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JUSTICE, EQUALITY, AND NATURAL RIGHTS CLAIMS: A RECONSIDERATION OF AQUINAS'S CONCEPTION OF RIGHT

JEAN PORTER
John A. O'Brien Professor of Theology, University of Notre Dame

ABSTRACT

According to a widely held view, Aquinas does not have a notion of subjective natural rights, understood as moral powers inhering in individuals. This article argues that this way of reading Aquinas is wrong, or at best, seriously misleading. Aquinas does identify the right, the object of justice, with the relation established between parties to an equitable exchange or interaction, and in this sense he identifies right with an objective state of affairs. But this line of analysis does not commit him to any particular construal of what constitutes a just relation. In particular, it leaves open the possibility that in some situations, the right, understood as an objectively equitable relation, presupposes that someone's claim of a right, is duly acknowledged. Moreover, in many contexts Aquinas says that individuals can claim certain liberties and immunities on the basis of some natural right, in terms that make it clear that these claims lie within the discretion of the individual. His overall conception of natural law and natural right implies that individuals can legitimately make certain claims by right, claims that emerge within some contexts and not others. He does not have a theory of rights, but neither do the scholastic jurists of the time, and his appeals to what someone can claim by right are reminiscent of their views. If they can be said to have a notion of subjective natural rights, the same can be said of Aquinas himself.

KEYWORDS: rights, justice, equality

According to Aquinas, justice is a virtue, which he identifies, following Justinian's *Digest*, as "a constant and perpetual will rendering to each that which is his right."[1] Correlatively, the object of the virtue of justice is the right, *jus*, which can be understood in terms of a right state of affairs, or an action directed towards rendering his or her right to another. To the contemporary reader, this claim may suggest that Aquinas associates justice with natural or human rights. Yet until recently, historians and moral and political theorists generally agreed that for ancient and medieval authors, "right" is always understood in terms of what is objectively just, in accordance with an impersonal moral order within which each person equally benefits from the moral duties incumbent on all.[2] The duties inherent in this moral order can be expressed in terms of objective rights, but

1 Aquinas, *Summa Theologiae*, II-II 58.1. All references to Aquinas are taken from the Leonine edition of the *Summa Theologiae*, vols. 4–12 of the *Opera Omnia iussa edita Leonis XIII* (Rome: Ex Typographia Polyglotta S.C. de Propaganda Fide, 1888–1906).

2 See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta: Scholars Press, 1997), 13–42.

these do not add anything normatively to the demands of the moral order itself. As such, objective rights are contrasted with subjective rights, understood as a kind of authority or moral power inherent in the individual, through which she can legitimately claim immunity from some kinds of coercion, or impose obligations on another. Doctrines of natural or human rights, understood as subjective moral powers, did not emerge until the late middle ages at the earliest, and were not widely recognized until the modern period—this was the consensus until recently. Given this view, clearly we would not expect to find a notion of subjective natural rights in Aquinas. His account of justice is correlated with a notion of the right, or alternatively, the due, as determined by objective standards of equity and non-maleficence, but it does not imply a doctrine of natural or human rights inhering in individuals—or so we might suppose

More recently, Brian Tierney and his former student Charles Reid have conclusively shown that the general view just sketched is wrong.[3] Beginning in the mid-thirteenth century, some canon lawyers were already defending individual claims to some performance or some forbearance, in terms that clearly indicate that they understood these as subjective natural rights. What is more, individuals could claim their rights in a number of tribunals, in the reasonable hope of a fair hearing and the possibility of vindication. Rights claims were central to the theory and practice of marriage law, and they also emerged in many other contexts. Admittedly, the jurists do not develop systematic theories of natural rights, nor do they extend rights claims to every domain of moral thought or legal practice. Nonetheless, it seems clear that by Aquinas's time, some scholastic jurists are already defending subjective natural rights, in at least some contexts.

At this point, we cannot just assume that Aquinas could not have entertained anything like a modern doctrine of natural subjective rights, simply because of his temporal location. Yet almost no one, including Tierney himself, is prepared to say that Aquinas recognizes subjective natural rights, even implicitly. On the contrary, Tierney regards Aquinas as an eminent representative of what was already an old-fashioned tradition:

> Habermas and De Lagarde both drew a contrast between the modern doctrine of natural rights and the thought of Thomas Aquinas, in whose work the older tradition of natural law found classical expression. *This observation, a commonplace in much recent writing on natural law theories, is true enough so far as it goes*; but it has led to a radical error of periodization in most modern writing on the history of natural rights. . . . It may be that a juristic, distinctively non-Aristotelian theory of natural rights had grown up before Aquinas, that Aquinas did not choose to assimilate such ideas into his Christian-Aristotelian synthesis, but that they did enter the mainstream of Western political thought through other channels.[4]

In this article, I argue that this way of reading Aquinas is wrong, or at best, seriously misleading. Aquinas does identify the right, the object of justice, with the relation established between parties to an equitable exchange or interaction, and in this sense he identifies right with an objective state of affairs. But this line of analysis does not commit him to any particular construal of what constitutes a just relation. In particular, it does not rule out the possibility that in some situations, the right, understood as an objectively equitable relation, presupposes that someone's claim of a right, or a claim by right, is duly acknowledged. When we examine the relevant texts, we find that

3 Ibid., 43–77; Charles J. Reid Jr., "The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry," *Boston College Law Review* 33, no. 37 (1991): 37–92; see also C. J. Reid, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids, MI: Wm. B. Eerdmans, 2004).

4 Tierney, *The Idea of Natural Rights*, 45 (emphasis added).

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Aquinas very often does say that individuals can claim certain liberties and immunities on the basis of some natural right, in terms that make it clear that these claims lie within the discretion of the individual. His overall conception of natural law and natural right implies that individuals can legitimately make certain claims by right, claims that emerge within some contexts and not others. He does not have a theory of rights, but neither do the scholastic jurists of the time, and his appeals to what someone can claim by right are reminiscent of their views. If they can be said to have a notion of subjective natural rights, the same can be said of Aquinas himself.

In this article, I also defend the interpretation just sketched, focusing on Aquinas's arguments with respect to property, the claims of parents, and the scope and limits of obedience, all taken from the *Summa Theologiae*. Through a close reading of these texts, seen in the context of juridical norms and practices that Aquinas shared with the jurists, I try to show that he too assumes that men and women can at their discretion claim certain things by natural right. This is an assumption and not a well-developed theory, but it is by no means disconnected from Aquinas's overall moral theory. On the contrary, when we place Aquinas's remarks about natural right in the context of his wider claims about natural right, equality, and liberty, we can readily see why he presupposes that men and women can claim certain things by right. He is committed to a certain view of the authority of the individual, vis-à-vis other individuals and the community itself, and he regards claims of right as one appropriate way in which that authority is expressed.

RIGHTS IN CONTEXT: JURISPRUDENCE, LEGAL PRACTICES, AND CLAIMS OF RIGHT

The question of what Aquinas or any other medieval author would have meant by *right*, or *a right*, or *the right*, is complicated by the fact that we ourselves are by no means clear about this important and controversial concept. For many scholars and activists, rights talk offers a vivid, rhetorically effective way of expressing moral claims that could just as well be formulated in other terms. Nonetheless, as Tierney observes, modern and contemporary theories of human or natural rights characteristically make stronger claims, to the effect that rights are subjective moral powers inhering in individuals and exercised at their discretion.[5] Although this is by no means exhaustive, subjective rights characteristically take one of two forms. On the one hand, a right may be regarded as a claim that imposes a duty on another. Alternatively, a right may be regarded as an immunity from some kind of coercion or harm, implying that someone else has no right to coerce or harm another in some specific way. A subjective right would accordingly be interpreted as a moral power of the individual, through which she can authoritatively claim something from another at her discretion, or claim immunity from some kind of coercion or harm.

What does it mean to say that at least some of the scholastic jurists have a conception of natural subjective rights? They do not develop theories of rights, as we have noted. Rather, their conception of natural rights is reflected in their practices, insofar as they defend substantive claims to natural rights that reflect the normative logic just outlined. That is to say, they regard at least some appeals to right as discretionary claims, through which one individual obliges another to perform some duty, or demands immunity from coercion in some specific respect. The clearest indications of

5 Ibid., 43–56; Reid, "Canonistic Contribution," 59–65. While no summary could do justice to the complexities of contemporary theories of rights, Tierney and Reid offer insightful analyses of what is at stake in the defense of subjective rights, which would be generally accepted as such. For an independent summary of recent theories, covering many of the same authors and issues as Tierney and Reid, see Kieran Cronin, *Rights and Christian Ethics* (Cambridge: Cambridge University Press, 1992), 26–56.

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the scholastic jurists' views on rights claims can be found, unsurprisingly, in the legal practices that they defend and the innovations that they support. While they do not offer theories of natural rights, they justify individuals' claims to their rights, which are theirs by nature. These claims, and the jurists' reflections on them, emerge within the context of juridical practice, and reflect processes of reflection on, and official recognition of pre-conventional bases for claims upon others.

As Tierney has observed, Europe in the twelfth and thirteenth centuries was a litigious society, within which traditional and novel claims of right played a central role in the expansion and reform of judicial procedures.[6] Men and women of every condition laid claim to rights of all kinds, on whatever basis, in whichever courts would give them a hearing. Initially, these claims were justified by appeals to prior agreements, or historical grants of privilege or immunity, or some enactment of human or divine law. However, scholastic jurisprudence, especially among canon lawyers, drew on an alternative tradition of right, according to which there is a natural right, or natural law, which precedes and in some way supersedes human agreements and enactments. In its earlier philosophical and juridical forms, this natural right was not identified with rights in anything like our sense—rather, it was associated with immutable legal or moral principles, which are known through one's natural powers of reasoned judgment but which are in no way under the individual's control. For the scholastic jurists and theologians, in contrast, natural right is associated most fundamentally with the individual's capacities for moral discernment, or with the fundamental first principles that provide the starting points for such discernment. Natural right thus understood is a kind of individual capacity or power, integrally connected to the human person's freedom and her standing as a responsible moral agent. This conception of natural right does not necessarily imply any kind of belief in rights as subjective moral powers, but within the scholastics' context, it would readily suggest such a view. As Tierney remarks,

> Once the term *jus naturale* was clearly defined in this subjective sense the argument could easily move in either direction, to specify natural laws that had to be obeyed or natural rights that could licitly be exercised; and canonistic arguments soon did move in both directions. Stoic authors, when they wrote of *jus naturale*, were thinking mainly in terms of cosmic determinism; the canonists were thinking more in terms of human free choice. When the concept of *jus naturale* was associated in the canonists' glosses with words like "power," "faculty," "free will," it was moving in a different semantic field of force, so to speak, and took on new meanings. Stoic reflection on *jus naturale* never led to a doctrine of natural rights; canonistic reflection did so, and quickly.[7]

Natural rights, thus understood, are claims to some kind of performance or some immunity, which are grounded in natural, that is to say, pre-conventional aspects of human life. These kinds of claims might have been construed in such a way as to yield a system of objective, impersonal duties, which all are bound to observe without reference to any one individual's claims. Tierney's point, however, is that the close association between the concept of right and notions of freedom, faculty, and power led the canon lawyers of the time to construe these claims in terms of individual freedoms or powers, stemming in some way from the agent's natural capacities and needs. Thus understood, someone who claims his right to some benefit or forbearance exercises a discretionary claim, which goes beyond general obligations by specifying that these are to be performed in some specified way, for the benefit of the one exercising the claim. Thus, the recognition of natural rights

6 Tierney, *The Idea of Natural Rights*, 54–58. For more general accounts of the expansion and development of legal activities and fora in this period, see R. W. Southern, *Scholastic Humanism and the Unification of Europe*, vol. 1, *Foundations* (London: Blackwell, 1995), 134–62, 237–82; James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 75–125.

7 Tierney, *The Idea of Natural Rights*, 65–66, see more generally 58–69.

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added two things to the accepted framework of mutual obligations, namely, the recognition that individuals enjoy a discretionary power to enjoin or forbid certain kinds of actions in their regard, and by implication, secondly, that individuals have the power to specify general obligations in such a way as to render them concrete and exigent.

Seen from one perspective, rights claims thus represent a reasonable, if not inevitable development of long-standing philosophical and doctrinal commitments. Seen from another perspective, these claims reflect a logical extension of practices already in place, in both civil and ecclesiastical contexts, for safeguarding individual freedom. Tierney cites the example of the thirteenth century canon lawyer Laurentius, who reformulates the obligation of the rich to supply the necessities of the poor in terms of a *jus*, a claim possessed by the poor individual herself: according to Laurentius, when the poor person takes from another under press of necessity, it is "as if he used his own right and his own thing." What is more, this right came to be regarded as a claim having juridical effect, insofar as it could be asserted and secured through a public process of adjudication. Of course, such a process would require some kind of legal structure, but for that very reason, it is incumbent on society to put the necessary procedures in place. And indeed, as Tierney goes on to observe, scholastic canon lawyers did set up legal fora through which the right to surplus wealth could be publically defended and enforced:

> Alongside the formal judicial procedures inherited from Roman law the canonists had developed an alternative, more simple, equitable process known as "evangelical denunciation." By virtue of the authority inhering in his office as judge, a bishop could hear any complaint involving an alleged sin and could provide a remedy without the plaintiff bringing a formal action. From about 1200 onward several canonists argued that this procedure was available to the poor person in extreme need. He could assert a rightful claim by an "appeal to the office of the judge." The bishop could then compel an intransigent rich man to give alms from his superfluities, by excommunication if necessary. The argument gained general currency when it was assimilated into the *Ordinary Gloss* to the *Decretum*.[8]

RIGHTS CLAIMS IN AQUINAS

At this point, we turn to a consideration of Aquinas's conception of the right. We can readily see why Tierney and other scholars have concluded that Aquinas does not have a conception of subjective rights. He does not offer a theory of natural or human rights, nor does he generally refer to a right in possessive terms, that is to say, as someone's own right. The jurists did not develop theories of rights, either, but as we have seen, at least some of them refer to rights in possessive terms, implying discretionary moral powers inhering in individuals. Aquinas clearly does believe that natural law and natural right are morally significant, but he appears to treat these as considerations justifying or ruling out some line of conduct, without reference to individual claims and immunities.

However, when we examine the relevant texts more closely, the distinction between his view and that of the jurists turns out to be less sharp than we might have thought. It is true that Aquinas does identify the right in its most general sense with an objectively just state of affairs, or with the normative considerations that determine what counts as right relations among individuals. But as Tierney himself points out, natural right can be understood in objective as well as subjective terms, and these are not exclusive options.[9] The jurists whom Tierney and Reid consider do

8 Ibid., 74.

9 Ibid., 65–66.

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recognize objective duties generated by natural right, but this does not keep them from grounding subjective claims of right in natural right, comprehensively understood. By the same token, Aquinas's general construal of the right in terms of an objective state of affairs is consistent with identifying respect for individuals' subjective claims as among the relevant normative considerations. At any rate, any theory of rights is bound to include some objective normative considerations, in virtue of which someone is justified in claiming a right, or asserting this or that specific right. Subjective rights depend critically on individual discretion, but that does not mean that individuals can create rights claims out of sheer force of will. We cannot assume that Aquinas has no conception of subjective rights, simply because he appeals to objective considerations of naturalness or right in a given context. These appeals should prompt us to ask how these moral considerations become salient in a particular case. Does this consideration apply in the same general way in every case, or does it depend for its force—in part, if not entirely—on someone's discretionary claim?

Aquinas's analysis of justice and right resembles that of the jurists in another, more specific sense—that is, he draws freely on the same juridical conceptions that shape canonical jurisprudence.[10] This should not surprise us, because Aquinas shares the same social context as the canonists, and while he does not have a lawyer's familiarity with courtroom procedures, he is clearly aware of the kinds of claims and justifications informing the legal practices of his own time. More specifically, Aquinas is well aware that in certain contexts, the language of right is associated with the practices of making and justifying claims. Someone claims something by right, referring to the consideration that justifies him in claiming some immunity from interference, or some service or material object, from another. It is true that Aquinas does not generally refer to someone's right in possessive terms, as the canonists do, except at one point. But that point is critically important—that is, in citing Justinian, he says that the object of justice is to render *jus suum unicuique*, to each his or her own right.[11] He goes on to say that the right, generally speaking, includes both natural and positive right, a distinction that can be traced to Aristotle, but which was by now generally incorporated into legal theory.[12] For Aristotle himself the categories of what is right by nature and what is right by convention are associated with generally applicable normative claims rather than individual powers. But by placing Aristotle's distinctions within the context of Justinian's definition, Aquinas at least leaves open the possibility that the claims of right to which Aristotle refers ought to be understood as grounds for the claims of individuals, which remain to some extent within individual discretion.

This suggestion is further reinforced by the central place that Aquinas gives to the figure of the judge and to judicial procedures in his extended analysis of the virtue of justice. After three questions devoted to the right as the object of justice, the virtue of justice generally considered, and the

10 Aquinas's familiarity with judicial texts and procedures is most evident in his remarks on legal judgment as a paradigmatic act of justice, *Summa Theologiae*, II-II 60, and his extended analysis of the normative significance of legal procedures, ibid., II-II 67–71, although he draws on classical and scholastic jurists throughout the *Summa Theologiae*. I am not claiming that he has a detailed knowledge of legal procedures—after all, he is a theologian, not a lawyer—but he clearly has a good, informed and appreciative layman's sense of the law of his time.

11 Ibid., II-II 58.1. Some have argued that *jus* as understood in this formula refers to the complex of rights and duties attached to some particular object, for example, the advantages and liabilities attached to owning a particular tract of land. However, as Reid argues, by the thirteenth century "*jus* was transformed unequivocally into an individual power or claim; it signified an individual's legal advantage, not the advantages and disadvantages inhering in a tangible object." Reid, "The Canonistic Contribution to the Western Rights Tradition," 55.

12 Aquinas, *Summa Theologiae*, II-II 57.2. Aristotle, *Nicomachean Ethics* 5.7, 11434b 18–24.

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vice of injustice in itself, he devotes a question to legal judgment, which he treats as a paradigmatic act of justice.[13] In this question, he devotes considerable attention to judicial authority and judicial procedures, and he returns to these and related issues at a number of points in subsequent questions. Aquinas's focus on the judge as an exemplar of justice is taken from Aristotle, but he develops it within the context of his own judicial practices, as we would expect, and he goes well beyond Aristotle in drawing out the significance of adjudication as an expression of justice. This line of analysis is significant in this context because it clearly indicates that Aquinas is familiar with the same contexts that shaped the jurists' views and practices regarding rights claims. At this point, a judge is characteristically one who adjudicates among the claims of individuals who petition the court to uphold their right, or to grant them immunity or redress from the improper claims or acts of another. Aquinas's focus on judicial paradigms does not prove that he is thinking of the right in juridical terms, and indeed, he clearly does not limit claims of rights to what can be adjudicated. Nonetheless, at the very least we can say that his intuitions about justice have been shaped by judicial contexts, and this opens up the possibility that he does have a conception of natural rights understood subjectively, as grounded in some way in the moral powers of individuals.

Yet even if Aquinas could have thought of claims of right in this way, do we have good, textually grounded reasons for thinking that he does understand the right in these terms? I believe that we do. Consider, first, Aquinas's comments on the widely discussed question of whether it is licit to take what is another's in order to sustain one's own life. As we have seen, some jurists resolve this question through an appeal to the right of the poor individual to the necessities of life. Aquinas shares the same moral convictions, but his analysis of the case would seem initially to fit squarely within the paradigm of an objective order of justice and right:

> Those things which depend on human right cannot restrict natural right or divine right. Now according to the natural order instituted by divine providence, lower things are directed to this end, that human necessities are to be supplied by them. And therefore, the division and appropriation of material things, which proceeds from human law, does not prevent human necessities from being supplied by things of this kind … [He adds that ordinarily, human needs will be met through such practices as almsgiving.] Nevertheless, if the need be so urgent and evident that it is manifest that the immediate need must be relieved by whatever things occur, as for example when some danger to the person is imminent, and it is not possible to supply the need in some other way, then someone can licitly take another's things to relieve his need, whether openly or in secret. Nor does such an action properly have the character of theft or robbery.[14]

In other words, the primary purpose of material things, as determined by a providentially instituted natural order, sets limits to the claims that can be made on the basis of human right, grounded in legal enactments. Normally, the necessities of those without property of their own should be met through almsgiving. However, in some circumstances someone can literally take matters into his own hands, taking what is another's in order to relieve his urgent need. He goes on to say that "the use of another's goods taken secretly in the case of extreme necessity does not have the character of theft, properly speaking, because through such necessity, that which someone takes to

13 Aquinas, *Summa Theologiae*, II-II 60.1. At this point, Aquinas takes his starting point from Aristotle, who similarly takes the activities of a judge as representative of a certain kind of justice. See *Nicomachean Ethics* 5.4, 1132a 10–30. A comparison will indicate that Aquinas develops this theme at greater length than Aristotle does, and he focuses directly on judicial procedures in a way that Aristotle does not.

14 Aquinas, *Summa Theologiae*, II-II 66.7.

sustain his own life becomes his own."[15] He adds that the same considerations apply when someone takes what is another in order to meet the immediate needs of a third party.[16]

It will be clear by now that Aquinas's treatment of this case is closer to the jurists' views than we might have initially suspected. Clearly, the claims generated by human and natural rights to the appropriation and use of material things go beyond the imperatives of an objective order of mutual obligations. The critical point is that in these circumstances, the primary purpose of material things, which is a matter of natural right, is put into effect through someone's free choice and action. In the case of extreme and urgent necessity, someone can simply take what she needs from the property of another in order to sustain her life, and what she takes is regarded as her own. It was a commonplace that the goods of the rich should be regarded as belonging to the poor, but for Aquinas, the specific goods taken by this particular desperate person belong to her. Thus, she cannot be said to be guilty of theft or robbery, and by implication, she can claim immunity from punishment. Admittedly, Aquinas does not say that the rich individual has a duty to hand over his possessions to the poor individual. However, the category of subjective rights can plausibly be extended to include claims to immunity as well as powers to impose duties, and given this line of interpretation, Aquinas can be said to defend the right of the desperate individual to claim what necessity renders her own, without fear of punishment.

Consider, secondly, Aquinas's response to the question, whether the children of Jews and other unbelievers can be baptized against the will of their parents.[17] He begins by asserting, in the strongest terms, that this practice is contrary to the universal custom of the church, which has greater authority than any individual theologian, however eminent. He goes on to say that this custom is justified on two grounds, the second of which is relevant here. That is, it is repugnant to natural justice to baptize a child against the will of its parents, because before he attains the use of reason, a child is under the care of its parents by natural right (*de jure naturale*). On a first reading, it seems that Aquinas is asserting that it would be contrary to the objective duties set up by the order of justice and right to baptize a child against its parents' will. But this way of framing the case implies that something more is at stake here. After all, Aquinas says that it would be contrary to natural justice to baptize the child of unwilling parents, implying that these parents, as individuals, are asserting a claim to raise their child as they see fit. The general considerations that Aquinas sets out are only salient because these individuals are asserting a claim, as individuals, pertaining to the upbringing of this specific child. Once again, what Aquinas seems to have in mind is a claim to an immunity that is grounded in a general natural right, but takes the form of a specific claim, pertaining to one's freedom of action with respect to a particular object, in this case, this specific child.

In addition to these examples, we can identify other texts in which Aquinas defends immunities from coercion or punishment by appealing to some aspect of our shared human nature, without necessarily invoking natural right explicitly. For example, those who are accused of a crime are entitled to appropriate judicial procedures, and those who are convicted of a crime retain immunities for harm from other private individuals, in virtue of the claims of humanity that they hold in common with the rest of us.[18] Someone can defend himself against attack, even by lethal force, because the natural inclination towards maintaining one's life justifies him in placing his own

15 Ibid., II-II 66.7 ad 2.

16 Ibid., II-II 66.7 ad 3.

17 Ibid., II-II 10.12.

18 Ibid., II-II 64.3 ad 2. Aquinas's brief remarks here should be seen in the context of his extended discussion of what we would describe as norms of due process and proper legality, which he regards as obligations of justice grounded in considerations of fairness, equity, and natural equality. See Ibid., II-II 67–71.

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self-preservation ahead of the claims of his attacker.[19] In the former case, Aquinas formulates the claims of judicial procedure, as we would describe them, in terms of the duties of public officials and private individuals towards those accused of crimes. Yet it is difficult to believe that in this context, these particular duties would not be closely correlated with the claims of the accused—to be heard, to enjoy immunity from private vengeance, and the like. Aquinas's formulations do not imply a purely objective conception of the right, but they do suggest that he has some notion of rights as claims imposing duties, as well as rights understood as immunities. At any rate, in the latter example, Aquinas clearly sees the individual's natural inclination to self-defense as a basis for a claim to act in a certain way, and to be vindicated in the confessional, or in a court of law.

It appears, then, that Aquinas does have a conception of subjective rights, insofar as his moral analyses depend at critical points on individual claims, grounded in some consideration of natural right or nature. Generally, although not always, these are claims to some kind of immunity, implying that no one has a right to constrain the individual's freedom in specific ways. The predominance of immunity claims in Aquinas's analysis suggests that he places a higher value on human freedom than we often assume. A final example indicates that this is indeed the case.

The texts in question occur in Aquinas's discussion of obedience, considered as a virtue annexed to justice. He first considers the claim that relations of authority and subordination are themselves illegitimate, on the grounds that God created the human person free, and wills that the individual should be governed only by his or her own judgment (this is the first of three objections offered at II-II 104.1, "Whether one person is bound to obey another?"). He replies that just as lower creatures are moved by higher creatures in the order of natural causality, so in the realm of human action, the will of a subordinate is appropriately moved by the command of superior authority. However, this does not imply that a subordinate surrenders his or her own judgment and will: "God leaves the human person in the hand of his own counsel, not because it is licit for him to do everything he wants, but because he is not bound to that which is to be done by a necessity of nature, as irrational creatures are, but by free choice proceeding from his own deliberation. And just as other things that are to be done must proceed from his own deliberation, so this also, that he obeys his superiors."[20]

This qualification suggests that Aquinas wants to resist any suggestion that the obligations of obedience are absolute and unconditional. When we come to "Whether subordinates are bound to obey their superiors in all things?" we find that this is indeed the case.[21] First, no one is bound to obey another if doing so would contravene God's law—on the contrary, one is positively obliged not to obey in such a case. This is of course what we would expect. However, Aquinas goes on to qualify the obligation of obedience in another way. "No inferior is held to obey a superior if he commands something in which [the inferior] is not subordinated."[22] This implies, first of all, that no one is obliged to obey another human being with respect to those things that pertain to the inner motions of the will. The scope of human obedience extends only to those things that are done externally through the body. Even with respect to external actions, the scope of human authority and the obligations of obedience are further limited in particular contexts by the rationale for the authority in question. For example, a soldier is required to obey his commander in military matters but not in other spheres of life. Finally, just as the obligation to obedience is grounded in nature, so nature sets limits on the extent of this obligation:

19 Ibid., II-II 64.7.
20 Ibid., II-II 104.1 ad 1.
21 Ibid., II-II 104.5.
22 Ibid.

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> With respect to those things which pertain to the nature of the body, a human person is not obliged to obey another human person, but only God, because human persons are equal by nature, for example, in those things which pertain to the sustaining of the body and the generation of children. Hence, those in a state of servitude are not obliged to obey their lord, nor are children obliged to obey their parents, with respect to contracting matrimony or preserving virginity, or anything else of this sort.[23]

Here we see Aquinas asserting a general claim to freedom in certain fundamental aspects of human life, including most centrally those having to do with marriage and celibacy. We are all equal, insofar as we share in a common human nature, and for Aquinas this natural equality places strict limits on the scope of human authority. By implication, men and women enjoy critically important immunities from coercion in certain matters: no one can be forced either to marry or to remain unmarried, to enter religious life, and the like—all rights that are central to the canonical jurisprudence of marriage at this time.[24]

NATURAL RIGHT AND NATURAL EQUALITY

What can we conclude from these examples? At the very least, it is clear that the moral and juridical order as Aquinas understands it extends beyond the sphere of objective right, comprised of duties of respect and forbearance that are incumbent on all but owed to no one in particular. He also holds that men and women enjoy certain centrally important immunities from coercion, grounded in considerations of natural right or aspects of our shared human nature. His construal of natural rights claims is thus broadly similar to the views of the jurists whom Tierney and Reid consider. More generally, Aquinas's approach reflects the same general social and intellectual factors that shape the emerging medieval jurisprudence of natural right. Like the jurists, he does not develop a theory of rights, and it does not seem to occur to him to do so. The language and practices of rights claims are central to the social world of thirteenth century Europe, and Aquinas, like his interlocutors, draws freely on these as needed in his overall project.

At the same time, Aquinas is not just making *ad hoc* appeals to a familiar idea in his comments on claims of natural right. He does not develop a theory of rights as such, but his remarks on rights claims presuppose certain views about the normative significance of human nature. As we saw in the last section, his analysis of the scope and the limits of obedience depends explicitly on the claim that we are all equal in some fundamental respects. This natural equality is correlated with a "zone of autonomy" within which each individual can determine his or her marital or celibate status as each sees fit. Aquinas thus connects equality and freedom, in terms that are intriguingly similar to many contemporary theories of rights.[25]

This aspect of Aquinas's thought may come as a surprise, especially given the widespread view that he should be regarded as an eminent defender of the "older tradition of natural law" interpreted in Aristotelian terms. Yet Aquinas's moral theory, and more particularly his account of justice, draws on what we might describe as multiple traditions of equality, many of which associate equality with some kind of claim to freedom and self-determination. He begins his treatment of right,

23 Ibid., II-II 104.5.

24 Reid, "The Canonistic Contribution to the Western Rights Tradition," 72–92; Reid, *Power over the Body, Equality in the Family*, 25–68.

25 See, e.g., Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 120–83.

considered as the object of the virtue of justice, with the claim that the right implies a kind of equality:

> It is proper to justice, in comparison to the other virtues, that it directs the human person with respect to those things pertaining to others. For it brings about a certain equality, as the name itself shows, for those things which are equalized are commonly said to be made just. ... [T]he rectitude of an operation of justice, even apart from any reference to the agent, is constituted through comparison to another, for that is said to be just in our work which corresponds to another in accordance with some equality, as for example, the recompense of due wages for services rendered.[26]

At this point, Aquinas is relying on Aristotle, who similarly associates justice between individuals with an ideal of equality in exchanges.[27] Taken by itself, this ideal would not imply any kind of commitment to robust ideals of universal equality and equal regard extended in some way to all. Aristotle himself famously does not believe that all persons are equal, as moral agents or otherwise, and correlatively, he seems to have thought that justice, as practiced between individuals, is limited in scope.

Aquinas, in contrast, does believe in the natural equality of all human beings. More specifically, he holds that all human persons are equal in the critical respect that each is an individual of the same specific natural kind, namely, humanity. This implies for him that each human individual, without exception, is potentially capable of intellectual understanding and discursive reasoning, which he identifies with the Image of God borne by us all.[28] Individuals may be unable to exercise these faculties, due to immaturity or to some disability, but they are intrinsic to human existence, structurally built into the substance of each individual, and integrally bound up with our sense of what we owe to one another. Aquinas's remarks on the divine Image in the *prima pars* emphasize rationality and intellectual capacity, but in the introduction to the *prima secundae*, he quotes a well-known remark of John of Damascus, identifying the divine Image with human capacities for self-governance and dominion over one's own actions.[29] The upshot is that all human beings are equal, in that each possesses at least the innate capacities for intellectual understanding, discursive reasoning, and free, self-reflective action. What is more, the natural equality of all men and women implies that the hierarchical structures of society, legitimate and necessary though they may be, are almost always conventional rather than natural, and always presuppose that the parties involved stand as equals to one another, simply by virtue of shared humanity. Aquinas makes this point crisply, in order to contrast rule among angelic agencies with human rule: "the demons are not equal in accordance with nature, and so there is among them a natural order of preference. This is not the case among human beings, who by nature are equal."[30]

Seen from this perspective, Aquinas's claim that justice aims at bringing about an equality of exchange takes on a different cast. For him, the ideal of equality of exchanges is paradigmatic,

26 Aquinas, *Summa Theologiae*, II-II 57.1.

27 See Aristotle, *Nicomachean Ethics* 5.3, 1131a 10-1131b 24, for a summary of the distinct kinds of equality involved in exchanges and distributions. Aristotle's own view is notoriously complex and difficult, and I have not attempted to address the question of whether, and to what extent, Aquinas interprets Aristotle's overall views correctly. For further particulars, see Jeffrey Hause, "Aquinas on Aristotelian Justice: Defender, Destroyer, Subverter, or Surveyor?" in *Aquinas and the Nicomachean Ethics*, eds. Tobias Hoffmann, Jörn Müller, and Matthias Perkams (Cambridge: Cambridge University Press, 2013), 146–64.

28 Aquinas, *Summa Theologiae*, I 93.1 ad 4.

29 Ibid., I-II introduction.

30 Ibid., I 109.2 ad 3.

because in every encounter or relationship, we are engaged with someone who is in some fundamental way an equal, if only by virtue of our shared humanity. This does not mean, of course, that the paradigmatic ideal of justice will be attainable or desirable in every interaction with another—in many contexts, an equal return for benefits or losses would be impossible or inappropriate.[31] Nonetheless, we can readily see why equality of exchange is paradigmatic for him, if only because many everyday encounters will involve exchanges of the relevant kind. Aquinas's conception of justice thus gives a central place to ideals of equality of exchange, equity, and fairness, because these are always potentially relevant and will often be directly relevant in a society of those who are equal in some fundamental ways.

Aquinas's overall commitments to natural equality lead him to interpret the Aristotelian ideal of equality of exchange expansively. To take the most immediately relevant example, he identifies the central norms of non-maleficence, including prohibitions against murder, theft, fraud, and the like, as norms of commutative justice, which apply to exchanges between individuals.[32] It may not surprise us that Aquinas considers murder, theft, and the like to be forms of injustice, but it is worth remarking that he identifies these kinds of actions as forms of impermissible equality. In doing so, he takes his starting points from Aristotle, who also identifies fundamental offenses against other persons as violations of commutative justice.[33] Nonetheless, it is difficult to see how Aquinas's detailed analysis of the norms of non-maleficence could be derived from an Aristotelian conception of justice as equality of exchanges. We might expect that Aquinas draws on other traditions of equality in the course of developing these analyses, and on closer examination, we see that this is indeed the case. These alternative traditions draw extensively on scriptural and patristic reflections on the meaning of equality before God, but they also include other classical traditions. In particular, they include Roman and canonical traditions of natural law and natural right, which offer a distinctive perspective on equality and its connection to freedom.

Aquinas offers an important clue to his overall approach in the context of discussing offenses committed verbally, including invective, detraction, and the like. These kinds of offenses imply some kind of disrespect, as he observes. He compares this kind of disrespect with the kind of disrespect shown by actions directed against the person, the associates, or the possessions of another. The critical point is that in each case, Aquinas associates the kind of disrespect in question with a kind of dishonor:

> contumely implies dishonor to someone. This can happen in two ways. For since honor follows from some excellence, someone can dishonor another by depriving him of an excellence on account of which he had honor. This comes about through sins of deeds, which we treated above. In another way, when he brings that which is contrary to the honor of someone to his attention and that of others. And this properly pertains to contumely.[34]

In order to appreciate the full significance of these remarks, we need to keep in mind that the sins of deeds to which Aquinas refers include assaults on the person, the associates, or the property of another, for example, murder, adultery, or theft.[35] These kinds of actions are strictly prohibited, no matter what the status or circumstances of the intended victim might be. Thus, when Aquinas

31 Ibid., II-II 80.
32 Ibid., II-II 64 introduction.
33 See Aristotle, *Nicomachean Ethics*, 5.2, 1130b 30-1131a 9, 5.4, 1132a 1–19.
34 Aquinas, *Summa Theologiae*, II-II 72.1.
35 Ibid., II-II 64–71.

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characterizes these as deprivations of excellence, what he has in mind can only be some natural excellence, on account of which every man and woman should be honored. In this way, Aquinas draws on the language of personal fealty and differential status as a way of articulating a very different set of ideals, according to which human individuals relate as equals on the shared ground of mutual respect and common commitments. By doing so, he indicates that his analysis of the norms of non-maleficence takes place within a distinctive semantic field, as Tierney would say, shaped by considerations of status, honor, and respect. These considerations fit awkwardly within an Aristotelian discourse focused on equality of exchanges, but they fit naturally, as it were, within a juridical discourse shaped by claims of right.

We have already observed that Aquinas moves within the same social and intellectual world as the jurists, and draws freely on the same traditions of natural right and natural law as they do. In order to move forward, we need at this point to consider one specific element of these traditions, namely, the place they give to free status, seen in contrast to servitude. We usually associate freedom with someone's ability to act without constraint, or to act effectively, in such a way as to exercise her capacities or to attain her goals. Men and women in the thirteenth century recognized and prized these elements of freedom, but in addition, the general idea of freedom was associated with a complex of social and political ideas that would be largely absent today. In this society, freedom was a status, a social condition implying both some degree of independence and honorable estate.[36] As such, it contrasted with servitude, which implies constraint, dependence, and a lack of social honor. Servitude was universally regarded as onerous, a condition to be avoided or escaped if at all possible, and no one regarded it as a natural part of human existence—rather, it was generally regarded as one of the regrettable results of the sin of our first parents. For the scholastic jurists, this complex of ideas provides a context within which to integrate ideals of freedom and equality.[37] Following the Roman jurists, they hold that all men and women are equal by natural right, insofar as each person is naturally free, and by natural right, material goods are held in common. Natural equality, seen from this perspective, is most fundamentally an equality of status, implying equality of honor, dignity, and respect, and a protected share in the common possessions of humanity. At the same time, it would seem that natural equality, liberty, and community of possessions are set aside by the law of nations, and scholastic jurists and theologians spend considerable efforts to explain how the supposedly unchanging natural right can be qualified in these ways.

Aquinas's remarks in II-II 72.1 indicate that he, too, regards human nature itself as conferring free status, and by implication, a natural equality of estate or condition. Like the jurists, he acknowledges that this natural status is qualified, and to some extent compromised, through social arrangements that introduce division and dominion into human society. He recognizes that communal practices and human law provide the necessary conventional framework within which men and women can grasp and exercise the claims of natural right. These conventional structures will necessarily limit and qualify the exercise of natural right to some degree, if only to deal with potential conflicts of claims of right. Nonetheless, natural right cannot be set aside by the right set up by human enactments.[38] The claims of private ownership are to be set aside in favor of a claim

36 Janet Coleman offers a good summary of the complex ideals of freedom and servitude, seen in relation to ownership and poverty, in "Property and Poverty," in *The Cambridge History of Medieval Political Thought, c. 350–c. 1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988), 607–48.

37 For a fuller account of scholastic views on equality, free status, and possessions, together with textual citations, see Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids, MI: Wm. B. Eerdmans, 1999), 245–93.

38 Aquinas, *Summa Theologiae*, II-II 66.7.

based on the natural right to sustain one's life through the appropriation of material goods. The claims of dominion and the disabilities attached to servitude are inextricably part of our fallen world, but they are also limited in scope by claims of natural right to dispose of one's sexual faculties as one sees fit. In short, for Aquinas natural right is expressed and qualified, but not fundamentally changed, by the law of nations.

Aquinas appears to link free status to a capacity to claim certain things by right. This is a plausible connection, but it is worth noting that it is by no means necessary, especially given the complexity of notions of free status and servitude at this time. We have already noted that free status does not imply that someone is free of all constraints and obligations. Free status confers a measure of personal liberty, but it also carries the connotation of being valued for one's own sake. Arguably the latter is more fundamental, since we can value someone for his own sake, even when he is not capable of free agency—that, presumably, is the right attitude to take towards small children, for example. In his explicit remarks on the significance of free status, Aquinas focuses on this latter aspect of freedom as an honorable status. The distinction between servitude and political rule is understood in terms of the purpose underlying governance or command—someone in a servile condition is constrained to act for his master's benefit, whereas the free man or woman is governed in order to promote the individual's own good, or the common good.[39] This way of construing the political, in itself, would be consistent with a thorough-going paternalism.

Yet Aquinas does give considerable scope to individual claims to immunities and freedoms. Can we offer a plausible way of understanding how he might do so, given his overall conceptions of equality and freedom? I believe that we can. The key to understanding the connection between political authority and individual rights claims, as Aquinas understands them, lies in the idea of authority itself. Aquinas understands political authority in teleological terms. Political rule is justified because, and insofar as, it is directed towards the common good. By the same token, legislative authority, which is one aspect of political authority, is justified insofar as it is exercised for the common good. My point is that Aquinas understands the moral powers of the individual in similar terms. The individual is naturally inclined to seek her private good through self-reflective choices and activities,[40] reflecting some overall conviction of what her final good is.[41] The orientation of the individual towards the free pursuit of her own good is natural and proper for Aquinas—indeed, men and women cannot lead adequately human lives, let alone good and holy lives, apart from this kind of self-determination. The individual's powers for self-determining choice are thus teleologically justified, and they exert a claim on others.

Seen from this perspective, natural equality and the capacity to claim certain things by right are inextricably tied together. Men and women have the authority to claim certain things by right, because in certain fundamental respects, we share equally in the same status, an honorable status attached to the human estate itself. More specifically, the fundamental equality enjoyed by all men and women is an equality of status as free, self-directed rational agents. For Aquinas this is not just a matter of honor. Rather, it implies that individuals ought to be free to act as they see fit in certain critical respects, and to claim certain immunities and certain kinds of sustenance for themselves. The ideal of equality as Aquinas understands it is not limited to an equality with respect to claims of right, since it also integrates broader considerations of equity and general claims of non-maleficence. Nonetheless, natural equality is centrally connected to claims of right, and equal

39 Ibid., I 96.4.
40 Ibid., I-II 1.1 ad 2.
41 Ibid., I-II 91.2.

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regard, as we would express the normative ideal, is bound up with respect for the honorable status of men and women, who are equally free by nature.

Of course, individual authority is not unlimited, any more than political authority is. Individuals can be constrained for good reasons. But if the authority of the individual is not to be rendered nugatory, he must have some recourse, as it were, to claim certain immunities and freedoms, over against those who would constrain him in unjustifiable ways. These claims are grounded in the same kinds of consideration that ground legislative activity. The general concept of *jus*, right, is a legal concept, and as such, it carries practical implications. Understood in its most general sense, *jus* refers to a principle of justice, or a basis for a legitimate claim of some kind. As such, it is frequently contrasted with *lex*, written law, which is said to be an authoritative formulation of some principle of right or justice. The correlation between the right and legal enactments is critically important for the jurists in this period, but they never lose sight of the broader sense of rights, as conventional or natural grounds for some kind of claim.[42]

This latter way of construing the right is central to Aquinas's moral analysis. For him, the critical moral power inhering in individuals is an authority to pursue one's natural aims and overall beatitude independently, in accordance with one's own best judgments. This authority cannot be exercised without restraint, because without some framework of mutual obligations and constraints, no society could exist at all. At the same time, however, the individual has to have the authority to set certain limits on the constraints of others—otherwise, our human capacities for judgment and self-determining freedom would be otiose. Aquinas assumes that individuals exercise their authority through claims, and these claims are grounded in considerations of natural right, which he believes to be generally accessible to all. The individual does not possess rights as discrete powers—rather, she possesses a general moral power for self-determining action, which she can exercise preemptively on the basis of some claim of right. Correlatively, the claims inherent in natural right are not simply legal principles, under the sole domain of legislators and judges—they are also accessible to individuals, as the basis for claims over against others. Aquinas does not seem to think of rights as discrete moral powers, and in that respect, his approach would differ from that of many contemporary theories of natural or human rights. Nonetheless, he does clearly hold that the individual possesses the authority to determine the course of her own life in certain critical ways, and this authority implies moral powers to claim certain immunities and performances by right. In my view, Aquinas's approach offers a better way of accounting for claims of right than do most contemporary theories, but that is an argument for another day.

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42 At this point, I am summarizing a line of interpretation I developed in *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids, MI: Wm. B. Eerdmans, 2010), 70–82.