The Essential
NATURAL LAW

Samuel Gregg

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by Samuel Gregg

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Leslie Lightheart

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Contents

Note on Texts Used

Below is a list of abbreviations and notations that I use when referring to various texts. Where possible, I also use a standardized notation so that readers can find the relevant passages in other editions of the work.

"ST I-II q.94, a.2" means "Thomas Aquinas (1265-1273), *Summa Theologiae*, First part of the Second Part, Question 94, Article 2 of the T. Gilby, ed. (1963), Blackfriars edition."

"Albornóz, 1573: VII, 29" means Bartolomé de Albornóz (1573), *Arte de los Contratos,* Biblioteca de la Universidad de Sevilla, Book 7, Chapter 29 of the edition cited.

"Aristotle (undated/1980): V.1.1129b12-14" means Aristotle (undated), *Nicomachean Ethics,* W.D. Ross, ed. (1980), Oxford University Press, Book V, chapter 1, Bekker page 1129, Bekker Column B, Line Numbers 12-14 of the edition cited.

"Aquinas, *Quaestiones de Quolibet Quodlibetal* IV, q.9 a3c" means Thomas Aquinas (1256-1259; 1269-1272), *Quaestiones de Quolibet Quodlibetal*, Quodlibet IV, Question 9, Answer 3c of the edition cited in Busa, Robert, ed. (1996), *Thomae Aquinatis Opera Omnia cum Hypertextibus in CD-ROM*. Editoria Elettronica Editel.

"Brown Scott, 1934: bk.2, q.2, a.1" means James Brown Scott (1934), *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations,* Clarendon Press, Book 2, Question 2, Answer 1 of the edition cited.

"de Soto, 1553-1554/1968: VI, q.II, a.2" means Domingo de Soto (1553-1554/1968), *De Iustitia et Iure,* IEP, Book VI, Question II, Answer 2 of the edition cited.

"Grotius, 1609/2004: I, 218" means Hugo Grotius (1609), *The Free Sea. Richard Hakluyt, tr., with William Welwod's Critique and Grotius's Reply,* David Armitage, ed. (2004), Liberty Fund, Book I, page 218 of the edition cited.

"Grotius 1625/2005: II.25.3.3" means Hugo Grotius (1625), *On the Rights of War and Peace,* Richard Tuck, ed. (2005), Liberty Fund, Book II, Chapter 25, Paragraph 3.3 of the edition cited.

"Lessius, 1606/2020: IV lib. 2, cap. 21, dub. 20" means Leonardus Lessius (1606), *De iustitia et iure caeterisque virtutibus cardinalibus,* Thomas Duve et al., eds. (2020), Frommann-Holzboog, Part IV, Book 2, Chapter 21, Dubium 20 of the edition cited.

"Mercado, 1571/1975: bk.2, ch.2, fol.19" means Tomas de Mercado (1571), *Summa de Tractos y Contractos,* IEP (1975), Book 2, Chapter 2, Folio 19 of the edition cited.

"Pufendorf, 1672/1998: bk.II, ch.III, 23" means Samuel von Pufendorf (1672), *De Jure Naturae et Gentium Libri Octo,* Frank Böhling, ed. (1998), Akademie Verlag, Book II, Chapter II, page 23 of the edition cited.

"Suárez, c.1612/2012a: II, 20, 1" means Francisco Suárez (c. 1612), *Tractatus De Legibus Ac Deo Legislatore,* Ulan Press (2012), Book II, Chapter 20, page 1 of the edition cited.

"Suárez, c.1612/2012b: II, 19, 8" means Francisco Suárez (c. 1612), *De opere sex dierum,* Nabu Press (2012), Book II, Chapter 19, page 8 of the edition cited.

"Vattel, 1758/2008: bk.2, ch.2, s. 25" means Emer de Vattel (1758), *The Law of Nations,* Béla Kapossy and Richard Whatmore, eds. (2008), Liberty Fund, Book 2, Chapter 2, section 25 of the edition cited.

"Vitoria, 1557/1917: rel. I, sect III" means Francisco de Vitoria (1557), *De indis et iure belli relectiones,* Ernest Nys, ed. (1917), The Carnegie Institution of Washington, Relatio I, Section III of the edition cited.

Introduction

Few ideas have been as influential in the development of moral, political, legal, and economic thought in the broad Western tradition as the idea of natural law. It is also true that the understanding of natural law and its influence on specific norms and institutions—rights, justice, private property, rule of law, limited government, etc.—is not anywhere near as widespread in the twenty-first century as it was just 100 years ago.

Today you can study for a law degree without receiving any real exposure to the classical, medieval, early modern, and contemporary natural law thinkers whose writings form an essential backdrop to the functioning of legal institutions, ranging from contracts to international law (Helmhotz, 2015). The purpose of this short book is to help rectify this deficit by explaining the basic principles of natural law and highlighting significant contributions that key natural law scholars have made to ideas and concepts that have encouraged the growth of free societies.

A developing tradition of thought

Natural law is often seen as an ethical theory associated with Christianity, and even more particularly Catholic Christianity. Major natural law theorists like Thomas Aquinas (1225–1274), Francisco Suárez (1548–1617), Hugo Grotius (1583–1645), and Emer Vattel (1714–1767) were believing, practicing Christians.

Yet natural law thought has manifested itself in non-Christian settings, too. Plato, Aristotle, and Cicero are pre-Christian thinkers but remain major reference points for reflection by natural law thinkers. Both the medieval Jewish philosopher Maimonides (1138–1204) and the early modern Jewish thinker Moses Mendelssohn (1729–1786) articulated ethical theories with recognizably natural law characteristics. In the twentieth century, the

American legal philosopher Lon L. Fuller (1902–1978) outlined a secular and procedural theory of natural law.

The fact that natural law has been embraced, developed, and articulated by people from dissimilar cultural settings and religious beliefs tells us several things about natural law. The first is that it cannot be viewed as simply a handmaiden to Christianity. Natural law, as we will see, is broadly congruent with the idea that all humans possess reason, and that, as C.S. Lewis once wrote, "human beings, all over the earth, have this curious idea that they ought to behave in a certain way, and cannot really get rid of it" (Lewis, 1952/2012: 8). This has led many to believe that this reason has been imbued in humans by God, who himself is understood, at least in Jewish and Christian thought, as embodying the quality of Divine Reason, as captured in the Greek concept of *Logos* (Gregg, 2019).

The idea of natural law holds that all people, whatever their ethnicity, culture, or religion, can know the difference between good and evil, right and wrong. The idea, for example, of the Golden Rule—do unto others as you would have them do unto you—is understood as a principle of moral conduct that everyone can know. While such beliefs are applied to different and changing conditions and problems, the core principles always apply.

A second feature of natural law is that its proponents have, at least since the time of Aquinas, understood themselves as working within a tradition that traverses the centuries. Early modern Protestant natural law scholars like Grotius and Samuel von Pufendorf (1632–1694), for example, knew the works of Aquinas as well as texts written by their Catholic contemporaries such as Suárez.

This points to a broader point about natural law. It is not a static tradition of thought. It has developed over time, partly through natural law theorists clarifying particular concepts, and partly through its proponents responding to ongoing intellectual challenges to its positions and changes in the realm of politics, society, and the economy. Whether it was the encounter between Europeans and the peoples of the New World in the late fifteenth century, or questions about what justice meant in the context of emerging market economies in the late eighteenth century, natural law scholars have applied natural law principles to discern how people should choose and act in these changing contexts.

Like any tradition of thought, some natural law thinkers devote more attention to specific areas of inquiry than others. Some focus on natural law's applicability to legal theory. Others are more interested what natural law principles tells us about the proper ordering of politics. Yet others concentrate on the relationship between natural law and economic questions.

While this book seeks to introduce readers to how natural law thinkers have contributed to the enhancement of freedom in the political, legal, and economic realms, we will focus on some of these scholars more than others. The most important of these is Thomas Aquinas.

Thomas Aquinas

Aquinas's name is inseparable from natural law philosophy, not least because his writings are widely acknowledged as having given decisive form to natural law ethics, reasoning, and political and legal theory. Born in 1225 in southern Italy, Aquinas was educated at the famous Benedictine abbey at Monte Cassino. Instead of becoming a Benedictine monk, Aquinas joined the recently formed Dominican order which was already in the process of becoming a formidable intellectual force in medieval Europe.

In 1245, Aquinas was sent to study theology at the University of Paris. This is where he most likely met his teacher (another Dominican), the natural scientist, philosopher, and theologian Albertus Magnus (c. 1200–1280). Three years later, Aquinas accompanied Albertus Magnus to Cologne, where he wrote extensively about Scripture, before being sent back to Paris for further studies in theology in 1252. Over the next four years, Aquinas penned lengthy commentaries on the writings of the prominent theologian and bishop of Paris, Peter Lombard. In 1256, Aquinas was appointed regent master in theology (the equivalent of a teaching professor) at the University of Paris, where he wrote works on topics ranging from metaphysics to internal Church disputes.

Between 1259 and 1268, Aquinas was back in Italy where he taught in Naples, Orveito, and Rome. It was at the last of these locations that he began to compose his most famous and important work: the *Summa Theologiae,* a manual for instruction in all the teachings of Catholicism for seminary students beginning their studies as well as lay people interested in theology.

Manuals like the *Summa* deployed a particular style of argumentation that was used by many natural law thinkers before and after Aquinas. What became known as the scholastic method involved engaging in the rational

investigation of problems and controversies in fields as different as law, philosophy, art, and theology.

The scholastic method involved examining a given subject from opposing points of view. Typically, the writer would pose a question, give three arguments contrary to his own position, and then systematically refute each of the three objections. This type of structured reasoning helped readers focus on the most important aspects of the question being studied. The objective was to arrive at rational, intellectually defensible positions that accorded with practical reason, factual evidence, and the conclusions of accepted authorities. Among the latter were reputable pre-Christian thinkers like Aristotle and Cicero, the Hebrew and Christian Scriptures, early Christian scholars (known as the Church Fathers), as well as, from the thirteenth century onwards, texts written by Aquinas.

Today the *Summa* remains the indispensable reference point for those working in the natural law tradition or who want to learn more about it. This is especially true of Part II of the *Summa*. Divided itself into two sections—the *Prima Secundae* and the *Secunda Secundae*—this part of the *Summa* addresses critical questions such as the nature of human reason, the principles of morality, the character of justice, the origins and limits of government, the relationship of positive law (law decreed or promulgated by political or legal institutions with the authority to do so) to natural law, and the virtues. These are the sections to which natural law scholars—religious, secular, Catholic, Protestant, Jewish, Aristotelian, or Muslim—interested in exploring topics like the nature and limits of state power, or the character of property, continually turn.

Aquinas's period in Italy came to an end when the Dominicans reassigned him back to the University of Paris. Three years after arriving in Paris, Aquinas was sent back to Naples by his order with the charge of establishing a *studium generale* (a house of learning) and filling it with suitable staff. Two years later, on March 7, 1274, Aquinas died, leaving the *Summa* incomplete, but having written more than eight and a half million words over the course of his life in very precise Latin.

Two particular points are worth highlighting about Aquinas's work. The first is that his thought was engaged in a conversation which went beyond the confines of medieval Catholicism. His writings embraced reflection upon classical thinkers of Greece, especially Plato (c.428–348 BC), Socrates

(c.470–399 BC), and Aristotle (c.384–322 BC), and those of Rome, like Cicero (c.106–43 BC), and master-thinkers of the later Roman Empire such as the Catholic bishop Augustine (354–430). But Aquinas also included the post-imperial philosopher and Roman politician Boethius (477–524); eleventh century Persian minds like Ibn Sina (970–1037); Muslim thinkers such as Ibn Rushd (1126–1198); and medieval Jewish scholars like Maimonides (1138–1204). In other words, Aquinas was part of a trans-historical reflection about the character of good and evil, justice, property, liberty, government, and reason itself.

This brings me to my second point about Aquinas. During one of his periods of teaching in Paris, one of Aquinas's students asked him: how does one settle disputed questions? Does one appeal to reason or authority? Aquinas's answer is long but instructive:

> Any activity is to be pursued in a way appropriate to its purpose. Disputations have one or other of two purposes.
>
> One is designed [*ordinatur*] to remove doubts about whether such-and-such is so. In disputations of this sort you should above all use authorities acceptable to those with whom you are disputing; with Jews, for example, you should appeal to the authority of the Old Testament; with Manichees, who reject the Old Testament, you should use only the New; with Christians who have split off from us, e.g., the Greek [Orthodox], who accept both Testaments but reject the teaching of our [Catholic] Saints, you should rely on the authority of the Old and New Testaments and those of the Church teachers [*doctores*] they do accept. And if you are disputing with people who accept no authority, you must resort to natural reasons.
>
> Then there is the professorial academic disputation, designed not for removing error but for teaching, so that those listening may be led to an understanding of the truth with which the professor [*magister*] is concerned. And here you must rely upon reasons, reasons which track down the root of the truth and create a real knowledge of how it is that your assertions are true. Otherwise, if professors settle questions by bare authorities, listeners are

> indeed told that such-and-such is so, but gain nothing in the way of knowledge or understanding [*scientiae vel intellectus*] and go away empty. (Aquinas, 1256-1259; 1269-1272, *Quaestiones de Quolibet Quodlibetal* IV, q.9 a3c, in Busa, 1996)

This long citation points to Aquinas's conviction that natural law is truly universal in its capacity to engage people from a potentially endless number of backgrounds if—and this is a considerable "if"—they are willing to embrace principles of moral reasoning potentially knowable by all people.

Early modern, late, or second scholasticism

A second natural law source upon which this book draws consists of a group of thinkers known as "early modern scholastics" or "late scholastics," and who are often described as part of "second scholasticism." They emerged in Europe in the early modern period, broadly understood as the late sixteenth century stretching to the mid-eighteenth century, and represented a "second" or "late" flourishing of scholasticism and the scholastic method before becoming largely dormant in the second half of the eighteenth century. Like Aquinas, these scholastics were primarily in the business of explaining the doctrines of Christian faith to seminarians, clergy, and educated lay people. This latter category might include anyone ranging from devout and intellectually curious individuals to state officials who, living in a Christian world before and after the Reformation, needed to be aware of what might be the church's position on any given subject.

Where these scholastics differed from Aquinas and other medieval scholastics was that some of them were Protestant, all were dealing with a number of new conditions that became pressing in the early modern period, and they invested more time studying the historical context and empirical dimension of the issues that concerned them.

In the wake of the Reformation in the sixteenth century, Western Europe found itself religiously divided in ways that exacerbated existing political tensions. It was also a period in which commerce (already vibrant in medieval Europe) began accelerating and Europeans encountered peoples hitherto unknown to them in the Far East and the Americas. All this was overlaid by the emergence of monarchical absolutism as a system of government across

much of continental Europe. This development raised immediate and urgent questions about freedom and the limits of state power.

In the midst of all these changes, two groups of scholastic thinkers began asking what reason required people to do in these conditions. The first were Catholic theologians and canonists (church lawyers). Some were associated with the aforementioned Dominican order. Others belonged to the most prominent post-Reformation religious order, the Society of Jesus (the Jesuits). Located in Italy, modern-day Belgium, and especially Spain, many of these Dominicans and Jesuits studied and taught at the University of Salamanca in Spain.

Dominican and Jesuit scholastics focused much of their attention on some very practical problems. For example, Francisco de Vitoria (1483–1546) wrote extensively about natural law's applicability to the idea of international law, the concept of "just wars," and liberty of commerce within and across sovereign boundaries. Similarly, Suárez developed a philosophy of law that involved some modification of Aquinas's positions but which also took aim at the idea of the Divine Right of Kings, which Protestant and Catholic monarchs had embraced as they sought to consolidate their hold on power. Others, like the theologian Martín de Azpilcueta (1491–1586) and Jesuits such as Juan de Mariana (1536–1624) and Luis de Molina (1535–1600), addressed economic questions in depth. These included topics like the right use of money or what constituted a just price.

The second group of natural law thinkers from this period relevant to our discussion are Protestant scholars, especially Grotius, Pufendorf, and Vattel. These philosophers are often presented as disassociating natural law from theology. That is not quite true. As noted, Aquinas thought it entirely possible and often necessary to make arguments based upon natural reason alone. Moreover, Grotius, Pufendorf, and Vattel believed that God's existence and providence is rationally provable and they happily engaged in theological reflection and disputation.

For our purposes, their importance lies in the fact that, like their early modern Catholic counterparts, these Protestant natural law philosophers explored the implications of natural law for some of the specific challenges of their time. They were particularly interested in exploring the rights and obligations of individuals to each other as well as the state. This led them into long reflections on the nature and limits of natural rights, and making

important distinctions between those rights that are enforceable by the state and those that are not. Building on thinkers like Suárez, these commentators devoted particular attention to international relations. For them, issues like whether a state could inhibit its members from trading with people subject to another sovereignty needed to be resolved on grounds of natural law and, as a derivative of natural law, the idea of natural rights.

It's important to note that while natural law scholars used natural rights phraseology, these rights were seen as grounded in natural law rather than being self-sufficient claims that required no further justification. In other words, natural rights derived their moral, legal, and political force from giving effect to requirements of natural law. Absent that foundation, natural rights would be understood simply as assertions of will and thus having little to do with reason.

Twentieth century natural rights and natural law

The last group of thinkers upon which this text draws are natural law scholars who became prominent in the twentieth century. A major focus of individuals such as the French philosopher Jacques Maritain (1882–1973) and the American legal theorist Lon L. Fuller (1902–1978) was on articulating theories of natural law that provided philosophically defensible foundations for natural rights. This helped to furnish an apparatus for thinking about the political and legal institutions necessary for promoting freedom and justice.

There are differences of background, methodology, and focus between these thinkers. Most were Catholic, some were Protestant, and others were secular. But what matters is that all were writing in periods in which two things were happening. First, totalitarian and authoritarian regimes of a fascist and Communist nature had come to power. Second, natural law was being eclipsed in legal philosophy and practice by alternative legal theories like legal positivism, associated with legal scholars such as Hans Kelsen.

In general terms, legal positivism holds that law is primarily a matter of social fact enacted or decreed by legitimate authority. For a law to be law, according to legal positivists, what matters is not so much its ethical rightness or wrongness but whether 1) it meets established criteria in terms of the ways in which the law is or will be created and enforced, and 2) its effectiveness in achieving its objective. The law is simply "posited" by the state rather than being derived from or reflecting the application of natural law.

The potential for such thinking to become a threat to freedom and justice was underscored during the 1946 Nuremberg war crimes trials of the surviving leaders of the National Socialist regime. During the trial, one defense that many of the accused articulated was that everything done on their orders had been directly or indirectly sanctioned by the German state. The law was the law, and the moral rightness or wrongness of the law was consequently not relevant.

The prosecution responded by maintaining that while this may have been the case, such actions were not only rendered illegal by international law, but were called into question by strong Western legal philosophical traditions which emphasized that there are indeed universal laws which no positive law (no matter how firmly sanctioned by the state) can annul. The chief Nuremberg prosecutor, Justice Robert H. Jackson (a Justice of the United States Supreme Court and a firm believer in natural law), contended that the International Military Tribunal sought to "[rise] above the provincial and transient and [sought] guidance not only from international law but also from the basic principles of jurisprudence which are assumptions of civilization and which long have found embodiment in the codes of all nations" (Jackson, 1947: part 2, 29). This was Jackson's roundabout way of saying that a law made by the state which violated basic norms of justice—by declaring, for instance, that German Jews were to be accorded fewer protections under the law than other Germans simply because they were Jewish—was no law at all because such a law violated the natural law potentially knowable by all people.

The experience of totalitarianism led to a renewed emphasis on human rights after World War II, as expressed in the United Nations Declaration of Human Rights adopted by the United Nations General Assembly and published in 1948. But this new attention to rights was accompanied by two other developments.

First, the language of rights came to be increasingly deployed far beyond the scope of anything ever articulated by natural law theorists and often in ways that demanded the extensive use of state authority to advance particular understandings of what is often called "social justice." The second half of the twentieth century witnessed the emergence of what the legal scholar Mary Ann Glendon (1991) famously called "rights talk": the tendency to reduce all political issues to assertions and conflicts of rights. At the same time, modern liberal thinkers like Ronald Dworkin were arguing

that individual rights should be identified and political and legal institutions designed "without employing any particular conception of the good life or of what gives value to life" (Dworkin, 1985: 350).

If, however, rights are detached from moral norms—such as the wrongness and injustice of coercing people to adopt particular political or religious views, or the wrongness of individuals or the state arbitrarily confiscating people's property—the binding character of rights becomes far less obvious and more susceptible to significant qualification (if not emptying out) by the state. To varying degrees and in different ways, twentieth century natural law scholars sought to rearticulate ideas of natural law that could respond to these multi-level and interrelated challenges. In doing so, they introduced important clarifications to natural law accounts of justice, rights, rule of law, and limited government that could be seen as enhancing the freedom of individuals and communities.

Two caveats

Before going another further, I must make two caveats. The first is that natural law thinkers do not agree about everything. They may hold to the same basic principles of reasoning, but nevertheless, they often arrive at different conclusions about how to order things. Natural law tells us, for instance, that constitutional arrangements *do* need to limit power if individuals and communities are to be free from unreasonable coercion and able to make the type of free choices that allow them to do good and avoid evil. But natural law does *not* immediately tell us whether the different ways in which Russia's or America's constitutional arrangements configure, say, the separation of powers between an executive, judiciary, and legislature are inherently superior to those of Australia, Canada, or France.

The second caveat concerns how to situate natural law theory on the political spectrum. Strictly-speaking, natural law is concerned with what it is reasonable; and by reasonable, we are speaking of what it is right and good for individuals and communities to freely choose. Natural law is not concerned with assessing whether a position is conservative, classical liberal, modern liberal, social democrat, etc. Many positions associated with natural law may cohere with what are usually regarded as "conservative" positions. In other cases, conclusions derived from natural law may been understood as having

more in common with more "classical liberal" views.[1] From this standpoint, natural law theory does not fit neatly into categories like conservative-versus-progressive, liberal-versus-traditionalist, or even secularist-versus-religious.

With these cautions in mind, let us turn to defining what natural law is—and isn't.

1 By "conservatism," I mean those schools of thought that emphasize the importance of tradition as a repository of wisdom, skepticism of radical change, and attention to human imperfectability. By "classical liberalism," I mean those thinkers who stress the importance of liberty from unjust coercion, a state limited to key functions like national security and rule of law, strong limits on government power, and minimal state intervention in the economy. Many contemporary center-right intellectuals draw on both conservative and classical liberal sources.

Chapter 1

What is Natural Law?

Perhaps the most confusing aspect of natural law is the phrase itself: "natural law." For many people, the word "natural" implies human biology or the physical environment. For others, it means "instinct." Likewise, when some people hear the word "law," it implies "constraint" or obedience to legislation, regulations, and codes decreed by institutions with the authority to do so.

There is obviously some validity to using these words in such ways. Yet such uses are not a good starting point for understanding what natural law is.

The origins of the expression "natural law" are to be found in debates between the Greek philosopher Plato and those thinkers known as the Sophists. In broad terms the Sophists believed that politics was not about questions of right, wrong, justice, or injustice. They maintained that social arrangements reflected whoever was the strongest. Hence, it was "natural" for the strong to rule the weak. Such was the "law" of human "nature."

Plato disagreed with the Sophists. For him, politics and justice could not be reduced to the rule of the strong. Nevertheless, Plato recognized the rhetorical power of the term "natural." He thus decided to use it for his own purposes. In Plato's thought, "natural" became a way of saying "human," and one distinctive feature of humans is that we have *reason*. This is what makes humans different from animals. They act according to instinct alone. We do not.

What did Plato mean by "reason?" First and foremost, he meant the mind's ability to know truth, and how to choose and act rightly as individuals and communities in light of truth. Reason was thus more than our mind's ability to know how to weigh and calculate quantifiable objects, or our capacity to comprehend the workings of the material world in which we exist. Reason certainly included those capacities; it found expression in fields such as mathematics or natural sciences like physics. But reason, from Plato's standpoint,

was above all *practical* in the sense of helping us *know* ethical and philosophical truth and then how to *choose* and *act* rightly.

What is the "law" dimension of natural law? The law part concerns that which is right for human beings. Here "right" does not primarily mean "efficient" or "useful." Insofar as efficiency means the optimal use of scarce resources and avoidance of waste, or utility means the usefulness or value that consumers experience from the use of a product, natural law regards efficiency and utility as valuable and, as we will see, potential factors to consider when making moral judgments.

But when the phrase "right" is used in natural law, the focus is upon what reason identifies as good and just. Much of this was neatly explained by Thomas Aquinas. To his mind, natural law consists of the basic principles of practical reason for humans. The most fundamental of these principles is that good is to be done and evil is to be avoided. Here good means reasonable while evil means unreasonable. A second key principle of practical reasoning is that knowledge is a good to be pursued while falsehood and ignorance are to be overcome. A third principle is that you may never do evil even if you anticipate that good may come of it.

This third principle merits more explanation as it is one that many have found perplexing. Surely, the argument goes, there are instances in which one must choose means (e.g., bombing German cities in World War II) that we would not otherwise choose in order to realize a greater good (e.g., hasten the defeat of Nazi Germany).

In one sense, the idea that we may never do evil that good may come of it is a logical derivative of the first principle of doing good and avoiding evil. That means avoiding the free choice of evil in *every* aspect of any action, whether it is the *object* or goal of the act (defeating Nazi Germany), or the *means* through which that goal is achieved (the waging of war). Once your act involves a conscious choice of an evil (consciously targeting civilian populations and non-combatants while waging war), it follows that the act itself is evil, no matter how much good might be realized. In other words, there are some acts that cannot be rationally defended by reference to any end.

Right reason and truth

How then do we know these principles? Natural law holds that people possess a basic knowledge of these principles through their possession of reason

(ST I-II a.94, a.4). In this sense, the principles of natural law are "natural" to human beings (ST I-II q.94, a2) not because of human biology but because they are universally knowable by human reason (ST I-II q. 94, a.4; a.94, a.6) and universally binding because of their basis in human reason (ST I-II q. 94, a.4). Reason thus permits us to know the truth about good and evil, even though the directedness of such knowledge can be undermined or obscured by the pull of powerful emotions, and the meaning of this information for human choice and action can be hard to determine (ST I-II q.94, a.6).

What is the content of this truth about good and evil? In basic terms, it is the truth about human flourishing. Such flourishing occurs when we can freely choose particular things that are good in themselves (such as knowledge or beauty) and therefore fulfilling (ST I-II q.94, a.2) for humans *qua* humans, intelligible to human reason as reasonable for humans to pursue, and which other species (like animals and plants) cannot know and cannot therefore choose because they lack reason. Our knowledge of such goods comes about through our intrinsic orientation toward the various goods that reason bids us to pursue. These goods in turn provide reasons for humans as rational beings to make this implicit awareness explicit and propositional through reflection on human choice and action.

The study of natural law consequently involves identifying and applying the principles of rational thought to how we know and choose the good, right, and just when we make free choices. Natural law maintains that for us to be rational in the fullest sense is to choose and act in accordance with what our reason tells us is the truth about the right course of action. Aquinas defined truth as *adaequatio intellectus et rei* [conformity between the intellect and reality] (ST I, q.21, a.2c). What Aquinas meant by "reality" is the truth about something as it is in itself: that, for instance, the content of the most basic principle of justice *is* to give others what they are owed, and not something else; or that the content of the virtue of courage *is not* the same as being reckless or being a coward.

The ethics of human action

Natural law is thus neither social science nor political theory. Instead, natural law is primarily ethics insofar as it is concerned with practical reasoning about how individuals and communities do good and avoid evil when making choices and acting. Aquinas put it this way:

> Good is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle in the practical reason is one founded on the notion of good (ST I-II, q.94, a.2).

To understand what Aquinas is driving at, we need to ask ourselves: how do we identify a good reason for action; that is, something that requires no other reference to another purpose because our reason tells us that something is *self-evidently* good for human beings?

Let's take the case of someone who exercises to reduce excessive weight. Losing excessive weight is a good reason to act. But it is only *intelligibly* good because it contributes to being healthy and staying alive. The free choice to exercise presupposes that human life is a fundamental good to be promoted and protected. Life is therefore an ultimate reason to act.

Another example of a self-evident good—a reason for action that needs no further explanation—might be "religion." Imagine someone leaving his house on a Saturday. Why, we ask, is he doing so? If the answer is "he is going to synagogue," we may inquire, "why is he attending synagogue?" If the response is "because he is a religious Jew," we may further inquire, "why does he choose to practice his Judaism?"

At this point, we could mention factors like upbringing, a desire to see friends, express his identity, etc. But one answer to the question of why the man chooses to go to synagogue that requires no further explanation is that Judaism is his *religion*.

At some point in their life, most people ask themselves, with varying degrees of intensity and seriousness, 1) whether there is a God (or gods); 2) whether it is *reasonable* to believe in his (or their) existence; 3) which religion's account of God is more compelling than others; and 4) what our conclusions about these questions mean for the way that we live our lives. People want to *know* the true answers to these questions. That includes those who conclude that, upon asking such questions, there is no God.

Thus, to continue with our example, the man's choice to go to synagogue ultimately results from his choice to reflect reasonably upon the truth of whether or not there is an ultimate transcendent source that stands at the beginning of time and who set the universe in motion. Having concluded

that 1) there is such a being; 2) that this being (God) has communicated to humans who he is through special revelation to a particular people at a particular time as well as through the natural reason that he has inscribed into the human mind; 3) that part of this communication by the same God allows people to know what he wants them to do and what he does not want them to do; and 4) that Judaism provides the most compelling account of all the possible explanations for such things, the man's choice to go to synagogue reflects his subsequent decision to order his choices and actions on the basis of these conclusions of his inquiry into the question of religion. Religion is thus a self-evident good.

Other self-evident goods identified by Aquinas included life, procreation, knowledge, sociability, and reasonable conduct (ST I-II q.94, a.2; q.94, a.3). Contemporary natural law thinkers have further fleshed these out as the following goods: life (and component aspects of the good of life like health), friendship, knowledge of truth, aesthetic experience, skillful performance in work or play, and practical reasonableness itself. The last of these is the shaping of our participation in all the other self-evident goods in light of our particular commitments and our choice to pursue specific projects (Finnis, 1980: 81-97).

When we act in ways that allow us to participate in one or more of these goods, we fulfill ourselves in the way that humans should. Conversely, when we act in ways that contradict such goods (such as intentionally working in a less-than-skillful way, lying, killing, etc.), we damage ourselves. Indeed, identifying certain reasons for action as always good also allows us to identify certain actions that can never contribute to human fulfillment.

If, for example, knowledge of truth is good in itself, we also understand that error and ignorance are evils that no person can reasonably wish for themselves or others. This does not mean that we are obliged to know everything about every possible subject. All of us have to choose what subjects we are going to invest our time and energy in ascertaining the truth about. Such choices are driven in part by our particular aptitudes and our specific obligations. An unintended albeit foreseeable side-effect of this is that we will remain ignorant of many topics. That, however, is very different from saying that I consciously choose error over truth, or ignorance over knowledge.

Natural law does not hold that we must try and participate in all of these goods in all of our freely chosen actions. This is impossible. We cannot

simultaneously study (the good of knowledge) while running a marathon (the good of skillful performance). Our choice of one good over another inevitably means that we do not participate in other goods through that particular choice. This is an unintended side-effect that we foresee will result from our action but we do not choose it.

Reason and free choice

Plainly, natural law places great emphasis on the fact that all human beings act. Reflection on human actions, it holds, leads us to recognize that they are more than simply the result of human biology or instinct. Certainly, there are acts, like the working of our internal organs, which reflect our biology. But what makes human actions different from those of other creatures are two elements which, taken together, make such actions *free*.

As noted, one such element is our possession of reason. An element of rational logic is required if people are to act freely in a deliberative manner. This point becomes clearer if we consider an insane person's actions. Though her actions are not coerced, we do not consider her actions to be freely chosen precisely because the person's rationality is impaired. For centuries, legal systems have permitted defendants to enter the plea of "not guilty by reason of insanity." People may thus claim that they were not responsible for their actions because their will was not shaped by reason. It follows that unless reason guides the will, there is no free choice; and without free choice, we cannot be regarded as responsible for our actions.

By itself, however, reason is insufficient to make human acts free. Many machines made by humans (like computers) have a type of intelligence built into them. Yet few would claim that a computer is free. For machines do not possess another specifically human characteristic of human action: i.e., free choice.

Unless one accepts that humans can make choices, it is impossible to understand distinctly *human* action. While an animal can be taught to behave in certain ways, humans' capacity for choice allows us to settle upon and implement a course of action, and then choose a different form of action: to drink a glass of whisky now, and then go surfing afterwards. A human act thus amounts to what is chosen.

This, however, does not settle an important question. Can humans make truly *free* choices? Many say no. Some regard choices as resulting from

a combination of a person's environment, emotions, genetics, and brainwaves. From this standpoint, people may have the sense that they are freely making choices but, in reality, free choice is an illusion.

Natural law contests this position. Aquinas argues that practical reason allows us to identify reasons for action. Reason allows us, for example, to resolve medical problems. Reason also tells us, however, that we should try and solve medical questions. Why? Because the preservation and promotion of life and health are *good* reasons for us to act—they require no further explanation—and, in that sense, are self-evident.

This idea is at the root of the vision of free choice outlined by Aquinas: that is, of human intelligence in action. This is a person's will working as an intelligent response to what someone comprehends as an opportunity to act. "For one's will is in one's intelligence," Aquinas wrote, and "the source of this sort of appetite is understanding, i.e., the intellectual act that is somehow moved by something intelligible" (Aquinas, 1270–1272*, Sententia super Metaphysican*, XII, 7, in Busa, 1996). The ultimate source of human actions—their motivation—are thus *reasons*; that is, something intelligible.

People make free choices when—having judged that they have a reason or reasons to agree to one possible act, and a reason or reasons to adopt alternative but opposing options for action—they choose one option instead of the others. Once a person formally chooses a possibility, it becomes a plan for action. Putting this into effect is what Aquinas calls "command" [*imperium*] (ST I-II, q.17, a.1).

Natural law thus sees free choice as (1) the contemplation of possibilities that provide reasons for action, followed by (2) the active determination of the value of the object of a possible act, and then (3) the active willing of that act (Finnis, 1998: 71). This view of free choice and reason suggests that humans can make free choices to the extent that we understand and act upon reasons that are not reducible to the emotions, the influence of our environment, etc.

It is not that natural law views something like emotions as unimportant. The felt strength of an emotion can be a sign of one's commitment to good reasons to act. Aquinas observed that sometimes "good desires work against a perverse reason" (ST II-II, q.155, a.1. ad.2). In some cases, emotions may even reflect our inner awareness of the wrongness of rationalizing a bad choice. Nevertheless, natural law maintains that feelings must be subordinated to reason when it comes to making a free choice. While we can describe the

experience of moral good and evil, experience itself cannot define, intellectually speaking, why one action is good and another is wrong. Only reason can identify what is desirable in the sense of what is good. Only by allowing our rational will to direct our lives, can we become free agents of our decisions rather than slaves of our passions.

Freedom, morality, and virtue

There is another way in which natural law attaches deep significance to free choice. This concerns the effects of our actions.

Much of the time we think about our actions in terms of the effects that they may have upon others or the material world. But natural law stresses that our choices also have an effect on our own character. This difference may be described in terms of what are called the "transitive" and "intransitive" dimensions of human acts. Aquinas explains this in the following way:

> Action is of two sorts: one sort—action [*actio*] in a strict sense—issues from the agent into something external to change it... the other sort—properly called activity [*operatio*]—does not issue into something external but remains within the agent itself perfecting it (Aquinas, 1256-1259/1952: q.8, a.6c).

The transitive effect of an act is what occurs outside us as a result of the action. When I work, for instance, I shape other people and things. But the intransitive effect of the same act leaves a mark on me as a person. My very same act of work, for example, shapes me internally in terms of reinforcing certain good habits (virtues) or certain bad habits (vices), depending on the act. While the intransitive effects of my work may not be at the forefront of my mind when I choose to work one way rather than another, it is an unavoidable effect of any freely chosen act. This free choice lasts within people until they decide to act in a way incompatible with that choice.

This is how people develop habits of action. The more we choose to steal, for example, the more accustomed we become to stealing. To break this bad habit, we need to repudiate our past choices to steal and start performing actions incompatible with stealing. One person may thus choose through her actions to renounce a past life of crime, while another weakens her virtuous habits by suddenly starting to make unreasonable choices.

For Aquinas, the more virtuous we are, the more likely it is that we will act well and the easier it becomes to choose the good freely. Pursuing the good and avoiding evil, he insists, won't happen simply through studying philosophy. We will always need to cultivate the virtues if we are to act well (Aquinas, 1271–1272/1993: II, 2, 259), especially what are called the cardinal virtues of prudence, justice, courage, and temperance.

And by prudence, Aquinas doesn't mean shrewdness, being worldly-wise, cautious, or pragmatic. Rather, he means the type of practical wisdom that involves understanding and applying the principles of natural law in an integrated way, with discernment, and in accordance with one's effort to live all the other virtues. This means, among other things, that the prudent person will exclude from her reflection and deliberation any choice that involves choosing to violate directly any of the moral goods: that is, to do evil.

Moral absolutes

This raises the question of how natural law understands the nature of evil acts. Human actions, from the standpoint of natural law, can go wrong in several ways. An act might be wrong, for example, simply because it involves directing oneself against a good like truth, for instance, by lying (ST II-II q.110, a.3).

There is, however, another dimension to natural law theory that shapes its understanding of free choice, morality, and virtue. This is its insistence that there are certain choices which may *never* be made; that is, certain actions that are never acceptable, regardless of the circumstances or the nobility of the intention, because such actions are always seriously wrong by reason of their object: that is, what we are choosing to do.

An example of what natural law scholars call an exceptionless norm is the direct killing of an innocent person: in other words, directly choosing to violate the fundamental good of life. Even if an act of directly killing an innocent person might save an entire city from destruction, such an act remains intrinsically wrong by reason of its object. It is always irreconcilable with the choice of the good. There is never a good reason to make murder the deliberate object of our act. It follows that, in accordance with the principle that good is to be done and evil avoided, such an act can never be freely chosen. There are no exceptions.

To this extent, natural law is grounded on a commitment to moral absolutes. Examples of other acts that would meet the same criteria are lying

(which violates the good of truth) and theft (which violates the good of property). Aquinas puts it this way: "Let us say that someone robs in order to feed the poor: in this case, even though the intention is good, the uprightness of the will is lacking. Consequently, no evil done with a good intention can be excused" (Aquinas, 1273/1954: 250). For what is being willed *is* theft, and all theft is always wrong.

This is not to say that natural law denies certain relativities in morality. One such relativity is that many moral principles apply variously. Take, for example, the obligation to honour our parents. The requirements of living out this affirmative norm rightly vary with persons and circumstances. Some of the ways in which an eleven-year-old child honours his living parents can't help but be different to the way in which the same person as an adult honours his aging or deceased parents. Note, however, that acknowledging this variability involves no denial of the principle that certain acts may never be freely chosen.

Natural law also affirms a wide pluralism about what we may rightly choose. While natural law theory posits certain acts as never worthy of humans, it also insists that there is significant room for judgment concerning the reasonable and good options that people can choose. Some of these judgments may be incompatible with each other even though they are derived from the same principles.

From a natural law standpoint, for example, there is no single absolutely right answer to the question of what percentage of a given country's GDP should be directly controlled by the state. Natural law thinkers acknowledge that answering such a question depends upon theoretical and empirical information about which people equally well informed by practical reason can and do form different, even incompatible views.

By contrast, if we try to relativize those negative norms of natural law which forbid absolutely, natural law insists that the door opens quickly to barbarism. Suddenly it becomes conceivable that the choice to carpet-bomb cities full of non-combatants might be acceptable if it's deemed likely to undermine the enemy's will to fight. Maybe it's licit to steal from your employer "just this once" to pay your rent next month. In the absence of exceptionless absolutes, you are at least in principle open to choosing evil in order to realize good, which means in effect that you *are* willing to freely choose to do evil.

This commitment to moral absolutes in the form of exceptionless norms puts natural law directly at odds with those forms of ethics that either 1) seek to determine the right course of action based on a weighing of all knowable (and unknowable) good and evil effects of an action; or 2) try to establish criteria by which we can judge the rightness of a given way of acting based on a calculation of foreseeable consequences deriving from a given choice.

Jeremy Bentham, for example, argued that moral decision-making involves people weighing all the possible pleasures and pains proceeding from a variety of possible actions, and assessing which act is likely to maximize the most pleasure. But Bentham offers no *morally* objective criteria to establish what is greater pleasure or lesser pain. This means that, in the process of weighing, it is very difficult to stop people from quickly drifting in the direction of choosing whatever it is they happen to want based upon their feelings and passions rather than according to reason (Finnis, 1991: 18).

Those ethicists who adhere to what is called "consequentialism" take a somewhat different approach. Recognizing the problems associated with the type of calculus proposed by Bentham, they seek to establish criteria according to which we can decide what to do (especially in what are called hard cases) on the basis of a rational assessment of 1) all the consequences that flow from an act and 2) all the intrinsic goods that are part of that act. The act that is to be chosen is one in which all the possible good consequences and intrinsic goods realized outweigh all the possible bad consequences and intrinsic goods realized.

Natural law thinkers point out that it is impossible for anyone to know all the possible consequences of their actions (indeed, economists remind us that our choices also have many unknown consequences). Moreover, how do we weigh the significance of one consequence against, say, two other consequences? Consequentialism, natural law ethics holds, subsequently ends up arbitrarily assigning some amount of value to a particular consequence, and another amount of value to other consequences. Consequentialism thus leads to haphazard, arbitrary, and thus unreasonable decision-making in the realm of morality.

The same methodological problem arises with comparing and weighing all the different intrinsic goods potentially realized by two different actions. By what criteria do we establish that one realization of the good of truth outweighs two realizations of the good of work? In this regard, consequentialism

runs afoul of what is called the problem of incommensurability: trying to weigh and compare what cannot be weighed and compared.

Natural law is not indifferent to the importance of consequences. It does not tell us to ignore the known, albeit unintended consequences of our actions. It recognizes that our free choices can have many effects, many of which are knowable but unintended, and in that sense, side-effects of our choices. There are also instances in which people can reasonably measure the foreseeable consequences and efficiency of alternative choices. One such context is a market for those goods and services in which a common denominator (i.e., money) allows appraisals of costs and benefits. All that natural law reasoning is stating is that we cannot make an assessment of consequences the *ultimate* reference point for decision-making, let alone appeal to consequences in order to justify intrinsically wrong acts like murder or theft.

But what about liberty?

Natural law's understanding of reason, human action, and human choice is certainly controversial. Some have questioned whether, for example, knowledge, life, or practical reasonableness are universally recognized across cultures as essential human goods.

To this claim, many natural law theorists respond by noting that there are few, if any societies that have regarded it as reasonable and good to desire ignorance for its own sake or that consider it legitimate to murder people. Though there will be arguments about whether a particular act constitutes an act of murder, few will affirm murder *per se* is good.

Other questions about the applicability of natural law arise from the fact of human sociability. We need others in order to survive and flourish ourselves. This has implications for our choices. And such choices—whether they are coordinated through the medium of a contract or via a treaty between two countries—must, from a natural law standpoint, be as reasonable and just as all our other choices.

Natural law is cognizant that our opportunities to choose the good and live virtuously can be bolstered or limited by the conditions surrounding us. Even if we lived in a society in which everyone only made free choices for the good, many of those choices would still be incompatible with each other. Decisions need to be made about how to resolve such conflicts in reasonable and just ways. The reality that everyone sometimes makes unreasonable

choices only further complicates matters. All these factors necessitate institutions, laws, and protocols that enable societies to make decisions about how to coordinate people's free choices in ways that meet the requirements of reason and justice.

Herein lies two of the reasons why natural law is so important for liberty and free societies more generally. Put simply, natural law underscores that we *cannot* flourish if we cannot make free choices, for it is in the very process of making free choices that we can become virtuous and actualize the goods that make us distinctly human. As we will see, natural law does not maintain that government and law must be neutral vis-à-vis questions of morality and virtue, particularly insofar as our actions effect other people and touch on the requirements of justice. Nevertheless, much of natural law's reflections on politics, law, and economics are underpinned by the conviction that any political, legal, and economic coordination of people's choices must give as many people as possible the space they need to make free choices.

That in turn points to the second and complementary reason why natural law matters for freedom. It provides us with principles around which to develop a political and legal framework that helps to prevent the state from exercising excessive control over its citizenry. Sometimes such expansions of government power are undertaken in the name of seeking to realize good ends, such as wanting people to be virtuous and less susceptible to vice. On other occasions, it is done with the explicit objective of unjustly circumscribing freedom, often in radical ways that involve grave violations of justice in order to establish a tyranny intent on pursuing particular goals and which views any emphasis on liberty as undermining the realization of such ends.

But whether the ends are good or bad, preventing illegitimate expansions of state power so as to enhance the possibilities for people to freely choose to pursue the good is a major focus of natural law thought. As successive chapters illustrate, this has major implications for how natural law understands the role of law and government, the nature of property and the functioning of the economy, and the role of international law and the character of trade between nations. Before we turn to those, however, we need to grasp the way in which natural law understands two things that have been crucial for the development of free societies: the nature of rights and the character of justice.

Chapter 2

Rights and Justice

The legal obligation to respect rights has been formally recognized by most countries since the 1948 United Nations Declaration of Human Rights. Yet as one of the members of the Declaration's drafting committee stated at the time, "We are unanimous about these rights on condition that no one asks why" (Thils, 1981: 51). The participants, it appears, decided that agreement on a common philosophical foundation for rights was unlikely to be achieved.

Rights are usually presented as a product of a modern post-Enlightenment world and associated with figures like John Locke and events such as the American and French Revolutions. There is, however, a strong case to suggest that the first substantive conceptions of rights were developed by medieval natural law thinkers whose ideas on this subject were clarified and developed further by their modern counterparts, some of whom were reacting to expansionist tendencies on the state's part.

From "*ius*" to rights

One concept that proved critical to the natural law treatment of rights was that of *ius*. Although the word *ius* first acquired momentum in Roman law, there are many debates about its precise meaning in the Roman texts. It is with Aquinas and later scholastics, most notably the Spanish Jesuit Francisco Suárez, that *ius* began taking on the character of what would be understood as "rights" today.

In Aquinas's treatment of justice, *ius* means "the just thing in itself" (ST II-II, q.57, a.2). The context of this statement establishes that by "thing" Aquinas means acts, objects, and states of affairs which are the subject matter of relationships of justice between people (ST II-II, q.57, a1.c, ad 1 and ad 2).

More than three centuries later, Suárez approached the topic in a slightly different way. In his *De Legibus*, he extended Aquinas's concept of

ius to embrace persons themselves. According to Suárez, "the true, strict and proper meaning" of *ius* is "a kind of moral power which every man has, either over his own property or with respect to what is due to him" (Suárez, 1612/2012a: I, ii, 5). *Ius*, then, is something that a person is owed either as a liberty or an entitlement of justice.

It's important to recognize here that Suárez was working out these ideas in the context of his critique of what was called the Divine Right of Kings. This theological and political theory held that monarchs were not subject to the will of the political community, regardless of whether that will was expressed directly by all members of a community or indirectly through a parliament or assembly. Instead, monarchs were only answerable to God.

Suárez contested this position. He argued that the state arose from a type of pact on the part of its members to assist each other by guaranteeing certain freedoms and ways of realizing justice and who, on this basis, freely consent to subordinating themselves to a political authority. Consequently, Suárez's concept of rights serves to ensure that sight is not lost of particular freedoms and protections that are owed, as a matter of *right*, to individuals in a political community (Suárez, 1612/2012a: V, 7, 3).

This stress upon rights as something pertaining to individual persons was further underlined by Suárez's Protestant contemporary, Hugo Grotius. Grotius identified the deepest meaning of *ius* as being "a moral quality of a person, making it possible to have or to do something correctly" (1625/2005: I.1.4). In Grotius's view, *ius* is a power possessed by people that enables them to make particular choices about their lives, use of their liberty, their property, and their reputation without facing undue interference or sanctions from the state. Grotius claimed, for instance, that people enjoy the right to self-preservation. This means that they have the power to pursue goals and interests that help them preserve their life and goods in ways compatible with everyone else's right to do so—and they do not require the state's permission to do so.

Grotius (and Pufendorf) break down these rights into two further categories (Grotius 1625/2005: II.25.3.3). What they called "perfect rights" are rights that are strictly enforceable in courts. Perfect rights allow us to make a direct claim on someone else: that, for instance, someone may not take my life. "Imperfect rights" are not enforceable in courts. They allow us to give or be given something lawfully, such as property, but we cannot enforce such a claim on others via the legal system. Someone in need, for example, may have

an imperfect right to my charity. The beggar cannot, however, enforce such a right under the law. Conversely, when I enter into a contract with someone, she has a perfect right claim on whatever I have promised to give her in that contract.

Rights versus unjust coercion

Moving forward a few centuries, we see natural law theorists ceasing to use the imperfect/perfect distinction but nonetheless continuing to attach the idea of rights to notions of liberty from unwarranted external coercion. A particular emphasis was also placed on the idea that the state does not create rights.

In the atmosphere of legal positivism that shaped much early- to mid-twentieth century legal discourse, it became easy for rights to become understood as whatever the state said that they were. And if rights are understood primarily in terms of whatever has been authorized by the political community, their coherence and stability becomes questionable. For if you believe that rights have no stronger foundation than the state's exercise of its sovereign powers, they may be diminished or even abolished by the state. In such circumstances, rights would simply be identified—or abolished—according to whatever a particular majority in a particular country at a particular time preferred those rights to be.

Twentieth century natural law thinkers consequently underscored the necessity of grounding rights on a moral foundation that was not subject to revision or amendment by the state. Jacques Maritain, for instance, insisted that rights were inviolable insofar as they protected the capacity of individuals to make choices freely in order to realize particular moral goods and virtues that are central to human flourishing (Maritain, 1943). Taking natural rights seriously, for Maritain, thus meant taking natural law seriously.

Let us use the example of religious liberty to show how a right is derived from the good. Why, it might be asked, do have people have a right to religious liberty? Some might say that religious belief is a purely subjective matter; hence, religion belongs to that sphere of personal autonomy with which the state may not interfere. A pragmatist might claim that we must accord people the right of religious liberty because it helps to maintain social order.

The natural law case for religious liberty is different to these positions. It holds that the right to religious liberty is grounded upon the good of religion, understood as the truth about the transcendent and ultimate meaning

of the universe and what that means for how we live our lives. Whether we are a theist, agnostic, or atheist, we can agree that religion is a basic reason for action, inasmuch as we all have reason, without appeal to ulterior motives, to ascertain the truth about ultimate or transcendent realities and order our lives to accord with that reality.

No further explanation is necessary for the right of religious liberty: it gives direct effect to this *good* of religion as truth-seeking about the transcendent. Searching for the truth about the transcendent presumes the freedom to do so. You cannot pursue knowledge of the transcendent without the constant interior decision to do so. To force someone to be religious or an atheist, or to force someone to be Buddhist rather than Jewish, is to eliminate the element of the interior choice for the good of religious truth by overwhelming it with the inner deliberation to avoid being harmed (George, 1999: 125-138).

Acknowledgment of this right inevitably raises the issue of political structures. By saying that individuals have a natural right to religious freedom—and, by extension, a right to be part of communities based on pursuing religious truth—natural law implicitly condemns any political system which denies that liberty as a matter of policy. In that sense, the natural law account of rights reveals important truths about the structure of rightly ordered political arrangements. The state that recognizes religious liberty in the sense outlined above is by definition a *limited* state, and acknowledges its fundamental incompetence in important spheres of private life and civil society.

The legal and political questions do not stop here. How, for example, do we resolve the inevitable conflicts between people's legitimate exercise of this right and other rights? Natural law theorists have addressed many of these questions in their treatment of justice.

Justice, virtue, and the common good

A distinctive feature of natural law ethics is that it identifies justice as a virtue: that is, the habit of giving others what they are due. This is to be found in Aristotle's treatment of justice which he commences by describing the notion of general justice. By this, Aristotle meant comprehensive virtue with regard to relationships with other persons (Aristotle undated/1980: V.1.1129b12–14). Justice-as-a-virtue was subsequently understood in the natural law tradition as having a uniquely social dimension in the sense that one of its defining elements is *other-directedness*.

As a virtue, general justice properly understood involves one's general willingness to promote what is called the "common good" of the communities to which one belongs. In natural law theory, common good is not a synonym for common ownership, let alone collectivism. As far as the political realm is concerned, the common good consists of those conditions that help promote the flourishing of individuals and groups within a given political community.

Some of these conditions can be found in the rights affirmed by natural law. Without some protection of rights like religious liberty or economic freedom, the scope for actively pursuing goods like truth or skillful performance is radically diminished. Other conditions of the common good have an institutional form. One example is the rule of law. Though it's not impossible for people to do good and avoid evil in the absence of the rule of law, it is much harder without it.

Another element of justice that presents itself very early in the natural law tradition is that of *duty* in the sense of what we owe to others. This is closely associated with a third element: *equality*. This should not be understood in the sense of equal outcomes or equal starting points in life. Instead equality means *fairness* as expressed in the Golden Rule: doing unto others as you would want them to do to you. And what one should want others to do unto you is what is reasonable and just—the objective measure that requires rational impartiality between persons.

These three elements—other-directedness, duty, and the Golden Rule—are linked and overlap with each other. But attention to all three elements underscores that the same common good that is the end of general justice requires more than simply a broad inclination on the part of individuals and groups to promote the flourishing (in the sense of growing in virtue and participating in goods like life, work, health, truth, beauty etc.) of others and themselves. On one level, Aquinas specifies, it is a particular concern of the rulers since they have a certain responsibility to promote the common good (Aquinas, 1265-1273/1975: III, c.80, nn.14, 15) of the political community. But Aquinas also notes that it is a concern of every citizen. Working out how this common good is realized is how natural law theorists identify the different types of justice that apply to different relationships in which people engage different types of rights.

Distributive, commutative, and legal justice

The first of these forms of justice is *distributive justice*. It embraces the relationship between individuals and communities when it comes to the distribution of common resources in a just manner, according to criteria such as merit, function, and need. In the case of distributive justice, there has been considerable attention paid to its meaning for property arrangements.

The second type of justice is *commutative justice*. This concerns relations between individuals and groups engaged in particular exchanges. Commutative justice has been understood as principally applicable to questions such as contract and the adjudication of disputes arising within such relationships.

The question of the stability of the meaning of commutative justice and distributive justice vis-à-vis each other has always been the cause of much discussion within the natural law tradition. Consideration of what commutative justice demands in seeking to determine what two people owe each other in a set of mutually agreed-upon arrangements often involves, for instance, reflection upon the criteria associated with distributive justice.

We see such overlaps at work in bankruptcy law (Finnis, 1980: 188-192. When a business fails, courts charged with determining what individuals and groups owe each other on the basis of pre-existing agreed-upon contracts (the realm of commutative justice) invariably end up employing criteria such as merit, need, and function (the realm of distributive justice) to decide who gets what from whatever is left of a set of common resources upon which there are competing claims.

In Aquinas's thought, all these modes of justice flow from general justice insofar as they are all ultimately derived from everyone's responsibility to the common good. For some time after Aquinas, however, the natural law tradition lost sight of this point. This is apparent in the attempt by early modern natural law thinkers like Thomas Cajetan (1469-1534) to clarify the relationship between general, commutative, and distributive justice. Cajetan specified that:

> There are three species of justice, as there are three types of relationship between any "whole:" the relations of the parts among themselves, the relation of the whole to the parts, and the relations of the part to the whole. And likewise there are three justices:

> legal, distributive and commutative. For legal justice orientates the parts to the whole, distributive the whole to the parts while commutative orients the parts one to another. (Cajetan, 1518: II-II, q.61, a.1, cited in Finnis, 1980: 1985)

Notice how Cajetan essentially places general, distributive, and commutative justice on the same level. Unlike Aquinas, he does not posit general justice as the foundation of the other modes of justice. The effect of this was to gradually separate commutative and distributive justice from the demands of general justice, thereby narrowing the scope of commutative and distributive justice. Commutative justice came to be seen as strictly limited to dealings between two or more private parties and not derived from the concern for the common good to which general justice points. Likewise, distributive justice became focused strictly upon the relationship primarily between the individual and the state when it came to the allocation of material resources, rather than the multiple relationships that exist between individuals, numerous non-state communities, and political and legal institutions.

And social justice?

It is in this context that the idea of social justice developed within the natural law tradition from the mid-nineteenth century onwards as a way of trying to address these problems. As demonstrated by Paul Dominique Dognin (1961), Catholic natural law thinkers deployed the term social justice to restore general justice to its central place in the natural law tradition's treatment of justice. This was given direct expression by Pope Pius XI in his 1937 encyclical condemning Communism, *Divini Redemptoris*:

> Now it is of the very essence of social justice to demand for each individual all that is necessary for the common good. But just as in the living organism it is impossible to provide for the good of the whole unless each single part and each individual member is given what it needs for the exercise of its proper functions, so it is impossible to care for the social organism and the good of society as a unit unless each single part and each individual member—that is to say, each individual man in the dignity of his

> human personality—is supplied with all that is necessary for the exercise of his social functions (Pius XI, 1937: 55).

The context of these remarks is a discussion of the relationship between employers and employees. But the broader point being made here is that everyone must go beyond excessively narrow conceptions of commutative justice when thinking about what justice requires. Instead, they must take into account conditions outside this particular relationship which affect the wider community. The reference to the common good serves to specify this as the goal of social justice, thereby reestablishing general justice as foundational to natural law reasoning about these matters.

Within the natural law tradition, social justice is thus the *habit* or *disposition* to be committed to promoting the conditions that promote the well-being of others. This takes us full-circle back to the idea of justice as a *virtue*. And virtues, as previously noted, are only realized when a person *freely* commits himself to choosing the good. It follows that a pre-condition for realizing social justice is a high degree of free self-determination. To realize social justice in this sense means that, at some level, I must decide *freely* to commit myself to the well-being of others and to the common good—and I must do so continuously.

This leaves us, however, with an important question. How does natural law conceive of the state's role in promoting the common good? Does concern for the common good give government officials a license to do more or less whatever they deem necessary to ensure that the conditions that facilitate human choices for fundamental goods prevail. As we will see in the next chapter, the natural law answer to that question is a firm "no."

Chapter 3

Limited Government and Rule of Law

Any discussion of the nature and ends of liberty and justice inevitably touches upon the role of government and law in society. A good place to begin reflecting upon natural law's approach to these questions is Aquinas's understanding of law.

In his *Summa Theologiae*, Aquinas defined law "an ordinance of reason for the common good, made by him who has care of the community, and promulgated" (ST I-II, q.90, a.4). "Law" in this statement means laws formally made by the legitimate political authority. "Reason" means natural law, which signals the law itself must be reasonable rather than driven by whatever the authorities just happen to want. "Him" means the political authority: i.e., government and legal officials such as legislators, judges, and government ministers. Finally, the "common good" means the conditions that assist individuals and groups in a given political community to make free choices for the goods that promote human flourishing.

This last point is especially important because the common good of a given political community is not a license for the state to do whatever it wants. What is called the "political common good" puts firm limits what the state can do vis-à-vis individuals and non-state communities ranging from the family to businesses.

The political common good

Natural law understands the political common good as consisting of all those conditions in a given political community (like the Commonwealth of Australia, the State of Michigan, or the City of Montreal) that tend to favour,

facilitate, and foster the coherent participation of each individual in goods like truth, work, and beauty, which are self-evidently good for all humans.

Note that a particular characteristic of the political community's common good is that it is not the all-inclusive end for its members. Rather it is instrumental insofar as it is directed to *assisting* the flourishing of persons by fostering the conditions that facilitate—as opposed to try and directly realize—the free choice of its members to flourish.

The ways in which the legitimate authorities of a political community serve this end might include, among others, interacting with other legitimate political authorities, protecting the members of the political community from hostile outsiders, vindicating justice by punishing wrongdoers, and defining and adjudicating the responsibilities associated with particular relationships, such as contractual duties. It is harder, for example, to choose to pursue the good of knowledge in a situation of civil disorder. Likewise, we know that the incentives for us to work are radically diminished if there is no guarantee that our earnings will not be arbitrarily confiscated by others or the state.

It's important, however, to remember that all this is about assisting people to flourish, and that helping individuals and associations in a given political community means precisely that: *helping*. The state does not assist individuals and communities by dulling, usurping, or annulling their ability and personal responsibility to make the free choices that actualize human flourishing. In short, the activities and powers of the political authorities are themselves limited by the rationale for a political community. This means that the goal of the political common good is *not* the all-round moral fulfillment of every member of that community. The political common good thus limits what state officials may do in a given political community. That includes the realm of what is called public morality.

Natural law, the state, and morality

Natural law's approach to the topic of the state's role concerning public morality is grounded on three pivotal points.

First, natural law holds that all human-made law (positive law) has a moral dimension. Even something as mundane as traffic regulations is understood as possessing an underlying moral logic. Traffic laws rightly regulate the free choices of millions of people to drive, because without such laws goods

such as human life and health are put at unreasonable risk. When we obey traffic regulations, we implicitly embrace that moral rationale.

Second, natural law underscores that the moral principles and norms of justice that apply to all forms of human action apply as much to state actors as they do to individuals and communities. In Chapter 1, we observed that natural law emphasizes that there are exceptionless moral norms that identify certain choices as always and in every case evil, and hence never to be chosen by individuals or communities. Those who write legislation, apply policy, or interpret law are *not* exempt from adherence to these norms. Thus the state cannot engage in activities such as stealing people's property, violating their bodily integrity by torturing them, forcing them to lie, etc.

Third, natural law does not hold that all moral evil can or should be prohibited by the state. The free choice to lie, for example, is always wrong because such acts always damage the good of truth. Yet we don't legally prohibit and punish all acts of lying. An act of lying damages the liar himself and many types of communities (friendships, families, etc.). Not all lies, however, directly undermine the *political* common good. Hence, we generally restrict legal prohibition and punishment of lying to areas such as court proceedings or devices like contracts. By contrast, all acts of murder are not only wrong in themselves; they also severely damage the political common good insofar as failure to deter and penalize murderers severely undermines the ability of individuals and communities to pursue the good. The law consequently prohibits and punishes acts of murder.

Some of these distinctions were worked out at length by Aquinas. Consider, for example, the *Summa*'s description of the proper goal of law: "For the end of human law is the temporal tranquility of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state" (ST I-II, q.98 a.1c).

The words "external actions" and "peaceful condition of the state" tell us that positive law is concerned primarily with the demands of justice and peace. Aquinas spells out the fuller significance of this when he explains:

> Because human law is ordained for the civil community, implying mutual duties of man and his fellows: and men are ordained to one another by outward acts, whereby men live in communion with one another. This life in common of man with man pertains

> to justice, whose proper function consists in directing the human community. Wherefore human law makes precepts only about acts of justice …. (ST I-II q.100 a.2c)

Then, as if to make sure his readers get the point, Aquinas states: "and if it commands acts of other virtues, this is only in so far as they assume the nature of justice" (ST I-II q.100 a.2c).

Underlying this claim is Aquinas' argument that not all acts of virtue have the political common good as their object. The object of many acts of virtue is the *private* good of individuals, families, and other communities. Such acts fall outside the immediate scope of the political common good for which the rulers are responsible.

This becomes clearer when Aquinas answers the question, "Whether human law prescribes acts of all the virtues?" His response is as follows:

> The species of virtues are distinguished by their objects… Now all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude: Thus, matters of fortitude may be achieved either for the safety of the state, or for upholding the rights of a friend, and in like manner with the other virtues. But law… is ordained to the common good. Wherefore there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those 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 (ST I-II, q.96 a.3c).

To be sure, Aquinas does not regard justice and peace as having minimalist content. But to Aquinas' mind, the law's proper concern for justice and tranquility does not authorize the state to promote all acts of virtue. Natural law's conception of the political common good thus puts *principled* constraints on using positive law to shape the free choices and actions of individuals and groups living within a given political community.

Subsidiarity and the state

This does not exhaust the ways in which natural law restricts the scope of state power. Not only does the political common good limit what the state may do vis-à-vis individuals; it also constrains what the state may do concerning the freedom of the communities over which it exercises authority.

One way of understanding this is through the natural law concept of *subsidiarity*. The word itself is derived from the Latin *subsidium*, meaning "to assist." This idea was partially formulated by Aquinas when he commented, "it is contrary to the proper character of the state's government to impede people from acting according to their responsibilities—except in emergencies" (Aquinas, 1265-1273/1975: III c.71, n.4). An example of such an emergency might be when the government requires my business to provide certain goods to the military in time of war, even if doing so makes me unable to fulfil my contractual obligations to supply the same goods to private actors. In this case, the state's responsibility to protect the country from external aggressors rightly overrides my personal obligations.

The principle of subsidiarity thus reminds us that there are numerous free associations and communities which precede the state and establish many of the conditions that assist people to achieve perfection. They thus have a primary responsibility to give others what they are objectively owed in justice. The way this works in practice was outlined by John Paul II in his 1991 encyclical *Centesimus Annus*. It states:

> a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good (John Paul II, 1991: 48).

The same encyclical further clarifies that

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

> the detriment of both economic and civil freedom. (John Paul II, 1991: 48)

The interventions of higher communities, such as the state, in the activities of lower bodies should therefore be made with reference to the political common good: i.e., the conditions that enable all persons to make the free choices through which they fulfill themselves. Subsidiarity thus combines axioms *of non-interference* and *assistance*. It follows that when a case of assistance and co-ordination through law or the government proves necessary, as much respect as possible should be accorded to the rightful liberties of the assisted person or community.

The primary significance of this principle thus lies in the fact that such liberties are essential if people are to choose freely moral goods and virtues: i.e., through acting and doing things for ourselves—as the fruit of our own reflection, choices, and acts—rather than have others do them for us.

Subsidiarity thus suggests that the state may intervene directly only when it is clear there is no other association or community in closer proximity to those with a particular need, or that all other associations and communities have failed to meet the need. And even in those instances when the state appears to be the only institution capable of meeting the need, the principle of subsidiarity suggests that once a non-state community or association has emerged which is capable of addressing the need, the state should allow that association to assume responsibility for fulfilling this need.

At the same time, there are particular responsibilities that natural law does regard as the state's prerogative. Perhaps the most important of these is something that free societies see as fundamental to their very identity: rule of law.

Reason and the rule of law

Aquinas specified that the rule of law is "not the rule of men" (Aquinas, *Sententia Libri Ethicorum*, V.11 n.10 in Busa, 1996). By "rule of law," Aquinas did not primarily mean that those charged with administering the law simply upheld established rules consistently. Rule of law was, for Aquinas, a matter of acting according to *reason* rather than our passions or in an arbitrary fashion.

Aquinas believed that law should determine as far in advance as possible what judges should decide (Aquinas, 1271-1272, *Sententia Libri*

Ethicorum, V.11 n.10, in Busa, 1996). Nonetheless even after laws are made, announced, and implemented, Aquinas recognized that further exercises of judgment (and therefore reason) are required, not least because many laws inevitably require judges to resolve unavoidable ambiguities of meaning, to reconcile different laws, and to fill in gaps in law.

This attention to reasonableness is at the heart of natural law's conception of the rule of law. It stresses that the very idea of the rule of law is partly derived from the conclusion that it is *reasonable* to limit arbitrary power. Rule of law thus contains a distinct inner morality insofar as arbitrariness is understood to be inherently unjust.

In the twentieth century, this point was emphasized by the legal philosopher Lon Fuller. He maintained that rule of law incarnates an inner moral reasoning inasmuch as there are certain conditions of reason that a law must meet before it is understood to be a legitimate law (Fuller, 1977). For Fuller, rule of law means that a law must be:

- sufficiently general;
- publicly promulgated (you cannot have secret laws);
- prospective (i.e., applicable only to future behaviour, not past);
- clear and intelligible;
- free of contradiction;
- relatively constant in the sense that they are sufficiently stable to allow people to be guided by their knowledge of the content of the rules;
- possible to obey; and
- administered in a way that does not wildly diverge from their obvious or apparent meaning (Fuller 1977: 33-38).

Unless, for instance, a law is clear and promulgated, it fails to meet a basic requirement of reason and is therefore unjust. Note, however, that this requirement is not simply a technical precondition for a functioning legal system. It contains an inner reasonableness insofar as these requirements testify that there are coherent and just (reasonable) and incoherent and unjust (unreasonable) ways of applying laws. Hence, it is through conforming to these basic principles of reasonability that law meets the minimal requirements of

justice and makes a vital contribution to freedom from unjust coercion and arbitrary decision-making by those wielding legitimate coercive power.

From law to the economy

Natural law's conception of limited government and rule of law relies heavily upon the notion that protecting the ability of individuals and communities to make free choices cannot be grounded on a notion of freedom detached from reason, or the idea of liberty for the sake of autonomy. The same logic manifests itself in an area to which natural law thinkers have long devoted considerable attention: the realm of property and economic relations.

Chapter 4

Property and the Economy

The use and ownership of material things is a topic to which natural law thinkers have consistently given thought. In Chapter 2, we observed that the proper use of material goods, whether as individuals or in exchanges between individuals and communities, is a prime focus of commutative justice and distributive justice. This, however, does not exhaust the scope of natural law analysis of these questions.

If individuals and communities are to make free choices for moral goods and to be virtuous, they often require what might be called "instrumental goods." These are goods that have their own value and which can be used to protect and promote the pursuance of fundamental goods like work and truth, but which are not in themselves fulfilling.

Material things are a prominent example of such an instrumental good. They are not a fundamental good in the sense that goods such as life, truth, and friendship are intrinsic to human identity. Rather, material things—whether in the form of the natural world, or things that humans have created by applying their intelligence and labour to the natural world, or devices that act as a symbol or store of value (like money)—are goods which are a means that help humans to flourish. Money in the form of capital, for instance, enables entrepreneurs to build businesses that grow and employ people, thereby enabling others to participate in the good of work.

The question then becomes: how do we ensure that material things help to promote the flourishing of all members of a community? The natural law answer to that question lies in the application of two principles: common use and private ownership.

Private property as the means for common use

Natural law's treatment of issues of property begins with the observation the earth and all it contains is to be used by and on behalf of all people, in the sense that nothing is predestined to be used by any one person or group (Grisez, 1993: 790). To that extent, the use of material goods is "common."

Common use should thus not be understood as a type of end-state of affairs in which a perfect distribution of material wealth is achieved once and for all and never changes. This would be to deny the truth and necessity of human freedom and the fact that people's responsibilities, obligations, and holdings of wealth are in a constant state of flux. What matters is that material goods are used in ways that enhance the conditions that promote the flourishing of every person and community.

So how do we give effect to the principle of common use? Natural law's response has been that it is usually realized through private ownership—so much so that private possession of property isn't just permissible; it is usually essential for realizing this goal. Natural law's condemnation of theft can be understood as pointing towards this conclusion, and helps to establish private property as something that is an immediate derivation of natural law.

Aquinas drew upon Aristotle to outline three reasons to favour the private ownership of material goods. First, he notes, people tend to take better care of what is theirs than of what is common to everyone, since individuals tend to shirk responsibilities that belong to nobody in particular. Second, if everyone were responsible for everything, the result would be confusion. Third, dividing up things generally produces a more peaceful state of affairs. By contrast, sharing things in common often results in tension. Individual ownership, then—understood as the power to manage and dispose of things—is legitimate and necessary (ST II-II, q.66, a.2).

Nevertheless, natural law doesn't regard private ownership of material goods as absolute. In the first place, private ownership is a *means* of ensuring common use and that material goods serve humanity. Aquinas himself specified that "if the need be so manifest and urgent that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property" (ST II-II, q.66, a.7).

This is not an endorsement of theft. What it means is that if a particular manifestation of private property is actually obstructing common use, then the ownership of that property is no longer private. An example is someone who is starving to death and on the point of death and whose only opportunity to save her life is by eating an apple on a tree belonging to someone else.

Elsewhere Aquinas provides a clearer indication of what constitutes "imminent danger." In discussing almsgiving, he states that "it is not every sort of need that binds us as a matter of strict obligation, but only what is a matter of life and death" (ST II-II, q.32, a.5).

Later natural law thinkers broadly follow Aquinas's treatment of common use and private ownership. But different dimensions of this teaching were stressed more than others.

One early modern scholastic, Tomas de Mercado (1530–1576), sharpened Aquinas's point about the way in which private ownership encouraged personal responsibility by highlighting how it also encouraged people to be more productive and creative in their use of their property. He noted that people tend to be more naturally inclined to care for their own home rather than the homes of others. "If universal love," Mercado wrote, "will not induce people to take care of their things, then private interest will. Hence private goods will multiply. Had they remained in common possession, the opposite will be true" (Mercado, 1571/1975: bk.2, ch.2, fol.19).

One also sees more extensive critiques of common ownership during the period of the second scholasticism of the sixteenth and seventeeth centuries. Domingo de Soto (1494–1560) repeated Aquinas's criticism of common ownership, but stressed other particular negative features of such collectivized property arrangements. Common ownership, he maintained, tended to corrode the virtue of liberality (generosity), not least because "those who own nothing cannot be liberal" (de Soto, 1553-1554/1968: bk.4, q.3, fol.105-6).

Other scholastics, such as Juan de Mariana, underlined the abuses associated with common ownership. Speaking of his own religious order (the Jesuits), he exclaimed, "Certainly it is natural for people to spend much more when they are supplied in common than when they have to obtain things on their own. The extent of our common expenses is unbelievable!" (Mariana, 1605/1950a: 604).

Martín de Azpilcueta maintained that, even in cases of extreme need, it was not proven "that extreme need makes the needy the absolute owner of

the neighbour's good. It only gives them a right to use them if it is necessary to escape the need" (Azpilcueta, 1556: 206).

Some of these scholastic glosses on Aquinas's position on common use and private property, we may speculate, owe something to external factors. One was the emergence, after the sixteenth century religious schisms in Western Europe, of the modern state: one which became increasingly powerful and, in terms of economic policy, more inclined to impose heavier taxation and quite willing to engage in currency debasements to reduce government debts. In their criticisms of the negative effects of such policies, Mercado and Mariana explicitly linked their arguments to considerations about unjust infringements of private ownership of property. Mariana went so far as to describe currency debasement as a form of theft (Mariana, 1609/1950b: 586).

Similar arguments about the use and ownership of material goods are to be found in seventeenth and eighteenth century Northern European Protestant natural law treatments of private property. In his *De iure praedae Commentarius* [Commentary on the Law of Prize and Booty], Grotius stated that because all things had been given by God to "the human race, not upon individual men, and since such gifts could not be turned to use except by private occupation, it necessarily followed that what had been seized on should become his to each" (Grotius, 1604/2006: 11). From this was derived the right to property, not least because it was "permissible to acquire to oneself, and to retain, those things which are useful for life" (Grotius, 1604/2006: 10). "Let no one occupy," he added, "what has been occupied by another" (Grotius, 1604/2006: 13).

A later generation of Protestant natural law scholars elaborated upon these points using the language of rights more expansively. This is especially evident in the writings of the Presbyterian ministers and philosophers Gershom Carmichael (1672–1729) and Francis Hutcheson (1694–1746). Both men are rightly described as forefathers of the Scottish Enlightenment. Yet they are also part of the natural law tradition. Carmichael even acknowledged that he found "the doctrines of the Scholastics, or rather of the more ancient among them... much more correct and more consonant with sound reason, as well as with sacred scripture, than the doctrines that are opposed to them today" (Carmichael, 1724/2002: 229).

Concerning material goods, Carmichael held that God does not appear to have assigned any one particular external non-human thing to any one

particular human being. Property needs therefore to be secured by some type of human action—specifically "by human labor and more closely adapted for human purposes" (Carmichael, 1724/2002: 94).

On this basis, Carmichael identified different categories of property rights, most notably "*real* or *personal*" rights (Carmichael, 1724/2002: 78). Real rights, Carmichael states, involve possession and use of things (i.e., property) to which corresponds the obligation of others not to disturb them in their use of things. Personal rights are about those things and services conditionally owed to us (Carmichael, 1724/2002: 78) as a result of agreements mediated through devices like contracts. Neither real nor personal rights in Carmichael's schema are "absolute" insofar as they may be created, exchanged, transferred, or abolished. But Carmichael stresses that any such creation, exchange, or abolition should normally occur through voluntary consent. Only in emergency situations may the state abrogate such rights.

Hutcheson's line of reasoning about property is similar. According to Hutcheson, human reason contains clear evidence of what God desires of human beings (Hutcheson, 1747/2007: 104-5). One of these desires, he maintains, is that "we ought to promote the common good of all, and that of particular persons" (Hutcheson, 1747/2007: 109). In Hutcheson's view, it is through people pursuing their advantages without harming others or violating the natural law that the common good is advanced: "he who profits one part without hurting another plainly profits the whole" (Hutcheson, 1747/2007: 110). Hutcheson then argues that there are so many "enjoyments and advantages" that all people desire and can procure for themselves "without hurting others, and which 'tis plainly the interest of society that each one should be allowed to procure, without obstruction from others." It follows, he states, that "each man has a *right* to procure and obtain such advantages and enjoyments" (Hutcheson, 1747/2007: 110).

In delineating different property rights, Hutcheson adopted Carmichael's categories of real and personal rights (Hutcheson, 1747/2007: 145). He initially focused upon what are the human and just conditions that allow us to say that one person owns certain goods to the exclusion of others (Hutcheson, 1747/2007: 137-8). But Hutcheson went on to add that the natural fruits of a person's labour are the foundation of merit that provides one person with a basic title to particular property (Hutcheson, 1747/2007: 139-140).

In part, Hutcheson may be forging an argument against the position of his contemporary David Hume (1711–1776) who believed that property emerges as a result of the usefulness of a convention that emerges over time and eventually receives endorsement and codification in law. While not dismissive of these factors, Hutcheson clearly believes that private property is more than a convention. It is also a requirement of natural reason and justice and "requisite also to the maintenance of amicable society": that is, the common good requires property arrangements that allow people to own things and use them to the exclusion of others (Hutcheson, 1747/2007: 137-138). In other words, it is through private property that material goods serve the well-being of all.

Scholastics and markets

One way in which private property helps realize the principle of common use is that it identifies who owns what, and who therefore has the specific power to invest or exchange which elements of property. These are essential preconditions for the workings of a market.

The development of key ideas underpinning free markets is normally associated with Adam Smith's *Wealth of Nations.* But as Odd Langholm points out, "historians of economic doctrine now recognize that modern theory is the product of continuous growth over a much longer period of time than was previously assumed" (Langholm, 1998: vii).

In his 1954 *History of Economic Analysis,* the economist and historian of economic thought Joseph Schumpeter drew attention to the work of Jesuit and Dominican scholastics who made vital contributions to clarifying key economic concepts. His conclusion was that "the economics of the doctors absorbed all the phenomena of nascent capitalism and... served... as a basis for the analytic work of their successors, not excluding A. Smith" (Schumpeter, 1954: 94).

The global expansion of commerce and trade which began in the Middle Ages and accelerated from the late fifteenth century onwards raised many moral questions for merchants in Christian Europe. What, for instance, constituted a just price? Were money markets permissible? Was it legitimate for the state to give one merchant or a business a monopoly on a given product or type of industry? Many commercial traders, anxious about their salvation, turned to their confessors for guidance.

Confronted with this and other moral questions, many clergy in turn looked to theologians and canon lawyers charged with the responsibility of providing guidance to priests on such subjects. In his discussion of money changing, Mercado informs his readers that he wants to help confessors "who, abstracted as they are from the world, cannot understand the ways of these entangled dealings" (Mercado, 1571/1975: bk.2, ch.2, fol.313). Some of the most detailed descriptions of sixteenth and seventeenth century commercial life are contained in these writings.

Having gathered such information, many scholastics applied the insights of natural law to the new situation enveloping European life and, increasingly, the Americas and the Far East in the wake of European colonialization. This produced an unprecedented number of treatises on the moral dimension of economic life by scholastics like Mercado, Vitoria, de Soto, and Grotius, which sought to assess the ethical dimension of the new and developing commercial practices in light of the demands of natural law.

These scholastics' inquiries consequently embraced activities and practices as varied as taxation, coinage, foreign exchange, credit, and prices. They also analyzed the workings of the banking business of their time, and showed how the fluctuations in foreign exchange were related to changes in the purchasing power of different currencies.

One unforeseen result of these reflections was the theoretical conceptualization of important aspects of commercial life. These include the subjective theory of value (the idea that a good has whatever value which the valuing agent gives it), a simple version of the quantity theory of money (the notion that the general price level of goods and services is proportional to the money supply in an economy), and deep understanding of the nature of inflation through studying the effects of coinage debasement.

Scholastic thinkers were also the first to work out important concepts vital for a market economy such as the distinction between value in use and value in exchange, the idea of comparative advantage, the concept of scarcity, the character of opportunity cost, the origins and nature of capital, and the economic role of interest (Gregg, 2016: 39-87). Some scholastics such as Leonardus Lessius were especially critical of monopolies established by legal grants from rulers, portraying them as sins against justice and charity, and violations of people's freedom to engage in trade (Lessius, 1606/2020: IV lib. 2, cap. 21, dub. 20).

There are, however, two areas in which scholastic thinkers made distinctive contributions to the development of contemporary free economies that reflect responses to particular issues confronting society at the time. Many scholastics writing in the early modern period were living at a time in which the premier Catholic power of the time, Spain, had not only acquired a world empire but also was experiencing the economic costs of the almost continuous wars that accompanied and followed such acquisitions.

While Aquinas's treatment of the state had outlined the limits of the scope of government power, scholastic writers gravitated to underscoring the state's limited competence in the economic realm. De Soto, for example, emphasized how the state's excessive intervention in economic life damaged the common good: "Great dangers for the republic spring from financial exhaustion; the population suffers privations and is greatly oppressed by daily increases in taxes" (1553-1554/1968: bk.3, q.6, a.7).

Reacting to the financial privations visited upon Philip II's Spain as the king struggled to suppress rebellion in the Netherlands, ward off Muslim invaders from the Mediterranean, and maintain order throughout his ever-expanding dominions, Mariana argued that public law and government should focus on protecting private property rather than usurping it. While he noted that taxation was necessary if government was to perform its essential functions, Mariana observed that the state tended to move beyond such boundaries very quickly and to increase taxation accordingly (1609/1950b: 23-27). Mariana also argued that government-sponsored currency debasements, excessive expenditures, and subsequent tax increases effectively facilitated the slow but systematic violation of private property (1605/1950a: 548).

The second important contribution scholastic thinkers made to the development of market economies concerned the issues of prices—or, more precisely what constituted a just price. In this regard, Aquinas's reasoning provided the basic foundations for the natural law treatment of this issue, which matured in the period of the second scholasticism.

Aquinas invested considerable effort in examining how one determined the justice of a given commercial transaction, how one measured the value of a good, and what constituted a just price.

The question of the just price, he argued, fell primarily into the area of commutative justice: that is, what individuals who enter freely into an exchange owed each other

In Aquinas's view, it was normally the case that the measure of something's value is the price it would presently fetch "in the market" [*secundum commune forum*] (ST II–II, q.61 a.4c; II–II, q.77 a.1, a.4c, and ad.2). This was understood as the exchanges between willing buyers and sellers in the same place and timeframe, with all parties to the exchange being aware of the merits and defects of what is being exchanged (ST II–II, q.77 a.1).

Significantly Aquinas specified that this market price will vary from time to time and location to location, depending on whether the good is scarce or abundant [*secundum diversitatem copiae et inopiae rerum*] (ST II–II, q.77 a.2, ad.2). He also insisted that sellers who enter the marketplace did not violate justice if they sold a commodity at the available price knowing that the price will fall when other sellers come to market, provided that they do not lie to anyone (ST II–II, q.77 a.3, ad.4). Though Aquinas agreed that the state could regulate prices in emergencies (Roover, 1974: 331), he held that the just price is normally the market price in the absence of fraud or collusion.

Later scholastic thinkers continued to develop this line of thought, especially through linking price to value. Unlike Adam Smith, they did not adhere to a labour theory of value (the idea that the value of goods and services depends upon how much work has been expended on creating a product). Instead, they drew upon Aquinas and other medieval natural law thinkers like Bernardino of Siena (1380–1444) and Antonio of Florence (1389–1459) to develop the idea that the value (and therefore price) attached to goods and services primarily depended upon the utility attached to them by people. They often employed the phrase "common estimation" to describe this.

According to these scholastics, three elements determined the price of saleable goods. These were a good's *viruositas* [objective use in value], *raritas* [scarcity], and *complacibilitas* [desirability or common estimation] (Chafuen, 2003, 81). Over time scholastic thinking on this subject gravitated towards the conclusion that the just price was the value of the good as determined by common estimation in the market. Francisco de Vitoria, for example, wrote that wherever there is a marketable good, the price was not determined by the nature of the good or the labour employed to create it. "If," he specified, "according to common estimation, the bushel of wheat is worth four silver pieces and somebody buys it for three, this would constitute an injustice to the seller because the common estimation of a bushel of wheat is four silver pieces" (Brown Scott, 1934: bk.2, q.2, a.1).

In determining what drove "common estimation," Luis de Molina focused on the question of utility. He maintained that "it should be observed that a price is considered just or unjust not because of the nature of things in themselves... but due to their ability to serve human utility. Because this is the way in which they are appreciated by men, they therefore command a price in the market and in exchanges" (Molina 1593/1597; 1759: 167-168). Molina then specifies that he understand utility as *subjective* utility: "the nature and the need of the use given to them determined the quantity of price... it depends on the relative appreciation which each man has for the use of the good" (Molina 1593/1597; 1759: 168).

An optimistic view of commerce

Some scholastic thinkers regarded commercial activity as morally indifferent. Others, however, ascribed positive moral characteristics to trade and commerce. The economic historian Henry Robertson records that Jesuits like Suárez and Molina were unashamed promoters of the social benefits of enterprise, financial speculation, and the expansion of trade (Robertson, 1973). De Soto even portrayed commercial activity as evidence of civilizational development:

> Mankind progresses from imperfection to perfection. For this reason, in the beginning barter was sufficient as man was rude and ignorant and had few necessities. But afterward, with the development of a more educated, civilized and distinguished life, the need to create new forms of trade arose. Among them the most respectable is commerce, despite the fact that human avarice can pervert anything (de Soto, 1553-1554/1968: VI, q.II, a.2).

Aquinas had prefigured this favourable view of commerce, including its non-economic benefits. Aquinas rejected Aristotle's view that those involved in commerce would become obsessed with their own riches and unconcerned with the common good (Finnis, 1998: 200-210). Instead, Aquinas held that it was possible for people to engage in commerce with correct intentions ranging from the desire to help the needy to the duty to take care of one's family (ST II–II, q.77, a.4c). Though warning against the folly and sin of greed,

Aquinas believed that those involved in commerce, including those using and managing capital, were capable of doing great things.

Aquinas's reflections on the nature of the virtue of magnificence were especially revealing. He defined magnificence as the virtue of "that which is great in the use of money" (ST II-II, q.134, a.3). It is not so much, he specified, about making gifts or charity. Nor, Aquinas added, does the person who embraces this virtue "intend principally to be lavish towards himself" (ST II-II, q.134, a.1). Rather, he said, magnificence concerns "some great work which has to be produced" with (1) a view to the good that goes beyond the immediate gain, and (2) which cannot be done "without expenditure or outlay" of great sums of money. Moreover, magnificence for Aquinas also concerned "expenditure in reference to *hope*, by attaining to the difficulty, not simply, as magnanimity does, but in a determinate matter, namely expenditure" (ST II-II, q.134, a.4).

It is important to note that Aquinas was not focused here upon questions of property or wealth *per se*. Likewise, *magnificentia*—understood by Aquinas as the doing of great works which require great expenditure and the use of reason to ensure that there is minimal risk of great loss (ST II-II, q.134)—is not so much about who owns the wealth. As Aquinas specified, the poor man can also choose to do great things (ST II-II, q.134, a.3). Rather it is about the one who *deploys* great sums to help realize a "great work." That encompasses an extraordinary spectrum of individuals, ranging from the banker lending capital to others to businesses that seek to use the capital loaned to them to start and grow an enterprise.

Commerce across borders

This positive evaluation of commerce on the part of medieval and early modern natural law thinkers represented a break with the classical world's view, which was generally indifferent or even hostile. But it was an evaluation that became even more significant as European world trade expanded across the continents from the sixteenth century onwards.

Chapter 5

The Law of Nations and International Trade

It is difficult to underestimate the shock of the European encounter with the Americas at the end of the fifteenth century. The confusion, violence, and changing circumstances immediately raised questions among scholastic thinkers about how Europeans should treat the peoples of the Americas. It also resulted in an exploration of two related questions.

The first was how nations should interact with each other, and on what basis such relations should be based. The second concerned the issue of the freedom of people to trade: not simply within with sovereign states but also across state boundaries. What restrictions, if any, could the authorities place on those members of their political community who wanted to engage in commerce with those who belonged to other political communities?

Some of the most important contributions to this topic in the period were made by natural law thinkers. Moreover, they did so at a time during which the European world was moving in precisely the opposite direction to that of free trade.

Prior to the eighteenth century, the dominant economic framework of post-medieval Western Europe was essentially mercantilism. This was a way of economic thinking and acting which held that nations became rich by encouraging exports and restricting imports (LaHaye, 2021). Governments acted to protect merchants from foreign competition by imposing tariffs and quotas on imports, as well as granting monopolies on the production of particular goods or trade routes to particular merchants. Trade by sea was especially restricted under mercantile arrangements. While it was rare for states to ban outright the importation of goods and services from abroad, governments introduced a number of restrictions that served to minimize competition.

In 1650 and 1651, for example, England introduced the Navigation Laws (LaHaye, 2021), which sought to prevent foreign-owned ships from engaging in coastal trade within the English realm. The same laws required any trade between English colonies and the mother country to be conveyed on colonial or English ships. Those seeking to break into these protected markets often found that their only recourse was to engage in smuggling.

Established merchants who benefited from these arrangements typically returned the government's favours. They acquiesced in the raising of taxes and the paying of customs dues that provided funding for, among other things, wars undertaken by European states to make territorial acquisitions around the globe, establish colonies, and expand and defend them.

These measures had implications for how sovereign states treated each other and for merchants who wanted to trade with each other across state boundaries. Here what was called "the law of nations" became important, not least because it became a primary reference point for scholastic thinkers who believed that there were limits on what the state could do to regulate trade between sovereign states.

The *ius gentium*

The origins of the idea of the law of nations—the *ius gentium*—are to be found in Greek and Roman philosophers and lawyers. In the *Institutes* of the Roman jurist Gaius (130–180), the *ius gentium* is closely associated with the natural law:

> Every people that is governed by statutes and customs observes partly its own peculiar law and partly the law common to all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile* as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of all mankind. (Poste, 1904: 1)

For Gaius, the *ius gentium* is thus ultimately derived from the *ius naturale* insofar as the origins of the former lie in the latter.

Roman law, however, also articulated a second sense of *ius gentium* (Nichols, 1962: 57-58) that seems closer to the idea of a universal positive law rather than natural law. In the ancient world, many of the laws applicable to a person were associated with the state to which he owed allegiance rather than where he lived. An Athenian citizen living in Corinth, for instance, might be subject to many Athenian laws and could often legitimately request to be judged in Athens for a crime committed in Corinth. Not surprisingly, this created complications for the legal authorities in Corinth and Athens, but also resentments between them.

This situation was further complicated by the fact that more and more people were subject to the jurisdiction of not only particular states, but were also citizens of Rome. It was on this basis that Saint Paul, for instance, was able to escape from the jurisdiction of both the Jewish religious authorities in first century Judea as well as that of King Herod Agrippa II (Rome's client ruler of several territories in modern-day Israel) by appealing his case to the Roman Emperor on the grounds that Paul possessed Roman citizenship.

To address potential conflicts between different jurisdictions, a Roman body of law had emerged by the first century B.C. that was applicable to everyone across the Empire, regardless of whether they held citizenship of one or more states or were living in a different jurisdiction to that from where they derived their particular citizenship. This Roman law embraced *all* the tribes, city-states, or peoples (*gentibus*) within the Empire and was considered as distinct from and more authoritative than the *ius civile* (the law specific to a particular state).

Following Rome's fall, the bishop and scholar Isidore of Seville (560–636) played a major role in preserving, codifying, and clarifying the two senses of the *ius gentium*. He listed a number of institutions (such as peace treaties and the treatment of prisoners in wartime) that he regarded as belonging to the law of nations (Isidore, 1472/1911: 5.6). He added that this law was so called because it was in force among almost all peoples (Isidore, 1472/1911: 5.9).

The medieval treatment of *ius gentium* differed slightly from that of the Roman jurists. While Aquinas agreed with Gaius's distinction between *ius civile* and *ius gentium* (ST I-II, q.95, a.2, 4), his references to the *ius gentium* specified that it was that aspect of positive law that was immediately derived by deduction from the natural law and which was universally applicable across jurisdictional boundaries (ST I-II, q.95, a.2, 4).

For Aquinas, an example of this is contracts. Contracts had been introduced into society because they were proven to serve the well-being of individuals and communities (ST II-II, q.77 a.1c). To that extent, contract law was a matter of positive law rather than natural law. Yet contract law was also unquestionably based on the principle known as *pacta sunt servanda* (agreements are to be performed). This principle was so essential for justice and order in *any* human community that, Aquinas argued, it (like property) should be understood by all peoples as immediately deducible from principles of natural law (ST I-II, q.95 a.4c and ad.1; and II-II, q.57, a.3c and ad.1). It thus belongs to the *ius gentium* rather than the *ius civile*.

Like Aquinas, Suárez maintained that the *ius gentium* was somewhere between natural and positive law. It was, he said, "a mean between natural and human law, and very much closer to the former" (Suárez, c.1612/2012b: II, 17, 1). He divided, however, the contents of *ius gentium* into two groups.

The first group was those laws that were part of the domestic law of most states, such as laws governing property and domestic commerce (Suárez, c.1612/2012: II, 20, 7). The second group was those laws that were common in the way they coordinated relationships *between* peoples (laws *inter nationes*). Examples included the laws governing war and international commerce (Suárez, c.1612/2012b: II, 19, 8). These, Suárez held, were most worthy of the title of *ius gentium* (Suárez, c.1612/2012b: II, 19, 8). Vitoria had made a similar point when he shifted the emphasis of *ius gentium* from *inter omnes homines* [between all men] to *inter omnes gentes* [between all peoples] (Vitoria, 1557/1917: rel. I, sect III).

It was the almost completely universal character of the *ius gentium*, Suárez held, that invested it with a moral status more authoritative than other laws and an authority very close to that of natural law. According to Suárez, the *ius gentium* emerged through "practice itself and by tradition" and "without any special meeting or consent of all peoples at a particular time." Its universal usage, however, was derived from the fact that the *ius gentium* "is so close to nature and so suited to all nations and the fellowship between them that it would have been almost naturally propagated along with the human race itself, and thus it was not written, because it was laid down by no lawgiver, but prevailed by usage" (Suárez, c.1612/2012b: II, 20, 1).

Clearly Suárez regarded the *ius gentium* as an instance of customary law and tradition rather than formal prescription (Suárez, c.1612/2012b: III,

2, 6). Nevertheless, in light of people's propensity to disagree about so many things, agreement about something across the divisions of nations and peoples was, in Suárez's view, significant proof of the innate reasonability of a law (Suárez, c.1612/2012b: II, 19, 50).

Suárez also made the crucial point that the *ius gentium* bound people together over and above sovereign states. The *ius gentium*'s provisions thus extended to everyone—"even foreigners and members of any nation whatsoever" (Suárez, c.1612/2012b: II, 10, 9). This did not mean that humanity in its entirety had at some time consented to the content of the *ius gentium*. Rather, all peoples were expected to have independently recognized its content by virtue of their possession of reason. Widespread failure within a given political community to know the *ius gentium* thus was considered proof of that society's corruption or barbarism.

These arguments underwent further modification following the rise of the modern state with its particular claim to sovereignty and the increasing instances of war between such states after the Reformation. The effect was to generate an appropriation and rethinking of the principles of the *ius gentium* as part of the public international law designed to govern relations between sovereign states after the 1648 Treaty of Westphalia. This Treaty, which brought an end to the Thirty Years War that had devastated Europe, formally established the principles crucial to modern international relations, especially the principle of non-interference in the domestic affairs of sovereign states and the inviolability of the borders of those sovereign states.

Hugo Grotius played a major role in this rethinking by seeking to codify "a body of law that is maintained between states" that was conceptually distinct from the civil law of states and also grounded in "the law of nature and nations" (Grotius, 1625/2005: I, Prolegomena, 17-18, 39-41). Pufendorf likewise insisted that the *ius gentium* was more than just convention. He accepted Grotius' argument that the law of nations was, strictly speaking, the law between states as opposed to the natural law shared by all humanity (Pufendorf, 1672/1998: bk.II, ch.III, 23), but also stressed that it was very close to the latter.

In his highly influential *The Law of Nations* (1758), Emer de Vattel added the further qualification that nations and individuals were distinct entities. This subsequently results, Vattel wrote, in each having "very different obligations and rights" (Vattel, 1758/2008: Preliminaries, 6). Discerning

these differences involved "the art of thus applying [the law of nature] with a precision founded on right reason" (Vattel, 1758/2008: Preliminaries, 6). This was particularly true when it came to commercial relations between states which, from Vattel's standpoint, increasingly formed the subject matter and focus of the law of nations.

Trade between nations

The urgency with which natural law scholars invested their discussions of the nature and scope of the law of nations owed much to the expansion of international commerce. Writing in the late sixteenth century, the jurist and historian Bartolomé de Albornóz described commercial activity as

> the nerve of human life that sustains the universe. By means of buying and selling the world is united, joining distant lands and nations, people of different language, laws and ways of life. If it were not for these contracts, some would lack the goods that others have in abundance and they would not be able to share the goods that they have in excess with those countries where they are scarce. (Albornóz, 1573: VII, 29)

Looking at the commercial life of Seville, Spain, Mercado saw a society in which a "banker traffics with a whole world and embraces more than the Atlantic, though sometimes he loses his grip and it all comes tumbling down" (Mercado, 1571/1975: bk.2, ch.2, fol.15).

Reflecting on these circumstances, many scholastic thinkers started to ask how natural law and the law of nations might apply to questions arising out of the fact of this spread of trade across the globe. When Vitoria studied interactions between Spain and its newly acquired colonies, he argued that "Spaniards have a right to travel into the lands" of the Indians, though they were not permitted to harm the Indians. Such a right, he argued, was "derived from the law of nations, which is either natural law or derived from natural law." Vitoria went on to state that the same *ius gentium* held that foreigners "may carry on trade, provided they do not harm to citizens." He also insisted that the rulers of the Indians could not "hinder their subjects from carrying on trade with the Spanish; nor... may the princes of Spain prevent commerce with the natives" (Vitoria, 1557/1917: 151-153).

Suárez embraced Vitoria's principle of freedom to trade and promoted it as a right arising from the law of nations. "A state," Suárez wrote, "might conceivably exist in isolation and refuse to enter into commercial relations with another state… but," he added, "it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause" (Suárez, c.1612/2012: II, 347).

The natural law thinker who was most focused on trade and argued strongly in favour of free trade was Grotius, most particularly in his 1609 book *Mare Librum* [The Free Sea]. He criticized Portuguese efforts to establish a monopoly on trade with the East Indies and maintained that no-one had a right to exclude others from the open seas. "Under the law of nations," Grotius wrote, "all men should be privileged to trade freely with one another." It was subsequently impermissible for any state, he insisted, to inhibit another state's subjects from trading with its subjects, precisely because the "right to engage in commerce pertains equally to all peoples" (Grotius, 1609/2004: I, 218).

Grotius's most important book, *On the Rights of War and Peace*, repeats these key arguments: "No one, in fact, has the right to hinder any nation from carrying on commerce with another nation at a distance" (Grotius, 1625/2005: II, 199). While he did not exclude requiring merchants to pay taxes to help cover the costs of various public expenses associated with trade, Grotius opposed the imposition of any tax that has nothing to do with paying for the costs of trading the good. Justice, he argued, "does not permit the imposition of any burdens that have no relation to the merchandise actually in transit" (Grotius, 1625/2005: II, 199). This meant that the government could not, for example, impose a tariff on trade with the objective of trying to make imports more expensive. It could, however, impose a tariff if the objective was to pay for the maintenance of roads and harbours that facilitated trade.

In both Pufendorf and Vattel, we see some modifications to the positions advanced by Vitoria, Suárez, and Grotius. Pufendorf affirmed the right to trade along the lines established by Grotius: "it is highly inhuman," he stated, "to deny a native of our world the use of those good things which the common Father of all men has poured forth." These words reflect the principle of common use. Nonetheless, he also argued that the state may regulate trade. Pufendorf, for example, details several exceptions, most of which gravitate around possible harms that might befall a country (Pufendorf, 1660/2009:

368). This shift also owed something to the Treaty of Westphalia's emphasis upon the full power of sovereign states to control who and what crossed their borders.

Writing almost a century later, Vattel was particularly conscious of how the acceleration of trade across borders was transforming relations between states. He was also aware that many were starting to question the efficacy and justice of the dominant mercantile system. His approach to the topic of trade was to begin by grounding the right to trade across boundaries in the principle of common use. "All men," he writes, "ought to find on earth the things they stand in need of" (Vattel, 1758/2008: bk.2, ch.2, s.21). Vattel particularly stressed the observation that no nation or people could procure everything it needed from its own resources:

> It is seldom that nature is seen in one place to produce everything necessary for the use of man: one country abounds in corn, another in pastures and cattle, a third in timber and metals, &c. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary; and the views of nature, our common mother, will be fulfilled. (Vattel, 1758/2008: bk.2, ch.2, s.21)

This is what Vattel called the foundation "of the general obligation incumbent on nations reciprocally to cultivate commerce" (Vattel, 1758/2008: bk.2, ch.2, s.21). On this basis, he repeated Grotius's condemnation of Portugal's earlier attempts to establish a monopoly on trade in the Far East (Vattel, 1758/2008: bk.2, ch.2, s.24). Vattel further condemned "monopoly" as being "in general... contrary to the rights of the citizens" (Vattel, 1758/2008: bk.1, ch.8, s.97).

To underscore the point, he stated that "Every nation ought, therefore, not only to countenance trade, as far as it reasonably can, but even to protect and favor it" (Vattel, 1758/2008: bk.2, ch.2, s.22). This freedom, according to Vattel, implies limits to what states can do vis-à-vis liberty to trade across boundaries:

> Freedom... is implied in the duties of nations, that they should support it as far as possible, instead of cramping it by unnecessary

> burdens or restrictions. Wherefore those private privileges and tolls, which obtain in many places, and press so heavily on commerce, are deservedly to be reprobated, unless founded on very important reasons arising from the public good.... Every nation, in virtue of her natural liberty, has a right to trade with those who are willing to correspond with such intentions; and to molest her in the exercise of her right is doing her an injury. (Vattel, 1758/2008: bk.2, ch.2, s.23)

Vattel did not, it should be cautioned, see this natural right to trade as absolute. "The obligation of trading with other nations," Vattel commented, "is in itself an imperfect obligation" (Vattel, 1758/2008: bk.2, ch.2, s.25). There are instances, he states, when a nation ought to decline a commerce which is disadvantageous or dangerous (Vattel, 1758/2008: bk.2, ch.2, s.25; see also bk.1, ch.8, s.98). The state's obligation to provide for the nation's necessities (such as national defense) and uphold the sovereignty with which it has been invested by the Treaty of Westphalia might mean that governments may occasionally have to regulate the trade of particular goods (like military technology) in ways that departed from a strict free trade position. But for Vattel, free commerce between nations should be the norm. People have a natural right to trade inside and between countries, and while the state may regulate that right, such a right cannot be suppressed.

Conclusion

Within 18 years of the publication of *The Law of Nations*, Adam Smith's *Wealth of Nations* made a systematic case for free trade primarily based on empirical observations concerning comparative advantage and a penetrating critique of mercantilism. Though certainly aware of the writings on trade by Grotius and Pufendorf (and, likely, Vitoria and Suárez), Smith did not approach the topic from the standpoint of natural law, the law of nations, notions of *ius*, or commutative and distributive justice. Nor does the *Wealth of Nations* set out to establish a natural right to trade as a general ethical or legal proposition.

What matters, however, is that natural law thinkers writing about commerce between nations developed a principled case for free trade based on natural law claims about liberty and the nature and ends of property. As observed, they were very cognizant of the more strictly economic dimensions

of free trade. But they did not begin their arguments with reflections on cost-benefit or utility. It is not that such considerations are necessarily incompatible with natural law arguments for limited government, rule of law, and private property. Scholastic thinkers did, however, believe that one could and should write about economic topics like trade between nations from the standpoint of reasoning that is concerned with truth and justice.

Chapter 6

Conclusion

Over the centuries, natural law ethics and reasoning has proved extraordinarily resilient. The relative influence of different philosophical positions waxes and wanes. But natural law's understanding of the character of reason and the human mind's capacity to know the truth about reality remain immensely attractive to people living in very different social, political, economic conditions,

One reason for this, I suggest, is that while the world of the twentieth-first century may differ greatly from the societies in which Aquinas, Suárez, and Grotius lived, the basic problems addressed by natural law thinkers persist. Tyranny has, after all, emerged in every age. People have been arguing about the nature of freedom and justice from time immemorial. Arguments about the origins and ends of property never seem to go away.

Judging the morality and rightness of one's own and others' choices and actions as we respond to such problems requires humility and experience. Yet it also demands some degree of confidence that principled answers to these questions do exist, and that our minds are capable of knowing such answers.

Natural law holds that our reason *can* provide us with knowledge of first principles that help us develop coherent and logical responses to the moral, political, legal, and economic quandaries that confront us. It is thus at odds with any theory that maintains an *a priori* commitment to philosophical skepticism at its core. Natural law does not deny that we should be careful about accepting without any critical reflection anyone's insistence upon the rightness or wrongness of a particular path of action. Nor does natural law dispute that right reason and sound moral judgment is in many ways relative to situations and so varies rightly from time to time, place to place, and even person to person. As already observed, it is part of the very meaning of

many moral principles (e.g., honour your parents) that they apply variously, i.e., in varying ways on varying occasions. Natural law theory, we have seen, also acknowledges that there are often many possibilities for doing good that might be incompatible with each other, but which are nonetheless consistent with the principles of practical reason.

Curiously, it may well be natural law's insistence that there are universal moral and philosophical truths knowable through right reason that represents one of its most important contributions to the maintenance of free societies. For many people who primarily think about natural law in terms of prohibitions, this connection between truth and liberty may seem initially counterintuitive. It's therefore worth reflecting more on this point.

Many philosophers and social scientists have argued that psychological urges, cultural and social influences, and economic conditions affect an individual's potential to choose. Enhanced knowledge of these factors has helped us to be more attentive to their impact on human choice and action. But it has also led some to conclude that reason only allows us to decide how we achieve certain objectives, and to view the ends of our choices as the result of the unchosen workings of our emotions and instincts, which themselves are often reduced to the workings of chemical processes within human beings and/or the results of our cultural conditioning.

Another factor at work is the post-Enlightenment tendency to think that 1) the only truth that we can really know is the information yielded through the natural sciences, and that 2) we should consequently be sceptical about any claim that cannot be explained or proven by empirical methods of inquiry. Within such frameworks, any claim not grounded on an empirical basis is often deemed to be a subjective interpretation and therefore not universally binding.

Reinforcing these tendencies has been awareness that many opinions and movements have claimed the mantle of truth and, in the name of truth, suppressed freedom and murdered millions via guillotine, gas chamber, or gulag. Once someone claims to know the truth about morality, the argument goes, the temptation is to force others to embrace such truths through the use of state power.

We have already seen in Chapter 3 that natural law does not translate into an open-ended use of state power to promote particular moral goods and prohibit specific moral evils. On the contrary, natural law puts principled

limits on the state's scope to do so. It is also arguable that scepticism about the type of truth-claims promoted by natural law opens the door to significant curtailments of freedom and justice.

The American philosopher Richard Rorty (1931-2007) once wrote that it is only on the basis of relativism that democracy and freedom will be safe. "No specific doctrine," he stated, "is much of a danger, but the idea that democracy depends on adhesion to some such doctrine is" (Rorty, 1988: 33). In Rorty's view, the search for impartial standards like those proposed by natural law against which humans can judge themselves, others, and those in positions of authority, is futile. Nonetheless, Rorty later added, those who hold to no objective standard and claim no foundation in practical reason can still feel outrage about unjust curtailments of liberty (Rorty, 1991: 31).

But how, we must ask, is the rightness of such outrage to be discerned? How can we know it is justified without the type of reference point that Rorty rejects?

Think about it this way: If there is only opinion—your opinion, my opinion, everyone else's opinion—but no truth, and if every opinion is valid simply by virtue of being freely chosen, or by reference to one's subjective preferences, we could state: "The Nazis and Communists cannot be held accountable for their destruction of freedom and justice because they acted according to their own preferences, they showed real commitment to their opinions, and who in any case is to judge that what they did was wrong?"

In such circumstances, public debate can easily cease to be a matter of reasoned discussion of the truth of people's positions, whether the topic is trade, property rights, the nature of justice, or the limits of state power. Instead, there is a possibility that questions of politics, law, and morality will slowly gravitate to the issue of who can muster sufficient force—whether through electoral majorities or the barrel of a gun—to advance their opinion over the opinions of others.

From this perspective, the commitment to knowing ethical and philosophical truth which is central to natural law and shapes its approach to political, legal, and economic order may not be as great a threat to liberty as sometimes supposed. If something as important to free societies as the rights that protect individuals and communities from unjust coercion from others and the state are not grounded in truth-claims about the character of good and evil, and therefore justice and injustice, we cannot discount the

possibility that rights may be reduced to whatever mobs, powerful individuals, well-connected lobbies, the government, or some combination of all these forces want them to be.

In such circumstances, what the United States Declaration of Independence called "unalienable rights" would no longer be so unalienable. Any state that comes to be seen as the ultimate source of rights is also a state that can take away those same rights—in which case rights would no longer be about justice; instead they would function simply as political and legal masks for raw assertions of power.

Therein lies one of natural law's major contributions to politics, law, and social life in a free society. It provides principles grounded upon reason that are independent of the perpetual rising and falling of what is fashionable or the influence of interest groups.

Without some type of conviction, however latent it might be, that there are universal moral and philosophical truths which the human mind can comprehend, it is harder for free societies to resist whoever happens to be the stronger, or more ruthless, let alone create space for people to make the type of free choices that allow us to participate in goods that are self-evidently beneficial for humans. In this sense, understanding natural law and the principles that it embodies surely has enormous potential to serve as a powerful ballast for the free society and to remind us of why liberty is important and why the protection of freedom merits eternal vigilance.

Works Cited

Albornóz, Bartolomé de (1573). *Arte de los Contratos*. Biblioteca de la Universidad de Sevilla.

Aquinas, Thomas (1256-1259/1952). *Quaestiones Disputatae de Veritate*. Robert W. Mulligan, tr. Henry Regnery Company.

Aquinas, Thomas (1273/1954). *In Duo Praecepta Caritatis et in Decem Legis Praecepta. De Dilectione Dei: Opuscula Theologica.* Vol. II, No. 1168, Edición Taurinen.

Aquinas, Thomas (1265-1273/1963). *Summa Theologiae.* T. Gilby, ed. Blackfriars.

Aquinas, Thomas (1261-1263/1975). *Summa contra Gentiles*. University of Notre Dame Press.

Aquinas, Thomas (1271–1272/1993). *Commentary on Aristotle's Nicomachean Ethics*. C.I. Litzinger, tr. Dumb Ox Books.

Aristotle (undated/1980). *Nicomachean Ethics.* W.D. Ross, ed. Oxford University Press.

Azpilcueta, Martín de (1554). *Manual de Confesores y Penitentes*. Fondo Antiguo de la Universidad Complutense.

Brown Scott, James (1934). *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations*. Clarendon Press.

Busa, Robert, ed. (1996). *Thomae Aquinatis Opera Omnia cum Hypertextibus in CD-ROM*. Editoria Elettronica Editel.

Cajetan, Thomas de Vio (1518). *Commentaria in Secundum Secundae Divi Thomae ad Aquino*.

Carmichael, Gershom (1724/2002). *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael*. James Moore and Michael Silverthorne, eds. Liberty Fund.

Chafuen, Alejandro (2003). *Faith and Liberty: The Economic Thought of the Late Scholastics*. Lexington Books.

De Roover, Raymond (1974). *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe*. University of Chicago Press.

Dognin, Paul-Dominique (1961). La Notion Thomiste de Justice Face aux Exigences Modernes. *Revue des Sciences Philosophiques et Théologiques* 45: 601-40.

Dworkin, Ronald (1985). *A Matter of Principle*. Harvard University Press.

Finnis, John (1980). *Natural Law and Natural Rights*. Clarendon Press.

Finnis, John (1991). *Moral Absolutes: Tradition, Revision, and Truth*. Catholic University of America Press.

Finnis, John (1998). *Aquinas: Moral, Political, and Legal Theory*. Oxford University Press.

Fuller, Lon (1977). *The Morality of Law*. Yale University Press.

George, Robert P. (1999) *In Defense of Natural Law*. Clarendon Press.

Glendon, Mary Ann (1991). *Rights Talk: The Impoverishment of Political Discourse*. Free Press.

Gregg, Samuel (2016). *For God and Profit: How Banking and Finance Can Serve the Common Good*. Crossroad Publishing Company.

Gregg, Samuel (2019). *Reason, Faith, and the Struggle for Western Civilization*. Regnery.

Grisez, Germain (1993). *The Way of the Lord Jesus.* Vol. 2: Living a Christian Life. Franciscan Press.

Grotius, Hugo (1604/2006). *Commentary on the Law of Prize and Booty.* Martine Julia van Ittersum, ed. Liberty Fund.

Grotius, Hugo (1609/2004). *The Free Sea. Richard Hakluyt, tr., with William Welwod's Critique and Grotius's Reply.* David Armitage, ed. Liberty Fund.

Grotius, Hugo (1625/2005). *On the Rights of War and Peace*. Richard Tuck, ed. Liberty Fund.

Helmhotz, R.H. (2015). *Natural Law in Court: A History of Legal Theory in Practice*. Harvard University Press.

Hutcheson, Francis (1747/2007). *A Short Introduction to Moral Philosophy.* L. Turco, ed. Liberty Fund.

Isidore of Seville (1472/1911). *Etymologiae*. W.M. Lindsay, tr. Oxford University Press.

Jackson, Robert (1947). Closing Speech. *Trial of the Major War Criminals before the International Military Tribunal.* Vol. XIX: Proceedings, 7/19-29/1946, One Hundred and Eighty-Seventh Day: Friday, 7/26/1946: Morning Session: Part 2, 29. International Military Tribunal.

John Paul II (1991). *Centesimus Annus: Encyclical Letter Addressed by the Supreme Pontiff John Paul Ii to His Venerable Brothers in the Episcopate, the Priests and Deacons, Families of Men and Women Religious, All the Christian Faithful and to All Men and Women of Good Will on the Hundredth Anniversary of Rerum Novarum*. <https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html>, as of August 10, 2021.

LaHaye, Laura (2021). Mercantilism. *Library of Economics and Liberty*. <https://www.econlib.org/library/Enc/Mercantilism.html>, as of July 12, 2021.

Langholm, Odd (1998). *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power*. Cambridge University Press.

Lessius, Leonardus (1606/2020). *De iustitia et iure caeterisque virtutibus cardinalibus*. Thomas Duve et al., eds. Frommann-Holzboog.

Lewis, C.S. (1952/2012). *Mere Christianity.* Harper Collins Publishers.

Mariana, Juan de (1605/1950a). *Discurso de las Cosas de la Compãnia*. Edición Atlas.

Mariana, Juan de (1609/1950b). *Tratado Sobre la Moneda de Vellon*. Edición Atlas.

Maritain, Jacques (1943). *The Rights of Man and the Natural Law*. Doris C. Anson, tr. Charles Scribner's Sons.

Mercado, Tomas de (1571/1975). *Summa de Tractos y Contractos*. IEP.

Molina, Luis (1593/1597/1759). *De Iustitia et Iure.* Vol. 2: Coloniae Allobrogum. Cuenca.

Nichols, Barry (1962). *An Introduction to Roman Law*. Oxford University Press.

Poste, Edward (1904). *Gai Institutiones or Institutes of Roman Law by Gaius*. E.A. Whittuck, ed. Clarendon Press.

Pius XI (1937). *Divini Redemptoris Encyclical of Pope Pius XI on Atheistic Communism to the Patriarchs, Primates, Archbishops, Bishops, and Other Ordinaries in Peace and Communion with the Apostolic See*. <https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19370319_divini-redemptoris.html>, as of August 10, 2021.

Pufendorf, Samuel von (1660/2009). *Two Books of the Elements of Universal Jurisprudence.* Thomas Behme, ed. Liberty Fund.

Pufendorf, Samuel von (1672/1998). *De Jure Naturae et Gentium Libri Octo*. Frank Böhling, ed. Akademie Verlag.

Robertson, Henry (1973). *Aspects of the Rise of Economic Individualism: A Criticism of Max Weber and His School.* A.M. Kelly.

Rorty, Richard (1988). Taking Philosophy Seriously. *New Republic* (April 11): 33.

Rorty, Richard (1991). The Seer of Prague. *New Republic* (July 1): 31.

Thils, Germain (1981). *Droits de l'homme et perspectives chrétiennes*. Fayard.

Schumpeter, Joseph A. (1954). *History of Economic Analysis*. Oxford University Press.

Soto, Domingo de (1553-1554/1968). *De Iustitia et Iure*. IEP.

Suárez, Francisco (c.1612/2012a). *Tractatus De Legibus Ac Deo Legislatore*. Ulan Press.

Suárez, Francisco (c.1612/2012b). *De opere sex dierum.* Nabu Press.

Vattel, Emer de (1758/2008). *The Law of Nations*. Béla Kapossy and Richard Whatmore, ed. Liberty Fund.

Vitoria, Francisco de (1557/1917). *De indis et iure belli relectiones*. Ernest Nys, ed. The Carnegie Institution of Washington.

Suggested Further Reading

The literature on natural law is vast and is found in disciplines like philosophy, law, theology, political science, metaphysics, and history.

Websites focused on natural law

In addition to the works cited in this book, an excellent resource for those interested in natural law is located at The Witherspoon Institute's online center for *Natural Law, Natural Rights, and American Constitutionalism*. This resource is conceived as an archive for and a commentary on the seminal documents of the natural law tradition, beginning with Plato and continuing all the way through history to late-twentieth century new natural law theory. It also contains a special section on natural law, natural rights, and American constitutionalism and political thought, as well as a section on critics of natural law theory. It can be found at: <http://www.nlnrac.org/>

For those interested in natural law texts written in the early modern and Enlightenment periods, The Natural Law and Enlightenment Classics Series published by Liberty Fund presents not only some of the most significant natural law writers from this period but also the lesser-known theorists who contributed to the development of natural law ideas. It can be found at <https://www.libertyfund.org/collections/natural-law-and-enlightenment-classics/>

Further learning about natural law

Many of the works cited in this book are also a good place to begin reading more widely about natural law. Other such works include:

Budziszewski, J. (1997). *Written on the Heart: The Case for Natural Law*. IVP Academic.

Copleston, F.C. (1955). *Aquinas*. Penguin Books.

D'Entrèves, Alexander P. (1951). *Natural Law: An Introduction to Legal Philosophy*. Hutchison University Library.

Gregg, Samuel (2003). *On Ordered Liberty*. Lexington Books.

Grisez, Germain, and Russell Shaw (1988). *Beyond the New Morality: The Responsibilities of Freedom*. University of Notre Dame Press.

Murphy, Mark C. (2019). The Natural Law Tradition in Ethics, *Stanford Encyclopedia of Philosophy.* https://plato.stanford.edu/entries/natural-law-ethics/#NatLawPraRat

More advanced books include

Anscombe, G.E.M. (2011). *Human Life, Action and Ethics: Essays by G.E.M. Anscombe*. Mary Geach and Luke Gormally, eds. Imprint Academic.

Boyle, Joseph M., Germain Grisez, and Olaf Tollefsen (1976). *Free Choice: A Self-Referential Argument*. University of Notre Dame Press.

Foot, Philippa (2001). *Natural Goodness*. Oxford University Press.

Gomez-Lobo, Alfonso (2002). *Morality and the Human Goods: An Introduction to Natural Law Ethics*. Georgetown University Press.

Haakonssen, Knud (1996). *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*. Cambridge University Press.

Hittinger, Russell (2003). *The First Grace: Rediscovering the Natural Law in a Post-Christian World*. ISI Books.

Hopfl, Harro (2004). *Jesuit Political Thought: The Society of Jesus and the State, c.1540–1630*. Cambridge University Press.

John Paul II (1993). *Veritatis Splendor*. Encyclical. <http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html>, as of July 12, 2021.

Midgley, E.B.F. (1975). *The Natural Law Tradition and the Theory of International Relations.* Paul Elek.

Novak, David (1998). *Natural Law in Judaism*. Cambridge University Press.

Rasmussen, Douglas B., and Douglas J. Den Uyl (2005). *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics.* Pennsylvania State University Press.

Rhonheimer, Martin (2000). *Natural Law and Practical Reason: A Thomist View of Moral Autonomy*. Fordham University Press.

Taliaferro, Karen (2017). *Ibn Rushd and Natural Law: Mediating Human and Divine Law*. Oxford University Press.

Tierney, Brian (1997). *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625*. Emory University Scholars.

Weinreb, Lloyd L. (1987). *Natural Law and Justice*. Harvard University Press.

Some journals and collected editions on all aspects of natural law thought include:

Angier, Tom, ed. (2019). *The Cambridge Companion to Natural Law Ethics*. Cambridge University Press.

Finnis, John, ed. (1992). *Natural Law.* 2 vols. New York University Press.

George, Robert P., ed. (1996). *Natural Law, Liberalism, and Morality*. Oxford University Press.

Gregg, Samuel, and Harold James, eds. (2012). *Natural Law, Economics and the Common Good*. Imprint Academic.

The American Journal of Jurisprudence. <https://academic.oup.com/ajj>

The Thomist. <https://www.cuapress.org/journals/the-thomist/>

Some works critical of natural law include:

Austin, John (1832/1998). *The Province of Jurisprudence Determined.* Ashgate Publishing Limited.

Goodnow, Frank Johnson (1916). *The American Conception of Liberty and Government*. Brown University.

Holmes, Jr., Oliver Wendell (1918). Natural Law. *Harvard Law Review* 32, 1: 40–44.

Kelsen, Hans (1945/1961). *General Theory of Law and State*. A. Wedberg, tr. Russell and Russell.

Kramer, Matthew (1999). *In Defense of Legal Positivism: Law Without Trimmings*. Clarendon Press.

Murphy, James Bernard (2005). *The Philosophy of Positive Law*. Yale University Press.

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About the author

Samuel Gregg is Research Director at the Acton Institute in Grand Rapids, Michigan. He is also a Visiting Scholar at the Feulner Institute at the Heritage Foundation in Washington DC, a Fellow at the Center for the Study of Law and Religion at Emory University in Atlanta, Georgia, and a Contributing Editor at *Law and Liberty*, part of the Liberty Fund Network in Indianapolis, Indiana. The author of 16 books—including the prize-winning *The Commercial Society* (2007), *Wilhelm Röpke's Political Economy* (2010), *Becoming Europe* (2013), the prize-winning *Reason, Faith, and the Struggle for Western Civilization* (2019), and over 400 articles and opinion pieces—he writes regularly on political economy, finance, American conservatism, Western civilization, and natural law theory. He served as President of the Philadelphia Society from 2019-2021. He is the General Editor of Lexington Books' Studies in Ethics and Economics Series. He also sits on the Academic Advisory Boards of Campion College in Sydney, Australia; the Fundación Burke in Madrid, Spain; the Instituto Fe y Libertad in Guatemala City, Guatemala; the Institute of Economic Affairs in London, United Kingdom; the Argaman Institute in Jerusalem, Israel; as well as the editorial boards of the *Journal of Markets and Morality* and *Revista Valores en la sociedad industrial*. In 2001, he was elected a Fellow of the Royal Historical Society, a Member of the Mont Pèlerin Society in 2004, and a member of the Royal Economic Society in 2008.

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