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IN DEFENSE OF LAW: THE COMMON-SENSE JURISPRUDENCE OF AQUINAS

Sean B. Cunningham†

I. INTRODUCTION

In his thirteenth-century *Treatise on Law*, St. Thomas Aquinas defined a law as "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[1] Perhaps surprisingly, this definition seems to capture well our understanding of the term "law" even today. Common sense tells us that laws are, at least for the most part, reasonable directives publicly promulgated by authorized lawmakers for the good of the whole community. Regardless of their political leanings, citizens who believe that a particular enactment or judicial interpretation is bad policy, favors special interests, or thwarts the will of their elected representatives, typically consider the enactment or ruling a bad law or a subversion of what the law really is.[2]

Much of our political debate focuses on questions that implicitly assume the normative truth of this definition.[3] Is a law good—i.e., is it reasonable, fair, and based on good policy? Should the law forbid or encourage such-and-such activity? Who should make our laws—the legislature or the courts? Are the processes for resolving legal disputes over our elections legitimate? Are our laws being made for the good of all the people or only for the benefit of special interests? How should the law protect the weak, help the poor, preserve order

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† Partner of Hunton & Williams LLP, Washington, DC. The opinions expressed in this article are solely my own and are not intended to represent the views of Hunton & Williams or its clients. Special thanks to Dean Bruce W. Green, the faculty, students, and editorial staff of the Liberty University Law Review for their generous invitation to submit this article. Thanks also to Mark Ryland and John Safranek for their helpful comments.

1. ST. THOMAS AQUINAS, SUMMA THEOLOGICA I–II, Q. 90, art. 4, c. (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

2. *Compare* Lauren Bans, *Anatomy of a Bad Law*, THE NATION, Apr. 17, 2006, http://www.thenation.com/doc/20060417/bans (arguing that South Dakota's law banning abortion is based on flawed research), *with* Cal Thomas, *Unequal Justice Under a Bad Law*, JEWISH WORLD REV., June 18, 1999, http://www.jewishworldreview.com/cols/thomas061899.asp (arguing that the federal Freedom of Access to Clinic Entrances Act unjustly violates the constitutional rights of pro-life activists who picket abortion clinics).

3. In modern jurisprudence, it is common to distinguish between the "normative" and the "empirical." Aquinas does not use this terminology, and does not draw a sharp distinction between the two. Where a particular law is empirically inconsistent with the normative definition, it is not, properly speaking, a law. Nevertheless, his normative definition is based on observation of legal phenomena. *See generally* AQUINAS, *supra* note 1.

in the streets, improve education and health care, defend families, provide for the common defense, or advance any of a variety of other policies that reflect concepts of value or goodness (i.e., concepts of morality)? Perhaps many laws fall short of this definition in certain respects, but it seems to be a reasonable normative definition, or at least a common starting point for endless public debates.

Given the definition's plausibility at first glance, it is even more surprising that academic jurists and political philosophers have been attacking elements of the definition for decades, and in some respects, centuries. Some jurists regard the notion that law is intelligible, consistently applied, and reasonable as at best, dubious, or at worst, a mask for class interest.[4] Others dismiss the notion that statutory (or, still less, constitutional) text can have a determinate meaning as rigid "formalism."[5] Some appear to conclude that the concept of the rule of law, as opposed to a rule of individual men and special interests, is naïve.[6] Others perceive the notion that some sort of objective morality is knowable and superior to human positive law as either irrational or dangerous,[7] or

4. *E.g.*, Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 100–02 (1993).

5. There are many varieties of the "indeterminancy thesis," often associated with the Critical Legal Studies school of jurisprudence. Theorist Stanley Fish generally describes this view as follows: "[J]udges are not constrained by the rules and texts that supposedly ground the legal process . . . ." STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 189 (1994). A more radical variant claims that indeterminacy is a "*general* feature of *all* interpretation; no matter what constraints are supposedly in place, they will not check the interpretive will, which can always re-characterize them on the way to pursuing its own agenda." *Id.* at 190. For Fish, even obvious, "unproblematical instances are unproblematic only within interpretive conditions—specifications of what counts as evidence, arguments as to the weight and shape of precedent, etc.—which, while presently settled, can themselves become the object of dispute and so become problematical." *Id.*

6. According to Fish:

> [T]he indeterminacy thesis, judges are not constrained by the rules and texts that supposedly ground the legal process, and this absence of constraint [raises the concern that judicial decision making is inherently] undemocratic because the decisions follow from the desires of particular judges rather than from the directions embedded in public texts, and illegitimate because the result is a government not of laws but of men.

FISH, *supra* note 5, at 189–90.

7. *See, e.g.*, Ken Gewertz, *Heavyweights Battle Over the Pledge of Allegiance*, HARV. U. GAZETTE, Sept. 26, 2002, http://www.news.harvard.edu/gazette/2002/09.26/13-pledge.html (quoting Harvard Professor Alan Dershowitz as saying "[n]atural law is dangerous! You invoke

acknowledge only an extremely narrow variety of natural law.[8] Some see statutory interpretation as only a technique for advancing the client's interest or the judge's political agenda.[9] Oliver Wendell Holmes suggested that the traditional notion of law as a rational system of concepts and moral principles needs to be "wash[ed] . . . with cynical acid [to] expel everything except the object of our study, the [actual] operations of the law."[10]

II. PROSPECTUS AND APOLOGY

This Article discusses several important themes in Aquinas's jurisprudence, focusing on his definition of law. The Article suggests that Aquinas's definition of law is relevant to contemporary legal and political issues, and identifies a number of questions that may need to be further addressed in order to recover a "common sense" jurisprudence in the tradition of Aquinas. Such common sense may help neutralize the "cynical acid" that, in the academy at least, has corroded the intellectual respectability of the concept of a law as an intelligible, consistently applicable rule formulated by legitimate authorities for the true moral good of the community. This Article represents a partial effort toward the broader project of renewing Aquinas's philosophical jurisprudence in an age that tends to equate philosophy in general with doubt and obfuscation rather than common sense and clarity.

The Article does *not* do several things. While it takes note of some general trends in jurisprudence, particularly in the twentieth century, it does not provide a summary or systematic analysis of the history of modern jurisprudence. Nor does it provide a systematic summary of the philosophical underpinnings of Aquinas's jurisprudence, much of which is drawn from Aristotle's philosophy of being, knowledge, ethics, and politics. It does not emphasize the theological ground of natural law, which Martin Luther King and others have powerfully articulated in the context of civil rights issues.[11] This Article focuses on

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natural law when you want to get your way without having to argue about it. Jefferson believed in natural law, but Jefferson was wrong!").

8. H.L.A. HART, THE CONCEPT OF LAW, 189–94 (1961) (discussing the "minimum content of natural law" as consisting of basic protections of persons, property, and contractual promises).

9. *See* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, N.Y.U. J. LEGIS. & PUB. POL'Y 333, 343 (2004) (lamenting that existing treatises on statutory interpretation are little more than sourcebooks for advocates to persuade the court that a statute should be interpreted in favor of their clients). *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

10. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 462 (1897).

11. *See generally* MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1963),

statutory law, with only passing reference to common law jurisprudence, which is of obvious relevance to the subject matter.[12] Many of these themes are more ably discussed in the extensive contemporary literature on Aquinas's natural law theory.[13]

This Article briefly makes note of the prevalent skepticism, cynicism, and nihilism that characterize much of modern academic jurisprudence. The Article then addresses Aquinas's definition in terms of five key themes: (1) the rule of law; (2) the intelligibility of law (and its limits); (3) the common good as the

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reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., 289–302 (James Melvin Washington ed., 1986) (drawing on classics of the Western natural law tradition to demonstrate the moral wrongs of racial segregation); Robert P. George, Address at the 1993 St. Ives Lecture Series, *Natural Law and Civil Rights: From Jefferson's Letter to Henry Lee to Martin Luther King's Letter From Birmingham Jail*, 43 CATH. U. L. REV. 143, 143 (1993) (discussing Dr. King's recognition that moral laws are "not merely contingent [or] conventional"). Although Aquinas's definition of law is, properly speaking, a definition in an Aristotelian sense and can be usefully discussed and applied in purely secular terms, his understanding of law, and natural law in particular, is closely related to his theology of creation, his philosophy of divine governance of creatures through the "Eternal Law," and his explication of the ceremonial and moral precepts of the "Divine positive law" in the Old and New Testaments. As King eloquently emphasized, the Divine law often sheds light where prejudice and confusion have obscured the natural law. Aquinas explained the need for the Divine Law: "on account of uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err." For the definitive scholarly treatment of natural law in the context of Aquinas' theology, see RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD (2003).

12. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–15 (1997) (discussing the tensions between Anglo-American common law jurisprudence and modern statutory construction).

13. *See, e.g.*, SCOTT BUCHANAN, SO REASON CAN RULE: REFLECTIONS ON LAW AND POLITICS (1982); J. BUDZISZEWSKI, RESURRECTING NATURE (1986); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992); ROBERT J. HENLE, THE TREATISE ON LAW (1993) (provides detailed commentary on Aquinas's Treatise on Law); HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Thomas R. Hanley trans., Liberty Fund 1998) (1936); Fulvio di Blasi, *Practical Syllogism, Proairesis, and the Virtues: Toward a Reconciliation of Virtue Ethics and Natural Law Ethics*, 2004 NEW THINGS & OLD THINGS 21 (2004); Robert P. George, *Kelsen and Aquinas on "The Natural Law Doctrine,"* 75 NOTRE DAME L. REV. 1625 (2000); Christopher Wolfe, *Natural Law Liberalism and the Issues Facing Contemporary American Public Philosophy*, http://www.thomasinternational.org/projects/step/essays/wolfe_000.htm (last visited Dec. 1, 2006).

object of law; (4) the relationship of human positive law to natural law; and (5) the philosophy of natural purposes underlying Aquinas's natural law jurisprudence. The Article concludes that Aquinas's Treatise on Law, and particularly his definition of law, may provide a sound philosophical basis for recovering a "common sense" jurisprudence.

III. JURISPRUDENCE AS "CYNICAL ACID"

A. Skepticism and Cynicism in Academia

Skepticism, cynicism, and nihilism in legal education seem to be part of a larger philosophical trend, particularly in academia. It is not unusual in elite institutions of higher learning in the United States for scholars or even entire academic departments to devote themselves to debunking or eliminating the very object of their chosen discipline. In some cases religious studies reduce faith in God to a sociological or psychological phenomenon to be explained away scientifically;[14] philosophy favors analysis of language over discovery of truth about being;[15] psychology explains away intellect and free will;[16] anthropology, sociology, and "sociobiology" reject the essential differences between human beings and animals;[17] literary theory de-constructs literary texts to reveal political subtext;[18] and economics and political science reduce any concept of the public good or the nature of political life to quantified analysis of competing subjective interests.[19] Even the natural sciences, historically, have discounted the reality of the objects of our common experience in favor of reductionist explanations.[20]

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14. *See generally* DONALD WIEBE, THE POLITICS OF RELIGIOUS STUDIES: THE CONTINUING CONFLICT WITH THEOLOGY IN THE ACADEMY (1999).

15. *See generally* MORTIMER J. ADLER, TEN PHILOSOPHICAL MISTAKES 81 (1985) (describing the tendency in twentieth century analytical philosophy to focus on the use of language as the object of philosophy rather than things communicated by language).

16. The schools and texts of psychology and neuroscience that assume that the "psyche" (Greek for "soul") can be explained solely in terms of brain chemistry or irrational urges are too numerous to cite.

17. *See, e.g.*, EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975). *See generally* DENNIS BONNETTE, ORIGIN OF THE HUMAN SPECIES 65–110 (2003) (discussing scientific attempts to reduce human language and rationality to animal nature).

18. *See, e.g.*, FISH, *supra* note 5.

19. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

20. *See generally* Mortimer Adler, *The Questions Science Cannot Answer*, BULLETIN OF THE ATOMIC SCIENTISTS XIII, April 1957, *available at* http://radicalacademy.com/ aldersciencequestions.htm (last visited Dec. 1, 2006); Leon Kass, *The Permanent Limitations of Biology*, *in* LIFE, LIBERTY, AND THE DEFENSE OF DIGNITY (2002); LEON KASS, TOWARD A MORE

The common element in these disciplines is that they limit the object of study to a narrow, often quantifiable range of phenomena that can be studied using certain empirical methods. They dismiss much of our common experience and received opinions as irrelevant to the scientific enterprise. For the limited purposes of scientific inquiry, it may be entirely appropriate for some of these disciplines, particularly the natural sciences and economics, to focus narrowly on certain types of phenomena. The problem arises when the empirical conclusions based on a narrow subset of human experience are universalized and proclaimed to be the whole truth about reality, nature, and the human person.

B. Skepticism and Cynicism about Law

The study of law is not immune to the trend of self-negating scholarship. Elite law schools sometimes teach that law is anything other than what common sense seems to say it is (or, at least, should be). Law is *nothing but*, variously, commands backed by threats,[21] a prediction of what judges will do,[22] a by-product of "what the judge had for breakfast,"[23] or a mask for entrenched class interests.[24] The notion of a statute as a clear rule that means what it says is wholly illusory[25] because language is not a reliable vehicle for the communication of objective meaning.[26] Absent objective meaning, the advocate or activist "simply beats the text into a shape which will serve his own purpose."[27] Due to the plasticity of language, the notion that there could be

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NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS (1985); ERNST MAYR, THIS IS BIOLOGY: THE SCIENCE OF THE LIVING WORLD (1997) (arguing that the phenomena of biology cannot be explained solely in terms of chemistry and physics); R.F. Hassing, *Wholes, Parts, and the Laws of Motion*, 6 NATURE & SYS. 195 (1984). Of course, it must be conceded that scientific reductionism has resulted in many technical wonders and mathematically elegant models of empirical data.

21. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 61 (Anders Wedberg trans., Law Book Exchange 1949) (1945).

22. *See* K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1960) ("What [judges and other] officials do is, to my mind, the law itself."); Holmes, *supra* note 10, at 461 (defining law as "prophecies of what the courts will do in fact . . . .").

23. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 161–62 (1950) (stating that law is ultimately indeterminate and reducible to "non-rational, non-logical" factors, such as what the judge had for breakfast on the morning the case was decided).

24. *See* Horwitz, *supra* note 4, at 100–01.

25. HART, *supra* note 8, at 136 (describing a false dilemma posed by critics of formalism: "Either rules are what they would be in the formalist's heaven and they bind as fetters bind; or there are no rules, only predictable decisions or patterns of behaviour [sic].").

26. *See* Horwitz, *supra* note 4.

27. SANFORD LEVINSON, CONSTITUTIONAL FAITH 177 (1988) (quoting RICHARD RORTY,

"one right answer" in any case is dismissed as hopelessly naïve.[28] What H.L.A. Hart termed the "internal aspect" of legal rules—law as experienced by those who obey or apply the law—is often rejected as a legitimate basis for a scientific jurisprudence that should be limited to empirical observation of the law as mere patterns of behavior.[29]

Even the traditional, so-called "Socratic" method of American law schools (albeit effective for training zealous advocates) presents law as the product of manipulation,[30] presenting the law as, at best, a means of maximizing economic productivity or a tool for achieving justice for oppressed classes. At worst, it is nothing but the technical means for sophistry or "intellectual prostitution." Thus, in this skeptical, reductionist, cynical view, the common-sense notion of law as a clear directive of duly authorized lawmakers to achieve the good of the whole community is unscientific wishful thinking.

The law is not always clear. There are various reasons for this lack of clarity. First, general statutory rules are not always simple to apply to specific situations. Hart gives the example of an ordinance providing: "no vehicles allowed in the park."[31] In the case of a private automobile, the meaning of the ordinance is clear, but what about a municipal grounds-keeping truck, or a motor scooter, bicycle, or pair of roller skates?[32] Hart uses this as an example of what he calls the "open texture" of language.[33] Compounding the problem of ambiguity, much of the statutory law today is drafted in an attempt to address extremely technical issues in areas such as economics, engineering, chemistry, and accounting among others. Because the drafters are either lawyers who are not experts or experts who are not lawyers, the results are often ambiguous. In some cases, even the lawyers are not fully aware of the precedential, constitutional, and jurisdictional context in which new law will be inserted. Because of the inherent ambiguity caused by such a drafting scheme, unintended consequences or judicial modifications often result.

A third reason for statutory ambiguity is that much legislative language is—whether by neglect or design—imprecise or even sloppy. The reality of the

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CONSEQUENCES OF PRAGMATISM 151 (1982)).

28. *See generally* OBJECTIVITY IN LAW AND MORALS (Brian Leiter ed., 2001).

29. HART, *supra* note 8, at 55–60 (comparing the internal aspect of legal rules with external aspect consisting of "regular uniform behavior which an observer could record.").

30. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 77, 292 (1999).

31. HART, *supra* note 8, at 125.

32. *Id.* at 123.

33. *Id.* at 120–32 (because of the legislature's relative "ignorance of fact" and "indeterminacy of aim," the language of law has an "open texture" which must be supplemented by the courts and officials in particular cases).

legislative process is often far removed from the ideal of a rational process guided by prudence and based on thorough legislative fact-gathering.[34] The language is often negotiated at the last minute, in the dead of night, between well-intended staff whose first priority is to "make a deal" to allow legislation to move forward. The cliché that law is like making sausage is frequently, and perhaps unavoidably, true at many levels. And yet, regardless of the ambiguities, persistent in our experience of law are the notions that the law has determinate meaning, that there is an ascertainable legislative intent (or at least an ascertainable zone of delegated rule-making authority to an executive agency), and that the law is for the good of the public. The reason for these notions may be because it would be very difficult to operate a legal system on the explicit premise that law is meaningless, infinitely malleable, or a massive fraud perpetrated on the public.

Despite the fact that democracy and the rule of law are almost universally celebrated, modern schools of cynical jurisprudence sometimes deny the very possibility of a rule of law or recoil at the notion that the people should determine the laws of the land through their elected representatives. If law is intrinsically indeterminate and language inherently unreliable, then the rule of law is an illusion. Law becomes whatever the adjudicators say it is or a mask for political willfulness and entrenched class interests.[34] Moreover, "enlightened" judges are better equipped to protect the autonomy of the individual against the prejudices of elected legislatures.

C. *Moral Nihilism and Amoral Jurisprudence*

The relationship between law and morality is often even less clear than the relationship between law and legislative intent. Thoughtful citizens in a democratic society frequently disagree about particular moral matters. Some of these matters pertain to sexuality-related practices that have been condemned by traditional religions, such as adultery or abortion. Partly because there is so much disagreement over these and other matters, skeptical philosophers have

34. At best, according to Yves Simon, "legal formulas are the work of a legislative prudence and their determination has been worked out by the sensible, the dependable inclinations of experienced and well-intentioned persons." YVES R. SIMON, THE TRADITION OF NATURAL LAW: A PHILOSOPHER'S REFLECTIONS 86 (Vukan Kuic ed., Fordham University Press 1992) (1965).

35. Echoing Marx's claim that "your jurisprudence is but the will of your class made into a law for all," one contemporary theorist explains that "neutrality can only be defined with reference to an existing order under which the beneficiaries of prior injustice are able to entrench themselves by initially defining those entitlements." Horwitz, *supra* note 4, at 100–01. *See also* KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 26 (Frederick Engels ed., Int'l Publishers 2004) (1948).

long assumed that there is no knowable, universal moral order that can legitimately form the basis for our laws. "Legal positivists" deny any necessary connection between law and morality. "You can't legislate morality!" seems to be a common assumption among law students.

In law schools today, the concept of natural law as understood by Aquinas, or, to a degree, by English jurists Fortescue, Hooker, or Blackstone, is frequently either ignored or completely misunderstood, or is simply unknown.[36] The term "natural law" often means either a modern liberal concept of radical autonomy of the individual that should be imposed by judges,[37] an illegitimate excuse for overriding the will of the popularly elected legislature, or a mask for pure prejudice against behaviors the natural law proponent does not like.[38]

D. Neutralizing Cynical Acid

On the basis of such ambiguities of language, politics, and morality, a great deal of "cynical acid" has corroded common sense notions of law and justice for centuries. Doctrines of positivism, legal realism, critical legal studies, law and economics, and various other "isms" have questioned or rejected the objectivity and moral foundation of law and have either denied the existence of a common good or hijacked it with various counterfeit or incomplete goods. These schools of jurisprudence have arguably made powerful critiques of various naïve formalisms of the past, and their cynicism has been based on substantial empirical evidence. Nevertheless, the very fact that people persist in speaking and acting as if the law had a "formal existence,"[39] and that many (often competing) "values" pervade the content of our laws, it is reasonable to ask whether so much cynicism, skepticism, and nihilism can really provide a complete or true account of the law and what the law aspires to be.

Although much in modern jurisprudence deserves criticism, we need not draw an entirely pessimistic picture of contemporary jurisprudence and its

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36. A Federalist Society debate on "natural law" held at the University of Texas School of Law in 1996 pitted conservative Lino Graglia (opposing natural law) against liberal Sanford Levinson (favoring natural law). Further confusing the debate was that conservative and noted critic of evolutionary "naturalism" Philip Johnson of Berkeley law school rounded out the pro-natural law team, while a liberal law professor completed the anti-natural law team. Brilliant scholars all of them, each held an entirely different view of what natural law means. *See* discussion *infra* Parts IV.C and IV.D regarding conservative and liberal views of natural law.

37. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) (arguing that judges should interpret the law in the way that results in the most moral outcome according to certain principles of liberty).

38. *See* Gewertz, *supra* note 7.

39. *See* FISH, *supra* note 5, at 141–79 (rejecting formalism in an essay entitled "The Law Wishes to Have a Formal Existence").

effects. Fortunately, academic jurisprudence, particularly the more extreme varieties, seems to be largely ignored in the actual practice of law and the work of most judges.[40] To the extent that "ideas have consequences," even some bad ideas have had good effects. To their credit, the most cynical schools of jurisprudence have exposed the weaknesses and inconsistencies of earlier schools of jurisprudence that were based on Classical Liberalism, an overly rigid textual literalism, and a mechanistic philosophy of nature and knowledge.[41] The point of this Article is to help recover a more resilient and practical jurisprudence that accepts the limitations of law without falling into interpretive skepticism, political cynicism, or moral nihilism. The perennial philosophy of Aquinas may be the key to such recovery, although many questions must be addressed to make such recovery legitimate and persuasive.

IV. FIVE THEMES

A. Rule of Law

This part addresses two issues: (1) whether a rule of law is better than a rule of men; and (2) whether laws should be made by legislatures or judges.

1. The Rule of Law Versus the Rule of Men

In addressing the nature of law, a threshold question arises: should there be laws at all? Would it be better to be ruled by an all-powerful King or by wise men, who can evaluate, Solomon-like, each case and apply unwritten principles of justice for the best possible outcome? For Americans, it may seem obvious that our system of government is essentially a rule of laws not of men and that such rule of law is superior to the alternative, the arbitrary rule of an unjust King. As Thomas Paine declared, "[T]he world may know, that so far as we approve of monarchy, that in America *the law is king*. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."[42]

Thomas Paine stated the principle of the rule of law as if it were an American invention. His view is consistent with the popular mythology that modern democracy, human rights, and limited government are purely modern (i.e., post-"Enlightenment") inventions. It is sometimes assumed that medieval

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40. HART, *supra* note 8, at 56–60 (comparing the internal aspect of legal rules with external aspect consisting of "regular uniform behavior which an observer could record").

41. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach* (1935), *reprinted in* AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (rejecting "'mechanical jurisprudence[,]' . . . legal magic and word-jugglery").

42. THOMAS PAINE, COMMON SENSE 40 (Barnes & Noble Books 1995).

jurisprudence and political theory consisted of, at best, an elaborate apology for benevolent dictatorship or the "divine right of kings," or, at worst, a footnote to the ignorance and cruelty of the "Dark Ages."[43]

Although it is true that there was no such thing as a nation-state or liberal democracy in Aquinas's time, his teaching on the rule of law is surprisingly both familiar and fresh. In his discussion of human positive law, Aquinas poses a similar question, "Whether it was useful for laws to be framed by men?"[44] Drawing on Aristotle, Aquinas carefully distinguishes between tyrannical rule—the rule of one man for his own private purposes—and "political rule"—the rule of (just) laws.[45] Aquinas states matter-of-factly that law is for the people not for the king. He quotes Isidore, "A law is an ordinance of the people whereby something is sanctioned by the Elders together with the Commonalty."[46] Because law pertains to the common good, "to order anything to the common good, belongs either to the whole people, or to someone who is the viceregent of the whole people."[47] Granted, one or more members of the community are charged with making the laws, i.e., "a public personage who has care of the whole people: since in all other matters the directing of anything to the end concerns him to whom the end belongs."[48]

2. Judges or Legislatures?

Aquinas also distinguishes between rule by judges and rule by laws. Of particular relevance to contemporary debate over the role of judges, he makes clear that the role of judges is to apply the law not to legislate. Even with regard to ensuring the consistency of human positive law with natural law, he strongly suggests that this task is for the legislature not for judges.[49] This raises many

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43. The notion of a "divine right of kings" was not so much a medieval doctrine as it was an Enlightenment theory used to justify the despotic rule of the first modern nation states. Most prominently, Jacques-Benigne Bossuet articulated the theory as a justification of the absolute monarchy of King Louis XIV of France in the seventeenth century. Bossuet's theory was antithetical to Aquinas's doctrines of the rule of law and primacy of natural law as checks on the authority of individual men. *See generally* HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

44. AQUINAS, *supra* note 1, at Q. 95, art. 1.

45. *See* Sean B. Cunningham, Note, *Is Originalism "Political"?*, 1 TEX. REV. L. & POL. 149, 174 (1997).

46. AQUINAS, *supra* note 1, at Q. 90, art. 3, c.

47. *Id.*

48. *Id.*

49. Russell Hittinger, *Natural Law in the Positive Laws*, 55 REV. POL. 5, 22 (1993) (arguing that, as a matter of natural justice, the judge should defer to the lawgiver on matters of natural law); Russell Hittinger, *Distinguishing Between Constitutional Art and Morals*, 4

questions. What is the obligation of the judge to enforce an unjust law? Should judges second guess the discretion of regulators on matters implicating natural law? Are modern legislatures better suited than judges to make law? How, if at all, can Aquinas's jurisprudence be reconciled with the Anglo-American tradition of common law jurisprudence, which is based on judge-made law?

Anticipating some of these questions, Aquinas is clear that the caretaker of the community is primarily a legislator not a judge. He considers the objection that "it would have been better for the execution of justice to be entrusted to the decision of judges, than to frame laws in addition."[50] Five-hundred years before the drafting of Article I, Section 1 of the Constitution,[51] Aquinas drew a sharp and principled distinction between the role of the legislative and judicial functions: "it is better that all things be regulated by law, than left to be decided by judges . . . ."[52] He gives three reasons for this distinction. First, "because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case."[53] This reason may not be very persuasive today, but a related point is that it is certainly more efficient and fair to have written laws rather than leave the law entirely to the discretion of judges and other officials. Second, "because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact."[54] This reason is a common sense observation about the difference between legislative fact-

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S. CAL. INTERDISC. L.J. 567, 571 (1995) (arguing that legislation of natural law precepts is the function of the legislature, not the judiciary).

50. AQUINAS, *supra* note 1, at Q. 95, art. 1, obj. 2.

51. *Compare* U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."), *with* U.S. CONST. art. III, § 2, cl. 2 (explaining that judicial power extends only to specific "cases" and "controversies").

52. AQUINAS, *supra* note 1, at Q. 95, art. 1, reply 2 (quoting Aristotle, Rhet. i. 1). Aristotle certainly admits that the difficulty in applying the generalities of written law poses a dilemma: "[S]ome things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule." THE BASIC WORKS OF ARISTOTLE 1203 (Richard McKeon ed., W.D. Ross trans., Random House 1941). Nevertheless, he recognizes that the judge who has been "trained by the law judges well." *Id.* at 1203. Moreover, he insists that "justice exists only between men whose mutual relations are governed by law . . . . This is why we do not allow a man to rule, but rational principle, because a man behaves . . . in his own interests and becomes a tyrant." *Id.* at 1013.

53. *Id.*

54. *Id.*

gathering, which is an open-ended process, and judicial fact-finding, which is focused on the particular case at hand.

Third, "because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted."[55] This third point relates to democratic legitimacy—moral matters should be decided by the legislature not by judges on the basis of heart-rending, extreme cases or of the judge's personal political philosophy. Indeed, Aquinas argues that a law made by a man who lacks law-making authority is unjust.[56] For these reasons, Aquinas concludes, "[s]ince then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of men."[57]

Today one could object that the legislature cannot possibly predict all particular applications of a law in advance. Aquinas anticipates this objection and concedes that there are gaps to be filled by judges. He formulates the objection as follows:

> [S]ince human actions are about singulars, which are infinite in number, matter pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each one of them. Therefore it would have been better for human acts to be directed by the judgment of wise men, than by the framing of laws.[58]

Aquinas replies that "[c]ertain individual facts which cannot be covered by the law '*have necessarily to be committed to judges*,' as the Philosopher says . . . for instance, 'concerning something that has happened or not happened,' and the like."[59]

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55. *Id.*

56. AQUINAS, *supra* note 1, at Q. 96, art. 4, c (arguing that a law can be unjust "in respect of the author, as when a man makes a law that goes beyond the power committed to him").

57. AQUINAS, *supra* note 1, at Q. 95, art. 1, reply 2.

58. *Id.* at Q. 95, art. 1, obj. 3.

59. *Id.* at Q. 95, art. 1, reply 3 (quoting Aristotle). It may not be too much of an exaggeration to use the Philosopher's (i.e., Aristotle's) description of the advocates of despotism to describe many contemporary skeptics: "they maintain that the laws speak only in general terms, and cannot provide for circumstances; and that for any science to abide by written rules is absurd." BASIC WORKS, *supra* note 52, at 1199 (discussing the relative merits of the rule of the despot and the rule of law). As Yves Simon stated:

> A law is a rule and there is nothing more essential to it than the intelligible features implied in the concept of rule. These include universality and necessity.

B. Law and Objective Truth: Law Is Intelligible and Adequately Determinate

This section addresses four issues: (1) whether a rule of law requires law to be intelligible and determinate; (2) Aquinas's common-sense understanding of legal language; (3) Aquinas's rudimentary "canons" of statutory construction relating to the common good and the authority of the lawgiver; and (4) Aquinas's pragmatic, but non-skeptical, "realism" about the shortcomings of human laws.

1. A Rule of Law Requires Legal Intelligibility and Determinacy

A legal text is "intelligible" if it effectively communicates the intent of the lawgiver to the public and the officials who are charged with applying it. If a law "says what it means and means what it says," it is intelligible. Determinacy is the related notion that, in any given case, there is "one right answer."[60] Obviously not every law is clear on its face, and even a seemingly clear law may admit of more than one reasonable interpretation in hard cases. Nevertheless, it is difficult to conceive of a rule of law unless there can be laws (i.e., legal texts) that can reliably communicate coherent policies in a manner that can be fairly applied to diverse circumstances.

If, as legal skeptics often suggest, law is not intelligible and determinate, there can be no rule of law in the sense described by Aristotle, Aquinas, or Thomas Paine. One contemporary legal philosopher poses the problem as follows:

> If singular legal propositions have no truth-value antecedent to judicial decision, judges cannot be obligated to discover such truths, nor can they in fact be doing so. Rather, they are free to make it up as they go along, without possibility of mistake. Such unrestricted judicial freedom is compatible neither with the idea that we are governed by the decisions of the majority of us, as expressed by our elected representatives, nor with the idea that ours is a government of laws and not of men . . . .[61]

> To be sure, both of these features admit of degrees: a rule can be more or less universal and more or less necessary. . . . Between law and action there always is a space to be filled by decisions which cannot be written into law.

SIMON, *supra* note 34, at 83.

60. *See* OBJECTIVITY IN LAW AND MORALS, *supra* note 28.

61. Michael S. Moore, *Pre-Modernism, Modernism, and Post-Modernism: The Plain Truth About Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 23, 30 (2003).

2. Legal Language and Objective Truth

For Aquinas, a law is a "rule and measure of human acts."[62] Specifically, it is a rule "whereby man is induced to act or is restrained from acting: for 'lex' [law] is derived from 'ligare' [to bind], because it binds one to act."[63] This understanding of law as a binding rule requires a common sense understanding of language as being capable of reliably communicating truth.

Aquinas apparently assumes that language can (at least for the most part) reliably communicate directives of reason in a manner that can be understood by the public and applied consistently in a variety of particular cases. His discussion of promulgation, one of the four elements in his definition of law, shows his confidence in written language. He considers the objection that, because promulgation takes place only in the present, a law that is promulgated at one point in time does not bind in the future. His response presupposes the intelligibility of language over time, "[t]he promulgation that takes place now, extends to future time by reason of the durability of written characters, by which means it is continually promulgated."[64]

Aquinas's common sense understanding of legal language is consistent with his philosophy of knowledge and being. For Aquinas, truth is defined as the conformity of the mind to reality.[65] He is neither a skeptic—who denies that truth is knowable—nor a "constructivist"—who contends that the only relevant truth is an ever-evolving network of relationships our minds weave together out of experience.[66] His understanding of legal language also presupposes a common intellectual culture in which every law student was trained in classical grammar, logic, and rhetoric.

3. Principles for Statutory Interpretation

Although Aquinas had confidence in written language, his jurisprudence is not a rigid formalism insisting that a single right answer to every legal dispute is reachable by deduction from the text of the applicable statutes. He acknowledges that, because laws are formulated in general terms, they are sometimes either ambiguous or not properly applicable to every situation. He does not therefore jump to the conclusion that law is inherently indeterminate, fraudulent, or limitlessly malleable for political purposes. In short, he accepts the formality of law without being a formalist, bases his jurisprudence on reality

62. AQUINAS, *supra* note 1, at Q. 90, art. 1, c.

63. *Id.*

64. *Id.* at Q. 90, art. 4, reply 3.

65. JACQUES MARITAIN, THE DEGREES OF KNOWLEDGE 93 (1995).

66. Moore, *supra* note 61.

without being a legal realist, and accepts the practical difficulties of interpretation and adjudication without being a pragmatist. His jurisprudence may be regarded as naïve by adherents to such legal theories as legal realism, law and economics, critical legal studies, modernism, post-modernism, and various other quasi-scientific "isms," but it is not clear whether any of these theories necessarily refute or represent progress beyond Aquinas's relatively common-sense understanding of law.[67]

Aquinas addresses the difficulties of statutory construction and application in a principled way. He does not articulate a systematic theory of statutory construction, provide a catalog of canons of construction, or set forth anything like a modern theory of, say, constitutional or administrative law.

Rather, his primary principle of statutory construction is deference to legislative authority. If there is any doubt about the meaning of a law, the judge should take into account the intent of the legislature: "Hilary says (De Trin. iv): 'The meaning of what is said is according to the motive for saying it: because things are not subject to speech, but speech to things.' Therefore we should take account of the motive of the lawgiver, rather than of his very words."[68] If a particular interpretation of the law gives rise to a questionable result the interpreter should, as a last resort, attempt to determine the legislature's intent:

> He who follows the intention of the lawgiver, does not interpret the law simply; but in a case in which it is evident, by reason of the manifest harm, that the lawgiver intended otherwise. For if it be a matter of doubt, he must either act according to the letter of the law, or consult those in power.[69]

Aquinas is not necessarily taking a side in the contemporary debate over whether judges should consult legislative history.[70] It is not clear how a federal judge or regulator in the United States can, or should, "consult" the Congress to

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67. The brilliance and analytical force of these various methods of jurisprudence is not in question. The problem begins when any method begins to assert that the law is "nothing but" this or that, contrary to the full range of common experience and opinion that forms our concepts of law and legality. The fact that we believe, speak, and organize our communal life around the concepts of intelligible and authoritative rules set forth for a common good suggests that the definition of law should include concepts of reason, legitimacy, generality, publicity, and goodness.

68. AQUINAS, *supra* note 1, at Q. 96, art. 6, c.

69. *Id.*

70. *See, e.g.*, SCALIA, *supra* note 12, at 17, 29–37 (rejecting the use of legislative history because "it is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . It is the *law* that governs, not the intent of the lawgiver.").

clarify the meaning of an enactment. Perhaps it was possible in the thirteenth century to consult the legislature to determine its un-promulgated intent. Aquinas seems to presume that the legislature has an ascertainable intent, which should take precedence over a judge's preferred outcome or an absurd result.

4. Aquinas's Non-Skeptical "Realism"

At this point, a skeptic may protest that Aquinas's common sense approach is unscientific, begs the central questions of modern jurisprudence, and ignores 800 years of philosophical "progress." However, it may be that the skeptic expects either too much or too little from the subject matter of law. If a jurist at first demands that there be "one right answer" in every case, achievable by logical deduction from the law and the evidence, he will be disappointed, and may become a skeptic, who believes there are no right answers. For Aquinas, by contrast, the fact that truth in legal matters is not always obvious, and may even be unattainable in many cases, does not mean that there is no truth in the law or that it is not worth pursuing. As Chesterton observed, "[i]f a thing is worth doing, it is worth doing badly."[71]

For Aquinas, men are not angels—not only in the ethical sense as James Madison later observed, but also in epistemological and ontological terms. For Aquinas, angels have direct intuitive knowledge of reality, unmediated by sense impressions, time or space.[72] Modern philosophy is impatient, demanding angelic knowledge, accepting only clear and distinct ideas as legitimate objects of knowledge, and regarding human knowing as a constructive activity of the mind rather than a conforming of the mind to reality.[73] For human beings, knowledge of reality is possible, but requires time, observation, and reasoning, and may sometimes fail. "'We must not seek the same degree of certainty in all things' . . . . Consequently in contingent matters, such as natural and human things, it is enough for a thing to be certain, as being true in the greater number

71. G. K. CHESTERTON, WHAT'S WRONG WITH THE WORLD (1910), *quoted in* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). It must be conceded that, if the "rules" for how laws are construed are fundamentally in dispute, the practical effect is that the laws, as construed, do not fit Aquinas's definition as well. Several jurists and scholars have called for a revival of the study of canons of construction, and even a formal regularization of rules of construction, whether through a restatement or even by the enactment of Federal rules. *See, e.g.*, SCALIA, *supra* note 12; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002); O'Connor, *supra* note 9, at 334.

72. *See* JACQUES MARITAIN, THREE REFORMERS: LUTHER, DESCARTES, ROUSSEAU (1970).

73. *Id.*

of instances, though at times and less frequently it fail."[74] Accordingly law has limits.

> The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which the speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences. Nor is it necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus.[75]

If there can be a science of statutory construction, it will necessarily be an imperfect science. However, a realist epistemology, common standards of logic and grammar, and careful study of the "common law" of statutory construction may go a long way towards an interpretive regime worthy of the rule of law.

C. Common Good

This section addresses four issues: (1) whether law is for the common good, as distinct from merely private goods; (2) whether the common good can trump the letter of the law; (3) the relationship between common good and the good of individual persons; (4) whether a "thick" theory of the common good is compatible with limited government and civil liberties.

1. Law Is for the Common Good

Aquinas wisely adopted a common-sense account of the relationship between law and the good of society. He takes the ordination to the common good as an essential element of law and that the common good is ascertainable. Quoting the seventh-century philosopher Isidore, Aquinas states that "laws are enacted for no private profit, but for the common benefit of the citizens."[76]

The notion that laws of the country or state should be for the common benefit of the citizens comports with common sense. Even when concerns are raised that the legislative process is controlled by special interests, the public nevertheless apparently assumes that laws *should* serve the common good. Many citizens might agree with St. Augustine that without justice, "what are kingdoms but gangs of criminals on a large scale?"[77] They would also agree that laws prohibiting murder, theft, fraud, and telemarketing on numbers listed on the federal "do-not-call list" all serve the common good. Even murderers,

74. AQUINAS, *supra* note 1, at Q. 96, art. 1, reply 3.
75. *Id.* at Q. 91, art. 3.
76. *Id.* at Q. 90, art. 2.
77. 4 ST. AUGUSTINE, CITY OF GOD 139 (Penguin 1986).

thieves, "con artists," and telemarketers benefit from these laws when they are not individually profiting from their anti-social actions.

If a law does not serve the common good, it is unjust, and thereby illegitimate.

> [L]aws may be unjust . . . by being contrary to human good . . . either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory . . . or in respect of form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws; because as Augustine says (De. Lib. Arb. i, 5), a law that is not just, seems to be no law at all."[78]

2. *Whether the Common Good Can Trump the Letter of the Law*

For Aquinas, a law can also be unjust if it is contrary to the common good in a particular case. It would be impossible for a legislature to foresee all particular situations. "No man is so wise as to be able to take account of every single case; wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view."[79] Accordingly, the lawmaker's task is to formulate general rules not to anticipate every particular situation. "[E]ven if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion: but should frame the law according to that which is of most common occurrence."[80]

Occasionally, a general rule could have absurd or harmful consequences under certain unforeseen circumstances. Aquinas poses the question, "[w]hether he who is under a law may act beside the letter of the law?"[81] Aquinas gives a hypothetical situation in which a law requires keeping the city

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78. AQUINAS, *supra* note 1, at Q. 96, art. 4, c. This does not mean that a citizen has an obligation to disobey every unjust law:

> Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matthew 40:41, "If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two."

Id.

79. *Id.* at Q. 96, art. 6, reply 3.

80. *Id.*

81. *Id.* at Q. 96, art. 6, c.

gate closed at night. However, what if the city's retreating defenders return at midnight and must be re-admitted to the city immediately to avoid death? Aquinas reasons that, in certain circumstances, the common good must trump the letter of the law.[82]

This pragmatic principle is not a license for willfulness, and it is distinct from the notion of civil disobedience against an inherently unjust law. The idea of an *ad hoc* appeal to an unwritten concept of the common good may seem troubling to a strict positivist or formalist or may embolden a skeptic to argue that judges should have unlimited powers of equity.[83] But who would deny that, in the event of a hurricane or terrorist attack, certain laws and regulations could legitimately be suspended at once to avoid further destruction?

3. *The Common Good and the Good of Individual Persons*

What is the content of this common good? The highest good of an individual human person is happiness and, ultimately, eternal happiness with God. This happiness consists of virtue and progress toward the realization of man's true nature, including contemplation of truth, not merely of pleasure or satisfaction.[84] The "common good" is the good of the individuals in the community to the extent that such good can be pursued as a common objective through a coordinated effort.[85] Aquinas's description of the common good is very general:

> Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another . . . .[86]

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82. *See id.* ("Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.").

83. *See* Matthew Schultz, Comment, *Equitable Repudiation: Toward a Doctrine of Fallible Perfection in Statutory Interpretation*, 29 FLA. ST. U. L. REV. 303 (2001) (citing Aristotle and Aquinas in support of the proposition that judges should have broad authority to repudiate statutes and that statutory objectivity is a myth).

84. *Contra* THOMAS HOBBES, LEVIATHAN 160 (C.B. Macpherson ed., Penguin Books 1968) (1651) ("[T]he Felicity of this life, consisteth not in the repose of a mind satisfied. For there is no such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest Good,) as is spoken of in the Books of the old Morall [sic] Philosophers.").

85. *See* SIMON, *supra* note 34, at 86–92. Law cannot command every virtue or forbid every vice. Thus, the common good is limited in scope.

86. AQUINAS, *supra* note 1, at Q. 96, art. 1, c.

Despite common sense, modern philosopher-jurists of both the Left and the Right have expressed skepticism about the concept of a common good, rejecting the concept as at best, delusional or at worst, proto-totalitarian. Anglo-American political philosophy, specifically Classical Liberalism in its various forms, regards the common good as nothing more than the composite of the individual goods of survival and pleasure and economic benefit, or the greatest good for the greatest number. By contrast, certain totalitarian doctrines tend to regard the common good as something greater than, and external to, the good of all the persons who comprise the community.[87]

Classical Liberalism in general struggles with the very idea of a common good as being anything other than the maximization of individual profits and pleasures (utilitarianism's greatest good for the greatest number of people), a very thin concept of a social compact to support commerce and private property (Locke), or a truce against what would otherwise be violence and chaos (Hobbes's "State of Warre"). Classical Liberal political philosophy assumes, contrary to Aristotle and Aquinas, that political community is not natural. The "State of Nature" is a fictional "State of Warre" in which there are only autonomous individuals.[88] The misery, poverty, and violence of the State of Nature provide an incentive for miserable individuals to enter a social compact for their mutual advantage.[89] The only natural law is the law of the individual self interest. The only common good is thus an artificial good that is reducible to the maximization of the individual goods. An extreme variant of this conception of the common good is the greatest-good-for-the-greatest-number utilitarianism of Jeremy Bentham. This artificial conception of the common good is fundamentally different from Aquinas's understanding. For Aquinas, political life is natural. The State of Nature is nowhere to be found in our common experience.[90]

"Conservative" public choice theory, a derivative of Classical Liberalism, argues that legislatures act according to a rational calculus of the relative weight of special interests—the common good or public interest is a fiction. According to Landes and Posner,

> In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that

87. Yves Simon describes opposite errors: "[T]he myth of a common good external to man and conceived after the pattern of a work of art" and the individualist reduction of the common good to the "'greatest good of the greatest number.'" SIMON, *supra* note 34, at 107.

88. HOBBES, *supra* note 84, at 160.

89. "Desire of Ease . . . disposeth men to obey a common power." *Id.* at 161.

90. *See* ADLER, *supra* note 15 (refuting the doctrine of Hobbes and Locke that political life is not natural).

> outbid rival seekers of favorable legislation. . . . Payments take the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.[91]

Conservatives (many of whom are best understood as old-fashioned Classical Liberals) typically express skepticism toward any concept of public interest, believing it to be code for some left-wing agenda favored by politically unaccountable judges or bureaucrats.[92]

The notion of a common good is also sometimes associated with an organic view of the State as something larger than and superior to the good or liberty of individual persons. Various atheistic or neo-pagan creeds such as Stalinism, Maoism, Pol Pot, National Socialism, are examples of the horrors wrought by a Statism that sets itself apart from the good of individual persons. Some ideologies of racism or ethnic exclusion have used religious texts or traditions to justify persecution. Certain economic doctrines equate the common good with maximization of overall wealth, regardless of the effects on the poor and the weak. In Aquinas's philosophy, the common good is rooted in the good of individual persons who are social by nature. Following Aquinas's teachings, the Catholic Church's social doctrine has consistently vindicated the dignity of the human person as against such claims of State power or ideology.[93]

The common good for legal purposes is neither a paradise, a monastery, nor a highly regimented reform school. Nor is it a machine-like social unit like a military unit or a sports team trained to operate as an instrument for the achievement of a specific goal extrinsic to the members of the unit. The common good does not consist of victorious class struggle, imperial conquest, or building pyramids. It must be emphatically stated that Aquinas's philosophy does not sacrifice the dignity of the individual to a proto-totalitarian or communistic conception of the State.

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91. See FARBAR & FRICKEY, *supra* note 19, at 15 (1950) (citing William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 371, 371 (1983)).

92. *Id.*

93. *See, e.g.*, Pius XI, *Mit Brennender Sorge* (1937), http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html (last visited Dec. 1, 2006) (denouncing Nazi racism); Pius XI, *Divini Redemptoris* (1937), http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html (last visited Dec. 2, 2006) (denouncing "atheistic communism"). *See generally* RICHARD W. ROUSSEAU, HUMAN DIGNITY AND THE COMMON GOOD: THE GREAT SOCIAL ENCYCLICALS FROM LEO XIII TO JOHN PAUL II (2002).

4. Common Good and Limited Government

Aquinas was not a libertarian.[94] The notions of either an absolute right of the individual to do as he or she pleases or a right to do wrong are incompatible with Aquinas's natural law ethics. The pursuit of happiness for Aquinas was the pursuit of specific goods that are best for human nature. The purpose of the state and its laws is, in part, to compel good acts and forbid bad acts according to what is good or bad by nature.

What is the role of American-style individual liberty in a State that operates according to Aquinas's philosophy? Aquinas's natural law legal principles are compatible with American traditions of civil liberty in two ways.[95] First, as Robert Bork explains, individual liberty in the United States was historically understood to be enjoyed in a context of common moral standards upheld by vigorous institutions of civil society. The problem is that our liberties were grounded in an incomplete philosophy from the start. If the principles of this libertarian philosophy are played out to their logical extreme, the result is a breakdown in civil society in favor of a chaotic anti-society of atomistic individuals.

> We can now see the tendency of the Enlightenment, the Declaration of Independence, and [Mill's] *On Liberty*. Each insisted on the expanding liberty of the individual and each assumed that order was not a serious problem and could be left, pretty much, to take care of itself. And, for a time, order did seem to take care of itself. But that was because the institutions—family, church, school, neighborhood, inherited morality—remained strong. The constant underestimation of their value and the continual pressure for more individual autonomy necessarily weakened the restraints on individuals. The ideal slowly became the autonomous individual who stood in an adversarial relationship to any institution or group that attempted to set limits to acceptable thought and behavior.[96]

Bork, without expressly referencing natural law, argues that liberty must be bounded by substantive moral principle. "Our modern, virtually unqualified, enthusiasm for liberty forgets that liberty can only be 'the space between the walls,' the walls of morality and law based upon morality. It is sensible to

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94. The term "libertarian" is used in the general sense of an ethical doctrine derived from classical liberalism that places individual liberty above any substantive conception of what is good for human beings by nature. *See* WOLFE, *supra* note 13 (distinguishing "antiperfectionist liberalism," libertarianism, and "radical or post-modern (super) liberalism").

95. *See* GEORGE, *supra* note 13; JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1986); WOLFE, *supra* note 13.

96. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 63-64 (1996).

argue about how far apart the walls should be set, but it is cultural suicide to demand all space and no walls."[97]

Aquinas's political philosophy allows for ample "space between the walls." The powers of the law to police morality are limited. Although it must serve the common good, the law's task is not to make everyone virtuous or to bring about the common good all at once. It need not compel every act of virtue or ban every act of vice. First, the law can command only those virtues "that are ordainable to the common good—either immediately, as when certain things are done directly for the common good—or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace."[98]

Similarly, although the Divine law forbids all sins, "human law cannot punish or forbid all evil deeds: since while aiming at doing away with all evils, it would do away with many good things, and would hinder the advance of the common good . . . ."[99] Indeed, punishing every vice may do more harm than good.[100] Thus, prudent lawmakers must legislate with moderation and tolerance.

D. Natural Law

This section addresses three issues: (1) the relationship between human law, properly speaking, and a natural moral order prior to human conventions; (2) the distinction between Aquinas's concept of natural law and a radical libertarian view of natural law; and (3) the basic content and know-ability of natural law.

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97. *Id.* at 65.
98. AQUINAS, *supra* note 1, at Q. 96, art. 3, c.
99. *Id.* at Q. 91, art. 4, c.
100. As Aquinas stated:

> The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz. that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils: thus it is written (Prov. 30:33): "He that violently bloweth his nose, bringeth out blood"; and (Mt. 9:17) that if "new wine," i.e., precepts of a perfect life, "is put into old bottles," i.e., into imperfect men, "the bottles break, and the wine runneth out," i.e., the precepts are despised, and those men, from contempt, break into evils worse still.

Id. at Q. 96, art. 2, reply 2.

1. Human Law Is Subordinate to Natural Law: "An Unjust Law Is No Law At All"

The legitimacy of a particular human law depends on whether it comports with an objective moral order because an unjust law is no law at all.[101] For Aquinas, law and morality are inextricably linked, because human laws, properly speaking, are nothing but specifications of the natural law.[102] He even seems to say that human positive laws (i.e., statutes and other written rules of general applicability) are a subset of a larger, unwritten, moral code. He uses the term "law" analogously to refer to four different kinds of true laws. The highest kind of law is the immutable Eternal Law which governs the entire universe.[103] The "natural law" is the "participation of the rational creature" in the Eternal Law.[104] The Divine law is Biblical revelation, consisting of moral precepts, which are clarifications of the natural law, and ceremonial precepts.[105] He defines all of these types of law using the same definition drawn from human experience of human laws. Although the Eternal Law is the most perfect form of law, the human law is the type that men can most easily understand from experience.

The natural law meets the definition of law because it is a rational directive by God for the good of all human kind. Although the natural law by itself is not promulgated in the same way as human laws, it is "written in our hearts" in an analogous way. It is the nature of the rational creature, i.e. the human being, to understand the natural law, not intuitively, but by natural inclination.[106] The relationship between the natural law promulgated by God and human positive law promulgated by human lawgivers is that the positive laws are specifications of the natural law in a political community that are identified by practical reasoning and promulgated by the authorized lawgiver.

In answer to the question, "Whether there is a human law?" Aquinas explains that "a law is a dictate of the practical reason." Because practical

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101. *Id.* at Q. 96, art. 4, c. (quoting St. Augustine, "'[A] law that is not just, seems to be no law at all.'") ("lex iniusta non est lex").

102. The natural law is, in turn, a "participation" in the Eternal Law. The term "law" is thus used analogously.

103. *See* Q. 93, arts. 4–6 (discussing God's governance of creatures by the Eternal Law).

104. *See* Q. 91, art. 2; Q. 94 (discussing the natural law).

105. *See* Q. 91, art. 5; QQ. 98–108 (explaining the precepts of the Old Law and the New Law).

106. *See* AQUINAS, *supra* note 1, at Q. 94, art. 2, c. ("[A]ll those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance."). *See* discussion *infra* regarding human teleology in the Part IV.E.3.

reason is the mode of reason whereby a person knows moral good and evil, laws are essentially specifications of the natural law.

> [W]e conclude that just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determinations of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed . . . .[107]

Although the process is analogous to deductive mathematical reasoning, the "indemonstrable principles" of moral reasoning are very general principles known by natural inclination, and the process of reasoning to particular determination is not as easy or reliable as mathematical reasoning.

2. Aquinas's Natural Law Versus Libertarian Natural Rights

Perhaps ironically, when the term "natural law" is discussed in law schools today, it is often in the context of a debate between what could be called conservative legal positivism and liberal natural law activism.[108] In these debates, conservatives typically oppose the use of natural law by judges, while liberals rely on a narrow, radically libertarian form of natural law.

Conservative legal positivism is the view that the law is nothing more than the command of the sovereign, interpreted in a formalistic manner. Under this view, morality is irrelevant to the task of the judge.[109] Any moral content in the law is front-loaded by the legislature. Only the legislature has standing to consider moral matters and to determine the policies of the society.[110] This view is conservative in two respects: (1) it takes a common-sense, traditional

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107. *Id.* at Q. 91, art. 3, c.

108. *See, e.g.*, Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982) (identifying natural law with a moral philosophy of individual autonomy); POSNER, *supra* note 30, at 96 (discussing Dworkin's "natural-law theory").

109. *See, e.g.*, Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis of Law*, 65 OHIO ST. L.J. 1139, 1140 (2004); Lino A. Graglia, *Jaffa's Quarrel With Robert Bork: Religious Belief Masquerading as Constitutional Argument*, 4 S. CAL. INTERDISC. L.J. 705 (1995).

110. *See, e.g.*, Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 129 (1994).

view of legal interpretation and the role of judges; and (2) at least in the United States, democratically elected legislatures are often more comfortable with traditional morality than unelected judges.

By contrast, liberal natural law activism combines skepticism with a radical vision of a just society as one in which the autonomy of the individual is realized to the fullest extent. No caricature of this kind of liberalism could state the matter more starkly than Justice O'Connor's majority opinion in the Supreme Court's 1992 order in *Planned Parenthood of Pennsylvania v. Casey*, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[111] Obviously neither the Constitution nor any statute explicitly provides for an individual right of self-creation or self-definition, a right to determine the nature of the universe, a right to determine whether one is human, or whether other members of the community are human. This concept of natural law is fundamentally different from Aquinas's concept of natural law. For Aquinas, human nature is a given. Although he acknowledges that the application of the natural law is not obvious in every particular instance, he understands that certain acts—such as murder, rape, and theft—are evils that are contrary to human nature properly understood.[112]

3. *Content and Know-Ability of Natural Law*

Today, natural law is usually only discussed in the context of extremely controversial matters of sexual morality. Rather than engage in reasoned discussion, opponents of Thomistic natural law sometimes simply state that because a particular practice they wish to defend has historically been classified

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111. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

112. Early modern political philosophers tended to collapse the distinction between human nature in the classical sense of a normative inclination toward a state of fulfillment of concrete goods and the empirical "reality" of a human nature as vice-prone, sinful, and self-seeking. According to Thomas Hobbes, the natural inclination of man is a matter of amoral desire, not of the attainment of a specified good:

> [T]he Felicity of this life consisteth not in the repose of a mind satisfied. For there is no such Finis Ultimus (utmost ayme,) or Summum Bonum (greatest good,) as is spoken of in the Books of the old Morall Philosophers. . . . Felicity is a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later.

HOBBES, *supra* note 84, at 160. It is common in our culture to speak of human nature as describing an inclination towards selfishness, sexual promiscuity, and various desires. For Aquinas as a theologian, true human nature is wounded, but not destroyed, by original sin. It makes sense for him to speak of nature in normative terms.

as a "crime against nature," the concept of natural law is inherently a mask for hatred or prejudice and cannot be taken seriously.[113] Focusing solely on the most controversial issues obscures the common-sense basis of natural law reasoning.

Natural law pertains to all morality not just sexual morality. It is commonly asserted that law and morality should be kept strictly separate, as if acknowledgement of popularly held moral convictions were tantamount to the establishment of a theocracy. However, innumerable moral matters are taken for granted in "civilized" nations but are no less matters of morality. In the ancient world or in various cultures untouched by the moral teachings of the great monotheistic religions, many practices that are now almost universally regarded as abhorrent were tolerated or even encouraged, including infanticide, summary execution of prisoners of war, rape, slavery, incest, human sacrifice, cannibalism, revenge killing, polygamy, pederasty, theft, raiding, the killing by a father of his wife and members of his household, and female genital mutilation.[114] For example, we have laws against theft, arson, vandalism, deceptive trade practices, and many other practices that are—perish the thought—*bad* for the community. Some of these things have not always been illegal. Aquinas claims that, although theft is contrary to the natural law, the "Germans" in his time did not regard theft as immoral.[115] All of these practices in time, and perhaps with some hypocrisy in individual cases, were condemned as being contrary to Christianity. It does not therefore follow that laws against murder and incest make our government a theocracy.

There are also many other equally moral matters about which erstwhile attackers of natural law ethics frequently address in terms of moral absolutes. These include matters of civil rights on the basis of race, environmental degradation, the justice of particular wars, or whether the government should fund health care for the poor and the elderly. All of these controversial issues pertain to natural law principles.

Nevertheless, the fact that there are disagreements about what is moral or immoral is significant for Aquinas. Aquinas readily acknowledges that identifying the "secondary precepts" of the natural law is hard work, requiring experience and reasoning. The results vary "on account of the uncertainty of human judgment, especially on contingent and particular matters, different

113. *See* Gewertz, *supra* note 7 (quoting Dershowitz).

114. *See, e.g.*, WARREN H. CARROLL, THE FOUNDING OF CHRISTENDOM 83, 219–20 (1985) (discussing child sacrifice, infanticide, and temple prostitution among the Canaanites, Carthaginians, and Greeks).

115. *See* AQUINAS, *supra* note 1, at Q. 94, art. 4 (quoting Julius Caesar as stating that "[G]oods entrusted to another should be restored to their owner."). *Cf.* note 99.

people form different judgments on human acts; whence also different and contrary laws result."[116] Even when the particulars of natural law are identifiable by those citizens who are (or believe they are) already virtuous but not by others, prudence dictates restraint. As discussed above, the purpose of law is to lead the members of the community to virtue gently, not to root out all vice or compel virtue.[117]

Aquinas poses the question, "Whether an effect of law is to make men good?"[118] He answers that "the proper effect of law is to lead its subjects to their proper virtue: and since virtue is 'that which makes its subject good,' it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect."[119]

The first precept of natural law is do good and avoid evil.[120] This may seem like a useless tautology, but it is an important point that is consistent with human experience. It is difficult to conceive of a human being desiring evil for the sake of evil. Certainly people desire many evil things, whether it be coveting a neighbor's possessions or spouse, desiring the death or misfortune of one's enemies, or craving "sinful" desserts are all desired because they will bring pleasure or power or some other thing that the person desiring regards as a more desirable good, at least for the moment.

More specific precepts of the natural law are known by certain basic natural inclinations, ordered by reason.[121] Human beings, for the most part, naturally desire to live, be healthy, have families, form communities, and grow in knowledge of the world, morality, and God. The desires to live, be healthy, and reproduce are desires we have in common with plants and animals. Family and community are partly animal and partly rational. Political life, legal structures, religion, philosophy, and conceptual knowledge are specific to the human being as a rational animal.

Many positive laws found in legal codes throughout the world are fairly straightforward reflections of the natural law. Laws forbidding murder and battery address the natural desire to survive. Laws against theft, rape, and murder protect harmony and individual dignity within the community. Beyond these basics, there may be a great deal of controversy about which laws and policies will best protect and support these natural goods. The goods themselves, however, and the overarching principle that the integral good of the

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116. *Id.* at Q. 91, art. 4, c.
117. *See supra* note 100.
118. AQUINAS, *supra* note 1, at Q. 92, art. 1, c.
119. *Id.*
120. *Id.* at Q. 94, art. 2, c.
121. *Id.*

human person is to be pursued and evil avoided, remain in the background. Environmental, food and drug, and other social welfare laws presuppose basic human inclinations to survival and health.[122] Laws to punish crime, protect marriage, ensure religious liberty, and protect private property presuppose certain human natural goods.[123]

E. Natural Purposes

This part addresses four issues: (1) the relationship between reason and natural purposes; (2) Aquinas' "teleological" (i.e., purpose-oriented) philosophy of nature; (3) human teleology (i.e., the purposes of human nature); (4) whether there can be a Thomistic theory of natural law without natural teleology.

1. The Relationship between Law and Natural Purposes

Aquinas states that "[l]aw is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for lex (law) is derived from ligare (to bind), because it binds one to act."[124] However, the essence of law is not command or compulsion alone, because the "rule and measure of human acts is the reason, which is the first principle of human acts . . . ."[125] This language may seem puzzling. Modern philosophy often reduces reason to a purely instrumental status, subordinate to a variety of desires. According to David Hume, "[r]eason is and ought only to be the slave of the passions . . . ."[126] Aquinas follows Aristotle's teaching that "it belongs to the reason to direct to the end, which is the first principle in all matters of action . . . ."[127] He is not referring to any arbitrary end derivative of passions. Rather, the purpose of reason is to achieve the fulfillment of a knowable natural good. In the case of a law, the end or purpose is the common good. "Actions are indeed concerned with particular matters: but those particular matters are referable to the common

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122. Such laws may be deeply flawed, premised on an unwarranted optimism about the ability of government to remedy market failures, or based on unrealistic risk assessments. *See, e.g.*, ECOLOGY, LIBERTY & PROPERTY: A FREE MARKET ENVIRONMENTAL READER (Jonathan H. Adler ed., 2000). They are, nevertheless, publicly justified in terms of what is "good" for society in a broadly moral sense.

123. Some such laws may be misguided or wrong, but they are nevertheless justified in terms of what is good for society.

124. AQUINAS, *supra* note 1, at Q. 90, art. 1.

125. *Id.*

126. DAVID HUME, TREATISE OF HUMAN NATURE 415 (L.A. Selby-Bigge ed., Oxford 1978) (1740).

127. AQUINAS, *supra* note 1, at Q. 90, art. 1, c.

good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end."[128] The common good is, in turn, derived from the natural, and ultimately, supernatural good of the individual persons, which is happiness or beatitude appropriate to the rational creature:

> Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred. Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness, as stated above . . . . Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness. Wherefore the Philosopher, in the above definition of legal matters mentions both happiness and the body politic: for he says (Ethic. v. 1) that we call those legal matters "just, which are adapted to produce and preserve happiness and its parts for the body politic" . . . .[129]

2. *Aquinas's Teleological Philosophy of Nature*

For Aquinas, nature itself is a source of moral norms.[130] The natural law is knowable through the inclinations of nature.[131] However, for modern readers, the terminology of "nature" is very confusing and raises many questions. Nature in the modern sense typically either means the object of scientific study, explainable in terms of basic "laws" and elementary particles or a Romantic state of primeval purity, unencumbered by human conventions and unadulterated by technology. Thus, nature is either the world of extended, quantified things (i.e., material bodies), as analyzed in terms of their common physical and chemical properties or "laws," or it is the pristine wilderness of Romantic ardor, or perhaps just organic fruits and nuts.

Aquinas' concept of nature is something quite different. Aquinas, following Aristotle, accepts as an obvious fact our experience of the world as being full of

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128. *Id.* at Q. 90, art. 2, reply 2.

129. *Id.*

130. *See generally* JAN AERTSEN, NATURE AND CREATURE: THOMAS AQUINAS'S WAY OF THOUGHT (1988).

131. *See* Q. 94, art. 2.

many different kinds (natures) of things that cannot be explained simply in terms of their material or chemical constituents. Though chemistry teaches us that all things are made of carbon, nitrogen, hydrogen, and other elements, and that each atom is made up of certain elementary particles and a lot of "empty space," we do not see or feel these things in our ordinary experience. Non-living things—plants, animals, and human beings—are all of different kinds. Moreover, we know and understand things according to their kinds—our knowledge of how one set of oranges tastes gives us the ability to predict and expect something about other oranges; our knowledge of how one set of squirrels act under conditions of drought give us the ability to predict and expect something about how other squirrels would act under similar conditions. Not even the most disciplined scientist or skeptical philosopher experiences a world devoid of these common-sense distinctions.[132]

For Aquinas each kind of thing moves or behaves in a manner according to its intrinsic nature. Natural things are not simply machines—whether made by a "Divine watchmaker" or by blind forces of chance and necessity.[133] The

132. Indeed all scientists and philosophers depend on them to begin their everyday work—the writing of a treatise or the running of a scientific experiment depends crucially on the reliability of everyday knowledge about pens, paper, computers and word processors, lab benches, instruments and their dials, mathematical knowledge learned via color pens on a whiteboard, etc.

133. Aquinas' concept of nature is not the same as Newton's mechanical vision of the universe. For Aquinas, God creates natures with an intrinsic capacity of self-organization. For Newton, and accordingly for William Blackstone and William Paley, nature is like a machine operated by God. Blackstone's concept of natural law is somewhat similar to Aquinas', but appears to rely on a mechanical philosophy of nature:

> Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.
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> Thus when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

motions of natural things are not entirely reducible to the laws of physics and chemistry. Rather, each natural kind has its own intrinsic purpose or telos. This purpose is not the same as some sort of miniature spirit or vital force. Rather, the purpose is a sort of intrinsic reason in the thing. Although these purposes are created by God (whether directly or indirectly), they are intrinsically intelligible by man.

The concept of natural purpose is not necessarily instrumental with respect to human beings. The purpose of an acorn is not simply to provide a shady oak tree; the acorn has its own intrinsic purposive tendency to develop into a tree. Man can readily grasp the purposive motion and development of the growing tree. Modern science describes the physico-chemical mechanisms that make the unfolding of nature possible, but the self-organizing, self-perfecting character of the tree's nature is readily grasped by reason and sense perception prior to an elucidation of the physico-chemical basis for the tree's internal principles of operation. According to Aquinas:

> Nature is nothing but the plan of some art, namely a divine one, put into things themselves, by which those things move towards a concrete end: as if the man who builds up a ship could give to the pieces of wood that they could move by themselves to produce the form of the ship.[134]

Being a healthy, fully grown tree is the acorn's intrinsic telos.

3. *Human Teleology*

Aquinas' notion of human purpose builds on his teleological philosophy of nature. A man is not a rock, an acorn, or a dolphin, but he has much in common with each of these things. Because a man is not a disembodied spirit, the precepts of the natural law follow upon the inclinations of nature at several

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> For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *24, *26.

134. THOMAS AQUINAS, IN OCTO LIBROS PHYSICORUM ARISTOTELIS EXPOSITIO 130 (Marietti Editori 1954), *quoted in* MARIANO ARTIGAS, THE MIND OF THE UNIVERSE: UNDERSTANDING SCIENCE AND RELIGION 156 (2000).

levels. "Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law."[135] The level of natural teleology in man is the inclination of self-preservation, which Aquinas regards as characteristic of all substances, including animals, plants and even non-living things.

Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: in as much as every substance seeks the preservation of its own being, according to is nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law.[136]

Second is the inclination man has "in common with other animals."[137] This animal inclination includes those things "'which nature has taught to all animals,' . . . such as sexual intercourse, education of offspring and so forth."[138] Third is the inclination specific to man as a rational creature.

> [T]here is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to . . . live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.[139]

For Aquinas, the ultimate end and highest good of man is theological, not merely natural. Following Augustine, he believed that the beatific vision of God is the ultimate end of man. However, for Aquinas, grace builds upon nature, and his ethics of human purpose is mostly compatible, and indeed largely based upon, Aristotle's understanding of practical reasoning, virtue, and the natural good of the human being, for whom the highest natural good is friendship and living peaceably within the *polis*.[140] For Aquinas, as for Aristotle, anything that is contrary to man's nature is bad because it is contrary to the fulfillment of his highest purpose.

4. Can There Be Natural Law without Nature?

Aquinas's common sense view of law is based in part on his common-sense understanding of natural law, which, in turn, is based on his common-sense

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135. AQUINAS, *supra* note 1, at Q 94, art. 2, c.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See generally* RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD (2003).

understanding of nature. Modern science and modern philosophy, however, reject such common sense teleology as scientifically disproven, technologically useless, laughably anthropomorphic, or even as a pantheistic holdover from Greek paganism.[141] Some scholars have suggested that because modern science has discredited certain conclusions of Aristotelian science, natural teleology is a fatal flaw in any attempt to refurbish Aquinas's natural law theory. According to Leo Strauss, "[t]he teleological view of the universe, of which the teleological view of man forms a part, would seem to have been destroyed by modern natural science."[142] Scott Buchanan states the problem trenchantly:

> The reflective reason in man is clearly purposive, but the rest of nature sleeps in its mechanical and mathematical order. Technical man can impose purposes on natural objects by quasi-magical arts; he can even invent purposes and bend nature to his will. . . . The classical doctrine of human nature then exists in the modern world as a mere humanism. This, I believe, is what paralyzes the doctrine of natural law in the modern world, and prevents it from reviving its full force by penetrating the equations and mechanisms that pervade both natural and social science.[143]

As a result, some modern natural law theorists simply jettison natural teleology as obsolete, replaceable by less "biological" notions borrowed from Kant or others.[144] In any event, it is difficult to avoid natural teleology in reading or making sense of Aquinas's natural law theory. A full recovery of Aquinas's natural law jurisprudence will require a recovery of his teleological understanding of nature.

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141. *Id.*

142. According to Yves Simon:

> It goes without saying that there cannot be such a thing as natural law in a thoroughly mechanistic universe. When mechanism is associated with idealism, as it is in Descartes and most modern philosophers . . . we have *values* instead of natural laws. . . . [V]alues have generally been conceived as placed in things, imposed upon them, forced into them by the human mind. Assuming that we still retain a sense for the distinction between the right and the wrong, what else can we do if things have no nature and no finality of their own?

SIMON, *supra* note 34, at 50.

143. BUCHANAN, *supra* note 13, at 303 ("This is the reason that so-called secondary natural law seems arbitrary, dated, and dogmatic when it makes particular determinations.").

144. *See* FINNIS, *supra* note 13, at 33–34 (arguing that a teleological conception of nature is irrelevant to natural law reasoning).

A thorough discussion of Aquinas' philosophy of nature is far beyond the scope of this Article. It should not be assumed, however, that Aquinas's teleological understanding of nature is dead. On the contrary, in the past several decades, a widening stream of scholarship and scientific inquiry has bolstered teleological philosophies of nature. Many eminent Thomist philosophers have seriously engaged the problem of natural teleology in relation to modern science.[145] Jewish and secular Aristotelians have made parallel contributions.[146] At the same time, many scientists (both experimentalists and theoreticians) and philosophers of science have acknowledged the shortcomings of a mechanical understanding of nature, in favor of theories of self-organization, or a restored and purified understanding of "natural powers,"[147] "capacities,"[148] and even the long-discarded notion of things having intrinsic "natures."[149]

V. CONCLUSION: TWO TRADITIONS

There is no single "Western tradition" of law. There are, rather, two opposite traditions. The first tradition is a jurisprudence of common sense which embraces reason, legitimate authority, and a common moral order. This primary tradition also embraces vigorous principles of limited government, individual liberties and the rule of law, albeit as practical limitations for the sake of the common good, not as ends in themselves. It speaks of truth and goodness with confidence—of law and public good without guilt or fear that there really is no such thing or that at bottom it is socially constructed or merely the aggregation of selfish individual desires. It accepts the contingency and messiness of human affairs without rejecting common sense or attempting to base the science of human affairs on something more clear and distinct.

The second tradition is a skeptical tradition which rejects the reality or relevance of objective truth, moral order, or a common good. It was born of

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145. *See, e.g.*, ARTIGAS, *supra* note 134; Richard F. Hassing, *Modern Natural Science and the Intelligibility of Human Experience*, *in* FINAL CAUSALITY IN NATURE AND HUMAN AFFAIRS 211–56 (Richard F. Hassing ed., 1997); Richard F. Hassing, *Introduction*, *in* HASSING, *supra*; WILLIAM A. WALLACE, THE MODELING OF NATURE: PHILOSOPHY OF SCIENCE AND PHILOSOPHY OF NATURE IN SYNTHESIS (1996); Michael Augros, *Reconciling Science With Natural Philosophy*, 68 THE THOMIST 105 (2004). *See also* www.isnature.org (website of the Institute for the Study of Nature).

146. Adler, *supra* note 20; Kass, *supra* note 20.

147. ROM HARRE, LAWS OF NATURE (1993).

148. NANCY CARTWRIGHT, NATURE'S CAPACITIES AND THEIR MEASUREMENT (1989).

149. NANCY CARTWRIGHT, THE DAPPLED WORLD: A STUDY OF THE BOUNDARIES OF SCIENCE (1999).

moral skepticism rooted, in turn, in a rejection of natural purposes. In its youth, it substituted a rational calculus of individual self-interest for natural law and the common good. In middle age, it went in various directions, exalting logical form over moral content, or rejecting forms in favor of sorting through hard-nosed empirical data to predict what judges will do. In its dotage, it now turns against itself, rejecting even reason in favor of the will to political power. This tradition has coexisted with the first tradition by feeding off of the moral capital of the prior tradition. Moral relativists may well pay their taxes, seek a just society, and care for their children. Deconstructionists certainly hope that people will buy, read, and understand their books. But the bitter fruits of a half-true philosophy are now ripe: social pathology and the absence of a common intellectual culture.

The root problem is what counts as knowledge. For Aquinas, as for Aristotle, the knowledge of human things is not the same as mathematical or experimental knowledge, but it is still true knowledge. Language communicates truth about objective reality, albeit imperfectly. Ethical and political knowledge is based on common opinion and experience, but applying the natural law to specific circumstances is not always easy. Human reason is capable of discerning purpose in nature, including human nature.

By contrast, for much of modern philosophy, words are arbitrary names, unmoored from reality. Common experience is fundamentally deceptive and must be replaced by something narrower. "Feigning the world to be annihilated," Hobbes and Descartes reject common experience in favor of clear and distinct ideas drawn from mathematics or experimental science.[150] There is no highest good, only the lowest common denominator of self-interest in terms of pleasure and survival. Natural law, and by extension human law, becomes nothing but a mechanism for optimizing individual liberty to acquire comforts and security. Jurisprudence becomes a formal order of concepts devoid of moral content (positivism) or a quasi-scientific effort to predict the behavior of judges (legal realism).

But if language is only a game, and the only real knowledge is knowledge of quantity or "empirical" analysis, then notions of objective truth in human matters and moral order are no better than belief in unicorns. If reason is fundamentally unreliable, and moral order unknowable, the skeptics and cynics win. In that case, the only thing preventing complete chaos is "natural" Hobbesian self-interest as desire for comfort and fear of violent death.[151] Law

150. *See supra* note 145.

151. Instead of naturally inclining toward the highest good, "man by nature chooseth the lesser evill [sic]." HOBBES, *supra* note 84, at 199.

becomes nothing but sophistry, or at best a vehicle for implementing a half-philosophy of radical individualism or economic materialism.

The moral foundations and, increasingly, the rational foundations of law have been under attack for centuries. To recover the primary tradition, it will be necessary to squarely address the philosophical bases of the "Nothing But" tradition by answering several questions. Can language reliably communicate truth, and, if so, how reliable must it be? Can we acknowledge the limitations of language without concluding that it is inherently arbitrary? Can there be a true "science" of politics based on an unabashed acceptance of a common good? Is there a common good which is proportionate to the good of the individual human person? What is the good of the human person by nature? Finally, without natural purposes, is the natural law tradition a house built upon sand?