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The Natural Law Formula and the Missing Link: Tracing and Updating Aquinas' Methodology

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Research dedicated to natural law usually analyzes the same commonplaces to deduce natural rules and natural rights. Recurrently it focuses its attention on some specific elements of reality (e.g., the human being, its possibilities, inclinations, and goods) in order to assess what should be achieved (e.g., happiness, the ultimate end, or human flourishing) and how it can be done. Observing how it proceeds, what kind of methods guides it, we discover that it connects these elements following similar patterns. The connection of these elements, as variables in a formula or links in a chain, is called here "the Natural Law Formula." The first chapters explain the nature of the eight links of the chain and how they are intrinsically connected. It means that if we change one variable, the whole equation will change producing different results. The last chapters show how the formula can be used to arrive at several natural law conclusions. Works of the most influential natural jurists are reviewed, and those of Aquinas, where almost all the puzzles of the formula were completed and fit tightly together. Some mentions of human rights discourse, evolutionary biology, axiology, and other recent sciences that did not exist centuries ago are included.

Key words: legal realism, natural law, human rights, axiological hierarchy, teleological hierarchy

https://doi.org/10.32082/fp.6(74).2022.1070

1. Introduction

Every method is a road that takes people from one specific place to another. From the historical method of Savigny we can only reach the historical school; from the Pure Theory of Kelsen we can only arrive at positivism; and from the Rawlsian veil of ignorance we can only deduce some adjudication guidelines of things that appertain to everyone. If we hope to reach a deep understanding of natural law, the first thing to do is open the epistemological map and look for the roads that lead us to our desired destination. Immediately we will find that there is no single path, but multiple possible ways used by many authors during the last three thousand years. However, the bulk of traffic seems to be concentrated in one large, wide highway that crosses several points.

Although I am not planning to do a quantitative analysis here, some data can give us an overview of the matter. In a big data research on HeinOnline conducted in October 2021, we found 79,040 papers that mention "natural law" and 1,341 that included both words in the title. In this last group, an occurrence of word analysis was made in the most cited articles. After filtering irrelevant data (pronouns, adverbs, quantifiers, conditional, and other generic words), the one hundred most repeated words were the following:

TABLE 1. Words most repeated in the 111 most influential articles about natural law

n°	Word	Occurr.
1.	law	17403
2.	right/s	11130
3.	natural law	9933
4.	moral/ly-ity	5766
5.	constitution/s-al	5474
6.	court/s	5133
7.	legal	4692
8.	theor/y-ries	4639
9.	natural	4262
10.	state	4030
11.	human	3993
12.	principle/s	3749
13.	justice	3644
14.	reason/s-able-ing	3639
15.	good/s	3296
16.	nature	3129
17.	property	2910
18.	power/s	2876
19.	rule/s	2824
20.	government/s-al	2741
21.	judge/s	2465
22.	public	2402
23.	laws	2240
24.	people	2171
25.	positiv/e-ism-ist	2155
26.	individual/s	2153
27.	judicia/l-ry	2042
28.	politic/s-al	2025
29.	person/s	1886
30.	fact/s	1755
31.	decision/s	1746
32.	value/s	1699
33.	social	1698
34.	being/s	1696
35.	claim/s	1686
36.	life	1673
37.	necess/ary-arly-ity	1642
38.	doctrine	1629
39.	action/s	1570
40.	society	1567
41.	cases	1557
42.	philosoph/y-ical	1533
43.	order	1521
44.	citizen/s/hip	1503
45.	dut/y-ies	1485
46.	tradition/al	1445
47.	statut/e-es-ory	1440
48.	legislat/ure-ive	1376
49.	nation/s-al	1338
50.	authority	1326
51.	equal/ity-lly	1313
52.	liberty	1293
53.	just	1285
54.	international	1270
55.	interest/s	1211
56.	purpose/s	1192
57.	interpretation	1185
58.	need/s	1185
59.	subject/s	1172
60.	contract/s	1160
61.	end/s	1152
62.	process	1126
63.	argument	1085
64.	norm/s	1078
65.	free	1075
66.	means	1070
67.	history	1067
68.	Aquinas	1030
69.	freedom	1029
70.	jurisprudence	1027
71.	force	1000
72.	judgment/s	972
73.	meaning	964
74.	trust	948
75.	obligation/s	931
76.	sovereign/ty	918
77.	copyright	913*
78.	Finnis	912
79.	belie/f-ve	892
80.	Locke	883
81.	protection	879
82.	idea	848
83.	intent/ion/s	835
84.	religio/n-us	830

85.	private	816
86.	economic	815
87.	practical	795
88.	relations/hip	790
89.	understanding	780
90.	Fuller	737
91.	fair/ness	736
92.	community	729
93.	ethic/s-al	722
94.	congress	704
95.	Dworkin	691
96.	practice	676
97.	[J.] Wilson	649**
98.	respect	622
99.	self-defense	620
100.	legislation	618

Source: Self-created table with data taken from HeinOnline on October 6, 2021.

Notes: Papers offered by HeinOnline with more than ten citations were selected, in total 111. One article that did not contain a proper investigation into find natural law was not selected. Occurrences of words with the same root and meaning were merged: for example, "right" with 4246 occurrences and "rights" with 6884 occurrences were merged in "right/s" with 11130 occurrences.

* "Copyright" had 1024 occurrences. We did not count the 111 times in which the word was not part of the article.

** "Wilson" had 681 occurrences, but not all of them are from James Wilson.

This data gives an idea of where the natural law discussion is centered nowadays, who are currently the most influential authors, and what sort of arguments they tend to have. Today, the most cited authors related to natural law who appear in Table 1 are six, in order: Aquinas, Finnis, Locke, Fuller, Dworkin, and Wilson one of the drafters of the U.S. Declaration of Independence. We can appreciate how the natural law debate has been slightly displaced from the abstract medieval analysis to a more concrete scrutiny of "moral rights" (words that are among the top four of Table 1) and rules (related to constitutions, courts, property, government, judges, laws, judiciary, cases, process, judgments, legal relationships, congress, and legislation, in that order). Table 1 also shows some of the most recurrent arguments used to justify natural law: morality and ethics, human nature, principles, justice, reason, goods, laws, facts, decisions, values, necessity, traditions, liberty, and freedom, needs, ends, force, religion, and respect. However, this list of words only provides a general glimpse of the topic.

In addition, in another project in which I spent twenty years[1] I have traced the way in which hundreds of authors have arrived at their conclusions in natural law. "Human nature," "reason," "principles," "goods," "ends," "powers," and "values" were some of the most common starting points to bring up natural law and natural rights,[2] which coincides with the previous list of occurrences. On the contrary, other elements such as local traditions, culture, customs, or religion were less frequent.[3] The most interesting part of these essays, at least for our purposes here, is how they link these commonplaces, how they deduce principles from inclinations or shape the common good from human ends. In this article we will examine the eight most important commonplaces used by these authors and

1 This project is aimed at producing a natural law summary or code, a systematic exposition of what is reasonable and does not need legal approval from the authority in each branch of law. For information, *see* Juan Carlos Riofrio, "CIN Codex Iuris Naturalis," (Dec. 1, 2023), accessed 20.02.2023, https://jcriofrio.wixsite.com/codex.

2 Gahl draws a general overview of the natural law traditions at Robert A. Gahl Jr., "Natural Law Approaches to Comparative Law: Methodological Perspectives, Legal Tradition and Natural Law," *Journal of Comparative Law* 8 (2013): 179. All elements mentioned above appear there.

3 Giovanni Ambrosetti, "Christian Natural Law: The Spirit and Method Of," *American Journal of Jurisprudence*, vol. 16 (1971): 290; Jonathan Jacobs, "Judaism, Natural Law and Rational Tradition," *The Heythrop Journal* 8 (2013): 166; Hu Shih, "The Natural Law in the Chinese Tradition," *Natural Law Institute Proceedings*5 (1953): 117; Daisetz T. Suzuki, "The Natural Law in the Buddhist Tradition." *Natural Law Institute Proceedings* 5 (1953): 89; M. S. Sundaram, "The Natural Law in the Hindu Tradition," *Natural Law Institute Proceedings* 5 (1953): 67. On the occurrences list the respectively closet words related to one specific religion are "Christian" and "Catholic" repeated 381 and 333 times; they are not in the 100 most repeated words. Notwithstanding the validity of these approaches, we will not consider them owing to their less common use.

how they connect them. By joining these links a *chain* will appear or, even better, a *formula* will arise where if we change the meaning of one variable, everything else will change. This is the so-called "Natural Law Formula."

Instead of a quantitative analysis, we will do here a qualitative investigation. Otherwise, we will miss the most critical aim of this study: that is to say, to see how authors deduce natural law conclusions connecting the different commonplaces or elements of natural law.

Today, the most cited authors related to natural law are: Aquinas, Finnis, Locke, Fuller, Dworkin, and Wilson (one of the drafters of the U.S. Declaration of Independence).

After examining their remarkable works, one author especially stood out: the most complete methodology, which includes the analysis of most abstract elements and many particularities of reality as such, was found in Thomas Aquinas. Not in vain is he still today the most cited author on natural law. For this reason, we will follow more closely his way of argumentation.

Thomist followers regularly use a similar approach, although they often overlook some elements deeply explored by their master. Perhaps the most disregarded component of Aquinas' methodology is the explanation of how potencies (powers) work on human nature, defining inclinations, goods, and ends of the individual. "Potency" was one of the most noteworthy discoveries of Aristotle and a crucial notion for Aquinas, that their followers will miss. Practically the metaphysical notion of "powers" hardly appeared in the 111 most influential articles about natural law.[4] This is undoubtedly the missing link of the formula that we will try to recover in the following lines.

Nevertheless, Aquinas was a man of his time. In the thirteenth century economics, human rights, axiology, and evolutionary biology did not exist as autonomous sciences. It was simply impossible for him to include a treaty of human rights in the Summa Theologica, or to develop a theory of values following Hartmann's schemes. At the same time, we should take care not to interpret his words according to our current understandings. For instance, while today "inclination" is an ambiguous notion with different meanings in psychology, sociology, and anthropology, for Aquinas it was a technical word with a deep metaphysical sense related to the appetitive powers.[5] If Thomas Aquinas had lived today, he would probably have used some technical notions that did not exist eight centuries ago. This necessary update is the main task of contemporary Thomism.

This paper is devoted to delineating the variables of the formula, the commonplaces where natural law authors have centered their attention, and to examining how these links work together in a single chain. As it is impossible to cite hundreds of authors every time, we will track the most renowned names (especially the six most cited authors mentioned in Table 1), not to explain their whole cosmovision, but only to show how they link some elements of the formula. From now on, I apologize for an occasional quick review of some of their points of view. Although I can eventually express my opinion on their positions, my main aim is to clarify how the formula operates, not to critique or validate anyone.

4 The "potency" or "potencies" (as human powers) did not appear at all in the 111 most cited papers on natural law. A peripheral mention of "human power/s" (11 occurrences) and "power of reason" (5 occurrences) appeared without further explanation. Normally "power/s" (2876 occurrences) is used in the legal sense.

5 We will deal with this notion in Chapter III.2.

2. Synthesis of the Natural Law Formula

The complete quest to find natural law content can be summarized in five concise questions that ordinary people usually consider in solving their moral and legal issues: *What is this reality? What really matters here? What should be achieved? How? When and where?* Imagine that we are living in Wuhan in early 2019, where many cases of severe pneumonia are spreading very quickly. The first thing that we will do is examine what is happening, what is the cause, and the odds of being infected. One day we hear that the Wuhan Institute of Virology announced that there is a new virus, very contagious with high rates of fatality, called Coronavirus-19. Now at least we know *what this reality is*, although multiple questions will ensue. In medical issues *what really matters* is obvious: to save our lives and health. Intuitively we will conclude: life and health *should be* protected. But *how*? How can they be protected? Nobody knew very well what to do at the beginning of the crisis. Some individuals began wearing masks and parents kept their kids away from those who were coughing, fulfilling their parental duties according to their conscience. Soon the authorities realized that Wuhan was facing a crisis and tried their best, tackling the first cases even with an excess of force. As the virus was spreading everywhere, legal measures became stronger: social distancing, restrictions on the media, lockdown were imposed, first in China and then in other places.

This natural method used by common citizens to deal with moral and legal cases has been perfected and systematized by scholars since antiquity. More or less, the argument goes as follows:

1. It all begins by trying to understand *reality* as much as possible: what is the human being, its properties (*e.g.*, life, health, identity, and mortality) and possibilities (*e.g.*, to smell, see, move and know)? The same question applies to animals, things, the environment, and other parts of reality. An analysis of the human powers, their objects, and inclinations should be made here.

2. After solving the previous questions, it is possible to deduce what things are "good" for each being: some wavelengths from 380 to 700 nanometers are good for the human eye, and certain sounds in a frequency range from about 20 Hz to 20 kHz are good for our ears. However, a virus that kills or changes the sense of smell, sometimes irrevocably, is not good for our nose.

3. With an idea of what is good in mind, the will feels a particular inclination to it. When we see, hear or eat reality, we provide it with a personal meaning making it part of our life project. For example, a reliable vaccine would have enormous value in a society with a high fatality rate due to a certain virus, and medicine is equally considered something very valuable for sick people.

4. When things become "valuable" and "good" to us, we consider them as ends to be achieved. The first ethical and legal principles arise at the same time: a simple affirmation of what is good (*e.g.*, *pro homine*, *pro liberty*, *pro health*), which contains an implicit negation of the contrary. This is the meaning of the phrase *good is to be done and pursued, and evil is to be avoided*.[6]

5. After clarifying what should be achieved, the question of the means arises. How can the ends be reached? We are well aware that our time and resources are limited, and that not all ends deserve the same efforts to achieve them. That is why we do not pay the same price for every product on the market. Without a doubt, life and health should be protected firstly because without them we cannot eat and digest food. At a certain point we distinguish some means that are necessary to reach the main ends (*e.g.*, healthy food, clean air, medicines for illness) and we will prioritize them in our mind. Sometimes these priorities will appear as rules to follow or as rights to be respected.

6. Now, the intellect shows two things to the will: what should be achieved and some possible means to that end. The will is aimed now at adopting one option, creating a positive rule: a legal law if that is the will of the authority. Laws are created to achieve human goods, to fulfill the first principles of law and

6 St. Thomas Aquinas, *Summa Theologica*, I-II, q. 94, a. 2, trans. Fathers of the English Dominican Province, 1920–1922, hereafter be referred to as S.T. An excellent explanation of this principle appears in Germain G. Grisez, "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2," *Natural Law Forum* 10 (1965): 168.

practical reason (*pro homine*, *pro libertate*, *pro health*, *good is to be done*) and to choose among the means that we understand are possible to be adopted. If we do not have a medicine to cure Coronavirus, that is not an option.

7. Finally, the specific circumstances should be taken into account. The reasonability of the measures against Coronavirus was different at the beginning of the pandemic, when nobody knew how to deal with the virus, than after one year of research on the topic. Particular cases deserve particular policies. Personal perceptions, traditions, needs, and certain conditions must also be considered when making the overall moral and legal analysis.

In this way, by comparing our circumstantial choices with our understanding we test the morality, validity and legality of our actions.

We can distinguish the key elements of the argument. First, there is the study of reality: the being of all things, their potencies, and inclinations, as well as the objects that are good for them. Second is the investigation of personal understanding: what we consider valuable, first principles of reason, and some conclusions about rules and rights. Third is the inspection of human decisions. Finally, everything is considered under some specific circumstances. Connecting sequentially these elements we obtain the formula:

> Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances.

All these variables are naturally interconnected in such a way that, if we modify one, the whole equation will change. If there is no Coronavirus or if its fatality rate is inferior to the common flu, the lockdown, social distancing, and strong vaccination measures will make no sense. If we have no idea how to deal with a crisis, the level of reasonability of measures could decrease, and the use of some unproven means might be more acceptable. The next Chapter explains how these links are intrinsically connected.

Connecting sequentially these elements we obtain the formula: Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances.

3. Eight links of the chain

Almost all elements of the formula appear in Table 1.[7] Almost all, except those of the second link: the potencies, objects, and inclinations.[8] We will explain now how these elements are linked, following closely the methodology used by the most influential authors.

3.1. Being (reality)

Let's begin with the first metaphysical experience that every person has in life. When babies are born, they open their crossed and bleary eyes. After the darkness of the womb, the world is too bright, and everything

7 These words appear in Table 1 explicitly: "being" (place 34), "goods" (place 15), "values" (place 32), "principles" (place 12), "ends" (place 61), "means" (place 66), "laws" (place 23), "rights" (place 2), "cases" (place 41), "relationship" (place 88). There are other words related to some notions, like "human" (place 11) and "nature" (place 16) with the notion of being. "Circumstances" only has 383 occurrences.

8 *See* note 4 above.

is blurred; the objects they can see best are between 8 and 10 inches from their faces. With time they will learn to focus their pupils. They perceive that there *is* something. After learning how to align their pupils, they will distinguish shapes, colors, and depth better, and they will be able to trace different objects. That is how humans grasp knowledge. Technically, "the first thing conceived by the intellect is being; because everything is knowable only inasmuch as it is in actuality."[9] Focusing our attention, little by little the eyes of the face and the eyes of the soul will pass from generic and blurred knowledge to a very defined, clear, and deep one.[10] As an ancient Roman philosopher said, "brains avail when the mind is attentive."[11]

The whole scientific effort follows a similar process. "Being implies the habitude of a formal cause."[12] While metaphysics is interested in what is in act, *habitude*, and existence, the other sciences will "cut"[13] progressively into pieces the multiple forms of reality to investigate them. Ophthalmology will "cut" the eyes to see what a healthy eye is, biology will "cut" the living things of the universe to understand corporeal life, and ethics will "cut" human actions to determine how to achieve happiness.

The importance of focusing on being in any analysis of natural law cannot be emphasized enough. Being determines everything: the nature of things, their potentialities, actions and ends, what is good, and what we know about reality. The nature of things is principally constituted by the forms that habitually exist in act. Mere potency (pure matter) is a working hypothesis that has never existed; potency is always a potency "of something or someone" that is in act—only what is in act can act, actualize, create, enlighten or move things (active powers) or receive some actualization from outside (passive powers). The greater the act, the greater the power. Things beyond each nature, beyond its potentialities, cannot be ends of that nature. Hence, the potentialities of what is in act mark the ends of things and what is "good" for each being.[14] And "everything is knowable so far as it is in act, and not, so far as it is in potentiality."[15] Only actual light can illuminate our eyes.[16] Scientific theories and hypotheses are constructed on things known, trying to understand them better. All scientific research struggles to grasp reality, as much as possible.

Strictly speaking, there cannot be any sort of method of natural law that does not take into account reality and its forms (that is to say, being and its nature). Any "method of natural law" that deserves the name must dig into reality as much as possible, and work with essential inputs from metaphysics, medicine, psychology, cosmology, and other sciences. For example, no experimental science can operate without the principles of non-contradiction or causality. Indeed, any non-idealistic approach to morality and the law

9 S.T. I, q. 5, a. 2, where Aquinas adds that "being is the proper object of the intellect, and is primarily intelligible; as sound is that which is primarily audible."

10 According to Aristotle, "a child begins by calling all men father, and all women mother, but later on distinguishes each of them" (Physics, I, 1). For the works of Aristotle we use the revised Oxford translation, *The Complete Works of Aristotle*, edited by Jonathan Barnes, 1991. Aquinas explains that it is "because he who knows a thing indistinctly is in a state of potentiality as regards its principle of distinction; as he who knows 'genus' is in a state of potentiality as regards 'difference'" (S.T. I, q. 85, a. 3).

11 Sallust, *Conjuration de Catilina*, trans. Joseph Roman, 1924, c. 51. It means that the intellect is strengthened where the mind focuses its attention.

12 S.T. I, q. 5, a. 2, ad 2. The being has many dimensions. The merit of the Greeks was great for having arrived at certain crucial concepts, such as substance and accidents, act and potencies, habits and second acts (actions). However, they did not go beyond the "essence," in the "mode of being" of things. The philosophical notions of "person" and "act of being" opened up their understanding later in the disputes on the Trinity, and especially with Boethius and Aquinas. Metaphysics is the main science concerning the study of these notions.

13 The expression is from Evandro Agazzi, *Spécificité des sciences humaines en tant que sciences* 39 (1979).

14 "In idea being is prior to goodness" (S.T. I, q. 5, a. 2). Genesis 1 draws a parallel when it states that, *after* each day creation "God saw that it was good." According to this anthropomorphism, first is existence and second the appreciation of goodness.

15 S.T. I, q. 87, a. 1. *See:* Aristotle, *Metaphysics*, IX, 8.9.6.

16 Possibilities of things can be deduced after knowing the act. The intellect "does not know primary matter except as proportionate to form" (S.T. I, q. 87, a. 1). *See* Aristotle, *Physics*, I, 7.

[17] will be based on reality to draw from it certain conclusions, without which practical reason cannot work.[18] Our courts do not judge fictitious characters, no matter how evil the archenemy may be; nor are cases of foreign multiverse judged, nor any patent of alien technology registered in public offices. Only real people, with real cases can knock on the doors of the judiciary or the public administration.

One typical kind of reductionism of some scholars is to pay exclusive attention to human nature while missing the greater picture. For sure, it was not a fault of Aquinas, who spent 119 long questions of the First Part of his Summa Theologica, dedicated to the nature of God, angels, humans, animals, plants, and things,[19] before dealing with moral matters. Natural law should take into account all types of reality: living and non-living beings; persons, humans, and non-humans; things and their environment; the micro and macro-cosmos; natural things and any product of human invention. I do not see any objection to developing a natural computer law dedicated to examining the nature of such equipment, or a natural environmental law devoted to ecological matters.

3.2. Potencies, objects, inclinations, tendencies, appetites, and passions (reality)

From this conception each human being is a complete individual that *exists* with his own identity, endowed with absolutely all the features and goods of our species *in potency*. Humans are beings in constant growth. Some powers will be developed earlier than others. While the heart starts beating from around five or six weeks of pregnancy, the capacity for sexual reproduction will appear many years later. Fine motor of the hand develops in the first year after birth: by the second month babies realize they have hands; then it can take two more months until they see something and try to grasp it with their hands, swiping or hitting it occasionally, and after scratching at toys and things they gradually will cultivate fine motor.[20]

But humans will never fly on their own as birds or Superman do. Human powers are limited and have their objects, inclinations, tendencies, appetites, and passions. Everything is connected. Powers are real capacities of being, of what exists in reality, not hypothetical possibilities of the imagination. Human eyes can see but cannot throw laser rays as some superheroes can. The higher the being, the higher the potency. At the same time, there is no inclination or tendencies without powers, precisely because they are inclinations and tendencies of those powers.

Although Aquinas dedicated a huge part of the Summa Theologica to explain the nature, types, scope, and hierarchy of potencies, many of his followers will miss this crucial part of the investigation. Indeed, in recent decades there has been a plain lack of analysis of human powers in natural law studies—most of them do not even mention the word.[21] We saw in the introduction that in the

17 Rhonheimer warns against incurring in the "dualistic fallacy," a deficient understanding of the Natural Law that presumes a dichotomy between the natural order (objective) and reason (subjective). Martin Rhonheimer, "The Cognitive Structure of the Natural Law and the Truth of Subjectivity," *The Thomist: A Speculative Quarterly Review, The Catholic University of America Press* 67, no. 1 (January 2003).

18 According to Hume, "ought statements" cannot be derived from "is statements," from physical goods there cannot be derived moral goods—the so called "naturalistic fallacy" by Moore. Certainly, from theoretical sciences it is not possible to deduce *immediately* ethical or legal conclusions. David Hume, *A Treatise of Human Nature* (1896): 245. George Edward Moore, *Principia Ethica*, edited by Thomas Baldwin (1993). However, we cannot absolutely dissociate ethics and law from reality. That would be the fallacy of the "naturalistic fallacy." Carlos I. Massini-Correas, "The Fallacy of the Naturalistic Fallacy," *Persona y Derecho* 47 (1993): 29.

19 Part I contains the treatises of God (qq. 2–43), creation (qq. 44–49), angels (qq. 50–64), corporal creation (qq. 65–74), human nature with its potencies and inclinations (qq. 75–102). With this background, Aquinas analyzes in Part I-II salvation (qq. 1–5), human acts (qq. 6–21), passions (qq. 22–48), habits (qq. 49–54), virtues (qq. 55–67), and ethics and the law in general. For García-Huidobro, it is possible to avoid the first part of the Summa Theologica without losing the meaning of the second. Joaquín García-Huidobro, "How Is the Natural Law Known?," *Rechtstheorie* 30(1999): 479, 481. However, if key notions of the first part are avoided the moral arguments will be much weaker.

20 Cynthia Ramnarace, "Fine Motor Milestones," *Parents* (2021), accessed 20.02.2023, https://www.parents.com/baby/development/physical/fine-motor-milestones/.

21 *See* note 4 above.

111 most influential articles about natural law the notion of human potencies hardly ever appeared. From Locke, passing through James Wilson and the Declaration of Independence, natural law theory suffers seriously from the intellectualistic sting that hampers the connection between human reason and human nature. The "pursuit of happiness," good actions, rights, and equality are self-evident;[22] we get everything by feeling or intuition,[23] without any need of reflection on the real world.[24] That natural law could be the same for an angel, a demon, or a human person because the analysis of each nature and its possibilities does not really matter at the end of the day. The paradigmatic example is the book *Natural Law and Natural Rights*, in which Finnis examines only the "power of understanding,"[25] overlooking all inferior potencies. By such an intellectualistic approach, natural law has not yet become well anchored in the potencies of human nature. Certainly, today the notion of potency is the missing link that prevents an efficient functioning of the natural law formula.

By an intellectualistic approach, natural law has not yet become well anchored in the potencies of human nature. Certainly, today the notion of potency is the missing link that prevents an efficient functioning of the natural law formula.

We must return to Aquinas. In his core investigation about human nature, he asks whether we should distinguish five genera of powers in the soul.[26] In his answer he shows the deep intrinsic relationship that exists between *powers-objects-inclinations/tendencies-ends and appetites*. One element cannot subsist without another. The first premise states that "the powers of the soul are distinguished generically by their objects."[27] As far as there are three souls, there should be three genera of powers. The object of power of the vegetative soul "is only the body that is united to that soul,"[28] the object of power of the sensitive

22 The Declaration of Independence (1776) states that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

23 According to Wilson, who signed this Declaration, God put in our conscience or moral sense a paternal precept to pursue our own happiness, and law directs us to this proper end for our own good. About how we can know that precept, "I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther." James Wilson, *Collected Works of James Wilson 1*, 508, ed. Kermit L. Hall and Mark David Hall (2007). According to Wilson, we apprehend the first moral principles intuitively, because they are self-evident, and the secondary principles by deductive discourse (*Id*., 508, 599). *See* Justin Buckley Dyer, Reason, Revelation, and the Law of Nature in James Wilson's Lectures on Law," *American Political Thought* 9 (2020): 264.

24 However, the intent to ground everything in "the Laws of Nature and of Nature's God" is still present in the Declaration of Independence. Nevertheless, both laws are presented in a dichotomous way.

25 John Finnis, *Natural Law and Natural Rights* (2nd ed., 2011), 393–5, 400–4. By the way, in the 111 papers most cited on natural law, there is no single mention of the "power of understanding" but five "power of reason."

26 S.T. I, q. 78, a. 1.

27 S.T. I, q. 78, a. 1. The same idea in S.T. I, q. 77, a. 3, ad 4. It presupposes that "every faculty, as such, is *per se* directed to its proper object" (S.T. I, q. 85, a. 7). *See* also S.T. I, q. 1, a. 3.

28 S.T. I, q. 78, a. 1. The powers of the vegetative soul include nutrition, development, and reproduction.

soul is something extrinsic, "namely, *every sensible body*, not only the body to which the soul is united,"[29] and the object of power of the intellectual soul is also something extrinsic, but "more universal… namely, not only the sensible body, but *all being* in universal."[30] Then, "forasmuch as the soul itself has an *inclination* and *tendency* to something extrinsic,"[31] there are two kinds of powers in the last two souls: the *appetitive power* "in respect of which the soul is referred to something extrinsic as to an *end*, which is first in the intention"[32] and the *locomotive power* "in respect of which the soul is referred to something extrinsic as to the term of its operation and movement; for every animal is moved for the purpose of realizing its desires and intentions."[33] Note that the last two powers (appetitive and locomotive powers) appear in the sensitive soul, as well as the intellective soul, and that both souls have their own inclinations, tendencies and ends.[34] Finally, passions are identified with the movements of the sensitive appetite.[35]

Without hesitation, Aquinas strongly advocates for a *hierarchical order* of the potencies. It is evident that losing one's sight is not the same as losing smell or taste, and losing these faculties is not the same as losing reason, or the capacity to love. To the question if among the powers of the soul there is order, his answer is as brilliant as it is simple: "Since the soul is one, and the powers are many; and since a number of things that proceed from one must proceed in a certain order; there must be some order among the powers of the soul."[36] Not all powers are equal. Some of them are able to unify more things and better. According to the order of nature and perfection, the intellectual powers are prior to the sensitive powers,[37] and both prior to the vegetative powers.[38] A second argument is related to the *openness* of the powers, their capacity of being united with more universal things. On this basis, among the sensible extrinsic powers the vision occupies the first place, because with the vision we can reach even the stars;[39] however, as the intellectual object is more universal, it should be considered the first human power. With the same argument, an omnipotent power should be put above all. This hierarchy of human powers will determine the hierarchy of the inclinations, tendencies, appetites, and ends of powers.

It is important to delimit the contours of the Thomistic notion of *inclinations*. The notion refers normally to the inclinations of the sensitive and intellective soul, although elsewhere he states that "each power of the soul is a form or nature, and has a natural inclination to something. Wherefore each power desires by the natural appetite that object which is suitable to itself."[40] An eye does not desire sounds or tasty food, neither darkness nor too much light. Inclinations, as such, are facts, are features of human nature. In itself they can be considered good—an ontological good—; that is why Aquinas avoids talking about "evil inclinations."[41]

29 *Id.* Here are included internal potencies (memory, imagination, fantasy, and estimative/cogitative) and external ones (vision, smell, taste, etc.), as well as self-motion ("locomotive power").

30 *Id.* As is known, this soul includes the powers of intelligence and the will.

31 *Id.*

32 *Id.* In ad 3 he defines *natural appetite* as
That inclination which each thing has, of its own nature, for something; wherefore by its natural appetite each power desires something suitable to itself. But the 'animal appetite' results from the form apprehended; this sort of appetite requires a special power of the soul—mere apprehension does not suffice. For a thing is desired as it exists in its own nature, whereas in the apprehensive power it exists not according to its own nature, but according to its likeness. Whence it is clear that sight desires naturally a visible object for the purpose of its act only—namely, for the purpose of seeing...

33 *Id.*

34 For in those which lack knowledge, the form is found to determine each thing only to its own being—that is, to its nature. Therefore this natural form is followed by a natural inclination, which is called the natural appetite. But in those things which have knowledge, each one is determined to its own natural being by its natural form, in such a manner that it is nevertheless receptive of the species of other things (S.T. I, q. 80, a. 1).

35 S.T. I, q. 24, a. 3.

36 S.T. I, q. 77, a. 4.

37 In S.T. I, q. 82, a. 3, it is plainly stated that the intellect is the noblest potency in absolute.

38 *Id.*

39 *Id.*

40 S.T. I, 80, a. 1, ad 3.

41 In the whole *Summa Theologica* he never talks about "evil inclinations." Some editions inexactly translate the words

However, some movements of the inclination—the passions—can be branded as evil when they are inordinate, when they move against reason.[42]

Aquinas explicitly stated that inclinations "belong to the natural law."[43] Thomists usually consider only the general classification mentioned in article 2 of question 94: there are some inclinations that man shares with all substances (self-preservation), others that he shares only with animals (such as sexual intercourse, education of offspring and so forth), and others according to the nature of his reason (such as to know the truth about God and to live in society). He also wrote in a previous question that "each power of the soul is a form or nature, and has a natural inclination to something,"[44] so that at least a dozen inclinations must be considered part of the natural law. Unfortunately, natural lawyers will get trapped in question 94, forgetting the previous questions of the Summa Theologica. The link between inclinations and human powers is almost always missed in natural law research: consequently, hierarchical inclinations are not easily accepted. This happened not only in the new schools of natural law[45] but even in most classical Thomism.[46]

Inclinations have received a picturesque variety of interpretations throughout history.[47] Their role as the basis of natural law[48] will be very much disregarded in the modern era[49] and later will be recovered with subtle or manifest shades of desire, spontaneity, or aspiration. Occasionally someone will talk about "normative inclinations."[50] Today sciences such as behavioral biology, sociology, and ethnography, also study certain inclinations of the species or communities: the instinct to eat specific seeds or fruits or to attract mates flapping both wings, the tendency to celebrate

affectionibus pravis that appears in S.T. II-II, q. 157, a. 4, as "evil inclinations."

42 The malice of some men can be called natural, either because of custom which is a second nature; or on account of the natural proclivity [*inclinationem*] on the part of the sensitive nature to some inordinate passion, as some people are said to be naturally wrathful or lustful; but not on the part of the intellectual nature (S.T. I, q. 63, a. 4, ad 2).

43 All the inclinations of any parts whatsoever of human nature, *e.g.* of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law, and are reduced to one first precept, as stated above: so that the precepts of the natural law are many in themselves, but are based on one common foundation" (S.T. I-II, q. 94, a. 2). "It is evident that virtues perfect us so that we follow in due manner our natural inclinations, which belong to the natural right. (S.T. II-II, q. 108, a. 2).

44 S.T. I, 80, a. 1, ad 3.

45 Grisez, Boyle and Finnis refuse the doctrine of hierarchical principles and ends, because their basic goods are incommensurable. We will talk about them in the next chapter.

46 Constable criticizes the lack of hierarchy in Grisez, Boyle, and Finnis precisely comparing their thoughts with the Thomistic doctrine of inclination. In George W. Constable, "A Criticism of *Practical Principles, Moral Truth, and Ultimate Ends by Grisez, Boyle, and Finnis*", *American Journal of Jurisprudence* 34 (1989): 19. However, he directly connects inclinations with ontological goods, forgetting that inclinations are *inclinations of potencies*, and that Aquinas studied deeply the hierarchy of human powers. Indeed, he just mentions there the power of the will. In another discussion on the topic with Furton—another classical Thomist—the link between powers and inclinations did not appear. Edward J. Furton, Restoring the Hierarchy of Values to Thomistic Natural Law, 39 Am. J. Juris. 373 (1994); George Constable, *The Problem of a Hierarchy of Values in Natural Law - A Response to Professor Furton*, *American Journal of Jurisprudence* 41 (1996): 63. Constable never mentions anything about human powers (or potencies). Furton dedicates only one paragraph to the power of reason on page 389.

47 Brian McCall, *The Architecture of Law: Rebuilding Law in the Classical Tradition* (2018), 81–126; Peter P. Cvek, "Thomas Aquinas and John Locke on Ultimate Reality and Meaning: Natural Law and Natural Inclinations," *Ultimate Reality and Meaning* 4 (2015): 34; Jonathan Crowe, "Natural Law and Normative Inclinations," *Ratio Juris* 28, no. 1 (March 2015): 52–67; Peter Karl Koritansky, *Natural Inclination as the Basis for Natural Law*, "Reading The Cosmos: Nature, Science, and Wisdom" (Giuseppe Butera ed., 2011): 205–14.

48 Koritansky, *supra* note 47, at 205–14.

49 *Id.*, at 207–13.

50 Crowe, *supra* note 47, for whom inclinations are "learned and resistible," distinguishing them from reflex movements and instincts. Although he quotes the Summa Theologica, his scheme differs substantially. Aquinas never talk about any "normative inclination." In S.T. I-II, q. 94, a. 2 there appear three inclinations (self-conservation, sensitive inclinations and rational inclinations) as a basis of some natural law precepts, not directly as a law.

feasts or to live in community. It must be noted that these new senses do not match exactly with the ontological notion of inclinations, although they are not completely unconnected.

We cannot *immediately* deduce ethical or legal conclusions from theoretical sciences. At the same time, we cannot absolutely dissociate practical reason from reality.[51] Today some biological studies fall plainly into the naturalistic fallacy,[52] inferring directly and in a naturalistic way certain legal conclusions from biological data. For example, after establishing that some apes have an inclination to be "serial monogamous" they infer that human beings should be monogamous but not for life;[53] other researches pretend to ground the right to property on the fact that some animals and insects have a tendency to possess a territory in an exclusive manner.[54] Yet there is a leap into the void in that argumentation, emphasized by Barros[55] and others:[56] from mere facts it is difficult to infer directly moral or legal mandates, without any practical argument.

Nevertheless, biology cannot be dismissed. After denying any "biological mandate," Barros, Leiter, and Weisberg have observed that some behaviors should be considered in legal analysis. To that end, they distinguish two kinds of behaviors: one that is learned and mutable, and another that is not. If "a behavioral trait is neither learned nor mutable, then legal systems will face great difficulty in establishing effective rules that run counter to that trait."[57] In the hypothesis that human health requires eating meat, the promotion of vegetarianism by authorities should be criticized as something contrary to human nature. On the contrary, if the behavior is learned an analysis of its malleability (non-innate)[58] and plasticity (modifiability)[59] should be made. It makes no sense to regulate non-plastic behaviors: this regulation is doomed to failure. According to them, authorities should be aware that only "normative positions that are consistent with basic human

51 *See* note 18.

52 *Id.*

53 "We concluded that an examination of comparative anatomy combined with the results of modern understanding of neuroscience does provide significant support for our thesis that humans are primed for pair-bonding, but not necessarily long-term fidelity." June Carbone & Naomi Cahn, *Examining the Biological Bases of Family Law: Lessons to Be Learned for the Evolutionary Analysis of Law*, 2 Int'l J. L. Context (2006): 277, 285. However, they recognize that "biological insights do not stand alone; they must be integrated with more traditional legal and/or sociological analysis" (*Id.*, at 291).

54 Stake argued in 2004 that there is an evolutionary basis for an instinct to respect possession. Jeffrey Evans Stake, "The Property Instinct," *Philos Transactions Royal Society* 1451, (2004): 1763–74. More recently, Ori Friedman and Karen Neary suggested that there are psychological grounds that suggest that both adults and children tend to associate prior possession with ownership. Ori Friedman & Karen R. Neary, "First Possession beyond the Law: Adults' and Young Children's Intuitions about Ownership," *Tulane Law Review* 83 (2009).

55 Barros denies "an easy connection" between human and animal behaviors.
Even with primates, the link between animal and human behavior is hard to establish, but the examples used by Stake—ants, salamanders, and spiders—are so evolutionarily remote from humans that the bar for relevance must be set even higher. The evolutionary lines of humans and any of these species diverged so long ago that it is preposterous to suggest that present behaviors are a shared heritage received from a common ancestor. [D. Benjamin Barros, *The Biology of Possession*, 20 Widener Law Review 291 (2011): 307.].

56 Brian Leiter & Michael Weisberg, "Why Evolutionary Biology Is (So Far) Irrelevant to Legal Regulation," *Law & Philosophy* 29 (2009): 31, criticizing the use of nonhuman animal examples in arguments about human behavior.

57 Barros, *supra* note 55, at 304.

58 Etiological studies analyze the origin of species behavior and how they evolve, focusing on its causes. According to some authors, while etiological facts play almost no role in legal analysis, facts about the innateness and malleability of behavior would be highly relevant. These last characteristics are better established through research on actual human behavior, than in etiological studies. Barros, *supra* note 55, at 315–6; Leiter & Weisberg, *supra* note 56, at 39–41.

59 If a certain human behavior is solely the product of evolution, then regulations aimed to change it will be futile; otherwise, if it is caused by environmental factors, the best strategy is to regulate these factors, not the behavior. Yet, if the behavior is not plastic at all, the regulation will have no effect. Leiter & Weisberg, *supra* note 56, at 39–45.

tendencies are more likely to be effective than those that run counter to basic human tendencies."[60]

Theoretical sciences provide three important insights for practical reason: first, crucial notions of things, explaining the features of each species, based on evidence. "It is the definition that shows the specific nature."[61] No method of natural law can work without a certain understanding of what human nature and the environment are. Second, sciences should explain what is impossible, possible, and probable for each element. Third, they should try to delimitate what specialized powers are for (*e.g.*, the eye to see, the ear to hear), which are the aims of each organ, what sort of things complete or perfect each nature.

3.3. Goods, values, virtues, and assets (reality and understandings)

Following the most natural process of knowledge, we can observe how newborns grasp the first notions of what is good. After several months of living in a warm environment, babies are born. Outside of the womb things are quite different. It is too cold! Immediately they will take their first mouthful of air—another new experience—and they will try to express their discomfort by crying and moving about. Newborns do not know that if they cross their arms they will feel better—they do not even realize that they have arms. Suddenly, the weather changes. Now it is warm again—that is "good"! Then comes the first hug from mummy. After this experience, instinctively the baby will turn its head toward anything that strokes its cheek or mouth, searching for the object.[62] Once the umbilical cord is cut, in some way they feel the need for food. Breastfeeding should ideally start soon after birth. One myth suggests that babies are born with the reflex to look for their mother's breast. The mother should put her breast towards her baby's mouth, and after pushing a little, the baby's tongue will feel the nipple and instinctively[63] will suck—that feels "really good"! Breastfeeding takes time and practice for both parties, but soon babies will seek, fasten onto, and suck their mother's breast *naturally*. When time passes and the child attains the use of reason, the little girl will not remember the first events of her life, but will understand what breastfeeding was for and why it was "good" for her. If later she gets married and gives birth to a beautiful boy, the mother consciously will apply the means to fulfill her pleasant duty of feeding her firstborn.

In this example there are four types of knowledge about the same human good. (i) *Sensible knowledge*. Human inclinations (in this case, reflex movements and desires) show by experience what is good but in a blurred way. "Good milk" is not an innate idea, it is simply the object of one power; when the tongue perceives the presence of its object,[64] it will be activated and will activate the nervous system providing information to the brain. Experience of actual goods causes sensible knowledge. (ii) *The acquaintance of how to reach the good*. After realizing that certain actions provided a good experience (warm environment and nutrition), the child will instinctively repeat them when she feels the need for the same experience (to avoid cold or hunger).[65] (iii) *The abstract comprehension of*

60 Barros, *supra* note 55, at 304.

61 S.T. I-II, q. 1, a. 3. This important art of giving good definitions of essences, on which crucial issues depend, has no name until now. We can call it "ousiology." For example, if we do not include in the definition of human being the human egg fertilized by the sperm, laws that protect human life will not apply to the fertilized egg.

62 It is also due to the rooting reflexes that are present at birth but disappear around four months, as it gradually comes under voluntary control. Mijna Hadders-Algra, "Early Human Motor Development: From Variation to the Ability to Vary and Adapt," *Neuroscience & Biobehavioral Revew* 90(2018): 411–27.

63 *Id.* The sucking reflex, common to all mammals, causes the child to instinctively suck anything that touches the roof of their mouth.

64 A thing is knowable only in the degree that it is actual; hence our intellectual potency attains to self-knowledge only through possessing an intelligible object in a concept, and not by directly intuiting its own essence. This is why the process of self-knowledge has to start from the exterior things whence the mind draws the intelligible concepts in which it perceives itself; so we proceed from objects to acts, from acts to faculties, and from faculties to essence. [Aquinas, *Commentary on Aristotle's De Anima Book II*, Chapter IV, § 308, trans., Kenelm Foster & Sylvester Humphries (1951)].

65 Aquinas realized that "through the deficiency of his age, a child cannot use the habit of understanding of principles,

the human good. Only after reaching the use of reason will the individual understand why breastfeeding matters, why milk is so important for mammals and for human health. (iv) *The practical understanding of the good*. Finally, the mother will see the same good (milk) as something that *should be* given to the firstborn. Only at this stage do the moral and legal reasoning begin to work.

Grisez, Finnis and Boyle[66] pointed out that the first notion of good is pre-moral, prior to any substantive moral deliberation. To some extent, the same idea could be applied to other parts of reality discovered by our senses or by other sciences (*e.g.*, the notion of human being, its powers, and inclinations). Some authors consider the basic goods self-evident.[67] It seems to me that they are considering only the first two types of knowledge of human goods. In any case, even if these goods have some level of self-evidence—a thesis that I fully accept[68]—nothing precludes this knowledge being enriched by experience, reflection, or faith.

Aquinas tightly connects many of these elements in a single paragraph:

> What is apprehended and what is desired are the same in reality, but differ in aspect: for a thing is apprehended as something sensible or intelligible, whereas it is desired as suitable or good. Now, it is diversity of aspect in the objects, and not material diversity, which demands a diversity of powers.[69]

"Good" and what "is desired as suitable"[70] are considered equivalent notions. In the same line, the Stagirite defines that good is that at which all things aim.[71] Today we can track this idea of "good" in our language, which defines this word as something "very satisfactory, enjoyable, pleasant, or interesting," "suitable, convenient, or satisfactory," and "kind or helpful"[72] for someone about something. It means that one thing is good when: (i) it is something that the individual can receive, is able or in *potency* to receive; (ii) this thing is *suitable* for the individual;[73] and (iii) because of its suitability, it is *desired* by the individual.

Since a *value* is something that is interesting, important, worthy, or good for something or someone,[74] the relationship between values and goods seems to be

or the natural law, which is in him habitually" (S.T. I-II, q. 94, a. 1, ad 3). Animals also "know"—not by the abstract reason—what things are good for them, and that is why they seek them. Then, it should be concluded that the apprehension of what is good should precede the use of abstract reason.

66 Germain Grisez, Joseph Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, *American Journal of Jurisprudence* 32 (1987): 99, especially at 126; Finnis, *supra* note 25, at 34.

67 For Grisez and Finnis, the basic goods are self-evident and underived, not the result of the speculative enquiry into the natural properties of humans or anything else. Finnis, *supra* note 25, at 33–6, 64–9; John Finnis, "Is and Ought in Aquinas," in *Collected Essays-I-Reason in Action* 147 (2011); and Grisez, *supra* note 6, at 168–201, especially at 173.
In this point there can be significant differences between Finnis and Aquinas. *See* Mark W. Sayers, "Knowledge as a Self-Evident Good in Finnis and Aquinas: When is the Immediately Obvious Not So Immediate," *Australian Journal of Legal Philosophy* 23 (1998): 92, especially at 99.

68 We will analyze this topic a little more in Chapter IV. About the degrees of self-evidence, *see* Juan Carlos Riofrio, *Evidence and Its Proof. Designing a Test of Evidence*, 2019 Forum Prawnicze 14 (2019).

69 S.T. I, q. 80, a. 1, ad 2.

70 *Id.* Aquinas repeats the idea in many places. "Each power desires by the natural appetite that object which is suitable to itself" (S.T. I, q. 80, a. 1, ad 3); "The ratio of good is the ratio of appetibility, as said before (q. 5, a. 1), and since evil is opposed to good" (S.T. I, q. 19, a. 9).

71 Aristotle, Nicomachean Ethics, I, 1.

72 *Cambridge Dictionary Online*, s.v. "Good, *a.*," accessed October 31, 2021, https://dictionary.cambridge.org/dictionary/english/good.

73 Something can be considered suitable because it is a perfection of the power, or "completes" it, or allows the power to reach higher aims, or at least fits well with the power and do not harm it.

74 *Cambridge Dictionary Online*, s.v. "Value, *n.* and *v.*," *supra* note 72. One classical definition states that value is "any object of any interest." Ralph Barton Perry, General Theory of Value (1926). Commonly axiologists distinguish two kinds of values: instrumental and intrinsic values, "between what is good as a means" and "what is good as an end." *See* Brian Duignan, *Axiology*, Enc. Britannica Online, 2021, https://www.britannica.com/topic/axiology. According to Dziedziak, defining "value" is an extremely difficult enterprise. Some of its basic meanings are:

a fairly straightforward assignment. In short, both notions can be connected simply by defining that value *is what is considered as good because it is convenient for one subject and its powers*.[75] However, Aquinas never undertook this task. Notwithstanding the long treatise of virtues and the vast analysis of the value of multiple entities (God, persons, cosmos, substance, accidents, virtues, actions, etc.), he never wrote a treatise of values. Axiology, as a science, only appears at the turn of the nineteenth century.[76] Despite this, it appears clearly throughout his work that he adopts a cognitivist, monistic, and hierarchical axiology. Cognitivist, because he understood that values should be objectively grounded on the objects of the human powers, on truth and being,[77] making it possible to distinguish true and false values. Monistic, because all values can be intrinsically weighted according to one criterion, being: "In things, each one has so much good as it has being, since good and being are convertible."[78] And hierarchical, because everything can be ranked according to the level of being that each one has.[79] Other natural lawyers can have similar or different axiological approaches.[80]

The Aristotelian and Thomistic ethics of virtue is underpinned in this axiology. Each virtue is of worth because they enhance human powers, make it easier to achieve human ends, and allow higher levels of happiness.[81] Today the theory of values also has consequences in the legal domain, where judges—principally in human rights and constitutional courts—define the most critical cases by weighing several values: contrasting privacy with transparency (*e.g.*, the right to the truth or to information), balancing the value of life and the freedom of decision (*e.g.*, taking a pregnancy to term or euthanasia), weighting diversity versus identity, social versus individual values (*e.g.*, for conscience clauses), minority values versus the general values of the legal system. Jurists have made some efforts to connect the "real values" of natural law, not just conventional mores, with the courts' decision process.[82] Yet, the classical approach to natural law still offers crucial insight into legal axiology, although

1) That what is judged positively by a human being (something precious), 2) that what is in accordance with nature, 3) that what ought to be, 4) that what is the object of desire, 5) that what demands coming into being, 6) that what is an aim of human aspirations, 7) that what fulfils certain needs, 8) that what demands fulfilment, 9) ideas, 10) absolute good, 11) that w|hat obliges the receiver or appeals to them, 12) everything that is considered to be good. [Wojciech Dziedziak, "Axiological Basis for the Application of Law—a Perspective of the Equitable Law," *Studia Iuridica Lublinensia* 24 (2015): 49, 50].

75 A close definition was provided by Hervada, who stated that "value is the estimation of being as good, which obeys an objective and real dimension of being." Javier Hervada, *Lecciones Propedéuticas de Filosofía del Derecho* (3th ed., 2000), 68. "The theory of values must start from the valuable nature of the human person, in itself and in relation to its ends" (*Id.*, at 67).

76 The term "value" originally meant the worth of something, chiefly in the economic sense of exchange value, as used by Adam Smith in the eighteenth century. A wider use of the term in philosophy will occur during the nineteenth century under the influence of a variety of thinkers and schools, as Rudolf Hermann Lotze, Albrecht Ritschl, Friedrich Nietzsche, Alexius Meinong, Christian von Ehrenfels. The name "axiology" was first used by Paul Lapie, in 1902, and Eduard von Hartmann, in 1908. Duignan, *supra* note 74; Paul Lapie, *Logique de la volonté* (1902); Eduard von Hartmann, *Grundriss der Axiologie (1907–1909).*

77 We reached that conclusion relating values and desires. *See* note 70 above.

78 S.T. I-II, q. 18, a. 1.

79 *Id.* and S.T. I, q. 5, a. 1. Indeed, the S.T. II-II is fully dedicated to ranking virtues.

80 Authors such as Edith Stein, Julian Marías, Constable and Furton will adopt this hierarchical theory of values. *See* Edith Stein, *La Struttura della Persona Umana* 62 (2000); Julián Marías, *Historia de la Filosofía* (20th ed., 1967), 406–12; and note 46. Instead, Finnis and Grizes maintain the irreducibility and incommensurability of seven basic values. Those who refuse natural law, like Joseph Raz, tend to disagree with a hierarchical theory of values. *See* Nien-hê Hsieh. "Incommensurable Values," in *Stanford Encyclopedia of Philosophy* (2016), https://plato.stanford.edu/entries/value-incommensurable/.

81 S.T. II-II, q. 108, a. 2.

82 Michael S. Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review* 5 (1985): 277, a very influential article with 1994 citations. It should be highlighted how Moore links reality, values and the intentions or pur-

it probably needs an update to be able to speak with the same language and technicalities that courts use in their axiological reasoning.

An additional legal notion intrinsically connected with the ones mentioned is that of "assets." Assets are real goods, goods embodied materially in reality, objects of the legal relationship that can be owed or due to justice. They must have some external manifestation—mere dreams or thoughts are not of interest to the law—and be able to be distributable. Assets are understood as "something having value, such as a possession or property, that is owned by a person, business, or organization."[83] Following the links of the natural law chain, if there is a hierarchy of goods and values, of aims and means, there should also be a hierarchy of assets. This is another legal element of the natural law formula that can be developed more extensively.

Usually moralists and theologists are more interested in virtues and less in constitutional values and assets. In all honesty, jurists are not very concerned about virtues but about other things. It seems that the same formula can provide different results—though not contradictory—for different sciences.

3.4. Ends and means (personal understandings)

While the notion of value adds a subjective appreciation to the notion of good, the notion of end confers dynamism to both. Values and goods are seen as ends *to be achieved*.[84] Properly speaking, the investigation of practical reason begins here, evaluating what ends should be achieved and how, with what means. Nevertheless, no practical argument can be drawn without some previous understandings about human nature, its potencies, and goods.

Let us consider for a moment the Summa Theologica structure. As was mentioned, only after considering God, creation, the nature of angels, the human being and its potencies in Part I,[85] Aquinas feels comfortable to deal with morality and the law. All previous investigations will back moral and legal research, which Part II is dedicated for.[86]

Part I-II starts by dealing with human ends. The first article analyzes whether it belongs to humans to act motivated by an aim, and concludes that "it is clear that whatever actions proceed from a power, are caused by that power in accordance with the nature of its object. But the object of the will is the end and the good. Therefore all human actions must be for an end."[87] On this cornerstone all moral and legal reasoning will be based. *Power's objects mark the end.* This simple, obvious, and quite overlooked consideration is utterly crucial for the delimitation of human ends. Our nature, and specifically our powers, determine what our aims are. It is not part of our happiness—nor part of our ends—to enjoy living one meter under the earth where there is little oxygen, trying to find carrots or roots to eat, as naked moles-rats do, nor flying opening our arms as birds open their wings, nor hibernating without clothes for five months at thirty degrees Celsius below zero, as polar bears do. These kinds of happiness are not only improbable but quite impossible for humans. Human potencies are not designed for any of these—they are not human ends.

The investigation of what sort of goods constitute human happiness appears in question 2. After considering "natural wealth" (connected directly to human powers, such as food, drink, clothing, cars, dwellings,

poses of the law. We will add more explanations at the end of Chapter III.6.

83 *Cambridge Dictionary Online*, s.v. "Asset, *n.*," *supra* note 72.

84 Aristotle and Aquinas explicitly link the notions of end and good. The very first sentence of Nicomachean Ethics declares that "every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim" (book 1.1). Also at the beginning of the Summa Theologica we read: "goodness has the aspect of the end, in which not only actual things find their completion, but also towards which tend even those things which are not actual, but merely potential" (S.T. I, q. 5, a. 2, ad 2).

Although there is no explicit link between end and values, he wrote that "all agree in desiring the last end: since all desire the fulfilment of their perfection, and it is precisely this fulfilment in which the last end consists" (S.T. I-II, q. 1, a. 7). As values can be understood as some personal desires of goods, ends and values can be connected.

85 *See* note 19 above.

86 Part I-II will be dedicated to the general principles of morality and law, and Part II-II to specific moral issues.

87 S.T. I-II, q. 1, a. 1.

and such like), "artificial goods" invented by the art of man (like money), honors, fame, power, bodily goods and pleasure, Aquinas concludes that "it is impossible" that happiness essentially consists in created goods. Our body and powers exist for something else, so the "last end cannot consist in the preservation of its being;"[88] wealth also "is sought for the sake of something else, viz. as a support of human nature;"[89] and honors, fame and pleasure are just consequences or "can result from happiness."[90] Then Aquinas concludes that the gist of our happiness is related to the Divinity. The ultimate end is principally an uncreated good, the infinite good (namely, God) and, in a secondary way, the "attainment or enjoyment of the last end. Now the last end is called happiness."[91] Notwithstanding that, happiness indirectly includes certain honors, fame, glory, and sensitive pleasures.[92]

What really matters in Part I-II is how to attain human happiness (the ultimate end), to which all human powers, actions, goods, and values point. According to this view, these elements are considered means to achieve the ultimate end. "Human flourishing," "human excellence," or a "fulfilled life" require the use of human powers[93] to achieve their ends, integrating them in a project of life aimed at reaching the gist of happiness.

It is well noted that following the Thomistic schemes the ultimate end has a certain priority over all human goals.[94] But we should stress that in that scheme *all human ends are ranked*. The higher the power, the higher the end, the higher the happiness. Without order in our existence, there are only sparks of pleasures; instead of happiness the result is sadness. There is no happiness at all for who dies practicing a risky sport. Bliss can admit the occasional lack of some lower ends but never of the highest. An uncultivated man who consumes drugs because nobody loves him, obtains a significant temporal pleasure in all his intoxicated corporal senses: that is an animal "happiness," not a human one. Conversely, an old grandmother with her body worn out during long years of housework is extremely happy feeling the love of her big family and seeing her children and grandchildren succeeding in life. Only the last can be called a "fulfilled life." As we can see, the order of the ends appears as master strokes of the architectural plans for the construction of the person; they show what a "flourishing life" means.

Individuals and societies can specify their ends (*e.g.*, choosing one friend or another, buying one house or not, eating fish or meat), can prioritize when to achieve each end, and decide how to do that. However, it is not in their power to choose unhuman ends, to decide that knowledge or food are not aims to be achieved, or to change their natural hierarchy.

The ends mark the order. According to the philosophical maxim which affirms that *there is no order without end*, there is no possible moral or a legal order without human ends.[95] Each real order has only one principle of order, only one last end.[96] Food is not a right because one glorious day a benevolent authority granted it as a privilege: no, food is a right because the law, written or not, has to protect individuals with this one specific nature which needs food to survive.

Since there is no more than one human nature, *human ends should be the same for every human science*. Therefore, ethics, economics, psychology, health, and legal and political sciences must share the same ultimate human ends. Nevertheless, as sciences "cut" reality into pieces to investigate isolated parts,[97] each science can focus its attention on some specific middle-aims, having different means to achieve their aims. For instance, while personal ethics is interested in how to achieve happiness by means of a virtuous life, poli-

88 S.T. I-II, q. 2, a. 5.

89 S.T. I-II, q. 2, a. 1.

90 S.T. I-II, q. 2, a. 2.

91 S.T. I-II, q. 3, a. 1. Previously, it was observed that "the end is twofold: namely, the thing itself, which we desire to attain, and the use, namely, the attainment or possession of that thing" (S.T. I-II, q. 2, a. 7).

92 S.T. I-II, q. 2 and 3, a. 3.

93 S.T. I-II, q. 3.

94 "To an ultimate end the purposes of every practical science are directed" (S.T. I-II, q. 1, a. 5).

95 About unity and order in the legal system, *see* Juan Carlos Riofrío, "Unidad y Orden Metafísicos en el Ordenamiento Jurídico," *Dikaion* 23 (2015): 299.

96 "Nature tends to one thing only" (S.T. I-II, q. 1, a. 5). Compared to the last end, immediate aims are transformed into means to achieve the last one.

97 *See* note 13 above.

tics will seek the best policies that produce community peace and welfare, and the law will protect the most relevant human aims, even with coercion.

3.5. Principles (personal understandings)

The mention of principles in certain forums is seen as the dogmatic path where some "fanatics" try to impose their views, without solid grounds because these partisans believe that their principles are self-evident. That was the attack of Holmes, who labelled "naïve state of mind" the jurists who believe in "the supposed *a priori* discernment of duty or the assertion of a preexisting right."[98] Opponents of natural law clearly reject the idea of an evident law, an easy flank to attack if certain precisions are not stated. We should demystify this dogmatic notion of principles.

In its etymological sense[99] and in its first sense in Latin and the Romance languages, *principle* is "what is at the beginning,"[100] what has certain *priority* or is in its *primary* stages. Principles also have a foundational function of those things that come later: for instance, in the sequence of numbers there is no two without one, because the notion of two (twice one) requires the notion of one. Commonly, principles are divided in two groups: those predicated from material reality, and those applied to reason. While material things are governed by cosmological principles (*e.g.*, gravity, cause-effect, inertia), mental entities are structured according to rational principles (*e.g.*, non-contradiction, logic, coherence). As the law is rational,[101] all legal principles should be rational too. Apropos, let us analyze legal reasoning.

What is at the beginning of legal reasoning? The answer is easy, "the first premise," but this requires an explanation. Consider a fine imposed by a policeman on a taxi driver who did not see a red light. The law states that everyone who passes a red light should be fined $100 (premise 1); the taxi driver passed a red light (premise 2), so the driver must be fined $100 (conclusion). In this syllogism the statement of the law is the first premise, the "principle," the first argument that supports the imposition of the fine. Without it the policeman would act in a very different way. So, necessarily any fine, any sanction, any judgment, any written law, or any legal argument must be based on rational premises which provide them with rational support. Only irrational statements lack principles.

Of course, this statement of the law is not the first principle of the legal system. Why not? Simply, because the red-light statement is grounded in other previous reasons (or principles): people should obey the law, the law is for the common good, security is part of the common good, we have to secure life, life cannot be put at risk while driving, life must be protected, and so on. At the end, the most fundamental principles in their simplicity shine out by themselves and can be expressed in a few words, affirming what is of worth: *pro life* or *pro security*, for example. "Life" alone is not a principle of the practical reason because a noun alone does not indicate anything to be done; instead of that, the affirmation of life ("*pro life*") sheds some light on practical reason. Life should be respected or protected, no one can harm it. Without the *pro life* principle, the red-light statement makes no sense.

Therefore, principle of law is a *logically prior proposition in a point of law*. This proposition should be at the beginning of legal reasoning. If we talk about the first principles of the legal system, they can usually be stated concisely in a general way,[102] because they are

98 Oliver Wendell Holmes, "Natural Law," *Harvard Law Review* 32 (1918–1919): 40, 42. This article has been very influential, receiving 297 citations. "Holmes" appears 339 times in the 111 most influential articles of natural law.

99 "Principle" comes from late Middle English, from Old French, and derives from the Latin *principium* "a beginning, commencement, origin, first part." It also means "source" and "foundation." *Online Etymology Dictionary*, s.v. "Principle, *n.*," accessed October 31, 2021, https://www.etymonline.com/word/principle.

100 What "est in principio" (Latin), "está al principio" (Spanish), "è al principio" (Italian), "está no princípio" (Portuguese). Translation mine.

101 "The end is the first principle in all matters of action but it belongs to the reason to direct to the end. Since directing to an end is the function of law—law is an act of reason" (S.T. I-II, q. 90, art. 1).

102 Aquinas realized that virtually all science is contained in the principles of science. S.T. I-II, q. 3 a. 6. So, principles should be stated in a general way to be able to contain several elements of each science.

the most basic pieces of legal reasoning. Aphorisms like *neminem laedere*, *in dubio pro children* or *pacta sunt servanda*, are widely accepted as general principles of the law: they are the first arguments that support all legal reasoning, and without them nothing can stand on its own. Even positivists need some non-written principles, some previous ideas, to analyze the law in their analytic schemes. The most striking example is the principle of reasonability, widely used by constitutional courts worldwide even if no constitutional provision recognizes it.[103] The very first principles of the legal and moral order should even be simpler. They are just affirmations of the being, ends, goods, or values: *pro homine*, *pro family*, *pro children*, *pro nature*, *pro Deo*, *pro action*, *pro life*, *pro freedom*, *pro welfare*, for example. For each good there is one first principle. Without these smallest of elements, there are no middle principles,[104] no complex moral reasoning, no legal reasoning, and no possible legal system.

It is still possible to take one step more, the last step, simplifying *pro life*, *pro Deo*, *pro homine*, and all principles into one.[105] We can simply say "*pro good*." Using the language of human rights declarations, we can say that "good" should be respected, protected and fulfilled, as much as possible.[106] However, natural lawyers may prefer the ancient formulation of the first principle of practical reason: "Good is to be done and pursued, and evil is to be avoided."[107] According to Aquinas, here are contained all principles and precepts of natural law.[108]

Using the language of human rights declarations, we can say that "good" should be respected, protected and fulfilled, as much as possible. However, natural lawyers may prefer the ancient formulation of the first principle of practical reason: "Good is to be done and pursued, and evil is to be avoided."

103 As Gavara said, "the main problem posed by the application of the principle of proportionality in a broad sense is the non-provision of its application in the constitutional text." Juan Carlos Gavara de Cara, *Derechos Fundamentales y Desarrollo Legislativo. La Garantía del Contenido Esencial de los Derechos Fundamentales en la Ley Fundamental de Bonn* (1994), 313.

104 For instance, there is no *neminem laedere*, *in dubio pro children* or *pacta sunt servanda* if previously there are no *pro health*, *pro children*, *pro truth* or *pro loyalty* principles.

105 Aquinas observes "that the precepts of the natural law are many in themselves, but are based on one common foundation" (S.T. I-II, q. 94, a. 2, ad 2).

106 The third word also can be "achieved," "developed," or "promoted." It contains a programmatic duty. About these words, *see* Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties," *Human Rights Law Review* (2005): 81.

107 Good is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle of practical reason is one founded on the notion of good, viz. that 'good is that which all things seek after.' Hence this is the first precept of law, that 'good is to be done and pursued, and evil is to be avoided.' All other precepts of the natural law are based upon this. (S.T. I-II, q. 94, a. 2). *See* Grisez, *supra* note 6.

108 After explaining that the principle *pro good* is coined in one personal habit, the synderesis, Aquinas stated: "synderesis is said to be the law of our mind, because it is a habit con-

In conclusion, legal archeology (the science of legal principles) is intrinsically connected with legal axiology. And legal axiology must be rooted in legal teleology (the science of aims),[109] and both in legal ousiology (the science of defining the nature of things, with its powers and inclinations). Natural law is not just a theoretical approach that connects the law with some ideal or moral principles, but a methodology that uses practical principles based on human nature to understand the law in depth. We need to root natural law in nature. Without staying grounded in human nature, there is no "natural" law properly speaking.

If the previous connections are accepted, we can also accept that the self-evidence of some ends, goods and values will permeate the principles to some extent. The first premises of practical reason, the simple affirmation of self-evident goods, will be self-evident too; instead, the secondary or derived principles will be less evident for us.[110] From the previous connection we also can conclude that principles will inherit a hierarchy of potencies, goods and ends explained above. For example, if the value depends on the level of being, and the value of every human (dignity) exceeds the environmental value, and the infinite value of Divinity overcomes both, there should be a hierarchical order between the principles *pro natura*, *pro homine*, and *pro Deo*.[111]

A benchmark here is the discussion maintained between Fuller and Hart in the 1960's. In his book *The Morality of Law*,[112] Fuller formulated eight principles of what he called "the inner morality of law," which requires that laws be general, public, prospective, coherent, clear, stable, and practicable. Hart cast doubts upon the "morality" of these principles, which in his view were more instrumental principles for effective legislation.[113] Fuller responded by denying the mere instrumental function, explaining that governments should apply these principles to avoid harming freedom and dignity.[114] Although these principles can be traced back to the Greeks, Isidore of Seville and Aquinas, and other moralists,[115] and although its non-observance can produce pernicious consequences, it is true that many of them have little moral flavor. The mandate of promulgation (principle 2), non-retroactivity (principle 3), and the *stare decisis* support (principle 7) are universal principles of the law, rarely studied in ethics. These secondary principles of the law have traits that are more legal, than moral.

3.6. Natural laws and positive laws (understandings and voluntary actions)

Traditionally there is a distinction between natural law and positive laws: the first is produced by God with

taining the precepts of the natural law, which are the first principles of human actions" (S.T. I-II, q. 94, a. 1, ad 2).

109 For every human end there is one practical principle. That is because "the end is the first principle in all matters of action but it belongs to the reason to direct to the end" (S.T. I-II, q. 90, a. 1).

In general, teleological approaches to any kind of morality or legal theory have consequences for their axiologies. As Schroeder observes, teleological theories "are committed to claims about value, because they appeal to evaluative facts, in order to explain what is right and wrong, and what we ought to do—deontic facts." Mark Schroeder, "Value Theory," *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2021), https://plato.stanford.edu/archives/fall2021/entries/value-theory/.

110 Properly speaking these are not innate principles. What is innate are the human powers, with their objects and inclinations; when human powers are activated by the presence of their goods, they activate the synderesis producing the first principles. Sounds are not innate ideas. When music is played, the ear captures its melodic notes, the intellect understands the lyric, the will loves everything, and the synderesis concludes "music should be heard."

111 The maxim is encoded in Scripture: "we must obey God rather than men" (Acts 5, 29). "In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person" (John Paul II, Encyclical Letter Centesimus Annus n. 47 (1991)). So, the *pro natura* principle cannot prevail over *pro homine* principles, nor can either of the two can prevail over the *pro Deo* principle.

112 Lon L. Fuller, *The Morality of Law* (1964).

113 Hebert L. A. Hart, "Essays," in *Jurisprudence and Philosophy* 347 (1983).

114 Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.

115 Robert Henle, "Principles of Legality: Qualities of Law Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville," *American Journal of Jurisprudence* 39 (1994): 47.

the creation of human nature, and the second are produced by the human will. Some natural lawyers omit the mention of God, maintaining that human nature can be studied without theological considerations, which methodologically is possible because, as was stated, every research "cuts" one part of reality to study it.[116]

The law is a product of the intellect and the will. Both sources appear in the classical definition of the law, as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[117] The intellect will enquire what is good, what possible means exist to achieve it, and how reasonable they are; after this research the intellect will finally *conclude* what sort of actions are appropriate (physically, ethically, legally, and economically) to achieve that good. The intellect can conclude that some means are necessary to attain the end, while other are only more or less convenient, due to the diversity of means for that purpose. "An innocent person does not deserve punishment," is an example of a necessary conclusion; "a criminal could deserve ten or eleven years in prison," is an example of two convenient conclusions. Bearing in mind the whole of human existence, the *necessary conclusions of the intellect will create the hard core of the natural law.* If many suitable means appear to reach one end, the will of the authority has to choose or *determine* which one of them will be the law in the community. Evidently, the will cannot act in a vacuum—it needs some propositions of the intellect to accept or reject. *These determinations of the will are the essence of positive laws.*[118] Aquinas admits both ways to derive positive laws from natural law.[119]

Natural inclinations are not *simpliciter per se* natural precepts. First, they should be "apprehended by reason as being good," as "objects" (objects of human power) and, second, the practical reason should put them as ends to be pursued.

Now let us look more closely how necessary conclusions are obtained. First, the intellect should discover what is good for the person and society. As was seen, this task is done by analyzing what things are (being, powers, inclinations, etc.), what they are for (ends), and what kind of principles govern them. In this way, Aquinas obtains the first precepts of natural law:

116 *See* Chapter III.1 and note 13 above.

117 S.T. I-II, q. 90, a. 4. The same applies to the eternal and natural law that, according to Aquinas, are product of the intellect and the will of God.

118 The thesis appears in S.T. I-II, q. 95, a. 2, where Aquinas states that "it must be noted that something may be derived from the natural law in two ways: first as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details."
A similar idea appears on Nicomachean Ethics V, 6, where Aristotle distinguishes a *natural justice* that does not depend on human opinion, and a *legal justice* whose origin is indifferent, but once determined, is mandatory. The master of Aquinas distinguished three types of natural law: the *essentialiter law*, composed by the first practical principles, the *subpositive law*, which are the conclusions immediately connected to the first principles, and the *particulariter law*, which is a particular determination due to the positive will of the legislator. Albertus Magnus, Summa de Bono, tract. V, q. 1, a. 3 (1933).

119 S.T. I-II, q. 95, a. 2.

> Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. (…)[120]

Natural inclinations are not *simpliciter per se* natural precepts. First, they should be "apprehended by reason as being good," as "objects" (objects of human power) and, second, the practical reason should put them as ends to be pursued. After using many links of the natural law formula (being, powers, inclinations, objects, goods, and ends), Aquinas can conclude that there is an "order of natural inclinations" that cause—precisely because everything is connected—"the order of the precepts of the natural law." So, the hierarchy of human powers causes the hierarchy of its inclinations, tendencies, ends, goods, and, consequently, the hierarchy of precepts. The paragraph then analyzes three natural inclinations (to self-preservation, sensitive and rational inclinations) and the natural law precepts that can be obtained from them.

In addition, any law should be founded on some rational principles. As already explained,[121] a "principle" is not only a position (the first or "primary" idea), but mainly a foundation of what comes after. There is no two without one, there is no norm without previous rational premises. Just laws are underpinned on natural law principles of reason in a logical, teleological, axiological, and archeological way. Logically, because any norm is a "complex precept of reason," and there is no complexity without composition of various simpler elements. Principles are the simpler elements by which any complex reasoning (a syllogism, a theory, a commandment) begins. As there is no syllogism without a first premise, neither is there a commandment without the existence of a first statement or presupposition. The rule "in case of doubt among several interpretations of a norm, the most favorable one for the worker must be applied," requires the previous acceptance of a general principle called *in dubio pro operario*, and, in turn, this statement presupposes the idea of *pro operario*. Teleologically and axiologically, because laws are precepts promulgated *for the common good*, what is a specific application of the first principle of the practical reason (good is to be pursued). Each law is intended to respect, protect, achieve and develop some part of the common good (*e.g.*, freedom, health, security). And archeologically, because the reasonability of the law is supported by the reasonability of its first principles. When all is said and done, the *pro good* principle is always a condition of reasonability of the law.

It is worth noting that "the entire science is virtually contained in its principles,"[122] although in a general and undetermined form. Once this is accepted, it is easy to realize what role the first principles of the law can play in the legal system. In civil law tradition, jurists[123] agree that the general principles of law serve: (i) as an informative criterion of the legal system, filling the normative gaps; (ii) as a guiding criterion for the interpretation of current norms; (iii) as a limiting criterion to avoid abuse of the law or excesses contrary to the highest ends and values; (iv) as a rational justification for the rules and, therefore, (v) as an integrating criterion of the various norms in a simpler general justification. In the common law system these functions are less studied,[124] although principles still have a wide use in many areas of the law.[125]

120 S.T. I-II, q. 94, a. 2.

121 *See* Chapter III.5.

122 S.T. I-II, q. 3, a. 6. From a slightly different point of view, Andorno affirms that "the natural law is part of positive law; moreover, it constitutes its own nucleus." Roberto Andorno, *Universality of Human Rights and Natural Law*, 38 Persona & Derecho 35, 37 (1998).

123 Giorgio Del Vecchio, *General Principles of Law (Felix Forte trans., 1956); Ángel Sánchez de la Torre, Los Principios Clásicos del Derecho* (1975), 123–81; Orges Ripert, *La Règle Morale dans les Obligations Civiles* (4th. ed., 1959), 158; Luis Díez Picazo, *Sistema de Derecho Civil* vol. I, 171 (4th. ed., 1981); Federico De Castro, *Derecho Civil de España, General Part* v. 1, 473 (1955).

124 As an exception, *see* Percy E. Corbett, "The Search for General Principles of Law," *Virginia Law Review* 47 (1961): 811.

125 In the common law system, it is more usual to deal with some moral, constitutional, or international principles, than with the "general principles of law." There is a profuse use of many

The human mind tends to unify and absolutize multiple elements that appear together or have something in common: we call "legal system" a collage of hundreds of thousands of norms approved by quite different authorities, of different ranks and jurisdictions, who lived in different centuries and circumstances. Such collage of laws resembles the picturesque image of the chain novel of Dworkin:[126] a book written by a group of uncommunicated novelists, one after the other, without any previous agreement about the content. If we know how the novel was written, it will be foolish to query the general intention of the author. There is not one single intention but many. Likewise, the whole legal system will be a collage of unconnected manuscripts if the principle of unity is merely the will of the different authorities. Without general principles of law tightly anchored on human nature—I mean, on hierarchical human powers, ends, goods, and values—a harmonic interpretation of the whole legal system would remain just a fairy tale.

Some scholars have dedicated magnanimous efforts to developing a natural law theory of interpretation that can overcome textualism, originalism, and other positivistic readings of the law. The most cited author here is Michael S. Moore,[127] whose "realist theory" asserts that the meaning of certain words is not conventionally fixed but linked to reality. "Death," for example, refers to a natural kind of event that occurs in the world: what is arbitrary is the symbol, the five letters that compose the word "d-e-a-t-h," not the referent.[128] Ultimately, language founds a stable point of support on reality (the being with its features). Not everything in the law is convention. Only on these understandings, when the words of a judgment refer to a real case, does the role of the precedent make sense.[129] Moore later analyzes the hermeneutic role of the intention and values. About the intention, "the realist maintains that there is a right answer to whether intentions are hierarchically ordered as means to ends or whether they act on a coordinate basis in causing behavior."[130] And about the second topic he argues that our courts balance "real values," weighting real—not conventional, fictional, or hypothetical—weights to find what is just.[131]

A completely different hermeneutic approach is taken by Greenberg with his "Moral Impact Theory,"[132] a consequentialist reading of the law that weights the general impact of promises, agreements or statutes on personal obligations, rights, powers, and so on, in light of fairness, democracy, the rule of law, and other relevant values. Finally, we find other natural lawyers who attempt to provide a moral reading of the constitution, according to the canons of natural law.[133]

principles in natural law essays. *E.g.*, Philip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," *Yale Law Journal* 102(1993): 907; Paul Savoy, "The Spiritual Nature of Equality: Natural Principles of Constitutional Law," *Howard Law Journal* 28 (1985): 809; Richard A. Epstein, "From Natural Law to Social Welfare: Theoretical Principles and Practical Applications," *Iowa Law Review* 100 (May 2015): 1743; Rena Cain Cohen, "Bentham's an Introduction to Principles of Morals and Legislation: Analytical Jurisprudence, or Another Natural Law Theory," *Mercer Law Review* 16 (1965): 433; Srdan Budisavljevic, "Principles of Internal Morality of Law in Lon Fuller's Natural Law Theory," *Collection of Papers, Faculty of Law* 77 (2017): 189; and Henle, *supra* note 115. It is also good to remember the memorable debate materialized in these three articles: Finnis, Grisez and Boyle, *supra* note 66; Ralph McInerny, "The Principles of Natural Law," *American Journal of Jurisprudence* 25 (1980): 1; and John Finnis & Germain Grisez, "The Basic Principles of Natural Law: A Reply to Ralph McInerny," *American Journal of Jurisprudence* 26 (1981): 21.

126 Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* 34 (Winter 1982): 164.

127 Moore, *supra* note 82. Moore adheres to a natural law theory of interpretation that does not take a position about the justice of the law. *Id.*, at 398.

128 *Id.*, at 294.

129 *Id.*, at 368–76.

130 *Id.*, at 346.

131 *Id.*, at 379–96.

132 Mark Greenberg, *Legal Interpretation and Natural Law*, 89 Fordham L. Rev.109 (2020).

133 Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69 (April 2001): 2087; R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation*, 4 S. Cal. Interdisc. L. J. 463 (1995); James E. Fleming, "Fidelity to Natural Law and Natural Rights in Constitutional Interpretation," *Fordham Law Review* 69 (2000–2001): 2285. Although Ronald Dworkin was a hesitant natural lawyer, we must mention

In Moore we come across a well-finished natural law theory of interpretation, that connects reality, its possibilities, goods, values, ends, and means with the correct reading of the law. Perhaps his missing link is the principles of law, that appear only implicitly in his text. Greenberg merely connects some values within a consequentialist moral framework. To come to the point, none of these hermeneutic efforts would be plausible if the written law had no connection with reality, with some goods, principles, values, or ends of the human being. Everything is connected.

3.7. Natural and positive rights (understandings and voluntary actions)

In this human rights era, the most challenging goal for natural law is to define and delimit natural rights. None of the greatest ancient or medieval thinkers developed a theory of "rights," a word that only centuries later will be widely used.[134] Authors normally derivate positive and natural rights from one of the elements of the formula (from ends, values, and principles mainly), using the *via positiva* or the *via negativa* either.[135] For the analysis of this rich and extensive topic, which is impossible to cover in a few pages, we have dedicated another specific research.[136]

3.8. Personal relationships, cases, and circumstances

The last link of the natural law formula is the circumstantial reality of each individual: its existence in one specific environment, society, culture, and legal system. Aquinas realized that "the general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people."[137] And even the positive law "can be rightly changed because of the changed condition of man, to whom different things are expedient according to the difference of his condition."[138] Many natural lawyers will try to explain in many ways how universal values and immutable precepts can suffer some adaptations in the present century.[139]

It is imperative to arrive at this last stage, to speak seriously about real natural laws and real natural rights. As MacIntyre stated in his critique of human rights, we cannot conceive human beings as monads, prior to any interpersonal relations, lodged in no particular culture or tradition. Since these humans never existed, neither can theoretical rights subsist, and are only "moral fictions," "chimeric rights," a check for payment in a social order that lacked the institution of money.[140]

One classical example can give us some lights. A British citizen is always entitled to all natural rights and to the constitutional rights of his country. However, when Robinson Crusoe remained alone on his island, he could not ask anyone for the fulfillment of his hypothetical rights. Until the arrival of Friday, the second island settler, Robinson Crusoe could have the whole natural law theory in his mind, and he would trust seriously that as a British citizen he was entitled to those things recognized in the Magna Carta. However, all rights remained inoperable—almost as a "fiction" or "chimera"—until the apparition of another rational individual. Technically, these natural and

here his book Freedom's Law: The Moral Reading of the American Constitution (1996, 2005).

134 "Dikaion" and "ius" were the most used notions used by the jurists that have no equivalent in English and cannot be translated as "law" or "right." Michel Villey, *Leçons d'Histoire de la Philosophie du Droit* (2002).

135 The via negative obtains rights from duties: what is detected to be a duty of someone should be at the same time a right for another. *See* Felicien Rousseau, *La Croissance Solidaire des Droits de l'Homme: Un Rétour aux Sources de l'Ethique* (1982), 163.

136 Juan Carlos Riofrio, "How to Deduce Human Rights From Natural Law and Other Sciences," *Ius Humani* 12 (2023), *pro manuscrito*.

137 S.T. I-II, q. 92, art. 2.

138 S.T. I-II, q. 97, art. 1.

139 In the first half of the twentieth century, Stammler's conception of natural law gained notoriety. He saw it as "a permanent ideal of variable content," since under certain empirical conditions some precepts can be corrected. Rudolf Stammler, *The Theory of Justice*, trans. I. Husikde trans. (1902, 1925), 181–5. The idea entered the public debate and got many clarifications. Georges Renard, for example, will talk about a "natural law with a progressive content," while others will prefer the formula of a "natural law of changing and progressive application." Jacques Leclercq, *Le fondement du droit et de la société* (4th ed., 1957). Translation mine.

140 Alasdair Maclntyre, *After Virtue* 65 (2007), 65.

positive rights were *potential rights*,[141] rights awaiting one specific actualization: not only the arrival of someone to the island, but the whole configuration of a concrete interpersonal relationship in which the respect of each right could be asked of one real debtor.

We have said that to get the hypothetical conclusion of one *natural right* many primary and secondary principles should come into play. Now we add that to get the conclusion that Pedro has here and now one specific natural right, *practical reason and facts* must play together. What kind of facts? The facts of legal relationship, facts of the case law. The universal principles, values and ends of natural law are just theory, and have no effect at all, without the contingent reality.[142]

4. Conclusion

After reviewing how hundreds of the most influential authors deal with natural law we detected some similar patterns in their *modus operandi*. Still today the most complete methodology, that includes the analysis of many abstract elements as well as many particularities of reality, was found in Thomas Aquinas. He never dedicated a treatise to explain how and from where natural law can be dug up from. Nevertheless, in his investigations of human nature, powers, inclinations, ends, goods, principles, rules, and virtues it is possible to track his method smoothly. It is clear that the whole puzzle of what we call "the natural law formula" was complete and fit tightly in his mind.

Definitely, Aquinas was a man of his century. In his outstanding and extensive works it is neither possible to find any economics or human rights treatise, nor a systematical study of values or evolutionary biology. Economics, human rights, axiology, evolution, and biology simply did not exist as autonomous sciences eight centuries ago. However, he has set the basis to develop all human sciences on a solid ground, explaining slowly and with precision how human nature plays a crucial role in them. To some extent, this natural law formula constitutes the backbone of any human science, giving them structure, unity, and order.

The above mentioned formula is a chain composed of the following links: *Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances*. All these elements are necessarily linked and work together, as has been explained in this article. A change in any variable of the equation will affect the whole equation. If by any means we solve one variable of the formula, others will be solved too. For example, if from chance, faith, evidence, or reflection we got the famous seven basic goods of Finnis, we can deduce from them some human ends and natural rights.

Several generations of authors have explained how to deduce legal content from reality, from the "basic goods," and from other elements of the formula. It is up to us that their experience does not fall on deaf ears.

141 About human rights as "potential rights," *see* Juan Carlos Riofrío, "La hiperinflación de los derechos fundamentales: consideraciones sobre sus límites, potencialidades y sobre su relativa indisponibilidad," *Revista de Direito Brasileira* 18 (2017): 49.

142 Juan Cianciardo, "The Culture of Rights, Constitutions and Natural Law," Journal of Comparative Law 8 (2013–2014), 267, where the author explains the classical position of Aquinas, Aristotle, Plato, and St. Augustine.

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