A MODEST READING OF ST. THOMAS AQUINAS ON THE CONNECTION BETWEEN NATURAL LAW AND HUMAN LAW

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I. INTRODUCTION

For at least the last two decades, the natural law tradition has been "enjoying a renaissance"1 or "revival."2 Professor J. Budziszewski, a popular contemporary natural law theorist, recently provided a fairly standard description of the natural law as "the foundational principles of right and wrong which are both right for all and at some level known to all . . . ."3 Budziszewski's conception of the natural law is substantially similar to the definition of the natural law that Lord Coke provided almost four hundred years ago: "The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction . . . ."4 Neither Budziszewski nor Lord Coke's understanding of the natural law is entirely original; they inherited this view of the natural law from the most influential natural law theorist of all time, the thirteenth-century Dominican monk, St. Thomas Aquinas.

Scholars have called Aquinas "one of the most renowned and brilliant theologians and philosophers in history"5 and "a thinker of unequalled depth and subtlety."6 Aquinas’s Summa Theologica7 was his

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3. BUDZISZEWSKI, supra note 1 at 21.


6. BUDZISZEWSKI, supra note 1 at 69.

magnum opus. In the second part of Summa Theologica, frequently called the “Treatise on Law,” Aquinas addressed several “Questions” concerning law. This Article will focus on Aquinas’s Questions numbered ninety through ninety-seven. In these eight Questions, Aquinas gamely tackled many of the tough issues concerning the nature of law. Most importantly for purposes of this Article, Questions ninety-four and ninety-five addressed natural law and human law, respectively.

In Question ninety-five, Aquinas articulated a connection between human law and natural law: “every human law has just so much of the nature of law, as it is derived from the law of nature.”

It is worth noting here that the scope of the natural law described by Aquinas is breathtakingly broad - the natural law literally commands, in a sense, every act of virtue and prohibits every vice: “there is in every man a natural inclination to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law: since each one’s reason naturally dictates to him to act virtuously”.

The relatively recent resurgence of the natural law tradition has generated a corresponding resurgence of criticism of the tradition; some of this criticism smacks of fear. This fear of the resurgence of the natural law tradition likely stems from the perceived connection between natural law and human law. Whether an abstract natural law exists in some sense and its precise content are questions not likely to cause many to bolt awake at night in a cold sweat, but what one’s fellow human may very concretely do with what he or she perceives to be that natural law can be downright scary. This is not to imply that the theoretical existence of a natural law is universally accepted, indeed the question whether natural law exists at all is itself a controversial question for moral philosophers. However, few legal scholars are likely to fret over the abstract existence or non-existence of a natural “law” that only God (or nature) enforces. As Professor David Smolin stated, “the real issue is not whether natural law is enforceable, but rather who is charged with its enforcement, and what means of enforcement are employed.” Therefore Smolin recognized, “it is the specter of state enforcement of natural law that is most responsible for the fear that natural law theory generates.”

9. Id. at 62.
10. See generally Smolin, supra note 1, at 383 (indicating “it is the specter of state enforcement of natural law that is most responsible for the fear that natural law theory generates”).
11. Smolin, supra note 1, at 393.
12. Id.
This Article's thesis is that natural law need not strike fear into the hearts of those who worry about man's compulsion of his fellow man through force. Rather, this Article demonstrates a quite narrow and limited reading of Aquinas's seminal description of the connection between natural law and human law. True, contemporary natural law theorists tend to be fairly aggressive with regard to the connection between natural law and human law, but a less threatening approach to the natural law tradition is more than merely plausible.

II. AGGRESSIVE CONTEMPORARY APPROACHES TO THE NATURAL LAW TRADITION

Those legal scholars who fear natural law because of the threat of human compulsion are not merely paranoid, as most proponents of the natural law tradition understand the tradition as suggesting a strong normative connection between the natural law and human law. Harold Berman described natural law theory as the belief "that human law derived ultimately from, and was to be tested ultimately by, reason and conscience." Modern natural law tradition proponents take this connection between natural law and human law very seriously. Indeed, since Aquinas famously noted the connection between natural law and human law, many later natural law theorists have followed suit throughout the subsequent centuries, and lately these theorists have done so with seeming relish. For example, Budziszewski incorporated the concept of natural law into his very definition of human law when he defined human law as "the application of the natural law, by public authority, to the circumstances of particular human societies." In addition to Budziszewski, Professor Charles Rice, another noteworthy contemporary advocate of the natural law tradition, has advocated a strong connection between natural law and human law. More specifically, Rice suggested "two functions" ("constructive" and "critical") for natural law "with respect to human law." Rice's "critical" function for natural law is interesting, but perhaps less controversial: In its "critical function, the natural law... provides a reason to draw a line and criticize an action of the state as unjust and even void." "Criticism" of state action and even declaring it "void" as against the natural law (so long as a mere commentator makes this declaration and not anyone in authority) do not seem all that threatening in our culture, and so the natural law's providing a basis to criti-
cize the state is not likely to strike fear into the hearts of the natural law's opponents.

However, Rice's proposed "constructive" role for the natural law is bound to generate more concern from the natural law's opponents. In Rice's account of the "constructive" role, "natural law serves as a guide for the enactment of laws to promote the common good." As a possible application of this "constructive" function for natural law, Rice cited the law concerning divorce: "Legislators should . . . consider restrictions on divorce so as to strengthen the family as a divinely ordained natural society entitled to the protection of the State." Unlike the "critical" function of natural law, Rice's proposal to use the natural law's "constructive" function to limit divorce would concretely affect contemporary Americans.

Some contemporary advocates of the natural law tradition tend to characterize the appropriate connection between natural law and human law as follows: Natural law should be generally enforceable as part of human law unless prudence dictates otherwise. Budziszewski's account is classic: "The relationship between the natural law and the human law does involve enforcement; that which the natural law prohibits should be prohibited by the human law as well, within the limits of prudence already mentioned."

A. WHAT PART OF THE NATURAL LAW SHOULD BE ENFORCED BY THE STATE?

Natural law advocates who would enlist human government to enforce natural law face a fundamental difficulty in that almost nobody really seems to have the stomach to require complete enforcement. A moment's reflection demonstrates why thoroughly incorporating the natural law into human law might make some queasy—assuming that natural law has something to say about all of the following subjects, should human government outlaw blasphemy? Sodomy? Poor parenting? Cruelty? Gluttony? Is there a clear stopping place?

But human law cannot practically command every virtue and proscribe every vice. Even the most ardent advocates of a strong connection between natural law and human law generally have recognized that the fullness of natural law cannot serve as a humanly enforceable standard for conduct. Professor Craig Stern made this point eloquently: "Few would hold that the Bible permits a state to punish whatever sin its citizens agree it ought to punish. An evil thought is a
Unbelief is a sin. Every failure to meet the standard of Christ Himself is a sin.” In the light of the comprehensive moral scope of the natural law, a thorough human program to enforce every precept of the natural law would be, to say the least, a very aggressive undertaking.

This daunting difficulty has not completely deterred natural law advocates, but to make the potentially strong tonic of natural law usable as a humanly enforceable standard, those advocates have concluded that it must first be watered down to make it palatable for human consumption. Therefore, those who would base human law in natural law must face the seemingly intractable question of how to divide that part of natural law which human law ought to enforce from that part of the natural law that human law ought to leave to God or nature (or perhaps to God through nature) to enforce. (For purposes of this analysis, let us leave to one side the fact that people will not agree over the substantive content of natural law and assume, contrary to fact, that even believers in the natural law can agree on its content.) Recognizing this difficulty of dividing the enforceable aspects of the natural law from the unenforceable, virtually all natural law theorists from Aquinas to Budziszewski have sought to address the difficulty by placing some limits on human enforcement of natural law. As Smolin stated, “Christian tradition has long taught that certain parts of God’s law should not be enforced by the State.”

B. LIMITATIONS ON THE ENFORCEMENT OF NATURAL LAW THROUGH HUMAN LAW

Budziszewski provided the most recent catalogue of principles for limiting the enforcement of natural law through human law. He organized his concerns under two headings: “How Not to Link the Natural Law with Legislation” and “How Not to Link the Natural Law with Jurisprudence.” This Article focuses on Budziszewski’s four prudential limitations on legislating the natural law. According to Budziszewski, “Among the most serious ‘wrong ways’ of exercising moral

21. Smolin, supra note 1, at 396.
23. Id.
24. BUDZISZEWSKI, supra note 1, at 113-36. These two categories of linking natural law with legislation and jurisprudence roughly correspond (respectively) with Professor Rice’s constructive and critical functions for natural law. See Rice, supra note 15.
judgment which legislators should avoid are commanding what cannot be seen, commanding more than common good requires, commanding without due regard for prudence, and commanding without due regard for what natural law thinkers call 'subsidiarity.' This Article will examine each of these proposed limitations in turn.

1. Limit One: Man Is Competent to Judge Only Exterior Acts

With regard to what Budziszewski calls “judging what cannot be seen,” Aquinas articulated the point as follows: “man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear.” Later natural law commentators have taken this “ball” from Aquinas and run with it. Smolin writes that “merely evil thoughts are not punishable by the state because human beings cannot read minds.” However, this argument that people cannot read minds misses the mark. Of course people cannot “read minds,” but mind reading would not be necessary to punish evil thoughts. People can and do judge the hearts, minds, motives, and character of other people all the time without reading minds. American law is full of “good faith” requirements that assume that people can judge such things. Many crimes include a mens rea element that makes outward actions criminal only when accompanied by an evil state of mind. This mens rea element requires our criminal justice system to prove what is in the defendant’s mind. While people cannot “read minds” directly and flawlessly, people can and do competently look to circumstantial evidence to judge other people’s internal motives every day.

In taking up Aquinas’s point about human judgment’s competence over “interior movements,” Budziszewski recently made a somewhat more nuanced argument than Smolin’s earlier statement about people’s inability to read minds: “The law may command and prohibit outward actions, but it must not attempt to command or prohibit the hidden movements of the heart, such as virtues, vices, feelings, thoughts, and beliefs.” Budziszewski illustrated his point using the virtue of honesty, which he characterized as “an internal disposition of character.” Budziszewski suggested that human authorities can never know whether a person is truly honest, and therefore “the law may never issue a command like ‘Be of honest character.’” While it

25. BUDZISZEWSKI, supra note 1, at 115.
26. AQUINAS, supra note 8, at 21.
27. Smolin, supra note 1, at 399.
28. BUDZISZEWSKI, supra note 1, at 115.
29. Id.
30. Id. at 116.
may be true that human judges cannot measure honesty as God can, \(^3\) that does not mean that human judges are entirely incompetent to judge whether a virtue like honesty resides within a particular human breast. To the contrary, the American justice system explicitly provides for the proof of human character. Federal Rule of Evidence 405(a) provides that when a person's character is relevant and not otherwise inadmissible, character may be proven "by testimony as to reputation or by testimony in the form of an opinion." \(^3\)

True, the Federal Rules of Evidence ("FRE") limit such so-called "character evidence," but there is no general prohibition of such evidence. Rather, the FRE prohibit using character evidence only when offered for a particular purpose, where it is used to prove conduct. \(^3\) Thus, the FRE prohibit only character propensity evidence, not character evidence generally. To the contrary, relevant evidence of character is perfectly admissible under the FRE for any purpose other than to prove conduct. The reason for this limitation on the use of character evidence to prove conduct has little, if anything, to do with human competence to judge character. Rather, the FRE generally prohibit litigation parties from proving conduct by showing character because of doubts about the logical connection between character and conduct; people frequently act contrary to their general character. \(^3\) Thus, the FRE limit use of evidence of character to prove conduct, but the FRE never suggest that character cannot be proven at all. In fact, the very character trait that Budziszewski chooses as an example of his proposition that humans cannot judge character, namely honesty, is a special focus of proof under the FRE. FRE 608 permits litigation parties to attack or support the credibility of trial witnesses by reputation or opinion evidence of the particular witness's "character for truthfulness or untruthfulness." \(^3\)

It simply is not the case that people are incompetent to judge the character of their fellows – people can, and people do. For this reason, job applicants frequently list "character references" on their résumés.

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31. The Old Testament story of God's selection of David to be king over Israel in place of the rejected Saul makes this point. God revealed to the prophet Samuel that Saul's replacement would be one of the sons of Jesse of Bethlehem. *I Samuel* 16:1. At God's command, Samuel traveled to Bethlehem, where he saw Jesse's son, Eliab. Apparently Samuel was favorably impressed because he thought that Eliab must surely be the "LORD's anointed" king over Israel. *I Samuel* 16:6. But God corrected Samuel's natural reaction: "[T]he LORD said unto Samuel, Look not on his countenance, or on the height of his stature; because I have refused him: for the LORD seeth not as man seeth; for man looketh on the outward appearance, but the LORD looketh on the heart." *I Samuel* 16:7.

32. See Fed. R. Evid. 405(a).

33. See Fed. R. Evid. 404.

34. See Fed. R. Evid. 404.

35. See Fed. R. Evid. 608(a).
Applicants know that potential employers will want to draw some inferences about the unseen character of their potential employees. In a fascinating article concerning evidentiary limitations on proof of conduct by demonstrating character, Professor David Leonard noted the common use of character evidence in our everyday lives:

Undeniably, we use evidence of character in our daily lives. When deciding whether to hire a certain person as a babysitter for our children, we place heavy emphasis on what we know (or have come to believe) about that person's sense of responsibility, judgment, caution, prudence, and thoughtfulness, among other qualities.\(^{36}\)

While these qualities all are unseen, people do not let these qualities' invisibility prevent them from judging whether those qualities exist. Rather, people use circumstantial evidence to make rational inferences about those qualities' existence, just like juries use circumstantial evidence to make rational inferences in American courtrooms every day.

While people are capable of judging others' character, that fact is not to say that people ought to sit in judgment of the character of others. The American criminal justice system does generally strive to punish people only based on their conduct, not based on their character. The United States Court of Appeals for the Ninth Circuit has poignantly described "the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not for who he is."\(^{37}\) This statement leads to the logical question, why is it that we punish people only for bad conduct, not for bad character? Is it because people are incompetent to judge character? Nothing in the relevant authorities suggests that people are incompetent to judge other people's character. Since it is possible for people to judge the character of others, there must be other reasons that bad character ought not to be punished as such. The fundamental principle that bad character should not be punished as such is not based, at least not explicitly, on people's inability to judge character. Budziszewski (and Aquinas) probably are right that bad character should not be punished by human rulers, but not because people cannot judge character—people can, and people do, every day.

2. Limit Two: Human Law Must Protect Only the Common Good

Budziszewski's prudential limitation on the enforcement of natural law through human law revolved around the distinction between


\(^{37}\) United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985).
the common good and mere private good. Budziszewski cited Article Three of Aquinas's *Summa* Question Ninety-Six, in which Aquinas states that "all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude."38 Because human law "is ordained to the common good," it prescribes only those acts of virtue "that are ordainable to the common good."39 Likewise, Budziszewski suggested that the human law ought not prescribe some acts of virtue because those acts tend, at least primarily, only to the private good of one or more individuals. For Budziszewski, the common good/private good distinction appeared to be one of degree as he stated, "every virtue contributes to the common good," but "not every act of every virtue contributes significantly to the common good. Those which do may be commanded by law, but those which do not may not."40

Budziszewski noted a couple of examples in which the same vice (or lack of virtue) can impinge the common good more or less significantly. He stated that "the law properly takes an interest in whether a witness has been truthful in court, but it does not ordinarily take an interest in whether a teenager has been truthful in her secret diary."41 These contrasting examples are well-chosen. The lie in the teenager's secret diary is about as private a lie as one can imagine, whereas the witness's lie on the public record in open court is very public indeed. But is this common good/private good distinction really the proper dividing line between those lies that the state ought to regulate and those that the state should not? It is possible to think of very private lies that people probably would nevertheless want the state to regulate. For example, imagine that a homeowner sells to a neighbor his or her house telling the neighbor that the house has recently been professionally inspected and found to be in a perfectly safe, livable condition. In reality, however, the home inspection revealed several dangerous defects that would be very expensive to repair. In reliance on the homeowner's lie, the neighbor pays top dollar for the house. While the homeowner's individual lie probably does not substantially affect the public good, the neighbor's private good is devastated. Should the state not prohibit the homeowner from thus defrauding the neighbor?

To this question, one might reply, "but if many people were free to repeat the homeowner's lie to other neighbors, then the common good would be greatly impaired." This is true. Likewise, if every American

38. *Aquinas*, supra note 8, at 94.
39. *Id.*
41. *Id.*
teenager were exercising a dishonest twist of character by regularly writing lies in their diaries, would our society not suffer significantly? People might not immediately appreciate what is wrong, but certainly people would notice that something is wrong with America's youth. Any act of virtue (or vice) can impact the common good if repeated often enough. Thus, the common good/private good distinction does not explain why the American criminal justice system punishes lies in court but not in private diaries. Instead, there may be a better explanation as to why the American criminal justice system chooses only to punish certain lies. Perhaps the lie in court (like the homeowner's lie to the neighbor about the home inspection) is directed to others with the intention and expectation that others will rely on those lies. In that way, those lies resemble a form of "verbal violence" against those at whom they are directed and therefore fit Aquinas's description of vices that "are to the hurt of others" such as "murder and theft." Human society could not be maintained if such "verbal violence" went unregulated. Conversely, human society probably can be maintained if teenagers are allowed to write lies in their secret diaries, but that does not mean that society would not suffer from the lies.

Budziszewski's "contributes significantly to the common good" test does not provide very clear guidance to the magistrate trying to discern what part of the natural law that magistrate ought to enforce. To the contrary, under Budziszewski's test, it probably is impossible to judge which acts of vice will, in the end, do the most harm to the common good. Budziszewski provided an apt illustration of this difficulty when he noted that a citizen's public lie "impinges much more keenly on the public good" than a man's lie "to his wife." This claim may not be true. A lie to one's wife may chip away at human society's very foundation. In a mid-nineteenth century United States Supreme Court decision upholding the doctrine of spousal testimonial privilege, which was designed to protect communications within marriage, the Court recognized that marriage provides such a foundation for society:

This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.

42. AQUINAS, supra note 8, at 92.
43. BUDZISZEWSKI, supra note 1, at 116.
While the Court's opinion in *Stein v. Bowman*\(^45\) spoke of a rule against a state's ability to compel one spouse to testify against another, the language speaks of a principle that is equally applicable to promoting honesty within marriage. It is hard to imagine many things more destructive of marital unity than dishonesty within the marriage. Therefore, contrary to Budziszewski's contention, it is not at all clear that lying to one's wife (at least if repeated often enough, within enough marriages) does not impair significantly the common good. However, probably nobody thinks that human law ought to enforce honesty within marriage.

Other examples of seemingly private conduct that impairs the common good abound. Another such example is found in the biblical concept of *loshon hora*. Professor David Leonard discussed this concept as a possible basis for the Anglo-American rule against proving conduct through character. Leonard based the concept in two verses from The Book of Psalms, particularly Psalm Thirty-Four: "What man is he that desireth life, and loveth many days, that he may see good? Keep thy tongue from evil, and thy lips from speaking guile."\(^46\) "Loshon hora refers generally to various forms of speech prohibited by the Torah, and more specifically to derogatory or harmful speech."\(^47\) Leonard eloquently described the devastating harm that *loshon hora* causes: "Our petty daily character judgments, when voiced, can be the source of the kind of hatreds that divide us as nations, as cultures."\(^48\) When it comes to the society's destruction, few evils take a back seat to speaking ill of others. The apostle James taught that the spoken word can do tremendous damage, describing the tongue as "a fire, a world of iniquity ... that ... defileth the whole body, and setteth on fire the course of nature: and it is set on fire of hell."\(^49\) He continued that it is an "unruly evil, full of deadly poison."\(^50\) Yet despite evil speaking causing every day massive societal destruction of human well-being, nobody, not even any natural law tradition proponent, advocates criminalizing evil speaking. Relative impact on the common good cannot serve as a suitable dividing line between the parts of natural law that human law should enforce and those that it should not.

3. **Limit Three: Prudence**

Budziszewski appealed to prudence as a third possible limit on the enforceability of natural law through human law: "The relation-

\(^{45}\) 38 U.S. 209, 223 (1839).
\(^{46}\) Psalms 34:12-13.
\(^{47}\) Leonard, *supra* note 36, at 1188.
\(^{48}\) *Id.* at 1189.
\(^{49}\) James 3:5-6.
\(^{50}\) James 3:8.
ship between the natural law and the human law does involve enforce-
ment; that which the natural law prohibits should be prohibited by
the human law as well, within the limits of prudence . . . ."51 Budzis-
zewski cited two prudential reasons that human law should not pro-
hibit all vices. For one, Budziszewski's prudence would limit human
enforcement of natural law in that human law "must not lay upon citi-
zens greater burdens than they can bear . . . ."52 Aquinas similarly
counseled against requiring the impossible through human law: "laws
imposed on men should also be in keeping with their condition, for, as
Isidore says . . . law should be possible both according to nature, and
according to the customs of the country."53

Budziszewski also cited Aquinas, who in turn cited Augustine, for
the proposition that "human law cannot punish or forbid all evil deeds:
since while aiming at doing away with all evils, it would do away with
many good things, and would hinder the advance of the common
good . . . ."54 Aquinas therefore concluded that since human law
should not punish all vices, the divine law (Scripture) must step in to
prohibit those vices that human law does not punish.55 Smolin like-
wise recognized the impracticability and undesirability of taking state
punishment of vice to its logical extreme and so formulates prudential
limitations on the human enforcement of natural law. For example,
"[d]ecisions regarding state enforcement must take account of the
practical good versus practical evil that would result from either state
enforcement or state nonenforcement."56

Budziszewski cited freedom of expression as an example of the
need to permit some vice in order to avoid doing violence to something
good. According to Budziszewski, the expression of wrong and disor-
dered ideas must be allowed so that truth can be "sharpened and clari-
fied" in contest with error.57 Liberty of expression (a "good") trumps
suppressing evil speech (another "good"). However, this argument can
have a very wide application, perhaps so wide that it swallows com-
pletely the idea of incorporating natural law into human law.

The fundamental equality of all people is a foundational precept
of natural law, and human liberty as an essential good is one of this
precept's corollaries. Abraham Kuyper long ago vividly described the
natural good of human liberty:

51. BUDZISZEWSKI, supra note 1, at 83.
52. Id. at 118.
53. AQUINAS, supra note 8, at 91.
54. Id. at 21.
55. Id.
56. Smolin, supra note 1, at 401.
57. BUDZISZEWSKI, supra note 1, at 118.
Every State-formation, every assertion of the power of the magistrate, every mechanical means of compelling order and of guaranteeing a safe course of life is therefore always something unnatural; something against which the deeper aspirations of our nature rebel; and which, on this very account, may become the source both of a dreadful abuse of power, on the part of those who exercise it, and of a continuous revolt on the part of the multitude. Thus originated the battle of the ages between Authority and Liberty, and in this battle it was the very innate thirst for liberty which proved itself the God-ordained means to bridle the authority wheresoever it degenerated into despotism.\textsuperscript{58}

When Budziszewski acknowledged that the good of liberty of expression can override the good of suppressing evil speech, he opened the door to recognizing likewise (based partially in the fundamental equality of all people) the overriding good of permitting people the liberty to make their own decisions generally, even when those decisions are wrong. Frequently the harm that the wrong decision poses to the common good will be outweighed by the benefit to the common good from a general environment of human liberty in which people are free to make their own decisions. In addition to Budziszewski’s example of liberty of expression, John Finnis cited religious liberty as another example:

[T]o know the truth about the ultimate matters compendiously called . . . ‘religious,’ and to adhere to and put into practice the truth one has come to know, is so significant a good and so basic a responsibility, and the attainment of that “good of human spirit” is so inherently and non-substitutably a matter of personal assent and conscientious decision that, if a government intervenes coercively in people’s search for true religious beliefs, or in people’s expression of the beliefs they suppose true, it will harm those people and violate their dignity even when its intervention is based on the correct premise that their search has been negligently conducted and/or has led them into false beliefs. (footnotes omitted).\textsuperscript{59}

The effect of recognizing equality as a natural law principle cannot be limited to freedom of speech and freedom of religion. For example, just as people will disagree about the proper dictates of religious devotion, some will disagree over whether homosexuality is morally wrong. Even assuming that homosexuality violates natural law, equality demands that those who believe homosexuality to be wrong not use force to impose their (even correct) view on those who may be

\textsuperscript{58} Abraham Kuyper, Lectures on Calvinism 80 (2d prtg. 1994).
mistaken. This view is consistent with a limited reading of Aquinas as supporting human enforcement of natural law only when necessary to the maintenance of human society. Some minimal human enforcement of natural law is necessary to the preservation of human society, but moving beyond that limited goal to the attempt to lead people to virtue ends up giving up more good in lost liberty than is gained in compulsory "virtue."  

4. Limit Four: Due Regard to Subsidiarity

Budziszewski wrote that "the Church has different work than the state, work which the law must respect."  

This principle applies to a variety of human associations: "family, Church, neighborhood, workers' association, and so forth—has its own mission or calling, its own proper purposes, which the law should seek neither to take over nor absorb."  

The state also has its own role to play: "Rather than pushing the various forms of human association aside or doing their work in their place, the state should see to the background conditions that they need in order to flourish."  

Budziszewski identified this as the principle of "subsidiarity." The "subsidiarity" limitation, like the prudence limitation, tends to swallow the general rule of the enforcement of natural law through human law. This principle of subsidiarity suggests some questions about the nature of the connection between natural law and human law. Would a presumptive enforcement of natural law through human law accomplish the state's work of providing a background in which other institutions can flourish? Does this limited role for the state imply something about what part or parts of the natural law the state ought to seek to enforce? The next section of this Article will suggest a more modest reading of Aquinas consistent with a more limited goal for the connection between natural law and human law. This more limited goal will suggest a flipping the presumption of the connection between natural law and human law. Rather than a human law that presumptively enforces natural law unless one of the identified limitations suggests otherwise, this more modest reading of Aquinas suggests a human law that reverses the presumption to one of no enforcement of natural law through human law unless absolutely essential to the human law's more limited goal.

61. BUDZISZEWSKI, supra note 1, at 118.
62. Id. at 119.
63. Id.
III. A MODEST READING OF AQUINAS CONCERNING NATURAL AND HUMAN LAW

A. A Goal for Human Law

Human law needs a purpose or target to guide the analysis of what parts of the natural law the human law ought to enforce. John Finnis has articulated the role of government's aim or purpose this way: "The government of political communities is rationally limited not only by constitutional law and by the moral norms which limit every decent person's deliberation and choice, but also by the inherent limits of its general justifying aim, purpose or rationale."64 Without such a target, people would be left with the general idea that government should self-consciously enforce natural law, and with that general guiding principle, there is no logical stopping point between what should be enforced and what should not.65 Of course, natural law theorists do provide a target, the common good. However, as discussed above, this target does not do much to guide or constrain the enforcement of the natural law through human law.

B. Human Law Is for the Depraved

Aquinas provided a more limited target for human law that can serve as a standard for dividing humanly enforceable natural law from that natural law that God is left to enforce.66 While Aquinas

64. Finnis, supra note 59, at 4.
65. See generally Elizabeth Mensch, Christianity and the Roots of Liberalism, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 54, 66 (Michael W. McConnell et al. eds., 2001) (discussing Augustine's and Luther's view that the polity is "only a necessary...dike against chaos" and that there is "no conceptual basis for legal limits to a ruler's power.").
66. The tendency of some contemporary natural law theorists to be more aggressive than Aquinas was with regard to the incorporation of natural law into human law may be due to the influential teaching of intervening historical figures such as John Calvin. Calvin suggested a very aggressive goal for human government:

The end of secular government...while we remain in this world, is to foster and protect the external worship of God, defend pure doctrine and religion and the good condition of the Church, accommodate the way we live [to the requirements of] human society, mould our conduct to civil justice, reconcile us one to another, and uphold and defend the common peace and tranquillity [sic].

...[Civil order...] prevents idolatries, sacrileges against the name of God, blasphemies against his truth, and other scandals to religion from emerging into the light of day and spreading among the people; it prevents disturbances of the public peace; it allows each to remain safe and unharmed in the enjoyment of what is his; it makes possible innocent contacts between people; and it sees to the cultivation of upright conduct and decency. In short, it upholds a public form of religion amongst Christians and humanity among men. Nor ought it to worry anyone that I am now allotting to the human polity that care for the right order of religion, which I seem earlier to have placed outside [merely] human determination. I approve a political order that makes it its business to prevent true religion, which is contained in the law of God, from being be-
noted that various forms of law in general are aimed at the common good, his aspirations for human law seem much more modest. He begins his analysis of the subject by rejecting the argument that no human law is necessary because “men are more to be induced to be good willingly by means of admonitions, than against their will, by means of laws.” However, Aquinas did not reject this argument entirely, instead he acknowledged that for some “who are inclined to acts of virtue, by their good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions.” Aquinas would not enforce some the natural law through the human law for the benefit of these virtuous people. Rather, Aquinas thought that human law ought to target those who “are found to be depraved, and prone to vice, and not easily amenable to words . . .” For these depraved people “it was necessary . . . to be restrained from evil by force and fear, in order that, at least, they might desist from evildoing, and leave others in peace . . .” Thus, paternal admonition is sufficient for those ready to be led to positive virtue, but human law is necessary to force some less virtuous people to “leave others in peace.”

1. More Grievous Vices

Accordingly, Aquinas concluded in the Second Article of Question 96 that human law must forbid “only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.”

Here Aquinas provided four descriptions and two examples of those vices that human law ought to prohibit. First, these vices are “more grievous.” Second, these vices are those “from which it is possible for the majority to abstain.” Third, these vices tend “to the hurt of others.” Fourth and last, if such vices were not prohib-

smirched and violated with impunity by public and manifest sacrilege. But in doing so, I no more allow men to make laws about religion and the worship of God according to their fancy that I did before.


67. AQUINAS, supra note 8, at 73.
68. Id. at 75.
69. Id.
70. Id.
71. Id. at 92.
72. Id.
73. Id.
74. Id.
75. Id. (stating that the vices have an adverse effect).
ited, "human society could not be maintained." In this Article of Question 96, Aquinas finally articulated a very powerful principle for dividing between those natural law precepts that ought to be enacted into human law and those precepts that should not: human law should enforce only those precepts of the natural law that are necessary to the maintenance of human society. When Aquinas described those vices that ought to be prohibited as those that, if they were not prohibited, "human society could not be maintained," Aquinas set up a target at which human law could take aim. This target (maintenance of human society) is more distinct than the prevailing and flexible "common good" target. Aquinas's articulated goal also is much more limited than the general pursuit of the common good. Many human activities that violate natural law may harm the common good without threatening the maintenance of human society altogether. Note that Aquinas's chosen examples of human vices that human law ought to reach are quite extreme: Those examples are "murder, theft and suchlike." Such vices, if left unchecked, certainly would threaten the maintenance of human society.

In an attempt to develop Aquinas's basic idea of distinguishing the more grievous vices from the less grievous vice, Smolin set out more thorough principles for drawing the line between the part of the natural law the state ought to enforce from that part it ought not enforce. However, even Smolin identified the "primary purpose of state enforcement" of natural law as making "human society possible." This primary purpose is quite similar to Aquinas's stated goal of maintaining human society. With this concrete, but rather limited, end in view, Smolin cited Aquinas and easily concluded that "punishment of serious harms to others, such as crimes against the person and property of others, is a primary function of the state."

2. To the Hurt of Others

Focusing for a moment on Aquinas's third description of those "more grievous vices" that human law ought to prohibit, Aquinas taught that human law ought to focus "chiefly" on those vices that "are to the hurt of others." Smolin seized on Aquinas's use of the word "chiefly" and inferred that Aquinas saw "a role for the state beyond" this narrow but necessary function" of punishing vices that hurt

76. Id.
77. Id.
78. Id.
79. Smolin, supra note 1, at 397-402.
80. Id. at 397.
81. Id.
82. AQUINAS, supra note 8, at 92.
However, Smolin may have been reading too much into Aquinas's use of the word "chiefly." When read in the immediate context, it appears that Aquinas may have been limiting his connection between natural law and human law to those evils that are directed at others. First, Aquinas described those vices that human law should prohibit as "more grievous." If Aquinas was taking aim at evils directed to the hurt of others, his use of the phrase "more grievous" fits such evils quite well. However, it is hard to imagine an evil not directed to the hurt of others that comfortably fits Aquinas's characterization of "more grievous." Smolin argued that the fact that Aquinas elsewhere advocated "state suppression of threats to religion" implied that Aquinas supported human enforcement of natural law beyond the mere prohibition of evils directed to the hurt of others. Perhaps so, or perhaps Aquinas's vast writings were not entirely internally consistent? In any event, in Aquinas's Treatise on Law, he focused on law in general and on the connection between natural law and human law in particular. Aquinas would reasonably be expected to say what he means on this subject here in his Treatise on Law. Moreover, he wrote here that human law ought to forbid "only the more grievous vices . . . and chiefly those that are to the hurt of others." Aquinas did not mention in the second Article of Question 96 of his Treatise on Law support of religion as an appropriate goal for human government. To the contrary, the goal for human law that Aquinas cited is much more modest, specifically maintenance of "human society." This goal is perfectly consistent with a human law that seeks to prohibit only evils directed to the hurt of others. In fact, Aquinas spoke of the two concepts together, "chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained." Immediately following this clause, Aquinas gave examples of the sorts of evils at which human law should aim: Human law should aim at "murder, theft and suchlike." Of course, human society could not be maintained if murder and theft were freely permitted. But would human society fall apart if the state did not repress religious dissent? That contention seems a stretch, and it probably would not be fair to characterize suppression of religious dissent as "suchlike" the prohibition of murder and theft. At this point in his Treatise on the Law, Aquinas seems to take sensible aim at human enforcement of only

83. Smolin, supra note 1, at 398.
84. Id. at 398-99.
85. AQUINAS, supra note 8, at 92.
86. Id.
87. Id.
88. Id.
that part of natural law that prohibits acts directed to the hurt of others.

Aquinas’s response to anticipated objections also supports this limited reading. Aquinas anticipated the following argument in support of the suppression of all vices: “Isidore says . . . that laws were made in order that, in fear thereof, man’s audacity might be held in check.” Aquinas anticipated that it could be argued, therefore, that to hold “man’s audacity” sufficiently in check, human law should repress all evils. In his reply to this anticipated objection, Aquinas did not take issue with Isidore’s idea that the aim of human law is to deter human audacity. Rather, Aquinas defined that “audacity” at which human law should take aim: “Audacity seems to refer to the assailing of others.” Therefore Aquinas concludes that human law that forbids those sins “whereby one’s neighbor is injured” sufficiently fulfills Isidore’s purpose for human law of checking human audacity.

Aquinas anticipated a second objection to the idea that human law ought not to prohibit all vices: Since law is aimed at virtue, and complete virtue requires the extirpation of all vices, human law should prohibit all vices. Aquinas responded that “the multitude of imperfect men” are “unable to bear” a human law that would prohibit “all evil.” Thus, Aquinas asserted that it simply is impossible to instill complete virtue through human law. While Aquinas did cite the inability of the multitude to comply with human law that would prohibit all evil, he did not explicitly state that human law ought to prohibit as much evil as the multitude can bear. In his Treatise on Law, Aquinas addressed directly the subject of how far human law ought to go in enforcing the natural law, and in that context, Aquinas stated only that evils directed to the hurt of others should be prohibited to make human society possible.

Aquinas anticipated a third objection that since human law is derived from the natural law, and the natural law prohibits all vices, then human law should prohibit all vices. Responding to this objection, Aquinas replied simply that while the “natural law is a participation in us of the eternal law[,] . . . human law falls short of the eternal law.” While Aquinas cited Augustine for the proposition that human law ought not attempt “to do everything,” he did not here spell

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89. *Id.* at 90.
90. *Id.* at 92.
91. *Id.*
92. *Id* at 90.
93. *Id.* at 92.
94. *Id.* at 90-91.
95. *Id.* at 92.
out what the human law ought to attempt. The most Aquinas stated on that question has already been discussed, that human law ought to prohibit the worst vices, those that hurt others, without the prohibition of which human society would not be possible.

This is not to suggest that a dividing line between harmful evil and harmless evil is a workable standard for dividing that part of natural law that the state ought to enforce from that part that it should not. It does seem a fair inference from Aquinas's use of the word "chiefly" that Aquinas saw the category of vices that "are to the hurt of others" as a subset of natural law. In other words, Aquinas implied that there are some vices that are not to the hurt of others, and Smolin therefore saw some of those evils not to the hurt of others as properly punished by human government. However, Aquinas may be wrong to the extent that he suggested a dividing line between the "more grievous vices" and those that do not hurt others. Craig Stern has debunked the idea of pursuing the common good through civil punishment of only "harmful" evil. Stern pointed out that all evil is harmful and then asked these rhetorical questions:

[A]re we willing to assert that failure to attend services of the True Church, or, even worse, failure to trust God, receive redemption in Christ and sanctification by the Holy Spirit, does not harm the actor and others? . . . Irreligion breeds evil of all kinds. Should the state, therefore, fine absence from divine service where the Gospel is preached and the Bible taught? . . . Should it punish irreligion and blasphemy?97

Thus, conduct's absolute harmfulness does not provide a workable standard for deciding which evils that human law ought to police and which evil human law ought not to police. Such a standard would not be workable because all violations of natural law are potentially harmful. Evil's destructive force is a given in this fallen world. People cannot eradicate, or even minimize, the destructive force of evil through force.98 Using the evil of force (evil because it violates the natural law principle of equality) to prohibit other harmful evil merely compounds evil's destructive force. Force should be used only to limit force (and perhaps fraud).

96. Id. at 93.
97. See Stern, supra note 20, at 5. It is entirely possible that Aquinas' answer to some or all of Professor Stern's rhetorical questions may have been "yes." See Smolin, supra note 1, at 398-99 (citing Aquinas' views on "state support of religion, and state suppression of threats to religion"). But I know of no contemporary advocates of the natural law tradition who would go that far.
98. I personally believe that God's redeeming grace, freely accepted by man, is the world's only answer to harmful evil.
3. Human Law Tailored to the Human Condition

Aquinas’s stated broader purpose for the enforcement of natural law through human law (the maintenance of human society) unlike the goal of prohibiting harmful evil, does provide a more useful tool for limiting the enforcement of natural law by the civil magistrate. A principal vice of the more aggressive target for human law, use of human law to promote virtue through the incorporation of the natural law, is that it does not sufficiently take into account the actual human condition. The world is imperfect, and people are fallen. To treat human law as originating in natural law and incorporating as much natural law in the human law as practicable with the goal of encouraging mankind to follow God’s original design for mankind presents a potential problem: People do not live in a world that comports with God’s original design. This approach is like trying to use the owner’s manual for a manufactured product when the product is broken. Consumers can push the right buttons on their computer keyboards all day long, but if their hard drives are crashed, those consumers will not be happy with the results. Much as people might like to use the “owner’s manual” of natural law that comes with the human product, that manual simply will not work under the existing circumstances in this less than ideal world. People need something else, something that takes into account the less than ideal condition of the human product. People need something designed for less than ideal circumstances. People need a human law made for broken people, not a law made for people as they were ideally designed to be.

People may need some positive law to cabin depredations by the strong against the weak. So people have to live with some force, which is a bad thing, but a necessary evil in this broken world. Very few people like medicine, and they do not take it unless they really need it, but most people will take some medicine if they are sick. Positive human law is like medicine—people need it, but they should take as little as they possibly can.

IV. CONCLUSION

This Article’s purpose was to articulate an alternative reading of Aquinas. The proposed alternative reading would accept the existence of natural law and even the legitimacy of its enforcement, to some extent, by the state. However, the alternative reading of Aquinas proposed in this Article would not advocate a warrant for civil government to enforce the natural law generally (with only limited exceptions). Even if the guidance of St. Thomas Aquinas is generally accepted, as it is by most contemporary advocates of the natural law
tradition, it is possible to read Aquinas's *Treatise on Law* more narrowly, in a way that gives due attention to the necessarily limited purpose of human law and that makes Aquinas' connection between natural law and human law less threatening and more consistent with other important tenets of the natural law, such as human equality and liberty.