

# BEYOND STANDARD LEGAL POSITIVISM AND “AGGRESSIVE” NATURAL LAW: SOME THOUGHTS ON JUDGE O’SANNELLAIN’S “THIRD WAY”

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With his contribution on “The Natural Law in the American Tradition,”<sup>1</sup> Judge Diarmuid O’Sannlain has begun the indispensable task of laying the groundwork for sound jurisprudential reasoning in the natural law tradition. It is on the basis of this groundwork that we can begin to appreciate what natural law reasoning might mean, and what it does not mean, for contemporary American legal thinking. More specifically, it is on the basis of this groundwork that one can begin to articulate what might be called a “third way” of jurisprudential reasoning. This “third way” would steer clear of two opposed and equally problematic jurisprudential views; that is, it would steer clear of what we might call “standard legal positivism” (on the one hand), and (on the other hand) what Judge O’Sannlain calls the “aggressive” natural law jurisprudence of some contemporary theorists.

According to standard legal positivism, it is social facts or conventions alone (and not any moral principles) that constitute the fundamental criteria for determining what may count as valid law; for the standard legal positivist, then, there is no general requirement that positive law (or law as it is posited) must satisfy certain minimal moral norms in order to be valid as law.<sup>2</sup> Thus the standard legal positivist holds that judges fulfill their

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1. Diarmuid F. O’Sannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513 (2011).

2. Thus for H.L.A. Hart, the legal positivist endorses “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.” H.L.A. HART, *THE CONCEPT OF LAW* 185–86 (Penelope Bulloch & Joseph Raz, eds., 2d ed. 1994). In other work, Hart has identified the legal positivist view as the view that there is no “necessary connection,” or that there is a “separation,” between law and morality. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958). More recently, Jules Coleman has preferred to discuss legal positivism in terms of a “separability thesis,” rather than a “separation thesis.” For Coleman, “The separability thesis is the claim that there is no necessary connection between law and morality. That claim does express a tenet of positivism.” See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 104 n.4 (2001). But note that some theorists who consider themselves legal positivists (we might call them non-standard legal positivists) have denied the “separability thesis.” For an example of this “non-standard” version of legal positivism, see

legal duty as judges precisely by adhering to the law as it is simply posited (and thus as it is identifiable on the basis of morally-neutral social facts), and not by engaging in moral reasoning—beyond the positive law itself—regarding what the law ought to be, or what the unwritten “natural law” might require. At the opposite end of the spectrum, proponents of what Judge O’Scannlain calls “aggressive” natural law thinking hold that judges may—and indeed often must—render decisions concerning the positive law by looking beyond what the positive law itself provides and by discerning what is required as a matter of natural justice, or unwritten “natural law.” Thus, as Judge O’Scannlain observes, the “aggressive” natural law theorist holds that judges may on their own undertake to enforce or to actualize what they believe is required by the natural law, even if such enforcement or actualization is not itself mandated or authorized by existing positive law as such.<sup>3</sup>

In opposition to standard legal positivism and to aggressive natural law thinking, Judge O’Scannlain suggests a “third way”: according to this “third way,” judges may not look beyond the positive law in order to enforce what, in their own minds, is required by the natural law; however, judges working within the American tradition may legitimately appeal to natural law moral principles in their legal decision-making, since this sort of appeal is consistent with strict reliance on the positive law itself insofar as natural law moral principles are built into—or embedded within—American positive law itself. This embedding of the natural law within American positive law—Judge O’Scannlain further argues—is evidenced by the fact that this country’s Founders were animated and informed by natural law principles as they deliberated about and eventually passed the positive law known as the United States Constitution.

In the brief reflections that follow, I aim to do two things: first, to offer independent confirmation of the fundamental correctness of the judge’s proposed “third way” between standard legal positivism and “aggressive” natural law; and second, to begin offering a conceptual clarification that might give further support to this third way. I wish to achieve both of these tasks by reference to the thought of Thomas Aquinas, whose work is in some ways alien to contemporary American jurisprudence, but by no means alien to the natural law tradition as such.

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the work of Joseph Raz: “The separability thesis is . . . implausible . . . [I]t is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil.” JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 211 (1994).

3. For Judge O’Scannlain, the work of Hadley Arkes qualifies as an example of “aggressive” natural law theorizing. Hadley Arkes claims, for example, that “[T]he task of judgment, in our constitutional law, persistently moves us away from the text, or from a gross description of the act [being judged], and it moves us to the commonsense understanding of the principles that guide these judgments: the principles that help us in making those distinctions between the things that are justified or unjustified.” HADLEY ARKES, *CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS* 6 (2010).

For Aquinas, to understand what we mean by the term, “law,” is to understand that it is an ordering of reason (a *rationis ordinatio*, or a rational ordering) for the sake of the common good of some community, emanating from one who has care of the community, and promulgated.<sup>4</sup> Notice that, for Aquinas, law—properly understood—is laid down not by just any person or any agent that possesses reason or that has good ideas, but rather by the one whose job it is to care for the community.<sup>5</sup> For Aquinas, an essential feature of the law as such is that it emanates from one (whether this be an individual or group) that possesses the proper authority to look after the common good of the community in question. From this, there follows an important implication regarding the question of whether judges as such may engage in acts of legislation (or, to express the manner in an idiom commonly used by many contemporary observers, whether they may “legislate from the bench”). For Aquinas, because it is essential to the nature of law as such that it emanate from an agent or agents who have proper authority, it follows that judges who as such are not authorized to make the law (i.e., judges whose offices are not defined as law-making offices) may not legitimately engage in acts of legislation. Some contemporary natural law thinkers have made the mistake of presenting Aquinas’s thought as if it were the thought of an “aggressive” natural law theorist.

But if one reads Aquinas with due care, it is evident that, on Aquinas’s view, there is a strict limitation on the power of judges to engage in their own acts of enforcing what is required by the natural law, if such acts of enforcement would amount to acts of unauthorized law-making. We can say, then, Aquinas’s own theory of natural law contains within itself a certain kind of qualified legal positivism: judges, if they have not been given legislative authority by the law that delineates the nature and scope of their offices in the first place, may not “legislate from the bench.” Stated a bit differently, we might say that it is a violation of the natural law itself if a judge makes decisions by applying his or her own personal understanding of what the natural law requires, if such an application is not permitted by the law which gives the judge his or her authority to decide cases in the first place.<sup>6</sup>

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4. For this famous and now almost-canonical definition of law, see ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, Q. 90, art. 4 (Fathers of the English Dominican Province trans., 1915) (1265–1274).

5. Thus Aquinas explicitly declares that it is not just anyone’s reason (*ratio cuiuslibet*), but rather the reason of one who has care of the community, that is competent to make law. See AQUINAS, *supra* note 4, at I-II, Q. 90, art. 3.

6. Robert George has helpfully pointed out that, for many legal theorists, “belief in natural law entails the authority of judges to enforce it when they judge it to be in conflict with positive law . . . .” Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2279–80 (2001). But as George goes on to observe, this view—though common among both supporters and detractors of natural law reasoning—is a mistaken one. For it is a mistake to suppose that believers in natural law will, or necessarily should, embrace expansive judicial review or even ‘natural law’ jurisprudence . . . . And that is because questions of the existence and content of natural

Aquinas was quite clear about the requirement that acts of law-making, if they are to be legitimate, must emanate from the one (whether an individual or a group) that has proper authority to make the law. This requirement is helpfully illustrated in a section of Aquinas's *Summa Theologica* having to do with the killing of the innocent. In that section, Aquinas asks whether a judge in a capital case may sentence a defendant that he—as judge—knows, based on private or personal information alone, to be innocent. Aquinas's answer is revealing. He says that a judge may sometimes be obligated to pronounce a sentence that he personally knows to be an unjust one. The reason for this is that the judge, insofar as he exercises public authority, is obligated to render judgments on behalf of the community and for the sake of the community's common good; accordingly, the judge may legitimately render judgments based only on knowledge acquired by him as a public authority, and not based on knowledge acquired by him as a private individual (i.e., outside the scope of an appropriate public, judicial process). If the judge in a capital case privately knows that a defendant is innocent, but is unable to remove himself from the case and is unable to bring his privately-acquired knowledge to light through some appropriate judicial proceeding, then the judge does no wrong—says Aquinas—in sentencing the innocent defendant to death.<sup>7</sup> The judge would be doing wrong, however, if he were to rely materially on his own privately-held knowledge or beliefs, in order to render what in essence is a public and not a private decision.

So much for my brief attempt (following Thomas Aquinas) to offer some independent support of Judge O'Scannlain's suggested "third way" between standard legal positivism and "aggressive" natural law theorizing. I turn now to what I regard as the harder task, namely the task of providing the beginnings of a conceptual clarification that might serve to provide further justification for Judge O'Scannlain's jurisprudential position. In articulating his position, Judge O'Scannlain referred, for illustrative purposes, to the relatively recent decision of the U.S. Supreme Court in the case of *District of Columbia v. Heller*.<sup>8</sup>

Of relevance for Judge O'Scannlain is the fact that, in *Heller*, the Supreme Court explained its reasoning and decision making by launching into an extended discussion of how the "natural right" to bear arms was understood in American history before and during the time of the Framers' enactment of the U.S. Constitution.<sup>9</sup> For the purpose of my analysis here, I shall refrain from commenting on the merits of the *Heller* decision as such. I wish instead to address what I regard as a deeper jurisprudential issue; and in order to address that issue, it will be most helpful if I simply stipulate—

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law and natural rights are, as a logical matter, independent of questions of institutional authority to give practical effect to natural law and to protect natural rights.  
*Id.* at 2279–80.

7. See AQUINAS, *supra* note 4, at II-II, Q. 64, art. 6, ad. 3; for other passages relevant to this topic, see also *id.* at II-II, Q. 67, art. 2 & II-II, Q. 96, art. 6.

8. 128 S. Ct. 2783 (2008).

9. O'Scannlain, *supra* note 1, at 1523–26.

for the sake of the present analysis—that the Supreme Court’s reasoning and decision-making in *Heller* were correct.

But now to my question: assuming that the Supreme Court decided correctly in *Heller*, was the decision correct on account of the fact that there really does exist, as a matter of objectively valid “natural law,” a genuine “natural right” to bear arms? Or rather, was the Supreme Court correct in *Heller* on account of the fact that the law-makers who framed the Constitution and the Bill of Rights were animated by the understanding that there was such a natural right, even if—as a matter of objectively valid “natural law”—the Framers may have been wrong in understanding or believing this?

Before saying a bit more about why I regard these questions as important, I would like to make a brief observation about why, in my view, Judge O’Scannlain is right to suggest that the understandings which animate the legislator’s acts of law-making are relevant to a judge’s interpretation and application of the law. The reason is that such understandings reveal what the law itself actually *is*. In other words, the understandings that animate the legislator’s acts of law-making are not of merely historical or biographical interest; they are not just add-ons; they are not merely tangential considerations which in themselves are extraneous to the correct determination of what the law itself *is*. Rather, the understandings that animate acts of legislation belong to the rational principles which define and determine what the law itself *is*, since—as Aquinas affirms—the law is nothing other than an ordering of reason; and an ordering of reason, to be an ordering of reason at all, must be determined or guided by some animating rational principle or act of understanding.

By way of analogy, we might observe that the intention that animates an agent’s action is not merely tangential or extraneous to the correct determination of what the agent’s action *is*; the intention is not something added on to the action. Rather, the intention is the animating principle which plays a key role in defining just *what* the action is in the first place. Hence, it is intention which formally defines an act of murder and makes it an act that is different in kind from the act of, say, involuntary manslaughter.

But now back to my questions, slightly reformulated: was the *Heller* Court correct since it correctly discerned that there really does exist, as a matter of objectively valid “natural law,” a “natural right” to bear arms? Or rather, was the *Heller* Court correct since it correctly discerned that the law-makers who framed the Constitution and the Bill of Rights were animated by the understanding that there is such a “natural right,” even if the Framers may have been mistaken about this? If I have rightly understood the position that he puts forward, Judge O’Scannlain should be deeply resistant to the binary choice that I am presenting here. For if Judge O’Scannlain were to opt for the first answer (that the *Heller* Court was correct since it correctly discerned that there really does exist, as a matter of objectively valid “natural law,” a “natural right” to bear arms), then he would be in danger of endorsing a version of “aggressive” natural law thinking,

according to which judges may undertake to enforce or to actualize what, according to their own understanding, is required by an objectively valid natural law. But if Judge O'Scannlain were to opt for the second answer (that the *Heller* Court was correct since it correctly discerned that the law-makers who framed the Constitution and the Bill of Rights were animated by the understanding that there is such a "natural right," even if the Framers may have been mistaken about this), then his position is in danger of collapsing into a version of legal positivism. For if the *Heller* Court was correct simply on account of the fact that it correctly discerned the actual understandings that animated the Framers in their acts of law-making, then the correctness of the Court's reasoning would be determined on the basis of historical facts alone and not by reference to any moral considerations regarding what is required by the "natural law" as such.

Now if I have understood his position correctly, Judge O'Scannlain would want to say that the *Heller* Court was correct since it correctly discerned the actual understandings of the Framers, *and also* correctly discerned that there really does exist, as a matter of objectively valid natural law, a "natural right" to bear arms. But that answer—as correct as it may be—does not address the fundamental problem of principle that I wish to raise. What if the *Heller* Court correctly discerned that the Framers were animated by the understanding that there is a "natural right" to bear arms, and yet the Framers were nevertheless mistaken about this supposed right? In order to suggest a possible answer to this question, I would like to turn once again to the thought of Thomas Aquinas. Aquinas—so far as I understand his "natural law" jurisprudence—would say that the *Heller* Court was correct in its decision on account of the fact that the Court correctly discerned that the Framers understood that there is a "natural right" to bear arms, and the *Heller* Court would *still* be correct in this decision, even if it were the case that the Framers were mistaken about this "natural right," *provided that* the Framers' being mistaken about this philosophical or anthropological issue did not lead them to make the mistake of enacting positive laws that were fatally defective precisely as laws. A positive law might be fatally defective precisely as a law, if—for instance—it emanated from someone who lacked the proper authority to enact it; or if it was not properly promulgated (e.g., if it was promulgated only *ex post facto*); or if it required citizens to do that which is contradictory or otherwise impossible.

For Aquinas, properly authorized law-makers might very well enact positive laws that are animated by mistaken philosophical or anthropological views. But even if law-makers are motivated by incorrect philosophical or anthropological views, it does not follow that the laws which are enacted on the basis of such views are thereby invalid as laws. Indeed, unless judges have been given the authority to enforce their own philosophical or anthropological views, they are—on Aquinas's view—in danger of acting outside the scope of proper authority (and thus acting illicitly) if they take it upon themselves (a) to strike down properly posited laws on the grounds that such laws reflect some incorrect philosophical or

anthropological perspective, or (b) to enforce unposit laws on the grounds that such enforcement is mandated by the judge's "more correct" philosophical or anthropological perspective.

For Aquinas, defectiveness in the legislator's philosophical or anthropological views does not necessarily entail defectiveness as a matter of legal validity. Imagine a scenario in which a legislator—animated by a mistaken philosophical or anthropological view—passes laws that legalize and regulate prostitution. In passing such laws, the legislator (again, whether an individual or a group) may believe (based on what for Aquinas would be a mistaken view) that prostitution is neither morally good nor morally evil, but morally neutral; or the legislator may believe (again, based on what for Aquinas would be a mistaken view) that the question of prostitution's morality is altogether undecidable, since it is impossible to make objectively valid moral judgments about anything whatsoever. Now Aquinas himself would regard prostitution as morally objectionable—indeed, he would regard it as intrinsically evil insofar as it is an instance of fornication<sup>10</sup>—but he would nevertheless say that properly enacted laws which legalize and regulate prostitution (even if those law are motivated by incorrect philosophical or anthropological views) may be perfectly valid as law. Indeed, Aquinas argues explicitly in favor of the legal permission of prostitution; but unlike arguments which focus on the alleged neutrality or undecidability of prostitution's moral status, Aquinas's argument for the legal permission of prostitution depends on an affirmative moral judgment regarding the common good. Even if prostitution in itself is morally illicit, so Aquinas argues, the legal prohibition of prostitution would bring about greater harm than benefit to the common good (this is because, for Aquinas, the legal prohibition of prostitution would induce many men to satisfy their inordinate desires by resorting to behaviors that would bring about more egregious forms of damage and disorder to the community as a whole).<sup>11</sup> Since the aim of law is the common good and not just individual goods—so Aquinas argues—it would be unwise to pass laws that prohibit prostitution.

The point here is that, on Aquinas's view, widely divergent philosophical or anthropological views (some correct and some incorrect) may independently lead to the same, perfectly correct conclusions regarding the kinds of laws that ought to be passed for a particular community. Stated more provocatively: for Aquinas, the passage of perfectly valid laws (and even perfectly beneficial laws) may be informed and motivated by adherence to perfectly incorrect philosophical or anthropological beliefs. In the face of such laws, the proper role of the judge as judge is to assess not the soundness of the legislator's philosophical or anthropological views, but rather the legal validity of the legislator's acts of law-making. Even though (as we have seen above) the judge must attend to the legislator's acts of understanding in order to discern what the law itself *is*, it nevertheless remains the case that the judge as such is authorized to criticize the

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10. ST. THOMAS AQUINAS, *DE MALO*, Q. 15, art. 1-3.

11. AQUINAS, *supra* note 4, at II-II, Q. 10, art. 11; *see also* ST. AUGUSTINE, *DE ORDINE*, II, 4.

legislator for being a bad legislator, but not for being a bad philosopher or bad anthropologist.

Now might there be some alternative scenario in which the legislator's being mistaken about some given philosophical or anthropological issue does, in fact, lead the legislator to enact positive laws that are fatally defective precisely as laws? In other words, might there be some alternative scenario in which the legislator's being a bad philosopher or a bad anthropologist *does* indeed cause the legislator to be a bad legislator as well? Of course. Consider a utilitarian-motivated theory of punishment according to which the central purpose of punishment is not to achieve retribution with respect to some individual wrong-doer, but rather to deter the citizenry in general from engaging in socially-offensive conduct. Animated by this theoretical view of the purpose of punishment (one that Aquinas would regard as incorrect), a utilitarian legislator may pass criminal laws which are to be enforced *ex post facto*, perhaps based on the belief that the *ex post facto* enforcement of such laws will lead to increased general deterrence and thus bring about the "greatest good for the greatest number." In a scenario such as this, Aquinas would hold, the legislator's philosophical or anthropological views do lead the legislator to pass positive laws that are fatally defective precisely as laws. But again, it is not the defectiveness of the philosophical or anthropological views as such—but rather the defectiveness of the legislative enactments engendered by such views—that fall within the scope of the judge's proper authority to evaluate and criticize.

According to Aquinas's "natural law" judicial philosophy, a judge (unless given the special authority to enforce his or her own particular philosophical or anthropological views about things) should aim not to correct legislatures for being defective philosophers or defective anthropologists, but rather for passing positive laws that are fatally defective as laws. As noted above, there are many ways in which a positive law might be fatally defective as a law: for example, a positive law may have been enacted without the proper authority; or it may not have been properly promulgated; or it may require citizens to do that which is contradictory or otherwise impossible. But now we might ask: on what basis does a judge know that these are among the various ways in which a positive law might be fatally defective as law? There simply are no general provisions in the United States Constitution which explain to American judges how positive laws ought to be tested in terms of authoritativeness, promulgation, or coherence. In holding that judges may legitimately criticize positive laws on the basis of these criteria—even though these criteria are not spelled out in the Constitution itself—are we not (as Hadley Arkes says we are) moving "away from the text"<sup>12</sup> of the Constitution itself and thus relying on a kind of unwritten "natural law"? And if so, are we not guilty of engaging in the sort of "aggressive" natural law theorizing that Judge O'Scannlain has so forcefully questioned?

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12. ARKES, *supra* note 3, at 6.

My response to these important and difficult questions cannot be fully justified within the present context. But I hope that the following, exceedingly brief response (based on Aquinas's jurisprudence) will be more-or-less on the mark, and might perhaps suggest some avenues for further dialogue on the topic. It is true enough that the United States Constitution—itsself an instance of positive law—does not explicitly enumerate the many different normative grounds upon which a judge may legitimately criticize instances of positive law. But it does not follow from this that a judge must “move away” from what is given through the positive law in order to understand and appreciate such normative grounds. Consider: the United States Constitution—in the midst of all the things that it does explicitly enumerate—also presents itself as an instance of what is meant by “law.” In presenting itself as an instance of “law,” the Constitution does not *justify* its status as an instance of law; it does not *explain* what is meant by “law”; and it does not *spell out criteria* that must be met if a particular enactment is to be regarded as valid law. If the United States Constitution does not provide such justification, explanation, or criteria, then how are American judges supposed to be guided in their understanding of what is meant by “law” and in their assessment of the legal soundness or defectiveness of particular positive laws?

It is tempting to think that the requisite justification, explanation, or criteria must be made available (assuming that they are available at all) either (a) through the sheer fact of some particular act of positing (e.g., through some existing “convention” or “social fact”) that the judge happens to accept or endorse as directive or normatively significant for his or her decision-making, or (b) through the judge's own “natural law” moral reasoning which—precisely because it is the judge's own, independent moral reasoning—allows the judge to take a critical stance with respect to all merely posited “conventions” and “social facts.” If one is tempted by the first option, then one is likely to be attracted to some form of legal positivism; if one is tempted by the second option, then one is likely to be attracted to some form of “aggressive” natural law thinking. But Aquinas would hold that this binary choice between two mutually exclusive options represents a well-disguised false dichotomy.

For Aquinas, it is never the case that the various positings of human beings are mere “social facts” which in themselves are devoid of intrinsic goodness and which acquire value or normative significance only through some extraneous, supervenient act of acceptance or endorsement by an observing agent (e.g., a judge) who happens to regard the “mere facts” as directive or normatively significant for him or her. Rather, all human activity as such—including the activity of positing even the most incomplete, imperfect, or defective instances of law—is always and inescapably informed by rational, goal-directed norms, and thus is never accurately characterizable as a mere “convention” or “social fact” devoid of all intrinsic goodness. Conversely, it is never the case that the norms on the basis of which judges (or we) may legitimately evaluate existing positive laws, can be given apart from the actual and concrete practices, interactions,

and patterns of behavior (in short, the positings) that inform us and make us the social, linguistic, concept-wielding, and hence rational beings that we are. Accordingly, the term “natural law” is not best understood as referring to some kind of invisible, ideal, transcendental, unposited, or unexpressed kind of law or set of norms residing in some Platonic heaven above us; the term refers rather to the distinctive and immanently rational manner in which we, as goal-directed beings, inescapably (even if imperfectly) institute or posit various kinds of order, both in our own lives and in the things that surround us, for the sake of achieving what we apprehend as intelligible goods in our real (non-Platonic) world here and now.

Aquinas gives expression to this same point when he maintains that “human law” (or what we have been calling “positive law”) is not something that exists independent of and separate from “natural law,” just as “natural law” is not something that exists independent of and separate from “eternal law.”<sup>13</sup> For Aquinas, “natural law” is simply “eternal law” but apprehended precisely under the aspect of its (eternal law’s) being in us as rational beings that are both (a) ordered to the common good of the universe, and also (b) capable of rationally ordering ourselves and other things towards that very same common good of the universe. By the same token, on Aquinas’s account, “human law” is simply “natural law” but apprehended precisely under the aspect of its (natural law’s) being in us as beings that are not only (a) capable of rationally ordering ourselves and other things towards the common good of the universe, but also (b) capable of ordering other human beings to a more limited common good, namely, the common good of a particular and uniquely situated political community. (Notice: since natural law and human law do not exist in addition to or in opposition to eternal law, it follows—for Aquinas—that the limited common good that is the object of human law—i.e., the common good of a political community—is not pursued in addition to or in opposition to the common good of the universe, but rather *as a part of* the common good of the universe.)

For present purposes, the key implication of the foregoing observations is that—on Aquinas’s view—American judges who properly criticize positive laws on the basis of “natural law” principles, do not do so by holding positive laws up to some external model or standard (known as “natural law”), and then discerning whether there is a match or mismatch between the two entities (“positive law” and “natural law”). As we have seen, positive law (or human law) for Aquinas is not something that exists independent of and separate from “natural law,” but is rather a *specification* or *particularized instantiation* of the natural law. Because of this, positive laws (or human laws) which are properly judged to be defective in light of natural law (or even eternal law) are not laws that have been compared to, and found wanting in accordance with, an external, transcendental standard; rather, they are laws which happen to harbor within themselves some *immanent* or *internal* defect. “Natural law” judges, therefore, do not need

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13. AQUINAS, *supra* note 4, at I-II, Q. 91, art. 2, ad. 1.

to appeal to an external, transcendental standard, or “move beyond” what is given in the positive law. What they need to do, rather, is attend carefully to what is given in the positive law itself in order to discern whether there is some lack of due order or intelligibility which *immanently* renders the law fatally defective precisely as the law that it is (or claims to be). But this is just another way of suggesting that the proper activity of “natural law” judges working in the American tradition is adequately explained neither by standard legal positivism nor by “aggressive” natural law; and following Aquinas, the best way to move beyond these two opposed schools of jurisprudential thought is to question the well-disguised false dichotomy that they *both* seem to endorse.

*Notes & Observations*