Acting in Conscience

A Natural Law Based Approach to Freedom of Conscience

A Thesis Submitted to the

College of Graduate and Postdoctoral Studies

In Partial Fulfillment of the Requirements

For the Degree of Master of Arts

In the Department of Philosophy

University of Saskatchewan

Saskatoon

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Abstract

The relationship between the authority of conscience and the authority of the state is a perennial issue in both political and ethical philosophy. The extreme emphasis on the authority of the state or conscience leads to the undermining of a free society. This thesis will explore the issues at play in this interaction from the perspective of natural law by exploring the proper domain and orientation of each sphere of authority. It will then demonstrate how the application of natural law principles offers a practical solution to the fraught issue of conscientious objection in a medical context. The solution that the application of natural law offers to this social issue properly respects the freedom of conscience necessary for a free society while allowing for the reasonable limits that governments need to maintain and enact the legal order necessary for a society.

Acknowledgements

I would like to express my deep gratitude to Dr. John Liptay for his help, patience, and guidance throughout the construction of this thesis. I would also be remiss not to mention my gratitude to my committee members Dr. Ria Jenkins and Dr. Carl Still. They both wrote serious constructive criticism, which required me to re-evaluate and refine my argument. I believe the thesis was substantially improved as a result of their feedback.

Dedication

To Mom and Dad, who illustrated by their words and deeds the importance of doing what is right come what may.

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Introduction

Maintaining a free society is a task fraught with peril. Citizens in free societies can pursue desired ends without *undue* hindrance, yet governments do, and must, restrict the ability of individual citizens to act as they please, since individual priorities and values inevitably come into conflict. A peaceful polity, therefore, depends upon reasonable limitations on individual freedom. The question of what is reasonable, however, is not easily answered. Moreover, while maintaining a free society necessitates reasonable limitations of individual freedom, the power of the state must also possess certain limits. To further complicate matters, not all freedoms are equal; the freedom to act in accordance with deeply held beliefs and moral principles is more important than the freedom to pursue mere interests or hobbies. To that end, the Canadian Charter of Rights and Freedoms recognizes as the first of its articulated rights the "freedom of conscience and religion" (Section 2(a)). Although the Charter allows that the rights and freedoms that it recognizes are subject "to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Section 1), the fact that freedom of conscience is the first of the articulated rights and that the limits on this right need to be demonstrably justified strongly indicates the importance of this freedom. The simple existence of these first two sections clearly testifies to a strong commitment to uphold freedom of conscience in Canadian law. Moreover, Canada is by no means unique in this regard. The first amendment to the

Constitution of the United States upholds freedom of speech, freedom of assembly, and freedom of religion.[1]

A cursory survey of the constitution's legal equivalents in many other jurisdictions would no doubt reveal similar legal protections.[2] The exact particulars of these documents are not relevant, but what is relevant is that it is widely accepted that free societies hold an interest in maintaining the protection of individual conscience. Conscience protections in the Canadian Charter and the US Constitution attempt to protect what is obviously essential for a free society, namely, freedom itself. It is a contradiction in terms to say one possesses freedom but not the right to act according to one's conscience. Defending conscience rights is no small task and is not isolated to one legal system or philosophical tradition, yet its importance to a free society is paramount. As with any societal task, a wide range of viewpoints is often necessary to identify the scope of the problem and lay out possible solutions. To that end, this thesis will define and defend conscience rights from the perspective of natural law, relying heavily on the work of Thomas Aquinas and his contemporary interpreters.

The thesis will proceed as follows:

It will begin by establishing in Chapter 1 an account of what conscience is. Without a clear statement of the terms involved, the discussion of conscience rights can easily fall into confusion. While conscience is a commonly used term, that does not mean that there is a common, shared understanding of just what it is. People often use words that they would find

[1] While this amendment does not mention conscience, it mentions religion which implies conscience rights, insofar as religions make moral claims. It is, therefore, difficult to conceive how one could possess freedom of religion without freedom of conscience. See Christopher Tollefsen, "Conscience, Religion and the State," *American Journal of Jurisprudence* 54 (2009): 93-115.

[2] For instance, article 10 of the EU Charter of Fundamental Rights guarantees freedom of religion and conscience. https://fra.europa.eu/en/eu-charter/article/10-freedom-thought-conscience-and-religion.

difficult to define. For instance, ‘time’ is a frequently used word, but many would find it difficult to define. ‘Conscience’ is no different; its widespread usage does not necessarily imply a widespread commonly understood definition. Just like ‘time,’ ‘conscience’ is often used with an assumed definition. While assumed definitions may suffice for friendly discussion, they lack the precision for philosophical debate. Moreover, the ambiguity of ‘conscience’ is not isolated to private discussion, as even scholarly papers about conscience rights sometimes fail to clearly define it, including important studies both rejecting and supporting the idea of conscience rights in medicine.[3] While scholars, such as Savulescu, Emanuel, etc. may possess some definition of conscience, they do not state it in their papers. In contrast, this thesis will begin by laying out some of the essential constitutive features of conscience and discussing its role in ethics, as a foundation for the discussion to follow.

The second chapter focuses on the nature of legal authority. When individuals act according to their consciences, they do not do so in a vacuum. Actions occur within the context of a society, which means that governments must navigate the difficulties of determining which actions are legally permissible. This raises questions of how a state is able to exercise the legal judgement necessary to maintain societal cohesion and higher goods such as justice, while at the same time respecting the rights of the individual’s conscience. While this discussion will consider some broad implications of the natural law tradition in the right ordering of civil society, it will focus mainly on the interaction of the state’s authority with the individual's conscience. This will require a further clarification of what makes legal pronouncements

[3] In his paper rejecting the notion of conscience rights in medicine, Julian Savulescu has no definition of conscience; see "Conscientious Objection in Medicine," *British Medical Journal* 332, no. 7536 (2006): 294-297; cf. Julian Savulescu, "Should Doctors Feel Able to Practise According to Their Personal Values and Beliefs?—No," *The Medical Journal of Australia* 195, no. 9 (2011): 497. Likewise, Ronit Y. Stahl and Ezekiel J. Emanuel, "Physicians, Not Conscripts — Conscientious Objection in Health Care," *The New England Journal of Medicine* 376.14 (2017): 1380-1385 has no definition.

legitimate. In short, the second chapter will unpack the various factors which determine when a state can interfere with an individual's ability to act as he/she wishes, and determine when a state oversteps the bounds of its legitimate authority. This chapter will also explore whether laws themselves carry moral authority which binds conscience. In other words, if the government enacts a law does the citizen have a moral duty to follow it, and if so how does this affect conscience? While the natural law tradition does not hold that morality is ultimately determined by civil legislation neither does it hold that civil ordinances are morally indifferent. Conscience has authority over actions and civil authority requires the ability to restrict or mandate certain actions in order to govern. The interaction of these two spheres of authority will require significant exploration.

The third and final chapter of the thesis will take the two previous sections and apply their conclusions to a practical situation concerning conscientious objection. If the natural law tradition can address the concerns of a wider societal debate around conscientious objection, natural law principles must be able to work in the real world. Ethical theories must not only possess logical consistency but must also be able to address the complexities of life if they are to achieve their end of providing moral guidance for action. In the contemporary Canadian context conscience rights are hotly debated. Arguably the most common arena for this debate is medical ethics. Practices such as abortion or euthanasia are contentious and yet legal. Several different groups are involved, which complicates matters. Some medical personnel object on conscience grounds to being involved in these practices, while others argue that these objections conflict with patient autonomy. The implications of the debate concerning conscience rights are obvious. For instance, if a patient requests an abortion and a physician objects to the practice on moral grounds, a conflict clearly exists. In this situation, what right does the physician have to object?

Can he/she refuse all involvement or must he/she at least be required to give a referral? In this conflict, does the state have the authority to compel action even if it violates conscience? If the state does have the ability to compel the violation of conscience, what is the limiting principle of this power? The practical application of natural law theory to the contemporary debate about the conscientious objections of medical professionals can test whether natural law ethics can effectively address conscience rights in the larger society. Proper solutions to these conflicts are necessary because maintaining a free society is difficult at the best of times. If a significant minority within a country believes their rights are being fundamentally undermined, then freedom is likewise compromised.

This thesis seeks, then, to develop an account of conscientious objection within the Thomistic natural law tradition and focuses narrowly on identifying the normative principles, in both the moral and political domains, that inform conscience and on applying them to two specific case studies. In proceeding this way, it has not been possible to discuss in detail all the numerous issues which arise within the context of making conscientious judgements in a free and democratic society; in particular, a fuller account would need to be given of such things as individual rights, equality, and social justice. Moreover, in the nature of the case, it has not been possible to address all rival and alternative moral viewpoints. However, the grounds for this on-going dialectic and discussion are what this thesis seeks to set out.

Chapter I: Conscience and Its Right to Freedom

1.1 What is Conscience?

Before we endeavour to discuss the exact manner in which conscience rights operate in society it is necessary to establish in a general sense what is meant by conscience within the natural law tradition. While some discussions of conscience assume a reader's working understanding of conscience, it remains that the concept is difficult to define clearly and that even when it is clearly defined, it has different operative definitions.[4] This thesis invokes an understanding of conscience advanced in the broadly Thomistic tradition of philosophy.[5] On this view, conscience as a concept must possess an odd mix of infallibility and fallibility. It must possess a type of infallibility in order for it to have the authority to bind a person. At the same time, it must possess fallibility as our personal experience tells us conscience can be used to justify the most heinous of acts.

Thomas Aquinas does not understand conscience as an inclination or some power to detect morality; rather, he considers it an act of prudential judgement with respect to a moral

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[4] This thesis makes no attempt to thoroughly survey all the operative definitions of conscience present within the field of ethics, as such an undertaking is beyond the scope of this project. The strength of the account that I adopt is its connection to the natural law tradition in ethics, and it is this that makes it rationally superior to alternative approaches. While I believe it is possible to defend this last claim, I likewise do not undertake in this thesis the dialectical work that would be required to do so.

[5] While Thomas Aquinas does not have any single treatise devoted to the study of conscience, he treats it briefly in the following places: *Summa Theologiae*, *De Malo,* and *Quaestiones De Disputate Veritate.* In addition to these primary texts of Aquinas, I have drawn on a number of important secondary works in this study, in particular, Steven Jensen, especially *Knowing the Natural Law: From Precepts and Inclinations to Deriving Oughts* (Washington, D.C.: Catholic University of America Press, 2015); "Aquinas," in *The Cambridge Companion to Natural Law Ethics,* ed. Tom Angier (Cambridge, United Kingdom: Cambridge University Press, 2019), 31-51; and *Sin: A Thomistic Psychology* (Washington, D.C.: Catholic University of America Press, 2018). Stephen Brock, *The Light That Binds: A Study in Thomas Aquinas's Metaphysics of Natural Law* (Eugene, Ore.: Pickwick Publications, 2020) has also informed my reading of Thomas.

matter.[6] This understanding requires some unpacking. In his *Quaestiones Disputatae de Veritate* Thomas provides a more expansive discussion of conscience in comparison with his rather short discussion of conscience found in the *Summa*; the more expansive discussion of conscience is helpful for gaining further insight into Thomas's thought. He argues that the judgement of conscience is the conclusion of the syllogism whose major premise is *synderesis* and whose minor premise is a particular judgement.[7]

Synderesis (according to Thomas) is a natural moral habit present within each individual.[8] This natural habit orients us toward the first principles of practical reason which are necessary for conscience to function. According to Thomas, this habit cannot err due to its generality: "*synderesis* is said to goad us toward what is good and to murmur about what is bad."[9] The claim that *synderesis* is incapable of error due to the generality of the principles it grasps may seem implausible. For the sake of argument, let us consider what would logically result if *synderesis* were capable of error.[10] If the broadest of all possible moral principles, do good and avoid evil, could be in error, this would not simply undermine the authority of *synderesis* but would effectively demolish ethics as a field, resulting in practical nihilism. Just as the infallibility of the principle of non-contradiction is the basis for all speculative reason,

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[6] ST I q. 79, a. 13.
[7] *Quaestiones Disputatae de Veritate* q. 17 a. 3,4. While the *Summa Theologiae* is a later a text than *Disputatae de Veritate,* the fact that the *Summa Theologiae* is in essence a summary means that the lengthier discussion found in *Quaestiones Disputatae de Veritate* is an invaluable aid in understanding Thomas's understanding of conscience.
[8] ST I q. 79, a. 12. *Synderesis* is a natural moral habit that orients persons to grasp the truth of the first principles of practical reason. Throughout this section, I will use the term *synderesis* in a somewhat loose sense, for the sake of simplicity. *Synderesis* is the most remote principle in practical reason in that it enables the individual to recognize the truth of the first principle of practical reason. With respect to a practical moral syllogism, the first principles of practical reason would form the major premise and a particular judgement the minor, whereas *synderesis* is remote to this syllogistic act as it is by synderesis that the first principle is known to be true.
[9] ST I q. 79, a. 12.
[10] It should be noted that by *synderesis* being incapable of error I do not mean that through this natural habit we have an infallible grasp on what precisely constitutes a good or bad action, as that is obviously false. I mean that the natural inclination towards the good and away from evil, as that person perceives it, cannot be false.

likewise the infallibility of *synderesis* is necessary for practical reason to maintain moral coherence. *Synderesis*, then, is a habit or disposition that orients us to do good and avoid evil. Furthermore, in the abstract, one cannot rationally object to the first principles specifying the human goods to be pursued which are also held by *synderesis*.[11] These goods include that life is a good to be maintained, children should be nurtured and protected, and that truth is superior to falsehood.[12] While these are very general claims, the idea that the good presented by *synderesis* cannot be rationally objected to does not mean that the manner in which these general goods intersect with the particular ends sought in day-to-day moral decision-making is always clear. *Synderesis* does not clarify the particulars of what constitutes good and evil; it simply tells us that we should do good and avoid evil.

We see that *synderesis* is in itself incapable of error because it makes known the truth of the first principles of practical reason, and, in this way, *synderesis* is understood to have authority over human acts. Before we illuminate the other aspects of conscience and conscience's authority, it is essential to underscore the role that principles such as those elucidated by *synderesis* play in binding the agent to perform or refrain from actions. The natural law claim is that these principles are objective and true, and for this reason they are binding on persons. Moreover, the further claim is that the authority of these ethical principles cannot originate or have its ultimate basis in the subject as this would reduce moral demands to

[11] See ST I-II q. 94, a.1, ad 2. By objection in the abstract, I mean objection in principle; however, that does not mean that all particular situations in which said principles are invoked are morally binding. For instance, while there exists a general moral mandate to care for children flowing from the natural inclination to safeguard the species, it does not follow from this that every person has the same level of obligation to care for every child. Parents will have more particular concerns for their children than a stranger will. The stranger will possess the general moral obligation to care for children and this will perhaps find its expression in helping a needy child when they can. However, the particularities of the situation loosen the moral demands placed on the stranger in contrast to the parent.

[12] ST I-II q. 94, a. 2. I will discuss this in greater detail below.

subjective opinions on how one should act, leading to a subjectivism or practical nihilism no less destructive to ethics than if *synderesis* were capable of error.

1.2 Types of Judgement

To further understand conscience as an act of judgement, it is necessary to discuss the various types of judgement. Broadly speaking, from Thomas's perspective, there are two types of judgements: speculative and practical. Speculative judgments, as the name suggests, deal with matters of theoretical concern. Questions of the nature of objects and entities are speculative. In turn, practical judgements are made with reference to action. Questions of how to build a house belong to the domain of practical reason. The distinction between practical and speculative reason is not always clear-cut, as one could speculate on how to build a house without intending to build the house. This reasoning would not be practical in a pure sense, as practical judgements are ordered to action, but it would be virtually practical, as this sort of knowledge could be converted into purely practical knowledge with a change in intention.[13]

Purely practical knowledge implies that one ought to act in a certain way in order to arrive at an end. For instance, if Adam wishes to build a house, he ought to survey the ground to see whether it is suitable for supporting weight, then he ought to lay the foundation, frame the house and so on. Is he free to reject these oughts? In a sense, yes. However, in rejecting these oughts he is at the same time rejecting his act of building a house as well. This is because to will the end is to, at the same time, will the means to that end.[14] Thus, practical judgements by their

[13] For a fuller discussion of the various types of practical knowledge, see Jensen, *Knowing the Natural Law*, 10-12.

[14] ST I-II q. 8, a. 2.

nature imply demands. Adam choosing to build a house is not a moral imperative, at least not absent some addition of information such as the need to provide a home for his family or fulfill a contract. However, setting out to accomplish a task, such as building a house, does illustrate that ends imply oughts. If Adam wills the end of building the house he also wills the means of building. Hence, ends imply oughts. In order to have the good of the house Adam must follow certain dictates given to him by his practical reason. Moral demands are no different: in order to obtain a particular moral good one must follow certain actions. For instance, if Adam wishes to fulfill his duties as a father, he must provide for his children's needs. If he were to spend the money budgeted for his children's clothing on a new fishing rod he would not simply be choosing to buy the fishing rod he would be choosing to neglect his duty to his children.

1.3 Natural Ends

Having established that when someone wills an end or desires to obtain some good they at the same time will the means for that end (a principle underpinning practical reason), we must now discuss from whence these various ends of human persons come. It is uncontroversial to state that when someone chooses to achieve an end they must proceed in a manner directed to that end. However, when we speak about this we usually do so in reference to freely-chosen ends. Adam the house builder cannot continue to be a house builder while rejecting the basic tenets of structural design. To reject these tenets is to cease to act as a house builder, at least at that moment. Initially, this understanding of practical reason does not seem stable enough to ground an entire ethical system. However, the natural law tradition claims to do just this by its appeal to natural ends, as well as ends that we choose. To proceed further we must discuss the natural ends that Thomas lays out in ST I-II q. 94, a. 2. These ends are the final causes of human

acts since all human action is motivated by the obtaining of some good.[15] Whenever people act they are pursuing a good, either sensible or intellectual, and they seek these goods because they grasp them as in some respect perfective of the human person.[16] With this in mind let us proceed to discuss the types of natural ends that exist within the human person. Thomas argues that there are three classes of natural ends in the human person.[17] First, there are the ends that humans hold in common with all beings—namely, the natural desire to maintain oneself in existence. All beings from rocks to humans will resist their own destruction. The type of resistance each offers depends upon the type of being under consideration. The rock resists its own destruction by maintaining itself as an intact unit in so far as it is capable; the deer runs when it perceives a threat; and Adam builds a house in order to protect himself from the elements. Second, there are ends humans share in common with all animals —namely, to procreate and safeguard their offspring. Here too the manner in which lower animals and humans pursue this end differs: just as deer will mate and a doe will nurture her fawn, so will humans mate and nurture their children. However, deer act purely on instinct, whereas humans (ideally) involve reason in pursuing these natural ends inscribed in their natures. Lastly, there are ends that humans share in common with all rational beings—namely, to act in accord with right reason in the pursuit of truth. Given the considerations appealed to at each level, it seems reasonable to hold that the classes of ends laid out in 94:2 correspond with a hierarchy of goods.

The meaning and significance of Thomas's threefold classification of ends is a topic of current debate. Historically most Thomists have held that these ends exist in a hierarchy, with the ends particular to humans being most important, followed by the ends that humans share in

[15] ST I-II q. 5, a. 4.
[16] ST I-II q. 26, a. 1; cf. ST I-II q. 5, a. 4.
[17] ST I-II q. 94, a. 2. There is some controversy over whether these are truly three classes of ends or not. I will discuss this controversy later in the chapter.

common with all animals; the ends humans share in common with all beings come last.[18] In this hierarchical view, all the ends are ultimately ordered to a singular *Summum Bonum* or highest good, which is found in the full satisfaction of one's intellectual desire to know the truth. Therefore, this view, which I will call traditional natural law (TNL), locates the highest good of the human person in the intellect, or in speculative reason. Other scholars such as Germain Grisez and John Finnis argue against this hierarchical ordering of the ends in favour of "underived, irreducible"[19] basic goods. I will call this position new natural law (NNL).[20] Finnis argues that Thomas's threefold distinction is an "irrelevant schematization".[21] According to this understanding, the human person is fulfilled not by a singular end but through the basic goods taken together as comprising integral human fulfilment.[22] While this is likely the most hotly debated point in contemporary Thomism, both new natural law and traditional natural law (TNL) nonetheless agree that Thomas's threefold distinction of ends is a description of natural ends. What is contested is the meaning of the distinction, but there is no debate as to whether humans have natural ends to maintain themselves in existence, procreate and safeguard offspring, and pursue truth. For present purposes, we do not need to establish who is correct on the question of whether humans find their ultimate fulfilment in speculative contemplation of truth, or by the

[18] For a general description of this view, see Brock, *The Light that Binds,* 107-141; cf., Jensen, *Knowing the Natural Law*, 44-61.
[19] John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford; New York: Oxford University Press, 2011), 102.
[20] For a brief discussion of Grisez's view of the highest good, see Germain Grisez, "The True Ultimate End of Human Beings: The Kingdom, Not God Alone," *Theological Studies* 69, no. 1 (2008). Not everyone recognizes that traditional natural law and new natural law are the proper terms for these approaches. These names are simply given for sake of clarity.
[21] Finnis, *Natural Law and Natural Rights*, 95.
[22] Ibid, 419. Moreover, Finnis's view posits a different account of the relation of practical reason and speculative reason to our understanding of the human good, as we do not first know the good in the speculative intellect; rather, we first know it in the practical intellect. For a discussion of this view, see Finnis, *Natural Law and Natural Rights*, 59-160.

fulfilling of irreducible basic goods. All we need to establish is that these three classes of natural ends are common to all humans. On this point, new and traditional natural law generally agree.

Establishing the three ends described in ST I-II q.94, a.2 as natural ends does not of itself vindicate the natural law position, as there is still the need to deal with the *naturalistic fallacy*. The naturalistic fallacy is a term originating with G.E. Moore, who posits that it is fallacious to derive moral norms from nature. Nature indicates nothing more than facts about the world, but it is silent on whether those facts are good or bad. For instance, the fact that humans are the type of beings that enjoy flavourful food simply tells us something about the type of beings humans are, but does not tell us anything about the moral good.[23] The naturalistic fallacy is developed from the position of David Hume, who argued that one cannot derive an ought from an is.[24] The thrust of Hume's objection is that in a valid argument, one cannot include anything in the conclusion that is not contained in one of the premises. Nature statements, or *is* statements, describe the world as it is, they are statements of fact. However, ethical statements that describe what ought to occur, or ought to be, are statements of value. Natural law ethics begins with the observation of nature as it is, but proponents of the naturalistic fallacy objection will argue that no value statements can be derived as conclusions from the observation of nature, as observation of what is does not reveal what ought to be. As facts and *the good* are two different things, natural law is not entitled to include the good in its conclusions.

While new natural law and traditional natural law may agree that 94:2 describes *natural* ends, this does not mean that natural law theory itself is rendered moot by the naturalistic fallacy. Proponents of both new and traditional natural law accept that in order for a natural law theory to

[23] G. E. Moore, *Principia Ethica* (New York: Barnes and Noble Books, 2005), 38–39.
[24] David Hume, *Treatise on Human Nature*, book 3, part 1, section 1; for a brief discussion of this argument, see Jensen, *Knowing the Natural Law*, 1-3.

work, the naturalistic fallacy must be dealt with in some way—but they differ on how this is to be done. New natural lawyers generally accept the naturalistic fallacy as a legitimate fallacy and then argue that the fallacy, while legitimate, does not actually apply to natural law. Conversely, traditional natural law theorists generally deny that the fallacy is legitimate.

Let us look at John Finnis as a representative of the new natural law view. Finnis argues that natural law is based on the first principle of practical reasonableness: that the good should be done and pursued and evil avoided. According to Finnis's interpretation of Thomas, these first "principles … make no reference at all to human nature, but only to human good."[25] If, as Finnis claims, Thomas's natural law ethics centres around the notion of the human good, then the naturalistic fallacy does not apply to NNL since *the human good* is present at the very beginning of any natural law discourse. Since, clearly, *the good* is a notion of moral significance, as one ought to pursue it, Hume's claim that natural law theorists adopt elements in their conclusions not contained in their premises does not apply to new natural law theory. Finnis's approach raises the question as to whether his interpretation of Thomas is really a *natural* law. If ethical inquiry makes "no reference at all to human nature", it is reasonable to ask whether Finnis's system is still a natural law ethic. Finnis has a response for this. He argues that Thomas does have a natural mooring for his ethics in that, *post facto*, metaphysical analysis reveals the natural root of the human good.[26] Finnis's point is not that the human good is somehow divorced from human nature but merely that we first discover *the human good* in our experience and only later can we reflect on the metaphysical implication of this discovery.

[25] Finnis, *Natural Law and Natural Rights*, 36.
[26] Ibid.

While the new natural law view argues that the naturalistic fallacy is a real fallacy but that it does not land, traditional natural law argues that it is not a legitimate fallacy. Let us look at Steve Jensen as a representative of this view. In order for the naturalistic fallacy to be a legitimate fallacy natural law would have to include an ought in its conclusion without any moral content in the premises. As I mentioned earlier, Hume's critique assumes that the "is" of human nature does not carry any moral implications; however, Jensen argues that this is simply not the case, since "good depends on nature."[27] When we want to know how we should morally treat a thing the first question is 'What is that thing?' Jensen points out that since "we are beings with minds, knowledge is good for us; because a tree has no mind, knowledge is not good for it."[28] This good that we possess as a result of our nature "has the character of an end."[29] Since we have minds, we ought to cultivate knowledge. In other words, the knowledge of our nature reveals our good; since the good has the character of an end, *is* does, in a very real sense, imply *ought*. In light of this the naturalistic fallacy fails to undermine the natural law because the naturalistic fallacy itself relies on the faulty assumption that nature does not imply any moral duties.

As just noted, new and traditional natural law both contend with the naturalistic fallacy. Both approaches can plausibly refute the claim that this fallacy undermines natural law in general. Which approach one takes will depend largely on epistemological considerations. If one holds that we know the human good first and only know nature based on a *post facto* metaphysical analysis, Finnis's approach is more attractive. If, on the other hand, one maintains that our knowledge of nature itself reveals the human good, Jensen's approach is more attractive.

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[27] Jensen, *Knowing the Natural Law*, 18.
[28] Ibid.
[29] Ibid, 19.

The underlying point is that since both interpretations of natural law can defend against the naturalistic fallacy, this critique can be set aside.

While both traditional and new natural law can respond to the naturalistic fallacy and a full discussion of the two traditions falls beyond the scope of this thesis, my finding is that the traditional natural law approach poses a more faithful reading of Thomas. This is chiefly for three reasons. First, in 94:2, Thomas discusses three classes of ends that correspond to three classes of being: merely material being is ordered to the maintaining of existence, animals are further ordered to the procreation and protection of offspring, and humans are further ordered to the pursuit of truth. These three classes of being are hierarchically ordered, so it is reasonable to assume that just as the beings are ordered in terms of their excellence, so are the ends proper to each. Second, in ST I-II q. 3, a. 5 Thomas clearly illustrates the superiority of the speculative intellect to the practical intellect; insofar as the pursuit of truth is more speculative than practical, it makes sense that he hierarchically orders the ends. Third, Finnis' suggestion that the three classes of ends are an irrelevant schematization seems not in keeping with Thomas's approach to philosophy. Thomas is known for his brevity and direct answers. An irrelevant distinction would be out of step with Thomas's normal approach. He frequently makes distinctions, but he makes them in order to use them. These three reasons are not exhaustive, and the debate between these

two approaches to natural law is a live one.[30] However, it is important for my purposes to provide some justification as to why the traditional natural law approach is adopted in the thesis.

While the naturalistic fallacy critique may not successfully land against the natural law tradition, more than this is necessary to demonstrate that natural law ethics deserves to be respected in a modern pluralistic society: natural law ethics must be reasonable in itself. This question of reasonability is most commonly foregrounded in objections to the teleological character of natural law ethics.[31] Critics variously propose that natural teleology has been disproven by modern science; that even if natural ends are granted, this does not mean that humans are bound by them; and that in order for nature itself to have some kind of moral weight, a god is required to maintain metaphysical coherence of the natural law theory. In other words, natural law makes no sense without a god. Let us treat the last of these first. It is entirely true that for natural law to work, some kind of god is required. This god need not be a robust image of god, but at minimum some kind of intelligence either behind, identical with, or somehow

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[30] For examples of this controversy in academic literature see: Ralph McInerny, "The Principles of Natural Law," American Journal of Jurisprudence 25 (1980): 1-15; Steven J. Jensen, *Knowing the Natural Law: From Precepts and Inclinations to Deriving Oughts* (Washington, D.C.: Catholic University of America Press, 2015); Stephen L. Brock, *The Light That Binds: A Study in Thomas Aquinas's Metaphysics of Natural Law* (Eugene, Ore.: Pickwick Publications, 2020); Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987); Christopher Tollefsen, "Response to Robert Koons and Matthew O'Brien's "Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory," *American Catholic Philosophical Quarterly* 87, no. 4 (2013): 751-78; John Goyette, "On the Transcendence of the Political Common Good," *The National Catholic Bioethics Quarterly* 13, no. 1 (2013): 133-55; Germain Grisez, "The True Ultimate End of Human Beings: The Kingdom, Not God Alone," *Journal of Theological Studies* 69, no. 1 (2008): 38-61; John Finnis, *Natural Law and Natural Rights,* 2nd ed. (Oxford: New York: Oxford University Press, 2011); *Natural Law and Public Reason,* eds. Robert P. George and Christopher Wolfe (Washington, D.C.: Georgetown University Press, 2000); Patrick Lee, "Is Thomas's Natural Law Theory Naturalist?" *American Catholic Philosophical Quarterly* 71, no. 4 (1997): 567-87; Patrick Lee "The New Natural Law Theory," in *The Cambridge Companion to Natural Law Ethics*, ed Tom Angier (Cambridge, United Kingdom: Cambridge University Press, 2019), 73-91; *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez*, ed Robert P. George (Washington, D.C.: Georgetown University Press, 1998).

[31] Kai Nielsen, "An Examination of the Thomistic Theory of Natural Law," *Natural Law Forum* 4 (1959): 63–71. For a further description of these critiques, see Jensen, *Knowing the Natural Law*, 3-6. For a further discussion of the debate as to whether teleology and science conflict, see John Haldane, in J.J.C. Smart and John Haldane, *Atheism and Theism,* 2nd ed. (Malden, Mass.: Blackwell Pub., 2003), 8-16, 82-116.

undergirding the universe. Neither does this require a personal God as in the Judaeo-Christian model. The ancient Stoics had no such image of god and yet they founded the natural law tradition. In this thesis, I simply posit that a god exists, or at least that it is reasonable to hold that a god exists, and make no attempt to argue for this position.[32] Nonetheless, it is worth bearing in mind that the objection to natural law theory on the grounds that it requires some kind of god can also be directed to the Canadian Charter, which begins as follows: "Canada is founded upon principles that recognize the supremacy of God and the rule of law."[33] If the principle upon which Canada is founded acknowledges not just God's existence but his supremacy, as the Charter does, an ethical system that requires God's existence is perfectly in keeping with this vision.

As for the view that somehow natural science has disproven natural teleology, this is simply an empty argument. At best, the theory of evolutionary development proposes a nontheistic alternative explanation for natural teleology, which is not the same as a disproof. However, even the idea that natural science provides an alternative is dubious on two levels. First, natural science requires the presupposition that nature is rational, so that it can be understood, and orderly, so that the observations of the scientist yield repeatable data. These assumptions require an explanation. The best explanation for this is to posit that nature has certain tendencies. Possessing tendencies is simply another way of saying that nature possesses an inclination toward certain outcomes, or ends. Second, simple observation reveals that natural

[32] The fact that this thesis will not make efforts to argue for God's existence is not to imply that there are no readily accessible philosophical arguments for God's existence. It is that satisfactorily demonstrating the rationality of these positions would needlessly lengthen the thesis. Arguments for God's existence can be found in Thomas's five ways as set out in ST I q.2, a.3. Another fine source is Edward Feser, *Five Proofs of the Existence of God* (San Francisco, Ignatius Press 2017). Despite the similarity in name, Feser's argument are not simply a recapitulation of Thomas's five ways.

[33] https://laws-lois.justice.gc.ca/eng/const/page-12.html

beings act in pursuance of certain ends. Not all of these actions are rational, yet tendencies still exist. For instance, on cold days deer walk around more, as this keeps them warmer and aids in their self-preservation. Does this mean that deer possess a rational sense of self and intentionally think through the cause-and-effect relationship between movement and increased body heat? No, but the tendency still exists and is not unique in the animal kingdom. One would be hard-pressed to think of examples of animals that do not have some kind of instinct for self-preservation or act toward the end of survival. Likewise, procreation and nurturance (in some form) of offspring are universal in the animal kingdom. Finally, with respect to rational animals such as humans, the pursuit of truth is patently obvious. If someone objects to the claim that this tendency exists, they can only do so on the grounds that they do not believe it to be true, thereby appealing to the very end they seek to undermine. Does any of this mean that animals never act in ways that are contrary to their survival, or fail to reproduce? No—nor does it mean that humans never fail to pursue truth with vigor. It is nonetheless an error to suppose that observation of nature, which is a basis for natural science, fails to reveal these tendencies.

Next let us treat the claim, as posited by Alan Donagan, that natural teleology imposes no moral weight upon human action.[34] In response to this Stephen Brock has a succinct retort. "[The] natural law centers, not just on any nature, but on human nature."[35] Even if one were to grant that nature, in the abstract, has no authority over human acts, Donagan's critique falsely distances himself from his own nature. When he argues "let nature do what it wills and I will do what I will",[36] he misses the fact that while natural law involves the observation of nature in general, its application to human ethics involves human nature in particular. This aspect means

[34]Alan Donagan, "The Scholastic Theory of Moral Law in the Modern World," in *Aquinas*, edited by Anthony Kenny (Notre Dame: University of Notre Dame Press, 1969), 325–39, at 335.
[35] Brock, *The Light that Binds*, 109.
[36] Donagan, "Scholastic Theory," 335.

that Donagan's critique needs to be re-rendered "let my nature do what it will and I will do what I will." This reformulation makes it clear that Donagan is attempting to make a distinction between himself and his nature.

Despite the objections to a teleological approach to ethics it remains the case that consideration of natural ends is brought to bear in basic moral determinations on a day-to-day basis. For instance, if a study revealed that drug overdose had markedly increased, then a number of questions would likely arise: What is the cause of this increase? What body is best equipped to address this challenge? Would a particular policy, if implemented, likely have unintended negative consequences? One might even raise objections to policy interventions. For instance, a libertarian could object that state intervention compromises autonomy; a utilitarian could propose a safe injection site; others could object that funding a safe injection site would amount to state funding of vice. No matter how vociferous such a debate might be, it would be highly unlikely that any disputant, regardless of their position, would deny that health and life are the primary goods to be maintained. Any objection to considering natural ends of this kind would seem out of place because we recognize that beings naturally tend towards the maintenance of their own existence. From this it follows that drug abuse is a harmful aberration.

Another case in which teleological reasoning is implicit is in the case of child welfare. If Jane has two sons who are suffering from neglect, questions would naturally emerge. We would seek reasons for the neglect and ask whether Jane could somehow be persuaded to take her role as mother more seriously. If not, we could ask whether the neglect necessitates that her children be removed from the home. Jane's situation would no doubt be complicated, and objections could likely be raised to every possible solution. However, it would be a strange objection to say "who cares about the welfare of children?" From the perspective of natural law, this is because

we naturally recognize that animals tend to protect their offspring. Further, the very fact that such a concept as "child neglect" exists implies that there is such a thing as flourishing. The reason why child neglect can exist is that children are ordered to flourishing. It is the duty of parents to aid in a child's achievement of the end of flourishing. If an end such as flourishing were not common to all children, it is difficult to imagine how such a thing as child neglect could, in principle, exist.

We can also see that a class of teleological ends is revealed in our general detestation of lies. No one desires to be lied to. Even if a lie is relatively benign, people naturally detest being lied to. On the natural law account, this is because humans are naturally ordered to seek the truth in accord with right reason; as lies are obviously opposed to the truth, they frustrate this end, thereby aggravating the person lied to. On the strength of this kind of analysis, the natural law position is that teleological reasoning is implicitly involved in our day-to-day moral decisions, making it difficult for an objector to suppose that people do not possess natural ends.

1.4 Can Conscience Err?

So far, we have established what conscience is—namely, an act of judgement relating to a moral matter. This act is akin to the conclusion of a syllogism whose major premise is the first principle of practical reason and whose minor premise is a particular judgement. *Synderesis* is the habit which orders the person to the first principles of moral reasoning. This habit is incapable of error in respect to the broad statement that the good should be done and pursued and evil avoided without at the same time eliminating morality altogether. However, one can be mistaken about the minor premise, as it is a particular judgement. As Thomas spells out in his *Disputed Questions on Truth*, conscience, like any syllogism, can be in error in two ways: either

it accepts a false premise, or it commits some form of logical fallacy in its application of a premise.[37] In practical terms, this means that, from a natural law perspective, people can make erring judgements of conscience either by mistakenly accepting a false premise, or by making a mistake in their reasoning from a premise to a conclusion.

The latter types of errors come about when one makes a simple logical error. For instance, John might incorrectly reason that his actions are directed to the achievement of some good end, insofar as his action has no relation to that good. John could think that he should do the good and avoid evil and that his friend Julie is a good person, and in this way reach the conclusion that he should aid Julie in the concealment of a crime. Whether or not Julie is a good person generally has no real bearing on whether the act of concealing a crime is right or wrong. However, it is reasonable to see how this confusion could exist, especially when emotions and prior relationships complicate matters. The fact that John made a false logical connection, all other things being equal and assuming the crime they were concealing violated a just law, would lead him to make an error in his conscientious judgement. One can make conscientious errors of these kinds either by mistakenly believing an illicit action is licit, or through a mistaken apprehension of the situation as it stands. Thomas calls these errors of higher reason and lower reason, respectively.[38] Fred could have a misunderstanding of human nature. For instance, he could mistakenly believe that people are ultimately ordered toward the pursuit of pleasure above all else; in Thomas's view, this would constitute a faulty premise due to an error in higher reason. On the other hand, Sarah could mistakenly believe that the tax code changes do not apply to her business, and this error could lead her to violate a lawful tax; this would constitute an error

[37] *De Disputate Veritate* q. 17, a. 2.
[38] Ibid.

due to lower reason. While Thomas accepts these types of errors as legitimate errors, he clarifies that conscience cannot err when it makes universal claims that are direct inferences from *synderesis*, such as when one says, "I ought to follow the law of God." Such statements do not admit of error. Alternatively, a particular judgement that directly violates *synderesis*, such as "I ought not to pursue the good of human life" (we could alternatively insert any direct denial of a first principle of practical reason), is not really an instance of conscience erring, as it does not attempt to apply *synderesis* to a particular situation, but rather rejects *synderesis* itself.[39]

1.5 The Authority of Conscience

As previously discussed, conscience has an infallible universal root, namely *synderesis*, and the particular judgments that are required to apply *synderesis* to concrete situations have a robust founding in natural law principles. Nonetheless, it remains the case that one might receive the most rigorous training in formal logic and the best education concerning the nature and purpose of the human person, and still err in judgments of conscience. Moreover, if an erring judgement of conscience has been undertaken in honesty, no internal corrective will exist to raise the alarm bells. If legitimate errors in conscience happen by necessity—that is, due to some form of ignorance of human nature, or logic, or of the nature of the actual situation—one possessing such deficiencies will simply persist in error, barring some kind of external corrective. Considering this, it appears that conscience, due to its reliance on particular judgements, is the proverbial house built upon sand. This seems to undermine its authority. This problem is further complicated by the fact that unless we are to accept Protagoras's notion that "man is the measure

[39] *De Disputate Veritate* q. 17, a. 2.

of all things",[40] the authority of conscience is not self-validating. Conscience does not possess moral authority simply because it represents the agent's best judgement of the moral status of an act or situation in a vacuum. Rather the authority of conscience is rooted in the fact that it is only by utilizing conscience that an individual can access the moral order.[41] Unless we grant the validity of moral subjectivism, the authority of conscience is rooted in its connection to the seat of ultimate moral authority, which it elucidates— namely god. Therefore, if we undermine the authority of conscience, we likewise compromise our ability to make judgements that carry moral weight as there is no other source of moral authority to which a person can appeal.

The position that an erring conscience does not bind agents to act in accordance with its faulty determination is nothing new. No less of an authority than Augustine of Hippo held that an erring conscience does not bind.[42] Augustine argues that conscience functions like a pro-consul does for the emperor. The task of the pro-consul is to make known the emperor's dictates. If the pro-consul gives a command that goes against the law enacted by the emperor, then that command is not binding.[43] This is because the office of pro-consul does not itself possess the authority to make law: that power resides with the emperor. Insofar as the pro-consul's role is purely to make known the will of the emperor, if he fails to do this, his action is illegitimate, and

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[40] Mauro Bonazzi, "Protagoras," *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/protagoras/

[41] A reader could object to my contention that conscience grants access to the moral order. Instead, an objector could argue that our access to the moral order is rooted in *synderesis* rather than conscience, as the habit of *synderesis* allows us to see the truth in the claim that we should do good and avoid evil. While it is true that *synderesis* allows us to see this truth, which is essential for all moral reasoning, someone could in turn object that *synderesis* itself depends on the power of reason. It is impossible for an intellectual habit to exist without the existence of the power which is habituated. The nature of this dispute depends on what is meant by *access* to the moral order. My contention is that if we have no ability to apply the dictates and implications of the moral order to the circumstances of day-to-day life, we do not have proper access, as the binding force of the moral order is not actualized in any meaningful sense. Since conscientious judgement allows for this application, it is conscience that grants us access to the moral order.

[42] For a further discussion of Augustine's argument, see Eric D'Arcy, *Conscience and its Right to Freedom,* (London: Sheed and Ward, 1961), 76-79.

[43] Augustine, *Sermo VI De Verbis Domini*, cap. 8, as cited in D'Arcy, *Conscience and its Right to Freedom*, 77.

therefore non-binding. Similarly, conscience possesses no authority in its own right, but only with reference to its proper expression of the moral order. If conscience is in error, then it fails to properly express the moral order and relate it to a particular circumstance; therefore, just as the unfaithful pro-consul's directives would be non-binding, so would be those of the erring conscience.

When Thomas takes up the question as to whether an erring conscience binds he argues that it does.[44] He addresses Augustine's position by pointing out that the pro-consul analogy is poorly constructed.[45] In this analogy Augustine appears to assume that the subject receiving the command had independent knowledge of the emperor's will. In such a case the subject would indeed be justified in ignoring the pro-consul, insofar as the pro-consul acts against the emperor. However, this is not how conscience operates. Conscience is the means by which an individual uncovers the moral law and its demands. People do not have independent access to the moral law beyond that which is granted by conscience. Thus, if we were to rework Augustine's analogy to make the pro-consul function like conscience, we would need to stipulate that the subject possesses no access to the emperor except by means of the pro-consul. For such a subject to disobey the pro-consul giving an order would constitute a subjective rebellion against the emperor. If a subject (call him Marcus) disobeyed the pro-consul, he would be acting against what he believed the emperor is ordering. If Marcus were to insist that only orders given directly by the emperor were binding, this in essence would amount to the insistence that no orders bind. Marcus has no direct access to the emperor; he only has the pro-consul. Therefore, Marcus must assume that the pro-consul speaks correctly. If Marcus had reason to doubt the pro-consul's

[44] *De Veritate* q. 17 a. 4.
[45] Ibid.

word, all these doubts would not grant him access to the emperor. All he could do is persuade the pro-consul to act more honestly. Similarly, while conscience may err, since it is the only access we have to the moral order, it still binds. Conscience requires continual formation, but that formation is only necessary in order for one to maintain moral integrity and make correct moral judgements. Conscience binds, whether this formation occurs or not.[46]

Thomas clarifies that while the erring conscience binds, it does not bind in the same manner as the properly functioning conscience. The properly functioning conscience binds absolutely and for an intrinsic reason, whereas the erring conscience binds conditionally and for

[46] In cases where an erring conscience binds an individual, one may indeed be morally culpable to some degree for one's erring conscience. The degree of culpability would depend on whether one should have reasonably known the moral demand. For instance, if one, in one's position as a lawyer, violated lawyer-client-privilege one would still be culpable even if one was genuinely ignorant of the demand to keep legally privileged information secret. This is because one ought to have known this demand. If one was ignorant of that moral demand, one would be culpable for that ignorance. Conversely, if there was a justly enacted tax law, of a very technical nature, one may be ignorant of one's violation of this law; depending on how reasonable it is to expect one to know that technical aspect of the law, one may or may not be morally culpable. Thomas takes up the question of culpability for erring consciences in ST I-II q. 19 a. 6 wherein he writes "if the mistake in question is the sort of mistake that is a cause of involuntariness and that arises from ignorance of a circumstance without any negligence, then such a mistake on the part of reason or conscience does excuse." Therefore, as referenced above, Thomas believes that following an erring conscience exculpates the person when the error is due to ignorance of circumstance. That said, while the person may be morally blameless in this instance this does not mean that they will be spared the natural consequences of this error. This is seen in the example Thomas uses. He argues that a man is morally culpable if he believes that he is obliged to sleep with his neighbour's wife. This is because even if he is ignorant of the fact that adultery is wrong he ought to know that it is. On the other hand, if the man mistakenly believes his neighbour's wife is in fact his own wife he is not morally culpable for this as he is merely ignorant of the circumstances. Presuming he did not do anything to facilitate this ignorance —for example, excessively drinking so that his reason is dulled— he is not culpable for the act. That said, while he is perhaps blameless of adultery this does not mean that there will not be consequences for this act. His wife may have difficulty trusting him after a mistake of this magnitude, and he may find himself responsible for a child with another woman. This example illustrates that while an involuntary ignorance which leads to an erring conscience may remove moral culpability it is nonetheless vital that people do everything in their power to form their conscience which includes informing oneself of the facts in their own circumstances. In short, a truly erring conscience is always a type of ignorance, either ignorance of moral principles or ignorance of a matter of facts with moral implications. The degree of moral culpability depends on the degree to which an individual ought to have known his/her error. Since this thesis concerns conscience and its interaction with state authority the issue of culpability for an erring conscience can largely be set aside. This is because the culpability for an erring conscience is primarily of interest to whether someone is a virtuous person, but it is largely irrelevant with respect to civil law. There are some implications with respect to sentencing (if a person was genuinely ignorant of a law it may lessen the civil punishment), however not with respect to the law in general. Therefore, the question of to what degree a person is culpable for an erring conscience will be set aside as it is highly situationally specific and mostly irrelevant with respect to human law.

an extrinsic reason.[47] The erring conscience binds the person to a particular action, but it does so conditionally in that, if conscience is corrected, the binding force to that action is removed. On the other hand, the correct conscientious judgement is absolute, as the action it approves is good *per se*. The erring conscience is binding for an extrinsic reason: one is bound to an action because they are instructed by conscience.[48] Correct conscience, by contrast, has an intrinsic reason for its binding force, as the action it approves is good in itself. It is for the preceding reasons that Thomas does not say that following conscience is an unqualified good. The action prompted by conscience may, in fact, be morally wrong. Rather than arguing that following conscience is a good, Thomas holds that disobeying conscience is an evil. As we can see, while conscience can err and an erring conscience binds in a different way than does a correct conscience, either way, conscience binds. Therefore, a person is never justified in disobeying their conscience.

1.6 Conscience: Permits, Obliges, and Forbids.

Thus far, we have focused on conscience's defining characteristics—how it operates, what informs it, and its degree of authority. While these are essential aspects of conscience, they leave untouched a further important element. For while it is clear from the preceding discussion that conscience has the moral authority to bind actions, this does not mean that conscience acts in a uniform manner in the sense that it only deals in absolutes, always forbidding or obliging. For instance, one who espouses a utilitarian ethic is always to act in a way that maximises pleasure

[47] *De Veritate* q. 17 a. 4.
[48] Thomas considers acts where an agent is bound by an erring conscience to be binding for an extrinsic reason due to the fact that there is nothing in the action itself which implies a moral obligation or prohibition. Rather the agent is bound by something extrinsic to the moral character of the act, namely the conscientious judgement. This is not like the case of proper judgements of conscience where the agent is bound for an intrinsic reason in which there is something in the act itself which ought to bind conscience.

and minimizes pain. Under such a directive, conscience will always oblige or forbid. This is because as soon as someone is morally certain that a particular action will either cause pain or promote pleasure, conscience will likewise respectively forbid or oblige said action.

In contrast, Thomas's view of conscience allows for more variation with respect to action. Thomas argues that there are three types of actions: "(a) some acts are *good of their kind* (*boni ex genere*), (b) some acts are *indifferent* (*indifferentes*), and (c) some are *bad of their kind* (*mali ex genere*)."[49] He argues that since conscience is the application of moral knowledge to an act, conscience does not operate in the same way with respect to all actions. So, as there are three types of acts, in a like manner conscience has three operations with respect to these actions. If an action is *per se* good, then conscience imposes a particular obligation. If an action is *per se* evil, then conscience imposes a prohibition. Finally, if an action is morally indifferent, then it is neither obliged nor forbidden: conscience merely permits the action. Therefore, in Thomas's view conscience permits, obliges, and forbids. It is evident by the examples Thomas uses that he does not mean to imply that every particular good is obliged by conscience. The example he uses of an act that is good *per se* is abstaining from fornication. General rules like this one are considered universal moral obligations. Moreover, since this obligation is to abstain, it is, in reality, a reworded prohibition rather than an active obligation. This is an important distinction in Thomas's thought. For Thomas, prohibitions against evil apply always and at all times, whereas the good obliges always but not at all times, as he states in *De Malo,* further clarifying his understanding of moral obligations: "The will of the rational creature is obliged to be subject to God, but this is done through positive and negative precepts, of which the negative precepts

[49] ST I-II q. 19, a. 5.

oblige always and at all times, and the positive precepts oblige always but not at all times."[50] In other words, acts that are *per se* evil are never justified, and therefore they "oblige always and at all times;" in contrast, acts that are *per se* good oblige always, since there is a universal obligation to do the good, but not at all times, as to do every possible good at all times is beyond the practical limits of a finite creature.

Accordingly, *per se* good acts always create a conscientious obligation, but it does not follow from this that a person is bound to perform that good act at all times. This same principle holds when it comes to general categories of good acts, as well as to more particular moral duties. For example, there is a general moral duty to care for other people and provide help when we are able. This moral duty flows from the natural end of maintaining the species and thereby promoting the good of human flourishing. This good can be realized by helping a poor person on the street with a meal. Assuming that you were feeding the person for the good of that person rather than as a means of vainly displaying to those around you how good you are (thereby making the action about pride rather than human flourishing), this act of charity would be a *per se* good act.

There is a general moral obligation to perform such acts of charity at times, but it is impossible to do every possible act of charity. This same limitation holds even for cases in which the moral demand is more direct and particular, such as in the case of parents. Parents obviously have a more direct natural end to care for their children than to care for a stranger. While this does mean that parents will as a practical matter do more good for their children than for a random individual, the same principle holds. Parents are always obliged to care for their

[50] *De Malo*, q. 7, a. 1 Rp. 8.

children, but not at all times. If Sarah has a son, it is a *per se* good action to care for him. She must, therefore, care for him and see that his needs are provided for; however, as Sarah is finite, she cannot possibly actively pursue her son's good at all times. It would be a gross violation of parental responsibility if she never cared for her son, but practically speaking she cannot always actively work for his good. Here it is helpful to consider the different ways that actions can be ordered to ends. Actions can be actually ordered, virtually ordered, or habitually ordered to ends.[51] Sarah is actually ordering her acts to her son's good when she drives him to school, as in doing so she is directly acting for her son's benefit. During this trip, Sarah will likely have to focus on the various demands of driving safely. These tasks are not directly ordered to her son's good, as she may not even be thinking about her son during this time; however, as long as she continues to drive to the school, those acts are virtually ordered to her son's good as they are still related to the larger task of driving him to school. Habitually ordered acts are more dispositional. Insofar as Sarah loves her son, that love habituates in her a general disposition to act for his good. Therefore, since Sarah habitually wills her son's good, she is always predisposed to act for his good whether or not she is directly acting for his good at any given moment. In this way her orientation to the good is as Thomas describes in *De Malo*. She is *always* acting for her son's good in that she is habitually ordered to her son's good but she is not necessarily acting for his good *at all times* in that she has other tasks in life that do not directly concern her son.

In contrast to moral obligations, moral prohibitions are relatively simple. Once something is established by conscience as prohibited it can never be done. Prohibitions made in error may be corrected, but assuming conscience continues to prohibit the action, such an action is never

[51] These distinctions are taken from Steven Jensen, *Sin: A Thomistic Psychology,* 17-22, 66-83, in which a further discussion of the ways that acts can be ordered to ends is discussed.

justified. This prohibition, as Thomas makes clear, binds always, and at all times. Thomas's natural law doctrine, contrary to consequentialist ethical models, does not allow for exceptions to ethical prohibitions to accomplish a good end; therefore, the circumstances are irrelevant when an action is directly prohibited by conscience, as one is never permitted to perform that act. All that is required to follow a moral prohibition is not to act in contravention of that prohibition. Assuming someone has a reasonable moral prohibition, such a prohibition may be difficult to follow, but it is certainly possible to keep. This is why prohibitions bind always and at all times.

Finally, we are left with what Thomas calls morally indifferent acts—that is, acts that in themselves are allowed but not demanded. Since such acts are allowed but not demanded I will classify them as merely permissible acts or "permissible acts" for short. The example Thomas uses of a morally indifferent act is bending down to pick up a leaf, as it is difficult to conceive of how the simple act of picking up a leaf could have any intrinsic moral character.[52] However, the act of picking up a leaf could be related to the fulfilment of a job to which a groundskeeper was assigned. This would give that act of picking up a leaf a certain vicarious moral character due to its relation to a good, in this case the fulfilment of a contract. Likewise, the picking up of a leaf could be forbidden if that leaf happened to be a pressed leaf of sentimental value to its owner, or if it was situated on private property and could only be accessed by trespassing. Therefore, while morally indifferent acts are generally permissible but not obligatory, the relation of these acts to extraneous obligations or prohibitions may produce a vicarious moral content in those acts.[53]

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[52] ST I-II q. 19, a. 5.

[53] It is important to note that classifying an act as morally indifferent means that the character of that act in itself, abstracting from any concrete circumstances, is morally indifferent. This does not mean that no circumstances can emerge that can create a moral demand with respect to an act that, in itself, is morally indifferent. For instance, there is nothing inherent to driving on the right side of the road that creates a moral demand. However, society would collapse if everybody chose to drive on whichever side of the road they wished. Anarchy would ensue from this. Therefore, the government makes a somewhat arbitrary judgement that the right side is mandated. Driving safely is a

Actions with an intrinsic moral character are inherently limited in number, as classifying acts as *per se* good or *per se* bad involves appealing to such moral standards, creating two limited sets. Actions that are good will have certain characteristics allowing them to be identified as such, and likewise with bad. Morally indifferent acts, on the other hand, are simply all those acts that do not fit into either of the other two categories. As such, most actions in life are permissible with respect to conscience, as the number of permissible acts is virtually limitless.

As we have seen, conscience has three possible relations to actions. Acts can be obligatory, as is the case when relating to *per se* good acts, requiring people to habitually predispose themselves to performing those actions; such a habitual predisposition will manifest itself periodically, not constantly, in actions. Actions can be prohibited, such as is the case with *per se* bad acts; these acts are never permitted and therefore these prohibitions are binding always with respect to dispositions, and at all times with respect to acts. Finally, merely permissible acts, which are neither good nor bad in themselves, are generally permissible, absent some reason which changes their status to either forbidden or obligatory. In the following chapter, when we discuss the role of state authority with respect to conscience it will be necessary to advert to these distinctions, as a state authority in dealing with matters of conscience must respect these distinctions. That is, if a state wishes to respect conscience, as is necessary for maintaining a free society, it will need to recognize that its authority to contravene conscientious authority is contingent on whether conscience is permitting, obligating, or forbidding. Therefore, this distinction is of interest to both the individual and the government.

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moral demand flowing from the general moral duty to safeguard oneself and others from harm, however, driving on the right side of the road is, in itself, morally indifferent. To be clear, the existing law mandating that we drive on the right side of the road creates moral implications for this act, but that is due to the law, not due to the inherent moral character of driving on the right side. I will expand further on this notion in chapter 2.

1.7 Conclusion

Because conscience is the only means to access the moral law, it is necessary for individuals to obey their conscience. The necessity of obedience is not based on the premise that conscience can never err, as such a position is absurd. However, despite the fact that conscience can err, the fact remains that there is ultimately no alternative means by which the individual can access the moral order. The propensity for error is not a reason to abandon the authority of conscience, but rather is a reason to insist on a robust system of conscience formation with the aid of a sound ethical system such as that offered in the natural law view.[54] While a full account of natural law ethics is well beyond the scope of this thesis, what has been presented allows for a general appreciation of how a natural law ethic functions—namely, as a teleological system aimed at the good.[55] The pursuit of the good leads to natural human flourishing. One pursues human flourishing by placing the ends, or goods, in a hierarchy culminating in a singular good, namely God, and one obtains this highest good by the contemplation of the truth in the light of right reason.

The authority of conscience is rooted in the particular role that it plays in providing the individual with access to the moral law. This role encourages the respect for the freedom of

[54] While a full account of how to form consciences in society is beyond the scope of this thesis, in brief, this would entail encouraging strong families and communities in society. Properly formulated just laws also aid in forming virtuous conscientious citizens; I will expand on how laws aid the development of virtue in chapter two. Religious organizations also play a role in developing conscientious citizens as is seen in the charitable endeavours that these bodies engage in, their instilling of respect for time-tested values, and the fact that religious conviction was the driving force behind many of the abolitionists, such as William Wilberforce. Moreover, no society in history has ever existed that did not engage in some effort of conscience formation. The simple act of telling children in kindergarten to share their toys, or parents teaching manners, are efforts in conscience formation. While the fact that conscience is capable of error is clear, as it is our only means of accessing the moral order, the reasonable response to the fallibility of conscience is to properly form not to jettison it.

[55] For a fuller discussion of the natural law system Jensen's *Knowing the Natural Law* and Brock's *The Light that Bind's* are excellent sources.

conscience in two ways. First, since conscience is the exclusive means by which individuals access the moral order, the freedom of conscience cannot be undermined, absent some just cause, without undermining the very essence of the individual's freedom. Since the purpose of the moral life is to promote human flourishing, a grave and just cause is required to interfere with a conscientious judgement, as failing to respect this lays the foundation for a tyrannical society. Second, while the state is discussed in greater depth in the next chapter, it is worth briefly mentioning here that in a practical sense the state's power relies on two elements: the authority to exert its will, and the judgement of the individual that it is good to follow the law. A state that exercises its power primarily by force is a tyranny. In a free society, therefore, the state must conduct itself in such a way that the citizens deem it good to follow the law. However, the mechanism by which those citizens deem it good to follow the law is conscience. In light of this, if the leaders of a free state fail to respect the freedom of conscience, they undermine the ground upon which they stand.

Chapter II: The Law, The State, and the Common Good

Thus far, we have focused on conscience and its authority in individuals, obviously an important prerequisite to the discussion of the state's role in respecting freedom of conscience. While the authority of conscience means that an individual is not justified in violating their conscience, this does not mean that the state must, in all circumstances, respect an individual's conscientious judgement. The state would not be able to practically function in such a case. While a tyranny, in which the state has no respect for conscience, is obviously opposed to a free society, so is a system in which the state has no authority to limit the action of its citizens. If all a citizen must do is claim that a certain action is demanded by their conscience and the state must therefore acquiesce, this would logically result in anarchy, as no system can practically function under such constraints. As neither extreme is compatible with a free society, it is necessary to lay out, in general terms, a natural law view of politics and the solution it proposes to the problem of conflicting moral authorities.

Any stable free society must have a way of recognizing the need of individuals to act in accordance with their ends, while recognizing that the discrete ends of individuals will at times conflict with each other. However, although such conflicts will require mitigation (insofar as they threaten social stability), it does not follow from this that government intervention is the sole or even the chief means of such mitigation. Families, churches, and various social institutions and customs all have a role to play in maintaining a proper polity. Nonetheless, while nongovernmental structures are important, since this project is focused on freedom of conscience with respect to the government, this chapter will focus on governmental authority and only mention other bodies as necessary. In order to explore the topic of freedom of conscience with

respect to government it is necessary to outline three aspects of this interaction: the nature and purpose of the law, the role of the state, and the common good which unites the ends of the government and the ends of the citizens.

2.1 The Nature and Purpose of the Law

Thomas provides his definition of law in question 90 of the *Summa's prima-secundae*: "Law is (a) an ordering (*ordinatio*) by reason, (b) directed toward the common good, (c) made by one who is in charge of the community, and (d) promulgated."[56] In this definition he includes four elements which all law requires. For Thomas, the law is much more than a mere dictate from a ruling power; any law that lacks these aforesaid elements is not a law in fact but only in name.[57] It is true that a dictate which lacks one or more of the elements of Thomas's definition may have the same practical implications of a law. For instance, a government could order the seizure of property from a disfavoured group to benefit a favoured group. Such a law is manifestly ordered to the private good of one party to the detriment of another. Whether one follows such a dictate is often a matter of prudential judgement, for on Thomas's account these are laws in name only and do not have the same binding force on conscience as just laws.[58] As unjust laws occur only in the case of human laws, I will discuss these in greater depth when discussing human law later in this chapter. However, it is first necessary to briefly discuss in turn each of Thomas' four elements of a law to clarify what Thomas means.[59]

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[56] ST I-II q. 90, a. 4.
[57] ST I-II q. 95, a. 2.
[58] ST I-II q. 96, a. 4.
[59] As the promulgation element of law is obvious in all types of law except for natural law, I do not propose to treat it in any detail. Natural law is understood to be is promulgated by the natural teleology that is made known to the rational creature by nature, and that element has been adequately treated in the previous chapter.

In the first article of question 90, Thomas proposes that law is an ordinance of reason. At first glance this may appear obvious, as clearly laws ought to be reasonable. So why does he include this article at all? His response to objection 3 sheds light on this. Here Thomas quotes Justinian: "Whatever pleases the ruler (*princeps*) has the force of law."[60] While the first two objections to this article deal with the metaphysics of how law can precede from reason, the focus of the third is practical.[61] This objection suggests that law is simply an expression of the will of the ruler. In his response to this objection, Thomas grants that laws do indeed proceed from the will of the ruler, but insists that the will must be governed by reason or else such precepts "constitute wickedness rather than law."[62] In other words, while laws require a connection with the will, as all human acts require the will, this does not mean that a law can proceed from the mere whim of a ruler. This limiting of the will of the ruler is one of the factors that distinguish a just monarch from a tyrant, and a democracy from mob rule. In the case of human law, we see this limiting of the will in documents such as constitutions and charters. For instance, the Charter of Rights and Freedoms is meant to limit the power of the government to enact any law that it wishes by requiring that enacted laws be consistent with the principles of Canada's founding: "Canada is founded upon principles that recognize the supremacy of God and the rule of law."[63] This document, and others like it, is intended to limit the power of the government to enact any law they wish by ensuring that all laws are in keeping with a particular legal tradition and are ordered to assist in maintaining a particular kind of society. In order for the law to have this directing force it cannot proceed from mere will, as the will in and of itself is

[60] ST I-II q.90, a.1.
[61] Ibid.
[62] Ibid.
[63] Charter of Rights and Freedoms, https://laws-lois.justice.gc.ca/eng/const/page-12.html#:~:text=Guarantee%20of%20Rights%20and%20Freedoms&text=1%20The%20Canadian%20Charter%20of,a%20free%20and%20democratic%20society.

too fickle to provide such an orientation and, moreover, cannot show that what it wills *should* be willed. Therefore, law must proceed from reason, as reason has the power to move the will towards particular ends, where such ends can be understood as goods to be pursued.[64]

Thomas states, secondly, that law is ordered to the common good. While a fuller discussion of the common good will occur later, it is worth briefly highlighting now how law is ordered to the common good. The common good is not merely the sum of various particular goods designated for common use, but rather an independent higher good to which lower goods are ordered.[65] Thomas argues that although laws are necessarily concerned with particular matters, as they are directed to permit or forbid particular acts, they are united by the fact that they are ordered to one common good. He goes on to argue that laws are thus ordered in a very similar way to human actions,[66] as individual actions are ordered to particular ends but those ends are secondary to one ultimate good.[67] This common good is a higher good to which all the particular goods of the law are ordered. If a law is ordered purely to a particular good with no reference to the common good, it would not be a legitimate law.

In the case of human law, an example of such an illegitimate law would be one which promotes the seizure of property without compensation. Even if the seized property were distributed, this would not make the law ordered to the common good; rather, it would be a private good designated for public use. Particular goods are limited and cannot be fully shared due to their divisibility. By contrast, an example of a common good is the flourishing of the city.

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[64] ST. I-II q. 90, a.1.
[65] ST I-II q. 90, a.2. This understanding of the common good is somewhat controversial. I will discuss this further as well as how it contrasts with opposing views in the section on the Common Good to follow.
[66] Ibid.
[67] ST I-II q.2, a.7. It should be noted that though both new and traditional natural law scholars accept that humans have an ultimate end, as that is explicit in Thomas's text, there is a dispute about the nature of this end.

Since citizens can share in this flourishing, if both Bob and Ellen are citizens of that city, that good is common to them. Bob's enjoyment of that flourishing is not diminished by Ellen's enjoyment of it, as the good they enjoy is the same good. For Thomas, laws are ordered to the common good. Therefore, if a particular law unjustly prejudices one group over another, it is by that fact ordered to a private good, which means it is not a law in fact but only a law in name.

Thomas's statement that law is to be promulgated by the one in charge of the community is simple enough. He argues that as law needs to be ordered to the common good, a law can only be constructed by one of two agents: either by the multitude itself, or by a public person authorized to act in the interest of the multitude. While individual people are ordered to the common good as their own proper good, this does not mean that they are naturally ordered to see the common good of the community with a view to the whole. Therefore, either the multitude can construct rules for ordering society to the common good, as is the case in societal convention, or a public person whose office is entrusted with safeguarding this particular aspect of the common good can do so. Moreover, Thomas emphasizes that enforcement of laws cannot be adequately entrusted to purely private persons: "law must have [coercive power] in order to lead someone efficaciously to virtue. Now, as will be explained below (q. 92, a. 2), this coercive power is had by the multitude or by a public personage whose role it is to inflict punishments."[68]

Thomas's definition of law is not unique to human law, as question 90 discusses the essence of law generally. If Thomas had meant for this definition to treat merely human law, he would have withheld this definition for questions 95-97, in which he discusses human law in

[68] ST I-II q. 90, a. 3. In this context it is clear that Aquinas is referring to either a public person or the multitude acting as one. The multitude here does not refer to the citizens acting as disparate individuals but rather the multitude acting together in a similar manner as a type of public person.

particular. While each form of law—divine, eternal, natural, and human—has its own proper function, all forms are united by the general definition he provides in question 90 article 4.

Eternal law is that law which chiefly exists in the mind of God, but which finds its expression in the various other types of law.[69] All true laws have their origin in the eternal law; that is, laws, in so far as they are just, must flow from some source of ultimate justice, otherwise justice would be arbitrary.[70] Thomas thus does not consider unjust laws to be true laws.

Natural law refers to the mode of one's rational participation in the eternal law.[71] In natural law, the rational person observes the natural world and recognizes that things manifest natural inclinations towards certain goods. While irrational creatures simply pursue the good by instinct, rational creatures can see in the teleology of nature an imprint of the eternal law. By using reason, one can seek the perfection toward which the natural inclination orients us, and insofar as the good grasped this way reflects the natural teleology created by God, Thomas maintains that "the rational creature's mode of participation in the eternal law is called natural law."[72]

Thomas's next type of law is Divine Law, which refers to the laws revealed by God.[73] Here our discussion can be brief. While Thomas lists four reasons for the existence of the divine

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[69] ST I-II q. 91, a. 1.
[70] ST I-II q. 93, a. 3.
[71] ST I-II q. 91, a. 2.
[72] Ibid. The exact manner in which the natural law participates in the eternal law is the subject of controversy. Odon Lottin, for instance, does not believe Aquinas's statement that the natural law is the rational creature's participation in the eternal law is intended as a definition. Lottin argues that this statement is present for historical reasons, as it is referring to a Franciscan tract on law, but that it is not intended as a definition. Lottin further buttresses this contention by mentioning that Aquinas's definition of law in earlier texts does not include this statement. While Lottin's position is of some interest, it has more recently been sufficiently answered. For an excellent summary of Lottin's position as well as a response, see Brock, *The Light that Binds* 33-41. This thesis, accordingly, regards Thomas's statement that the natural law is the rational creature's participation in the eternal law to be intended as a definition.
[73] ST I-II, q. 91, a. 4.

law (as not everything can be contained within the natural law and human law), two of his reasons are of particular interest for the present purposes. First, some laws are so necessary for the common good that they need to be made explicit, as human judgements are liable to error. A divine law is such a law, needed to safeguard against errors in judgement.[74] Consequently, it is clear that while human law is not simply synonymous with divine law (as in a theocracy), this does not mean that human law should disregard divine law, as divine law can inform human law about the nature of justice itself and therefore can guide human law in its ordering of a just society. Second, Thomas, citing Augustine, argues that it is impossible for human law to outlaw every evil act, as this would result in destroying many goods along with the evil.[75] This would impede the common good and ultimately prove destructive to human society. Therefore, divine law exists to create the grounds to punish those offenses that cannot be covered under human law.[76] This quasi-appeal to the law of unintended consequences reveals Thomas's understanding that it is not sufficient that a human law be ordered to a good end or in opposition to an evil; it must do so without compromising its orientation to the common good. Law, then, is not ordered to the good simply, as this is too broad. It is ordered to the common good. In this way, Thomas places limits on the types of laws which can be justly enacted.

2.2 Human Law

Thomas's view of the nature and purpose of law in general provides a framework by which we can now discuss the particulars of human law. While this discussion cannot treat this

[74] Ibid.
[75] For instance, gossip is an evil that is destructive of friendships and reputations. While publications in media may have legal implications, it is difficult to imagine how a legal system could restrict private speech to curtail gossip without at the same time disrupting the ordinary private conversations necessary in a free society.
[76] Ibid.

matter exhaustively, it is necessary to briefly discuss certain aspects of what constitutes human law and what its purpose is in society. As discussed above, law is a promulgated ordinance of reason to the common good by one who has charge of a community. Since law is ordered to the common good, it directs the subjects of that law not just to their own particular good but rather to the common good.[77] The individual's conscience and state authority are both ordered to the common good; the particular role that state authority has is promoting the common good with a view to the whole, whereas the individual promotes the common good in the particular circumstances of his/her life. Since the individual has this particular role in promoting the common good, which is ultimately in unison with the wider governmental role, the individual is given a reason to respect proper legal pronouncements as possessing moral, as well as civil, authority. This is because the common good pursued by the state and the individual is the same good.[78] Thus, proper legal pronouncements bind conscience. Moreover, Thomas argues that a properly ordered system of laws forms individuals in a life of virtue by directing them through the law to the proper end of the common good.

At first glance, Thomas's claim that proper law is a teacher of virtue is an odd argument, as it is not clear how law in and of itself would make a person virtuous. If Tom is a good man, he will refrain from stealing because he is a good man; whether the law forbids stealing or not is accidental to Tom, as due to his virtue he would not steal either way. Conversely, if he is a thief, the law may restrain him from stealing, but only because he fears being caught and punished; if he does not steal, then, this is not due to his virtue but rather to his fear. It seems the law is merely accidental to Tom's orientation to the common good. If Tom is already virtuous he will

[77] ST I-II q. 92, a. 1. I will expand more on how the person properly participates in the common good later in the chapter.
[78] ST. I-II q. 96, a. 4.

be ordered in some way to the common good, but if he obeys the law out of fear of punishment, this is not a guarantor that any disposition within Tom will be reordered. Thomas notes a similar objection: "Law does a man no good unless he obeys the law. But the very fact that a man obeys the law stems from his goodness. Therefore, a man's goodness is presupposed in relation to law. Therefore, it is not law that makes men good."[79] Thomas replies that some people follow the law out of fear, but if the law itself is properly ordered to the common good, following that law will in some sense order that person toward virtue.[80] Moreover, as Thomas argues repeatedly, following the law will aid one in acquiring virtue, since virtue is habitual continence.[81] Tom might initially avoid stealing because he is afraid of getting caught, but over time, repeated suppression of his desire to steal will impede the development of his vicious habit. Eventually, Tom will not steal because he has been habituated not to steal. When this occurs Tom will have become more virtuous (admittedly in a limited sense—i.e., in regard to respect for others' property), even if his initial motivation was a desire to avoid punishment. Even if Tom never fully develops virtue, so long as he fears getting punished more than he desires to steal, the law will have prevented a vicious habit from developing within him, bringing him closer to a virtuous disposition.

2.3 The Common Good

Human law, as illustrated above, is pedagogical in nature, as it exists to form and maintain a particular type of society, namely a society that is directed towards some *good*. It is very important to be clear as to the nature of this good, as this good, which is commonly

[79] ST I-II q. 92, a. 1.
[80] Ibid.
[81] Ibid. Cf. ST I-II q. 63, aa. 1,2.

possessed by the members of society, is what binds that society together. If law were ordered to promoting virtue and discouraging vice, but only in relation to individuals, such law might constitute helpful advice but would lack the force to bind and direct an entire community. Thomas elaborates on the communal character of law in the following passage:

> (a) every part is ordered toward its whole in the way that what is incomplete (*imperfectum*) is ordered toward what is complete (*perfectum*), and since (b) a man is part of a complete community, law must properly be concerned with the ordering that leads to communal happiness (*ad felicitatem commune*). Hence, in the definition of legal affairs alluded to above, the Philosopher makes mention of both happiness and political communion. For in *Ethics* 5 he says, "The laws (*legalia*) we call 'just' are those that effect and conserve happiness and its elements within the political community." For as *Politics* 1 puts it, a city is a complete community.
>
> Now in every genus, the genus is especially predicated of the thing that serves as the principle of the others, and the genus is predicated of the others because of their relation to that thing. For instance, fire, which is maximally hot, is a cause of the heat in mixed bodies, which are called 'hot' to the extent that they participate in fire. Hence, since 'law' is predicated especially in relation to the common good, it must be the case that any other precept about a particular act has the character of law only to the extent that it is ordered toward the common good. And so every law is ordered toward the common good.[82]

As Thomas clearly illustrates, law is ordered to communal happiness. Any system of law that cannot, in principle, be possessed as a good by the whole of the community, such as a law that directly privileges one party to the detriment of another, is not thereby a law in fact but only a law in name, because it is manifestly not ordered to the common good but rather to the redistribution of private goods. I say "in principle" because a given law may be situationally opposed to the happiness of one party due to a selfish inclination on the part of that party. Nonetheless, that party could still possess that good if they had a change in disposition. Let us examine a family as an example. The parents enact a rule (law) that the children are to do their chores. Few children, perhaps none, make it through the entirety of childhood without resisting

[82] ST. I-II q. 90, a. 2.

this apparently unreasonable dictate from on high. In one respect, these laws are not ordered to communal happiness, as the children generally do not care as much as the parents whether the rooms are clean; therefore, in one sense, the parents benefit from this law to the detriment of the children's happiness. Yet assuming these are good parents, these chores are ordered to the flourishing of the family and inculcate the beginnings of virtue in the children. Therefore, the chores are ordered to both the particular happiness of the children and the flourishing of the family. Similarly, while a thief would rather laws against thievery be relaxed, this does not mean that the laws against theft are for the benefit of property owners and to the detriment of the thief, as the thief can participate in the common good if he gives up his vice. Therefore, this notion of communal happiness does not mean happiness for the greater number, but rather happiness that admits common participation. Any law that cannot fall under this orientation to the common good is not a law under Thomas's definition.

Before progressing further, we must more precisely elucidate the meaning of the term "common good," which is the subject of some controversy. But in turning to consider Thomas's conception of the common good, we are met with a problem. While Thomas references and uses the common good in many of his arguments, he does not dedicate a treatise to the common good or offer a clear definition of it; that is, one does not find him saying 'by the common good I mean …' or 'the common good differs from the private good in this way, and this is how we participate in it.' This is not to say that no coherent understanding of what exactly the common good is can be derived from Thomas's text, but any definition will require a fair degree of interpretation and inference.

The natural law understanding of the common good falls in two general camps: the communal use view and the shared good view. First, let us explore the communal use view. On

this account, the common good is the amalgamation of those goods necessary for individuals to flourish. While these goods would be inaccessible to an isolated person, by participating in society the person gains access to a host of practical aids necessary for his or her flourishing. In this view, the goods are common with respect to their accessibility, but those who access these goods appreciate them in a private manner. While individual persons benefit greatly from access to these goods and such persons have a responsibility to aid society, their own proper perfection is connected to their individual person, such that the common good is not their own proper good. This view is exemplified by figures like Jacques Maritain, I. Th. Eschmann, and John Finnis. Although these thinkers do differ in important respects and a full discussion of their various views falls beyond the scope of this thesis, they all hold that the common good refers to a set of societally accessible goods, which taken together constitute a necessary aid to human flourishing.[83]

[83]For a fuller discussion of these views and the proper context in the political philosophy of the respective scholars see: John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); "The Public Good: The Specifically Political Common Good in Aquinas," in *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez*, ed. R. George (Washington, D.C.: Georgetown University Press, 1998); Jacque Maritain, *Man and the State* Chicago: University of Chicago Press, 1951); *The Person and the Common Good* (London: Geoffrey Bles, 1948); *The Rights of Man and Natural Law*, trans. Doris Anson (New York: Charles Scribner's Sons, 1943); I. Th. Eschmann, "In Defense of Jacques Maritain," *The Modern Schoolman* 22 (1945): 192. For a helpful primer on these various views, see Lawrence Dewan, "St. Thomas, John Finnis, and the Political Good," *The Thomist* 64 (2000): 337-74. While Dewan is certainly critiquing Finnis and as such he is not an unbiased source, he presents summaries of the various views at play in a succinct manner which makes his article helpful for general knowledge of the views at issue. As Finnis has written most recently and extensively on this subject, I will take him as representative of the amalgamation or instrumental view of the common good with respect to political society. This is not intended to imply that Finnis is in agreement in all respects with Maritain or Eschmann, as he is not. However, they are in agreement with the notion that the political common good refers to a set of goods inaccessible to an individual but necessary for human flourishing. While this thesis will present the particular view of the common good that I take to be most defensible (the shared good view), the controversy surrounding the common good cannot be resolved easily with reference to Aquinas's texts, and charity demands mentioning that this is a somewhat live issue.

2.4 Finnis's Specifically Political Common Good

John Finnis contends that the political common good is limited and instrumental.[84] His most succinct definition of the common good is as follows: "in the case of political community, the point or common good of such an all-round association was said to be the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development."[85] On this basis, we can say that for Finnis, what is *common* in the *political* common good is that the particular goods are beneficial for multiple parties. The common good is thus common in terms of its uses, but not in terms of its participation. By this, I mean that while many individual persons have access to these goods, thereby making them common with respect to use, each individual uses these goods for their own private purposes. Individuals need this common good since certain ends cannot practically be attained by individual action alone. For instance, laws are needed to regulate certain aspects of human interaction. Without laws, society would be chaotic, eliminating the peace required for individuals to obtain their own proper ends. We, therefore, need laws, and as

[84] It should be noted that Finnis uses the term common good in three senses: A. the common actions of an organization in pursuit of some good, B. the necessary pragmatic aids provided by society for the obtaining of private ends, and C. the good which all humans enjoy as basic goods. Finnis most often discusses the common good in sense B. (*Natural Law and Natural Rights,* 154-155). Sense B. is also the sense that he generally uses when discussing the political common good. Finnis does state that all senses of the common good are subordinate to sense C. and ordered to integral human fulfillment, and friendship, which is included in integral fulfillment, plays an important role in Finnis's understanding of the common good. He makes clear that friendship and fairness are motivations to follow laws even if they are not always in the best interests of the individual in a given instance (John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics & Public Policy* 1, no. 1 (1984): 137). However, Dewan reads Finnis as *primarily* committed to sense B with respect to the political common good. This is how I am reading him as well, as it appears that this is the most straightforward reading of "The Public Good," which is Finnis' most expansive text concerning the political common good. A complete discussion of the nuances of Finnis' understanding of the common good falls beyond the scope of this thesis.

[85] Finnis, *Natural Law and Natural Rights,* 154.

laws should not unreasonably benefit one party while neglecting another, these laws, being of benefit to all citizens, are common or public goods.[86] While the laws in a just society are of common benefit to the various members of society, individuals within the society enjoy these goods so that they can pursue their own properly individual good. Finnis takes much the same approach when relating his notion of the common good to other collaborative endeavours. For instance, a hospital is required to maintain a healthy society. Institutions like hospitals, along with most goods which require collaborative action, form a set of material aids that allow individuals to obtain their own proper ends.[87] If individuals or even families were required to operate completely independently of others and provide for themselves and their needs in their entirety, they would be greatly limited in their ability to meet these needs. This would render human flourishing inaccessible to most individuals. It is by means of access to these public goods that they can achieve their own proper ends. In Finnis's view, the common good in itself is not the proper good of the individual but only insofar as social goods such as friendship form part of integral human fulfillment. Rather the individual's proper good is integral human fulfillment, of which the common good plays a part. The set of material and situational aids, termed the common good, are commonly accessible aids which allow for the obtaining of an individual's personal or familial end. While these goods may have a common source or cause, an individual appreciates these goods by making use of their benefits for the sake of his/her private purposes – *and for the sake of his/her friends*.[88]

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[86] Finnis, "Public Good", 193. Finnis takes 'public good' to be synonymous with the political common good; see "Public Good" 181-182 and *Natural Law and Natural Rights*, 459.
[87] Finnis, *Natural Law and Natural Rights,* 167.
[88] See Finnis, *Natural Law and Natural Rights*, pp. 88, 141, 143-144. These pages indicate that Finnis does not understand the common good to be merely instrumental.

Finnis's theory of the specifically political common good, which he terms the public good, is connected to his general theory of the good. He cites Aristotle in support of his position that "Man is more naturally conjugal than political."[89] Finnis argues that the specifically political society does not in itself add to the human good at a basic level, whereas the specific goods of family life—marriage, procreation, sexual enjoyment, and the complementarity of man and woman in the domestic life—are so foundational to human fulfilment that they constitute a basic good sought for its own sake. Political life, on the other hand, is not nearly as fundamental.

While Finnis is clear that the political society is an irreplaceable aid to obtaining the various basic goods, it does not itself fulfil any basic human need in such a way that it is sought for its own sake. Rather its value is in its ability to facilitate the fulfilment of the proper good of each and all individuals. Therefore, for Finnis, the specifically political common good is not the proper good of the individual. He argues:

> Contrary to what is often supposed, Aquinas's many statements that we are "naturally political animals" have nothing particularly to do with *political* community. So they cannot be pressed into service as implying that the state or its common good is the object of a natural inclination or an intrinsic and basic good. Strikingly, they do no more than assert our social not solitary nature, our need to have interpersonal relationships for acquiring necessities such as food and clothing, for speech, and in general for getting along together (*convivere*); or the need for various social but not peculiarly political virtues, such as good faith in promising and testifying, and so forth.[90]

This merely instrumental quality of the political common good is quite clear. He admits only one exception to this: retributive justice. Justice is a necessary part of the human good, and the state is the only proper agent to enact public laws and punish offences. In this one respect, Finnis

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[89] Finnis "Public Good," 190; cf. In Eth. VIll.12 n.19 [1720]; also n.18 [1719]; Nic. Eth. Vlll.12: 1162a17-18.
[90] Finnis, "Public Good," 191-92.

accepts that the common good proper to political life is more than merely instrumental.[91] Finnis is somewhat vague on what the distinction between social life and political life means; he likely means the social relations that do not explicitly involve government action, or laws but rather everyday community interactions, are social, whereas the government sphere is more explicitly political. Justice, which is a constituent element of the human good, entails the mediating of disputes and, when necessary, punishing offences and thus requires a state; but the larger political society is not something that forms a constituent element of the human good, as it is merely a necessary pragmatic aid.[92]

Finnis's ensemble theory of the common good, which is almost purely pragmatic with respect to political life, stands in stark contrast with the view advanced in this thesis, in which the common good is a unified model whereby various individuals partake of the same good. Moreover, in this model, the common good is proper to the individual and, in an important sense, superior to the private good. It is on this basis that I shall endeavour to resolve the larger question of how governmental authority relates to conscience, granting that Finnis has a different approach to doing so.[93]

As previously noted, Thomas is markedly less clear on the nature of the common good than he is on many other things on which he writes. Therefore, while, in my view, the ensemble

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[91] Ibid., 193.

[92] Finnis, *Natural Law and Natural Rights*, 155.

[93] Finnis's paper "Public Good" gives a potential avenue. Since he contends that the state and political life, in general, is a limited instrumental good, his approach would likely involve a focus on just rulers recognizing their instrumental function and therefore only intervening when absolutely necessary. If government actors unduly intervened in the conscientious judgements of individuals and families, that would introduce disorder as the individuals' basic goods including that of family life are more foundational to the human good than the political life. Imprudent interventions would be, at least to some degree, tyrannical, as the state would undermine basic elements of the human good that governments exist to serve. This brief sketch of a potential argument based on an instrumental view of the common good is merely meant to indicate that this model could be used and my rejection of this model does not imply that it cannot develop potential solutions to the current problem. Be that as it may, my claim is that such an approach would part ways significantly with Aquinas.

model of the common good such as that proposed by Finnis is not the clearest reading of Thomas's text, Thomas' vagueness means that determining the nature of the common good is a live question. Moreover, this ensemble model of the common good is seen in other authorities, such as the *Compendium to the Social Doctrines of the Catholic Church*, which, citing *Gaudium et Spes*, defines the common good as "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfilment more fully and more easily."[94] Given this state of affairs it will help to clarify and strengthen my own reading of Thomas on the common good by continuing to regard Finnis as representative of the ensemble approach and to raise some concerns with his account.

2.5 Problems with Finnis's Model

My critique of Finnis's view of the instrumental character of the common good is not intended to be exhaustive or dispositive; I will thus touch on only a few of the problems in Finnis's account. As previously noted, Thomas is uncharacteristically vague on the precise nature of the common good and its relation to the private good. As such, we are restricted to discussing which reading of Thomas is more plausible. This section is not intended to claim that Finnis cannot reply to any of my objections but rather to illustrate that there are difficulties in Finnis's interpretation of Thomas and in his account of the common good as it plays out in society. I reject Finnis's approach not because my argument requires a different understanding of the common good, but because his view of the common good evokes important questions of interpretation that are not, in my view, satisfyingly resolvable. The difficulties I will focus on

[94] *Compendium to the Social Doctrines of the Catholic Church*, 164; cf. Second Vatican Ecumenical Council, *Gaudium et Spes*, 26.

with respect to the instrumental common good fall into two general categories: textual difficulties with respect to Thomas, and philosophical problems.

The proper interpretation of Thomas's numerous texts at least appears to contradict Finnis's understanding of the common good. For instance, in various places Thomas discusses the superiority of the common good over the private good, whereas in Finnis's account the common good is merely instrumental. This means that for Finnis the common good is a good not in the sense that it is a proper end, but rather that it is a necessary means for obtaining the individual's proper good. The individual's proper good is found in integral human fulfilment rather than a common good in the sense of a shared good.[95] In this conception of the good, the political common good is instrumentally ordered to the acquiring or fulfilling of various goods. This would appear to imply that the person's proper good, found in integral human fulfilment, has a wider scope than the common good, thus subordinating the common good to the human good, at least as far as individuals within society are concerned.

Thomas, by contrast, clearly holds that the common good is superior, as, for instance, when he states, "[the] common good is more important than a private good if it is of the same genus."[96] Finnis could object to the use of this text, as Thomas goes on to expound his view that virginity is more excellent than married life, thereby allowing for the possibility that a particular private good might be more excellent than a certain common good. This could imply that a private good, namely virginity, is more excellent than a common good, namely marriage. However, this objection would miss the qualification Thomas places on this case when he refers

[95] Since Finnis believes that the human good involves an amalgam of various basic goods, discussing where the human good is found is, by definition, more complex than in a TNL view. Finnis includes friendship in his list of basic goods (Finnis, *Natural Law and Natural Rights* 155) and friendship is obviously a social good that cannot be possessed solely by a private individual. Finnis clearly does not hold that atomistic individualism is conducive to human fulfilment, but he holds that the political common good is of merely instrumental value.
[96] ST II-II, q. 152, a. 4, ad 3.

to genus. Clearly, Thomas holds virginity to be superior due to its orientation. He says, "virginity dedicated to God is preferable to carnal fecundity."[97] It is the supernatural orientation of consecrated virginity that renders it superior, as the supernatural is superior to the natural. This point is further emphasized when we consider the objection to which Thomas is replying. The objection cites Aristotle's contention that the common good is superior to the private good.[98] If Thomas wished to deny the general principle that the common good is superior to the private good he could have done so, and it would have made for a more straightforward argument. He would not have had to appeal to different genera if he did not accept the general superiority of the common good to the private good.

Thomas affirms the superiority of the common good to the private on numerous occasions. For instance, in Book Three of the *Summa Contra Gentiles* he writes:

> Now it is better for a good that is conferred on a thing to be common to many than for it to be exclusive, for "the common good is always found to be more divine than the good of one alone." But the good of one being becomes common to many if it can pass from one to the other; this cannot occur unless it can diffuse this good to others through its own action. On the other hand, if it lacks the power to transfer the good to others, it continues to keep it exclusively.[99]

Here he not only affirms the common good as superior and *more divine* due to its shareability, but he also further clarifies his understanding of the term. He says that the good *becomes common to many if it can pass from one to the other.* If a particular good cannot do this it is kept exclusively. This conflicts with the instrumental notion of the political common good advanced by Finnis, which carries with it an exclusive character.

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[97] Ibid.
[98] ST II-II, q. 152, a. 4, ob 3.
[99] SCG b. 3, c. 69, p, 16.

Finnis holds that the political common good is constituted by the various goods provided by society that allow one to obtain his or her personal fulfillment. However, all of these goods are limited. Take for instance, roads. Roads are generally necessary for obtaining private goods. Moreover, if citizens were expected to construct and maintain their own roads, society would grind to a halt. Clearly, roads designated for common use are, in all but the rarest of circumstances, necessary for people to obtain the private good. This falls under Finnis's understanding of a common good. However, anyone who has been in a traffic jam knows that roads are limited in their shareability for the simple reason that the space my car occupies is held exclusively. Likewise with healthcare. Various countries manage their healthcare systems in different ways using different funding models. Still, all stable societies have some kind of healthcare system. That means families, as a general rule, have access to healthcare rather than being left exclusively to determine on their own how to procure remedies for their illnesses. However, during the recent Covid crisis, the rationale for various public Covid measures was the safeguarding of medical systems, demonstrating the limited shareability of healthcare. The types of goods Finnis holds to be common are actually forms of private goods designated for public use either by the government or the market. These goods may well be necessary for and ordered towards true common goods, but they cannot be truly common goods as Thomas understands them due to their limited shareability.

Thomas cannot mean that the common good is merely numerically superior to the private good, but rather that it is a good that is different in kind to private goods, for he says:

> The common good of the city and the individual good of a single person differ not only with respect to many and few, but also with respect to a formal difference; for the concept of the common good is different from the concept of the good of an individual, in the way that the concept of the whole differs from the concept of a part.[100]

[100] ST II-II q. 58, a. 7, ad 2.

While the whole and the part may have certain distinct goods (as, for instance, in the way the ability to grasp matters more to the good of my hand than it does to the good of me as a whole), this does not mean that the existence of my nervous system is merely instrumentally good to my hand; rather, the good of my hand is ordered to the good of me as a whole. Moreover, the good of my hand is ordered to me as a whole in such a manner that it will naturally sacrifice itself for the sake of my body as a whole.[101] Therefore, this demonstrates that the good of the part (my hand) is ordered to the good of the whole (my body, which in turn is ordered to the good of me as a whole). This same logic is on display in Thomas's second class of ends in q. 94 a. 2, as the good of the individual in safeguarding their own existence is subordinated to the good of their species. This is seen in the fact that all animal species make some kind of allowance for their offspring even if it is just the fact that salmon spawn in the relative calm of inland streams and rivers rather than the ocean. This does not mean that the survival of an individual has no importance or that the notion of the common good is merely a mathematically greater good as the utilitarians contend. Rather, the common good is a good which is commonly held and accessible to multiple individuals without its dilution. Thus, the salmon in safeguarding its young is pursuing the common good of the flourishing of the species, albeit in a non-rational manner, as species pursue their ends in accordance with their nature.

[101]"[We] see that a part naturally exposes itself for the sake of conserving the whole, in the way that a hand is exposed to a blow without deliberation for the sake of conserving the whole body. And since reason imitates nature, we also find an inclination of this sort among the political virtues. For a virtuous citizen exposes himself to the danger of death for the sake of conserving the whole polity; and if a man were a natural part of this [earthly] city, then this inclination would be natural to him." ST I q. 60, a. 5.

2.6 Common Good as Shared Good

In contrast with the notion of the instrumental common good held by Finnis is what I am calling the shared good view. Charles De Koninck proposed this distinct notion of the common good, without using this name, in his 1943 essay *The Primacy of the Common Good Against the Personalist.* In this paper, he holds that the common good is not merely some assembly of goods that are accessible to multiple parties; rather, it is a singular good that is truly common to many. As De Koninck writes:

> The common good is better, not insofar as it comprises the singular good of all the singulars: it would not then have the unity of the common good insofar as it is universal but would be a pure collection. It would be only materially better. The common good is better for each of the particulars that participate in it insofar as it is communicable to the other particulars: communicability is the very reason of its perfection. The particular does not attain the common good under the note itself of common good if it does not attain it as communicable to others. The good of the family is better than the singular good, not because all the members of the family find in it their singular good: the good of the family is better because, for each of its individual members, it is also the good of the others. That does not mean that the others are the reason for the proper loveableness of the common good. On the contrary, under this formal aspect, the others are loveable insofar as they can participate in this good.[102]

In this paragraph, De Koninck summarizes his understanding of the common good. He holds that the common good is not an assembly, as that would be merely numerically superior to the private good. Rather, the common good is a truly communicable good wherein multiple individuals participate in a good which transcends them and in so doing unites them. De Koninck goes on to clarify that the common good is not merely the amalgamation of all the goods of the individuals taken together and considered as a group, as this would only be considered common because we

[102] De Koninck, *The Primacy of the Common Good Against the Personalists*, 75.

are considering the individuals as a group. Instead, the common good is a good whereby multiple individuals participate in one good.

De Koninck's discussion of the family is quite helpful in unpacking his understanding of the common good. The family is not merely an ensemble of various disparate goods. The family is a singular unit; the individuals in the family do not thus find their proper perfection merely as individuals but in the higher good of the family. Moreover, this higher common good produces the proper lovability in its members. Let us consider George. George has two sons, Adam and Jacob. Assuming George is a good father, he loves his sons. However, he would not chiefly love his sons because of anything particular to his sons considered in themselves: Adam might be a saint and Jacob might be a scoundrel, yet the love which George has for them is due to his sharing with his sons a higher good called the family. It is in light of this higher common good that the particular loveableness is produced in Adam and Jacob. This love of the common good of the family orders George's actions towards the good of Adam and Jacob, as together they attain a good which none of them in principle can attain as singular individuals.

Let us briefly consider Finnis's view and De Koninck's side by side using the analogy of a house. According to Finnis's view the *political* common good is a collection of goods. From one perspective, a house is as well. A well-constructed house consists of a roof, walls, floors, etc.. However, this collection of goods would be of no benefit as disparate units if they did not possess some higher architectonic good which unites them into the good of the house. This higher principle which unites the parts to the whole is the common good of the house. That good of the house is then in turn ordered to the higher good of the family who dwells in that house. In a like manner, the common good of the family does not consist solely or exclusively in possessing proper food and shelter, or in the members caring for the physical, developmental,

and emotional needs of each. All of these goods are more or less necessary for the flourishing of the family; therefore, they might be analogously considered common goods. However, properly speaking, the common good is the family itself, which unites and perfects the individual members to a good which is not merely materially better but ontologically superior to the private good of the individuals of which it is composed.

The ontological superiority of the common good is due to the fact that singular common goods, such as the family, are communicable to multiple parties without diminishment. George's enjoyment of the family is not in any way lessened by his sons' enjoyment because it is communicable. Moreover, if George were to focus primarily on his own particular enjoyment of family life, he would thereby treat it as a type of private good. He would gain benefits from his family, but in such a way that his enjoyment is only tangentially connected to the other members of his family. In this case, his family life would be rendered substantially deficient. For instance, one of the profound joys of family life occurs in parents witnessing the growth and flourishing of their children. Witnessing the growth and learning of children is fascinating due to our common humanity; we thus, for example, have an appreciation for a baby taking his first steps. Having said this, if George were to feel no more joy at witnessing the first steps of his son than he would at witnessing the first steps of any other child, we would clearly see this as odd and in some sense deficient. The reason for this is that George is more intimately united with his sons due to the fact they are united together in a family.

De Koninck is far from alone in this view of the common good, as Steven Jensen, for example, uses the term "shared good" to describe a view very similar to De Koninck's understanding of the common good. He argues that in "a truly shared good, the good of an

individual is found (at least in part) outside himself, that is, in others."[103] He goes on to discuss a helpful distinction between a shared good and a shared means.[104] In a shared means, individuals work together to accomplish a task they cannot accomplish individually. For example, two children might have a lemonade stand. They aid each other in various tasks, yet at the end of the day they will divide up the money. Therefore, while they join together for a common activity, their division of the profits makes it a form of a private good. On the other hand, let us consider the case of surgery. The surgeon performs the surgery, the anaesthetist manages the anaesthesia, the nurses assist and monitor, etc. In contrast to the children running the lemonade stand, the surgery team does not merely unite for common action; they also possess a common end—namely, the promotion of health in their patients. This common possession of an end allows them to share in the accomplishment of that end.

2.7 The Role of the State

As previously discussed, the family is a common good as demonstrated by the fact that multiple parties can enjoy the good of the family without in any way diminishing that good. In a similar way, civil society is a common good. Being a member of a free, prosperous, just society, city, province, country, etc. is a good that benefits all the members of that society, and my enjoyment of such a flourishing society in no way diminishes my neighbour's enjoyment. This is because we are both partaking in the one good. Moreover, the common good of the family is directed to the common good of society. This is seen in the fact that parents, as a general rule, not only want their children to grow and mature into happy adults, but they also want their children to benefit society. Parents generally brag when their children benefit society and

[103] Jensen, "Aquinas" in *Cambridge Companion to Natural Law Ethics*, 38.
[104] Ibid.

experience shame if their children harm societal flourishing. Nonetheless, while the common good of families is directed to the common good of society, families exercise a very particular function. If parents were equally concerned with the general welfare of the national economy as they were with feeding their children, they would not be able to fulfil their role as parents. Just because both families and the government are directed toward the flourishing of the society, this does not mean they exercise the same function in their pursuit of that good.

Thomas clearly endorses the idea that the good of individual households is ordered to the good of the city.[105] While families order themselves to the higher common good of the society at large, this does not mean they can properly do so without direction. As Thomas points out elsewhere in *De Regno*: "it is evident that several persons could by no means preserve the stability of the community if they totally disagreed. For union is necessary among them if they are to rule at all: several men, for instance, could not pull a ship in one direction unless joined together in some fashion."[106] While the good of families is ordered to the good of society, this does not mean that the governmental authority's interest in maintaining the common good is

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[105] ST. I-II q. 90, a. 3, ad. 3. There is some dispute regarding what Aquinas means by the term *complete community.* I will not attempt to resolve this dispute. For further discussion of this dispute, see: Finnis, "The Public Good;" Michael Pakaluk, "Is the Common Good of Political Society Limited and Instrumental?" *The Review of Metaphysics* Vol. 55, No. 1 (2001): 57-94; Dewan, "St. Thomas, John Finnis, and the Political Good.*"* For present purposes, I will simply posit that Aquinas's quote mentioned above is to be read at face value, namely, that Aquinas is articulating his view that the good of the family is not a purely independent good but rather a good which is in turn ordered to the common good of society. This interpretation is at odds with Finnis's view as Finnis finds the connection between Aquinas's term *complete community* and the state dubious. See Finnis, "Public Good," 191, 195.

[106] *De Regno*, Book 1, Chapter 2. This passage takes place in Thomas's larger context of his argument for a monarchic rule which may not accord with modern sensibilities, though it should be noted that Canada is technically a monarchy. That said, whether or not one accepts Thomas's preference for monarchy is irrelevant to the larger point that he is addressing, that is, the need to limit the number of political decision-makers. While this is obviously done in the case of monarchies, in representative democracies, this is done as well, as after the voters select a representative, that representative then exercises his/her prudential judgement with respect to legislation. While an argument which forwards the superiority of monarchy may seem out of place in modern political thought, Thomas's central point here focuses on the need for unity of purpose. This need for unity of purpose is also safeguarded to at least some extent in representative democracies. So while this line of reasoning would not accord with a system of direct democracy, it is not inherently opposed to representative democracy.

thereby rendered null. Flourishing family life and well-functioning governments are both required to maintain the common good of society.

Even though families are directed properly to the common good, political leadership is still necessary, for two reasons: First, not every family will be properly ordered. Some families are dysfunctional to the degree that they act against the common good of society. For instance, when parents neglect or abuse a child, they inhibit rather than aid their child's growth and maturation. It is necessary to call upon a higher authority when parents are unwilling or unable to properly exercise their role.[107] Second, even if we were to posit for the sake of argument that a society existed which was comprised entirely of perfectly virtuous parents, in such a case we would still require a governing authority to maintain the common good. Thomas's analogy of the ship is helpful here. The captain is not required for the ship simply because poor sailors exist, and someone needs to discipline them. The sailors could be perfectly competent, and legitimate disagreements would still emerge, as when one sailor may wish to sail to London, whereas another wishes to sail to New York. Both may be excellent ports and perfectly appropriate for their ship, but they are nonetheless mutually exclusive ports. Moreover, it is natural for a sailor to desire that their specific task on the ship be given greater priority. A sailor will naturally possess more expertise in his or her specific task but may be ignorant about how changes in one task may affect another sailor. Therefore, the captain is needed to maintain order and direct the ship appropriately. In a similar manner, even if families were all virtuous, legitimate disagreements could emerge. Perfectly reasonable, virtuous people can disagree about a course of action and these disagreements can have serious consequences. Therefore, state authority is required to mediate these disputes.

[107] This is a complex issue and it will be discussed in greater depth later in this chapter.

One reason why Finnis is hesitant to affirm that the political common good has any value beyond the merely instrumental is that he is concerned with governmental overreach. This is far from an idle fear. While this thesis opposes Finnis's understanding of the common good, this does not mean that Finnis's concerns are baseless. Both Finnis and his critics accept that checks on government power are necessary. For instance, Lawrence Dewan, in a paper which is largely critical of Finnis's understanding of the political common good, agrees that government needs limits: "As we come to the end of the twentieth century, it seems that we are better and better advised to seek good reasons to oppose the all-encompassing power of political leaders."[108] On a surface level, understanding the common good as ontologically superior to the private good could easily lead to the misunderstanding that the state has nearly absolute authority. A few things require clarification to correct this potential confusion. First, it does not follow that, just because the state authority is tasked with the maintenance of the common good of the society in a general sense, and families are ordered to the common good of society, the family is thereby ordered to the good of the state authority. For while the state authority is the necessary steward of the political common good, it is not synonymous with the political common good. Neither are the state's priorities, in themselves, the common good. Here again, Thomas's analogy of the ship is helpful. In this analogy, what is the common good? The ship, not the captain. The Endurance crew was not united with Captain Shackleton because he was their common good; they were united with him because he was the Captain of the Endurance and therefore was tasked with maintaining its welfare, pursuing its mission, and safeguarding its crew. As they had made the good of the Endurance their own good by seeking its good as a common good, they no doubt possessed great loyalty and gratitude to Shackleton for maintaining their survival in harsh arctic

[108] Dewan, "Aquinas, Finnis, and the Political Good," 339.

conditions; nonetheless, the office of captain is not something that can be possessed as a common good. The same is true of government: the government is a steward of the common good, which is to say that it is tasked with maintaining and promoting the common good of the society.

2.8 The Principle of Subsidiarity

Further protection against government overreach can be added to this general structure without shifting to an instrumental view of the common good by appealing to the principle of subsidiarity. While the principle of subsidiarity is not explicitly articulated in Thomas, as it was formulated much later, it is very much in keeping with his general thought. Pius XI provides a general definition of the principle of subsidiarity as follows:

> The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.[109]

In brief, this principle holds that matters that can be handled locally ought to be handled locally. It is improper for a higher level of authority to intervene when a local authority can handle the task, for which it is thought to be primarily responsible. In his *Commentary on Aristotle's Ethics* Thomas discusses how certain entities, such as armies, are unities of order. However, while the general purpose of waging war may belong to the army as a whole, certain tasks also belong to particular soldiers or groups of soldiers within the army and not principally to the army as a

[109] Pius XI, Encyclical Letter *Quadragesimo Anno*, (May 15, 1931), 80.

whole. They are more properly the operation of the part and not the whole.[110] Thus, while the principle of subsidiarity allows us to recognize that both the family and the government are oriented toward the common good of society and that government has a higher responsibility for maintaining this good, it does not follow from this that the government can intervene in the affairs of familial life whenever it pleases.

The government lacks the proper authority to intervene whenever it wishes for two reasons. First, the common good of society is not synonymous with whatever is deemed best by any particular government. Rather, the political common good is the flourishing society. This means that government action must be oriented to the promotion of true societal flourishing rather than that which is most politically expedient.[111] Second, parents in a family have a particular task in promoting the common good, namely, in raising mature, well-formed, virtuous children who can in turn enter the wider society. Just as in the case of Thomas's military example, though the family and the government are both ordered to the common good of the society, it does not follow that the two exercise interchangeable roles. The party principally responsible for maintaining the good of the family is the parents. Since the government is entrusted with the task of maintaining the good in a general sense for all society, families do fall within their purview. However, this interest does not mean that the raising of children, for

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[110] Aquinas, *Commentary on Aristotle's Ethics* , I, I, 5. For a fuller description of how Aquinas helped develop the principle of subsidiarity, see Chapter 2 of Michelle Evans and Augusto Zimmermann, eds., *Global Perspectives on Subsidiarity* (New York: Springer, 2014).

[111] The notion of a "flourishing society" is admittedly somewhat vague. While natural law does offer some general principles which allow for ethical decision-making in day-to-day life, any political philosophy in a system that allows for self-government will have to admit that reasonable people can have a general understanding of the good on a private and societal level. Therefore, while I will not break down all the dimensions of a flourishing society, as that would take us too far afield, we must grant that the good is knowable on a private level, otherwise ethics is a fruitless field, and likewise that the good is knowable on a societal level, otherwise self-governance is pointless. Moreover, if the political common good cannot be grasped by reason there is nothing to morally distinguish a free state from a tyranny. Therefore, in general terms, a flourishing society means a rightly ordered, free, secure, prosperous society which is established in a manner which allows for individuals and families to be able to meet their moral and civic duties and find true human fulfilment.

example, is chiefly the task of the government. Rather, governments support parents in their role by providing police/civic security, good laws, infrastructure, and so forth. The government may intervene to help secure the common good when parents are unable or unwilling to fulfil their natural obligations, but such interventions are, properly speaking, just aids. They may aid the parents in fulfilling their duties, but it is only in the case of extreme neglect or likewise grave circumstances when the ordinary parental roles have collapsed that state actors should intervene. This is in keeping with the principle of subsidiarity, as in these cases, assuming overreach has not occurred, the parents have demonstrated the matter in question, namely, that the children's welfare cannot be handled locally.

2.9 Governmental Authority and Conscience's Authority [112]

Having established the principles at issue, it is now necessary to briefly discuss when and how the government may intervene in matters of conscience. This discussion will be somewhat brief, as the entirety of the final chapter is dedicated to the application of this general theory. Let us recall three important points. First, the authority of conscience is the sole means by which the individual has access to the moral order because conscience is an act of judgement regarding the moral character of an action. Second, state laws bind conscience.[113] Third, when conscience and a law of the state are in direct opposition, conscience is primary with respect to the individual.

[112] While this section is chiefly concerned with state law directly, insofar as governments necessarily delegate some of their authority to professional organizations, the government is required to see that those organizations respect the rights of citizens as well. For instance, while lawyers are regulated by the Federation of Law Societies, this is not directly a governmental organization; however, if this society made a ruling that Muslims were barred from practicing law, a clear violation of religious freedom, the government would be required to ensure that this federation properly respected religious freedom. The same would be true for regulatory bodies such as the college of physicians; if this college violated the conscience rights of physicians the government would be required to see that those rights are respected. When the government allows bodies such as these the exclusive rights to regulate, they are granting them pseudo-governmental authority and, as such, the government is required to see that that authority is properly exercised.

[113] ST I-II q. 96, a. 4.

Consciences and the state are tasked with maintaining the common good, but, while human laws may inform conscience in certain contexts, they cannot supersede or replace conscience. Developing a logically consistent, practically attainable solution as to how these various issues interact is the primary purpose of this study.

All of the previously established principles are in service of this general endeavour to determine how conscience relates to governmental authority. This project is also in keeping with the general goal set by section one of the Charter, as the government must have some mechanism to place reasonable limits on the rights laid out in the Charter. I submit that there are two general categories of state intervention on conscience:

1. Imposition: where, prior to the promulgation of law, conscience permits, but does not oblige, an act, and the state implements a law forbidding or mandating that act.
2. Violation: where conscience obliges or forbids an act and the state demands that one does not acquiesce to this conscientious judgement.

Reasonable limits upon individual conscience are necessary, as it is not only naïve but indeed impossible for a state to never make imposition on conscience and still perform its duties. Moreover, it is a practical inevitability (although not a logical necessity) that a state will be forced by circumstance to outright violate conscience at times. Thus, the Charter rightly allows for reasonable limits on conscience rights. If all anyone had to do were simply state that a certain law violates their conscience, thus rendering that law null, no society could survive. However, to determine the reasonableness of an intervention on conscience, we must first know how conscience operates on an individual in a specified situation. Conscience permits, obliges, and

forbids.[114] In each of these respective cases, state interaction with conscience operates differently.[115]

In the case of act which in themselves conscience could permit, interactions with state authority are quite frequent, as the permissible covers everything that is not, in itself, forbidden.[116] While conscience, left to its own devices, may very well permit an act, when the state implements a law forbidding such an act, assuming it is a just law, conscience is bound by that law. This is an imposition, as a governmental act creates an obligation where previously none existed. All that is necessary for this law to bind conscience is that it is rationally ordered to the common good. In other words, for a law to justly impose on conscience, it must simply be reasonable. For instance, my conscience may well tell me that in a properly functioning vehicle on a clear summer day I can morally drive 125 km/h on Highway 11 between Saskatoon and

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[114] See chapter one, section 1.6, for references.

[115] Section one of the Charter cannot properly operate on section two, irrespective of the Oaks test (https://www.constitutionalstudies.ca/2019/07/oakes-test/) if we do not first establish what the proper role of the state is with respect to conscience. Unless we first establish a proper understanding of what conscience is and the state's role in maintaining the common good and how this informs its legal interaction in promoting the common good among its citizenry, it is impossible to know whether an imposition or a violation of conscience is reasonable. The reason why I am discussing the reasonableness of the law in either the case of impositions or violations of conscience is that Thomas argues that a just law possesses four criteria. Law is: A. promulgated, B. an ordinance of reason, C. ordered to the common good, and D. enacted by the proper authority. For the purpose of this thesis, we are assuming A and D to be satisfied as most contentious conscience rights cases satisfy those criteria. The question of whether it satisfies B and C is necessary in order to determine whether the state is acting justly when it imposes on or violates conscience. An individual who objects on conscientious grounds is by definition claiming that the law is unjust. The question then remains whether that individual's claim is reasonable. The purpose of the two bars (imposition and violation) is to provide a reasonably objective standard by which the reasonability can be judged. Cases of conscientious objection, then, exist when the state and a citizen disagree on whether a particular law is just. The objector must believe that the law is unjust otherwise they would not object, and the state must believe the law is just otherwise they would remove the law. The ideal solution to this problem is for one of the parties to realize their error as this would eliminate the dispute. Either the state would realize its error and remove the law or the objector would realize his or her error and remove the objection. Conscientious objection protections exist for those cases where the ideal solution is not likely—or even possible— at least in the short term. Yet clearly not all conscientious objections can be accepted, as this would result in anarchy. Therefore, we need some reasonably objective standard by which we judge conscientious objection. Clearly, the standard cannot be justice itself, as that is the very point which is disputed. Moreover, not all objections are of the same character. A state asking a citizen to violate a central value is more serious than the state telling a citizen he/she cannot do something which his/her conscience, prior to the enactment of a law, permits. This is why I propose the two standards by which we judge whether a state is justified in contravening a person's conscience.

[116] Obviously that which is obligatory is also permissible, but since permissible acts are not in any way morally necessary obligation will be treated separately.

Regina. However, the government tasked with implementing laws ordered to the common good decides to set a limit of 110 km/h. This is an imposition on my conscience, as, were my conscience purely independent, no prohibition of exceeding 110 km/h would exist under those circumstances.[117] All that is required for the state to justify such an imposition is that it be a just law, rationally ordered to the common good. If the government were, without grave cause, to impose a speed limit of 5 km/h on Highway 11 or require that citizens must wear top hats and eat ice cream on Tuesdays, those laws would not bind conscience, as they are not rationally oriented to the common good. In brief, all that the government must do to make impositions on conscience is to demonstrate reasonableness.

While in the case of conscientiously permissible acts the government only needs to make reasonable laws, the bar is considerably higher when conscience grasps acts as *per se* good or bad, and hence obliging or forbidding. Since conscience is the highest moral authority to which an individual has access, it is also the only means by which anyone can orient themselves toward the common good. If the state were to disregard this conscientious judgement of an act and thereby violate conscience absent grave cause, it would risk damaging the common good it is tasked with safeguarding. While it is at times necessary for government actors to act against an

[117] Grave cause may create a conscientious obligation to exceed 110, in which case that would be treated in a similar manner to other conscientious obligations treated below, with one caveat. Laws are general guidelines intended for broad application, but the grave causes that could create a conscientious obligation to exceed the speed limit are by definition circumstantially based. It is unreasonable to expect human law to envision the exact particularities of every possible situation. Therefore, laws are drafted for general applicability and situationally-based objections are generally best left up to prudent prosecutorial discretion. For instance, it is likely reasonable for a police officer to let a person off with a warning for speeding (presuming it is still a somewhat safe speed) if he/she is rushing someone to the hospital for a medical emergency. Likewise, that same police officer could judge that the person rushing to get to a meeting has a less grave cause and still give a ticket. The situational specified nature of these decisions means that they need to be left up to the prudential judgement of those tasked with enforcing laws (police, courts, etc.), rather than to the formulation of laws which obviously can not envision every possible circumstance. Thomas treats these points in ST q. 96 a. 6 when he argues that it is not possible for a law to account for every situation. He further expands on this point in ST II-II q. 120 when he discusses *epieikeia*. He points out that it is generally just to return what is borrowed, but in some cases this general rule would not apply "for instance, if a mad man were to deposit his sword and then demand it back when he was in a fury" (ST II-II q. 120 a. 1).

individual's conscience, simple reasonability is too weak of a standard to justify this violation. Instead, in these cases, a state actor must demonstrate that their action is necessary to maintain the common good. Further, they must not only demonstrate that their action is reasonably ordered to the common good, but also that no one could reasonably object to it. In other words, all that is required for a governmental violation of conscience to be unjust is for the conscientious judgement of obligation or impermissibility to be reasonable.

The government will in certain situations need to violate conscience—for instance, if the parents of a child objected to modern medicine and believed they had a moral objection to safeguard their children from it. If this led them to refuse to give insulin to their diabetic three-year-old, who would with insulin live a relatively normal life regardless of how genuinely or deeply held these beliefs were on the part of the parents, the state could intervene. Likewise, the state can arrest a murderer, even if the murderer were avenging some grievous injury and believed his or her honour demanded the murder.[118] However, in cases in which a reasonable person could see either side of the argument, conscience of the individual must be respected. For instance, a government mandate that every member of a particular society must accept and intellectually assent to a certain religious doctrine, such as that God is Trinitarian, is a doctrine that some would find perfectly reasonable. Catholics would hold that this Trinitarian God is the supreme common good, so obviously, this law can be ordered to the common good. Yet for a government to implement this type of law in a civil context would not pass the proposed test.

[118] This same logic would also apply to a terrorist who believed that he/she had a conscientious obligation to blow up a building with people in it. Even if a terrorist sincerely held a conscientious obligation that they had to blow up that building, no reasonable person would hold that this presumed obligation on the part of the terrorist is reasonably ordered to the common good; this is because the terrorist would at best be advancing a utilitarian vision of the good wherein harms could be directly intended and inflicted against the innocent for the sake of some perceived benefit to others. This vision of the good is, at best, an absenting from the superiority of the common good, as it is the benefit to some to the detriment of others. Common good is found in a communal appreciation of the good. An act which is ordered to the common good can never directly intend the harm of an innocent; common good is defined by its sharability those harmed are obviously not sharing in this "good" sought by the terrorist.

Conscientious objectors to this law would not need to prove that the acceptance of the doctrine of the Trinity is not reasonably ordered to the common good. As such persons have reached the judgement that such accent is forbidden to them, or that they are obliged not to give such accent, they would simply need to demonstrate that a reasonable person could object to this forced adoption of a doctrine to declare this law an unjust violation of conscience.

Chapter III: The Rights to Conscientious Objection in a Medical Context

3.1 Introduction

In order for a society to remain free and prosperous, it must possess some common notion of the good. If there is no common good that unites the people in a given society, that society loses any practical claim of being a complete society. Societies require some common purpose. If a society has no common purpose, it is not a true group, as groups are composed of individuals united by common actions. A society that lacks any real notion of common purpose is, more accurately speaking, a loose association of disparate individuals joined temporarily in a pragmatic relationship. Such a "society" would be dissolved as soon as it ceases to benefit one's private aims. To maintain society, the good that unites individuals must be real and sustainable. Societies need some common understanding of the good to progress towards in order to motivate common action. Notions such as progressive and regressive do not have real meaning without some commonly held notion of the good. Joseph Ratzinger articulates this point excellently in his 1991 essay *"*Conscience and Truth." He writes: "The concept of truth has been virtually given up and replaced by the concept of progress. Progress itself "is" the truth. But through this seeming exaltation, progress loses its direction and becomes nullified. For if no direction exists, everything can just as well be regress as progress."[119] As he articulates, any notion of progress is incoherent without a notion of the good toward which an individual or society is progressing. Therefore, any attempt to resolve contentious issues such as conscience rights by an appeal to progress cannot proceed without first establishing the good that progress is directed towards.

[119] Joseph Ratzinger, "Conscience and Truth," in *Crisis of Conscience*, ed. John Haas (New York: Crossroad Pub., 1996), 10. While Ratzinger uses the word truth, the good would equally fit with the general argument.

Ratzinger's insight is further underscored by the fact that everyone, regardless of their political perspective, has an inherent love of progress if that progress is directed toward their vision of the good. Liberal and conservative parents both take joy in witnessing their child's maturation. This is a love of progress, as they are delighting in the fact that their child is more nearly approaching the good of human flourishing they envision for their child. Conversely, the news that cancer is progressive would not be met with such jubilation. While progress is directional in character, which means that both its intelligibility and value are understood in relation to a good, colloquially speaking when progress is mentioned in general it is assumed that it refers to what is good *in itself*. Therefore, to determine whether something is, properly speaking, progress, we must first determine what is the good that we are seeking. This is true in the case of society in general as well as of its elements or features, such as healthcare.[120] Progress, then, cannot be the good which unites a society, nor is it identifiable with the common good that political leadership is meant to secure and in view of which it legislates.

As we have seen, the common good also plays a role in an individual's formation and judgment of conscience, a judgment which one is obligated to follow. Recognition of the rights of conscience is found in a plethora of examples in various jurisdictions having some form of conscience protection, indicating that there is widespread agreement, in principle, that conscience protections are a necessary good in a free society. That said, there is disagreement about how these conscience protections function in practice. As previously illustrated, both extreme neglect of, and over-emphasis on, conscience rights are destructive to a free society.

[120] With this understanding in mind, this chapter will ignore any argument against conscience rights that are purely based on the notion of societal progress. In order for progress to have any import, we must first establish what we are progressing towards. Arguments which appeal to progress but do not establish some common good of society by necessity beg the question. Progress is directional in character and whether progress is good or bad is purely related to what the thing is progressing towards.

Any solution to the problem of how to respect conscience rights in a free society must satisfy three criteria:

1. Consistency: Any solution must be capable of handling a variety of situations, otherwise it is not truly a solution to the problem of conscience rights but rather an *ad hoc* suggestion for a given situation.
2. Practicality: Any solution must be capable of a relatively simple application. This entails clearly articulated principles that illustrate when conscience rights are or are not being properly respected. It must also have limiting principles.
3. Flexibility: Any solution must be able to accommodate various values in a diverse society. Any large society is going to manifest sincere disagreements about key issues. While limitless acceptance of every possible system of values is not possible in any given society, a solution to matters of conscience rights must be able to accommodate people with good faith disagreements about the proper course of action in society.

A solution which purports to resolve a contentious issue must satisfy these criteria to manage the varied concerns at play in a free society.

The next section will illustrate how a natural law approach would deal with conscience rights of healthcare providers. It will demonstrate that the solutions provided by natural law principles are reasonable and capable of satisfying the aforementioned criteria. This demonstration will require three steps. First, it will illustrate that medicine has a distinct end—namely, health in accord with the human good. Having established this end of medicine, this will allows acts that are opposed to health to be understand as contra-medical. Second, I will discuss why it is reasonable to hold that abortion and euthanasia are not ordered to health, but rather are opposed to it, thereby making these acts contra-medical. With those two claims established, I

will finally discuss how governments with an interest in freedom should act when physicians object to performing acts that violate their consciences. Since medicine is ordered to health, and abortion and euthanasia are not ordered to health, conscientious objection to these procedures is therefore reasonable. Moreover, since physicians who object to involvement in abortion and euthanasia believe that those acts are by their nature harmful, these acts are rendered impermissible by their consciences. Therefore, a government with an interest in freedom of conscience ought to respect the conscientious judgements of such physicians. As this is how governments, such as that in Canada, deal with conscientious objection in other medical situations,[121] for the sake of consistency they should similarly respect conscientious objection to abortion and euthanasia.

3.2 The End of Medicine

Although conscience rights are contentious in many contexts, such as, for instance, education and speech codes, they are undeniably most contested in the field of medicine. This is not surprising, as medical treatment often affects people in vulnerable, even life-and-death, situations, and care providers are charged with a high degree of responsibility. Moreover, in every society a certain amount of self-sorting takes place in which people form subcultures with others who possess similar values and interests. However, when it comes to medicine, people from various backgrounds, and possessing different values, both provide and require medical treatment. This makes resolving problems yet more difficult, as disagreements on such matters as the proper course of treatment, the morality of certain practices, and so on, will naturally emerge.

[121] For example, physicians are allowed to object to performing medical interventions that they do not deem beneficial. I will discuss this in greater detail below.

Yet, despite the difficulty managing the various concerns and conflicts, a consistent, flexible, and practical solution is required to maintain a free society which properly respects conscience.

To discuss how natural law principles can aid in resolving disputes over conscience rights, it is first necessary to discuss the essential good toward which medicine is ordered. While the practice of medicine brings with it a host of ancillary values and skills, such as compassion and technical expertise, it is chiefly ordered to the promotion of health in accordance with the wider human good: it is this that gives medicine its unique aim. Specific principles such as those proposed by prominent bioethicists —respecting autonomy, non-maleficence, beneficence, and justice— have an obvious and proper place in medicine, but are far too broad to define what

medicine by its essence is.[122] Medicine is, strictly speaking, oriented toward the promotion of health. This end is what distinguishes medicine from other fields.[123]

While medicine is a complex field, it cannot maintain coherence without the centralizing focus of its orientation to health. While there can of course be legitimate disagreement about what constitutes the promotion of health, a particular practice must be in some way oriented to the promotion of health in order for it to be properly considered medicine. A patient and

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[122] This thesis will not address the precise role of Beauchamp and Childress's four principles of medical ethics in medicine. There is nothing wrong with these principles in themselves and they perhaps have some role as practical aids. However, there is nothing distinctly medical about these principles in themselves, and therefore they cannot in themselves define medicine or its proper orientation. Moreover, principles such as beneficence and non-malevolence require a certain understanding of human nature and the human good in order to serve any real purpose. See John Finnis and Anthony Fisher, "Theology and the Four Principles of Bioethics: A Roman Catholic View," in *Principles of Health Care Ethics*, ed. Raanan Gillon (Chichester: John Wiley & Sons, 1993), 31-44.

[123] For a further discussion of the *telos* of medicine being health, see Farr Curlin and Christopher Tollefsen, *The Way of Medicine* (Notre Dame: University of Notre Dame Press, 2021). Pages 1-31 establish the general principles used to argue this, and pages 23-31 make the point that only health can serve as the telos of medicine. Curlin and Tollefsen contrast the traditional view of medicine, wherein medicine is directed towards the promotion of health, with what they term the provider of services model. In the provider of services model the physician is essentially contracted to perform a particular task in accordance with the patient's wishes. The relationship between the physician in this model is essentially the same as any other work that an individual might contract out to a third party. They argue in their book that "We no longer have a shared public understanding of what medicine is for, or what the end of medicine is or should be. Rather, medicine has substituted for its once clearly recognized purpose something amorphous, subjective, and shadowy. As a consequence, the norms that medical professionals and professional ethicists bring to medical practice are devoid of objective content and radically deficient for guiding doctors and protecting patients" *The Way of Medicine,* 1. Natural law reasoning cannot be employed without clearly defined ends. Moreover, without a unified end for the field of medicine, there is nothing to give order and distinction to the field, but rather, as Farr and Tollefsen argue above, medicine becomes subjective, amorphous and shadowy. Particular fields require distinct ends. Therefore, I will present and argue for a vision of medicine wherein the promotion of health is the end as opposed to the provider of services model. A full discussion of the history and purpose of medicine is beyond the scope of this thesis, however, I offer a brief argument for the end of medicine. This is not intended to imply that there are no other operatitive definitions of medicine. *The Oxford Dictionary of Biochemistry and Molecular Biology (2 ed.)* (https://www.oxfordreference.com/display/10.1093/acref/9780198529170.001.0001/acref-9780198529170-e-12047) defines medicine as: "the science or practice of preventing, diagnosing, alleviating, and curing disease." This is fine as a practical description, but once we press below the surface this definition requires a unifying end to maintain coherence. Disease is some form of aberration from normal healthy functioning. The treatment of disease, or other illnesses, injuries etc. involves recognizing that there is some derivation from properly healthy functioning and then working to aid in its restoration in someway. In some cases, total restoration is the goal, in other cases total restoration is deemed inappropriate or not desirable due to a patient's priorities; in these cases, partial restoration is sought, such as the managing of pain. In any case the promotion of health is the goal. The definition of medicine offered in the Oxford Dictionary, cited above, does not differ in kind from my definition, but only in perspective. The orientation to health definition is a definition with respect to the end of the field. The Oxford definition is a description of the means by which that end is pursued. If an opponent of health as the end of medicine accepted the technical description of medicine given above, they would need to explain how disease, diagnosis, and treatment could possibly be understood without reference to health and how medicine could have any distinct purpose without a distinct unifying end.

physician may disagree about the best way to pursue health. An oncologist may wish to pursue an aggressive cancer treatment due to its probability of success, whereas a patient may desire a milder treatment or no treatment because of side effects and quality of life concerns. These complex medical decisions will indeed involve taking into account the desires of the patient as well as the clinical judgement of the physician. In such a case, both the physician and the patient would be pursuing health, and any disputes they might have would be merely over the proper means to secure the end of health or over which aspects of health—or other human goods—should be emphasised.[124]

If the patient were to ask their physician to reseed the lawn and install a back patio, such a request would rightly be seen as non-medical because it is not primarily ordered to the

[124] While health, or the restoration thereof, is the proper end of medicine, this does not, therefore, mean that full restoration of all proper functions of the body needs to be sought at all times. Recall the earlier discussion of the distinction Thomas makes between how obligations bind as opposed to how prohibitions bind (ref. section 1.6). Obligations bind always, but not at all times, whereas prohibitions bind always and at all times. In context, this means that a physician who has the end of promoting health must not ever act directly against the end of promoting health, as this is prohibited. Therefore, this binds the physician against directly harming a patient always and at all times. This sentiment is captured by the widely accepted norm, "first, do no harm." However, since obligations bind always but not at all times, the general obligation, on the part of the physician, to promote the health of their patient does not mean that a physician is thereby obligated to promote all aspects of his/her patient's health at all times. For instance, if a physician were to bind the broken bone of a person with leukaemia while not treating —at that moment— the leukaemia, is the physician acting towards the end of binding bones rather than health? No, the physician would simply be acting in pursuit of an aspect of health—the proper functioning of bones— while not pursuing another. Moreover, this is true even when a patient acknowledges the reality of human mortality and chooses not to pursue long-term survival but rather quality of life in the remaining days, i.e. palliative care. Palliative care tends to focus on things like pain management and progressively withdraws restorative medical interventions when, in the judgement of the patient, in collabouration with the physician, those treatments are deemed no longer beneficial. This is usually due to the fact that those medical interventions are negatively impacting the patient's quality of life. Does this mean that palliative care does not have the promotion of health as its end? No, undue pain is injurious to a person and the pain management in palliative care seeks to limit this injury. When I have a headache and take some Tylenol I am doing so because the headache is somehow injurious and I wish to restore the proper function of my body, including the lack of annoyances such as headaches. What is my end in taking the Tylenol? The restoration of health. Likewise, the patient nearing the end of their life receiving palliative care is still pursuing aspects of health such as managing of pain, even though he/she acknowledges the natural diminishment of all natural bodies and accepts that survival is no longer a reasonable long term prospect. This requires careful judgement; as long as it is a reasonable determination, then the patients wishes should be respected. By reasonable, I mean a judgement that at least to some degree accounts for the proportionality of the benefits of the treatment and its negative consequences. For instance, an 80-year-old man with prostate cancer, which tends to be slow-moving, may reasonably refuse any treatment other than, perhaps, pain management. Conversely, a person who was stabbed and did not wish to have stitches to seal the wound because this would lead to a scar appears far less reasonable; this patient would not be a proper candidate for palliative care, but rather is an individual who is grossly disinterested in there own survival.

promotion of health, as any health-promoting effects would be tangential. The reseeding of the lawn could potentially be a just, non-maleficent, and beneficent act, but it would be non-medical because its end is not to promote health. Being a non-medical act and, therefore, outside of the scope of the medical profession, it would not be morally objectionable. However, the physician would not be required to perform such an act because it is non-medical. If a law were enacted that forced physicians to build patios, such a law would rightly be judged as absurd. However, when a physician objects on conscience grounds to involvement in a practice that he or she considers immoral, that objection constitutes an act of prudential judgement: it is a judgment that the practice in question promotes a particular evil, in so far as evils are by their very nature opposed to health.[125] Just as the physician (*qua* physician) would rightly reject a legal mandate to engage in a nonmedical act, he or she would have all the more reason to object when asked to perform an act opposed, in the physician's judgement, to the good of medicine. If the general ability of physicians to make prudential judgements concerning health is undermined, the field of medicine would be effectively destroyed. To be clear, some limits on the power of physicians to make such judgements are necessary; this power is limited by the principles outlined earlier, principles on which I will further elaborate in this chapter. However, if moral, prudential judgements are jettisoned from medicine, the good of medicine is jettisoned along with it, for without moral, prudential judgements the physician cannot orient their actions to the good of health. If acts cannot be properly ordered to the good of health, medicine will lose the good of

[125] This is not to say that acts which have foreseen, though not intended, evil effects are by their nature opposed to health. Medicine may have side effects which are in some sense injurious to the patient; this does not mean that those medicines are evil by nature, as the use of those medicines meets the standards of the principle of double effect, which will be discussed below. Likewise, amputations do in some sense cause harm to the individual, but as long as the surgeon is removing a diseased organ that will threaten the health of the patient or cause chronic pain, this would not be the direct pursuit of an evil, but rather the pursuit of a good—the health of the patient— with an unintended, though foreseen, evil effect.

health as its *telos* and, just as Ratzinger argued with respect to society at large, there would be no way to distinguish medical progress from regress.

Conscience, since it is simply an act of prudential judgement concerning matters of moral content, is frequently used in medicine. While not all actions of conscience concern contentious matters, the fact remains that when a physician judges that a particular course of treatment is good or bad in a certain situation, that is a judgement of conscience.[126] These judgements of conscience routinely override principles such as autonomy. For instance, it is generally understood that antibiotics serve no effective purpose against viral infection, and that giving antibiotics unnecessarily can lead to an increase in drug-resistant strains of infections. A physician who refuses to administer antibiotics to a patient suffering from a viral infection would be right to do so. This is a judgement of conscience. The physician judges that the giving of these drugs would advance harm (the increase in drug-resistant infections) to no real benefit. Therefore, the physician judging the action to be wrong would not give the drugs. This conscientious judgement informs the standard medical practice.

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[126] Recall the briefest form of the definition of conscience laid out in section 1.1: conscience is a prudential judgement with respect to a matter with moral content. Strictly speaking, all human choices are directed toward some good. Therefore, all human decisions fall under conscience's jurisdiction. There are obviously matters of prudential judgement in any field that possess little moral content, though these remain under the jurisdiction of conscience; indeed, most conscientious judgement are of this sort, and are made easily and habitually. Decisions concerning the best route to get to work are prudential judgements with little direct moral content, as are administrative prudential judgements, such as the format of reports or the allocation of breaks. Since these are morally simple judgements, they are not generally the subject of ethical disputes. However, medicine is a field which is full of moral content. When physicians are weighing particular options about what treatments to adopt or avoid, they are clearly making conscientious judgments, as they wish to promote the good of their patients. They are conscientious judgements insofar as they are prudential judgements ordered towards the pursuit of certain goods and the avoiding of evils. This broad appeal to conscientious judgement is in keeping with general medical standards with regards to the broadness of ethical implications in medicine. For instance, in a paper arguing that conscience is essential to ordinary clinical judgement, Warren Kinghorn writes: ""Ethics" is not a specialized and esoteric discipline to be invoked only in moments of crisis or "dilemma"; it is, rather, simply an account of what good medical practice looks like in particular situations, even when these situations are pedestrian and uncontroversial. Daily bedside teaching rounds are pervasively about "ethics" even when that word is never mentioned." Warren Kinghorn, "Conscience as Clinical Judgment: Medical Education and the Virtue of Prudence," AMA Journal of Ethics 15, no. 3 (2013): 202-05.

The case of conscientious judgments with respect to antibiotics, then, is not unique. The judgement of conscience is at play in every medical judgement, only its role is not given much thought because most medical judgements are not contentious. In 2019, however, an Ontario Superior Court ruling upheld that physicians have the right to refuse to perform CPR on patients if they do not deem it medically beneficial.[127] In this case, an 88-year-old man suffered a heart attack while in hospital and the physicians judged that performing CPR would simply break the man's bones with no real benefit. In other words, they deemed the action harmful and not likely to promote health; therefore, their consciences prohibited them from performing the act. Whether or not the physicians were correct in their assessment of the situation or the moral matters at play is irrelevant to the fact that this case clearly displays an exercise of conscience. The court finding holds that physicians must make their best judgement as to whether to perform the act of CPR. This legal finding is in keeping with the moral procedure of assessing conscience rights that I have laid out. The physicians' consciences prohibited them from performing the act, and therefore they did not perform that act. What did they need to justify their conscientious objection? They simply needed to be reasonable in their judgement. If the case were of a 25-year-old athlete with a good chance of responding well to CPR, and the physicians, for reasons known only to themselves, refused to engage in CPR, it is doubtful that the court would have ruled in their favour, as they would have been making an unreasonable judgement.

3.3 Are Abortion and Euthanasia Ordered to Health?

The application of the natural law principles laid out in Chapter 1 provides a solution to the problem of how to address the right of medical practitioners to act in accordance with their

[127] James Downar, Eliana Close, and Robert Sibbald, "Do Physicians Require Consent to Withhold CPR That They Determine to Be Nonbeneficial?" *Canadian Medical Association Journal* vol. 191, no. 47 (2019): E1289-1290.

consciences. As previously illustrated, the absolute authority of conscience with respect to the individual is an important consideration for government actors to take into account if they wish to maintain a free society. Nonetheless, the government does have the authority to impose on, and even out right contradict, conscience when doing so is necessary to maintain the common good. The relatively recent (historically speaking) addition to the practice of medicine of abortion and the still more recent practice of euthanasia creates a difficulty with respect to conscience rights and medicine. If a physician objected to the use of medication or surgery in principle, it would be difficult to conceive of how they could still practice medicine, as such principled objection would render the field of medicine all but impossible to practice.[128] If an individual made such an objection, government actors could not reasonably be expected to accommodate that objection. However, an objection limited to involvement in a specific practice is clearly different than a broad objection to the field of medicine. Those who object to participating in abortion and euthanasia no doubt possess varied reasons and objections with varying degrees of cogency. This thesis will simply address those who object to any involvement in the practices of abortion and euthanasia, either in performing the task or in referring. As this is the broadest possible objection to physician involvement, if this category of objection is respected by the law, it will naturally help resolve all lower levels of objection.

Abortion and euthanasia are two of the most controversial practices and most often-cited examples of conscientious objection concerning physicians. The conscientious objection to either is generally based on an objection to the direct and intentional taking of innocent human life.[129]

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[128] For the sake of simplicity, I will generally refer to physicians' conscience rights. That said, nurses and other health professionals face similar challenges. The solution to their conscience rights is virtually identical to that of the physician. The only difference would be a slight variation in practical application to deal with the particularities in different jobs in the medical field.

[129] Some object to abortion and not to euthanasia or vice versa. Whether or not it is correct to create a moral distinction between these two practices is a question that it is unnecessary to pursue. That may be relevant when discussing the logical consistency of a particular physician, but it is irrelevant with respect to conscience rights.

The objection to abortion among medical practitioners is twofold. First, if medicine as a field is directed to health, then practices that are ordered against health are by their very nature contra-medical. From this fact, it follows that if abortion as a practice is not chiefly ordered towards health but rather towards death, then it is by its nature beyond the scope of medicine. Second, abortion is in most cases the direct and intentional destruction of the pre-born human life; therefore, not only does the classical prohibition against providing abortifacients found in the Hippocratic Oath apply to it, but so also does the generally accepted moral prohibition against taking innocent human life. Both objections rely on the presupposition that the preborn are, in fact, independent human beings. Therefore, before proceeding further, it is necessary to briefly sketch out an argument for this presupposition.

Due to the principle of biogenesis, species reproduce offspring in their own kind. This fact is implicitly understood when people ask a pregnant woman "what she is having": they are asking whether it is a boy or a girl, not for a statement on the species or nature of the offspring, as that would be pedantic. This general social presupposition is affirmed biologically:

> Human development begins at fertilization when a sperm fuses with an oocyte to form a single cell, the zygote. This highly specialized, totipotent cell (capable of giving rise to any cell type) marks the beginning of each of us as a unique individual. The zygote, just visible to the unaided eye, contains chromosomes and genes that are derived from the mother and father. The zygote divides many times and becomes progressively transformed into a multicellular human being through cell division, migration, growth, and differentiation.[130]

[130] Keith L. Moore, T.V.N. Persaud, and Mark G. Torchia, *The Developing Human: Clinically Oriented Embryology*, 10th ed. (Philadelphia: Elsevier, 2016), 11, as cited in Curlin and Tollefsen, *The Way of Medicine*, 116. *The Way of Medicine* has a more expansive argument illustrating that human life begins at fertilization. This argument is found on pages 111-116. Notably, their argument also responds to two counterarguments: first, that human life cannot begin at fertilization because twins can divide; and second, that at the earliest stages the embryo is merely an aggregate of undifferentiated cells. Their response to the first is by arguing that the fact that one thing can divide and become two things does not mean that it was not originally one thing. Their response to the second objection is to deny its scientific basis and general reasonableness: "[E]mbryologists observe division of labor among the cells of even the very early embryo, and from the first cell division the roles of some cells can be distinguished from the roles of others" (*The Way of Medicine*, 117). Moreover, Curlin and Tollefsen note how the embryo acts in a directed manner towards its development, which indicates that it is not a clump of cells but rather a cohesive whole. While they do not cite this specifically, this appears to be a quasi-appeal to Aristotle's oft-cited dictum "That which exists on its own acts on its own," or, action follows being. Since the embryo possess independent action it must possess independent being.

While this human life is highly dependent on his or her mother during gestation and beyond, the fact remains that a preborn child constitutes a nascent human life. This human is not simply human in the way the mother's appendix is human: it is an independent human life in that it will, absent some natural or artificial impediment, continue to develop just as any *post utero* human develops. It is true that preborn humans are extremely fragile, and unfortunately, natural death is not uncommon. However, this fact, though tragic, no more compromises the preborn human's status as an independent human life than the fact that infants who tragically die of SIDS compromises the status of infants as independent human life.

Every characteristic distinguishing a human immediately after fertilization and a human walking down the street comes down to four factors: age, level of development, location (a preborn human is located in the mother's womb), and degree of dependence. Unless the originating point of human life is treated as the point when human dignity is bestowed, any other point will be arbitrary. Moreover, as all of these distinguishing characteristics are relative, this would render the degree of human dignity relative if these characteristics are deemed to bestow dignity. For instance, a 30-year-old is far more developed and ideally less dependent than a 6-year-old—yet we would rightly recoil if it were suggested that the 6-year-old possessed less dignity on this account. Some, such as Peter Singer, may accept that a pre-born human life is indeed a living human, but nonetheless maintain that it does not yet possess personhood.[131] Laying aside the long, ugly history of distinguishing between human persons and human beings, even if one were to grant Singer's contention that the human personhood of the preborn is in

[131] Peter Singer, *Practical Ethics* (New York: Cambridge University Press, 1993), 93, 111. For a further discussion of Singer's approach and a response see, Charles Camosy, "Common Ground on Surgical Abortion? Engaging Peter Singer on the Moral Status of Potential Persons," *Journal of Medicine and Philosophy* 33 (2009): 577 – 593.

doubt due to his functionalist model of personhood, the reasonable course is to err on the side of caution. If a hunter is unsure of whether the rustling in the bushes is a deer or a human person, it would be gross negligence to shoot and hope for the best.

While Singer's argument for the permissibility of abortion denies the personhood of the preborn, Judith Thomson presents an argument which apparently grants the personhood of the preborn.[132] In this argument, she presents a few hypothetical cases, three of which I will briefly discuss. The first presents a woman who has been kidnapped by the music appreciation society, and then attached to a famous violinist. The violinist needs the use of her kidneys for nine months, which Thomson extends out to nine years for rhetorical effect. Insofar as she is now in the position of providing for this violinist, medical providers might refuse to detach the violinist, as this would, in effect, result in his death. The second apparently analogous situation she presents is that of a burglar climbing into the window of a house. Thomson argues that the woman is no more responsible for the consequence of consensual intercourse than she would be for the burglar entering her house, having left her window open. Thomson employs this analogy to account for the fact that even if the violinist argument stood it would only morally account for abortion in the case of rape, and not for the failure of contraception, as in this example. Finally, she presents an imagined situation wherein a woman is trapped in a house with a rapidly expanding baby. The baby will eventually kill her. Therefore, even though the child is innocent, she has the right to kill the child in self-defence. Since the child threatens her life, she is justified in killing the child to end that threat. While none of these analogies foreground the relationship of a mother and child, Thomson posits, without argument, that the responsibilities of motherhood

[132] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs*, vol. 1, no. 1, (1971): 47-66.

flow entirely from consent. Therefore, if a given mother does not consent to the responsibilities of motherhood, those responsibilities do not exist.

The problem with the three analogies presented above, according to the natural law account that I have advanced, is that they proceed from a denial of nature, both in denying the natural ends of acts in general, and in denying natural relations with respect to the natural connection between mothers and their offspring. Moreover, Thomson also does not acknowledge the difference between natural and unnatural states. Considering the violinist in her analogy, she argues that the woman is not bound to maintain her support for the violinist, as his situation, while tragic, does not concern her. In this she is largely correct, though the situation might change if the violinist were her son rather than a stranger. Where she errs is in assuming that the removal of the kidney connection is the same thing as killing. To remove the tube is to remove his unnatural use of her body, from which death would follow as a tragic foreseen but *not willed* consequence. She would not be justified in dismembering the violinist, or injecting him with some toxic substance. In addition to the utter lack of relationship between the violinist and the woman, the act of disconnecting the violinist differs in kind from that of an abortion. Abortion seeks the death of the preborn person; the disconnecting from his or her mother is a by-product of the direct and intentional killing of the preborn human life. This is the exact opposite of the violinist case. Furthermore, the violinist is in an unnatural state; the removal of the kidney connection is the removal of an unnatural aid. Conversely, the preborn human is in his or her natural state. The removal of the child from the womb with the end of killing it is the removal of the natural and ordinary means by which people at that stage of development sustain themselves. Hence, detaching the violinist is not properly analogous to the act of abortion.

The burglar in Thomson's analogy is trespassing and thus not in the natural environment of a home, in which an ownership claim can be made. Moreover, sneaking through a window is not analogous to sexual intercourse. All mammalian species reproduce by intercourse. This act is directed by nature to reproduction. Unless Thomson is likewise positing that windows are specially designed burglar entrances, the burglar sneaking in because the window was open to air out the house is not analogous to pregnancy as a result of intercourse. The burglar's entry in this situation is not analogous to pregnancy, as intercourse is naturally ordered to pregnancy, but rather to something like a disease. Pregnancy, though, is not a disease, but rather a sign of a healthy reproductive system.

As for the case of the rapidly expanding baby, this is simply a poor analogy. In cases where a pregnancy risks the life of the mother, the threat is not the baby itself but rather the surrounding health issue to which the baby contributes. A better analogy would be that a mother and her wounded child are trapped in a leaking airlock, where the child is consuming some of the air the mother needs to survive; if the mother dies, she will not be able to treat the wounded child and therefore the child will likely die. This situation is deeply tragic, but in this situation, the child is not the aggressor, innocent or otherwise. The child is simply a contributing factor that worsens the prospects of the mother.

Despite these weaknesses in Thomson's position, a person in favour of abortion as healthcare might look to develop her account and apply it to those cases where the mother's health, be it mental or physical, is threatened by the pregnancy. Considering the objection that mental health is threatened by pregnancy, there are two problems:

A. It assumes that we have a clairvoyant understanding of what mental health entails and that abortion would remedy this situation with little to no risk of regret or without further damaging mental health.
B. It ignores the actual act of abortion with a utilitarian view of the end justifying the means.

Even if we were to grant objection A, despite the fact that it lacks epistemic humility, and assume that abortion as a rule remedies mental health and does not carry with it severe risks of damage to mental health in the form of regret and depression, this still does not address the issue at hand, which is the issue raised by objection B. A person could claim that their spouse causes mental distress, but that does not mean that spousal murder is therefore oriented to health. Therefore, while the mental health of the mother is indeed of medical concern, a solution to this cannot involve the direct and intentional killing of an innocent, as this lacks proportionality and moreover, the suffering of one party, while tragic, does not justify the killing of an innocent. Even if we grant the dubious moral claim that the suffering of one party does justify the killing of an innocent, this still would not make it a medical act, as the act of killing by its nature is not ordered to health. Therefore, even if we grant that abortion is morally licit, that is not enough to make it the concern of medicine.

In the case of genuine medical risk to the physical health of the mother, we must first consider the principle of double effect.[133] Broadly stated, the principle of double effect is

[133] The proper interpretation of the principle of double effect is the subject of some controversy. Specifically, this dispute involves NNL vs TNL and surrounds how large of a role intention plays in principle. This thesis will not attempt to remedy those disputes, as it largely falls outside the present use of double effect reasoning. For a brief account of the TNL view, see Jensen, *On Good and Evil Acts* (2, 54 n24, 159–62), and for a brief discussion of the NNL view, see Finnis, *Natural Law and Natural Rights* (120, 122-124, 130). See also Joseph Boyle, "Toward Understanding the Principle of Double Effect," *Ethics* 90 (1980): 527–38. Tollefsen also approaches this topic from an NNL view. The different views on double effect do not impact significantly on the conclusions arrived at in my discussion.

deployed in cases in which an act which is not evil in itself has two effects: one good and intended, and the other bad, and, while foreseen, not intended. For the act to be considered moral the good effect must not flow from the evil effect and, in addition, must be proportionate to the foreseen evil. *The Way of Medicine* presents a tidy summary as follows:

1. The act is good in itself (sometimes stated as the act is not intrinsically wrong).
2. The bad effect is not intended.
3. The good effect is not achieved by means of the bad effect.
4. There is proportionate reason for accepting the bad effect.[134]

With respect to the case in which the preborn human risks the life of the mother, the clearest case is that of an ectopic pregnancy. In this case, unless the child is removed, the mother's life will be in severe jeopardy. Removing the damaged section of the fallopian tube is necessary to safeguard the mother's health; in this case, the child will die, but this effect, while tragic and foreseen, is not intended. The child dies not due to a directly intended act, as in abortion, but due to our present inability to maintain the life of a child at that stage in pregnancy. The removal of the damaged fallopian tube is an action ordered to the promotion of health in the mother. Therefore, this procedure, unlike abortions understood as analogous to fictitious examples, would constitute healthcare.

While Thomson's argument does not succeed in general, perhaps her most glaring error is that she treats the mother and child's relationship as one between strangers. None of her analogies involve motherhood. She attempts to mitigate this anticipated objection by pointing out that if a woman's aim were to contracept or not to accept the responsibility of motherhood, then she may morally refuse such responsibility. Her argument, however, overlooks the natural

[134] *The Way of Medicine*, 88.

relationship between mother and child and the different *kinds* of harm that are inflicted on each in the course of an abortion. This is no small oversight, as it flies in the face of all natural and basic human experience. Mothers raise and often risk death for their young in virtually every species. When odes are written to motherhood, these refer not to the cold realism of a contract in which a mother chooses to accept the privileges and duties of motherhood. Rather, they are written in light of the natural warmth and gratitude children have for their mother in particular, and that society has for motherhood in general.[135] Thomson does recognize that a woman who has accepted the responsibility of motherhood has a responsibility for her child. However, if the duty of motherhood were purely consent-based, and if a woman were to have only the responsibilities she has consented to, then it seems that a mother could draft any internal agreement with her child. She could draft an internal contract that states she will consent to carry out the duties of motherhood until such time as it is inconvenient. If a mother has no natural duty and owes nothing to her child, then, clearly, she could consent to any such agreement she wishes.

The preceding set of arguments is a brief sketch of why those opposed to the practice of abortion refuse to engage in it. They judge that the preborn child possesses worth and dignity, and therefore refuse to intentionally cause or facilitate by referral its destruction. Aside from the general moral issues involved in directly pursuing the death of an innocent, physicians who object to involvement in these acts also do so because these practices are manifestly not ordered to health. Their judgement is reasonable, and they should not be compelled to act otherwise.

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[135] An obvious objection to this point is concerning the case of adoption. In adoption parents take on the role of mother and father even though they are not the natural parents of the child. Does this mean that they are not parents of their adoptive child? No, in an act of charity they have chosen to take on this role. However, they possess this role by analogy to the that of birth parents, as in the ordinary course of matters birth parents raise their children. Charitable adoptive parents are only employed when birth-parents are unable to fulfill their role for one reason or another. The natural default to birth parents is seen in the fact that we would rightly recoil from a situation wherein children were commoditized and treated like puppies from a breeder.

Objection to euthanasia, by comparison, is relatively simple, largely because the humanity and personhood of the elderly and infirm are already generally accepted. The physician who objects to euthanasia does so on two grounds, one of which is specific to medicine and the other, more generally, with respect to morality. First, there is the general moral prohibition against the killing of the innocent. Second, one can object because euthanasia is manifestly ordered to death rather than to health and therefore should not be a concern of or fall within the practice of medicine. End-of-life medicine is very complex, since, as people near death, their bodies naturally degrade and cease normal functioning. Additionally, quality of life concerns generally take on greater prominence with respect to treatment, medical intervention, pain management, etc. Proper medicine does not entail vitalism, the belief that the physical death of the body is to be avoided at all costs; such a view reduces the human person to a machine that must simply be maintained with no concern for dignity. However, there is a difference between allowing death and acting with the intention of death. Since the end of medicine is health in accordance with the human good, any act intentionally directed against health is, by that very fact, not in accord with medicine's true aim. Certain medical practices may unintentionally hasten death in their pursuit of health, but they are still ordered to health. For instance, pain management may reduce the heart or respiration rate. These consequences, while foreseen, are not intended, and, assuming that the pain management is proportionate, it is licit whether or not it unintentionally hastens death. Euthanasia, however, is categorically different. The end of euthanasia is the death of the patient, not the treatment of disease or the management of pain. In the case of euthanasia, it would seem that life itself is treated as a disease to be cured by death. But it is absurd to claim that intentional death can be ordered to health. Therefore, the physician objects to euthanasia on the grounds that it is directed towards death and is therefore contra-

medical. Additionally, as the patient is innocent, the general prohibition against the killing of an innocent comes into effect, a prohibition that applies just as well to suicide, assisted or otherwise, as it does to general murder. This is so even if the innocent seeks assistance in their death or requests active euthanasia.

3.4 Conscientious Objection and State Action

Now that we have established that medicine is ordered to health, and that abortion and euthanasia are contra-medical (or that it is reasonable to hold that they are), one task remains: we must discuss how this ought to impact state policy. The preceding discussion of abortion and euthanasia are not intended as an exhaustive exploration of the issues at play. While they demonstrate that abortion and euthanasia are not ordered to health but rather death and are, therefore, contra-medical acts, strictly speaking, it is not necessary to prove this definitively in order to respect the physician's right to conscientious objection. Even if we were to grant that a generally reasonable person could hold that abortion, for instance, is morally licit and potentially medical, this would not render null the physician's right to refuse involvement in it. To compel a physician to engage in an act which is directly opposed to the judgement of his/her conscience — that abortion and euthanasia are morally impermissible— the onus is on the state to prove that that judgement is manifestly unreasonable, to the extent it opposes an act necessarily connected to the common good. If the physician who objects deems the practice prohibited by his or her conscience, what should the state's response be to this judgment? As previously demonstrated, governments of free societies are authorised to impose on conscience by rendering impermissible acts that are merely permissible. In order to exercise this authority, all the government needs to demonstrate is that the law that creates this imposition is reasonably ordered to the common good. However, when conscience binds either in the negative or positive direction, as in the case

under consideration, the mere reasonability standard is far too weak to maintain any real protection of conscience. Rather, the government must demonstrate that the law in question is necessary to maintain the common good, and that an objector is manifestly unreasonable in spite of their claim that their action is in accord with the common good. Otherwise, the state, in forcing an individual to act directly against his/her conscience, unjustly violates his/her conscience.

Even if granted, Thomson's argument does not demonstrate that opposition to abortion is manifestly unreasonable. Quite the opposite, she grants that a reasonable third party can say "[t]here's nothing we can do for you. We cannot choose between your life and his".[136] Indeed I am not aware of a serious discussion that proposes that opposition to abortion or euthanasia in itself demonstrates unreasonableness. The arguments that exist tend to focus on not imposing one's moral standards on others. However, that is precisely what proponents of abortion and euthanasia seek to do to physicians who object. If physicians were morally objecting to ordinary medical care, this would be a different case. For instance, if a surgeon objected on moral grounds to repairing cervical tears caused by childbirth, he or she would have to demonstrate how a rational individual could hold this view. It is doubtful that any rational argument against repairing cervixes could exist, as restoring a damaged part of the body to health is clearly ordered toward the end of health. However, the cases of abortion and euthanasia are manifestly different from this kind of example, as no serious person believes that no one, in principle, can object to these practices. If proponents of abortion and euthanasia wish to override conscience rights, the onus is on them not merely to demonstrate that these are standard medical practices, but rather that they are so manifestly ordered to health (and the common good) that no rational

[136] Thomson, "A Defense of Abortion," 52-53.

party could object to them. Failing this, the physician's right to conscientiously object stands. This objection holds, whether in reference to performing these acts or providing effective referrals to others who will. To legally insist on effective referrals is to still mandate that physicians participate in the practice. If a physician views abortion or euthanasia as morally equivalent to murder, an effective referral is no more morally licit than referring someone to a contract killer rather than performing a murder oneself. Therefore, in order to mandate effective referrals while at the same time respecting conscience rights, the proponent of abortion and euthanasia retains the burden of demonstrating the unreasonableness of the objection to those practices in principle.[137]

Physicians who conscientiously object to abortion and euthanasia are seeking not an exception to the general rules of medical prudence, but rather a consistent application of them. For instance, in the earlier case discussed, concerning the Ontario physician who refused to

[137] An opponent could argue that referrals are a common part of medical practice and therefore it is unreasonable for a physician to object to referrals. Clearly, referrals are necessary for patients to access specialists. But while it is true that referrals are part of medicine in general, that does not mean that they are appropriate or medical in every instance. Giving injections is a general part of medical practice. For a physician to object to giving injections in principle would be unreasonable. However, it does not follow that the physician is thereby bound to inject any substance into any person for any purpose. Likewise, a physician's general acceptance of giving referrals does not mean that he/she is bound to give any such referral for any such purpose. The general purpose of a referral is that the physician direct the patient to a specialist to further their care. This assumes that the physician believes it is in keeping with the end of promoting that patient's health to get access to that specialist. In the case of conscientious objection to abortion or euthanasia, that is precisely what the physician denies. The physician who conscientiously refuses to refer the patient for abortion or euthanasia believes that those acts would be harmful to their patient as, rather than being ordered to health as their end, those acts are ordered to death. Moreover, this refusal to refer need not be isolated to abortion and euthanasia. For instance, let us consider a physician who had a patient with debilitating hypochondria who requested a test that, in the judgement of the physician, was unnecessary. The physician would reasonably refuse to refer as the tests would likely provide no medical benefit but would rather exacerbate a mental illness and bog down an overburdened medical system. This refusal to refer would be an objection on conscience grounds. The physician would believe that referring in this case advanced an evil (exacerbating a mental health issue and wasting resources) to no benefit. That is precisely the same reason why a physician opposed to abortion or euthanasia would refuse to refer. In the course of writing this thesis, I spoke with several physicians all of whom stated that they had refused to refer people for tests that, in their view, were unnecessary and/or harmful to the patient. Clearly, physicians refusing to refer for abortion and euthanasia are acting in a manner consistent with general medical practice. They are making a conscience judgement that abortion or euthanasia would harm their patient, and therefore they are refusing to refer. It is those who deny conscience rights with respect to referrals who are asking for those cases to be treated differently, whereas the physicians who object to referrals when they believe that the referral would harm their patients are simple following standard medical procedure by acting for their patients good.

perform CPR on an elderly man with brittle bones, this was a conscientious objection to using CPR in that situation. The physician judged that the act would harm his patient to no real benefit, and that therefore the action was not ordered to health. What was required for him to object to performing CPR? Was he required to rationally prove that no one could possibly make a different assessment? No, it was simply necessary to demonstrate that this was a reasonable view. Physicians who object to providing abortion or euthanasia are in like manner judging that these acts do not accord with medicine, their patient's good, or sound ethics. Physicians make decisions like this frequently. Every time a physician objects to performing a particular treatment with respect to a patient, these are prudential judgements with respect to a moral matter—namely, promoting their patient's health. Another term for an act of prudential judgement with respect to a moral matter is conscience. To eliminate or seriously undermine conscience's protection, then, would at the same time eliminate the protection of physicians making prudential judgements in general.

Laws, or policies of regulatory bodies, that command physicians to violate reasonably held conscientious positions are by their very nature ordered to the private rather than the common good. In an ordinary medical situation, physician and patient participate in health as a type of shared (common) good. This is because it is the patient's health that is directly promoted, and the physician who acts to foster the patient's health as an end. The fact that this interaction is a type of common good means it is legitimate for laws to protect and promote a healthy doctor-patient relationship, as laws are ordered to the common good. However, if a law orders a reasonable physician to act in a manner he or she deems harmful, this law cannot, in principle, be ordered to the common good. This is because the patient's and the physician's are in no way united in respect to the acts end. The patient deems the act as in some sense in accord with

health, and the physician has precisely the opposite view.[138] These laws would be ordered not to the common good but rather to the promotion of the private good of one party over another. Such laws do not meet the definition of law. Therefore, such a law would be not a law in fact, but only in name.

There are those who object to the concept of conscientious objection in medicine by arguing that this is not a proper appeal to conscientious objection properly considered. They do so by arguing that conscientious objection in medicine is manifestly different from legitimate conscientious objection in other contexts, such as military drafts and combat. Ezekiel Emanuel and Ronit Stahl argue against conscientious objection in a medical context in their paper "Physicians Not Conscripts."[139] Stahl and Emanuel argue that physician conscientious objection is not properly named, as it semantically borrows the phrase from pacificist objection to war, but it is substantially different.[140] They write:

> [C]onscientious objection in health care differs from conscientious objection to military service in five important ways: first, it objects to professional practices, not state-mandated conscription; second, it occurs within the context of a freely chosen profession; third, it

[138] This is of course assuming that no coercion occurs either by subtle pressure from physicians or societal pressure. This is not the case in reality. In hospital visits and counselling as a parish priest, I have encountered numerous people who felt pressured into medical decisions. For instance, I have counselled women who had physicians try to persuade them to get an abortion due to a genetic defect in the child. I also often encounter people in nursing homes who express a desire to die due to the fact that their family rarely visits. These people do not want to die because they believe that is good, but rather they are lonely and feel that they are a burden. That said, while I acknowledge that people often experience some form of coercion, I will treat this matter assuming that women who choose abortion always do so freely, and people who seek euthanasia are doing so because they are experiencing pain that cannot be remedied by something as simple as family visiting. This is not true in my experience. However, I will grant this as this allows the widest possible latitude to my opponents.

[139] Ronit Y. Stahl and Ezekiel J. Emanuel, "Physicians, Not Conscripts — Conscientious Objection in Health Care," *The New England Journal of Medicine* vol.376 no. 14 (2017): 1380-385. A similar argument is made by Julian Savulescu, "Conscientious Objection in Medicine," *British Medical Journal* vol. 332, no. 7536 (2006): 294-297; cf. Julian Savulescu, "Should Doctors Feel Able to Practise According to Their Personal Values and Beliefs?—No," *The Medical Journal of Australia* vol. 195, no. 9 (2011): 497. For a more expanded form of this argument, see Dov Fox "Medical Disobedience" *Harvard Law Review* (Vol. 136, forthcoming). Since these arguments are the same in substance, the Stahl and Emanuel argument will be taken as representative.

[140] At no point in their argument do they consider the possibility that there are various types of conscientious objection and appear to simply assume that, for conscientious objection to be legitimate, it must precisely mirror the case of conscientious objection in war. They never explicitly state this premise, but it is clearly an operative hidden premise. This substantially weakens their argument as the whole argument hinges on a hidden premise they make no effort to justify.

> allows selective objection to professionally accepted interventions; fourth, it accepts objection without external scrutiny; and fifth, it shields the objector from all repercussions and costs.

The first of these objections is a distinction without a difference. The state is a political organization entrusted with the proper authority to make laws and policies with an interest in the common good of society. The medical bodies that define professional practices are bureaucratic agencies that enact rules (laws) and policies with an interest in promoting health. Both the state and medical bodies are essentially political bodies, and as such, they can be objected to and are subject to reasoned disagreement in a free society. To pretend that medical bodies are beyond reproach and that anything they state is *de facto* medically appropriate is no less destructive than if such claims were made of a government; critical scrutiny is appropriate—indeed, necessary—in both contexts. Stahl and Emanuel's only apparent defence against this charge is an appeal to Rawlsian reflective equilibrium.[141] However, none of this reflection is displayed in their paper, as they never once explain why, abortion, for instance, is proper medical care; rather, they simply appeal to authority, even when this leads to absurd conclusions.[142] For instance, they argue that euthanasia and abortion are simply standard practices, noting that physicians are not permitted to assist in capital punishment, yet they are mandated to assist in euthanasia. They are correct that it is improper for physicians to assist in capital punishment. Whether or not capital punishment is morally licit, it is not ordered to health and, therefore, not medical. However, there is something very odd in the suggestion that the killing of the guilty is rightfully prohibited, but that the killing of the innocent is mandated. They likely make this distinction because they

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[141] Stahl and Emanuel, "Physicians, Not Conscripts," 1382.

[142] Their commitment to allowing the free exchange of ideas necessary for some sort of Rawlsian equilibrium to emerge is further drawn into question by the fact that they do not cite or address anyone who disagrees with their position—nor do Savulescu or Fox for that matter. If they are arguing that an open debate among experts is the best method to come to conclusions on matters surrounding conscience rights it would behove them to engage with opponents of their position.

assume that since euthanasia at least in principle respects autonomy, it is therefore in the patient's best interest. However, they make no argument for this position. They never once argue for the medical appropriateness of contentious acts but purely appeal to the authority of professional bodies. If they possess a scientific or medical reason for abortion and euthanasia being proper medical acts, the onus is on them to state it. Simply stating that the medical professional bodies have made the judgement that abortion and euthanasia are standard medical practices[143] does not amount to an argument. Moreover, while technical expertise —which is presumably the expertise of these medical professional bodies— is obviously a consideration in medical ethics, Stahl and Emanuel make no argument as to why the moral character of abortion and euthanasia is a technical scientific question. Physicians who conscientiously object to involvement in abortion and euthanasia do not object on the grounds that they lack the technical abilities to carry out those acts. Rather, they object on the grounds that these act are immoral/contra-medical, which is more properly a philosophical question than a scientific one. Accordingly, while Stahl and Emanual's general argument is an appeal to authority, they conclude their paper by suggesting that legal authority is an unwelcome intrusion on what is

[143] It is important to note that the term standard practice can be used in two ways: in a descriptive sense or in a normative sense. As the name suggests, a descriptive sense is simply a description of what generally is done, whereas a normative sense is a statement of what ought to be done. Stahl and Emanuel are using the term in the normative sense as they are declaring that physicians do not have the right to object to these standard practices. Herein we have a strange variation of the naturalistic fallacy; let us call it the technocratic fallacy. Stahl and Emanual are attempting to derive an ought from a mere description of what is done. In order to escape this they must provide the reason why it is generally done and, therefore ought to be done by all. Since they do not make any effort to explain the underlying reasons why these practices, abortion and euthanasia, are beyond reproach, we are left with a pure appeal to authority, which I will call the technocratic fallacy.

properly entrusted to medical bureaucracies; this raises the question of where the limiting principle of the authority of the medical professional body lies.[144]

The second objection, that the medical profession is freely chosen, and the third, that conscience is selective, can be dealt with together. First, it is irrelevant that the medical profession is freely chosen, as the question is not whether the physicians want to be physicians, but rather whether practices such as abortion and euthanasia are proper medical acts. As for the second part of their objection that conscience objects to some things and does not object to others, this is a strange objection. Let us consider three analogies—Rosa Parks, a police officer, and a soldier—and appeal to Stahl and Emanuel's reasoning. Rosa Parks freely chose to take a seat on the bus. Riding public transit is inherently a public act and is thus subject to public authority. She could have chosen not to ride the bus, yet she chose to ride the bus while seated, thus violating the law, the public standard for action. She could have privately objected to the law, but in public, the law sets the standard for general behaviour. She violated this standard. Moreover, her violation was selective. She no doubt was very much in favour of laws prohibiting murder and theft, yet she selectively violated this law. By the Stahl and Emmanuel standard, this makes her a poor citizen who selectively violates the accepted public standard when she deems fit. Therefore, by this standard, she should have followed the law until such time as the legal standard changed. Stahl and Emanuel could object that while Rosa Parks' actions were performed in public she acted as a private citizen, and therefore was entitled to act on her conscience. But this public-private distinction simply does not hold. If citizens are only free to

[144]"The proliferation of conscientious objection legislation in health care violates the central tenet of professional role morality in the field of medicine… Although the political process may continue unabated, and courts may deem conscience clauses to be legal, it is incumbent on professional societies to affirm professional role morality and authoritatively articulate the professional ethical standards to which all licensed health care professionals must adhere." Stahl and Emanuel, "Physicians, Not Conscripts," 1384.

exercise their conscientious rights when they are deemed private, then there are no effective conscience rights. Citizens are always to some degree representative of the societies they dwell in.

Next let us consider a police officer and a soldier with conscientious objections. The nature of their objections would exactly parallel those of physicians, in the sense that the objections of both would have an intra-professional character: objection to an assigned task rather than an objection to a discipline as such. If a police officer objected to an order to club those peacefully assembled or a soldier objected to firebombing a village of innocents, yet the police officer still approved of investigating a murder and the soldier of guarding an airfield, these would be selective objections. They would not represent objections to the field as a whole, but rather objections to a particular order on the grounds that said orders violate their conscience. These are thus conscientious objections. Stahl and Emanuel never explain why the objection to select tasks rather than to the whole of a field is important. It is probably because wartime pacificists objected to active combat, and as such they objected to serving in combat as soldiers. That is a total objection to a field; however, it simply does not follow that if we grant that objecting to a field as a whole is legitimate, then *only* objecting to a field as a whole is legitimate. If there were a true thanatology, a field ordered to death, and a person freely entered that field and objected to killing, that would be absurd. Yet medicine is ordered to health, not death; therefore, some medical practitioners object to abortion and euthanasia on the same grounds that the police officer or the soldier would—namely, on the grounds of conscience violation. When we extend Stahl and Emanuel's logic to other situations, it is clear that their position lacks any demonstrable limiting principles. Their whole argument rests on a pure appeal to authority with no discussion of what limits that authority. Their loose appeal to a Rawlsian

reflective equilibrium is of no benefit here, as they have not identified any principles that would guide such reflection.

The fourth objection—that conscientious objection is not subject to external scrutiny—is simply false. A physician is not free to make just *any* conscientious objection, but only an objection that is reasonable. Recall the earlier example of the refusal to repair cervixes. If a physician made such an objection they would not be taken seriously, as the objection is unreasonable. Moreover, if a Jehovah's Witness wanted to become a surgeon but refused to take part in any procedure that involved a blood transfusion, that too would be unreasonable. Regardless of how genuinely a person held a view determining blood transfusion to be morally illicit, blood transfusion is an essential part of surgery and is reasonably ordered to the promotion of health. It is not reasonable to expect society to accommodate a physician with a conscientious objection to it. External scrutiny is needed to confirm that the objection is at least in principle reasonable and in accord with the medical good, namely, health. Conversely, Stahl and Emanuel seem to present medical professional bodies as above external reproach, as they insist that laws which impede their ability to establish independent medical ethics are in themselves unethical. This paradoxically means that they are not arguing against conscience rights in general, but rather only against conscience rights for the individual. They are presenting a scenario wherein professional associations may tolerate legal bodies but in reality they believe that they possess privileged access to a norm of "professional conscience" set by medical colleges. This means that the singular technocratic conscience sets the standard for any individual physicians. Physicians are only able to object when these bodies have not yet rendered a judgement. Such a scenario appears far more averse to external scrutiny than one that respects individual conscience clauses.

Stahl and Emanuel's fifth objection hinges on whether an objection is reasonable. If a physician objected to cervical repair there would be professional repercussions. However, if the objection were reasonable, then presumably no such repercussions would ensue. Again, by this same logic, the conscientious objection of a police officer who refused to club people in a peaceful assembly or the soldier who refused to firebomb a village can be understood as reasonable. Pragmatically, both the police officer and the physician in these scenarios could face consequences; if their objections were reasonable, however, such consequences would be unjust.[145] The whole argument hinges on whether abortion and euthanasia are proper medical practices and whether reasonable conscientious objections can be made. Stahl and Emanuel make no argument for this beyond an appeal to authority. Therefore, there is nothing to respond to, as the onus is on them to present arguments for their position.

While I clearly disagree with Stahl and Emanuel's treatment of conscientious objection, I of course agree with their general contention, which is implied though not explicitly stated, that medical ethics are something that needs to be taken very seriously. Medical ethics and its proper application have serious consequences for people in very vulnerable situations. However, Stahl and Emanuel do not appear to take seriously the fact that their solution in effect undermines the proper conscientious judgement of physicians, if their judgement is not in agreement with whatever standard is set by medical professional boards. There are two consequences that Stahl and Emanuel never consider.

First, their appeal to Rawlsian equilibrium would presumably require a relatively free and open exchange of ideas. However, there approach effectively dictates that disagreement with

[145] Dov Fox gives a full-throated endorsement of fining physicians who make conscientious objection claims. It is difficult to imagine a mindset more hostile to the freedom of conscience in society than his presented view. See Fox, "Medical Disobedience."

whatever professional associations declare as standard practice is inappropriate and should have consequences, such as the loss of a job. Obviously if the consequences to expressing disagreement with their contentions are the loss of a job or a fine or other such punishment, that would seriously undermine the free exchange of ideas. Even if, for the sake of argument, it was granted that Rawlsian equilibrium is always the appropriate method for mediating disputes around the nature of medicine and proper practice, it is reasonable to assume that many physicians would be unduly pressured into agreement out of fear of retribution when one decision would likely lead to negative consequences and the other would not. This would, in effect, lead to a might makes right model of medical ethics rather than one based in reasoned discourse.

Second, Stahl and Emanuel never contemplate that undermining the freedom of medical providers to make conscientious judgements compromises the ability of conscience to ensure that the physician is properly oriented towards the common good in other respects. As I argued in chapter 2, legal pronouncements have a pedagogical role. If legislation, or professional policy, undermines conscientious appeals this carries with it the risk of devaluing conscience's power to restrain action in other respects. If a physician compromises his/her values to avoid negative professional consequences, this undermines conscience's binding force and could lead to a weakening of conscience's ability to restrict action when following conscience is inconvenient or involves a financial cost.[146] Hence, the two preceding reasons, as well as the five prior

[146] Jaro Kotalik, a physician and bioethicist at Lakehead University, made a similar argument before the Ontario legislature: "if a physician would be forced to act against his or her conscience because of some legal instrument, it would weaken the physician's commitment to conscientious behaviour in other instances of their clinical practice. One day, he can refer a patient to MAID even if his conscience is telling him that it is wrong. The next day, he or she may act against one's conscience because it would bring about prestige or power or money, or simply because to be true to one's conscience would be just inconvenient. A well-functioning conscience is the best protection—the best guarantee—that society can have that the patients' and society's interests are well served in health care."

objections, strongly indicate that we should reject Stahl and Emanuel's undue restriction on conscientious objection, in favour of a moderate approach such as that presented by natural law.

Legislative Assembly of Ontario, "Committee transcript: Dr. Jaro Kotalik testimony." March 30, 2017. (Accessed December 6, 2022). https://www.ola.org/en/legislative-business/committees/finance-economic-affairs/parliament-41/transcripts/committee-transcript-2017-mar-30#P1418_374500

Conclusion

In debates concerning the rights of conscience generally, conscience rights of physicians are perhaps most hotly contested. No solution to determining the proper limits or extension of these rights offers an untroubled utopia in which conflict, even between parties operating in good faith, is eradicated from social discourse and public policy debates. That would be expecting far too much from a solution that would necessarily be primarily philosophical in nature. However, when one examines the issue from a natural law perspective, several clarifying aids emerge. First, the natural law tradition provides a precise definition of conscience. The examination of this definition, which, briefly stated, is that conscience is an act of prudential judgement with respect to the moral character of an act, reveals how wide-ranging conscience is in human life. Moreover, the fact that conscience is the sole means by which individuals can access the moral order means that issuing a blanket denial of conscience's proper authority is, in effect, to argue for practical nihilism, where might makes right. Since, for better or worse, there is no way to assess the morality of a situation apart from conscience, excluding conscience from public discourse and public action in conflict with the authority of the state is, in effect, to endorse tyranny.

If conscience is not allowed its legitimate domain, then all acts, or at least a large portion of them, become subject to the whims of an external authority. Whatever can be said about a society which supplants the individual conscience in deference to an overarching conscience, it cannot be suggested that such society would be free. If, on the other hand, out of deference to the proper authority of conscience no contravention were allowed, one would only exchange one tyranny for another. If all an individual had to do were claim conscience rights, thus rendering a

particular law null, the whole political order would be rendered null as well. The danger here is that this state of affairs would give rise to petty tyrants who, rather than using conscience to access the moral order, would wield conscience as a weapon in order to exert their will. At the very least, we can say that giving conscience rights too great a role would be to jeopardize the stability and order of the political community.

Clearly neither an extreme neglect nor over-emphasis on individual conscience is conducive to a free society. Here, again, the natural law tradition is helpful. If government and individuals are both ordered to the common good as their proper good, the government clearly has an interest in safeguarding the proper role of conscience in the individual, and the individual an interest in respecting the proper role of the government. This is because the individual is ordered to a particular aspect of the common good, and the government is entrusted with enacting laws and policies ordered to the pursuit of the common good of society with a view to the whole. This means that the individual ought to respect the proper authority of the government to safeguard the common good and grant the government the authority to impose on the individual conscience with respect to merely permissible acts. However, when it comes to the outright violation of conscience, which is sometimes necessary, a far higher standard is required. Governments are to act reasonably in their role of safeguarding the common good. However, insofar as they are also required to respect the authority of conscience necessary for a free society, any violation of conscience must not be found to be merely reasonable—it must be so necessary that opposition to the government's action in that context cannot be reasonably ordered to the common good. In other words, in the case forbidding permissible acts, the government merely needs to present reasonability. By contrast, when conscience binds, the

system inverts, and all that the individual needs to demonstrate to assert his or her rights against what would be violations of conscience is reasonability.

The preceding thesis discusses how a natural law understanding of conscience offers a compelling solution in the contemporary dispute surrounding conscience rights. It does not pretend to be the last word on this subject, however, and two different kinds of development are called for in a future study. First, in view of the limitations noted in the introduction, this thesis could be developed further to address issues concerning rights, equality, and social justice; in addition, future studies could engage more broadly with rival ethical positions on these issues –in particular, those arising from feminist critiques. While I attempted to respond to one of the more influential of these critiques, Judith Jarvis Thomson's, I would be remiss if I did not mention that she does not encompass the whole of feminist critiques, and that there exist other variants of this position.

The second area in which further study is called for is the natural law tradition itself. Two elements, in particular, warrant further discussion: the epistemology of the good, and the topic of virtue. This thesis relies heavily on a reasonable apprehension of the good. However, the epistemological concerns inherent in such an appeal were only dealt with briefly. Further research could elaborate on this general discussion. With respect to virtue, again, this thesis relied heavily on the concept of prudential judgements; for the sake of brevity, however, it did not discuss in any great detail how virtue is acquired and safeguarded, as well as the proper role of prudence with respect to conscience. Thankfully the natural law tradition possesses a cornucopia of texts on those topics so an expansion of this project could take place in the same line as this thesis.

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