

BIOETHICAL CONTROVERSIES AND THE LANGUAGE OF RIGHTS

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Abstract

The paper argues that the language of rights is conceptually inadequate for giving precise moral direction to the deliberations that arise over questions in bioethics. It begins with background on the development of the notion of human rights in Western thought, and from this attempts to show in what sense human rights are morally derivative rather than foundational, and how this fact leads to imprecision in 'rights-discourse'. It ends by suggesting that the Aristotelian-Thomistic tradition of practical reason, first principles and moral norms is a firmer conceptual foundation for addressing bioethical questions.

Introduction

As advancements in biotechnology increase, bioethical controversies keep pace. The language of rights finds itself a common medium for expressing the claims of competing voices. We hear of the rights of the medical profession and the rights of patients; of the right to life (and self-preservation) and the right to die; of the right to health care and to refuse treatment; the right to clinic access and clinic protest; the right to be informed and the right to be left alone. Embryos have rights, scientists have rights, the scientific community has rights, patients have rights, hospitals have rights, and insurance carriers have rights. Of late we even hear of the rights of clones. We talk about human rights, natural rights, positive rights, legal rights, moral rights, absolute rights, prima facie rights, professional rights, inalienable rights and inviolable rights. Rights are acquired, forfeit, violated, infringed, transferred and claimed. "Rights language" is common to bioethical discourse in ethics, law and politics.

But what does it offer towards resolving difficult questions? I contend that the language of rights, despite possessing powerful rhetorical force, offers little philosophical help. This is not to say that prominent and forceful accounts of human rights—e.g., by the U.N. in its 1948 Universal Declaration, or by Pope John XXIII in his landmark encyclical *Pacem in terris* (1963)—have no value in expressing or defending general truths about moral claims arising on account of being human, nor that when employed in tandem with systematic ethical reasoning do not add persuasive force to moral argument. My contention is that the language of rights is conceptually inadequate for articulating, with needed specificity, the moral claims and duties arising from human nature in all its complexity, and corresponding to those claims the moral norms that direct the deliberations and actions of agents in relation to bioethical questions. This is for two reasons. First, rights properly understood are not foundational, and second, we can get from moral foundations to moral judgements on what is right and wrong without going through the concept of rights. In this essay I attempt three things: first, I give some background on the development of the notion of human rights in Western thought. Second, I show how (i.e., in what sense) human rights are morally derivative rather than foundational, and how this fact leads to imprecision in ‘rights-discourse’. Finally, I point (and only point) to the Aristotelian-Thomistic tradition of practical reason, first principles and moral norms as a firmer conceptual foundation for addressing the baffling array of new questions arising in the field of bioethics.

‘Rights’ as justice claims:

The earliest antecedents to the English word “rights” are found in Greek philosophy and Roman law. The Greek word for “right,” *dike*, is used by Homer as far back as the 9th-8th centuries BCE. He uses the term to mean that which is prescribed by the rules or customs proper to civilized men, in contrast say to the vulgar ways of the uncivilized Cyclopes. Over the next few centuries the word begins to take on moral connotations. *dike* in Thucydides (d. ca 401 BCE) and Xenophon (d. ca 352 BCE), for example, implies not only the exigencies of social and political mores, but also the moral idea of claims between individuals. The duties binding agents are emphasized here, rather than liberties or prerogatives one is entitled to claim (Muirhead, 1918).¹ The Latin antecedent, *ius*, popularized in Roman law in the time of the Republic, originally was closer in meaning to our words *law* (as in *ius gentium*) and *justice* (*iustitia*) than to the modern notion of “rights” as subjective powers. *Ius*, Michel Villey maintains, was conceived more as an “incorporeal thing.” So for example a *fundus* was not merely a field, but a plot of land with its legal qualities of usufruct, inheritance and the like (Tierney, 1997). To speak of *ius* was to speak of something that was legally binding and obligatory. When towards the end of the second century BCE

Roman law came under ethical scrutiny under the influence of the philosophical circle of Scipio Aemilianus, the principally legal meaning of *ius*² united with the Stoic notion of the perfect and universal law, the *lex naturale*, and led to an understanding of *ius* which, while maintaining its legal connotation, combined with the notion of *universal* justice. So, for example, when Cicero in *De Republica*, bk. III, defines a “people” as a “coming together of persons who are united by a common agreement about *law and rights (ius)* and by the desire to participate in mutual advantages” (Macmillan, 1976: p.195),³ the *ius* in question is grounded in something higher than that which proceeds from the will of the Court of the Areopagus or from simple common interest. The right is grounded in a normative order. Again, the emphasis is on duty.

In its developed classical form *ius* means that which is due or owed to somebody. To act according to right is to act justly, hence Ulpian’s famous definition of justice, “to render to each his due” (*suum ius cuique tribuere*). Drawing on the Aristotelian notion of $\forall x \exists y (x \neq y \rightarrow Hxy)$, *ius* refers to the quality of a situation, an objectively right state of affairs, “the just,” what John Finnis describes as, “what’s fair” (Finnis, 1980: p. 21-22). This understanding is borrowed and adapted for Christian purposes by the early Church Fathers,⁴ and, not surprisingly, finds a systematic development by Aquinas in the thirteenth century) (Tierney, 1997). For the sake of convenience I will focus on Aquinas’ treatment.

Aquinas never uses the uniquely modern term “human rights,” understood as substantive qualities inhering in persons (‘my rights,’ ‘his rights’). Villey, in fact, maintains that no such meaning was even known to him (Tierney, 1997:23). Nevertheless, central to his doctrine of justice is the notion of right (*ius*) which lays down the theoretical foundation for the modern concept, if not even containing the concept implicitly. Justice, he tells us, related to the verb “to adjust,” denotes a kind of equality of one thing in reference to another insofar as an adjustment is a correction of something to bring it into conformity with something else (*Summa Theologiae (ST)*, II-II, question (q.) 57, article (a.) 1c).⁵ The notion of equality, therefore, denotes essentially *relation to another*, for, as Thomas says, “a thing is equal, not to itself, but to another (*ST*, II-II, q. 58, a. 3).”⁶ So the *rightness* in an act of justice is the adequate expression of equality in relation to another.⁷ Speaking from the perspective of an expressing agent *B*, we may say that it is *right* for *B* to express an act of such equality to person *A*, or from *A*’s perspective (the beneficiary of the equality-expressing act), that it is *A*’s *right* to have such an act of equality expressed toward him. To say person *A* has a *right* vis-à-vis person *B* is to say that *A* is equal in some way with *B* and “the right” or “the just” (as substantives) is the expression of that equality. The just thing, the *ius*, is the quality that characterizes the rightness of the relationship; it is objective, a “thing” (*rem*). If the equality is natural equality, the correlative right is *natural right* which can be said to arise by prescription of the natural law (*ius naturale*). If it is

established by agreement or common consent, that is by virtue of positive law, then it is *positive right* (*ST*, II-II, q. 57, a. 2c).⁸ So according to Aquinas, the proper object of justice is another person's right, or simply "the right" (*ius*) (*quod iustum est*, what is just). *Ius* signifies the just thing in itself (*ipsam rem iustam*) (*ST*, II-II, q. 57, a. 1, ad. 1).⁹

Aquinas develops this definition in his famous account of justice in the *Summa Theologiae*: "justice is the habit by which a person grants to each one his own *right* by a constant and continuous will" (*ST*, II-II, q. 58, a. 1c).¹⁰ Justice, he says, is granting to each one "what belongs to him (*quod suum est*)" (*ST*, II-II, q. 58, a. 1, ad. 5).¹¹ That which belongs to him, Aquinas tells us, is "what is due him according to equality of proportion" (*ST*, II-II, q. 58, a. 11c).¹² So when Thomas says that the object of justice is *ius*, he means that justice *secures* what is rightly owed, or again, secures the *right* of another, that is, secures what is due, what is one's own, what one is entitled to (*ST*, II-II, q. 122, a. 6c).¹³ Reciprocally, injustice (*in-ius-titia*) is a violation of right, a failure to render to another his due. Here inequality (*inaequalitatem*) is the object of the act (*ST*, II-II, q. 59, a. 1).¹⁴

It is important to see that Aquinas' word *ius*, like its classical antecedents, emphasizes the idea of responsibility *to* (i.e., of duty). But it is also important to see that it implicitly contains the idea of the claims of a beneficiary. As John Finnis points out (1998: p.136-137), and I think rightly, when Aquinas lists general duties owed to all persons by virtue of their being human persons, e.g., the duty to inflict no injury on any person, he implicitly itemizes 'rights' "to which one is entitled simply by virtue of one's being a person." "Aquinas would have welcomed the flexibility of modern languages which invite us to articulate the list not merely as forms of right-violation (*in-iur-iae*) common to all, but straightforwardly as rights common to all: human rights" (Finnis, 1998: p.136-137).¹⁵

In the two centuries after Aquinas a transition occurs in the usage of the term *ius*. While the original connection between justice and right is maintained, *ius* comes to be understood as something inhering in a person, a power or liberty that someone has or possesses. The canonist Johannes Monachus, for example, writing around 1310 offers the following definition of right: "*ius* means the right and just, as when we say so-and-so has or does not have a right (*ius*)" (Tierney, 1997). The subjective orientation was most straightforwardly articulated in medieval feudal conceptions of property ownership. Individual and corporate landholders like lords, guilds, city corporations and monastic chapters would, when the need arose, complain to their local prince or bishop to uphold their "rights," by which was meant the prerogatives of their dominion over their estates (O'Donovan, 1996). In the fourteenth century, Byzantine spiritual writer and

political activist, Nicholas Cabasilas (c. 1322-1392), protesting against what he judged to be the unjust expropriation and taxation of monastic properties, argued that a lawful property title, acquired through purchase or inheritance, secures a “right” (*:6∇4≡<)(*ius*) which is “inviolable” (Sevcenko, 1957: p.10-11). It entitles one to dispose of that property without interference (Sevcenko, 1957).¹⁶ Those, he says, who think that a “right grows old, like a living body worn out by time” are badly mistaken” (Sevcenko, 1957: par.11)

The idea of *ius* as something original and subjective is also used by the Franciscans in the fourteenth century to defend a conception of evangelical poverty which entailed the absolute rejection of ownership (O’Donovan, 1996: p. 248). Trying to reconcile this ideal with the practical need to *use* material goods for basic subsistence, Franciscan theologian William of Ockham posits a “right of use” (O’Donovan, 1996; Tierney, 1997: p. 27-34).¹⁷ Sometime earlier Bonaventure treating the same subject posited a “right of natural necessity” (O’Donovan, and O’Donovan, 1999).¹⁸ And, John Peter Olivi, identifying *ius* with *potestas* (a power), speaks about the “right of royal power,” and the “right of property” (Olivi, quoted in Tierney, 1945: p. 39). Jean Gerson in the mid fifteenth century also connects the notion of right to the notion of ownership but ownership in a more primordial sense (in O’Donovan and O’Donovan, 1999: p. 528). “The definition of *right* is: a proximate faculty or power which belongs to some subject as prescribed by primary justice.” Primary justice is essentially God’s natural ordering of the universe. All things that have being are the beneficiaries of the prescriptions of primary justice. What primary justice prescribes to a thing can be said to be *possessed* by right. “Of anything,” Gerson writes “we may say that it has ‘right’ to the extent that it has ‘being’”. For everything has the right, or title, to possess whatever it may be that the absolute norm of primary justice prescribes that it possess” (O’Donovan, and O’Donovan,1999: p. 528).

Three and a half centuries after Aquinas, Spanish Jesuit, Francisco Suarez (c.1610), examining the term *ius*, offers two related meanings, the first arising from the requirements of equality in a given situation, the second as something someone *has*. The first, identical to Aquinas’ conception, means “that which is just” (*iustum*), “that which is equitable” (*aequum*), and is the object of justice (*iustitia*) (Schneewind, 1990: p.69). *Ius* in the second sense is “a certain moral power which every [person] has, either over his own property or with respect to that which is due him” (Schneewind, 1990: p.70). The second, he writes, is no less “the true object of justice” than the first (Schneewind, 1990). *Right* in the second sense can be said to be the prerogative conferred on a subject by *right* in the first sense. The Dutch jurist and statesman Hugo Grotius, writing in 1625, offers a similar definition: “a moral quality of the person enabling him to have or do something justly” (Finnis, 1980: p. 207).

From the dawn of the Enlightenment through the time of the French Revolution, the notion of right undergoes a fundamental change. From rights as the primary objects of justice emerges an idea of rights simply as primary, detached from justice claims. On the heels of Suarez and Grotius comes Hobbes' (1651) influential notion of natural right as the "Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature" (Tuck, 1991: p. 91). Far from being an inherent liberty to secure justice-claims, right is conceived as the liberty to advance self-interest. Hobbes's departure from the classical view is epitomized in his famous statement from the *Leviathan* describing the natural state of mankind: "because the condition of Man is a condition of war of every one against every one; ... It follows that in such a condition, every man has a Right to every thing; even to one another's body" (Tuck, 1991: p. 91). Though Hobbes' account was rarely taken up in full, and often harshly criticized, (see Tierney, 1997: p. 340) his account still exercised enormous influence.¹⁹ For even when a later theorist like Locke related rights to duties, since he shared the first principle of Hobbes' anthropology (in contradiction to classical tradition), namely that humans are by nature solitary, his rights theory ends by prioritizing the basic claims of the solitary individual: the preservation of life, liberty and property.

By divorcing rights from prior justice claims, claims that require that *ius* be done, subjective rights in the Hobbesian tradition were cut loose from their intrinsic relationship to a normative moral order. To act on a so-called right did not necessarily mean to be *doing* right.²⁰

Unsurprisingly, Catholic philosophy, with its legacy in the classical tradition mediated through Aquinas, rejected the radically new understanding of rights proposed and defended by certain Enlightenment thinkers. In fact, the Catholic Church delayed for nearly two centuries ratifying the subjective orientation in any form. The language of natural rights as "inherent in every person and prior to any Constitution and State legislation," was only fully taken up in the 20th century (Pope John Paul II, 1995). The first systematic declaration of the Catholic Magisterium on "human rights" is John XXIII's encyclical letter *Pacem In Terris* (1963). In part one, he writes:

every human being is a person . . . By virtue of this, he has rights and duties of his own, flowing directly and simultaneously from his very nature, which are therefore universal, inviolable and inalienable. . . . The natural rights . . . are, however, inseparably connected, in the very person who is their subject, with just as many respective duties; and rights as well as duties find their source, their sustenance and their inviolability in the natural law which grants or enjoins them (Pope John XXIII, 1965).

Consistent with the traditional notion, right here is grounded in a prior normative order. Because the encyclical is speaking about rights which are proper to the human person, the order to which it refers is the order of human nature (i.e., the natural law). The principal thing which separates this account from Aquinas'—and which it shares with the Hobbesian tradition—is the subjective orientation. Otherwise it is consistent with Aquinas' understanding. Aquinas cast the term “right” in the language of justice, and his successors in the language of subjective claims; both orientations however maintain the basic understanding of *ius* which comes down to us from Roman law: rendering (or receiving) what is *due*.

The language of subjective rights was first constitutionally formulated in the 1776 “Virginia Bill of Rights” (June 12) and the “American Declaration of Independence” (July 4). It was gradually incorporated into modern constitutions throughout the world, including the former Soviet Union and China, and finally was accepted wholesale by the General Assembly of the United Nations in the famous *Universal Declaration of Human Rights* in December 1948.²¹ The language of subjective rights is now a recognized part of all international and constitutional law.

“Rights” as derivative:

It should now be clearer what I meant when I said human rights, properly understood, are not morally basic: the term “rights” is a shorthand way of referring to claims or powers conferred by the prior demands of justice. It is only after we reflect on the basic requirements of justice that we can speak meaningfully about rights. And while some (perhaps most) of the problems surrounding contemporary ‘rights talk’ derives from erroneous Enlightenment ideas about the asocial nature of the human person, I suggest that even when correctly understood “rights,” given their derivative nature, remains an ambiguous medium for ethical discourse. Let me illustrate this by briefly considering some ambiguities associated with the term the “right to life.”

To what are we referring when we appeal to the concept of the “right to life”? Is it the right never to be subject to intentional killing, not to have our lives taken without justification, not to be killed by anyone at any time, not to be harmed, not to be bothered (i.e., to be left alone); the right, as in Hobbes’s ‘state of nature,’ over another’s life? Does it entitle me to claim from others that positive action be taken to preserve my life, or every measure possible be taken, or that I be granted access when ill to basic medical care, or when well to preventative (“wellness”) care, or to claim from others that my economic quality of life be

improved (“welfare rights”)? Without a prior consideration of the content and scope of a given right, we do not know what kinds of actions it permits or forbids.

What if we qualify the term with the adjective “inviolable”? Would that make it any clearer? I think not. A right whether natural or constituted by positive law is by definition inviolable. But its inviolability does not necessarily specify its proper scope. Once it is established that a right exists then it is fixed and only violated at the cost of (greater or lesser) injustice. For example, if bicycles are forbidden from being ridden down High Street between the hours of 7:30 AM and 6:30 PM every day but Sunday, then *ceteris paribus* I have a right to ride my bicycle down that street at all other times. To forbid me arbitrarily would be unjust. If however during legitimate bicycle hours I am riding a unicycle, or riding recklessly, or not riding at all, or something else that does not fall into the scope of that right, then constraint against me may be justified. Further, if President Bush plans a trip which includes traveling down High Street during the time window permitting bicycle riding, then for that period the right may be legally revoked by the same authority that established the right. In that case no right exists and there is nothing to violate. We might say that contained implicitly within the definition of the right is the caveat “may be suspended for lawful reasons by lawful authority.”

A human or natural right, like the right to life, on the other hand, can never be annulled or revoked by positive law and hence remains “inviolable” at all times. But again, the question arises, in what does the “right” consist? Is it absolute and unqualified? Or, can it be restricted? On whose authority? Common morality, for example, understands the right to life to be limited by both natural and positive law, illustrated in the commonly accepted ‘right’ to punish (and in the entire criminal justice system) and the ‘right’ to self-defense.

As I have said, it is only after justice-claims have been analysed and assessed that we can say what a right entails, that is what we have a ‘right’ to do and not to do, to expect to be done and expect not to be done to us. This raises a question: from where do the claims of justice arise? This leads me to the final part of this essay.

Human Good, Human Action and Moral Norms:

The ethics of Aristotle offers clarity on the foundations of morality and hence of justice. Aristotle asserts that all things act for *ends*. The end of an action—that ‘for the sake of which’ something is done—he also calls a “good.” Rational creatures are moved to act for ends, not by irresistible instinct (like non-rational

animals) or intrinsic principles of growth (like vegetation), but through a rational recognition of the choiceworthiness of realizing certain ends or goods in and through human action (Barnes, 1984, pp. 1729-30, 1733-36).

In what sense are human goods recognized as “choiceworthy”? Aristotle holds that human goods correspond to the fulfillment of capacities of human nature. And the realization of the capacities of a thing’s nature corresponds to that thing’s fulfillment or flourishing, what Aristotle calls, in the case of human persons, *eudaemonia*. Persons are moved therefore to act for ends which they perceive correspond to their well being. Of course not all ends objectively correspond to human well being-- as Aristotle says, not all who set out to be happy end up happy--so it is important to identify aright the genuine goods corresponding to human fulfilment. How then do we come to understand a thing’s ‘nature’?

To understand a thing’s nature, Aristotle says in *De Anima*, we must first understand its potentialities, i.e., its proper capacities; but a thing’s potentialities can only be discovered by first identifying its corresponding acts; and acts, in turn, are understood when the objects of those acts are identified: objects illuminate acts, acts potentialities, and potentialities natures (Barnes, 1984 pp 660-661). For example, to understand our rational nature we need first to understand our capacity for thought. But in setting out to understand our thinking faculty, we must first observe, reflect upon and identify *acts* of thinking: “for activities and actions” (i.e., what an agent does), Aristotle writes, “are prior in definition to potentialities” (i.e., precedes the question, what enables it to do what it does (Barnes, 1984). So the question, what does an agent do?, *think*, precedes the question, what enables it to think? But to understand intelligent acts we must go back to the objects of those acts, namely, that which is thought. Thus, to understand the faculty of thought, Aristotle writes, we start with what is intelligible (Barnes, 1984). The same schema holds for discerning the nature of our practical intellect. To understand its nature we must first, by examining its acts, know what are its ends, that is, its goods. Since the practical intellect is the faculty for moral deliberation and judgment, whose *raison d’etre* is the pursuit of intelligible ends corresponding to human fulfillment, might say that the rationally recognizable ends of the practical intellect are the proper subject matter of the practical science of ethics.²²

Aristotle starts us off but we need to turn to Aquinas for the next step. Aquinas tells us that these objects are the first principles of practical reason. Recall that he speaks in the *Summa Theologiae* about man’s inclination to preserve himself in being in his famous question on natural law.²³ Here he says the order of inclinations corresponds to the order of the first principles of the natural law. But the first principles of the natural law (or of practical reason (*ratio practica*)) are not derived from the inclinations, nor from human nature, nor for that matter from anything else. That is precisely why they are called *first* principles, first in

the sense of primary, i.e., not derived from any more basic principles. Aquinas tells us that first principles are “self-evident,” by which he means known in themselves.²⁴ As soon as they are presented to the practical intellect and their terms understood, they are recognized to be true without being inferred through the assistance of a middle term. This is what he means when he says they are “naturally known.”²⁵ The first principles differentiate propositionally that which Aquinas says is most basic to our practical understanding, namely, apprehension of the “good.”²⁶ The most basic undifferentiated principle of action then is this: “Good is that which all things seek.”²⁷ Those things, therefore, that practical reason naturally understands as good, as desirable to get at, as ends worth pursuing, belong propositionally expressed to the first principles of practical reason, e.g., ‘life is good and worthwhile to pursue,’ ‘knowledge is good and choiceworthy,’ ‘friendship is good and desirable to have,’ etc.. The goods which are the objects of the primary principles can be called ‘basic’ in the same sense that the principles are said to be basic, i.e., they are not means to any other goods (ends), they are goods sought for their own sakes.²⁸ So the first principles can be said to be rationally intelligible foundational principles of human action directing the acts of intelligent agents toward the realization of basic human goods; their very ‘directiveness’ is a principle of action. The goods toward which they direct are recognized by rational agents as desirable, as choice worthy, as ends to be pursued. Motive-to-act therefore is a result of the persuasive force of human good.²⁹ Thomas tells us a few of the basic goods: the good of bodily life and bodily integrity, of the procreation and education of children, of knowledge, especially of God, and of community or friendship.³⁰

Every judgment of practical reason, Aquinas says, proceeds from the first practical principles, the objects of which are basic human goods.³¹ Moral precepts guide our deliberations and judgments in accord with the good of the person.³² It follows, that moral precepts, like those of the Decalogue, are derived from first principles and basic goods. The role of moral precepts is to guarantee that human action stays fully reasonable, that is to say, directs action in such a way as to promote and protect human good.³³

Conclusion:

How then do we proceed with discerning the requirements of justice? In general terms justice requires that I respect in my neighbour and my neighbour in me the goods which correspond to human fulfilment. ‘Neighbour,’ of course, includes the whole network of relationships directly and indirectly affected by the details of a given situation. And so, in a simple act of commutative justice, my intended course of action must not only respect the goods of the beneficiary, but

must also be mindful to respect (i.e., not unfairly harm) the goods of all others impacted by my actions.

In terms of liberal discourse on topics in bioethics, dialogue would begin by seeking a consensus on what constitutes the good of the human person and proceed by asking how an already existing, proposed or envisaged procedure, policy, or action relates to the protection and promotion of human good. Rather than framing discussion over controversial issues in terms of rights or so-called conflicts of rights, for example, the rights of embryos vs. the rights of scientific research, the rights of the unborn vs. the rights of pregnant mothers, we would ask whether, how and to what degree the procedure, policy, or action defends and promotes, or denigrates and destroys fundamental human goods like life, knowledge, friendship, family and religion.

Notes

1.Liddell and Scott's Greek and English Lexicon (1944 ed.) notes this use of the term in the phrase *dikaios emi* meaning '*I am bound to do*'; it supplies also the later usage, '*I have a right to do.*'

2. Its legal meaning developed in response to the pressing need to incorporate conquered foreigners and their wide variety of local law and ceremonial practice into a common system of law.

3. Cicero, *On the Commonwealth*, Bk. III., tr. George H. Sabine and Stanley B. Smith (New York, Macmillan Publishing Co., 1976), 195, emphasis added.

4. See Augustine's *De Civitate Dei* bk. II, ch. 21 and bk. XIX, ch. 21. Villey argues that the early Christian view and the classical view are incompatible; he maintains that under the influence of the Church Fathers *ius* came to be understood in terms of legal precept (i.e., prescriptive law); Brian Tierney argues that the two meanings (moral and legal) are not incompatible; see Tierney, 23, 32-33.

5. Thomas Aquinas, *Summa Theologiae* (hereafter *ST*), II-II, q. 57, a. 1c.

6. *ST*, II-II, q. 58, a. 3.

7. Aquinas writes in *ST*, II-II, q. 57, a. 2: "the *right* or the *just* is a work that is adjusted to another person according to some kind of equality."

8. *ST*, II-II, q.57, a. 2c.

9. *ST*, II-II, q. 57, a. 1, ad. 1.

10. *ST*, II-II, q. 58, a. 1c; "*iustitia est habitus secundum quem aliquis constanti et perpetua voluntate ius suum unicuique tribuit*". Saint Ambrose (339-97) uses almost the identical definition in *De Officiis*, bk. I, ch. XXIV: "*iustitia est quae unicuique quod suum est tribuit*".

11. *ST*, II-II, q. 58, a. 1, ad. 5.

12. *ST*, II-II, q. 58, a. 11c. By saying equality of proportion and not generic equality Aquinas self-consciously avoids endorsing what is called today 'egalitarianism'.

13. *ST*, II-II, q. 122, a. 6c.

14. *ST*, II-II, q. 59, a. 1.

15. Tierney also thinks the classical objective notion of *ius* lends itself to a rendering in terms of subjective right without necessarily lending itself to distortion. He argues this against Villey who maintained: "The notion of

subjective right is logically incompatible with classical natural right.” See Tierney, 32-34, 77.

16. With respect to the question of rightful state interference in the affairs of property owners, Cabasilas anticipates with remarkable precision Mill’s ‘grand simple principle’: he writes “But on this matter [i.e., on how owners ought to manage their property] the laws contain no directives; it is not a valid charge ... that such-and-such a one misspent his property, laid it out on the wrong things, purchased goods that were no use, named unsuitable people instead of wise and upright people as his heirs. Legislators ... demand restraint from us all only where others can be harmed; in private affairs not only do they allow autonomy, but they enforce the observance of the owner’s dispositions.” *Illegal Outrages*, par. 10.

17. Villey argues that Ockham’s 14th century response to Pope John XXII in relation to the controversy over Franciscan poverty and the question whether friars could really renounce a *right* of use in all exterior things, including in the things they in fact used, was “the decisive moment in the history of subjective right.” Without denying that the Franciscan Order in the 13th and 14th centuries was “a cradle of rights doctrines,” Tierney argues convincingly against the claim to Ockham’s pivotal status. See Tierney, 27-34.

18. In his influential work, *A Defense of the Mendicants* (no. 10), Bonaventure itemizes four different sources of right which bear upon material possessions: first, the ‘right of *natural necessity*’ refers to material goods needed to live; second, the ‘right of *brotherly love*’ refers to goods held in common by the community of the baptized; third, the ‘right of *worldly civil society*’ refers to the kind of personal ownership found in civil society; and fourth the ‘right of *ecclesiastical endowment*’ which refers to the material goods bestowed upon the Church. (translated in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, eds. Oliver O’Donovan, Joan L. O’Donovan (Grand Rapids, Mich: Eerdmans, 1999), 317-18; cf. Tierney, 36-7.

19. Tierney asserts: “Hobbes’s work is best seen as an aberration from the mainstream of natural rights thinking that flowed from the medieval jurists through Ockham, Gerson, and Grotius to Pufendorf and Locke and writers of the Enlightenment.” (Tierney, 340)

20. For example, the following incoherent assertion is found in a contemporary bioethics textbook: “Often our statement that someone ‘has a right to do X’ implies nothing about the morality of the act, other than that others have no right to interfere with it. Thus, one can consistently affirm that a woman has a moral or a legal right to have an abortion and likewise affirm that she is not acting rightly in

exercising her right.” Tom Beauchamp, James Childress, *Principles of Biomedical Ethics*, 4th ed. (Oxford: Oxford University Press, 1994), 73.

21. The declaration was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. Its moving preamble reads: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people; whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law; whereas it is essential to promote the development of friendly relations between nations; whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms; whereas member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms; whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, now therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member States themselves and among the peoples of territories under their jurisdiction.”

22. For Aristotle, ethics (i.e., the studied pursuit of the good life) is unconditionally practical [*Ethics*, 1095a3-5]; human fulfillment, therefore, reposes not in a passive condition of body or soul but first and always in action. Since he thinks goods are commensurable, he concerns himself principally with “the highest good”, i.e., a good choice-worthy in itself and never chosen for the sake of anything else which he identifies to be happiness. And happiness, he says, exists in “an activity of the soul expressing complete virtue.” [*Ethics*, 102a5]

23. Aquinas, *ST, I-II*, q. 94, a. 2c.

24. “they are apprehended universally” (*in apprehensione omnium cadunt*), *ibid.*

25. “*naturaliter apprehendit*,” *ibid.*

26. “*bonum est primum quod cadit in apprehensione practicae rationis*”, *ibid.*

27. “*Bonum est quod omnia appetunt*.” *Ibid.*

28. Aquinas teaches elsewhere that among ends, some ends are ultimate in that beyond these ends the agent seeks nothing further, e.g., a doctor intends health beyond which he is satisfied. (If this were not the case then actions would tend to infinity, which is impossible.) These ends, or goods can be called basic; see *Summa Contra Gentiles*, bk. III, ch. 2: 3.

29. Aquinas writes that “the proximate mover of the will is the good as apprehended, which is its object and it is moved by it, just as sight is by color. So, no created substance can move the will except by means of a good which is understood. Now, this is done by showing it that something is a good thing to do: this is the act of *persuading*.” *Summa Contra Gentiles*, bk. III, ch. 88: 2.

30. *ST*, I-II, q. 94, a. 2c.

31. *ST*, I-II, q. 100, a. 1c.

32. John Paul II asserts in his encyclical *Veritatis splendor* (1993) that moral precepts “are meant to safeguard the good of the person, the image of God, by protecting his goods.” The precepts of the Decalogue, he says, “are really only so many reflections of the one commandment about the good of the person, at the level of the many different goods which characterize his identity as a spiritual and bodily being in relationship with God, with his neighbor and with the material world.... [They] represent the basic condition for love of neighbor”. (No. 13; cf. no. 72).

33. A criticism of Aquinas’ theory is its failure to explicate just how we get from allegedly self-evident first principles to concrete norms like ‘to intentionally kill the innocent is always morally forbidden.’

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