

## REASONING ABOUT NATURE IN VIRTUE, ACTION AND LAW: THE PATH FROM PRINCIPLES TO PRACTICE

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**Abstract.** This paper argues that the role of nature in Aquinas’s account of virtue, action and law does not require the kind of adherence to Aristotle’s ‘metaphysical biology’ that is refuted by Darwin because of the way Aquinas transforms nature as applied to a rational being and as an analogy to elucidate virtue, habit and law. Aquinas’s grounding of ethics and law in the notion of nature is also not a kind of intuitionism designed to answer all moral questions and stop all ethical debates but a model which gives principles; these principles in turn are not that from which all conclusions can be derived with universality and certainty but are principles which are the topic of reasoned and ongoing debate about their interpretation and application in particular laws or practices. The paper then examines Aquinas’s application of the principles of natural law to evaluate human law as an example of this reasoned debate, which is both subject to error and correction, showing how Aquinas’s notion of nature can work in practical applied ethics.

**Keywords:** Thomas Aquinas, virtue, nature, principles of natural law.

After a long period of emphasis on law in Aquinas’ ethics – in scholastic manuals, and then in both “new natural law” theorists and proportionalists (no matter their debates with each other), there has been in the last 25 years or so a move toward an emphasis on virtue over against what was seen as the rigid and metaphysically over-committed natural law based ethics. MacIntyre and Grisez are reluctant to involve themselves in what MacIntyre famously called Aristotle’s “metaphysical biology” because of its commitment to form, function, species, etc. undone in some sense by Darwin.<sup>1</sup> This work has had its counterweights in those arguing for the interdependence of law and virtue. Russell Hittinger shows how without something outside the mind to ground the virtues and in human nature to unite them, virtue based ethics founders into a kind of conventionalism, and Ma-

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<sup>1</sup> Alastair MacIntyre, *After Virtue: A Study in Moral Theory*, University of Notre Dame Press, Notre Dame c1981, Repr. Bloomsbury Academic, 2013, p. 173. In the preface to this reprint, p. xi, MacIntyre explains his reasons for rejection of this “metaphysical biology” in *After Virtue*. MacIntyre at least partly rejects his rejection of it in his *Dependent Rational Animals: Why Human Beings Need the Virtues*, Open Court Press, Chicago, IL 1999.

ria Carl persuasively argues for the complementarity of law and virtue in Aquinas.<sup>2</sup>

I want here to agree with and build on the views of Hittinger and Carl by exploring the role of nature in a rational creature and as discerned by reason in Aquinas's account of action, virtue, and law. Through exploring and taking seriously that nature is an analogous term for Aquinas, I want to argue that the standard of nature is importantly transformed when applied to the rational creature not to be refuted by Darwin and fluid enough to accommodate the multiplicity and openendedness conferred by rationality and free choice. Nonetheless, I want to conclude with some cautionary examples of how Aquinas' attempt to apply his own ethic foundered on a more narrowly biological reading of nature and to finding natural or in accord with nature practices merely ratified by convention and tradition. I will suggest a model for ongoing reflection and debate on the application of models of nature and principles of nature law which neither exaggerates our ability to discern objective moral truths with certainty and without exception, nor pessimistically consigns us to skepticism about any possible objectivity in our judgments.

## I. Virtue and Nature

The Aristotelian language of form and motion toward an end is used and reshaped in similar ways the definitions of habit, and its types, both moral and theological virtue in Aquinas's *Summa theologiae*. The first step in connecting motion with virtue is to make habit continuous with properties of elements, achieved simply by defining habits as qualities related to what is suitable or unsuitable to a thing's nature.<sup>3</sup> From this ground in nature, Aquinas then goes on to relate and distinguish the qualities of simple elements from the quality of habit in the human being. He notes that some habits or qualities are merely ordered to form, i.e., to the generation of another; some qualities, however, relate to the act or operation of the thing not just its achievement of its form, e.g., those which charac-

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<sup>2</sup> Russell Hittinger, *After MacIntyre: Natural Law Theory, Virtue Ethics and Eudaimonia*, "International Philosophical Quarterly" 29 (4) 1989, p. 449-461. Maria Carl, *Law, Virtue, and Happiness in Aquinas's Moral Theory*, "The Thomist" 61 (3) 1997, p. 425-447. Hittinger argues that Germaine Grisez's "new natural law" theory suffers from the same weakness as the virtue ethics of Alastair MacIntyre and Edmund Pincoffs: since Grisez argues that the basic goods are simply given or intuited as basic and incommensurable for which there is no appeal to further justify them. (p. 458-489.) Germaine Grisez, *The Way of the Lord Jesus*, volume 1, chapter 12, <http://www.twotlj.org/G-1-12-E.html>, c2008. See also Alastair MacIntyre, *After Virtue*, and Edmund Pincoffs, *Quandries and Virtues: Against Reductivism in Ethics*, University Press of Kansas, Lawrence, KS 1986.

<sup>3</sup> Thomas Aquinas, *Summa theologiae*, I-II, q. 49, a. 2.

terize powers. Moreover, not all acts of powers have corresponding habits; the acts of simple elements, for example, “cannot be adjusted in various ways, so as to dispose the subject well or badly to its form or to its operation” but are completely specified by the form in “one determined way.”<sup>4</sup> Hence there is no place in the development of the elements for habit, as there can be in more complex bodies and animals. The progression and analogy here is from fixed qualities following directly on simple forms which are necessitated to move in one determined way by that form, to qualities and habits whose acts are more and more diverse and less directly determined by that nature. Thus though habits of the good type, i.e., virtues, to some degree ameliorate the lack of necessity and uniformity that marks the path of human 'motion' toward its end by giving the appetitive powers a fixed inclination which they do not have naturally and necessarily, they also repeat the pattern of a 'nature' which chooses its actions freely by means of reason whose consideration is undetermined to any particular path. This movement becomes explicit in the definition of virtue as a habit, accomplished first by relating virtue to lower more determined acts and then in the divergence from this model:

There are, however, some powers which of themselves are determined to their acts, as for example, the active natural powers. And in this way natural powers are of themselves called virtues. But the rational powers, which are proper to human being, are not determined to one thing, but are indeterminately related to many; however, they are determined to acts through habits [...]<sup>5</sup>

Here Aquinas finds room for freedom and diversity not in the rejection of nature's determining power, but in a nature whose nature 'determines' it to be actualized in a plurality of ways. The same structure is repeated in the discussion of whether virtue is natural to us. Aquinas answers that the virtues belong to us naturally “according to an inchoate aptitude to acquire them;” however, he continues, “their completion is not [natural to us], since nature is determined to one thing, but the completion of these virtues is not according to one mode of action.”<sup>6</sup>

This shift occasions two more, one in the natural model as it applies to the acquisition of virtue, another in the multiplication of virtues in the face of a single nature. Habits, Thomas is well aware from Aristotle's *Ethics*, are causes by actions, e.g., justice from just acts, but his argument for this conclusion returns to and adjusts the natural model rather than resting with Aristotle's assertion. Natural

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<sup>4</sup> Ibidem, I-II, q. 49, a. 4.

<sup>5</sup> Ibidem, I-II, q. 49, a. 2.

<sup>6</sup> Ibidem, I-II, q. 63, a. 1.

agents, like fire, do not cause habits in themselves in the way our acts cause habits of virtue or vice; nonetheless, just as all natural change requires agent and patient, giver and receiver of the form passed from one to the other, so the development of habit has an agent (the intellectual power) and a patient (the appetitive powers), they are simply united in one 'agent' capable of receiving its own act, capable of specifying and moving itself toward its own end.<sup>7</sup> Now since there is a single end, there should be a single virtue to be developed toward this end, but there are many moral virtues. Aquinas' response to this further asymmetry between the two realms is yet again another analogy to nature; just as non-univocal agents produce multiple effects on patients of different species and with different natural aptitudes, so reason produces many habits in different objects, operations and passions in virtue of their different relationships to reason.<sup>8</sup> It is on this basis that Aquinas gives a preliminary listing and definition of the virtues, both major and minor, which Aristotle lists without such a systematic or justificatory scheme.<sup>9</sup>

When Aquinas turns to the discussion of the principle virtues in both categories (i.e., moral and theological), he repeats the pattern of natural motion, guided by form and directed to its fulfillment. The moral virtues are connected to the pattern of motion as the actualization of potencies of intellect, will, and concupiscible and irascible appetites, which in turn are connected to the natural motion of a thing to its end, first, as the desire for and motion toward that end and, second, as the resistance of anything which would prevent its arrival at that end; and will is understood as a higher appetite corresponding to a rational being's direction toward its end consciously and with free choice about the means.<sup>10</sup> The four cardinal virtues are explained in explicit connection to this schema, prudence as the virtue of reason, justice as the virtue of will, temperance of the concupiscible and fortitude of the irascible appetite. The four cardinal virtues not only perfect the faculties of the person they also correspond to the direction, maintenance of momentum toward, and achievement of the end of motion.

The progression of the analogy is from fixed qualities following directly on simple forms necessitated to move in certain ways by that form, to qualities and habits whose acts are more and more diverse and less directly determined by that nature. The variation on this theme reaches a kind of breaking point with the dis-

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<sup>7</sup> *Ibidem*, I-II, q. 52, 2.

<sup>8</sup> *Ibidem*, I-II, q. 60, 2.

<sup>9</sup> *Ibidem*, I-II, q. 60, 5.

<sup>10</sup> On the two sensible appetites, see *ibidem*, I, q. 81, a. 2; on the will as rational appetite, see q. 82, a. 2.

cussion of theological virtue. Though described in terms of the same categories of nature and habit, theological virtue is neither directed toward an end given by nature nor acquired by our own activities. The appeal to natural qualities and natural change in the account of theological virtue may be a way of explanation by analogy but it constructs nature as an explanatory model which is explicitly understood to fall short of its object.

I could continue to multiply the instances of analogies to form and natural determination to describe moral activity as it is carried forward, for example, in strikingly symmetrical ways into the discussion of vice and sin. But the examples already given illustrate the way in which the language chosen stands at cross purposes with the conclusions drawn on these issues. While the language gives the discussions of human virtue and vice, good and evil, a common set of structures and categories drawn from physics, the asymmetry between the two realms is asserted as clearly and carefully as their likeness; in fact it is asserted in much more detail and with more force than if the categories of nature were abandoned altogether, because they remain as kind of measure constantly being brought up short in regard to what they measure and define. I do not mean to imply that for Aquinas there are no objective standards of right and wrong, nor any human nature seeking its fulfillment; but, Aquinas makes clear that these are neither uniform, simple, nor easily discernible.

## **II. Action and Nature: The Determination of Acts as Good or Evil**

In the account of human actions, Aquinas begins with the distinction between essential and accidental attributes applied to actions understood to have a 'species' analogously to natural things. Just as form determines species and essential characteristics but makes certain other features merely accidental in natural things, so human acts are determined as good or evil by their species. As goodness depends on being and being, in turn, upon the species given by a thing's form, Aquinas contends, so acts are determined to their species by their objects.<sup>11</sup> The analogy is between the object of action and the form of a natural being, and the assumption is that actions belong to species in something like the same way natural things do. Aquinas specifies the analogy further: just as motion gets its form or species from its terms, so human action derives its character from its object, which is the effect and, hence, term of the activity.<sup>12</sup>

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<sup>11</sup> *Ibidem*, I-II, 18, 3.

<sup>12</sup> *Ibidem*, I-II, 18, 3, ad 3.

But though Aquinas begins with this simple model in which acts are rendered good or evil by their species, i.e., by reference to certain essential features, regardless of their particular contexts, intentions, and characteristics, i.e., without reference to its 'accidents', he progressively complicates this model by introducing a greater place for the 'accidental' aspects of an action. Thus, Aquinas moves toward, though he does not quite reach, the view that these particular features of an act may completely change its nature from good to evil, or evil to good, but he does so not by discarding the analogy to natural forms and motion but by adding to and adjusting it. The first step in this process qualifies the distinction between essential and accidental characteristics which makes definition and classification possible. As the perfection of a natural thing, Aquinas argues, comes not just from the form conferring its species but also from its accidents (e.g., shape and color), so the goodness of an action is perfected by its circumstances (e.g., when, where, and how it is done).<sup>13</sup> But if circumstances are capable of rendering an act good or evil, they are 'accidents' capable of changing the 'essence' or form of the act. Circumstances, Aquinas responds to an objection, are like "proper" accidents, those which are per se and follow from the essence. This attempt to retain some recognizable form of the essence/accident distinction is less complete than it seems, however, because while in natural things only some very small proportion of accidents are proper, i.e., necessary and traceable back to the thing's essential features, the circumstances of an act include just about any feature of action making the placement of an act in the 'species' good or evil considerably more fluid and complex; moreover, unlike in natural things, circumstances as proper accidents give the act its species rather than follow from it. This complexity is deepened in the very next article which gives not only the two features capable of making an act good or evil already articulated (object and circumstances) but adds two more conditions for the goodness of an act: the goodness it has in so far as it has its being, analogous to the genus of a natural thing; the goodness which accrues to it from its object, functioning as its species; from circumstances which are like its accidents; and from its intention which, like the end in natural things, is the cause of goodness of the act.<sup>14</sup> Thus the features of action are mapped onto the categories of genus, species, accident, and end, but, as is already clear, these categories only imperfectly apply to human activity.

Aquinas is nonetheless committed to retaining the model even while pointing out its limitations. On this model, then, the most important aspect of human

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<sup>13</sup> *Ibidem*, I-II, 18, 3.

<sup>14</sup> *Ibidem*, I-II, 18, 4.

action is its object, from which it takes its species. But the object turns out to be more elusive than the model would suggest. First, the object of an action only specifies the act by its relationship to reason, a claim justified by reasserting the analogy between the activities of nature and morality. Since what is formal in regard to human nature is reason, human acts are given their form as good or evil by the relationship their objects bear to reason.<sup>15</sup> Aquinas makes the proportional analogy explicit as he reconsiders the role of circumstances in conferring on an acts its species of goodness or evil. "Just as the species of natural things are constituted by their natural forms, so the species of moral actions are constituted by forms as conceived by the reason."<sup>16</sup> But while the role of form in natural things is the determination of their acts to a fixed path, the role of reason in determining the path of human acts is in fact to diversify and complicate. Though the act of the will is rendered good by its intention, this claim still introduces less determination into the account than would at first appear. On the hand, the consistent claim throughout the discussion of the act of the will is its dependence on the intention as the form of the act as a whole (i.e., the act of the will externalized in action), reasserting the model of forms determining species; on the other hand, the form in this case, the intention, is capable of being completely disengaged from the external act and its result. Aquinas insists that the act is good if the intention is good, i.e., follows reason's apprehension of the thing as good, even if reason is mistaken<sup>17</sup>, and/or even if the good intended is not achieved<sup>18</sup>. Thus any act of the will may be good. Once again we have a form, the intention, which makes the categories of good and evil fluid rather than fixed.

Now this is, of course, only in regard the internal act of the will; the whole act is the internal willing together with the external act; as such the act as a whole can be made evil either by a defect in the intention or in the relationship of object and circumstances to reason.<sup>19</sup> The four characteristics defining an act as good or evil -- its genus as a being, its species taken from its object, its accidents as circumstances, and its end as given by the will -- are the threads which Aquinas separates and then reweaves to form a complex fabric of human action, each lending a different color or texture to the whole, any one of which may deprive it of its goodness. Thus whether it is a matter of a circumstance/accident, which because

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<sup>15</sup> *Ibidem*, I-II, 18, 5.

<sup>16</sup> *Ibidem*, I-II, 18, 10.

<sup>17</sup> *Ibidem*, I-II, 19, 5, 6.

<sup>18</sup> *Ibidem*, I-II, 20, 5.

<sup>19</sup> *Ibidem*, I-II, 20, 2.

'proper' defines the act, e.g., as belonging to another makes some kinds of taking theft, or whether it is an intention of a end which may make theft committed for adultery more adultery than theft, or take the goodness away from almsgiving done for vainglory, or the multiple or mistaken apprehensions of reason which may apprehend different or wrong paths as good, what we have been given as the model of moral thinking is one which has embellished the simple model natural classification to a multivalent complexity, even though governed throughout by notions of nature and form.

The way such discussions aid moral reasoning is by making moral judgment incomplete and uncertain until analyzed in terms of all the aspects of an act (end, object, circumstances) which are capable to changing their character from good to evil, but this means that they must be assessed in terms of larger and sometimes conflicting patterns and concerns. No single characteristic places the act completely and unambiguously in its 'species'. The direction and structure of the discussions of moral and theological virtue is somewhat different but no less distant from the natural model from which its categories and arguments are drawn. In these discussions the shape of natural motion, its ground in nature and origin toward an end, is retained but with each of the elements redefined. If the features of natural motion are the governance by form at its origin and term, resulting in a uniform and predictable path between starting and end point, the features of human action are a rational nature which confers freedom rather than determination on its 'movement', a complex nature which renders its activities multiple rather than single, and in the case of theological virtue, an end or term for motion not contained in the form from which it originates.

What is achieved are two different and almost opposite goals with the use of Aristotelian notions of form, motion, and essential properties in his moral theory: first, by grounding human virtue, action, and fulfillment in a nature, he introduces rationality and order into the account of human action. Second, by elaborating and qualifying the model of a fixed nature whose end or fulfillment is determined by nature, and whose acts are in universal and absolute terms capable of being characterized as good or evil, Aquinas reintroduces a level of complexity, diversity and uncertainty into moral thinking for which practical wisdom is the only and still uncertain remedy.

Thus it seems to me that those who have argued (with or without approbation) for the necessity and clarity of Aquinas' moral theory and/or have drawn back from his account because of its ground in Aristotle's "metaphysical biology" have overestimated Aquinas' investment in necessity and in that metaphysical biology. For, even though Aquinas accepts Aristotle's notion of nature and form



and takes it that there is a universal human nature, he understands that nature and form in a nuanced and complex way, that rationality as its specific difference paradoxically does not serve to fix the nature and its acts but to open up possibilities, to broaden the color palette with which action and virtue are depicted. The categories of fixed natures and necessary properties are models, vehicles for an elaborate set of analogies which are qualified and reinterpreted as they are applied to human virtue and action. Of course, there is an objective good and a final end for Aquinas, just as there is for Plato and Kant, and there are arguments that can be made against such views. But Aquinas's view is not *more* open to criticism than Kant's or Plato's because of its ground in the model of nature, nor, indeed, is it *less* open to criticism. Aquinas' version of virtue ethics and natural law is not, in other words, a form of moral intuitionism, such that the appeal to nature was supposed to answer all moral questions and stop all ethical debates, nor is it a form of socio-biology, more dependent than Kant or Plato on biological accounts of human nature. We can see this most easily, perhaps, by looking at what Aquinas has to say about the relationship between natural and human law.

### III. Natural Law and Practical Politics

Aquinas' requirements for a just human law – that it be conducive to the common good, made in a way and by those who have the authority to do so, that it impose no disproportionate burden – are well known and rightly admired.<sup>20</sup> As with the accounts of human virtue and actions, Aquinas couches these conditions in the categories of Aristotle's notions of nature and motion. So the common good (rather than the interest of the ruler) is the *end*, proportionate burden is the *form* and the power of the lawgiver, the origin. In this way, Aquinas includes as necessary and sufficient conditions for just laws factors which later theories make their exclusive concern, the common good (utilitarianism), equal/ proportionate burden (deontology), legitimate and limited governmental power (contractarian or procedural principles). Here we see the model of natures with origins and ends used to include multiple factors which can, of course, be in tension with one another in particular cases. The crucial point is that for Aquinas the tension is not resolved by throwing out one or two of these essential factors as extraneous to justice or by the simple assertion of some proposed law as in accordance with nature, but rather by a process of reasoning about how and why a law complies or fails to comply with these standards.

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<sup>20</sup> Ibidem, I-II, 96, 4.

On the limits of human law and government, Aquinas attempts to craft a balanced compromise between ancient, theocratic and modern, liberal notions of the role and limits of government. Thus Aquinas argues that human law does not forbid all but only the most grievous vices from which the majority can refrain, “chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.”<sup>21</sup> Similarly, Aquinas argues, human law doesn’t prescribe all virtue but only those pertaining to the common good. It isn’t just a matter of doing what is minimal or possible, however, for Aquinas maintains that restraint when it comes to law actually promotes virtue, by leading to it gradually and without creating such a large burden on “the imperfect” that they will “break out in greater evils.”<sup>22</sup> Thus, Aquinas supports the ancient Greek view that the role of government and law is to make human beings good, thereby rejecting the modern notion, which also has roots in Augustine, that government is only about restraining violence and cannot or should not aim at more.<sup>23</sup> Yet, as we have seen, Aquinas calls for pragmatic limits on what government can and should do to prohibit vice and command virtue, thereby rejecting the notion that the coercive power of government is to be used to bring the population to full virtue, as it is in theocracies.<sup>24</sup>

Aquinas’s responses to particular problems about human laws and government tend to follow a strategy of balance and flexibility. On this score, it’s difficult to give much credence to those, either among defenders or detractors of Aquinas, who make his account of natural law a deductive ethical system that is rigid and rule governed.<sup>25</sup> Alan Donegan, for example, saw natural law as like Kantian ethics in its rule governed character. This view prevails also among some who count themselves in the natural law tradition. While Germaine Grisez, for example, argues that there are a plurality of basic or principal goods, argues strongly against the notion that there could be basic conflict between those goods such that one would have to compromise or weigh them against each other. And the so-called proportionalists attempted to come up with a way of resolving con-

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<sup>21</sup> *Ibidem*, I-II, 96, 2.

<sup>22</sup> *Ibidem*, I-II, 96, 2., ad 2.

<sup>23</sup> *Ibidem*, I-II, 92, 1; 95, 1.

<sup>24</sup> Alasdair MacIntyre describes Aquinas as disagreeing with both later “puritans” and “liberals.” “Like those puritans and unlike those liberals [Aquinas] understands the law as an instrument for our moral education. But, like those liberals and unlike those puritans, he is against making law by itself an attempt to repress all vice.” Alasdair MacIntyre, *Natural Law as Subversive: The Case of Aquinas*, “*Journal of Medieval and Early Modern Studies*” 26 (1) 1996, p. 66.

<sup>25</sup> For an early and clear argument to this effect, see James F. Ross, *Justice is Reasonableness: Aquinas on Human Law and Morality*, “*Monist*” (58) 1974, p. 86–103.

flicts between different values and working out the grounds for exceptions to moral principles.<sup>26</sup>

Aquinas crafts a way between extremes on many issues, maintaining exceptionless principles yet not in a way that yields answers with deductive certainty or without exceptions and qualifications.<sup>27</sup> Thus interpretation and application are required, and there is room for flexibility and for differences of opinion even by those sharing the same principles. Aquinas even gives prudential reasons (borrowed from Aristotle) for preferring a social order based on laws as opposed to only particular decisions of the wise judge: one needs to find fewer lawmakers to make general rules than one would judges for each case; further, judgments about individual cases have to be made quickly, while the construction of laws can proceed more thoughtfully, and, lastly judges judge of the present rather than the future as lawmakers do, thus, judges are more influenced by their feelings.<sup>28</sup>

Aquinas is the essential contributor to the notion of natural law as an objective standard over against which the force of governments and restrictive customs can be ruled not law but violence, the high and unexceptionable principle which has grounded the idea of crimes against humanity in courts from Nuremburg to the Hague. But his notion of natural law is also cited with approbation by those who are more traditionalist as much or even more because of the reasoned flexibility of the basic principles in their specification and application.<sup>29</sup> What we see when we examine Aquinas's own specifications and applications of natural law is a mix or balance between these two virtues. For example, Aquinas asserts firmly and boldly that unjust laws are not binding in conscience, as we saw, but then argues that, in order to avoid "scandal or disturbance," they should be obeyed, unless they are against the law of God.<sup>30</sup> Similarly, he affirms that human laws can be changed, based on changes in understanding or changes in the condition of the

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<sup>26</sup> James J. Walzer, *Proportionalism*, [in:] *The HarperCollins Encyclopedia of Catholicism*, ed. Richard McBrien, Harper, San Francisco, CA 1995, p. 1058. See also the clear though not unbiased account in Christopher Robert Kaczor, *Proportionalism and the Natural Law Tradition*, The Catholic University of America Press, Washington, D.C. 2002, p. 1-22.

<sup>27</sup> See for example, Thomas Aquinas, *op. cit.*, I-II, 94, 5; 95, 2. For a thoughtful look at this issue see John Boler, *Aquinas on Exceptions in Natural Law*, [in:] *Aquinas's Moral Theory: Essays in Honor of Norman Kretzmann*, ed. Scott MacDonald and Eleonore Stump, Cornell University Press, Ithaca, NY 1999, p. 161-192.

<sup>28</sup> *Ibidem*, I-II, 95, 1, ad 2.

<sup>29</sup> See MacIntyre, *Natural Law as Subversive*, and David VanDrunen, *Aquinas and Hayek on the Limits of Law: A Convergence of Ethical Traditions*, "Journal of Markets and Morality" (5, 2) 2002, p. 315-337.

<sup>30</sup> Thomas Aquinas, *op. cit.*, I-II, 96, 4. Aquinas adds that laws that inflict unjust suffering exceed the power God gives to lawgivers so such laws can be disobeyed, as long as one can do so "without scandal or inflicting a greater harm" (ad 3).

people, but he adds that changing laws is itself damaging to the common good, undermining custom and, hence, the observance of law. Thus, unless the common good is served in a way that overcomes the negative effects of change itself, Aquinas is for maintaining the status quo.<sup>31</sup> Aquinas takes essentially the same position on whether individuals can make exceptions to laws.<sup>32</sup> Similarly Aquinas splits the difference of whether the sovereign is subject to the law (not, he argues, according to its coercive but only according to its directive power).<sup>33</sup> Aquinas argues strongly in favor of custom as having the force of law since, he argues, "the consensus of the whole people expressed by custom is more important for a particular observance than the authority of the sovereign, who does not have the power to make laws except insofar as in his person he governs for the people;" thus, custom "has the force of law, abolishes law, and is the interpreter of law."<sup>34</sup> But this strong and high-minded support for what MacIntyre calls "plain persons" and communal practices is qualified in two significant ways.<sup>35</sup> First, natural and divine law can only be changed by divine authority not human action; thus, custom must yield to authority and law, and reason trumps custom; second, the ability of the people to make law by their customs pertains only to those who are self-governing; if not, they are limited in their customs by what the lawmaker allows.<sup>36</sup> There is never any argument that people should be self-governed; it depends on their "moderation and seriousness" as well as custom and tradition.

Thus we see that it is quite difficult to place Aquinas on the political spec-

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<sup>31</sup> Ibidem, I-II, 97, 1-2. Even though suiting laws to the condition of the population has a certain modern and flexible ring to it, Aquinas's example, taken from Augustine, is of a people changed by having lost their "moderation and responsibility" such that they lose the right to govern themselves. See Augustine, *De libero arbitrio*, I, 6, [in:] *Corpus Augustinianum Gissense*, (electronic edition) ed., Cornelius Mayer, Schwabe, Basel 1995.

<sup>32</sup> Thomas Aquinas, op. cit., I-II, 96, 6.

<sup>33</sup> Ibidem, I-II, 96, 5, ad 6.

<sup>34</sup> Ibidem, I-II, 97, 3, cor. and ad 3.

<sup>35</sup> See MacIntyre, *Natural...*, p. 70. MacIntyre argues that Aquinas in rejecting the view that human law should repress all vice, would have rejected Louis IX's restrictions on gambling, swearing, prostitution, usury and so forth. In this Aquinas is opposing Louis IX's arrogation of the application of law from "plain persons" to an "exclusive professionalized authority." I find this less persuasive than MacIntyre's related claim that Aquinas rejected in both Louis IX and Frederick II and the Constitutions of Melfi the investing of "imperial authority with a sacred and numinous quality... designed to place actions performed and judgements uttered in the name of that authority quite beyond appeal and quite beyond question." (p. 72). MacIntyre does persuade me that Aquinas's strong support of custom as having the force of law is a stance against royal power and for local control. My only larger point in response to MacIntyre is that for every point Aquinas makes for custom and the people, he makes others supporting the authority of rulers and, above all, priests.

<sup>36</sup> Ibidem, I-II, 98, 4.

trum of liberal vs. conservative, pragmatist or idealist, traditionalist or revolutionary. What he gives to the revolutionary reformer with one hand, he takes away with the other, giving to the conservative and traditionalist. Laws can be changed but not often. Unjust laws don't bind in conscience but should often be obeyed anyway. Custom is law and instructs the lawmaker chosen by the people but must bend to the will of the lawmaker when he or she is not so chosen. Laws are without exception, in general but not in particular cases, in principle but not in specification and application. The sovereign should obey the law but is not subject to the law. Laws that harm people *can* under certain conditions be disobeyed, but laws contrary to divine law *must* be disobeyed.

Even the breadth of Aquinas's vision, the many resources at his disposal, including, importantly, the standard of natural and divine law against which to measure human law, along with the disposition toward careful and moderate answers does not guarantee wise and just conclusions. Aquinas supported the Church in its persecution of heresy, enlisting secular power for purposes of coercion.<sup>37</sup> He maintained that slavery was not part of nature yet argued that it was an allowable arrangement in human society.<sup>38</sup> He gives way, we think today, to theocratic tendencies in relationship to heresy and concedes too much to custom in regard to slavery. Further, I would argue, though I know many Thomists would disagree, he put too much weight on biological nature and not enough on rationality and its transformation of non-rational functions, defining too narrowly the nature and capacities of women and restricting too much the role and meaning of sexual expression and activity.<sup>39</sup>

MacIntyre is confident that Aquinas, using natural law, can distinguish between "local prejudice" and "local custom."<sup>40</sup> I am not so sure about Aquinas or

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<sup>37</sup> Ibidem, II-II, 10, 8.

<sup>38</sup> Ibidem, II-II, 57, ad 2. Cf. III ST Suppl., 52. Aquinas's support of slavery is not complete, but my point is that his condemnation is not complete either and that his qualified support is based on utility and custom.

<sup>39</sup> The issues surrounding Aquinas's positions on sexual morality are complicated and long debated, and I do no more than signal one way they might be complicated here. Cf. Mark D. Jordan, *The Invention of Sodomy in Christian Theology*, University of Chicago Press, Chicago, IL 1997, p. 136-158. See also only as a beginning the selected texts by Aquinas on issues in sexual ethics in *St. Thomas Aquinas on Politics and Ethics*, ed. Paul E. Sigmund, Norton, New York, NY 1988, p. 229-248, and Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics*, Eerdmans, Grand Rapids, MI, 1999, p. 187-244.

<sup>40</sup> This distinction is MacIntyre's. MacIntyre, *Natural...*, p. 80-81. MacIntyre cites a number of Aquinas' particular political determinations. He argues that when Aquinas grounds his answer in natural law, his positions are "as much at odds with local prejudice – as contrasted with local custom – as it is with centralizing power." Thus for MacIntyre natural law *does* yield wise decisions that were contrary to popular prejudices of the time. His examples are Aquinas's positions that

anyone on that score. Both Reinhold Niebuhr and Bernard Williams express similar concerns about appeals to nature and natural law. Aristotle's defense of slavery as "natural" for Williams is an example of trying to "contrive a settled opinion [on] how far the existence of a worthwhile life for some people involves the imposition of suffering on others." As Williams remarks trenchantly, "that phenomenon has not so much been eliminated from modern life as shifted to different places."<sup>41</sup> We can be and surely are in some ways simply unable to see where it has shifted for us. For Niebuhr, "we had better realize how tentative" any natural law we elaborate is. "Otherwise," he continues, "we shall merely sanction some traditional relation between myself and my fellow man as a 'just' relation...for it will be discovered invariably that my definition of justice guarantees certain advantages to myself to which I have no absolute right, but with which I have been invested by the accidents of history and the contingencies of nature."<sup>42</sup> Neither moral cloudiness nor clarity is the exclusive property of natural law theorists, and even as we cling to the notion that there is a moral standard beyond positive law and custom in natural law to which we can have some access, we have to be wary of enshrining what is merely the prejudice of our time and place as timeless nature.

#### IV. The Nature of Reasoning

Aquinas's responses to conflicts and problems of specification and application of the principles of natural law to human law are those of a determined mod-

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unbelievers should not be compelled to convert (as opposed to heretics), that the rule of unbelievers over believers can be legitimate, and that Jewish children should not be removed from their parents' authority for conversion. See Thomas Aquinas, *op. cit.*, II-II, 10, aa. 8, 10, 12. Some qualifications are in order, however. Aquinas uses natural law to argue against forced conversion of children because "a child is by nature part of its father" and, as long as without reason, "does not differ from an irrational animal." (a. 12) And though Aquinas asserts that the divine law does not do away with the human law, "which is the law of natural reason" under which already existing authority of unbelievers over believers can continue, he adds that the Church *can* do away with the dominion of unbelievers over believers when it sees fit. (a. 10) And while Aquinas argues that because belief is a matter of will, non-Christians should not be compelled to believe; nonetheless, he continues, "they should be compelled by the faithful, if there is the opportunity, so that they do not hinder the faith..." On this ground, he continues, Christians are justified in going to war against unbelievers. (a. 8). Thus, I cannot agree with MacIntyre that Aquinas goes wrong *only* when he fails to remain "faithful to his own conception of natural law."

<sup>41</sup> Bernard Williams, *Shame and Necessity*, University of California Press, Berkeley, CA 2008, p. 125.

<sup>42</sup> Reinhold Niebuhr, *Christian Faith and Natural Law*, [in:] *Love and Justice: Selections from the Shorter Writings of Reinhold Niebuhr*, ed. D. B. Robertson, Westminster Press, Philadelphia, PA: [1992], c1957, p. 54. What Niebuhr gives the name "natural law" is grounded in a human nature he sees differently than Aquinas, as "a realm of infinite possibilities of good and evil because of the character of human freedom."

erate whose conclusions about more specific political arrangements is a mirror of his very complex notion of nature.

The model of reasoning he sets out for these matters is, we can reasonably infer, the one he sets out in his own work of disputation – arguments pro and con and then an attempted answer crafted out of recognition of what is most important and compelling in those opposing views. Though he did not apply it reflexively to Aquinas’s own reasoning, at least not explicitly, James Ross describes something close to the the model of practical moral reasoning I am suggesting here in his article, “Justice as Reasonableness: Aquinas on Human Law and Morality,” by likening the process of relating human law to natural law to the process of American constitutional review.<sup>43</sup> Crucially, he argues, the principles of natural law in relation to human law (and we can add an account of the virtues and their relationship particular acts and persons) are *policies* rather than “universally general truths applied by universal instantiation to individual cases.”<sup>44</sup> What it means for human laws to be “derived” from natural law as conclusions and applications is that natural law explains and justifies the justice of the laws human societies propose to govern themselves.

Though there are places we are, quite rightly, convinced that Aquinas fails to fully apply his own principles of natural law to overturn unjust laws and practices, Aquinas himself gives us a way to incorporate those insights and convictions in the notion that the natural law can be changed by addition.<sup>45</sup> We have in Ross’s analogy of on-going reflection on law, morality and justice to the American process of constitutional review a notion of how there can be substantial change and evolution over time, as well as what come to be seen as side and backwards steps, while remaining equally substantially committed to basic principles. But we have something of the same picture in Aquinas’ own model of reasoning in his disputed questions, which are themselves part of an ongoing conversation and debate among scholars who share principles yet interpret and apply them differently. Medieval disputation and the decisions of the American Supreme Court are not immune to the prejudice of taking one’s own culture and conventions as “nature” but they are part of a process of never closed debate and reconsideration.

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<sup>43</sup> James F. Ross, *op. cit.*, p. 86–103.

<sup>44</sup> *Ibidem*, p. 90.

<sup>45</sup> Carl, *op. cit.*, p. 444. Cf. Ross, *op. cit.*, p. 95, who seems to think that Aquinas should also have admitted the possibility of reduction or subtraction from the natural law over time.

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