NATURAL LAW AND THE LEGISLATION OF VIRTUE: HISTORICITY, POSITIVITY, AND CIRCULARITY

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I. INTRODUCTION

As Alexander D'Entreves observed over forty years ago, the case for natural law "is not an easy one to put clearly and convincingly."[1] Furthermore, even if one can make the case for natural law in a clear and convincing manner, one should not expect such an argument to be clear and convincing for all time. Instead, the case for natural law must be an ongoing argument, addressing itself perpetually to the needs of the time as these needs shift and change. In short, the case for natural law "must needs appear in a different light according to the angle in time or in place from which it is looked at."[2] With this precept in mind, I seek to examine Thomas Aquinas's natural law teaching on the legislation of virtue [3] in light of concerns that are especially acute from the perspective of contemporary liberalism.

Within our liberal democracy—where the values of individual autonomy and 'self-determination' tend to be prized above almost all others—it is not surprising that natural law teaching on the legislation of virtue has met with resistance. Thus constitutional law expert Laurence Tribe has claimed that a jurisprudence informed by natural law is dangerous, since it can be used to justify "moralistic intrusions on personal choice."[4] In a similar vein, political theorist John Rawls has argued that an application of the teleological principle of "perfectionism" in our liberal democracy would violate the principle of "equal liberty."[5] In this paper, I do not intend to address these concerns directly.

[1] A.P. D'Entreves, "The Case for Natural Law Re-examined," 1 *Natural Law Forum* (1956), p. 5.

[2] *Ibid.*

[3] It is important to note that, strictly speaking, human laws can command only the acts of the virtues, and not the virtues themselves. The virtues are habits acquired over time through the repeated performance of certain kinds of acts. Human laws command the acts of the virtues; but whether or not the performance of these acts will lead to virtue depends on factors beyond the scope of the law itself.

[4] See Laurence H. Tribe, "Clarence Thomas and 'Natural Law,'" *New York Times*, 15 July 1991, p. A-15.

Rather, I intend to address what I take to be a prior theoretical issue, namely the issue of how the natural law in general is related to the legislation of virtue in particular.

For Aquinas, the passage from the natural law as such to the legislation of specific acts of virtue is not immediate and direct, but must be *mediated* by premises derived from a people's concrete historical situation. If one fails to understand the meaning and implications of this mediation, then one is also likely to misunderstand the relation between natural law and human self-determination in history. More specifically, one is likely to regard the natural law as either too 'detached' from historicity to allow for human self-determination in the face of contingency, or else too 'attached' to historicity to allow for genuinely valid, non-relative moral judgements. It is precisely this sort of misunderstanding, I believe, that motivates Roberto Unger's complaint that all natural law theories must purchase specific content by giving up universality, or universality by giving up specific content:

> [A]ll the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. They are repeatedly trapped in a dilemma. Either the allegedly universal ends are too few and abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal. One has to choose between triviality and implausibility.[6]

As I shall seek to show, Unger's criticism rests on a misunderstanding of the mediation that necessarily takes place between the natural law as such and a people's own concrete, historical situation. On the one hand, all legislation informed by natural law thinking must be guided in part by premises drawn from a people's concrete, historical situation. On the other hand, this necessary dependence on concrete, historically-relative premises does not cause the Thomistic account to collapse into any form of historicism or positivism. Rather, the Thomistic account maintains its critical and normative force, in spite of its sensitivity to the contingencies of human self-determination in history. As I shall try to show,

5 See John Rawls, *A Theory of Justice*, 1st edition (Cambridge: Harvard University Press, 1971), pp. 325-330.

6 See Roberto M. Unger, *Knowledge and Politics* (Cambridge: Cambridge University Press, 1975), p. 241.

Aquinas's account is open to historicity and positivity, yet without being historicist or positivist. Finally, at the end of this paper, I shall make some brief observations about the fundamental, non-vicious circularity that characterizes all reasoning about natural law and morality.

II. THE NATURE AND KINDS OF LAW

Aquinas tells us that law (*lex*) is "a rule (*regula*) and a measure (*mensura*) of acts whereby man is induced to act or is restrained from acting."[7] To the extent that law is a *rule*, it functions as a general guide or directive for governing human action; to the extent that law is a *measure*, it functions as a standard or criterion for judging the rightness or wrongness of human action. Since the final goal or purpose of all human action is felicity or happiness (*felicitas vel beatitudo*), it follows that "law must principally look to the ordination to happiness" (*ST*, I-II, q. 90, a. 2). Furthermore, Aquinas holds as a general principle that "every part is ordered to the whole as the imperfect to the perfect" (*ST*, I-II, q. 90, a. 2). Since the singular man relates to society as the imperfect part to the perfect whole, law must properly look to the happiness of society (*ad felicitatem communem*), and not just the happiness of one man (*ST*, I-II, q. 90, a. 2). It follows that law as such is ordered to the common good (*ad bonum commune*).

For Aquinas, law is principally ordered to the common good, and not only the good for the individual. But this is not meant to imply that the good for society can be pursued to the detriment of the good for the individual. For Aquinas, the good for society and the good for the individual do not stand outside of one another, as two externally related goods might stand in relation to one another. While there can be a conflict between two externally related goods (e.g., when two organisms compete for nourishment in a context of scarcity), there is in principle no conflict between what is good for the part and what is good for the whole.

Aquinas's thinking on this issue can be articulated in terms of an organic paradigm: in the well-functioning society, as in the living

[7] Saint Thomas Aquinas, *Summa Theologiae*, I-II, q. 90, a. 1, as rendered in *The Treatise on Law*, ed. and trans. R. J. Henle, S.J. (Notre Dame: University of Notre Dame Press, 1993), p. 124. All subsequent quotations from Aquinas's treatise on law will be taken from the translation by Henle and cited parenthetically in the text with *ST* used as the abbreviation for *Summa Theologiae*.

organism, the part and the whole are not externally related, but reciprocally co-determine one another. There can be no conflict between the good for the individual and the good for society, any more than there can be a conflict between what is good for the spleen and what is good for the body as a whole. A healthy spleen makes for a healthy body, and a healthy body makes for a healthy spleen. By the same token, a good individual makes for a good society, and a good society makes for a good individual. A society that did not engender and sustain good individuals could not be called a good society, and—reciprocally—an individual that did not contribute to the good of society could not be called a good individual. For Aquinas, the common good does not refer to an aggregate of otherwise unrelated individual goods; rather, the common good refers to the perfection or actuality of a community of individuals who themselves reach their own perfection or actuality in and through the community that they collectively constitute.[8]

For Aquinas, law cannot be ordered to the common good without also being ordered to the good, or the happiness, of the individuals within society. Now if law is ordered to the happiness of individuals as constitutive of its ordering to the common good, then law must positively affect the moral development of those individuals who are subject to law. This is because, for Aquinas, the individual cannot achieve happiness, which is his or her proper good, without also being morally good or virtuous. Thus Aquinas tells us, "... it is proper to law to bring subjects to the virtues proper to themselves [*inducere subjectos ad propriam ipsorum virtutem*]" (*ST*, I-II, q. 92, a. 1).

It is important to remember here that Aquinas's account of law is a normative account, and not merely a descriptive or empirical account. When Aquinas says that law is a rule and measure of human acts, he is not referring merely to the fact that legislative measures enacted by those in power happen to guide those subject to it or sanction the punishment of those who fail to obey it. The Thomistic account of law contemplates a good society where the law promotes what is

[8] A full elaboration of this point would require a further discussion of "causality" within an organic or biological context. Within the living organism, as within a well-functioning society, the parts and the whole reciprocally "cause" one another: the organs cause the body to be a living body, and the living body causes the organs to be differentiated organs. A similar kind of reciprocal causality (with some significant differences) characterizes the relation between the parts and the whole of a well-functioning society.

actually good for both individuals and society as a whole.[9] As normative, the Thomistic account of what law is must simultaneously be an account of what actual legislative enactments ought to be. For Aquinas, if any given set of legislative enactments does not promote the common good and the good for individuals, then ¾ strictly speaking ¾ such enactments do not deserve the title of "law." Just as a being *qua* being cannot be evil, so too a law *qua* law cannot be bad or cannot fail to promote the good.[10]

While all law *qua* law is ordered to the good, Aquinas distinguishes between four different kinds of law.

(1) "Eternal law" refers to the eternal, perfect idea of the divine governance of the community of the whole universe, an idea that exists outside of all time in the mind of God (*ST*, I-II, q. 91, a. 1).

(2) "Natural law" refers to the human being's participation in the eternal law. While all created beings participate in the eternal law, the human being — by virtue of his or her rational nature — does so more excellently than non-rational creatures do (*ST*, I-II, q. 91, a. 2). Aquinas notes that there are several precepts of natural law, including, for example, the precepts that command self-preservation, procreation, the teaching of the young, the seeking of truth, social living, and acting justly towards one's fellows. (*ST*, I-II, q. 94, a. 2).

[9] Because the Thomistic account contemplates a "good society" populated by good men and women, it would be accurate to say that the Thomistic account finds its exact opposite in the jurisprudence of Oliver Wendell Holmes, Jr., according to whom all legal theorizing should adopt the perspective of the "bad man": "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, and not as a good one...." See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897), p. 458.

[10] From within the Thomistic account of law, the real question is not, "which laws are good and which are bad?"; the question is rather, "which legislative enactments genuinely promote the common good and therefore deserve the title of law?" As a rule and measure of human acts, "law" in the proper, normative sense of the term provides the standard or criterion for determining whether certain legislative enactments are good or bad, and thus whether they are themselves instances of law or not.

(3) "Human law" refers to particular rules and determinations devised by human reason insofar as they fulfill the conditions which belong to the nature of law in general (*ST*, I-II, q. 91, a. 3). For Aquinas, human law is required in addition to natural law, because the precepts of natural law are universal and indemonstrable first principles, which alone cannot guide human beings in their actions regarding particular things. (*ST*, I-II, q. 91, a. 3).

(4) "Divine law" refers to the idea and the precepts of the divine governance of the world insofar as these are made known through revelation, primarily through the Old and New Testaments.

In addition to the four kinds of "law" outlined by Aquinas, we might add a fifth kind, entitled "positive law." Positive law is not necessarily "law" in Aquinas's normative sense of the term. "Positive law" refers simply to any legislative enactment as it is factually given and enforceable through the power of the state, regardless of whether the legislative enactment is good or not. For Aquinas, it would make no sense to speak of a bad "human law," for all human law, according to the normative sense of the word, is good. By contrast, it does make sense to speak of a good or bad "positive law." If a positive law is a good law, then it is a "human law" in Aquinas's normative sense of the term.[11]

III. THE PASSAGE FROM NATURAL LAW TO THE LEGISLATION OF ACTS OF VIRTUE

According to Aquinas: (1) every human law is derived from the natural law (*ST*, I-II, q.95, a. 2); and (2) human laws command the acts of all the virtues (*ST*, I-II, q. 96, a. 3).[12] In spite of these claims, Aquinas does not hold that the natural law directly prescribes any rules commanding the acts of the virtues. Instead, the passage from the natural law to any specific rules commanding acts of the virtues involves a two-fold mediation: the first mediation is from natural law to human

[11] Here we distinguish between "human law" and "positive law," because a bad legislative enactment can still be enforced, and is therefore commonly—though misleadingly—called "law" by many people.

[12] See also *ST*, I-II, q. 94, a. 3, where Aquinas writes that all the acts of the virtues belong to the natural law.

law in general; the second mediation is from human law in general to specific rules commanding the specific acts of the virtues.

The distinction between these two mediations is a conceptual distinction; it is not meant to suggest that there is any kind of temporal sequence, or two-step process, involved in the derivation of specific legislation from natural law. Stated negatively, the two-fold mediation is meant to imply: (1) a system of human law can never be derived directly from the general precepts of natural law; and (2) a general system of human law, as such, does not automatically contain an answer to the question concerning which specific acts of virtue should be legislated and which not. The activity of deriving a system of human law from natural law, and the activity of legislating specific acts of virtue, may not be temporally separate; nevertheless, these two activities are conceptually distinct, and so we speak here of a two-fold meditation between natural law and the legislation of specific acts of virtue. We shall consider each kind of mediation in turn.

The derivation of human law from natural law is not immediate and direct, but takes place through what Aquinas calls "determination." "Determination" in law resembles the way in which the house-builder "has to determine the general form of a house to some particular shape." (*ST*, I-II, q. 95, a. 2) In determining the general form of a house to a concrete situation, the house-builder must take account of various contingent factors, including climate, geography, available building materials, surrounding edifices, the specific purposes of the house, and so forth. The general form of "house," by itself, does not prescribe the specific determinations that will characterize the actual house to be built.

In a similar way, the general precepts of natural law (e.g., self-preservation, procreation, learning, and social living) do not, by themselves, prescribe any of the specific determinations of human law. The precepts of natural law are relatively open and indeterminate in themselves, in need of being determined by reference to various contingent factors, including, for example, a people's history, religion, culture, geographical situation, customs, technology, level of economic development, form of political organization, and so forth. The content of actual human laws is never derived directly from the natural law, but is always partly the result of the specific needs and practices of a particular soci-

ety at a particular point in its history. As Aquinas writes, "the natural law has it that he who does wrong should be punished, but whether he is punished in this or that way is not a determination of the natural law." (*ST*, I-II, q. 95, a. 2)

To say that all human laws are derived from the natural law does not mean that all the specific determinations of human law must already be contained within the natural law. All human laws are derived from the natural law in the sense that all human laws—if they are to be called laws in the normative sense of the term—must contain specific determinations that promote the common good, and the good for individuals, within a particular society. Since all human activity is ordered to the good by virtue of the natural law, it follows that all positive law that promotes social and individual good (i.e., all human law in the normative sense) receives its orientation from the natural law, and is therefore derived from the natural law.

This brings us to the second kind of mediation between natural law in general and the legislation of specific acts of virtue. We will recall that, for Aquinas, law is ordered to the common good; because of this, there is in principle no virtue whose acts the law cannot command. Accordingly, Aquinas writes that human laws command the acts of all the virtues (*ST*, I-II, q. 96, a. 3). This does not mean, however, that human law necessarily commands acts pertaining to every single virtue that might be proper to a given people or society. Within the sphere of human law, it is possible to distinguish between those acts of virtue which are the proper subject matter for legislation, and those which are not. For Aquinas, this distinction is grounded in the fact that law is ordered *principally* to the common good. Since priority is given to the common good, and not just the good of individuals, it follows that "human law does not command all the acts of all the virtues, but only those which can be ordered to the common good." (*ST*, I-II, q. 96, a. 3)

The restriction of legislation to those acts of virtue that can be ordered to the common good can be analyzed in two parts: first of all, human law commands external acts only, and not internal states of mind (e.g., feelings, intentions, etc.), since only external acts have a direct bearing on the common good; secondly, human law does not command all external acts pertaining to the virtues, but only certain kinds of external acts, namely those that can be ordered to the common good. We can

illustrate this two-fold restriction through an example: while the virtue of temperance is a good for the individual, human law does not command internal actions or states of mind associated with temperance; furthermore, human law does not even command all the external acts that might be conducive to temperance. Human law does not command sobriety in the home, but it may very well command sobriety in public or while driving.

Only acts of virtue that can be ordered to the common good are the proper subject matter of legislation through human law. Our next question thus becomes: which acts of virtue can be ordered to the common good? An answer to this question depends upon how one conceives of the nexus between individual acts of virtue and the common good; and this depends, in turn, on how "thick" or "thin" one's conception of the common good is. Since natural law, in itself, prescribes no particular view of the common good, an answer to these questions will depend, to a large extent, on a number of contingent factors, including, for example, a people's history, religion, culture, geographical situation, customs, technology, level of economic development, form of political organization, and so forth. We can illustrate this by contrasting two kinds of regimes, ancient and modern.

Under the regimes of ancient Greece or Rome, a great number of acts of the virtues were regarded as the proper subject matter of public legislation. For these regimes, there was a relatively tight nexus between individual acts of virtue and the common good. This tight nexus was supported, in turn, by a relatively "thick" conception of the common good: it was inconceivable that the common good could be sustained without individual acts of piety, patriotism, and the like. By contrast, in modern liberal democracies, fewer and different acts of the virtues are regarded as the proper subject matter of public legislation. In contemporary America, for example, military service is no longer required by law, taxes are not levied for the upkeep of religious institutions, and important forms of civic participation are not required by law. Within pluralistic democracies, the trend is to regard progressively fewer acts of the virtues as constitutive of the common good or the proper subject matter of human law. This is because the notion of the common good within liberal democracies is relatively "thin," focusing

less on the moral virtues and more on material prosperity.[13] This "thinning" of notions of the common good within liberal democracies is attributable, in part, to the valorization of individual autonomy, which – in turn – would have been unthinkable without the weakening of traditional familial and cultural bonds through the effects of innovations in science, technology, and modern forms of economic organization.[14]

IV. HISTORICITY WITHOUT HISTORICISM

By proposing a two-fold mediation, Aquinas avoids the untenable conclusion that natural law immediately and directly prescribes the legislation of any specific acts of virtue. At the same time, this two-fold mediation seems to imply that there is a broad conceptual gap between natural law, considered in itself, and the legislation of specific acts of virtue: while the precepts of natural law are general, actual commands pertaining to specific acts of virtue are always particular, suited to a concrete people and situation. Because of this conceptual gap, we must now ask whether, and how, Aquinas's thought concerning the connection between natural law and the legislation of acts of virtue can be defended against the historicist challenge.

According to the historicist challenge, the precepts of natural law are so general and vague as to be consistent with virtually any vision of the common good whatsoever. Aquinas holds that human law

[13] This contrast is not meant to suggest that the moral virtues are entirely unrelated to material prosperity. These two sides are reciprocally related to one another: the discipline and moderation that characterize virtuous activity are simultaneously the necessary conditions for material productivity and prosperity; conversely, the surplus of free time that results from material prosperity makes possible leisure activities, which are necessary for the development of the virtues.

[14] The communitarian thinker, Michael Sandel, has lamented this thinning of contemporary notions of the common good. See, for example, Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Harvard University Press, 1996). While Sandel laments the ascendancy of "procedural justice" over "substantive" notions of justice, classical (neo-Kantian) liberal thinkers (including John Rawls, Thomas Scanlon, Thomas Nagel, and Brian Barry) seek to justify such ascendancy as a positive movement in the direction of enlightenment and individual autonomy. Of these four liberal thinkers, only Barry acknowledges that the replacement of "substantive justice" by "procedural justice" is premised on a general skepticism regarding all over-arching visions of the good. See Brian Barry, *Justice as Impartiality* (Oxford: The Clarendon Press, 1995), pp. 168-173. Thus Barry (indirectly) confirms Nietzsche's prediction (made over 100 years ago) that developments in science and technology would be accompanied by general skepticism about "highest values."

commands only the acts of those virtues that can be ordered to the common good; in turn, an answer to the question about which specific acts of virtue can be ordered to the common good depends on how "thick" or "thin" one's conception of the common good is. Insofar as the precepts of natural law alone are too general to prescribe any specific view of the common good, it seems that natural law can provide no grounds for criticizing any particular vision of the common good, no matter how thick or thin. Accordingly, Aquinas's thought concerning natural law and the common good seems to be indistinguishable from historicism: since any vision of the common good seems to be consistent with the general precepts of natural law, it seems that "anything goes" when it comes to the common good.

In responding to this challenge, Aquinas would freely admit that the basic precepts of natural law, in themselves, do not prescribe any particular vision of the common good. However, it does not follow that Aquinas's view of natural law and human law provides no grounds for criticizing particular visions of the common good. Even while prescribing no particular vision of the common good, the Thomistic account provides a bulwark against historicism by articulating just how the common good (no matter how thick or thin) must be related to individual goods. In other words, Aquinas's avoidance of historicism does not depend on any particular view about *what content* should be contained within the common good; it depends rather on his view about *how* the common good (whatever its particular content happens to be) must be related to individual goods.

As we have already seen, human law for Aquinas should command acts of the virtues that can be ordered to the common good. Furthermore, the ordering of individual acts of virtue to the common good must involve a reciprocity between the common good and the good for individuals: a good society makes for virtuous individuals, and—reciprocally—virtuous individuals make for a good society. In order to preserve this reciprocity, human law must subscribe to a vision of the good that is neither too thick nor too thin. If a regime subscribes to an overly "thick" conception of the common good, and thus an overly "tight" connection between individual acts of virtue and the common good, then it will seek to legislate too many acts of the virtues. Such a regime will be overly invasive in the lives of individuals, undermining

the development of individual autonomy and freedom. Individual freedom is a necessary condition for the development of individual virtue; and since the common good cannot be sustained without individual virtue, there can be no common good without individual freedom. Thus paradoxically, a regime that seeks to legislate too many acts of the virtues for the sake of the common good will end up undermining freedom and virtue, thereby undermining the common good as well.[15]

On the other hand, if a regime subscribes to an overly "thin" conception of the common good and accepts an overly "loose" connection between individual acts of virtue and the common good, then the law will legislate too few acts of the virtues. Where an insufficient number of acts of virtue are legislated, the common good will cease to be supported by acts of individual virtue. When a regime has reached the point where almost no acts of the virtues are the szzubject matter of legislation, then the common good ceases to be the common good, but devolves into a mere aggregate of goods for externally related, self-seeking individuals. Such a regime no longer reflects the essence of "law" at all, but is best described (oxymoronically) as a form of "regulated lawlessness." Paradoxically, a regime that allows too much leeway for the sake of individual autonomy will actually undermine the goal of autonomy. If individuals do not learn to subordinate themselves

[15] In a similar vein, Aristotle argues (against the Platonists) that—paradoxically — too much "unity" in the state can actually lead to the state's destruction. If a regime seeks to sustain the common good by requiring the common ownership of all property, then nobody will take responsibility for any particular property, and all things will fall into disrepair. The common good can be sustained only indirectly, through the mediation of individual goods, i.e., by granting individuals sufficient freedom and independence to seek what they consider to be their "own" good. See Aristotle, *Politics*, Book II, chap. 2-3.

Also relevant in this regard is Augustine's observation (which Aquinas cites approvingly) that the law should not prohibit prostitution, even if fornication in exchange for money is vicious and detrimental to the well-being of those who engage in such a transaction. For Augustine (and Aquinas), the legal prohibition of prostitution would be harmful to the common good in the long run: "Suppress prostitution and the world will be torn apart by lust." (Quoted in Paul E. Sigmund, trans. and ed., *St. Thomas Aquinas on Politics and Ethics* (New York: W.W. Norton Company, 1988), p. 62.) See Augustine, *On Ordination*, II, 4, and Aquinas, *ST*, II-II, q. 10, a. 11.

Furthermore, according to a common jurisprudential principle, that which is outlawed cannot be regulated. For this reason, it may not make sense to outlaw certain kinds of vicious behavior: the value of being able to regulate certain kinds of vicious behavior may outweigh the value of the goods to be achieved by outlawing it.

to what is "larger" than themselves as individuals (i.e., the common good), then they will not develop self-discipline and virtue, but instead will become enslaved to their desires and passions—and this means that they will not be autonomous at all.[16]

Far from being unable to criticize particular visions of the common good, the Thomistic account has very clear implications for various forms of political organization: any regime that fails to sustain a reciprocity between parts and whole is to be rejected as contrary to the nature of law (for law necessarily aims at the common good in and through individual goods, and at individual goods in and through the common good). In terms of the contemporary debate, Aquinas would say that both communitarians and proponents of individualistic liberalism are in error about the common good. Communitarians tend to propose too thick a conception of the common good, while proponents of individualistic liberalism tend to propose too thin a conception of the common good. Both views fail to envision society properly, in terms of the reciprocity by which part and whole co-determine one another: while communitarians envision a body without internally differentiated organs, individualistic liberals conceive of society as an aggregate of organs without a body.[17]

16 This claim reflects the insight of Rousseau (later developed by Kant and Hegel) that freedom does not consist in "doing whatever you want," but rather in rational self-determination in partnership with others. As Rousseau writes, "... to be driven by appetite alone is slavery...." See Jean-Jacques Rousseau, "On the Social Contract," in *The Basic Political Writings*, trans. Donald A. Cress (Indianapolis: Hackett Publishing Co., 1987), p. 151.

17 Admittedly, this representation is a caricature of the well-considered positions put forth by communitarians (e.g., Michael Walzer and Michael Sandel) and liberals (e.g., John Rawls and T.M. Scanlon); nevertheless, even this caricature does accurately represent, by way of exaggeration, the one-sidedeness to which both sides are prone. To put the point less controversially: communitarians fail to see that there can be no genuinely *human* community if individuals are not allowed, even encouraged, to envisions themselves as free and different from others within their own community; by contrast, proponents of individualistic liberalism fail to see that there can be no autonomous, self-defining individuals apart from a community through which such individuals derive their inspiration and capacity to define themselves as autonomous. In short, both communitarians and proponents of individualistic liberalism fail to think dialectically: they fail to see that each of the terms ("community" and "individual") is empty, apart from some reference to its opposite.

V. POSITIVITY WITHOUT POSITIVISM

While the conceptual gap between natural law and the legislation of virtue does not entail historicism regarding the common good, one may ask whether that gap renders the Thomistic account indistinguishable from a certain kind of *de facto* legal positivism. Legal positivism is understood here as the view that law is not necessarily a rule or measure ordered to the human good (where the good is defined by man's natural *telos*), but is simply a rule or measure dictated by the will of the sovereign (either the prince or the people), and backed by the threat of some (formal or informal) punishment. For a natural law theorist, law by definition is ordered to the good, and so the notion of a morally bad law is unintelligible. For legal positivism, by contrast, an understanding of law depends primarily on an understanding of what punitive social practices are enforced as a matter of fact, regardless of whether those practices are morally good or bad; for legal positivists, the notion of a morally bad law is perfectly intelligible.[18]

The claim that the Thomistic account amounts to *de facto* positivism can be approached in terms of a question: how is one to judge whether a particular human practice or positive law is or is not consistent with the natural law? The precepts of natural law, considered in themselves, are broad and general, while the determinations of any given practice or positive law are specific and particular by comparison. Thus there can be no *immediate* and *direct* inconsistency between the generalities of natural law and the particularities of actual human practice or positive law. In order to demonstrate an inconsistency, and thus in order to criticize actual human practices or positive laws in light of the natural law, the conceptual gap between the generalities of natural law and the particularities of actual human practice or positive law must be filled by some kind of mediating premises. The problem, however, is that the content of such mediating premises must be derived from actual human practice or positive law, i.e., from the very thing to be evaluated or criticized in the first place. Thus one is never in a position to evaluate actual human practices and positive laws in light of the nat-

18 Thus H.L.A. Hart famously defines legal positivism in terms of "the simple contention that it is in no sense a necessary truth that laws produce or satisfy certain demands of morality." See H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1992), p. 181.

ural law alone. One can evaluate human practice and positive law, only if one also accepts premises drawn from the realm of human practice and positive law. Every putative attempt to evaluate actual practice or positive law by reference to the natural law always requires an implicit acceptance of crucial features of that which one is seeking to evaluate. Insofar as the Thomistic account does not afford a perspective that is free from premises or commitments drawn from the realm of actual practice or positive law, it amounts to a *de facto* positivism. The problem can be illustrated by means of a simple example.

Within the context of tax law, the natural law precept, "promote justice," is perfectly consistent with two contrary positive law regimes, one that imposes a flat tax and one that imposes a progressive tax. Proponents of a flat tax often argue that the progressive tax is unjust, while proponents of a progressive tax often argue that the flat tax is unjust. Is there a way to adjudicate the issue and to determine which tax regime is more or less just from a natural law perspective? On its own, the natural law does not make any pronouncement as to which regime is more or less just. There is no immediate and direct inconsistency between the precepts of natural law and either of these different positive law tax regimes. In order to demonstrate any inconsistency, and thus in order to criticize one of these positive law regimes in light of the natural law, one must rely on premises derived from actual human practice and positive law. For example, in order to be in a position to evaluate the relative justice or injustice of a progressive or flat tax regime, one must first presume a great deal about actual practices involving the *inter vivos* acquisition and transfer of property, the disposition of the property of decedents (e.g. through inheritance), the role of the family in the economy, the economic relations between wage labor and capital, and so forth.[19] And in turn, the nature, meaning, and normative implications of these actual practices are determined largely by the actual positive laws that have been enacted in the areas of property law, contract law, trusts and estates, family law, employment law, labor law, and so forth. Accordingly, the activity of judging positive tax law

[19] For an analysis of some of the arguments for and against progressive taxation, see Jeffrey A. Schoenblum, "Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals," *American Journal of Tax Policy* 12 (1995), p. 221 ff.

from the point of view of natural law depends on the acceptance of at least some non-neutral (i.e., normatively and jurisprudentially significant) presuppositions taken from the realm of actual human practice and positive law. Thus the content of positive law itself implicitly determines the outcome of particular value judgments that are putatively based on the natural law.

By positing a broad conceptual gap between natural law and the legislation of specific acts of virtue, Aquinas has made the interpretation and application of natural law depend on the acceptance of premises taken from actual human practice and positive law. Whenever one seeks to make value judgments based on natural law, some normatively significant content drawn from actual practice and positive law intervenes and determines the outcome of those judgments. Thus one is never really passing judgment on actual practices or positive laws as such, but is rather accepting some normative features of actual practices and positive laws in order to criticize some other features. Because of this inescapable dependence on the content of actual practice and positive law—the argument goes—it seems that the Thomistic account amounts to a kind of positivism in fact, if not in name.

The fact that all concrete value judgments based on the natural law depend, in the final analysis, on the acceptance of some normatively significant content derived from actual practice and positive law seems to have inspired H.L.A. Hart's argument for the alleged superiority of legal positivism over natural law thinking. For Hart, the teleological precepts of natural law acquire meaning only in conjunction with the acceptance of specific content derived from actual practice and positive law. Since the content of positive law itself indirectly determines the outcome of value judgments pertaining to positive law, it is best, Hart argues, to jettison all references to teleology and to base legal theory simply on actual practice and positive law as given. It thus becomes possible, for example, to understand the human being's desire for self-preservation in a teleological or non-teleological way. For the natural law theorist, self-preservation "is not man's good or end because he desires it; rather he desires it because it is already his natural end."[20] The legal positivist, by contrast, can do without the extra teleological baggage:

[20] Hart, *The Concept of Law*, p. 186.

> [W]e can, in referring to survival, discard ... the notion that this is something antecedently fixed which men necessarily desire because it is their proper goal or end. Instead we may hold it to be a mere contingent fact which could be otherwise, that in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end than that men do desire it.[21]

The Thomistic response to the positivist challenge would be to accept the basic point of the challenge, but to radicalize it beyond the bounds of positivism itself. For Aquinas, the legal positivists are correct to point out that the precepts of natural law are general in themselves, and can be applied in concrete contexts only by presupposing some content derived from actual practice and positive law. More pointedly, Aquinas would agree that the natural law is not a transcendent "thing-in-itself": instead, the content of natural law becomes determinate and knowable only insofar as it is instantiated in particular practices and positive laws. Accordingly, value judgments concerning actual practices and positive laws are not made on the basis of the general precepts of natural law alone, but become possible only within the "medium" of actual practices and positive laws themselves. There is, then, a fundamental circularity; however, it would be wrong to think that this circularity is a flaw, or that judgments concerning the moral worth of actual practices and positive laws can be made without such circularity. For Aquinas, one who would seek to escape the circularity misconstrues the relation between natural law and positive law (or between natural law and the actual human practices that get their content and normative meaning from the positive law[22]).

Natural law and positive law do not stand alongside one another as two separate actualities, the former of which provides an external criterion for measuring the goodness or badness of the latter. Instead, natural law becomes knowable *as* natural law only insofar as it is made determinate in concrete instances of positive law. Of course, this is not to say that every instance of positive law is a genuine embodiment of

[21] *Ibid.*, pp. 187-88.

[22] For the sake of simplicity, I shall refer in what follows only to the relation between natural law and positive law; however, what I say about this relation should be understand as applying as well to the relation between natural law and the actual human practices that get their content and normative meaning and from the positive law.

the natural law; but it is to say that the natural law is not knowable in any determinate and thus normatively significant way, except insofar as it is embodied and thus made determinate in some actual or hypothetical positive law or practice.[23] Thus every appeal to natural law in order to pass judgment on the moral worth of positive law is inevitably an appeal to natural law *as it is embodied and made determinate* in (actual or hypothetical) positive laws and practices. This basic circularity should not be surprising, since it is paralleled by a similar circularity in epistemology. The activity of knowing and the being-as-known do not stand alongside one another as two separate actualities; the knowing in act is one with the known in act. As a result, intelligible being is not available as a standard for judging the adequacy of knowing, except insofar as it is actualized in the mind of the knower. Just as all judgments regarding the moral worth of actual practices and positive laws must take place within the determinate "medium" of actual practices and positive laws themselves, so too all judgments regarding the validity of knowing must take place within the "medium" of knowing itself. Just as one cannot step outside of the medium of knowing in order to determine whether one's knowing "measures up" to being, so too one cannot step outside of the medium of actual practices and positive laws in order to determine whether actual practices or positive laws "measure up" to the natural law.

So far, Aquinas would agree with the positivists in affirming a basic circularity: one cannot know the natural law "in itself," apart from its instantiation in actual practices and positive laws. But Aquinas would also argue that there is a second side to the circularity, a side that the positivists routinely overlook: one cannot know positive law *as* an instance of law, without some implicit reference to the natural law. Not surprisingly, this two-sided circularity is paralleled by a two-sided circularity in the realm of epistemology: as we have seen, intelligible being is available as a standard for judging the validity of knowing, only within the medium of knowing itself; but conversely, knowing becomes

[23] For this reason, I find that Jacques Maritain's teaching on our knowledge of the natural law 'by inclination' (a kind of knowledge that is indeterminate and incommunicable) is not helpful for addressing the issue at hand. See Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), pp. 91-93. See also Yves R. Simon, *The Tradition of Natural Law: A Philosopher's Reflections*, edited by Vukan Kuic (New York: Fordham University Press, 1992), pp. 126ff.

actualized and recognizable *as* knowing, only to the extent that it is the knowing *of being*.

Now in rejecting the second side of this circularity, the positivist would try to argue that it is possible to recognize positive law *as* an instance of law, entirely apart from all reference to the natural law. Of course, this position amounts to the claim that it is possible to recognize positive law *as* an instance of law, apart from all reference to the human being's ordination to happiness, which is the substance of the natural law itself. Thus legal positivists have sought to define the essence of law in an entirely neutral and descriptive way, apart from all reference to the law's purpose (human happiness) or its moral content.

Along these lines, H.L.A. Hart has defined law in terms of a people's habitual obedience to a sovereign (either the prince or the people) in accordance with accepted rules of recognition.[24] This definition, however, is ultimately question-begging. Instead of speaking of obedience for the sake of the common good (where the common good requires an important reciprocity between the parts and the whole, as we have seen), Hart speaks of "habitual" obedience in accordance with rules. The term "habitual" is infinitely flexible and open-ended (unlike the notion of the common good); as such, the term "habitual" provides no principled ground for thinking that a week's or an hour's or even an moment's obedience according to accepted rules is any less "habitual" and law-like than a month's or a year's or a decade's obedience. Either all (even momentary) obedience in accordance with accepted rules is a form of law, or else there is some further criterion that distinguishes law-like obedience from non-law-like obedience. But in order to distinguish law-like habitual obedience from non-law-like habitual obedience, Hart would have to appeal to some further descriptive category, and so on *ad infinitum*. The infinite regress here is inescapable, as is the infinite regress that would ensue if one sought to give an account of an organism in terms of mechanical or chemical events alone, without some reference to the notion of "life."

Thus it is with all positivist accounts of law: in seeking to avoid all references to the intrinsic purpose of law (human happiness), the positivist remains trapped within an infinite play of descriptive categories that ultimately fail to elucidate what law is. The solution, of

[24] See H.L.A. Hart, *The Concept of Law*, pp. 77-96.

course, is not to escape the circularity by concocting a new and more comprehensive set of descriptive categories. The solution is to acknowledge the circularity *as necessary*. To acknowledge the circularity as necessary is simply to acknowledge that no account of positive law can fully abstract from the over-riding goal that gives meaning to all human activity, namely the pursuit of human fulfillment or happiness as determined by the natural law. Thus while the positivist account and the natural law account are both circular in this way, the natural law account is superior to this small degree: the natural law account recognizes the necessity of the circularity, while the positivist account does not.