

FOUNDATION FOR A NATURAL RIGHT TO HEALTH CARE

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Abstract

Discussions concerning whether there is a natural right to health care may occur in various forms, resulting in policy recommendations for how to implement any such right in a given society. But health care policies may be judged by international standards including the UN *Universal Declaration of Human Rights*. The rights enumerated in the UDHR are grounded in traditions of moral theory, a philosophical analysis of which is necessary in order to adjudicate the value of specific policies designed to enshrine rights such as a right to health care. We begin with an overview of the drafting of the UDHR and highlight the primary influence of *natural law* theory in validating the rights contained therein. We then provide an explication of natural law theory by reference to the writings of Thomas Aquinas, as well as elucidate the complementary “capabilities approach” of Martha Nussbaum. We conclude that a right to health care ought to be guaranteed by the state.

Keywords: Natural law, Thomas Aquinas, Martha Nussbaum, Right to Health Care

I. Introduction

Discussions concerning whether there is a natural right to health care may occur in various forms. The ultimate result of such discussions is one or more policy recommendations for how to implement any such right in a given society. But the health care policies of any nation in the modern world may be judged by internationally agreed-upon standards including, most especially, the United Nations’ (UN) *Universal Declaration of Human Rights* (UDHR). Hence, it is fundamental to any health care policy analysis to review carefully the historical formulation of the UDHR and subsequent international declarations and treaties. But the rights enumerated in the UDHR were not conceived *ex nihilo*, but are grounded in traditions of moral theory represented by those who drafted or consulted in the drafting of the UDHR. Thus, a philosophical analysis of the most influential theories underlying the UDHR is necessary in order to adjudicate accurately the value of specific policies that may be devised so that particular

societies may successfully enshrine in their laws and economic structure rights such as the right to health care. In this paper, we begin with a historical overview of the drafting of the UDHR and highlight the primary influence of *natural law* theory in validating the rights contained therein. We will then provide a detailed explication of natural law theory by reference to the writings of Thomas Aquinas, who, in the 13th century, provided a detailed formulation of natural law which to this day has influenced both religious and secular moral theorists.

II. The Right to Health and Health Care in the UDHR

In 1948, the United Nations promulgated the *Universal Declaration of Human Rights*, Article 25 of which states,

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹

Nearly twenty years later, the UN adopted the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the treaty to implement the economic, social, and cultural rights enumerated in the UDHR. ICESCR Article 12 states, “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”²

Despite the UN General Assembly’s adoption of ICESCR over forty years ago, substantive issues persist concerning the proper understanding of its articles and the legitimate ways in which individual member nations may implement them. Of note, the United States has yet to ratify the ICESCR (Kinney 2008, 349-350). The UN Committee on Economic, Social, and Cultural Rights (2000, §1) published a comment on issues related to Article 12 of the ICESCR,

¹ Adopted and proclaimed by UN General Assembly Resolution 217A(III), December 10, 1948.

² Adopted and opened for signature, ratification, and accession by UN General Assembly Resolution 2200A(XXI), December 16, 1966.

reaffirming that “Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.” The Committee further explained in this comment the content of the human right to health.

Despite the UDHR being touted as “universal,” the document is primarily *aspirational* in nature. No member nation fully embodies – then or now – the totality of enumerated rights to the fullest degree. One reason for the lack of full universal implementation of the UDHR is the fact that the promulgated rights are purposely *general* in nature, which is certainly appropriate for a document of this type. The more generally construed a statement of rights, the stronger the claim that such rights are universally valid. This reasoning apparently underlies the UDHR and similar international declarations of rights, where the goal is a broad consensus concerning norms which can be applied in myriad social, political, economic, and cultural contexts. As Stephen James (1994, 12), a political scientist at Princeton University, states:

The moral judgment implicit in all international human rights law is that violating conduct is wrong because it has breached a universal moral standard subscribed to by the vast majority of states, if only in formal terms.

This construal of the normativity of international human rights may be challenged, however, if there are certain human rights which are not universally agreed upon. Throughout history, philosophers of various backgrounds and in different schools of thought have asserted the existence of universal moral norms.³ They do not, however, always utilize the concept and

³ Most notable in this regard are Immanuel Kant’s (1997) “categorical imperative” and John Stuart Mill’s (2001) “principle of utility.” We will focus only on the *western* philosophical tradition; however, other non-western philosophical and religious traditions also include a well-formulated concept of universal moral norms or natural rights – e.g., the Universal Islamic Declaration of Human Rights (<http://www.alhewar.com/ISLAMDECL.html>), as well as the non-western contributors to UNESCO (1949). UNESCO is the acronym for “United Nations Educational, Scientific, and Cultural Organization.”

language of “rights.”⁴ Indeed, the term “rights” was not necessarily recognized universally at the time of the UDHR over sixty years ago. During the second half of 1944, talks were underway at the Dumbarton Oaks Conference in Washington, D.C. to create an international organization that would become the United Nations. U.S. President Franklin D. Roosevelt had pressed the issue of human rights at the conference, but the term did find itself in the final charter for the United Nations:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and *promote respect for human rights and fundamental freedoms* (Dumbarton Oaks 1944; emphasis ours).

According to Mary Ann Glendon (2001, 9), the term human rights was explicit in the document, but “the truth is that the promotion of fundamental rights and freedoms was far from central to the thinking of any of the Big Three – Franklin Roosevelt, Winston Churchill, and Joseph Stalin – as they debated the shape and purpose of the United Nations.” She argues that this was because the norm in the world at this time was that the treatment of a nation’s subjects, with some exception, was the business of that nation. It was not until World War II was nearly over before the world was made aware of the atrocities that occurred to persons at Nazi concentration camps, and thus the UDHR was born so that these horrors would never occur again.

Though the UDHR explicitly states that human rights do exist and should be both respected and promoted, there continues to be controversy about the notion of “rights” today.⁵

Nevertheless, the concept of human rights can be argued to be universally valid based on sound

⁴ For a utilitarian, such as Mill, any given right exists only insofar as it maximizes utility – “the greatest good for the greatest number” – hence, all rights are *contingent* and thus subject to change; whereas, for a deontologist, such as Kant, any right that falls under the categorical imperative would be *absolute* and thus inviolable.

⁵ For example, legal “positivists” argue that all rights are creations by legislative bodies and that there are no universal human rights by which the laws of any particular nation are bound, except as defined through international agreement. See Hart (1961); for critiques of Hart’s legal positivism, see Fuller (1964) and Dworkin (1977).

rational argumentation and not mere stipulation; and there have been attempts from various theoretical foundations—including utilitarianism, deontology, and natural law theory—to support the need to recognize certain universal rights. It is important, then, to justify the rights enumerated in the UDHR and similar international documents by means other than appealing to consensus agreement. For such agreement is often lacking, unless one renders the statement of a particular right so general as to be virtually useless as a practical foundation for law and public policy. For example, one may achieve universal agreement that every human being has a right not to be murdered, but the types of acts that constitute “murder,” as opposed to justifiable cases of killing, must be specified if such a right is to have any normative teeth with respect to civil law. James Griffin (2001, 6) of Oxford University, and past president of the Aristotelian Society, affirms this view: “It is a feature of the international declarations in general that they pay little attention to reasons or justifications . . . [I]n order to avoid nearly criterionless claims about human rights, we need to develop, and to be guided by, a fuller substantive account of what they are.”

The alternative is to outline a rigorous *philosophical* foundation upon which human rights, such as those enumerated in the UDHR, may be justified even in the face of disagreement or blatant lack of recognition of such rights by individual nations. If, as will be our focus in this paper, a human right to health and health care⁶ can be established in this fashion, then nations, such as the U.S., which have not fully embraced and enacted this right in its laws and policies, can be rightly criticized for moral failure.

In what follows, we will outline a foundation for universal human rights by appeal to Thomas Aquinas’s classical formulation of the concept of *natural law*. We will chart the

⁶ As in a previous publication of one of the authors (Kinney 2008, 338), we assume that a human right to health means a right to the health care services and public health protections that facilitate the enjoyment of good health to the extent possible given specific and independent processes within human beings.

progression from Aquinas's account of natural law to the concept of human rights as recognized in various international documents. Aquinas, along with Enlightenment philosophers who followed in the natural law tradition, created a theoretical foundation for the concept of human rights and the language in which such rights are implemented and realized. Our focal point will be whether there is a universal human right to health and health care as asserted in the UDHR and the ICESCR. We will conclude with an analysis of who, within a particular nation, bears the responsibility for ensuring that such a right is protected; for much of the debate in the U.S. concerning health care reform turns on the issue of whether the government or private industry should primarily shoulder the economic and administrative burdens involved in realizing this particular right.

We have elected to reexamine carefully the Thomistic origins of natural law theory due to its foundational role in the evolution of western human rights theory. By examining the fundamental principles Aquinas affirms, we may be able to articulate strategies for health care reform that will inevitably involve contributions from government and the private sector, and which will result in a health care system that is more just and more capable of realizing the internationally recognized human right to health.

III. The Development of the UDHR

The conception, drafting, and adoption of the UDHR followed an extraordinary set of events in human history. The Second World War had concluded with staggering death tolls of both armed forces and civilians. It is estimated that the total number dead ranged from 50 million to over 70 million (White 2011). During the war, the Allies, recognizing the failures of the League of Nations in stopping the military buildup of Nazi Germany and the outbreak of war

(Glendon 2001, 3-4), established the United Nations as a world organization to prevent future wars; fifty-one nations signed the UN Charter (Schlesinger 2004).

In 1946, the Economic and Social Committee of the United Nations established a commission on human rights to develop recommendations for a UN Commission on Human Rights, which consisted of members from the following countries: Australia, Belgium, Byelorussia (present-day Belarus), China, Chile, Egypt, France, India, Lebanon, Panama, the Philippines, Ukraine, the U.S.S.R., Yugoslavia, Uruguay, the United Kingdom and the United States.⁷ The commission's members represented Chinese, Islamic, and Hindu perspectives, as well as a variety of Western philosophical, political, and religious views.

One of the commission's first tasks was to examine philosophical thought and religious traditions around the world to identify foundational principles that would justify human rights. The commission gave this task to the "philosophical committee" (Glendon 2001, 73). This committee, officially titled the Committee on the Theoretical Bases of Human Rights, included E. H. Carr, a political scientist from Cambridge University; Richard McKeon, a philosopher from the University of Chicago; Jacques Maritain, a social philosopher from France; and Archibald MacLeish, an American poet (Glendon 2001, 51).

In March 1947, the committee sent out a questionnaire to leading thinkers in the world, including Mohandas Gandhi and Aldous Huxley, among others. The questionnaire "solicit[ed] their views on the idea of a universal declaration of human rights" (Glendon 2001, 51). Responses indicated that many non-western thinkers "noted that the sources of human rights were present in their traditions, even though the language of human rights was a relatively modern European development" (Glendon 2001, 73). The committee found these results

⁷ The organization and work of this commission is described in Roosevelt (1948) and Glendon (2001).

encouraging; although human rights were not explicitly laid out and defined by some of the religious traditions, sufficient common ground emerged to support developing a framework for human rights that could be agreed upon by members of the committee. The committee believed that there were certain rights that “may be seen as implicit in man’s nature as an individual and as a member of society and to follow from the fundamental right to live” (Glendon 2001, 77).

A dichotomous view regarding the establishment of a philosophical foundation for universal human rights is represented by one of the chief architects of the UDHR, French philosopher Jacques Maritain. As Glendon reports, “Maritain liked to tell the story of how a visitor at one meeting [of UNESCO’s “philosophers’ committee”] expressed astonishment that champions of violently opposed ideologies had been able to agree on a list of fundamental rights. The man was told: ‘Yes, we agree about the rights but on condition no one asks us why’” (Glendon 2001, 77; cf. UNESCO 1949, 9). The reason why Maritain said this was that the committee’s purpose was to achieve consensus and find a general common ground of ideas that were both practical and pragmatic. The document to be drafted, therefore, was to be “‘sufficiently definite to have real significance both as an inspiration and a guide to practice’ but ‘sufficiently general and flexible to apply to all men, and to be capable of modification to suit people at different stages of social and political development’” (Glendon 2001, 78).

IV. Philosophical Foundation for Human Rights⁸

Maritain’s somewhat tongue-in-cheek response above obscures the fact that he was one of the foremost modern natural law theorists, who influentially defined the “common good” in terms of the good of *each individual person* who constitutes a given society – as opposed to defining it in terms of an *aggregate* amount of goodness, as in utilitarianism, in which the good of a smaller number of individuals may be overridden by consideration of the good of the

⁸ Much of this section is derived from Eberl (2006, 9-16) and Eberl (2010).

majority (Maritain 1966). He thus had his own answer to the question of why certain rights should be established universally in the UDHR:

In my opinion any rational justification of the idea of the rights of man, as of the idea of law in general, demands that we should rediscover the idea of natural law ... in its true metaphysical connotations, its realistic dynamism and the humility of its relation with nature and experience. We are then able to understand how a certain ideal order, rooted in the nature of man and of human society, can impose moral demands valid throughout the world of experience, history and fact, and can establish, for the conscience as for the written law, the permanent principle and the elementary and universal criteria of rights and duties (Maritain 1947).

Maritain further contends, “The same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights” (Maritain 2001, 58).

Following Maritain’s example, we do not propose to argue for natural law theory as the only possible foundation for a universal human right to health and health care, or any other human right for that matter. Nevertheless, we agree with Maritain’s well-founded view that the long-standing and influential tradition of natural law ethics provides an optimal grounding for the normative validity of the rights promulgated in the UDHR and similar documents. Hence, we will focus our attention upon the foundational systematic formulation of the concept of “natural law” in the writings of the 13th century philosopher Thomas Aquinas.

The challenge of developing any such normative foundation for a universal human right to health and health care is aptly expressed by George Annas (2004, 24), a prominent bioethicist at Boston University: “The challenge facing medicine and health care is to develop a global language and a global strategy that can help improve the health of all of the world’s citizens.” Elizabeth Fenton (2008, 2), a Postdoctoral Fellow in the Program in Ethics and Health at Harvard University, makes a similar claim in the course of critiquing Annas’s overall view:

“[Global] consensus ... requires a foundation of universally agreed-upon statements about humankind, which will be transcultural yet supportive of moral pluralism.”

In laying out the classical Thomistic account of natural law, we will show how this normative theory can satisfy the two requirements of providing a “global language” for defining a right to health and health care that is *transcultural*, and yet preserves some degree of *pluralism* in how such a right is construed and practically enforced within the context of particular social, political, economic, and cultural conditions: “The specific content of a right to health – the entitlements it includes – cannot be specified independently of the context in a given state with given resource limits and health needs” (Daniels 2008, 332).

According to Aquinas, the fundamental “good” for human beings consists in our *flourishing*, which is the fulfillment of our shared *nature* (Aquinas, *Summa theologiae* [ST] Ia-IIae Q. 18, a. 5; Q. 49, a. 2; Q. 71, a. 1). Human nature is defined by a set of *capacities* relative to our existence as living, sentient, social, and rational animals. Human flourishing involves actualizing these definitive capacities of the human species, such that each of us becomes the most *perfect* – i.e., most complete or fully actualized – human being we can be. To achieve this end, Aquinas claims that all human beings have a set of *natural inclinations* to pursue whatever we perceive to be good – i.e., what is desirable to us and will help actualize our definitive capacities. The *natural law* thus includes a set of principles which, if followed, will satisfy a human being’s natural inclinations and thus lead to her perfection according to her nature as a human being.

A key question for natural law, and other universal rights, theorists concerns the conception of “human nature” upon which various rights and duties are supposed to be founded. We believe that one advantage of the Thomistic account of natural law is that it is premised upon

a relatively basic conception of human nature in which the only common features identified are life, sentience, sociability, and rationality. Of course, each of these features must be defined and such definitions, as they become more specific, may be controversial. But a high degree of specification is not required to define certain general natural law precepts. For example, sentience may be understood broadly to refer to human beings' capacity to sense their environment and respond to it, along with the correlative experiences of pleasure and pain. One could then deduce that depriving a person of any of her senses – say, by blinding her – or causing her unwarranted pain would be bad for her;⁹ hence, there is an obligation to avoid intentionally or negligently depriving a person of her senses or causing her undue pain. On the positive side, restoring a blind person's sight, should they desire it, or causing a pleasurable experience would be good and thus worth pursuing.

Aquinas, as a Christian monk living in the 13th century, has his own more specific renderings of what would count as proper specifications of “good” and “evil” relative to these basic features of human nature; however, contemporary natural law theorists operating within the Thomistic “spirit” need not follow Aquinas precisely in advocating such specifications. For example, Aquinas holds that a fundamental good that ought to be pursued is “knowing the truth about God” (ST Ia-IIae Q. 90, a. 2);¹⁰ but one need not be a theist to agree with a broader construal of this specific good that follows from human beings' rational capacity – viz. knowing the truth *simpliciter*. Arguably, every human being desires to know what is true – we generally do not enjoy being deceived or otherwise believing in falsehoods – even if we vehemently disagree about what we take to be true or what epistemic methodology we ought to adopt in order to discover what is true.

⁹ The fundamental good of promoting pleasure and avoiding pain for both oneself and others is also affirmed by non-natural law moral theorists, most notably utilitarians John Stuart Mill (2001) and Jeremy Bentham (1907).

¹⁰ All translations of Aquinas's texts are Eberl's.

Aquinas defines “law” as “nothing other than (1) a certain ordinance of reason (2) for the common good, (3) made by whoever has care of the community, and (4) that is promulgated” (ST Ia-IIae Q. 90, a. 4). In order for some principle to count as a law, it must fulfill all four criteria. Aquinas specifically defines “natural law” as human beings’ capacity to understand the general principles which underlie the existence of particular substances, actions, and events. For example, everything that exists is governed by the principle of non-contradiction, which states that the same thing – whether it is a substance, action, or event – cannot both *be* and *not be* at the same time, in the same place, in the same respect. Hence, it cannot be both raining in this very spot at this very moment and not raining in this very spot at this very moment.

There are general principles that underlie what a moral agent ought to do in a particular situation (ST Ia-IIae Q. 94, a. 2; Aquinas, *Quaestiones disputatae de veritate* Q. 16, a. 1). Some of these general principles are *self-evident* because they are immediately knowable by the human mind without any empirical investigation required. Everyone acts, for example, on the principle of non-contradiction, even if they had never seen it formulated before reading the above paragraph. For example, the following sentence is illogical to say: If Nicolas Sarkozy is the current president of France, it is true that Nicolas Sarkozy is not the current president of France. Similarly, Aquinas thinks that certain general practical principles are self-evident to any rational mind.

Aquinas thus formulates the first, fundamental principle of natural law that is understood by the human mind: “Good is to be done and pursued, and evil avoided.” He then contends, “And upon this are founded all other principles of natural law; such that everything which practical reason naturally apprehends to be good [or evil] for human beings belongs to the natural law principles to be done or avoided” (ST Ia-IIae Q. 94, a. 2). Hence, natural law

mandates us to use our reasoning capacity to determine what is “good” in accordance with our nature as rational animals and go after it – thereby entailing certain *positive* obligations – and avoid whatever we determine to be “evil” because it is opposed to our flourishing as human beings – thereby entailing certain *negative* obligations. Aquinas concludes:

Therefore, natural law is nothing other than a concept naturally instilled in a human being by which he is directed toward acting in accord with his proper actions; whether they are suitable to him from his generic nature, such as to procreate, to eat, and the like, or from his specific nature, such as to reason and the like (ST Supp. Q. 65, a. 1).

Aquinas cites the following goods with respect to our shared nature toward which human beings are naturally inclined: life, sexual intercourse, education of offspring, pursuing truth [about God], and living in society (ST Ia-IIae Q. 94, a. 2). Aquinas acknowledges that this list is not complete and exhorts the prudent use of practical reason to determine the set of goods and evils relative to human nature, and then to define the principles of natural law which promote the goods while avoiding the evils. For example, since human beings are *social* by nature (Aquinas, *Sententia libri Ethicorum* I 9), it is good for us to live in communities; fulfilling this good requires that we be honest with one another and keep our promises (ST IIa-IIae Q. 88, a. 3 *ad* 1), avoid deception (ST IIa-IIae Q. 110, a. 3), as well as respect others’ property and not injure one another (Aquinas, *Summa contra Gentiles* III 129).

In addition to the human goods and correlative natural law principles, Aquinas himself enumerates, contemporary natural law theorists have cited other goods and principles that arguably follow from the Thomistic understanding of human natural inclinations. While only some of these items are found explicitly in Aquinas’s writings, a case can be made for all of them being in the spirit of Aquinas’s natural law ethic. Gerard Hughes (1976, 35) lists food, shelter, proper medical treatment, affection, support, and “a fairly clear role in society” as

necessary for a human being to flourish as a rational, social animal. John Finnis (1980, 86-94) identifies seven “basic forms of good for us”: life, knowledge, play, aesthetic experience, sociability/friendship, practical reasonableness, and religion. He further specifies that the basic good of *life* signifies “every aspect of the vitality which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury” (Finnis 1980, 86). Joseph Boyle (2002, 79) is even more specific in drawing a natural law-based conclusion in favor health care as a fundamental good worth pursuing, though not by immoral means:

Health is good bodily functioning and is the perfection of our being alive just as animals. Being alive is not only a necessary condition for pursuing other goods but is part of the personal reality of a human being. This means that life and health are intrinsically good; that is, whenever an action in view promotes or protects life or health, that action is so far forth choice-worthy; that is protects or enhances life or health provides a reason sufficient for doing it, though not necessarily a reason that morally justifies doing it.

Boyle’s thesis is also echoed by non-natural law theorists, such as Rawlsian ethicist Norman Daniels of Harvard University. Daniels shares the idea with Boyle that good health is necessary for pursuing the fulfillment of human condition. He appeals to a modified version of Christopher Boorse’s (1975; 1976; 1977) definition of health as “the absence of disease, and diseases ... are *deviations from the natural functional organization of a typical member of a species*” (Daniels 1985, 28). Daniels contends that “disease and disability, both physical and mental, are construed as adverse departures from or impairments of species-typical ... ‘normal functioning’” (Daniels 2000, 314). His thesis is that health care is necessary for individuals because of the positive effect it can have on alleviating diseases and others maladies that impact a person’s range of opportunities in life, and thus hopefully returning the affected individual to a level of “normal functioning” (Daniels 2001).

As is the case with the rights enumerated in the UDHR, natural law principles are quite general so as to be universally applicable to all human beings, no matter what their cultural background or station in life. Aquinas thus recognizes the need for what he terms “human law,” which is the particular determination of general natural law principles made by human legislators using prudent practical judgment. Human laws are crafted with respect to particular communities to help educate each community’s members in becoming morally virtuous; such laws can thus be considered *culturally relative*, because the same human laws would not be appropriate for every community (ST Ia-IIae Q. 95, a. 2 *ad* 3). Aquinas further notes the important role that the *customs* of different communities play in specifying and applying natural law principles (ST Ia-IIae Q. 97, a. 3).

Nevertheless, human laws must be crafted in accordance with the general principles of natural law that are universal and thus binding upon all human beings regardless of culture or circumstance. Any valid human law, Aquinas contends, must be somehow derived from the natural law; otherwise, it would be a “perversion of law” (ST Ia-IIae Q. 95, a. 2). For example, a law permitting racial segregation is not a valid human law because it violates the natural law mandate to treat all human beings justly and maintain social harmony.¹¹ Even if such a practice has the force of custom supporting it, Aquinas maintains that the customs of human communities, useful as they may be in specifying and applying the natural law, cannot change the universally binding principles of natural law and must yield when they conflict (ST Ia-IIae Q. 97, a. 3 *ad* 1). Respect for cultural diversity thus has limits imposed by the basic conception of human nature outlined above. For example, the cultural practice of female circumcision would not be justified due to its negative effects of causing physical pain and depriving victims of the

¹¹ Dr. Martin Luther King, Jr. explicitly invokes Aquinas on this point to justify non-violent civil disobedience in his “Letter from a Birmingham Jail” (April 16, 1963).

capacity for sexual pleasure – following from our sentient nature – of being a sign and instrument of sexual discrimination – following from our social nature – and of violating victims’ autonomy insofar as they do not choose this for themselves – following from our rational nature as Aquinas links this with our capacity for self-determination (ST Ia Q. 83, a. 1). With respect to the subject at hand, while the U.S. is customarily based upon a free-market economic system, protecting the free-market system does not have the force of law in cases where such a system engenders injustices that violate the principles of natural law. We contend that this is the case with the current U.S. health care system. Aquinas thus assigns the free-market system, and its foundation upon a right to private property, a *relative* – not absolute – value. For, although he recognizes a right to private property (ST IIa-IIae Q. 66, a. 2), Aquinas also contends that a person in “manifest and urgent need” may rightfully take another’s surplus property, and that doing so does not constitute an act of theft since “in cases of need all property becomes common” (ST IIa-IIae Q. 66, a. 7).

V. From Natural Law to Human Rights

While one may appeal to various theoretical bases to ground the validity of universal human rights, such as Kantian deontology, George Annas states that the goal of the UDHR “is to provide the conditions under which humans can flourish” (Annas 2004, 24). This view is reflected, and given a specific foundation upon the concept of natural law, by one of the chief framers of the UDHR, Jacques Maritain (1949). Following in this tradition, Stephen James (1994, 2) contends,

When we talk about human rights in international law, therefore, we are necessarily talking about *universal* human rights grounded in some conception of *universal human nature* ... Human rights are grounded in a minimalist human nature. This basic human nature is constituted by our shared physical needs, social needs and moral potentiality. The idea of human rights assumes at the very least

the existence of a human subject who is conscious and able to make and justify moral choices.

John O'Manique (1990, 472), of the Norman Paterson School of International Affairs at Carleton University, also affirms that “if we are looking for the source of a concept of human rights that are truly universal and inalienable, then we should look for ontological roots that are broadly human but not a human creation.” This assertion refers to the *existence* of universal and inalienable human rights, just as the natural law, according to Aquinas, exists independently of human *fiat*. Nevertheless, the *exercise* of such rights, as Aquinas states concerning human law, must “consider many things, as according to persons, matters, and times” (ST Ia-IIae Q. 96, a. 1).

Hence, in addition to offering an *objective* foundation for universal human rights, Thomistic natural law theory provides the *flexibility* various authors note to be required for any valid and realizable system of such rights, as expressed by James (1994, 4):

Rejecting radical cultural relativism does not preclude flexibility in the conceptualization, interpretation and application of human rights within and between different cultures. Human rights are universal but not absolute (in the sense of pure, unalloyed, completely uniform) in their application to various cultures.

For example, as noted above, *life* is a fundamental good for human beings according to Aquinas and other natural law theorists such as Finnis. Thus, one ought to promote life, which includes both a *negative* obligation not to kill and a *positive* obligation to protect human life when feasible. This twofold obligation is implicit in any natural law mandate insofar it is derived from the foundational principle: “Good is to be done and pursued (positive), and evil avoided (negative).” Understood thus, this obligation also provides the foundation for a natural right to life as taking the form of both a right not to be killed and a right to have one’s life protected. But are such rights *absolutely* inviolable? While a committed pacifist may commit himself to the idea that one can never justifiably kill another human being no matter what, others may recognize that

understanding the obligation not to kill as absolute may interfere with fulfilling the correlative positive obligation to protect life. Akin to the notion of *prima facie* moral duties advocated by W. D. Ross (1930), a natural law theorist may accept that the right not to be killed may come into direct conflict with other natural rights, such as the right to have one's life protected.

Furthermore, any rights that follow from a positive obligation certainly cannot be understood as absolutely inviolable insofar as it is not possible for such an obligation to be fulfilled at all times; whereas negative obligations can always be fulfilled: I can always avoid killing another person, but I cannot always act to preserve another person's life and health. Nevertheless, the positive obligation to preserve the life and health of others may support a *prima facie* right to health and health care that ought to be respected when feasible and insofar as other, more stringent, negative or positive rights are not violated. Balancing the strength of these various rights in relation to each other is the mutual job of moral theorists, policymakers, and individual voters in democratic societies.

VI. A Human Right to Health and Health Care

As noted above, rights founded upon the natural law entail both negative and positive obligations.¹² As Finnis (1980, 205) asserts,

we may safely speak of rights wherever a basic principle or requirement of practical reasonableness [the hallmark of Thomistic natural law theory], or a rule derived therefrom, gives to A, and to each and every other member of a class to which A belongs, the benefit of a positive or negative requirement (obligation) imposed upon B

Finnis describes the pre-modern notion of *ius*, which is not equivalent to, but is sometimes translated as, "right."¹³ The term *ius* refers to what is "due" as a matter of justice, and this may involve both positive and negative obligations of one party to another. At the most general

¹² Hence, Miguel Faria's (2005, 471) argument that there is no natural right to health care is conceptually ill-grounded when he describes "genuine natural rights" as *negative* only.

¹³ For a detailed analysis of Aquinas's understanding and use of the term *ius*, see Eberl (2010).

societal level, *ius* refers to what is “due” for the sake of the common good: “for the common good is precisely the good of individuals whose *benefit*, from fulfillment of duty by others, is their *right* because *required* of those others in justice” (Finnis 1980, 210). Thus, natural rights follow from the obligations individuals, or society as a whole, have to certain others as a result of what would promote the common good as defined by natural law – i.e., the flourishing of human beings as living, sentient, social, rational animals.

In its comment on Article 12 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights (2000, §33) contends,

The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil* [sic]. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

This statement asserts both negative and positive obligations on the part of each member nation to ensure “full realization of the right to health” (Donnelly 1994, 132-134). But the question remains whether such obligations are the province primarily of governmental bodies in each nation, or the general populace. As Martha Nussbaum (2002, 118), Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago, notes,

Still another unresolved question is whether rights (thought of as justified entitlements) are correlated with duties. If A has a right to S, then it would appear there must be someone who has a duty to provide S to A. But it is not always clear who has these duties—especially when we think of rights in the international context.

Nussbaum grounds the correlative concepts of “rights” and “duties” in what she terms the *capabilities approach*. This approach refers to the intrinsic good of a human being’s individual

and, within a given society, collective capacity to act in certain ways that maximize both her individual flourishing and the common good. Nussbaum's view accords with the Thomistic natural law ethic – although they differ in certain conceptual details as well as in some of the specific conclusions derived from each theory – insofar as both (1) see individual and collective human flourishing as the ultimate goal of moral action, (2) understand this ultimate goal to be reached through the actualization of natural human capabilities, and (3) hold that such actualization is achievable through just interpersonal and social relationships defined in terms of our moral obligations to each other, which in turn is the foundation for rights and duties.

When the question arises of what moral obligations society has to its members in order to promote the common good so defined, Nussbaum contends,

[O]nce we identify a group of especially important functions in human life, we are then in a position to ask what social and political institutions are doing about them. Are they giving people what they need in order to be capable of functioning in all these human ways? And are they doing this in a minimal way, or are they making it possible for citizens to function *well*? (Nussbaum 1992, 214).

Concerning individuals who can profit from education, care, and resources ... the Aristotelian view¹⁴ observes that these basic human capabilities exert a claim on society that they should be developed. Human beings are creatures such that, provided with the right educational and material support, they can become capable of the major human functions. When their basic capabilities are deprived of the nourishment that would transform them into the higher-level capabilities ... they are fruitless, cut off, in some way but a shadow of themselves ... The very being of these basic capabilities makes forward reference to functioning; thus if functioning never arrives on the scene, they are hardly ever what they are. This basic intuition underlies the recommendations that the Aristotelian view will make for public action: certain basic and central human powers have a claim to be developed and will exert that claim on others – and especially, as Aristotle held, on government (Nussbaum 1992, 228-229).¹⁵

¹⁴ As noted above, Nussbaum's "Aristotelian" view coheres quite well with Aquinas's natural law ethic, which is not at all surprising since Aquinas was significantly influenced by reading and commenting upon Aristotle, and quoted him at length in his writings as "The Philosopher" (Torrell 1996, ch. 12).

¹⁵ Nussbaum refers to this overall political viewpoint as "Aristotelian Social Democracy" (Nussbaum 2002, 122).

Nussbaum lists ten basic, or central, human capabilities, the existence of which exerts moral and political claims upon others to provide the means for their actualization. The first two capabilities listed are *life* and *bodily health* (Nussbaum 2002, 129).¹⁶ The latter, of course, is integral to promoting the former, but it also possesses a more extensive value on its own insofar as being healthy also means that one is not suffering from physical disease or injury – recall that our nature as *sentient* beings, capable of feeling pleasure and pain, is a definitive property of human nature according to Aquinas – nor is debilitated in a way that interferes with physical and intellectual activity. In other words, health, along with life, is a basic, foundational necessity for a human person to be able to engage in a maximal degree of activity in pursuit of their individual and, in concert with others, social flourishing: “human abilities come into the world in a nascent or undeveloped form and require support from the environment – including support for physical health and especially, here, for mental development – if they are to mature in a way that is worthy of human dignity” (Nussbaum 2011, 137).¹⁷ Of course, this does not entail that a person will actually engage in the *maximal* degree of activity, nor that it is incumbent upon society to ensure that they achieve the end of such activity. Rather, society’s obligation is to equip individuals with the opportunity to avail themselves of the tools, with which they are already naturally endowed but may be hampered through disease or disabling injury, to be able to choose for themselves which fulfilling activities they will engage in for their own and others’ benefit.

VII. Conclusion – Toward a Just Health Care Policy

¹⁶ Nussbaum likens her approach to Rawls’s notion of “primary goods”; although she also criticizes Rawls’s approach as inadequate for responding to the diversity of human needs. While Rawls himself does not include *health* among the primary goods – but rather lists it among supportive “natural goods” – Rawlsian ethicist Norman Daniels (1985; 2008, pt. 1) makes a compelling case for health being a primary human good.

¹⁷ It is worth noting that Nussbaum is here highlighting a shared insight between her capabilities approach and the economic philosophy of Adam Smith.

What does this philosophical analysis mean for health policy and, in particular, the current debate over health care reform in the United States? What specific policy recommendations follow if a right to health and health care is established as a matter of natural law? If bodily health is a central human capability the existence of which imposes moral and political claims upon others for their advancement, how is recognition of these claims going to be implemented? To implement a moral or political claim, lawmakers will often make the claim a legal “right.” In modern democracies, the most efficient way to make a law is to enact a statute or promulgate a regulation that specifically establishes the right along with terms for its implementation and enforcement.

In the final analysis, sovereign states and their respective governments must make a political decision to establish human rights as legally enforceable rights. Generally, legislatures in modern democracies enact laws which establish entitlement to benefits as a matter of law. Obviously, there are important issues that would attend enactment of such legislation, including the specific content of benefits and their amount, duration, and scope; other issues involve the nature of implementation and enforcement. Scholars have addressed all of these issues regarding the international human right to health (Wronka 2008; Weisstub and Diaz Pintos 2008; Wicks 2007; MacDonald 2007; Toebes 1999).

In 2000, the UN Economic, Social, and Cultural Committee published a General Comment 14 to ICESCR that outlines the content of the international right to health and its implementation and enforcement. Building on the typology of the content of social human rights developed by Asbjørn Eide (1995, 21) of the Norwegian Centre for Human Rights at the University of Oslo, General Comment 14 (¶ 33) imposes three types or levels of obligations: the obligations to respect, protect, and fulfill. The obligation to respect requires states parties to

refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires states parties to take measures that prevent third parties from interfering with Article 12 guarantees. The obligation to fulfill requires states parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures toward the full realization of the right to health. This general comment provides a useful guide for domestic legislation to implement the international human right to health.

American society is currently engaged in a vigorous, if not rancorous, debate over the recently enacted health reform legislation: the Patient Protection and Affordable Care Act (2010) and the Health Care and Education Reconciliation Act (2010). At the core of the debate is what role government should play in providing health care to its citizens. One side of the debate posits a *libertarian* viewpoint, that health care services are understood to be essentially conventional economic services that should be distributed as are other commodities in the economic marketplace, without excessive government regulation or subsidy.¹⁸ One problem, though, with the idea of health care as a commodity distributed pursuant to market forces is that, for the great majority of people, many health care services are simply not affordable (Newhouse 2002); and while the health insurance market should render access to health care services more affordable, the cost of private health insurance remains economically unfeasible for many. The more liberal side of the debate would posit that government should play a greater role in the financing and delivery of health care services to ensure equal access for all. Is there a middle ground between the notions of health care as a right and as a market commodity? The major factor that justifies a middle ground is the apparent need for public subsidies, defrayed by tax payers, to make

¹⁸ The libertarian view can trace its roots to another, more recent, natural law theory as formulated by John Locke in his *Two Treatises of Government* (1988). It is worth noting, though, that Locke's promotion of a natural right to private property includes a "proviso" that one should not appropriate goods beyond one's necessity if, in so doing, others will be deprived of the basic necessities of life; nor should one appropriate so much beyond what they need that goods are left to spoil in their possession (Nozick 1974, 174-182).

increasingly costly health care services available to most, if not all of its members. There is no developed country in the world in which health care services are financed solely from private funds of patients. Most developed countries, since World War II, have enacted public programs of some variation to defray the costs of health care for its citizens (OECD 2011).

The report of the U.S. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1983), completed during the Reagan administration, offers such a middle ground, which provides sound guidance in addressing health care in trade policy. The report concluded that health care was neither a right nor a pure commodity, but something in between. The Commission framed its analysis of access to health care "in terms of the special nature of health care and of society's moral obligation to achieve equity, without taking a position on whether the term 'obligation' should be read as entailing a moral right" (President's Commission 1983, 32). The Commission defined "equitable access to health care" as requiring that "all citizens be able to secure an adequate level of care without excessive burdens"; and it concluded that "society has an ethical obligation to ensure equitable access to health care for all" because of the "special importance of health care" (President's Commission 1983, 4). The Commission determined that the societal obligation is balanced by individual obligations, and described the content of an individual's obligations:

Individuals ought to pay a fair share of their health care cost and take reasonable steps to provide for such care when they can do so without excessive burdens. Nevertheless, the origins of health needs are too complex, and their manifestations too acute and severe, to permit care to be regularly denied on the grounds that individuals are solely responsible for their own health (President's Commission 1983, 4).

This Commission's report recognizes that health care necessarily involves some governmental involvement but does not take an ideological position on the precise role of any level of government in providing health care. Such an approach is appropriate as the realization

of human rights, even the provision of benefits to individuals, does not necessarily require that government do the providing. One might easily assume that government has the major role given that international and regional human rights treaties talk in terms of government duties with respect to human rights. This is understandable given that the treaties are made by nation states to establish obligations of ratifying states. The important characteristic when it comes to making a human right a reality rather than a aspirational statement is legal enforceability. A legal regime must exist that empowers individuals to exercise the right as well as confer a social guarantee that makes it impossible to argue that the right does not exist.

In sum, what can natural rights theory and its progeny, human rights theory, contribute to health care reform? In our view, the development of the United Nations treaty system – beginning with the UDHR in 1948 – represents a nearly international *consensus* about the major imperative animating health reform: viz., that a fundamental human right to health exists in international law and philosophical tradition, and governments are thus obligated to realize this right through fair and just implementation. The declaration establishes a policy imperative that requires countries, by whatever appropriate means, to realize the international human right to health.

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