4-26-2006

Thomas Aquinas and the Metaphysics of Law

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58 ALABAMA LAW REVIEW 575 (2007)

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ABSTRACT

Despite modernity's longstanding aversion to metaphysics, legal scholars are increasingly questioning whether law can be understood in isolation from wider questions about the nature of reality. This Article examines perhaps the most famous of metaphysical legal texts—Thomas Aquinas's still widely read *Treatise on Law*—with a view toward tracing the influence of Thomas's metaphysical presuppositions.

This Article shows that Thomas's account of human law cannot be fully understood apart from his metaphysics. Attention to Thomas's hierarchical view of reality exposes tensions between Thomas's "top-down" account of law and his sophisticated "bottom-up" observations. For example, Thomas grounds human law's authority in its foundation in the "higher" natural and eternal laws. At the same time, he is well aware that many if not most legal questions involve "determination of particulars"—the resolution of questions that might reasonably be answered in more than one way. Thomas's metaphysics sometimes works against his inclination to give place to human freedom in the creation of law.

Thomas's metaphysical approach also raises important questions for contemporary legal theory. His insistence on addressing the question of law's ontological status, for example, challenges the reductionism of much contemporary jurisprudence and provides a vocabulary for accounting for the wide variety of analytical approaches legal philosophers employ.

* Professor of Law, University of Alabama. I am grateful to Alfred Brophy, Alan Durham, David VanDrunen, Timothy Hoff, Mark Murphy, John Nagle, and Michael Pardo for helpful comments on previous drafts of this Article. I am also grateful to Dean Ken Randall and the University of Alabama Law School Foundation for generous research support, to Chris Sanders for research assistance, to Caroline Barge for secretarial assistance, and to Ben Lucy for his friendship and encouragement. The errors that remain are mine.

INTRODUCTION

One of the great, if unsurprising, projects of twentieth-century American jurisprudence was the attempt to separate law and metaphysics.[1] The project was unsurprising because the objections to metaphysics were both numerous and obvious: If metaphysical speculations prevented scientists from "seeing" the natural world clearly, why should the same not be true of law?[2] If we cannot give a full account of even the most common (and largely fixed) features of natural reality with any degree of certainty, why make jurisprudence hinge on our ability to do so with respect to human artifacts like law? And what is the meaning, in any event, of statements that cannot be verified through sense experience and logical deduction?[3] Given the mediated nature of our access even to empirical phenomena, why suppose that we can understand the deepest principles of being and action that make the world what it is? Why not avoid the temptation to engage in endless (and fruitless) debates over essences (including law's essence[4]) and focus instead on programs that are more likely to succeed, such as analyzing our social practices and the way we talk about them?[5] Why allow legal argumentation that draws upon alleged fixities to hamper officials' ability to make needed reforms?[6] Why impede our politics with the philosophical

1. "It would not be much of a stretch . . . to say that the central effort of legal thinkers from Holmes through the Legal Realists through the modern proponents of 'policy science' has been precisely to improve law by ridding it of the curse of metaphysics." STEVEN D. SMITH, LAW'S QUANDARY 2-3 (2004). *See generally id.* at 65-96 (criticizing main schools of 20th century legal thought).

2. *See infra* notes 34-38 and accompanying text.

3. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 844-45 (1935).

4. "As Ludwig Wittgenstein described philosophy in general, legal philosophy under a Hartian approach sees its primary purpose as a kind of therapy: a way of overcoming the temptation to ask metaphysical questions ('what is Law?' or 'do norms exist'), and a method of transforming such questions into (re-)descriptions of the way we actually act." BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 6 (3d ed. 2003) (footnotes omitted).

5. *But see* Jules L. Coleman & Ori Simchen, *"Law,"* 9 LEGAL THEORY 1 (2003) (arguing that Hartian jurisprudence is about law itself, not merely the *concept* of law). *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

6. *See generally* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776).

vestiges of antiquated religious structures from which we are still in need of liberation?[7]

Although there is still a near consensus that attempting to define law as a kind and to connect it to a more general account of reality tends to obscure rather than enhance our understanding of law, the verdict is no longer unanimous. Indeed, there seems to have been a modest revival of interest in the relationship between law and metaphysics—not only among religious believers, where such interest might be expected,[8] but also among secular theorists as well.[9] Conceptual analysis of law, at least in its strong form, has been challenged on methodological grounds;[10] there is a stronger philosophical argument to be made for moral realism now than was the case a few decades ago,[11] and some have questioned whether our ontologically-challenged legal world view can make sense of law as it is practiced by lawyers and judges in any event.[12]

This Article does not address the merit or demerit of metaphysical legal theory generally. Rather, it has a twofold purpose. First, it attempts to trace the influence of metaphysics in a classic jurisprudential text, Thomas Aquinas's *Treatise on Law*. Thomas's understanding of metaphysics is somewhat narrower than the conventional modern usage of the word. Contemporary usage thinks of metaphysics as "the study of ultimate reality,"[13] dealing with questions like, "What are the most general features of the World?[,]"

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7. *See, e.g.*, Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1427 (1989) (reviewing MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)) ("[S]uch things as divine revelation and biblical literalism are irrational superstitious nonsense . . . .").

8. Because the characteristics of the natural world can be ascribed to an Author.

9. "I doubt that there would be a conceivable enterprise called general jurisprudence if law were [merely] a nominal kind . . . ." Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188, 206 (Robert P. George ed., 1992).

> My own view is that the only things whose nature is fixed by our concepts are 'things' that do not exist—Pegasus, the twentieth-century kings of France, and the like. There are no things referred to by such terms, so such words' meaning can only be given by their concepts. . . . .
>
> General jurisprudence should eschew such conceptual analysis in favour of studying the phenomenon itself, law.

Id. at 205-06; *see also* SMITH, *supra* note 1; Ronald J. Allen & Michael S. Pardo, *Facts in Law and Facts of Law*, 7 INT'L J. EVIDENCE & PROOF 153, 157-61 (2003); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1790-97 (2003); Coleman & Simchen, *supra* note 5; Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. 619 (2002).

10. "The aim of Conceptual Analysis is to uncover interesting and informative truths about the concepts we employ to make the world rationally intelligible to us. The basic idea is that concepts are reified objects of thought that structure our experience and make the world rationally intelligible to us, and because they are shared are essential to our ability to communicate with one another." Jules L. Coleman, *Methodology*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 311, 344 (Jules Coleman & Scott Shapiro eds., 2002). Coleman further notes that "[i]t is nowadays a commonplace in philosophy that Quine has presented several compelling arguments adequate to undermine the projects of Conceptual Analysis." *Id.*

11. *See generally* MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW (2004).

12. *See, e.g.*, SMITH, *supra* note 1, at 22-37; Robert P. George, *What is Law? A Century of Arguments*, FIRST THINGS, Apr. 2001, at 23, 23-29.

13. PETER VAN INWAGEN, METAPHYSICS 1 (1993).

"Why does a World exist?," and "What is *our* place in the world?"[14] Thomas understands the term rather more narrowly as referring to the investigation of the general, transcendental characteristics of *being* and *beings*.[15] Although Thomas's metaphysics leaves an unmistakable imprint on his account of law,[16] the *Treatise* is often read as though Thomas's understanding of the way things are were not all that different from ours.[17] Second, I hope to show that Thomas's account of law, in all its metaphysical splendor and obscurity, raises questions about law that might profitably be examined in the process of attempting to construct an account of human law that connects to worldly realities. Even if we reject Thomas's metaphysics, the angelic doctor may still have something to teach us.

Part I begins by connecting Thomas's account of law—especially his account of natural law—with his conception of nature.[18] Thomas's account

14. *Id.* at 4. Inwagen also helpfully uses the antinomy of appearance and reality and the idea of "getting behind" appearances to reality to illustrate the domain of metaphysics as the study of "ultimate reality." *Id.*

15. In the prologue to his *Commentary on the Metaphysics of Aristotle*, Thomas characterizes metaphysics as the science that "considers first causes," that "deals with the most universal principles"—specifically "*being* and those things which naturally accompany being, such as *unity* and *plurality*, *potency* and *act*"—and that considers things that are "separate from matter" (i.e., God and the angels). ST. THOMAS AQUINAS, COMMENTARY ON THE METAPHYSICS OF ARISTOTLE 1 (John P. Rowan trans., Henry Regnery Co. 1961) [hereinafter AQUINAS, METAPHYSICS OF ARISTOTLE]. These inquiries are unified by their consideration of "*being in general*." *Id.* at 2. The science is known by different names because it considers being under these various aspects: "It is called *divine science* or *theology* inasmuch as it considers [God and the intellectual substances]. It is called *metaphysics* inasmuch as it considers being and the attributes which naturally accompany being . . . . And it is called *first philosophy* inasmuch as it considers the first causes of things." *Id.*; *see also* ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURAL LAW 86 (1996) (characterizing scholastic understanding of metaphysics as "referring . . . to transcendental claims about being").

16. Clearly, Thomas does not deduce his account of law from his metaphysical system in a historical and theological vacuum. I have not attempted to sort out the relative influence of history, Christian doctrine, and metaphysics in his thought but only to show that metaphysics conditions his account in significant ways.

17. The obvious exception to this statement is the routine acknowledgment that teleology has an important place in Thomas's account of law.

18. To understand a particular account of natural law, one must grapple with at least two broad questions. The first is a question of methodology: What is the relationship between nature and ethics or law? In recent years, the fact/value dichotomy has consumed most of this aspect of the discussion. Scholars sympathetic to the natural law tradition increasingly argue that the fact/value dichotomy has "collapsed" or otherwise is avoided in natural-law thinking. *See* Kevin P. Lee, *The Collapse of the Fact/Value Dichotomy: A Brief for Catholic Legal Scholars*, 1 J. CATH. SOC. THOUGHT 685, 685-86 (2004); *see also* LISSKA, *supra* note 15, at 195-201; ALASDAIR MACINTYRE, AFTER VIRTUE 51-61 (2d ed. 1984).

The second question is more basic: When theorists speak of *nature*, what do they have in mind? Consider, for example, the different images used to represent nature at various times and places. Female imagery for nature abounded in the Middle Ages and Renaissance: "The earth was to be conceived as a nurturing mother, who sustained and supported humanity throughout their time of sojourn in the world." 1 ALISTER E. MCGRATH, A SCIENTIFIC THEOLOGY: NATURE 105 (2001). Other prominent images included the organism, Francis Oakley, *Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition*, 6 NAT. L.F. 65, 79 (1961) (citing R.G. COLLINGWOOD, THE IDEA OF NATURE (1945)); the machine, *id.*; the stage; the book; and the mirror, 1 MCGRATH, *supra*, at 103-05, 107-10. The idea that "laws of nature" exist is a similar construct. *Id*. at 226-28 (citing Francis Oakley, *Christian Theology and the Newtonian Science*, *in* CREATION: THE IMPACT OF AN IDEA 54-83 (Daniel O'Connor & Francis Oakley eds., 1961)). Imagery also may be useful in describing what nature is *not*; nature frequently is represented in opposition to grace, "unnatural" vices, technology, culture, the mimetic arts, the supernatural, the metaphysical, and even the inexcusable. C.S. LEWIS, STUDIES IN

of law depends fundamentally on his conception of human action and the characteristic inclinations of the human person.[19] The focus here, however, will be on Thomas's account of nature in general. Contemporary conceptions of nature are dominated by the hard sciences, which attempt to identify empirically the connections between individual discrete events in the natural order.[20] Thomas's goal in describing nature, on the other hand, is to identify

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WORDS 42-74 (2d ed. 1967); *see also* JOHN HABGOOD, THE CONCEPT OF NATURE 1-5 (2002).

Not only is nature represented by conflicting images, but many theoretical accounts of nature also exist. This is not merely a modern phenomenon. Thomas himself notes multiple uses of the word nature. *See* ST IaIIae.10.1 (for a discussion of this citation format, see *infra* note 19). Plato and Aristotle, for example, both divided the world into the realms of nature, art, and chance but differed as to each realm's precise role in the overall scheme of things. 1 MCGRATH, *supra*, at 90-95. They likewise differed over the origins of human perceptions of universals and particulars. Medievals inherited a tradition of reflection on natural law that drew not only upon conflicting Stoic and Platonic elements but also upon accounts of natural law based in different traditions of inquiry. The project of medieval synthesis involved assimilating accounts of nature and natural law drawn not only from philosophers and theologians but also from canon and civil lawyers. *See* JEAN PORTER, NATURAL AND DIVINE LAW 66-75 (1999). The natural sciences dramatically and increasingly have influenced accounts of nature since then. Far from seeing nature as a "second book" of God's revelation, *see id.* at 71, it is now common to view nature only as "the amoral scene of Darwinian struggle." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 235 (1990).

The concrete consequences of differing conceptions of nature are perhaps exhibited nowhere better than in law. Scholars who would strenuously resist the label "natural lawyer" nevertheless cannot avoid being interested in the world in which law must operate. The efficiency-minded academic lawyer is concerned with the psychology of market decision-making, the family lawyer with which features of family life are "givens" and which are not, *see generally* SEX, PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE (David M. Estlund & Martha C. Nussbaum eds., 1997), and the environmental lawyer with whether nature is "a material resource for human consumption" or something else, *see* Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 13-14 (2000) (noting "three principal discourses" of nature in environmental debates: the first "treats nature as a material resource for human consumption"; the second "treats nature as an esthetic resource"; and the third "argues that humanity has an ethical obligation to protect nature independent of any instrumental value nature may have"). *See also* Alex Geisinger, *Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature*, 27 B.C. ENVTL. AFF. L. REV. 43, 47-48 (1999) (criticizing Western ideology of "separation and domination" with respect to nature and noting alternative "metaphors for our understanding of nature," including "(1) nature as a limited resource on which humans rely; (2) nature as balanced and interdependent; and (3) the model of nature versus society, characterized by the market's devaluation of nature, the separation from nature that leads to failure to appreciate it, and the American idealization of the environmentalism of primitive peoples").

19. *See* ST IaIIae.90.1, c. In citing to Thomas's *Summa Theologica*, I have borrowed Norman Kretzmann's form:

> [The abbreviation ST is followed by]
> the traditional designation for the Part (*Pars*)—Ia (*Prima*), IaIIae (*Prima secundae*), IIaIIae (*Secunda secundae*), or IIIa (*Tertia*). The first arabic numeral following any one of those designations indicates the Question in that Part, and the next arabic numeral, following a full point, indicates the Article belonging to that Question. A 'c' immediately following the second arabic numeral indicates that the passage belongs to Aquinas's reply in that Article (the 'body' (*corpus*) of the Article); 'obj. 1', 'obj. 2', etc., indicates one of the 'objections' (opposing arguments); 'sc' indicates the 'sed contra' (the citation of an authority or generally acceptable consideration contrary to the line taken in the Objections), and 'ad 1', 'ad 2', etc., indicates one of Aquinas's rejoinders to the objections.

NORMAN KRETZMANN, THE METAPHYSICS OF CREATION: AQUINAS'S NATURAL THEOLOGY IN *SUMMA CONTRA GENTILES* II 9 n.16 (1999). Analogous forms are used for Thomas's other works cited in this Article. Unless otherwise noted, translations of the *Summa Theologiae* are taken from ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Christian Classics 1981).

20. "Modern science studies the world of space and time, not some reality beyond them, and arose

the common characteristics of "beings" and the principles underlying their movements, i.e., to develop a science of metaphysics.

Part II begins the exploration of the specifics of Thomas's metaphysics with an account of his attempt to define law's essence. Examination of Thomas's famous definition of law shows how, following Aristotle's method, Thomas thinks law can be understood by focusing on its formal, final, material, and efficient causes. It also shows how Thomas's metaphysical assumptions about bodies and human action affect the specifics of Thomas's account. Part III examines Thomas's account of human law's ontology, which raises a number of metaphysical questions, including the ontological status of human law relative to other types of law, the status of unjust laws in Thomas's framework, and how it is that human laws can vary so significantly notwithstanding their shared ontological dependence on the single natural law.

Part IV describes Thomas's methodology, which is grounded on the assumption that there are different orders of reality and, thus, different methods of analysis that may obtain for different kinds of realities in the world. Thomas's account challenges the reductionism of some contemporary jurisprudence, while at the same time explaining why law is fruitfully analyzed from so many competing perspectives.

Part V examines two of the most well-known features of Thomas's metaphysics: the analogy of being and his assumption that reality is fundamentally hierarchical, proceeding in a chain from God downward through successively inferior orders of angels, humans, animals, plants, and inanimate objects. Part V connects these assumptions about reality with Thomas's account of law. Thomas affirms a substantial degree of human freedom in human lawmaking, drawing a helpful analogy between rulers and architects. Nevertheless, because Thomas holds that God's plan for the universe extends even to the minutest details of human law, and because all being is, for Thomas, hierarchical, there is a noteworthy gravitational pull against human freedom in lawmaking at work in the *Treatise*, albeit one that Thomas himself repeatedly seems to be striving to resist.

I. THOMAS AQUINAS'S METAPHYSICAL CONCEPTION OF NATURE

Thomas Aquinas is probably best known to legal scholars for his account of natural law in Question 94 of the *Treatise on Law*. One of the first

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when a logical quest for timeless patterns gave way to a mathematical, hypothetical and experimental approach to the contingent rationality of space and time . . . ." COLIN E. GUNTON, THE ONE, THE THREE AND THE MANY 75 (1993) [hereinafter GUNTON, THE ONE, THE THREE AND THE MANY]; *see also* ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF THOMAS AQUINAS 178 (Univ. of Notre Dame Press 1994) (1956) (modern empiricism reduces causation to "constant relationship[s] between phenomena"); COLIN E. GUNTON, THE TRIUNE CREATOR 134 (1998) [hereinafter GUNTON, THE TRIUNE CREATOR] ("[T]he modern age replaced an essentially Hellenic philosophy of nature, according to which it is what it is by virtue of intrinsic rational powers and causes operating *above* material being, with one of contingencies consisting in patterning *within* it."). *See generally* M.B. Foster, *The Christian Doctrine of Creation and the Rise of Modern Natural Science*, 43 MIND 446 (1934).

questions that will occur to any reader of Question 94 (or indeed to anyone who thinks much about the phrase "natural law") is which "nature" is grounding the enterprise: Human nature? The cosmos? The nature of law?

In his treatment of natural law, Thomas explicitly connects law and nature in two ways. First, he says in Question 90 that "God instilled [natural law] into man's mind so as to be known by him naturally."[21] Second, the characteristic inclination of the human person is to use the "light of natural reason, whereby we discern what is good and what is evil."[22] Implicitly, however, Thomas's account of law is also influenced dramatically by his presuppositions about the nature of reality. For Thomas, what is most important about nature is not the observable web of contingent patterning[23] but rather the universal principles that lie beneath observable particulars.[24] Thus, for example, in the *Treatise on the Creation*,[25] Thomas begins neither with the particular story told in *Genesis* 1[26] nor with a bottom-up account of natural phenomena but rather with a philosophical demonstration that "God is the efficient, the exemplar and the final cause of all things, and [that] primary matter is from Him."[27]

Thomas's focus on universal principles of being is no accident. Rather, he argues, it is the culmination of human scientific progress over the centuries: The ancient philosophers "failed to realize that any beings existed except sensible bodies," and because they regarded matter as eternal and uncreated, they had trouble accounting for changes they observed in it.[28] The recognition of "a distinction between the substantial form and matter"[29] improved upon this understanding, even though the causes of change in bodies continued to be attributed mistakenly to "universal causes" like the zodiac or Platonic ideas. Further refinements of the classical understanding of the interconnection between form, substance, accident, and causation likewise aided human understanding, but the most significant change, ac-

21. ST IaIIae.90.4, ad 1.

22. ST IaIIae.91.2, c. John Finnis characterizes Thomas's answer to the question why natural law is so called as follows:

> Why are these principles *natural* law? Not because they are somehow read off from nature or human nature. Rather, for at least three reasons. They are not made by human devising {ad-inventio} but rather are first-order realities, as are the other realities which pertain to our nature. Their reasonableness, moreover, is a sharing in the practical reasonableness, the wisdom, of the very author of our nature, the creator by whose wisdom and power the fulfilment which we can freely choose is (like our freedom itself) made possible. And no human choices or acts are against the natural law (or indeed against any divine law) except in so far as they are against human good.

JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 309 (1998) (footnote omitted); *see also* RUSSELL HITTINGER, THE FIRST GRACE xxi-xxiii (2003).

23. *See supra* note 20.

24. I do not mean to suggest Thomas is uninterested in the natural world, only that he thinks the most important task for understanding the natural world is understanding "being in general."

25. ST Ia.44-49.

26. *But see Treatise on the Work of the Six Days*, ST Ia.65-74, which appears afterward.

27. ST Ia.44.4, ad 4. The quotation appears at the end of Question 44 and seems to summarize Thomas's position as set out in the various articles therein.

28. ST Ia.44.2, c.

29. *Id.*

cording to Thomas, was one of focus—from a consideration of "*being* under some particular aspect . . . to the consideration of *being*, as being."[30] Thomas concludes that "whatever is the cause of things considered as beings, must be the cause of things [generally]."[31]

Thomas's primary approach to nature, then, is to try to discover principles that apply generally to all beings, an approach that involves background assumptions radically different from those modern readers would bring to the same enterprise. Most of us are unaccustomed to thinking in explicitly metaphysical terms at all, much less in the highly developed Aristotelian scheme Thomas inherits and reconfigures. More fundamentally, we tend to take our conception of nature from the contemporary natural sciences, which are largely empiricist. Because modern science's goals involve the identification of generalizable relationships and working principles that enable prediction or manipulation of future states of affairs, it cannot avoid metaphysics (or something like it) entirely.[32] Nevertheless, modern conceptions of metaphysics are far more limited and modest than those Thomas employs.[33]

As noted above, a working assumption of the modern scientific method is that a too-robust metaphysics hinders efforts to learn the truth about the world. At least since Francis Bacon's assault on Aristotle in *The New Organon*,[34] empiricists have argued that a priori conceptions of reality obscure

30. *Id.*

31. ST Ia.44.2, c; *see also* Jan A. Aertsen, *Aquinas's Philosophy in Its Historical Setting*, *in* THE CAMBRIDGE COMPANION TO AQUINAS 12, 28-30 (Norman Kretzmann & Eleonore Stump eds., 1993) (citing passage in relation to Thomas's belief in philosophical progress); *cf.* ST Ia.75.1, c. Thomas nevertheless conceived of himself as a naturalist. *See generally* GUNTON, THE TRIUNE CREATOR, *supra* note 20, at 105-07, 112.

32. *See, e.g.*, WILLEM B. DREES, RELIGION, SCIENCE AND NATURALISM 152, 259-74 (1996) (arguing that "our understanding of reality raises some questions, questions which are not themselves answered by science and thus may be considered as pointing beyond science to metaphysical issues, without, however, pointing to one particular metaphysical view"); 3 ALISTER E. MCGRATH, A SCIENTIFIC THEOLOGY: THEORY 250-58 (2003) (arguing that scientists' attempts to evade metaphysics entirely have been unsuccessful).

33. *See generally* LISSKA, *supra* note 15, at 86. Even modern religious believers outside the Thomist tradition are likely to find Thomas's approach to nature uncongenial. To begin with, they are likely to share—in practice if not in theory—the culture's empiricist approach to understanding nature. Even assuming they are prepared to find a place for a divine ordering in nature, Thomas's emphasis on being and his use of Aristotle's fourfold account of causation will seem strange and out of kilter with modern scientific understanding. Readers from Christian traditions marked by a skepticism toward natural theology also may find an insufficient connection between Thomas's account of the created order and more particular aspects of the biblical narrative, including Jesus's incarnation and promised return to consummate all things.

34. Bacon writes:

> The most obvious example of the first type is Aristotle, who spoils natural philosophy with his dialectic. He constructed the world of categories; he attributed to the human soul the noblest substance, a genus based on words of second intention; he transformed the interaction of *dense* and *rare*, by which bodies occupy greater and smaller dimensions or spaces, into the unilluminating distinction between act and potentiality; he insisted that each individual body has a unique and specific motion, and if they participate in some other motion, that motion is due to a different reason; and he imposed innumerable other things on nature at his own whim. He was always more concerned with how one might explain oneself in replying, and to giving some positive response in words, than of the internal truth of things; and this shows up best if we compare his philosophy with other philosophies in repute among the Greeks.

rather than illuminate natural phenomena.[35] Bacon argued, for example, that acceptance of Aristotle's emphasis on natural teleology discouraged concrete investigation into more immediate cause-and-effect relationships.[36] Though it took some time for the inductive method to take root, the modern natural sciences are now so firmly committed to the priority of empirical observation over a priori theorizing that it can be difficult to imagine an alternative conception of the "scientific method."[37]

Thomas's conception of nature, then, is at odds with modern working assumptions about the natural world in two respects. First, his account is metaphysical in the general sense that its primary goal is to identify and apply the unseen principles that govern all reality (specifically everything that partakes of being) to all facets of life rather than to examine particular phenomena in a systematic way to discern connections between events. Second, Thomas assumes, contrary to Bacon and the empiricists, that the most important thing to understand about an object is what it is for—where it fits in the cosmic order. While it seems unlikely that science will abandon its quest for something like the underlying principles that were the subject of the metaphysicians' quest, a strongly teleological account of the natural

> The 'similar substances' of Anaxagoras, the atoms of Leucippus and Democritus, the earth and sky of Parmenides, the strife and friendship of Empedocles, the dissolution of bodies into the undifferentiated nature of fire and their return to solidity in Heraclitus, all have something of natural philosophy in them, and have the feel of nature and experience and bodies; whereas Aristotle's physics too often sound like mere terms of dialectic, which he rehashed under a more solemn name in his metaphysics, claiming to be more of a realist, not a nominalist. And no one should be impressed because in his books *On Animals* and in his *Problems* and other treatises there is often discussion of experiments. He had in fact made up his mind beforehand, and did not properly consult experience as the basis of his decisions and axioms; after making his decisions arbitrarily, he parades experience around, distorted to suit his opinions, a captive. Hence on this ground too he is guiltier than his modern followers (the scholastic philosophers) who have wholly abandoned experience.

FRANCIS BACON, THE NEW ORGANON 51-52 (Lisa Jardine & Michael Silverthorne eds., 2000) (1620) (Aphorism LXIII).

35. Thomas's metaphysics has been accused of obscuring both scientific observation and biblical interpretation. Later theologians have argued (in a vein not dissimilar to Bacon) that philosophical conceptions of God inherited from the ancient Greek philosophers, some of which Thomas inherits and does not modify adequately—particularly his account of God and God's relation to the creation—have inhibited a full understanding of the biblical narrative as it might inform a theological understanding of creation. Colin Gunton, for example, argues that neglect of the doctrines of the incarnation, the divine covenants, and eschatology generally has hampered an understanding of the created order that makes room both for the integrity of the created order as distinct from the Creator and for God's continuing purpose for, and interaction in time within, creation. *See generally* GUNTON, THE TRIUNE CREATOR, *supra* note 20; *see also* OLIVER O'DONOVAN, RESURRECTION AND MORAL ORDER 53-75 (1986) (eschatology).

36. Bacon argues:

> It is no less of a problem that in their philosophies and observations they waste their efforts on investigating and treating the principles of things and the ultimate causes of nature (*ultimatibus naturae*), since all utility and opportunity for application lies in the intermediate causes (*in mediis*). This is why men do not cease to abstract nature until they reach potential and unformed matter, nor again do they cease to dissect nature till they come to the atom. Even if these things were true, they can do little to improve men's fortunes.

BACON, *supra* note 34, at 55 (Aphorism LXVI).

37. Oliver O'Donovan has made the point succinctly: "Only when thought could escape the inhibiting influence of a teleological philosophy could it examine the universe in a way that was open to the contingency of relations, not presupposing that it would find a unifying purposiveness but prepared to find exactly what it did find." O'DONOVAN, *supra* note 35, at 45.

world has come to be seen as implausible in the wake of the natural sciences' extraordinary successes, which have been brought about largely by the abandonment of a teleological focus.[38] As discussed below, Thomas's metaphysical presuppositions decisively shape his account of nature and thus his accounts of natural and human law. However, unless we are to repeat the scholastics' mistakes, we cannot simply assume a priori that Thomas's account of law is unenlightening because of its metaphysical orientation. The account itself must be explored.

II. LAW'S ESSENCE

A. Defining Law

The *Treatise on Law* begins, naturally enough, with a consideration of law's essence. Thomas analyzes law, by analogy,[39] as if it were a natural kind.[40] In Thomas's world, natural kinds are marked by their essences, which are identified in terms of the characteristic tendencies of the members of the group marked out as that kind of being.[41] Although Thomas modifies important aspects of Aristotle's metaphysics, he adopts Aristotle's basic framework for understanding essences in the natural world. Thomas accepts Aristotle's hylomorphic account of objects; his account of motion, act, and potentiality; and, most importantly for present purposes, his fourfold account of causation.[42]

Like Aristotle, Thomas is interested in accounting for the observed fact that all material beings exhibit both stability and change and for material beings' simultaneous universality (i.e., membership in a class of beings) and particularity (e.g., Socrates and John are both men, but they are not each other). In broad outline, a material being's essence is understood best in terms of four causes: (1) its form—that which allows one to know *what* something is; (2) its matter—what it is made of; (3) its efficient cause—where it came from or the point at which its motion started; and (4) its final cause—what it is for/where it is headed.[43]

Because law is not a material entity, the fourfold causation model can be applied only analogically.[44] Thomas argues that law's formal cause is "an

38. *See* O'DONOVAN, *supra* note 35, at 45. *But see* GUNTON, THE TRIUNE CREATOR, *supra* note 20, at 105-06 (criticizing Aristotle for de-emphasizing the material relations of things in favor of "ideal or intellectual relations of things"); *id.* at 106 ("[T]he key to later science is the combination of experiment and mathematics which goes ill with Aristotle's tendency to classify phenomena rationally . . . .").

39. *See infra* Part V (C).

40. *See infra* Part III.

41. *Cf.* LISSKA, *supra* note 15, at 103-05.

42. *See generally* F.C. COPLESTON, AQUINAS 73-110 (Penguin Books 1991) (1955).

43. *See* 1 AQUINAS, METAPHYSICS OF ARISTOTLE, *supra* note 15, I.L.4:C, at 70-71; *see also* PIERRE CONWAY, METAPHYSICS OF AQUINAS 34 (Mary Michael Spangler ed., 1996).

44. *See infra* Part V; *cf.* FINNIS, *supra* note 22, at 31. On Aristotle's application of fourfold causation to manmade and other objects, see R.J. Hankinson, *Philosophy of Science*, *in* THE CAMBRIDGE COMPANION TO ARISTOTLE 109, 121-22 (Jonathan Barnes ed., 1995). In addition to that adduced below, the textual evidence favoring the claim that Thomas consciously is using the fourfold causation model is

ordinance of reason" (a reasonable command or prohibition), its efficient cause is "either . . . the whole people, or . . . someone who is the viceregent [sic] of the whole people,"[45] and its final cause is the common good. Law is immaterial, so there is no material cause strictly speaking; nevertheless, law's promulgation seems to occupy the analogous position in Thomas's account.

In addressing law's formal cause, Thomas starts with the common-sense notion of human law as a rule or measure of human activity.[46] Common sense is buttressed by his controversial suggestion that *lex* is derived from *ligare*, which means "to bind."[47] While Thomas seems to regard the idea that laws are rules as self-evident, he feels compelled to justify the second aspect of his account of the form of law—that rules are not law unless they bear some relation to reason.[48] Here, he offers a metaphysical proof: (1) All actions are undertaken for an end; (2) The starting point for human actions is reasoning about what to do. The *principle* of the *genus* of human action thus is reason;[49] (3) Because "the principle in any genus, is the rule and measure of that genus,"[50] and reason is the principle of the genus of human action,[51] it follows that law is a matter of reason.[52]

As noted above, law does not have a material cause. However, Thomas discusses promulgation in Question 90 by analogy to material causation.[53] If

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as follows: (1) his statement in the Prologue to the *Treatise on Law* that he will first consider law's "essence" and (2) the fact that his description in the Prologue of the discussion of law's essence to follow includes references to law's "cause" and "end" as separate discussions (corresponding to ST IaIIae.90.2-90.3).

45. ST IaIIae.90.3, c.

46. Thomas presupposes that the appropriate starting point for investigation is that which is first in the order of knowledge. *See infra* Part V.

47. *See* ST IaIIae.90.1, c. An arguably more persuasive etymology for *lex* is *legere*, meaning "to read."

48. ST IaIIae.90.1, ad 3 ("But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. . . . [O]therwise the sovereign's will would savor of lawlessness rather than of law.").

49. *See* ST IaIIae.1.1, ad 3. Aristotle holds that a *principle* is something that "comes first either with reference to a thing's being (as the first part of a thing is said to be a principle) or with reference to its coming to be (as the first mover is said to be a principle) or with reference to the knowing of it." 1 AQUINAS, METAPHYSICS OF ARISTOTLE, *supra* note 15, V.L.1:C, at 303. Thomas does not disagree with this assessment as far as it goes but notes the differences that also mark the various uses of *principle*. In particular, he emphasizes that the good is the "principle[] of the . . . motion of many things; that is, all those which are done for the sake of some end. For in the realm of . . . moral acts, . . . demonstrations make special use of the final cause." *Id*.

In the discussion about law, Thomas says reason is the first principle of human action because "it belongs to the reason to direct to the end, which is the first principle in all matters of action." ST IaIIae.90.1, c; *see also* CONWAY, *supra* note 43, at 108-11.

50. ST IaIIae.90.1, c.

51. *Human action* is a term of art in Thomas's thought. Humans, like everything else in the natural world, act for an end, and it is this characteristic act that is dispositive of their essence. The characteristic human act is to use reason to pursue the good. *See generally* ST IaIIae.1-48; GILSON, *supra* note 20, at 251-56; RALPH MCINERNY, ETHICA THOMISTICA 60-76 (rev. ed. 1997); YVES R. SIMON, THE TRADITION OF NATURAL LAW 78-82 (Vukan Kuic ed., 1965).

52. For an explanation as to why Thomas thinks he is entitled to draw inferences about law in general from characteristics of human law, see *infra* Part V.C.

53. ST IaIIae.95.4, obj. 2, contains the suggestion that law's material cause consists of the kind of command issued by the relevant authority. Thus "*statutes, decrees of the commonalty, senatorial de-*

matter is required for the embodiment and separation of material beings, promulgation may be said to serve an analogous function in connection with law. Laws cannot serve as universal principles of practical reason[54] unless they are "applied to those who are to be ruled and measured by [them],"[55] and promulgation is the means through which such application takes place.[56] The *written* character of law also receives attention in this discussion.[57]

Law's final cause (its purpose), according to Thomas, is the common good.[58] Again, Thomas's justification for this conclusion is largely a priori. As we already have seen, the principle (i.e., starting point or source) of human acts is reason. Because a law is a rule and measure of human acts, laws must be rules of *reason*, specifically practical reason.[59] Reason itself, however, must also start somewhere, and practical reason's starting point is the pursuit of the good,[60] which for humans is happiness.[61] Thus, it follows that law's overarching orientation is toward human happiness.

The critical remaining question is *whose* happiness the law should consider. Thomas reasons as follows that the happiness to be considered is that of the community rather than the individual: (1) "[E]very part is ordained to the whole, as imperfect to perfect"; (2) Individual humans are part of the perfect community; therefore: (3) the community is the primary focus of consideration and law should be oriented toward it rather than toward the individual.[62] The conclusion is double-edged: On one hand, a law that disadvantages particular individuals may be justified by its tendency to pro-

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crees, and the like . . . do not differ, except materially." *Id.* Thomas rejects this claim, holding that the division of human laws into these various types is meaningful because different forms of government generate correlative embodiments of law. *Id.* at c; *see also* Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26 LAW & PHIL. 161 (2007). Promulgation seems a better analogue to matter because it is the vehicle through which earthly law presents itself to humans. It has the further advantage of being an essential element of law according to the received wisdom of the day. *See* THOMAS GILBY, THE POLITICAL THOUGHT OF THOMAS AQUINAS 134-35 (1958).

54. ST IaIIae.90.1, ad 2 ("Such like universal propositions of the practical intellect that are directed to actions—have the nature of law."). Thomas borrows the familiar Aristotelian distinction between *practical reason*, which relates to decisions about what to do and *speculative* or *theoretical reason*, which relates to our knowledge of things as they are apart from our actions.

55. ST IaIIae.90.4, c.

56. Thomas also notes that promulgation "extends to future time by reason of the durability of written characters, by which means it is continually promulgated." ST IaIIae.90.4, ad 3. One might argue that written characters are, analogically speaking, law's material cause. But promulgation has a stronger claim in that Thomas's definition of law includes not only the focal case of human law but also the unwritten eternal and natural laws, which nevertheless are promulgated.

57. *Id.*

58. *Id.* at IaIIae.90.2, c.

59. *Id*. at IaIIae 90.1, ad 2.

60. *See id*. at IaIIae.94.2, c. ("Now as *being* is the first thing that falls under the apprehension simply, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good.").

61. *Id.* at IaIIae.2.7; *id*. at IaIIae.3.1.

62. *Id*. at IaIIae.90.2, c; *see also* ST. THOMAS AQUINAS, ON KINGSHIP 9-10 (Gerald B. Phelan trans., 1982); *cf.* ST IaIIae.96.4, c (analogizing burdens on individuals required to facilitate the common good to the sacrifices that nature makes in parts of organic bodies in order to preserve the whole).

mote the common good. On the other, laws aimed at individual activities must find their justification in the common good; otherwise, they are "devoid of the nature of a law."[63]

Lastly, law's efficient cause (its origin) is the political community's ruler(s). Thomas again emphasizes law's connection to human action, and he again makes an a priori argument. He just has demonstrated that law "regards first and foremost the order to the common good."[64] Because law, as a product of practical reason, involves ordering toward an end, Thomas argues that the direction toward that end is properly the choice of the person "to whom the end belongs."[65] Thus, laws should be made by either "the whole people or . . . a public personage who has care of the whole people."[66]

Thomas also connects the requirement that law should be made by a public person to the prior discussion of the regulation of human action by practical reason by arguing that law should be "an efficacious inducement to virtue."[67] "[P]rivate person[s] cannot lead another to virtue efficaciously . . . [but] can only advise."[68] Law, on the other hand, can induce obedience from the reason, if only due to fear of punishment.[69]

This argument presupposes both a state monopoly on the exercise of force, at least deadly force,[70] and some account of a distinction between public and private personages. Thomas writes elsewhere that "the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evildoers to death."[71] He also draws a clear distinction between public and private dealings, arguing, for example, that judges may draw only on legally admissible evidence in making their rulings and never on their private knowledge, even when a case's outcome might turn on their decision to do so.[72]

63. ST IaIIae.90.2, c. John Finnis argues that an important thrust of the discussion of the common good in Thomas's treatment of law and politics is that it serves, contrary to common understanding, as a *limitation* on government power: "[Thomas's] position is not readily distinguishable from the 'grand simple principle' (itself open to interpretation and diverse applications) of John Stuart Mill's *On Liberty*." FINNIS, *supra* note 22, at 228.

64. ST IaIIae.90.3, c.

65. *Id.*

66. *Id.*

67. *Id.* at IaIIae.90.3, ad 2.

68. *Id.*; *see also id.* at Ia.IIae.50.2, c (discussing rule by command and its relationship to the commanded person's will).

69. *Id.* at IaIIae.92.2, c. *But see* FINNIS, *supra* note 22, at 257 and sources cited therein (discussing law's "internalization" by the people).

70. ST IIaIIae.64.3, c. Civil magistrates are entitled to employ "perfect coercive power" that extends to "irreparable punishments such as death and mutilation." *Id.* at IIaIIae.65.2, ad 2. Parents and slaveholders can employ punishments, such as beatings, that "do not inflict irreparable harm." *Id*.

71. *Id*. at IIaIIae.64.3, c.

72. *See id*. at IIaIIae.67.2, c. *See generally* FINNIS, *supra* note 22, at 250-52 (discussing the distinction between public and private personages and its relationship to the rule of law).

B. Metaphysical Influences in the Treatise

What implications does Thomas's metaphysics have for his account of law's essence? The claim that law may be analyzed as if it were a natural kind with an essence is fundamental, and it is examined in more detail in Part III. For the moment, it is enough to notice how Thomas's metaphysical framework colors his observations about law (particularly human law) and his argumentation.

It is only fitting to begin by observing that perhaps Thomas's biggest shortcoming in many legal theorists' eyes—his refusal to separate law and morality—follows from his metaphysics.[73] If, as Thomas supposes, one cannot fully understand *anything* without understanding its end (its final cause), and if the very idea of *good* is connected with the fulfillment of that end, no airtight separation of facts and values can exist in the realm of knowledge. Thomas's reputation in this regard appears to be undergoing some rehabilitation as conventional wisdom about the impossibility of deriving values from facts is being questioned and doubt about the possibility of value-neutral observation of social practices increases.[74]

The most striking single instance of metaphysical influence in Thomas's discussion of law's definition is the analogy[75] he draws between organic bodies and their members and the body politic and its constituents.[76] The theme is significant not only because it recurs several times in the Question in which Thomas defines law but also because one can observe Thomas's apparent struggle to square his metaphysics with what he regards as an appropriate account of human law and lawmaking.[77]

Recall Thomas's argument that law's final cause is the common good.[78] Following Aristotle,[79] Thomas begins with the principle that wholes have priority over parts.[80] The focal case in the conception of wholes and parts is that of the bodies of living organisms.[81] Such bodies are, generally speaking, self-sustaining in ways that their parts are not; thus it may be said that the parts exist for the sake of the whole, and it seems reasonable to give the

73. It also is no doubt part of his theology, as that term is usually understood. And Thomas's views about God no doubt were important in his acceptance and modification of Aristotelian philosophy.

74. *See* O'DONOVAN, *supra* note 35, at 46-52 (arguing that our understanding of generic categories ultimately depends on teleology). *But see* Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003). *See generally* LISSKA, *supra* note 15; MACINTYRE, *supra* note 18; Robert P. George, *Natural Law and Human Nature*, *in* NATURAL LAW THEORY, supra note 9, at 31; Lee, *supra* note 18; Daniel N. Robinson, *Lloyd Weinreb's Problems with Natural Law*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 213, 214-17 (Robert P. George ed., 1996).

75. Analogy is itself a crucial feature of Thomas's account of law. *See infra* Part V.

76. ST19 IaIIae.96.4, c.

77. *See id.*

78. *Id.* at IaIIae.90.2, c.

79. *See* ARISTOTLE, POLITICS ¶ 1253a, at 55 ll. 19-41 (Benjamin Jowett trans., Random House 1943).

80. *See* ST IaIIae.90.3, c; *id.* at IaIIae.96.4, c.

81. *See* ARISTOTLE, *supra* note 79.

body priority over its individual "members."[82] Again following Aristotle,[83] Thomas holds that human potential cannot be fully realized outside of communities; the complete community is thus a whole in a way an individual person is not.[84] Communities provide not only the basis for physical survival but also a social context in which the virtuous life can be lived. Because the individual is but a part of the perfect community, itself a natural institution, the community's good deserves priority in lawmaking and is not in any fundamental conflict with the individual's good.

Thomas's reliance on the body/member analogy as justification for the idea that law is oriented to the common good may baffle modern readers. However, in his context, it was far more persuasive. His conclusion rests on the authority of both Isidore and Aristotle and presumably also the bulk of the Christian political tradition in which Thomas was working. As we shall see, Thomas believes more familiar realities, like animal bodies, can sometimes shed light by analogy on other, deeper realities.[85] Thus, he has independent reasons to believe that inquiry into the relationship between the bodies of living things and their parts can shed light on the lives of "bodies" like communities. In sum, he may have seen little reason to question either that the common good should have unqualified priority in lawmaking or that the body/member analogy provided important support for the position.

One of the body/member analogy's strengths is its ability to give an account of the potential confluence between the good of a whole and that of its parts. Bodies need their parts, and presumably do not inflict injury on them lightly. Moreover, the parts cannot exist without the whole, so there is no question that if one must choose between the interests of the whole and that of its parts, the whole has priority.[86] Nevertheless, as applied to political life, the analogy pushes more strongly toward the priority of the whole than Thomas thinks appropriate. Thomas is not naive enough to think that the body politic (as represented by its rulers) inevitably will care for each of its parts just as a human might be expected to care for his.[87] Nor does he think humans depend on the body politic to the same extent their limbs depend on their body, and he recognizes that humans may have ends of their own. These disanalogies require Thomas to find a way to prevent his account of the community/citizen relationship from becoming a license for self-serving rule by tyrants or overly intrusive political control.

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82. *Member* is used here in the sense of "limb" or "organ" when referring to the organism and in the sense of person when referring to a part of the body politic.

83. *See* ARISTOTLE, *supra* note 79, ¶ 1252b, at 54 ll. 29-30.

84. *See* ST IaIIae.90.3, c.

85. *See infra* Part V.

86. The body/member metaphor also works relatively well when Thomas is explaining why law's efficient cause is the "whole people or . . . a public personage who has care of the whole people." ST IaIIae.90.3, c. In this instance, it helps to underwrite the distinction between public and private authority. Laws should be made by the whole (or its representative), not by the part, because law's purpose is to order the public life of the community.

87. *See id.* at IaIIae.96.4, c. (dealing with a ruler's actions that further his personal good and not that of the community).

Thomas deals with these problems by giving an account of the common good that cuts in the opposite direction from the body/member metaphor. An organic body's parts may exist for the sake of the whole, but in Thomas's account of the political common good, the whole exists for the sake of its parts. Thomas uses the concept of the common good to declare out-of-bounds both laws made only in the ruler's self-interest[88] and those that impinge on individual decisions without benefiting to the whole.[89] Not only that, but in Thomas's vision, the purpose of building a community is not to establish an empire but rather to enable the community's members to lead virtuous lives. The whole point of having a community is to enable individual members to flourish.

These two different directions ultimately come into conflict, however, when Thomas deals with the community's treatment of criminal offenders. In a series of questions in the Second Part, Thomas discusses the propriety of punishments for wrongdoers, concluding that it is perfectly acceptable to harm an individual for the community's sake. For example, in dealing with the question of capital punishment, Thomas writes:

> [I]t is lawful to kill dumb animals, in so far as they are naturally directed to man's use, as the imperfect is directed to the perfect. Now every part is directed to the whole, . . . wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community, as part to whole. Therefore if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since *a little leaven corrupteth the whole lump* (1 Cor. v.6).[90]

Significantly, the killing of humans is put on a different ground than the killing of animals for food. Thomas justifies the taking of animal and plant

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88. *Id.*

89. *See id.* at IaIIae.96.3, c; *see also* FINNIS, *supra* note 22, at 222-31 (arguing that common good in this context refers to a "limited common good, specific to the political community [which Thomas refers to as] *public good*"). One can see a similar move in Thomas's treatment of the relationship between secular and ecclesiastical power. In ST IIaIIae.60.6, ad 3, Thomas writes:

> The secular power is subject to the spiritual, even as the body is subject to the soul. Consequently the judgment is not usurped if the spiritual authority interferes in those temporal matters that are subject to the spiritual authority or which have been committed to the spiritual by the temporal authority. The implication is that the higher spiritual authority *would be* usurping power if it intruded in matters other than those set out. Thomas was not entirely consistent in his treatment of church-state relations in other works.

See Paul E. Sigmund, *Law and Politics*, *in* THE CAMBRIDGE COMPANION TO AQUINAS, *supra* note 31, at 217, 218-19.

90. ST IIaIIae.64.2, c. Thomas makes similar arguments in *id.* at IIaIIae.64.3 (dealing with the execution of death sentences); *id.* at IIaIIae.64.5 (concerning suicide); and *id.* at IIaIIae.65.1 (maiming).

life for food on the basis of the ordering of creation.[91] Humans are not made to be "used" by the community in the same way animals and plants are made to be used for human sustenance.[92]

Nevertheless, Thomas's organic image[93] of community life creates some interesting tensions in his account of the death penalty. On one hand, the justification for execution relies more on deterrence than retribution; the evildoer may be put to death because he is "dangerous and infectious to the community."[94] On the other, Thomas holds that it is evil in itself to kill a human being.[95] He reconciles these two principles by arguing that the murderer's execution[96] is justified because the murderer has forfeited his human dignity.[97] Once the wrongdoer's dignity has been forfeited, he may be used for the greater good in the way animals are.[98]

This is about as close as Thomas comes to recognizing the possibility of an inherent conflict between individuals and the community, and his solution is not entirely satisfactory. He maintains that no conflict exists between the common good and the well-functioning human's individual good—"The common good is the end of each individual member of a community, just as the good of the whole is the end of each part"[99]—but he seems to doubt his own argument. Even as Thomas defends the execution of the criminal from society's perspective, he writes that "in every man though he be sinful, we ought to love the nature which God has made, and which is destroyed by slaying him."[100] If no inherent conflict exists between the individual good and the common good, why must "the nature which God has made" and which "we ought to love" be destroyed?[101]

One can also see metaphysical elements in the significance Thomas attaches to the nature of human action. Recall that Thomas defends law's

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91. *Id.* at IIaIIae.64.1.

92. *Cf. id.* at IIaIIae.64.1, c. ("There is no sin in using a thing for the purpose for which it is.").

93. Thomas does not think human society is literally organic. The community/body analogy can be pressed too far. *Cf. id.* at IaIIae.17.4; *id.* at IIIa.8.1, ad 2. Nevertheless, Finnis may overstate the case somewhat when he claims that "Aquinas firmly discourages attempts to understand human societies as organisms or substances. There are analogies between organisms and societies; . . . but the disanalogies are fundamentally more important." FINNIS, *supra* note 22, at 25 (footnotes omitted).

94. ST IIaIIae 64.2, c.

95. *Id.* at IIaIIae.64.2, ad 3.

96. It is not clear that Thomas limits the death penalty to murder. *See id.* at IIaIIae.64.2, sc.

97. Thomas writes:

> By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts, by being disposed of according as he is useful to others. . . . Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful, as the Philosopher states (*Polit.* i. 1 and *Ethic.* vii. 6).

Id. at IIaIIae 64.2, ad 3.

98. *See id.*

99. *Id.* at IIaIIae.58.9, ad 3. On the other hand, the same cannot be said about the good of individuals: "[T]he good of one individual is not the end of another individual: wherefore legal justice which is directed to the common good . . . ." *Id.*

100. *Id.* at IIaIIae.64.6, c.

101. *Id.*

close connection to reason as follows: (1) all actions are undertaken for an end; (2) the distinctive feature of specifically human actions is that they result from deliberation and reasonable choice.[102] The *principle* in the *genus* of human action is thus reason; (3) because reason is the principle of the genus of human action, reason is the rule and measure of human action.

While the metaphysical thrust of the specific argument we have just seen Thomas make is not unimportant,[103] the real work in the argument is done at a deeper yet still metaphysical level. To accept Thomas's argument, one must already have assumed that (1) the world has an externally given order, (2) part of that order includes a distinctive human "essence," and (3) that essence involves using reason to act for a good end. These are controversial assumptions, but if one is prepared to accept them, the argument makes sense: it would be at least anomalous if rules binding humans to particular courses of action had no connection to *someone's* reason.

On the other hand, those with doubts about the world's orderliness are not the only ones who may find Thomas's justification implausible. As we have just seen, Thomas's metaphysical arguments in support of his account of law show that his account depends crucially on his account of the human person. Thus, even among those prepared to admit the existence of something like a human essence, accounts differ as to what that essence might be. Though Thomas is participating in a long Christian tradition of identifying reason as that which separates humans from other animals and thus constitutes the "image of God," alternative traditions also exist.[104] If, for example, the essence of human being (in theological terms, the "image of God")[105] is to be a person living in mutually constitutive relations with other people (in an "analogy of relation"[106] to the Trinity),[107] love, rather than reason, might be taken to be the defining principle of authentic human action.[108]

III. HUMAN LAW'S ONTOLOGY

A. Is There Such a Thing as Law?

Implicit in Thomas's attempt to define law is the assumption that it is more than a nominal kind—a set of objects related only by a common name. However, although Thomas believes in universals, he does not subscribe to

102. *Cf. id.* at IaIIae.1.1, c; *id*. at ad 3.

103. I.e., it relies on the assumptions that all actions are taken for an end, that natural kinds have distinctive essences represented by characteristic actions, and that the orientation (principle) of such actions is something against which they can be measured.

104. *See generally* G.C. BERKOUWER, MAN: THE IMAGE OF GOD 67-118 (Dirk W. Jellema trans., 1962) (surveying alternatives).

105. GUNTON, THE TRIUNE CREATOR, *supra* note 20, at 193.

106. *Id.* at 206.

107. For a defense of a view like this, see *id.* at 193-211.

108. Interestingly, while this might make Thomas's proof of reason's place in law more difficult, it would make his defense of law's orientation to the common good much more straightforward than the analogy he draws between the body politic and human bodies.

the Platonic notion that kinds ("human being," "horse," etc.) exist separately from the objects that embody them. Rather, the archetypes for these features of the created order are part of the eternal law, the blueprint by which God made the world. To the extent the universals have any separate existence, it is only as ideas in the mind of God.[109]

Does law exist separately from laws? It follows from the preceding paragraph that Thomas would reject the existence of law as a singular entity while affirming the existence of laws as the embodiment of the kind, law. If law followed the order of things in the material world, we would expect to find various human laws, natural laws, eternal laws, etc., that share the characteristics of the species of law of which they are a part but not the separate existence of a single, generic human law, natural law, eternal law, etc., that encompasses all laws in each such category. Thomas equivocates on this issue, however. He argues that while there are discrete precepts of natural law, human law, and divine law, as well as "many types of things in the Divine mind,"[110] each type of law may be viewed as a unity because "things, which are in themselves different, may be considered as one, according as they are ordained to one common thing."[111] Because the various kinds of law are ordained to the common good, each is rightly considered law, as are the particular laws (or precepts) we might also identify.[112]

Thomas's claim that human law is law raises a further question. We shall see later[113] that Thomas divides reality into two categories—things that cannot be affected by human will and things that can be so affected. Although the eternal and natural laws belong to the former category, human law would seem to belong to the latter. How, if at all, does law's human authorship affect its status as law?

Thomas clearly does not think human authorship precludes human law from obtaining the status of law. Human law is derived from natural law, which human beings did not create, but it is not the same as natural law. Indeed, Thomas gives human law its own category in his taxonomy in the *Treatise*.[114] Moreover, Thomas acknowledges that much human law in-

109. *Cf.* ST Ia.85.1, ad 1; COPLESTON, *supra* note 42, at 93-96.

110. ST IaIIae 93.1, obj. 1.

111. *Id.* at IaIIae.93.1, ad 1.

112. *See id.* (eternal law); *id.* at IaIIae.94.2, ad 1 ("All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept."); *id.* at IaIIae.99.1, ad 1 (old law). The reasoning concerning laws' general orientation toward the common good would seem to provide a basis for arguing the existence of *a* human law in addition to human laws. The question would seem appropriate to the inquiry made in *id.* at IaIIae.91.3 ("Whether There Is a Human Law"), but Thomas never (as far as I have been able to determine) claims that though many precepts of human law exist, human law constitutes a unity. Indeed, he affirms Isidore's division of human law into two separate categories, the law of nations and the civil law, each derived from natural law in different ways. *See id.* at IaIIae.95.4.

113. *See infra* Part IV.

114. Finnis writes:

> [A] conceptual distinction or disconnection [between law and morality] is effortlessly established by the move made in the *Summa*, of taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified *prior* to any question about its relation to morality.

volves the "determination of particulars"; i.e., the resolution of details that, as far as humans can determine, might defensibly be decided one way or the other. Human law thus is not the "brooding omnipresence" so often decried by natural law's opponents.[115] Rather, it consists of particular rules, and the human sovereign puts it into effect. Unlike the other main instantiations of law, human law is a cultural artifact; nevertheless, it is not created *ex nihilo*. It reflects reality, including, but not limited to, the human capacity to use reason to act for a good end and the moral reality of the temporal world it is created to govern.

B. Unjust Laws

We have just seen that Thomas affirms both that human beings make law and that human authorship does not prevent human laws from being included in the generic category, law. Nevertheless, Thomas's claims elsewhere in the *Treatise*—in particular his statement that "that which is not just seems to be no law at all"[116]—suggest that not every human enactment by a person in political authority qualifies as law.

Thomas's famous statement about unjust laws is perhaps the best-known, and most controversial, feature of his account of human law. John Finnis argues that, in order to understand Thomas at this point, one must take into account the possible vantage points from which law may be examined.[117] From the citizen's perspective, saying that an unjust law is not law may simply mean that immoral enactments are not binding in conscience (except to avoid scandal), even if disobeying them may have adverse temporal consequences.[118] Thomas's account of law is, however, not exclusively intended as an ethical guide to the faithful, and his suggestion that unjust laws are not law is more troublesome when read from the viewpoint of the theologian/theorist[119] or that of the lawyer or judge working in a legal system in which morality is not a conventional part of the rules of recognition.[120]

Reading the *Treatise* as a whole, it seems evident that Thomas is not concerned primarily with providing a universal legal rule of recognition.[121]

John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195, 203-04 (Robert P. George ed., 1996).

115. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

116. ST IaIIae.95.2, c (emphasis omitted); *see also id.* at IaIIae.96.4c ("[*A*] *law that is not just, seems to be no law at all.*").

117. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 365-66 (1980).

118. ST IaIIae.96.4.

119. The *Summa* is a work of theology. The theologian offers a presentation of law in theological perspective. *See infra* notes 164-178 and accompanying text.

120. I.e., the rules enabling those in a society to recognize when a law is in effect. *See generally* HART, *supra* note 5, at 77-96.

121. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (Univ. Chi. Press 1979) (1765): "[The law of nature] is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." One may debate whether Black-

In Question 96, he clearly states that an unjust law sometimes should be obeyed, as a matter of conscience, "to avoid scandal."[122] The "scandal" Thomas has in mind is, of course, civil disobedience. The potentially scandalized community, the citizen, and Thomas are all able to recognize that this unjust enactment is a law as far as the community, its lawyers, and its judges are concerned.[123]

Moreover, as noted above, Thomas is writing a work of theology, not a legal treatise. As a result, he is interested in providing an external theological (speculative) account of law and, secondarily, a work of ethics for the faithful. Thus, his readers presumably are more interested in the questions "How is human law related to God?" and "Does living rightly always entail obedience to human law?" than in "What is the content of the human law?" One thus might offer a summary rebuttal to the charge that Thomas denies the status of law to immoral law as follows: Thomas merely holds that unjust laws do not bind one's conscience the way other laws do, even if they are still laws from the sovereign's perspective and their violation may result in unhappy consequences for the lawbreaker.

Despite these plausible and important replies to his critics, it is hard to read Thomas as saying other than that human law's ontological status (i.e., its being law) depends on its connection to right reason. Consider Thomas's implicit appeal to the distinction between appearance and reality in this statement from Question 93:

> Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence. Nevertheless even an unjust law, in so far as it retains some appearance of law, though being framed by one who is in power, is derived from the eternal law; since all power is from the Lord God, according to *Romans*.[124]

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stone intended this statement to suggest a rule of recognition. On one hand, his use of the words *validity* and *authority* tend to suggest he does. On the other, as John Finnis points out, even in Blackstone's "blunt formulation[]," he is "affirm[ing] that unjust LAWS are not law." FINNIS, *supra* note 117, at 364.

122. ST IaIIae.96.4, c.

123. As John Finnis has argued:

> [The natural law] tradition explicitly (by speaking of 'unjust *laws*') accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses. The tradition goes so far as to say that there may be an obligation to conform to some such unjust laws in order to uphold respect for the legal system as a whole . . . .

FINNIS, *supra* note 117, at 365; *see also* Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience*, 33 AM. J. JURIS. 99, 99 (1988). *But see* FINNIS, *supra* note 117, at 364 n.13 (citing ST IIaIIae.70.4, ad 2 and contrasting ST IIaIIae.57.1, ad 1) (noting that Thomas "does say that an unjust judgment of a court is not a judgment").

124. ST IaIIae.93.3, ad 2; *see also id.* at IaIIae.95.2, c (internal citations omitted):

Moreover, *violence* may be read not merely in the contemporary sense of the imposition of will by brute force, but also in its Aristotelian context as describing motion that hinders fulfillment of law's *telos*.[125] Unjust "laws" move the community farther away from its happiness; law's essence is to do just the opposite. The most such enactments can do is appear to be laws.

The best way to understand Thomas's position about human law's relationship to reason is to take seriously Thomas's belief that humans *make* laws while simultaneously affirming that they do not make them *ex nihilo* (out of nothing). All human law, says Thomas, is derived from the natural law, which he defines as the human being's participation in the eternal law.[126] Nevertheless, all law is not derived from natural law in the same way. The *jus gentium*, or law of nations, are legal rules that are more or less constant across time and place. These laws are derived from the natural law "as . . . conclusion[s] from premises."[127] Civil law (*jus civile),* on the other hand, is derived from the natural law "by way of determination of certain generalities."[128] Thomas compares these "determinations" to the decisions that an architect must make to finish a house that has been planned to have a general shape but for which many of the details have been left unspecified.[129] Significantly, human laws that are determinations can be expected to vary across places and times "according as each political community decides on what is best for itself."[130]

Despite these acknowledged variations, Thomas continues to argue for the universal connection between right reason and law. He explains the distinction between the two types of natural law derivation by analogizing between practical and speculative reason: Scientific knowledge (which involves speculative or theoretical reason) includes "naturally known inde-

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> As Augustine says . . . *that which is not just seems to be no law at all*: wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above . . . . Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.

Cf. id. at IaIIae.95.4, c (citing Aristotle for the proposition that tyrannical governments do not produce law).

In ST IaIIae.96.4, c, Thomas also speaks of the force of human law as depending on its justice. In that passage, he notes that laws are unjust if they are "contrary to human good" because they deviate from the essentials of appropriate end, author, and form. *Id.* In that case, they are "acts of violence rather than laws." *Id.* Laws also "may be unjust through being opposed to the Divine good" (e.g., commanding idolatry). *Id.* The statements in ST IaIIae.96.4, obs. 1 aim to answer the question whether "human law does . . . bind a man in conscience." They thus arguably have a more practical than theoretical focus; nevertheless, they are not inconsistent with the more theoretical statements made in Questions 93 and 95 (and quoted above).

125. *See* Simon Oliver, *Motion According to Aquinas and Newton*, 17 MOD. THEOLOGY 163, 167 (2001).

126. ST IaIIae.91.2, c; *see infra* note 217.

127. ST IaIIae.91.2, c.

128. *Id.*

129. *Id.* at IaIIae.95.2, c.

130. *Id.*

monstrable principles"[131] but is also gained when human effort and experience lead to "the conclusions of the various sciences."[132] Similarly, the practical reason begins with the general principles of the natural law and, through human effort and experience, arrives at determinations of the actions to be taken in particular cases.[133] In some cases the most general principles lead to legal rules in short order, as when "one should do harm to no man"[134] leads to prohibitions on murder or battery. In other cases, determining the appropriate rule must rely more on indirect reasoning from the natural principles and on experience with what has proven useful in the working of the world.[135]

There are, for Thomas, two main reasons that legal rules vary notwithstanding their supposed common origin in reason: (1) ruler error and (2) the interaction between rules and context. First, although everyone knows the most basic principles of practical reason (the natural law), some people are unaware of the more specific principles. Unawareness or rejection of natural law leads to differentiated and suboptimal law. Thomas primarily identifies moral corruption as the reason the more detailed principles of natural law are not known,[136] but he also suggests that a (presumably blameless) lack of wisdom or experience might account for such ignorance.[137]

The second source for variation is the seemingly limitless diversity of human circumstances. Circumstantial diversity causes laws to vary with time and place and also accounts for the fact that rules sometimes produce unforeseen and perverse consequences. Thomas's affirmation on the subject of legal variation is straightforward: "The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people."[138] The determinations represent judgments about how the general principles of the natural law are to be applied in the circumstances at hand, and thus can be expected to vary according to time, place, and the character of the people being governed.[139] Thomas even

131. *Id*. at IaIIae.91.3, c.
132. *Id.*
133. *See infra* text accompanying notes 139-140.
134. ST IaIIae.95.2, c (emphasis omitted).
135. *Id.* at IaIIae.95.2, c; *cf. id.* at IaIIae.91.3, c (discussing the relationship between custom and utility); *id.* at IaIIae.94.5, c (discussing natural law by addition and subtraction).
136. *Id.* at IaIIae.94.4, c; *cf. id.* at IaIIae.94.6, c.
137. *See id.* at IaIIae.95.1, ad 2; IaIIae.95.2, ad 4. Thomas's argument is based in part on a comparison between practical and speculative reason. Thomas holds that certain general principles of speculative reason (e.g., the principle of non-contradiction) are always true and are generally known but that scientific conclusions, although equally true, are not equally known to everyone. *See id.* at IaIIae.94.4, c ("[T]hus it is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all."). Practical reason deals not with necessary truths but rather with what is to be done ("contingent matters"). *Id.* Thomas argues that practical reason is similar to speculative reason in that its general principles are always true and are generally known, and also in that its specific conclusions are less widely known than the general principles. *Id.* Practical reason differs from speculative reason in that its conclusions are variable and contingent rather than necessary. *Id.*
138. *Id.* at IaIIae.95.2, ad 3.
139. As to the latter, see *id.* at IaIIae.96.2, c.

speaks of "additions" to the natural law as human laws include provisions that have been discovered to be conducive to human flourishing.[140]

Thomas also observes that rules sometimes "fail" and thus cannot always be implemented according to their express terms. Indeed, he explains that the more specific a rule is, the more likely it is to fail occasionally in its concrete application. For example, Thomas derives the rule that goods should be returned to their owner from the more general principle that one should act according to reason. The latter principle is general and is always true. The former principle is usually true, but not always. Thus, even though it is right "that goods entrusted to another should be restored to their owner,"[141] this principle should not be followed "if [the goods] are claimed for the purpose of fighting against one's country."[142] If the principle is made even more specific, such as by adding the condition that goods held in trust should be returned "with such and such a guarantee, or in such and such a way,"[143] it is all the more likely that the principles should not be applied in particular circumstances: "[T]he greater the number of conditions added, the greater the number of ways in which the principle may fail . . . ."[144]

In addition to these two main causes, Thomas hints at a third source of legal variation. As already noted, in his discussion of determinations, Thomas analogizes these decisions to those an architect must make in "determin[ing] the general form of a house to some particular shape."[145] This illustration suggests that variations in law might be expected even absent ruler "error" and even in similar cultural/historical contexts. While architectural discretion is limited by the laws of physics, the type of building being built, budget, topography, and a host of other factors, we would not expect the details of each building to be precisely the same where the identity of the architect is different. So, apparently, it is with law.

Nevertheless, there may be reasons to doubt whether Aquinas intended to go quite this far in celebrating human freedom to make law. When the problem of variation in human law is explicitly raised in Question 95 as an objection to the claim that human law is derived from natural law, Thomas

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140. *Id.* at IaIIae.94.5, c; *cf* . *id.* at IaIIae.91.3, c ("Wherefore Tully says . . . *justice has its source in nature; thence certain things came into custom by reason of their utility; afterwards these things which emanated from nature and were approved by custom, were sanctioned by fear and reverence for the law*.").

141. *Id.* at IaIIae.94.4, c.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at IaIIae.95.2, c. The Latin *artifex* is translated *craftsman* in a popular English edition of the *Summa*, but *architect* seems equally appropriate, since Thomas's example is a person who gives a house its particular shape. *See also* FINNIS, *supra* note 22, at 267 (arguing that the metaphor is intended to "[stress] the designer's wide freedom within the ambit of the commission"); George, *supra* note 12, at 23-29 (noting Thomas's "stress on *determinationes* by which human lawmakers give effect to the requirements of natural law in the shape of positive law for the common good of his community—enjoying, to a considerable extent, the creative freedom Aquinas analogized to that of the architect—reveals his awareness of the legitimate variability of human laws").

attributes the variations to "the great variety of human affairs"[146] and does not mention the great variety of legislators and judges. In addition, Thomas suggests elsewhere the single best determination for each case is contained in the eternal law—the reasonable will of God.[147] It is thus hard to avoid the conclusion that any deviation from that right answer would be problematic, even if it were inevitable.

Finally, it is worth noting that a rule's ontological status as law does not necessarily mean it must always be obeyed. As we have seen, in Thomas's thought, (1) reason, (2) political authority, and (3) a view to the common good are necessary to constitute "law." That said, just laws (presumably even those derived rather directly from the natural law) may sometimes fail in their application and should thus occasionally be disobeyed,[148] and unjust "laws" should be obeyed in some cases to avoid scandal.[149] Perhaps surprisingly, Thomas's ethics do not in all cases tie the obligation to obey a governmental command to its ontological status as law.[150]

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146. ST IaIIae.95.2, ad 3.

147. Thomas comments:

> [O]n the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, *which are, however, contained in the eternal law*. Hence the need for human reason to proceed further to sanction them by law.

Id. at IaIIae.91.3, ad 1 (emphasis added). Significantly, the objection to which this reply is addressed is that human law is not needed because natural law is sufficient to order human affairs. *Id*. at IaIIae.91.3, obj. 1. Thomas's answer is that human law is needed because natural law (humans' participation in the eternal law) is incomplete. *Id.* at IaIIae.91.3, c. Legislators fill this gap by making particular determinations that, when reasonable, are binding. *Id.* The "particular determination" nevertheless is answered in principle in the eternal law, though we lack direct access to the determination. *Id.*

That Aquinas should affirm this is not as surprising as it might seem at first blush. It merely requires assuming that God, who is infinitely wise and just and who is all-knowing, is aware of the determination that needs making and, thus, knows the best solution.

148. Aquinas writes:

> Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule: but, if it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great loss to the city, if the gates were not opened to them: and so in that case the gates ought to be opened, contrary to the letter of the law . . . .

Id. at IaIIae.96.6, c. One might object that the issue raised in Thomas's example is not one of disobedience but merely of interpretation, i.e., the lawgiver would not have intended the gate to be kept closed under the circumstances; therefore, one who opened the gate would not be disobeying a valid law but would merely be interpreting it correctly. Although Thomas does connect the authorized disobedience with the lawgiver's presumed intent to "maintain the common weal," *id.*, there are a number of other aspects of the discussion that seem to call such a reading into question. *Id.* First, Thomas expressly characterizes the case in view as one "wherein the observance of that law would be hurtful," and concludes that "it [i.e., the law at issue] should not be observed." *Id.* Second, he requires that the letter of the law be observed in such cases "if the observance of the law according to the letter does not involve any sudden risk needing instant remedy," because "it is not competent for everyone to expound what is useful" to the political community. *Id.* In such cases the letter of the law must be followed until the authorities can be consulted. Third, these authorities "have the power to dispense from the laws." *Id*. The "law" in this discussion is not an ideal but is a concrete rule that has the limitations that attend legislation.

149. *Id.* at IaIIae.96.4, c.

150. This makes the comments about the relative force of human law and natural law all the more confusing. Perhaps the difficulty can be resolved along the lines of Thomas's account of human acts. Many acts are not good or bad considered in the abstract; they take on moral qualities only in their

IV. ORDERS OF REALITY/METHODOLOGY

We already have seen that Thomas presupposes that law may be analyzed more or less as a natural kind, even though he recognizes that human laws are constructs. Nevertheless, Thomas assumes that a single scientific method is insufficient to enable investigation of all types of reality, and this assumption affects his account of law. Thomas presupposes that there are (1) different types of objects, (2) different modes of knowing, and (3) different intentions in the knower.[151] First, Thomas emphasizes that more than one kind of object may be known. He identifies four distinct types of science that represent different objects of study and, indeed, different orders of reality:

> There is one order that reason does not establish but only beholds, such is the order of things in nature. There is a second order that reason establishes in its own act of consideration, for example, when it arranges its concepts among themselves, and the signs of concepts as well, because words express the meanings of the concepts. There is a third order that reason in deliberating establishes in the operations of the will. There is a fourth order that reason in planning establishes in the external things which it causes, such as a chest and a house.[152]

These orders are helpfully characterized as (1) natural science, (2) logic (conceived broadly), (3) moral philosophy, and (4) technique.[153]

The objects of study represented in these orders may be divided roughly according to whether their subject is things humans do or make (*operabilia*) or things they do not (*speculabilia*). Thomas also divides knowledge into the broad categories of speculative knowledge and practical knowledge. When one considers an object that is what it is regardless of human willing or thinking, the only available knowledge of it is speculative knowledge.

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specific context. *See id.* at IaIIae.18.9, c; COPLESTON, *supra* note 42, at 206.

151. *See* MCINERNY, *supra* note 51, at 38-40 (discussing ST Ia.14.16).

152. Thomas Aquinas, *Commentary on Aristotle's Nichomachean Ethics*, Lect. 1, n.1 (C.I. Litzinger trans., 1993), *quoted in* RALPH MCINERNY, AQUINAS 41 (2004).

153. Aquinas concludes that:

> [S]ciences {scientiae} are of four irreducibly distinct {diversae} kinds: (1) sciences of matters and relationships {ordo} unaffected by our thinking, i.e. of the 'order of nature {rerum naturalium}' studied by the 'natural philosophy' . . .; (2) the sciences of the order we can bring into our own thinking, i.e. logic in its widest sense; (3) the sciences of the order we can bring into our deliberating, choosing, and voluntary actions, i.e. the moral, economic, and political sciences compendiously called *philosophia moralis*; (4) the sciences of the multitude of practical arts, the technologies or techniques which, by bringing order into matter of any kind external to our thinking and willing, yield 'things constituted by human reason.'

FINNIS, *supra* note 22, at 21 (footnotes omitted). John Finnis draws this summary not only from the prologue to Thomas's *Commentary on Aristotle's Nichomachean Ethics* but also from the prologue to his *Commentary on the Politics*. *Id.*; *see also* Jan A. Aertsen, *Thomas Aquinas on the Good: The Relation Between Metaphysics and Ethics*, *in* AQUINAS'S MORAL THEORY 235, 235-53 (Scott MacDonald & Eleonore Stump eds., 1999).

Knowledge of other objects may be purely practical or mixed. Finally, knowledge is sought with either practical or theoretical intentions—the knower seeks knowledge either because he wishes to obtain it for its own sake or because he wants to do something.[154]

Thomas's categories suggest that because human law is an "operable" not a "speculable," the study of law will always fit broadly into the category of practical reason. Nevertheless, even though human law is an "operable," it may be known either in practical or in theoretical mode. One may approach the study of law by asking a question like, "How does one draft legislation?" Such an inquiry reflects a practical mode of knowledge. On the other hand, one might ask a theoretical question such as whether more than one type of law exists. Finally, even if one tries to know law in the practical mode, one's intentions may nevertheless be theoretical. Thus, both members of Congress and graduate students may share an interest in how legislation is drafted but may have very different motives for asking the question.

The application of Thomas's general account of knowledge to the study of law raises the question of the kinds of knowledge lawyers and legal scholars are in the business of acquiring. Even if human law is a natural kind in the sense that it exists as part of the world's divine design, it remains, to borrow from Thomas, an "operable" and not a "speculable." Thus, we should not be surprised when legal materials and processes are somewhat resistant to being fully accounted for through methodologies customarily used in the natural sciences.[155] Moreover, Thomas's account suggests it would be wrong to expect that the study of law should yield only one kind of knowledge; practical and theoretical dimensions of legal scholarship cannot neatly be hived off from each other.

Perhaps more significantly, Thomas's account of the types of knowledge raises the question of the general category into which knowledge of the law might fit. Recall that his three categories of knowledge concerning "operables" roughly correspond to logic, moral philosophy, and the "practical arts" (technique). Because he defines law as a rule and measure governing *human action*, Thomas treats law as a branch of moral philosophy. Indeed, the *Treatise on Law* begins with the assumption that law, whether natural or human, is given to regulate human action. Because practical reason regulates human action, and because practical reason's first principle is

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154. MCINERNY, *supra* note 51, at 38-40; *see also* ST Ia.14.16, c.

155. John Finnis argues that the implications of Thomas's view of orders of reality are crucial:

> [H]uman actions, and the societies constituted by human action, cannot be adequately understood as if they were merely (1) natural occurrences, (2) contents of thought, or (4) products of techniques of mastering natural materials. . . . [H]uman actions and societies cannot be adequately described, explained, justified, or criticized unless they are understood as also, and centrally, the carrying out of free choices. For neither the making of free choices nor any of their consequences regarded as such are reducible to nature, logic, or technique.

FINNIS, *supra* note 22, at 22; *cf.* 2 ALISTER E. MCGRATH, A SCIENTIFIC THEOLOGY: REALITY 199-227 (2002) (offering an account of reality as "stratified"). McGrath draws extensively on the work of Roy Bhaskar. *See generally* ROY BHASKAR, FROM EAST TO WEST: ODYSSEY OF A SOUL (2000); ROY BHASKAR, RECLAIMING REALITY: A CRITICAL INTRODUCTION TO CONTEMPORARY PHILOSOPHY (1989).

that good is to be done and evil avoided, no ultimate separation of law and morality can exist.

However, it would be wrong to conclude that Thomas thinks law and ethics are indistinguishable. If one of the *Treatise on Law*'s purposes is to defend the claim that reason, authority, the common good, and publicity unite law in all its manifestations, another equally important purpose is to explain what distinguishes the various kinds of law from each other. Thomas takes natural law to be the starting point for ethical deliberation in general.[156] Human law is distinguished from natural law in the following ways: (1) Human law is derived from natural law.[157] As we already have seen, Thomas acknowledges that much human law consists of determination of particulars, legal determinations that each political community makes as it "decides on what is best for itself."[158] These decisions are not fully determined by the moral rules of the natural law but instead are the decisions of "expert and prudent men . . . based . . . on its principles."[159] (2) Moreover, human law is neither to repress every vice nor to prescribe all acts of virtue.[160] (3) And, because law derives much of its force from custom, it is not to be changed whenever something better comes along.[161] Nevertheless, human law has in common with moral philosophy the aim of leading humans "to virtue, not suddenly, but gradually,"[162] and its function, seen from a theological perspective, is as an external restraint on human action tending to lead humans to virtue.[163]

Might law appropriately be studied from vantage points other than moral philosophy? There is reason to believe Thomas would be open to this possibility despite his identification of law with rules governing moral conduct.[164] Recall that the *Treatise* is part of a larger work of theology. In Thomas's framework, *theological* accounts of phenomena like human law are "top-down" accounts.[165] While philosophy proceeds from a consideration of creatures "upwards" to a consideration of God, theology considers God first and only then considers creatures in light of him.[166] To be sure, theologians consider the creation to learn more about God, as in the case of

156. Ralph McInerny, *Ethics*, *in* THE CAMBRIDGE COMPANION TO AQUINAS, *supra* note 31, at 196, 208-12.

157. ST IaIIae.95.2, c.

158. *Id.* at IaIIae.95.4, c.; *cf. id.* at IaIIae.95.2, c.

159. *Id.* at IaIIae.95.2, ad 4. This looks like prudence that is similar to the sort of prudence required for individual moral decision making when the rules run out. *See* MCINERNY, *supra* note 51, at 99-102 (discussing ST IaIIae.58.5, c); *see also* ST IaIIae.94.5, c (discussing changes to the natural law by "addition" and "subtraction").

160. ST IaIIae.96.2, c; *id.* at IaIIae.96.3, c.

161. *Id.* at IaIIae.97.2, c. Note that law thereby is distinguished from technique.

162. *Id.* at IaIIae.96.2, ad 2.

163. *See id.* at IaIIae.90 (prologue) (considering "the extrinsic principles of acts").

164. *Cf.* Robert P. George, *One Hundred Years of Legal Philosophy*, 74 NOTRE DAME L. REV. 1533, 1548 (1999) ("[L]aw exists in what Aristotelians would call the order of technique, but it is created in that order precisely for the sake of purposes that obtain in the moral order.").

165. KRETZMANN, *supra* note 19, at 26-27.

166. SAINT THOMAS AQUINAS, SUMMA CONTRA GENTILES II.4.5 (James F. Anderson trans., Univ. Notre Dame 1975) (1956) [hereinafter SCG]; GILSON, *supra* note 20, at 21.

natural theology.[167] They also study creatures' origin in God and how creatures are related to him.[168] Nevertheless, Thomas says that while the natural philosopher (scientist) is interested in the fact that fire has an "upward tendency,"[169] the theologian is interested in how it "represent[s] the sublimity of God"[170] and in the ways it is related to God,[171] such as his creation of it and its subjection to him.[172] The point of a theological account of something in the natural world thus is not to give an exhaustive account of it[173] but to set forth its significance in relation to God and his purposes for the creation.[174]

It follows that theological knowledge is primarily speculative "because it is more concerned with divine things than with human acts."[175] When it comes to divine things, the only type of knowledge humans can have is speculative knowledge because such things are not open to human decision-making.[176] Nevertheless, theology necessarily must provide an account of human acts because "man is ordained by them to the perfect knowledge of God."[177] Thomas's account of law (and thus of human law) is included in the *Summa* because of law's relationship to human acts. Theology has implications for practical decision-making notwithstanding the fact that its initial goal is not to provide practical wisdom.[178]

Two conclusions may be drawn from this discussion. First, the *Summa*'s theological account of law need not preclude accounts of law undertaken with nontheological motivations. Indeed, given that the *Summa* is primarily a work of speculative reason, someone seeking practical wisdom might well expect to find more directly useful sources elsewhere. Second, one sees in this discussion that the boundaries between different sources of knowledge are not, for Thomas, hermetically sealed. The example of fire is instructive at this point. The study of fire by both scientists and theologians is entirely appropriate, even if the foci of their respective inquiries are entirely different.

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167. *See* SCG, *supra* note 166, at II.2; *see also id.* at II.4.1 ("The Christian faith . . . regards fire . . . as representing the sublimity of God . . . .").

168. ST Ia.2 (introduction); *see also id.* at Ia.1.3, ad 2; Ia.1.7, c. Theology's subject matter includes both God and "everything other than God, but *only* as everything other than God relates to God as its source and its goal . . . . Theology is about God considered in himself and considered in the fundamentally explanatory source-and-goal relationships—primarily the relationships of efficient and final causation—to everything else, especially to the rational creature. It is in this way that the business of theology is the single ultimate explanation of everything, the Grandest Unified Theory . . . ." KRETZMANN, *supra* note 19, at 10.

169. SCG, *supra* note 166, at II.4.2.

170. *Id.* at II.4.1.

171. *Id.* at II.4.1 ("as being directed to Him in any way at all"); *id.* at II.4.2.

172. *Id.* at II.4.2.

173. *Id.* at II.2.

174. *Id.*

175. ST Ia.1.4, c.

176. *See id.* at Ia.14.16, c. (stating that human knowledge about divine things is speculative because such things are "not operable by the knower").

177. *Id.* at Ia.1.4, c.

178. *See* RALPH MCINERNY, ST. THOMAS AQUINAS 62 (Univ. Notre Dame 1982) (1977) (classifying this type of knowledge as "*minimally practical knowledge* or *theoretical moral knowledge*").

Returning to the general categories of knowledge Thomas supplies, it seems reasonable to think law might be understood in any of the four general areas of scientific knowledge. The natural law tradition reflects Thomas's treatment of law as a branch of moral philosophy. Other schools of legal thought emphasize law's connections with other branches of knowledge. Legal positivism and legal naturalism stress legal scholarship's continuity with the methods of the natural and social sciences. Meanwhile, formalism emphasizes law's connection to logic and rationality, and one can see a focus on law as technique in sociological and economic jurists' interest in law as a tool for social engineering.

Thomas's taxonomy of sciences seems on its face to exclude cultural or historical perspectives on law. Interestingly, however, Thomas devotes a significant part of his discussion of human law to the relationship between law and custom.[179] Law is closely related to ethics yet distinct from it.[180] Similarly, law is related to, but distinguishable from, social custom. In Thomas's framework, though law always must be reasonable (and therefore evil custom can never amount to law), social and cultural (and thus historical) context is a critical component of law.[181] Thomas follows Justinian in affirming that custom can make, abolish, and interpret law.[182] Just as human speech manifests reason and can result in "the creation, abolition, and interpretation of law,"[183] repeated and widespread action likewise manifests reasoned deliberation and can have the same effects with respect to law.[184]

Although Thomas may be prepared to accept knowledge about law from sources other than moral philosophy, it would be wrong to assume that he accepts the possibility of value-free knowledge about law in the sense that we might pretend we knew nothing about law's purpose and then study it from that perspective. Much less would he be prepared to accept an account of law that dismissed its integral connection to moral philosophy. Thomas is famously committed to law's fundamentally moral character: It is of the essence of law to be a measure of human action, and practical reason is always to guide human action.[185] Practical reason's starting point is that "good is to be done . . . and evil . . . avoided."[186] An account of law that neglects this knowledge is unlikely to be a fruitful account.[187] Moreover,

179. ST IaIIae.97.2, c; IaIIae.97.3, c; IaIIae.95.3, c. *See generally* DAVID VANDRUNEN, LAW AND CUSTOM: THE THOUGHT OF THOMAS AQUINAS AND THE FUTURE OF THE COMMON LAW 25-55 (2003).

180. *See supra* text accompanying notes 157-163.

181. ST IaIIae.97.3, c.

182. VANDRUNEN, *supra* note 179, at 37-41; *see also* ST IaIIae.97.3, c.

183. VANDRUNEN, *supra* note 179, at 37.

184. *See id.* at 98-102 (discussing the relationship between utility and law in Thomas's account). *But see* ST IaIIae.91.3, c. (undercutting custom as resting on historical/cultural circumstances). The discussion there suggests rather that customs emanate from "*nature . . . by reason of their utility*" and later are "*sanctioned by fear and reverence for the law*." *Id.* at IaIIae.91.3, c.

185. ST IaIIae.90.1, c.

186. *Id.* at IaIIae.94.2, c.

187. *See* O'DONOVAN, *supra* note 35, at 46-52 (arguing that even generic, as opposed to teleological, differentiation entails a moral component).

absent a robust sense of what law is *for*, the implications of facts learned about law outside moral philosophy are far from clear.[188]

A potentially valuable feature of Thomas's jurisprudence is thus its anti-reductionist tendency. There is no mistaking Thomas's commitment to practical reason (morality broadly defined) as the law's controlling feature. Nevertheless, Thomas tries not to reduce law to morality. He also traces law's relationships to political authority, history, revelation, and technique. Law is related to all these fields of study but is not reducible to any of them. Perhaps in an effort to "say something" about law, contemporary legal scholarship tends toward reductionism by accounting for legal rules, or providing for new ones, based solely on one chosen dimension of knowledge about law.[189]

V. BEING: HIERARCHICAL AND ANALOGICAL

A. The Hierarchy of Being: An Overview [190]

Two of the most famous features of Thomas's account of reality are his claims that being is hierarchical and analogical. Thomas believes beings exist in a hierarchy of perfection with God, the immutable, spiritual intellect, at the top and with corruptible, inanimate matter at the bottom. In between (in descending order of perfection) are angels, humans, animals, and plants. Inanimate objects occupy the spectrum's lower end. Compounds are more perfect than the raw elements because they display properties like magnetism that they derive from heavenly bodies.[191] Nevertheless, they are ontologically inferior to plants because plants possess their own innate principle of life, which Thomas calls a "soul" (though he does not mean to suggest any sort of self-awareness or spirituality).[192] Animals (and their souls) are more perfect than plants because they are sentient beings, but they too lack the capacity to reflect on what they perceive. Though Thomas refers to humans' intellectual capacities in terms of a human having a "rational soul," the human soul differs from that of other animate beings[193] in that it is a

188. Finnis writes:

> Should the theory of politics perhaps be replaced with a general theory of consumption and consumer-satisfying institutions? Should the theory of law be absorbed into a general theory of "social engineering" or of "markets"? One cannot answer such questions without ranking features of human existence in terms of importance.

FINNIS, *supra* note 22, at 49.

189. The most obvious example approaches legal decision-making from the perspective of the so-called "efficiency-minded judge."

190. Readers familiar with Thomas's account of being may wish to skip subparts A. and B. of this Part.

191. Thomas Aquinas, *Quaestio Disputata de Anima, 1*, *in* THOMAS AQUINAS, SELECTED PHILOSOPHICAL WRITINGS 184, 189 (Timothy McDermott trans., 1993) [hereinafter *QDA 1*].

192. *Id.*; *see also* SCG, *supra* note 166, at II.4.1.

193. Norman Kretzmann helpfully connects contemporary use of "animate" and "inanimate" (and their derivation from *anima*) with Thomas's description of rocks as not having souls and plants and animals as having them. Norman Kretzmann, *Philosophy of Mind*, *in* THE CAMBRIDGE COMPANION TO AQUINAS, *supra* note 31, at 128, 129.

principle both incorporeal and subsistent[194] that is the human's substantial form. Within each category exist subcategories that likewise vary in perfection.

Thomas also believes substances can only know like substances.[195] It thus is significant that even though humans can apprehend reality only through their five senses, the rational soul's knowledge transcends sense impressions. Humans' ability to know abstract natures of things implies that the soul is spiritual, not material, because the natures known through the intellect are not sensible objects but are "altogether abstracted from matter and material conditions, and without any bodily organ."[196] Because the natures being known are real, but not material, the capacity for intellectual understanding is for Thomas a fundamentally spiritual capacity, which humans have in common with beings above them in the hierarchical chain but not those below. The human capacity for rationality is shared only with spiritual beings: the angels and God. Rocks, plants, and animals are not self-aware—of all material creatures, only humans are. The human soul thus exists "on the borderline between corporeal and separate [i.e., purely spiritual] substances."[197] Thomas identifies this spiritual capacity for rationality as the "image of God" in humans.[198]

Higher beings also are relatively more actualized than lower ones. Thomas holds that God, the highest being, distinct from the creatures, is perfect because he is pure act; no unrealized potentiality exists in him. In Thomas's world, change is the result of potency becoming act—that is, of relatively imperfect being moved to (or attracted to) some end. God's acting for an end would imply his being moved by something else and thus would call into question his perfection and his place as the "unmoved mover." Even God's creation of the world is done not to achieve any end, in Thomas's view, but only to communicate his goodness to the creatures.[199]

At the opposite end of the actualization spectrum[200] is primary matter, which is "pure potentiality."[201] Primary matter is not nothing; it exists, but

194. ST Ia.75.2, c; Kretzmann, *supra* note 193, at 131. The soul's independent subsistence forms the basis for its immortality. *Id.*

195. *QDA 1*, *supra* note 191, at 187-88.

196. Thomas Aquinas, *Quaestio Disputata de Anima, 13*, *in* THOMAS AQUINAS, SELECTED PHILOSOPHICAL WRITINGS 129, 133 (Timothy McDermott trans., 1993) [hereinafter *QDA 13*].

197. Kretzmann, *supra* note 193, at 136 (quoting *QDA 1*, *supra* note 191, at Ic) (internal quotation marks omitted); *see id.* at 152 n.23.

198. ST Ia.93.6, c.

199. *Id.* at Ia.9.1c; Ia.44.4, c.

200. *Cf. QDA 1*, *supra* note 191, at 189 ("The activities of elemental forms—*the lowest and closest to matter of all*—don't transcend the physico-chemical level of expanding and contracting and what seem other ways of arranging matter." (emphasis added)).

201. 2 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY: MEDIEVAL PHILOSOPHY 326 (Continuum 2003) (1950); *id.* (prime matter is "the indeterminate substrate of substantial change"); *cf.* ST Ia.44.2, obj. 3 ("primary matter is only in potentiality"); AQUINAS, METAPHYSICS OF ARISTOTLE, *supra* note 15, at VIII.1; GILSON, *supra* note 20, at 176-77; John F. Wippel, *Metaphysics*, *in* THE CAMBRIDGE COMPANION TO AQUINAS, *supra* note 31, at 85, 111-12 ("pure potentiality"). In support of his assertion that God created primary matter, Thomas cites Augustine's statement that primary matter is "nigh unto nothing." ST Ia.44.2, sc.

never apart from a substantial form. Its existence is inferred from the fact that sensible things change from one form to another. Prime matter is the common underlying "stuff" that remains even as the substantial form changes. Nevertheless, it is completely unactualized and therefore cannot exist on its own. Again, between God and primary matter are the various species of the created order. Thomas holds that differentiation inevitably implies varying degrees of perfection in the creatures.[202]

B. Hierarchy and Analogical Knowledge

As noted above, one feature of Thomas's hierarchical world is that creatures' ability to know the world is related to their place in the hierarchy of being. Thomas, as a theologian, is especially concerned with what humans can know of God through the created order. He holds that humans' only natural knowledge of God is indirect and largely negative.[203] God is spirit, and human minds can only receive sensory impressions. Nevertheless, as we have already seen, human intellect is immaterial and can proceed beyond sense impressions:

> As *human* intellect it must start from sense, from material beings, but as human *intellect* it can proceed beyond sense, not being confined to material essences, though it can do this only in so far as the immaterial objects are manifested in and through the sensible world, in so far as the material things have a relation to immaterial objects. . . . [T]he intellect does not and cannot by its own power apprehend God directly; but sensible objects, as finite and contingent, reveal their relation to God, so that the intellect can know that God exists.[204]

Even though humans cannot perceive God directly, Thomas argues, God's nature is manifested to some extent through the physical, tangible things he has made.[205]

Nevertheless, because God is distinct from the created world, and because a vast gulf exists between God's perfection and that of the creatures, Thomas is quick to emphasize that God's characteristics (especially his existence) cannot be predicated univocally of both God and creatures.[206] Thomas follows Aristotle in observing that the same word may be predicated of different objects in three ways: (1) univocally, (2) equivocally, and (3) by

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202. ST Ia.47.2.

203. *See* MCINERNY, *supra* note 178, at 118-25 (and sources cited); *see also* 2 COPLESTON, *supra* note 201, at 347-62; 388-97.

204. 2 COPLESTON, *supra* note 201, at 393.

205. ST Ia.13.5 (citing *Romans* 1:20).

206. God is distinguished from the creation chiefly because he is the only being whose essence it is to exist. All other beings derive their existence from him. ST Ia.3.4, c.

analogy.[207] His account of analogical predication and its connection to the hierarchy of being proves important for the *Treatise on Law*.

Univocal predication occurs when the things spoken about "share a common term and the same account is associated with that term."[208] Equivocal predication occurs when different things "share the same name, but a different account of the name is given in its various applications or uses."[209] Thus, *woman* is used univocally when predicated of Laura Bush or Hillary Clinton because the same account of the word's meaning can be applied to both. On the other hand, *bee* may be used equivocally to describe either an insect or a spelling competition. The word's use is appropriate in either instance but only because more than one account of what is meant by *bee* is available to the speaker.

Thomas, again following Aristotle, also identifies a third category of predication involving words that have multiple possible meanings, but whose meanings, though different, bear some relationship to each other—the accounts to which they refer are similar in some respects and different in others.[210] Thus, *healthy* may be predicated analogically of a body or of medicine or of urine. The meanings of *healthy* in each case are related but different: A body is healthy if all its parts are functioning well, medicine is healthy if it causes health in a body, and healthy urine is one indication that a body is functioning well.[211]

Thomas's most famous use of the concept of analogy occurs in connection with his account of being. Because God, unlike everything else in the universe, is self-existent, his being is categorically different from creaturely "being." Thomas thus holds that being and other attributes of God, when predicated of God and of creatures, can only be understood analogically. Moreover, the analogy's primary term is the characteristic as found in God, with the analogous human characteristic being both essentially like and unlike the analogous divine quality. Humans know something of what God is like from the world he has made, but they must be careful not to forget that God's instantiation of the relevant attribute is not subject to creaturely limitation and imperfection and thus is qualitatively different from creaturely instantiations of the same attribute.[212] Thomas's use of analogy at this point is a matter of both linguistics and ontology.

A corollary of the analogical nature of being is that things known most easily and directly in the natural world may in fact be less important (and even less real) than similar realities that are invisible yet analogous.[213] Thus,

207. ST Ia.13.5, c.
208. MCINERNY, *supra* note 178, at 134-35.
209. *Id.* at 135.
210. *Id.* at 136.
211. ST Ia.13.5, c. *cf.* ARISTOTLE, METAPHYSICS: BOOKS Γ, Δ, and E Γ2, at 1003a33-1003b6 (Christopher Kirwan trans., 2d ed. 1993)(350 B.C.).
212. ST Ia.13.4, c; Ia.13.5, c.
213. *See id.* at Ia.84.7, ad 3; SIMON, *supra* note 51, at 110-12. *See generally* Yves R. Simon, *On Order in Analogical Sets*, 34 THE NEW SCHOLASTICISM 1, 16-26 (1960).

in the *Treatise on Law*, Thomas takes human law as the starting point for his general definition of law. Humans can observe human law directly. Observation discloses human law's intimate relation to reason, its orientation to the common good, its origin in appropriate political authority, and its public nature.[214]

Significantly, however, Thomas presupposes that what can be known about human law may help illuminate other, less directly observable realities that go by the name "law," most notably the "higher" eternal and natural laws.[215] While insights about human law can be applied to higher law only by analogy, they nevertheless are presupposed to provide insight about those higher laws. The bases for this assumption are that God reveals himself through his effects—through what he has made—and that these effects have varying degrees of perfection. As a result, the "lower" material things directly accessible to human perception reveal, albeit only by analogy, "higher" effects of God.

C. Hierarchy, Analogy, and the Treatise on Law

What difference does this make for Thomas's account of law and especially human law? The most obvious consequences are found in the discussion of the kinds of law in Question 91. Here he discusses in turn eternal law, natural law, human law, divine law, and even the "law" in the fomes of sin.[216] Thomas is at pains to justify treating divine providence (eternal law), ethics (natural law), jurisprudence (human law), Scripture (divine law), and even the human tendency toward sin as part of the same phenomenon: law. Analogy and hierarchy are his main devices for ordering this group of related, though obviously different, things. Thomas draws a clear hierarchical relationship among eternal law, natural law, and human law. Eternal law—the plan for the governance of the universe existing in the mind of God—is the ultimate authority. Human law gets its authority by being derived from natural law, which is itself a "participation" of the eternal law.[217] This is the

214. ST IaIIae.90, c.

215. See *id.* at IaIIae.93.5, c, in which Thomas begins with the more familiar and more observable human law and draws an analogy to describe the operation of the eternal law.

216. *See id.* at IaIIae.91.6, obj. 1. The *fomes of sin* refers to the human inclination toward sin St. Paul decries in *Romans*: "[B]ut I see another law in my members, warring against the law of my mind, and bringing me into captivity to the law of sin which is in my members." *Romans* 7:23.

217. John Wippel explains "participation" as follows:

> If a particular quality or characteristic is possessed by a given subject only partially rather than totally, the subject is said to participate in the quality or characteristic. Because other subjects may also share in that perfection, each is said to participate in it. No one of them is identical with it.

Wippel, *supra* note 201, at 93; *cf.* FINNIS, *supra* note 117, at 399 ("A quality that an entity or state of affairs has or includes is participated, in Aquinas's sense, if that quality is *caused by* a *similar* quality which some other entity or state of affairs has or includes in a more intrinsic or less dependent way."). *See generally id.* at 398-403. For a discussion of the distinction between Platonic understandings of participation and Thomas's understanding, see MCINERNY, *supra* note 178, at 118-25. Elsewhere, Finnis translates *participatio* as "sharing out": "And so it is clear that the natural law is precisely the sharing out of the eternal law in the rational creature . . . ." FINNIS, *supra* note 22, at 308 n.64 (translating a portion

clearest operation of Thomas's analogy/hierarchy presupposition. Law is defined by beginning with human law, and the definition of law so derived is read back, albeit analogically, into higher features of reality. It turns out that just as human law is the product of reason, is promulgated, and is oriented toward the common good, the same can be said of eternal and natural law. With that being said, different notions of promulgation, common good, and reason are required to complete the chain. "Law" is not predicated univocally of each of the three types, only by analogy.

Whereas the natural law and human law direct humans with respect to their earthly happiness, divine law is a necessary part of the laws governing humans because humans have a supernatural end in addition to their natural end. Because they cannot naturally perceive things conducive to their spiritual welfare, revelation is needed. Thomas also notes (1) Scripture's usefulness in teaching the appropriate judgments on "contingent and particular matters"[218] that otherwise would be in dispute were natural law the only guide to decision, (2) God's competence to prescribe rules for "interior movements" whereas human law's competence extends only to "exterior acts," and (3) the necessity that Scripture should forbid "all sins," which would be impossible for human authorities to do.[219]

Thomas has to work harder to justify the inclusion of the "law of the 'fomes' of sin" in Question 91.[220] Thomas has in mind here the human tendency not to do what one knows to be the right thing to do. This appropriately is called a law, he argues, both because it resembles a natural inclination within a person—Thomas holds that it is actually a "deviation from the law of reason" and for this reason it is not really a law[221] —and because the inclination is "a penalty following from the Divine law depriving man of his proper dignity."[222]

Given Thomas's presupposition that the things we observe in the world may have something to teach us about unseen realities, one would expect Thomas's account of natural law and eternal law to be shaped more by his account of human law than vice versa. Indeed, some Protestant theologians criticize Thomas's description of God's relationship to the world in terms of "eternal law" as too Platonic and insufficiently Christological. The typical charge is that Thomas has taken Plato's Ideas and relocated them in the

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of ST IaIIae 91.2, c.).

Russell Hittinger recently has argued on the basis of Thomas's statement that natural law is a participation of the eternal law that in Thomas "[t]here are not four or five kinds of law, but only two. Law that proceeds from the divine mind and law that proceeds from the human mind; as Augustine said, one is eternal and the other is temporal." HITTINGER, *supra* note 22, at xi (citing Stephen Louis Brock, The Legal Character of Natural Law According to St. Thomas Aquinas ch. 2-C (1988) (unpublished Ph.D. dissertation, Univ. Toronto)).

218. ST IaIIae.91.4, c.

219. *Id.*

220. *Id.* at IaIIae.91.6, obj. 1.

221. *Id.* at IaIIae.91.6, c.

222. *Id.*

mind of God.[223] The Bible depicts the second person of the Trinity not only as the pre-incarnate Logos (the primary mode of Christ's depiction in the *Summa*)[224] but also as taking on human form, living as a poor, itinerant prophet, and being put to death by the authorities.[225] The dominant image of God in the *Treatise on Law* is that of supreme governor who does his will through commands to inferior governors, an image that arguably understates God's personal interaction with the world.[226]

Not only, as we have just seen, does Thomas's picture of human law and lawmaking influence his theology, but his theology also affects his account of human law and specifically his account of how human law gets its authority. Thomas declares emphatically that "every human law has just so much of the nature of law, as it is derived from the law of nature."[227] However, human law can be derived from natural law in either of two ways. Laws with a close connection to the clearest ethical principles of the natural law (e.g., laws against murder) are derived "as a conclusion from premises"[228] and have force from both human law and natural law. Other laws that do not have a close fit with obvious natural law principles (here Thomas gives as examples the penalties for murder or other crimes) are "determinations" and have "no other force than that of human law."[229]

Thomas apparently considers both types of human law to be, ontologically speaking, law because both meet the minimum qualifications of being derived from natural law. Determinations, however, carry less weight in some unspecified respect. Given that both types of law are enforceable by the civil authority and binding on the conscience,[230] the additional "force"

223. *See, e.g.*, GUNTON, THE TRIUNE CREATOR, *supra* note 20, at 101-02. *But see* Jean-Marc Laporte, *Christ in Aquinas's* Summa Theologiae*: Peripheral or Pervasive?*, 67 THE THOMIST 221, 221-48 (2003).

224. *See* ST Ia.34.1, ad. 2.

225. *See, e.g.*, N.T. WRIGHT, JESUS AND THE VICTORY OF GOD 147-97 (1996).

226. Aquinas writes:

> Wherefore we observe the same in all those who govern, so that the plan of government is derived by secondary governors from the governor in chief; thus the plan of what is to be done in a state flows from the king's command to his inferior administrators: and again in things of art the plan of whatever is to be done by art flows from the chief craftsman to the undercraftsmen, who work with their hands. Since then the eternal law is the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law. But these plans of inferior governors are all other laws besides the eternal law. Therefore all laws, in so far as they partake of right reason, are derived from the eternal law.

ST at IaIIae.93.3, c.

It hardly seems likely that Thomas adopted this picture of God's governance based solely on its resemblance to human government and lawmaking. One difficulty with the application of the idea of analogy in this way is that it necessarily involves decisions about which analogies should be pursued and which should not. *Cf.* 3 MCGRATH, *supra* note 32, at 113-19 (discussing the authority of analogies).

227. ST IaIIae.95.2, c.

228. *Id.* at IaIIae.95.2, c.

229. *Id.* at IaIIae.95.2, c; *see supra* notes 138-140 and accompanying text (discussing determinations).

230. ST IaIIae.96.4, c.

added by the more direct derivation from ethical first principles is unclear.[231]

Perhaps the obscurity may be removed as follows: Thomas suggests in Question 91 that all legal questions have a right answer. In principle, the eternal law, the reasonable will of God, contains each case's appropriate determination.[232] Although the eternal law contains a best answer in every case, human beings do not have direct access to every such answer. Nevertheless, we do have natural knowledge of the general principles of the natural law. (Recall that, for Thomas, natural law is a "participation of" the eternal law—the limited imprint of the divine light on human beings.[233]) We thus can make some sense of the hierarchy of authority within human law at which Thomas gestures in Question 95: Human laws instantiating the first principles of natural law known to all humans carry the highest possible authority; their authority stems not merely from their enactment by proper political authorities but also from their status as part of the eternal law—God's will for humans generally. Human laws derived directly from these first principles as "conclusions from premises"[234] carry similar though slightly attenuated standing. Laws enacted by appropriate authorities with a view to the common good and with apparent (though not infallible) reason have the force of human law,[235] i.e., less force than laws that carry the imprimatur of the natural law itself. Nevertheless, they are rules that bind *prima facie* the religious believer's conduct.[236]

One implication of Thomas's analysis is that what gives human law its authority is primarily divine reason, not created human reason. The best law, or at least the strongest law, is the one that involves as little human will as possible given the nature of the created order. To his credit, Thomas does not deny the role of human will in his account of human law, rightly observing that much human law is linked to obvious ethical principles only in a tenuous way. The acknowledgment, however, is somewhat begrudging. The freedom humans enjoy to use their reasoning capacity to fashion laws (even good laws) and the appropriate diversity of human law are alluded to[237] but neither celebrated nor explored. Indeed, as we have seen, Thomas attributes diversity of law not primarily to a degree of divinely permitted freedom in lawmaking but mainly to ignorance of the natural law and "the great variety

231. John Finnis suggests that Aquinas' statement that determinations have their force "from human law alone," "goes further than the [Aquinas'] analysis itself warrants," and that it would be more accurate to say that determinations have force because of reason *and* because they have been enacted. FINNIS, *supra* note 22, at 267.

232. *See supra* note 147 and accompanying text.

233. ST IaIIae.91.2, c.

234. *Id.* at IaIIae.95.2, c.

235. *Cf. id.* at IaIIae.96.2, ad 3 ("human law falls short of the eternal law"); Ia.13.5, c (natural causes "fall short" when they reproduce themselves in less perfect beings).

236. *See* FINNIS, *supra* note 22, at 267-74.

237. *See supra* text accompanying notes 126-130 (discussing the various foundations for and variations of derived human laws).

of human affairs."[238] The emphasis is primarily on the "right answer" known at once to God[239] and to "expert and prudent men,"[240] if not to ordinary humans.[241] These features of his account provide the grain of truth in derisive comments about the "brooding omnipresence" of natural law. The thought that the answers to all questions are already present in the eternal law, and that law's authority consists primarily in its reason, easily can lead to the temptation to seek a priori answers to legal questions.

In Thomas's defense, the eternal law from which human law derives its authority includes God's control over the identity of the community's rulers.[242] Moreover, Thomas notes the role of prudence and gradual accumulation of human knowledge about law, which can serve as the basis of future reasonable decisions.[243] If all that Thomas has in mind when he says all human law is derived from the natural law is that humans will make law by reasoning based on their accumulated moral and technical experience of law's operations, his account would seem to leave adequate room for human freedom. At the same time, the more important this sort of lawmaking is to human law, the less significant human law's "derivation" from natural law would seem to be.

CONCLUSION

Thomas's metaphysical orientation creates a wide gulf between his thought and conventional Anglo-American jurisprudence. To be sure, many of his arguments are unpersuasive because they proceed a priori from contestable assumptions about being in general or the human person. Nevertheless, taking Thomas's metaphysics seriously permits us to see places where contemporary legal scholarship might profit from following his lead.

The most promising of these are related to Thomas's methodology. One thing that enables Thomas to proceed with his analysis of law is the conviction that human law, though man-made, is an inherent part of the natural order and is therefore capable of being studied coherently. The reasons why that presupposition has been called into question cannot be simply forgotten, but neither should one pretend that conceptual analysis has been a satisfactory substitute for the traditional study of law itself.

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238. ST IaIIae.95.2, ad 3.
239. *See supra* note 147.
240. ST IaIIae.95.2, ad 4.
241. *Id.* at IaIIae.93.1, ad 1. Thomas's rejoinder might well be that God, in his infinite knowledge and wisdom, could do the best possible job of legislating and adjudicating or that the statement is intended to show that practical reasoning about determinations is not merely a subjective matter. These statements no doubt are unobjectionable to Christian believers as far as they go, but they do not address the question of whether God has taken jurisdiction over such matters or whether part of his good intention might be to leave humans free, within broad parameters, to make their own arrangements about earthly political order. *Cf.* William S. Brewbaker III, *Found Law, Made Law and Creation: Re-Examining Blackstone's Declaratory Theory*, 22 J.L. & RELIGION (forthcoming 2006-2007).
242. ST IaIIae.93.1, c.
243. *See, e.g.*, *id.* at IaIIae.97.1-97.3 (discussing change in human law and the relationship between custom and law). *See generally* VANDRUNEN, *supra* note 179.

Indeed, other features of Thomas's methodology might lend some needed methodological coherence to legal scholarship. I do not mean coherence in the sense of prescribing a monistic approach to legal scholarship but rather just the opposite. Thomas's account of the various orders of reality and of practical and theoretical wisdom, combined with his sensitivity to the concerns different sciences bring to the objects they study, provide a ready vocabulary for explaining the wide variety of approaches one observes in legal scholarship. In particular, Thomas is sensitive to the idea that one's methodology for studying a subject should not proceed a priori as if all objects of study were the same but should proceed so as to discover what method of study best suits the object being investigated. One can easily imagine, as Thomas does, that civil law, being a product of human reason and freedom, might require a methodology different from, say, geology. Moreover, one may study law with either practical or theoretical intentions, and those intentions may vary depending on the student's interest. As Thomas's account itself demonstrates, the theologian may have a quite different interest in the study of law than the jurist.

It may be that legal scholars find fault with Thomas to some degree because his interests differ from theirs. The vast majority of law practice, judging, and legal analysis is concerned with what Thomas calls the "determination of particulars." Thomas can be praised for recognizing that these determinations cannot simply be deduced from moral principles, but his short treatment of law provides little guidance as to what makes a determination good. One can imagine his responding that it is not the theologian's job to supply the jurist with such answers.

Although Thomas is a theologian and not a lawyer, this answer is not entirely sufficient. Thomas's emphasis on the (ontologically) higher eternal and natural law tends to undercut human law's integrity in its own right. Thomas appears to insist that human law's authority is connected not just to human reason but also to divine reason. The result is that Thomas has difficulty giving a satisfying account of human freedom in lawmaking, even as he acknowledges that earthly rulers enjoy a substantial amount of freedom to act reasonably in making law.