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Property, Human Flourishing and St. Thomas Aquinas:
Assessing a Contemporary Revival

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Introduction

There has been a marked resurgence of interest in exploring the moral values that underpin and shape the social and legal institution of property in recent times. Debate continues to run between what may be loosely termed 'exclusion' and 'economic' theorists[1] on the one hand, and 'progressive' theorists[2] on the other hand, about whether property serves one or a plurality of values, what those values are, and how property contributes to, and is in turn shaped by, their realisation.[3] Jane Baron helpfully highlights that this debate also concerns the *means* of property law, framing it in terms of a conflict between 'information' theorists, who prioritise simplicity and predictability in property law, and 'progressive' theorists, who are more comfortable with complex contextual decision-making by courts and administrators in respect of property.[4] Information theorists champion exclusion as an effective means of ensuring that property law has a strong

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1. See Henry E Smith, "Exclusion versus Governance: Two Strategies for Delineating Property Rights" (2002) 31 J Leg Stud S453, "Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law" (2009) 94 Cornell L Rev 959, and "Property as the Law of Things" (2012) 125 Harv L Rev 1691; Henry E Smith & Thomas Merrill, "The Morality of Property" (2007) 48 Wm & Mary L Rev 1849; Thomas Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730.
2. The 'progressive' perspective on property is perhaps most overtly articulated in Gregory S Alexander, Eduardo M Peñalver, Joseph W Singer & Laura S Underkuffler, "A Statement of Progressive Property" (2009) 94 Cornell L Rev 743, but it is a wider school of thought encompassing more perspectives on property than those captured in the Statement. On progressive property generally, see Timothy M Mulvaney, "Progressive Property Moving Forward" (2014) 5 Cal L Rev Cir 349; Ezra Rosser, "The Ambition and Transformative Potential of Progressive Property" (2013) 101 Cal L Rev 107; John A Lovett, "Progressive Property in Action: The Land Reform (Scotland) Act 2003" (2011) 89 Neb L Rev 739.
3. There is overlap on some points between these perspectives, as well as scholars who are not easily classifiable in these terms. On the spectrum between these two perspectives are a variety of other property theories which may display *some* features of these perspectives. See JE Penner, *The Idea of Property in Law* (Oxford University Press, 2000); see also Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 UTLJ 275; AJ van der Walt, *Property in the Margins* (Hart, 2009); Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Avihay Dorfman, "Private Ownership" (2010) 16 Legal Theory 1 and "The Normativity of the Private Ownership Form" (2012) 75 MLR 981.
4. Jane Baron, "The Contested Commitments of Property" (2010) 61 Hastings LJ 917.

signalling function[5] with a moral basis[6], arguing that while fine-grained contextual analysis may be required in some areas of property law, simple rules should be the norm[7]. While progressive theorists deny that contextual decision-making is *always* required to resolve property disputes[8], they are generally more willing to reconsider rules in order to ensure fairness and coherence with progressive values, and they resist the idea that property rules can be applied without attending to their consequences[9].

Within the progressive property school of thought, 'human flourishing' theories of property have developed, contending that the shape of property law, as well as the outcomes of property disputes, should be determined based on securing human flourishing. Some of these theories are innovative in introducing Aristotelian virtue ethics and the property theory of St. Thomas Aquinas into current debates in property law theory.[10] In light of this development, the aim of this article is twofold: to provide a more comprehensive overview of Aquinas' statements on property than has been done in recent writings in property theory that have invoked Aquinas; and against that backdrop, to encourage further scholarly reflection on its role in informing the development of progressive property theory. It argues that Thomistic property theory is most useful as a source of intellectual heritage and inspiration for progressive property theory. Indeed, at various points in their work, human flourishing property theorists

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5. See Thomas W Merrill & Henry E Smith, "What Happened to Property in Law and Economics?" (2001) 111 Yale LJ 357; Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90 Va L Rev 965.

6. See Merrill & Smith, *supra* note 1.

7. See Henry E Smith, "Property and Property Rules" (2004) 79 NYU L Rev 1719; "Exclusion versus Governance: Two Strategies for Delineating Property Rights" (2002) 31 J LS S453; Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101 Colum L Rev 773.

8. Joseph W Singer, "Property as the Law of Democracy" (2013) 63 Duke LJ 1287 at 1307.

9. As Baron puts it, from the perspective of progressive property theorists, "…we can never unreflectively apply even simple property rules, but must always ask whether the application of the rule in the particular circumstances presented actually furthers the values for which the rule purportedly stands." Baron, *supra* note 4 at 948.

10. The core focus of this article is the work of Gregory Alexander & Eduardo Peñalver, who have in various works articulated 'human flourishing' theories of property rooted in the Aristotelian tradition: see Gregory S Alexander & Eduardo M Peñalver, "Properties of Community" (2009) 10 Theor Inq L 127. Lametti also somewhat more tentatively suggested the possibility of a theory of property grounded in virtue-ethics. See David Lametti, "The (Virtue) Ethics of Private Property: A Framework and Implications" in A Hudson, ed, *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Press, 2003) 39. However, Lametti does not commit himself to this approach, or articulate a fully developed theory of property grounded in virtue-ethics. Eric Freyfogle propounds a human flourishing theory of property, but does not rely on Thomistic or Aristotelian property theory so is not considered directly here. See, e.g., Eric T Freyfogle, "Private Ownership and Human Flourishing: An Exploratory Overview" (2013) 24 Stellenbosch L Rev 430. Jedediah Purdy articulates a property theory characterised by some commentators as falling with the progressive school of thought (see Lovett, *supra* note 2 and Rosser, *supra* note 2) which refers to the importance of human flourishing. See Jedediah Purdy, "A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates" (2005) 72 U Chicago L Rev 1237 and "People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property" (2007) 56 Duke LJ 1047. However, human flourishing is not at the core of Purdy's thesis, which focuses primarily on freedom, and Purdy does not rely on Thomistic or Aristotelian property theory, and so is not explored in this article.

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characterise the role of Thomistic property theory in this way.[11] However, this article argues that where property theorists use Thomistic property theory to directly support their detailed responses to current property dilemmas, complex interpretative issues can arise that limit the usefulness of reliance on Aquinas' thinking on property.

The first part of the article analyses key aspects of Aquinas' stated views on property. The article then considers how that theory has been used in recent works that develop a human flourishing perspective on property, framing that perspective in terms of the tensions and debates in modern property theory between progressive and information perspectives. The paper argues that Aquinas' analysis of property is at its core consistent with the goals of human flourishing property theory and provides a rich source of material for its further development (and indeed for the development of progressive property theory more generally), subject to two qualifications. First, although there is significant scholarly support for an interpretation of Aquinas' views as supporting governmental redistribution of property, that interpretation is contested, and the nature of the contestation highlights important under-explored questions for progressive property theory; second, Aquinas' conception of the defence of necessity is strictly limited, which restricts its usefulness as direct support for an expanded legal defence of necessity against property offences. These points of detail do not take away from the broad conceptual coherence that exists between the progressive property movement and Aquinas' thinking on property, but they do signal the need to use Aquinas' thinking as a source of intellectual heritage and inspiration for the development of progressive property theory, rather than as direct authority for progressive arguments concerning modern property dilemmas. Thomistic property theory works best as a revitalising influence in progressive property theory, which, as this article will demonstrate, can highlight fresh angles and perspectives that can inform internal reflection within that school of thought, as well as responses to criticisms of progressive property theory.

Aquinas on Property

In this part, I analyse three key aspects of Aquinas' treatment of property: first, his defence of the lawfulness of private property and his explanation of its relationship to common use of material goods; second, his discussion of the duty in justice to redistribute superfluous property; third, his analysis of the sin of theft. Aquinas considers these issues in detail in his *Summa Theologiae*, at *IIaIIae 66*, which is entitled 'On theft and robbery'.

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11. See Gregory S Alexander & Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) at 87. See also Alexander & Peñalver, *supra* note 10 at 129. Writing alone, Peñalver disclaims any attempt to provide a 'knock-down' case for a virtue theory of property, limiting his aim to reintroducing Aristotelian ethical theory into discussions of property: "Land Virtues" (2009) 94 Cornell L Rev 821 at 863-64.

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(A) Possession of External Things

Aquinas considers whether it is natural for human beings to possess external things. He concludes that it is, saying, 'God has supreme dominion over all things; and, according to His providence, He has ordained certain things for the support of man's body. For this reason man has a natural dominion over things with regard to the power to make use of them'.[12] The purpose of certain material resources is to sustain human beings on earth, and to that end it is natural for human beings to use and manage such resources.

Aquinas goes on in articulus 2 to consider the lawfulness of private property. He distinguishes between an individual's right to use material resources for sustenance, and to hold private property. He argues that while the law of nature prescribes a right for human beings to use material goods for sustenance, private property is an addition to the law of nature that flows from human reason and is restricted by that primary requirement of the law of nature. Aquinas adopts a practical view of the benefits of private property in his *responsio*, saying:

> Two things pertain to man with regard to external things. One is the power to procure and dispose of them; and, in this regard, it is lawful for man to possess property. Indeed, this is necessary to human life, for three reasons. First, because everyone is more diligent in procuring something for himself than something which belongs to all or many; for each one, avoiding labour, would leave to someone else [the procuring of] that which was to belong to all in common, which is what happens where there is a multitude of servants. Second, because human affairs are conducted in a more orderly manner if each man is responsible for the care of something which is his own, whereas there would be confusion if everyone were responsible for everything in general. Third, because a more peaceful state of things is preserved for mankind if each is contented with his own. Hence we see that quarrels arise more frequently between those who hold property in common and where there is no division of the things possessed.
>
> The other thing which pertains to man with regard to external things is their use. In this respect man ought to hold external things not as his own, but as common: that is, in such a way that he is ready to share them with others in the event of need.[13]

As John Finnis notes, all of these justifications are based on the contribution private property can make to the common good, as opposed to any metaphysical connection between the possessor and the property.[14] The instrumental arguments advanced are familiar ones: material resources are put to more productive use where they are privately owned, society is more clearly ordered and regulated

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12. *Summa Theologiae,* IIaIIae 66: 1 *Ad 1* (Cambridge University Press, 2002). All references to *Summa Theologiae,* unless otherwise indicated, are to the translation by RW Dyson, *Aquinas: Political Writings*.

13. IIaIIae 66: 2 *responsio*.

14. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) at 190. In his own natural law theory, Finnis emphasises the importance of private ownership in facilitating the attainment of the good of personal autonomy in community, as well as a possession/use distinction: see John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) at 169-71.

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under such a system, and disputes amongst men are minimised.[15] Private property is conceived of as a useful tool for efficient and effective social co-ordination.[16] However, it is for Aquinas always subject to the law of nature's requirement that all men have the right to access and use material resources for their sustenance.[17]

Aquinas' theory of law provides an important, and in some respects contentious, backdrop to his approach to property.[18] A detailed exploration of this debate, and of Aquinas' typology of law, is beyond the scope of this article. However, the position of private property within this typology is made clear when Aquinas states:

> Community of goods is attributed to the natural law not because natural right dictates that all things should be possessed in common and that nothing should be possessed as one's own, but because the division of possessions is not according to natural right, but, rather, according to human agreement, which belongs to positive right, as stated above. Hence the ownership of possessions is not contrary to natural right; rather, it is an addition to natural right devised by human reason.[19]

Thus, Aquinas argues that natural law does not dictate that all possession should be in common. Aquinas contends that the natural law can be changed by addition, "…for many things advantageous to human life have been added over and above the natural law, both by the Divine law and by human laws."[20] Such additions form the secondary principles of the natural law.[21] Aquinas explains private ownership in these terms, as an addition to the natural law by human law:

> Something is said to be naturally right in two ways. In one way, because there is a natural inclination to do it: for example, not to injure another, in another way, because there is not a natural inclination not to do it. For example, we might say that it is a matter of natural right for man to be naked, because nature does not give him clothes; but he devises them by act. In this sense, 'the possession of all things in common and one liberty for all men' are said to be consistent with natural right: because, that is, the distinction of possessions and slavery were not brought in by

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15. Douglas Sturm summarises these arguments as arguments concerning responsibility, efficiency and harmony. Douglas Sturm, "Property: A Relational Perspective" (1986) 4 JL & Religion 353 at 376.

16. See also Drostan Maclaren, arguing, "[t]he final cause and formal reason for the existence of private property is the effective service which one expects from it, the organization of the use of material things by human community. Property is a practical consideration and by its very nature the right to private property is a relative one, since it is not always and in all circumstances the most effective means of ensuring that all men should have a fair share in the benefits of creation." Drostan Maclaren, "Private Property and the Natural Law" (Aquinas Society of London, 10th March 1948, Aquinas Papers, No.8, Blackfriars).

17. Aquinas makes this point again in ad 2, where he says "a rich man does not act unlawfully if he anticipates someone in taking possession of something which was originally common property but then shares it with others; but he sins if he excludes others indiscriminately from making use of it". IIaIIae 66:2 *ad 2*.

18. As Timothy Murphy notes, "contemporary scholars of St Thomas disagree vehemently over the proper status of law in his theology generally and over the proper role of law in his ethics in particular." Timothy Murphy, *Economic Rights in Liberalism, Catholicism and Socialism—A Theological and Philosophical Inquiry into Irish Jurisprudence* (PhD thesis, St Patrick's College, Maynooth, 2002) at 41.

19. IIa IIae 66: 2 *ad 1*.

20. IaIIae 94: 5 *responsio.*

21. *Ibid*.

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> nature, but by human reason for the advantage of human life. And so again the law of nature was not changed in this respect, except by addition.[22]

For Aquinas, any additions introduced through human law are subject to the law of nature.[23] A human law may be a general conclusion derived from the principles of the law of nature, or it may be a specific application of those general principles. He argues that these two kinds of derivation are linked to the law of nature to different degrees: "those things which are derived in the first way are not contained in human law simply as belonging to it alone; rather, they have some of their force from the law of nature. But those things which are derived in the second way have their force from human law alone."[24]

In developing this distinction between modes of derivation from the law of nature, Aquinas discusses the *ius gentium* as one of the divisions of human law, and situates private property within that category in his typology of law. He explains:

> Accordingly, positive law is divided into the *ius gentium* and 'civil law', according to the two ways in which something may be derived from the law of nature, as stated above. For to the *ius gentium* belong those things which are derived from the law of nature as conclusions from principles—for example, just buyings and sellings and other such things—without which men cannot live together. This kind of law belongs to the law of nature, since, as is proved at *Politics* I, man is by nature a social animal (Politics I: I (1253a2)). But those things which are derived from the law of nature as specific applications belong to the civil law, according as each State decides on what suits it best.[25]

The above-quoted passage demonstrates a degree of ambiguity in Aquinas' theory on the appropriate categorisation of the *ius gentium*.[26] On the one hand, he says, "positive law is divided into the *ius gentium* and "civil law"", and on the other hand, he says of the *ius gentium*, "this kind of law belongs to the law of nature". Such duality appears to be a distinctive characteristic of Aquinas' *ius gentium*—it is a discrete category of law, but it straddles human and natural law.[27]

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22. IaIIae 94: 5 *ad 3*.
23. IaIIae 95: 2 *responsio*.
24. IaIIae 95: 2 *responsio*. However, it is important to note that at IaIIae 104: 1 *responsio*, Aquinas emphasises the significance of the fact of institution as a source of force for human law in addition to reason. While Aquinas clearly speaks in terms of derivation from the natural law, Murphy correctly notes that deduction from principles seems inconsistent with the notion of "practical reasoning" central to his theory of natural law: Murphy, *supra* note 18 at 47.
25. IaIIae 95: 4 *responsio*.
26. There is substantial academic disagreement on this issue, which is beyond the scope of this article to resolve. For example, Dyson locates the *ius gentium* outside of natural law. Dyson, *supra* note 12 at 134. In contrast, Maclaren argues that the *ius gentium* is natural rather than positive law. Maclaren, *supra* note 16. Similarly, JB McLaughlin contends that the *ius gentium*, and accordingly the claim to possess property privately, falls within natural, rather than positive law. JB McLaughlin, "St. Thomas and Property" (1920) 9 Studies 571.
27. As Finnis puts it, the *ius gentium* is "the law that is substantially adopted by all peoples (and in that sense is positive law) because recognized virtually everywhere as what is required by reason (natural law)." Finnis, *Aquinas*, *supra* note 14 at 268. See also Mortimer J Adler, "A Question About Law" in Robert E Brennan OP, ed, *Essays in Thomism* (Sheed & Ward, 1942) 205 at 214.

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It is at once enacted and natural, and includes private possession of property.[28] Private ownership is a rational derivation from the law of nature's requirement that human beings must have use of the earth's material resources for their sustenance. Accordingly, it forms part of the *ius gentium* and lies between the law of nature and positive law.

(B) Superflua and Necessity

Whenever someone enjoys a superabundance of material goods, Aquinas says that someone else is necessarily suffering want, because of the limited nature of the earth's resources. In light of this, he argues, "whatever anyone has in superabundance is due under the natural law to the poor for their succor".[29] For Aquinas, because there are many persons in need who cannot practically be sustained from the same material resources, the individual possessor judges for him or herself how his or her property should be dispensed to those in need.[30] However, the obligation to distribute *superflua* is a matter of justice—private ownership loses its lawful character if others who are in need are excluded from using material resources.[31] Aquinas argues:

> One would not act unlawfully if, going early to the play, he prepared the way for others; but he acts unlawfully if by so doing he hinders others from going. Similarly, a rich man does not act unlawfully if he anticipates someone in taking possession of something which was originally common property but then shares it with others; but he sins if he excludes others indiscriminately from making use of it.[32]

(C) The Sin of Theft

Aquinas goes on to consider offences against private property. He notes that theft is a sin, but he considers whether it is lawful to steal in circumstances of necessity, and in doing so, stresses again that human law is subject to the dictates of

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28. As Richard Schlatter argues, "St. Thomas made no sharp distinction between the *ius gentium*—the body of reasonable additions to the natural law, including the laws of property—and the enacted law of the state. It was possible for him to say that private property was natural and at the same time to say that in any specific case it had been instituted by human lawgivers." Richard Schlatter, *Private Property—The History of an Idea* (George Allen & Unwin, 1951) at 57. See also William J McDonald, *The Social Value of Property According to St. Thomas Aquinas* (Catholic University of America Press, 1939) at 89-93; David Lametti, "The Objects of Virtue" in Gregory S Alexander & Eduardo M Peñalver, eds, *Property and Community* (Oxford University Press, 2010) 1 at 25.

29. IIa IIae 66: 7 *responsio.* In his later discussion of the virtue of charity, Aquinas notes that the needs of dependents, as well as the needs of an individual in possession of property, determine what constitute *superflua*: IIaIIae 32: 5 *responsio*.

30. IIaIIae 66: 7 *responsio*. Finnis argues that this discretion is not unfettered—an individual's judgment of his/her needs and the needs of any dependents must be practically reasonable. Finnis, *Aquinas*, *supra* note 14 at 194.

31. Alfred O'Rahilly argues that Aquinas' teaching on *superflua* indicates that "…there is a quantitative limit to what can be covered by the property-rights of any individual" and that the community as a whole can lay claim to what goes beyond that limit. Alfred O'Rahilly, "St. Thomas's Theory of Property" (1920) 9 Studies 337 at 348.

32. IIaIIae 66: 2 *ad 2*.

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natural law.[33] Although as we saw in the last section, the distribution of '*superflua*' is ordinarily a matter for the individual in possession of property, Aquinas holds that theft does not occur in situations where material resources are used for basic sustenance. Such cases are narrowly defined as follows:

> If, however, there is a necessity so urgent and clear that it is obvious that the necessity must be met at once by whatever means are to hand—for example, if a person is in immediate danger and no other help is available—anyone can then lawfully supply his own need from the property of another by taking from it either openly or in secret; nor, properly speaking does this have the character of theft or robbery.[34]

In addition, anyone can take property from another on behalf of a needy individual.[35]

Thus, the presumptive individual discretion to determine the distribution of *superflua* is trumped by circumstances of urgent need that cannot be otherwise satisfied.

(D) Aquinas on Property—Summary

From this brief overview, it should be clear that Aquinas' approach is relatively non-prescriptive in relation to private ownership, and understands ownership in non-absolutist terms.[36] The law of nature demands that human beings must be able to use the earth's material resources to secure their survival. Private property is a derivation of human reason from this basic precept of natural law, which is regarded by Aquinas as a useful addition to the law of nature, because it contributes to the common good by helping to secure the efficient and peaceful use of the earth's resources. As such, it is part of the *ius gentium*, which is the body of law derived by human reason from the precepts of the law of nature and closely rooted in the law of nature. It is subject to the duty in justice to distribute superfluous property to those in need, and to the qualification that those in narrowly defined circumstances of urgent need can take another's property without committing the sin of theft.

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33. IIa IIae 66: 7.

34. IIaIIae 66: 7 *responsio*. He explains, "[p]roperly speaking, to take and use another's property secretly in a case of extreme necessity does not have the character of theft, because that which someone takes in order to support his own life becomes his own by reason of that necessity". IIaIIae 66: 7 *ad 2*.

35. IIaIIae 66: 7 *ad 3*. Rev. Edward Cahill summarised the rights and claims over *superflua* as follows: "the use of, or revenues from, superfluous goods is *due* to the needy. The owner's obligation of giving them is not one of *strict* justice, except in case of extreme or quasi-extreme (*evidens et urgens*) need, seeing that it is only in such a case that he allows the needy person to seize the goods without the owner's permission. But the lawful exercise of the owner's rights over his own superfluous goods in the face of the needs of others is limited to his right in deciding as to what particular needy person or class of persons he will assign them". Rev. Edward Cahill SJ, *The Framework of a Christian State—An Introduction to Social Science* (MH Gill & Son, 1932) at 558.

36. McDonald goes so far as to argue, "… the true Thomistic notion of private property attributes to it nothing of an absolute or unrestricted character but envisions it mainly as a system of private production for public consumption." McDonald, *supra* note 28 at 30.

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2. Aquinas in Human Flourishing Property Theory

As noted at the outset, lively debate is on-going in property theory between information and progressive theorists concerning the means and ends of property, including the relative significance of the owner's right to exclude within the institution of property, and the strength of that right. Furthermore, these perspectives divide on the extent and significance of what Tony Honoré termed property's 'social aspect', by which he meant property's role as a social institution.[37] While neither perspective denies this function for property, some progressive theorists characterise property's social aspect, rather than its role as an individual right, as its central, defining feature.[38]

In addition, there is *internal* debate within both schools of thought concerning the priority of objectives and the best strategies for advancing those objectives.[39] Of particular interest for the purposes of this article is the fact that different approaches to the question of property's ends are identifiable within progressive property theory. While some theories adopting a progressive approach focus on values such as democracy and equality[40], others focus on sharing or inclusion[41], while still others situate themselves within the Aristotelian tradition and place an emphasis on the facilitation of human flourishing, and with it ethically virtuous activity by individuals in society, as key principles that should shape and delimit property.[42] This part briefly summarises the views of two prominent proponents of such a human flourishing approach to property, namely Eduardo Peñalver and Gregory Alexander, who both employ Thomistic statements on property in support of some of their arguments. Three main uses of Aquinas' thinking on property in human flourishing property theory are identified and analysed in this and the next part: to support recognition of efficient use of land as an important, though non-exclusive, value of property; to support the idea of owners' obligations, in particular their obligation to submit to governmental redistribution of private property; and to support the normative plausibility of expanded consideration of necessity in the context of property offences. In the next sections, the relevant human flourishing property theories are outlined, and each of these uses of Thomistic property theory is analysed.

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37. AM Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107 at 145.

38. See Joseph W Singer, "Democratic Estates: Property Law in a Free and Democratic Society" (2009) 94 Cornell L Rev 1009; Gregory S Alexander "The Social Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745.

39. For example, within the 'information' grouping, there is debate concerning whether the right to exclude, or the right to 'set the agenda' for property should be regarded as the essence of property: compare Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730 and Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 UTLJ 275.

40. See Singer, *supra* note 38; van der Walt, *supra* note 3; AJ van der Walt, "The Modest Systemic Status of Property Rights" (2014) 1 JL Property & Soc'y 15.

41. See Rashmi Dyal-Chand, "Sharing the Cathedral" (2013) 46 Conn L Rev 647; Eduardo M Peñalver, "Property as Entrance" (2005) 91 Va L Rev 1889.

42. Others invoke human flourishing in their property theory without relying on Aristotelian or Thomistic theory: see the discussion *supra* note 10.

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(A) Land-Use Decision-Making, Human Flourishing, and Necessity

In 'Land Virtues', Eduardo Peñalver draws on Thomistic property theory in proposing a break from economic analysis in the context of land-use decision-making.[43] As an alternative, Peñalver argues for "[a] theory of owner obligation rooted in the Aristotelian tradition", based on virtue ethics.[44]

Peñalver characterises virtue ethics as an important source of guidance in delineating the respective scope of individual freedom and collective decision-making in relation to land-use.[45] He defines virtues as "…acquired, stable dispositions to engage in certain characteristic modes of behaviour that are conducive to human flourishing."[46] He argues that flourishing is a collective endeavour, involving mutual social obligations.[47] Reasons for action, as well as external actions, are important, since virtuous activity requires proper motivation rather than mere compliance with rules.[48] The standard applied is the conduct of the virtuous person, which in turn is based upon "… an objective conception of what it means to live well or flourish in a distinctively human way."[49]

For Peñalver, the role of law is to intervene where markets fail and to encourage and facilitate human virtue and flourishing.[50] For instance, Peñalver argues that the law can enforce specific moral obligations to help those who might be harmed by immoral decisions of owners.[51] He relies on Aquinas to support the contention that law can be used to require people to act virtuously, and over time may convert them to doing so voluntarily.[52] Finally, he argues that law can assist in clarifying how those who wish to act virtuously should behave, and in coordinating such actions.[53] At the same time, Peñalver acknowledges the significance of autonomy to human flourishing, and suggests that determining the appropriate distribution of decision-making power between individuals and the state is 'a difficult puzzle', which requires a broader perspective than that afforded by economic analysis.[54] He welcomes the fact that virtue theory brings to the forefront the tensions that exist between the various values implicated in property and land use law and requires those tensions to be addressed directly.[55]

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43. Peñalver, *supra* note 11. He does not dispute the relevance of economic analysis, but objects to "a careless equation of efficiency with goodness". *Ibid* at 863.
44. *Ibid*. Peñalver also analyses the Thomistic approach to property although without specifically endorsing or relying upon it in "Is Land Special?: The Unjustified Preference for Landownership in Regulatory Takings Law" (2004) 31 Ecol LQ 227 at 278-82.
45. Peñalver, *supra* note 11 at 870-71.
46. *Ibid* at 864.
47. *Ibid* at 870.
48. *Ibid* at 864-65.
49. *Ibid* at 866.
50. *Ibid* at 869. Writing elsewhere with Alexander, he suggests: "[l]egal intervention can also clarify social obligations and coordinate collective actions necessary for human flourishing where private owners would otherwise struggle to do so on their own". Alexander & Peñalver, *supra* note 11 at 93.
51. Peñalver, *supra* note 11 at 871.
52. *Ibid*, relying on *ST* Ia IIae: 95 art 1 and 96 art 2.
53. *Ibid* at 872.
54. *Ibid* at 874.
55. As he notes, "…decisions about land use impact human flourishing in myriad ways and are, therefore, thoroughly suffused with moral content." *Ibid* at 876.

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Peñalver details how virtues essential to human flourishing can be fostered through land-use decision-making. He begins with industry, relying directly on Aquinas' practical justification of private ownership to support the contention that private possession encourages the productive use of land.[56] He argues,

> [o]ne way to understand the institution of private ownership is as an elaborate system of indirect morals legislation, a structure of legal incentives whose principal goal is to encourage people to cultivate the virtue of industry … by offering landowners the reward of a privileged claim over the fruits of their labour.[57]

Where that incentive fails, more coercive legal measures can be used to encourage efficient land-use. However, Peñalver again turns to Aquinas to stress that industry is not the exclusive or primary virtue to be considered in land-use decision-making: private possession is permissible to achieve industry, but is subject always to the ultimately common right of men to use the earth's resources to sustain themselves.[58] Accordingly, he argues that industry is just one of several 'land virtues' that should influence land-use decision-making. Although as was seen above, the justification of private possession of property offered by Aquinas (and relied upon by Peñalver) was not framed directly in terms of virtue, it could be captured in particular circumstances by the Thomistic virtues of prudence (concerned with practical reasonableness) and/or justice (focused on giving to each their due). As Aquinas put it, "… every virtue that causes a good judgment of reason may be called prudence: every virtue that causes actions to fulfill what is right and due may be called justice…"[59] The decision to adopt a private ownership system could be deemed prudential, while actions taken on foot of that system could be regarded as required by justice, provided that the standards set out by Aquinas for prudence and justice were satisfied.

In relation to justice, Peñalver argues that legally coerced redistribution, either of land or of money, may be required in certain circumstances. He does not specifically reference Aquinas in developing his theory of the virtue of justice. However, his argument aligns closely with Aquinas' treatment of *superflua*, for example when he says:

> Because the system of private property as a whole is established in order to facilitate the ability of members of the community to flourish, owners' rights are qualified by an obligation to share from their surplus property with those who need them in order to satisfy more fundamental needs.[60]

For Peñalver, owners' obligations are not narrowly determined by the urgent material needs of others, but rather are more broadly determined by the concept of

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56. *Ibid* at 879.
57. *Ibid* at 878. Peñalver also relies on this point as made by Aquinas in "Property as Entrance", *supra* note 41 at 1918. There he emphasises the usefulness of property in community settings.
58. Peñalver, *supra* note 11 at 879.
59. IaIIae 61: 3 *responsio,* translated by WD Hughes OP, *Summa Theologiae Volume 23 (Virtue)* (London: Blackfriars, 1969).
60. Peñalver, *supra* note 11 at 880. Writing elsewhere, Peñalver adopts John Finnis' interpretation of Aquinas as supporting governmental redistribution of property in order to ensure a just distribution. See Peñalver, *supra* note 44 at 281.

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human flourishing. For example, he includes within the requirements of human flourishing, "… the material resources necessary for social participation, moral training, language acquisition, and the nutritional resources necessary for physical and mental development."[61] On this point, concerning the *extent* of an owner's sharing obligations, Peñalver appears to go further than was contemplated by Aquinas. For example, in his discussion of the virtue of charity, Aquinas stated that giving is usually only required from resources available to an individual *after* satisfying the needs of himself or herself and those of any dependents, with an owner's core obligation being to respond to "evident and urgent necessity" on the part of others that cannot be met through other means.[62]

Peñalver contends that a recipient's urgent and acute needs, their connections with particular property, their dignity, and/or mutual relationships of reliance between the giver and the recipient could all warrant compelled redistribution of property in-kind.[63] To illustrate this point, he cites the defence of necessity, which prevents an owner from interfering with the use of private property by another to satisfy dire and immediate needs.[64] He argues that this shows that the law already recognises and protects need-based claims over privately held property, thereby supporting his thesis. Similarly, writing with Sonia Katyal, he invokes Aquinas' argument that theft does not occur when property from another's *superflua* is used in circumstances of urgent necessity to argue for the normative and legal plausibility of broader consideration of necessity in the context of property offences.[65] Peñalver and Katyal advocate necessity as a defence for those who use the property of others, without permission or other lawful basis, to meet their economic and/or physical needs, or in the alternative, for consideration of necessity as a mitigating factor in respect of sentencing for property offences committed in such circumstances.[66] Drawing on Aristotle, Adam Smith, Amartya Sen and Elizabeth Anderson (although not Aquinas), they suggest that the *standard* against which necessity is assessed should potentially involve access to more than merely subsistence resources, extending instead to all those resources needed to participate minimally in the life of a particular community. They reason that the numbers of individuals who might need to violate property laws to avoid imminent physical harms are likely to be very low, and accordingly argue for a conception of necessity that is dynamic and context-dependent. They contend that while the necessity doctrine might still, against the backdrop of this broader understanding of necessary resources, be qualified in some way, a

61. Peñalver, *supra* note 11 at 881.
62. *ST* IIaIIae 32: 5 *responsio*, translated by RJ Batten OP, *Summa Theologiae Volume 34 (Charity)* (London: Blackfriars, 1975). He further suggests at this point, "[t]he probable and normal course of events is what must guide us in working out what is superfluous and what is necessary." In *ST* IIaIIae 32: 6, he distinguishes between things that are necessary to keep individuals and/or their dependents alive, and things that are necessary to maintain a livelihood in keeping with one's social position.
63. Peñalver, *supra* note 11 at 882.
64. *Ibid* at 882-83.
65. Eduardo M Peñalver & Sonia K Katyal, *Property Outlaws—How Squatters, Pirates, and Protestors Improve the Law of Ownership* (Yale University Press, 2010) at 135.
66. *Ibid* at 153-56.

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showing of *imminent physical harm* might not be required to establish a defence of necessity.[67]

(B) The 'Social-Obligation Norm', Community, and Human Flourishing

Gregory Alexander characterises human flourishing as a basis for imposing duties on owners.[68] He argues for explicit recognition of a "social obligation norm" that he identifies as implicit in American property law. He bases this norm on an Aristotelian conception of human flourishing, according to which life within a community of social relations is necessary, as well as "…the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternatives."[69] He stresses that resources, as well as virtues, are necessary for individuals to flourish.[70] Accordingly, he argues that distributive justice is required, which generates obligations for owners to give others the resources needed for human flourishing on a non-reciprocal basis.[71] Specifically, Alexander contends, "…an owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing."[72] This obligation is limited by the autonomy interests of the owner, which will prevail if they are weightier than the interests implicated by the social obligation norm.[73] Alexander concludes that owners' interests can justifiably be curtailed "…on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization."[74]

Writing in conjunction, Alexander and Peñalver build upon this theory. Together, they advance a conception of community based on the Aristotelian insight into the inherently social nature of human beings, arguing that dependence on others is integral to human flourishing.[75] Their theory envisages plural modes of human flourishing and stresses the need for individuals to have the capacity to choose and deliberate carefully upon their options in life.[76] They contend that all individuals are equally entitled to the means necessary for human flourishing and that the mutual recognition amongst individuals of the value of flourishing requires those with the means to flourish to share their resources with those who would otherwise lack the necessary material resources.[77] Such obligations are

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67. *Ibid* at 136-38.
68. Alexander, *supra* note 38.
69. *Ibid* at 761-62.
70. *Ibid* at 768.
71. *Ibid* at 771, 774.
72. *Ibid* at 774.
73. *Ibid* at 815.
74. *Ibid* at 819.
75. Alexander & Peñalver, *supra* note 10 at 127, 135.
76. *Ibid*.
77. *Ibid* at 141-42.

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determined by the needs of others and can require disproportionate contributions from some in society.[78]

Alexander and Peñalver address the appropriate role of the state in their theory, acknowledging that social interdependence, and the relationship between human flourishing and community, do not necessarily mean that the state should enforce the resulting individual obligations.[79] They note that in early societies, local communities could supply human beings' needs, and that such provision continues in modern society.[80] However, they characterise private redistribution as insufficiently reliable to secure access for all to the material goods that are required for human flourishing, saying, "… at least since the rise of modern capitalism, the uncoerced actions of private entities have never been sufficient to supply all members of society with access to all of the resources necessary for them to have the opportunity to develop the capabilities necessary for human flourishing."[81] They invoke Aquinas' discussion of theft to justify their conclusion that the state should be not only empowered, but required, to qualify individual property rights in order to secure human flourishing, extending to the compulsory sharing of surplus property.[82]

(C) Aquinas in Human Flourishing Property Theory—Summary

Overall, three important direct uses of Aquinas' property theory can be identified in modern human flourishing property theory. First, Aquinas' practical justification of private possession is invoked to explain *a* property virtue—the virtue of industry—while also bolstering the claim that industry, and with it efficiency, is not the exclusive or paramount property virtue. Second, Aquinas' arguments on theft and *superflua* have been relied upon to justify governmental redistribution of property as a means of enforcing owners' social obligations, underpinned by the ultimate objective of securing of human flourishing for all individuals within a community. Relatedly, Aquinas' views on theft have been used to justify broader consideration of necessity as a defence to, or a mitigating factor in respect of, property offences such as theft and trespass. More generally, at the conceptual level, Aquinas' property theory has been relied upon to support the view, central to progressive property theory, that private possession of property is only legitimate subject to its consistency with securing the needs of all individuals.

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78. *Ibid* at 143.
79. As they put it, "there is no a priori connection between the social dependence we have been describing and the need for, or permissibility of, direct state action in support of human capabilities." *Ibid* at 145.
80. *Ibid.*
81. *Ibid* at 146. The complementary role of private communities is acknowledged later as operating alongside state intervention to compel redistribution necessary to secure human flourishing. See 149; see also Alexander & Peñalver, *supra* note 11 at 95-97, 125-26.
82. Alexander & Peñalver, *supra* note 10 at 146-48; see also Alexander & Peñalver, *supra* note 11 at 86-87.

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3. Assessing Aquinas in Human Flourishing Property Theory

In this part, I analyse the specific use of Thomistic statements on property in human flourishing theories of property described in the last section. I suggest that Aquinas' thinking on property provides strong support for the contention of human flourishing property theory (and indeed of progressive property theory more generally) that efficiency is *a* value of significance in property law, but not its exclusive or primary goal. Furthermore, the core insight of Thomistic property theory that property must serve, and be subordinate to, the primary need to secure the material sustenance of all equally valuable individuals, supports the key messages of progressive property theory, including its current prioritisation of sharing as an aspect of property law[83], subject to two minor qualifications. First, it is important to note that it is a particular (albeit a dominant and plausible) interpretation of Aquinas' theory of property that supports governmental redistribution in the manner contended for by human flourishing property theorists, and more significantly, to consider the potential implications of contrary interpretations for progressive property theory. Second, Aquinas' treatment of necessity does not provide direct support for progressive arguments for a defence of necessity in the context of property offences that would extend beyond the use of material resources to satisfy urgent need.

(A) Efficiency and Industry

Peñalver used Aquinas' practical justification of private possession of property to argue that industry is *a* virtue that should shape land-use decision-making, and that the law should seek to encourage, but is not the exclusive or primary property virtue. This reliance highlights the fact that Aquinas viewed private ownership as subject to the more important need to secure material sustenance for all men. For the modern property theorist, Aquinas' approach, and Peñalver's use of it, persuasively demonstrates that a commitment to efficiency, and to the benefits of coordination in respect of land-use, does not necessarily require a non-pluralistic approach to property's values, nor does it require an absolute commitment to securing efficiency above all else. Rather, efficiency (or in Peñalver's terms, industry) can be understood as one important aspect of property's goals that must be balanced with competing values and aims realised through, or affected by, property.

This insight, prompted by Peñalver's use of Aquinas' practical justification of private ownership and its relationship to common use, is helpful in bridging the divide that has arisen between information theorists, who prioritise efficiency, simplicity and transparency in property law, and progressive property theorists, who contemplate a significant degree of contextual decision-making in property

83. For discussion of the 'sharing' perspective within progressive property theory, see Dyal-Chand, *supra* note 41; AJ van der Walt, "The Modest Systemic Status of Property Rights" (2014) 1 J Law, Property & Soc'y 15.

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law.[84] As illustrated by Peñalver's approach, and his reliance on Aquinas for support, progressive property theorists can and do champion efficiency as an important goal of property alongside other values, recognising its coordination benefits.[85] Similarly, some information property theorists regard efficiency, as well as predictability and simplicity, as a means to other ends (e.g., human flourishing).[86]

Furthermore, Peñalver's approach, building on Aquinas' focus on the coordination and efficiency benefits of private possession, provides a strong response to criticisms levied against the contextual nature of the progressive perspective and its attendant information costs.[87] Insofar as efficiency, industry and clarity are values that form part of a contextual approach to property, the need for sensitivity to information costs, and for predictability and stability in property law, are capable of being captured by such an approach. Progressive property theories can give weight to the benefits of efficiency and low information costs, not as ends in themselves, but as important values that may help to secure progressive values through the use and management of land.

Where disagreement between these perspectives hardens is concerning how reliable legal rules are at realising property's ends, and how often such rules should be reconsidered or displaced. While progressive property theorists are unwilling to accept that efficiency should be allowed to trump fairness in individual cases, or to impede the realisation of other progressive goals in respect of property, information theorists argue that 'property rules' should not be jettisoned in favour of more complex 'governance rules' lightly.[88] Such theorists give priority to simple, readily comprehensible property rules as a reliable means of securing a well-functioning property system that operates fairly in most cases. Accordingly, Peñalver's reliance on Aquinas' account of the coordination benefits of private possession of property remind us that the division between progressive property theorists and at least some prominent information theorists centres on their different views about the appropriate *means* of property law.

(B) The Redistribution Debate

As already noted, human flourishing property theory argues that the state has the power and duty to compel redistribution, and regards such a power as justified based on the need to secure equal opportunities for human flourishing to all individuals.[89] Aquinas' discussion of property, particularly his treatment of theft and *superflua*, is relied upon within human flourishing property theory to support this conclusion. Two aspects of this reliance will be considered here:

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84. For further discussion of this divide, see Baron, *supra* note 4.
85. Peñalver's discussion of industry in "Land Virtues" is a good example: Peñalver, *supra* note 10 at 877-80. See similarly Joseph W Singer, "Property as the Law of Democracy" (2013) 63 Duke LJ 1287 at 1288-89.
86. See Smith, "Mind the Gap", *supra* note 1 at 963-71.
87. *Ibid* at 976.
88. See Smith, "Exclusion versus Governance", *supra* note 1.
89. In *Properties of Community,* Alexander and Peñalver state that a full argument on this point is beyond the scope of that essay: Alexander & Peñalver, *supra* note 10 at 146.

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first, the significance of Aquinas' general subordination of private ownership to common use; second, the status of governmental redistribution in Aquinas' property theory.

Human flourishing property theory, and progressive property theory more generally, are at their core driven by the view that ownership is qualified by the needs of others, including non-owners, and cannot confer powers that impede the ability of all individuals to live equally in a secure and dignified way in society.[90] The scope of owners' rights depends upon their broader impact on social relations.[91] Ownership is understood to entail duties and not to confer absolute freedom, because the legal protection and enforcement of property rights necessarily disempowers those lacking such rights. These basic ideas echo the key tenet of Aquinas' theory of property, according to which freedom in respect of private property is restricted by the basic requirement that external goods be available to support the lives of all equally valuable individuals through securing their material sustenance.[92] Thus the foundational premise of human flourishing property theory, and of progressive property theory more generally, is strongly supported by Aquinas' theory of property.

Furthermore, Aquinas' approach reminds us that private property can be limited even where private ownership is recognised as a necessary legal institution. As already discussed, Aquinas conceived of private possession of property as an addition of human reason to the law of nature forming part of the *ius gentium*, which comprised principles created by human reason through direct derivation from the law of nature. Academics have divided substantially over whether the *ius gentium* is properly classified as part of the law of nature or human law.[93] While detailed consideration of that long-running debate is beyond the scope of this paper, it is submitted that whichever view is adopted, for Aquinas the *ius gentium* was made up of principles closely derived from, and closely connected to, the law of nature. Consequently, Aquinas clearly rooted property *as an institution*, as distinct from *any particular set of legal rules* concerning property, in natural law.[94] At the same time, he identified clear limits to private ownership, treating it as subordinate to the urgent material needs of others in society. In this way, Aquinas' theory provides a useful reminder that even where private ownership is naturalised, whether at a constitutional level, through human rights instruments, or otherwise, it can be subjected to the needs of those who do not possess property. The obligations and responsibilities of owners do not disappear simply because private ownership is recognised as derived from natural law, since the

90. See Alexander, Peñalver, Singer & Underkuffler, *supra* note 2.
91. See Joseph W Singer & Jack M Beerman, "The Social Origins of Property" (1993) 6 Can JL & Juris 217.
92. As Finnis notes, Aquinas' account of property proceeds from the presupposition that all human beings are equal, and defines the permissible scope of private property by reference to that presupposition. Aquinas treats property rights as "matters of interpersonal Justice" concerning relations between individuals, not between individuals and external resources. Finnis, *Aquinas*, *supra* note 14 at 188-89.
93. See the discussion at notes 24 to notes 28 above.
94. For a persuasive analysis of the distinction between the institution of property, and particular property rules, see Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988).

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scope of owners' exclusive rights is determined by the primary need to secure the material sustenance of all equally valuable individuals.

Turning from this broad conceptual coherence between progressive property theory and Aquinas' thinking on property to consider the detail of Thomistic property theory highlights the need to consider further the respective roles of private redistribution and public redistribution and the relationship between these two ways of achieving progressive property goals. This reflection is prompted by the fact that there is some disagreement amongst scholars on whether Aquinas' theory of *superflua* can be translated into a justification for redistribution of privately held property by the state.

The dominant interpretation of Aquinas' property theory, which is employed in human flourishing property theory, is that it does translate into an argument for governmental redistribution of privately held property.[95] For example, Andrew Lustig argues that the use of Aquinas' theory to support redistribution of property by government has a long and well-developed tradition in Catholic social and political theory, which employed and extended Aquinas' theory in justifying property, even as such theory moved in the direction of natural individual rights.[96] Furthermore, he contends that such a translation is necessary in the context of modern, non-agrarian economies.[97] Finally, he argues that Aquinas himself contemplated distributive decisions being made by rulers.[98] Robert Dyson adopts a similar view, asserting that while Aquinas left the distribution of *superflua* up to

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95. See Alexander & Peñalver, *supra* note 11 at 86; Alexander & Peñalver, *supra* note 10 at 147.

96. Andrew B Lustig, "Property, Justice and The Common Good: A Response to Paul J Weithman" (1993) 21 J Religious Ethics 181 at 184.

97. Andrew B Lustig, "Natural Law, Property and Justice: The General Justification of Property in John Locke" (1991) 19 J Religious Ethics 119 at 144. He further argues, "[t]he priority of property in common implies that property exists for the common good. Thus, when necessary, systematic redistribution to ensure that all receive the means to their subsistence is not merely allowed, but required, by the force of that natural law perspective." *Ibid* at 145.

98. Lustig refers to Aquinas' work "On Kingship" and contends: "[i]ndeed, as Thomas makes clear in "On Kingship", it is the ruler, finally, who is charged to distribute and regulate property for the common good. Only *within* and secondary to the context of the ruler's authority do notions of "individual discretion" make sense … Surely, if Thomas deems such allotments of property to be appropriately the king's prerogative, then collective mechanisms of government redistribution might also be justified in modern democracies, despite our having left the monarchy behind." Lustig, note 96 at 184. (In his discussion of the duties of a King in *On Kingship*, Aquinas refers to the ruler's responsibility to procure "a sufficient supply of the things required for proper living": see St Thomas Aquinas, *On Kingship—To the King of Cyprus*, translated and revised by Gerald B Phelan with introduction and notes by I TH Eschmann, OP (The Pontifical Institute of Medieval Studies, 1949) at chapter III (I, 14) para 118). See also Schlatter, contending that Aquinas followed Aristotle and regarded the State as bound to distribute and regulate private property in the interests of the common good: Schlatter, note 28 at 50-51. Etienne Gilson says that for Aquinas, matters concerning the exchange and distribution of goods necessary for human life depend "directly or indirectly on the State" rather than on private commerce, with the State obliged to secure the common good. Etienne Gilson, *The Christian Philosophy of St. Thomas Aquinas*, translated by LK Shook (Random House, 1966) at 324. Similarly, Frederick Copleston SJ argues that while Aquinas should not be represented as participating in the social and economic controversies of the 19th century, "…the policy of *laisser-faire* would not be compatible with his view of the purpose and function of political society and government. The task of the State is actively to produce the conditions under which a full human life can be lived." Frederick Copleston, *Thomas Aquinas* (Search Press, 1976) 238-39. See also McDonald, note 28 at 39-42 and Peñalver, note 44 at 280-81 for similar interpretations.

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individual owners, today, "…his argument would no doubt find expression as an argument in favour of progressive or redistributive taxation."[99] Marcus Lefébure contends that in light of Aquinas' views on *superflua*, "the government should enjoy a reserve right to ensure that individuals do in fact exercise their stewardship of common resources for the common good, including a right to supervene when necessary in order to redistribute property more fairly."[100] Thus according to Lefébure, Aquinas regarded responsibility for ensuring the proper use of property as being *divided between* the individual and the State.[101] This interpretation coheres with several aspects of Thomistic property theory: with Aquinas' argument that the parameters of property are set by the need to ensure that the basic needs of all are met; with his identification of obligations for owners to share privately held property to secure this end; and with his argument that theft does not, properly speaking, occur where a person takes from another's superfluous property to secure such basic needs. Overall, the interpretation of Aquinas' property theory as supporting governmental redistribution of property is plausible, particularly insofar as it is true to the prioritisation of use for material sustenance over private property within that theory.

However, a competing interpretation of Aquinas' views on governmental redistribution merits some consideration by human flourishing property theorists given the priority of virtue within their approaches to property. Paul J. Weithman contends that for Aquinas, property is common only insofar as owners have a duty to *independently* use *superflua* to help those in need, on the basis of their individual judgment, and accordingly that this argument does not justify governmental redistribution.[102] Weithman argues that it is impossible to replace this individual administration of *superflua* with redistribution by the State, as this would limit the scope for individuals within society to engage in virtuous activity, which was central to Aquinas' political theory.[103] In particular, he contends that the public administration of *superflua* would limit opportunities for

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99. Dyson, *supra* note 12 at xxxi-xxxii. See also Finnis, *Aquinas*, *supra* note 14 at 195 and *Natural Rights*, *supra* note 14 at 173.

100. Marcus Lefébure, "'Private Property' According to St Thomas and Recent Papal Encyclicals" in *St Thomas Aquinas: Summa Theologiae Volume 38: Injustice*, translated by Marcus Lefébure (London: Blackfriars, Eyre & Spottiswood, 1975) 275 at 277. He says that this principle was implicit in St Thomas' general principles and some of his statements on authority's role in society in the *Summa.* He points to a more explicit statement of this power for the State in *De Regimine Principium* (I, 15), where Aquinas said that it was part of the King's business to "… correct any lopsidedness, supply any lack and strive to perfect whatever can be bettered." *Ibid* at 278. The correct reference to *De Regimine Principium* appears to be to Book 2, Chapter 15, where it is stated, "[t]here is another thing that pertains to the good government of a kingdom, province, city, or any other rule, and that is that the ruler, who is in charge of the needs of paupers, minors, and widows and of assistance to foreigners and pilgrims, should provide for them from the common treasury." However, this section is attributed to Ptolemy of Lucca, rather than Aquinas. See Aquinas, *On the Government of Rulers*, translated by James M Blythe (University of Pennsylvania Press, 1997) at 138.

101. See also McDonald, *supra* note 28 at 40-43, arguing for a power for the State to enact property laws, impose taxes, and exercise the power of eminent domain.

102. Paul J Weithman, "Natural Law, Property and Redistribution" (1993) 21 J Religious Ethics 165, 170-71.

103. *Ibid* at 172-74. Indeed, Weithman notes that in a maximally effective welfare state, there would be no poor, and therefore no opportunity for virtuous activity through redistribution.

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developing and exercising the virtues of practical wisdom, justice, mercy, and liberality that are prioritised by Aquinas.[104]

This interpretation of Aquinas' property theory closely reflects Aristotle's defence of private property. Aristotle argued, "[t]here is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property."[105] According to Aristotle, part of the purpose of private possession of property was to facilitate *private* redistribution of resources, which led him to object to common property, since "[n]o one, when men have all things in common, will any longer set any example of liberality, or do any liberal action; for liberality consists in the use which is made of property."[106] David Lametti explains this symbiosis between private property and virtue as follows:

> Just as virtuous acts help one attain a virtuous disposition and a virtuous disposition helps one choose to act virtuously, acquiring and using possessions in a proper fashion will help a person to develop moderation and liberality, so liberality and moderation will help one to acquire and use property in a virtuous fashion.[107]

Accordingly, from this perspective, private property is understood to assist in the development of virtue, for example by enabling voluntary redistribution to the needy.

This means that the interpretation of Aquinas' theory relied upon in human flourishing property theory, although widely supported, is contested. More significantly for the purposes of this article, Weithman's interpretation highlights the need to consider the balance between public and private redistribution within human flourishing property theory, and to do so bearing in mind the prioritisation of the facilitation of virtuous activity by individuals. Weithman's view of the problematic nature of governmental redistribution is overly extreme, since, as Alexander and Peñalver acknowledge, the relationship between public and private redistribution is not an all or nothing matter—private redistribution can still occur within a regime of compelled redistribution.[108] The extent to which private redistribution can occur in such a context may depend on the intensity of governmental compulsion, so the two are undoubtedly related, but not mutually exclusive. Nonetheless, Weithman's interpretation of Aquinas' views on property is worthy of some consideration within progressive property theory, since it focuses attention on the need to think carefully about the consequences that flow from recognising ownership obligations for public and private actors

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104. See also McDonald, *supra* note 28 at 152-54, arguing that the state for Aquinas cannot "take the place of human modes of sharing goods such as friendship and love", for which external goods are necessary instruments.

105. Politica Book II 4-5 1263b, in *The Works of Aristotle*, vol X, translated by Benjamin Jowett, edited by WD Ross (Clarendon Press, 1921).

106. *Ibid*. On this aspect of Aristotle's theory, see Lametti, *supra* note 28 at 8-13.

107. Lametti, *supra* note 28 at 12. Lametti also emphasises the significance of moderation as one of the virtues promoted by property for Aristotle. *Ibid* at 14-15. See also Richard McKeon, "The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution" (1938) Ethics 297 at 304-12.

108. For development of this response, see Lustig, *supra* note 97 at 123.

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respectively, and on the extent to which those obligations should be reflected in the content and/or enforcement of *legal rules*. It further suggests the need to consider in greater detail the functional impact of the choice of legal means in light of the values driving progressive property theory—whether owners' obligations should be implemented by requiring *direct, private* action by owners, e.g., in redistributing property or refraining from enforcing property rights, or whether the identification of legally enforceable ownership obligations is primarily a means of justifying *public law measures* that limit or redistribute property. Again, these approaches are not mutually exclusive—owners can have individual obligations that they directly implement, whether through voluntary redistribution or through non-enforcement or qualified enforcement of private rights, as well as obligations that are implemented through direct governmental action. However, these two approaches, while they might be used to achieve the same ends, do so by allocating the burden of identifying and fulfilling ownership obligations to different actors: in the case of voluntary redistribution, to the owner him or herself; in the case of non-enforcement or qualification of private rights, to the owner and in the event of dispute, the courts; and in the case of direct governmental action, to a combination of legislative, executive and judicial action. While there is undoubtedly overlap between these three approaches, they empower different actors to different degrees. From the perspective of the development of progressive property theory, it is important to reflect upon these different allocations of responsibility with a view to identifying the most effective means of achieving a progressive outcome in the context of particular property issues or disputes.

Alexander and Peñalver themselves do not purport to provide definitive answers to these difficult questions, although they clearly acknowledge that both public and private redistribution have important roles to play in human flourishing property theory[109] and they identify the importance of carefully calibrating the use of the law to enforce owners' obligations[110]. They further recognise the complexity of appropriately balancing individual freedom and collective decision-making against the backdrop of facilitating human flourishing.[111] Thinking further about the implications of the choice between moral and legal obligations, and between public and private law obligations, for the realisation of the goals of human flourishing property theory, or indeed other progressive property perspectives, may require greater engagement with the different nuances of those theories as applied in public and private law contexts. While those spheres may be inseparable at the level of identifying the normative *values* of property law[112], they are separable as distinct, albeit related and at times overlapping, *legal means* of achieving those values.

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109. See Alexander & Peñalver, *supra* note 10 at 147-49 and Alexander & Peñalver, *supra* note 11 at 95-97.

110. See Alexander & Peñalver, *supra* note 10 at 148-49 and Alexander & Peñalver, *supra* note 11 at 92-94.

111. See Peñalver, *supra* note 11 at 870, arguing: "[a] complete virtue jurisprudence would include an account of the areas in which collective decision making would be expected to generate outcomes superior to individually determined conduct."

112. For this argument, see Gregory S Alexander, "Property's Ends: The Publicness of Private Law Values" (2014) 99 Iowa L Rev 1257.

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Although the insights of legal realism, identifiable at the root of much progressive property theory, correctly emphasise the close relationship between public and private law, including the important role of the state in both legal contexts[113], that fact does not mean that there are no relevant differences between public and private law measures, considering the goals of progressive property. Public law mechanisms largely place the onus for identifying what is required to fulfil ownership obligations on the State, which it may do for example through imposing restrictions on individual property rights that administrators and/or courts may be called upon to enforce in the event of non-compliance (depending on the design of the measure). Private law mechanisms are likely to give greater agency to individual owners in the first instance to define and satisfy their obligations *qua* owner, and to give residual power to courts to resolve disputes between private actors, albeit against the backdrop of any overlapping public law measures. Accordingly, owners may have different degrees of agency in the fulfilment of their moral and legal obligations *qua* owners, depending on whether a predominantly public or private law approach is adopted to ensure the fulfilment of ownership obligations. Furthermore, the choice of legal means will affect the 'property audience' affected by a change in legal rules.[114] While systemic changes to private law rules may have a wide impact, at least some public law measures have a narrower reach, and accordingly are likely to have limited adverse implications for the day-to-day mutual recognition of, and respect for, property rights that is foundational to the private law system of property.

A full exploration of those differences is beyond the scope of this article, which aims as a preliminary matter to encourage greater attention to be paid within progressive property theory to the appropriate balance between voluntary and legally enforced fulfilment of owners' obligations, and to prompt more fine-grained analysis of the differences between the various *types of legal mechanisms* for enforcing owners' obligations against the backdrop of the goals of progressive property theory.[115] The answers to these difficult foundational questions will, consistently with the general approach of progressive property theory, be contextually determined, and furthermore, will be contingent on local factors. They will likely vary depending on the issue being addressed and the broader social,

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113. For discussion of this aspect of legal realism, see Joseph W Singer, "Private Law Realism" (2014) 1 Crit Analysis of Law 226 and "Legal Realism Now" (1988) 76 Cal L Rev 465. For examples of progressive property theory rooted in a legal realist approach, see Joseph W Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale University Press, 2015) and *Entitlement: The Paradoxes of Property* (Yale University Press, 2000).

114. For discussion of the idea of different 'property audiences' and their variable information needs, see Thomas W Merrill, "Property and Sovereignty, Information and Audience" (2017) 18 Theor Inq Law 417. See relatedly, Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, 1994); Henry E Smith, "The Language of Property: Form, Context, and Audience" (2003) 55 Stan L Rev 1105.

115. As Alexander and Peñalver put it themselves: '…the determination that a particular use or allocation of property would contribute to human flourishing is only the first step in a more complex analysis. A separate question always remains how best, if at all, the law should seek to foster human flourishing (by mandating or encouraging that use or allocation) in a way that gives due regard to the various components of human flourishing.' Alexander & Peñalver, *supra* note 11 at 94.

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economic and legal culture in which it arises. The degree of trust in government and the values and bonds of affected communities will also impact significantly upon the balance between private and public redistribution that is appropriate to secure progressive goals in any given context, as well as legal and broader cultural attitudes towards public and private legal regulation.[116]

All of this means that progressive property theory, in its implementation, will necessarily differ between, and within, jurisdictions, and will change over time with shifts in legal, social and economic culture. Although the values of progressive property may be identifiable in relatively stable terms, its means will (consistent with its emphasis on contextual decision-making) be variable, although not necessarily unpredictable.[117] While the various approaches for implementing ownership obligations identified in this article—voluntary action, private law enforcement, public law enforcement—are not suggested to be mutually exclusive or hermetically sealed from each other, attending to their nuanced differences, including their empowering effects, is important for the future development of progressive property theory, in order to ensure that it can effectively achieve outcomes consistent with its goals. It may also be relevant for the development of responses to criticism of progressive property theory, since the degree of power conferred on the courts to adjudicate on a case-by-case basis (a much-criticised aspect of progressive property theory) may vary depending on the design of legal measures that are intended to secure the fulfilment of ownership obligations, and depending on the balance between public and private legal mechanisms.

(C) Necessity and Property Offences

A final qualification is required concerning the use by some human flourishing property theorists of Aquinas' arguments concerning theft to support arguments for the normative and legal plausibility of an expanded defence of necessity to property offences such as theft and trespass. As discussed in Part I, Aquinas clearly argued that the sin of theft was not committed where property was taken from its possessor to satisfy the urgent and evident need of the dispossessor for material sustenance. Accordingly, Aquinas' views on theft are consistent with imposing narrow limits on the enforceability of exclusive claims to material goods where those claims conflict with the urgent and basic needs of others for sustenance.[118] However, Aquinas set strict parameters for the exercise

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116. See Peñalver, *supra* note 11 at 64-65.

117. For persuasive arguments concerning the capacity of legal standards to generate predictable outcomes and the value of vagueness in law, see Joseph W Singer, "The Rule of Reason in Property Law" (2013) 46 UC Davis L Rev 1375; also Jeremy M Waldron, "Vagueness and the Guidance of Action" in Andrei Marmor & Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) at 58 and "Thoughtfulness and the Rule of Law" (2011) 18 Brit Acad Rev 1; Timothy Endicott, "The Value of Vagueness" in Andrei Marmor & Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) at 14.

118. As discussed above, Aquinas argued, "[i]f one is to speak quite strictly, it is improper to say that using someone else's property taken out of extreme necessity is theft. For such necessity renders what a person takes to support his life his own." *ST* IIaIIae 66: 7 *ad 2*.

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of the limited right to self-help that he recognised, in order to secure the practical benefits that he saw could be created by property.

As noted above, Aquinas' treatment of theft and *superflua* was invoked by Peñalver and Katyal to support their argument that necessity should be capable of being considered either as a defence to, or a mitigating factor in respect of, property offences in a broader range of circumstances than traditionally recognised by courts in the US.[119] They argued that economic needs, as well as physical needs, should trigger consideration of necessity, and that the focus should not be merely on basic sustenance. However, Peñalver and Katyal did not address the limited and extreme circumstances in which Aquinas envisaged an individual's needs generating an entitlement to take privately possessed property from another. As noted above, Aquinas regarded the distribution of *superflua* as a matter for the judgment of the owner, except in circumstances where access to material goods was urgently needed to secure an individual's survival in the absence of any alternative. Therefore, Aquinas' approach does not offer direct support for relaxing or removing the requirement of established urgency of need, or for expanding the scope of any entitlement of those meeting that threshold beyond access to basic material goods required for physical survival. This restricts the usefulness of his theory for any proposed expansion of the defence of necessity designed to achieve broader progressive ends.

Conclusion

Human flourishing property theory has, through its engagement with Aquinas' statements on property, opened debates within progressive property theory up to a rich and deep range of highly pertinent arguments about property. In so doing, human flourishing property theory contributes significantly to the broader project of explicating and examining the values underpinning and delimiting property as a social and legal institution and an individual right, and has identified a source of property theory that may assist in developing robust responses to criticism of progressive property theory. For example, Henry Smith criticised human flourishing property theories (and progressive property theories more generally), on the basis that "[e]nds-focused theories tend to overlook the richness of the mechanism by which ends are achieved."[120] Aquinas was remarkable in avoiding this pitfall while at the same time engaging deeply with the moral values and goals underpinning private property as a social and legal institution. Thomistic property theory thus demonstrates that a property theorist can recognise, and seek to

119. At one point in their discussion, Peñalver and Katyal seem reluctant to commit to a defence of necessity extending beyond urgent, dire physical needs, saying, "[w]e limit ourselves to the observation that there are plausible theories of distributive justice that would be amenable to permitting some additional room for self-help beyond the extreme case of, say, imminent starvation." Peñalver & Katyal, *supra* note 65 at 136. However, they subsequently appear to commit to such a broader understanding of necessity, for example referring to the current legal defence of necessity as "profoundly underinclusive" (at 153) and arguing that economic necessity must be recognised as a basis for a necessity defence (at 153).

120. Smith, "Mind the Gap", *supra* note 1 at 976.

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protect, the capacity of private ownership to create significant efficiency gains, while at the same time being committed to the realisation of a broader range of goals and values through property law. This insight may provide important space for the fruitful development of effective responses to current property dilemmas by theorists from various schools of thought, and may help to bridge the current divide between information and progressive property scholars. Aquinas' focus on private redistribution of *superflua* may also help to trigger a reframing of the debate about means within progressive property theory in positive terms: as a reflective internal debate about how best to implement owners' obligations in a manner that effectively achieves progressive goals in different contexts, instead of as a debate entered into defensively in response to criticisms levied by information property theorists.[121]

Furthermore, the central theme of Aquinas' property theory coheres with progressive property theory in a way that makes it a rich source of intellectual inspiration for perspectives on property within that broad school of thought. As Douglas Sturm summarises, "…the inner sense of Thomas' understanding of property is that the common good must be served by material things, that ownership by the individual is never absolute, that property is subordinate to the higher purpose of enhancing human life."[122] Alexander and Peñalver argue that the key point of their engagement with Thomistic property theory is in respect of this core conceptual idea that property is instrumental to "deeper and more fundamental human goods" and must give way where required in order to secure human flourishing.[123] In this respect, Thomistic property theory can be understood as an important intellectual precursor to the progressive property perspective that can usefully inform its future development, particularly in respect of material resources. However, this article has sought to gently caution that where property theorists move beyond using Thomistic property theory as a source of inspiration and intellectual heritage to using it as a source of direct authority for arguments concerning current property dilemmas, complex and at times contentious interpretative issues arise as scholars attempt to translate a theory developed in a very different social, economic and legal context. As Katherine Archibald argues, "[t]he effort of the scholar must be, first of all, to see St. Thomas and his philosophy, not in terms of the nineteenth or the twentieth century, but in terms of the thirteenth."[124] She astutely notes that in seeking

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121. For examples of such responses to the criticisms levied by information property theorists, see Joseph W Singer, *supra* note 8, and Gregory S Alexander, "The Complex Core of Property" (2009) 94 Cornell L Rev 1063 at 1063-68.

122. Sturm, *supra* note 15 at 380. Sturm further notes that Aquinas' conception of property "….is suggestive of the notion that the world, under the principle of common use, is a repository of possibilities properly available for the general enrichment of life. It is not a set of things to be distributed according to the doctrine of absolute property." *Ibid*. See similarly Lametti's summary of Aquinas' views on property: "…private property is an instrumental good (analogous to utility) but in the service of human development (dignity, development) within a Christian framework": Lametti, *supra* note 28 at 33.

123. Alexander & Peñalver, *supra* note 11 at 86.

124. Katherine Archibald, "The Concept of Social Hierarchy in the Writings of Aquinas" (1949) 12 The Historian 28 at 53, reproduced in John Dunn & Ian Harris, eds, *Aquinas Volume I* (Edward Elgar, 1997) 168 at 190-91. See similarly Gilson, *supra* note 98 at 223.

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solutions to current problems in Thomistic teaching, modern theorists bring to it attitudes and prejudices unknown in the thirteenth century, thereby further muddying a theory that was not entirely clear to begin with.[125] That should not be a reason to disregard the richness of Thomistic property theory or its potential to contribute to the development of progressive property theory, but rather to reflect carefully on how it is used. Thomistic property theory is most useful as a root for progressive property theory's core arguments, and as a springboard for productive internal development and effective external defence of that perspective on property.

125. Archibald, *supra* note 124 at 53.

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