subsistence farmers. *See* RUIZ, *supra* note 16, at 44.

41. *See* NELSON, *supra* note 7, at 94.

42. *See id.* at 167.

43. *See supra* note 11 and accompanying text.

44. *See, e.g.*, BERGAD, *supra* note 7, at 289 (contrasting the colonial land regime with the "*latifundia*" that emerged under U.S. domination); NELSON, *supra* note 7, at 116 (describing the sugar economy as one characterized by "*latifundia*"); CUBA, *supra* note 16, at 301-02 (describing that vast areas of Cuba's rural land was held in *latifundia* form).

45. *See* SEERS ET AL., *supra* note 6, at 84.

46. *See id.* at 85-86. Additionally, *centrales* often left cultivated land unharvested if there was not sufficient demand at harvest time. *See id.* at 86.

47. *See id.* at 90-93.

48. *See* CUBA, *supra* note 16, at 302 (describing the difference in standard of living between urban and rural areas in Cuba prior to the revolution).

revolution have been described as "squalid."[49] Most rural dwellings had dirt floors, 90% lacked electricity and running water; two-thirds of family expenditures were on food; only 11% of rural residents had routine access to dairy products, only 4% ate meat, and only 2% ate eggs.[50] Thirty percent of rural Cubans suffered from parasites, close to half were illiterate, and almost 90% failed to study beyond the third grade.[51] Rural laborers suffered from chronic seasonal unemployment that followed the pattern of the sugar crop.[52] Although poverty was most severe in rural areas, even in urban areas, the poor lived in miserable conditions.[53]

In the period before 1959, U.S. domination of Cuba took the form of repeated interventions, both in the form of overt military invasion and behind-the-scenes manipulations of political events within Cuba. Overt political and military intervention was accompanied by increasing North American penetration of the Cuban economy. North American corporations, such as the United Fruit Company, came to control an enormous proportion of Cuban agriculture, at one point owning 60% of Cuba's rural land[54] and 75% of its sugar industry.[55] Further, U.S. corporations acquired most of the Cuban industries and utilities.[56] The United States likewise dominated Cuban trade, buying most of its sugar output and supplying in exchange (under preferential tariff agreements) most of its imported goods.[57]

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49. SEERS ET AL., *supra* note 6, at 97.

50. *See id.* at 95-97.

51. *See id.* at 97.

52. *See* CUBA, *supra* note 16, at 299.

53. *See* RUIZ, *supra* note 16, at 46. "The majority of rural and urban workers enjoyed a thin slice of prosperity.... They were ill-fed, ill-housed, poorly schooled, and indifferently governed." *Id.* Although Cubans were relatively wealthy by Latin American standards, at least in terms of aggregate data, a comparison of Cuba to other Latin American nations is inapt. *See id.* at 10. Cuba operated within the North American economic sphere and Cubans, therefore, tended to compare themselves to North Americans. *See id.* at 8-9. Further, the cost of living in Cuba was much closer to that in the United States than in other Latin American nations. *See id.* at 10; *see also* CUBA, *supra* note 16, at 297 (comparing the per capita income of Cubans to that of residents of the United States and Mississippi and noting that life in Havana was more expensive than in many North American cities); Louis A. Pérez, Jr., *The Circle of Connections: One Hundred Years of Cuba-U.S. Relations*, *in* BRIDGES TO CUBA/PUENTES A CUBA 161, 175-78 (Ruth Behar ed., 1995) (describing pre-Revolutionary Cuba's tendency to identify and compare itself with North American rather than Latin America).

54. *See* CUBA, *supra* note 16, at 197.

55. *See* MORRIS H. MORLEY, IMPERIAL STATE AND REVOLUTION: THE UNITED STATES AND CUBA, 1952-1986, at 32 (1987).

56. *See id.* By 1929, American investment in Cuba accounted for 25% of total U.S. investment in Latin America, dominating Cuban industry in the areas of sugar, tobacco, railroads, iron ore, copper, manganese, telephone, telegraph, banking, docks, fruit, warehouses, public utilities and hotels. *See id.*

57. *See* BENJAMIN, *supra* note 24, at 69.

Just as North American control of large segments of the Cuban economy gave the United States strong incentives to pay close attention to political events in Cuba, so too U.S. economic penetration of the island (along with the Platt Amendment's provisions) gave U.S. policymakers powerful tools for enforcing their will on the island. The United States wielded its power in defense of its interests, frustrating the efforts of local reformers to realize the goals of the 1895 revolutionaries. In 1933, when reform-minded students and workers brought down the Machado dictatorship and replaced him with university professor Grau San Martín, the United States grew alarmed. Sumner Welles, U.S. ambassador to Cuba, reported that "American properties and interests are being gravely prejudiced. . . ."[58] The United States began a program of diplomatic maneuvers to isolate and destabilize the new regime.[59] It refused to recognize the Grau government and was extremely supportive when he was overthrown by a military coup led by Fulgencio Batista in early 1934.[60]

Despite these U.S. efforts, the Cuban Constitution of 1940 reflected the views of the 1933 revolutionaries more than it did those of the conservative forces in Cuban society.[61] It outlawed *latifundia*[62] and placed limits on the foreign ownership of Cuban property.[63] The 1940 Constitution was seen by Washington as dangerous to its property interests, but, under a series of corrupt governments that ruled Cuba between 1940 and 1959, its more progressive provisions were never enforced.[64]

E. *The 1959 Revolution*

The initial goals of the 1959 revolution were roughly the same as those of both the independence movement and the 1933 revolutionaries, although with a more radical orientation.[65] Broadly speaking, the goals were a

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58. CUBA, *supra* note 16, at 270. For a description of the goals of the anti-Machado movement, and U.S. opposition to its success, see RUIZ, *supra* note 16, at 80-89.

59. *See* CUBA, *supra* note 16, at 270-71.

60. *See id.* at 275. As a favor to the new Batista government, the United States agreed to abrogate the Platt Amendment in 1934. *See id.* at 279.

61. *See id.* at 281.

62. *See* CONSTITUTION OF THE REPUBLIC OF CUBA (1940) art. 90, *reprinted in* THE CONSTITUTIONS OF THE AMERICAS 226, 245 (Russel H. Fitzgibbon ed. 1948) ("*Latifundia* are outlawed, and in order to effect their disappearance the law shall stipulate the maximum extent of property that each person or corporation may possess for each type of exploitation for which the land may be employed.").

63. *See id.* ("The law shall restrictively limit acquisition and possession of land by foreign persons and companies, and shall adopt measures tending to revert the land to Cuban ownership.").

64. *See* BENJAMIN, *supra* note 24, at 97 (describing the negative reaction of the United States to the 1940 Constitution); CUBA, *supra* note 16, at 281-82; RUIZ, *supra* note 16, at 105-10.

65. *See, e.g.*, RUIZ, *supra* note 16, at 168-69 (discussing the broad social goals of Castro's movement before 1959 and noting its similarity to earlier revolutionary movements); *see also*

redistribution of property (particularly in rural areas), political reform, and greater independence from U.S. domination.[66] Thus, although the 1959 revolution must be seen as something fundamentally different from anything that had come before in Cuban history,[67] it also shared a certain continuity with earlier movements.[68]

The U.S. reaction to the Cuban revolution was also consonant with its earlier efforts to block change in Cuba. As it had in 1933, the United States sought to control the development of the situation through behind-the-scenes manipulation. Thus, even before Castro came to power, the United States, through the CIA, funneled money into anti-Batista, anti-Castro groups, hoping to find a moderate alternative to a Castro government.[69] Although later framed in terms of anticommunism, the consistency of the U.S. reaction to the 1959 revolution with its reaction to pre-Cold War attempts at revolutionary change within Cuba belie anticommunism as the true (or at least only) cause of U.S. opposition. Instead, the primary concerns of the United States were initially with the protection of the sizable U.S. investments and property interests in Cuba.[70]

MONA ROSENDAHL, INSIDE THE REVOLUTION: EVERYDAY LIFE IN SOCIALIST CUBA 108 (1997) (describing how 1959 revolutionaries were inspired by the thinking of earlier Cuban movements, particularly by José Martí).

66. *See, e.g.*, CUBA, *supra* note 16, at 317 (discussing the promises of social and political reform made by the 1959 revolutionaries prior to taking power); RUIZ, *supra* note 16, at 169 (describing the anti-American content of Castro's revolutionary goals). Each element of this agenda had been present, although often in more moderate manifestations, in earlier movements for change in Cuban society. The independence struggle had sought land redistribution and an end to foreign domination. *See supra* notes 17-20 and accompanying text. Likewise, the 1933 reformers were concerned with ending *latifundia* and reforming Cuba's political system. *See supra* notes 58-64 and accompanying text.

67. *See* CUBA, *supra* note 16, at 313-15 (describing the success of the 1959 revolution as the taking of Cuba "over a threshold never before crossed").

68. There was also a self-conscious effort on the part of Castro and his allies to portray themselves as "the fulfillment of unmet aspirations and unfulfilled promises of the past." *Id.* at 314.

69. *See* BENJAMIN, *supra* note 24, at 163.

70. *See id.* at 148; MORLEY, *supra* note 55, at 47-61. This interpretation of the U.S. reaction to the Cuban revolution (i.e., as concerned primarily with the protection of U.S. property) is also consistent with U.S. responses to other efforts at property reform, both communist and non-communist, in the Third World. For a broad overview of such responses and a theory that sees within them a consistent desire to retain U.S. hegemony, see generally THOMAS MCCORMICK, AMERICA'S HALF CENTURY: UNITED STATES FOREIGN POLICY IN THE COLD WAR AND AFTER (1989). Of particular relevance to the Cuban revolution was the U.S. response to a moderate property reform in Guatemala in the early 1950s. In that case, a clearly noncommunist agrarian reform led the United States, through the CIA, to organize a coup against the elected Guatemalan government in 1954. *See* Jim Handy, *"The Most Precious Fruit of the Revolution": The Guatemalan Agrarian Reform, 1952-54*, 68 HISPANIC AM. HIST. REV. 704-05 (1988). For a thorough history of the Guatemalan revolution and the U.S. reaction, see generally PIERO GLEIJESES, SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944-1954 (1991). The Guatemalan case is of particular importance because Ernesto "Che" Guevara, a key participant in the Cuban

There is debate among scholars as to the precise date when the United States began to work actively to *overthrow* the Castro government,[71] but it is beyond question that U.S. opposition to the policies of the revolutionary government began well before Castro embraced the Soviet bloc.[72] The United States protested, for example, Cuba's first agrarian reform, a fairly moderate reform law passed in early 1959, because it feared the law would adversely affect American-owned property on the island.[73] Regardless of the precise date at which U.S. policy switched from simple opposition to active subversion, it is obvious that the central goal of U.S. policy towards Cuba since the 1960s has been the overthrow of the Castro regime.[74] Cuba's reforms of property law have played a key role in maintaining this steady policy of U.S. opposition.[75]

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revolution and in the formulation of the revolutionary government's early policies, was present in Guatemala at the time of the U.S.-sponsored coup against the reformist government there. *See* COLE BLASIER, HOVERING GIANT: U.S. RESPONSES TO REVOLUTIONARY CHANGE IN LATIN AMERICA, 1910-1985, at 177-78 (1985). Thus, through Guevara, the U.S. response to property reform in Guatemala may have helped to shape the strategies of the Cuban revolutionaries after 1959.

71. Some scholars have argued that the United States began to plan for the overthrow of the Castro regime as early as the middle of 1959, well before Castro displayed any overt tendency towards Communism. *See, e.g.*, Piero Gleijeses, *Ships in the Night: The CIA, the White House, and the Bay of Pigs*, 27 J. OF LATIN AM. STUD. 1, 3 (1995) (arguing that by June 1959, the United States reached the conclusion "that it was not possible to achieve [its] objectives with Castro in power"). Other scholars have argued, however, that the U.S. decision to overthrow Castro did not come until his actions had clearly communicated his embrace of Communism. *See* Alen H. Luxenberg, *Did Eisenhower Push Castro into the Arms of the Soviets?*, J. INTER-AM. STUD. & WORLD AFF., Spring 1988, at 37, 50 ("[I]t would appear . . . that Eisenhower waited until the evidence was in.").

72. *See* Jules R. Benjamin, *Interpreting the United States Reaction to the Cuban Revolution, 1959-1960*, 19 CUBAN STUD. 145, 152 (1989) (criticizing the traditional Cold War explanation of U.S. opposition to the Cuban revolution as ignoring the fact that the shift towards opposition to the Castro government came before the Cuban embrace of the Soviet Union or the nationalization of U.S. properties).

73. *See* BENJAMIN, *supra* note 24, at 179-80.

74. *See* MORLEY, *supra* note 55, at 72.

75. *See* Cuban Liberty and Democratic Solidarity (Helms-Burton) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified in scattered sections of U.S.C.). This is not to say that opposition to Cuban property reforms is the only basis of U.S. hostility. Also crucial to the maintenance of a adversarial relationship has been Cuba's insistence on new terms for the U.S.-Cuban political relationship. *See* David Bernell, *The Curious Case of Cuba in American Foreign Policy*, J. OF INTER-AM. STUD. & WORLD AFF., Summer 1994, at 65, 74. Furthermore, a well-organized and financially powerful anti-Castro Cuban-American lobby contributes to the ongoing tension. *See* Jorge I. Dominquez, *U.S.-Cuban Relations: From the Cold War to the Colder War*, J. OF INTER-AM. STUD. & WORLD AFF., Fall 1997, at 49, 62. Nevertheless, disputes over property have played an important role in the continuing U.S.-Cuba hostility.

F. *Property Reforms of the Cuban Revolution*

This Part will provide an overview of the various property reforms undertaken by the Cuban revolutionary government after 1959. It will avoid going into a level of detail that is unnecessary for the ethical evaluation that is to begin in the next Part. Instead, it will provide the broad outlines of the reforms and discuss how they affected various sectors of Cuban society.

The Revolution's property reforms can be broken down into two eras.[76] The first era runs from the 1959 overthrow of the Batista government to the fall of the Berlin Wall in 1989. The subsequent collapse of the Soviet Bloc and the end of substantial Soviet subsidies to the Cuban economy led the Cuban government to undertake a new set of property reforms in the early 1990s that has fundamentally changed the nature of the Cuban property system. This Part will discuss each of these eras, and their respective property reforms in turn.

1. 1959-1989

The property reforms of the Cuban Revolution sought a fundamental reorganization of Cuban society. Thus, the Revolution's reforms affected all types of property, rural and urban, commercial and personal. This Part will provide a brief overview of the most important property reforms of the pre-1989 era, dealing in turn with agricultural, residential, and then industrial and commercial properties.

a. Agricultural Property

The first important property reform enacted by the revolutionary government was the First Agrarian Reform Law of May 17, 1959. The law sought to eliminate the *latifundia* that had characterized Cuban agriculture since independence. Thus, the prologue to the law cited statistics demonstrating the extreme maldistribution of agricultural property and the under-cultivation of land on larger farms as the motivation for undertaking the reform.[77] The law was not socialist in character, but was rather in the reformist tradition of the 1952 Guatemalan agrarian reform.[78]

The reform affected approximately 85% of the land in farms, but of

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76. This is not to say that policies during these two eras were completely static, but only that the approach undertaken during each of these eras differed in quite fundamental ways.

77. *See Primera Ley de Reforma Agraria, 17 de Mayo de 1959, reprinted in* DR. LUIS E. CANTON BLANCO, CONFERENCIAS DE PROPIEDAD Y DERECHOS REALES 624, 624 (1982) [hereinafter *Primera Ley de Reforma Agraria*].

78. *See* JOSÉ LUIS RODRIGUEZ GARCIA ET AL., CUBA: REVOLUCIÓN Y ECONOMIA, 1959-1960, at 51 (1985).

the land covered, 75% of it was owned by only 2873 owners.[79] The law prohibited holdings of over 30 *caballerías* (approximately 403 hectares), with exceptions for cattle ranches and farms that functioned at high levels of productivity, and designated parcels exceeding 30 cabellerias for confiscation and redistribution.[80] The law also banned sharecropping and sought to prohibit the *colono* system in cane cultivation.[81]

Confiscated land was to be redistributed to those owning less than a "vital minimum" of two *caballerías*, free of charge.[82] First priority for redistribution would be given to those already occupying land as tenants, *colonos*, and squatters.[83] Tenants cultivating less than two *caballerías* would be granted additional lands up to the vital minimum, while tenants cultivating more than two *caballerías* would be allowed to keep their additional lands (up to five *caballerías*), but would be expected to pay for the lands beyond two *caballerías*.[84] Restrictions were placed on the transfer and subdivision of redistributed parcels.[85] Recipients of redistributed land were to be encouraged to form private agricultural cooperatives,[86] and those who failed to cultivate redistributed land were to have their titles rescinded.[87]

Compensation for expropriated land was to take the form of twenty-year government bonds paying an annual interest of 4.5%.[88] The amount of compensation would be fixed according to declarations of the value of the land for tax purposes for 1958.[89] This use of tax declarations was similar to provisions in the Guatemalan agrarian reform of 1952, although the Cuban bonds matured faster and paid a higher rate of interest than their Guatemalan counterparts.[90]

Because the law did not generally discriminate between property owned by foreigners and property owned by Cubans, the first lands affected by the law were Cuban-owned cattle ranches.[91] Nevertheless, North American corporations, who owned large holdings in Cuban

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79. *See* SEERS ET AL., *supra* note 6, at 102.

80. *See Primera Ley de Reforma Agraria*, *supra* note 77, art. 2, 3.

81. *See id.* art. 11, 12, 13. In order to prevent *colono*-type cultivation arrangements, the law prohibited the operation of cane plantations by non-Cuban corporations and by Cuban corporations owned by persons or firms engaged in the manufacture of sugar.

82. *Id.* art. 16, 18.

83. *See id.* art. 5.

84. *See id.* art.18, 19, 21.

85. *See id.* art. 34, 35.

86. *See id.* art. 43.

87. *See* SEERS ET AL., *supra* note 6, at 102.

88. *See Primera Ley de Reforma Agraria*, *supra* note 77, art. 31.

89. *See id.* art. 29.

90. *See* Handy, *supra* note 70, at 684.

91. *See* MORLEY, *supra* note 55, at 81.

agricultural land, protested to the U.S. government that the compensation provided for in the law was insufficient (because tax declarations did not reflect the true value of the land). As a result, the U.S. State Department sent the Cuban government a note demanding "prompt, adequate, and effective" compensation.[92] Historian Morris Morley argues that the United States, dissatisfied with the response of the Cuban government and upset by the implication of a "structural rearrangement of the Cuban economy in which all foreign property interests would be endangered . . . , began to give serious consideration to various courses of action . . . that might bring down the Castro government."[93] Thus, the promulgation of the First Agrarian Reform played an important role in the creation of a policy of overt hostility by the United States against the Castro regime.

The Second Agrarian Reform Law, enacted on October 3, 1963, was much more far-reaching than the first. While the first law left medium-sized private farms more or less intact, the second law sought a wholesale nationalization of virtually all Cuban agriculture. The reach of the second reform law reflected the radicalization of the revolution that occurred in the period between 1959 and 1963.[94]

The Second Agrarian Reform Law established a much lower maximum size for agricultural land. It limited farms to five *caballerías* (67 hectares), nationalizing the land of all farms in excess of that limit.[95] Excepted from the law were farms that the government determined to be functioning at an extremely high level of productivity and farms cultivated by brothers, so long as each brother did not have in excess of five *caballerías*.[96] The law did not make explicit provision for the redistribution of nationalized farms, and thus it is more properly characterized as a straight nationalization of agricultural land than as an agrarian reform.[97]

Compensation for the land nationalized under the Second Agrarian Reform was to be paid according to the size of the plot taken. Owners were to receive fifteen pesos monthly for each *caballería* of land expropriated for a period of ten years, as long as the owner had been cultivating the land

92. BENJAMIN, *supra* note 24, at 179-80.

93. MORLEY, *supra* note 55, at 84-85.

94. *See* RODRIGUEZ GARCIA ET AL., *supra* note 78, at 81 (describing 1959-60 as a period during which the Cuban revolution underwent a process of rapid radicalization).

95. *See Segunda Ley de Reforma Agraria, 3 de Octubre de 1963*, art. 1, *reprinted in* CANTON BLANCO, *supra* note 77, at 681 [hereinafter *Segunda Ley de Reforma Agraria*].

96. *See id.* art. 2, 3.

97. After the Second Agrarian Reform, over 75% of Cuban agricultural land was in state hands, although land continued to be distributed to landless peasants and 50,000 peasants received land titles in the two years following the promulgation of the Second Agrarian Reform. *See* DHARAM GHAI ET AL., LABOUR AND DEVELOPMENT IN RURAL CUBA 14 (1988). Overall, by 1965 there were 200,000 peasant-owners, owning a total of about 200,000 *caballerías*, usually of very high quality lands. *See id.*

prior to expropriation.[98] If the owner had not been cultivating the land, then he would receive ten pesos monthly per *caballería* for a period of ten years.[99] By the time of the Second Agrarian Reform, all U.S. property on the island had already been confiscated, so those affected by the law were primarily Cubans owning mid-sized farms that had not been touched by the first land reform.

The process of radical reform in the agricultural sector resulted in the establishment of three basic forms of land tenure in rural Cuba prior to the fall of the Soviet Bloc: small private farms, state farms, and private cooperatives.[100] Small private farms are governed by legal provisions requiring farmers to cultivate their land in a way that contributes to social consumption and the national economy.[101] The transfer of the land belonging to small farmers is restricted by law; thus, farmers must obtain state permission to sell their land, and the state has the right to buy the land from the farmer for a price fixed by law.[102] Likewise, transfer of a private farm by inheritance is restricted to family members who have been working on the land for a period of time.[103] Small private farms made up about 17% of farmland in the mid 1980s.[104]

State farms became the dominant sector of Cuban agriculture in the early 1960s.[105] By the late 1980s, state farms accounted for 83% of the land, 80% of the agricultural workforce, and 78% of agricultural output.[106] State farms were large, state-run enterprises with salaried workers. Workers on such farms enjoyed a much higher standard of living than their pre-revolution counterparts, but state farms were characterized by stagnant output and lower efficiency than their private sector counterparts.[107]

In the mid-1970s, the Cuban government began to encourage private farmers to merge their small plots into farm cooperatives.[108] Farmers who did so received compensation for their land-contribution over a period of time out of the cooperative's earnings. In addition, they received a share of the cooperative's profits, with the size of the share determined by the amount of work undertaken. In addition, farmers on cooperatives were allowed to set aside a small parcel of land for cultivation for their own

98. *See Segunda Ley de Reforma Agraria*, *supra* note 95, art. 6.
99. *See id.* art. 6.
100. *See* DEBRA EVENSON, REVOLUTION IN THE BALANCE 189 (1994).
101. *See id.* at 191.
102. *See* CANTON BLANCO, *supra* note 77, at 381.
103. *See* EVENSON, *supra* note 100, at 191.
104. *See* GHAI ET AL., *supra* note 97, at 83.
105. *See id.* at 53.
106. *See id.*
107. *See id.*; JORGE F. PÉREZ-LOPEZ, THE ECONOMICS OF CUBAN SUGAR 29 (1991).
108. *See* GHAI ET AL., *supra* note 97, at 70.

consumption.[109] The cooperatives are run by a general assembly and a management board and are permitted to hire outside, seasonal labor.

Agricultural Production Cooperatives (CPA's) increased in number from forty-four in 1977 to 1414 in 1984.[110] The cooperatives have tended to be quite large, with an average size of over 750 hectares.[111] The agricultural yield on private cooperatives has tended to be higher than on state farms, and private cooperatives have tended to get more work out of laborers and machinery, with machinery lasting longer than on state farms.[112]

b. Residential and Personal Property

On October 14, 1960, the revolutionary government promulgated the Urban Reform Law, the objective of which was to eliminate speculation in the housing market and extend home-ownership to a broader segment of the Cuban population. In order to accomplish this goal, the law prohibited all rental of housing; it expropriated rental properties and offered them for sale to their inhabitants through monthly payments over a period of time at prices fixed by the state.[113] Owners of expropriated properties were to be compensated at prices fixed by the law.[114] The law also canceled mortgages on urban properties. Owners occupying mortgaged properties were to continue making payments on the principal to the state but without interest payments.[115] The right to buy, sell, or trade urban properties acquired under the law was severely limited. All persons interested in making such transfers were required to obtain prior approval of the state.[116] The law left housing occupants more or less as they were (although with obvious changes in legal status), but under the Urban Reform Law, the state became the primary landlord in Cuba.[117]

Although Debra Evenson denies that the Cuban government engaged in direct housing redistribution or nationalization,[118] the need for such measures was significantly reduced by the confiscation of properties

109. *See* EVENSON, *supra* note 100, at 193.

110. *See* GHAI ET AL., *supra* note 97, at 70-71.

111. *See id.* at 70.

112. *See* Brian H. Pollitt, *The Cuban Sugar Economy: Collapse, Reform and the Prospects for Recovery*, 29 J. OF LATIN AM. STUD. 171, 190 (1997).

113. *See Ley de Reforma Urbana, 14 de Octubre de 1960*, art. 2, 15 *reprinted in* CANTON BLANCO, *supra* note 77, at 691 [hereinafter *Ley de Reforma Urbana*].

114. *See id.* art. 21.

115. *See id.* art. 31, 32.

116. The state also had the right of first refusal in such proposed transfers. *See id.* art. 29.

117. *See* EVENSON, *supra* note 100, at 179.

118. *See id.*

belonging to Batista and his collaborators[119] as well as by *Ley 989*, promulgated on December 5, 1961. The latter provision declared that all properties belonging to people who left Cuba permanently were to be confiscated.[120] Properties confiscated under these provisions were available to be redistributed as the government saw fit. Three quarters of a million Cubans have left Cuba since 1959, almost a quarter of a million between 1959 and 1962 alone.[121] Most of those who left in the first few years after 1959 were from the upper and middle classes of Cuban society.[122] Although certainly not all of these people left behind empty homes to be confiscated, the massive departure of affluent and middle class Cubans and subsequent confiscation of many of their homes amounted, in effect, to a nationalization and redistribution of housing.

Faced with a severe and chronic housing shortage, in 1984 the Cuban government passed the General Housing Law, the purpose of which was to encourage private home ownership and stimulate construction in housing through the establishment of greater market flexibility in the housing laws.[123] The law declared that all Cubans have a right to own the home in which they live as well as one vacation home.[124] The law allowed those occupying state-owned homes to purchase them from the state for a price fixed by the law.[125] The law also allowed for the relatively free sale of primary homes and vacation homes.[126]

When the law was promulgated, approximately half of Cubans owned their own homes.[127] By 1988, the rate of home ownership had increased to 87%.[128] When the provisions of the 1984 law allowing the free sale of homes led to housing speculation, the government reversed course, imposing in 1988 severe restrictions on the sale of property.[129] Although

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119. These confiscations were authorized by the *Ley Fundamental de Febrero de 1959*. *See* JULIO A. CARRERAS, HISTORIA DEL ESTADO Y EL DERECHO EN CUBA 507 (1985).

120. *See Ley 989 de 5 de Diciembre de 1961*.

121. *See* MARIA CRISTINA GARCIA, HAVANA USA: CUBAN EXILES AND CUBAN AMERICANS IN SOUTH FLORIDA, 1959-1994, at 13 (1996).

122. *See id.*

123. *See* JUAN VEGA VEGA, COMENTARIOS A LA LEY GENERAL DE LA VIVIENDA 45-46 (1986).

124. *See id.* at 56.

125. *See id.* at 70.

126. *See id.* at 135-39.

127. *See id.* at 69.

128. *See* RODOLFO DÁVALOS FERNÁNDEZ, LA NUEVA LEY GENERAL DE LA VIVIENDA 29 (1990).

129. *See, e.g., id.* at x (discussing the government's desire to eliminate housing speculation); EVENSON, *supra* note 100, at 180 (citing the desire to eliminate speculation in the housing market as a motivation for the 1988 restrictions on the sale of homes); *see also Ley No. 65, 23 de Diciembre de 1988, Ley General de la Vivienda*, art. 70 (requiring government approval, with right of first refusal at a state-set price, for the sale of houses). Although the 1984 housing law contained similar provisions, the author was told by a law professor at the University of Havana that before

the sale of houses is now almost never permitted, *permutas*, or the trading of homes, has become a very common way to transfer property.[130]

Many Cubans have found ways of circumventing the laws restricting the transfer of residential properties. Two (illegal) methods in particular are worthy of note. First, many Cubans engage in unequal *permutas*, whereby two people exchange houses of unequal value. The party receiving the house of greater value augments her portion of the trade with an agreed amount of cash. A second means of circumventing the law is the creation of "phantom apartments" which then become the subject of a permuta for the purposes of transferring title. In all other respects, however, this latter mechanism amounts to a simple sale of residential property.

Under the 1988 General Housing Law, Cubans have the right to inherit homes and vacation houses from family members, but the rules for such inheritance are quite complex.[131] The rules allow some freedom to choose who will inherit the property in question, but they also seek to protect those who have lived in the home for a long time. Thus, heirs enumerated in a testamentary document can only be certain of inheriting the property covered by the will if they reside in the house or the house becomes vacant upon the death of the owner. If "specially protected" persons reside in the house at the time of the owner's death, however, the right to transfer the property by will is seriously abridged.[132] Owners likewise have the right to rent out rooms in their homes for money,[133] but the law makes it quite difficult to dislodge tenants once they have begun to occupy the property.[134]

c. Industrial and Commercial Properties

Some of the earliest actions of the revolutionary government concerned industrial properties owned by American corporations. These "interventions," as they were called, were piecemeal attempts to extend utility services to the poorest Cubans.[135] For example, on March 3, 1959, the government "intervened" the Cuban Telephone Company, whose rates

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1988 the state virtually always granted permission for sale, while after 1988 permission was always denied.

130. *See* EVENSON, *supra* note 100, at 182. *Permutas* are discussed in articles 68 and 69 of the General Housing Law of 1988. *See Ley No. 65, 23 de Diciembre de 1988, Ley General de la Vivienda*, art. 68-69.

131. *See id.* at 183.

132. *Ley No. 65, 23 de Diciembre de 1988, Ley General de la Vivienda*, art. 75-85; DÁVALOS FERNÁNDEZ, *supra* note 128, at 203.

133. *See Ley No. 65, 23 de Diciembre de 1988, Ley General de la Vivienda*, art. 74.

134. *See* EVENSON, *supra* note 100, at 182.

135. *See* BLASIER, *supra* note 70, at 187.

it saw as exorbitant, and lowered prices for telephone service.[136]

Massive expropriations of American property did not begin until relations between Cuba and the United States began to strain in late 1959. In December 1959, the State Department hinted that the United States might cut the Cuban sugar quota, upon which Cuba relied for a great deal of its export earnings.[137] In early 1960, the three foreign-owned oil refineries in Cuba, with the encouragement of an increasingly hostile U.S. government, refused to refine crude oil from the Soviet Union.[138] In response, the Cuban government nationalized the refineries in the first large-scale nationalization of industrial property..[139]

Tension quickly escalated over the first half of 1960. Castro claims to have learned about U.S. plans for the Bay of Pigs invasion in May 1960, and in July 1960, the United States eliminated the Cuban sugar quota.[140] In response, the Cuban government passed *Ley 851*, authorizing the government to nationalize American businesses and property, with compensation to be paid out of money earned on sugar sales to the United States.[141] As historian Cole Blasier observes, most of the Cuban nationalizations of U.S. property were taken in response to (and therefore not a cause of) the sugar quota cut.[142] By late 1961, virtually all U.S. properties in Cuba had been nationalized, and 85% of Cuba's industrial production was under the control of the government.[143]

Small Cuban-owned enterprises were left largely untouched throughout the earliest years of the revolution. During the so-called "Revolutionary Offensive" of 1968, however, almost all remaining private businesses in Cuba (with the exception of small farms) were nationalized.[144] The nationalization of close to 57,000 small Cuban-owned businesses had adverse effects on the availability of goods, as state enterprises proved unable to keep up with demand.[145]

2. Post-1989 Reforms

Despite frequent tinkering with the property regime over the course of the revolution, the basic ideological outlines of Cuban property law remained fairly steady throughout the three decades after 1959.

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136. *See Ley 122, 3 de Marzo de 1959.*
137. *See* BLASIER, *supra* note 70, at 192.
138. *See id.* at 191. Such a refusal represented a serious challenge to Cuban national security.
139. *See* CUBA, *supra* note 16, at 325-26.
140. *See id.* at 326.
141. *See Ley 851, 6 de Julio de 1960.*
142. *See* BLASIER, *supra* note 70, at 193-94.
143. *See* CUBA, *supra* note 16, at 328.
144. *See* GHAI ET AL., *supra* note 97, at 21.
145. *See* CUBA, *supra* note 16, at 344.

Agricultural property represented a mix of state and private ownership, with the state sector predominating. Private ownership of homes and personal property was widespread, albeit with varying degrees of restriction placed on the exchange of such property. Commercial and industrial property was, with few exceptions, entirely state-owned.

With the disintegration of the Soviet Bloc, beginning in 1989, however, the Cuban economy entered into a period of acute crisis. Although the precise causes of the crisis and its extent remain a matter of debate among scholars,[146] no one disputes that the Cuban economy underwent a profound shock between 1989 and 1993.[147] The economic crisis of the early 1990s forced the Cuban government to enact a series of economic reforms, the most dramatic of which have been reforms in the property regime.[148] In particular, Cuba has begun to allow private ownership of commercial and industrial property and has significantly reduced the role of the state in the agricultural sector. Strangely, while the government has opened up the property regime in the areas of commerce, industry, and agriculture, it has not shown the same willingness to reform in the area of private residential property.

a. Reforms of Agricultural Property

The most significant reform in the area of agricultural property has been the semi-privatization of state farms in the form of Basic Cooperative Production Units (UBPCs).[149] Beginning in September 1993, the government began to convert state farms into semi-private cooperatives in which worker/members were given a usufruct right to the land making up

146. The accuracy of official Cuban economic data has been impugned by some American scholars. *See, e.g.*, Alan Abouchar, *Measuring Cuba's Economic Growth*, 20 CUBAN STUD. 157, 157 (1990) (calling the official Cuban economic data unreliable). *But see, e.g.*, CLAES BRUNDENIUS, REVOLUTIONARY CUBA: THE CHALLENGE OF ECONOMIC GROWTH WITH EQUITY (1984) (reaching conclusions regarding growth that closely matched the claims of the Cuban government over the period prior to publication); Claes Brundenius & Andrew Zimbalist, *Cubanology and Cuban Economic Performance*, *in* CUBAN POLITICAL ECONOMY: CONTROVERSIES IN CUBANOLOGY 39, 39-62 (Andrew Zimbalist ed., 1988) (disputing the methodology of studies that have found the Cuban government to paint a rosy picture of its economic performance).

147. Cuban economists estimate that the economy contracted approximately 38% between 1989 and 1993. *See, e.g.*, JULIO CARRANZA VALDÉS ET AL., CUBA: RESTRUCTURING THE ECONOMY—A CONTRIBUTION TO THE DEBATE 9 (1996); Lic. Julio Carranza Valdés, *Las Finanzas Externas y los Limites del Crecimiento*, *in* La Economia Cubana en 1996: Resultados, Problemas, y Perspectivas (1996) (unpublished working papers, on file with the Center for the Study of the Cuban Economy, Havana, Cuba). Other estimates of the decline range as high as 50%. *See, e.g.*, Jorge Pérez-López, *The Cuban Economy in the Age of Hemispheric Integration*, J. OF INTER-AM. STUD. & WORLD AFF., Fall 1997, at 3, 5-6.

148. *See* Lilia Núñez Moreno, *Más Allá del Cuentopropismo en Cuba*, TEMAS, July-Sept. 1997, at 41, 41.

149. *See Decreto-Ley No. 142, 20 de Septiembre de 1993.*

the cooperative. UBPCs are intended to be self-managed cooperatives on the model of CPAs, which had consistently outperformed state farms in terms of efficiency and productivity.[150] UBPC workers own the produce of their farms. Although they are required to sell specified quantities of enumerated goods to the state, they are allowed to sell excess production in farmers markets, which have been reopened as a result of the crisis.[151] By 1996, virtually all of the state farms were converted into UBPCs, with varying levels of economic success.[152] Thus, the direct role of the state in Cuban agricultural production has been significantly reduced.[153] In addition to the UBPCs, the state has granted state-owned land for cultivation by private tobacco producers[154] and has granted usufructs in small, underutilized plots to private farmers.[155]

b. Reforms of Commercial/Industrial Property

Post-1989 reforms have also affected Cuba's system of commercial and industrial property. Most of the reforms have been targeted at foreign investors, as the government has sought to replace Soviet assistance with direct foreign investment. Some reforms, however, have been focused on Cubans themselves.

The largest changes in Cuba's commercial and industrial property have been undertaken with the goal of attracting direct foreign investment in the Cuban economy. Although joint ventures have been allowed in Cuba since 1982, very few existed prior to the crisis.[156] Since the advent of the

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150. *See supra* notes 106-08 and accompanying text.

151. *See* CARRANZA VALDÉS ET AL., *supra* note 147, at 22-23. Farmers' markets, in which farmers can sell excess produce at market prices, have had a checkered history in Cuba. They were opened in the early 1980s, only to be shut in the late 1980s as part of the "Rectification" process. *See* Susan Eckstein, *The Rectification of Errors or the Errors of the Rectification Process in Cuba*, 20 CUBAN STUD. 67, 69-70 (1990). As a result of the economic crisis of the 1990s, however, they have been allowed to reopen. *See Decreto No. 191, 19 de Septiembre de 1994.*

152. Most UBPCs operated at significant losses through 1998, and many farmers complained about continued interference in the management of UBPCs by administrative agencies. *See* Dr. Benjamín González Jordán, *La Agricultura Cubana: Un Balance Critico*, ECONOMIA Y DESARROLLO, Dec. 1995, at 81, 91; Pollitt, *supra* note 112, at 202; MSC. OMAR EVERLENY PÉREZ VILLANUEVA, CUBA: LA EVOLUCIÓN ECONOMICA RECIENTE 13 (1998) (study undertaken by the Center for the Study of the Cuban Economy, Havana, Cuba, on file with the author).

153. Nevertheless, as the only real customer, the state remains the most important actor in the performance of Cuban agriculture. *See* Santiago Rodriguez Castellón, UBPC: Una Innovación en la Agricultura Estatal (1998) (study undertaken by the Center for the Study of the Cuban Economy, Havana, Cuba, on file with author, describing the state as the main purchaser of UBPC production).

154. *See* CARRANZA VALDÉS ET AL., *supra* note 147, at 10.

155. *See Resolución No. 356/93, 28 de Septiembre de 1993 (Ministerio de Agricultura).*

156. *See* María Dolores Espino, *Tourism in Cuba: A Development Strategy for the 1990s?*, *in* CUBA AT A CROSSROADS: POLITICS AND ECONOMICS AFTER THE FOURTH PARTY CONGRESS 148, 154 (Jorge F. Pérez-López ed., 1994).

crisis, however, the government has undertaken a variety of legal reforms to attract foreign capital, particularly in the tourist industry, mining, biotechnology, and for import substitution (for example, petroleum). It amended the 1976 Constitution to provide greater protections for private property;[157] expanded the 1982 foreign investment law to allow majority (and even exclusive) foreign ownership in joint ventures;[158] provided attractive tax incentives to foreign investors,[159] and created a series of free-trade zones covered by less burdensome tax and customs standards.[160] As a result, direct foreign investment in Cuba increased from a negligible amount before the crisis to around two-billion U.S. dollars in 1995.[161]

With respect to Cubans, the government has made two crucial changes. First, it has decriminalized the possession of U.S. dollars.[162] At the same time, it has opened up various stores that operate only in hard currency. Cubans tend to use these stores to purchase the necessities that cannot be acquired through rations or purchased with pesos.[163] The dollarization of the economy has created striking inequalities between Cubans who have access to dollars, approximately half the population, and Cubans who do not.[164]

The second important reform aimed at Cubans has been the widening of opportunities for self-employment.[165] Since 1993, the categories of work

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157. *See* Jorge F. Pérez-López, *Islands of Capitalism in an Ocean of Socialism: Joint Ventures in Cuba's Development Strategy*, *in* CUBA AT A CROSSROADS, *supra* note 156, at 190, 192-94. The Constitution was amended to include recognition of the property of joint ventures, *see* CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 23, to acknowledge that only the "fundamental" means of production are to be maintained under socialist ownership, *see id.* art. 14, to allow for transfer of state property to the private sector, *see id.* art. 15, and to soften the provision of the 1976 Constitution giving the state a monopoly on foreign commerce. *See id.* art. 18.

158. *See* Espino, *supra* note 156, at 146. Since 1995, the Cuban government has allowed 100% foreign ownership of enterprises within Cuba. *See* CARRANZA VALDÉS ET AL., *supra* note 147, at 16.

159. The average tax burden on foreign earnings in Cuba is around 10.7%. *See* Oscar U. Eschevarria Vellejo, *Regulación, Plan y Mercado: El Caso de Cuba*, CUBA: INVESTIGACIÓN ECONOMICA, July-Sept. 1996, at 55, 65.

160. *See Ley No. 77, 5 de Septiembre de 1995*, art. 50 (authorizing the creation of free trade zones and industrial parks).

161. *See* CARRANZA VALDÉS ET AL., *supra* note 147, at 12. This growth, while impressive, is still insufficient to make up for the decline in Soviet aid. *See id.*

162. *See Decreto Ley No. 140, 13 de Agosto de 1993.*

163. *See* Hiram Marquetti Nodarse, *La Economía del Dólar: Balance y Perspectivas*, TEMAS, July-Sept. 1997, at 51, 54. Most visits to dollar stores result in total purchases of less than $10. *See id.* Dollar stores operate at extremely high margins and are thus enormously profitable to the state, rivaling tourism as a source of income. *See id.*

164. *See id.* at 53; Angela Ferriol Muruga, *Politica Social Cubana: Situación y Transformaciones*, TEMAS, July-Sept. 1997, at 88, 90. The recent Cuban film, *Guantanamera*, provides a strikingly realistic, albeit comical, look at life in the dual Cuban economy.

165. *See Decreto Ley No. 141, 8 de Septiembre de 1993.*

open to self-employment have been steadily expanded, standing in 1996 at 157 different activities.[166] Self-employed Cubans may also take advantage of new open markets for artisanal goods in order to sell their products directly to customers.[167]

University-educated professionals, who were previously not allowed to engage in self-employment, are now allowed to do so, although they may not work on their own behalf in the area of their professional training.[168] Thus, ironically, an engineer or doctor may undertake self-employment—and earn substantially more—as a seamstress or a taxi driver, but not as an engineer or doctor. Those engaging in self-employment are required to pay a high monthly licensing fee as well as income tax on their earnings.[169] Self-employment has grown rapidly over the past several years, from 1% of the workforce in 1988 to over 7% in 1995.[170]

c. Residential Property

While the post-1989 crisis has sparked a limited opening in the regulation of commercial and industrial property in Cuba, reforms in the residential property system have been more limited. The government has made moves to allow foreigners to purchase residential property within Cuba. For example, apartments have been constructed in the Miramar neighborhood of Havana for exclusive sale to foreigners (who are then allowed to resell the property to other foreigners).

With respect to Cubans, however, the government has moved to *increase* restrictions on the use of private residential property. For example, the rental of private rooms has been made more difficult than it was prior to the crisis.[171] The sale of houses by Cubans is still largely nonexistent, and *permutas* are governed by detailed regulations intended to prevent exchanges for profit.[172]

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166. *See Resolución Conjunta No. 1-96, 18 de Abril de 1996 (Ministerio de Trabajo y Seguridad Social—Ministerio de Finanzas y Precios).* Joint Resolution 1-96 allows self-employment in such diverse activities as animal grooming, tire repair, sale of used records, driving instruction, and the sale of food and beverages. *See id.*

167. *See Decreto No. 192, 21 de Octubre de 1994.*

168. *See Resolución Conjunta No. 1-96, 18 de Abril de 1996 (Ministerio de Trabajo y Seguridad Social—Ministerio de Finanzas y Precios).*

169. *See id.*

170. *See* Núñez Moreno, *supra* note 148, at 45. The actual number could be as high as 25%, as some studies have indicated that for every licensed self-employed worker there are approximately 3.5 unlicensed workers. *See id.* at 46.

171. *See, e.g., Decreto Ley No. 171, 15 de Mayo de 1997* (requiring property-owners who wish to rent rooms to register with a local housing authority and prohibiting those who rent rooms from engaging in other forms of self-employment).

172. *See, e.g., Resolución No. 381, 25 de Septiembre de 1989 (Instituto Nacional de la*

G. *Conclusion*

In order to facilitate the evaluation of the Cuban Revolution's property reforms, this Article will simplify the foregoing history in the following way. It will divide the parties affected by the reforms into three groups: (1) Cubans who remained in Cuba and whose property was affected by the series of nationalizations and redistributions undertaken by the Cuban government; (2) Cubans who left Cuba and therefore lost all the property they could not take with them, under Law 989; and (3) United States enterprises that lost property as a result of interventions, redistributions and retaliatory nationalizations. After the discussion of international law and property theory in the next Part, this Article will evaluate, from the perspective of international law, the reforms undertaken by the Cuban government with respect to each of these three groups.

III. EVALUATING THE CUBAN REVOLUTION'S PROPERTY REFORMS

A. *Introduction: Two Models*

When considering a government's actions under international law, one may draw upon two different models, or paradigms, of international legality: the classical international law model and the human rights model.[173] The two models are related to each other through a common language of international norms and are often employed by the same international bodies. Nevertheless, they are conceptually distinct.[174]

First, according to its classical understanding, international law is not

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Vivienda) (requiring parties seeking to exchange houses to apply for permission to a local housing authority, which has the right to refuse permission if it suspects that the exchange is motivated by a desire for profit).

173. It should be acknowledged at the outset that the portrayal of these perspectives is admittedly simplified and stylized in the interests of ease of discussion. Moreover, these two models are not intended to be exclusive. Other means of assessment of actions within the international sphere are certainly possible. Further, it is possible to identify positions that straddle the two models, as would, for example, someone committed to a positivist notion of human rights. Indeed, scholars sometimes seem to switch back and forth between the two models as they change topics. They embrace a notion of human rights that is clearly prescriptive and then shift to positivistic discussions of the source of international law as if these two positions fit together quite nicely. For a discussion of the problems with such alternating positions, see *infra* notes 347-59 and accompanying text.

174. *See, e.g.*, HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 337 (4th ed. 1994) (discussing how international law concerning property has followed a different path from international human rights law, because it is lodged within the distinct paradigm of classical international law).

concerned with individuals per se, but rather with the nation state.[175] The idea of the sovereign state stands at its heart,[176] with individual persons only part of the equation, to the extent that wrongs against them are perceived to represent slights against the states of which they are citizens.[177] Although the twentieth century has seen a move towards greater concern for individuals in international law, the idea of states as the primary agents and subjects of international law remains vital.[178]

Under the human rights model, on the other hand, international law is concerned fundamentally with the treatment of individuals by states.[179] The human rights model sees the individual as the primary entity of importance and subjects the state's freedom of action to a set of minimum standards in its treatment of persons.[180] Under this view, a state's violation of an individual's rights is an illegal act perpetrated against that individual, not just against that individual's home state.[181] The human rights model thus reverses the priorities of classical international law, subjugating the notion of state sovereignty to that of individual rights.

Second, classical international law has not tended to take cognizance of how a state treats its own citizens. Such issues have traditionally been seen as falling within the domestic domain, inside of which sovereign states had a virtually plenary right to non-interference.[182] Instead, classical international law has focused on issues involving more than one state or the treatment of nationals of one state by another.[183] In contrast, human rights law is precisely concerned with how a state treats its own citizens

175. *See* The Lotus Case (France v. Turkey), P.C.I.J., Ser. A, No. 10 (1927), 18; RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 1 (1984).

176. *Cf.* MYRES S. MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER 363 (1960) (observing that the notion that international law concerns states and not individuals is a product of nineteenth-century positivism).

177. *See* ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 194-95 (1987); FRANCK, *supra* note 3, at 458-59. This notion that "whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen," goes back to Emmerich de Vattel, an eighteenth century theorist of international law, and is known as the Vattel principle. EMMERICH DE VATTEL, THE LAW OF NATIONS 161 (1833), *quoted in* LILLICH, *supra* note 175, at 9.

178. The Vattel principle has been reaffirmed in the 20th century by the Permanent Court of International Justice. *See id.* at 13.

179. *See, e.g.*, JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 69-70 (1989) (arguing that the notion of human rights requires a certain view of the relationship between the individual and the state in which the rights of individuals are morally prior to and superior to society and the state); LOUIS HENKIN, THE AGE OF RIGHTS 5 (1990) (describing human rights as the rights of the individual, not the rights of the collectivity or community, or, presumably, the state).

180. *See* DONNELLY, *supra* note 179, at 69.

181. *See* FRANCK, *supra* note 3, at 458.

182. *See* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 3 (1988).

183. *See* STEINER ET AL. *supra* note 174, at 348.

within its own borders.[184] It seeks to establish universal minimum standards for the treatment of any individual by any state.[185]

Finally, classical international law has tended to favor a purely positivistic approach to the determination of what constitutes law:[186] the international law is what it is, and there is little room to ask what it should be. The content of the international law may be discerned by a careful study of commonly accepted indicia, often defined as the factors listed in Article Thirty-eight of the statute of the International Court of Justice: (a) international conventions; (b) international custom; (c) general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicists (although this last category is considered to be a "subsidiary" source of law).[187]

Human rights law, on the other hand, is often expressed in the moral language of universal rights, rather than the backward-looking "sources" of classical international law.[188] Thus, for example, the *Universal Declaration of Human Rights* locates the sources of the rights it declares in the "inherent dignity" of the human person, rather than in the indicia outlined in Section 38.[189] Similarly, the preamble of the 1948 *American Declaration of the Rights and Duties of Man* asserts that "[a]ll men are born free and equal, in dignity and in rights."[190] These founding documents of human rights law describe human rights as inherent and universal.[191]

The human rights model does not seek merely to restate what is already the customary standard of behavior among nations, but rather to exhort or even force nations to abide by a standard of conduct dictated by a deeply moral vision of what the customary standard of nations should become. Donnelly, for example, describes human rights as less about how human beings actually behave and more about "how people might live."[192]

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184. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("[I]n this modern age a state's treatment of its own citizens is a matter of international concern.").

185. *See* HENKIN, *supra* note 179, at 27, 52.

186. *See* STEINER ET AL., *supra* note 174, at 316.

187. *See id.* at 232. The last category admittedly moves beyond mere description and leaves some room for law-creation.

188. *See generally* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES (1998) (arguing that human rights talk is inherently moral and religious).

189. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); *cf. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (Advisory Opinion, May 29, 1951).

190. *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser L/V/I.4 Rev. (1965), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 293 (Burns H. Weston et al. eds., 1980).

191. *See, e.g., International Covenant on Civil and Political Rights*, art. 6, 10, G.A. Res. 2200, U.N. GAOR, Supp. No. 16, 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967) (describing the right to life as "inherent" and asserting an "inherent dignity of the human person").

192. DONNELLY, *supra* note 179, at 18. Donnelly speaks of human rights as a "social project"

Thus, rather than a retrospective approach appropriate to positivism, human rights law is often blatantly prospective and ethical in orientation.

Proponents of human rights sometimes try to present human rights law as conforming to the positivistic model of classical international law (for example, by pointing to widespread international acceptance of human rights, at least in word, as the basis for international obligation to respect human rights). Attempts to do so, however, are often fraught with contradictions. It is clear that human rights norms did not appear in the traditional sources of international law until after the Second World War.[193] Thus, they have a dubious pedigree according to the positivistic methodology of customary international law.[194] Moreover, to the limited extent that human rights norms are supported within the sources, positivists may only rely on such sources as evidence of broad acceptance of human rights by ignoring the reality of widespread human rights violations in actual state practice.[195]

To say that human rights only create obligation insofar as they are supported in the traditional source material is to misunderstand the very notion of human rights. By definition, these rights are inherent in a person's very humanity and universal in the scope of obligation they create. Michael Perry says "the idea of human rights . . . [is based on the notion that] every human being is sacred."[196] Perry goes on to observe that, because every human being is sacred, the notion of human rights involves the belief that "certain choices should be made and certain other choices rejected, in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being."[197] Perry thus outlines two essential features of human rights: (1) their inherence in humanity as such and (2) their resultant universality. A human right that inheres in a person only as a result of some body of positive international law or that inheres in only some human beings but not others

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and correctly observes that "[t]he Universal Declaration of Human Rights tells us little about what life is like in most countries." *Id.* Thus, he concludes that human rights represent "a utopian ideal and a realistic practice for implementing that ideal." *Id.* at 19.

193. *See* TESÓN, *supra* note 182, at 155 (citing 1 OPPENHEIM'S INTERNATIONAL LAW 640-41, 736-38 (H. Lauterpacht ed., 8th ed. 1955)).

194. *See* Martii Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1948 (1990) (noting that there is little actual support for the notion of human rights as customary international law).

195. *See* D'AMATO, *supra* note 177, at 90 (noting that some scholars have accused human rights advocates of over-stating the status of human rights law within international law); HENKIN, *supra* note 179, at 29, 32 (discussing human rights law's attempts to clothe itself in the legitimacy of positive law, but recognizing that gross human rights violations are still widespread); *see also* STEINER ET AL., *supra* note 174, at 341-42 (observing that the modern human rights movement claims to be based on consensus and consent).

196. PERRY, *supra* note 188, at 29.

197. *Id.*

is not a *human* right at all.

In some instances, commentators have drawn upon the notion of *ius cogens* in a similarly ill-conceived attempt to bypass the obvious problems of trying to root human rights in the traditional sources of international law. *Ius cogens*, often translated as "peremptory norms," have been defined as non-derogable principles of international law that may only be modified by new peremptory norms.[198] There is a close connection between *ius cogens* and human rights law. Both arose in the wake of the horror of the Second World War,[199] and common examples of *ius cogens* include the duty to respect human rights and the prohibition of genocide.[200] By turning to *ius cogens*, scholars have tried to imbue a positivistic notion of human rights with the universality and relative immutability lacking in everyday rules of international law. Unfortunately, advocates of the concept of *ius cogens* have often sought to ground them in the traditional, positivist methodology of the classical international law model.[201] As with human rights, however, the attempt to derive *ius cogens* from custom flounders in a sea of inconsistencies.[202]

To summarize, it is possible to distinguish in international law between two models or paradigms. First, there is the classical international law model. In this model, the primary subject is the state. The classical model is concerned solely with "international" questions, which it defines as questions involving more than one state or a state and the citizens of another state (which amounts to the same thing, according to the Vattel principle). Finally, this model is positivistic in its orientation, eschewing questions of what the law *should* be, and focusing instead on what, according to a certain set of criteria, the law *actually* is.[203]

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198. *See Vienna Convention on the Law of Treaties*, art. 53, U.N. Doc. A/CONF. 39/27, at 289 (1969) *reprinted in* 8 I.L.M. 679 (1969); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102, cmt. k (1987).

199. *See* Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT'L L. 433, 437 (1995).

200. *See* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 317 (1988).

201. *See id.* at 12 (arguing that content of peremptory norms is determined according to the same source-methods as other rules of positive international law).

202. There appears to be an implicit contradiction in the desire of *ius cogens* advocates to imbue *ius cogens* with the immutability and moral force of principles of natural law while deriving the content of *ius cogens* from the traditional sources of the classical international law model. The crucial problem is in justifying how norms that evolve from nothing more than custom can themselves "trump" subsequent developments within that custom such that they block the creation of new international rules. *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 421-23 (1983). As Weil observes, it is difficult to justify such a hierarchy of levels within international law without averring to higher moral principles, like the natural law. *See id.*

203. Of course, such positivism often masks significant uncertainty as to how to apply the

Second, there is the human rights model. This model differs from that of the classical international law in conceiving of the individual as the primary subject of international norms. Further, because the rights of concern to the human rights lawyer are thought to be universal in nature, the human rights model does not distinguish between a state's treatment of nationals and foreigners. That is, the human rights model ventures into areas that would, under the classical international law model, be considered subject to domestic law alone. Thus the human rights model redefines the area of interest to international law as including a state's treatment of its own citizens. Finally, although the human rights model makes frequent gestures in the direction of positivism, it cannot help but to be fundamentally moral in its orientation. It has a clear vision of what international standards should be, and wishes to bring those standards into reality, regardless of what the prevailing practices among states actually are.

B. *Classical International Law Treatment of the Expropriation of Property*

Human rights law has tended to neglect issues of property rights; human rights related to economic justice have been labeled the "stepchild" of the human rights movement.[204] Thus, the issues of concern to this Article (i.e., the justice of revolutionary property reform) have traditionally been left to the norms associated with classical international law. A more focused exploration of that model's approach to the protection of property is therefore the concern of this Part.

There is widespread agreement that sovereign states have the right to expropriate property within their borders,[205] but such expropriations are limited within international law by certain principles regarding how they can be carried out. First, it is generally agreed that expropriations must be for some public purpose.[206] This "public purpose" requirement is not very demanding and states have substantial leeway in determining what it

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criteria for determining what the law is. For an example of such confusion, see the discussion below on the state of the international law concerning compensation for the expropriation of alien-owned property.

204. *See* STEINER ET AL., *supra* note 174, at 337, 361.

205. *See* ADEOYE A. AKINSANYA, THE EXPROPRIATION OF MULTINATIONAL PROPERTY IN THE THIRD WORLD 17 (1980). In the United States, for example, the right of the state to expropriate is implicit in the Federal Constitution in the language of the Takings Clause, which presumes that the state may take property from its citizens by eminent domain. *See* U.S. CONST., amend. V ("[N]or shall private property be taken for public use, without just compensation.").

206. *See, e.g.*, AKINSANYA, *supra* note 205, at 19-20; Robert E. Freer, Jr., *Expropriation: United States Claimant's Rights and the Future of Cuba*, 4 U. MIAMI Y.B. INT'L L. 169, 169 (1995).

requires.[207] Second, expropriations are to be carried out in a nondiscriminatory fashion. That is, the expropriating state should not discriminate against property held by citizens of a particular state.[208] This does not appear to mean that states may not discriminate against aliens as a group, but only that they may not discriminate against particular nationalities within the larger subset of aliens.[209] Finally, it has traditionally been said that expropriations must be accompanied by compensation for the property taken. Of the three requirements, it is the third that has aroused the greatest controversy, both among states themselves and among international law scholars.[210]

The various positions on the appropriate standard of compensation for expropriation of alien-owned property can be placed into three broad categories. First, there are those who believe that the appropriate standard is the classic formula of "prompt, adequate, and effective" compensation.[211] Second, many believe that states need only treat aliens the same as nationals with regard to compensation for expropriated property. This second position is often called the "national treatment" position. Finally, some believe that there is a general duty to compensate, but that the level of compensation required is somewhat flexible, varying with the circumstances. This last position will be called the "partial compensation" standard.[212]

1. Prompt, Adequate, and Effective

The view that expropriation of alien-owned property must be accompanied by "prompt, adequate, and effective" compensation evolved over the course of the nineteenth century[213] in the context of an international law system characterized by the exclusive intercourse of colonial powers.[214] Prior to the First World War, there was a consensus

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207. *See* AKINSANYA, *supra* note 205, at 20, 202-03. In the United States, property redistribution has been held by the Supreme Court to constitute a "public use" sufficient to satisfy the requirements of the Takings Clause. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984). This conclusion is opposed by Richard Epstein, who considers land reform to run afoul of the public use requirement. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 181 (1985).

208. *See* AKINSANYA, *supra* note 205, at 20-25, 203-04.

209. *See id.* at 204-03.

210. *See id.* at 25 (noting the discord that has been provoked by disagreement as to the appropriate standard for compensation of alien-owned properties).

211. Throughout this Article, I will also refer to this standard as "full" compensation.

212. *See* Li Hao-p'ei, *Nationalization and International Law*, *in* JEROME A. COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 720 (1973) (*quoted in* STEINER ET AL., *supra* note 174, at 469).

213. *See* AKINSANYA, *supra* note 205, at 41.

214. *See* B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 58 (1959)

within this colonialist international law that the "prompt, adequate, and effective" standard was the correct one.[215] This consensus began to disappear, however, with the Russian and Mexican revolutions early in the twentieth century.[216] The breakdown became even deeper in the wake of the decolonization of the Third World that followed the end of the Second World War, as the dozens of new, predominantly capital-importing nations began to challenge the traditional formulation.[217] Within the United States, courts and commentators have questioned the claim to authoritative status for the "prompt, adequate, and effective" standard.[218] In *Banco Nacional de Cuba v. Sabbatino*,[219] the Supreme Court questioned the existence of an international consensus in favor of full compensation.[220] After surveying the evidence, Rudolf Dolzer observed that "the conclusion is inescapable that the existence of the . . . ["prompt, adequate, and effective" standard] as a rule of present law is not sustained by the prevailing doctrinal opinion."[221] Although the existence of a world-wide consensus over the standard is doubtful, "prompt, adequate, and effective" compensation remains the hands-down favorite, for obvious reasons, of the United States and the other capital-exporting nations of the First World.[222]

(describing how, before the First World War, massive amounts of capital flowed from Great Britain, the United States, and the European continent, who could rely upon "vigorous diplomatic support for their just demands for compensation for property seized," and who could "expect their governments to make use, if need be, of such measures as embargo, or pacific blockade, or naval demonstrations . . . to obtain specific restitution").

215. *See* TESÓN, *supra* note 182, at 157 ("During the height of European colonialism, capitulatory regimes were the most remarkable but not the only evidence of a system which made virtually inviolable the persons and property of Europeans and Americans abroad."); STEINER ET AL., *supra* note 174, at 446 (arguing that prior to the First World War there was a consensus around the prompt, adequate, and effective standard); Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 475-76 (1991).

216. *See* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 558 (1981).

217. *See* WORTLEY, *supra* note 214, at 61-62; Norton, *supra* note 215, at 478.

218. *See* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 124 (1984) (quoting Wolfgang Friedmann, *National Courts and the International Legal Order*, 34 GEO. WASH. L. REV. 443, 454 (1966) (calling the claim to authoritative status for the Hull formula "nothing short of absurd")).

219. 376 U.S. 398 (1964).

220. *See id.* at 428-29 ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."). The Court went on to cite the practice of Soviet Bloc and formerly colonized nations as evidence that many states refuse to submit to the full compensation standard. *See id.*

221. Dolzer, *supra* note 216, at 565.

222. *See, e.g.*, BLASIER, *supra* note 70, at 81 (describing consistent U.S. support for the "prompt, adequate, and effective" standard); STEINER ET AL., *supra* note 174, at 447 (describing the position in favor of "extensive protection . . . of private property" as that of the "capital-exporting

The "prompt, adequate, and effective" standard is rooted in an ideology of international law that had much more currency in the nineteenth and early twentieth centuries than it does today. It developed during the height of colonialism, when international law was viewed as the servant of the colonial European powers and the means by which they maintained their positions of authority.[223] Thus, it is unsurprising that the standard caters to the self-interests of the nineteenth-century colonialists and their desire to retain advantages achieved within the formerly colonized world. Adeoye Akinsanya, a Nigerian political scientist, concludes: "[I]t is small wonder why some scholars and international lawyers have seen the traditional law . . . as the legal garb that merely served to protect the imperialistic interest of the capital-exporting countries."[224]

Moreover, in the context of a nation emerging from foreign colonial or neo-colonial domination, the idea that the state must pay full compensation before it may reform its property system seems to presuppose two things: first, that the institution of private property is in some way ethically more fundamental than the state;[225] and, second, that justice demands that the state refrain from interfering with distributions of property that result from the operations of the free market.[226] It is somewhat ironic that this radical laissez faire philosophy, known within the United States as "substantive due process" and rejected as a requirement of justice in the context of economic regulation by American courts since the New Deal, continues to be forcefully endorsed by the United States in the international sphere.[227]

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countries").

223. *See* Benedict Kingsbury & Adam Roberts, *Grotian Thought in International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 1, 48-49 (Hedley Bull et al. eds., 1990) (noting that in the 18th and 19th centuries international law was seen as the exclusive purview of the European powers and the United States); *see also* STEINER ET AL., *supra* note 174, at 315-16 (discussing the development of classical international law and its relationship to the viewpoint and interests of colonial powers).

224. AKINSANYA, *supra* note 205, at 212.

225. *See, e.g.*, WORTLEY, *supra* note 214, at 14 (endorsing the idea that property is ethically more fundamental than the state).

226. If the state must compensate full value for property taken as part of a redistribution scheme, it is obvious that the state is severely constrained in its attempts to redistribute overall wealth. This standard does allow the state to alter the distribution of specific *forms* of property, such as land.

227. *See, e.g.*, Nicchia v. New York, 254 U.S. 228, 231 (1920) (describing a law that involves the "taking of one man's property and giving it to another" as the paradigm of due process violation); Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 455 (1916) ("[T]ake from one and give to another is . . . offensive to a right conception of due process."); Ochoa v. Hernandez y Morales, 230 U.S. 139, 160 (1913) ("Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it

Like "substantive due process," the "prompt, adequate, and effective" standard is politically conservative, rendering a state virtually incapable of restructuring society. Countries emerging from a position of colonial domination or rule by a corrupt regime often found that their economic infrastructure had been sold off to foreigners. Acceptance of the "prompt, adequate, and effective" standard would have made it impossible for such post-colonial governments or governments replacing corrupt regimes to undertake the reforms needed to reverse the policies of their predecessors. Put another way, the "prompt, adequate, and effective" standard denied the possibility of revolutionary social change for states in which a large proportion of productive property was foreign-owned.

2. National Treatment

Over the course of the twentieth century, the "prompt, adequate, and effective" standard came under increasing fire from both scholars and developing nations. Many developing nations have advocated the viewpoint that international law only requires that an expropriating state provide the same compensation for the expropriation of alien-owned property that it provides for the expropriation of property owned by its nationals.[228] This "national treatment" position was eloquently advocated in the nineteenth century by Argentine theorist Carlos Calvo and has come to be known as the Calvo Doctrine.[229] So popular is this position among Latin American states that statements of the doctrine have been incorporated into numerous constitutions in the region.[230]

The national treatment position involves the interplay of two principles: the noninterference principle and the equal treatment

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to another . . . ."); St. Louis, Iron Mt. & S. Ry. v. Wynne, 224 U.S. 354, 360 (1912) (stating that a law violates due process when "it takes property from one and gives it to another"); *see also, e.g.*, Carolene Prod. Co. v. United States, 323 U.S. 18, 31 (1944) (applying the post-New Deal version of due process analysis); *cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 40-41 (1993) (noting that under the pre-New Deal understanding, the government violated its duty to neutrality if it sought to alter existing distributions of property). For a theory of U.S. foreign policy that seeks to explain that continuing role played by the *laissez faire*, see generally MCCORMICK, *supra* note 70, at 1-16.

228. For a brief history of the national treatment doctrine, see Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1 (Richard B. Lillich ed., 1983).

229. *See* DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 17-19 (1955).

230. *See, e.g.*, CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 27, *reprinted in* THE CONSTITUTIONS OF THE AMERICAS, *supra* note 62, at 498, 505 (requiring foreign nationals to agree to be treated as Mexicans in order to be able to acquire property within Mexico); SHEA, *supra* note 229, at 24 (discussing attempts by Latin American nations to impose the Calvo Doctrine on foreign nationals by incorporating it into their constitutions).

principle.[231] The noninterference principle is based on the presupposition of the equality of nations and their right to noninterference at the hands of colleague states.[232] Calvo complained that

> in more than one case it has been attempted to impose on American states . . . [the rule that] foreigners merit regard and privileges more marked out and extended than those accorded even to the nationals of the country where they reside. This principle is intrinsically contrary to the law of equality among nations. . . .[233]

The equal treatment principle states that foreigners are, under international law, only entitled to be treated the same as a country's nationals. Calvo argued that "the responsibility of governments towards foreigners cannot be greater than that which these governments have towards their own citizens."[234]

Although the Calvo doctrine had its birth in Latin America, the idea that foreigners are only entitled to national treatment resonated strongly with former colonized peoples and became a popular position among newly independent states after the Second World War.[235] The doctrine has been consistently rejected, however, by the capital-exporting states of Europe and by the United States.[236] Capital exporters have instead clung tightly to the standard they developed over the course of the nineteenth century.

The differences in the positions of the two groups is exemplified nicely in the 1938 dispute between Mexico and the United States over expropriated property belonging to North Americans. After its 1910

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231. *See id.* at 19.

232. *See* Lillich, *supra* note 228, at 4.

233. CARLOS CALVO, LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE 140 (5th ed. 1896) *quoted in* SHEA, *supra* note 229, at 18. Calvo's argument derives much of its power from the specific context of neocolonial domination of Latin America in which it was written. The notion that foreigners (meaning citizens of colonial powers) must be granted protections beyond those given them in local law looks much more sinister when the norms granting them the additional protections (as well as the very content of those protections) are defined exclusively by the same colonial powers, as was the case at the time Calvo was writing. Such an imposition amounted to nothing less than simple extraterritoriality. Within such a context, the practice of diplomatic protection deeply offended the nationalist sentiments of Latin Americans. It may legitimately be asked, however, whether Calvo's proposals focused on the correct target or whether, as Lillich argues, they reflect a mistaken tendency to throw out the baby (minimum standards of conduct in international relations) with the bathwater (colonial interventionist foreign policy). *See* Lillich, *supra* note 228, at 3.

234. CALVO, *supra* note 233, at 138, *quoted in* SHEA, *supra* note 229, at 19.

235. *Cf.* Norton, *supra* note 215, at 478 (showing that newly independent states rejected law which they did not help create in the 1950s and early 1960s).

236. *See* SHEA, *supra* note 229, at 20.

revolution, Mexico began a long process of land redistribution and industrial nationalization that brought it into direct conflict with the property interests of U.S. citizens. Several agrarian properties owned by U.S. citizens were expropriated, prompting Secretary of State Cordell Hull, on July 21, 1938, to write a harshly-worded note to the Mexican ambassador in Washington:

> The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future.
>
> If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory.[237]

The Mexican Minister of Foreign Affairs responded with a note on August 3, 1938, in which he argued that "there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character. . . ."[238] Hull rejoined with what has become the classic formulation of the full compensation position: "[U]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor."[239]

Since the Second World War, developing countries have sought to embody the national treatment principle in a series of United Nations resolutions. On several occasions, overwhelming majorities in the U.N. General Assembly have passed resolutions endorsing what amounts to a national treatment standard for compensation of alien-owned properties. Resolution 3171, passed in 1973, "implies that each State is entitled to determine the amount of possible compensation and mode of payment" for

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237. Letter from Cordell Hull, U.S. Secretary of State to Mexican Ambassador in Washington (July 21, 1938), *reprinted in* GREEN HAYWOOD HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 656 (1942).

238. Letter from the Mexican Minister of Foreign Affairs to U.S. Secretary of State Cordell Hull (Aug. 3, 1938), *reprinted in* HACKWORTH, *supra* note 237, at 657.

239. Letter from Cordell Hull, U.S. Secretary of State to Mexican Ambassador in Washington (Aug. 22, 1938), *reprinted in* HACKWORTH, *supra* note 237, at 658-59.

expropriated property.[240] In 1974, the General Assembly passed Resolution 3281, also known as the Charter of Economic Rights and Duties of States (CERDS). Article 2(2)(c) of CERDS endorses the national treatment doctrine as the international standard for compensation for expropriated alien-owned property.[241] Unsurprisingly, however, these resolutions have failed to gain support among capital-exporting nations. CERDS, for example, passed by a vote of 120 to 6, with 10 abstentions.[242] The abstentions and negative votes were largely from the United States, Western Europe and industrialized countries.[243]

Just as the "prompt, adequate, and effective" standard is based upon an ideology of colonialism and the *laissez faire*, the national treatment standard has its own ideological underpinnings. First, national treatment is very much at home in the heightened nationalism produced by the humiliations of colonial "gunboat diplomacy" and interventionism.[244] Further, the national treatment doctrine reflects a more limited understanding of property rights, one in which property ownership is susceptible to modification by the state, in which simple wealth redistribution is unproblematic.

Of the two ideological bases for the national treatment doctrine, the first is far more troubling. The heightened nationalism displayed in the Calvo doctrine opposes any international interference in the domestic operations of the state. Such a view is, however, completely antithetical to any substantial notion of human rights. After all, without the ability to intervene in the operations of a state to prevent or punish violations of

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240. AKINSANYA, *supra* note 205, at 57-58 (discussing G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973), *reprinted in* 13 I.L.M. 238 (1974)).

241. *See* G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251, 255 (1975). Resolution 3281 declares that each state has the right

> to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Id.

242. *See* STEINER ET AL., *supra* note 174, at 488.

243. *See id.*

244. *Cf.* LILLICH, *supra* note 175, at 14 (discussing how the classical international law position was associated with military intervention, leading to the formulation of the national treatment standard in response).

human rights, there can be no enforcement of international norms, however they may be defined.[245] Perhaps for this reason, a more moderate position has been developed that seeks to retain a limited view of property rights without negating the notion of international law altogether.

3. Partial Compensation

The partial compensation position represents a compromise between the extremes of "prompt, adequate, and effective" compensation and national treatment. It admits the possibility of international minimum standards that limit the freedom of action of sovereign states in their expropriation of alien-owned property. It also acknowledges, however, the freedom of states to engage in redistribution of property and wealth by allowing less than full compensation to affected property-owners.[246]

Associated with the partial compensation position is the view that systematic attempts to reform a distribution of property (for example, land reform) should be treated differently from isolated instances of takings (such as, the taking of land to build a highway).[247] Some scholars have seemed to argue for specific exceptions to the "prompt, adequate, and effective" compensation requirement for nations that are seeking to undo the effects of corrupt or colonial regimes.[248] One Cuban scholar has implied, for example, that the Cuban expropriations were a unique event, necessary to reverse the effects of the corrupt Batista regime.[249]

The partial compensation position is not in complete opposition to the principle of national treatment. National treatment can be conceived in one of two ways: (1) a state is only required to treat foreigners the same way it treats nationals and has no substantive international law constraints on its actions whatsoever; or (2) a state is required to treat foreigners no better than it treats its own nationals, but there are certain restrictions on its

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245. *See* Lillich, *supra* note 228, at 5.

246. *See, e.g.*, Schachter, *supra* note 218, at 122-23, 128-29.

247. *See, e.g.*, I.N.A. Corp. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (advocating a standard of "appropriate" compensation, with the "appropriate" compensation level determined in part by the scale of the expropriation); Dolzer, *supra* note 216, at 576 (displaying a sensitivity to the relevance of the size of an expropriation on the ability of an expropriating state to pay full compensation).

248. *See* AKINSANYA, *supra* note 205, at 241-43 ("[A]n argument can be advanced . . . [to] reduce the compensation to a fraction of that demanded or even to zero, particularly for foreign investments made in a colonial or semicolonial situation or concession rights acquired through fraud, force, threat of force, or downright robbery."); *see also* Norton, *supra* note 215, at 478. Norton observes that the law of compensation for expropriation earned the special dislike of newly decolonized nations because "it purported to place strict limitations on how they could deal with foreign investors in control, at the time of independence, of the many of the new states' natural resources." *Id.*

249. *See* OLGA MIRANDA BRAVO, CUBA/USA: NACIONALIZACIONES Y BLOQUEO 87 (1996).

freedom of action that act as a minimum standard for its behavior towards both foreigners and nationals. This latter interpretation would allow a person to hold both the national treatment standard and the partial compensation standard simultaneously. Such a combination would amount to the view that states are restricted by a set of minimum standards of behavior that apply to their treatment of both nationals and foreigners alike.[250] Beyond this minimum standard, however, a state is not required to treat foreigners any better than it treats its own citizens.[251] Thus, this position combines a respect for state sovereignty with the belief in the existence of system of international law restricting the freedom of sovereign states to do whatever they please.

4. The Lack of Consensus on the Correct International Standard

There is presently no international consensus, among either states or scholars, as to the precise standard for compensation of alien-owned property. The 1938 exchange of notes between the Mexican and U.S. governments as well as the conflict between developed and developing nations in the United Nations over the correct standard provide ample evidence for the lack of unanimity behind either the "prompt, adequate, and effective" or the national treatment standard. If the customary international law from the nineteenth century is rejected by the great majority of twentieth-century nations (representing most of the world's population), as occurred in the U.N. General Assembly in the 1970s resolutions, one can only wonder whose "custom" is referred to by those who insist that "prompt, adequate, and effective" compensation remains the "customary international law."[252]

Although developing and developed nations have differed over the international law of compensation for expropriated alien-owned property, the scholarly discussion has provided little relief from the conflict. Scholars have proved unable to come to any agreement as to either the state of the international law or even the methodology for determining what the international law in this case is. This confusion derives in large

250. Human rights provide an example of such minimum standards in the present system of international law.

251. This third position is the one recommended by the natural law approach to international law endorsed in this Article. For a discussion of natural law, see *infra* Parts III.B.2 and III.B.3.

252. *See* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 (2d Cir. 1981) (concluding that the standard for compensation under international law is "appropriate" compensation); I.N.A. Corp. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (arguing that the standard for compensation in international law is "appropriate" compensation); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 cmt. c (1987) (acknowledging a lack of consensus behind the "prompt, adequate, and effective" standard).

part from the positivistic nature of modern international law. Positivistic international law scholars claim to find "the law" in the "practice of States,"[253] but if there is no one practice on which all nations unambiguously agree and no universally accepted methodology for determining what the practice of states actually is, then such positivism is bound to be inconclusive.[254] This is precisely what one observes in the case of the international law of compensation for expropriated property.

Scholars argue over the significance of the various possible pieces of evidence for determining customary international law of compensation. They disagree, for example, as to the significance of the 1970s' United Nations General Assembly resolutions. Some scholars argue that U.N. resolutions should only be considered evidence of customary international law in this area when they reflect a consensus of both capital-exporting and capital-importing nations.[255] Under this conception, none of the 1970s resolutions favoring the national treatment doctrine have any weight, no matter how lopsided their support in the General Assembly, because they were consistently opposed by capital-exporters. Other scholars have argued, however, that the only cause for ignoring the 1970s resolutions is a "dogmatic distortion" by scholars who oppose the content of the resolutions.[256]

Scholars who oppose the traditional doctrine have also tried to draw attention to the common practice of lump-sum settlements, among states with disputes over compensation for expropriated property, as evidence of a standard of compensation that is significantly less demanding than full compensation. The United States and Mexico, for example, reached a global settlement of their outstanding property disputes in 1941, under which expropriated oil companies eventually received $24 million out of their original claims for $500 million.[257] According to a study conducted by Richard Lillich and Burns Weston, 95% of claims for property are settled through similar lump-sum agreements.[258] Cuba has, for example,

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253. Dolzer, *supra* note 216, at 555.

254. *See id.* at 556-57 (arguing for a clear rethinking of the methodology of international law). Dolzer says: "[T]he mechanical application of old doctrines of sources may lead today to distorted answers, or to no answer at all, as to which norms govern a given situation." *Id.* at 557. Dworkin converts this problem of ambiguity into a more general observation about the positivistic enterprise as a whole. *See* RONALD DWORKIN, LAW'S EMPIRE 87, 96-98 (1986). Positivistic interpretation, he argues, must occur within an interpretive theory. *See id.*; *see also* TESÓN, *supra* note 182, at 146 (applying Dworkin's jurisprudence to the context of international law).

255. *See, e.g.*, Norton, *supra* note 215, at 478 (noting that there has not been a consensus in the U.N. General assembly on the topic of compensation for expropriation of alien-owned property since the 1960s).

256. Dolzer, *supra* note 216, at 563-64.

257. *See* BLASIER, *supra* note 70, at 86.

258. *See* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR

settled property claims with a number of nations through the use of lump-sum arrangements.[259] Most of the time, lump-sum settlements call for less than full compensation.[260] On the other hand, the argument has also been made that lump-sum settlements reflect largely political considerations, rather than assessments by states of the law or of their legal obligations.[261]

Shunning the U.N. General Assembly resolutions and lump-sum settlements, scholars who favor the traditional standard have instead embraced arbitration decisions as the most important source for evidence of customary international law in this area. Citing a string of decisions favoring what they claim to be the equivalent of a "prompt, adequate, and effective" standard of compensation,[262] these scholars have argued that such decisions amount to convincing evidence that the traditional standard remains the predominant viewpoint of international tribunals.[263] Of course, there are many reasons for disregarding the arbitral decisions as well. In the case of the Iran and Lybia tribunals, for example, the arbitrators were often faced with bilateral investment-guarantee treaties that determined their decisions.[264] Further, the language of the opinions favoring "full"

SETTLEMENT BY LUMP-SUM AGREEMENTS PART I: THE COMMENTARY 43 (1975).

259. *See* BRAVO, *supra* note 249, at 69. Cuba has reached such agreements with France, Switzerland, the United Kingdom, Canada, and Spain. *See id.*

260. *See* Dolzer, *supra* note 216, at 560.

261. *See id.* at 559.

262. *See, e.g.*, SEDCO, Inc. v. National Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180 (1986) (endorsing full compensation as the standard under international law); American Int'l Group, Inc. v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) (holding that full compensation was required without stating the basis for the holding); Norton, *supra* note 215, at 479-88 (discussing arbitral decisions dealing with the Lybian government's nationalizations of oil properties in the early 1970s and the decisions of the Iran-U.S. Claims Tribunal, which was created at the end of the hostage crisis).

263. *See* Norton, *supra* note 215, at 488 ("Every recent arbitral tribunal that has considered the issue has affirmed that customary international law requires a state expropriating the property of a foreign national to pay the full value of that property, measured, where possible, by the market price."); *see also* Juan C. Consuegra-Barquin, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 886 (1994) (arguing that currently "there is no doubt that the traditional compensation rule of 'fair, adequate, and effective' compensation has regained broad acceptance" as evidenced by, in part, arbitral decisions like those of the Iran-U.S. Claims Tribunal).

264. *See, e.g.*, Phillips Petroleum Co. v. Islamic Republic of Iran, Case No. 39, Award No. 425-39-2 (Iran-U.S. Cl. Trib., June 29, 1989) ("The Tribunal has consistently held that the applicable law for the purpose of determining the compensation owed by the Islamic Republic of Iran . . . is the 1955 Treaty of Amity."); Amoco Int'l Fin. Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987) (relying on the 1955 U.S.-Iran Treaty of Amity in order to justify full compensation); Starrett Housing Corp. v. Islamic Republic of Iran, Case No. 24, Award No. 314-24-1 (Iran-U.S. Cl. Trib., Aug. 14, 1987) (justifying full compensation); Phelps Dodge Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986) (justifying full compensation); Payne v. Islamic Republic of Iran, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986) (justifying full compensation); Norton, *supra* note 215, at 479-83 (stating that arbitrators emphasized the presence

compensation rarely use the traditional language of the Hull formula, often expressing themselves, instead, in terms of "appropriate" compensation.[265] Finally, as Norton points out, the arbitrators from developing nations usually dissented from the decisions in favor of "full" compensation.[266] Thus one could also argue that the arbitral decisions reflect the same lack of consensus about the standard of compensation as the U.N. resolutions on the subject.[267]

Another indicia appealed to by scholars in favor of the traditional standard of "prompt, adequate, and effective" compensation is the proliferation of bilateral investment treaties (BITs) that call for full compensation in the event of expropriation. These scholars have argued that the increasing acceptance by developing nations of full compensation as a term of such treaties indicates that the traditional standard has gained adherence even among those nations that had previously opposed it.[268] Again, however, others have argued that BITs do not reflect evidence of an emerging consensus in favor of the "prompt, adequate, and effective" standard. As Schachter points out, in order for BITs to count as evidence of a growing belief that full compensation is required by international law, the compensation provisions within BITs would have to be viewed by the parties to the agreement as an "obligatory" component of the treaty.[269] In

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of written investment treaties in both the Iran and Lybian tribunals).

265. *See* Ebrahimi v. Islamic Republic of Iran, Case No. 44, 46, 47, Award No. 560-44/46/47-3 (Iran-U.S. Cl. Trib., Oct. 12, 1994) ("The Tribunal believes that, while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the 'prompt, adequate, and effective' standard represents the prevailing standard of compensation."); I.N.A. Corp. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (opinion of Judge Lagergren) (endorsing the position that an exception to full compensation is allowed in cases of large-scale nationalizations); Texas Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389 (1979) (applying an "appropriate" compensation standard); *see also* Schachter, *supra* note 218, at 127-28 (noting the absence of the Hull formula from the *Texas Overseas Petroleum Co.* case); *cf.* Libyan Am. Oil Co. v. Libyan Arab Republic (1977), 20 INT'L LEG. MAT. 1, 86 (1982) (endorsing "equitable" as the standard of compensation, with "prompt, adequate, and effective" as a useful guide).

266. *See, e.g.*, Phelps Dodge Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986) (Hamid Bahrami dissenting); Norton, *supra* note 215, at 483 (stating that in most significant decisions, Iranian arbitrators sided against the majority ruling).

267. *See, e.g.*, I.N.A. Corp. v. The Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985) (demonstrating disagreement among judges favoring full compensation in this case as to the correct international standard for other cases of expropriation).

268. *See, e.g.*, Consuegra-Barquin, *supra* note 263, at 883 (claiming that BITs represent state practice in conflict with the U.N. resolutions); *cf.* Tali Levy, Note, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate, and Effective" Standard*, 31 STAN. J. INT'L L. 423, 424 (1995) (observing that in NAFTA, Mexico, a long opponent of the Hull formula, has accepted the substance of the "prompt, adequate, and effective" standard).

269. *See* Schachter, *supra* note 218, at 126.

fact, he observes, the provisions are just as easily seen as contractual concessions by the developing nations in order to help secure investment from the developed countries.[270] Thus, it could just as easily be argued that the inclusion of compensation provisions within BITs counts as evidence *against* any consensus that the correct standard is "prompt, adequate, and effective." After all, if there truly were consensus on this issue, why would there be any need to spell out the standard in the agreement?

A consideration of the foregoing evidence leads ineluctably to the conclusion that there can be no non-arbitrary standard of compensation for expropriation of alien-owned property drawing upon the positivistic methodology of classical international law. The possible sources point in too many different directions. Which sources one prefers over others will almost certainly reflect which conclusion one wants to reach. The only honest answer, therefore, is that there simply is no consensus on the appropriate compensation requirement.[271]

5. A Reconceptualization of the Debate?

The interminable debate over the present standard for expropriation of alien-owned property may rest on a mistake in the actual terms of the debate. That is, it may be the tacit agreements, more than the obvious disagreements, that have helped to perpetuate the inconclusive dispute over "prompt, adequate, and effective," national treatment, and partial compensation. Thus, an examination of the parameters within which the debate has taken place might help to reformulate the rules of the game in such a way as to facilitate a new, more fruitful approach.

Although scholars have disagreed as to their actual conclusions regarding the proper standard for compensation for expropriation of alien-owned property, they have agreed on a variety of crucial points. First, they have all approached the problem with a positivistic methodology. That is, they have agreed that the correct question to ask is what the law of compensation actually is, and not what the law of compensation (given a set of ethical premises) should be. They have poured over U.N. resolutions, lump-sum settlements, arbitral decisions and BITs searching for a means

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270. *See id.*

271. Tesón argues that this problem can be solved by providing a justice-based hermeneutic through which the ambiguous sources may be interpreted. *See* TESÓN, *supra* note 182, at 146. This position only makes sense, however, when there is broad agreement as to what are the relevant sources. In the case of compensation for expropriation of alien-owned property, no such agreement exists. Thus, even if different parties were to agree on an interpretive theory, they would be unable to resolve their differences, because they would go about applying that theory to different "sources." Indeed, this disagreement over sources appears to be a general weakness in Tesón's attempt to apply Dworkin's jurisprudence to the international context: international lawyers simply do not agree about the sources of international law to the same extent as domestic lawyers.

of divining from all of that contradictory evidence some single consensus that could serve as the basis for a conclusion regarding customary international law.

Second, with few exceptions,[272] they have all tended to accept the idea that a country's expropriation of property from its own citizens does not generally raise any issues under international law. Such actions are implicitly considered to be matters of solely domestic interest. Instead, scholars have focused exclusively on the issue of expropriation of alien-owned property.

In other words, scholars have tended to treat the compensation for expropriation issue under the rubric of the classical international law model. That model was characterized by a focus on state actors, a lack of concern for what a state does to its own citizens, and a positivistic methodology. The latter two characteristics are undoubtedly present in scholarly discussions of the compensation standard. And, because the discussions are primarily concerned with how nations treat foreign nationals, the first characteristic is present as well.[273] An alternative to this classical international law model exists, however, in the form of the human rights model. Treating the expropriation issue under the human rights model would provide a new set of solutions to the problem of the correct standard of compensation.

Consuegra-Barquin has proposed that expropriation be treated as a human rights *issue*,[274] but his analysis fails to embrace fully what this Article describes as the human rights *model*. In particular, he fails to move beyond the positivistic methodology associated with the classical model.[275] Thus, Consuegra-Barquin can be seen as straddling a middle position between the classical model and the human rights model. He wants to be able to apply the (nonexistent) international standards governing expropriation to the nationals of the expropriating state, but he refuses (1) to acknowledge the indeterminacy of that model and (2) to embrace the moral discourse appropriate to the human rights model. As a result, even if a person were to embrace Consuegra-Barquin's approach, she would still be left without any means of resolving the interminable debate described in the prior Parts of this Article.

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272. For one such exception, see Consuegra-Barquin, *supra* note 263, at 887-89.

273. This follows because a focus on the rights of only foreign nationals within states corresponds with the view that it is their status as nationals of a different state that confers certain rights upon the persons in question. If it were their status as a person that conferred the rights upon them, then the distinction between foreigners and nationals would become meaningless and states would be held to the same standard for the treatment of their own nationals as they were for the treatment of aliens.

274. *See* Consuegra-Barquin, *supra* note 263, at 887-89.

275. *See id.* at 883 (listing the traditional positivistic sources for determining the content of customary international law).

Consuegra-Barquin is correct, however, in his observation that property rights bear a close relationship to other human rights. Of course, any attempt to demonstrate this will require an effort to outline a more general theory of human rights. That is, however, the project of the next Part. Nevertheless, even a superficial examination of the individual's relationship to property reveals its connection to other human rights. Like the freedom of religious worship and the freedom of expression, property can easily be conceived as an essential feature in a person's attempts at self-expression. Further, some control over certain external resources is necessary in order to be able to enjoy any of the other, more commonly recognized, human rights. After all, if a person cannot acquire food, clothing and shelter, it would be extremely difficult to enjoy the freedom of conscience. Thus, it is unsurprising that the 1948 Universal Declaration of Human Rights stated, in Article 17, that everyone has the right to own property and to not be arbitrarily deprived of that property.[276]

As Consuegra-Barquin observed, a human rights approach to the issue of compensation for expropriation would effectively erase the strong distinction currently drawn between expropriation of alien-owned and national property within the context of international law.[277] This is not to say that there could not arise cases where the two would be treated differently. For example, if a law discriminated against foreign-owned property in general, it might not violate international norms, as long as it did not violate anyone's human rights. But the current tendency to completely disregard a state's treatment of its own national's property, within the international law context would be left behind.

Treating expropriation issues under the human rights model would lead scholars away from a positivistic focus on what the customary international law *actually* is and allow them to ask, as they have not generally done, what the international standard *should be*. Such an undertaking requires, first, the development of a theory of international law and the role of human rights within that theory. Second, it requires the formulation of a theory of property rights as human rights and an exploration of the boundaries of those property-related human rights. Only then will it be appropriate to evaluate how those property-related human rights should be protected within the international arena. The next two Parts therefore attempt to achieve these two goals. Part III.B describes a natural law approach to international law. Part III.C then elaborates a natural law theory of property rights as human rights and from that elaboration seeks to establish an international standard for compensation of expropriated property. Finally, the last Part takes the case study of the

276. *See* Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

277. *See* Consuegra-Barquin, *supra* note 263, at 889.

Cuban revolution's property reforms to show how this standard can be applied.

C. *A Natural Law Approach to International Law*

When searching for a comprehensive, ethically-grounded theory of international law and human rights, one obvious place to begin is with the natural law. After all, it was within the theory of natural law, as developed by St. Thomas Aquinas in the thirteenth century and systematically expanded by the Spanish scholastics of the sixteenth century, that the modern notion of international law developed.[278] Although following the Enlightenment's rejection of natural law methodology, international law began to move away from its natural law roots,[279] the concept of a law of nations that provides universal minimum standards of conduct is most at home in the moral universe of Thomistic thought.[280] Further, the notion of universal human rights is consonant with the Thomistic natural law tradition. Indeed, as with modern international law as a whole, it is from the milieu of natural law thought that the concept of human rights emerged as well.[281] This Part will outline a natural law theory of international law and human rights and then discuss why such a system is preferable to other possible ethical bases and superior to the presently-dominant positivistic

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278. *See* Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 215, 227 (arguing that natural law has been the most continuous influence on the development of modern international law). It is common to assign credit for the development of the modern concept of international law to Hugo Grotius, who was a Dutch lawyer in the natural law tradition during the 16th and 17th centuries. *See, e.g.*, Hedley Bull, *The Importance of Grotius in the Study of International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 223, at 65, 71 (claiming that Grotius's work states the classical paradigms of inter-state relations); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L. J. 1, 14-16 (1988) (discussing the tendency of modern historians of international law to disvalue the thought of premodern scholars, like Francisco Suarez and Francisco Vitoria, two 16th-century Spaniards). Grotius, however, is clearly writing in the tradition of the 16th-century Spaniards, whose work he cites heavily. *See* Bull, *supra*, at 73 (describing Grotius's work as following Suarez and Vitoria and pointing out that Grotius is rarely "strikingly original"). The concepts of international law discussed in the work of Grotius were clearly present in the earlier Spanish thought. *See* BERNICE HAMILTON, POLITICAL THOUGHT IN SIXTEENTH-CENTURY SPAIN 99 (1963) (discussing the views of the 16th-century Spanish Thomists on international law).

279. *See* Bull, *supra* note 278, at 79 (describing the rise of positivism within international law beginning in the eighteenth century).

280. This is not to say that international law outside of the context of natural law is incoherent. It would be perfectly possible to base a system of international law on some other foundation (e.g., raw power). Nevertheless, as I will argue below, the notion of international law is best justified within a system of natural law. *See infra* Part III.B.2.

281. *See* HENKIN, *supra* note 179, at 1 ("Individual rights as a political idea draws on natural law and its offspring, natural rights.").

approach.

1. An Overview of Natural Law Theory

a. Thomistic Natural Law

Before discussing the specifics of a natural law theory of international law, it is important to provide an overview of the Thomistic theory of natural law. Before the late seventeenth century, such an undertaking would have been unnecessary, but, as Alasdair MacIntyre has shown, modern philosophy is characterized by its rejection of the Aristotelian teleology that underlies Thomistic natural law reasoning.[282] Moreover, discussions of natural law within international law, indeed within legal literature in general, rarely go beyond the construction of a superficial straw man. Thus a brief description of Thomistic ethics is in order.

Fundamental to the theory of natural law is the notion that all human beings have a *telos*, or end. This *telos* is a concept of human-beings-as-they-could-be if they realized their *telos*, which stands in marked distinction to human-beings-as-they-happen-to-be.[283] Aquinas argued that the final *telos* of all human beings is happiness,[284] which he says, consists in the beatific vision of the divine essence.[285] Clearly, such a theological formulation would be an unacceptable basis for most international lawyers in the world today, and if this were all St. Thomas had said on the matter, his theory would provide very little to work with indeed. Fortunately, however, his theory is far more flexible than this simple formulation of the human *telos* implies, and it seems quite possible to structure it in such a way as to be conceptually acceptable in the present, more secular age.

First, it is important to emphasize that while Aquinas views the beatific vision as the form of *perfect* happiness, only attainable through God's grace after death,[286] he does admit the existence of an imperfect

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282. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 52 (1981) [hereinafter VIRTUE]. It is important to recognize that the teleology necessary for Thomistic natural law is not Aristotle's biological teleology, but rather a teleology of human ends: a notion of what it means for human beings to be "good" that can guide our ethical reasoning. *See id.* at 183.

283. *See id.* at 50.

284. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I-II, Q. 1, art. 8 (Fathers of the English Dominican Province trans., Benziger Brothers, Inc. 1947).

285. *See id.* at Pt. I-II, Q. 3, art. 8 ("Final and perfect happiness can consist in nothing else than the vision of the divine essence.").

286. Because of his belief that the true end of human beings is the beatific vision, Aquinas is committed to the view that human beings cannot achieve their final end in this life, but must wait until they die to encounter full happiness and perfection. *See id.* at Pt. I-II, Q. 5, art. 3 ("[I]t is evident that none can attain true and perfect Happiness in this life."). This full happiness can only be achieved through the grace of God and not by "man's natural power." *See id.* at Pt. I-II, Q. 5,

version of this happiness that is attainable during our natural lifetimes and through the exercise of our own rational capacities.[287] By focusing on this latter, incomplete happiness, one avoids Aquinas's theological assumptions. The fact that Aquinas considers earthly happiness to be incomplete should not affect the analysis, because his basis for considering it to be such is derived from his religiously-based belief in the afterlife. It is only incomplete insofar as there is something additional which comes later. Hence, although a nontheological understanding of the ultimate human end would always be insufficient to Aquinas, this insufficiency would be a relative one and does not imply that an ethic built up around a nontheological world view would be incapable of adequately telling us how we are to live.[288] After all, Aquinas thought that the existence of God was not self-evident,[289] but he did believe the practical moral principles needed to live a good life were available to all human beings, regardless of their religious beliefs or culture.[290] Hence, to some extent, the two can be separated without doing violence to either.[291]

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art. 5.

287. *See id.* at Pt. I-II, Q. 5, art. 3, art. 5.

288. *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 193 (1988) [hereinafter JUSTICE].

289. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 48 (1980).

290. *See, e.g.*, AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 2 (arguing that the precepts of natural law are self-evident to rational beings).

291. John Rawls has criticized Aquinas's teleological view of human beings as sharing one end. *See* JOHN RAWLS, A THEORY OF JUSTICE § 83, at 554 (1971). "Human goods are heterogeneous because the aims of the self are heterogeneous," he says. *Id.* "Although to subordinate all our aims to one end does not strictly speaking violate the principles of rational choice, . . . it still strikes us as irrational, or more likely as mad. The self is disfigured and put in the service of one of its ends for the sake of system." *Id.* A sympathetic reading of Aquinas shows Rawls's criticism to be inapt, however. The ultimate goal of (imperfect) human happiness is, for Aquinas, mediated by a series of subsidiary goods that are necessary for the accomplishment of that goal. These subsidiary goods are associated with his list of virtues. In order to be happy, a person must acquire the several goods that correspond to the various virtues described in the *Summa Theologica.* Among these are the cardinal virtues of prudence, justice, temperance, and fortitude. For an overview of Aquinas's teachings on the virtues, see AQUINAS, *supra* note 284, at Pt. I-II, Q. 55-67. Thus, although Aquinas only recognizes one ultimate *telos* for human beings, he does acknowledge the existence of a diversity of subsidiary goods, which all human beings should aspire to attain.

Rawls implies that these subsidiary goods are only "permitted" by Aquinas so long as their pursuit does not lead the ultimate goal to be "hindered." *See* RAWLS, *supra*, at 554. But the connection between subsidiary goods and the final end of human happiness is much more intimate than mere noninterference or simple instrumental assistance. Human happiness necessarily involves the right ordering of the human will implied by the possession of the various virtues. *See* AQUINAS, *supra*, at Pt. I-II, Q. 5, art. 7. This right ordering of the will is all we can aspire to in our mortal lives. In a sense then, human happiness, at least insofar as we can achieve it on earth, *consists in* the pursuit and acquisition of the various human goods. Rawls's attempt to drive a wedge between the pursuit (or achievement) of these subsidiary goods and the pursuit (or achievement) of happiness makes little sense within the Thomistic world view.

Aquinas divides the moral principles of natural law into two broad categories: primary precepts and secondary principles.[292] Primary precepts are self-evident principles that point directly towards various human goods. In other words, precepts derive their status as good or evil from the relationship they bear to the various subsidiary human ends. They take the general form that "good is to be done and pursued, and evil to be avoided."[293] Thus, an example of a primary precept is the assertion that the preservation of human life is a good to be sought. Primary precepts are self-evident to all rational beings and therefore cannot be "abolished from the heart of man."[294]

Secondary principles are the conclusions immediately following from primary precepts.[295] They are more specific than primary precepts, providing statements of rules of conduct as opposed to the general assertions of good or evil. A secondary principle corresponding to the example of the primary precept described above would be something like the familiar "Thou shall not kill." While, like primary precepts, the secondary conclusions are available to all rational beings, they can, unlike the general precepts, be "blotted out" by passions and bad habits.[296]

In general, as one moves from the extremely vague primary precepts to more specific moral judgments, the chances of error and subtleties induced by varying circumstances inevitably increase. As Aquinas says, "the more we descend to matters of detail, the more frequently we

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John Finnis provides a somewhat different answer to Rawls through his development of a natural law theory that incorporates within itself a multiplicity of human ends. *See* FINNIS, *supra* note 289, at 60-62, 81-92. It is possible to see within the ends proposed by Finnis traces of Aquinas's virtues. Nevertheless, Finnis allows much more freedom than Aquinas for selecting among the various human goods (although he emphasizes that commitment to one good cannot involve discounting the ultimate value of other goods). *See id.* at 105-06. Moreover, Finnis does not, like Aquinas, subordinate the various human goods to one ultimate good. It is unclear, however, what such a subordination would entail in terms of the content of an ethical system. Finnis could easily say that the achievement of excellence within his constellation of goods is essential to human happiness or the fulfillment of human nature without in any way fundamentally modifying his moral system. In the same way, it is not clear that Aquinas's subordination of the various virtues to the goal of human happiness (whether in its earthly or heavenly form) represents an impoverishment of the diversity of human excellence. It still leaves much room for a diversity of priorities within that one overall conception of the good human life. Nevertheless, as MacIntyre observes, some overarching notion of the overall human *telos* is necessary for avoiding a "subversive arbitrariness" in the moral life. *See* VIRTUE, *supra* note 282, at 189. Finnis seems to provide this overarching unity through his concept of the "life plan," which helps to provide a person's life with the integrity and constancy that MacIntyre identifies as so crucial. *See* FINNIS, *supra* note 264, at 105; VIRTUE, *supra* note 282, at 189.

292. *See* JUSTICE, *supra* note 288, at 195.

293. AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 2.

294. *Id.* at Pt. I-II, Q. 94, art. 6.

295. *See* JUSTICE, *supra* note 288, at 195.

296. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 6.

encounter defects."[297] But this is not to say that all diversity is a result of defect, for as Aquinas notes, at the practical level, the truth itself is not the same for all, because different circumstances will yield legitimate differences in how the same primary precepts are actually applied.[298]

Aquinas believes that people move deductively from the universal and general primary precepts to the specific principles that can be applied to actual situations in which they are called to make particular moral decisions by using their faculties of conscience.[299] Although the conscience can be led into error by ignorance, passions, and bad habits, a person must always follow his conscience, because the principles it presents subjectively appear to the person as something good.[300] To act counter, even to an erroneous conscience, is to embrace as the object of the will that which appears to the person to be evil. In so doing, the person makes his will evil.[301] But the person does not avoid sin merely by following an erroneous conscience, for if a person's conscience is erroneous through some fault of his own (for example, willful blindness or negligence in our search for facts), he bears the blame for his erroneous conscience to begin with.[302]

A person can make himself less likely to culpably form an erroneous conscience by cultivating good habits, or virtues.[303] There are a diversity of human virtues corresponding to a wide variety of subsidiary human ends. And the operation of the virtues, the connection between having certain virtues and performing good acts, is not so much mechanical as creative. The person who is in possession of the virtue of courage or justice can apply those virtues quite naturally in absolutely new circumstances and previously unknown ways.[304]

b. The Thomistic Categories of Law

The thinkers of the Thomistic renaissance in sixteenth and seventeenth century Spain accepted Aquinas's theory of natural law and, with a few alterations,[305] systematized it into a holistic theory of law for all humanity.

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297. *Id.* at Pt. I-II, Q. 94, art. 4.

298. *See id.* ("But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all.").

299. *See* JUSTICE, *supra* note 288, at 185.

300. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 19, art. 3, 5.

301. *See id.* at Pt. I-II, Q. 18, art. 3.

302. *See id.* at Pt. I-II, Q. 19, art. 6.

303. *See id.* at Pt. I-II, Q. 55, art. 3.

304. *See* VIRTUE, *supra* note 282, at 177.

305. Finnis describes how the 16th-century theorists misread Aquinas to hold that the natural law was morally binding only because it is endorsed by the will of a superior being, namely God. *See* FINNIS, *supra* note 289, at 45-49. Aquinas, however, held to such "voluntarist" theory. Rather,

In particular, the thinking of Francisco de Vitoria, a Dominican friar writing in the early sixteenth century,[306] and Francisco Suarez, a Jesuit philosopher writing in the late sixteenth and early seventeenth centuries,[307] helped Thomistic legal theory to achieve new heights of complexity and subtlety. The elegance of their conception of the different categories of law, along with their consideration of the significance of an international community, make them important stopping-points on the path towards the formulation of a natural law theory of international law.

The Spanish Thomists divided law into five, hierarchically arranged, categories: (1) divine or eternal law; (2) natural law; (3) divine positive law; (4) human positive law; and (5) *ius gentium*. These categories were seen as interrelated in important ways. The following discussion analyzes each of these categories and its relationship to the others.

For Aquinas, the eternal law is the very order of the universe itself.[308] Ultimately, eternal law is the measure of all other laws, because it is the law that emanates from the will of the creator. Aquinas says: "Since, then, the eternal law is the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law."[309] All rational creatures know the eternal law, though not in its entirety, by its reflection in the nature of observable creation itself.[310]

This participation of rational creatures in the eternal law is what Aquinas, and the Spanish Thomists following him, referred to as the natural law.[311] They saw natural law as accessible to all rational creatures and therefore believed it to exist among Christians and non-Christians alike.[312] While passions and culture can obscure the truth of more specific moral principles, the most general principles of the natural law are incapable of being disregarded by rational human beings.[313] The converse of the observation that all human beings are bound by the strictures of natural law is the belief that all human beings are protected by a set of

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he simply believed the primary precepts of natural law to be self-evidently true ends of human existence. This self-evident truth led directly to the obligation to pursue such ends by virtue of their status as ends. *See id.* at 46.

306. For a short biography of Francisco de Vitoria, see HAMILTON, *supra* note 278, at 171-76.

307. For a short biography of Francisco Suarez, arguably the greatest and most systematic thinker of 16th-century Spain, see *id.* at 184-88.

308. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 93, art. 1.

309. *Id.* at Pt. I-II, Q. 93, art. 3.

310. *See id.* at Pt. I-II, Q. 93, art. 2.

311. *See id.* at Pt. I-II, Q. 91, art. 2 ("This participation of the eternal law in the rational creature is called natural law."); FRANCISCO SUAREZ, S.J., DE LEGIBUS bk. II, ch. ii, para. 4 (1612), *reprinted in* CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed. 1944) (describing the natural law as emanating from the eternal law).

312. HAMILTON, *supra* note 278, at 19-20; *see also* SUAREZ, *supra* note 311, at bk. II, ch. viii, para. 5.

313. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 4.

universal rights that cannot be abrogated by any human power. Hamilton observes: "[T]he view of natural law as common to all men, and to men alone, led . . . to a firm belief that the Indians of the New World . . . had natural rights of their own, the infringement of which no superior civilization or even superior religion could justify."[314] So important were these fundamental rights to Vitoria that he argued that states had the right to intervene in the affairs of a colleague state when they observed the latter violating the natural rights of persons within its borders (whether those persons were subjects of the violating state or resident aliens).[315]

The general principles of natural law are subject to only very limited change. First, as Aquinas points out, because its primary precepts cannot be removed from the hearts of humans, the natural law cannot be changed by subtraction.[316] Nevertheless, it is possible to alter the effect of the general principles of natural law by adding to them, or filling in their gaps, so to speak. If the natural law is silent or indifferent on a certain issue (as it often is), then it is possible to alter its effect by replacing that cipher with a specific prohibition or prescription.[317] Further, the way in which general primary precepts work themselves out in specific moral prescriptions may come to change over time with changes in material circumstance.[318]

Divine positive law encompasses all ethical injunctions revealed through Scripture. These revealed ethical truths serve to supplement the conclusions of natural law.[319] Unlike Occam,[320] who earlier argued that natural law was subject to the will of God, Francisco Suarez favored the opposite position. It is impossible, Suarez argued, that divine positive law should contain anything contrary to the natural law.[321] Unlike the natural law, divine positive law was seen as exclusively available to those who had accepted the Christian religion. Thus, those not exposed to the Christian faith could not be held morally responsible for failing to adhere to ethical injunctions not present in the natural law but present in the positive divine law.[322]

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314. HAMILTON, *supra* note 278, at 24.

315. *See id.* at 166.

316. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 5.

317. *See id.*; *see also* SUAREZ, *supra* note 311, at bk. II, ch. xii, para. 1 (addition to natural law does not change it).

318. *See id.* at bk. II, ch. xii, para. 6.

319. *See* HAMILTON, *supra* note 278, at 5.

320. *See id.* at 25.

321. *See* SUAREZ, *supra* note 311, at bk. I, ch. ix, para. 3.

322. This belief served as the basis for Bartolomé de las Casas's defense of the practice of human sacrifice among Native Americans in the New World. *See* GUSTAVO GUTIÉRREZ, LAS CASAS 178-81 (Robert R. Barr trans., Orbis 1995). Such practices, he argued, were not explicitly contrary to natural law, but rather only prescribed by divine positive law. *See id.* Hence, he concluded, the Native Americans could not legally be subjected to conquest as a result of their practice of human

Although divine positive law must be consistent with natural law, it derives its authority from an independent source: God. Human positive law, however, derives its authority from, and is completely subordinate to, the natural law. Human positive law is necessary to fill in the gaps left as a result of the very general nature of the natural law.[323] To some extent, human positive law has its own authority, but only because obedience to human positive law (when that law is passed by a legitimate authority) is itself enjoined by the natural law as a necessity for the maintenance of a peaceful human society.[324] Thus, an act that is not in itself evil under the natural law may become evil if it is proscribed by positive human law.[325] It is crucial to the legitimacy of such a law, however, first, that it be passed by a rightfully constituted legislative authority, second, that it be in the interest of the common good, and finally, that it not violate the principles of natural law.

Legislative authority was seen by the sixteenth-century Spaniards as resting ultimately in the community considered as a whole.[326] Only through a process of majoritarian delegation could this legislative power be assigned to an individual or group of individuals.[327] Once the power had been delegated, however, Suarez believed it could be passed on hereditarily and only removed if the ruler lapsed into tyranny.[328]

Second, in order for positive law to be just, it must be passed in the interest of the common good.[329] The requirement that laws be consonant with the common good results from the belief, prevalent throughout scholastic thought, that human beings are inherently social animals and require society in order to achieve their proper end.[330] Human beings can only achieve their end of community life, however, if the laws of society help to guide people toward the common good.

Finally, because positive human law's authority is ultimately traceable

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sacrifice. *See id.*

323. *See* HAMILTON, *supra* note 279, at 43.

324. *See id.* at 52.

325. *See* SUAREZ, *supra* note 311, at bk. I, ch. ix, para. 5 ("[E]ven as an act not in itself evil becomes evil through just prohibition of a superior, so an act not in itself either good or evil, will become good through a law which justly prescribes it.").

326. *See id.* at bk. III, ch. 2, paras. 3-4.

327. *See id.* at bk. III, ch. 4, para. 2 ("Civil power, wherever it resides . . . in the person of one individual . . . has flowed from the people as a community . . . [I]t must necessarily be bestowed upon . . . [the ruler] by the consent of the community.").

328. Once a leader declines into tyranny, the people are justified in establishing a new leadership and engaging in just war against the tyrant. *See* FRANCISCO SUAREZ, S.J., DE BELLO § 8, *reprinted in* CLASSICS OF INTERNATIONAL LAW, *supra* note 311, at 800, 854; FRANCISCO SUAREZ, S.J., DEFENSIO FIDEI CATHOLICAE bk. VI, ch. iv, *reprinted in* CLASSICS OF INTERNATIONAL LAW, *supra*, at 661, 705.

329. *See* HAMILTON, *supra* note 278, at 44.

330. *See, e.g.*, SUAREZ, *supra* note 311, at bk. I, ch. 3, para. 19.

to the natural law, a human law that is itself contrary to the natural law does not bind the human conscience. Suarez and Vitoria are insistent that even a lawfully authorized legislator has no power to bind through unjust laws.[331] Thus, the natural law acts as a set of minimum standards, external and universal constraints upon the lawmaking power of a sovereign. The sovereign need not limit herself to passing laws that merely replicate the commands of natural law. She is free to pass laws that fill in the substantial gaps left by its quite general principles, but these interstitial laws must be consistent with the principles enumerated in the natural law from which they derive their binding force.

It is clear from this discussion that interstitial positive law, that is, positive law that "fills in the gaps" and does not merely reiterate the commands of the more or less immutable natural law, is subject to change at the hands of the sovereign. Within the ample room provided by natural law, the legitimate maker of positive law may revise prior positive law as she sees fit, so long as her changes are in the interest of the common good. Further, it would stand to reason that a new government in place following the toppling of a tyrant would have substantial freedom, again within the strictures of the natural law, to revise the unjust legal system that the tyrant had put into place.

The final category of law discussed by the Spanish Thomists is what they call the *ius gentium.* The *ius gentium* is the set of legal norms governing interactions of different nations or peoples. Although *ius gentium* is often translated as "international law," it is clear that the *ius gentium* does not provide *all* of the content of what would today be considered international law. Vitoria, for example, thought that when a state's positive law violated the natural law in a particularly grave way, another state was justified in intervening in defense of the violator's citizens.[332] Under such a view, the natural law as it relates to a state's treatment of its own citizens must also be seen as contributing some of the content of international law. Nevertheless, *ius gentium*, conceived of as the norms governing the interactions among nations, does correspond to at least part of what would today be called international law.

The willingness of the sixteenth-century Spaniards to conceive of *ius gentium* as a binding law among the different nations derives in part from their view of the human race as one large and universal community, united by the common nature of the species.[333] The existence of a universal

331. *See id.* at bk. I, ch. ix, para. 4; FRANCISCO DE VITORIA, DE INDIS RELECTIO § 3, para. 2, *reprinted in* CLASSICS OF INTERNATIONAL LAW, *supra* note 311, at 101 ("If there were any human law which without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law.").

332. *See* RAMON HERNANDEZ, O.P., FRANCISCO DE VITORIA 180-81 (1995).

333. *See id.* at 174; SUAREZ, *supra* note 311, at bk. II, ch. xix, para. 9.

human community requires, for Suarez, that human beings develop a body of law "whereby they may be directed and properly ordered with regard to . . . intercourse and association."[334] This law is quite similar to the category of human common law, but, unlike that law, it does not derive from the law-making activity of a clearly-established sovereign.

Although Vitoria sometimes hints at the desirability of a world government,[335] the absence of such institutions led the Spanish Thomists to search for another source of the content of the *ius gentium*. For Vitoria, the *ius gentium* may derive from a variety of sources. It can be based upon the natural law, the consent of the majority of peoples, universal custom, uniform laws accepted in all countries, or international agreement.[336] For Suarez, on the other hand, the *ius gentium* is more exclusively formed through the universal custom of the world's peoples.[337] Suarez observes that certain universal customs reflect mere accidental correspondence in the internal governance of states, while others reflect customs worked out among states as to how they will treat each other. Only the latter group of customs can limit the actions of a state.[338] Suarez thinks the *ius gentium* may change over time, so long as the changes do not violate natural law.[339] Nevertheless, although they differ in their descriptions, Vitoria and Suarez agree that the *ius gentium* has moral force derived from the natural law.[340]

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334. *Id.*

335. *See* FRANCISCO TITOS LOMAS, LA FILOSOFIA POLITICA Y JURIDICA DE FRANCISCO DE VITORIA 179 (1993) ("El orbe todo, que en cierta manera forma una republica, tiene poder de dar leyes justas y a todos convenientes, como son las del derecho de gentes [*ius gentium*].").

336. *See id.*

337. *See* SUAREZ, *supra* note 311, at bk. II, ch. xix, para. 8.

338. *See id.* at bk. II, ch. xx, para. 7.

339. *See id.* at bk. II, ch. xx, para. 6.

340. *See* HAMILTON, *supra* note 278, at 166-67; TITOS LOMAS, *supra* note 335, at 179 ("El derecho de gentes, que o es derecho natural o del derecho natural se deriva."). As noted in the text, Suarez takes a more complex approach, arguing that certain universal customs, such as those situations in which countries just happen to agree on how to manage their own affairs, have no morally binding force, and may be changed by any one nation at will. Other customs, which are more closely related to the intercourse of nations, do have moral force and may be changed only with respect to one's own citizens until a new consensus emerges that the old standard is no longer the correct one. *See* SUAREZ, *supra* note 311, at bk. II, ch. xx, paras. 7-8. Of course, this latter situation assumes that the changes made be consistent with natural law, because otherwise they would be outside of the power of the legislator to undertake. Interestingly, Suarez seems to place the rule of compensation for expropriated property within the first category, because he thinks it can be unproblematically be changed. "It is a rule of the *ius gentium*," he says, "that one not be deprived of his possessions . . . without compensation, and still, through custom, a rule might be introduced that possessions may be taken without compensation." *See id.* at bk. VII, ch. iv, para. 6.

2. Thomistic Natural Law and International Law

The picture of international law that emerges from this overview of pre-Enlightenment Thomistic thought is one in which the gap between the classical international law model and the human rights model makes little sense. Instead of a situation where there are two different paradigms, each embracing to some extent different notions of what gives international law force and content, the Thomists saw one overarching system within which all human law neatly fits. All law, whether dealing with what would today be called international human rights, with the standards of conduct among nations, or even with the domestic laws of a particular jurisdiction, are based upon the one natural law, which places limits on its content and which makes it worthy of obedience.

The conception of international law embodied in the writings of Vitoria and Suarez is that of a body of natural law that transcends national boundaries. This body of law includes within it a set of rights and duties possessed by each and every human being by virtue of a shared human nature.[341] No matter where a person happens to be located, she is seen as protected by the rights inherent in human dignity, rights that limit the freedom of action of all states throughout the world. Within this framework of basic rights and duties derived directly from the natural law, no distinction based upon nationality makes any sense. All persons, by virtue of their humanity, are subject to the same consideration at the hands of all states.[342]

Laid over these basic natural rights and duties are a set of international customary norms constituting the *ius gentium*. Such customary norms may serve to provide foreigners with special rights, duties or protections not made available to nationals. Suarez speaks, for example, of practices which, because of their status within the *ius gentium*, cannot be changed with respect to foreigners until a new international consensus has been reached. Such practices may, however, be suspended with respect to one's own citizens without violating the *ius gentium* or the natural law.[343] Thus, the foreigner and her state can be seen as having some sort of right to be treated according to certain international norms which may not be

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341. *See, e.g.*, HERNANDEZ, *supra* note 332, at 168 (discussing how Vitoria saw the rights of citizens, based upon their human dignity, as limiting the power of the state).

342. This is not to say that there are not natural rights that do not distinguish between citizens and visitors. Presumably the right to choose one's form of government is limited to members of the community that will have to live under the government to be chosen. Visitors to such a community at the moment of choice could be excluded from that choice without violating their natural rights. "Basic natural rights" can be thought of as those natural rights that attach to a person at any and all times and are in no way derived from her membership in a particular community. These "basic" rights do not encompass the entire set of rights derived from natural law.

343. *See* SUAREZ, *supra* note 311, at bk. II, ch. xx, para. 9; bk VII, ch. iv, para. 7.

abrogated by a single state, acting alone.

It is important to note, however, that the rights conferred by natural law are not in any way dependent upon custom or common practice. They are natural and universal and have their own normative force. The rights conferred by *ius gentium*, on the other hand, derive their force from the natural law (which necessitates some rules for the intercourse of nations and thus gives certain common customs the force of law[344]), but their content derives from custom.

Alasdair MacIntyre denies that the concept of universal human rights existed before the Enlightenment.[345] His skepticism about the success of the Enlightenment's broader ethical project thus leads him to deny their existence altogether. "There are no such rights," he says, "and belief in them is one with belief in witches and in unicorns."[346] The reason there are no such rights, he argues, is that "every attempt to give good reasons for believing that there are such rights has failed" along with the rest of the Enlightenment's attempts to provide an objective basis for our moral intuitions.[347]

It is clear, however, that the notion of human rights is very much at home in the natural law world view of Thomism. The belief that every human being has the same fundamental *telos* creates in medieval natural law thinking the basis for an egalitarian humanistic thought in which all persons are endowed with equal dignity by virtue of their shared human nature. In Aquinas's writings, what modern philosophers would call rights tend to be expressed in terms of duties to maintain a certain standard of behavior toward others. Thus, in his discussion of buying and selling, for example, Aquinas argues that it is unlawful to sell a thing for more than it is worth.[348] Although he does not make the corresponding move and assert a "right" to buy something at a fair price, it is easy to "translate" the duty of all to sell at a fair price into a general "right" to not be deceived in a commercial transaction. After all, no one could "be cheated" without someone's moral wrongdoing—the universal duty not to cheat in effect translates into a universal freedom from "being cheated."

The similarity of Aquinas's teachings to the notion of human rights is more apparent in his teaching on necessity, where he says that those in situations of material need are entitled to take what they need wherever they find it, regardless of who previously owned the item.[349] Suarez is more

344. *See id.* at bk. II, ch. xix, para. 9; VITORIA, *supra* note 331, § 3, para. 2 (arguing that the *ius gentium* "either is natural law or is derived from natural law").

345. *See* VIRTUE, *supra* note 282, at 66-67.

346. *Id.* at 67.

347. *Id.*

348. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q. 77, art. 1.

349. *See id.* at Pt. II-II, Q. 66, art. 7.

explicit in his assertion of the existence of "rights," defining "*ius*" both as that which is just and as that which is due to each individual as a matter of justice, "a certain moral power which every man has, either over his own property or with respect to that which is due him."[350] Such a belief is also implicit in Vitoria's writings, which take quite seriously the moral claims of the indigenous Americans as human beings who as such were endowed with rights and deserving of equal moral consideration.[351] Catholic theologian Avery Dulles is thus on solid ground when he says that

> [w]hile we may concede that the idea of human rights did not explicitly emerge until modern times, the concept of human dignity, from which such rights follow is very ancient. As philosophers such as Jacques Maritain have argued, the medieval natural law tradition implicitly contains the idea of human rights.[352]

Clear intellectual roots can be traced from the modern concepts of international law and human rights back into the medieval notion of the natural law.[353] Scholastic thought had a forceful and obvious influence on later writers, such as Hugo Grotius,[354] whose role in the development modern international law is almost unquestioned.[355] Thus, it is important to understand how international law, which developed in the context of a natural law conception that saw an organic unity between human rights, international norms, and all other types of law, came to be conceptually separated from its natural law origins.

The dissociation between natural law and international law occurred in the wake of the eighteenth-century Enlightenment rejection of

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350. SUAREZ, *supra* note 311, at Bk. I, ch. ii, paras. 4-5.

351. *See, e.g.*, VITORIA, *supra* note 331, § 4, 15, 23, 24 (arguing that before the arrival of the Europeans in the New World, the Native Americans were the true owners of the land, which therefore could not be taken away from them by the Europeans). The writings of Bartolomé de las Casas show an even greater sensitivity to the rights of the indigenous. Las Casas argued forcefully that the Native Americans had the right to continue practicing their own religion until they freely chose to embrace the Catholic faith. *See* GUTIÉRREZ, *supra* note 322, at 188.

352. Avery Dulles, *Human Rights: Papal Teachings and the United Nations*, AMERICA, Dec. 5, 1998, at 14, 17.

353. *See, e.g.*, TITOS LOMAS, *supra* note 335, at 174 (tracing the notion of international law back into the thought of Vitoria); Dulles, *supra* note 352, at 17 (finding the origins of the concept of human rights to go back at least as far as medieval natural law thought).

354. For a discussion of Vitoria's profound influence on Grotius, see HERNANDEZ, *supra* note 332, at 213-30.

355. *See* Kingsbury & Roberts, *supra* note 223, at 4-5. Until the late 19th century, Grotius's works were cited as authoritative sources in judicial decisions, diplomatic practice, and scholarly discussions. *See id.*

Scholasticism, Aristotelianism, and the natural law in general.[356] This rejection was accompanied by an embrace of positivism as the source of international law.[357] At the end of the twentieth century, the embrace of positivism has not ended,[358] although human rights law has provided a beach-head for natural law approaches to the methodological and substantive problems of international law.[359] This Article asserts that the divorce of international law from its natural law origins has resulted in the same confusion regarding the grounds of international law that has characterized the search for grounds in ethical reasoning following the Enlightenment's rejection of natural law in the sphere of philosophical ethics.[360] As Alasdair MacIntyre has argued in the context of philosophical ethics, this confusion over grounds is unlikely to be resolved without a willingness to return to the teleological methodology of the natural law.

Under a natural law conception of international law, the debate over the compensation for expropriated property would not boil down to one of minimum standards versus national treatment. National treatment itself would be seen as constrained by minimum standards provided by the natural law's notion of basic human rights. Instead, the crucial questions would be: (1) What is the universal minimum standard for the treatment of property mandated by the natural law? and (2) Are there any customary norms regarding the treatment of alien-owned property that go beyond these basic minimum standards?

3. The Benefits of a Natural Law Approach to International Law

The preceding Part observed an historical connection between the emergence of the modern concept of international law and Thomistic natural law, especially as it was developed by the sixteenth-century Spanish scholastics. The factual observation of this connection is not new[361] and is unlikely to persuade many people of the desirability of rethinking the dominant positivist methodology of the present international law system and reasserting a Thomistic, natural law understanding of both

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356. *See* VIRTUE, *supra* note 282, at 49-59; Bull, *supra* note 278, at 79 (noting that beginning in the eighteenth century, natural law fell out of favor and positivism became the reigning discourse of international law).

357. *See* Bull, *supra* note 278, at 79.

358. *See* STEINER ET AL., *supra* note 174, at 316 (describing international law's positivistic methodology); Dolzer, *supra* note 194, at 555-56 (arguing that international law scholarship is based upon the positivistic hypothesis that international law is the practice of states).

359. *See* Bull, *supra* note 278, at 79; Dulles, *supra* note 352, at 14-15 (describing the growth of human rights law as representing a school of thought incorporating "the medieval natural law tradition").

360. *See* VIRTUE, *supra* note 282, at 49-59; *see also supra* notes 347-58 and accompanying text (discussing the problem of obligation within a positivist notion of international law).

361. *See* McDougal et al., *supra* note 278, at 215.

human rights and international law. Therefore, this Part will set forth several different reasons for reasserting the relevance of natural law.

I do not mean to say that contemporary international law should look to the sixteenth-century theorists for answers to specific problems, but rather, that certain aspects of the conceptual scheme of the Thomistic tradition of thought,[362] which has diverged from the discourse of international law, may provide useful tools for resolving systematic problems within the field of international law. These tools are not anachronistic artifacts from the sixteenth century applied to present day debates.[363] Rather, they reflect contemporary thinking, within the Thomistic tradition, on the problems of international law. After all, Thomists have never stopped talking about international law, even if many international lawyers at some point stopped listening.[364]

A reassertion of the natural law position would not, for example, seek to eliminate international law's concern with sources. As in the domestic context, human positive law has a role to play in the codification of natural law precepts and in the provision of interstitial norms. The notion of *ius gentium*, or customary norms governing the law of nations, provides a model for such positive law. This interstitial positive law, however, derives its ultimate authority and coherence from the natural law.

One reason for preferring a natural law approach to the present positivist paradigm is the difficulty of making positivism bear the moral weight required to sustain a system of international law in general, but especially of human rights law. Substantial literature has developed around the problem of how to justify the binding nature of international law.[365]

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362. By "tradition of thought," I mean a tradition in MacIntyre's sense of a "conception according to which the standards of rational justification themselves emerge from and are part of a history in which they are vindicated by the way in which they transcend the limitations of and provide remedies for the defects of their predecessors within the history of that same tradition." *Cf.* JUSTICE, *supra* note 288, at 7.

363. *Cf.* Benedict Kingsbury, *A Grotian Tradition of Theory and Practice? Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 QUINNIPIAC L. REV. 3, 7 (1997) (discussing the dangers of anachronistic readings of 16th- and 17th-century theorists of international law, either by reading contemporary concepts back into their work or simplistically applying their insights to present-day theory).

364. An important source of contemporary Thomistic reflection on international law is provided by the papal encyclicals of the twentieth century, to which I will turn in a later Part when outlining the details of a Thomist theory of property law. *Cf.* Dulles, *supra* note 352, at 15-17 (discussing the twentieth century papal encyclicals as important sources of insight on Catholic thought concerning human rights issues).

365. *See, e.g.*, James Leslie Brierly, *The Basis of Obligation in International Law*, *in* THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 1, 3 (Sir Hersch Lauterpacht & C.H.M. Waldock eds., 1958) (observing the need to find some basis for obligation in international law); Richard A. Falk, *New Approaches to the Study of International Law*, 61 AM. J. INT'L L. 477, 486-87 (1967); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Oscar

This is a debate that can only crop up once modern international law has been cut off from the natural law system of thought within which it developed.

The so-called "naturalistic fallacy" was used throughout the nineteenth century by partisans of the positivist school of international law in order to pillory the supposed logical incoherence of natural law.[366] The "naturalistic fallacy" refers to the idea that no series of factual premises can lead to an evaluative conclusion. It is often phrased in the catchy slogan: no "ought" from an "is." Despite an historical (even etymological) connection between the naturalistic fallacy and the natural law, it would appear that it is the positivistic conception of international law that is guilty of deriving an unjustified "ought" from an "is." For it is positivism that seeks to move from a simple, nonteleological description of the practice of states to some sort of binding "normative" assertion of the duty to abide by that practice. That is, it moves from a series of "is" premises (for example, X is the customary practice of states A, B, C, D, . . . , N, O, P) to an "ought" premise (such as, State Q ought to abide by X as well).[367] MacIntyre has shown how the naturalistic fallacy is only true of nonfunctional (that is, nonteleological) concepts.[368] The positivists, however, cannot claim that international law is a functional concept, because such an admission would amount to a concession to a teleological theory of law that closely resembles natural law.[369] That is, they would have to admit the existence

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Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 301 (1968) (listing a variety of theories that have been proposed as the ground of obligation in international law); Weil, *supra* note 202, at 422 (observing that without some moral basis for obligation, international law is "a soulless contrivance").

366. *See* Kingsbury & Roberts, *supra* note 223, at 34.

367. Tesón points out an additional problem with this positivistic methodology: its inability to resolve inherent ambiguities in the meaning of the sources to which it looks for content. *See* TESÓN, *supra* note 182, at 128-32. The question I am asking is even more fundamental, however. Tesón focuses on the question of how to interpret the sources of international law. My question is how those sources can be seen as relevant in the first place.

368. *See* VIRTUE, *supra* note 282, at 55.

369. A notion of international law as a functional, goal-oriented institution lies at the heart of the New Haven School approach to international law, developed in the 1960s by Myers McDougal, Harold Lasswell, Michael Reisman and others. *See* Myres McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. IN WORLD PUB. ORD. 249, 250 (1980); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 PROC. AM. SOC'Y INT'L L. 101, 105 (1981); Schachter, *supra* note 365, at 308-11. Reisman describes international lawmaking as the product of a successful process of communication of several signals, including policy goals, to a target audience. *See* Reisman, *supra*, at 111. Within the context of such a process-focused theory, the search for the basis of obligation in international law makes no sense at all, because effectiveness (i.e., the ability to instill in listeners a sense of obligation) is one of the criteria for successful international law-making. *See, e.g.*, Schachter, *supra*, at 311 (describing "effectiveness" and "legitimacy" as the criteria for determining the validity of international law within the New Haven School approach). To the extent

of a normative notion of what the content of international law should be (as opposed to what the content happens to be at the moment), a notion that would provide a source of legal content independent of actual state practice. Absent such a conception, however, the naturalistic dictates that mere assertions about this or that state practice provide absolutely no reason for a state to adhere to such a practice.[370] Positivists are therefore left with the embarrassing difficulty of trying to find some basis for obligation within their theory of international law.[371]

Courts and scholars have proposed the notion of consent as a possible grounds for obligation in positivistic international law.[372] This view, however, fails to correspond to the actual positivist method of determining the content of international law. International conventions, which incorporate an element of consent, are but one of the criteria used by positivists; others, like the views of scholars and the practices of states, have nothing to do with consent.[373] Further, as a logical matter, it is unclear that consent by itself provides a way out of the naturalistic fallacy. Surely the mere fact of consent to a practice or constraint at some point in the past provides no obligation (without some other ethical principle, such as

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that the New Haven School is only interested in process, it is a merely descriptive theory of how law is made to bind. As such, it would suffer from the same problem of justifying obligation to someone who happened not to succumb to the "process" of obedience-formation, someone able to step back from the process and question the validity of legal rules it produced (e.g., by questioning the moral value of the goals that motivate the communicators). There is some indication, however, that the New Haven School favors certain policy goals, such as the promotion of "human dignity," over others. *See* MCDOUGAL ET AL., *supra* note 176, at 987; McDougal & Reisman, *supra*, at 273, 275 (favoring "human dignity" as the most appropriate policy goal of international law). Given this preference, the New Haven School becomes a teleological system and needs to find a philosophical foundation for its prescriptive content (that is, for the telos it favors). In this latter permutation, the New Haven School analysis is more or less compatible with a natural law approach to international law. *Cf.* Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 86 (1991) (arguing that the New Haven school's embrace of "dignity" as a substantive policy goal leads it to collapse into a form of naturalism). The process-theory would describe how legal norms are made effective, while the natural law would provide guidance as to which norms should be pursued.

370. *See* Brierly, *supra* note 365, at 65 ("[T]he ultimate basis of obligation to obey the law cannot be anything but moral."); Weil, *supra* note 202, at 422.

371. *Cf.* Dolzer, *supra* note 216, at 555-56 (questioning how international law derives obligation from observations of state practice).

372. *See, e.g.*, The Lotus Case (France v. Turkey), P.C.I.J., Series A, No. 10 (1927), 18 ("The rules of law binding upon States . . . emanate from their own free will."); Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 45-46 (1989 IV) (identifying consent as the only basis of obligation in international law); David Kennedy, *supra* note 278, at 30-32 (noting the tendency of the doctrine of sources to favor consent as the basis of obligation in international law); Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, at 32-33 (1982 V) (discussing the view that consent is the basis of obligation in international law).

373. *See* Brierly, *supra* note 365, at 17-18.

"promise-keeping") to adhere to the practice or constraint in the future.[374]

But even if one were to grant that consent provided a sufficient basis for an obligation of states to be bound by the terms of international law, this would not provide a sufficient grounds for the notion of human rights as they are presently conceived. Although some human rights scholars have sought to ground the content of human rights in the consent of sovereign states to being bound by specific human rights norms,[375] such an explanation is completely at odds with the actual language of human rights discourse. That language is typically far more universal in its claims than would be justified under any sort of positivistic theory. The rights described in human rights documents are not rights assigned merely to the lucky citizens of consenting nations. Instead, they are rights that supposedly inhere in everyone, everywhere.[376] Each of the first twenty-seven articles of the *American Declaration of the Rights and Duties of Man* begin with the words "every human being," "every person," "all persons," or "all women."[377]

Indeed, the attempt by some to ground human rights within the traditional sources offends the very notion of human rights as inherent and fundamental. As Martii Koskenniemi comments, "Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because . . . noncompliance would 'shock the conscience of mankind' and be contrary to the 'elementary considerations of humanity.'"[378]

Human rights are thought to inhere in the individual in a way that transcends location or time, hence obviating the need for state consent to exist. The Universal Declaration of Human Rights, for example, declares

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374. *See* FRANCK, *supra* note 3, at 43 (citing H.L.A. HART, THE CONCEPT OF LAW, ch. 10 (2d ed. 1994)); *see also* Brierly, *supra* note 365, at 11-12 (discussing the problems posed by the withdrawal of consent for the consent theory of obligation).

375. *See, e.g.*, Henkin, *supra* note 372, at 45-46 (arguing that all international norms must be based upon universal consent).

376. *See, e.g.*, *American Declaration of the Rights and Duties of Man*, art. 1-27, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) (describing the rights listed within the document as the rights of "every person"); *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) (assigning the human rights to "[a]ll human beings" and to "everyone"); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER, *supra* note 190, at 302, 302-09 (describing the listed human rights as the rights of "everyone").

377. *American Declaration of the Rights and Duties of Man*, art. 1-27, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/ser. L./V/I.4 Rev. (1965). Conversely, it goes on to speak of the duty to respect human rights as the duty of "every person." *See id.*

378. Koskenniemi, *supra* note 194, at 1946-47 (quoting Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (Advisory Opinion, May 29, 1951; Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9)).

in its preamble that the rights it discusses "derive from the inherent dignity of the human person."[379] Jack Donnelly makes a similar claim: "From where do we get human rights?" he asks, and then answers: "The very term 'human' rights points to a source: humanity, human nature, being a person or a human being."[380] Rights based upon "the inherent dignity of the human person" cannot be granted or taken away, but simply are. Such universalistic talk about the dignity of human persons is completely at home within the natural law and utterly out of place in a system based upon state consent.

Human rights advocates who embrace consent as the basis of state obligation to respect human rights are trying to have their cake and eat it to. On the one hand, they want to embrace the notion that human rights are universal and that every human person is deserving of protection. If a state does not consent to protect the human rights of its subjects, any human rights activist worth her salt would argue that it is under a moral obligation to do so. On the other hand, human rights advocates embrace consent because they want to avoid adherence to any single philosophical theory for the justification for such a strong assertion.[381] Clearly there is a contradiction here. If human rights exist even in the absence of state consent, they must have some prior philosophical basis. If, however, human rights have no prior philosophical basis, then a state is under no absolute obligation to respect the human rights of its subjects or to consent to do so. Belief that states are under some consent-independent obligation to protect human rights within their borders requires a commitment to the belief that there is some philosophical basis for believing in the existence of human rights.

Of course, this argument from the nature of human rights discourse does not show that positivism is incoherent. It only demonstrates that the positivistic conception of international law is inconsistent with a notion of universal human rights. Thus, it only supports the following conclusion: if human rights, then not positivism. While some may not mind abandoning the concept of universal human rights, this conclusion should be enough to cause many to question their commitment to positivism.

If the first reason for embracing a natural law conception of international law is the normative impotence of positivism, the second reason is the normative strength of natural law. Of the traditional theories within moral philosophy, natural law alone provides a truly safe basis for universal human rights. Whether one considers the arguments of Utilitarians, Kantians, or Rawlsian liberals, the inherent weaknesses of the

379. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

380. DONNELLY, *supra* note 179, at 16.

381. *See* HENKIN, *supra* note 179, at 32.

alternative positions leaves human rights intellectually exposed.

The difficulties utilitarianism encounters in trying to provide an adequate theory of rights are widely acknowledged in the philosophical literature.[382] Classical utilitarianism measures moral worth on the basis of an aggregation of utility. Actions that maximize overall utility are considered morally more worthy than those that fail to do so.[383] It is obvious that the aggregate nature of utility makes it difficult, if not impossible, to defend "rights" in any individual sense. If respect for one individual's rights would result in a decline of overall utility (however measured), then utilitarianism would recommend that the individual's rights be violated.[384]

Some utilitarians have tried to respond to these criticisms by dividing moral thought into two levels. At a critical, abstract level of reasoning, utilitarianism would be used in order to select general rules or principles (including rules favoring the respect for rights) that would operate at the lower, rule-following level. Such efforts by these rule-utilitarians, such as R.M. Hare, do not resolve the rights problem, however.[385] These two-tiered schemes, with utilitarian calculus confined to a higher level, have a difficult time maintaining their two distinct levels of decision-making. That is, because (as utilitarian theories) they must be committed to the notion that rights may be overridden when the utility calculation dictates, they tend to break down into classical act-utilitarianism if the moral agent engages in utilitarian critical thinking too often.[386] Thus, as Williams has pointed out, the only way to keep this two-tiered system from breaking down into simple act-utilitarianism is for the theorist to impose artificial constraints on the frequency with which utilitarian thought may be exercised. The more he restricts utilitarian thinking, the more secure the rights his theory guarantees, but the more the rule-utilitarian does this, the less utilitarian his theory becomes.[387] Utilitarian reasoning, even when restricted to an abstract rule-making level, leads to insecure rights that are subject to frequent changes.

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382. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 95 (1977); BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 91 (1972); R.G. Frey, *Act-Utilitarianism, Consequentialism, and Moral Rights*, *in* UTILITY AND RIGHTS 61, 62, 69, 80 (R.G. Frey ed., 1984); *see generally* J.L. Mackie, *Rights, Utility, and Universalization*, *in* UTILITY AND RIGHTS, *supra*, at 86, 86-105.

383. *See, e.g.*, JOHN STUART MILL, UTILITARIANISM 7 (Geraint Williams ed., Everyman 1993) (1861) (providing a hedonistic version of the utility-maximizing principle).

384. *See* Frey, *supra* note 382, at 62.

385. *See* R.M. HARE, MORAL THINKING 39-43 (1981) ("The critical thinker considers cases in an act-utilitarian or specific rule-utilitarian way, and on the basis of these he selects . . . general prima facie principles for use, in a general rule-utilitarian way, at the intuitive level.").

386. *See* Frey, *supra* note 382, at 80.

387. *See* WILLIAMS, *supra* note 382, at 91-94.

Kantianism provides an appealing alternative to utilitarianism's difficulties. Kant's categorical imperative states that persons are never to be treated merely as means but must always be treated as ends, by which Kant means free rational agents with intrinsic worth.[388] Kant's theory suffers from well-known problems, however. First, he argues to the categorical imperative from an extremely rarefied notion of the human person as a free rational agent.[389] The simplicity of this understanding of human nature leads directly to the wonderful elegance of the categorical imperative itself. Nevertheless, it leads Kant into serious difficulties when he tries to derive practical moral principles. Kant's arguments in this regard are, as MacIntyre correctly observes, "notoriously bad."[390] The transition from such a thin notion of the human person to the richness of human moral life simply requires too many dubious steps and additional, often questionable, assumptions. What Kant requires for his ethical system is a richer notion of the nature of the human person, a fuller conception of human beings as they could and should be: a teleology. He acknowledged as much himself.[391] Thus, while Kant's system, in the abstract, appears to provide a more firm foundation for rights than utilitarianism, it puts the content of any system of rights at risk because of its inherent vagueness.

Kant's system has been developed by several modern philosophers, who have attempted to work past the problem of linking his vague categorical imperative with specific moral conclusions. The most formidable of these efforts has been presented by John Rawls's philosophy of "justice as fairness," as presented in *A Theory of Justice* and subsequent articles.[392] Rawls's argument, in simplified form, is that the only fair basis for deciding upon the structure of society is behind what he calls the "veil of ignorance."[393] Behind this veil, everyone is deprived of the information about themselves that it would be "unfair" to take into account in the formulation of the principles of justice: information such as one's social status, inclinations, aspirations, wealth, etc. These items of information are excluded, at least in part, because if they were included, then the principles that emerge from the "original position" behind this veil of ignorance

388. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (H.J. Paton trans., Harper & Row 1964).

389. Kant admits that he can provide no good argument that this is indeed the nature of human beings. In particular, he acknowledges an inability to prove that human beings are indeed free. Nevertheless, he argues that we must accept the freedom of human beings as a prerequisite of reason. *See id.* at 122-23.

390. VIRTUE, *supra* note 282, at 44.

391. *See* RAWLS, *supra* note 291, at 53 (noting that in his second *Critique*, Kant acknowledged the need for a teleology in order to found a coherent ethics).

392. *See id.* at 18-19. Rawls considers the "original position" to be the "procedural interpretation of Kant's conception of autonomy and the categorical imperative." *Id.*

393. *Id.*

would not be seen as fair or worthy of universal consent.[394] Once situated behind the veil of ignorance, Rawls thinks two principles of justice will inevitably emerge: (1) "each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others;" and (2) social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged and attached to positions and offices open to all.[395]

To claim that I can refute Rawls's encyclopedic theory here, in a few pages, would be both foolish and arrogant. All I can hope to do is provide the reader with a few reasons for questioning whether Rawls's theory is consistent with either our beliefs about the nature of international law and human rights or some of our intuitions about justice. I think that Rawls's theory is of limited use in the international context.[396] Further, I think there are reasons for questioning whether it succeeds as a theory of justice even *within* a society like our own.

Perhaps the strongest criticisms of Rawls's theory are those aimed at his assumptions regarding the knowledge of the decision-makers situated behind the veil of ignorance. In particular, it is unclear why people should not be allowed to take into consideration their conceptions of the good when deciding upon the principles of a just society.[397] Critics have argued that Rawls's original position reflects the assumptions of the nature of the person prevalent in the liberal individualist society that he seeks to justify, one in which a person's beliefs about the good life are accidental preferences that can be abstracted from him without destroying his identity.[398]

Rawls has responded to this criticism by arguing that "justice as fairness" does not seek to make any strong claims about the "essential nature and identity of persons," but is rather an expression of the principle of tolerance, which is a prudential requirement of the public conception of justice in a pluralistic democracy.[399] Justice as fairness "presents itself not as a conception of justice that is true," Rawls argues, "but one that can

394. *See id.*

395. *Id.* at 60, 83.

396. *Cf.* Martii Koskenniemi, *Book Review*, 85 AM. J. INT'L L. 385, 386 (1991) (reviewing LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS) (noting that Rawls provides few references to principles concerning governments' international actions).

397. *See, e.g.*, JUSTICE, *supra* note 288, at 3-4 (discussing the common criticism of Rawls, which argues that his original position smuggles in the values of liberal individualism that it seeks to justify).

398. *See id*; *see also* R.M. Hare, *Rawls's Theory of Justice*, *in* ESSAYS IN ETHICAL THEORY 145, 155 (1989) (accusing Rawls of tailoring the assumptions of the original position to reach his desired conclusions).

399. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985).

serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons."[400] The original position makes no claims about the metaphysical nature of the person, but merely embodies in procedural form the belief that persons are free and equal. The only alternative to this tolerance, Rawls argues, is moral autocracy.[401]

Unfortunately, as many have pointed out, Rawls's answer is not completely satisfying. First, as a more limited criticism, it is unclear what the value of Rawls's theory is for international law. Although Jack Donnelly has attempted to harness a Rawlsian notion of liberalism as the groundwork for universal human rights,[402] such a scheme seems misguided. As Rawls admits, his notion of the original position only makes sense once one has accepted the value of a commitment to pluralism.[403] But it seems at least conceivable that there are homogeneous, autonomous communities that can reasonably reject pluralism as a value for their own society. A committed Rawlsian would argue that such a society must fail to treat individuals as "free and equal persons,"[404] but it is difficult to see why this is necessarily the case. If everyone within a particular society has the same basic conception of the good, then society's refusal to allow alternative conceptions does not entail a failure to give equal regard to any member of that society, because there is no one who fails to hold the dominant beliefs. In such a society, Rawlsian rights could be legitimately denied without denying anyone equal dignity. The content of Rawlsian rights can therefore be seen as based upon assumptions about the nature of individual societies that are true for particular societies—societies in which citizens hold a wide variety of conceptions of the good—but are not universally true at the international level.

The result of this limitation is the implication that a fundamentally political, pragmatic theory of justice, like Rawls's, seems to provide a somewhat shaky basis for human rights that are seen as universal and rooted in human dignity as such (regardless of the type of society in which one lives). Human rights requires that the rights hold true for all persons at all times and places. Rawls's theory seems incapable of providing a basis for such rights.

Second, a more general criticism about Rawls's argument on behalf of liberal pluralism is in order. As many critics of liberalism have pointed out, Rawls's claims that justice as fairness provides rules for society that are somehow neutral among belief systems, but that are not in and of

400. *Id.* at 230.
401. *See id.* at 238, 245.
402. *See* DONNELLY, *supra* note 179, at 49-50, 66.
403. *See* Rawls, *supra* note 399, at 245.
404. *Id.* at 230.

themselves a belief-system do not ring true.[405] In particular, belief systems whose conceptions of the good include a notion of moral inculcation are incapable of finding a truly satisfactory modus vivendi within the liberal conception of justice as an individualist free-for-all.[406]

The Thomistic account of how the virtues are acquired provides an example of such a system. For Aquinas, the virtues represent habits that lead the virtuous to perform good acts.[407] In a sense, it is impossible to perform good acts, and therefore to be good, without possessing the requisite virtues. This conceptualization presents something of a chicken-and-egg problem: how can one ever acquire the virtues if the virtues are both a product and a prerequisite of the performance of good acts? The answer seems to lie in the institution of moral education, through which the young are taught how to be good.[408] To the Thomist, the only way in which to make people good is to educate them in goodness, but this conception is antithetical to the Rawlsian belief that people must be allowed freely to choose among the various conflicting conceptions of the good. The Thomist would answer Rawls by denying that, in the proper context, a certain amount of moral authoritarianism is necessarily a bad thing.

Rawls can only impose a system of completely free moral choice by doing some violence to the Thomistic theory of justice. Instead of a "neutral" ground within which all theories of justice may freely compete, what Rawls introduces through justice as fairness is a particular, individualist theory of justice that itself *competes* with other belief-systems. As such, he has more work to do to justify the precise nature of his original position, which it now seems rational for a Thomist (along with adherents of many other belief systems) to simply refuse to join. Without his original position, however, Rawls's attempt to provide a basis for individual rights falls to pieces.

In sum, neither utilitarianism, Kantianism, nor Rawls's "justice as fairness" is capable of providing an adequate grounds for universal human rights. Utilitarianism fails because it cannot provide an adequate basis for justifying respect for human rights when this would entail even a modest decline in overall utility. Kantianism fails because its notion of the person is too vague to provide the basis for a concrete set of rights. Finally,

405. *See* Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 999-1000 (arguing that liberalism's claim to objective neutrality among belief systems is false); *see also* JUSTICE, *supra* note 288, at 335-45 (portraying liberalism as a tradition of thought among, and in competition with, many others, and as possessing its own conception of the good).

406. *See* Nomi Maya Stolzenberg, *"He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 582-84 (1993) (discussing the conflict between liberalism and belief-systems that require determinate moral inculcation, like fundamentalism).

407. *See supra* notes 284-85 and accompanying text.

408. *See* JUSTICE, *supra* note 288, at 194.

Rawls's Kantian "justice as fairness" fails because its notion of the original position cannot obtain the consent of those whose theories of justice involve the necessity of moral inculcation.

4. Objections to a Natural Law Approach

Natural law has historically been written off by scholars after brief references to a series of stock objections.[409] These well-known objections, however, prove to be unfounded and fail to provide persuasive reasons for rejecting a natural law approach to problems of international law. This Part will address the most common criticisms of natural law: that it is guilty of the logical error of deriving prescriptive conclusions from purely descriptive premises (thus committing the so-called "naturalistic fallacy") and that it fails to take adequate account of the diversity of human beliefs about morality.

The naturalistic fallacy has been wielded like a cudgel against the natural law for centuries. The first clear formulation of this argument is often attributed to David Hume in his *Treatise of Human Nature*.[410] By the nineteenth century, the argument was being used to disqualify natural law as the basis of international law and was revered as a truth of logic.[411]

Although proponents of this line of criticism speak as if Thomistic thinkers were not aware of the potential for problems in moving from descriptive to prescriptive assertions, a careful reading of the scholastics shows them to have been sensitive to this issue. The contours of the "fallacy" are clearly laid out by Suarez in Book Two of *De Legibus*, where the Jesuit observes that knowledge of facts alone cannot partake of the obligatory nature of law: "[A] judgment pointing out the good or evil involved in a particular thing or act must necessarily precede [an act]; nevertheless, such a judgment has not the character of a law or of a prohibition, but is merely a recognition of some fact."[412]

Suarez provides the solution to the problem of how to derive obligation from the observation of facts by averring to the existence of God

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409. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 48-54 (1980) (arguing against the cogency of natural law); *cf.* E.B.F. MIDGLEY, THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS 140 (1975) (arguing that the post-seventeenth century, secularized version of natural law predominant within international relations—i.e., that of Grotius—was weakened by its departures from the Thomistic tradition and therefore an easier target for opponents).

410. *See* DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III, Pt. I, § 1 (L.A. Shelby-Bigge ed., Oxford Univ. Press 1978).

411. *See* Kingsbury & Roberts, *supra* note 223, at 34; VIRTUE, *supra* note 282, at 54 ("Some later moral philosophers have gone so far as to describe the thesis that from a set of factual premises no moral conclusion validly follows as a 'truth of logic.'").

412. SUAREZ, *supra* note 311, at bk. II, ch. vi, para. 6.

and his prohibition of all things declared evil by the natural law, "by a special command and by that will whose decree binds and obliges us, through the force of His authority, to obey those [natural precepts]."[413] As Finnis points out, however, Suarez's voluntarist solution to the naturalistic fallacy is unlikely to prove acceptable to those who demand a non-theological answer.[414] Thus, we must look back to Aquinas's theory of natural law in order to obtain a better solution.

Aquinas's solution can be described in a variety of ways. Finnis describes it as involving the assertion that there are self-evident propositions from whence the natural law derives its force. These involve the rational necessity of certain means to attaining certain specified ends.[415] MacIntyre, on the other hand, speaks of the importance of "functional concepts" which contain within themselves a prescriptive reference to their own *telos*.[416] It is not clear that they are proposing two separate solutions. Instead, the gist of both of their interpretations of Aquinas seems to be that he would deny the existence of any unbridgeable gap between descriptive and prescriptive assertions; or, put another way, he would emphasize the existence of prescriptive facts.[417]

MacIntyre gives the example of a watch. To assert that something is a watch is to assert that it ought to do certain things, like tell the time. If a person asserts that this particular watch cannot tell time, his listener is justified in drawing the evaluative conclusion that this is a "bad" watch.[418] Similar assertions could be made about farmers, doctors, and other "functional" concepts. It is Aquinas's view that the same can be said of human beings in general. What is required is a view of human beings that is analogous to our view of a good watch or a good doctor, that is, a view of human ends. Once these ends are accepted, it is not a fallacy to assert that they ought to be pursued, any more than it is a fallacy to assert that a watch ought to tell the correct time.[419] As MacIntyre observes, the naturalistic fallacy only arises because of the *rejection* of natural law's teleological reasoning.[420]

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413. *Id.* at bk. II, ch. vi, para. 8.

414. *See* FINNIS, *supra* note 289, at 45.

415. *See id.* at 46; *cf.* AQUINAS, *supra* note 284, at I-II, Q. 94, art. 2 (describing precepts of natural law as self-evident principles).

416. *See* VIRTUE, *supra* note 282, at 54-56.

417. *See id.* at 57 (noting that for Aristotle, to say something is "good" is to make a factual—as opposed to a purely "evaluative"—statement).

418. *See id.* at 55.

419. Indeed, as noted above, it is the international law positivists who are guilty of the naturalistic fallacy. *See supra* notes 347-52 and accompanying text. By separating the content of international law off from the human *telos*, they have eliminated any means of deriving obligation from assertions of fact about state action or consent or human dignity.

420. *See id.* at 56 ("[T]he 'no "ought" from "is" premises' principle becomes an inescapable

The second objection commonly thought to be fatal to natural law is the argument from diversity.[421] Arguing as if natural law theorists were completely ignorant of the moral diversity that exists in the world, critics claim that differences both between cultures and between the same culture at different moments in time demonstrate the implausibility of the claim that there is any set of moral truths derivable from human nature as such. While the problem of diversity raises important issues that should be kept in mind while formulating a theory of natural law, these criticisms fall short of their goal of disproving the possibility of natural law.

The problem of cross-cultural diversity was one with which the theorists of the Middle Ages were well acquainted. Aquinas spoke of the example of the ancient Germans, who, at least according to the descriptions of Julius Caesar, did not believe that theft was immoral.[422] Aquinas explained such differences of moral opinion among entire cultures by arguing that knowledge of the natural law could be "perverted by passion, or evil habit, or an evil disposition of nature."[423] Suarez followed Aquinas in this explanation, noting that the more specific a moral assertion, the more susceptible it was to erroneous interpretation.[424] Although it is certainly possible that some (often systematic) moral difference results from sheer misunderstanding, even by entire groups or cultures, this answer based upon error is insufficient. It is completely unable to attribute intercultural diversity to any other cause than a failure on the part of some cultures. Surely some moral difference is possible without either party to the disagreement suffering from a conscience warped by passions or bad habits.

Aquinas does hint at another possible answer earlier in the same discussion about the universality of natural law. He says that, as to the conclusions of reason regarding the content of the natural law, "neither is the truth or rectitude the same for all."[425] This assertion implies the possibility of a difference of opinion regarding the content of natural law that is based upon something other than error. Aquinas discusses how the same general principles (e.g., that a deposit should be returned) may vary in its effects depending on the circumstances.[426] An expansion on this explanation would allow for true cultural diversity in the interpretation of

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truth for philosophers whose culture possesses only the impoverished moral vocabulary which results [from the Enlightenment rejection of Aristotelianism].").

421. *See, e.g.*, ELY, *supra* note 409, at 48-54 (objecting to natural law in part on the basis of observed moral diversity).

422. *See* AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 4.

423. *Id.*

424. *See* SUAREZ, *supra* note 311, at Bk. II, ch. viii, para. 7. Suarez did not think such erroneous judgments necessarily led to guilt, because they were often unavoidable. *See id.*

425. AQUINAS, *supra* note 284, at Pt. I-II, Q. 94, art. 4.

426. *See id.*

the natural law without a commitment to the view that such diversity implies error or bad habits.

Such an expansion of Aquinas's initial intuition was undertaken by Bartolomé de las Casas, a Dominican friar writing in the Americas in the sixteenth century. The Spanish scholastics of the sixteenth century were acutely aware of the wide range of cultural differences with respect to moral beliefs. Writing after the Spanish discovery of the Americas, they had access to an enormous amount of data about the beliefs and practices of the inhabitants of the new Spanish territories. Faced with the sometimes radical differences in morality between the Spaniards and the indigenous Americans, Las Casas drew upon the notion of the flexibility of first principles to develop an argument that the indigenous religions involving human sacrifice were not in violation of natural law.[427] Las Casas's ability to reach such a conclusion using plausible arguments based upon first principles—the truth of which were commonly accepted by his opponents—demonstrates the consistency of a given set of general natural law principles with a wide variety of specific moral codes.

Martha Nussbaum has presented a similar argument in defense of Aristotle's objective moral theory against the objection of moral diversity. The commitment to such a theory, she argues, need not entail commitment to the belief that there is only one correct model of the human life. Rather, she says, belief in moral objectivity is consistent with the belief that there are a variety of acceptable models.[428]

An analogy can be made to Noam Chomsky's theory of language acquisition. Chomsky has noted the presence of deep structural similarities between all of the world's languages and posits the existence of a "language acquisition device" in the brain that allows children to learn the language spoken around them, through a common process, regardless of where they are.[429] The idea that a diversity of moral codes can be based upon a common set of self-evident principles derived from a common human nature or condition is no more far-fetched than the notion that all of the world's languages, in their diversity of lexicon and syntax, derive from a common deep structure and are acquired according to a common set of rules. John Finnis sees such an underlying moral commonality in his exploration of the diversity of human moralities:

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427. *See* GUTIÉRREZ, *supra* note 322, at 178-81.

428. *See* Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, *in* THE QUALITY OF LIFE 242, 256-57 (Martha Nussbaum & Amartya Sen eds., 1993).

429. *See* NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS ORIGIN, NATURE, AND USE 3 (1986); STEVEN PINKER, THE LANGUAGE INSTINCT (1994). Chomsky's theory has been described as the "dominant" one within linguistics. *See, e.g.*, Shannon Brownlee, *Baby Talk*, U.S. NEWS & WORLD REP., June 15, 1998, at 48 (describing Chomsky's theory of language acquisition as the dominant one within the field).

> All human societies show a concern for the value of human life . . . and in none is the killing of other human beings permitted without some fairly definite justification. All human societies regard the procreation of a new human life as in itself a good thing unless there are special circumstances. No human society fails to restrict sexual activity; in all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations. All human societies display a concern for truth. . . . All know friendship. . . . All value play. . . . All treat the bodies of dead members of the group in some traditional and ritual fashion. . . . [I]n some form or another, religion is universal.[430]

Nussbaum also sees a deep commonality in the human condition:

> Despite the evident differences in specific cultural shaping of the grounding experiences, we do recognize the experiences of people in other cultures as similar to our own. We do converse with them about matters of deep importance, understand them, allow ourselves to be moved by them. . . . [W]hen one sits down at a table with people from other parts of the world and debates with them concerning hunger, or just distribution, or in general the quality of human life, one does find in spite of evident conceptual differences, that it is possible to proceed as if we are all talking about the same human problem.[431]

Far from disproving the possibility of natural law, then, the argument from diversity simply puts constraints upon how theories of natural law are to be formulated. Natural law theories must confine their conclusions within an appropriate generality that will allow the necessary flexibility to account for significant diversity. John Finnis's theory of basic goods is an example of such a highly flexible approach.[432] Nevertheless, as Finnis demonstrates, a commitment to flexibility and an appreciation of the richness of human moral diversity need not imply a morality without any

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430. FINNIS, *supra* note 289, at 83-84.

431. Nussbaum, *supra* note 428, at 261. Nussbaum lists a set of areas of universal human experience: mortality, the body, pleasure and pain, cognitive capability, practical reason, early infant development, sociability, and humor. *See id.* at 263-65. A.J.M. Milne attempts to find the basis for a set of universal moral principles in the common requirements of a shared human sociability. *See* A.J.M. MILNE, HUMAN RIGHTS AND HUMAN DIVERSITY: AN ESSAY IN THE PHILOSOPHY OF HUMAN RIGHTS 6 (1986).

432. *See* FINNIS, *supra* note 289, at 29-31.

limits. Thus, Finnis is able to combine a highly flexible theory of natural law with the principle that no one may arbitrarily disvalue any of the basic goods he describes.[433] Appreciation of diversity need not descend into the pit of complete moral relativism.

It is important to recognize that a recognition of an acceptable degree of cultural diversity within the limits of natural law does not mean that all moral codes are created equal. Although some diversity legitimately exists within the bounds of natural law, some diversity also reflects outright moral error. Nussbaum views different moral systems as in part reflecting competing answers to the question of the content of the good human life.[434] Such a view makes it possible to criticize some moral "answers" as mistaken while allowing for a wide range of legitimate moral diversity.

The same solution that helps resolve the problem of cross-cultural diversity can be used to eliminate the challenge posed by cross-temporal diversity. If the flexibility provided by the generality of natural law principles can account for the diversity of moral systems across cultures, it can also account for changes within the same moral system over time. Such changes need not violate any principles of natural law and are likely to reflect the emergence of different material circumstances that alter the affect of the same natural law principles.[435] Once again, however, such an admission need not commit one to the view that all changes in cultural morality necessarily take place within the bounds of natural law principles. As Aquinas's first response the problem of diversity demonstrates, it is possible for entire societies to err in their understanding of natural law. Moral change therefore need not (although it still may) entail moral error.

Nussbaum provides a second possible answer to the problem of cross-temporal diversity in her belief in the possibility of a sort of moral progress. Just as she views different societies as providing different competing answers to the question of how to live a good human life, she thinks that the answers favored in a particular society may be overtaken by a superior set of answers. Indeed, Nussbaum thinks that the content of an Aristotelian moral system must be always open to revision in light of new circumstances and new evidence.[436]

This more tentative understanding of natural law implies that the

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433. *See id.* at 105.

434. *See* Nussbaum, *supra* note 428, at 249-50 (arguing that Aristotle's *Politics* "presents the beliefs of the many different societies it investigates not as unrelated local norms, but as competing answers to questions about justice and courage (and so on) with which all societies (being human) are concerned").

435. *See, e.g.*, SUAREZ, *supra* note 311, at bk. II, ch. xxii, para. 6 (arguing that while the natural law itself remains constant, its effects at the level of specific prescriptions may change with changing circumstances).

436. *See* Nussbaum, *supra* note 428, at 259-60.

content assigned to universal human rights must likewise be somewhat tentative. This is not to say that the force of human rights should be weakened, but rather that human rights may provide a lower level of universal protections than is commonly thought. Human rights advocates must be sensitive to the possibility that their views about the content of universal human rights may be merely the product of their own cultural context.[437] The human rights that emerge from a natural law conception of rights may not be as robust and far-reaching as is often assumed.

D. *A Natural Law Approach to the Problem of Compensation for Expropriated Property*

Before proceeding further, it would be helpful to summarize the conclusions the argument has produced up to this point. First, this Article has argued that the human rights model of international law provides a useful starting-point in the search for the law of compensation of expropriated property. It has noted the consonance between the human rights approach with a natural law understanding of international law, in which a set of universal minimum standards—defined by natural law—sits beneath a body of customary norms which may not conflict with the minimum standards. This Article then produced arguments intended to demonstrate the desirability of employing natural law to arrive at the minimum-standards content of international law and to refute the traditional criticisms of natural law reasoning. The task that remains in this Part is to set forth the specifics of a natural law approach to the problem of compensation for expropriated property. The first step in this approach will be to lay out a natural law theory of minimum standards in the area of private property, the topic to which the next Part turns.

1. Natural Law of Property: Two Traditions?

A survey of various theories of property claiming the mantle of the natural law tradition reveals two distinct groups of theories whose notions of property yield strikingly different ethical conclusions. First, there is a highly individualistic tradition of property theories, in which property rights are extremely robust. Second, there is a line of more social theories of property, in which property rights tend to be limited by the demands of social life.[438] This Part will explore each line of theories in turn. Although

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437. *See, e.g.*, Richard Falk, *Cultural Foundations for International Protection of Human Rights*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 44, 58-59 (Abdullahi Ahmed An-Na'im ed., 1991) (arguing that inflexible conceptualization of human rights norms amounts to a form of "secular fundamentalism" and that therefore the struggle against human rights should be limited to a struggle against "the intolerable").

438. I believe that the common distinction between individualistic and socialized property

both strands can in some way trace their intellectual ancestry to Aquinas, this Part will argue that the individualist strand represents such a distortion of natural law reasoning as to remove itself from the natural law tradition altogether. In contrast, the social theories of property reflect a more sound understanding of the natural law (that is, one that is factually more accurate) and are more faithful to the Thomistic heritage.

a. Individualistic Property Theories

After the Protestant Reformation, a strand of naturalistic property theories developed in which property rights, understood as rights of the individual, came to be viewed as nearly sacrosanct.[439] These theories draw upon the language of natural law and natural rights, but their content is quite different from that of the theories of earlier natural law theorists (as well as from that of subsequent thought in the specifically Roman Catholic tradition). Thus, although they retain linguistic elements of the Thomistic natural law tradition, these individualist theories are best seen as embracing their own unique, non-Thomist conception of property.

An important transitional figure in this process of divergence from the Thomistic tradition was Hugo Grotius, the late sixteenth-century Dutch theorist.[440] Grotius's theory of property draws upon the language and methodology of the Thomist tradition,[441] but the content of his theory is so different from his predecessors that he is properly seen as a representing

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theories is to a certain extent problematic. Theories commonly identified as social (e.g., redistributionist property theories) can also to a certain extent be characterized as individualistic in that they value the needs of each and every individual. On the other hand, theories that are often described as individualistic (e.g., highly utilitarian versions of liberalism) can also be characterized as social in that they are willing to trade on the well-being of individuals in the interest of such collective notions as aggregate utility. *See, e.g.*, MATTHEW H. KRAMER, JOHN LOCKE AND THE ORIGINS OF PRIVATE PROPERTY: PHILOSOPHICAL EXPLORATIONS OF INDIVIDUALISM, COMMUNITY, AND EQUALITY 126, 207, 210 (1997) (arguing that efficiency-based justifications of private property require a renunciation of individualism because they are willing to subsume individual well-being for the purposes of increasing aggregate measures of welfare). Despite these difficulties, but with some qualification, I will use the "individualist" and "social" labels in the conventional manner.

439. I make no claims regarding the connection between the theology of Protestantism and the content of post-Reformation individualist property theories, which tend to be endorsed by Protestant theorists. Nevertheless, I find the parallels to be fascinating. For the classic development of the thesis that the two are intimately connected, see generally R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1929).

440. I am not making any strong causal claims about the influence of Grotius's writings on other thinkers. I simply mean that he represents a nice middle-point between the social theories of the scholastics and the more purely individualistic theories, like those of Locke and Nozick, that come later.

441. *Cf.* STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 3 (1979) (noting that for Grotius the theory of property was inextricably tied to conceptions of human nature and society).

a break from the earlier theories.[442] Grotius's individualist revision of the natural law tradition, which served as the basis for Blackstone's more absolutist theory of property,[443] was followed in the seventeenth century by Samuel Pufendorf and later by John Locke.[444] More recently, this individualist tradition has been re-articulated by Robert Nozick.[445]

The individualist tradition can be characterized by three features. One characteristic is its tendency to view private ownership in a positive light. While the scholastics saw private ownership as a result of human sin,[446] Grotius, Locke, and Nozick never cast such aspersions on private property's pedigree, choosing instead to portray it as an unmitigated good.[447] This idea of property as an unmixed blessing leads the adherents of this property tradition to take a far less skeptical position regarding the value of robust property rights.

The second characteristic of the individualist natural rights tradition follows to a certain extent from the first: its increasing tendency to reject limits on property rights derived from social obligation. The doctrine of necessity, according to which an individual in dire need had the right to take what he needed from the property of another, is central to the Thomistic theory of property.[448] Although Grotius retains the doctrine of necessity as a limit on a person's property rights (that is, he retains the idea that a person in need has the right to *take* what he needs), he emphasizes that every effort should be made to avoid situations of necessity, and imposes upon the person in need a duty to pay back the original owner as soon as he is able.[449] Like Grotius, Locke retains a notion of the doctrine of necessity within his theory,[450] but Nozick does away with it altogether,

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442. *See* James Tully, *A Framework of Natural Rights in Locke's Analysis of Property: A Contextual Reconstruction*, *in* THEORIES OF PROPERTY: ARISTOTLE TO THE PRESENT 115, 123 (Anthony Parel and Thomas Flanagan eds., 1979).

443. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

444. *See* Tully, *supra* note 442, at 123, 125, 126-27.

445. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174-82 (1974).

446. *See supra* notes 443-45 and accompanying text.

447. *See, e.g.*, BUCKLE, *supra* note 441, at 11 (placing the origins of private property in the necessity for humans to be able to use things, rather than in some human fault); JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT bk. II, ch. V, § 27 (1690) (locating the origins of property in the mixing of one's labor with objects previously in the common); NOZICK, *supra* note 419, at 175-78 (following Locke's theory of acquisition).

448. *See supra* note 447 and accompanying text.

449. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS bk. II, ch. 2, § VI.2, § VII, § IX, *reprinted in* CLASSICS OF INTERNATIONAL LAW, *supra* note 311, at 1.

450. *See* BUCKLE, *supra* note 441, at 159. Locke's theory of property has been described as an attempt to use a natural law justification of property while doing away with natural law limits on property rights. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 199 (1962). Some attempts have been made to find strong social elements in Locke's provisos regarding the limits of just appropriation, see, for example, GOPAL SREENIVASAN, THE LIMITS OF

refusing to acknowledge even a duty of charity towards those in dire need.[451] Such relatively unfettered property rights have a tendency to correspond with a very positive attitude towards the market as a distributive mechanism.[452] If property can almost never be taken away against someone's will, it stands to reason that the only mechanism for changing property distributions will be consensual transactions in the market.[453]

Finally, and for the purposes of this argument most importantly, the individualistic strand of property thinking elevates the importance of property rights to such a high level that the individualist theorists cease to treat property as a means to an end and begin to treat it as an end in itself.[454] Thus, for Nozick, property rights trump every other potential right to such an extent that he is willing to sacrifice even the lives of human

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LOCKEAN RIGHTS IN PROPERTY (1995) (arguing that Locke's theory results in highly limited property rights), but these interpretations fail to square with the text itself. *See* BUCKLE, *supra* note 441, at 153-58. They certainly do not seem consonant with Locke's understanding of his own theory. After all, Locke thought that protection of property was the primary purpose of government. *See* Harvey C. Mansfield, Jr., *On the Political Character of Property in Locke*, *in* POWERS, POSSESSIONS, AND FREEDOM 23, 37 (Alkis Kontos ed., 1979). Further, Locke's proposals regarding the treatment of the poor in England show him to be anything but a redistributionist. *See* MACPHERSON, *supra*, at 221-48 (discussing Locke's beliefs about the poor, including his belief that the unemployed were morally depraved and that the poor and unpropertied did not possess the same natural rights as the propertied); SREENIVASAN, *supra*, at 46-47 (discussing Locke's proposals for reform of poor laws). To some extent, Sreenivasan's argument is that Locke's theory of property in fact leads to limited property rights, regardless of what Locke himself thought. *See id.* at 106, 113 (disputing Locke's view that his provisos are consistent with the existence of a landless peasantry). This may very well be true, but it does not cohere with either Locke's intentions or the dominant interpretation of his theories down to the present day. These two factors lead me to place Locke within the individualist property tradition.

451. *See* NOZICK, *supra* note 445, at 150-52 (describing a theory of justice in which holdings are just if they were acquired justly regardless of any other factor, such as a person's necessity); Shadia Drury, *Robert Nozick and the Right to Property*, *in* THEORIES OF PROPERTY, *supra* note 442, at 301, 372 (arguing that Nozick would deny Aquinas's doctrine of necessity).

452. *See* MACPHERSON, *supra* note 450, at 264 (identifying the notion of human society as a series of market relations as a central tenet of "possessive individualism," to which MacPherson believes Locke adheres).

453. It is a short step from this position to the quasi-religious liberal capitalist view that gives the market an almost mystical ability to yield "good" results. *See, e.g.*, WILLIAM J. MCDONALD, THE SOCIAL VALUE OF PROPERTY ACCORDING TO ST. THOMAS AQUINAS 104-06 (1939) (discussing the Smithian belief that social and personal welfare are best served by allowing the individual the greatest possible freedom in his use and disposal of property).

454. *See* C.B. MacPherson, *Property as a Means or End*, *in* THEORIES OF PROPERTY, *supra* note 442, at 3, 4, 6 (arguing that liberal, individualist theories of property differ from Thomistic and Aristotelian theories by treating property as an end in itself rather than as a mere means); *cf.* TAWNEY, *supra* note 439, at 248 ("[L]imitless increase and expansion, became the goal of the Christian's efforts.... Not an easy going and open-handed charity, but a systematic and methodical accumulation.").

beings in order to protect the property rights of others.[455] The shift in the individualist school from property as an means to property as an end is important, because it demonstrates that the individualistic property theories are based upon a radically different system of thought than natural law. Thomistic natural law places the development of the human being at the center of the ethical universe.[456] By placing property above felicity, the individualist school reverses the order of priorities within Thomism and places itself outside that tradition of thought.

In addition to forsaking the natural law tradition, however, this notion of property rights is unappealing in its own right. First, the arguments presented on behalf of such absolute property rights are logically flawed. Self-ownership of labor does not self-evidently translate into ownership of the total value of the thing upon which one works.[457] Second, such an absolute emphasis on property rights is self-defeating. Although Nozick, for example, bases his robust property rights on the need to take each individual's moral dignity seriously,[458] he ironically (or self-contradictorily) demonstrates this commitment to individual dignity by allowing individuals to pass completely out of existence, thus losing the ability to be the subject of any rights at all, rather than alter a particular property distribution.

The objector need not go so far, however. Even property distributions that do not result in people's deaths are susceptible to the objection that over-reliance on property rights can lead to the arbitrary denial of other,

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455. *See* Drury, *supra* note 451, at 372; NOZICK, *supra* note 445, at 181 ("A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated."); *cf.* EPSTEIN, *supra* note 207, at 319 (denying that duties to charitable obligation have any place in the law, but are rather private matters of conscience).

456. *See* Anthony Parel, *Aquinas' Theory of Property*, *in* THEORIES OF PROPERTY, *supra* note 442, at 88, 91 (discussing how for Aquinas all goods are subsidiary to the fundamental end of human beings, which is happiness).

457. There is no need for me to rehearse the many problems with Locke's labor theory of acquisition. Several scholars have already explored the problems with this argument in great detail. Sreenivasan, for example, has argued convincingly that the rights yielded by Locke's arguments are not nearly as strong as Locke himself (and many of his followers) believed. *See* SREENIVASAN, *supra* note 450, at 95-96; *see also* KRAMER, *supra* note 438, at 113-17 (arguing that Locke's labor theory of appropriation is less than convincing). Nozick's neo-Lockean arguments on behalf of his entitlement theory have likewise been challenged on logical grounds. Several scholars have rightly accused Nozick of a circularity in that his arguments rely on the presumption of the very private property rights they wish to establish. *See, e.g.*, Onora O'Neill, *Nozick's Entitlement*, *in* READING NOZICK 305, 309 (Jeffery Paul ed., 1981); Cheyney C. Ryan, *Yours, Mine, and Ours: Property Rights and Individual Liberty*, *in* READING NOZICK, *supra*, at 323, 328 (arguing that to sustain his argument against redistribution, Nozick must assume the property rights he wishes to justify).

458. *See* NOZICK, *supra* note 445, at 32.

equally important, rights.[459] Thus, for example, highly unequal distributions of property may cheapen, and even threaten the very existence, of the rights to political expression of those without property.

Finally, the individualistic notion of property fails to take seriously the social nature of human beings. The dominant motif of individualist story of private property is the isolated "man in nature." Thus, Locke's story of the origins of private property begins with "man" in a state of a self-reliant nature appropriating property by mixing his own labor with some previously untouched resource.[460] Nozick, likewise, begins his discussion of political philosophy by nodding in the direction of Locke's state-of-nature made up of atomized individuals.[461] Such mythology views human beings as naturally self-sufficient and self-interested, despite the fact that there is no evidence that human beings have ever lived in any way but in society with other human beings.[462] An alternative (and more plausible) set of assumptions, which views human beings as naturally social, leads to a different set of conclusions regarding the appropriate nature of property rights and imposing duties of cooperation within which it would be unthinkable to suggest that people have no obligation to provide for their neighbors in need.

b. Aquinas' Social Theory of Property

Parallel to the individualistic theories of natural property rights, there has survived a Thomist tradition of property as a fundamentally social institution. Aquinas's theory was developed out of the synthesis of two different strands of thought. The first was an extreme skepticism about

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459. *See* Thomas Scanlon, *Nozick on Rights, Liberty, and Property*, *in* READING NOZICK, *supra* note 457, at 107, 123 ("[Nozick must] consider the consequence of enforcement of absolute property and contract rights . . . and explain why the loss of liberty this involves for some people is not worse than that which is involved in the alternative systems which he deplores."); Samuel Scheffler, *Natural Rights, Equality, and the Minimal State*, *in* READING NOZICK, *supra* note 457, at 148, 164 ("[W]e have reason to wonder whether a highly inegalitarian society would be stable with respect to the rights of all."); *see also* RAWLS, *supra* note 291, at 278 (arguing that in a society characterized by excessive inequality of wealth, equal opportunity is put at risk "and political liberty likewise tends to lose its value, and representative government to become such in appearance only"); *cf.* Samuel Bowles & Herbert Gintis, *Power and Wealth in a Competitive Capitalist Economy*, 21 PHIL. & PUB. AFF. 324 (1992) (arguing that in a capitalist economy those with wealth will have disproportionate power over those without it).

460. *See* LOCKE, *supra* note 447, at bk. II, ch. II, § 4; ch. V, § 27.

461. *See* NOZICK, *supra* note 445, at 10-12.

462. *See* MCDONALD, *supra* note 453, at 137-38; Nussbaum, *supra* note 428, at 263-65. *See generally* Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 37-57 (1990) (discussing the need for cooperation in order for a property regime to get off the ground, and criticizing traditional narratives of property-origins for adhering to excessively individualistic premises).

private property inherited from the early Church Fathers.[463] The second was a fairly robust system of Roman private property law.[464] By tying together these two disparate views of property, Aquinas wove a middle path between the strong respect displayed for property rights within the Roman law tradition and the complete antipathy towards property of the many heretical social movements of the thirteenth century (which resonated strongly with the teachings of the early Church).[465]

In accordance with the dual sources of his thought, Aquinas developed a dual notion of property, in which he distinguished between two different perspectives: production and use. With respect to the former perspective, Aquinas thought that private property was *permissible*, although not required; while, with respect to the latter, he thought that property had to be shared in common.[466] In this division he followed Aristotle, who, in his *Politics*, said that "property ought to be generally and in the main private, but common in one respect [i.e., in use]."[467]

Although perhaps on the whole less skeptical of the institution of private property than the early Church fathers,[468] Aquinas remained firmly

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463. The hostility of the early Church Fathers pervades their writings. Basil criticized the rich for their sense of ownership:

> Tell me, what is yours? Where did you get it and bring it into the world? It is as if one has taken a seat in the theatre and then drives out all who come later, thinking that what is for everyone is only for him. Rich people are like that. For having pre-empted what is common to all, they make it their own by virtue of this prior possession. If only each one would take as much as he requires to satisfy his immediate needs, and leave the rest to others who equally needed it, no one would be rich—and no one would be poor.

MARTIN HENGEL, PROPERTY AND RICHES IN THE EARLY CHURCH: ASPECTS OF A SOCIAL HISTORY OF EARLY CHRISTIANITY 2 (1974) (quoting Basil). McDonald says of the early Church Fathers that they could have been, with plausibility, "charged with Communism." MCDONALD, *supra* note 453, at 11.

464. *See* MCDONALD, *supra* note 453, at 79.

465. *See id.* at 73-79; *see also* BEDE JARRETT, O.P., SOCIAL THEORIES OF THE MIDDLE AGES 125-28 (1966).

466. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q. 66, art. 2. Aquinas gave three arguments on behalf of the wisdom of allowing private property as to production: (a) private property encourages greater effort and care among producers; (b) private property helps prevent confusion as to who is responsible for what; and (c) private property helps to ensure peaceful cooperation. *See id.* None of these arguments tends to show that property must, as a matter of justice, be private. Rather, they show that private property is likely to have certain beneficial effects. This emphasis on the utility of private property, as opposed to its justice per se, is an important distinction between the Thomistic view of property and the individualistic property theories.

467. ARISTOTLE, POLITICS, bk. II, ch. v, § 5 (Ernest Barker trans., Oxford Univ. Press, 1946).

468. Aquinas, for instance, believed that private ownership was conducive to peace, *see* AQUINAS, *supra* note 284, at Pt. II-II, Q. 66, art. 2, while the Church fathers generally believed private property to be the root cause of many human conflicts. *See* ROBERT M. GRANT, EARLY

within the Christian tradition of limited private property rights. Unlike the individualist property theories, Aquinas saw property as growing out of the context of human sin.[469] In a state of innocence, Aquinas thought that no private property would be necessary. Unlike the Lockean tradition, which saw the state of nature as one of atomized and self-sufficient and property-owning individuals, Aquinas saw human beings' natural condition before the introduction of sin as a state of peaceful and productive cooperation.[470] Thus, in contrast to Locke's view that the state's primary function is to defend the pre-existent, natural institution of private property,[471] Aquinas believed that the state determines the specific nature of private property rights, which are themselves only necessitated by fallen humanity's inability to cooperate.

Because Aquinas viewed common sharing and cooperation as the natural condition of human beings, he constrained private property rights within limits aimed at preventing them from swallowing the original right of common use. As A.J. Carlyle puts it, "[p]rivate property is allowed, but only in order to avoid the danger of violence and confusion; and the institution cannot override the natural right of man to obtain what he needs from the abundance of that which the earth brings forth."[472]

Thus, Aquinas was quite willing to restrict the freedom of "owners" in their use of property. He had a strong theory of necessity, according to which a person in need could take whatever he required from the possessions of others. Such taking was not theft because whenever someone found themselves in a condition of necessity, all property reverted to its original common state: "In cases of need all things are common property."[473]

Just as the individualist notion of property went along with a tendency to trust the market mechanism as a means of justly distributing goods, the social vision of property tends to correspond to a desire to place the market within the bounds of morality. Thus, Aquinas believed that prices should not be allowed to exceed certain limits of justice,[474] regardless of the

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CHRISTIANITY AND SOCIETY 116 (1977). St. John Chrysostom said the following on this topic: "See how there is no conflict over common property, but everything is peaceful. But when someone ventures to seize something and make it his own, then jealousy enters in.... Then comes conflict, then disgust." *Id.*

469. *Cf.* JARRETT, *supra* note 465, at 122 (stating that medieval thinkers located the origins of private property in original sin and thought that "communism was a lost ideal left behind in the garden").

470. *See* AQUINAS, *supra* note 284, at Pt. I, Q. 98, art. 1.

471. *See* LOCKE, *supra* note 447, at bk. II, ch. VIII, para. 95.

472. A.J. Carlyle, *The Theory of Property in Mediaeval Theology*, *in* PROPERTY: ITS DUTIES AND RIGHTS 17, 126 (1915).

473. AQUINAS, *supra* note 284, at Pt. II-II, Q. 66, art. 7.

474. Aquinas determines the just price through what amounts to a labor theory of value. *See*

market pressures that might lead to such a result.[475] Although the notion of the just price was in general consistent with prices fixed according to the laws of supply and demand,[476] Aquinas thought the natural law prohibited a seller from taking advantage of situations of desperation for buyers.[477] The market therefore had to be kept within certain ethical bounds.[478] In addition, Aquinas thought it unlawful to charge interest for loaning money and urged strict prohibitions on usury.[479]

At the fundamental level, the crucial difference between the Thomistic tradition of property and the individualistic tradition is the tendency of the latter to treat property as an end in itself,[480] while Thomism insists that property is only a means to other ends.[481] Aquinas admitted that the use of a certain amount of private property was necessary in order for a person to be able to achieve her proper ends.[482] To desire property beyond what was needed to accomplish these appropriate ends, however, was to sin.[483]

Suarez and Vitoria both substantially followed Aquinas's lead with regards to his teachings on private property. Suarez believed the private ownership of property to be the result of human sinfulness, thus casting a cloud over the institution.[484] The sixteenth-century scholastics shared the view that private property was not a requirement of nature, but merely permissible under the natural law.[485] What was merely permissible, but not necessary, in the cooperative "state of nature" before the fall, however, became necessary (as a matter of practicality) in the aftermath of human sin. But because nature does not mandate any specific set of property rights, their precise content is subject to change by the state.[486] Further, the

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JUSTICE, *supra* note 288, at 199.

475. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q. 77, art. 1.

476. *See, e.g.*, David Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS L.J. 673, 718 (1994) (arguing that the just price was, in most cases, the market price).

477. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q .77, art. 1.

478. *See* MCDONALD, *supra* note 453, at 40 (discussing Aquinas's support for restrictions on market transactions, because he feared that unfettered market transactions could easily lead to the over-concentration of wealth and power in the hands of only a few).

479. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q. 78.

480. *See supra* note 428-30 and accompanying text.

481. *See* Parel, *supra* note 456,at 93-94. For Aquinas, to treat property as an end was to commit a grave sin. *See id.*

482. *See id.* at 92 ("For man needs in this life, the necessities of the body, both for the operation of contemplative virtue, and for the operation of active virtue.").

483. *See* AQUINAS, *supra* note 284, at Pt. II-II, Q. 118, art. 1.

484. *See* SUAREZ, *supra* note 311, at bk. II, ch. xxii, para. 2.

485. *See id.* at bk. II, ch. xxii, para. 14.

486. *See id.* at bk. II, ch. xx, para. 7 ("For example, a certain state might decree that . . . [its citizens] shall not use money."):

scholastics' view that property was merely permissible under natural necessity led them to embrace Aquinas's notion of necessity and the propriety of other limitations on the right to private property.[487]

Although modern scholars often assume that the pre-modern tradition of limited property rights and skepticism towards the market died out in the seventeenth century,[488] the tradition of limited property rights has survived into modern times, incorporated most explicitly into the Catholic social teachings set forth in the papal encyclicals. Beginning with *Rerum Novarum*[489] in 1889, the Popes have reiterated time and again the doctrine of limited property rights. As with Aquinas, this doctrine of property has been an attempt to weave a middle path between two contemporary extremes: the radical views of both liberal capitalism and communism. Thus, the Popes have emphasized two aspects of the Thomistic view. First, they have reaffirmed the practical need for an institution of private property.[490] The right to property that flows from this need, however, is a

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> [F]or it is a rule of the *ius gentium* that no one be deprived of his possessions, even for the public service, without compensation, and still, through custom, a rule might be introduced that possessions may be taken without compensation.... [F]or since custom can establish the mode and conditions of ownership, it can establish the principle that private possessions be held ... as a kind of servitude to the public welfare.

Id. at bk. VII, ch. iv, para. 6.

487. *See id.* at bk. II, ch. xx, para. 5 (describing commercial behavior as subject to the norms of a just price range for goods).

488. *See, e.g.*, James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1854, 1858 (1996) (implying that pre-modern ideas about limited property rights and fettered markets are completely alien to the modern reader).

489. POPE LEO XIII, RERUM NOVARUM (1889), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 14 (David J. O'Brien & Thomas A. Shannon eds., 1992) [hereinafter CATHOLIC SOCIAL THOUGHT].

490. *See id.* at 16; POPE PIUS XI, QUADRAGESIMO ANNO (1939), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 42, 51 (affirming the existence of a right to private property); POPE JOHN XXIII, MATER ET MAGISTRA (1961), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 488, at 84, 101 (providing the same); POPE PAUL VI, POPULORUM PROGRESSIO (1967), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 240, 245 (providing the same); POPE JOHN PAUL II, CENTESIMUS ANNUS (1989), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 439, 461 (providing the same). In some ways, the language of the Popes represents a break with the Thomist tradition. Saint Thomas never spoke of private property as a natural right, but rather as a *permissible* (and practically desirable) institution under the natural law. The Popes rephrase the issue as one of rights: does the individual have a right to private property? It is possible, however, to interpret the shift in emphasis in a manner consistent with Aquinas's more limited notion. First, the Popes can be read as asking whether, as a practical matter, a right to private property is necessary for human well-being. Their positive answer to this question can then be seen as consistent with Aquinas's assertion of the practical superiority of private ownership over other forms of property. *See* POPE JOHN PAUL II, *supra* note 489, at 461. Second, the Popes' emphasis

modest one. Hence, the second aspect of Thomistic property rights that the Popes have emphasized is that this right must be limited in nature, subsumed as a means to the end private property was instituted to serve, namely the promotion of human autonomy and dignity.[491]

Like Aquinas, modern Catholic thought has emphasized the dangers of excessive faith in market mechanisms as the means of distributing the goods of society. Pius XI observed that "the proper ordering of economic affairs cannot be left to the free play of rugged competition. From this source, as from a polluted spring, have proceeded all the errors of the 'individualistic' school."[492] Instead of unfettered market mechanisms and property as an end in itself, the Popes have reaffirmed the Thomistic commitment to a notion of private property at the service of human beings and a market firmly under the control of humanistic moral norms.[493]

The Thomistic notion of limited property rights has not survived exclusively within the Catholic tradition, however. Elements of it remain even in the Anglo-American heritage of property law.[494] Although the individualistic school of property thought is certainly the dominant one within Anglo-American property law, this tradition is, as Carol Rose has noted, "subject to constant albeit ill-articulated intrusion from the

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on the right to property must be seen in its historical context. The Popes felt compelled to emphasize the right to property largely as a response to what they saw as the moral errors of Communism.

491. *See, e.g.*, POPE LEO XIII, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 17 (noting that the rights that accompany private possession are limited); POPE PIUS XI, *supra* note 489, at 53 ("[W]hen civil authority adjusts ownership to meet the needs of the public good it acts not as an enemy, but as the friend of private owners."); POPE JOHN XXIII, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 102 ("It is not enough, then, to assert that man has from nature the right of privately possessing goods as his own, including those of productive character, unless, at the same time, a continuing effort is made to spread the use of this right through all ranks of the citizenry."); POPE PAUL VI, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 245 ("[P]rivate property does not constitute for anyone an absolute and unconditioned right."); POPE JOHN PAUL II, *reprinted in* CATHOLIC SOCIAL THOUGHT *supra* note 489, at 461 ("The successors of Leo XIII have repeated this twofold affirmation: the necessity and therefore the legitimacy of private ownership, as well as the limits which are imposed on it.").

492. POPE PIUS XI, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 62.

493. *See id.* SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION OF THE CHURCH IN THE MODERN WORLD (1965), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 166, 210 (arguing that economic growth must be kept under human control and not delegated to the market); POPE PAUL VI, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 246 ("[U]nchecked liberalism leads to dictatorship rightly denounced by Pius XI as producing 'the international imperialism of money.'").

494. *See* John Pocock, *The Mobility of Property and the Rise of Eighteenth Century Sociology*, *in* THEORIES OF PROPERTY, *supra* note 442, at 141, 163 (arguing that the tension between commercial notions of property and the notion of property as subsumed to virtue has never disappeared).

traditional, quite divergent understanding."[495] Rose identifies these "traditional," limited notions of property rights with the American tradition of "civic republicanism."[496] James Ely agrees with Rose, arguing that the absolute notion of property rights has never completely prevailed within American law.[497]

2. Property for Dignity

Having set aside the individualistic notion of property rights in favor of the Thomistic tradition of social property, the task now remains to fill in some of the details of a Thomist theory of essential property rights. Such essential rights would provide the foundation for a solution to the problem of compensation of expropriated property. The essential rights mandated by a Thomist theory of property would amount to the content of the universal minimum standard of treatment of property-owners by states, that is, the human rights standard for property ownership. I will call the Thomist theory of minimum property rights "property for dignity."[498]

Property rights are to be defined in terms of *each and every person's* overarching human dignity and not vice versa. Following Kant, I will define dignity as the property a thing has when it has intrinsic value, when it is, literally, price-less.[499] For Kant, this means that the possessor of dignity, the person, is to be treated always as a free rational agent; always as an end and never just as a means.[500] As was discussed above,[501] the vagueness of Kant's categorical imperative draws in large part from his minimalist notion of the person as rational agent. A fuller conception of the human person would help to provide more guidance in the formulation of concrete ethical guidelines for the treatment of such beings. Thus, the dignity of the human person includes not only her rational nature, but also

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495. Carol M. Rose, *"Takings" and the Practices of Property: Property as Wealth, Property as Propriety*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 49, 52 (1994).

496. *Id.* at 61. The features Rose assigns to civil republicanism bear a close resemblance to the Thomistic tradition of property thought. Both are suspicious of the market and of commerce, both believe the use of property should be subject to virtues like liberality, and both favor widespread ownership of property as a means of safeguarding human freedom. *Cf.* POPE PAUL VI, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 242-46.

497. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 4-5 (1998). Ely points to taxation, eminent domain, and nuisance laws of examples of limitations on property rights commonly accepted by Americans, despite their inconsistency with absolute notions of private property. *See id.*

498. Human dignity stands as the central element in Thomistic moral reasoning. *See, e.g.*, GAUDIUM ET SPES, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 172-73.

499. *See* KANT, *supra* note 388, at 96.

500. *See id.*

501. *See supra* notes 368-69 and accompanying text.

the physical needs that must be met in order to continue in existence as a rational being, the ability of the person to deploy her rational nature in order to form conclusions about intellectual, moral, spiritual and religious issues, and to translate the conclusions of her rational nature into physical reality by acting on the material world around her. It also includes other aspects of human well-being, unrelated to reason as such, like family and friendship, work and play, freedom and beauty. Put in more Thomistic terms, personal dignity requires the ability to pursue one's human end, a process that involves consideration and decision about the best ways to arrive at that end as well as the ability to act upon those decisions by pursuing that end through concrete action.

In this process of forming conclusions about ends and translating them into reality, private ownership of property becomes essential to the pursuit of the human *telos*. To illustrate this more clearly, one can imagine three levels of human dignity within which the pursuit of the human *telos* requires private ownership. First, there is the level of material human needs. These are the material items needed for mere survival of the body. They include such things as food and the clothing and shelter necessary for survival in the geographic locale where a person is located. I will call this level of dignity "physical dignity."

Second, there is the level of training and preparation needed to be able to form intelligent conclusions about the human *telos*. Such a task requires space (both physical and "spiritual"[502]) for reflection as well as for intellectual and moral training. The family plays a crucial role in this area of development, because part of the demands of dignity for the adult is that he have the ability to pass on to his children the conclusions he has formed over a lifetime of searching and to raise his children in accordance with the lessons he has drawn about the nature of human ends.[503] A material sphere of property is necessary at this level to protect the family from intrusion, thus protecting both the rights of the person to be educated and prepared for life and the people who whose prerogative it is to do the educating.[504]

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502. By "spiritual" space, I mean a space free from the moral intrusion of others, a place where one can seek and receive education without undue interference at the hands of those who do not have responsibility for moral instruction.

503. This demand of dignity for the adult operates as a requirement of dignity within the adult's sphere of moral expression (the third level of dignity). Of course, this right is not unlimited. The parents' right to educate is just one right in an equation that includes both the rights of society and the rights of the children themselves. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting) (balancing the rights of parents against the rights of children). Spelling out the exact nature of the balance between these rights can be quite complicated, and is not a project I will undertake in this Article. It is enough to assert that parents have some right in this regard and thus the family requires some protective sphere within which it can operate without interference from others. Private property provides such a sphere.

504. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (asserting the right

This second level of dignity includes a higher level of material well-being, because the resources needed to educate, be educated, and reflect are greater than those required merely to avoid death. Moreover, the level of material well-being associated with the demands of preparation will vary as society changes. Thus, for example, the material well-being required for preparation for life in a technologically advanced society, like the one in which we live, will be different from those required for preparation for life in a community of nomadic hunter-gatherers. I will refer to this second level of human dignity as "developmental dignity."

Finally, the third level involved in the pursuit of human ends involves the ability to put into practice those lessons learned through the ongoing process of preparation and reflection. In other words, once one has formed conclusions about how to live the good life, one must have the ability to put those beliefs into actual practice. That is, one must have the material goods needed to be able to actually structure one's life in a manner consistent with the moral and intellectual conclusions reached after a process of education and reflection. Activities involved in this level of dignity include such things as the education of one's children, religious worship, political participation, and work. They also include the expression of the virtues, like friendship, liberality, and charity. All of these modes of expression require some physical property on which to act. Friendship, for example, is impossible if one does not have the ability to control the disposition of material goods through which such friendship may be expressed.[505]

Economic and productive activity have an important place within the life of the person, family, and community. How a person makes a living is often a central aspect of her identity. Family or community-based productive activity can likewise play an irreplaceable role in the upbringing and education of children.[506] The freedom, within certain limits, to engage in self-directed work (in other words, work done under one's own direction or in a manner determined according to one's beliefs) is an undeniable aspect of human dignity. Not everyone will choose to engage in such self-directed work, but everyone should be able to choose to do so. That ability to engage in self-directed work requires the possibility of private control over some means of production as well as some ability to control the disposition of the products of one's labor. I will call this final level of human dignity "expressive dignity."

To briefly recapitulate, the three types of requirements of human

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of parents to direct the education of their children).

505. As Finnis points out, a person cannot invite his friend over to dinner if he has access to no property beyond his own ration. *See* FINNIS, *supra* note 289, at 144.

506. *See Yoder*, 406 U.S. at 211-12 (describing the Amish belief in the educational importance of manual labor over that of formal, high-school education).

dignity (physical dignity, developmental dignity, and expressive dignity) lead to the necessity of a body of private property available to the individual and family. The three levels are not all equal, with the requirements of survival trumping the other two, and the requirements of education[507] taking precedence over those of expression. But, despite this hierarchy, all three levels combine to form the requirements of human dignity.

The acknowledgment of these three levels of human dignity leads to the institution of a right to private property in the form of both personal household property as well as the opportunity to acquire private property in some means of production. Dignity requires that the right to household or community property be sufficient to guarantee a humane standard of living for the person, family, or community. Further, the property must be sufficient to provide for the moral and intellectual preparation of children over whom family or community-members have responsibility. Finally, it must be sufficient to provide some means for moral and intellectual expression.[508] Under this final requirement, the property regime must provide individuals or communities with some meaningful opportunity to engage in self-directed work that is expressive of human dignity and to own the means of production necessary for engaging in such work.

The "right" to own property is not limited to merely "negative" rights not to be prevented from owning property that meets the criteria laid down by the requirements of human dignity. Rather, human dignity implies the provision of a certain standard of living[509] to each person as a right. This standard of living requires the provision of material necessities, as well as the property needed to be able to educate one's children properly. Such provisions of property as a right are necessary to protect the rights of (1) every human being to physical survival and (2) every person to receive required moral and intellectual instruction necessary to be able to live a good life in pursuit of the human *telos*.

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507. This preference is not arbitrary, because it is plausibly argued that expression may be delayed without permanent damage, while education may be delayed at the risk of the formation of bad habits in the interim that will make further education far more difficult.

508. "Expression" is not an unlimited right. One's decision that her moral and intellectual principles required her to have a 24-hour talk show on cable television would not translate into a right to the property necessary for such an undertaking. Instead, what is meant by expression is a person's ability to apply to his life the moral and intellectual principles he concluded to be true, in a manner consistent with the dignity of other human beings.

509. This standard will vary from society to society, depending upon the level of well-being achieved on the whole within each. It will also vary within the same society over time, as that society's standard of living changes and items which were once considered luxuries come to be seen as necessary for a dignified life in the community. Thus, the fact that human beings once went about in loin-cloths without suffering any loss of dignity does not imply that the minimum standard for human dignity requires no more than that for life in 20th-century America.

This "positive" right does not encompass, however, the property needed for complete moral and intellectual expression, although it does require that all persons have an *opportunity* to engage in such expression. Further, a real opportunity must exist to engage in the type of meaningful independent economic activity (that is, activity consistent with human dignity)[510] that will allow people to both express themselves through their work and to procure the property they require for moral and intellectual expression. Thus, a society would not violate the requirements of property for dignity by failing to affirmatively provide people with the property they need to engage in self-directed work. It would violate the requirements, however, if people were in fact unable to obtain this property on their own, through mechanisms established within the property system.

The positive right to the provision of material necessities for life and education acts as a limit on the enjoyment by others of their expressive property rights. Thus, to the extent that some people acquire more property than others, they may be deprived of property in excess of their needs under the physical and developmental dignity in order to assist those who are unable to meet their own needs under these two levels of dignity.[511] Of course, such interference would have negative effects on someone's attempts to pursue her life plans. Hence, the fairest way to undertake such redistribution would be through widely-spread taxes on the surplus of as many members of society as possible, thus minimizing the disruption to the life plans of any one individual or household.

An important question to ask at this point is what considerations apply to communities, whether they be communities of belief, tightly bound ethnic communities, or economic communities. It would seem that the ability of the individual to engage in moral expression includes within it the opportunity to come together in community (or to preserve the well-being of pre-existent communities). These communities must in turn have some ability to engage in the moral inculcation of the young (an aspect of an adult's moral expression) and to undertake their own moral expression (derived from and dependent upon that of their members).[512] These communities, therefore, must also be endowed with certain "rights," including the right to own properties. The types of organizations that are

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510. *See* POPE JOHN XXIII, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 97-98 ("[I]f the organization and structure of economic life be such that the human dignity of workers is compromised, or their sense of responsibility is weakened, or their freedom of action is removed, then we judge such an economic order to be unjust, even thought it produces a vast amount of goods whose distribution conforms to the norms of justice and equity.").

511. *See* MCDONALD, *supra* note 453, at 39 ("We should surrender even conveniences in order to supply necessaries for others, and as to luxuries we should consider ourselves as having no claim to them so long as there are others who lack the necessities or conveniences of life.").

512. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (acknowledging such community rights with regard to the rearing of children).

capable of asserting property rights under the pretext of dignity are those that involve the coming together of persons for the purpose of collective activity, whether it be collective worship, collective political expression, or collective work. Further, as these organizations become larger and more bureaucratic, their claim to be participatory organizations essential to the dignity of their members becomes more and more suspect, and, consequently, their claim to dignity-based property rights more and more tenuous.[513]

Importantly, the type of economic organization implied by the coming together for collective work is not the modern corporation, but rather some type of cooperative, in which ownership and governance is exercised by the very people who have come together voluntarily to express themselves through collective work.[514] Thus, the ability to come together in cooperative economic organizations is part of the fundamental property rights implied by human dignity, but the formation of organizations along the lines of the modern corporation is not.[515] This is not to say that a state would be wrong to allow corporations to form. Rather, it means that the state does not violate anyone's dignity by not allowing corporations to form, or by limiting corporations' property rights in the interests of restricting their economic and political power. The exact nature of corporate property rights is thus generally subject to unfettered determination at the hands of the state.

As the example of corporate property shows, the standard mandated by human dignity is a somewhat flexible one.[516] Rather than an inflexible set of rules for what a property regime must be, the natural law, property-for-dignity approach sets forth a series of minimum standards all property regimes must meet in order to meet the demands of the natural law. Thus, for example, Suarez believed that, over time, a state could adopt the custom of expropriation without compensation without violating anyone's

513. *See* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 21, 24, 26 (1985); *see also* FINNIS, *supra* note 289, at 146-47 (discussing the decreasing ability of organizations to serve their members as they grow larger and thus more distant from their membership).

514. In the Cuban situation, this distinction would correlate with the difference between state farms and CPAs or other cooperative economic organizations. *See supra* notes 101-07 and accompanying text.

515. For a discussion of the appropriate moral standing of corporations, as well as persuasive arguments as to why corporations should not be treated as possessing the same rights as "natural persons," see generally DAN-COHEN, *supra* note 513. It is possible that some small corporations would sufficiently resemble cooperatives that they would have a plausible claim to certain property rights. My purpose at this point is not to lay down a legally specific principles, but merely to establish certain broadly applicable ethical rules.

516. *See* Parel, *supra* note 456, at 107 (arguing that a Thomistic theory of property does not necessitate any one particular property regime).

natural rights.[517]

Beyond the minimum standards, each sovereign state has virtual plenary power to determine the specific content of its property regime. The only limitation on this power is the possible existence of a positive international consensus that certain additional property protections are required. Thus, within the limits of the requirements of the *ius gentium*, a state might lay a system of socialized property on top of this basic matrix of essential private property rights. In such a system, individuals and families would be allowed to own homes and family-owned businesses; small businesses would be allowed to join together into private cooperatives; churches and small voluntary organizations could own property; but large (non-cooperative) productive enterprises would be owned by the state, their governance a matter of state control (although with some requirements of worker participation imposed by the requirement to respect the dignity of each worker).

On the other hand, a state might choose to implement a free market system over the system of property rights imposed by the natural law. In this case, most property would be allowed to be privately owned, although again there would be limits on enterprises' managerial prerogatives as a result of workers' dignity-rights. Further limits would be mandated by the necessity to ensure that the distribution of property did not result in the deprivation of anyone's human dignity. Clearly, however, the minimum standards imposed by property for dignity are consistent with very different decisions about how to structure one's society.

The notion of property for dignity set out in this Article is similar to the idea of property for personhood developed at length by Margaret Jane Radin.[518] Drawing upon Hegel's *Philosophy of Right*, Radin argues that certain categories of property are required in order for an individual to be able to express, and thereby realize in the world of concrete individuals, his personhood.[519] Because these categories of person-forming property are constitutive of personhood itself, they are not properly viewed as means to an end, but rather as ends.[520] As a result, they are subject to a stronger moral claim within Radin's theory than what she calls "fungible" property, or property that does not play a central role in the expression of one's personhood.[521]

There are several similarities between the conception of property put forth by Radin and that proposed in this Article. Both, for example, put the human person at the center of the inquiry into the nature and extent of

517. *See supra* note 321 and accompanying text.
518. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).
519. *See id.* at 972.
520. *See id.* 959-60 (contrasting personal property with "instrumental" property).
521. *Id.* at 978.

property rights. Further, both posit a hierarchy of property rights based on the centrality of the property in question to the needs of the person who owns it. Nevertheless, there are important differences that distinguish Radin's notion of "personal property" from property for dignity.

First, Radin's method of distinguishing personal from fungible property is quite different from the several layers of human dignity discussed earlier in this Part. There is a strong element of subjectivity to Radin's theory that introduces a serious weakness into her discussion. The subjectivity arises from the impossibility of making wide generalizations about how each autonomous person is going to define herself through her personal property. For some, their wedding rings will be essential attributes of their self-identities. For others the essential property will be military uniforms, or expensive sports cars or family-owned businesses (even relatively large ones). Indeed, it seems plausible to argue that a person can latch on to *almost* anything as non-fungible personal property.[522] I might, for example, have my identity bound up with my solid gold mansion or with my collection of Rolls Royces or some other set of luxuries which would, under the property for dignity approach, be subject to redistribution in order to meet the needs of others.

In order to avoid this problem, Radin introduces an external check on a person's ability to claim attachments to material objects. In order to avoid what Radin considers to be undesirable reliance on natural law solutions, she introduces the idea of an authoritative consensus as the means for distinguishing a healthy attachment to material objects from fetishism, with the former being subject to heightened moral protection, while the latter is not.[523] Thus, presumably my attachment to my solid gold mansion would be condemned as fetishism, while someone else's attachment to their wedding ring would not. "[A] 'thing' that someone claims to be bound up with nonetheless should not be treated as personal vis-à-vis other people's claimed rights and interests where there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution."[524]

Unfortunately, Radin's solution seems somewhat confused. First, she claims that the consensus is an "objective" one, implying that it is not relative to any particular perspective. But this would appear to subject her solution to the objection from moral diversity that has been urged incorrectly against natural law. It would seem that some moral communities may claim to have their personhood bound up with one type

522. I say "almost" anything because it would certainly be difficult to argue that my identity is bound up with *this particular* pile of one million dollars opposed to the one sitting next to it, and that my identity as a person would be destroyed if one were taken away and replaced with the other.

523. *See* Radin, *supra* note 518, at 969.

524. *Id.*

of "thing," while other moral communities would argue that such a consideration amounted to fetishism. Unlike the natural law, however, Radin cannot solve this problem by reference to general principles, because what she is seeking is a consensus regarding quite specific moral judgments about the particular types of property that may be bound up with the person. Hence, a group of wealthy Wall Street investment bankers might claim that their mansions in Greenwich, Connecticut, constitute an essential part of their personhood, while someone suffering from famine in the Sudan would understandably object to such an attachment as fetishistic.

Radin must therefore either admit her standard to be fundamentally subjective and find some way of restricting the content of the community to which she will turn for her consensus (for example, the relevant local community, the nation, the religious group, etc.), or she must find some truly objective basis for distinguishing healthy identifications from fetishistic ones. Natural law would have no such problem, because of its reliance on flexible principles and because of its appeal to an objective notion of a human nature or *telos*. Natural law is sensitive to the existence of moral consensus as potential evidence of the content of natural law, but it has the ability to account for widespread error in a given population.

Although Radin rejects natural law as a basis for her distinction between personal and fungible property, at times she appears to smuggle such a notion into her theory. In one article she speaks of the category of personal property being limited by an ethical vision of "human flourishing."[525] Further, her analogy of inappropriate and appropriate attachments to the example of a sick person and a healthy person[526] is remarkably similar to the teleological distinction between human nature as it happens to be and human nature as it could and should be.[527]

A second crucial difference between Radin's theory and a natural law theory of property is that Radin is willing to treat at least some property as non-instrumental.[528] Strictly speaking, natural law never treats property as an end, but always as a means to the more important end of human flourishing.[529] Thus, natural law would not agree with Radin's prohibition on the exercise of eminent domain with respect to personal property.[530]

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525. Margaret Jane Radin, *The Liberal Conception of Property: Cross Current in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1688 (1988).

526. *See* Radin, *supra* note 518, at 969.

527. *See* MACINTYRE, *supra* note 282, at 50.

528. *See* Radin, *supra* note 518, at 959-60.

529. *See, e.g.*, POPE PAUL VI, *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 489, at 245 ("All other rights whatsoever, including those of property and of free commerce, are to be subordinated to this principle [of the common good].").

530. *See* Radin, *supra* note 525, at 1687.

Because Radin's category of personal property does not correspond to the property required for human survival—which, under natural law, would not be expropriable—natural law would endorse the expropriation of personal property when doing so is necessary to supply others with the means of survival.[531]

Indeed, Radin's notion of property as constitutive of personality is problematic in and of itself. While there is certainly property that is very dear to me, property that I would be extremely reluctant to give up in even the most extreme of circumstances, it would be false to assert that this property constitutes my very personhood. There is not a single piece of property such that if it were taken away from me I would lose either my status as a real person or my identity as the same person I was before I lost the property.

A final difference between Radin's theory and the natural law notion of property for dignity is that the latter appears to provide more protection for commercial property. Although Radin admits the possibility that commercial property could constitute personal property,[532] she often speaks as if commercial property in general is more likely than other forms of property to engender fetishistic attachment.[533] In contrast, because the natural law views productive behavior to be part of expressive dignity, commercial property in general does not labor under any disability with respect to expropriation by the state. Commercial property that is central to the expression of a person's dignity falls under the dignity-based right, although it may be expropriated as a last resort to meet the needs of a more important demand of dignity (such as, physical dignity).[534] Nevertheless, both Radin's theory and property for dignity would allow the provision of minimal protections for corporate-owned commercial property. For the natural law, this is not because such property is commercial, but rather because it is not central to the dignity of any real person.

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531. This would only be true, however, in the exceptional circumstance where the state could not meet the need of the person by redistributing property not implicated in human dignity (e.g., corporate property).

532. *See* Radin, *supra* note 518, at 1010-11 (discussing Bell v. Maryland, 378 U.S. 226 (1964)) (implying that the owner of a small restaurant interested in excluding black people from the premises had some personhood basis for claiming the right to do so).

533. *See, e.g.*, Radin, *supra* note 525, at 1689 (pointing out that, from the perspective of personal property, there is a difference between home ownership and factory ownership). Fetishistic attachment does not constitute the basis for the heightened protection due to personal property. Thus, a category of property more likely to engender such attachment is also less likely to be worthy of any heightened protection.

534. Property affected by dignity concerns may be taken by the government for other reasons as well (e.g., to acquire the land necessary for a highway project or some other public work). Unless such takings seek to accomplish a well-formulated policy of redistribution of property, they should be accompanied by full compensation.

3. Summary of the Natural Law's Minimum Standard for Property Rights

Before moving on to apply the natural law property standard to the case of the Cuban revolution's property reforms, it would be useful to summarize what the content of that standard is. First, property for dignity recognizes a universal positive right to the property necessary for survival and education, and a universal, although limited, negative right to property for the expression of human dignity. Although property regimes must provide room for private property consistent with the demands of dignity, the individual property rights mandated by human dignity are limited by the claims of others to survival and/or education, when those needs cannot be satisfied by the redistribution of property not related to human dignity. Finally, the property for dignity approach provides no universal norms requiring the protection of corporate-owned property.[535]

The minimal property rights guaranteed by the natural law, property-for-dignity approach may be supplemented by international consensus along the lines of *ius gentium*, or international custom. Mere accidental common practice is not sufficient to establish a requirement of *ius gentium*, however. There must be a consensus that a certain level of protection is required in some way, a consensus that states are not free to violate the norm in question. As was discussed above, there presently appears to be no universally accepted set of norms regarding compensation for expropriated property.[536] There is, however, a consensus that expropriations must be for a public purpose and that they must be carried out in a nondiscriminatory manner.[537] Further, as with all action taken by governments, the natural law

535. Such a conclusion may prove troubling to some, but it should not. Corporations are normally in a very strong position to protect their own property interests. In some cases, the size of multinational corporations exceeds that of the economies of many of the nations in which they operate. Further, their influence within their home state will mean that they will normally receive the full support of their government in pressing claims against expropriating host states. The Guatemalan revolution provides a good example of how the U.S. government is willing to go to great lengths on behalf of large U.S. corporations. *See, e.g.*, BLASIER, *supra* note 70, at 89. Further, in the case of the Cuban revolution, despite the fact that no U.S. corporations received compensation from the Cuban government, they made up most of their losses in the form of special tax breaks provided to them by the U.S. Congress after the expropriations occurred. *See* Susan Fernández, *The Sanctity of Property: American Responses to Cuban Expropriations, 1959-1984*, CUBAN STUD., Summer 1984, at 21, 23-26. Some companies actually managed to earn a net profit out of the expropriation. *See id.* at 26. Finally, international capital markets are quite protective of the interests of large corporations. Countries that expropriate property without compensation will find it very difficult to raise capital on international markets or to attract direct foreign investment, problems that have plagued Cuba in its efforts to deal with the loss of Soviet assistance.

536. *See supra* notes 229-46 and accompanying text.

537. *See supra* notes 185-88 and accompanying text.

requires that expropriations be undertaken in the interest of the common good.[538]

Aside from these constraints, local states are free to develop whatever norms they see fit with respect to property not falling into the protected category of property for dignity. All things being equal, the choice of which property regime to institute, as long as not violative of minimal human rights or an international norm (for instance, a bilateral treaty recognizing the corporate property of another state), amounts to an undeniable right of sovereignty. This represents an extension of the right of societies to choose their own forms of government.[539]

IV. APPLYING THE PROPERTY-FOR-DIGNITY STANDARD TO THE CUBAN CASE: THE THREE GROUPS REVISITED

Under the guidelines set forth in the preceding Part, there are several questions to ask when assessing a property reform. First, are there people who are being denied their human dignity under the present property regime (with a special emphasis placed on violations of the physical and developmental levels of dignity)? A negative answer to this first question does not prohibit property redistribution, but a positive answer mandates it.

The second question to ask is whether the proposed reform will actually help to move society closer to a situation in which no one is denied her human dignity. This question involves two aspects. First, will the reform respect the dignity of those who lose property (i.e., are those who lose property reduced to a situation where their dignity is violated)? A reform that takes everything from those who previously had more than they needed, leaving them in a situation of destitution, would not be justified under the natural law conception of property for dignity. It would impermissibly trade on the dignity of one person in order to remedy the denial of dignity to another. Second, will the reform improve the situation of the worst off? A reform, for example, that tended to take property from the poorest members of society, in order to redistribute it to the wealthier, would not move the society closer to a situation in which the dignity of all was respected.

When property belonging to foreign nationals is involved, two additional questions need to be asked. First, is the law undertaken to serve some public purpose? Second, does the law discriminate unreasonably against property belonging to nationals of a specific state? Inappropriate answers to either of these two questions indicates that the law under consideration violates the *ius gentium*.

538. *See supra* notes 307-09 and accompanying text.
539. *See supra* notes 307-09 and accompanying text.

A. *Cubans Who Remained in Cuba*

Cubans who remained in Cuba were subjected to a series of redistributive measures that expropriated property from a steadily larger number of people over the course of the first decade of the revolution. Beginning with the First Agrarian Reform of 1959 and ending with the expropriations of small businesses during the Revolutionary Offensive in 1968, many Cubans who remained in Cuba lost substantial amounts of property. In order to assess how the members of this group were affected, this Part will go through each successive stage of the Cuban property reforms and briefly discuss their merits under the property for dignity standard.

1. First Agrarian Reform

The First Agrarian Reform law sought to remedy a situation of *latifundia* in rural holdings where the vast majority of rural Cubans were consigned to lives of almost total deprivation while a small minority of landholders maintained enormous tracts of underutilized land. The distribution of properties was such that the large landholdings of the few guaranteed that the remaining land could not generate a living for the remainder of the rural population. Further, those who worked the land often did so under onerous tenancy arrangements whereby they forfeited a large portion of their production to wealthy landholders. Health and education in rural areas were virtually nonexistent and the rural poor lacked any means of improving their economic condition.[540] In short, there was, before the First Agrarian Reform, a large group of Cubans being denied the property required for all three levels of dignity. Some type of reform was therefore mandated by the natural law.

By focusing its expropriations on landholdings of over thirty *caballerías*, the First Agrarian Reform law aimed to expropriate properties that were, if owned by individuals or families, loosely covered by the level of expressive dignity or, if corporate owned, not covered by dignity considerations at all. Because large landholders were left with substantial holdings (up to the thirty *caballería* maximum), they were not denied their rights under the expressive level of human dignity. They emerged from the expropriations with substantial (albeit reduced) opportunities for self-directed economic activity. Finally, the redistributive provisions of the First Agrarian reform emphasized the grant of the expropriated properties directly to those who worked the land. Thus, the law, as written, satisfied the requirement that it remedy the situation in which people were being

540. *See supra* notes 44-48 and accompanying text.

denied their dignity.

Although tens of thousands of previously landless Cubans received title under the law, some scholars claim that the primary beneficiary of the First Agrarian Reform was the Cuban state, which acquired title to close to one half of the expropriated landholdings and put them to use as state farms.[541] As a general rule, substantial participation in the economy by the state is not itself violative of the natural law. It may become a violation, however, if the presence of the state is so overpowering that it leaves *no* real opportunity whereby people can enter into the private sector and engage in self-directed work. Limitations on alienation of farmland under the First Agrarian Reform created a situation where those who did not receive redistributed land might have found it more or less impossible to enter into the rural sector as a private farmer.[542] Thus, it is probable that some people's rights were violated under the First Agrarian Reform, but it is important to emphasize that it was not the people who lost their land. Rather, the people wronged were those who desired the opportunity to engage in small-farming, but were denied that opportunity by the post-reform structure of the agricultural sector.

2. Second Agrarian Reform

Many of the same considerations covering the First Agrarian Reform also hold true for the Second Agrarian Reform Law of 1963. Assuming that by 1963, many of the factors leading to the denial of dignity to the rural poor had been removed, it is possible to classify the Second Agrarian Reform as a revolutionary reform that sought to change the basic rules of the game within Cuba's agricultural property regime. Rather than a remedial measure aimed at raising people out of inhuman living conditions, its goal was a fundamental restructuring of rural Cuban society. The question, then, is whether the second reform, which limited rural landholdings to an upper limit of five *caballerías*, managed to accomplish this task without violating the rights of those whose land was taken.[543]

This is a far closer case than with the first law, because virtually all of the land affected by the second law was implicated by some dignity concerns. Nevertheless, beyond the provision of opportunity for private economic expression, it is up to the state (within the limits of justice established by the common-good requirement) to determine how the wealth of society is to be distributed. Because the ownership of five *caballerías* provides sufficient opportunities for self-directed work and

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541. *See* GHAI ET AL., *supra* note 97, at 11.

542. *See supra* notes 98-99 and accompanying text.

543. For a discussion of the terms of the Second Agrarian Reform, see *supra* notes 90-95 and accompanying text.

does not leave those working the farm unable to earn a dignified (albeit modest) living, the rights of those who found their farms reduced to the new upper limit were not violated.

The new limitations of rural ownership would not violate the rights of farmers as long as those with hopes of acquiring land had some opportunity to do so. As with the first reform, to the extent that the prohibitions on transfer of property prevented those who remained without land from ever acquiring it, the law violated their rights. For the same reason as the first reform, the second reform failed to provide adequate opportunities for self-directed agricultural production. Thus, like the first reform, the second reform violated the rights of those who wanted the opportunity to engage in small-scale private farming.

3. Urban Reform

The Urban Reform took title from people who owned homes for rental and gave the properties to those who were living in the rental units.[544] As such, it sought to expand the range of ownership of property that falls under the physical and developmental levels of human dignity. It did so by taking property from within the expressive level of dignity (to the extent that those who lost properties were individuals and not corporations). The question, then, is whether those who lost all of their rental properties were left without any self-directed economic opportunity, thus violating their right to expressive dignity.

This raises the difficult question of whether the complete denial of the ability to pursue a single, specific profession can violate a person's dignity. In general it does not. What the expressive level of dignity requires is that human beings be given a real opportunity to express themselves through self-directed economic activity. Although this requires the opportunity to be able to select from a range of meaningful activities and enjoy (within limits) the benefits of that employment (such as through a small family business), it does not entail that every possible profession be available for such work. The state may legitimately bar certain forms of employment from the range of options open to each person, as long as a wide range of possibilities remain. Its reasons for doing so may vary: first the job may be seen as immoral or harmful to the person undertaking it, as with, for example, prostitution; second, the job may be seen as necessarily within the purview of the state, like a judge or police officer; finally, certain jobs may be determined to be best carried out by the state from the point of view of justice, as with doctors in a system of socialized medicine. A plausible argument may be made that the state may properly decide that

544. For a discussion of the terms of the Urban Reform, see *supra* notes 109-11 and accompanying text.

abuses within the private housing market are necessarily so severe that the only solution is to socialize the profession of landlord.[545] Thus, by itself, the Urban Reform does not appear to have violated anyone's rights.

4. Revolutionary Offensive

During the Revolutionary Offensive of 1968, virtually all small private businesses were expropriated by the Cuban government.[546] It is not clear that redistribution was even the goal of this expropriation. The effect of this action was not to better the situation of any Cubans who were living in a state of misery but rather to foreclose the possibility of private self-employment in virtually any field to almost all Cubans. Thus, the possibility for self-directed economic expression was almost completely eliminated. This action clearly violated the dignity rights of those who were expropriated as well as Cubans whose property was not expropriated but who, thereafter, were unable to open a small business.

5. Recent Reforms

Some of the excesses of the Cuban revolution's property reforms have begun to be remedied in the past few years as the country has enacted a series of reforms aimed at easing the post-Soviet economic crisis through an expansion of the private sector. Openings to foreign corporate capital, a large part of the government policy,[547] are not relevant to the inquiry required by the natural law conception of property. Of more interest are the semi-privatizations of state farms, the expansion of opportunities for self-employment, and the creation of farmers' and artisanal markets.

As the discussion of the justice of the Revolutionary Offensive and the agrarian reforms indicated, the Cuban government erred in its early reforms by not leaving open sufficient opportunities for self-directed economic activity. In the agrarian case, the failure to redistribute sufficient land directly to farmers and the restrictions on alienation of property combined to freeze people out of private agriculture. Reforms in the 1970s aimed at the stimulation of private cooperatives[548] and the more recent semi-privatization of state farms in the form of UBPCs[549] takes the Cuban government far closer to the demands of natural law in the agricultural area. The opening of farmers' markets gives those engaged in agricultural

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545. This is not to say that such a course of action is the wisest or best one, but only that it is within the power of the state to make the decision without violating anyone's rights.

546. For a discussion of the Revolutionary Offensive, see *supra* notes 140-41 and accompanying text.

547. *See supra* notes 152-57 and accompanying text.

548. *See supra* notes 104-05 and accompanying text.

549. *See supra* notes 145-49 and accompanying text.

production a greater opportunity to seek their own customers and to earn a fair price for their produce, thus augmenting their ownership rights over the product of their labor.

In the case of small businesses, the opening to self-employment and the creation of artisanal markets in recent years is hopeful, but still probably does not go far enough. Heavy taxes and onerous licensing requirements on self-employment have served to strongly discourage Cubans from exercising their right to self-directed economic activity.[550] Moreover, restrictions on which professions can be pursued go beyond mere efforts to prevent the practice of immoral professions, but seek instead to prevent competition with the state. For example, architects and engineers cannot practice their profession on their own behalf. The Cuban government should open up a wider variety of professions to self-employment and make some effort to ease entry into the private sector.

6. Remedies?

Several possible remedies exist for the Cuban government with respect to the Cubans who remained in Cuba and suffered violations of their economic human rights. These Cubans fall into two groups: those who failed to receive adequate economic opportunity as a result of excessive domination of the economic sphere by the state and those who had properties unjustly taken away from them in the 1968 Revolutionary Offensive. The remedies appropriate to each would be somewhat different. It would seem that the most appropriate remedy for those denied economic opportunity would be its provision. Thus, the government should ease entry into both private agricultural production and self-employment. Onerous burdens on the entry into either of these areas should be removed. For example, the government might lift burdensome restrictions that essentially prevent the transfer of rural property. Further, it could ease the licensing requirements and heavy taxes exacted from those seeking self-employment in favor of income-based taxes that take from people in proportion to their earnings.

Those who lost properties unjustly to the state as part of the 1968 Revolutionary Offensive should have those properties restored to them to the extent that such restoration is feasible (for example, if the properties are still not occupied). Any visitor to Havana knows that a great deal of commercial property is vacant. It is thus likely that small business-owners who lost properties could have those properties restored to them without any disruption. If properties are occupied, the government could grant similar, vacant properties to expropriated owners. Alternatively, it could

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550. *See* James C. McKinley, Jr., *In Cuba's New Dual Economy, Have-Nots Far Exceed Haves*, N.Y. TIMES, Jan. 11, 1999, at A6.

compensate expropriated owners with tax credits or financial assistance in the establishment of a new business. In any event, no one should have physical properties returned to them unless they plan to use them for engagement in small business activity.

B. *Cubans Who Left Cuba*

All Cubans who left Cuba in the early years after the revolution lost any property they left behind to the state under *Ley 989*.[551] These properties were sometimes left in the possession of friends and neighbors, but were also often redistributed by the State. Although some who left were guilty of crimes under the Batista government, by far the majority were simply Cubans who feared life under the new regime. Those whose property could not legitimately have been taken under criminal sanction should not have lost their entire estates simply for leaving the country. Human rights are human rights, regardless of whether a person is present in his home country or not. Thus, the confiscatory measures aimed at emigrating Cubans violated their human rights to property ownership.

The question, then, is the extent of their harm. Cubans who left were only harmed to the extent that the properties confiscated would not have been redistributed by subsequent redistributionist measures consistent with their human rights. Thus, for example, emigrating Cubans who lost rental properties or large plantations could not claim that they were wronged by such measures (except perhaps rural landowners, who are entitled to their five *caballerías* under the Second Agrarian Reform). Those who lost small businesses, however, would be entitled to some remedy, since the subsequent nationalization of small businesses was unjust.[552] Emigres are also entitled to some remedy up to the amount of their personal property (homes, clothing, furniture, etc.).

The question of remedies for Cubans who left Cuba is a very thorny issue, both in Cuba and among the émigré community in the United States and elsewhere. Cubans living in confiscated properties in Cuba often express fears about the return of the former owners, while in Miami, rumors abound of former property owners prepared to take back their expropriated properties, by force if necessary. If the lost property has been occupied for a sufficient length of time, however, the balance of factors would seem to favor some sort of monetary compensation or compensation in vacant properties, to those who left properties behind, rather than

551. *See supra* notes 116-17 and accompanying text.

552. There is an interesting problem raised by small businesses, however. Those who left small business behind would likely have lost much of their business even if the Cuban government had not confiscated their holdings. A small business whose owner is absent from the country for a long period of time is unlikely to thrive.

restitution of the precise property.

The preference for some alternative to direct restitution of taken property is based on the temporal dimension to property ownership. This temporal dimension is widely recognized.[553] As time passes, separation from property translates into a diminution of the importance of that property in the execution of the life plans (the pursuit of the human *telos*) that lies at the center of natural law property rights. The property that was lost is replaced by new property that takes over the function of creating the cocoon of family privacy and providing the means for economic creativity. The converse occurs for those who moved into the expropriated property. As time goes by, the property comes to play a more and more central role in the formulation and execution of their life plans. Thus, to take back property that was left behind forty years ago from someone who has occupied it for that period of time would appear to be unjust. A better solution would be to provide some form of compensation to the injured party, either monetary or in the form of a vacant piece of property.

The example of reunified Germany provides a useful illustration of how the overzealous restoration of four-decade-old property claims can lead to inhuman dislocation.[554] Marc Fisher describes how people who had owned homes for over two decades in East Germany feared their loss in the wake of a law favoring restitution of confiscated properties. The law not only discouraged investment in the former East Germany (as a result of uncertain land titles), it also greatly set back the process of national reunification. Fear of losing their properties to former owners fostered a strong antipathy towards West Germans among residents of the East. Fisher even argues that the policy of land restoration led to a jump in the suicide rate in the East.[555]

C. *U.S. Corporations*

Most of the property lost by U.S. citizens as a result of Cuban property reforms was owned by North American corporations.[556] Certainly North

553. As the laws of adverse possession demonstrate, Anglo-American law recognizes the significance of water passing under the bridge with respect to property rights. Cuban law before the revolution, and until the enactment of the new Civil Code in 1987, recognized the right to both good faith and bad faith adverse possession. *See* E.F. CAMUS, 3 CODIGO CIVIL EXPLICADO 575-84 (1949). When the Spanish Civil Code was replaced in 1987, the notion of bad faith adverse possession was omitted, and the period of time required for good faith adverse possession was significantly reduced. *See* Freer, *supra* note 206, at 916; *Ley No. 59, 16 de julio de 1987 (Codigo Civil de 1987)* arts. 184.1-190.

554. *See* MARC FISHER, AFTER THE WALL: GERMANY, THE GERMANS AND THE BURDENS OF HISTORY 177-81 (1995).

555. *See id.*

556. *See* Fernández, *supra* note 535, at 23 (observing that 89% of the value of the properties

American individuals who lost property falling within the universal human right to property (e.g., homes or family-owned businesses) would have some claim for compensation or other restitution under the property for dignity theory. Nevertheless, U.S. corporations have no such rights under the natural law and, therefore, in the absence of an international norm, they have no basis for their claims for compensation.

The only international norms that provide clear protection for U.S. corporations are the requirement that property be taken for a public purpose and the requirement that the expropriating state not discriminate against property owned by nationals of a particular country. States have wide latitude to determine what constitutes a public purpose.[557] Nationalization for the purposes of property redistribution meets the public purpose requirement. Nationalization aimed at reducing domination of the economy by foreigners would also probably meet the public purpose requirement. This is particularly true in a case, like Cuba, where that domination was facilitated by a neo-colonial relationship with an imperial power that used its hegemonic influence over prior, corrupt governments in order to facilitate its economic penetration of the national economy.[558]

With respect to discrimination, the Cuban nationalizations present a very close case. On their face, the confiscatory measures aimed at properties belonging to U.S. nationals clearly discriminated.[559] Further, as with the public purpose requirement, there ought to be some leeway in the discrimination requirement when a state emerging from a situation of neo-colonial domination seeks to rectify imbalances within its national economy that resulted from interference by a single foreign power. Any attempt by the Cubans to establish economic independence would necessarily need to be aimed at the United States, because it was the United States alone that had used its domination of the Cuban political system over the first half of the twentieth century to gain a dominant position in the local economy. To say that a nationalization process could not discriminate in such circumstances would be to say that a colonized nation can never truly shake off its legacy of colonial domination.[560]

Even if the Cuban nationalizations of U.S. businesses were properly characterized as illegally discriminatory, the issue of remedies would

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lost by U.S. citizens was the property of U.S. corporations).

557. *See supra* notes 185-86 and accompanying text.

558. *See supra* Parts II.C-II.D.

559. *See, e.g., Ley 851, 6 de Julio de 1960* (authorizing the confiscation of all properties and businesses owned by U.S. nationals).

560. Of course, during the U.S. War for Independence, the property of many loyalists and British nationals was confiscated without compensation. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (discussing the confiscations of British and loyalist property that occurred in Virginia during the War for Independence).

present another set of problems. Subsequent to the "discriminatory" nationalizations of U.S. businesses and properties, virtually the entire Cuban economy (both foreign and Cuban-owned) was nationalized as well. Thus, even if U.S. nationals had not lost their properties in discriminatory nationalizations, they would definitely have lost the same properties at a later point in time through nationalizations that were non-discriminatory.

V. CONCLUSION

The exploration of the Cuban property reforms is interesting in its own right. It is the story of a nation struggling to assert its sovereignty against a neighboring imperial power and to break with a past of dire economic inequality. Many of the Cuban government's reforms after 1959 were consistent with the demands of natural justice, but many went too far and became themselves the source of new injustices. Although recent actions by the Cuban government have moved in the direction of rectifying these excesses, this admittedly preliminary exploration of the requirements of the natural law in the field of property law has hopefully shed light on the need for additional efforts at expanding economic freedom in Cuba.

In addition to the intrinsically interesting issues of justice raised by the Cuban reforms, the story of the Cuban revolution is also important for the light it sheds on persistent problems within the international law. The traditional international law of compensation for expropriated property is in a state of disarray. A different approach, based upon a human rights model and a natural law methodology, may help to clarify the issues involved. The approach advocated in this Article, however, should not be limited simply to the issue of expropriated property. The moral, human rights model of international law may be used as an overarching model for understanding all of international law. A natural law approach to the international law helps to unite the entire field into one common methodology, bringing together human rights law and customary international law into a single paradigm of minimum universal standards combined with a set of international customs that augment those minimum standards but may not conflict with them.