DO NATURAL RIGHTS DERIVE FROM NATURAL LAW?

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Less than thirty years ago, a very competent student of political theory gave this assessment of the subject of this Symposium: "Natural law, which was for many centuries the basis of the predominant Western political thought, is rejected in our time by almost all students of society who are not Roman Catholics .... [N]atural law is today primarily not more than a historical subject."[1] Yet Professor Barnett has proposed that we explore the differences between natural law and natural rights (both included, by the way, in the assessment quoted above). Barnett's concern to distinguish natural law from natural rights is not inspired, I think, by a merely historical interest. His own writings[2]—to say nothing of the now ever-swelling chorus of what Professor Mary Ann Glendon (deprecatingly) denominated "rights-talk"[3]—prove that, like Lazarus, natural rights and natural law are back. Yet Professor Barnett's question to us is motivated, I suspect, by a perception that natural law and natural rights may have suffered from their hiatus underground, that there may have occurred some decomposition, some conceptual melding of the one into the other so that now we have but a blurry notion of what they are and tend to confuse them.

It is both theoretically and practically important to achieve clarity in this matter, for so far as natural law and natural rights have indeed risen from the dead to walk the earth again, they appear in the most significant places in our public life. Natural law and rights function as ultimate normative standards for

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1. LEO STRAUSS, STUDIES IN PLATONIC POLITICAL PHILOSOPHY 137 (1983).

2. *See, e.g.*, Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615 (1991).

3. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

judgement and action: when Dr. Martin Luther King, Jr. (to mention probably the most famous example of our time) tried to justify himself against the charge that he was encouraging lawlessness through his policy of civil disobedience, he appealed to the old dictum of St. Augustine, "[a]n unjust law is no law at all," and described "an unjust law" as "a human law that is not rooted in eternal and natural law."[4] When we debate abortion, currently the most divisive topic in our political culture, one side appeals to the right to life (of the fetus) and the other to the right to privacy (of the mother). Both are appeals to natural rights, not merely legal rights, for the parties are arguing about what rights the law should recognize, and not necessarily about what it does recognize.

How we understand natural law and natural rights has obvious practical implications, as is evident from disagreements on the role these natural standards should play in adjudication. Professor Barnett, for example, is clearly a "rights activist"; natural law and natural rights (and their relation), as he understands them, justify a very active judicial superintendence over legislation threatening rights.[5] Constitutional orthodoxy for many years after the New Deal Supreme Court crisis denied the validity of such an appeal to natural law or rights. As Justice Hugo Black so eloquently stated in his dissenting opinion in *Griswold v. Connecticut*, the "use by federal courts" of "formulas based on 'natural justice,'" "the natural law due process philosophy," "[other philosophies] which mean the same thing," or "whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment . . . and transfers that power [illegitimately] to this Court."[6]

I. NATURAL RIGHTS AND NATURAL LAW

The task Professor Barnett has set us is as difficult as it is important. Neither natural rights nor natural law lie out there in the world awaiting measurement and study in quite the way of the hole in the ozone layer or fossils of early humanity. Perhaps

4. MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL 10, 11 (1994).

5. *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 151-79 (Robert P. George ed., 1996).

6. *Griswold v. Connecticut*, 381 U.S. 479, 511-15 (1965) (Black, J., dissenting).

it is a residue of the decline earlier noted that it is no longer evident (if it ever was) what is the proper methodology for inquiry into natural law or rights. We appeal to them more frequently and with greater confidence than our ability to articulate them clearly and distinctly or to defend them would seem to warrant.

If we begin in the most natural way and look around at what those who talk about natural rights and laws say about them, we see a situation not just bordering on, but well within, the land of chaos on the most important issues. Rights theories and rights theorists we have aplenty, but we have nothing approaching consensus on what rights there are, where they come from, and what grounds them. We have fewer explicit theorists of natural law, but even here we have great variety and disagreement, as witnessed by several recent collections of essays by natural-law theorists in which the differences among devotees of natural law are almost as great as those separating them from the post-modernists.[7]

The chaos is not total, however. A more precise characterization of the present status of thinking about natural rights and law is that we have a great deal of formal agreement, but very little substantive agreement. Let me begin with the formal agreement.

We can turn to Professor Tuck's well-known 1973 study, *Natural Rights Theories,*[8] to see the contours of the rather far-reaching formal agreement. His analysis deserves special attention, for he develops quite fully some of the conceptual underpinnings necessary to understand natural rights and natural law. To start with, along with many other historians of rights, Tuck brings out one very important historical point: the current use of the term "rights" differs significantly from its original meaning as used in pre-modern legal codes or ancient (and much medieval) political and legal philosophy. The original "right" (*dike, jus*) was a far less differentiated concept than ours today. The pre-modern notion of right did not distinguish between right and duty, as we are so wont to do. The

7. *See, e.g.*, NATURAL LAW THEORY (Robert P. George ed., 1992); NATURAL LAW, LIBERALISM, AND MORALITY, *supra* note 5; RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987); Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371-429 (1988).

8. RICHARD TUCK, NATURAL RIGHTS THEORIES (1973).

Roman law, for example, used the term *jus* to signify "the assignment made as between parties of justice according to law; and one party's 'part' in such an assignment might be a burden, not a benefit—let alone a power or liberty of choice."[9] According to John Finnis, this blurring of concepts that Professor Barnett wants us to keep so distinct is characteristic of all or most "pre-modern legal vocabulary."[10] *Jus* and similar terms in European and non-European languages (such as *Recht, dike, droit, waneto, tshwanelo*) include the concepts covered in contemporary English by "a right" and "a duty," as well as by "law," and seem to have a primary meaning in the nature of "ought."[11] Somewhere in Western moral history, this unified concept underwent fission and became the bifurcated concepts we now know.

The distinction between rights and duties supplies the basis for another distinction on which Tuck relies: that between what he (following H.L.A. Hart and others) calls choice and benefit theories of rights.[12] According to John Finnis, one common analysis of rights, promulgated most fervently by Jeremy Bentham in the Nineteenth Century, finds rights to be "benefits secured for persons by rules regulating the relationships between those persons and other persons subject to those rules."[13] To be a rights-holder, according to this analysis, is to be the beneficiary of the duties of others, and rights are thus nothing independent of those duties. It is worth noting in our present context that the rules in terms of which these duties are established might well be (but need not be) rules established by the natural law.

Bentham took this analysis to be unfriendly to rights; he concluded that they were superfluous, merely the derivative reflex of the primary moral phenomenon, duties as established

9. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 209 (1980); *see also* LEO STRAUSS, NATURAL RIGHT AND HISTORY (4th ed. 1963); MICHEL VILLEY, LECONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT (1962); MICHEL VILLEY, SEIZE ESSAIS DE PHILOSOPHIE DE DROIT (1969).

10. FINNIS, *supra* note 9, at 209.

11. *Id.* at 209.

12. *See* H.L.A. Hart, *Are There Any Natural Rights?*, *in* CONCEPTS IN SOCIAL AND POLITICAL PHILOSOPHY 440 (Richard Flathman ed., 1973).

13. FINNIS, *supra* note 9, at 203-04 (emphasis omitted).

by rules.[14] If Bentham's analysis captured all there is to rights, then one might expect the disappearance or at least great attenuation of rights-talk, but quite the opposite has been our recent experience. These facts led Hart and others to wonder whether the survival of "rights-talk" does not imply some failing in Bentham's analysis, some aspect of rights that his benefit theory does not capture. Hart suggested, and Tuck follows him in articulating, an alternative "choice theory." As Tuck puts it:

> [A]ccording to this view, to have a right to something is more than to be in a position where one's expressed or understood want is the occasion for the operation of a duty imposed upon someone else: it is actually in some way to impose that duty upon them, and to determine how they ought to act towards the possessor of the right.[15]

This "choice" or "active rights" theory, then,

> will tend to have at its heart the idea of the individual's sovereignty within the relevant section of his moral world. It will also tend as a consequence to stress the importance of the individual's own capacity to make moral choices, that is to say, his *liberty*. If active rights are paradigmatic, then to attribute rights to someone *is* to attribute some kind of liberty to them.[16]

This sort of right arises independently of rule-generated duties of others. Thus, Tuck is interested in these active or choice rights, "for [they are] the only sort in which the concept of right has a truly independent role to play."[17]

The right to contract provides a particularly striking example of this sort of right. To have a right to contract is to possess the moral power through one's own choices and the agreements of others to generate further rights and duties of a wide ranging sort: for self, for the other contracting parties, and for the state that recognizes the contractor as a rights bearer and enforces that person's contracts. The rights and duties in question do not themselves derive from pre-existing duties and rights, but rather from the active choices of the contractors.

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14. *See* JEREMY BENTHAM, OF LAW IN GENERAL 249-50, 249 n.13 (H.L.A. Hart ed., Univ. Of London 1970).

15. TUCK, *supra* note 8, at 6.

16. *Id.* at 6-7.

17. *Id.* at 7.

The Hart-Tuck theory does not, however, provide an adequate analysis of rights, even formally. Much of what we normally call rights falls outside its scope. For instance, under the Social Security laws, persons over 65 years of age who have contributed to the social security fund in the prescribed ways have a right to retirement benefits at legally prescribed levels. This type of right is not well captured by the choice theory, but it seems arbitrary to exclude it from the class of rights. Hart admits as much in his discussion of the choice and benefit theories. He notices that we use the language of rights in situations where we can replace that notion with notions of duty, as with the benefit theory and as could be done in the social-security example above. Hart believes that when "other elements in our moral vocabulary suffice to describe" a case, it is "confusing to talk of rights."[18] He therefore, in effect, legislates (and Tuck follows him) that we will only consider the usage of rights to be proper when other elements in our moral vocabulary will not suffice.[19] But such an act of legislation is quite arbitrary if the goal is to understand what lies implicit in our attributions of rights, and even more arbitrary if we do not wish to prejudice the question of the relation between rights and law from the outset. There is no inherent reason why some forms of rights might not be largely or even wholly the obverse of the duties of others, and yet share a great deal with other sorts of rights that are not so readily resolvable into the pre-existing duties of others.

Neither the choice nor the benefit theory seems of itself comprehensive enough to account for all that goes under the name of rights. All forms of rights, however, are justified claims inhering in and raisable by an agent. The claim may be to things (for instance, a right to a social-security pension); to a service (for example, George's performance on his promise to Samantha to care for her cats while she is on vacation); or to a forbearance from interference (such as the government's non-interference with a writer's practice of sending anti-Clinton messages out on the Internet). To be a right, the claim must be justified. We have no difficulty understanding the source of justification for many claims; for instance, when the law vests rights, we readily understand the law to be the source of the

18. Hart, *supra* note 12, at 449; *cf. id.* at 444.
19. *See id.* at 449.

rights. The same is true when rights accrue from contracts among private parties. The most difficult case is the very one we are concerned with here—natural rights—in which the justification allegedly comes from some natural, or at least non-positive, fact. Rights are claims—raisable claims. They are not, like *jus* in the Roman law, merely assignments of the "part" of the just or right solution to each, such that all parties are the passive recipients of their own shares. Rights are "raised," or invoked, at the will of the rights-bearer, which means that the rights-bearer also has the option not to raise or invoke the right. Criminal suspects, for example, have the right to remain silent; they are not blameable under law if they choose to do so. But it is also within their right *not* to remain silent; they are not morally blamable (in terms of the right) if they choose not to exercise it. Rights contain an important element, then, of agent choice (which Hart develops with his choice theory). Unlike duties, which are morally compelling, rights are permissive—one may do or have with their warrant, but one need not do so unless also under a simultaneous duty. This permissive side of rights does not imply that rights are never inalienable. To choose not to exercise a right is not *ipso facto* to alienate it. The suspect who chooses to speak to the police today does not thereby alienate his right to remain silent the next time the police pick him up.

The more comprehensive conception of rights presented above has the advantage of leaving securely within the ambit of rights, in the proper sense, both of two kinds of rights that are frequently distinguished in the literature of rights; Hart's choice theory of rights does not do this. The two kinds of rights to which I refer are positive and negative rights. The distinction between these two kinds of rights should not be confused with the distinction between natural and positive rights. The latter distinction concerns the source of rights (either nature or some positive source); the former concerns the character of rights without regard to their source. The distinction between positive and negative rights is best understood in terms of the duties correlative with the rights.[20] In the case of positive rights, the rights-holder has a right to something that is exactly matched by

20. For a recent discussion, see ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 33-38 (1996).

the duty of the corresponding duty-bearer. In the example of the right to social-security payments mentioned above, the government (the duty-bearer in this case) has a duty to supply the legally established pension, which is precisely what the pensioner has a right to receive. This kind of positive right is a paradigm of the type of right best analyzed under the benefit theory. The right to send out anti-Clinton messages on the Internet (a particularized version of the right to free speech) is quite different, however. Here the duty-bearers (the government, for example) are under no obligation other than to forbear from interfering with the writer's exercise of the right. No one is obliged to supply the writer with anti-Clinton tirades to send out, nor even to read what is sent out.

Once we move beyond the formal definition of rights, we enter a realm of great dissension. Serious disagreements exist within at least three problem areas.

(1) The priority problem: Barnett in one way, and Finnis in quite a different way, both claim that natural law comes first (logically, if not temporally) and natural rights derive therefrom.[21] Thomas Hobbes, by contrast, claimed that natural right comes first and natural law derives therefrom.[22] All raise these general questions: which has priority; and how do natural rights and natural law (or duties) relate to one another and to other moral concepts?

(2) The substantive problem: Although it is clear that we possess both positive and negative rights, it is not so clear that we possess both positive and negative *natural* rights. Barnett affirms only negative rights (which is why his version of rights-theory can produce a very libertarian state), whereas other rights theorists, such as Alan Gewirth or John Finnis, emphasize positive rights.[23]

(3) The foundational problem: If we have natural rights, or natural-law duties, where do they come from? How do we know of them, and how do we justify them? In addressing this question Barnett derives natural rights from natural law, which in turn he

21. *See generally* FINNIS, *supra* note 9; Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655 (1997) [hereinafter Barnett, *Professor's Guide*].

22. *See* THOMAS HOBBES, LEVIATHAN chs. 14-15 (Richard Tuck ed., Cambridge 1991) (1651).

23. *See generally*, GEWIRTH, *supra*, note 20; FINNIS, *supra* note 9.

derives from the naturally given good or goal of happiness.[24] Because his is an ends-oriented theory, Barnett's mode of grounding natural law and rights is called teleological. In the current literature, this is most frequently contrasted with a type of theory called deontological, in which—as John Rawls put it—the right (and thereby rights) is *not* considered to be derived from the good.[25] Admittedly, this is a negative formulation, but it is difficult as a general matter to supply more than that, for the deontological theorists vary quite substantially among themselves.

Thinking about rights becomes even more chaotic, because the various lines of cleavage can be mixed and matched so that a large number of quite discrete positions emerge. For instance, Barnett is a teleological negative-rights theorist, while Finnis is a teleological positive-rights theorist. There are, likewise, both negative and positive variants of deontological rights theories. Robert Nozick, for instance, is a negative-rights deontologist[26] and Alan Gewirth a positive-rights deontologist.

That there is so little agreement on these basic matters regarding natural law and natural rights only seems to confirm the suspicion that there is no non-controversial answer at hand to Barnett's question regarding the relation between natural law and natural rights. To repeat an old saying, there are as many answers as there are natural-rights talkers. Professor Tuck speaks very wisely when he insists that

> the meaning of a term such as *a right* is theory-dependent, [and therefore] we have to be sure about what role the term played in the various theories about politics which engage our attention .... The elucidation of a complex notion such as a right requires a fairly full account of the possible theories about politics which invoke the concept.[27]

I propose to follow out the agenda suggested by Tuck only to a slight degree, however, by looking first to the classic natural-law theory, that of Thomas Aquinas, and then to the classic natural-rights theory of John Locke, in order to achieve some clarity on three closely-related goals: (1) a better insight into how theories of natural law and rights work, what they claim,

24. *See generally* Barnett, *Professor's Guide*, *supra* note 21.
25. *See* JOHN RAWLS, A THEORY OF JUSTICE 30-32 (1971).
26. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-53 (1974).
27. TUCK, *supra* note 8, at 2.

how they support those claims, and so on; (2) some historical insight into the progression of thinking that has gotten us to our current way(s) of thinking about natural law and natural rights; and (3) some philosophic insight into the question Barnett posed. If it is true, as has been suggested, that the most interesting questions about natural law and rights do not yield to wholly conceptual analysis (such as Hart's) and cannot be settled by wholly historical analysis (such as Tuck's), then we need to move to a more strictly philosophic kind of inquiry. The classic theorists can help us do that.

II. NATURAL LAW

There were, to be sure, natural-law doctrines prior to Thomas Aquinas, but none so elaborate, so detailed, or so philosophically successful. For at least four hundred years, Aquinas's version of natural law served as the backdrop for most political thinking in Europe, and even today, advocates of natural law for the most part look back to Aquinas and develop theories more or less of his type. Even a thinker as different from Aquinas as Professor Barnett pays the nearly obligatory homage to Aquinas's great synthesis.[28] Probably the simplest and yet the most important thing to say about the natural-law theory is that within it the principles of morality are understood both to be natural and to have the character of law. To say that morality is natural is to say both that the source or content of morality is given by nature and that our knowledge of that content is available through our natural faculties—that is to say, rationally.[29] To say that morality has the character of law is to say that the principles of morality are, strictly speaking, obligatory for us, or that morality is not just good for us in some sense, but is an obligation that makes us duty-bound to act or refrain from acting.[30] Aquinas emphasized this point in explaining why he spoke of a moral *law*: "Law is a rule or measure of action by which one is led to action or restrained from acting. The word

28. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (forthcoming 1998); *cf.* JACQUES MARITAIN, MAN AND THE STATE (1950); Joseph Boyle, *Natural Law and the Ethics of Traditions*, *in* NATURAL LAW THEORY, *supra* note 7, at 4.

29. *See* THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 90, art. 4.2.

30. *Cf.*, *e.g.*, Barnett, *Professor's Guide*, *supra*, note 21, at 674.

law (*lex*) is derived from *ligare*, to bind, because it binds or obliges (*obligare*) one to act."[31]

To state the claim of natural law in Aquinas's classic manner is to reveal already how it effects a synthesis of pre-existing Greek philosophic and biblical motifs.[32] According to Aristotle, for example, morality is natural in that it prescribes the natural virtues or excellences of the human being—those qualities that, in the context of a comprehensively virtuous human life, are conducive to happiness. The naturally virtuous life so understood is knowable through natural knowledge, but it is not law-like, especially because it is not (strictly speaking) obligatory. For Aristotle there was, rather, a natural good. The *Bible*, on the other hand, confirms the converse: morality has the character of law, but is not natural. The *Hebrew Bible* emphasizes this in detailing a set of laws that are known only because they were given by God in an act of special legislation. The laws are obligatory, but they are not presented or understood as rules for the achievement of the natural human good, as is evident, for instance, in the divine command, "Do not wear clothes of wool and linen woven together."[33] The combination of morality as law and morality as natural good distinguishes the natural-law philosophy not only from predecessor moral thought, but also from successor moral doctrines, including the chief moral systems of our day. The well-known classification of systems into consequentialist and deontological within contemporary moral and political philosophy expresses the same two broad alternatives to morality that Aquinas tried to knit together in his natural law. Our contemporary deontologists follow the biblical notion of morality by understanding morality as a form of law, a binding or obliging requirement, but not as natural. The consequentialists look to some form of natural good, but not to the mode of law. What Aquinas joined together has once again fallen asunder.

The Thomistic natural law thus embraces two persistent and compelling insights or perceptions about morality: it faces us as command (as obliging something), and it aims at the human

31. AQUINAS, *supra* note 29, at I-II, q. 90, art. 1; *cf.* Ernest Fortin, *Thomas Aquinas, in* HISTORY OF POLITICAL PHILOSOPHY 239-40 (Leo Strauss & Joseph Cropsey eds., 1972).

32. *See* Paul Sigmund, *Law and Politics, in* THE CAMBRIDGE COMPANION TO AQUINAS 223 (Norman Kretzmann & Eleonore Stump eds., 1993).

33. *Deuteronomy* 22:11 (New International Version).

good. These are nonetheless two quite different ways of understanding morality, and, as the original sources suggest, the combination is difficult to make work. Each of the component parts seems to reject implicitly the other; if morality is what rationally produces the natural good, it would seem to lose that quality of command that the idea of law carries with it.

Aquinas's aim in formulating the natural-law doctrine, then, was to develop a particularly comprehensive approach to moral phenomena, perhaps the most comprehensive approach ever ventured. In order to accomplish this task, he had to meet two specific requirements: he had to show first that the content of the natural law was given in nature and available to the unassisted human reason; and second, that the obligatoriness of the natural law was likewise given in nature and available to reason. That is to say, he tried to show that both the content and the obligatoriness of morality were immanent—were natural facts.

The way in which Aquinas's natural law builds on natural facts perhaps comes out best when his position is juxtaposed with the most commonly raised philosophic objection to the natural law. Kai Nielsen provided a perspicuous version of this critique when he observed that the "whole [natural-law] theory rests on the confusion between *what ought to be* and *what is*."[34] Nielsen, in other words, wanted to charge Aquinas with falling into the error David Hume unearthed in his analysis of the so-called "gap" between Is and Ought. "As Hume made us realize," said Nielsen,

> the statement, 'Man ought not to steal,' is quite different from the statement, 'Man does steal.' Men steal when they ought not. Sentences with an 'ought' in them belong to a different *logical type* than sentences with an 'is' in them. From factual statements alone, including statements of fact about human nature, we cannot deduce or derive any 'ought' statement whatsoever.[35]

Hume's point was not what it is sometimes taken to be—that no knowledge of "oughts" is possible (after all, he was himself a moral philosopher who devoted much ink to articulating a

34. Kai Nielsen, *An Examination of the Thomistic Theory of Natural Moral Law*, 4 NATURAL LAW FORUM 1 (1959), *reprinted in* ST. THOMAS AQUINAS: ON POLITICS AND ETHICS 216 (Paul E. Sigmund ed., 1988).

35. *Id.*

philosophy of oughts)—but rather that, because "is" statements and "ought" statements are different in kind, the one by itself cannot lead to the other. An "ought" conclusion must contain, Hume insisted, an "ought" premise, and his own approach to philosophical ethics centered on the effort to discover and make us aware of the function and origin of the "ought" premises in our moral judgements.[36]

In contrast to Nielsen and the other critics of Aquinas who raise this Humean objection against natural law, I suggest that Hume's distinction helps us see more clearly just what Aquinas's reasoning is, and that far from falling victim to the fallacy Hume uncovered, Aquinas's reasoning is in fact based on a recognition of the same logical demand to which Hume called attention.

Aquinas often earns the ridicule of readers by solemnly insisting that "the first precept of the law [of nature] is that good is to be done and pursued, and evil is to be avoided."[37] This seems to many readers to be completely empty, certainly of no help in thinking about morality. The deficiencies of its apparent emptiness are compounded when Aquinas proceeds to inform us that "all the other precepts of the law of nature are based on this."[38] Nielson again makes the point: "Aquinas . . . insists that all other natural laws are based on this vacuous first principle . . . . This, of course, is a very weak base indeed," the chief weakness deriving from what we need to know, but which this first precept surely does not tell us: what is the good that is to be done, and what is the evil that is to be shunned?[39] Nielson's question about the substance of good and evil is, of course, a valid one, but in raising this objection, he and most other critics of the Thomist natural law miss the point of this apparently vapid "first precept of the natural law": it is the source of what Hume would call the "ought" premise of practical syllogisms. If Aquinas can supply us the other premises of the form "x is good" and "y is evil," then the first precept, in combination with the other premises, can produce conclusions of the genuinely moral form "x ought to be done," and "y ought to be avoided." We can state Aquinas's point even more strongly: the first precept of the

36. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 466-70 (L.A. Selby-Bigge ed., Clarendon Books 2nd ed. 1978) (1739).

37. AQUINAS, *supra* note 29, at I-II, q. 94, art. 2.

38. *Id.*

39. Nielsen, *supra* note 34, at 213.

natural law enables Aquinas to treat morality as law—that is, as binding or obliging. The first precept of the natural law supplies the natural knowledge of the bindingness or obligatoriness of moral principles: morality is law, not just good advice. "To advise," Aquinas said, "is not a proper act of law."[40]

Understood in this way, Aquinas's first precept is anything but vacuous. But whence comes this first precept? In the first place, Aquinas insisted that this precept (as well as the other first principles of the natural law) is "indemonstrable," that is, "self-evident."[41] It cannot be derived or deduced from some antecedent knowledge. Are the precepts of natural law merely arbitrary positings, then? Many modern readers might be inclined to say that one man's self-evident truth is another's imposition to be shucked off. Aquinas strenuously denied any such interpretation of his appeal to indemonstrable first principles. All reasoning must make such an appeal; otherwise, reasoning is caught in a never-ending cycle of deferred premises. Aquinas meant to be quite literal about the relationship of moral reasoning to reasoning in general: "The precepts of the natural law are to the practical reason what the first principles of demonstrations are to the speculative reason."[42] Now the very "first indemonstrable principle" of the speculative reason is the law of contradiction, "that the same thing cannot be affirmed or denied at the same time . . . and on this principle all others are based."[43] No proof can be offered of this principle—wherein lies its indemonstrability—but it is not arbitrary, for all that, because, as Aristotle said in a passage to which Aquinas referred, "This is the most certain of all principles . . . for it is impossible for anyone to believe the same thing to be and not to be."[44] If they tried to deny this law of being, they would, by the force of their argument, be forced to affirm it as well. Aquinas was not referring here merely to a law of thinking—that is, to a rule for the operation of our minds. The law of contradiction is a law of being as well. This is to say that the human reason contains within itself, as a principle of its own operation, a substantive and necessarily true insight into

40. AQUINAS, *supra* note 29, at I-II, q. 92, art. 2.
41. *Id.*
42. *Id.*
43. *Id.*
44. ARISTOTLE, METAPHYSICS 1005 b29.

being. Aquinas made the daring move of saying that the practical reason has a comparably true substantive first principle of its operation: good is to be done, and evil avoided. This is a substantive delivery of the practical reason (that is, of reason as directive of action), just as the law of contradiction is a substantive delivery of the speculative reason. Both are equally indemonstrable; both are equally necessary.[45]

Aquinas's natural law begins, then, with our indemonstrable but certain knowledge that we are bound to do good and to shun evil. Aquinas made his point clearer when he said that the precepts of the natural law are known through *synderesis*, a term he used to refer to conscience in its dispositional form. Conscience is the natural voice of this rational command within us.[46] This identification shows how far Aquinas went in naturalizing theological categories and in giving a substantive meaning to what might appear merely formal truths.

The very first precept of the natural law supplies morality with the mandatory or compulsory character that makes it law; the other precepts supply it with its more specific content—that is, with the knowledge of the substantive goods we are obliged to pursue. "[W]hatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided."[47] The practical reason apprehends these goods via the natural inclinations. Human beings experience themselves as prompted by nature to seek or avoid certain things. We hunger for food; we seek the company of others. As opposed to many modern thinkers, Aquinas refused to consider pleasure and pain *per se* as the natural principles of action. Pleasure and pain, he observed, are always related to desire and aversion, and these in turn are related to an object, which in some sense is the fulfillment of the desire—the good pointed at by the desire and sought in the action in relation to the desire. Good therefore, said Aquinas, "has the nature of an end, and evil, the nature of a contrary."[48] There are

45. *See* Boyle, *supra* note 28, at 24-25.

46. *See* AQUINAS, *supra* note 29, at I, q. 79, art. 12-13; *id.* at I-II, q. 94, art. 1; *cf.* Boyle, *supra* note 28, at 13 (arguing that a basis for rationally evaluating the particularities of the concrete possibilities for action that one faces is also necessary to make correct moral judgments).

47. AQUINAS, *supra* note 29, at I-II, q. 94, art. 2.

48. *Id.*

quite an indefinite number of objects of human inclinations, but Aquinas perceived a pattern in them.

In the first place, humans are beings like all beings, and, like all beings, they have inclinations "to the preservation of their own being, according to their natures."[49] It is thus a natural good to preserve the being of the individual and, according to the first precept of the natural law, also a natural duty to do so. "By reason of this inclination, whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law."[50]

In the second place, human beings, like other animals, exist as a species, not merely as individuals. Not only are there others like us, but we exist in or as a succession of generations. As individuals, we are mortal (the first kind of inclination toward the preservation of the individual ultimately but necessarily fails to achieve its aim); but as a species we are immortal, or at least much longer-lived. Like other animals, we possess inclinations directed toward the preservation of the species, towards actions such as "sexual intercourse, education of offspring and so forth."[51] These things too are part of the natural law.

In the third place, humans possess inclinations completely unique to the species—inclinations rooted in the uniquely human differentia. For "there is in man a natural inclination to the good of the rational nature which is his alone. Thus, man has a natural inclination to know the truth about God and to live in society."[52] Actions related to these inclinations also are among those prescribed by the natural law; Aquinas explicitly used the examples "that a man should avoid ignorance [and] that he should not offend others with whom he must associate" as illustrative of precepts of this sort.[53]

Although one might wish for a somewhat less sketchy presentation, Aquinas without a doubt discharged his obligation to argue for both the availability of knowledge of the natural obligatoriness and the natural content of the moral law. He made clear that the natural law is comprehensive, even sweeping

49. *Id.*
50. *Id.* On the implication for suicide, see *id.* at II-II, q. 64, art. 5.
51. *Id.* at I-II, q. 94, art. 2.
52. AQUINAS, *supra* note 29, at I-II, q. 94, art. 2.
53. *Id.*

in scope: "all acts of virtue are prescribed by the natural law."[54] The entire range of human excellence or virtues comes within the natural law, but Aquinas also accepted the distinction that plays so large a role in Barnett's Article: it does not "pertain to human law to repress all vices," much less to attempt to accomplish the yet more difficult task of producing all virtue.[55]

> Human law is framed for the mass of men, the majority of whom are not perfectly virtuous. Therefore human law does not prohibit every vice from which virtuous men abstain, but only the more serious ones from which the majority can abstain, especially those that harm others and which must be prohibited for human society to survive, such as homicide, theft, and the like.[56]

Aquinas's natural-law doctrine thus opens up an important gap between morality and politics. The natural law is simply binding and valid at the level of morality, laying out comprehensive and obligatory moral standards applicable to all. These natural-law standards are not irrelevant to politics, for ultimately the task of the human law is to specify more concretely the demands of the natural law in actual circumstances and to bring to bear the authority and the coercive sanctions of the state in service to the natural law. Yet the coercive sanctions characteristic of the political sphere are not to be called forth on behalf of all the prescriptions of natural law. Under the inspiration of Aristotle, Aquinas may have viewed the political sphere as possessing greater dignity than many of his Christian predecessors did, but it is clear that, for him, politics was a sphere of compromise, a sphere of distinctly lower dignity than morality. One might see this distinction between spheres as a gesture in the direction of modern (liberal) theories of the state, such as find expression in theories of natural rights. That would be only partly correct. Aquinas himself was not a natural-rights thinker, and the natural-rights theorists who came later had to make an almost complete break with Thomistic natural-law theory in order to articulate their natural-rights position. It is to that break that I now turn, showing first how resistant natural law is to natural

54. *Id.* at I-II, q. 94, art. 3.

55. *Id.* at I-II, q. 96, art. 2; *cf.* Barnett, *Professor's Guide*, *supra* note 21, at 667.

56. AQUINAS, *supra* note 29, at I-II, q. 96, art. 2.

rights and then sketching the very different philosophy of natural rights itself.

III. NATURAL LAW AND NATURAL RIGHTS

Aquinas was himself not a natural-rights thinker, and my question is: why not? In order to answer that question, I make four arguments: (1) an argument in favor of the legitimacy of the question; (2) an argument in favor of the thesis that Aquinas was not a natural-rights thinker despite his use of the category *jus naturale* (natural right) in addition to *lex natura* (natural law); (3) an argument in favor of the idea that Aquinas could have presented, relatively easily, a doctrine of natural rights as a corollary to his doctrine of natural law; and (4) an argument in support of Aquinas's failure to develop such a natural-rights argument as incompatible in important (although not all) ways with the main thrust of his natural-law position.

I must begin by defending my question, for Professor Tuck and other historically oriented scholars may well say that I am asking an illegitimate, anachronistic, and even nonsensical question. According to Professor Tuck's history of rights theories, the idea of natural rights did not really emerge full-blown until well after Aquinas wrote. Aquinas's "general theory," according to Tuck, "was not a genuine natural rights theory."[57] To ask why he did not have a doctrine of natural rights is equivalent, in this line of thought, to asking what his reaction was to the theory of quantum mechanics. Conceding this point for the sake of argument to Professor Tuck, we might yet approach Aquinas along the lines John Marshall took in the famous *Dartmouth College* case. Faced with the question whether a corporate charter was covered by the Contracts Clause of the Constitution, Justice Marshall replied:

> It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it.[58]

57. TUCK, *supra* note 8, at 19.

58. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

Mutatis mutandi, reasoning like this shows why we can ask about Aquinas and natural rights. His theory can be assessed in terms of the resources it has to offer when the issue is posed to it. It may be anachronistic to ask what the particular individual Thomas Aquinas had to say about natural rights, but it is not inappropriate to ask how a doctrine of rights relates to the things about which Aquinas did think and write.[59] My question can be taken, then, as an exercise in speculation concerning what Aquinas would have said about rights had he been aware of them. For that matter, we might even pose the question: what would he have said about quantum mechanics?[60]

Aquinas, as we have seen, emphasized the binding character of law (*lex*); thus, when he developed a separate concept of *jus naturale*—reasonably translated as natural right—it might appear that he was developing something like the idea of right we have discussed above—a subjective, active right. That is not, however, the distinction Aquinas had in mind. He aimed to translate into his own system a distinction he came across in Book V of Aristotle's *Nichomachean Ethics*, a distinction between two meanings of justice. One "kind of justice," according to Aristotle, "is complete virtue" as it relates to or bears on others.[61] But there is another kind of justice, "which is a part of virtue,"[62] and that narrower kind of justice is what Aquinas distinguished from natural law as a whole. "What is right or just is an action which is appropriate for another person in a relationship of equality."[63] This is the sphere of Aristotle's distributive justice, where unequal things (such as honors) are distributed to unequal persons and thus are distributed equally in a proportional sense. It is also the sphere of commutative justice, where equality is maintained or restored through "correction of wrongs done in exchanges."[64]

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59. *See* Quentin Skinner, *Meaning and Understanding in the History of Political Thought*, 8 HIST. & THEORY 3 (1969) (arguing that a full understanding of the meaning of works cannot be achieved merely through the study of their text and contemporary context); Michael P. Zuckert, *Appropriation and Understanding in the History of Political Philosophy: On Quentin Skinner's Method*, 13 INTERPRETATION 403-24 (1985).

60. *Cf.* KURT RIEZLER, PHYSICS AND REALITY (1940).

61. ARISTOTLE, NICHOMACHEAN ETHICS 1129b26-30a10.

62. *Id.* at 1130a14-15.

63. AQUINAS, *supra* note 29, at II-II, q. 57, art. 2.

64. ARISTOTLE, *supra* note 61, at 1131a1-2.

This is clearly a very different matter than the sorts of claims we speak of as rights. Tuck is quite correct to conclude that Aquinas "[did] not often (if at all) talk about *jura* as other than objective moral rules."[65] He spoke, that is, in the undifferentiated manner characteristic of the pre-modern understanding of right.

Despite Aquinas's failure to speak of rights in the sense we do, I believe it would have been relatively easy for him to do so—or at least that it is relatively easy for us to translate, without distortion, much of what he said into the language of rights. On the one hand, one may easily move from the sort of natural duties established by the natural law via simple logic: one must possess the right (it must be morally permissible) to do what one has a duty to do. Thus, if self-preservation is a duty, we must also be able to speak of it as a right.[66] If one has a natural-law duty to "be fruitful and multiply," then one must also possess a natural right to marry, and so on. This is to say that one possesses rights as the reflex of one's own duties—the right to fulfill those duties.

On the other hand, one may also possess natural rights as the reflex of the natural-law duties of others. If William and Hilary and all others have a duty rooted in the natural law not to harm Harold, then Harold also has a right—a justified claim—not to be harmed by them, and perforce, a right to life. This is the kind of right that comes to light under the benefit theory of rights. Rights of this sort become particularly visible in Aquinas's analysis of *jus naturale* as a part of the natural law. According to *jus naturale*, particular *jura* (parts in a right distribution) are distributed to individuals in relation to some formula of equality. The "part" may not be a benefit (or a claim) but may indeed be a burden. It is the criminal's *jus* (right), or his share in the rights allocation, to "pay for" his crime by going to prison. Aquinas did not mean anything Hegelian or paradoxical by this, but merely that, in the distribution of burdens and benefits under the various forms of justice, the benefit or burden that falls to each is a *jus*—the right for that one.

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65. TUCK, *supra* note 8, at 19.

66. *See* MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 147-48 (1981) (analyzing the views of Jefferson and Witherspoon that "whatever men are in *duty* obliged to do . . . they have a *claim* to").

As different as this conception is from the modern sense of "right," several elements in it show how easily one can translate it into the modern notion. First, the *jus* in this case clearly inheres in an agent, and not merely in a situation. Secondly, the *jus* is one that an agent will be tempted to raise under some conditions—namely, when the *jus* allotted to the agent is in fact a benefit. Third, the allocation is something relatively specific—a right in, or to, something in particular, such as retribution for a crime, a certain office in the city, or a certain amount of money for a contract. These factors conjoin in a natural way, so that one could easily begin to speak of a right—a justified claim to something in particular—that an agent can claim or raise in the sense of a modern right: "I have a right to . . . " comes readily to mind for a party to Aquinas's *jus naturale,* at least under certain circumstances.

It is by no means clear, however, that *jus,* so understood and so derived, would produce the abstract kinds of rights claims that modern natural-rights doctrines do (for example, the right to liberty). But even here, Aquinas's natural law has some resources for generating a right. According to Aquinas, the natural law is a manifestation of the eternal law—that law whereby God rules the whole universe. Human beings, like all other created things, are subject to the divine rule. Yet, he insisted, human beings are subject differently; they are subject in a way suited to their rational nature. They are subject via the natural law, which is a law unlike the law of gravity that operates on them, will they or nill they. The law of nature, unlike the law of gravity, is a law human beings *can* disobey; it is a law that addresses their reason and will, rather than a law that determines their actions independently of their reason and will. It is part of the dignity of the human being to be governed in that almost divine manner rather than as a rock or a waterfall or even a panda bear. The very fact that human beings participate in the eternal law in the form of the natural law implies that natural-law duties can be fulfilled only by beings who are free to determine their own action via their reason and will. From such a need, one can perhaps conclude some form of a natural right to liberty.

Despite the ease with which rights-talk can be extruded from Thomistic natural law, Aquinas himself made no such move. Perhaps it is better to say that there are important elements of

Thomistic theory that resist this translation, especially into the kind of rights the liberal tradition affirms, so that, while one could reasonably and with little distortion speak of rights occasionally within the context of Thomist natural law, the Thomist doctrine does not well serve as a basis for a general natural-rights position. Although there are many reasons why this is so, let me develop briefly three of them.

Not restating the natural-law doctrine as natural-rights doctrine is preferable because leaving the theory in the form of natural law keeps the focus and moral tendency of the doctrine clearly in the forefront. The claims that individuals would be authorized to raise in a natural-rights version of natural law would be derivative from duties or legal obligations that natural law places upon them. In other words, agents' character as rights-possessors is actually derivative and wholly secondary to their status as addressees of the law. A rights version focuses on self-assertion of agents; the genuine natural-law version focuses on the moral command or address to each. The rights version misrepresents, or at least encourages a misunderstanding, of the nature of morality: conscientiousness, not self-assertion, is the proper moral attitude.

Moreover, the natural law can generate a version of a right to liberty, as explained above. But that right is far different from the right to liberty as affirmed, for example, in the Declaration of Independence. The natural-law-inspired right to liberty is not a right to do or not to do, as each agent determines. Rather, it is a right only to adhere to the natural-law mandate in a truly human way—that is, through the use of the agent's reason and will. It implies nothing whatsoever about a broader moral freedom—a realm of personal sovereignty or of relatively completely free choice—and it implies very little even about legal freedom (the right to be free of human legal direction). The freedom inhering in the natural law does not in any way imply a libertarian society. Thomas Aquinas remains very far from John Stuart Mill or Randy Barnett.

Even the simpler right to life that might be derived from the natural law is quite different from the right to life within natural-rights theory. As some natural-rights thinkers suggest, the right to life as a "choice right" (a kind of sovereignty over the object

of the right) implies a right to suicide.[67] Aquinas, of course, could not accept this conclusion, for the right to life deriving from his theory is much like the liberty derived from his theory—a right merely to perform an antecedent duty. Thus Aquinas affirms in no uncertain terms that "suicide is totally wrong."[68]

Finally, natural-law theory does not translate well into natural-rights theory because the natural law turns out to be too indeterminate to support the concrete rights-claims natural-rights theories raise. Rights are both specific and conclusory in a way that the natural law is not. This is so because natural law itself is indeterminate in some crucial respects and therefore does not allow the formulation of determinate and conclusory rights claims based on it. According to Aquinas, there are three laws or primitive substantive precepts of the natural law: they are directed to the survival and thriving of the individual as a mere being, as an animal being, and as a rational being. Each level imposes duties, both towards one's self and others, but the ultimate array of duties actually applicable cannot be captured in a simple table or code. No doubt this is why Aquinas left his natural law in such sketchy form. Part of the problem here is that natural-law duties at one level are qualified, even much modified, by duties at other levels. For instance, at the level of agent-as-being-as-such there appears to be an unqualified duty (and correlative right) of self-preservation, which would include the duty not to put oneself at risk of death so far as one could avoid that. Yet at the agent-as-animal level, there are duties deriving from the command to preserve the species, which might well require, say, that parents put themselves at risk for the sake of protecting their offspring. As John Locke pointed out, even the wildest of the wild beasts obey this mandate of nature by instinct.[69] Furthermore, at the agent-as-rational-being level of natural law there arise duties to society and God that further complicate the primary duty (and right) of self-

67. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT § 23, at 325 (Peter Laslett ed., 1965) ("[W]henever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw upon himself the Death he desires.") [hereinafter LOCKE, SECOND TREATISE]; MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 240-46 (1994) [hereinafter ZUCKERT, NEW REPUBLICANISM].

68. AQUINAS, *supra* note 29, at II-II, q. 64, art. 5.

69. *See* LOCKE, SECOND TREATISE, *supra* note 67, at 217.

preservation. The substantive ends of the third level of the natural law do impose potentially conflicting duties, such as duties to risk one's life for one's community or for the true God.

Not only do the different levels of natural inclination point to different precepts of natural law, but Aquinas nowhere clearly provided a formula for resolving conflicts. It is clear that the different levels exist in a kind of hierarchy—the human agent as rational being is higher than the human agent as being as such—but is not so clear that duties derivable at the higher simply trump those of lower levels. For instance, duties to society may override the duty of preservation, but they do not do so simply or universally, for the preservation of individuals and of the species as a species remains a necessary prerequisite for the cultivation of human rationality. Aquinas explicitly addressed the question of virginity in an illuminating manner. It would appear that under the second precept of the natural law, a life dedicated to chastity cannot be a moral life, for it does not respond to the mandate regarding preservation of the species. Yet Aquinas affirmed the validity under natural law of the chaste life (the monastic life in which he and most philosophers of his day shared) as an abstention "from bodily pleasures in order to devote oneself more freely to the contemplation of truth"—that is, as a fulfillment of the natural-law precepts directed at humans as rational beings.[70] But this higher duty does not cancel the lower duty universally.

> The command of the natural law regarding eating must be fulfilled by every person, otherwise the individual could not stay alive. The command concerning procreation involves the whole of the human race, which is obliged not only to multiply in body but also to grow in spirit. Therefore the human race is sufficiently provided for if some are involved with bodily procreation and others abstain from it to devote themselves to the contemplation of the divine for the improvement and welfare of mankind.[71]

The various natural duties require an act of specification—one of the functions of the human law and of moral casuistry—before they can produce a determinate table of obligations. Without a natural table of obligations, there can be no derivation of a table of natural rights. As is clear even from this

70. AQUINAS, *supra* note 29, at II-II, q. 152, art. 2.
71. *Id.*

brief discussion, the Thomist natural law does not provide claims as universal or conclusory as rights claims, at least natural-rights claims, normally are. Even that first natural right, the right to life, hardly is amenable to formulation in such uncompromising form within the Thomist scheme.

IV. NATURAL RIGHTS

Natural law in its classical Thomistic form does not develop into a natural-rights doctrine. It would be a valuable enterprise to investigate whether those theorists of our day who work from a natural-law doctrine roughly of a Thomist sort—John Finnis, for example—can succeed at extracting a philosophy of natural rights from such unpromising raw material. I do not follow that path here, however, but instead present in brief form the radical shift away from Thomistic natural law that did occur to prepare the way for modern natural rights. A full version of this story would need to include at least Grotius, Hobbes, Spinoza, Pufendorf, and Locke, all of whom contributed in important ways to the emergence of the modern natural-rights philosophy. Professor Tuck would probably add a large number of others to this list, but I slight even my brief cast of characters and focus instead on John Locke, who put forward what turned out to be the version of natural-rights theory that is the most potent in practice and, when properly understood, the most interesting philosophically.

Locke's teaching on natural rights has two parts: (1) a critique of the earlier, Thomist version of natural law, developed and presented in a treatise on natural law[72] that he wrote in the early 1660s (almost thirty years before he published his *Two Treatises on Government*) but which remained unpublished until the Twentieth Century; and (2) a positive doctrine of natural rights presented in his mature *Two Treatises* and *Essay Concerning Human Understanding*.[73]

In response to the Thomistic position that had become in one form or another the accepted and, by Locke's time, traditional position, Locke made an *extremely* clever move: he insisted that

72. *See* JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (Robert Horwitz et al. trans., Cornell Univ. Press 1990) [hereinafter LOCKE, QUESTIONS].

73. *See* JOHN LOCKE, TWO TREATISES, *supra* note 67; JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Clarendon Press 1979) (1690).

there is a natural law, but he equally loudly insisted that it is not immanent (as the Thomistic version held). The traditional notion held natural law to be present in nature, and therefore knowable and, presumably, generally, if not universally, known. If indeed it is natural, it must be more or less present to humanity. Locke, however, was much impressed by the variability and general ineffectiveness, or non-presence, of human moral concepts. He lived in the era of great European exploration of the world, and he collected and read voraciously the travel literature describing the customs and manners of peoples all over the world who had been previously unknown to the Europeans. On the basis of this reading, Locke drew what we would now call a "relativist" conclusion: there is no natural consensus about moral standards; what one people calls good and sacred, another violates and considers that good and sacred. In some places, Locke recounted, the old are revered; in others they are killed. In some places, the gods command that children be cherished; in others, that they be eaten.[74]

More specifically, Locke responded to the two elements of the Thomist natural law as follows. First, he denied that natural inclinations give us the content of morality, for natural inclinations, judging by the evidence supplied by those who act most under the promptings of nature, incline not towards the sorts of other-regarding and benevolent acts the natural law prescribes, but toward self-aggrandizement and barbarism. Locke here largely agreed with Hobbes, for the implication is that nature leads to a war of all against all. Moral rules work only under conditions that are the opposite of natural conditions of civilization and political life. Nature, understood as natural inclination, then, cannot be the source of the content of morality.[75]

Nor can Nature be the source of the obligatoriness of the natural law. Locke was not impressed with the Thomist argument about the natural or rational source of obligation. Reason, he argued, again following Hobbes, contains no substantive principles within it, not even such vague things as "seek the good"; reason is merely a calculative power. Locke, Hobbes, and others understood reason more or less as a kind of

74. *See* ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 195-204.
75. *See id.* at 202-03.

computer—a logical processor. It has no *content* other than what is supplied from elsewhere. It requires *input.* Conscience does not supply that input. Anticipating Freud, Locke observed that conscience is merely the voice within us of social norms we learn in the nursery. That is why it varies so much from place to place and time to time.[76]

Instead of the Christian-Aristotelian immanent natural law, Locke argued for a transcendent natural law. Neither the content nor the obligatoriness of the natural law is given in nature in any direct or present way, but, Locke said, there is nevertheless a natural law of another type. This was rhetorically a very powerful move, for it allowed him to present pages and pages of evidence and argument against the traditional notion. It allowed him to insist that the natural law was entirely unknown to human beings and entirely ignored by them—entirely ineffective; and at the same time, it allowed him to insist on the existence of natural law.[77]

Locke's transcendent natural-law position is that neither the content nor the obligatoriness of the natural law is immanently present in nature, but each can be known only through knowledge of God the creator and legislator. Therefore an absolutely essential step in Locke's argument is a rational proof for the existence of a creating, legislating God. Locke alleges that such a proof is possible and that, further, once we prove God's existence, we can deduce what he wills for us. Once we have done this, we are also able to grasp the obligatoriness of the natural law, for that derives from the fact that God, as our Creator, is our superior, and we are obliged to obey the will of our superior.[78]

I do not propose to dwell on the details of the two key parts of Locke's argument—the rational proof for the existence of God and the deduction of his will (and our duties). Suffice it to say that most modern readers do not find his proofs convincing. Because I will suggest in a moment that Locke did not find them convincing either, I am not surprised that so few readers do. I do want to note, however, how different Locke's synthesis of nature and law is from the Thomist Christian-Aristotelian

76. *See id.* at 199-201.
77. *See id.* at 208-09.
78. *See id.* at 207-09.

version. Locke came much closer to the Biblical component of the synthesis, for the content and obligation are traced directly to the transcendent God, and no effort is made to find these directly present in nature. Indeed, Locke's transcendent natural law begins to lose touch with nature as understood previously. It remains natural only in the sense that an ascent can allegedly be made from the phenomena of nature to the transcendent God, who is the source of nature. But only His will produces law. In bringing the transcendent God to the fore, Locke modified natural-law doctrine in the direction that Reformation thought had already moved. The God of nature described by Aquinas, the god who fit into the Aristotelian rational understanding of nature, was pushed aside by thinkers such as Luther and Calvin, who emphasized the power, the activity, the awesomely transcendent character of God. Locke's parallel reformulation of natural law, radical as it was, thus could find familiar and receptive response in his Protestant audience.

Locke's transcendent natural law is merely a stage in an unfolding argument, however. It allowed him to wean his audience away from the traditional natural law. He then went on to undercut it and left his readers with a genuinely modern version of natural law, which the transcendent natural law itself is not.

Locke undercut the transcendent natural law in the two essential places: its content and its obligatoriness. Let me bring out just one part of his argument, which has bearing on both these issues. The entire Lockean natural law depends on his rational proof for the existence of a creating, legislating God. Borrowing an argument from Descartes, Locke made central to his proof the following step: the human race cannot be self-created and thus must be created by a God. That conclusion follows, Locke said, from a consideration of the human condition:

> [I]f man were creator of himself, someone who could . . . bring himself into the world, he would also have granted himself an eternal duration for his existence . . . . For it is impossible to imagine anything so hostile and inimical to itself, which, though it could grant itself existence, would not at the same time preserve it . . . .[79]

79. LOCKE, QUESTIONS, *supra* note 72, at 55.

But what of another being who had the power to grant humanity existence—is it not the same act of hostility to grant humanity existence and "not at the same time preserve it?" A being with the power to create human beings must possess the power to preserve them (make them immortal), and therefore the creator must lack the will to do so—it must be an *enemy* to them. If there is a creating God, He is hostile to humanity. But if He is hostile to humanity, then His will is neither obligatory to, nor the source for the content of, the good for humanity. In the guise of proving God's existence and legislative will, Locke actually undermined his own tentatively-put transcendent natural law.[80]

Locke rejected both the traditional immanent natural law *and* his own novel transcendent natural law. That means that there is no natural law in the proper sense (no natural moral standards of a law-like or obligatory character). This does not mean there are no natural moral standards at all. Near the very opening of his treatise on the law of nature, Locke repeated the important distinction Hobbes had earlier introduced between natural law and natural right. Natural law is natural moral duty; natural right, on the other hand, is permissive—a liberty. As he said, "right consists in the fact that we have the free use of something, but law is that which either commands or forbids some action."[81] If there is no natural law, no rational command or prohibition, Locke suggested, then there is natural right—a moral liberty. This conforms with what Locke showed us in his treatise: nature impels human beings toward their own interest, and there are no natural-law standards to say nay.[82]

In his early treatise, therefore, Locke agreed with Hobbes—nature supplies not law, but right or liberty. This right is not an unmitigated blessing, for Locke here also agrees with Hobbes that natural right is a right of every man to everything. Natural right does not mandate justice, but reveals the natural rightfulness of mutual hostility. This natural arrangement is neither just nor good. Nature mandates that human beings seek their own good, but doing so according to nature produces a

80. *See* ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 210-12.
81. LOCKE, QUESTIONS, *supra* note 72, at 11.
82. *See* ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 211-12.

war of all against all and a complete failure to achieve any human good.[83]

So far as human beings can establish justice and the condition for the achievement of human good, they do this for themselves; they figure out rules and establish political and legal mechanisms to enforce them. As Hobbes put it, these rules might be called laws of nature, but in actuality they are neither laws nor natural. "These dictates of Reason, men use to call by the name of Lawes, but improperly."[84]

Despite Locke's important parallels to Hobbes in his early treatise on the law of nature, Locke deviated from Hobbes in equally important ways. Locke's new departure was announced in the great works of his maturity—his *Two Treatises,* his *Essay on Human Understanding,* and his works on religion. I restrict myself for the moment to the *Two Treatises.* Locke followed a strategy remarkably like that of the early work on the law of nature. He began his *Second Treatise* with a version of the transcendent natural-law position; he then undercut it in the direction of the Hobbesean natural-right doctrine, but proceeded to introduce his innovative post-Hobbesean doctrine of natural right.

The transcendent natural law in the *Second Treatise* is a simplified but recognizable version of the transcendent natural law from his earlier work. In this case it is the argument now known in the literature as "the workmanship argument." The beginning point is God the Creator. Human beings are the creation or "workmanship" of God; they therefore belong to God and are His property. From this fact derives a set of prescriptions under the natural law. These prescriptions mainly take the form of limitations on what human beings may do: they may not use force (may not directly harm each other), for they belong to God, not to each other; they may not harm themselves (they may not commit suicide, for example) for the same reason; and they may not indirectly harm each other through taking more than their fair share of the goods of the external world. They must leave "as much and as good for others," or they must take nothing from nature beyond what they really can

83. *See id.* at 212; *see also* LOCKE, QUESTIONS, *supra* note 72, at 74-75.

84. HOBBES, *supra* note 22, at 111.

use (they must not gratuitously put others at risk through allowing things to spoil).[85]

From the single fact that God created and thus owns humanity (not even attempted to be proven here, by the way), Locke derived this series of other-regarding requirements of the natural law, these natural duties or limitations. Locke also derived one other very important thesis: all men are created equal. If God has created humanity, then unless He has made a particular appointment of some of them to rule the others—of which there is no evidence—then human beings are all equal to each other. None is subordinated to any other by God or nature. Given this natural equality, therefore, political power must arise via consent of the governed.

Locke went on, however, to undo the natural-law limitations he had constructed on the basis of his transcendent-workmanship natural law. If human beings are forbidden to harm each other, then the state of nature would seem to be juridically the very opposite of what Hobbes claimed it to be—not a state of war, but a state of peace. This is just what Locke first claimed, but he showed in a series of restatements arguing that, contrary to the initial claim, it turns out that human beings *may* lawfully harm each other, and in the state of nature they will do so to such an extent that Locke's state of nature, just like Hobbes's, is a state of war.[86]

Moreover, despite the initial prohibition against suicide, Locke came to admit that human beings do indeed possess a right to take their own lives.[87] Finally, the famous fifth chapter shows how all the limitations on acquisition come to be repealed and how there are no limitations on what one may rightfully acquire in the name of the needs of others. By the end of the first half of the *Second Treatise,* Locke reversed all of the natural-law limitations he initially announced, and both the state of nature and the rightful range of action open to individuals in the natural state look rather like what Hobbes had described.[88]

Yet the alternative to the transcendent natural-law-workmanship argument that Locke accepted is not in fact

85. ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 216-22.
86. *See id.* at 234-40.
87. *See id.* at 240-46.
88. *See id.* at 252-72.

Hobbes's right of nature. As Locke put it near the opening of chapter V: "every Man has a *Property* in his own *Person.* This no Body has a Right to but himself."[89] This claim conflicts with the transcendent natural law in a particularly manifest manner, for that argument had held that human beings belong to God and not to themselves. Here, Locke said the opposite.

The claim also differs just as much from Hobbes's position, for Locke insisted that the claim of self-ownership implies that "nobody has a right to the person, but himself." Hobbes had altogether denied this claim. By nature, according to Hobbes, everyone has a right to everything, including other persons. Because this is so, there can be no natural [in]justice in Hobbes. One can never seize more than one has a right to, for one has a right to everything.

We stand now at the most interesting and also the most elusive point in all of Locke's political philosophy. It is the most interesting, for it represents the core of his philosophy—the notion of human beings as rights-bearers by nature because they are self-owners. It is the most elusive, for Locke was not clear in presenting his reasons for making this assertion.

We can better understand what he meant by referring again to Hobbes. Hobbes treated natural right as a pure liberty—that is to say, as a faculty or power or liberty with no correlative duty of any kind attached to it. Therefore Hobbes affirmed that under the right of nature every person has a right to everything, including others' bodies, to say nothing of each others' possessions. A has a right to his own life, by which Hobbes means, A by nature has the right—the moral liberty—to do whatever it takes to preserve himself. This includes a right to harm, even kill B, for B may be a threat to A's life. Of course, the reverse is true also. B may, with right, kill A, or take all his stockpiled nuts, berries, and filet mignons. Hobbes concluded from this situation that there is no justice by nature, for justice is rendering to each his own, but in nature there is nothing that is, properly speaking, one's own. A's life is not juridically his own. All others—B, C, D—have just as much of a right to A's life as he does himself. That is to say, Hobbes sees an analytic connection between property and justice: where there is no property, there

89. LOCKE, SECOND TREATISE, *supra* note 67, at 328.

is no injustice. And in nature there is no property. All justice for Hobbes, then, is conventional, the result of sovereign-made law.

Long before the Seventeenth Century closed, objections to Hobbes's analysis arose, the most cogent being that Hobbes misused the term "right" when he described it as a pure liberty with no correlative duty. A right, it was said, at least implied a duty in others to forbear from interfering with its exercise. During the late-Seventeenth Century, then, there was a pervasive ambiguity as to the meaning of the word "right" as Hobbes's meaning contended with the other meaning (argued for most forcefully by Baron Samuel Von Pufendorf).[90] Locke did not take a clear stance on whether he agreed that Hobbes had misused the term when he referred by it to his unconditional liberty, but Locke did intend to clarify which meaning he was adopting by using the language of property to define the language of rights. Property, as even Hobbes conceded, implies an exclusivity: to say A has property in his life is to say B does *not* have a right to it. Property is a right-claim, which necessarily implies a correlative duty of forbearance.[91]

By using the term property to refer to the realm of natural rights, Locke very concisely said at least these three things. First, Locke said that he meant "right" to be that sort of moral claim that carries along with it claims to exclusivity. Second, Locke said that he meant there is such property in or by nature; that is, human beings possess natural rights of the sort that imply natural duties. Finally, Locke concluded that justice is, therefore, by nature. This last claim can be readily understood in terms of the point Hobbes made: if justice is rendering to each his own, then—reversing Hobbes's conclusion—if human beings have an "own" by nature, then there is justice by nature. Justice, as Locke saw, implies and requires the establishment of "ownness," of claim inhering in individuals.

The foundation or ground of rights, is, according to Locke, self-ownership. Notice that Locke here claimed to achieve the allegedly impossible—the derivation of an "ought" from an "is." He concluded from an "is" (the fact of self-ownership) the "ought" of moral inviolability. Now this derivation of "ought" from "is" is not as mysterious or even problematical as the

90. *See* ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 275.
91. *See id.* at 275-77.

notorious difficulty of the problem would imply. Locke's point is that if human beings are indeed self-owners, then they are inviolable, for inviolability (exclusive right) is precisely what ownership means or implies. If B has a simple right to appropriate what A possesses, then A does not have property. So, to have property is to have moral inviolability.

According to Locke, then, the first or primary moral fact is self-ownership. But are human beings self-owners? What can this claim mean and how can it be supported? The prerequisite for the discovery of self-ownership, for Locke, is the discovery of the self. And the prerequisite for the discovery of the self is a thorough-going critique of the typical ways the human person was understood in previous thought—as God's created image, as rational soul, or as thinking substance. When Locke investigated personal identity without any of the aforementioned theoretical hypotheses, he came to see that the identity of the person is nothing like the identity of inanimate objects or of other animals. Human beings uniquely find their identity in self-consciousness—that is, the consciousness of self, of the "I" persisting over time, which stands as the basis for the unity of experience, intention and action of the person. Indeed, the "I" not only persists over time, but is the very basis for constituting the temporality of the human being; the human self is a temporal entity as no other is.[92]

The "I" is not, Locke argues, anything given in nature. It is made by the self in the course of its operations of sensation and reflection. Other animals have no "I" center, and human beings themselves develop the "I" consciousness only over time. With the discovery of the "I" self, Locke thus founded ego psychology as the study of the constitution of the "I."[93]

Most significant for the questions we are interested in here is Locke's picture of the structure of the self as self-owner. The self in its very nature is posited as self-owning—a fact witnessed in our most elementary locutions—I, me, mine, to quote an old Beatles' song.[94] The center of the self is the "I," the pure abstract and empty ego, possessor of its own data of consciousness (*my*

92. *See id.* at 279-86.

93. *See id.* at 280-81.

94. *See id.* at 285-86 (referring to THE BEATLES, *I Me Mine, on* LET IT BE (Harrisongs, Ltd. 1970)).

feelings, *my* ideas, *my* experiences), always found in these experiences (that is what makes them mine), yet never lost in them (that is how the "I" can stand above and possess them). The self is the mysterious compound of the "I" and the "me," the abstract and empty ego and the contents of consciousness understood as mine, and thus as me.

Moreover, Locke argued, if the human person were not a body with pleasures and pains, the self would never come into existence, as he showed via a mechanism too complex to summarize here.[95] At the same time, the self is most intimately concerned with (attached with care to) its pleasures and pains, its happiness and misery. Human beings are unique in that as selves they can seize on their entire lives as wholes, seeing them as unities, or potential unities spread over the dimensions of time and aiming toward happiness or misery as such. The self can give or attempt to give some shape to this life as a whole that comes to sight for it; life has "meaning" for a human person in a way it has not for any other mortal being. The self not only possesses its data of consciousness, but also its body, which is the source of most of these data of consciousness. The self appropriates the body and makes it its own—that is to say, makes it the instrument of its intentional actions in relation to its broader purposes in life. Action becomes in the full sense intentional, and the body, itself inseparable from the happiness and the misery of the "I" and thoroughly involved with intentionality, becomes the self's own.

Self-ownership procures ownership of body and action. The possession by the self of itself is an exclusive claim in the nature of a property right. My self, my happiness and misery, my body and its action are all mine in such a way that my sovereignty over them necessarily and *ipso facto* excludes similar claims to them by others. In the first instance, this ownership has nothing moral about it. It is merely a fact of the structure of self-consciousness. Yet it has moral implications, for the "I" necessarily is concerned with its own happiness and misery. So far as it accurately understands its situation, it necessarily raises rights claims over its body, actions, and road to happiness. The self posits itself as possessor of rights to life, liberty, and pursuit of happiness. Its

95. ZUCKERT, NEW REPUBLICANISM, *supra* note 67, at 281-85.

very claim for itself as a self contains a claim of exclusivity vis-à-vis others.

This claim of exclusivity does not derive from some pre-existing law or duty, natural or otherwise, but it does imply a subsequent duty—a duty of forbearance. Each claims a right that others forbear from interfering with what is the self's own, and logic (although not the practical conditions of existence) requires that each self raising such a claim recognize that every other self raises *ipso facto* the very same claim on the very same ground. This is a very imperfect duty, however, in that there is very little to require that it actually be honored. Although an observer such as Locke can notice standards of natural right and wrong, of natural justice, in nature human beings are apt to overlook claims of others. The result is war. The solution, of course, is government and law, which, if properly made, recognize each person as a self with rights and take their bearings from the natural standards of justice—to respect what is each one's own, or to respect their "property" or their rights to life, liberty, and pursuit of happiness. Given the nature of rights as property and of the concomitant duties that are co-constituted with rights, it is clear that Lockean rights are and must be negative rights.

Hobbes had affirmed a right of every man to everything and had grounded that in turn on the more primary right to self-preservation. What Locke did that Hobbes did not do was look more closely at this thing, the self, that Hobbes took for granted as both the subject and the object of the desire for self-preservation. Once we look at the self, we see its structure is such that it cannot ground Hobbes's right of nature. Rather, it constitutes Locke's natural property. Locke thus uncovered what Hobbes never could: the actual source of morality and justice in human existence. Locke followed Hobbes in denying to humanity the dignity that derived from being the cherished creature of a creating God, but he surpassed Hobbes and all other moderns who preceded him in uncovering the genuine source of the dim awareness human beings have of their own dignity.

Natural rights in their Lockean version are therefore entirely different from Thomistic natural law and, analysis would show, from those versions of natural-rights theory that contemporary quasi-Thomists such as Finnis are promoting. This is not to say

that moral rules of the sort often called laws of nature do not follow from the Lockean natural rights or natural property, but the priority of natural right and the derivativeness of natural law are clear. To answer the question of my title: natural rights do not derive from natural law.