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KELSEN AND AQUINAS ON "THE NATURAL-LAW DOCTRINE"

Robert P. George*

INTRODUCTION

The fiftieth anniversary of the publication of Hans Kelsen's influential essay, *The Natural-Law Doctrine Before the Tribunal of Science*,¹ provides an occasion to revisit a work in which the leading European legal theorist of the twentieth century outlined and strongly criticized the tradition of natural law theorizing. Contemporary scholars on the Continent and in the English-speaking world will, no doubt, examine Kelsen's essay from a variety of angles. I am struck, however, by the fact that it makes no reference whatsoever to the thought of the most famous and influential of all natural law theorists, namely, Saint Thomas Aquinas. Kelsen refers frequently to the writings of Germain Grotius, Samuel Pufendorf, Thomas Hobbes, Immanuel Kant, G. W. F. Hegel, and classical Greek philosophers; but Aquinas's theory, or "doctrine," of natural law is left unaddressed. If, however, something called "the natural-law doctrine" can be attributed to anyone, surely it can be attributed to Aquinas. I propose, therefore, to consider (1) the extent to which Kelsen's exposition of "the natural-law doctrine" captures or describes Aquinas's account of natural law and (2) whether Kelsen's critique of natural law ethics and jurisprudence tells against the teachings of Aquinas.²

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1 Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science*, W. POL. Q., Dec. 1949, at 481, 481, reprinted in HANS KELSEN, WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS BY HANS KELSEN 137, 137 (1957).

2 I shall, for the most part, refrain from commenting on the accuracy of Kelsen's attributions to other natural law thinkers of the various propositions he asserts to be constitutive of, or in some sense integral to, "the natural-law doctrine." For what it is worth, my view is that Kelsen's essay is, on this score, a "mixed bag."

I. NATURAL LAW, MORAL TRUTH, AND RELIGION

Let us begin by considering, sentence by sentence, the opening paragraph of Kelsen's essay.

Sentence One: "The natural-law doctrine undertakes to supply a definitive solution to the eternal problem of justice, to answer the question as to what is right and wrong in the mutual relations of men."³

Aquinas is concerned with "right and wrong" not only in "the mutual relations of men," but in human affairs generally. He famously argues that *all* acts of virtue, and not merely those ordained to the common good narrowly conceived, are the subject of natural law.⁴ Questions of justice are, to be sure, central to his thought, but they are not the only questions. His prescriptions concern what we would call, though he did not, "self-regarding" as well as "other-regarding" conduct.⁵ The principles and norms of natural law, as Aquinas understands them, would have relevance to the man permanently stranded alone on an island. Nevertheless, it is fair to say that Kelsen's statement is true, so far as it goes, when applied to Aquinas's conception of "the natural-law doctrine."

Sentence Two: "The answer is based on the assumption that it is possible to distinguish between human behavior which is natural, that is to say which corresponds to nature because it is required by nature, and human behavior which is unnatural, hence contrary to nature and forbidden by nature."⁶

Aquinas does, sometimes, employ the terms "natural" and "unnatural" in a morally normative sense. However, he makes abundantly clear that human choosing and acting is "natural" or "unnatural" in such a sense precisely insofar as it is reasonable or unreasonable.⁷ Other natural law theorists have sought to infer the reasonableness or unreasonableness of a possible choice or action from judgments

3 KELSEN, *supra* note 1, at 137.

4 See THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 94, art. 3 (Fathers of the Eng. Dominican Province trans., Benzinger Bros., Inc. 1947) (1485).

5 However, Aquinas is hardly oblivious to the distinction. See *id.* at pt. I-II, q. 91, art. 4 (deploying the distinction in teaching that it is unwise for human law to prohibit every act of vice).

6 KELSEN, *supra* note 1, at 137.

7 See 4 THOMAS AQUINAS, *SCRIPTUM SUPER LIBROS SENTENTiarUM* d. 2, q. 1, art. 4, sol. 1, ad. 2 (Maria Fabianus Moos ed., 1947) (1469) (stating that moral precepts are in accord with human nature because they are requirements of natural reason); AQUINAS, *supra* note 4, at pt. I-II, q. 71, art. 2 ("[V]irtue[s] . . . [are] in accord with man's nature, for as much as [they] accord[] with his reason: while vice[s] [are] contrary to man's nature, in so far as [they are] contrary to the order of reason.").

about its naturalness or unnaturalness,⁸ and this approach is sometimes, though mistakenly, attributed to Aquinas.⁹ The truth is, however, that for Aquinas, things work precisely the other way around: it is the reasonableness or unreasonableness of a choice or action that controls judgment as to its naturalness or unnaturalness in any morally normative sense.¹⁰

Sentence Three: "This assumption implies that it is possible to deduce from nature, that is to say from the nature of man, from the nature of society, and even from the nature of things certain rules which provide an altogether adequate prescription for human behavior, that by a careful examination of the facts of nature we can find the just solution of our social problem."¹¹

Aquinas certainly assumed no such thing. In his famous treatment of the question whether the natural law contains several precepts or only one, he says that the first principles of practical reason, which are the basic precepts of natural law, are self-evident (*per se nota*) and indemonstrable.¹² As such, they are not deduced from prior judgments about nature, human nature, the nature of society, or anything else.¹³ On the contrary, practical reasoning proceeds from its own first principles. We need not look to physics, metaphysics, anthropology, sociology, or any other speculative (or, to use the Aristotelian term, "theoretical") discipline to supply them.¹⁴ Of course, information drawn from these disciplines, when considered in the light of practical principles, can be highly pertinent to moral inquiry.¹⁵ Indeed, such information is often indispensable to sound judgments of right and wrong.¹⁶ But according to Aquinas, the pri-

8 See, e.g., THOMAS J. HIGGINS, *MAN AS MAN: THE SCIENCE AND ART OF ETHICS* 49-69, 88-100, 120-26 (1958).

9 See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 58 (1987) ("[N]atural law [according to Aquinas] directs us to fulfill our natural inclinations . . .").

10 For a careful and amply documented explanation of this critical point, see JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 90-94 (1998).

11 KELSEN, *supra* note 1, at 137.

12 See AQUINAS, *supra* note 4, at pt. I-II, q. 94, art. 2. On the (much misunderstood) meaning of "self-evidence" in Thomistic ethical theory, see Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1387-89, 1413 (1988).

13 See Germain Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae, I-2, Question 94, Article 2*, 10 NAT. L.F. 168 (1965).

14 See FINNIS, *supra* note 10, at 90-94.

15 See George, *supra* note 12, at 1412-14.

16 So, for example, knowledge of the facts of human embryogenesis and intrauterine human development is critical to a proper application of moral principles to the question of abortion.

mary principles of practical reason and basic precepts of natural law are not "deduce[d] from nature" (or anything else).

Sentence Four: "Nature is conceived of as a legislator, the supreme legislator."¹⁷

Not according to Aquinas. True, he allows that human goods and the norms of morality directing choice and action with respect to these goods (and their privations) would be different if human nature were different—if, that is to say, human beings were fulfilled and perfected by activities and purposes ("goods") other than those that in fact fulfill and perfect us.¹⁸ In this sense, morality and its content depend on (human) nature.¹⁹ But precisely because we do not (and, indeed, cannot) deduce the "ought" of morality from the "is" of nature (or anything else—including God's will),²⁰ it is a mistake, or so Aquinas would say, to imagine that we could discover moral truth by inquiring into the intentions or purposes of nature conceived as some sort of law-giver.

Moving to the second paragraph of Kelsen's essay, we can see even more clearly that his account of "the natural-law doctrine" is at sharp variance with what Aquinas teaches about the natural law:

This view presupposes that natural phenomena are directed toward an end or shaped by a purpose, that natural processes or nature conceived of as a whole are determined by final causes. It is a thoroughly teleological view, and as such does not differ from the idea that nature is endowed with will and intelligence. This implies that nature is a kind of superhuman personal being, an authority to which man owes obedience.²¹

Whatever views about final causes Aquinas retains from Aristotle's thought, he certainly would reject "the idea that nature is endowed with will and intelligence." Nature is not, in Aquinas's account, "a kind of superhuman personal being." Nor is the ground of our moral obligations a debt of obedience to the "will" of nature or, indeed, any other authority. Unlike many later theorists of natural law, Aquinas eschewed the voluntarism implied by this conception of moral obligation.²² The force of practical—including moral—principles, accord-

17 KELSEN, *supra* note 1, at 137.

18 See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 34 (1980).

19 See Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 31 (Robert P. George ed., 1992).

20 See FINNIS, *supra* note 10, at 90.

21 KELSEN, *supra* note 1, at 137.

22 On the impact of voluntarism on Christian moral theology after Aquinas, see 1 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES* 12–13 (1983). In the same work, Grisez provides a powerful critique of voluntarism and

ing to Aquinas, is *rational*; these principles state *reasons* for action and restraint, and to defy them is wrong inasmuch as it is *unreasonable*.²³ In this sense, the natural law is not an extrinsic imposition of an alien will—whether the “will” of nature or anything (or anybody) else. It is, rather, intrinsic to human beings; its fundamental referents are the human goods that constitute human well-being and fulfillment and precisely, as such, are reasons for action.²⁴

Moving now more deeply into Kelsen’s second paragraph, we find him arguing as follows:

At a higher stage of religious evolution, when animism is replaced by monotheism, nature is conceived of as having been created by God and is therefore regarded as a revelation of his all powerful and just will. If the natural-law doctrine is consistent, it must assume a religious character. It can deduce from nature just rules of human behavior only because and so far as nature is conceived of as a manifestation of God’s will, so that examining nature amounts to exploring God’s will. As a matter of fact, there is no natural-law doctrine of any importance which has not a more or less religious character.²⁵

According to Aquinas, the natural law is the “rational creature’s participation of the eternal law,”²⁶ and “the eternal law” is the supreme act of (practical) reason by which an omnipotent and omnibenevolent Creator freely orders the whole of His creation.²⁷ Thus, the natural law is a part of the rational plan by which God providentially governs the created order.²⁸ In this sense, Aquinas’s natural law doctrine can be regarded as having a “religious character.” Its

defense of the authentically Thomistic alternative account of moral obligation as a kind of rational necessity. See *id.* at 103–05; see also FINNIS, *supra* note 18, at 42–48, 337–43.

23 See FINNIS, *supra* note 10, at 79–86.

24 See *id.*

25 KELSEN, *supra* note 1, at 138.

26 AQUINAS, *supra* note 4, at pt. I–II, q. 91, art. 2.

27 See *id.* at pt. I–II, q. 91, art. 1.

28 Finnis sums up Aquinas’s teaching on “the eternal law” as follows:

God envisages and freely chooses the whole order of things, prescribing (so to speak) that order by impressing its principles (the “laws of physics,” the “laws of logic,” and so forth) onto or into the various orders of created entity and process. And this act is to the common benefit of the whole (and thus of its parts). So we can think of this supreme act of government as legislative, and its rational content as a law which, like its author, is timeless (even though that content is freely chosen, not necessary, and regulates creatures which are all within time).

FINNIS, *supra* note 10, at 307 (footnotes omitted).

religious character, however, has nothing to do with any putative deduction from nature, conceived as revelatory of the will of God or anyone (or anything) else, of moral norms, or of other "rules of human behavior." There is no sense, for Aquinas, in which one "reads off" from nature (or human nature) God's will regarding human conduct.²⁹

It is worth pausing here to observe, moreover, that there is no sense in which the natural law, as the eternal law's participation in the rational creature, is incompatible with human freedom. The dependency of human choice and action on divine power and causality does not vitiate the human power of creative free choice. Indeed, Aquinas interprets the biblical teaching that man is an *imago dei*³⁰ precisely as meaning that human beings are endowed with the God-like attributes of practical rationality and freedom:

Man is said to be made to God's image, in so far as the image implies *an intelligent being endowed with free-will and self-movement*: now that we have treated of the exemplar, i.e., God, and of those things which come forth from the power of God in accordance with His will, it remains for us to treat of His image, i.e., man, inasmuch as he too is the principle of his actions, as having free-will and control of his actions.³¹

Thus it is that, though God directs the brute animals to their proper ends by instinct or "natural appetite," He directs human beings to their proper ends by the God-like power of practical reason, namely, the power to understand what is humanly (including morally) good and bad and the freedom to choose to act in light of the reasons thus provided.³²

According to Aquinas, the whole of the created order is suffused with meaning and value inasmuch as it is the product of God's free and intelligent action.³³ At the same time, part—though not all—of the created order also has meaning and value by virtue of the contributions of human freedom and reason (which human capacities are themselves, as parts of the created order, suffused with meaning and value by virtue of divine wisdom and free choice).³⁴ This part of the

29 See *id.* at 309.

30 See *Genesis* 1:27.

31 AQUINAS, *supra* note 4, at pt. I-II, prologue.

32 See *id.* at pt. I-II, q. 91, art. 2.

33 See *id.* at pt. I, q. 50, art. 4.

34 These points are explained more fully in *Recent Criticism of Natural Law Theory*. See George, *supra* note 12, at 1384–85. Unfortunately, a key line on page 1384 was omitted by the printer in the version of this essay that appeared in the *University of Chicago Law Review*. It would be better, therefore, for readers to consult the revised

created order is governed by the principles of natural law, by which free and intelligent creatures order their lives according to the directives of practical reason. In precisely this sense, "the natural law is a participation of the eternal law" in the rational creature.³⁵

Does Aquinas's natural law theory presuppose religious premises? Can it be accepted only by those who presuppose God's existence and believe that He has revealed something of His will for human beings? I have said enough already to indicate that the answer to these questions must be "no." At the same time, one may not infer from the fact that principles of natural law, according to Aquinas's account, can be understood and acted upon without appeal to religious premises that God does not exist or that God's existence is simply irrelevant to natural law theory.

[J]ust as the fact that a good explanation of molecular motion can be provided, without adverting to the existence of an uncreated creator of the whole state of affairs in which molecules and the laws of their motion obtain, does not of itself entail either (i) that no further explanation of that state of affairs is required or (ii) that no such further explanation is available, or (iii) that the existence of an uncreated creator is not that explanation, so too the fact that natural law can be understood, assented to, applied, and reflectively analyzed without adverting to the question of the existence of God does not of itself entail either (i) that no further explanation is required for the fact that there are objective standards of good and bad and principles of reasonableness (right and wrong) or (ii) that no such further explanation is available, or (iii) that the existence and nature of God is not that explanation.³⁶

Let us now move beyond the opening paragraph of Kelsen's essay to his critique of "the natural-law doctrine." His principal objection to natural law theory is that it "obliterates the essential difference which exists between scientific laws of nature, the rules by which the science of nature describes its object, and the rules by which ethics and jurisprudence describe their objects, which are morality and law."³⁷ This objection boils down to the proposition that

version because it states, "While both parts, inasmuch as they depend ultimately on God's free action, are suffused with meaning and value, *the latter part is also suffused with humanly given meaning and value* (by virtue of the contributions of human intelligence and free action)." ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 31, 41 (1999) (emphasis added).

35 GEORGE, *supra* note 34, at 42.

36 FINNIS, *supra* note 18, at 49.

37 KELSEN, *supra* note 1, at 139.

[i]t does not follow from the fact that something is, that it ought to be or to be done, or that it ought not to be or not to be done. . . . There is no logical inference from the "is" to the "ought," from natural reality to moral or legal value.³⁸

That certain natural law theorists (including some who have claimed the patronage of Aquinas) have proposed to derive the "ought" of morality from the "is" of (human) nature is true.³⁹ It is equally true, however, that Aquinas is not among them, nor are his leading contemporary followers.⁴⁰ Although David Hume is widely credited with discovering the logical fallacy inherent in any attempt at such a derivation,⁴¹ Aquinas, among other pre-modern thinkers, was quite aware of the fallacy and sought more scrupulously than did Hume himself to avoid committing it.⁴² Accepting Aristotle's distinction between "theoretical" (or "speculative") and "practical" reasoning, Aquinas insisted, as we have seen, that practical reasoning proceeds from its own first principles.⁴³ He did not treat practical principles as theoretical principles that are given normative force by an act of the will. He did not treat theoretical knowledge of human nature as providing a sufficient premise for practical knowledge, let alone for practical knowledge of moral obligation.⁴⁴ He did not sup-

38 *Id.* at 140.

39 The origins of this approach to natural law theory are not in Aquinas, but rather, in later writings such as those of the early seventeenth-century Spanish, Jesuit, moral and political thinker Francisco Suárez. See 1 FRANCISCO SUÁREZ, *DE LEGIBUS AC DE DEO LEGISLATORE* (1612), in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 1, 58-73 (James Brown Scott ed., Gwladys L. Williams et al. trans., William S. Hein & Co. 1995); 2 *id.*, in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J., *supra*, at 73-89. For a useful account of Suárez's influence and valuable critique of his approach to natural law theory, see FINNIS, *supra* note 18, at 43-47, 54-57, 337-43, 347-50.

40 Grisez and Finnis, for example, and other leading contemporary moral philosophers and theologians working broadly within the Thomistic tradition, explicitly reject as logically illicit any proposal to derive "ought" from "is." See FINNIS, *supra* note 18, at 33-36; GRISEZ, *supra* note 22, at 105.

41 For what is often taken to be Hume's statement of discovery of the logical fallacy, see 2 DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. III, pt. I, §1 (1740), in 2 DAVID HUME, *THE PHILOSOPHICAL WORKS* (Thomas Hill Green & Thomas Hodge Grose eds., 1964).

42 On Hume's lack of care in this regard, see FINNIS, *supra* note 18, at 37-38 n.43.

43 See AQUINAS, *supra* note 4, at pt. I-II, q. 94, art. 2.

44 Indeed, something very much like the reverse is true. A complete (theoretical) account of human nature presupposes practical knowledge (a set of "value judgments") which provides data for theoretical inquiry, understanding, and judgment. Aquinas adheres to the Aristotelian methodological (and epistemological) principle, according to which we come to know human nature by knowing human potentialities; these we know by knowing human acts and by knowing their objects, namely, the

pose that, having first discovered the "facts" about human nature by way of non-practical inquiry, we then identify ethical obligations by applying a norm such as "follow nature."⁴⁵

Hume and his followers, perhaps including Kelsen,⁴⁶ suppose that if "values" cannot be derived from "facts," then they cannot be objective (or "true"), but must, rather, be mere projections of feeling, emotion, or other subrational factors capable of motivating human behavior.⁴⁷ They deny that practical reasons, as such, can motivate people. So they conclude that unless natural law theorists commit "the naturalistic fallacy" of purporting to derive "ought" from "is," their doctrine collapses into a form of ethical non-cognitivism.⁴⁸ But this simply begs the question against Thomists and others who claim that we can understand, and thereby be motivated to act for the sake of, more-than-merely-instrumental practical reasons.⁴⁹ It does a poor job of accounting for the experience of most people who, after all, often suppose that they are moved to do things (or to avoid doing things that they might otherwise do) not as a matter of brute desire, but rather because they perceive the worth or value, and thus the practical point, of doing (or avoiding doing) them.⁵⁰ Moreover, it flies in the face of powerful retorsive arguments which show that any truly knowledge-seeking defense of Humean moral skepticism, or other forms of non-cognitivism, will be self-refuting inasmuch as it contradicts in practice the very claims it seeks to defend in theory.⁵¹

Kelsen's claim that "from the point of view of science the natural-law doctrine is based on the logical fallacy of an inference from the

more-than-merely-instrumental goods (*bona*) to which the self-evident and indemonstrable first principles of practical reason direct human choice and action. See FINNIS, *supra* note 10, at 90-91.

45 All of this is made abundantly clear in Grisez, *supra* note 13. This unsurpassed textual study corrects many common misunderstandings of Aquinas's theory of natural law including, notably, the idea that Thomistic ethical theory purports to deduce the "ought" of morality from the "is" of (human) nature. See also GRIZEZ, *supra* note 22, at 103-05, 112 (observing that "St. Thomas was careful to explain that practical conclusions always must be resolved into practical principles which are distinct from and irreducible to theoretical ones").

46 See KELSEN, *supra* note 1, at 141.

47 See Jeffrey Goldsworthy, *Fact and Value in the New Natural Law Theory*, 41 AM. J. JURIS. 21 (1996).

48 See *id.*

49 See Robert P. George, *A Defense of the New Natural Law Theory*, 41 AM. J. JURIS. 47 (1996). For a revised version of this essay, free of multiple printer's errors that make it difficult for readers to grasp the sense of several sentences in the original, see GEORGE, *supra* note 34, at 18-33.

50 See George, *supra* note 49, at 49.

51 See FINNIS, *supra* note 10, at 58-61.

'is' to the 'ought'"⁵² simply has no force whatsoever against "the natural-law doctrine" as it is understood by Aquinas, for Aquinas's theory of natural law proposes no such inference. When Kelsen goes on to say that "[t]he norms allegedly deduced from nature are—in truth—tacitly presupposed and are based on subjective values, which are presented as the intentions of nature as a legislator,"⁵³ again his critique has no applicability to Aquinas. To be sure, the critique itself, it seems, tacitly presupposes the Humean idea that all "values" are subjective—that is, that people cannot be aware of and act on more-than-merely-instrumental reasons as such—and this is in direct contradiction to Aquinas's view. But insofar as the truth of the Humean idea is not obvious—indeed, that idea is, at best, highly problematic—Kelsen's marshaling of the idea in his critique of "the natural-law doctrine" need trouble no one interested in defending Aquinas or his natural law doctrine. If the idea is to be marshaled effectively against Aquinas and his contemporary followers, then its proponents must, among other things, provide a plausible account of common moral experience with which it is apparently incompatible, and they must come to terms with the problems of retorsion that appear, at least, to render any intellectually serious defense of the idea self-refuting.

II. NATURAL LAW AND POSITIVE LAW

In the second section of his essay, Kelsen focuses on the natural law doctrine of the relationship between natural and positive law. His central claim against the doctrine here is that it renders the positive law "superfluous."⁵⁴ "Faced by the existence of a just ordering of society, intelligible in nature, the activity of positive-lawmakers is tantamount to a foolish effort to supply artificial illumination in bright sunshine."⁵⁵ Yet, he insists,

[N]one of the followers of this doctrine had the courage to be consistent. None of them has declared that the existence of natural law makes the establishment of positive law superfluous. On the contrary. All of them insist upon the necessity of positive law. In fact, one of the most essential functions of all natural-law doctrines is to justify the establishment of positive law or the existence of the state competent to establish positive law. In performing this function most of the doctrines entangle themselves in a highly characteristic contradiction. On the one hand they maintain that human nature

52 KELSEN, *supra* note 1, at 141.

53 *Id.*

54 *Id.* at 142.

55 *Id.*

is the source of natural law, which implies that human nature must be basically good. On the other hand they can justify the necessity of positive law with its coercive machinery only by the badness of man.⁵⁶

Here, I believe, Kelsen offers a spectacularly poor argument (or pair of muddled-together arguments). It likely tells against no historically important natural law theorist, and it certainly casts no doubt on Aquinas's theory. We have already seen that Kelsen's particular account of human nature as the "source of natural law" in natural law doctrines has no applicability to Aquinas's teaching. Again, though it is true that, for Aquinas, human goods are what they are because human nature is constituted as it is, there is no sense in which Aquinas proposes to deduce knowledge of human goods (practical knowledge) from methodologically antecedent (theoretical) knowledge of human nature. The first principles of practical reason and the basic precepts of natural law, which direct choice and action to the goods of knowledge, friendship, and other more-than-merely-instrumental reasons for action—far from being inferred from anthropological, historical, metaphysical, theological, or any other theoretical premises—are grasped in non-inferential acts of understanding whereby "the practical intellect"—one's single intelligence directed towards answering the question of what is to be chosen and done—grasps the intelligible point of a possible action in its promise to instantiate a human benefit, namely, something like knowledge or friendship that is humanly fulfilling and, as such, worthwhile for its own sake.⁵⁷

Now, the fact that there are goods for human beings which, as such, provide reasons for action, does not entail that there are no bads. On the contrary, the privations of human goods (for example, ignorance, muddleheadedness, misunderstanding, and animosity) are bads that provide reasons (which may or may not, in any particular case, be conclusive) for people to avoid them, where possible.⁵⁸ Nor does the ability of human beings to understand certain ends or purposes as humanly fulfilling and, as such, good entail that human beings cannot choose in ways that are incompatible with the integral directiveness of the human goods, that is, immorally. Indeed, one

56 *Id.* (footnotes omitted).

57 *See* AQUINAS, *supra* note 4, at pt. I-II, q. 94, art. 2.

58 *See id.* Aquinas formulates the first and most general principle of practical reason as "good is to be done and pursued, and evil is to be avoided." *Id.* (emphasis added). On the proper interpretation of this principle and, particularly, the meaning of "good" and "bad" as including what is worthwhile and the privation of what is worthwhile generally and not (merely) what is morally right and wrong, see generally Grisez, *supra* note 13.

can, for the sake of a certain good or the instantiation of goods in certain persons, choose in ways that unreasonably damage or short-change other goods or treat other persons unfairly.⁵⁹ Any such choice will be unreasonable inasmuch as one's reason for it was, in truth, defeated by a conclusive (moral) reason against it. But a defeated reason remains a reason—for unreasonable choices are not necessarily utterly irrational—albeit one that can be acted on by a person who, at some level at least, understands the wrongfulness of his deed only on the basis of emotional motives that compete with and cut back upon or fetter reason.⁶⁰

One need not suppose that people are inherently "bad" in order to acknowledge the evident truth that human emotions, when inadequately integrated in the human personality, can motivate people to perform immoral acts. This is by no means to suggest that emotions are themselves inherently bad or ought to be gotten rid of somehow. (Indeed, in the properly integrated personality, emotions support morally upright choosing.) It is only to say that people can be emotionally motivated to do things that are contrary to the integral directiveness of human goods—sometimes for the sake of genuine, albeit partial, human goods to which they are deeply committed or attached.⁶¹ And this fact about human beings is, in part, what calls for and justifies the establishment of positive law and the existence of the state competent to establish positive law.⁶²

At the same time, it is important to see that, in Aquinas's account of the matter, positive law would remain necessary even in a human society in which people could always be counted upon to do the morally right thing. This is because any society—even a "society of saints"—needs laws and a system of lawmaking to provide authoritative stipulations for the co-ordination of actions for the sake of the common good.⁶³ Of course, in such a society, laws against murder,

59 See Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 123–25 (1987).

60 See *id.*

61 See *id.*

62 See AQUINAS, *supra* note 4, at pt. I–II, q. 95, art. 1 (setting forth Aquinas's view and addressing the question "Was it useful for laws to be framed by men?"); see also *id.* at pt. I–II, q. 96, art. 5 (discussing the question "Whether all are subject to the law?").

63 See FINNIS, *supra* note 10, at 35–37 (explaining Aquinas's position); FINNIS, *supra* note 18, at 28 (same). Consistent with Aquinas's legal theory (and Aristotle's thoughts in ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, ch. 7 (Terence Irwin trans., Hackett Pub. Co. 1985)), contemporary analytical jurisprudence has emphasized and valuably explored the importance of law in providing authoritative and, thus, binding solutions to problems of coordinating human behavior for the sake of the common good. See generally EDNA ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* (1977). For a

rape, theft, and other morally wrongful acts would be unnecessary, and punishment and other coercive features of real-life legal systems would have no place since, *ex hypothesi*, no one would willfully fail to abide by the law's just and authoritative stipulations. But the vast majority of laws by which people—particularly in complex modern societies—are governed in their daily lives as citizens would remain pertinent.

Thus, Aquinas holds that positive law is necessary *both* because actual human beings sometimes need the threat of punishment to deter them from doing what the natural law already proscribes (or to require them to do what it prescribes) as a matter of basic justice *and* because authoritative stipulations are frequently needed to coordinate action for the sake of the common good.⁶⁴ And he further holds that *all* just positive laws—including laws that are purely norms of coordination—are derived, in some sense, from the natural law.⁶⁵ The task of the legislator, he suggests, is to give effect to relevant principles of natural law in the shape of principles and norms of positive law for the governance of human society.

This work of giving effect to the principles of natural law is accomplished in two distinct ways, or two forms of "derivation." Some laws, such as those prohibiting murder, rape, theft, and other grave injustices which are straightforwardly contrary to natural law, are derived from the natural law by a process akin to the deduction of demonstrable conclusions from general premises in the sciences.⁶⁶ Other positive laws, however, cannot be derived from the natural law in so direct and straightforward a fashion. Where law is required to resolve a coordination problem, it is often the case that a variety of possible solutions, all having certain incommensurable advantages and disadvantages, are rationally available as options. One solution, however, must be authoritatively chosen by the legislator if the problem is to be solved. Consider, for example, the regulation of highway traffic. From the basic principle of natural law which identifies human health and safety as goods to be preserved, together with the empirical fact that unregulated driving, even among motorists of impeccable goodwill, places these human goods in jeopardy, it follows that a scheme of regulation (coordination) is necessary for the com-

summary of some important contemporary work in this area, with particular attention to the question of a *prima facie* (defeasible) moral obligation to obey law, see John Finnis, *Law as Co-ordination*, 2 *RATIO JURIS* 97 (1989).

64 See AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4; FINNIS, *supra* note 10, at 248, 265.

65 See AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 2.

66 See *id.*

mon good. Yet, typically, various reasonable but incompatible schemes are possible. For the sake of the common good, then, the relevant lawmaking authority must stipulate that *one* from among the various possible schemes shall be given the force of law. In selecting a scheme, the lawmakers operate not by any process analogous to the deduction of demonstrable conclusions from premises, but rather by a process of choosing between reasonable, yet incompatible, options—a process that Aquinas refers to as “*determinatio*.”⁶⁷

Laws that come into being as *determinationes*, according to Aquinas, have their binding force not from reason alone, but also from having been laid down by valid lawmaking authority.⁶⁸ Although it is the case that, but for the law’s enactment, no one would be under any general moral duty to behave as it requires, and despite the fact that the lawmaker(s) could, compatibly with the requirements of natural law, have stipulated a different requirement or set of requirements, “its directiveness derives not only from the fact of its creation by some recognized source of law (legislation, judicial decision, custom, etc.), but also from its rational connection with some principle or precept of morality.”⁶⁹

It is entirely clear, then, that the existence of natural law, as Aquinas conceives it, does not render positive law otiose. On the contrary, Aquinas quite reasonably views positive law, and the institutions of government that enjoy the power of lawmaking, to be indispensable to the common good of any society—even a hypothetical society of saints. They are themselves, as it were, requirements of natural law.⁷⁰ Although the binding force of (just) positive law always depends, in part, on its derivation from principles of natural law, the positive law in Aquinas’s account of it is no mere emanation or simple reflection of those principles. Indeed, insofar as human law is a matter of *determinatio*, lawmakers enjoy a measure of rational, creative freedom

67 See *id.* On Aquinas’s theory of *determinatio*, see FINNIS, *supra* note 10, at 266–74, FINNIS, *supra* note 18, at 281–90, 294–96, and Robert P. George, *Natural Law and Positive Law*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 321, 327–30 (Robert P. George ed., 1996).

68 See AQUINAS, *supra* note 4, at pt. I–II, q. 104, art. 1.

69 FINNIS, *supra* note 10, at 267 (footnote omitted).

70 I have had occasion elsewhere to explain the point as follows:

It is meaningful and correct to say that the legislator (including the judge to the extent that the judge in the jurisdiction in question exercises a measure of law-creating power) makes the natural law effective for his community by deriving the positive law from the natural law. The natural law itself requires that such a derivation be accomplished and that someone (or a group or institution) be authorized to accomplish it.

George, *supra* note 67, at 329–30.

that Aquinas himself analogizes to that of "the craftsman [or, as we might say, architect who] needs to determine the general form of a house to some particular shape,"⁷¹ yet who may design the structure, compatibly with the purposes it is meant to serve, to any of a vast number of possible shapes. The existence of this freedom in no way entails the utter independence of positive law from natural law (any more than the creative freedom of the architect entails the complete independence of his *determinationes* from the general principles of architecture which must be observed if a house is to be structurally sound and otherwise suitable for purposes of habitation, or from the governing terms of his commission). But it also marks the reasons of principle which Aquinas has for completely rejecting, as he does, the notions ascribed by Kelsen to "natural-law doctrine"—that, given the reality of natural law, positive law is "superfluous."

III. NATURAL LAW, UNJUST LAW, AND RESISTANCE TO TYRANNY

The third section of *The Natural-Law Doctrine Before the Tribunal of Science*⁷² introduces Kelsen's version of a familiar charge against natural law theory, namely, its alleged merging of the categories of "moral" and "legal" such that either (1) all positive laws are morally good, or (2) morally bad laws are in no meaningful sense truly laws. The section opens with the following sally against theorists of natural law:

If the positive law is, as all followers of the natural-law doctrine assert, valid only so far as it corresponds to the natural law, any norm created by custom or stipulated by a human legislator which is contrary to the law of nature must be considered null and void. This is the inevitable consequence of the theory which admits the possibility of positive law as a normative system inferior to natural law. The extent to which a writer abides by this consequence is a test of his sincerity. Very few stand this test.⁷³

71 AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 2; see also FINNIS, *supra* note 10, at 309 & n.69 (citing THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. 3, ch. 97 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975)).

72 KELSEN, *supra* note 1. The remaining sections (four through six) of Kelsen's essay focus mainly on problems of state power and private property. He is particularly concerned with post-Grotian thought, especially that of Locke, Comte, Spencer, Hegel, and Marx. He claims that "the most outstanding champions of natural law, from Grotius to Kant, have done their best to prove that private property is a sacred right conferred by divine nature upon man." *Id.* at 153. While some of the issues he raises could fruitfully be explored in light of Aquinas's teachings, I shall not conduct that exploration in the present Essay. For a sound exposition of the Thomistic natural law doctrine of property, see Joseph M. Boyle, Jr., *Natural Law, Ownership, and the World's Natural Resources*, 23 J. VALUE INQUIRY 191 (1989).

73 KELSEN, *supra* note 1, at 144.

Those who fail the test—the vast majority—are driven inexorably, Kelsen suggests, into the opposite position, namely, that “conflict between positive and natural law, although theoretically possible, is practically excluded.”⁷⁴ Indeed, Kelsen goes so far as to allege that “the natural-law doctrine has no other function than to justify the positive law—any positive law established by an effective government.”⁷⁵ So, in effect, the natural law theory, which begins by opening up *in theory* the possibility of the radical moral critique of regimes of positive law and government, ends by functioning *in practice* as an ideological apologetic for existing regimes—whatever they happen to be.

Kelsen’s principal targets here are Hobbes and Pufendorf, who, he alleges, despite their differences in other important respects and notwithstanding Pufendorf’s critique of Hobbes’s straightforward identification of positive with natural law, hold in common the view that the natural law must serve in the end to justify virtually any extant regime of positive law. Kelsen argues, moreover, that

there is a principle advocated by *all* leading representatives of the natural-law doctrine, by which a conflict between the natural and the positive—if at all admitted as possible—is deprived of any effect that could be dangerous to the established legal authority: it is the dogma that under the law of nature there is no or only a restricted right of resistance.⁷⁶

Is such an inherently “conservative” view justly attributable to Aquinas?

A commonplace criticism of Aquinas is that his evident endorsement of Saint Augustine’s statement that “a law that is not just[] seems to be no law at all”⁷⁷ shows that he is guilty of merging the categories of “legal” and “moral” in such a way as to render it analytically impossible for positive law and natural law to be in conflict.⁷⁸ (Of course, Kelsen himself does not consider Aquinas’s specific treatment of the relationship of natural to positive law in the essay here under review; Kelsen could not plausibly deny, however, that Aquinas’s treatment falls within what he says “all followers of the natural-law doctrine as-

⁷⁴ *Id.* at 145.

⁷⁵ *Id.*

⁷⁶ *Id.* at 148 (emphasis added).

⁷⁷ AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4 (quoting AUGUSTINE, DE LIBERO ARBITRIO bk. I, ch. 5 (Francis E. Tourscher trans., The Peter Reilly Co. 1937) (1524)).

⁷⁸ For example, Arthur C. Danto flatly ascribes to “the Thomistic defenders of natural law” the belief that “there cannot be an unjust law.” Arthur C. Danto, *Human Nature and Natural Law*, in LAW AND PHILOSOPHY 187 (Sidney Hook ed., 1964); see also H.L.A. HART, THE CONCEPT OF LAW 205–06 (1961).

sert.")⁷⁹ We have already seen that Aquinas's account of the derivation of positive law from natural law is complex and, in certain respects, quite subtle. Still further complexities and subtleties can be brought into focus if we consider the context of Aquinas's endorsement of Augustine's statement.

It will become clear that Aquinas's conception of "law" and "legality" is every bit as rich and highly nuanced as the conceptions advanced by modern analytical legal philosophers. To be sure, Aquinas does not go very far in carrying out the analytical work of explicitly identifying the respects in which concrete instances of the phenomenon of human law can deviate from "law" in a social-theoretical "focal" or "paradigmatic" sense (a sense, in part, built up out of consideration of concrete instances, albeit from an "internal" viewpoint that itself requires the application of critical-practical intelligence⁸⁰) while still retaining constitutive features of the concept of law. But he deploys the term "law" in an appropriately flexible way to take into account the differences between the demands of (1) intrasystemic legal analysis or argumentation (for example, in the context of professional legal advocacy or judging), (2) what we would call "descriptive" social theory (such as "sociology of law"), and (3) fully critical (such as "normative," "moral," and conscience-informing) discourse.

That Aquinas believed that laws could be and indeed sometimes were unjust is evident both from his many explicit references to unjust laws and from the very considerable attention he devoted to the problem of legal injustice.⁸¹ Central to his reflections were precisely the questions whether and, if so, how and to what extent unjust laws bind in conscience those subject to them to obey.⁸² It is clear that Aquinas believed that human positive law creates a moral duty of obedience, even where the conduct it commands (or prohibits) would, in the absence of the law (that is, morally, as a matter of natural law) be optional. This critical-moral belief in the power of positive law to create (or, where moral obligation already exists, to reinforce) moral obligation naturally suggests the question of whether this power (and the duties that are imposed by its exercise on those subject to it) is absolute or defeasible. If defeasible, under what conditions is it defeated?

79 Kelsen, *supra* note 1, at 144.

80 See FINNIS, *supra* note 18, at 11–19; HART, *supra* note 78, at 59–60, 86–88, 95–96, 113, 197, 226; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 171, 177 (2d ed. 1990).

81 See, e.g., AQUINAS, *supra* note 4, at pt. I–II, q. 96, art. 4 (discussing the ways in which a law may be unjust).

82 See *id.*

To answer this question, it is necessary to press the critical-moral analysis. What is the source of the power in the first place? Plainly it is the capacity of law to serve the cause of justice and the common good by, for example, coordinating behavior to make possible the fuller and/or fairer realization of human goods by the community as a whole. But, then, *from the critical-moral viewpoint*, laws that—due to their injustice—damage rather than serve the common good lack the central justifying quality of law. Their law-creating power (and the duties they purport to impose) is, thus, weakened or defeated. Unjust laws are, Aquinas says, “acts of violence rather than laws.”⁸³ As violations of justice and the common good, they lack the moral force of law; they bind in conscience, if at all, only to the extent that one is under an obligation not to bring about bad side effects that would, in the particular circumstances, likely result from one’s defiance of the law (such as causing demoralization or disorder,⁸⁴ as by undermining respect for law in a basically just legal system, or unfairly shifting the burdens of a certain unjust law onto the shoulders of innocent fellow citizens⁸⁵). That is to say, unjust laws bind in conscience, if at all, not *per se*, but only *per accidens*. They are laws, not “*simpliciter*,” or, as we might say, in the “focal” or “paradigmatic” sense, but only in a derivative or secondary sense (“*secundum quid*”).

Nothing in Aquinas’s legal theory suggests that the injustice of a law renders it something other than a law (or “legally binding”) for purposes of intrasystemic juristic analysis and argumentation. True, he counsels judges, where possible, to interpret and apply laws in such a way as to avoid unjust results where, as best they can tell, the lawmakers did not foresee circumstances in which a strict application of the rule they laid down would result in injustice and where they would have crafted the rule differently, had they foreseen such circumstances.⁸⁶ But even here he does not appeal to the proposition that the injustice likely to result from an application of the rule strictly according to its terms nullifies those terms from the legal point of view.

Nor does Aquinas say or imply anything that would suggest treating Augustine’s comment that “an unjust law seems not to be a law” as

83 *Id.*

84 *See id.* Note, however, that according to Aquinas one may never obey a law requiring one to do something unjust or otherwise morally wrong, and sometimes *disobedience* is required to avoid causing (or contributing to) demoralization or disorder. *See id.* For issues relevant to the translation of Aquinas’s phrase “*scandalum vel turbatio*,” see FINNIS, *supra* note 10, at 223 n.23, 273 n.112, 274 n.d.

85 *See* AQUINAS, *supra* note 4, at pt. II-II, q. 60, art. 5.

86 *See id.*

relevant to social-theoretical (or historical) investigations of what is (or was) treated as law and legally binding in the legal system of any given culture (however admirable or otherwise from the critical-moral viewpoint). So, for example, though H.L.A. Hart was among those who misunderstood Aquinas and his stream of the natural law tradition on precisely this point, no follower of Aquinas should suppose that Hart's "descriptive sociology" of law errs by treating as laws (and *legal systems*) various social norms (and social-norm-generating institutions) that fulfill the criteria or conditions for legality or legal validity of Hart's concept of law, despite the fact that his social-theoretical enterprise (reasonably!) prescinds to a considerable extent—indeed, it seeks to prescind as far as possible—from critical moral evaluation of laws and legal systems.⁸⁷ The criticism Hart's work invites from a natural law perspective has nothing to do with his willingness to treat unjust laws as laws; rather, it has to do with his unwillingness to follow through on the logic of his own method and his insight into the necessity of adopting or reproducing an *internal* point of view—a method which, if followed through, will identify the focal or paradigmatic case of law as *just* law (law that serves the common good) and the focal or paradigmatic case of the internal (or "legal") point of view as the viewpoint of someone who understands law and the legal system as valuable and legal rules as, ordinarily, binding in conscience because (or insofar as) they are just and, *qua just*, serve the common good.⁸⁸

With this background in mind, let us address directly the question of whether Aquinas ("like all followers of the natural-law doctrine") embraces some principle which excludes or effectively restricts the right of people to resist tyranny or gravely unjust regimes of law. Throughout his writings, Aquinas grapples with the problem of tyranny and, indeed, with the question of the legitimacy of tyrannicide. In his early work, as well as in his most mature writings, he defends the proposition, not only that the unjust acts of tyrants are devoid of moral authority, but that they constitute a kind of criminality which can justify revolutionary violence for the sake of the common good, and even tyrannicide, as a kind of resistance to, and/or just punishment of, the tyrant.

87 See generally HART, *supra* note 78.

88 This criticism of Hart (and Raz) is carefully developed by Finnis. See FINNIS, *supra* note 18, at 12–18. On Hart's misinterpretation of Aquinas on these matters, see *id.* at 351–66.

It is true that one work, *De Regno ad Regem Cypri*,⁸⁹ a theological treatise from Aquinas's middle period written to inform the conscience of a Christian king, suggests disapproval of tyrannicide. This work is probably authentic, or at least substantially so, though some responsible commentators have doubted Aquinas's authorship.⁹⁰ However that may be, even John Finnis, who treats the work as probably authentic, warns that it is "never a fully reliable and satisfactory source for the opinion of Aquinas."⁹¹ The warning seems particularly apt with respect to the question of tyrannicide in view of the inconsistency of the teaching of *De Regno* both with earlier and later works of unquestioned authenticity and great clarity.

Tyranny, for Aquinas, paradigmatically is rule (whether by the one, the few, or the many) in the private interests, or for the private ends, of the ruler or rulers at the expense of the common (public) good.⁹² The tyrant, in effect, uses, rather than serves, those over whom he exercises power and for whose sake (from the critical-moral viewpoint) public authority exists.⁹³ Aquinas's earlier writings distinguish between two types of tyranny: (1) the tyranny of those who abuse authority that they legitimately acquired and hold and (2) the tyranny of those who obtained and hold power by usurpation.⁹⁴ He suggests that usurping tyrants—as, in effect, parties making war against the political community—may legitimately be resisted and even killed by anyone who has the effective power to do so.⁹⁵ By contrast, where legitimate rule has degenerated into tyranny, the tyrants are entitled to something which we might call "due process of law." It is up to other public officials, operating as such, and not (ordinarily) to private citizens to overthrow their regimes and, if necessary, bring them personally to trial and punishment (including, where appropriate, capital punishment).⁹⁶

It is noteworthy that in his most mature writings, Aquinas, as Finnis observes, "seems to have lost interest in the contrast between

89 THOMAS AQUINAS, ON KINGSHIP TO THE KING OF CYPRUS (Gerald B. Phelan trans., 1949).

90 See, e.g., I.T. Eschmann, *St. Thomas Aquinas on the Two Powers*, 20 *MEDIAEVAL STUDIES* 177 (1958).

91 FINNIS, *supra* note 10, at 288; see also *id.* at 228, 254 n.d.

92 See AQUINAS, *supra* note 4, at pt. II-II, q. 42, art. 2.

93 See *id.* at pt. I-II, q. 105, art. 1. Note Aquinas's claim that tyrants "prey[] on their subjects" and rule them "as though they were . . . slaves." *Id.*

94 See FINNIS, *supra* note 10, at 289-90.

95 See 2 AQUINAS, *supra* note 7, at d. 44, q. 2, art. 2.

96 On the distinction between usurping tyrants and legitimate rulers who degenerate into tyranny, see FINNIS, *supra* note 10, at 289-90 and the sources cited therein.

usurpers and other kinds of tyrant."⁹⁷ In the *Summa Theologica*, he treats tyranny of any kind as an essentially criminal type of rule—indeed, a form of sedition—that can justify the revolutionary action of the people and the punishment of the tyrants.⁹⁸ (I say "can" justify since, as always for Aquinas, a final moral judgment as to the justice of resorting to force must take into account the impact of likely unintended bad side effects. Otherwise, morally permissible revolutionary action might, in any particular case, be unjust to innocent third parties who would, in the circumstances, be made unfairly to bear the burdens of such side effects.)

Aquinas's "natural-law doctrine," then, does not subscribe to the principle (advocated, according to Kelsen, by *all* leading representatives of the natural law doctrine) which "deprives of any effect" conflicts between positive and natural law "which could be dangerous to the established legal authority."⁹⁹ Although Aquinas does not treat the right of revolution in the face of tyranny as absolute, he plainly does not embrace Kelsen's alleged "dogma that under the law of nature there is no or only a restricted right of resistance."¹⁰⁰ Tyrants—not least those who came to power by legal means and govern by issuing and enforcing laws (*lex tyrannica*)¹⁰¹—must look elsewhere, rather than to Aquinas, for moral arguments designed to insulate them from insurrection and punishment for their misrule. Nothing in his thought merges natural and positive law in such a way as to confer upon positive law an automatic conformity to the requirements of natural law. On the contrary, according to Aquinas, the positive law of any regime and those rulers who create and enforce it stand under the judgment of natural law. Tyrannical rule is a "perversion of law,"¹⁰² and, as such, far from creating a duty of obedience, it gives rise to a (*prima facie*) right of resistance to the uttermost.

CONCLUSION

Despite his sometimes sweeping statements about its substance and what "all" of its principal exponents have held, we have seen that Kelsen's exposition of "the natural-law doctrine" has virtually no points of contact with Aquinas's thought. Hence, Kelsen's critique of

97 *Id.* at 290 (citing AQUINAS, *supra* note 4, at pt. II-II, q. 42, art. 2, and *id.* at pt. II-II, q. 104, art. 6).

98 See AQUINAS, *supra* note 4, at pt. II-II, q. 42, art. 2.

99 KELSEN, *supra* note 1, at 148.

100 *Id.*

101 See AQUINAS, *supra* note 4, at pt. I-II, q. 92, art. 1.

102 *Id.*

the doctrine has little or no applicability to Thomistic natural law theory. Neither Aquinas's theory of the identification of natural law principles, nor his account of their relation to divine power and to positive law, nor his views regarding their implications for the problems of legal injustice and tyranny are captured in Kelsen's exposition and critique. Kelsen did well, one might conclude, to avoid mentioning Aquinas, if he was to insist on describing "the natural-law doctrine" as he did. Still, it is odd, to say the least, for the "tribunal of science" to have left unheard and unmentioned the thought of so central an exponent of the natural law tradition.