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The Nihilism of the Law of Ireland

A thesis submitted to Trinity College, Dublin

by

Declan O'Keeffe

in the year two thousand and eleven

for the degree of *Doctor Philosophiae*

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Summary

Three arguments concerning Irish law are advanced in this dissertation. Firstly, it is argued (a) that the earlier jurisprudence of the Irish Supreme Court held that the constitutionally protected natural human rights can be understood in accordance with Saint Thomas Aquinas's (1224-1274) Christian theological understanding of the natural law, and (b) notwithstanding the references to Aquinas in the earlier jurisprudence, Aquinas's theological understanding of the natural law is not evident in the judgments of the Supreme Court in cases concerning contraception, abortion, abortion information, euthanasia and blasphemy handed down during the period from 1973 to 1999.

Secondly, it is argued that the decisions of the Irish Supreme Court in the cases concerning contraception, abortion, abortion information, euthanasia and blasphemy evidence that which the German philosopher Martin Heidegger (1889-1976) variously identified as the 'Metaphysics of Subjectivity' (*Metaphysik der Subjektivität*) and 'Nihilism' (*Nihilismus*).[1]

Thirdly, it is argued that, notwithstanding the affinities between the "new" natural law theory of Professor John Finnis (b. 1940) and the "theological" natural law theory of Aquinas, Finnis' new natural law theory cannot be reconciled with the theological natural law theory of Aquinas. It is argued that Finnis' new natural law theory presupposes the metaphysics of subjectivity identified by Heidegger. It is argued that the application of Finnis' new natural law theory in interpreting the Constitution of Ireland is not an "antidote" to the metaphysics of subjectivity and the nihilism of contemporary Irish jurisprudence but a participation in the very nihilism unfolding within the law of Ireland.

[1] While the meaning of these terms will be elaborated within the chapters of the dissertation, an Appendix containing brief explanations of the technical terms has also been included in the dissertation.

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Ad Majorem Dei Gloriam

4th November 2011

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Abbreviations

AC	Appeal Cases
All ER	All England Law Reports
ER	English Reports
CMLR	Common Market Law Reports
ILRM	Irish Law Reports Monthly
IR	Irish Reports
Plowd Comm	Ploweden's Commentaries or Reports
Rob Eccl	Robertson's Ecclesiastical Reports

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Introduction

This dissertation focuses on the philosophical foundations underlying the jurisprudence of the Irish Supreme Court. Three arguments concerning Irish law are advanced in this dissertation.

Firstly, it is argued (a) that the earlier jurisprudence of the Irish Supreme Court held that the constitutionally protected natural human rights can be understood in accordance with Saint Thomas Aquinas's (1224-1274) Christian theological understanding of the natural law, and (b) notwithstanding the references to Aquinas in the earlier jurisprudence, Aquinas's theological understanding of the natural law is not evident in the judgments of the Supreme Court in cases concerning contraception, abortion, abortion information, euthanasia and blasphemy handed down during the period from 1973 to 1999.

Secondly, it is argued that the decisions of the Irish Supreme Court in the cases concerning contraception, abortion, abortion information, euthanasia and blasphemy evidence that which the German philosopher Martin Heidegger (1889-1976) variously identified as the 'Metaphysics of Subjectivity' (*Metaphysik der Subjektivität*), the 'Will to Power' (*Wille zur Macht*), 'Nihilism' (*Nihilismus*) and the 'Rule of Technology' (*Technik*).[2]

Thirdly, it is argued that, notwithstanding the affinities between the "new" natural law theory of Professor John Finnis (b. 1940) and the "theological" natural law theory of Aquinas, Finnis' new natural law theory cannot be reconciled with the theological natural law theory of Aquinas. It is argued that Finnis' new natural law theory presupposes the metaphysics of subjectivity identified by Heidegger. It follows that the application of Finnis' new natural law theory in interpreting the Constitution of Ireland is not an "antidote" to the metaphysics of

[2] While the meaning of these terms will be elaborated within the chapters of the dissertation, an Appendix containing brief explanations of the technical terms has also been included in the dissertation.

subjectivity and the nihilism in contemporary Irish jurisprudence but a participation in the very nihilism unfolding within the law of Ireland.

The Jurisprudential Context of this Dissertation

There are three "facts", as it were, upon which the arguments in this dissertation are based: the first is the degradation in the "legal status" of God and the natural law in the jurisprudence of the Irish Supreme Court during the period 1973-1999, the second (not unrelated fact) is that of the radical changes in Irish law that took place during the same period. The third fact is that of the revival of natural law theory in contemporary jurisprudential scholarship.

The Degradation in the Legal Status of the Natural Law

The degradation in the "legal status" of God and the natural law in the jurisprudence of the Irish Superior Courts during the period 1973-1999 can be seen by juxtaposing excerpts from three judgments of the Supreme Court from the period. In his oft quoted judgment in *McGee v Attorney General*[3] delivered in 1973, Walsh J held that the constitutionally protected natural human rights can be understood in accordance with a Christian theological understanding of the natural law:

> Both in its preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many to argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgement of the ethical content of law in its ideal of justice.[4]

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[3] *McGee v Attorney General* [1974] IR 284. Hereafter referred to as the *McGee Case*.

[4] [1974] IR 284, at 317.

Twenty two years after the judgment in the *McGee Case* the Supreme Court held that the Courts do not recognise the natural law as superior to the Constitution:

> The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the Constitution were subject and at no stage recognised the provisions of the natural law as superior to the Constitution. The People were entitled to amend the Constitution in accordance with the provision of Article 46 of the Constitution and the Constitution so amended by the Fourteenth Amendment is the fundamental and supreme law of the State, representing as it does the will of the People.[5]

Twenty five years after the *McGee Case* was reported the Supreme Court held that it was impossible to say of what the constitutional offence of blasphemy consists:

> There is no doubt that the crime of blasphemy exists as an offence in Irish Law because the Constitution says so. It says that the publication or utterance of blasphemous matter "*is an offence which shall be punishable in accordance with the law*"...From the wording of the Preamble to the Constitution it is clear that the Christian religion is one of the religions protected from insult by the constitutional crime of blasphemy...and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists...[6]

This change in the Supreme Court's jurisprudence - from one which in which the natural law is articulated in Christian theological terms to one in which the interpretation of the law on blasphemy is impossible – raises the question of how and why such a change took place.

The Metaphysics of Subjectivity

It is argued in this dissertation that the change in the understanding of law in the jurisprudence of the Irish Supreme Court can be understood in the light of Heidegger's analyses of the history of European philosophy. In his analyses of European philosophy Heidegger identifies an understanding of the relation between truth and certainty in the philosophy of René Descartes (1596-1650) and his successors which is different from that

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[5] *In Re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1, at 43. Hereafter referred to as the *Abortion Information Case.*

[6] per Barrington J in *Corway v Independent Newspapers (Ireland) Limited* [1999] 4 IR 485, at 501-502. Hereafter referred to as the *Corway Case.*

found in medieval philosophy. While in both the medieval and Cartesian philosophies the truth of a thing is understood as a conformity or adequation between the 'thing' and the (conception of the thing in the) intellect, both the nature of 'thing' and 'intellect' are thought differently in the two philosophies. In broad terms, in the medieval philosophy truth is primarily the adequation of the created thing to the pre-conceived idea in the divine mind (and is only secondarily the adequation of the created thing to the human mind), while in the Cartesian philosophy truth is primarily the adequation of the human intellect to the thing. This transformation of the nature of truth from that found in the medieval philosophy to that found in the Cartesian philosophy effects a transformation in the way the truth of things is certainly known. Heidegger calls the Cartesian and post-Cartesian philosophies with their transformed relation between truth and certainty the "Metaphysics of Subjectivity" (*Metaphysik der Subjektivität*). Heidegger identifies the "rule of technology" (*Technik*) as an aspect of the working out in history of the consequences of the Cartesian transformation of truth and certainty. Technology (*Technik*) in the Heideggerian sense is not "technology" in the usual English sense of the word but an almost inescapable manner of calculative *thinking* which strives for certainty and seeks to impose order for the sake of order.

The Jurisprudence on the Natural Law

It is argued in this dissertation that the metaphysics of subjectivity identified by Heidegger is evident in the understanding of the natural law found in the *dicta* of Walsh J in the *McGee Case* and in Mr. Justice Costello's scholarly analyses of the Irish Constitution.[7] It is argued also that the "rule of technology" (*Technik*) identified by Heidegger is evident in the Supreme Court's decisions in the *Abortion Information Case* and the *Ward of Court Case*[8] and in some

[7] Ordinary Judge of the High Court of Ireland 1979-1994, President of the High Court of Ireland 1994-1997.

[8] *Ward of Court (withholding medical treatment)(No.2)* [1996] 2 IR 79, [1995] 2 ILRM 401. Hereafter referred to as the *Ward of Court Case.*

of the scholarly analyses of the Irish Constitution by Professor Desmond Clarke[9] and Dr. Oran Doyle.[10]

The Changes in Irish Law

The second "fact" upon which the arguments in this dissertation are based is that of the considerable changes in Irish laws - amendments to the Constitution, changes in statute law and "landmark" decisions of the Supreme Court - during the period from 1973 to 1999. For example, laws to facilitate contraception within marriage which were enacted in the aftermath of the *McGee Case* would have been unthinkable in the generations prior to the judgment and were controversial when enacted, but now have the capacity to embarrass.[11] Although the offences of buggery, indecent assault and gross indecency which were set out in the Offences against the Person Act 1861 and which had the effect of criminalising homosexual acts between consenting adults in private were found by the Supreme Court not to be contrary to the constitutional guarantees of equality, freedom of expression, freedom of association, privacy and bodily integrity and not to constitute an invidious discrimination against a plaintiff who claimed to be exclusively, congenitally and irreversibly homosexual,[12] the offences were subsequently abolished.[13] While a right to abortion might have been unthinkable in earlier generations, in the *X Case* the Supreme Court affirmed a right to abortion in certain circumstances.[14] Whereas once the Supreme Court had repeatedly denied

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[9] Professor of Philosophy, University College, Cork, 1994-2006.

[10] Lecturer in Law, Trinity College, Dublin, 2004-present.

[11] Health (Family Planning) Act 1979.

[12] *Norris v Attorney General* [1984] IR 36. Hereafter referred to as the *Norris Case*.

[13] Criminal Law (Sexual Offences) Act 1993.

[14] *Attorney General v X* [1992] 1 IR 1, [1992] ILRM 401, [1992] CMLR 277. Hereafter referred to as the *X Case*.

a right to obtain or make available information on abortion services in other jurisdictions,[15] after the fourteenth amendment to the Constitution in 1992 legislation regulating the provision of information on abortion services in other jurisdictions was enacted.[16] After the fifteenth amendment to the Constitution in 1996 legislation providing for divorce was enacted.[17] While some of the changes to the law occasioned considerable public controversy, there is a sense in which it can be said that during the period from 1973 to 1999 Irish law performed a "somersault".[18] These revolutionary or "somersaulting" changes in Irish law raise the question of the nature of the law of Ireland.

Nihilism

It is argued in this dissertation that the nature of Irish law can be understood in the light of Heidegger's analysis of "nihilism" (*Nihilismus*) found in his studies of Friedrich Nietzsche (1844-1900) and Ernst Jünger (1895-1998). Heidegger argues that the transformation in the understanding of truth from that found in the medieval philosophy to that found in the Cartesian philosophy raises the problem of the certainty of the thinking subject. He argues that the dissolution of the metaphysical conception of God as the ground of being and truth within Western thought (and Cartesian philosophy in particular) is related to the problem of the establishment of the (Cartesian) subject as the ground of (its own) certainty. Heidegger identifies the emergence of "scientific" thinking - with its striving to establish grounds for certain knowledge - as a consequence of the self-establishment of the (Cartesian) subject as

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[15] *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open-Door Counselling Ltd* [1988] IR 593; *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753.

[16] Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995.

[17] Family Law (Divorce) Act 1996.

[18] Diarmaid Ferriter, *Occasions of Sin* (Profile Books, 2009), at 407-546; Sandra McAvoy, "From Anti-Amendment Campaigns to Demanding Reproductive Justice: The Changing Landscape of Abortion Rights in Ireland, 1983-2008" in Schweppe ed, *The Unborn Child, Article 40.3.3° and Abortion in Ireland* (Liffey Press, 2008), at 15-46.

the ground of (its own) certainty. In broad terms, Heidegger argues that the subject's striving for certainty manifests itself in the subject's constant ascription of values. Nihilism, in the Heideggerian sense, is not the collapse all to nothing but the self-grounding subject's assumption that every thing's essential value can in no way be justified, legitimated or grounded independently of the subject and such that every thing has to be continuously assigned a value by the subject. In this sense, Heidegger describes nihilism as the subject's need or "necessity of devaluation for the sake of revaluation" (*die Notwendigkeit einer Umwertung und damit eine neue Wertsetzung ernötigt*). Heidegger elaborates the historical emergence of nihilism, *ie* the historical and social manifestation of the continuous wilful ascription of value to things, *eg* in the movements of twentieth century politics, in terms of the emergence of the subject which is presupposed in the metaphysics of subjectivity (with its Cartesian transformation of the relation between truth and certainty, its calculating, scientific and technological mode of thought and its continuous drive for certainty). In sum, Heidegger relates the social, historical phenomena of nihilism to the metaphysics of subjectivity.

Heidegger explains the emergent subject's nihilistic ascription of values for the purposes of securing the subject's certainty and ordering of the world as both a manifestation of the will to power (*die Wille zur Macht*) and a claim to justice. In broad terms, Heidegger explains that the self-grounding subject's valuations are in and of themselves relations - relations of rulership, power, and command, even as they mask themselves as claims to the ascription of freedom and to justice. In this sense Heidegger holds that the essence of nihilism is social (as distinct from psychological) and is disclosed through the relations between subjects. Heidegger identifies mastery (or rule or dominion) as the "metaphysical essence of justice" (*Herrschaft als das metaphysische Wesen der Gerechtigkeit*).

The Nihilistic Jurisprudence of the Supreme Court

It is argued in this dissertation that the metaphysical essence of justice as rule or dominion identified by Heidegger is evident in the Supreme Court's decisions in the *McGee Case* and the *Foy Case*.[19]

The Revival of Natural Law Theory in Contemporary Jurisprudence

The third "fact" upon which the arguments in this dissertation are based is that of the revival of natural law theory in contemporary jurisprudential scholarship following the publication of the first edition of Professor John Finnis'[20] book *Natural Law and Natural Rights* in 1980.[21] The term 'new natural law', which seems to have been introduced into common usage by Hittinger,[22] refers to the work of such Roman Catholic theologians as Grisez,[23] Boyle[24] and May[25] and such legal theorists as Finnis,[26] George[27] and Murphy.[28]

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[19] *Foy v An t-Ard Cláraitheoir* [2007] IEHC 470. Hereafter referred to as the *Foy Case*.

[20] Professor of Law and Legal Philosophy, University College, Oxford, 1989-2010.

[21] John Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press, 2011).

[22] Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame Press, 1987), at 5. Nicholas Bamforth and David A. J. Richards, *Patriarchal Religion, Sexuality and Gender* (Cambridge University Press, 2007), at 1.

[23] Germain Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1-2, Question 94, Article 2" (1965) 10 *Natural Law Forum* 168-201; *The Way of the Lord Jesus* (Franciscan Press, 1997).

[24] Germain Grisez and Joseph Boyle, *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate* (University of Notre Dame Press, 1979); Germain Grisez, Joseph Boyle and John Finnis, "Practical Principles, Moral Truth and Ultimate Ends" (1987) 31 *American Journal of Jurisprudence* 101.

[25] Germain Grisez, Joseph Boyle, John Finnis and William E. May, ""Every Marital Act Ought to be Open to New Life": Toward a Clearer Understanding" 52 (1988) *The Thomist* 365.

[26] John Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press, 2011); *Fundamentals of Ethics* (Georgetown University Press, 1983); *Moral Absolutes* (Catholic University of America Press, 1991); *Aquinas* (Oxford University Press, 1998); John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press, 1987).

[27] Robert P. George, *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992); *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, 1993); *In Defence of Natural Law* (Clarendon Press, 1999).

[28] Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006).

While these theologians and legal theorists differ on particular points of interpretation, they are united in articulating a natural law theory in terms of basic goods and requirements of practical reasonableness. The new theory of natural law is distinguished from Aquinas's account of the natural law in that it is "atheistic" in the sense that its exposition is independent of an elaboration of knowledge of God such as that pertaining to divine providence and creation, and is "without nature" in the sense that its exposition does not depend on an elaboration of facts knowable by theoretical reason.[29] The "new natural lawyers" have contributed to the debates on such topics as the legitimacy of nuclear deterrence, euthanasia, abortion, contraception and on the nature of marriage.[30] In the United States prominent new natural lawyers have advanced arguments at State Supreme Court level[31] and before the US Supreme Court.[32]

The Relevance of the "New" Natural Law to Irish Jurisprudence

Given that the question of the legal status of the natural law has been the subject of considerable controversy in contemporary Irish jurisprudence – controversy which has even included a public debate between a judge of the High Court and a philosophy professor carried out in the *Irish Law Times* in the aftermath of the Supreme Court's decision on

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[29] Fulvio Di Blasi, *God and the Natural Law* (St. Augustine's Press, 2006), at 3.

[30] Nigel Biggar and Rufus Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Ashgate, 2000).

[31] Nicholas Bamforth and David A. J. Richards, *Patriarchal Religion, Sexuality and Gender* (Cambridge University Press, 2007), at 2; John Finnis, "Law, Morality, and 'Sexual Orientation'" (1993-4) 69 *Notre Dame Law Review* 1049.

[32] Robert George and Gerard Bradley submitted an *amicus curiae* brief in support of the Respondent on behalf of the groups *Family Research Council* and *Focus on the Family* in the case of *Lawrence v Texas* 539 US 558 (2003) http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.frc.pdf (visited 17th October 2009). The submission was in support of a Texan anti-sodomy statute.

abortion in the *X Case*,[33] and given that "new" natural law arguments have been used to elucidate Irish Constitutional jurisprudence,[34] the question arises whether the "new" natural law theory might be of use in "reinstating" the legal status of the natural law in contemporary Irish jurisprudence.

The Relevance of Finnis' Theory to Irish Jurisprudence

It is argued in this dissertation that the metaphysics of subjectivity identified by Heidegger is evident in the understanding of the natural law found in the "new" natural law theory of Professor John Finnis. It follows that, since Finnis' theory is situated within the very movement of nihilism which brought about the degradation of the status of the natural law in contemporary Irish jurisprudence, the application of Finnis' theory in interpreting the Constitution of Ireland is a participation in the very movement of nihilism unfolding within the law of Ireland.

The Theses defended in this Dissertation

Aquinas's Account of the Natural Law

The first thesis, which is in two parts and which is defended in the first and second chapters of this dissertation, concerns Saint Thomas Aquinas's account of the natural law. It is argued

1. that Aquinas's account of the natural law is theological in the sense that it presupposes knowledge of God acquired in faith, and

[33] O'Hanlon J, writing *extra curia* in Roderick J. O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *Irish Law Times* 8; "The Judiciary and the Moral Law" (1993) 11 *Irish Law Times* 129; Desmond M. Clarke, "The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon" (1993) 11 *Irish Law Times* 177.

[34] Diarmuid Rossa Phelan, "Natural Law and Popular Sovereignty" (2007) 96 *Studies* 215, at 217-219; *Revolt or Revolution* (Round Hall Sweet & Maxwell, 1997), at 273-289.

2. that the text of *Bunreacht na hÉireann* can bear an interpretation broadly consistent with Aquinas's theological understanding of the natural law.

Aquinas's account of the natural law can be distinguished from both Finnis' and Costello's accounts of the natural law studied in this dissertation. The difference between Aquinas's treatment of the natural law and those of Finnis and Costello arises from the difference between Aquinas's and the other authors' understanding of the human knower's cognition of the natural law.

It is argued in the first chapter that Aquinas understands the human knower *qua* knower to be essentially ecstatic in the sense that the human knower is directed towards the intelligibility of beings other than itself, with the consequence that knowledge or understanding does not arise through the knower's thinking about thinking but rather through the knower's manner of being present to beings other than itself. Since the knower's manner of being present to things other than itself is necessarily "outward" looking and the understanding which it develops is perfected over time, Aquinas understands cognition as bearing an implicit reference to futurity. In particular, it is argued that Aquinas's knowledge of God and the natural law conform to the same structure. Since God is other than the knower, knowledge of God (and the natural law which participates in the Divine law) does not arise from thinking about thinking, but through the knower's manner of being present to that which is present – a manner of being present which Aquinas articulates in terms of habituation in virtue, acts of faith (*credere*) and faith (*fides*). Aquinas's account of cognition presupposes a relationship between truth, certainty and understanding which is fundamentally different from that presupposed by Finnis and Costello and which is not reconcilable with their conception of how the natural law is known with certainty.

Finnis' Account of the Natural Law

The second thesis, which is defended in the third chapter of this dissertation, is that Finnis' account of the natural law presupposes the metaphysics of subjectivity.

It is argued in the third chapter that Finnis' articulation of the natural law in terms of "self-evident basic forms of human flourishing" and "requirements of practical reasonableness" presupposes that the cognition of the natural law arises through the knower's thinking about thinking and so, in contrast to Aquinas's "outward looking" and "future oriented" understanding of cognition, Finnis understands cognition as "inward looking". It is argued that Finnis' understanding of cognition as bearing an implicit reference to interiority presupposes the transformation of the relation between truth and certainty from that found in medieval philosophy to that found in the Cartesian philosophy which Heidegger claims has been unfolding in the history of European philosophy since Descartes. It is argued that the Cartesian configuration of the relation between truth and certainty which is found in Finnis is not found in Aquinas and is such that Finnis' "new" natural law theory cannot be reconciled with Aquinas's "theological" natural law theory. It follows that since Finnis' new natural law theory presupposes the metaphysics of subjectivity, the application of Finnis' new natural law theory in interpreting the Constitution of Ireland is not an "antidote" to the metaphysics of subjectivity manifest in the jurisprudence of the Supreme Court but a participation in the very movement of nihilism unfolding within the law of Ireland.

The Jurisprudence of the Supreme Court

The third thesis, which is in two parts and which is defended in the fourth, fifth, sixth, seventh, eighth and ninth chapters of this dissertation, concerns the jurisprudence of the Irish Supreme Court:

1. notwithstanding the *dicta* of Walsh J in the *McGee Case* that the constitutionally protected natural human rights can be understood in accordance with Aquinas's Christian

theological understanding of the natural law, it is argued (in chapters 4, 5 and 6) that Aquinas's theological understanding of the natural law is not evident in either the *McGee Case* or in the scholarly commentary on the natural law and the Irish Constitution;

2. it is argued (in chapters 6, 7, 8 and 9) that the judgments of the Irish Supreme Court handed down during the period from 1973 to 1999 on such diverse issues as contraception, abortion, abortion information, euthanasia and blasphemy do not evidence the (Thomistic) understanding of law as directed to the common good but evidence the emerging triumph of the will to power (*Wille zur Macht*) and the subjection of law to the rule of technology (*Technik*).

More precisely, with regard to the status of the natural law within the jurisprudence of the Supreme Court and the scholarly commentary on the Constitution, it is argued:

(i) that the method of constitutional interpretation which is outlined in some extra curial writings of Mr. Justice Costello - a method of interpretation which relies on the authority of the Constitution to justify interpreting the Constitution in the light of Christian philosophy – involves a philosophically improper transposition of the temporal priority of faith to the order of being and law (chapter 4). It is argued that Costello's conflation of faith and law bears some similarity to the conflation of faith and philosophy in Descartes' philosophy and that it also presupposes the metaphysical interpretation of being, truth and certainty which Heidegger has identified within the history of European thought since Descartes;

(ii) that Costello's method of interpreting the Constitution is similar to that which is implicit in the *dicta* of Walsh J in the *McGee Case* (chapter 6);

(iii) that Clarke's method of interpreting the natural legal elements of the Irish Constitution by means of logical methods presupposes the conception of truth found in the metaphysical interpretation of being analysed by Heidegger (chapter 5).

With regard to the judgments of the Supreme Court in cases concerning contraception, abortion, abortion information, euthanasia and blasphemy, it is argued:

1. that the decisions of the Supreme Court on contraception in the *McGee Case* (chapter 6) and on abortion in the *X Case* (chapter 7) effect a rejection of the Thomistic understanding of the common good;
2. that the decisions of the Supreme Court in the *McGee Case* (chapter 6), the *X Case* (chapter 7) and on blasphemy in the *Corway Case* (chapter 9) evidence the metaphysics of subjectivity;
3. that the decision of the Supreme Court on euthanasia in the *Ward of Court Case* (chapter 8) evidences the reduction of law to regulation – a reduction which can be interpreted in the light of Heidegger's analyses of the 'rule of technology' (*Technik*);
4. that the decisions of the Supreme Court in the *McGee Case* (chapter 6) and the *Corway Case* (chapter 9) evidence the metaphysical essence of justice as rule or dominion.

Overview of the Dissertation

In order to clarify the contribution of this dissertation to the scholarship on Irish law and jurisprudence, the following paragraphs outline

(i) what this dissertation is;

(ii) what this dissertation is not;

(iii) why the works of Aquinas, Finnis and Heidegger are appropriate for an examination of the jurisprudence of the Irish Supreme Court during the period 1973-1999; and

(iv) the relation of this dissertation to the existing scholarship on jurisprudence and Irish law.

What this Dissertation is

1. This dissertation is a contribution to the genealogy of the concept of law in the jurisprudence of the Irish Supreme Court and in the legal scholarship on the Irish Constitution. It contains a historical reconstruction of the evolution of the meaning of the law in the jurisprudence of the Supreme Court during the period from 1973 to 1999 together with a philosophical explication of that historical evolution. The philosophical explication has two elements. Firstly, the progressive transformation in the Supreme Court's understanding of law is analysed in terms of the Supreme Court's departure from Aquinas's understanding of law as directed to the common good. Secondly, the transformation in the Supreme Court's jurisprudence is interpreted using philosophical insights drawn from Heidegger's work on Descartes, Leibniz, Nietzsche and Jünger.
2. The objective of this genealogy is to show that that which is played out in legal terms in the somersaulting changes in the law of Ireland is an effect of an event or phenomenon which is *not* itself legal. It is argued in this dissertation that the issues and concepts of contemporary jurisprudence and legal thought in Ireland are themselves shaped in response to a phenomenon or event which legal thought can neither intimate nor interrogate. This event – which Heidegger variously called "the event of nihilism" and the "death of God" and which he described as "the basic experience in western history" - is neither peculiarly Irish nor particular to law, rather it is an "ontohistorical" phenomenon, *ie* an event in the history of being and truth whose effects are indeed social and legal but which is irreducible to the effects it produces. Insofar as Heidegger understands metaphysics as having conceived God as the ground of being and truth, then Heidegger understand metaphysics to be the realm for the "death of God" and the "event of nihilism". Two arguments are advanced in this dissertation to establish the "situation" or "location" of the law of Ireland within the movement of nihilism (*Bewegung des*

Nihilismus). Firstly, it is argued that insofar as God was conceived as the ground of the constitutional natural law in the jurisprudence of the Irish Supreme Court, then the degradation of the "legal status" of God in the jurisprudence of the Supreme Court during the period 1973-1999 can be understood in consequence of the ontohistorical event of the "death of God" or "nihilism" studied by Heidegger. In particular, it is argued that the degradation of the "legal status" of God and the natural law can be understood as a working out of a nihilistic reconfiguration of being and truth. Secondly, it is argued that the decisions of the Irish Supreme Court in cases concerning contraception, abortion, abortion information, euthanasia and blasphemy handed down during the period 1973-1999 evidence the legal and social effects of this ontohistorical event in the realm of Irish law.

What this Dissertation is not

1. This dissertation does not contain a defence of natural law. This dissertation contains neither practical applications of natural law theory to contemporary issues in jurisprudence nor practical conclusions about the natural law and the Irish Constitution. It does not contain a defence of either a "theological" or a "new" natural law interpretation of *Bunreacht na hÉireann*.

   This dissertation contains neither a theory of constitutional interpretation nor a preferred interpretation of *Bunreacht na hÉireann*. As the objective of this genealogy is to show that that which is played out in legal terms in the somersaulting changes in the law of Ireland is an effect of an event or phenomenon which is *not* itself legal, the dissertation is not primarily concerned with the *legal* interpretation of *Bunreacht na hÉireann*. More precisely, since the objective of this dissertation is to show that the degradation in the legal status of the natural law in the jurisprudence of the Supreme Court and the somersaulting changes in Irish law are both effects of the ontohistorical

event of nihilism, the arguments in this dissertation are concerned with the *metaphysical* significance of the jurisprudence of the Supreme Court and not with the particularly *legal* significance of either EU law, the jurisprudence of the European Court of Justice, the jurisprudence of the European Court of Human Rights or the jurisprudence of the courts of other jurisdictions for the case law studied in this dissertation. Of the five cases studied in this dissertation, no issues of EU law were considered by the Court in three of the cases, the reference to EU law in a fourth case was *obiter*,[35] while in the fifth case - in which EU law was briefly considered - the Court's approach to EU law does not indicate any difference from its approach to Irish law.[36]

This dissertation does not articulate an alternative understanding of justice to that which is manifest within the movement of nihilism. Such an alternative understanding would require that the thought of justice be articulated in terms of the essence of truth in an articulation which escapes the metaphysical interpretations of truth and being implicated within the centuries old movement of nihilism. While the articulation of the relation between justice and truth has been a concern of Western philosophy since ancient times, it is a task of such magnitude that it lies outside the scope of this dissertation. The dissertation concludes with the briefest indication that the elements of such an alternative understanding of justice might be indicated in the fragments of such pre-Socratic authors as Heraclitus, Anaximander and Parmenides.

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[35] The decision in the *McGee Case* (in 1973) on contraception was given prior to the coming into force of EU law in Ireland. In the *X Case* (1992) on abortion the Court held that no decision on any question of EU law was necessary to enable it to give its judgment so the references to EU law in that case are *obiter*. In the *Ward of Court Case* (1996) on euthanasia and in the *Corway Case* (1999) on blasphemy no issues of EU law were considered by the Court.

[36] In the *Abortion Information Case* (1995) the Supreme Court construed the provisions of the fourteenth amendment to the Constitution (which the Bill, the subject of the proceedings, was to give effect) in accordance with the Court of Justice of the European Community's interpretation of the EU treaties (that the medical termination of pregnancy performed in accordance with the law of the State in which it is carried out constitutes a service within the meaning of the EU Treaties).

2. This dissertation does not contain a theory of adjudication. While this dissertation contains analyses of the criteria of adjudication implied in the *dicta* of Walsh J and Barrington J as well as in some of the extra curial writing of Costello J and O'Hanlon J, these judgments and writings are examined with a view to identifying their metaphysical presuppositions. In particular, when such terms as "imposing a restriction of the class of valid reasons", "reducing law to its justifications and rationalizations" and "failing to deliberate" are used in this dissertation in connection with particular judges and judgements it should not be interpreted as implying or denoting the judge's failure in his duty or a moral weakness of the judge, rather it should be interpreted as a manifestation of the almost inescapable manner of thinking implicated in the metaphysics of subjectivity which Heidegger claims has been unfolding in European thought since Descartes. Similarly, when it is argued in this dissertation that certain judgments of the Irish Supreme Court during the period from 1973 to 1999 evidence the will to power and the metaphysical essence of justice as rule or dominion, this should not be interpreted as meaning that the particular applicants, plaintiffs and judges intentionally seek out power or use the legal system to dominate. Rather, these judgments should be understood as evidence of the manifestation of the nihilism which Heidegger claims has been unfolding within European thought.

While this dissertation does not answer the question 'what is a judge to do?' the dissertation concludes with the briefest indication that what might be required of a judge in each particular case is that he engage in a deliberation upon the essence of things rather than in the kind of calculative thought which Heidegger associates with the metaphysics of subjectivity. For example, by systematically applying the canons of legal interpretation and legal precedent in the interpretation of the law pertinent to the legally established facts of a case, a judge might well make a legally certain determination in the case. However,

there is a danger that the representational and calculative thought implicit in such a legal method conceals or occludes the very nature of the the things upon which judgment is being brought to bear, with the consequence that the judge's objective, legally certain determination merely elaborates the legal *representation* of the case. It is suggested in the conclusion of this dissertation that, in contrast to the judge's analysis of an objective, legal representation of a case, the judicial discernment of what is essential in a case might involve a kind of deliberative thinking upon the essence of things – a kind of thinking which is hinted at in the fragments of Heraclitus, Anaximander and Parmenides and in the writing of Heidegger - which touches the very conscience of the judge himself.

3. It is not the objective of this dissertation to upset or offend the religious or moral sensibilities of Roman Catholics. In particular, the conclusion that the natural law presupposes knowledge of God acquired in faith (with its implication that there might not be a natural law on which Christians and atheists of good will can agree) is not to be understood as asserting that the traditional Christian understandings of the demonstrability of the existence of God and of the reasonableness of the natural law are irrational or irrelevant in the modern world. Rather, when contrasted with the understanding of the law implicit in the metaphysics of subjectivity, the conclusion about the knowledge of the natural law acquired in faith evidences the fact that while both Christians and atheists articulate their understandings of law in terms of such apparently simple and self-evident terms as 'nature', 'reason' and 'truth', these terms are markers for things with a long and difficult history - a history which includes the transformation in the relation between truth and certainty from that found in the medieval philosophy and theology to that found in the metaphysics of subjectivity.

This dissertation does not reach any conclusions on the moral teaching of the Roman Catholic Church or on the significance of Roman Catholic moral teaching for Irish law.

The case law on contraception, abortion, suicide, euthanasia and blasphemy are examined in this dissertation, not because of their importance within the moral teaching of the Roman Catholic Church during the latter half of the twentieth century, but because it evidences the Supreme Court's rejection of the (Thomistic) understanding of law as directed to the common good and can be understood as evidencing the emergence of the subject presupposed by the metaphysics of subjectivity. In particular, this dissertation does not assert that the law of Ireland or the jurisprudence of the Irish Supreme Court is nihilistic because they have departed from, or cannot be reconciled with, the theology of Aquinas or the teaching of the Roman Catholic Church.

4. This dissertation does not contain a defence of Heidegger's philosophy (although some of Heidegger's insights are relied upon in interpreting the somersaulting transformation of Irish law during the period 1973 to 1999). In particular, while it can be said that the relationship between being (*Sein*) and the being of being human (*Dasein*) is one of the central concerns of Heidegger's philosophy, this dissertation does not elaborate Heidegger's understanding of that relationship but relies upon various aspects of Heidegger's analyses of:

   (i) the relationship between being (*Sein*) and the Will to Power (*Wille zur Macht*) and the Will to Power's manifestation in the rule of technology (*Technik*) (which Heidegger examines in his lectures on Nietzsche and in his later work);

   (ii) the metaphysical and ontological aspects of the Cartesian philosophy (which Heidegger examines in his lectures on Nietzsche);

   (iii) the relationship between subjectivity and individuality (which Heidegger examines in his lectures on Leibniz and Nietzsche);

(iv) the nature of the type (*Typus* or *Gestalt*) by which the political and social nature of the nihilism of the modern age is manifest (which Heidegger examines in his lectures on Nietzsche and in his studies of Jünger).

The Choice of Aquinas, Finnis and Heidegger

In the following sections the reasons for choosing the works of Aquinas, Finnis and Heidegger to elucidate the degradation of the legal status of the natural law in the jurisprudence of the Supreme Court and the somersaulting changes in Irish law during the period 1973-1999 are outlined.

Aquinas

There are four reasons for examining Aquinas's theory of law in this dissertation.

Firstly, since Aquinas's theory of law is articulated in terms of theological categories and relies upon a particularly theological conception of being and truth, it provides a contrasting background against which the issues and concepts of contemporary jurisprudence and legal thought in Ireland can be examined. More precisely, the working out of the reconfiguration of being and truth (in consequence of the "event of nihilism" and the "death of God") within the realm of contemporary Irish law can be seen by comparison with the theological understanding of being and truth operative in Aquinas's legal theory.

Secondly, the text of *Bunreacht na hÉireann* can bear an interpretation broadly consistent with a Thomistic understanding of the natural law.

Thirdly, given Walsh J's *dicta* in the *McGee Case* that the constitutionally protected natural human rights can be understood in accordance with a Christian theological understanding of the natural law, and given that the classical exposition of natural law in the Christian tradition is that contained in the writings of Aquinas, Walsh J's *dicta* would suggest

that Aquinas's theory of law is relevant for the purpose of considering the role of natural law in the Irish Constitution and in the jurisprudence of the Supreme Court.

Fourthly, since the "new" natural law theory advanced by some contemporary legal theorists and Roman Catholic theologians has brought about renewed interest in Aquinas's natural law theory within contemporary legal scholarship (both within and without Ireland) and since "new" natural law arguments have been relied upon in the scholarly interpretation of *Bunreacht na hÉireann*, it would seem that Aquinas's theory of law might be relevant for analysing the "new" natural law theory and its significance for Irish constitutional interpretation.

Heidegger

There are three reasons for relying upon Martin Heidegger's philosophy within this dissertation.

Firstly, since Heidegger's analyses of the history of Western thought have traced various transformations of being and truth within the history of Western thought, his analyses can be relied upon to trace the transformation of being and truth within contemporary Irish jurisprudence. In particular, Heidegger's analysis of the "event of nihilism" or the "death of God", *ie* the dissolution of the metaphysical conception of God as the ground of being and truth within Western thought, is of particular relevance for understanding the transformation of the metaphysical conception of God as the ground of the natural law within the jurisprudence of the Irish Supreme Court.

Secondly, Heidegger's examination of the social effects of the "event of nihilism", *ie* his examination of the subject's nihilistic valuations as being relations of rulership and command over subjects as well as being claims to justice, can be relied upon to interpret the somersaults in Irish law during the period 1973-1999.

Thirdly, given that the "new" natural law theory is articulated in non-theological terms, Heidegger's analyses of Western thought can be relied upon to identify the transformation of being and truth from that found in Aquinas's "old" theological natural law to that found in the "new" non-theological natural law theory.

Finnis

There are two reasons for examining Professor John Finnis' "new" natural law theory in this dissertation.

Firstly, since Finnis' theory has brought about renewed interest in natural law theory within contemporary legal scholarship and has been used in the scholarly interpretation of *Bunreacht na hÉireann*, Finnis' theory is relevant for analysing the significance of the natural law for contemporary Irish jurisprudence.

Secondly, given that Finnis' theory is articulated in non-theological terms, it can be contrasted with Aquinas's "theological" theory so as to allow the differences between the two theories – and their significance for contemporary Irish jurisprudence - to come into relief.

The Relationship of this Dissertation to Contemporary Scholarship

In the following sections the relationship of this dissertation to the existing scholarship is outlined.

The Jurisprudence of the Supreme Court

While there are many judicial *dicta* which explicitly identify a natural law basis of the Irish Constitution and which explicitly identify the influence of Aquinas's natural law theory on the Constitution,[37] there is no detailed elaboration of the natural law to be found within the

[37] [1974] IR 284 at 317: see note 3.

"Whilst the language of the Constitution evokes the rhetoric of the political reformers of the 18th Century and the "*fundamental rights*" provisions, in particular, repeat many of the phrases contained in the 'Declaration of the Rights of Man' passed by the National Assembly of France on the 26th day of August 1798, the political

jurisprudence of the Supreme Court. The analysis of the change in the status of the natural law in the jurisprudence of the Supreme Court in this dissertation is not based on a *legal* analysis of the few judicial *dicta* on the natural law but on a *philosophical* analysis of the *dicta*, particularly the *dicta* of Walsh J in the *McGee Case*. This philosophical analysis is conducted in the light of the theology of Aquinas and the phenomenology of Heidegger. Similarly, the scholarly commentary on the natural law basis of the Constitution written by judges does not elucidate a theory of the natural law.[38] However, the metaphysical basis of

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philosophy of our Constitution owes infinitely more to Thomas Aquinas than Thomas Paine." per Denham J in *Best v Attorney General* [1999] 7 JIC 2703.

"The Thomistic philosophy – the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh J – confers an autonomy on parents which is clearly reflected in the express terms of the Constitution..." per Murphy J in *North Western Health Board v H.W.* [2001] 3 I.R. 622, at 372, quoted approvingly by Fennelly J in *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1, at 188; and in *N v Health Service Executive* [2006] 4 IR 374, at 579.

[38] "The classical exposition of natural law in the Christian tradition is that contained in the writings of Thomas Aquinas and his theory of law is obviously most relevant for the purpose of considering the role of natural law in the Irish Constitution." Costello J, writing *extra curia* in Declan Costello, "Natural Law, the Constitution, and the Courts" in Lynch and Meenan eds, *Essays in Memory of Alexis Fitzgerald* (Incorporated Law Society of Ireland, 1987), at 110.

"While St Thomas Aquinas claimed that natural law was the part of law which was discovered by human reason, others claimed that natural law did not depend upon the existence of God but was simply the dictate of right reason. Yet what was important was that its existence was accepted and with it, inevitably, the concept of human rights. In view of many people, the influence of scholastic philosophy on the history of natural law was decisive in the European tradition and St. Thomas Aquinas was the great exponent of this philosophy. It can be correctly asserted that the Constitution of Ireland opted for the theological origin of natural law", Walsh J, writing *extra curia* in Brian Walsh, "The Constitution and Constitutional Rights" in Litton ed, *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988), at 94.

"Irish constitutional jurisprudence owes much to the frank recognition that many of these rights do not derive from the fact that they are written down in the basic law of the State but rather from the very nature of man and from the natural law. What is important in relation to such rights, truly described as fundamental, is that they are confirmed and protected, but not created, by the Constitution...There are therefore rights recognised by the Constitution of Ireland which are acknowledged as being antecedent both to it and to all positive law and, as part of a higher law, immune from change and inviolable," O'Higgins CJ, writing *extra curia* in the preface to Madeleine Reid, *The Impact of European Community Law on Irish Constitutional Law* (Irish Centre for European Law, 1991), at 1.

"It is clear, therefore, that the protection of fundamental rights in the Irish Constitution (and in particular the right to life of the unborn) is firmly grounded on what is called the Natural Law...It should not be thought that recitals amount to more than an empty formula, quickly submerged in and subservient to the remaining provisions of the Constitution. The contrary is the case, as can be seen from a succession of statements by some of the most eminent judges in the field of constitutional law who have been appointed to the High Court and the Supreme Court since the foundation of the State. O'Hanlon J, writing *extra curia* in Roderick J. O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *Irish Law Times* 8, at 9.
O'Hanlon J, "The Judiciary and the Moral Law" (1993) 11 *Irish Law Times* 129.

the extra judicial commentary of Mr. Justice Costello[39] is examined in chapter 4 of this dissertation.

While it has been frequently asserted that the natural law basis of *Bunreacht na hÉireann* has been influenced by the social teaching of the Roman Catholic Church, the scholarly analyses have focused on the historical nature of this influence[40] and so have not been relied upon in this dissertation. While there are many scholarly analyses which refer to the natural law basis of the Irish Constitution,[41] and which analyse the Court's decisions on

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[39] Declan Costello, "Natural Law, the Constitution, and the Courts" in Lynch and Meenan eds, *Essays in Memory of Alexis Fitzgerald* (Incorporated Law Society of Ireland, 1987).

[40] W. Bromage and Mary C. Bromage, "The Irish Constitution: A Discussion of its Theoretical Aspects" (1940) 2 *The Review of Politics* 145; Michael Oakeshott, *The Social and Political Doctrines of Contemporary Europe* (Cambridge University Press, 1939), at 45-77; John Harris, *Ethics in Constitutional Law. A Theological Reflection on the Preamble to the Irish Constitution* (Pontifical University of St. Thomas, Rome, 2004); Gerard Hogan, "De Valera, the Constitution and the Historians" (2005) 39 *Irish Jurist* 293; Brian O'Reilly, "In the Name of the Most Holy Trinity: Religious Anachronisms and the Need for a Secular Constitution", *Cork Online Law Review* (2010), pp. 56-69 (visited 7th August 2011).

[41] Amy M. Buckley, "The Primacy of Democracy over Natural Law in Irish Abortion Law: An Examination of the C Case" (1998) 9 *Duke Journal of Comparative and International Law* 275; Desmond M. Clarke, "Emergency Legislation, Fundamental Rights and Article 28.3.3 of the Irish Constitution" (1977) 12 *Irish Jurist* (N.S.) 217; "The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon" (1993) 11 *Irish Law Times* 177; "Natural Law and Constitutional Consistency" in Quinn, Ingram and Livingstone eds, *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995), "The Role of the Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist* (N. S.) 187; Oran Doyle, "Legal Validity: Reflections on the Irish Constitution" (2003) 10 *Dublin University Law Journal* 56; "Legal Positivism, Natural Law and the Constitution", *Dublin University Law Journal*, 31 (2009), pp. 206-227; William Duncan, "Can Natural Law be used in Constitutional Interpretation" (1995) 45 *Doctrine and Life* 130; Mark De Blacam, "Justice and Natural Law"(1997) 32 *Irish Jurist* (N.S.) 323; Harris, note 40; S. Henchy, "Precedent in the Irish Supreme Court" (1962) 25 *Modern Law Review* 554; Gerard Hogan, "Unenumerated Personal Rights: *Ryan's Case* Re-evaluated" (1990-92) 25-27 *Irish Jurist* 95; "Constitutional Interpretation" in Litton ed, *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988); G. W. Hogan and G. F. Whyte, *J.M. Kelly: The Irish Constitution* (4th ed, Tottel Publishing, 2004), at 1249-1265; Richard F. Humphreys, "Constitutional Interpretation" (1993) 15 *Dublin University Law Journal* 59; Aileen Kavanagh, "The Quest for Legitimacy in Constitutional Interpretation" (1997) 32 *Irish Jurist* 195; John Maurice Kelly, *Fundamental Rights in the Irish Law and Constitution* (Allen Figgis and Company, 1961), at 38-45; "Fundamental Rights and the Constitution" in Farrell ed, *De Valera's Constitution and Ours* (Gill and Macmillian, 1988); Stephen M. Krason, "Constitutional Interpretation, Unenumerated Rights, and the Natural Law" (1996) 1 *The Catholic Social Science Review* 20; V. Bradley Lewis, "Natural Law in Irish Constitutional Jurisprudence" (1997) 2 *Catholic Social Science Review* 171; Cynthia Millen, *The Right to Privacy in the United States and Ireland* (Blackhall Publishing, 1998); Oakeshott, note 40, at 45-77; Rory O'Connell, "Natural Law: Alive and Kicking? A Look at the Constitutional Morality of Sexual Privacy in Ireland" (1996) 9 *Ratio Juris* 258; Tim Murphy, "Democracy, Natural Law and the Irish Constitution" 11 (1993) *Irish Law Times* 81; O'Hanlon, note 33; Phelan (2007), note 34; Phelan (1997), note 34, at 293-295; Gerard Quinn, "The Rise and Fall of Natural Law in Irish Constitutional Adjudication" (2000) 1 *American Philosophical Association Newsletter* 89; "Legal Change, Natural Law and the Authority of the Courts" (1995) 45 *Doctrine and Life* 97; Adrian F. Twomey, "The Death of Natural Law?" (1995) 13 *Irish Law Times* 270; G. F. Whyte, "Natural Law and the Constitution" (1996) 14 *Irish Law Times* 8.

contraception,[42] abortion,[43] abortion information,[44] euthanasia[45] and blasphemy,[46] with the exception of Doyle's study of the *Abortion Information Case*[47] (which is examined in chapter 7 of this dissertation), these analyses tend to focus on the historical or legal aspects of the Constitution and the cases rather than on their metaphysical or philosophical aspects. For example, while the Clarke-O'Hanlon debate carried out in the *Irish Law Times* in 1993 concerned the natural law and the Irish Constitution, the debate did not elucidate the metaphysical presuppositions underlying the arguments of the disputants.[48] Similarly, while Phelan's study of the legitimation of law in the context of the constitutional relationships between EU law and Irish national law examined the *legal* status of the natural law within

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[42] The *McGee Case* is also discussed in the literature on the natural law (see n. 41 above).
Robert A. Burt, "Privacy and Contraception in the American and Irish Constitutions", *Yale Law School Legal Scholarship Repository* (1-1-1988) http://digitalcommons.law.yale.edu (visited 31st October 2010); Gerard Casey, "Are there Unenumerated Rights in the Irish Constitution?" (2005) 12 *Irish Law Times* 123; Gerard Hogan, "Unenumerated Personal Rights: *Ryan's Case* Re-evaluated" (1990-92) 25-27 *Irish Jurist* 95; Hogan and Whyte, note 41, at 1252-1253; Deirdre Madden, *Medicine, Ethics and the Law* (Tottel Publishing, 2002), at 170-171; Schweppe, note 18.

[43] The *X Case* is also discussed in the literature on the natural law (see n. 41 above).
William Binchy, "Pluralism, Liberty and the Right to Life" in Whelan ed, *Law and Liberty in Ireland*, (Oak Tree Press, 1993); Hogan and Whyte, note 41, at 1511-1526; Teresa Iglesias, "The X Case: A Lego-moral Consideration" (1996) 3 *Dublin University Law Journal* 187; James Kingston and Anthony Whelan, *Abortion and the Law* (Round Hall Sweet & Maxwell, 1997), at 1-34; D. G. Morgan, *A Judgment too far?* (Cork University Press, 2001), at 26; O'Hanlon, note 33, Schweppe, note 18; Twomey, note 39.

[44] Buckley, note 41, at 275-309; Gerard Casey, *Born Alive* (Barry Rose Law Publishers, 2005), at 93-96; De Blacam, note 41, at 323-342; Michael Forde, *Constitutional Law* (2nd ed, First Law, 2004), at 720-724; Hogan and Whyte, note 41, at 1526-1534; Murphy, note 41, at 81-85; O'Hanlon J, note 33; Phelan (2007), note 34, at 215-224; Phelan (1997), note 34, at 293-295; Quinn (1995), note 41, at 97-118; Quinn (2000), note 41, at 89; Twomey, note 41, at 270-276; Ian Walsh, "Between Scylla and Charybdis: The Supreme Court and the Regulation of Information Bill (1995), (2003) *Cork Online Law Review* www.ucdlawsociety.com/colr/editions/2003/2003vii.pdf (visited 27th November 2009); Anthony Whelan, "Constitutional Amendments in Ireland: The Competing Claims of Democracy" in Quinn, Ingram and Livingstone eds, *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995), at 45-193; Whyte, note 41, at 8-15.

[45] Dermot Feenan, "Death, Dying and the Law" (1996) 14 *Irish Law Times* 90; Teresa Iglesias, "Ethics, Brain-Death, and the Medical Concept of the Human Being" (1995) 1 *Medico-Legal Journal of Ireland* 51, David Tomkin and Adam McAuley, "*Re A Ward of Court*: Legal Analysis" (1995) 1 *Medico-Legal Journal of Ireland* 45, at 50

[46] Neville Cox, *Blasphemy and the Law in Ireland* (Edwin Mellen Press, 2000); Brian O'Reilly, "In the Name of the Most Holy Trinity: Religious Anachronisms and the Need for a Secular Constitution" (2010) *Cork Online Law Review* 56 (visited 7th August 2011).

[47] Oran Doyle, "Legal Validity: Reflections on the Irish Constitution" (2003) 10 *Dublin University Law Journal* 56.

[48] See n. 33 above.

Irish national law,[49] his study does not examine the *metaphysical* presuppositions of the natural law theory implicit in his legal analysis. Millen's study of the natural law theories underlying the Irish and U.S. constitutions is more a study of the historical influences on those constitutions than a philosophical analysis.[50] In his study of legal positivism, the natural law and the Constitution, Doyle focuses on the same extra curial text of Costello J and the *dicta* of Walsh J. studied in this dissertation.[51] However, as Doyle's arguments - that the Irish legal system is consistent with legal positivism (where positivism is understood as a descriptive claim about legal systems rather than a normative claim about legal doctrines) and that the Irish constitutional natural law doctrine (which gave rise to the doctrine of unenumerated rights) may be contrary to a natural law requirement of legal certainty - are concerned with neither the metaphysical presuppositions of, nor the cognition of, the natural law, they have not been relied upon in this dissertation. Similarly, while Cox's study of Irish blasphemy law examines the past, present and possible future of Irish blasphemy law, it does not examine the metaphysical presuppositions of the law on blasphemy.[52] In sum, the scholarly analyses of the natural law jurisprudence of the Supreme Court and of the legal aspects of the case law have not been relied upon in this dissertation. The exposition of the metaphysical understanding of law implicit in the case law examined in chapters 6, 7, 8 and 9 can be considered as a novel contribution to Irish legal scholarship.

The scholarly analyses of the case law and the natural law jurisprudence of the Supreme Court do not explicitly articulate how the understanding of law implicit in the case law relates to Aquinas's understanding of law as directed to the common good. The arguments in

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[49] Phelan (1997), note 34.

[50] Millen, note 41.

[51] Oran Doyle, "Legal Positivism, Natural Law and the Constitution" (2009) 31 *Dublin University Law Journal*, 206.

[52] Cox, note 46.

chapters 6, 7, 8 and 9 - that the understanding of law implicit in the case law is irreconcilable with Aquinas's understanding of law - can be considered a novel contribution to Irish legal scholarship.

There seems to be no scholarship which examines Irish case law from the perspective of twentieth century Continental philosophy. The analysis of the case law in the light of Heidegger's philosophy in this dissertation can be considered a novel contribution to Irish legal scholarship.

Aquinas

There are three features of the interpretation of Aquinas advanced in the first chapter of this dissertation: its dependence upon a Heideggerian analysis of Aquinas's theory of cognition, its emphasis on Aquinas's theory of participation and its emphasis on Aquinas's account of the common good.

The first feature of the interpretation of Aquinas advanced in this dissertation is its dependence upon a Heideggerian analysis rather than on an "analytical thomistic" analysis advanced by such authors as Alasdair MacIntyre, Ralph McInerny, John Finnis and Anthony J. Lisska. The reason for not adopting an "analytical thomistic" approach popular among "new" natural law theorists is that, broadly speaking, these authors do not clarify the existential-ontological aspects of the cognition of the natural law in Aquinas. For example, as discussed in chapter 3, Finnis aims to establish ethics objectively. His interpretation presupposes the self-evidence of certain Thomistic principles, *eg* the first principle of the natural law, and involves controversial reconstructions of Thomistic theories, *eg* the relationship between the theoretical and practical intellects in moral decision, with the consequence that the nature of the certain cognition of the natural law remains unclear. Similarly, while Lisska aims to provide an analytic treatment of the Aquinas's theory of law

in terms of meta-ethics and jurisprudence,[53] his argument - that Aquinas's natural law theory is founded upon Aristotle's *Nicomachean Ethics* – is not primarily concerned with the nature of the cognition of the natural law and so it has not been relied upon in this dissertation.

For the same reason other recent approaches to Aquinas's account of the natural law have not been relied upon in this dissertation. For example, while Di Blasi's "non-analytic" interpretation of Aquinas aims to establish the inevitably theistic character of any adequate account of natural law,[54] his interpretation is more concerned with the theory of the natural law (rather than the natural law of which the theory is) and leaves unexplained the existential aspects of Aquinas's account of the cognition of the natural law.

In the first chapter of this dissertation the Heideggerian analyses of Aquinas by Lawrence Paul Hemming[55] and Michael Baur[56] are relied upon to elucidate Aquinas's account of cognition. The application of these Heideggerian analyses to elucidate the existential-ontological aspects of Aquinas's account of the cognition of the natural law can be considered a novel contribution to the scholarship on Aquinas's theory of the natural law.

The second feature of the interpretation of Aquinas advanced in this dissertation is its emphasis upon Aquinas's theory of participation. In contrast to the influential interpretation of Aquinas advanced by Etienne Gilson (1884-1978) with its insistence that one of the essential keys for understanding the historical significance of Aquinas is to recognize his philosophy as a decisive option for Aristotle and against Platonism, the textual analysis of Aquinas in this dissertation adheres more to that of the "participationist school" of Cornelius

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[53] Anthony J. Lisska, *Aquinas's Theory of Natural Law* (Clarendon Press, 1995).

[54] Fulvio Di Blasi, *God and the Natural Law: A Rereading of Thomas Aquinas* (St. Augustine's Press, 2006).

[55] Laurence Paul Hemming, *Heidegger's Atheism* (University of Notre Dame Press, 2002); "In Matters of Truth: Heidegger and Aquinas", in Kerr ed, *Contemplating Aquinas: On the Varieties of Interpretation* (SCM Press, 2003).

[56] Michael Baur, "Heidegger and Aquinas on the Self as Substance" (1996) 70 *American Catholic Philosophical Quarterly* 317.

Fabro (1911-1995) *et al.* The participationist school, which holds that Aquinas's work is a deliberately wrought and highly original synthesis between both Aristotelian and Platonic thought, has established that participation is one of the central structures of Aquinas's philosophy which is systematically connected with Aquinas's accounts of being, causality, perfection, and the distinction between essence and existence (*esse*) in finite beings. While the more recent scholarship on Aquinas's theory of participation – which focuses on the implications of the doctrine of participation for Aquinas's metaphysics - has been relied upon in this dissertation,[57] there has been little scholarship on the implications of Aquinas's doctrine of participation for the cognition of the natural law. John Rziha's recent work, which aims to show how the Thomistic doctrine of participation in the eternal law acts as a foundation for moral theology,[58] is not concerned with the existential aspects of the cognition of the natural law and has not been relied upon in this dissertation. The analysis of the implications of Aquinas's doctrine of participation for the cognition of the natural law contained in the first chapter of this dissertation can be considered a novel contribution to the scholarship on Aquinas's theory of the natural law.

The third feature of the interpretation of Aquinas advanced in this dissertation is its emphasis upon Aquinas's account of the common good. Jeremiah Newman's[59] and Charles De Koninck's[60] studies of Aquinas's account of the common good have been relied upon in this dissertation. The analysis of the jurisprudence of the Supreme Court in the light of Aquinas's account of the common good can be considered a novel contribution to Thomistic scholarship.

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[57] W. Norris Clarke, *Explorations in Metaphysics: Being-God-Person* (University of Notre Dame Press, 1994); Fran O'Rourke, *Pseudo-Dionysius and the Metaphysics of Aquinas* (Brill, 1992); Rudi te Velde, *Participation and Substantiality in Thomas Aquinas* (Brill, 1995).

[58] John Rziha *Perfecting Human Actions* (The Catholic University of America Press, 2009).

[59] Jeremiah Newman, *Foundations of Justice: A Historico-critical Study in Thomism* (Cork University Press, 1954).

[60] Charles De Koninck, *The Writings of Charles De Koninck*, Volume II (University of Notre Dame Press, 2009).

Heidegger

There has been little scholarship on the significance of Heidegger's philosophy for jurisprudence in general and there seems to be no scholarship on its significance for Irish law in particular.

While several studies of the relevance of Heidegger's philosophy for law were published in the 1950s, 60s and 70s, *eg* Maihofer,[61] Kaufmann[62] and Heinemann,[63] these studies focused primarily on the relevance of Heidegger's first major work *Sein und Zeit* (*Being and Time*) published in 1927. With the on-going publication of the critical edition of Heidegger's works (which started in 1975 and which runs to 102 volumes) the significance of Heidegger's studies of Nietzsche and his understanding of the social nature of nihilism have become clearer. As this dissertation draws on Heidegger's studies of Nietzsche and the social nature of nihilism, the earlier studies of Heidegger from the 50s, 60s and 70s have not been relied upon in this dissertation. More recent jurisprudential studies which draw on Heidegger's philosophy and which have been relied upon in this dissertation are those of Roger Berkowitz,[64] Laurence Paul Hemming,[65] Shai J. Lavi[66] and Philippe Nonet.[67] The Heideggerian analysis of contemporary Irish jurisprudence in this dissertation can be considered a novel contribution to the scholarship on Heidegger.

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[61] Werner Maihofer, *Recht und Sein* (Klostermann, 1954).

[62] Arthur Kaufmann, *Die ontologische Begründung des Rechts* (Wissenschaftliche Buchgesellschaft, 1965).

[63] Walter Heinemann, *Die Relevanz der Philosophie Martin Heideggers für das Rechtsdenken.* (Dissertation, Albert-Ludwigs-Universität zu Freiburg im Briesgau, 1970).

[64] Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Harvard University of Press, 2005).

[65] Laurence Paul Hemming "Work as Total Reason for Being: Heidegger and Jünger's *Der Arbeiter*" (2008) 12 *Journal for Cultural Research* 231.

[66] Shai J. Lavi, *The Modern Art of Dying. A History of Euthanasia in the United States* (Princeton University Press, 2005).

[67] Philippe Nonet, "What is Positive Law?" (1990) 100 *Yale Law Journal* 667; "Judgment" (1995) 48 *Vanderbilt Law Review* 987.

Finnis

Many recent studies of the "new" natural law theory[68] and of Finnis' account of the natural law in particular[69] have been drawn upon in this dissertation. However these studies do not contain a detailed analysis of the existential-ontological aspects of the cognition of the natural law implicit in Finnis's theory. The analysis of the cognition of the basic goods in Finnis' theory which is presented in chapter 3 of this dissertation can be considered a novel contribution to the scholarship on the "new" natural law theory.

With the exception of Phelan's study, which includes a "new" natural law theory interpretation of the natural law within Irish national law,[70] there is little scholarship on the significance of Finnis' theory for the interpretation of Irish Constitutional law. The argument advanced in this dissertation - that the application of Finnis' theory in interpreting the Constitution is a participation in the very movement of nihilism unfolding within the law of Ireland - can be considered a novel contribution to Irish legal scholarship.

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[68] Nigel Biggar and Rufus Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Ashgate, 2000); Bebhinn Donnelly, *A Natural Law Approach to Normativity* (Ashgate, 2007).

[69] David J. Klassen, *Thomas Aquinas and Knowledge of the First Principles of the Natural Law* (Ph.D. thesis, Catholic University of America, 2007); Brian David Simboli, *Motivation, Objectivity, and Basic Goods in John Finnis's Natural Law Theory* (Ph.D. thesis, University of Notre Dame, 1991); William J. Wagner, *The Normative Role of "Basic Goods" in the Natural Law Jurisprudence of John Finnis: A Critical Assessment* (Ph.D. thesis, Catholic University of America, 2002).

[70] Phelan (1997), note 34.

Chapter 1 Aquinas's Natural Law Theory

1.1 Introduction

It is argued in this chapter that knowledge of God as the promulgator of the natural law is an essential element of Saint Thomas Aquinas's theory of natural law. Since Aquinas holds that God is knowable only insofar as He reveals himself and that He cannot be encountered in advance of any encounter He initiates, then Aquinas understands that thinking, in its very structure, has nothing to do with God's appearing (in the sense that God does not appear through an individual's thinking about thinking). In particular, thinking about thinking does not reveal God as the promulgator of the natural law. It is argued that Aquinas understands faith (*fides*), not in the contemporary sense of an intention of the believer, but as the character of God's appearing to the believer. It is argued that in this Thomistic sense of faith (*fides*), the believer, who in the light or understanding of faith (*fides*) knows the world as created and governed by God, can naturally infer that the natural law is promulgated by God. In sum, it is argued in this chapter that Aquinas' account of the cognition of the natural law is theological in that it presupposes knowledge of God which is acquired in faith.

Aquinas defines law to be "an ordinance of reason for the common good, made by him who has care of the community, and promulgated". He argues that the nature of the government of things which exists in God by virtue of His creative causality has the nature of law and is called the Eternal Law and that man's participation in the Eternal Law by virtue of his rational nature is the natural law and "the light of natural reason" whereby good and evil are discerned. It is argued in this chapter that each of the elements of Aquinas's account of law - the doctrine of participation, the promulgation of the natural law, the identification of the precepts of the natural law, and the common good to which law is directed - presupposes knowledge of God acquired in faith. While each of these four elements have been analysed

by other authors in other contexts, and indeed some of the analyses of other authors have been explicitly relied upon in this chapter, the novelty of the argument in this chapter lies in showing that insofar as Aquinas's accounts of the natural law presuppose his faithful or theological accounts of causality, self-evidence, demonstrative knowledge, analogy, participation, intellection and hierarchical order, his theory of the natural law is genuinely theological and is founded upon a conception of being and truth that is genuinely theological.

Having established that Aquinas's theory of law is articulated in theological terms and founded upon a theological conception of being and truth, it is argued in the subsequent chapters of this dissertation that contemporary jurisprudence and legal thought in Ireland presuppose a non-theological conception of being and truth. In particular, it is argued that notwithstanding the fact that the Constitution can bear an interpretation broadly consistent with a Thomistic, *ie* theological, conception of the natural law and notwithstanding Walsh J's *dicta* in the *McGee Case* that the constitutionally protected natural human rights can be understood in accordance with a Christian theological understanding of the natural law, neither Walsh J's *dicta* nor the subsequent case law of the Supreme Court evidence the Thomistic understanding of the natural law. It is argued also that notwithstanding the asserted similarities between Aquinas's "old theological" natural law theory, the "new" natural law theory of Professor John Finnis, Finnis' "new" natural presupposes a non-theological conception of being and truth.

Four arguments are advanced in this chapter. Firstly, it is argued that Aquinas's account of how the natural law is known by philosophical analysis presupposes knowledge of God acquired in faith. While Aquinas's philosophical analysis of God is explicated in terms of causation (in which God is understood as the prior cause of all things) and participation (in which God is understood as source of the perfections in things), his analysis is a working out of an understanding of God which depends on faith. Consequently, his philosophical account

of natural law in terms of participation can also be considered as a working out of an understanding which depends on faith. The elements of this first argument can be summarised as follows:

(i) Given Aquinas's understanding of the self-evidence of the existence of God, the being (*esse*) of God is never in question, with the consequence that his proofs of the existence of God which start from creatures are demonstrations of the essence (*essentia*) and not the being (*esse*) of God. This understanding of self-evidence can be considered as a working out of an understanding of God which depends on faith.

(ii) Given Aquinas's threefold procedure for acquiring philosophical knowledge of God (*triplex via*) – a procedure in which the a proof of the existence of God is but a first step - and given his understanding of the nature of the analogical knowledge of God, Aquinas's philosophical knowledge of God is such that it reveals nothing of God's relation to creatures. Consequently the philosophical knowledge of God allows no inference about the relation of the Eternal Law in God to the natural law in man.

(iii) Since Aquinas's account of participation depends on prior knowledge of God it can be considered as a formula that clarifies a relation between God and Creation that is presupposed in faith.

Secondly, it is argued that Aquinas's accounts of how the natural law is known by all without philosophical analysis also presupposes knowledge of God acquired in faith. The five elements of this second argument are:

(i) Aquinas's account of the promulgation of the natural law presupposes knowledge of God as the Divine Legislator which is had by all.

(ii) Since Aquinas's demonstrative knowledge of God presupposes many other sciences, it is not immediately available to all and so it cannot be the knowledge of God that could

be presupposed by all for the purposes of recognising the natural law as originating from the Divine Legislator.

(iii) From an examination of four texts in which Aquinas treats of the knowledge of God which is less perfect than the demonstrative and which is had by all, and which arises from the intellect's spontaneous natural inferences, it is argued that

   a. in two texts, such knowledge of God is so vague and provisional as to be insufficient to know God as the promulgator of the natural law;

   b. in two other texts, such inferences presuppose the application of a principle which is not independent of Aquinas's fourth proof of the existence of God (*quarta via*);

(iv) Given Aquinas's account of cognition, in which acts of belief (*credere*) are necessary in any understanding which is progressive, a spontaneous natural inference can be considered as act of belief (*credere*) which forms part of the progression towards a more comprehensive understanding;

(v) However, given Aquinas's understanding of God's revelation, it follows that spontaneous natural inference or acts of belief (*credere*) by which God is known can only arise in the light of faith (*lumen fides*). Consequently, the spontaneous natural inference by which God is known by all must be understood as an explication of an understanding which originates in faith (*fides*).

Thirdly, it is argued that Aquinas's account of the identification of the goods that pertain to the natural law presupposes knowledge of God. It is argued that given Aquinas's account of the natural inclinations (by which those goods which are proper to man by virtue of his nature are naturally apprehended and immediately known by all) and his account of the relationship between the precepts of the natural law and the precepts of the Decalogue, it

follows that Aquinas's identification of the goods that pertain to the natural law presupposes knowledge of God.

Fourthly, it is argued in this chapter that Aquinas identifies both order and God as common goods of the State and identifies the common good of order as being subordinate to, or for the sake of, the common good of God. Given this hierarchy of common goods, it follows that the common good of the order of the State must be understood in light of knowledge of God.

1.2 Aquinas's Account of the Nature of Law

Aquinas begins his treatise on law with an examination of the essence of law in question 90 of the first part of the second part of the *Summa Theologica*. Arguing that law is a rule whereby man is induced to act or is restrained from acting and that reason is the rule of human acts, Aquinas concludes in the first article that law is something pertaining to reason.[71] Since the first principle in practical matters is the last end of human life, and since the last end of man is happiness, then Aquinas concludes that law is principally concerned with the relationship to happiness. Given that man is part of the community, that law is concerned with the relationship to "universal happiness", then Aquinas concludes in the second article

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[71] "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting for *lex* (law) is derived from *ligare* (to bind), because it binds one to act. Now the rule and measure of human acts is reason, which is the first principle of human acts, as is evident from what has been stated above [Q.1, a.1 *ad* 3]; since it belongs to reason to direct to the end, which is the first principle of all matter of action, according to the Philosopher [*Physic. ii*]. Now that which is the principle in any genus, is the rule and measure of that genus: for instance, unity in the genus of numbers, and the first movement in the genus of movements. Consequently it follows that law is something pertaining to reason." Aquinas, *The Summa Theologica of St. Thomas Aquinas* (Christian Classics, 1981), Ia IIae, q. 90, a. 1, *co.*
Respondeo dicendum quod lex quaedam regula est et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur, dicitur enim lex a ligando, quia obligat ad agendum. Regula autem et mensura humanorum actuum est ratio, quae est primum principium actuum humanorum, ut ex praedictis patet, rationis enim est ordinare ad finem, qui est primum principium in agendis, secundum philosophum. In unoquoque autem genere id quod est principium, est mensura et regula illius generis, sicut unitas in genera numeri, et motus primus in genere motuum. Unde relinquitur quod lex sit aliquid pertinens ad rationem. Aquinas, *Summa Theologica* (Marietti, 1946), Ia IIae, q. 90, a. 1, *co.*

Unless otherwise stated, all Latin texts of the *Summa Theologica* are taken from the Marietti edition (1946) and all English translations are taken from the Blackfriars translation, Christian Classics edition, 1981.

that law is ordained to the common good.[72] In the third article Aquinas argues that the making of a law belongs either to the whole people or to one who has care of the whole people since to order anything to an end is the concern of those to whom the end belongs.[73] In the fourth article of question 90, Aquinas argues that since a law is imposed on others by way of rule, and a rule is applied to those who are to be ruled by its being notified to them, he concludes that promulgation is necessary for the law to obtain its force.[74] Drawing these

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[72] "As stated above [a. 1], the law belongs to that which is a principle of human acts, because it is their rule and measure. Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must need be referred. Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness, as stated above [q. 2, a. 7; q. 3, a.1]. Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is part of the perfect community, the law must needs regard properly the relationship to universal happiness...Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of law, save insofar as it regards the common good. Therefore every law is ordered to the common good."
Respondeo dicendum quod, sicut dictum est, lex pertinet ad id quod est principium humanorum actuum, ex eo quod est regula et mensura. Sicut autem ratio est principium humanorum actuum, ita etiam in ipsa ratione est aliquid quod est principium respectu omnia aliorum. Unde ad hoc oportet quod principaliter et maxime pertinet lex. Primum autem principium in operativis, quorum est ratio practica, est finis ultimus. Est autem ultimus finis humanae vitae felicitas vel beatitudo, ut supra habitum est. Rursus, cum omnis pars ordinetur ad totum sicut imperfectum ad perfectum; unus autem homo est pars communitatis perfectae, necesse est quod lex proprie respiciat ordinem ad felicitatem communem...Unde oportet quod, lex maxime dicatur secundum ordinem ad bonum commune, quodcumque aliud praeceptum de particulari opere non habeat rationem legis nisi secundum ordinem ad bonum commune. Et ideo omnis lex ad bonum commune ordinatur. Aquinas, note 71, IIae, q. 90, a. 2, *co.*

[73] "A law, properly speaking, regards first and foremost, the order to the common good. Now to order anything to the common good, belongs either to the whole people, or to someone who is the vice-regent of the whole people. And therefore the making of a law belongs either to the whole people or to a public personage who has care of the whole people: since in all other matters the directing of anything to an end concerns him to whom the end belongs."
Respondeo dicendum quod lex proprie, primo et principaliter respicit ordinem ad bonum commune. Ordinare autem aliquid in bonum commune est vel totius multitudinis, vel alicuius gerentis vicem totius multitudines. Et ideo condere legem vel pertinet ad totam multitudinem, vel pertinet at personam publicam quae totius multitudinis curam habet. Quia et in omnibus aliis ordinare in finem est cuius est proprius ille finis. Aquinas, note 71, Ia IIae, q. 90, a. 3, *co.*

[74] "As stated above [q. 90, a. 1], a law is imposed on others by way of a rule and measure. Now a rule and measure are imposed by being applied to those who are to be ruled and measured by them. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force."
Respondeo dicendum quod, sicut dictum est, lex imponitur aliis per modum regulae et mensurae. Regula autem et mensura imponitur per hoc quod applicatur his quae regulantur et mensurantur. Unde ad hoc quod lex virtutem obligandi obtineat, quod est proprium legis, oportet quod applicetur hominibus qui secundum eam regulari debent. Talis autem applicatio fit per hoc quod in notitiam eorum deducitur ex ipsa promulgatione. Unde promulgatio necessaria est ad hoc quod lex habeat suam virtutem. Aquinas, note 71, Ia IIae, q. 90, a. 4, *co.*

"...law directs the actions of those that are subject to the government of someone: wherefore, properly speaking, none imposes a law on his own actions."

conclusions together, Aquinas defines law to be "an ordinance of reason for the common good, made by him who has care of the community, and promulgated".[75]

After his treatment of the nature of law, Aquinas proceeds to treat the various kinds of law in question 91, namely eternal law, natural law, divine law and human law. Having previously shown that the universe is governed by Divine Providence,[76] Aquinas concludes in the first article of question 91 that the nature of the government of things which exists in God, the Ruler of the universe, has the nature of law and is called the eternal law.[77] In the second article, Aquinas argues that since all things subject to divine providence are ruled and measured by the eternal law, then it follows that all things partake somewhat of the eternal law insofar as the eternal law "being imprinted on them, they derive their respective

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...lex est directiva actuum qui conveniunt subiectis gubernationi alicuius, unde nullus, proprie loquendo, suis actibus legem imponit. Aquinas, note 71, Ia IIae, q. 93, a. 5, *co.*

[75] "...Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."
...Et sic ex quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata. Aquinas, note 71, Ia IIae, q. 90, a. 4, *co.*

[76] "It is necessary to attribute providence to God. For all good that is in created things has been created by God, as was shown above [q. 6, a. 4]. In created things good is found not only as regards their substance, but also as regards their order towards an end and especially their last end, which, as was said above, is the divine goodness [q. 21, a. 4]. This good of order existing in things created, is itself caused by God. Since, however, God is the cause of things by His intellect, and thus it behooves that the type of every effect should pre-exist in Him, as is clear from what has gone before [q. 19, a. 4], it is necessary that the type of effect should pre-exist in the divine mind: and the type of things ordered towards an end is, properly speaking, providence."
Respondeo dicendum quod necesse est ponere providentiam in Deo. Omne enim bonum quod est in rebus, a Deo creatum est, ut supra ostensum est. In rebus autem, invenitur bonum, non solum quantum ad substantiam rerum, sed etiam quantum ad ordinem earum in finem, et praecipue in finem ultimum, qui est bonitas divina, ut supra habitum est. Hoc igitur bonum ordinis in rebus creatis existens, a Deo creatum est. Cum autem Deus sit causa rerum per suum intellectum, et sic cuiuslibet sui effectus oportet rationem in ipso praeexistere, ut ex superioribus patet; necesse est quod ratio ordinis rerum finem in mente divina praeexistat. Ratio autem ordinandorum in finem, proprie providentia est. Aquinas, note 71, Ia, q. 22, a. 1, *co.*

[77] "As stated above [q. 90, a. 1 *ad* 2; aa. 3, 4], a law is nothing else but a dictate of the practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence, as was stated in the First Part [q. 22, aa. 1, 2], that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, according to *Prov. viii. 23*, therefore it is that this kind of law must be called eternal."
Respondeo dicendum quod, sicut supra dictum est, nihil est aliud lex quam quoddam dictamen practicae rationis in principe qui gubernat aliquam communitatem perfectam. Manifestame est autem, supposito quod mundus divina providentia regatur, ut in primo habitum est, quod tota communitas universi gubernatur ratione divina. Et ideo ipsa ratio gubernationis rerum in Deo sicut in principe universitatis existens, legis habet rationem. Et quia divina ratio nihil concipit ex tempore, ut dicitur Prov. VIII; inde est quod huiusmodi legem oportet dicere aeternam. Aquinas, note 71, Ia IIae, q. 91, a. 1, *co.*

inclinations to their proper acts and ends". He argues that the rational creature is subject to Divine providence in the most excellent way, insofar as it partakes of a share of providence by being provident both for itself and others. Aquinas variously calls this participation of the eternal law in the rational creature "the natural law" and "the light of natural reason" whereby good and evil are discerned.[78] In sum, Aquinas identifies the natural law as a certain participation of the rational creature in the eternal law, the eternal law being identified with God himself.[79] In the third article of question 91 (and again in the first article of question 94)

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[78] "...the rational creature is subject to Divine providence in the most excellent way, insofar as it partakes of a share of providence, by being provident both for itself and others, it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end, and this participation of the eternal law in the rational creature is called the natural law...[hence the Psalmist says in Psalm VI,6] *The Light of Thy countenance, O Lord is signed upon us*: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law."
Unde cum omnia quae divinae providentiae subduntur, a lege aeterna regulentur et mensurentur, ut ex dictis patet; manifestum est quod omnia participant aliqualiter legem aeternam, inquantum scilicet ex impressione eius habent inclinationes in proprios actus et fines. Inter cetera autem rationalis creatura excellentiori quodam modo divinae providentiae subiacet, inquantum et ipsa providentiae particeps, sibi ipsi et aliis providens. Unde et in ipsa participatur ratio aeterna, per quam habent naturalem inclationem ad debitum actum et finem. Et talis participatio legis aeternae in rationali creatura lex naturalis dicitur. Unde cum Psalmista [dixit] signum est super nos lumen vultus tui, domine, *quasi lumen rationis naturalis, quo dicernimus quid sit bonum et malum, quod pertinet ad naturalem legem, nihil aliud sit quam impressio divini luminis in nobis. Unde patet quod lex naturalis nihil aliud quam participatio legis aeternae in ratione creatura.* Aquinas, note 71, Ia IIae, q. 91. a. 2, *co.*

Aquinas identified the relevant sense of 'natural' as that which belongs to something in virtue of itself, or according to its own being (and which is distinguished from 'natural' in the sense of the accidental, the artificial and the voluntary):
"...the word *nature* is used in a manifold sense...In another sense nature stands for any substance, or even for any being. And in this sense, this is said to be natural to a thing which befits it in respect of its substance. And this is that which of itself is in a thing. Now all things that do not of themselves belong to the thing in which they are, are reduced to something which belongs of itself to the thing, as to their principle. Wherefore, taking nature in this sense, it is necessary that the principle of that ever belongs to a thing, be a natural principle."
Respondeo...natura dicitur multipliciter...Alio modo dicitur natura quaelibet substantia, vel etiam quodlibet ens. Et secundum hoc, illud dicitur esse naturale rei, quod convenit ei suam substantiam. Et hoc est quod per se inest rei. In omnibus autem, ea quae non per se insunt, reducuntur in aliquid quod per se inest, sicut principium. Et ideo necesse est quod, hoc modo accipiendo naturam, semper principium in his quae conveniunt rei, sit naturale. Aquinas, note 71, Ia IIae, q. 10, a. 1, *co.*

[79] "The law implies order to the end actively, in so far as it directs certain things to the end; but not passively – that is to say, the law is not ordained to the end – except accidentally, in a governor whose end is extrinsic to him, and to which end his law must needs be ordained. But the end of the Divine government is God Himself, and His law is not distinct from Himself. Wherefore the eternal law is not ordained to another end."
Ad tertium dicendum quod lex importat ordinem ad finem active, inquantum scilicet per eam ordinantur aliqua in finem, non autem passive, idest quod ipsa lex ordinetur ad finem, nisi per accidens in gubernante cuius finis est extra ipsum, ad quem etiam necesse est ut lex eius ordinetur. Sed finis divinae gubernationis est ipse Deus, nec eius lex est aliud ab ipso. Unde lex aeterna non ordinatur in alium finem. Aquinas, note 71, Ia IIae q. 91, a. 1 *ad* 3.

of the first part of the second part of the *Summa Theologica* Aquinas argues that since law is a dictate of the practical reason, and since the practical reason proceeds from general principles to more particular conclusions, the precepts of the natural law can be identified as the general and indemonstrable principles from which practical reason proceeds. Human law can be identified as the particular determinations to which practical reason concludes, assuming that the essential conditions of law are observed.[80] With regard to divine law Aquinas explains that, having proved man is ordained to eternal happiness with God, an end which exceeds his natural faculty,[81] it is necessary that besides the natural and the human law there should be a law given by God – the divine law - by which man be directed to his supernatural end.[82]

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[80] "As stated above [q. 90, a. 1], a law is a dictate of the practical reason. Now it is observed that the same procedure takes place in the practical and in the speculative reason: for each proceeds from principles to conclusions, as stated above. Accordingly we conclude that just as in the speculative reason, from naturally known indemonstrable principles, we draw conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determinations of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed, as stated above [q. 90, aa, 2, 3, 4]."
Respondeo dicendum quod, sicut supra dictum est lex est quoddam dictamen practicae rationis. Similis autem processus esse invenitur rationis practicae et speculativae, utraque enim ex quibusdam principiis ad quasdam conclusiones procedit, ut superius habitum est. Secundum hoc ergo dicendum est quod, sicut in ratione speculativa ex principiis indemonstrabilibus naturaliter cognitis producuntur conclusiones diversarum scientiarum, quarum cognitio non est nobis naturaliter indita, sed per industriam rationis inventa; ita etiam ex praeceptis legis naturalis, quasi ex quibusdam principiis communibus et indemonstrabilibus, necesse est quod ratio humana procedat ad aliqua magis particulariter disponenda. Et istae particulares dispositiones adinventae secundum rationem humanam, dicuntur leges humanae, servatis aliis conditionibus quae pertinent ad rationem legis, ut supra dicum est. Aquinas, note 71, Ia IIae q. 91, a. 3, *co.*

[81] Aquinas, note 71, Ia IIae q. 5, a. 5.

[82] "Besides the natural and the human law it was necessary for the directing of human conduct to have a Divine law. And this for four reasons. First, because it is by law that man is directed how to perform his proper acts in view of his last end. And indeed if man were ordained to no other end that that which is proportionate to his natural faculty, there would be no need for man to have any further direction on the part of his reason, besides the natural law and human law which is derived from it. But since man is ordained to an end of eternal happiness which is inappropriate to man's natural faculty, as stated above [q. 5, a. 5], therefore it was necessary that, besides the natural and the human law, man should be directed to his end by a law given by God…"
Respondeo dicendum quod prater legem naturalem et legem humanam, necessarium fuit ad directionem humanae vitae habere legem divinium. Et hoc propter quatuor rationes. Primo quidem, quia per legem dirigitur homo ad actus proprios in ordine ad ultimum finem. Et si quidem homo ordinaretur tantum ad finem qui non excederet proportionem naturalis facultatis hominis, non oporteret quod homo haberet aliquid directivum ex parte rationis, supra legem naturalem et legem humanitus positam, quae at ea derivatur. Sed quia homo ordinatur ad finem beatitudinis aeternae, quae excedit proportionem naturalis facultatis humanae, ut supra habitum est; ideo necessarium fuit supra legem naturalem et humanam, dirigeretur etiam ad suum finem lege divinitus data… Aquinas, note 71, Ia IIae q. 91, a. 4, *co.*

In order to prove the thesis that Aquinas's account of the natural law is theological in the sense of presupposing knowledge of God acquired in faith, the following four aspects of Aquinas's treatment of law are examined in the remainder of this chapter:

1. the presupposition that the universe is governed by Divine Providence and the reliance on the doctrine of participation in identifying the demonstration of an impression of the eternal law upon man with a demonstration of the natural law;
2. the presupposition of the promulgation of the natural law;
3. the precepts of the natural law;
4. the nature of the common good to which law is directed.

1.3 Participation in Divine Providence

Aquinas argues that the nature of the government of things which exists in God by virtue of His creative causality has the nature of law and is called the eternal law. Relying on the doctrine of the virtual pre-existence of an effect in its efficient cause, Aquinas argues that since God is the cause of all things, then the type of every effect must pre-exist in Him. In particular, since the good of order existing in created things is itself caused by God, then the type of things ordered towards an end, *ie* providence, must also pre-exist in the mind of God. In this section the following four arguments are advanced:

1. Aquinas's understanding of the self-evidence of the existence of God is such that the being (*esse*) of God is never in question, with the consequence that his proofs of the existence of God which start from creatures are demonstrations of the essence (*essentia*) and not the being (*esse*) of God;
2. Given the relationship between Aquinas's theory of analogy and the knowledge of God acquired by Aquinas's threefold procedure (*triplex via*), the knowledge of God is such that it reveals nothing of God's relation to creatures. In particular, this knowledge of God

allows no inference to be drawn about the relation of the Eternal Law in God and the natural law in man;

3. Aquinas's account of participation presupposes a prior knowledge of God;
4. As both Aquinas's presupposition of the self-evidence of the existence of God and his doctrine of participation can be considered as a working out of an understanding of God which depends on faith, his account of the natural law must also be considered as a working out of an understanding of God which depends on faith.

1.3.1 Causality

The doctrine of the virtual pre-existence of an effect in its efficient cause is predicated on the understanding that if an agent is to communicate something to an effect, then it must actually have, or at least virtually possess, what it is to communicate to its effect.[83] In other words, the effect, before it is actually produced, pre-exists virtually in its efficient cause,[84] *ie* while the efficient cause does not formally contain the perfection or actuality of the effect, it contains it virtually "in a certain higher and more universal manner".[85] This understanding of

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[83] "An effect proceeds from an agent according to the mode of being of the agent." Aquinas, *Disputed Questions On Spiritual Creatures (*Marquette University Press, 1954), chapter 9, n. 51.
A quolibet enim agente procedit effectus secundum modum sui esse... Aquinas, *Quaestio Disputata De spiritualibus creaturis* in Aquinas, *Quaestiones disputatae II* (8th ed, Marietti, 1949), *cap.* 9, n. 51.
John F. Wippel, *The Metaphysical Thought of Thomas Aquinas* (Catholic University of America Press, 1984), at 518; 573.

[84] "An effect, before it is actually produced, pre-exists virtually in its efficient causes but not actually, which is to exist absolutely." Aquinas, *Aristotle's Posterior Analytics* (St. Augustine's Press, 2007), Book I, lecture 3, n. 22.
...Effectus autem, ante quam producatur in actu, praeexistit quidem in causis activis virtute, non autem actu, quod est simpliciter esse. Aquinas, *In Aristotelis libros Posteriorum Analyticorum expositio in In Aristotelis libros Peri Hermeneias et Posteriorum Analyticorum* expositio (2nd ed, Marietti, 1964) I, *lect.* 3, n. 22.

[85] "In [non univocal] agents, nevertheless, even though they do not possess the form of the effect according to the same notion, they do so in a higher and more universal manner." Aquinas, *Commentary on Aristotle's Physics* (Routledge & Kegan Paul, 1963), Book VIII, lecture 10, n. 4.
In quibus tamen agentibus, etsi non sit species effectus secundum eandem rationem, est tamen quodam modo altiori et universaliori. Aquinas, *In XIII libros Physicorum Aristotelis expositio* (Marietti, 1965), *VIII, lect.* 10, n. 4.

"...the perfection of the effect (but not the effect itself) is, in a different order, identical with part of the perfection of the cause; it is not another perfection just as good as part of the perfection of the cause, but the same perfection in another order." Arthur Little, *The Platonic Heritage of Thomism* (Golden Eagle Books, 1949), at 37-38; O'Rourke, note 57, at 155.

causality allows a conceptual articulation of the cause's manifestation in the effect in a threefold way (*triplex via*). Firstly, by virtue of the *similarity* of the effect to its cause, knowledge of the cause can be inferred from the effect (*via positive*). Secondly, since the effect *differs* from the cause (inasmuch as the cause is *not* one of its effects), then knowledge of the cause must be distinguished from knowledge of the effect (*via negativa*). Thirdly, the effect is removed from the cause, not because the cause lacks any perfection found in the effect, but because the cause *superexceeds* the effect in perfection (*via remotionis*). However, as Clarke notes, the very fact of establishing a causal link between a lower effect and a higher cause generates an analogous similarity such that the cause must be postulated as a necessary condition of intelligibility for an already known effect.[86] It is argued in the following sections that Aquinas's demonstrative knowledge of God presupposes such a postulation. This raises the question of how the unity of analogy in established by Aquinas. More precisely, it is argued in the following sections that Aquinas's understanding of analogy is such that demonstrative knowledge of God does not lead to any "metaphysical disclosure" of God and must be understood as arising from, or in consequence of, faith. In particular, as Aquinas's reliance on demonstrative knowledge of Divine providence must be understood as arising from faith, it follows that his understanding of the natural law must also be understood in consequence of faith. In outline, the argument proceeds as follows:

1. From an examination of Aquinas's various senses of self-evidence, it follows that in Aquinas's consideration of God, the being (*esse*) of God is never in question. In

[86] "If both cause and effect were of the same species the similarity would be on the same level and kind, that is, univocal. If the cause were a higher level of being than the effect, then the similarity could not be strictly univocal but would have to be at least analogous. In this perspective, the very fact of establishing a causal link between a lower effect and a higher cause at once *ipso facto* generates an analogous similarity, a spectrum of objective similarity extending from the known effect at least as far as the cause, whether the latter is directly known or only postulated as a necessary condition of intelligibility for an already known effect. Whether both of the terms of the relation are known or only one known, every effect has to be similar in some way to its cause, or it could not be a real effect, and the same holds for the cause." W. Norris Clarke, "Analogy and the Meaningfulness of Language about God: A Reply to Kai Nielsen" (1976) 40 *The Thomist* 61, at 86.

particular, Aquinas's demonstrative knowledge of God is an explication of the essence (*essentia*) of God;

2. Aquinas's demonstrative knowledge of God - obtained by application of the doctrine of causality as part of the *triplex via* - is such that it reveals nothing of God's relation to creatures and must be understood in consequence of faith. In particular, Aquinas's demonstrative knowledge of God's providence reveals nothing of the relation of God's providence (Eternal law) to man (natural law) and must be understood in consequence of faith;
3. The doctrine of participation is not independent of the demonstrative knowledge of God and so does not provide a means of establishing knowledge of the natural law which is independent of Aquinas's demonstrative knowledge of God. The doctrine of analogy also secures the unity of analogy on God as the first and pre-eminent cause of all things;
4. Although Aquinas uses the philosophical terminology of causality, participation and analogy, his account of the natural law is properly theological.

1.3.2 The Self-evidence of the Existence of God

Prior to proceeding with his proofs of the existence of God in the first part of his *Summa Theologiae*, Aquinas treats of the self-evidence of the existence of God and distinguishes two senses of self-evidence: self-evident in itself, though not to us (*esse per se notum secundum se et non quoad nos*) and self-evident in itself and to us (*esse per se notum secundum se et quoad nos*).[87] Aquinas defines a self-evident proposition as one in which something already

[87] "A thing can be self-evident in either of two ways; on the one hand, self-evident in itself, though not to us; on the other, self-evident in itself, and to us. A proposition is self-evident because the predicate is included in the reckoning of the subject, as "Man is an animal", for animal is contained in the essence of man. If, therefore the essence of the predicate and subject be known to all, the proposition will be self-evident to all; as is clear with regard to the first principles of demonstration, the terms of which are common things that no one is ignorant of, such as being and non-being, whole and part, and such like. If, however, there are some to whom the essence of the predicate and subject is unknown, the proposition will be self-evident in itself, but not to those who do not know the meaning of the predicate and subject of the proposition. Therefore, it happens, as Boethius says in *De Hebdomandibus* "that there are some mental concepts self-evident only to the learned, as that incorporeal substances are not in space".

predicated is included in the reckoning of the subject. For example, in asserting 'animality' of 'man', 'man' is that which is already predicated and provides the ground for the proposition such that the reckoning of the subject 'man' can conclude with the proposition 'man is an animal'. Consequently, having already asserted that the proposition 'God exists' is self-evident on the ground that God and His being (*esse*) are the same,[88] it follows that when Aquinas considers God, asking whether God exists,[89] 'God exists' is already predicated and does not have to be demonstrated in any reckoning of 'God'. Rather, when Aquinas considers God, asking whether God exists, it is the essence (*essentia*) and not the being (*esse*) of God which has to be demonstrated in the reckoning of 'God' - a demonstration which proceeds from beings considered as God's effects.[90] In sum, the being of God is not in question in Aquinas's consideration of God.[91]

Respondeo dicendum quod contingit aliquid esse per se notum dupliciter: uno modo, secundum se et non quoad nos; alio modo, secundum se et quoad nos. Ex hoc enim aliqua propositio est per se nota, quod praedicatum includitur in ratione subiecti, ut homo est animal: nam animal est de ratione hominis. Si igitur notum sit omnibus de praedicato et de subiecto quid sit, propositio illa erit omnibus per se nota: sicut patet in primis demonstrationum principiis, quorum termini sunt quaedam communia quae nullus ignorat, et ens et non ens, totum et pars, et similia. Si autem apud aliquos notum non sit de praedicato et subiecto quid sit, propositio quidem quantum in se est, erit per se nota: non tamen apud illos qui praedicatum et subiectum propositionis ignorant. Et ideo contingit, ut dicit Boetius in libro De Hebdomandibus, *quod quaedam sunt communes animi conceptions et per se notae, apud sapientes tantum, ut incorporalia in loco non esse.* Aquinas, note 71, Ia, q. 2, a 1, *co.*

[88] "...Therefore I say that this proposition "God exists", of itself is self-evident, for the predicate is the same as the subject; because God is His own existence as will be hereafter shown [q. 3, a. 4]."
Dico ergo quod haec propositio, Deus est, quantum in se est, per se nota est: quia praedicatum est idem cum subiecto; Deus enim est suum esse, ut infra patebit. Aquinas, note 71, Ia, q. 2, a. 1, *co.*

It should be noted that Aquinas seeks to establish in q. 3, a. 4 that "God is not only His own essence...but also His own existence."
Respondeo dicendum quod Deus non solum est sua essentia...sed etiam suum esse. Aquinas, note 71, Ia, q. 3, a. 4, *co.*

[89] "Concerning God, whether God exists"
De Deo, an Deus sit. Aquinas, note 71, Ia, q. 2, *co.*

[90] "...Now because we do not know the essence of God, the proposition is not self evident to us; but needs to be demonstrated by things that are more known to us, though less known in their nature-namely, by effects."
...Sed quia nos non scimus de Deo quid est, non est nobis per se nota: sed indigent demonstrari per ea quae magis nota quoad nos, et minus nota quoad naturam, scilicet per effectus. Aquinas, note 71, Ia, q. 2, a. 1, *co.*

"...But because they are his effects and depend on their cause, we can be led from them in so far as to know of God *whether He exists*, and to know of Him what must necessarily belong to Him as the first cause of all things, exceeding all things caused by him."

1.3.3 Demonstrative Knowledge of God

In the prologue to his *Commentary on the Posterior Analytics of Aristotle*, Aquinas identifies analysis (*resolutio*) as the reasoning process which yields knowledge (*scientia*) and which grounds the certitude of judgment.[92] In the prologue to his *Commentary on the Metaphysics of Aristotle* Aquinas identifies the certitude of scientific knowledge as deriving from an understanding of causes and pertaining to the perfection of knowledge.[93] Thus,

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Sed quia sunt eius effectus a causa dependentes, ex eis in hoc perduci possumus, ut cognoscamus de Deo an est*; et ut cognoscamus de ipso ea quae necesse est ei convenire secundum quod est prima omnium causa, excedens omnia sua causata.* Aquinas, note 71, Ia, q. 12, a. 12, *co.*

[91] "What is "per se notum esse" is what, out of itself, comes to be known as a proposition. Thus the question [*de Deo, an Deus sit*] asks whether the proposition "Deus est" comes to be known out of itself, as self-evident. We already know that the thing "notum esse" – to be known – is known of itself, by virtue of itself. The term "per se notum esse" – usually translated as "self-evident" – already contains a reference to *esse*, already asserts being is given in any knowing *per se*. Thus although being is not enquired into in the first half of the question, *de Deo*, it is already asserted in the phrase. The thought of "being" in determinations of *esse* is present in both halves of the question. The movement from one mode of "self-evidence" to the other appears as a movement of disclosure, but in fact is not. For what is to be known as self-evident by us is already known of itself...For Aquinas, to speak of the essence of God is the same as to speak of his existence. Thus the essence, quidditas, of God, is to be determined out of the quidditas of beings. This means that the essence of God will be determined out of the whole of beings, out of what is most "being-ful" in them." Hemming *"No Being without God"* (Verlag Hänsel-Hohenhausen, 1997), at 12-13.

[92] "That part of logic which is devoted to the first process is called the judicative part, because it leads to judgments possessed of the certitude of science. And because a certain and sure judgment touching effects cannot be obtained except by analyzing them into their first principles, this part is called analytical, i.e., resolvent." Aquinas, *Commentary on Aristotle's Posterior Analytics* (St. Augustine's Press, 2007), *prologue*, n. 6
Pars autem Logicae, quae primo deservit processui, pars Iudicativa dicitur, eo quod iudicium est cum certitudine scientiae. Et quia iudicium certum de effectibus haberi non potest nisi resolvendo in prima principia, ideo pars haec Analytica vocatur, idest resolutoria. Aquinas, *In Aristotelis libros Posteriorum Analyticorum expositio* in *In Aristotelis libros Peri Hermeneias et Posteriorum Analyticorum expositio* (Marietti, 1964), *prooemium*, n. 6.

"...demonstrative knowledge, which is acquired by demonstration, proceeds from propositions which are true, first, and immediate, that is, which are not demonstrated by any intermediate, but are evident by means of themselves. They are "immediate" because they lack an intermediate demonstrating them, and "first" in relation to other propositions which are proved by means of them."
...demonstrativa scientia, idest quae per demonstrationem acquiritur, procedat ex propositionibus veris, primis et immediatis, idest quae non per aliquod medium demonstrantur, sed per seipsas sunt manifestae (quae quidem immediate dicuntur, in quantum carent medio demonstrante, primae autem in ordine ad alias propositiones, quae per eas probantur); et iterum ex notioribus, et prioribus, et causis conclusionis. Ibid, I, *lect.* 4, n. 37.

[93] "From the viewpoint of the order of knowing, those things from which the intellect derives certitude seem to be more intelligible. Since the certitude of science is acquired by the intellect knowing causes, a knowledge of causes seems to be intellectual in the highest degree." Aquinas, *Commentary on Aristotle's Metaphysics* (Dumb Ox Books, 1995), prologue.
Nam ex quibus intellectus certitudinem accipit, videntur esse intelligibilia magis. Unde cum certitudo scientiae per intellectum acquiratur ex causis, causarum cognitio maxime intellectualis esse videtur. Aquinas, *In XII libros Aristotelis Metaphysicorum commentarium* (Marietti, 1820), *prooemium.*

Aquinas holds that to have knowledge of a thing is to cognise its cause, and it is knowledge of the cause which is sought in demonstration. This demonstrative knowledge of a thing is knowledge of its "ultimate explanatory principles" and its location within "a wider explanatory structure".[94] Aquinas's arguments for the existence of God are examples of such metaphysical analysis leading to demonstrative knowledge of God. The arguments proceed from such characteristics of sensible beings as motion (as in the *prima via*) or generation and corruption (as in the *tertia via*) to the affirmation of the necessary existence of an ultimate or grounding principle as the cause of these characteristics, *eg* the "First Mover" of the *prima via* and the "First Cause" of the *tertia via*, which are identified with God.[95] However, in his treatment of the essence and existence of God in the first part of the *Summa Theologiae*, Aquinas employs the distinction between proper being (*ens proprium*) and veritative being (*ens ut verum*)[96] and holds that all a successful demonstration of the existence of God

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All Latin texts of the *Commentary on Aristotle's Metaphysics* are taken from the Marietti edition (1820) and all English translations are taken from the translation of John P. Rowan (Dumb Ox Books, 1995).

It is obvious that a cause is the middle of a demonstration, which produces knowledge, because to have knowledge is to cognize the cause of a thing. *But a cause is what is sought in all the aforesaid questions* (in which demonstration plays a part) [emphasis added]."
Manifestum est enim quod causa est medium in demonstratione, quae facit scire; quia scire est causam rei cognoscere. Causa autem est quod quaeritur in omnibus praedictis quaestionibus. Aquinas, note 93, II, *lect.* 1, n. 8.

[94] Aquinas's understanding of demonstrative knowledge is not the same as the post-Cartesian notion of demonstration:
"After Descartes it has become necessary to distinguish Aristotelian "syllogismus" and "demonstratio" from a Cartesian, rationalist "deduction". Aristotle and St. Thomas do not begin with self-evident principles and derive conclusions therefrom in a rationalist-deductive mode (even though *Posterior Analytics* is often interpreted this way); rather, they begin with a statement to be justified (it will become the "conclusion" only in a formal restatement of the argument) and "reduce" it back to its ultimate explanatory principles." Paul T. Durbin in Aquinas, *St. Thomas Aquinas. Summa theologiae* (Cambridge University Press, 1990), vol. 12, at 82.

[95] Aquinas, note 71, Ia, q. 2, a. 3, *co.*
Michael Tavuzzi, "Aquinas on Resolution in Metaphysics" (1991) 55 *The Thomist* 199, at 199-227.

[96] "Being is said in two ways: in one way it means the actuality of being; in another way it means the composition of a proposition, which the soul gets when it joins the predicate to the subject. According to the first meaning of being, we cannot know the being of God, nor can we know his essence. But we can know it according to the second meaning. Because we know that this proposition, which we form when we say 'God exists' is true."
Ad secundum dicendum quod esse *dupliciter dicitur: uno modo significat actum essendi; alio modo significat compositionem propositionis, quam anima advinenit coniugans praedicatum subiecto. Primo igitur modo accipiendo esse, non possumus scire esse Dei, sicut nec eius essentiam: sed solum secundo modo. Scimus enim*

establishes is the truth of the proposition 'God exists'. Thus Aquinas holds that there can be no identity between the divine being of God Himself and the propositional fact of God's existence in the human intellect with the consequence that Aquinas holds that the divine being by which God exists in himself forms no part of the affirmative answer to the question 'Does God exist?'[97] Consequently, it follows that Aquinas understands that a philosophical demonstration of the existence of God does not disclose anything of the proper being of God Himself.

In conclusion, given Aquinas's understanding of the self-evidence of the existence of God (which implies that it is the essence (*essentia*) rather than the being (*esse*) of God which is demonstrated in any reckoning concerning God), and given Aquinas's understanding of the virtual pre-existence of the effect in its efficient cause (which implies that the cause possesses the perfection of the effect "in a certain higher and more universal manner"), Aquinas's demonstrative knowledge of God can be considered as an explication of the essence (*essentia*) of God which is predicated on the being (*esse*) of God.

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quod haec propositio quam formamus de Deo, cum dicimus 'Deus est' *vera est. Et hoc scimus ex eius effectibus.* Aquinas, note 71, Ia, q. 3, a. 4, *ad* 2.

"[Being as true] is not the being or mode of existence of the thing known, nor yet the being or mode of existence of the act of intellection (of thought): what [being as true is] is the being, the mode of existence, of the thing known or thought of in so far as it is known or thought of." Alejandro Llano, "The different meanings of 'being' according to Aristotle and Aquinas" http://www.nd.edu/Departments/Maritain/ti00/llano.htm (visited 25th April 2004), p. 6.

[97] Aquinas's distinction between actual being (*esse*) and veritative being (*esse ut verum*) bears some similarity to the distinction between existence as a first level predicate and existence as a second-level concept. Using Fregean terminology, the existence affirmed in the proposition 'God exists' is signified by a predicate of the second level, i.e., a predicate of concepts or *Esgibtexistenz* and not by a predicate of the first level or *Wirklichkeit*.
Gyula Klima, "On Kenny on Aquinas on Being: A critical review of *Aquinas on Being* by Anthony Kenny" (2004) 44 *International Philosophical Quarterly* 567; C. F. J. Martin, *A distinction between different notions of existence in the writings of St. Thomas Aquinas, and its use to distinguish logic from metaphysics* (*D. Phil.* Thesis, Oxford, 1984) at 44-80, 120-124.

1.3.4 The *Triplex Via*

Such affirmations of God as First Mover or First Cause are the first step (*via positive*) in a threefold way (the *triplex via*) by which God is known as the principle of creatures.[98] In the second step (*via negativa*), God is distinguished from His creatures since God, the cause of the creature, is not the creature. In the final step (*via remotionis*), the preservation of the affirmation of the *via positiva* in the distinction of the *via negativa* is expressed by the affirmation of eminence: it is as cause of His creatures that God is not His creatures, but must have everything the creatures have, not as it is in the creatures, but as the cause which *superexceeds* the creature in perfection.[99]

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[98] "...God is known from creatures as their principle, and by way of excellence and remotion."
...[*Deus*] *cognoscitur a nobis ex creaturis, secundum habitudinem principii, et per modum excellentiae et remotionis.* Aquinas, note 71, q. 13, a. 1, *co.*

[99] "...Hence we know that His relationship with creatures so far as to be the cause of them all, also that creatures differ from Him inasmuch as He is not in any way part of what is caused by Him; and that creatures are not removed from Him by reason of any defect on His part because He superexceeds them all."
Unde cognoscimus de ipso habitudinem ipsius ad creaturas, quod scilicet omnium est causa, et differentiam creaturarum ab ipso, quod scilicet ipse non est aliquid eorum quae ab eo causantur, et quod haec non removentur ab eo propter eius defectum, sed quia superexcedit. Aquinas, note 71, q. 12, a. 12, *co.*

"Again, there is another knowledge of God, higher than [the knowledge of God common to the majority of mankind mentioned in chapter 38]: this knowledge is acquired by demonstration, by means of which we come nearer to a proper knowledge of Him, since demonstration removes from Him many attributes, by removal of which the mind discerns God standing apart from other beings. Thus demonstration shows God to be unchangeable, eternal, incorporeal, absolutely simply, one. A proper knowledge of an object is arrived at, not only be affirmations, but also by negations. Thus as it is proper to man to be a rational animal, so it is proper to him also not to be inanimate or irrational. But between these two modes of proper knowledge there is this difference, that when a proper knowledge of a thing is got by affirmations, we know both what the thing is and how it is distinct from others: but when a proper knowledge of a thing is got by negations, we know that the thing is distinct from other things, but what it is remains unknown. Such is the proper knowledge of God that we have in demonstrations. But that is not sufficient for the final happiness of man. Aquinas, *Summa contra Gentiles* (Burns, Oats & Washbourne, 1923), Book III, *cap.* 39, n. 1.
Rursus, est quaedam alia Dei cognitio, altior quam praemissa, quae de Deo per demonstrationem habetur, per quam magis ad propriam ipsius cognitionem acceditur: cum per demonstrationem removeantur ab eo multa, per quorum remotionem ab aliis discretus intelligitur. Ostendit enim demonstratio Deum esse immobilem, aeternum, incorporeum, omnio simplicem, unum, et alia huiusmodi, quae in libro primo de Deo ostendimus. Ad propriam autem alicuius rei cognitionem pervenitur non solum per affirmationes, sed etiam per negationes: sicut enim proprium hominis est esse animal rationale, ita proprium eius est non esse inanimatum neque irrationale. Sed hoc interest inter utrumque cognitionis propriae modum, quod, per affirmationes propria cognitione de re habita, scitur quid est res, et quomodo ab aliis separatur: per negationes autem habita propri cognitione de re, scitur quod est ab aliis discreta, tamen quid sit remanet ignotum. Talis autem est propria cognitio quae de Deo habetur per demonstrationes. Non est autem nec ista ad ultimam hominis felicitatem sufficiens. Aquinas, *Summa contra Gentiles* (Marietti, 1967) III *cap.* 39, n. 1.

The only explicit and formal definition of the word 'God' given by Aquinas[100] is "something that is existing above all things, which is the principle of all things and is removed from all things".[101] Aquinas holds that the perfections attributed to God and to creatures are really present in both, but not in the same way: the perfections in God exist "in a certain higher and more universal manner" and "in a more eminent mode than in creatures". Consequently, while creatures can be compared with God, God cannot be compared with creatures.[102]

All Latin texts of the *Summa contra Gentiles* are taken from the Marietti edition (1967) and all English translations are taken from the translation by the Father of the English Dominican Province (Burns, Oats & Washbourne, 1923).

"Thomas describes very precisely how God can be known by us from creatures. The conceptual articulation of the divine "reflection" in the effect follows a threefold way (*triplex via*): we know God from creatures "as their principle, and by way of excellence and remotion". The creatures do not enable us to grasp God's essence, but because they are *his* effects, we can be led from them in so far as to know of God *whether He exists*, and to know of Him what must necessarily belong to Him as the first cause of all things, exceeding all things caused by him". This means that we know, first, his *causal connection* with creatures; second, that creatures *differ* from him inasmuch as he is *not* one of his effects; and third, that the effects are removed from him, not because He lacks any perfection found in the effect, but because he *superexceeds* them all in perfection. The three steps are connected by a determinate logical order: starting from the effect, the causal connection is established (*via positive*: the cause is the cause of the effect); next, the cause is distinguished from the from its effect (*via remotionis*: the cause is not the effect); finally, as the negation does not cancel out the first affirmation, the preservation of the affirmation in the negation is expressed by the affirmation of eminence: it is as cause *of* its effect that the cause is *not* the effect, so the cause must have everything the effect has, not, *as* it is in the effect but in a superior fashion." te Velde, note 57, at 120-121 (emphasis in the original).

[100] David B. Twetten, "Aquinas's Aristotelian and Dionysian Definition of 'God'" (2005) 69 *The Thomist* 203, at 205.

[101] "We can name a thing according to the knowledge we have of its nature from its properties and effects. Hence because we can know what stone is in itself from its property, this name *stone* signifies the nature of stone in itself, by which we know what it is, for the idea which the name signifies is the definition, as is said in Book VI of Aristotle's *Metaphysics*. Now from the divine effects we cannot know the divine nature in itself, so as to know what it is, but only by way of eminence, and by way of causality, and of negation as stated above [q. 12, a. 12]. Thus the name *God* signifies the divine nature, for this name was imposed to signify something existing above all things, the principle of all things and removed from all things; for those who name God intend to signify all this."
Ad secundum dicendum quod, secundum quod naturam alicuius rei ex eius proprietatibus et effectibus cognoscere possumus, sic eam nomine possumus significare. Unde, quia substantiam lapidis ex eius proprietate possumus cognoscere secundum seipsam, sciendo quid est lapis, hoc nomen lapis ipsam lapidis naturam, secundum quod in se est, significat: significat enim definitionem lapidis, per quam scimus quid est lapis. Ratio enim quam significat nomen, est definitio, ut dicitur in IV Metaphysic. Sed ex effectibus divinus divinam naturam non possumus cognoscere secundum quod in se est, ut sciamus de ea quid est; sed per modum eminentiae et causalitatis et negationis, ut supra dixtum est. Et sic hoc nomen Deus significat naturam divinam. Impositum est enim nomen hoc ad aliquid significandum supra omnia existens, quod est principium omnium, et remotum ab omnibus. Hoc enim intendunt significare nominantes Deum. Aquinas, note 71, Ia, q. 13, a. 8, *ad* 2.

[102] William J. Hoye, *Actualitas omnium actum* (Verlag Anton Hain, 1975), at 121-125.

It is argued in the following sections that Aquinas's use of analogy is such that the demonstrative knowledge of God obtained by starting from creatures reveals nothing of God's relation to creatures. In particular, even if it can be established that the perfection of providence exists in God in a more eminent way than it does in man, Aquinas's use of analogy in establishing that conclusion is such that nothing can be inferred from such knowledge of God about the relation of God's providence (the Eternal Law) to man (the natural law).

1.3.5 Analogy

In the *Disputed Questions*: *On Truth* Aquinas distinguishes between a proportion (*per modum proportionis*) and a proportionality (*per modum proportionalitatis*). A "proportion" refers to the proportion of one thing to another thing, *eg* the proportion of four to two is double. A "proportionality" refers to a similarity or ratio of proportions, *eg* six and eight are proportionate because, just as six is the double of three, eight is the double of four.[103] When things are said to be proportionate by way of proportionality, their relation to each other is not considered.[104] Since Aquinas denies that a finite thing can be proportionate to an infinite

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[103] "A thing is said to be proportionate to another in two ways. In one way, a proportion is noted between two things. For example, we say that four is proportioned to two since its proportion to two is double. In the second way, they are proportioned as by a proportionality. For example, we say six and eight are proportionate because, just as six is the double of three, so eight is the double of four; for proportionality is a similarity of proportions." Aquinas, *The Disputed Questions on Truth* (Henry Regnery, 1954), q. 2, a. 3, *ad* 4.
Ad quartum dicendum, quod aliquid dicitur proportionatum alicui dupliciter. Uno modo quia inter ea attenditur proportio, sicut dicimus quatuor proportionari duobus, quia se habet in dupla proportione ad duo. Alio modo per modum proportionalitatis, ut si dicamus sex et octo esse proportionata, quia sicut sex est duplicitum ad tria, ita est octo ad quatuor: est enim proportionalitas similitudo proportionum. Aquinas, *Quaestiones disputatae De veritate,* q. 2, a. 3, *ad* 4, in Aquinas, *Quaestiones disputatae I* (Marietti, 1949).

All Latin texts of the *De veritate* are taken from the Marietti edition (1949) and all English translations are taken from the translation of Mulligan, McGlynn and Schmidt (Henry Regnery, 1954).

[104] "...Since in every proportion a relation is noted between those things that are said to be proportioned because of some definite excess of one thing over the other, it is impossible for any infinite to be proportionate to a finite by way of proportion. When, however, things are said to be proportionate by way of proportionality, their relation to each other is not considered."
...Et quia in omni proportione attenditur habitudo ad invicem eorum quae proportionari dicuntur secundum aliquem determinatum excessum unius super alterum, ideo impossibile est infinitum aliquod proportionari finito per modum proportionis. Sed in his quae proportionata dicuntur per modum proportionalitas, non attenditur habitudo eorum ad invicem. Ibid, q. 2, a. 3, *ad* 4.

thing, he denies that there can be a proportion between a creature and God, *ie* he argues that the relation that pertains between a creature and God is a proportionality such that their relation to each other is not considered.[105]

Similarly, it follows that the relation between the perfection of the natural law found in man and the superexcedant perfection of the eternal law found in God can also be described as a proportionality such that their relation to each other is not considered. Consequently, knowing the relation of the eternal law to the natural law is one of proportionality explains nothing of the nature of the natural law. However, the relation between the eternal law and the natural law can be understood in consequence of faith insofar as proportionality articulates a relation between God and man that conforms to divine revelation. As Hemming explains (in the context of the analogy of being (*analogia entis*), but which applies *mutatis mutandis* with equal force in the context of the natural law):

> Such an understanding of analogy is in fact very weak – so weak, that it cannot bear any ontological consequences. As a formula of faith it works without difficulty, because it clarifies in thinking a relation that is already presupposed by the character and structure of what God has divinely revealed. As a comment on the difference between God and creatures it takes for granted the cleft taken to exist between God and creatures, it neither demonstrates it, nor makes it manifest (it is already manifest) nor resolves it. At no time does Aquinas himself ever require analogy to bear ontological consequences. It is for this reason that analogy is of *names*.[106]

In sum, notwithstanding Aquinas's use of the philosophical language of causality and participation to explicate the relationship between the Eternal Law in God and the natural law in man, his enterprise is properly theological.

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[105] "Although there can be no proportion between God and a creature, there can be a proportionality as was previously shown [q. 2, a. 3, *ad* 4]."
Ad septimum dicendum, quod quamvis non possit esse aliqua proportio creaturae ad Deum, tamen potest esse proportionalitas; quod in praecedenti quaestione frequenter expositum est. Ibid, q. 3, a. 1, *ad* 7.

[106] Laurence Paul Hemming, *Postmodernity's Transcending* (SCM Press, 2005), at 129.

1.3.6 Participation

In identifying the light of natural reason as the imprint of the Divine Light whereby man discerns good and evil, Aquinas's demonstration of an impression of the eternal law upon man is identical with a demonstration of the natural law.[107] Aquinas elaborates this dependence of the human intellect's natural light on the superior illumination of God Himself in terms of participation. In the following paragraphs it is argued that Aquinas's doctrine of participation does not provide a means of establishing knowledge of the natural law which is independent of Aquinas's demonstrative knowledge of God.[108]

Aquinas distinguishes between light as source (*lux*) and light as radiance (*lumen*): *lux* is an active quality *per se* whereas *lumen* is the participation of a transparent medium in that quality.[109] Analogous to the participation of the diaphanous medium in physical light,[110] Aquinas identifies the light of the agent intellect as a participating likeness of the uncreated light.[111] Aquinas explains the common possession of the perfection of intellectual light in the many human intellects by reference to one higher source from which the many intellects

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[107] Aquinas, note 78.
Brock, *The Legal Character of Natural Law according to St. Thomas Aquinas* (University of Toronto, 1988), at 58.

[108] In section 1.3.3 above it was argued that Aquinas's demonstrative knowledge of God depends on faith.

[109] Aquinas, *In librum Aristotelis De anima commentarium* (5th ed, Marietti, 1959), II, *lect.* 14, nn. 420-421.

[110] A diaphanous medium such as air is permeated by light but does not assimilate it such that as soon as the light ceases to shine the diaphanous medium falls back into darkness.

[111] "Now it is manifest both that God is the author if the intellectual power, and that He can be seen by the intellect. And since the intellective power of the creature is not the essence of God, it follows that it is some kind of participated likeness of Him who is the first intellect. Hence also the intellectual power of the creature is called an intelligible light, as it were, derived from the first light, whether this be understood of the natural power, or of some perfection supperadded of grace or of glory.
Manifestum est autem quod Deus et est autor intellectivae virtutis, et ab intellectu videri potest. Et cum intellectiva virtus creaturae non sit Dei essentia, relinquitur quod sit aliqua participata similitudo ipsius, qui est primus intellectus. Unde et virtus intellectualis creaturae lumen quoddam intelligibile dicitur, quasi a prima luce derivatum: sive hoc intelligatur de virtute naturali, sive de aliqua perfectione superaddita gratiae vel gloriae.
Aquinas, note 71, Ia, q. 12, a. 2, *co.*

receive or participate in some way the perfection they possess in common.[112] Clarke summarises Aquinas's understanding of participation as follows:

> The term, participation, therefore, is a condensed technical way of expressing the complexus of relations involved in any structure of dependency of a lower multiplicity on a higher source for similarity of nature. It will thus be St. Thomas's chosen tool for expressing the fundamental relations of dependence of creatures on God both for their origin and their analogical imitation of His divine essence.[113]

In Aquinas's treatment of law, participation describes the situation where God as the Eternal Law is the sole and unique ground of law, all other laws existing by participation in the Eternal Law and distinguished by their differing modes of promulgation. However, the problem with the doctrine of participation is how it comes to be known. As Rocca asked in the context of his commentary of Aquinas's 'Avicennian argument' for the existence of God, but which applies with equal force to the question of law:

> But how do we know the fact of participation? In [Aquinas's] texts a general statement is made or implied that what exists by participation is reduced to what exists essentially. This general statement appears to be a universal truth that we *first* come to know independently and then *later* apply to the case of God. In reality, however, we have no knowledge, *except in the case of God*, of any quality, perfection, or reality existing in pristine, perfect, or "essential" state. In Thomas' hands, then, the seemingly general and independent principle of participation is actually a more abstract, philosophical way of explicating the relationship between God and creation, and indeed depends for its own meaning upon the prior knowledge of God as pure subsistent being.[114]

Since, as Rocca argues, Aquinas's doctrine of participation depends upon the prior knowledge of God, and since, as has been argued in section 1.3.3 above, prior knowledge of God depends on faith, then it follows that Aquinas's doctrine of participation is also consequent on faith.

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[112] Although participation is one of the central structures of Aquinas's philosophy and is systematically connected with such other notions as being, causality, perfection and the distinction between essence and *esse* in finite beings, Aquinas nowhere treats of participation as a separate theme nor provides an explicit justification of its structure.
W. Norris Clarke, "The Meaning of Participation in St. Thomas" in Clarke, note 57, at 89; te Velde, note 57, at ix.

[113] Clarke, note 57, at 92-93.

[114] Gregory P. Rocca, *Speaking the Incomprehensible God* (The Catholic University of America Press, 2004), at 234-235 (emphasis in the original).

The doctrine of participation also justifies the securing of every analogy on the prior being of God as first and pre-eminent cause of all, such that the attribution to the creature is made secondarily,[115] *eg* God as the Eternal Law is first and pre-eminent and that in which all other law participates.

1.3.7 Theological Aspects of Aquinas's Account of Participation

Since Aquinas defines theology as "knowledge of those things which pertain to human salvation"[116] and which "is not derived from creatures but is inspired by an immediate divine light",[117] it follows that he understands theology as a scientific knowledge of the things that are given in faith and that are not deduced from reason.[118] In this sense Aquinas's account of the natural law can be considered theological.[119] God is known, in faith, as the Creator, as the

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[115] "Before Descartes, the unity of every analogy is secured on the prior being of God as first and preeminent cause of all that is...for St. Thomas, analogy...is always primarily in virtue of God and only secondarily with respect to beings. The *real* meaning of every analogical name is located in God, and is only imperfectly manifested by beings. For St. Thomas, analogical language is the signification of a relationship whereby creation is understood to be already dependent on the creator. In each case God is the 'prime analogate', the attribution to the creature is only made secondarily. The analogies proceed *from* God *to* beings." Laurence Paul Hemming, "Giving a Good Account of God: Is Theology ever Mathematical?" (2006) 70 *The Thomist* 367, at 377-378.

[116] *...theologia est scientia de rebus quae ad salutem hominis pertinet.* Aquinas, *Scriptum super Sententiis* www.corpusthomisticum.org (visited 1st October 2007) I, q. 1, a. 3, *qc.* 2, *s.c.* 1.

[117] *...per cognitionem non a creaturis sumptam sed immediate ex divino lumine inspiratam, et haec est doctrina theologiae. Ibid*, I, q. 1, a. 1, *co.*

[118] "If faith is the *object* of the science of theology, then faith is not its content, but rather the things that are given *in* faith. In the *scientia theologiæ* what is scientific is the 'reflection on', the 'knowing in' so that in no sense is this a *scientia fidei*, a science of faith, but a *scientia de rebus fidei*, a science of the things of faith, or more properly, which pertain to the things of faith. These things may be understood through reason, *sapientia*, but they are not given *by* or *in* reason (they are not deduced from reason), because they are given *by* or *in* faith, for wise, and reasoned, reflection." Laurence Paul Hemming, "Unreasonable Faith" (2000) 81 *New Blackfriars* 389, at 391 (emphasis in the original).

[119] "Aquinas is a Christian – he therefore believes something which the whole of Aristotle's physics resists – that there is a temporal first and creating cause to the cosmos which lies entirely outside Aristotle's careful elaboration of the causes of things. For Aristotle the world is eternal – for Aquinas it is not. Moreover, the phrase Aquinas uses in connection with the appearance of the eternity of the world in Aristotle's texts is often "*quod est haereticum*". The question of faith is prior in deciding the question of God's efficient causality. This is particularly true in *De aeternitae mundi* where the error of supposing that the world was from all eternity is an error first in faith, and then not only in faith but according to the philosophers who also can show that whatever is in whatever way it is, has been caused by God. As the *De aeternitae mundi* demonstrates, not only is the question of God's prior causality of all things a question of faith, it is also primarily a question of what is possible to God. It is therefore essential to be alive to the way in which Aquinas is already reconfiguring the

first words of the Bible[120] and of the Christian creeds attest.[121] Consequently, in faith, the being of God is not in question. While God and creation are known in faith - and so are not deduced from reason - their relationship can be clarified by philosophical analysis.[122] In common with the Christian tradition Aquinas holds that God is transparent only to God and that He is known by the created human intellect only in so far as it receives the light of glory[123] and not by means of philosophical analysis. Since Aquinas identifies Eternal Law, which is identical with God Himself, as the ground of the natural law, it follows that the ground of the natural law is transparent only to God and is known by man, not by means of his philosophical analysis, but only in so far as man, in faith, receives the light of glory. God, as the ground of natural law, is neither transparent, nor orderable, nor harnessable at will for man's purposes, but is known in faith. Consequently Aquinas's writings disclose no

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metaphysics he receives from Aristotle in order to undertake the work of faith." Laurence Paul Hemming, "Transubstantiating Ourselves" (2003) 44 *Heythrop Journal* 418, at 437.

[120] "In the beginning, God created the heaven and the earth..."
In principio creavit Deus caelum et terram... Nova Vulgata Bibliorum Sacrorum Editio, Genesis 1:1.

[121] "We believe in one God, the Father Almighty, maker of heaven and earth, of all that is seen and unseen..."
Credo in unum Deum Patrem onmipotentem, factorem cæli et terra, visibilium omnium et invisibilium. Nicene Creed

[122] "For Thomas, membership of a school of philosophy does not befit Christians...Thomas speaks about philosophy, of course, as a habit of knowledge necessary for an educated believer...I cannot find that the epithet *philosophus* is ever applied by Thomas to a Christian." Mark D. Jordan, *The Alleged Aristotelianism of St. Thomas Aquinas* (Pontifical Institute of Mediaeval Studies, 1990), at 6.

Similarly, the Magisterium of the Roman Catholic Church does not prefer any philosophical school. For example, in his Encyclical Letter *Fides et Ratio* (14th September 1998) Pope John Paul II reaffirmed Pope Pius XII's teaching in his Encyclical *Letter Humani Generis* (12th August 1950) that "The Church does not have a philosophy of her own, nor does she select a particular one to the detriment of others."
"*suam ipsius philosophiam non exhibet Ecclesia, neque quamlibet praelegit peculiarem philosophiam aliquarum damno.*" John Paul II, *Fides et Ratio*, §49 in Hemming and Pearsons (eds.) *Restoring Faith in Reason: A Translation of the Encyclical Letter of John Paul II* Fides et Ratio *together with a Commentary and Discussion* (SCM, 2002), at 80-81.

[123] "...No created intellect can know God infinitely. For the created intellect knows the divine essence more or less perfectly in proportion as it receives the light of glory. Since therefore the created light of glory received into any created intellect cannot be infinite, it is clearly impossible for any created intellect to know God in an infinite degree. Hence it is impossible that it should comprehend God."
...Nullus autem intellectus creatus potest Deum infinite cognoscere. Intantum enim intellectus creatus divinam essentiam perfectius vel minus perfecte cognoscit, inquantum maiori vel minori lumine gloriae perfunditur. Cum igitur lumen gloriae creatum, in quocumque intellectu creato receptum, non possit esse infinitum, impossibile est quod aliquis intellectus creatus Deum infinite cognoscat. Unde impossibilie est quod Deum comprehendat. Aquinas, note 71, Ia, q. 12, a. 7, *co.*

"technique" – rational, empirical, or otherwise – by which this ground can be "harnessed" for the orderability of man and man's world.

In sum, while Aquinas's philosophical analysis of God is explicated in terms of causation (in which God is understood as the prior cause of all things) and participation (in which God is understood as source of the perfections in things), his analysis is a working out of an understanding of God which depends on faith. The doctrine of participation is a formula of faith that clarifies a relation between God and creation that is already presupposed by what God has divinely revealed and which is necessary for salvation.[124] The doctrine of analogy is such that that any analogical relationship between creatures and God is indeterminate and such that no "metaphysical disclosure" of the essence of God is achieved.[125] In particular, Aquinas's reliance upon the doctrine of participation to prove the existence of the natural law is a properly theological working out of an understanding of God which depends on faith.

1.4 The Divine Legislator

In this section it is argued that Aquinas understands natural law to be known by all as instruction coming from a Divine lawgiver.[126] Since Aquinas's demonstrative knowledge of God presupposes many other sciences, it cannot be the knowledge of God that could be

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[124] "Three things are necessary for man to be saved: knowledge of what is to be believed; knowledge of what is to be desired; and knowledge of what is to be done. The first is taught in the Creed, where knowledge of the articles of faith is given; the second is in the Lord's Prayer; the third is in the Law. Here we are concerned with knowledge of what is to be done, and with regard to this there is a fourfold law. The first is the law of nature, and that is nothing other than the light of the intellect planted in us by God, by which we know what should be done and what should be avoided. God gave this light and this law in creation…"
Tria sunt hominis necessaria ad salutem: scilicet scientia credendorum, scientia desiderandorum, et scientia operandorum. Primo docetur in symbolo, ubi traditur scientia de articulis fidei, secundum in oratione dominica; tertium autem in lege. Nunc autem de scientia operandorum intendimus: ad quam tractandam quadruplex invenitur. Prima dicitur lex naturae; et haec nihil aliud est nisi lumen intellectus institum nobis a Deo, per quod cognoscimus quid agendum et quid vitandum. Hoc lumen et hanc legem dedit Deus homini in creatione. Aquinas, *Collationes in decem praeceptis* www.corpusthomisticum.org/cac.html (visited 19th December 2009), *prooemium.*

[125] Laurence Paul Hemming, *Heidegger's Atheism* (University of Notre Dame Press, 2002), at 198.

[126] Lawrence Dewan, "St. Thomas and the Divine Origin of Law: Some Notes" (2008) 8 *Revista Civilizar* 123, at 126; "St. Thomas, Our Natural Lights, and the Moral Order" in Lawrence Dewan, *Wisdom, Law, and Virtue* (Fordham University Press, 2008), at 207.

presupposed by all for the purposes of recognising the natural law as originating from the divine legislator. Four of Aquinas's accounts of the knowledge of God which is less perfect than the demonstrative and which is had by all are examined. These accounts refer to the intellect's spontaneous inferences by which such less perfect knowledge of God is attained. From an examination of these four texts it is argued that such spontaneous inferences presuppose the application of a principle which is not independent of Aquinas's fourth proof of the existence of God (*quarta via*) and so must be considered as an explication of an understanding which originates in faith or in acts of belief.

1.4.1 The Promulgation of the Natural Law

From his examination of Aquinas's treatment of the diversity of laws in the light of the scholastic convention that a proper division of a subject is made according to an ultimate differentiating element of the subject's nature, Brock has shown that the various kinds of law - eternal law, natural law, divine law and human law – are distinguished by the diversity of their promulgations.[127] Brock's demonstration can be summarised as follows. While law is a measure of human acts, not every measure is something that men are induced to follow and not everything that moves men is a genuine measure, it follows that a measure of human acts is itself is not sufficient to constitute law. Since there are many reasonable ordinations and commands that are not laws, *eg* rulings which the head of a family makes for his family, it follows that the most proper division of law cannot be a division of the class of ordinations of reason since law itself is a member of that class. A division of law cannot be made according to law's common feature of directing things to the common good since not every ordination that directs human acts towards the common good is a law, *eg* neither the dispositions of private citizens to do what is for the public good nor ordinations of a public authority

[127] Brock, note 107, at 65-84.

directing things towards the common good which are not commands can be called laws. However, in finding that law becomes a law in act and not merely in the legislator's intention when it satisfies a fourth criterion: promulgation (in addition to the three criteria of being an ordination of reason, for the common good and made by one who has care for the community) Aquinas identifies an ultimate differentiating element of the law's nature.[128]

In response to the particular objection that promulgation is not essential to law as the natural law has the essential character of a law and needs no promulgation,[129] Aquinas argues that "the promulgation of the natural law is from the very fact that God places it within the minds of human beings so as to be naturally known."[130] As Dewan has noted, for this reply to be sufficient, it requires that human knowledge of natural law include an appreciation of divine providence as its source.[131] Since promulgation is the ultimate differentiating element of the law's nature, then in order for an ordinance to have the character of law there must not only be the ordinance's conformity to the will of the legislator, but also the intimation or insinuation that the ordinance is the legislator's will. In sum, Aquinas holds man must know that the natural law comes from God as legislator.

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[128] "[Question 91] seems first to divide law into law eternally promulgated and law promulgated in time, and then to divide temporally promulgated law into law promulgated naturally, humanly, and supernaturally. Eternal law is distinguished from all other laws by having its proper mode of existence in the mind of God; the other laws are distinguished from each other by the diverse instruments through which they come to exist in the mind of men. Evidently, then 'natural law' means law promulgated to man naturally." Brock, note 107, at 71.

[129] "...It would seem that promulgation is not essential to a law. For the natural law above all has the character of law. But the natural law needs no promulgation. Therefore it is not essential to a law that it be promulgated." *...Videtur quod promulgatio non sit de rationis legis. Lex enim naturalis maxime habet rationem legis. Sed lex naturalis non indiget promulgatione. Ergo non est de ratione legis quod promulgatur.* Aquinas, note 71, Ia IIae, q. 90, a. 4, *obj.* 1.

[130] *Ad primum ergo dicendum quod promulgatio legis naturae est ex hoc ipso quod Deus eam mentibus hominum inseruit naturaliter cognoscendam.* Aquinas, note 71, Ia IIae, q. 90, a. 4, *ad* 1.
Brock, note 107, at 71-72.

[131] Lawrence Dewan, "St. Thomas and the Divine Origin of Law: Some Notes", in Dewan, *Wisdom, Law, and Virtue*, note 126, at 126; "St. Thomas, Our Natural Lights, and the Moral Order", note 126, at 206-212.

1.4.2 Imperfect Knowledge of God

As Aquinas holds that demonstrative knowledge of God presupposes many other sciences,[132] it is not immediately available to all and so it cannot be the knowledge of God that could be presupposed by all for the purposes of recognising the natural law as originating from the divine legislator. In the following paragraphs four texts of Aquinas on knowledge of God which is less perfect than the demonstrative and which is had by all are examined in order to show that they presuppose knowledge acquired in faith.

In one text Aquinas argues that "to know that God exists in a general and confused way is implanted in us by nature" so that God is "naturally known" as man's beatitude but such knowledge is "not to know absolutely that God exists".[133] In a second text Aquinas argues that there is "a certain general and vague knowledge of God in the minds of practically all men" such that God is grasped as "the ordainer of the natural order" without knowing "who or what manner of being the ordainer of nature is".[134] However, as these texts emphasise the

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[132] "...the science of whose province it belongs to prove the existence of God is the last of all to offer itself to human research, since it presupposes many other sciences...many are unable to make progress in the study of science, either through dullness of mind, or through having a number of occupations and temporal needs, or even through laziness in learning, all of whom would be altogether deprived of the knowledge of God, unless Divine things were brought to their knowledge under the guise of faith."
...Scientia enim ad quam pertinet probare Deum esse et alia huiusmodi de Deo, ultimo hominibus addiscenda proponitur, praesuppositis multis aliis scientiis...Multi enim in studio scientae proficere non possunt, vel propter hebetudinem ingenii; vel propter alias occupationes et necessitates temporalis vitae; vel etiam propter torporem addiscendi. Qui omnio a Dei cognitione fraudarentur nisi proponerentur eis divina per modum fidei. Aquinas, note 71, IIa IIae q. 2, a. 4.

[133] "To know that God exists in a general and confused way is implanted in us by nature, inasmuch as God is man's beatitude. For man naturally desires happiness, and what is naturally desired by man must be naturally known to him. This, however, is not to know absolutely that God exists; just as to know that someone is approaching is not the same as to know that Peter is approaching, even though it is Peter who is approaching; for there are many who imagine that man's perfect good which is happiness, consists in riches, and others in pleasures, and others in something else."
Ad primum ergo dicendum quod cognoscere Deum esse in aliquo communi, sub quadam confusione, est nobis naturaliter insertum, inquantum scilicet Deus est hominis beatitudo, homo naturaliter desiderat beatitudinem, et quod naturaliter desideratur ab homine, naturaliter cognoscitur ab eodem. Sed hoc non est simpliciter cognoscere Deum esse, sicut cognoscere venientem, non est cognoscere Petrum, quamvis sit Petrus veniens, multi enim perfectum hominis bonum, quod est beatitudo existimant divitias; quidam vero voluptates, quidam autem aliquid aliud. Aquinas, note 71, Ia, q. 2, a. 1, *ad* 1.

[134] "There is a certain general and vague knowledge of God in the minds of practically all men, whether it be the fact of God's existence being a self-evident truth, as some think [Book 1, chapter X], or, as seems more likely, because natural reasoning leads man promptly to some sort of knowledge of God: for men seeing that natural things follow a certain course and order, and further considering that order cannot be without an ordainer, they

provisional nature of such knowledge of God, such knowledge is insufficient for knowledge of the natural law's promulgation by God.

In a third text Aquinas argues that the "simple people" who "naturally follow their instincts" arrive at "a certain natural cognition" of God as the Creator of the cosmic order.[135] In a fourth text treating specifically of the natural law, Aquinas argues that very universality of the practice of offering sacrifice to God is a manifestation of the very essence or nature of

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perceive generally that there is some ordainer of the things which we see. But who or what manner of being the ordainer of nature is, and whether He be one or many, cannot be gathered off-hand from this slight study."
Est enim quaedam communis et confusa Dei cognitio quae quasi omnibus hominibus adest: sive hoc sit per hoc quod Deum esse sit per se notum, sicut alia demonstrationis principia, sicut quibusdam videtur, ut in primo libro dictum est; sive, quod magis verum videtur, quia naturali ratione statim homo in aliqualem Dei cognitionem pervenire potest. Videntes enim homines res naturales secundum ordinem certum currere; cum ordinatio absque ordinatore non sit, percipiunt, ut in pluribus, aliquem esse ordinatorem rerum quas videmus. Quis autem, vel qualis, vel si unus tantum est ordinator naturae, nondum statim ex hac communi consideratione habetur: sicut, cum videmus hominem moveri et alia opera agere, percipimus ei inesse quandam causam harum operationum quae aliis rebus non inest, et hanc causam animam nominamus; nondum tamen scientes quid sit anima, si est corpus, vel qualiter operationes predictas efficiat. Aquinas, *Summa contra Gentiles*, note 99, *cap.* 38, n. 1:

[135] "Therefore when [the Psalmist] says 'Out of the mouths…' he shows that [the divine majesty] is manifest to the highest degree. And firstly he indicates the manifestation, secondly, its reason, whence he says, 'For I will behold…' That it is manifest he proves: for that is manifest which is placed in all things, in as much as it is in all of the simple things, as if by a certain natural cognition. For the genus of humans is twofold, those who follow natural and right instincts, namely the simple, and the wise. That the wise might know God is no great thing, but that the simple people do, is. For there are those who pervert the natural instincts: and these people push away the cognition of God…But, God makes it so that by those people, that is, the simple ones, who naturally follow their instincts, the others who pervert their instinct are confounded. By infants, the Psalmist designates the simple people…Tully says in the book *On the Nature of the Gods*, and it was said as well by Aristotle, even though we do not find it in the books of which we possess, that if someone entered a palace, which seemed to be well established, no one is so insane that even though he does not see by what fashion it was made he would still perceive that it was made by somebody. We enter into the world, and we do not see when it was made; but from this very fact that it is well-ordered, we must perceive that it was made by somebody. And the order of the heavenly bodies especially shows this." Aquinas, *Commentary on Psalm 8*, translation by Dewan, in Dewan, "St. Thomas and the Divine Origin of Law: Some Notes", note 126, n. 22.
Deinde cum dicit, Ex ore, *ostendit quod est maxime manifesta. Et primo ostendit manifestationem. Secundo eius rationem, ibi,* Quoniam videbo*: quod sit manifesta, probat: quia illud est manifestum quod est omnibus inditum, quantumcumque simplicibus, quasi quadam naturali cognitione. Duplex namque est genus hominum, qui consequitur naturalem et rectum instinctum, sicut sint simplices, vel sapientes. Quod sapientes cognoscant Deum, hoc non est magnum, sed quod simplices sico. Sunt autem quidam qui naturalem instinctam pervertunt: et isti cognitionem Dei repellunt…Deus autem facit ut per illos, idest per simplices, qui sequuntur naturalem instinctum, confundantur qui pervertunt naturalem instinctum. Per infantes designantur simplices…Tuillius dicit in lib. de natura deorum, et fuit dictum etiam ab Aristotle, quamvis in eius libris quae apud nos habentur non inveniatur, quod si aliquis homo intraret palatium, quod videret bene dispositum, nullus ets ita amens, qui licet non videret quomodo factum fuerit, quin percipiat quod fabricatum sit ab aliquo. Nos intremus mundum, nec videmus quando factus sit: sed ex hoc ipso quod est it bene ordinatus, debemus percipere quod est factus ab aliquo. Et hoc specialiter ostendit ordo corporum caelestium.* Aquinas, *In psalmos Davidis expositio, Super Psalmo* www.corpusthomisticum.org (visited 28th October 2009), VIII, b.

human being and of the natural order[136] and concludes that "natural reason forcefully tells man that he is subject to a higher being because of the defects which he perceives in himself".[137] Unlike the first two texts, these two texts do not assert the provisional nature of such knowledge. However, in common with the first two texts, the third and fourth texts also evidence two features of the intellect's grasp of a natural knowledge of God by means of its spontaneous natural inference or spontaneous reasoning process: firstly, the intellect starts from experience such as the desire for happiness, the experience of order, or the experience of being defective; and secondly, it involves the spontaneous and natural application of the principle "all other less perfect things must receive their being" from "the being which is most perfectly and mostly truly being".[138] Clarke summarises Aquinas's formulation of the principle as follows:

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[136] "At all times and among all nations there has always been the offering of sacrifices. Now that which is observed by all is seemingly natural. Therefore the offering of sacrifices is of the natural law."
Sed contra est quod in qualibet aetate, et apud quaslibet hominum nationes, semper fuit aliqua sacrificiorum oblatio. Quod autem est apud omnes, videtur naturale esse. Ergo et oblatio sacrificii est de iure naturali. Aquinas, note 71, IIa IIae, q. 85, a. 1, *s.c.*
Dewan, "St. Thomas, Our Lights, and the Moral Order", note 126, at 207.

[137] "Natural reason forcefully tells man that he is subject to a higher being because of the defects which he perceives in himself, with regard to which he needs help and direction from someone above him: and whatever this superior being may be, it is known to all under the name God. Now just as in natural things the lower are naturally subject to the higher, so too it is a dictate of natural reason in accordance with man's natural inclination that he should tender submission and honour, according to his mode, to that which is above him. Now the mode befitting to man is that he should employ sensible signs in order to signify anything, because he derives his knowledge from sensibles. Hence it is a dictate of natural reason that man should use certain sensibles, by offering them to God in sign of the subjection and honour due to Him, like those who make certain offerings to their lord in recognition of his authority. Now this is what we mean by sacrifice, and consequently the offering of sacrifice is of the natural law."
Respondeo dicendum quod naturalis ratio dictat homini quod alicui superiori subdatur, propter defectus quos in seipso sentit, in quibus ab aliquo superiori eget adiuvari et dirigi. Et quidquid illud sit, hoc est quod apud omnes dicitur Deus. Sicut autem in rebus naturalibus naturaliter inferiora superioribus subduntur, ita etiam naturalis ratio dictat homini secundum naturalem inclinationem ut ei quod est supra hominem subiectionem et honorem exhibeat secundum suum modum. Est autem modum conveniens homini ut sensibilibus signis utatur ad aliqua experimenda, quia ex sensibilibus cognitionem accipit. Et ideo ex naturali ratione procedit quod homo quibusdam sensibilibus rebus utatur offerens eas Deo, in signum debitae subiectionis et honoris, secundum similtudinem eorum qui dominis suis aliqua offerunt in recognitionem dominii. Hoc autem pertinet ad rationem sacrificii. Et ideo oblatio sacrificii pertinet ad ius naturale. Aquinas, note 71, IIa IIae, q. 85, a. 1, *co.*

[138] "...There are three demonstrations [of a universal cause of the coming into being of things], the first of which is this. It is necessary that if some one attribute is found in common among many things, it be caused in them by one cause. For it cannot be that this common attribute belongs to each one as derived from its own self, since each one, according as it is its own unique self, is distinguished from every other, and a diversity of causes produces a diversity of effects. Therefore, since being (*esse*) is found common to all things, which, according to *what* they are, are distinct from each other, it must be that their being is communicated to them, not from their

Whenever a real common attribute or perfection is shared among many, its only adequate ontological grounding is a single common source (efficient cause) for all, which possesses this common perfection in all fullness. The reason is that the *common sharing* of the same perfection – ie, the *real similarity* between all the members in the order of this perfection – needs an adequate sufficient reason or ontological grounding, and it cannot be *because* these sharers are *many* and *diverse* that they have something in common, that they are really *similar*. For real similarity – though it is not identity – is still a mode of unity, and diversity and multiplicity as such cannot be the ground of any unity. Now if this common perfection in each member had its *ultimate* origin or source totally from each individual member by itself as unique and individual, as self-sufficient and self-enclosed, then it would be their radical individual diversity and multiplicity which would be the cause for their similarity, for their common bond of community. This is not intelligible. Diversity as such can never be the cause of unity. Therefore, ontological similarity among many, to have an adequate sufficient reason, must be grounded somewhere in a *concrete ontological unity*, a single source from which all the others ultimately derive this common perfection....[139]

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own selves, but from some one cause. And this seems to be the reasoning of Plato, who maintained that before all multiplicity there is unity, not only in numbers but in real things. The second argument is that if something is found diversely participated by many things, then this something must be attributed to all those in which it is found in a less perfect way by that one in which it is most perfectly. For things are said to be more or less on the basis of their difference or approximation to one instance; since none of the many can explain by itself why it has something more or less perfectly than the other. Now, one must posit one being which is most perfectly and most truly being, for, as the philosophers have proved, there exists a first mover, completely unmoved itself and perfectly. Therefore all other less perfect things must receive their being from this one. The third argument is that all which is by something else must be reduced to that which is by itself. One must assume a being that is its own being; this is proved by the fact that there must be a first being that is pure act without any composition. Hence it follows that all other things which are not there own being but have being by way of participation are by this one being." Aquinas, *On the Power of God* (Burns Oates & Washbourne, 1932), q. 3, a. 5, *resp.*
Et hoc triplici ratione demonstrari potest: quarum prima est haec. Oportet enim, si aliquid unum communiter in pluribus invenitur, quod ab aliqua una causa in illis causetur; non enim potest esse quod illud commune utrique ex se ipso conveniat, cum utrumque, secundum quod ipsum est, ab altero distinguatur; et diversitas causarum diversos effectus producit. Cum ergo esse inveniatur omnibus rebus commune, quae secundum illud sunt, ad invicem distinctae sunt, oportet quod de necessitate eis non ex se ipsis, sed ab aliqua una causa esse attribuatur. Et ista videtur ratio Platonis, qui voluit, quod ante omnem multitudinem esset aliqua unitas non solum in numeris, sed etiam in rerum naturis. Secunda ratio est, quia, cum aliquid invenitur a pluribus diversimodo participatum oportet quod ab eo in quo perfectissime invenitur, attribuatur omnibus illis in quibus imperfectius invenitur. Nam ea quae positive secundum magis et minus dicuntur, hoc habent ex accessu remotiori vel propinquiori ad aliquid unum: si enim unicuique eorum ex se ipso illud conveniret, non esset ratio cur perfectius in uno quam in alio inveniretur, sicut videmus quod ignis, qui est in fine caliditatis est caloris principium in omnibus calidis. Est autem ponere unum ens, quod est perfectissimum et verissimum ens: quod ex hoc probatur, quia est aliquid movens omnio immobile et perfectissimum, ut a philosophis est probatum. Oportet ergo quod omnia alia minus perfecta ab ipso esse recipiant. Et haec est probatio Philosophi [in II Metaphysic.]. Tertia ratio est, quia illud quod est per alterum, reducitur sicut in causam ad illud quod est per se. Unde si esset unus calor per se existens, oporteret ipsum esse causam omnium calidorum, quae per modum participationis calorem habent. Est autem ponere aliquod ens quod est ipsum suum esse: quod ex hoc probatur, quia oportet esse aliquod primum ens quod sit actus purus, in quo nulla sit compositio. Unde oportet quod ab uno illo ente omnia sint, quaecumque non sunt suum esse, sed habent esse per modum participationis. Haec est ratio Avicennae [in VIII Metaphysic.] Aquinas, *Quaestiones disputatae De potentia Dei* in *Quaestiones disputatae II* (8th ed, Marietti, 1949), q. 3, a. 5, *resp.*

[139] W. Norris Clarke, *The Philosophical Approach to God* (Wake Forest University, 1979), at 39-41 (emphasis in the original).

Clarke also noted that the problem with this argument is that it presupposes the Neoplatonic principle that the highest in any order is the cause of all the lower members of the same order.[140] te Velde observed[141] that this argument is not independent of Aquinas's fourth argument for the existence of God (*quarta via*).[142]

It was argued that Aquinas's demonstrative knowledge of the existence of God, the *quarta via* included, and his doctrine of participation are not philosophical arguments which can be considered as being independent of such truths of faith as God is the Creator, rather, they must be considered as explications of an understanding which originates in faith.[143] It is argued below that insofar as the principle that "all other less perfect things must receive their being from the being which is most perfectly and mostly truly" – which is not independent of

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[140] "[It is a] remarkable bit of metaphysical sleight-of-hand by which not only St. Thomas but other medieval philosophers generally (perhaps following the Arabs) neatly reversed the... Aristotelian principle that the cause of a generic property must be the highest in that genus, thus making it the equivalent of the quite different Neoplatonic principle, "The highest in any order is the cause of all lower members of the same order." The Aristotelian principle deduces the maximum in perfection from the fact of causality; the Neoplatonic, rooted in the theory of emanation and participation, deduces causality from the rank of maximum." Clarke, note 85, at 113.

[141] "This argument is striking by its circularity. It seems to presuppose God as the one who is most perfectly being and true, the existence of which has been proved by the fourth of the "five ways", by the very same argument on the basis of degrees of perfection. From the degrees of perfection found in reality (such as goodness, truth, and the like) the existence of something that is most perfectly is proved; from God as the one which is most perfectly being it is deduced that all other things which are more or less perfect must receive their being from God. In fact, the proof of creation shows the existence of God as creator; and the proof of the existence of God as creator shows the createdness of the world." te Velde, note 57, at 131.

[142] "The fourth way [of proving the existence of God] is taken from the gradations which are found among things. For in the order of things, there are found greater and lesser manifestations of the good, the true, and the noble; [this is true of anything at all]. But 'greater' and 'less' are postulated of different things insofar as they tend in varying degrees toward that which is greatest: thus there is greater [and lesser] heat, since hot things tend toward what is hottest. Therefore there exists something which is most true, best and most noble, and thus which exists in the highest manner: for what has greatest truth has greatest being, as is claimed in the second book of the *Metaphysics*. That which is called the greatest of any kind whatsoever is the cause of everything of that kind; as fire is the greatest heat is the cause of all heat, as in found in the same book. Therefore there exists that which among all entities is the cause of being, goodness, and any other perfection whatsoever: and this we call God." *Quarta via sumitur ex gradibus qui in rebus inveniuntur. Invenitur enim in rebus aliquid magis et minus bonum, et verum, et nobile; et sic de aliis huiusmodi. Sed magis et minus dicuntur de diversis secundum quod appropinquant diversimode ad aliquid quod maxime est; sicut magis calidum est, quod magis appropinquat maxime calido. Est igitur aliquid quod est verissimum, et optimum, et nobilissimum, et per consequens maxime ens: nam quae sunt maxime vera, sunt maxime entia, ut dicitur II* Metaphysic. *Quod autem dicitur maxime tale in aliquo genere, est causa omnium quae sunt illius generis, sicut ignis, quae est maxime calidus, est causa omnium calidorum, ut in eodem libro dicitur. Ergo est aliquid quod omnibus entibus est causa esse, et bonitatis, et cuiuslibet perfectionis: et hoc dicimus Deum.* Aquinas, note 71, Ia, q. 2, a. 3, *co.*

[143] See section 1.3 above.

the Neoplatonic Principle or the *quarta via* – is applied in spontaneous inferences which leads to a knowledge of God as the divine legislator and promulgator of the natural law, such natural and spontaneous reasoning must also be considered as an explication of an understanding which originates in faith or in acts of belief. In order to advance this argument some aspects of Aquinas's accounts of intellection and faith are reviewed in the following sections.

1.4.3 Intellection

In common with Aristotle Aquinas holds that all cognition is according to some form[144]: knowledge occurs by assimilation of the object known into the knowing subject.[145] In cognition an identity between the known and the knower is established whereby the object known is in the knowing subject according to the nature of the knowing subject.[146] Since nothing is intelligible except insofar as it is in act, the intellect itself is in act only in so far as it is actually understanding something,[147] *ie* the human knower *qua* knower achieves its

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[144] "All cognition follows from the form which is the principle of cognition in the knower."
Respondeo dicendum, quod omnis cognitio est secundum aliquam formam, quae est in cognoscente principium cognitionis. Aquinas, note 103, q. 10, a. 4, *resp.*

[145] "Knowledge is according to the mode of the one who knows; for the thing known is in the knower according to the mode of the knower."
Ad tertium dicendum quod scientia est secundum modum cognoscentis: sicut enim est in sciente secundum modum scientis. Aquinas, note 71, Ia, q. 14, a. 1, *ad* 3.

[146] "...for the received is in the receiver according to the mode of the receiver."
...receptum est in recipiente per modum recipientis. Aquinas, note 71, Ia, q. 84, a. 1.

[147] "...When the human mind is considered in relation to sensible things outside the soul, it is found to be related to them in a twofold manner. In one way, it is related as act to potency, to the extent that things themselves outside the mind are only potentially intelligible. The mind itself is intelligible in act, and it is on this basis that the agent intellect, which makes potentially intelligible things actually intelligible, is held to be included in the soul. In another way, it is related to things as potency to act, inasmuch as determined forms of things are only potentially in our mind, but actually in things outside the soul. In this respect our soul includes the possible intellect, whose function it is to receive forms abstracted from sensible things and make actually intelligible through the light of the agent intellect."
...Cum enim mens nostra comparatur ad res sensibiles quae sunt extra animam, invenitur se habere ad eas in duplici habitudine. Uno modo ut actus ad potentiam: inquantum, silicect, res quae sunt extra animam sunt intelligibiles in potentia. Ipsa vero mens est intelligibilis in actu; et secundum hoc ponitur in ea intellectus agens, qui faciat intelligibilia actu. Alio modo ut potentia ad actum: prout scilicet in mente nostra formae rerum determinatae, sunt in potentia tantum, quae in rebus extra animam sunt in actu; et secundum hoc ponitur in

perfection in the act of knowing in becoming (cognitionally) the object-to-be-known. In particular, since the intellect can come to know itself only through its understanding of something other than itself,[148] it follows that in Aquinas's account of cognition, the human knower can never be made immediately present: it neither knows itself as something present within experience nor finds itself as an ontic presence among other presences within experience, rather, it is "essentially ecstatic, open, and directed towards the intelligibility of beings other than itself".[149] As the human knower achieves its perfection in the act of knowing, then as Baur has shown,[150] this ecstatic openness of the knower which is directed

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anima nostra intellectus possibilis, cuius est recipere formas a sensibilibus abstractas, factas intelligibiles actu per lumen intellectus agentis. Aquinas, note 103, q. 10, a. 6, *resp.*

[148] "But in this life our intellect has material and sensible things for its proper natural object as stated in q. 84, a. 7. It understands itself according as it is made actual by the species abstracted from sensible things by the light of the agent intellect, which not only actuates the intelligible things themselves, but also by their instrumentality, activates the passive intellect. Therefore the intellect knows itself not by its essence, but by its act."
Sed quia connaturale est intellectui nostro, secundum statum praesentis vitae, quod ad materialia et sensibilia respiciat, sicut supra dictum est; consequens est et ut sic seipsum intelligat intellectus noster, secundum quod fit actu per species a sensibilibus abstractas per lumen intellectus agentis, quod est actus ipsorum intelligibilium, et eis mediantibus intellectus possibilis. Non ergo per essentiam suam, sed per actum suum se cognoscit intellectus noster. Aquinas, note 71, q. 87, a. 1, *co.*

[149] "According to Aquinas, a material substance is determined by both form and matter. The greater the degree of formality or immateriality possessed by the substance, the greater is that substance's capacity for immanently-grounded unity; and the greater is that being's capacity to withstand external threats to its own existence...the knower's greater degree of immateriality and self-subsistence in the face of otherness makes it essentially ecstatic, open, and directed towards the intelligibility of beings other than itself. It is because of the knower's high degree of immateriality and self-subsistence that the knower does not regard the other as simply "other". We can illustrate this by contrasting two different formal principles, the nutritive and the intellectual. On the level of nutrition, the living being withstands and overcomes the alien-character of other beings by destroying the other in its otherness (that is, by consuming it). On the level of intellectual cognition, the intellect withstands and overcomes the alien-character of other beings, not by destroying the other in its otherness, but by *becoming* the other. Because of its greater degree of immateriality, the intellect can become the other while still remaining itself. The other loses the character of sheer otherness, not because it is destroyed (as in consumption), but because the knower *qua* knower does not stand opposed to the other as other; it is rather open to the other in its otherness. This is because the intellect perfects itself – and indeed truly *becomes* itself – only in becoming other." Baur, note 56, at 331.

[150] "With [his] notion of abstraction, Aquinas affirms something similar to what Heidegger discusses under the rubric of Dasein's projective character. We will recall that, for Heidegger, we are open to the presencing of beings because of our projective orientation: in projecting ourselves upon our own potentiality-for-being, we are open to the presencing of beings other than ourselves. The potentiality-for-Being towards which we project ourselves, however, is nothing already actual or present for us. In a similar vein, Aquinas would argue that the intellect *qua* intellect does not simply find itself existing amongst a collection of actualities or presences which already happen to be present for it, apart from its own activity. After all, the beings-to-be-known become actually intelligible for the intellect only to the extent that the active intellect supervenes upon the not-yet-intelligible phantasm and makes the phantasm actually intelligible. Since the proper object of the intellect is the intelligible *qua* intelligible, the not-yet-intelligible is, from the point of view of intellectual knowledge, "nothing" at all, and to that extent, the intellect is open to the presencing of beings only if it projects itself upon

towards the intelligibility of beings other than itself can be considered as a projecting of the knower upon its own potentiality-for-being. In other words, the human knower bears an implicit reference to futurity.[151] In this sense, the human knower is never fully transparent to itself as it has a future which is unknown to it.[152]

In the following section, it is shown that, in common with his understanding of habits, Aquinas's account of acts of faith can also be considered as a mode of knowing, *ie* as projecting of the knower upon its own potentiality-for-being such that "*what* the knower knows will determine *how* the knower will *be*."[153]

1.4.4 Faith

Aquinas distinguishes between faith taken as a habit (*fides*) and faith as an act (*credere*).[154] Aquinas defines faith (*fides*) as the inchoation of eternal life[155] and since

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that which is simply not yet "there" for it. Insofar as the intellect's activity is not determined or delimited by pre-given presences, it is free in its projective, disclosive activity." *Ibid*, at 333.

[151] "Just as we might say that Aquinas's human knower is thrown non-empirically into the finite kind of being that it is, so too we might also say that Aquinas's human knower exists as being-ahead towards its own potentiality-for-being. This, to be sure, is not Thomistic terminology; however, this terminology is not inappropriate if one understands how the human knower exists as Being-ahead. Aquinas would say that the human knower exists out toward its own perfection. The knower *qua* knower achieves its perfection in the act of knowing and thus in becoming (cognitionally) the object-to-be-known. How does the human knower, as potential knower, exist out towards its own perfection? It cannot do so by comporting itself towards some actual being which it already knows to be there for it; after all, insofar as the knower is merely out towards its own perfection, it is not yet perfected in the act of knowing and thus does not yet know the object as something actual towards which it could comport itself. Accordingly, the inquiring human knower cannot relate to its own perfection as it would relate to any kind of ontic presence or actuality which is already there for it. As with Heidegger's Dasein, Aquinas's human knower maintains itself authentically in its being by projecting itself out towards its own perfection, a perfection which, precisely insofar as the knower is characterised by inquiry, is nothing yet actually present for it." *Ibid*, at 334-335.

[152] "I am, however, never really transparent to myself, for I have a future. The future is always unknown to me, and so hides me from myself (as forgetting does with respect to the past)...The self never knows what is not-itself, which is why even the self's coming to know God would have to be a divinisation of the self. What is genuinely other to the self – 'not-I', is entirely hidden and concealed from the self, and remains entirely unknown to it, until I do indeed come upon it, as a mystery and something to be discerned, whose meaning cannot be exhausted because it has a future." Laurence Paul Hemming, "The Subject of Prayer: Unwilling Words in the Postmodern Access to God" in Ward ed, *The Blackwell Companion to Postmodern Theology* (Blackwell, 2001) 454.

[153] "*What* the knower knows will determine *how* the knower will *be*." Hemming, note 125, at 279.

[154] Aquinas, note 71, IIa IIae, q. 2, aa. 1 *et* 3.

ultimate human happiness exists in the beatific vision in the afterlife, Aquinas understands the necessity of faith (*fides*) as being eschatological or future-orientated.[156] He argues that the beatific vision can only be reached in a learning process in which God has the role of a teacher.[157] While faith in a teacher is not necessary for every kind of learning, it is necessary for learning which progresses: the pupil must, by an act of faith (*credere*), believe his teacher who already enjoys the possession of the principles towards which the pupil is gradually progressing.[158] In other words, whereas faith (*fides*) is future-orientated, believing (*credere*) is the activity in the present by which the student "thinks with assent"[159] so as to reach an understanding of the principles which the teacher possesses. Progressive learning presupposes the temporal, the historical and the worldly: the student's understanding has a character, a manner and an occurrence in a particular place and at a particular time, such that

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William J. Hoye, "Der Grund für die Notwendigkeit des Glaubens nach Thomas von Aquin" (1995) 70 *Theologie und Philosophie* 374; "The Thought of Being as the Necessary Reason for Supernatural Faith in the Theology of Thomas Aquinas" (1988) 44 *Doctor Communis* 173.

[155] "...faith is a habit of mind, whereby eternal life is begun in us, making the intellect assent to what is non-apparent."
Fides est habitus mentis, qua inchoatur vita aeterna in nobis, faciens intellectum assentire. Aquinas, note 71, IIa IIae, q. 4, a. 1, *co.*

[156] "The self never knows what is not-itself, which is why even the self's coming to know God would have to be a divinisation of the self. What is genuinely other to the self – 'not-I', is entirely hidden and concealed from the self, and remain entirely unknown to it, until I do indeed come upon it, as a mystery and something to be discerned, whose meaning cannot be exhausted because it has a future." Hemming, note 152, at 454.
Hoye, note 102, at 256-306.

[157] "...man's ultimate happiness consists in a supernatural vision of God: to which vision man cannot attain unless taught by God."
Ultima beatitudo hominis consistit in quadam supernaturali Dei visione. Ad quam quidem visionem homo pertingere non potest nisi per modum addiscentis a Deo doctore. Aquinas, note 71, q. 2, a. 3, *co.*

[158] "Hence, in order for a human being to attain the fulfilled vision of happiness, it is pre-required that he believe in God as the pupil does his teacher."
Unde ad hoc quod homo perveniat ad perfectam visionem beatitudinis praeexigitur quod credat Deo tanquam discipulus magistro docenti. Aquinas, note 71, IIa IIae, q. 2, a. 3, *co.*
Hoye, "The Thought of Being as the Necessary Reason for Supernatural Faith in the Theology of Thomas Aquinas", note 154, at 176.

[159] "If *to think* be understood in the second way [as the movement of the mind while yet deliberating, and not yet perfected by the clear light of truth], then [to think with assent] completely expresses the nature of the act of believing."
Et secundum hoc cogitatio proprie dicitur motus animi deliberantis nondum perfecti per plenam visionem veritatis....Si vero sumatur cogitare secundo modo [quod dicitur cum assensione cogitare] sic in hoc intelligitur tota ratio huius actus qui est credere. Aquinas, note 71, q. 2, a. 1, *co.*

the student's understanding always springs from out of the particular world the student inhabits. In phenomenological terms one might say that Aquinas understands the knowledge of faith (*fides*) as arising out of, and having as its basis, "a knowledge of what appears to us: what is decisive is our manner of being present to what it is that we are present to".[160] In drawing attention to the necessity of acts of belief (*credere*) for the student's progression towards understanding, Aquinas draws attention to that fact that the student sees (or understands) in the manner in which he has been prepared to see by his habituation in the subject to be understood.[161] He uses the metaphor of light to explain the relationship: just as light is related to specific colours as a formal cause is related to material causes,[162] the light of

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[160] Hemming, note 119, at 437-438.

[161] "The word 'experience' derives from the Latin verb *experior* and is related to the Greek *περάω*, I pass through, from which also the word *πόρος*, a passage or shallow ford between two river-banks derives. To pass through in this way has an ancient connection with truth, that is, a getting through to the truth by undertaking a work of enquiry, a wrestling to get across – hence an *απορία*, something to whose truth we cannot find a way through. However, *experior* has another odd feature, belonging to that class of verbs in Latin which are deponent. Typically we say these are verbs with an active meaning but which are conjugated in the passive voice, but this is not really correct. They retain their passive resonance. Thus the passive infinitive *experiri* really means, to be passed through, to be made a trial of, therefore indicates *that which is tested.* An *experimentum* is the means of bringing something to light through testing and trying it, hence in connection with know-how, with knowing your way around and with Greek *επιστήμη*, with that knowledge which Latin calls *scientia* and we know as 'scientific': *experientia* are the things brought to light by trial and by testing. It appears that what we experience in the sense of what we know by sensation is thus that kind of knowing that we personally 'put to the test by our being passed through' and are ourselves 'passed through' with regard to some event or occurrence. In experience we do not therefore address something, rather we are addressed by it, we are oriented toward it such that it orders us to think what it is....Aristotle (and Aquinas, for that matter) held no different view with regard say, to the practices of what we now call the virtues. The repeated exposure of the self to specific practices, as much of the soul as of the hands or the body in general confers skill and aptitude with regard to what is at hand. Experience as a knowing-my-way-around therefore also has, or can have, a moral consequence as a well as a technical outcome. For Aquinas the saints, habituated to prayer and to the practices and ways of the love of God, therefore are not just ones who 'know their way around' with regard to what it is to be known of God, but are also by that very habituation more attuned to, more familiar with, the experience of God. The Greeks resolved this ambiguity in the character of aptitude by having two terms for 'habit'. The first kind of habit, *ἕξις* a disposition, a predisposition to be good at something; the second, *συνήθειαν*, however, denotes a habit that is learnt or acquired by habituation and custom. *Συνήθειαν* literally means 'to become accustomed to by being together with' – where it is presupposed that what is indicated is a length of time. Both are required in certain circumstances – if I have no prior aptitude for work with my hands, then I should never lift a chisel: if I have that aptitude, however, I may after a time and the acquisition of familiarity learn how to carve a garland of oak-leaves around the head of a figure on a wood panel. The former *ἕξις* is perfected in *συνήθειαν*. Aquinas introduces a third condition for experience, however, prior even to my disposition or habituation, I must be granted the invitation to the Christian life by God. Without God's infused gift of grace, I will have no disposition toward holiness..." Laurence Paul Hemming, "The Experience of God. Aquinas on the Identity and Difference of Divine and Human Knowledge" in Hemming and Boeve eds, *Divinising Experience: Essays in the History of Religious Experience* (Peters, 2004), at 60-61.

[162] Aquinas, note 116, III, d. 24, q. 1, a. 1, *sol.* 1.

faith (*lumen fides*) makes one see what one believes.[163] In this sense, faith (*credere*) is a way of living in the world that arises from the world being disclosed or revealed through faith (*fides*). Just as one trained in some subject or skill can, by reason of his study and "habituation" in the subject, perceive the significance of the things pertaining to that subject and understand things in the light of his understanding of the subject,[164] the believer, through repeated habituation to the means by which God discloses himself - the sacraments, the liturgy, the contemplation of the scriptures, through being manifest in the lives of the saints and in the person of Christ – can experience the world (including himself and nature) as revealed in and through Christ and is shaped to understand what is illuminated in the light of faith.[165]

1.4.5 Theological Aspects of Aquinas's Account of Imperfect Knowledge of God

It was argued in sections 1.4.3 and 1.4.4 above that Aquinas holds that the human knower *qua* knower bears an implicit reference to futurity such that his understanding is determined

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[163] "The light of faith makes us see what we believe."
Lumen fidei facit videre ea quae creduntur. Aquinas, note 71, IIa IIae, q. 1, a. 4, *ad* 3.

[164] "...like the case of one who, because he has the habit of some knowledge, can by reason of the presence of the habit perceive those things which fall under that habit."
...sicut aliquis ex hoc quod habet alicuius scientiae habitum, ex ipsa praesentia habitus, est potens percipere illa quae subsunt illi habitui. Aquinas, note 103, q. 10, a. 8, *resp.*

[165] "What is grace? Too often grace is conceived as a kind of light, an illumination which flows from God to the creature. This, however, is only a metaphor. The light in question is the light of understanding: understanding has a character, a manner, a 'how', and it has a situatedness, it occurs in such-and-such a place and at such-and-such a time, it always springs from out of the particular world we inhabit (we need a body to understand anything). What understanding understands is never freed from the peculiarities and *existentialia* – the worldedness – in which, and at which, it understands. Nor is there ever a pure 'thing-understood' from which every aspect of time, place and character has been stripped off...What we 'see' in the light we take too easily for granted as a kind of self-evidence, something which, in its standing for itself, stands there also for us. In fact it is not that simple – *we* have to be shaped to receive what is illuminated. Grace is not automatic, nor is it simple rays: it is the continual and virtuous accommodation *to* what is to be known: God does not come as a simple, dazzling, flash or vision, but through our repeated habituation to the means by which he discloses himself: the liturgy." Laurence Paul Hemming, *Worship as a Revelation* (Burns & Oates, 2008), at 109.
Mark A. Wrathall, "The Revealed Word and World Disclosure. Heidegger and Pascal on the Phenomenology of Religious Faith" in Wrathall, *Heidegger and Concealment* (Cambridge University Press, 2011), at 157.

The character of understanding and deliberation implicit in judicial decision making is taken up in chapter 4.

by his manner of being present to what it is that he is present to. In this sense, the acts of belief (*credere*) and the intellectual habits identified by Aquinas in the process of actualising understanding can be considered as aspects of the human knower's projection towards his own potentiality for being. It was argued is sections 1.4.1 and 1.4.2 above that Aquinas holds that there is a knowledge of God which is less perfect than the demonstrative and which is had by all. This knowledge, which arises from spontaneous natural inferences, is the basis on which the natural law can be known by all as an instruction coming from a divine legislator. Given Aquinas's understanding of the essential futurity of human intellectual perfection, it follows that, while such spontaneous natural inferences can be considered as acts of faith (*credere*) which could be made by anyone in the progression of their understanding, it can only be made insofar as knowledge of God has already been granted in faith (*fides*). Since Aquinas holds that God is only knowable insofar as He reveals Himself, then God cannot be encountered, nor can the possibility or meaning of such an encounter be anticipated, in advance of any encounter God initiates. Consequently, it can be said that Aquinas understands that thinking, in its very structure, has nothing to do with God's appearing in the sense that God does not appear through an individual's thinking about thinking.[166] In this sense, thinking of itself does not reveal God as the promulgator of the natural law. Rather, Aquinas understands faith (*fides*) as the character of the disclosure of God's appearing such that the world is known as created by God and the Galilean man Jesus is known as the Christ through faith, not philosophically. In the light of faith (*fides*), the believer who knows the world as created and governed by God can naturally infer that the natural law is promulgated by God.

In conclusion, it can be noted that since Aquinas holds that natural law is law that is naturally promulgated by God and is in man "as in those who are ruled and measured by it", it

[166] Hemming, note 125, at 187-189.

follows that, contrary to the "new" natural law theory,[167] Aquinas does not consider human reason as a kind of the proximate or immediate promulgator of the natural law with a certain autonomy of the practical reason whereby man can recognize the natural law's inherent rationality and binding force and, as it were, promulgate the natural law to himself.

1.5 The Precepts of the Natural Law

It is argued in this section that Aquinas's account of the apprehension of those goods that pertain to the precepts of the natural law presupposes knowledge of God.

While Aquinas states in several texts that the first principles of the natural law are known naturally[168] and explicitly identifies the first precept "good ought to be done and evil ought to be avoided"[169] as an example of a precept of the natural law which is self-evident to all men, nowhere does he give an exhaustive list of the precepts which he regards as self-evident. From his examination of Aquinas's works Armstrong has identified "The commandments of God must be obeyed", "One ought to live according to reason", "Thou shalt love the Lord thy God" and "Thou shalt love thy neighbour" as examples of precepts of the natural law which Aquinas regards as self-evident.[170]

Aquinas argues that the other precepts of the natural law are "founded upon" the first precept "in such fashion that all those things to be done or avoided pertain to the precepts of natural law that practical reason naturally apprehends as being human goods".[171] This

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[167] Finnis' "new" natural law theory is examined in Chapter 3.

[168] Aquinas, note 71, Ia IIae, q. 94, a. 2; q. 100, a. 1.

[169] "...Hence, this is the first precept of law: that good is to be done and pursued, and evil is to be avoided..." *...Hoc est ergo primum praeceptum legis, quod bonum est faciendum, et prosequendum, et malum vitandum. Et super hoc fundantur omnia alia praecepta legis naturae...* Aquinas, note 71, Ia IIae, q. 94, a. 2, *co.*

[170] R. A. Armstrong, *Primary and Secondary Precepts in Thomistic Natural Law Teaching* (Nijhoff, 1966), at 40-41.

[171] "...good is the first thing that falls under the apprehension of the practical reason, which is directed to action, since every agent acts for an end under the aspect of the good. Consequently the first principle in the practical reason is the one founded on the notion of good, viz., that good is that which all things seeks after. Hence, this is

argument raises the question of the sense in which, in Aquinas's natural law theory, the doctrine of goods naturally apprehended is related to the doctrine of *per se nota* precepts.[172] For example, in the *prima secundae* of the *Summa Theologiae* Aquinas argues that the two moral precepts of the Mosaic Law - *Thou shalt love the Lord thy God*, and *Thou shalt love thy neighbour* - are the first general principles of the natural law which are naturally self-evident to human reason and from which the Decalogue follows as an immediate conclusion,[173] while in the *secunda secundae*, Aquinas argues that the Decalogue are the most manifest principles, *ie per se nota* principles, of the natural law.[174]

Aquinas articulates the relationship between the doctrine of goods naturally apprehended and the doctrine of *per se nota* precepts in terms of natural inclination: "the order of precepts of the natural law is according to the order of the natural inclinations".[175] While Aquinas uses

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the first precept of law, that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based on this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided."
...ita bonum est primum quod cadit in apprehensione practicae rationis, quae ordinatur ad opus, omne enim agens agit propter finem, qui habet rationem boni. Et ideo primum principium in ratione practica est quod fundatur supra rationem boni, quae est, bonum est quod omnia appetunt. Hoc est ergo primum praeceptum legis, quod bonum est faciendum, et prosequendum, et malum vitandum. Et super hoc fundantur omnia alia praecepta legis naturae, ut scilicet omnia illa facienda vel vitanda pertineant ad praecepta legis naturae, quae ratio practica naturaliter apprehendit esse bona humana. Aquinas, note 71, Ia IIae, q. 94, a. 2, *co.*

[172] "Is "ignorance is to be avoided" a conclusion of a syllogism such as "the humanly bad is to be avoided, and ignorance is an instance of the humanly bad"? Or is "ignorance is to be avoided" rather the fruit of an experience in which ignorance is encountered as what is meant by "the humanly bad" and so is immediately seen as "that which is to be avoided" (with no middle term)?" Lawrence Dewan, "Jean Porter on Natural Law: Thomistic Notes" in Dewan, *Wisdom, Law, and Virtue*, note 126, at 244-245.

[173] "Those two principles are the first general principles of the natural law, and are self-evident to human reason, either through nature or through faith. Wherefore all the precepts of the Decalogue are referred to these, as conclusions to general principles."
Ad primum ergo dicendum quod illa duo praecepta sunt prima et communia praecepta legis naturae, quae sunt per se nota rationi humanae, vel per naturam vel per fidem. Et ideo omnia praecepta Decalogi ad illa duo referuntur sicut conclusiones ad principia communia. Aquinas, note 71, Ia IIae, q. 100, a. 3, *ad* 1.

[174] "The precepts of the Decalogue are the first principles of the law, and to which naturally reason immediately assents as to most manifest principles."
Respondeo dicendum quod praecepta Decalogi sunt prima praecepta legis, et quibus statim ratio naturalis assentit sicut manifestissimis. Aquinas, note 71, IIa IIae, q. 122, a. 1, *co.*
Dewan, note 172, at 245.

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

the terms "natural inclination" and "natural appetency" in diverse contexts, in the context of his natural law theory, they have a metaphysical usage.[176] Since a thing has a determined essence or nature which governs its operations, its natural inclinations are those inclinations towards those ends that are proper to its nature.[177] As Gustafson explains:

> The notion of natural appetency brings to the fore the dynamic and teleological aspects of reality which are implicit in the theory of potency and act, inasmuch as a natural appetite is an inclination of a being towards its proper good. The axiom *Omne agens agit propter finem* is paralleled on a deeper level by the axiom *Omne agens agit propter bonum.* It is the good which an appetite seeks, in responding to the intrinsic dynamic finality of its nature.[178]

Thus, when treating of the goods which are naturally apprehended and which pertain to the natural law, Aquinas examines the various inclinations characteristic of human nature and

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Quia vero bonum habet rationem finis, malum autem rationem contrarii, inde est quod omnia illa ad quae homo habet naturalem inclinationem, ratio naturaliter apprehendit ut bona, et per consequens ut opere prosequenda et contraria eorum ut mala vitanda. Secundum igitur ordinem inclinationum naturalium, est ordo praeceptorum legis naturae. Aquinas, note 71, Ia IIae, q. 94, a. 2, *co.*

[176] "The confusion [about the term *naturalis inclinatio*] arises because in S. Thomas's writings the term has a variety of uses. On one level he speaks of the *naturalis inclinatio* possessed by a stone which makes it fall to the ground when released from a height; while on another level, the term, the term is used in a strictly psychological manner, sometimes referring to animal wants, while on other occasions to hunger, sex drives. However, these are secondary usages; for S. Thomas this term has primarily a metaphysical meaning." Armstrong, note 170, at 43.
Gustaf J. Gustafson, *The Theory of Natural Appetency in the Philosophy of St. Thomas*, (The Catholic University of America Press, 1944), at 68-69.

[177] "...To desire or have appetency is nothing else but to strive for something, stretching, as it were, toward something which is destined for oneself."
Appetere nihil aliud est quam aliquid petere, quasi tendere in aliquid ad ipsum ordinatum. Aquinas, note 103, q. 22, a. 1.

[178] Gustafson, note 176, at 114.
Lisska discusses the notion of natural inclination under the term of "dispositional properties":
"4. *Essential properties fundamentally are dispositional in character*: A dispositional property, by definition, is a potentiality directed towards a specific development or 'end'. A disposition is a capacity to 'do something' which an object possesses. Like most Aristotelian terms, there are analogical uses of disposition, ranging from a concept (an acquired disposition to understand), to sense faculty such as an eye (a natural disposition to see), to an innate property such as growth (a natural disposition to utilize food and transform energy). Yet throughout this discussion, a disposition is always a potentiality or a capacity to undertake or to develop towards a specific end. The 'end' is called and 'act', which is the fulfilment or completion of the potency. Aristotelian teleology makes sense only in terms of the attainment of a *telos*, which is the end or goal of the dispositional property. Aquinas, following Aristotle, suggests that potency and act are the two fundamental categories of all being...
5. *The dispositional theory of essential properties entails a metaphysics of finality*:...The metaphysics of finality suggests that the ends appropriate to human nature are built into the very nature or essence which determines a person. The end is not a 'non-moral good' to be attained which is common to many teleological theories such as classical utilitarianism. The end is a constitutive aspect of the very nature of the dispositional property. This is the act/potency relation so often articulated in Aristotle and Aquinas." Lisska, note 53, at 86-87.

concludes that, insofar as man is a substantial being, he has a natural inclination towards his self-preservation and so the good of self-preservation is naturally apprehended by all.[179] Insofar as man has a biological nature, he has a natural inclination towards sexual union and the rearing of offspring such that he naturally apprehends the sexual union of male and female and the care of offspring as goods.[180] Similarly, insofar as man has a rational nature, he has a natural inclination towards knowledge and social harmony with the consequence that such knowledge of God and social harmony are naturally apprehended as goods.[181]

Thus, Aquinas argues that those goods which are proper to man by virtue of his nature are the objects of his natural inclinations and are naturally apprehended and immediately known by all. In particular, given his various identifications of the Decalogue as *per se nota* principles in themselves – which presupposes a natural apprehension of God - and as immediate conclusions of the *per se nota* principles of the Mosaic Law – which presupposes

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[179] "...Because in man there is first of all an inclination to good in accordance with the nature he has in common with all substances: inasmuch as every substance seeks preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law."
Inest enim primo inclinatio homini ad bonum secundum naturam in qua communicat cum omnibus substantiis, prout scilicet quaelibet substantia appetit conservationem sui esse secundum suam naturam. Et secundum hanc inclinationem, pertinet ad legem naturalem ea per quae vita hominis conservatur, et contrarium impeditur. Aquinas, note 71, Ia IIae, q. 94, a. 2, *co.*

[180] "...Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth."
Secundo inest homini inclinatio ad aliqua magis specialia, secundum naturam in qua communicat cum ceteris animalibus. Et secundum hoc, dicuntur ea esse de lege naturali quae natura omnia animalia docuit, ut est coniunctio maris et feminae, et educatio liberorum, et similia. Ibid.

[181] "...Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: and thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination."
Tertio modo inest homini inclinatio ad bonum secundum naturam rationis, quae est sibi propria, sicut homo habet naturalem inclinationem ad hoc quod veritatem cognoscat de Deo, et ad hoc quod in societate vivat. Et secundum hoc, ad legem naturalem pertinent ea quae ad huiusmodi inclinationem spectant, utpote quod homo ignorantiam vitet, quod alios non offendat cum quibus debet conversari, et cetera huiusmodi quae ad hoc spectant. Ibid.

the love of, and therefore knowledge of,[182] God, it is clear that Aquinas holds that the first principles of the natural law presuppose knowledge of God.[183] Given the arguments made in sections 1.3 and 1.4 above, it follows that such knowledge of God can be considered as the working out of an understanding of God given in faith.

1.6 The Common Good

In this section it is argued that Aquinas identifies both order and God as common goods of the State and identifies the common good of order as being subordinate to, or for the sake of, the common good of God.

1.6.1 The Various Senses of the Common Good

The phrase *bonum commune* itself occurs 370 times in Aquinas's works.[184] A particular difficulty in identifying Aquinas's understanding of the common good is his description of the common good in different terms and his application of it within such diverse contexts as speculative theology, metaphysical theory, politics, ethics and law. For example, in Aquinas's treatments of the common good it is variously identified with the universal good, the object of love, the goal of justice, the life of virtue, and with the continuation in existence of the species.[185] In this chapter the following three senses of the common good found in

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[182] "Since to love God is something greater than to know Him, especially in this state of life, it follows that love of God presupposes knowledge of God."
Ad secundum dicendum quod quia dilectio Dei est maius aliquid quam eius cognitio, maxime secundum statum viae, ideo praesupponit ipsam. Aquinas, note 71, IIa IIae, q. 27, a. 4, *ad* 2.

[183] "The precepts of the Decalogue, just as they are given to all the people, so also they fall under the grasp of all, as pertaining to natural reason. But paramount among things commanded by natural law are the ends of human life..."
...praecepta Decalogi, sicut data sunt omni populo, ita etiam cadunt in aestimatione omnium, quasi ad naturalem rationem pertinentia. Praecipue autem sunt de dictamine rationis naturalis fines humanae vitae, qui se habent in agendis sicut principia. Aquinas, note 71, IIa IIae, q. 56, a. 1, *co.*

[184] Leo J. Elders, "Das Gemeinwohl als Ziel und Ordnungsprinzip des gesellschaftlichen Lebens: Deutung und Bedeutung" (1995) 11 *Forum Katholische Theologie* 90, at 93.

[185] "In the absence of the definite article, *bonum commune* or *communis utilitas* could carry either a theoretical or a concrete meaning, the common good or one common good amongst many. To some extent, this was implied by the difference between 'good' (*bonum*) and 'benefit' or 'utility' (*utilitas*), since the definition of benefit

Aquinas's works are reviewed with a view to clarifying the sense in which Aquinas understands the common good as the good to which law is directed:

(i) the good which is predicably common (*bonum commune in praedicando*);

(ii) the good which is causally common (*bonum commune in causando*);

(iii) the common goods (*bona communia*).

Before reviewing these three senses in which a good can be common, Aquinas's distinction between two senses of community is first introduced.

Aquinas distinguishes two senses of community: common in reason (*communis secundum rationem*) and common in reality (*communis secundum rem*).[186] In the first sense, a thing is common in reason (*communis secundum rationem*) when it belongs to many individuals while its unity depends upon intellectual abstraction from those individuals in which it is found. For

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accommodated the more neutral sense of 'usefulness' as well as the more positive sense of 'effecting good'. These terms were not necessarily mutually exclusive (one phrase could cover both meanings depending on the needs of a given argument) nor were they only alternatives open to scholastic theologians (compare the equally neutral 'advantageous' or 'congruent', *commodum*, *conferens*, *conveniens*). Aquinas provides a good example of the available variety in terminology. Even a cursory list would have to comprise the terms *bonum commune*, *bonum in communi*, *bonum communitatis*, *bona communia*, *bonum commune totius universi*, *bonum commune speciei*, *bonum commune multitudinis*, *bonum commune iustitiae et pacis*, *bonum commune civitatis*, *bonum commune regni*, *bonum commune domus vel familiae*, *bonum commune perfectum*, *bonum commune humanum*, *bonum commune naturae*, *bonum commune spirituale*, and *bonum commune morale*. Thus God, although more usually described as the *summum bonum* or *bonum universale*, could also be described as the *bonum commune*, whereas, in its loosest sense, any common good could be termed *quoddam bonum commune*, *aliquod bonum commune*, or *bonum communiter sumptum*. This range of terminology is, in itself, a point worth making about the scholastic 'notion' of the common good, particularly if the list is extended still further to include its numerous synonyms *bonum multitudinis*, *bonum rei publicae*, *bonum multorum*, *bonum civitatis*, *bonum societatis humanae*, *bonum publicum*, *utilitas publica*, *utilitas communis*, *communis salus*, *salus totius communitatis*, and *salus rei publicae*." M. S. Kempshall, *The Common Good in Late Medieval Political Thought* (Clarendon Press, 1999), at 10.
I. Th. Eschmann, "A Thomistic Glossary on the Principle of the Preeminence of the Common Good" (1943) 5 *Mediaeval Studies* 123, at 142-165.

[186] "...For something is said to be common in two senses. First it is said to be common through effect or predication, that is, when some one thing is found in many according to one intelligible character...Second, a thing is said to be common after the manner of a cause, that is, it resembles a cause which, while remaining numerically one, extends to many effects."
...Dicitur enim dupliciter aliquid commune. Uno modo per consecutionem vel praedicationem; quando scilicet, aliquod unum per invenitur in multis secundum unam rationem...Alio modo per modum causae, sicut causa quae, una numero manens, ad plures effectus se extendit. Aquinas, note 103, q. 7, a. 6 *ad* 7.

"...To know however what names are properly communicable, we must consider that every form existing in the singular subject, by which it is individualized, is common to many either in reality, or in the mind..."
...Ad sciendum autem quae nomina proprie sunt communicabilia, considerandum est quod omnis forma in supposito singulari existens, per quod individatur, communis est multis, vel secundum rem vel secundum rationem saltem... Aquinas, note 71, Ia, q. 13, a. 9.

example, 'humanity' is an intellectual abstraction from really existing individual human beings. 'Humanity' is common to individual human beings yet it has merely rational rather than real existence: while humanity can be predicated of many human individuals, its unity and universal character are found only in the intellect.[187] In Thomistic terminology, the community of 'humanity' is purely "logical". In the second sense, a thing is common in reality (*communis secundum rem*) when it belongs to many individuals while its unity is found in reality. For example, the sun is the common source of light for many individuals, while remaining one and having real existence: it is common precisely as it is a single real individual. Aquinas relies on this distinction between these two senses of community when treating of the question of whether the law is always directed to the common good. When the objection is raised that the common is opposed to the particular with the consequence that law cannot be ordered to the common good,[188] Aquinas defeats the objection by arguing that where the end of a human act is both a particular and a common good then it is not opposed to the common good in the sense of the objection. More precisely, from his examination of the relationship between the particular acts which law commands and the common good, Aquinas concludes that the particular acts which law commands are not parts contained in the common good understood as a logical whole (*bonum commune in praedicando*), but belong to the

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[187] "...since the form signified by this word *man* - that is, humanity - is really divided among its different subjects, it stands of itself for the person, even if there is no adjunct determining it to the person-that is, to a distinct subject. The unity or community of human nature, however, is not a reality, but is only in consideration of the mind."
...Quia enim forma significata per hoc nomen homo, idest humanitas, realiter dividitur in diversis suppositis, per se supponit pro persona; etiamsi nihil addatur quod determinet ipsum ad personam, quae est suppositum distinctum. Unitas autem sive communitas humanae naturae non est secundum rem, sed solum secundum considerationem... Aquinas, note 71, Ia, q. 39, a. 4, *ad* 3.

[188] "Law directs man to act. But human acts are in particulars. Therefore law is ordered to the particular good."
Praeterea, lex dirigit hominem ad agendum. Sed actus humani sunt in particularibus. Ergo et lex ad aliquod particulare bonum ordinatur. Aquinas, note 71, Ia IIae, q. 90, a. 2, *obj.* 2.

community of final cause (*bonum commune in causando*).[189] These two senses of the common good are reviewed in the following sections.

1.6.2 Good Predicably Common (*bonum commune in praedicando*)

Goods such as health and knowledge are examples of purely personal, private goods which belong only to the individual who possesses them and which cannot be shared with others.[190] Insofar as health and knowledge are considered as intellectual abstractions from the really existing individual habits of health and knowledge, they are common in reason (*communis secundum rationem*) and have merely rational existence. Like a genus such as *animal* or a species such as *man*, *health* and *knowledge* can be predicated of many individuals. Being predicable of many individuals, they can be called goods common "by the community of genus or species" or "goods predicably common" (*bonum commune in praedicando*). However, as the community of such goods predicably common is merely logical, these goods have no extra-mental existence. They can neither be sought nor desired and cannot be any individual's good. As Froelich summarises:

> To seek after a good precisely as it is common in predication is a fruitless search after a good which can never belong to anyone. For an object of desire it must be viewed as a good numerically one and existing over and above the particular goods to which it corresponds. But then it is no one's good. No one could say, "This is my good", but at best, "This is humanity's good" as though humanity were a proper name...The good common in predication excludes the individual good, just as the universal excludes the particular.[191]

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[189] "Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end."
Ad secundum dicendum quod operationes quidem sunt in particularibus, sed illa particularia referri possunt ad bonum commune, non quidem communitate generis vel speciei, sed communitate causae finalis, secundum quod bonum commune dicitur finis communis. Ibid, ad 2.

[190] "The good of one individual is not the end of another individual."
Bonum autem unius personae singularis non est finis alterius. Aquinas, note 71, IIa IIae q. 58, a. 9, *ad* 3.
Michael A. Smith, *Human Dignity and the Common Good in the Aristotelian-Thomistic Tradition* (Mellen University Press, 1994), at p. 87.

[191] Gregory Froelich, "The Equivocal Status of the *Bonum Commune*" (1989) 63 *New Scholasticism* 38, at 46.

1.6.3 Good Causally Common (*bonum commune in causando*)

The proper good (*bonum suum*) which an individual desires can be understood in different ways, according to the diverse goods in which that individual finds his perfection.[192] 'A person as an individual human being', 'a person as a member of a family' and 'a person as a citizen of the State' can all refer to the same individual but according to different formalities with the consequence that the proper good of an individual is different according to the different formalities under which that same individual is considered.[193]

In one way, the proper good can be understood as the good of an individual insofar as the individual is an individual. Such goods are purely private and belong only to the individual who possesses them and cannot be shared with others, *eg* an individual pursues his own purely private, proper goods when he desires his own health, knowledge and nourishment for his own conservation. In a second way, the proper good can be understood as the good of an individual insofar as the individual belongs to a community or species. If a proper good is the

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[192] "Now the good that is proper to a thing may be received in many ways. One way depends on what is appropriate to the essential character of the individual. It is thus that an animal seeks his good, when he desires the food whereby he may be kept in existence. A second way depends on what is appropriate to the species. It is in this way that an animal desires his proper good, inasmuch as he desires the procreation of offspring and the nourishment of the same, or the performance of any other work that is for the preservation of protection of individuals belonging to his species. A third way depends on the essential character of his genus. It is in this way that an equivocal agent seeks its proper good by an act of causation, as in the case of the heavens. And a fourth way depends on the analogical likeness of things produced, in relation to their source. And it is in this way that God, Who is beyond genus, gives existing being to all, because of His own goodness."
Bonum autem suum cuiuslibet rei potest accipi multipliciter: Uno quidem modo, secundum quod est eius proprium ratione individui. Et sic appetit animal suum bonum cum appetit cibum, quo in esse conservatur. Alio modo, secundum quod est eius ratione speciei. Et sic appetit proprium bonum animal inquantum appetit generationem prolis et eius nutritionem, vel quidquid aliud operetur ad conversationem vel defensionem individuorum suae speciei. Tertio vero modo, ratione generis. Et sic appetit proprium bonum in causando agens aequivocum, sicut caelum. Quarto autem modo, ratione similitudinis analogiae principiatorum ad suum principum. Et sic Deus, qui est extra genus, propter suum bonum omnibus rebus dat esse. Aquinas, *Summa contra Gentiles*, note 99, III, *cap.* 24, n. 7.

[193] "The proper good of man must be taken in diverse ways, to the extent that 'man' is taken in diverse ways. For, the proper good of a man inasmuch as he is man, is the good of reason, in that, for man, to be is to be rational. But the good of man to the extent that he is an artisan, is the good of art; and so also to the extent that he is a political being, his good is the good of the political community." Aquinas, *On Charity* (Marquette University Press, 1960), a. 2, c.
Proprium autem bonum hominis oportet diversimode accipi, secundum quod homo diversimode accipitur. Nam, proprium bonum hominis inquantum homo, est bonum rationis, eo quod homini esse est rationale esse. Bonum autem hominis secundum quod est artifex, est bonum artis; et sic etiam secundum quod est politicus, est bonum eius bonum commune civitatis. Aquinas, *Quaestio disputata De caritate* in *Quaestiones Disputatae* (Marietti, 1965), a. 2, c.

goal or end of many, it is a good common to that many. Since Aquinas understands an end or goal is a cause or explanation of appetency,[194] then a proper good which is the end of many can be called a good common *per modum causae*. Goods proper to the individual insofar as the individual belongs to a community or species are common or shared. Examples of goods causally common include children - which are a common good of its parents;[195] victory and order - which are common goods of an army;[196] order[197] and God[198] - which are common goods of the State and of the universe.[199]

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[194] "...For it is clear that good has the nature of an end; wherefore, a particular end of anything consists in some particular good; while the universal end of all things is the Universal Good."
...Manifestum autem quod bonum habet rationem finis. Unde finis particularis alicuius rei est quoddam bonum particulare, finis autem universalis rerum omnium est quoddam bonum universale. Aquinas, note 71, Ia, q. 103, a. 2, *co.*
Elders, note 184, at 93-95; Froelich, note 191, at 46; Newman, note 59, at 40-42; Smith, note 190, at 40; Antoine Pierre Verpaalen, *Der Begriff des Gemeinwohls bei Thomas von Aquin* (Kerle Verlag, 1954), at 48.

[195] "...for children are the common good of both, namely man and wife, whose union is for the sake of the offspring; but what is common binds and sustains friendship..." Aquinas, *Commentary on the Nicomachean Ethics* (Dumb Ox Books, 1993), *VIII, lect.* 9
...Et huiusmodi ratio est, quia filii sunt commune bonum amborum, scilicet viri et uxoris, quorum coniunctio est propter prolem. Illud autem quod est commune continet et conservat amicitiam quae, ut supra dictum est, in communicatione consistit. Aquinas, *In X libros Ethicorum Aristotelis ad Nicomachum expositio* (Marietti, 1964) *VIII, lect.* 9.

All Latin texts of the *Commentary on the Nicomachean Ethics* are taken from the Marietti edition (1964) and all English translations are taken from the translation of C. I. Litzinger (Dumb Ox Books, 1993).

[196] "For the military art attains the victory of the whole army, which is a certain common good, from the victories of this and that particular soldier."
Militaris enim pervenit ad victoriam totius exercitus, quae est quoddam bonum commune ex singularibus victoriis huius et illius. Aquinas, note 93, VIII, *lect.* 7, n. 1303.

"...the leader of an army, who intends the common good, i.e., the order of the whole army, by his command moves one of his captains, who intends the order of the company."
...dux exercitus, qui intendit bonum commune, scilicet ordinem totius exercitus, movet suo imperio aliquem ex tribunis, qui intendit ordinem unius aciei. Aquinas, note 71, Ia IIae, q. 9, a. 1, *co.*

[197] "The relatively ultimate end of the State, its immanent common good, is what St. Thomas calls the "unity of order" [*De Regimine Principium*, Bk 1, c. 15] For the State, being an accidental whole, exists only in so far as order reigns among its parts. But the common good of the State is not order as such, static order; it is rather dynamic order, the good life of the multitude [*De. Reg. Princ.* Bk. I, c.14; *In Politic.* Bk III, *lec*t. 5]..." Newman, note 59, at 37.

[198] "In this community by which all people agree on happiness as an end, each and every man is considered as a certain part: but the common good of the whole is God himself, in whom consists the happiness of whole."
In praedicta autem communitate quae omnes homines in beatitudinis fine conveniunt, unusquisque homo ut pars quaedam consideratur: bonum autem commune totius est ipse Deus, in quo omnium beatitudo consistit. Aquinas, *De perfectione vitae spiritualis* (Marietti, 1954), *cap.* 13, n. 634.

For example, in the Thomistic account, marriage is a common endeavour on the part of the husband and the wife. The husband and wife unite in marriage and order all their combined efforts towards their shared end of begetting and educating children. Their child is the exclusive possession of neither the mother nor the father and the responsibility for the child's welfare does not fall only on one of the parents. Consequently, the child is a common good opposed to the parents' private good but not to their individual good such that each of the parents can say "this is my child" and "this is our child" without contradiction. The order of an army is an example of an army's common good. Order is the form of the army by which a swarm of men is made into a single force. Since order is the form of the whole army, it is common to all the parts. Each soldier, whose duties as a soldier are defined by his particular station in the whole, owes his ability to engage effectively in battle largely to the order of the whole. The good of the whole army is unopposed to the individual soldier's good. Similarly, every creature, as part of the whole of creation, finds its perfection in the created order of the universe.

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[199] "n. 2628: Therefore the Philosopher asks whether the nature of the whole universe has its good and highest good, i.e., its proper end, as something separate from itself, or whether this consists in the ordering of its parts in the way in which the good of any natural being is in its own form.
n. 2629: Then he answers the question raised; and in regard to this he does two things. First, he shows that the universe has both a separate good and a good of order. Second, he shows the ways in which parts of the universe contribute to its order (*And all things*). He accordingly says, first, that the universe has its good and end in both ways. For there is a separate good, which is the fist mover, on which the heavens and the whole of nature depend as their end or desirable good, as has been shown. And since all things having one end must agree in their ordination to that end, some order must be found in the parts of the universe; and so the universe has both a separate good and a good of order."
n. 2628: *Quaerit ergo philosophus utrum natura totius universi habeat bonum et optimum, idest finem proprium, quasi aliquid separatum a se, vel habeat bonum et optimum in ordine suarum partium, per modum, quo bonum alicuius rei naturalis est sua forma.*
n. 2629: *Deinde cum dicit aut utroque solvit propositam quaestionem. Et circa hoc duo facit. Primo enim ostendit, quod universum habet, bonum separatum, et bonum ordinis. Secundo ostendit qualiter partes universi se habent ad ordinem, ibi, omnia vero coordinata. Dicit ergo primo, quod universum habet utroque modo bonum et finem. Est enim aliquod bonum separatum, quod est primum movens, ex quo dependet caelum et tota natura, sicut ex fine et bono appetibili, ut ostensum est. Et, quia omnia, quorum unum est finis, oportet quod in ordine ad finem conveniant, necesse est, quod in partibus universi ordo aliquis inveniatur; et sic universum habet et bonum separatum, et bonum ordinis.* Aquinas, note 93, XII, *lect.* 12, n. 2628-2629.
Froelich, note 191, at 46-53.

1.6.4 The Superiority of the Common Good to the Individual Good

Aquinas identifies universality as the feature by which the "common good as final cause" can be distinguished from the individual or singular good, *eg* while the man who defends his own life seeks his unsharable, individual or singular good of his life, the patriotic man who defends his country, *ie* defends his own life *and* the lives of his fellow countrymen, seeks the common good.[200] By virtue of its universality the common good is better than the individual or singular good - the common good is the good of the singular individual *as well as* the good of the "whole" of which each individual has a "part".[201] Indeed it was in relation to the common good that some rights of individuals within the community were first called inalienable by medieval theorists.[202] While Aquinas approves the Aristotelian observation

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[200] "...the good, which has the note of a final cause, is all the more efficacious insofar as it communicates itself to a greater number of beings. That is why, if the same thing is a good for each individual *and* for the city, it is clear that it is much greater and more perfect to...procure and defend that which is the good of the whole city, than that which is the good of only one man. Certainly, the love which ought to exist among men has as end to conserve the good even of the individual. But it is much better...to show that love for the sake of a nation and cities." (emphasis added)
...Manifestum est enim, quod unaquaeque causa tanto prior est et potior quanto ad plura se extendit. Unde et bonum, quod habet rationem causae finalis, tanto potius est quanto ad plura se extendit. Et ideo, si idem bonum est uni homini et toti civitati: multo videtur maius et perfectius suscipere, idest procurare et salvare illud quod est bonum totius civitatis, quam id quod est bonum unius hominis. Pertinet quidem ad amorem, qui debet esse inter homines, quod homo conservet bonum etiam uni soli homini. Sed multo melius et divinius est, quod hoc exhibeatur toti genti et civitatibus. Vel aliquando amabile quidem est, quod exhibeatur uni soli civitati, sed multo divinius est, quod hoc exhibeatur toti genti, in qua multae civitates continentur. Dicitur hoc autem esse divinius, eo quod magis pertinet ad Dei similitudinem, qui est ultima causa omnium bonorum. Hoc autem bonum, scilicet quod est commune uni vel pluribus civitatibus, intendit methodus, idest quaedam ars, quae vocatur civilis. Unde ad ipsam maxime pertinet considerare finem ultimum humanae vitae, tanquam ad principalissimam. Aquinas, note 195, I, *lect.* 2, n. 30.

[201] "The common good is the end of each individual member of a community, just as the good of the whole is the end of each part."
Bonum commune est finis singularum personarum in communitate existentium, sicut bonum totius finis cuiuslibet partium. Aquinas, note 71, IIa IIae q. 58, a. 9, *ad* 3.

[202] "Significantly, the course of legal doctrine saw the victory of concepts which stressed the individual's nature and value. So, in the development of the idea of privilege, the true condition of a person became the criterion by which his freedom to alienate was judged. Here important and congenial elements were the newly emphasized scholastic concepts of definition and teleology and the organic concept of society which stressed the proper functioning of every participating element. Because the woman and child were *ipso facto* prey to their presumably more sophisticated environment they were owed special protection, as was the Church because of its peculiar and essential calling. And because the emperor, at first, and the kings later, were regarded as fulfilling a unique role, they too had to be guarded for the ultimate well-being of all. What must be accented is the priority of influence: it was in relation to the common public good that rights were first called inalienable by medieval theorists." Peter N. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought* (Columbia University Press, 1956), at 177.

that the more ordered a person is to the common good the more regulated is their life,[203] Aquinas nonetheless holds that in pursuing the common good one pursues one's proper good.[204] Thus, Aquinas formulates the question of the relationship between the members of the community and the community as a whole in terms of the relationship between the individual member's proper good and the common good rather than in the more modern terms

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[203] "It is with the world as with a household, where free men are least at liberty to do this or that as the occasion arises but all their functions, or most of them, are regulated; for slaves and beasts, on the other hand, there are few things which relate to the common good and most things are left to their choice." Aristotle, *Metaphysics* (Clarendon, 1924), Book XII, c. 10, 1075a15.

"That all are not ordered in the same way is made clear by an example; for in an ordered household or family different ranks of members are found. For example, under the head of the family there is a first rank, namely, that of the sons, and a second rank, which is that of the slaves, and a third rank, which is that of the domestic animals, as dogs and the like. For ranks of this kind have a different relation to the order of the household, which is imposed by the head of the family, who governs the household. For it is not proper for the sons to act in a haphazard and disorderly way, but all or most of the things that they do are ordered. This is not the case with the slaves or domestic animals, however, because they share to a very small degree in the order which exists for the common good. But in their case we find many things which are contingent and haphazard; and this is because they have little connection with the ruler of the household, who aims at the common good of the household."
Sed quod omnia non sic sint similiter ordinata, manifestatur per quoddam exemplum. In aliqua enim domo vel familia ordinata inveniuntur diversi gradus, sicut sub patrefamilias est primus gradus filiorum, alius autem gradus est servorum, tertius vero gradus est bestiarum, quae serviunt in domo, ut canes, et huiusmodi animalia. Huiusmodi enim gradus diversimode se habent ad ordinem domus, qui imponitur a patrefamilias gubernatore domus. Filiis enim non competit ut faciant aliquid casualiter et sine ordine; sed omnia, aut plura eorum quae faciunt, ordinata sunt. Non autem ita est de servis aut bestiis, quia parum participant de ordine, qui est ad commune. Sed multum invenitur in eis de eo quod contingit, et casualiter accidit. Et hoc ideo quia parvam affinitatem habent cum rectore domus, qui intendit bonum domus commune. Aquinas, note 93, XII, *lect.* 12, n. 2633.
De Koninck, note 60, at 79.

[204] "He that seeks the common good (the good of the multitude), seeks in consequence his own good (*bonum suum*), for two reasons. Firstly, because the individual good cannot exist without the common good of the family, the city or the realm...Secondly, as man is part of the household and of the city, it is important to judge what is good for him in the light of prudence which has for its object the common good (good of the multitude): for the good disposition of the part is drawn from the whole; that is why Augustine says...that "every part is bad which does not conform to its whole."
Ad secundum dicendum quod ille quaerit bonum commune multitudinis ex consequenti etiam quaerit bonum suum, propter duo. Primo quidem, quia bonum proprium non potest esse sine bono communi vel familiae vel civitatis aut regni. Unde et maximus Valerius dicit de antiquis Romanis quod malebant esse pauperes in divite imperio quam divites in paupere imperio. Secundo quia, cum homo sit pars domus et civitatis, oportet quod homo consideret quia sit sibi bonum ex hoc quod est prudens circa bonum multitudinis, bona enim dispositio partis accipitur secundum habitudinem ad totum; quia ut Augustinus dicit, in libro Confess., turpis est omnis pars suo toti non congruens. Aquinas, note 71, IIa IIae q. 47, a. 10, *ad* 2.
De Koninck, note 60, at 83.

of person (absolutely considered) and society (absolutely considered)[205] – terms which lend themselves to totalitarian and personalist conceptions of the relationship.[206]

In sum, both the common good according to causality (*bonum commune in causando*) and the individual or singular good are real and are really distinct but are ordered to one another. The common good (*bonum commune in causando*) is the good of the whole *and* of its parts without ever being a private good. It possesses no specific separate existence from the individual or singular good, but is determined by reference to the notion of the ordered unified whole.[207] Since the common good (*bonum commune in causando*) is real it is opposed to the

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[205] "Instead of discussing the problem [of the relations between the members of the community and the community as a whole] in terms of "person" and "society", I approach it in the fundamental terms of "proper good" and "common good". Ultimately, person and society are not to be judged by what they *are* absolutely, but by what is their perfection, i.e. by what is their good; that is the only way in which Aristotle and St. Thomas ever discussed this problem. To look upon the absolute comparison of person and society as the most basic consideration is distinctly modern. It is also distinctly modern to accord absolute priority to the subject and to believe with Spinoza...that "to be absolutely" is "to be good absolutely", i.e. that "ens simpliciter" is "bonum simpliciter". From this identification it follows quite logically: "Per finem, cuius gratia aliquid facimus, appetitum intelligo." *Finis cui* becomes *finis qui*. From such a point of view, the problem of person and society quite naturally becomes the question: is the person better than society? Instead of: is the proper good of the person better than his common good?" De Koninck, note 60, at 325.

[206] "The totalitarian solution is that the individual person is ordered and subjected to society. We are inclined, in rejecting this doctrine, to swing to its opposite extreme; but if we prescind from the common good of persons which is final, and therefore first cause of society, we are left with a mere aggregate of individuals. Now in this formal consideration, each and every one of that group could never be more than an *alter ego*, and the group itself could never be more than an aggregate, a mere *unum coacervatione* of *alter egos*. Hence, in this perspective, the whole question of our relation to the common good and to our particular good becomes a problem entirely different from that over which the battle has raged until now, resolving itself into the simple question: must one love oneself more than one's neighbour. There is not the slightest doubt that we must love ourselves more. Even Aristotle expressly taught this fundamental truth. Indeed, St. Thomas used the Philosopher's doctrine...My essay...was written mainly to dissipate the false assumption that the common good is an alien good, that is, either a personal good of our neighbour or the sum total of proper goods. When we state the fundamental problem in terms of person and society, it is quite natural that the subordination of the personal good to the common good should be interpreted as the collectivist and totalitarian subjection of the individual to the mass. But the truth is...that personalism and totalitarianism proceed from the same assumption. When we say, in opposition to the personalists, that the individual is subordinate to society, we do not mean, as they would have us mean, that the person and his proper good are subordinated to society considered absolutely, that is, to a mere aggregate of proper goods in which no aspect of a real common good is to be seen. We mean that, within a given order, the good of the individual person is subordinated to the common good of the community. If the political community has the right to execute a criminal citizen, it is not formally because it represents a number of persons, but rather "ut bonum commune conservetur". The condemned man does not become the victim of mob violence; he is destroyed because he has proved a responsible menace to the common good." *Ibid*, at 325-326.

[207] "Mit dieser Angleichung und Trennung von Gemeinwohl und Privatwohl sowie mit dem Hinweis auf das Ganzheitsprinzip hat der Aquinate ausgesprochen:

1. beide Güter sind wirkliche, wirklich-verschiedene, aber einander zugeordnete Güter;
2. das Gemeinwohl besitz kein vom Privatwohl getrenntes Sondersein;
3. die Natur des Gemeinwohles ist zu bestimmen in Anlehnung an die Idee der Ordnungseinheit. "

common good according predication (*bonum commune in praedicando*).[208] Thus Aquinas's notion of the common good can be distinguished from that found among contemporary natural law theorists.[209]

1.6.5 The Love of the Common Good

Aquinas distinguishes two ways in which an individual can love the common good: one can love it in order to posses it exclusively (like the tyrannical ruler who seeks to possess it as a private good) or one can love it for its conservation and promotion (like the one who

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Eberhard Welty, *Gemeinschaft und Einzelmensch.* (Verlag Anton Pustet, 1935), at 217.

[208] "The common good differs from the singular good by that very universality. It has the note of superabundance and is eminently diffusive of itself insofar as it is more communicable; it extends to the singular more than the singular good does: it is the better of the singular. 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 the 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 good 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 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. Hence, the common good is a good which is the good of particulars, not the good of the collectivity envisaged as a sort of singular. In that case, it would be common only accidentally and would properly be singular, or, if one wishes, it would differ from the singular good of the particulars in being the good of none of them. But when we distinguish the common good, we do not mean by this that it is not the good of particulars. If it were not the good of particulars, it would not be truly common." De Koninck, note 60, at 75.
Smith, note 190, at 87.

[209] For example, Murphy argues for what he calls the "weak natural law thesis" (Murphy, note 28, at 3) – that law that is not backed by decisive reasons for action is defective as law. He argues that the concept of the common good "underwrites law's reason giving force" in the sense that a law that is non-defective with respect to its reason-giving force is so in virtue of its connection to the common good. In seeking to clarify the understanding of the common good which the weak natural law theory presupposes, Murphy considers three candidate conceptions of the common good – none of which coincide with the Thomist account given above - namely the 'instrumentalist', the 'distinctive good' and the aggregative. (at 62). On the instrumentalist view, the common good consists in the presence of those conditions that are necessary or helpful means for members of the community to realize their own worthwhile ends. On the distinctive good view, the common good consists in the obtaining of some intrinsically good state of affairs that is literally the good of the community as a whole (as opposed to simply the goods of the members of the community). On the aggregative view, which Murphy favours, the common good consists in the realization of some set of individual intrinsic goods, characteristically the goods of all (and only) those persons that are members of the political community in question.
Finnis' notion of the common good is examined in section 3.8.1.

sacrifices himself to protect it for the whole city)[210] and Aquinas concludes that one cannot love the common good without loving its shareability with others.[211]

1.6.6 Dignity and the Common Good

The Christian tradition teaches that a denial of the universality of the end to which man is ordered is at once a denial of the dignity that man derives from his ordination to this end.[212] Consequently, the attempted exaltation of the quite personal good above every truly common

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[210] "To love the common good of a city in order to appropriate and possess it oneself does not make a good politician; for it is thus that the tyrant too loves the good of the city: in fact it is for himself that he desires the good, not for the city. But to love the good of the city in order that it might be preserved and defended is truly to love the city, and it is that which makes a good politician, so much so that, with an eye to conserving and augmenting the good of the city, he exposes himself to danger and neglects his private good."
Amare bonum alicuius civitatis ut habeatur et possideatur, non facit bonum politicum; quia etiam aliquis tyrannus amat bonum alicuius civitatis ut ei dominetur; quod est amare seipsum magis quam civitatem; sibi enim ipsi hoc bonum concupiscit, non civitati. Sed amare bonum civitatis ut conservetur et defendatur, hoc est vere amare civitatem; quod bonum politicum facit, in tantum quod aliqui propter bonum civitatis conservandum vel ampliandum, se pericula mortis exponant et negligant privatum bonum. Aquinas, note 193, *a.* 2, *c.*

"Men...want to be always governing, as though to govern were to be healthy, and as though not to govern were not to be healthy. For it is thus that men seem to desire governance like sick people desire health." Aquinas, *Commentary on the Politics* in Lerner and Mahdi eds, *Medieval Political Philosophy: A Sourcebook* (Free Press of Glencoe, 1963), 298.
Sed postea homines...volunt semper principari, ac si principari esset sanum esse, et non principari, esset infirmum esse. Sic enim videntur homines appetere principatum, sicut infirmi appetunt sanitatem." Aquinas, *In libros Politicorum expositio* (Marietti, 1951), III, *cap.* 5, *lect.* 389.
De Koninck, note 60, at 79; Smith, note 190, at 66.

[211] "...As love has good for its object, love is diversified according to the diversity of the good. But there is a good proper to man insofar as he is a singular person; and as regards the love that has this good for its object, each is for himself the principal object of such love. But there is a common good which belongs to this one and that one insofar as they are parts of some whole, for example to the soldier insofar as he is part of the army, and to the citizen insofar as he is part of the city: as regards the love that has this good for its object, its principal object is that in which this good principally consists, as the good of the army in the general, and the good of the city in the king: that is why it is the duty of the good soldier to neglect even his proper safety in order to preserve the good of his general, as man naturally exposes his arms in order to protect his head..."
...cum amor respiciat bonum, secundum diversitatem boni est diversitas amoris. Est autem quoddam bonum proprium alicuius hominis in quantum est singulare persona; et quantum ad dilectionem respicientem hoc bonum, unusquisque est sibi principale obiectum dilectionis. Es autem quoddam bonum commune quod pertinet ad hunc vel ad illum inquantum est pars alicuius totius, sicut ad militem, inquantum est pars exercitus, et ad civem, inquantum est pars civitatis; et quantum ad dilectionem respicientem hoc bonum, principale obiectum dilectionis est illud in quod principlaiter illud bonum consistit, sicut bonum exercitus in duce, et bonum civitatis in rege; unde ad officium boni militis pertinet ut etiam salutem suam negligat ad conservandum bonum ducis, sicut etiam homo naturaliter ad conservandum caput, brachium exponit... Aquinas, note 193, a. 4, *ad* 2.

[212] For example, St. Augustine (354-430), Pope St. Gregory (c. 540-604), St. Bernard (1090-1153) and Aquinas all taught that Satan and the fallen angels refused supernatural beatitude because it can be achieved only as a common good and because they had to seek it *qua* common good. The sin of the fallen angels was a "practical personalist error: they preferred the dignity of their own person to that dignity which would come to them through their subordination to a good, higher but common in its very sovereignty". De Koninck, note 60, at 73, 105-107, 337-344.

good is at once a denial of the superior dignity that man receives by the subordination of his quite personal good to the common good. Given Aquinas' identification of the superiority of the common good over the individual good, together with his identification of that love which loves the common good because of its shareability with others, it follows that Aquinas holds that there is a superior dignity in the subordination of the quite personal good to the common good. For example, the patriot, who exposes himself to danger and neglects his private good for the good of his country, might attain to such superior dignity.

1.6.7 The Twofold Order (*duplex ordo*)

In his treatments of the common good Aquinas identifies two common goods of an army: the intrinsic (causally) common good of order and the extrinsic, ultimate (causally) common good of the army's commander (or victory).[213] He argues that whenever there is a group

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[213] "In an army we find two orders, one by which the parts of the army are related to each other, and a second by which the army is directed to an external good, namely, the good of its leader. That order by which the parts of the army are related to each other exists for the sake of the order by which the entire army is subordinated to its leader. Consequently, if the subordination to the leader did not exist, the ordering of the parts of the army to each other would not exist. Consequently, whenever we find a group whose members are ordered to each other, that group must necessarily be ordered to some extrinsic principle."
Quam positionem philosophus in XI Metaphysic. *reprobat per similitudinem exercitus, in quo invenimus duplicem ordinem: unum quo exercitus partes ordinantur ad invicem, alium quo ordinantur ad bonum exterius, scilicet bonum ducis; et ordo ille quo partes exercitus ordinantur ad invicem, est propter illum ordinem quo totus exercitus ordinatur ad ducem, unde si non esset ordo ad ducem, non esset ordo partium exercitus ad invicem. Quamcumque ergo multitudinem invenimus ordinatam ad invicem, oportet eam ordinari ad exterius principium.* Aquinas, note 103, q. 5, a. 3.

"A twofold order is found in things. One kind of order is that of parts to a totality or multitude as the parts of a house are mutually ordered to each other. Another kind of order is that of things to an end. This order is of greater importance than the first. For, as the Philosopher says in the eleventh book of the Metaphysics, the order of the parts of the army among themselves exist because of the order of the whole army to the commander."
Invenitur autem duplex ordo in rebus. Unus quidem partium alicuius totius seu alicuius multitudinis adinvicem, sicut partes domus adinvicem ordinantur. Alius *est ordo rerum in finem. Et hic ordo est principalior, quam primus. Nam, ut Philosophus dicit in undecimo* Metaphysicorum, *ordo partium exercitus adinvincem, est proper ordinem totius exercitus ad ducem.* Aquinas, note 195, I *lect.* 1, n. 1.

"We see this in the case of an army; for the good of the army is found both in the order itself of the army and in the commander who has charge of the army. But the good of the army is found in a higher degree in its commander than in its order, because the goodness of an end takes precedence over that of the things which exist for the sake of the end. Now the order of an army exists for the purpose of achieving the good of its commander, namely, his will to attain victory. But the opposite is not true, i.e. that the good of the commander exists for the sake of the good of order."
Sicut videmus in exercitu: nam bonum exercitus est et in ipso ordine exercitus, et in duce, qui exercitui praesidet: sed magis est bonum exercitus in duce, quam in ordine: quia finis potior est in bonitate his quae sunt ad finem: ordo autem exercitus est propter bonum ducis adimplendum, scilicet ducis voluntatem in victoriae

whose members are ordered to each other, that group must necessarily be ordered to some extrinsic principle and concludes that the army's intrinsic order exists for the sake of the commander (or victory). Similarly, Aquinas relies on the same principle of twofold ordering in identifying the relationship between the State's intrinsic (causally) common good of order (*bonum intrinsecum*) and the extrinsic, ultimate, (causally) common good of God himself (*bonum commune extrinsecum et divinum*). By virtue of the State's common good of order, the citizens are so ordered to each other that such conditions as peace, prosperity, and training in virtue necessary for their "good life", both as individuals and as a collective, are attained.[214] However, this common good of order is subordinate to the common good of God.[215]

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consecutionem; non autem e converso, bonum dicis est propter bonum ordinis. Aquinas, note 93, XII, *lect.* 12, n. 2630.

[214] "The relatively ultimate end of the State, its immanent common good, is what St. Thomas calls the "unity of order" [*De Regimine Principium*, Bk 1, c. 15] For the State, being an accidental whole, exists only in so far as order reigns among its parts. But the common good of the State is not order as such, static order; it is rather dynamic order, the good life of the multitude [*De. Reg. Princ.* Bk. I, c.14; *In Politic.* Bk III, *lect.* 5]...In our opinion...the temporal common good of the State must be considered under a twofold aspect. It has two constitutive elements, that which constitutes the immediate proximate end of the State and that which constitutes its more remote-though not absolutely ultimate-end. These two cannot be separated and the temporal common good of the State consists in their union and mutual interaction.

The proximate end of the State consists in the availability to the citizens of those conditions, material and moral, which are necessary for the living of the good life, namely peace [Cf. *In I Ethic.*, *lect.* 1; *In Politic.*, Bk. I, *lect.* 1; *De Reg. Princ.*, Bk. I, c.15], prosperity [*De Reg. Princ.*, Bk. I, c.15; *Ibid.*, cc. 2 and 4; *Summa Theologiae* Ia IIae, q. 105, a. 2] and, most important of all, training in virtue [*Q.D. de virtut.* q. 1, a. 5, *ad* 5]. In this sense we can clearly see that the common good is something quite distinct from the private good of the individual. It is the achievement of collective action.

The more remote element of the political common good consists, not in the conditions for virtuous living, but rather in the attainment of the good by each and every member of the State and in the consequent happiness which is virtue's reward [Cf. *De Reg. Princ.*, Bk. III, c.2]. In this sense the common good depends for its attainment on the personal action of the individual citizens.

The proximate end of political society, then, consists in the facilities for virtuous living, by means of which citizens are enabled to attain to that virtue and felicity which is the remote element of the temporal common good. Viewed as "the conditions for virtuous living" the common good is a means; viewed as "the good life" it is an end. By keeping this distinction in mind we can see how the common good of the State can, at the same time, be the good of all and of each of the citizens...[It] must be well remembered that the function of the Medieval State was first and foremost moral rather than material. The State for Medieval thinkers was a divine institution whose purpose was to maintain righteousness or justice...The king, [Aquinas] says, is principally concerned "with the means whereby the multitude subject to him may live well." The concern is threefold: "first of all, to establish the virtuous life in the multitude subject to him; second, to preserve it when once established; and third, to promote its greater perfection" [*De Regimine Principum*, Bk. 1, c.15]. If we bear in mind that the fact that the Medieval ruler was rather a judge, who declared and enforced the Law, than a legislator who enacted particular laws, we can more easily see how he guided his subjects in the leading of the virtuous life." Newman, note 59, at 37-40.

[215] "The temporal common good, since it is but the relatively ultimate end of the State, is subordinate to the absolutely ultimate good. This latter is none other than the ultimate end of man, not as a citizen of the State but

This hierarchy of common goods also imposes a hierarchy of laws. While civil laws directed to the common good admit of no dispensation,[216] a dispensation can be granted from the particular legal measures implementing those civil laws directed to the common good in cases where greater utility can be achieved[217] or in case of necessity.[218] Aquinas's accounts

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as a member of humanity, a citizen of the City of God [*De. Reg. Princ.*, Bk. I, c.14]. [This] end is not an earthly one...Rather it is beatitude-the possession of God-which consists in the activity of man's highest faculty, knowing God [*Summa Theologiae* Ia IIae, q. 3, a. 2, 3, 4]. Hence, says Aquinas, while it is the function of the priest to teach men the way to their true felicity, it pertains to the ruler so to order human life that men may be able to attain to celestial beatitude [*De. Reg. Princ.*, Bk. I, c.15]." *Ibid*, at 40.

[216] "A dispensation should be given whenever, in a particular case, the observance of the letter of the law would go contrary to the intention of the lawgiver. Now, the intention of any lawgiver is ordered primarily and principally to a common good; and secondly, to an order of justice and virtue, in accordance with which the common good is preserved, and through which one attains to it. In the case, therefore, of precepts whose actual content is the preservation of the common good, or the very order of justice and virtue, they contain the lawgiver's intention, and are therefore indispensable."
Respondeo dicendum quod, sicut supra dictum est, tunc in praeceptis debet fieri dispensatio, quando occurrit aliquis particularis casus in quo, si verbum legis observetur, contrariatur intentioni legislatoris. Intentio autem legislatoris cuiuslibet ordinatur primo quidem et principaliter ad bonum commune; secundo autem, ad ordinem iustitiae et virtutis, secundum quem bonum commune conservatur, et ad ipsum pervenitur. Si qua ergo praecepta dentur quae contineant ipsam conservationem boni communis, vel ipsum ordinem iustitiae et virtutis; huismodi praecepta continent intentionem legislatoris, et ideo indispensabilia sunt. Aquinas, note 71, Ia IIae q. 100, a. 8, *co.*

[217] "...For instance, if in some community a law were enacted, such as this – that no man should work for the destruction of the common weal, or betray the state to its enemies, or that no man should do anything unjust or evil, such precepts would not admit of dispensation. But if other precepts were enacted, subordinate to the above, and determining special modes of procedure, the latter precepts would admit of dispensation, insofar as the omission of these precepts in certain cases would not be prejudicial to the former precepts which contain the intention of the lawgiver. For instance, if, for the safeguarding of the commonwealth, it were enacted in some city that from each ward some men should keep watch as sentries in case of siege, some might be dispensed from this on account of some greater utility."
...Puta si poneretur hoc praeceptum in aliqua communitate, quod nullus destrueret rempublicam, neque proderet civitatem hostibus, sive quod nullus faceret aliquid iniuste vel male; huiusmodi praecepta essent indispensabilia. Sed si aliqua alia praecepta traderentur ordinata ad ista praecepta, quibus determinantur aliqui speciales modi, in talibus praeceptis dispensatio posset fiere; inquantum per omissionem huiusmodi praeceptorum in aliquibus casibus, non fieret praeiudicium primis praeceptis, quae continent intentionem legislatoris. Puta si, ad conservationem reipublicae, statueretur in aliqua civitate quod de singulis vicis aliqui vigilarent ad custodiam civitatis obsessae; posset cum aliquibuis dispensari propter aliquam maiorem utilitatem. Ibid.

[218] "Every law is ordained for the common well-being of men, and only for this does it have the force of reason and law...Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases is very hurtful. Since the lawgiver cannot have in view every single case, he shapes the law according to what happens more frequently by directing his attention to the common good. Wherefore, if a case arises wherein the observance of the law would be hurtful to the general welfare, it should not be observed. For instance, supposed that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for the public welfare as a general rule, but, if it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great loss to the city, if the gates were not opened to them and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common weal, which the lawgiver had in view. Nevertheless it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this

of dispensations are founded on the inherent limits of law: since law is not an end in itself, but a means to realize the common good, the normative power of law applies only when the law is conductive to the realization of the common good. Given the difficulty or even the impossibility of designing civil laws which take account of exigent circumstances, then Aquinas holds that in particular exigent circumstances where the literal application of a law would not be conducive to the common well-being of men, the obligatory force of that law fails.[219] However, as the precepts of the Decalogue are directed to God they admit of no dispensation.[220]

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who are in authority, and who, on account of such like cases, have the power to dispenses from such laws. If however the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law."
Respondeo dicendum quod supra dictum est, omnis lex ordinatur ad communem hominum salutem, et intantum obtinet vim et rationem legis;...Contingit autem multoties quod aliquid observari communi saluti est utile ut in pluribus, quod tamen in aliquibus casibus est maxime nocivum. Quia igitur legislator non potest omnes singulares casus intueri, proponit legem secundum ea quae in pluribus accidunt, ferens intentionem suam ad communem utilitatem. Unde si emergat casus in quo observatio talis legis sit damnosa communi saluti, non est observanda. Sicut si in civitate obsessa statuatur lex quod portae civitatis maneant clausae, hoc est utile communi saluti ut in pluribus, si tamen contingat casus quod hostes insequantur aliquos cives, per quod civitas conservatur, damnosissimum esset civitati nisi si portae aperirentur, et ideo in tali casu essent portae aperiendae, contra verba legis, ut servaretur utilitas communis, quam legilator intendit. Sed tamen hoc est considerandum, quod si observatio legis secundum verba non habeat subitum periculum, cui oportet statim occurri, non pertinet ad quemlibet ut interpretetur quid sit utile civitati et quid inutile, sed hoc solum pertinet ad principes, qui propter huiusmodi casus habent auctoritatem in legibus dispensandi. Si vero sit subitum periculum, non patiens tantum moram ut ad superiorem recurri possit, ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi. Aquinas, note 71, Ia IIae q. 96, a. 6, *co.*

[219] Georgio Agamben, *State of Exception* (University of Chicago Press, 2005), at 24; Alon Harel and Assaf Sharon, ""Necessity knows no Law": On Extreme Cases and Uncodifiable Necessities" //papers.ssen.com/sol3/papers.cfmabstract_id=1718549 (visited 30 January 2011), at 7; Virpi Mäkinen, "Rights and Duties in Late Scholastic Discussions on Extreme Necessity" in Mäkinen and Korkman eds, *Transformations in Medieval and Early-Modern Rights Discourse* (Springer, 2006), at 43.

[220] "...Now the precepts of the Decalogue contain the very intention of the lawgiver, God. For the precepts of the first tablet, which order to God, contain the very order to the common and final good, which is God; whereas the precepts of the second tablet contain the very order of justice to be maintained among men, that is, that nothing undue be done to anyone and what is due be rendered to everyone: for it is in this light that the precepts of the Decalogue are to be understood. Therefore they admit of no dispensation whatsoever."
Praecepta autem Decalogi continent ipsam intentionem legislatoris, scilicet Dei. Nam praecepta primae tabulae, quae ordinant ad Deum, continent ipsum ordinem ad bonum commune et finale, quod Deus est; praecepta autem secundae tabulae continent ipsum ordinem iustitae inter homines observandae, ut scilicet nulli fiat indebitum, et cuilibet reddatur debitum; secundum hanc enim rationem sunt intelligenda praecepta Decalogi. Et ideo praecepta Decalogi sunt omnio indispensabilia. Aquinas, note 71, Ia IIae q. 100, a. 8, *co.*
Lawrence Dewan, "Death in the Setting of Divine Wisdom: The Doctrine of St. Thomas Aquinas" in Dewan, *Wisdom, Law, and Virtue*, note 126, at 331.

1.6.8 Common Goods (*bona communia*)

When treating of distributive and commutative justice, Aquinas argues that distributive justice concerns the relation between the community (ordered whole) and each single person (part).[221] Distributive justice maintains the order of the community as a whole to its individual members by providing proportional distribution of the common goods (*bona communia*). These common goods, such as honour, money or other exterior goods, are not ends in themselves but more common means to ends which are necessary for the common good of the community and are to be distributed among the citizens for their private use according to their merit or contribution to the common good.[222]

1.6.9 Theological Aspects of Aquinas's Account of the Common Good

It was noted in section 1.6.8 above that Aquinas understands distributive justice as directed to the maintenance of the order of the community to its individual members by

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[221] "Particular justice is directed to the private individual, who is compared to the community as a part to the whole. Now a twofold order may be considered in relation to a part. In the first place there is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about the mutual dealings between two persons. In the second place there is the order of the whole towards the parts, to which corresponds the order of that which belongs to the community in relation to each single person. This order is directed by distributive justice, which distributes common goods proportionately. Hence there are two species of justice."
Respondeo dicendum quod, sicut dictum est [q. 58, aa 7, 8], iustitia particularis ordinatur ad aliquam privatam personam, quae comparatur ad communitatem sicut pars ad totum. Potest autem ad aliquam partem duplex ordo attendi. Unus quidem partis ad partem, cui similis est ordo unius privatae personae ad aliquam. Et hunc ordinem dirgit commutativa iustitia, quae consistit in his quae mutuo fiunt inter duas personas ad invincem. Alius ordo attenditur totius ad partes, et huic ordini assimilatur ordo eius quod est commune ad singulas personas. Quem quidem ordinem dirigit iustitia distributiva, quae est distributiva communium secundum proportionalitatem. Et ideo duae sunt iustitiae species, scilicet commutative et distributiva. Aquinas, note 71, IIa IIae q. 61, a. 1, *co.*

"[Aristotle] says that one species [of justice] - the same holds for the unjust thing corresponding to it - consists in the distribution of certain common goods (either honour, money or any other thing belonging to external goods or even to external evils, like labour, expenses and so on) that are to be apportioned among people who share in social community."
Et dicit, quod una species [iustitiae], et similiter iusti, quod secundum ipsam dicitur, est illa, quae consistit in distributionibus aliquorum communium, quae sunt dividenda inter eos qui communicant civili communicatione. Aquinas, note 195, V *lect.* 4, n. 927.
Froelich, note 191, at 54-55; Smith, note 190, at 77-78.

[222] "Thus, in distributive justice a greater amount of the common goods is given to whomever has a greater role in the community."
Et ideo in distributiva iustitia tanto plus alicui de bonis communibus datur quanto illa persona maiorem principalitatem habet in communitate. Aquinas, note 71, IIa IIae q. 61, a. 2.

providing proportional distribution of the common goods (*bona communia*). It was argued in section 1.6.7 that he understands the common good of order (*bonum commune intrinsecum*) to be subordinate to the common good of God (*bonum commune extrinsecum et divinum*). Given the arguments made in sections 1.3, 1.4 and 1.5 above, to the effect that the knowledge of God presupposed by Aquinas can be considered as the working out of an understanding of God given in faith, then it follows that Aquinas's accounts of distributive justice and the common good of the order of the State must can also be considered as a working out of an understanding given in faith.

1.7 Conclusion

In this chapter it was argued that each of the elements of Aquinas's account of the natural law – its participation in the Eternal Law, its promulgation, its precepts and the common good to which it is directed – presuppose knowledge of God, and since knowledge of God is acquired in the light of faith, Aquinas's account of the natural law can be considered as a working out of an understanding of God which depends on faith. In the next chapter some of the Thomistic elements in the text of *Bunreacht na hÉireann* are identified.

Chapter 2 Thomistic Elements in the Irish Constitution

2.1 Introduction

In this chapter the text of *Bunreacht na hÉireann* is reviewed and some of the articles which support an interpretation broadly consistent with a Thomistic understanding of the natural law are identified.

The objective of this chapter is not to defend a theological interpretation of *Bunreacht na hÉireann* but to prepare the way for showing in the subsequent chapters that notwithstanding Walsh J's *dicta* in the *McGee Case* - that the constitutionally protected natural human rights can be understood in accordance with a Christian theological understanding of the natural law - neither Walsh J's *dicta* nor the subsequent case law of the Supreme Court evidence the Thomistic understanding of the natural law.

2.2 God

The Constitution's dedication to the glory of God,[223] the Preamble's invocation of "the Name of the Most Holy Trinity" and its acknowledgment of the people's obligations to "our Divine Lord Jesus Christ Who sustained our fathers through centuries of trial"[224] can be understood as professions of faith - a faith arising out of, and having as its basis, the particular historical and worldly experience of the Irish people. Given the people's faith, the enactment of the Constitution "seeking to promote the common good, with due observance of...Charity"

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[223] "*Dochum Glóire Dé agus Onóra na hÉireann*", *Bunreacht na hÉireann.*

[224] "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, and seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, do hereby adopt, enact and give to ourselves this Constitution." Preamble to *Bunreacht na hÉireann.*

can be considered as an act of faith (*credere*), *ie* a way of living in the world that arises from the world being disclosed or revealed through faith (*fides*).[225]

Given the Preamble's recognition of God "from Whom is all authority" and Article 6's acknowledgement that it is from the people under God that all powers of government are derived,[226] the Constitution can be understood as acknowledging that the people's power of government participates in the government of things which exists in, and emanates from, God, *ie* Divine Providence[227] and as an acknowledgement that God is known by all as a divine lawgiver.[228]

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[225] See section 1.4.4 above.

Given such references to God in the Preamble and the text of the Constitution, it is not surprising that there are references to God and Christian faith in the judgments of the Superior Courts. For example, in holding that a statutory provision [s 25 *Shops (Hours of Trading) Act*, 1938] permitting shops selling kosher meats to open on Sunday mornings was not unconstitutional, Walsh J held, in *Quinn's Supermarket v The Attorney General* [1972] IR 1, at 23:

> Our Constitution reflects a firm conviction that we are a religious people. The preamble to the Constitution acknowledges that we are a Christian people and Article 44, s. 1, sub-s. 1, acknowledges that the homage to public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgement to members of the Christian faith.

In finding laws imposing various punishments for the commission of acts of buggery, indecent assault and gross indecency not to be unconstitutional [ss 61, 62 *Offences against the Persons Act*, 1861; s. 11 *Criminal Law Amendment Act*, 1885], O'Higgins CJ held, in *Norris v The Attorney General* [1984] IR 36, at 64:

> The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to "our Divine Lord, Jesus Christ." It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and with Christian beliefs. Yet it is suggested that, in the very fact of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult to accept.

[226] "All powers of government, legislative, executive and judicial, derive, under God, from the people..."
"Is ón bpobal, faoi Dhia, a thagas gach cumhacht riala..." *Bunreacht na hÉireann*, Article 6.1.

The Preamble of the Constitution of the Irish Free State (Saorstát Éireann) also acknowledged "that all lawful authority comes from God to the People". Hogan and Whyte, note 41, at 103.

"The entire compatibility of this derivation of power from a divine source with the concept of popular sovereignty – a compatibility which the Irish constitution presupposes – is explained in the works of such mediaeval philosophers as Suarez and Bellarmine." Bromage and Bromage, note 40, at 150.

[227] See section 1.3 above.

[228] See section 1.4 above.

The Preamble's recognition of God as "our final end" suggests Aquinas's doctrine of natural appetency or natural inclination whereby God is recognised as the good proper to man's nature to which man is naturally inclined.[229]

In addition to the people's and the State's acknowledgement of God, the Constitution also mandates some individual office holders to personally acknowledge God. Before entering upon their duties, presidents[230] and judges[231] appointed under the Constitution must publicly promise and declare in the presence of Almighty God to uphold the Constitution and invoke God's direction and sustenance to do so. The members of the Council of State also subscribe to a declaration in the presence of Almighty God.[232] Whether these declarations are vows, *ie* promises made to God, or oaths, *ie* calling God to witness, the obligations they give rise to can be understood as arising from God.[233] These declarations in the presence of God and the

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[229] Preamble to *Bunreacht na hÉireann*, note 224.

"The Irish version, which pursuant to Article 25.5.4 and Article 8.1 is authoritative in case of conflict, uses the word *dírithe* where the English text uses "referred". *Dírithe* suggests "directed to", that is, action oriented to God as goal, whereas "referred" carries connotation of comparison or referral to judgment." Phelan (1997), note 34, at 283.

[230] "The President shall enter upon his office by taking and subscribing publicly, in the presence of the members of both Houses of the Oireachtas, of Judges of the Supreme Court and of the High Court, and other public personages, the following declaration: "In the presence of Almighty God I... do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me."" *Bunreacht na hÉireann*, Article 12.8.1°.

[231] "Every person appointed a judge under this Constitution shall make and subscribe the following declaration: "In the presence of Almighty God I...do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (*or as the case mat be*) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me."" *Bunreacht na hÉireann*, Article 34.5.1°.

[232] "Every member of the Council of State shall at the first meeting thereof which he attends as a member take and subscribe a declaration in the following form: "In the presence of Almighty God I...do solemnly and sincerely promise and declare that I will faithfully and conscientiously fulfil my duties as a member of the Council of State."" *Bunreacht na hÉireann*, Article 31.4.

[233] "I answer that the obligation both of a vow and of an oath arises from something Divine; but in different ways. For the obligation of a vow arises from the fidelity we owe God, which binds us fulfil our promises to Him. On the other hand, the obligation of an oath arises from the reverence we owe Him which binds us to make true what we promise in His name."
Respondeo dicendum quod utraque obligatio, scilicet voti et iuramenti, causatur ex aliquo divino, aliter tamen et aliter. Nam obligatio voti causatur ex fidelitate quam Deo debemus, ut scilicet ei promissum solvamus.

invocations of God's direction of sustenance can be considered as recognition of Divine Providence.[234]

Given that Aquinas identifies the Decalogue as *per se nota* principles and that he holds that the first principles of the natural law presuppose knowledge of God, the Constitution's mandate of the proscription of blasphemy by law,[235] its committing the State to acknowledging that the homage of public worship is due to Almighty God, to holding His Name in reverence and to respecting and honouring religion[236] can be understood as expressions of the naturally known principles of the natural law.[237]

2.3 The Common Good (*bonum commune*)

In declaring that the people, in seeking to promote the common good, enacted the Constitution so that the dignity and freedom of the individual may be assured and true social order attained,[238] the Preamble to the Constitution can be understood as identifying social order as an intrinsic, causally common good (*bonum commune intrinsecum*) which constitutes the individuals (parts) as a unified whole. Since Aquinas holds that the dignity of man is derived from the universality of the end to which he is ordered, then from a Thomistic perspective, the Preamble's relating of the dignity and freedom of the individual to the common good can be interpreted as identifying the individual's dignity with that superior

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Obligatio autem iuramenti causatur ex reverentia quam debemus ei, ex qua tenemur quod verificemus id quod per nomen eius promittimus. Aquinas, note 71, IIa IIae, q. 89, a. 8, *co.*

[234] The specifically theological aspect of this vow is relied upon by O'Hanlon J, writing *extra curia*, in Roderick J. O'Hanlon, "The Judiciary and the Moral Law" (1993) 11 *Irish Law Times* 129, at 133-135: see section 4.4.3 below.

[235] "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law." *Bunreacht na hÉireann*, Article 40.6.1°.

[236] "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion." *Bunreacht na hÉireann*, Article 44.1.

[237] See section 1.5 above.

[238] Preamble to *Bunreacht na hÉireann*, note 224.

dignity which is assured by the subordination of the individual's private good to the common good.[239]

From a Thomistic perspective, it is by virtue of the State's common good of order, that such conditions as peace, prosperity, and training in virtue necessary for the citizens' "good life", both as individuals and as a collective, are attained. This understanding of order is evident in the Constitution's directive principles of social policy intended for the general guidance of the Oireachtas, *eg* that the State strive to promote the people's welfare by securing and protecting a social order in which justice and charity inform all the institutions of national life.[240] Similarly, the Constitution's guaranteeing, subject to public order and morality, the rights of citizens to express freely their convictions and opinions, to assemble peaceably and without arms, to form associations and unions,[241] freedom of conscience, the free profession and practice of religion,[242] the requirement that children receive a certain minimum moral, intellectual and social education,[243] as well as the recognition of the importance of the education of public opinion,[244] can all be understood as directed to attaining the conditions necessary for, and establishing the social order which facilitates, the citizens'

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[239] See section 1.6.6 above.

[240] "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas...The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all institutions of the national life." *Bunreacht na hÉireann*, Article 45.1.

[241] "The State guarantees liberty for the exercise of the rights of the following rights, subject to public order and morality:-i. The right of the citizens to express freely their convictions and opinions...the State shall endeavour to ensure the organs of public opinion...shall not be used to undermine public order or morality or the authority of the State; ii. The right of the citizens to assemble peaceably and without arms...; iii. The right of the citizens to form associations and unions....", *Bunreacht na hÉireann*, Article 40.6.1°.

[242] "Freedom of conscience and free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen." *Bunreacht na hÉireann*, Article 44.2.1°.

[243] "The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social." *Bunreacht na hÉireann*, Article 42.3.2°.

[244] "The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion...shall not be used to undermine public order or morality or the authority of the State." *Bunreacht na hÉireann*, Article 40.6.1°i.

"good life". Indeed, the citizen's duty of fidelity to the nation and loyalty to the State[245] can be understood as a duty to conserve and promote the common good.[246]

2.3.1 The Twofold Order (*duplex ordo*)

Since Aquinas holds that whenever there is a group whose members are ordered to each other, that group must necessarily be ordered to some extrinsic principle, then the Preamble's identification of the Most Holy Trinity as "our final end to whom all actions both of men and States must be referred",[247] can be understood as an identification of God as the extrinsic, ultimate, causally common good (*bonum commune extrinsecum et divinum*).[248] Thus, from a Thomistic perspective, the Constitution identifies a twofold order (*duplex ordo*) in which the common good of social order is subordinate to the common good of God.[249]

2.3.2 Common Goods (*bona communia*)

By providing for the State to delimit by law the exercise of the rights to private property so as to reconcile their exercise with the exigencies of the common good,[250] and by stating as a general principle of social policy for the guidance of the Oireachtas that the State direct its policy towards securing the distribution of the ownership and control of the material resources of the community so as to best to serve the common good,[251] the Constitution can be

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[245] "Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens." *Bunreacht na hÉireann*, Article 9.3.

[246] See section 1.6.5 above.

[247] Preamble to *Bunreacht na hÉireann*, note 224.

[248] See section 1.6.3 above.

[249] See section 1.6.7 above.

[250] "The State, accordingly, may as occasion requires delimit by law the exercise of the said rights [to private ownership of external goods and the general right to transfer, bequeath, and inherit property] with a view to reconciling their exercise with the exigencies of the common good." *Bunreacht na hÉireann*, Article 43.2.2°.

[251] "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas...The State shall, in particular, direct its policy towards securing:-...ii That the ownership and control

understood as relating property and the ownership and control of the material resources (*bona communia*) to social order (*bonum commune intrinsecum*) in distributive justice.[252]

2.3.3 Inalienable and Imprescriptible Rights and the Common Good

The Constitution identifies the family as a necessary basis of social order[253] and requires the State to recognise the indispensable contribution of the life of women within the home to the common good.[254] It requires the State's recognition of the family as a moral institution with inalienable and imprescriptible rights.[255] It also requires the State to guarantee to respect the inalienable right and duty of parents to provide, according to their means, for the education of their children[256] and, as "guardian of the common good", to supply the place of parents in those exceptional cases where the parents fail in their duty towards their children.[257] These articles suggest that it is because of the unique duties of families, parents

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of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good." *Bunreacht na hÉireann*, Article 45.2.

[252] See section 1.6.8 above.
Inalienable rights are those rights which cannot be given away, transferred or waived while imprescriptible rights are those rights which cannot be taken away, lost or revoked.

[253] "The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." *Bunreacht na hÉireann*, Article 41.1.2°.

[254] "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved." *Bunreacht na hÉireann*, Article 41.2.1°.

[255] "The State recognises the Family as the natural primary and fundamental unit of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." *Bunreacht na hÉireann*, Article 41.1.1°.

[256] "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children." *Bunreacht na hÉireann*, Article 42.1.

[257] "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child." *Bunreacht na hÉireann*, Article 42.5.

and women in relation to the common good that these rights can be considered as inalienable.[258]

2.3.4 The Natural Law

The Constitution's mandate that the State acknowledge man as a rational being with natural rights antecedent to positive law[259] can be construed as being consistent with Aquinas's understanding of the natural law as being man's participation in the Eternal Law by virtue of his rational nature.[260] Similarly, the Constitution's requirements that the State recognise the family's inalienable and imprescriptible rights antecedent and superior to all positive law,[261] and that the State guarantee to respect the inalienable right and duty of parents and the natural and imprescriptible rights of the child[262] can also be construed as pertaining to the natural law in virtue of the unique duties of families and parents in relation to the common good.[263]

While there has been considerable debate as to whether these rights pertain to the natural law,[264] they have been interpreted by the Courts[265] and by judicial commentators[266] as pertaining to the natural law.

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[258] See section 1.6.4 above.

[259] "The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods." *Bunreacht na hÉireann*, Article 43.1.1°.

[260] See note 78 above.

[261] *Bunreacht na hÉireann*, Article 41.1.1°, note 255.

[262] *Bunreacht na hÉireann*, Article 42.1, note 256; Article 42.5, note 257.

[263] See section 1.6.4 above.

[264] See notes 40 and 41 above

[265] See note 37 above.

[266] See note 38 above.

2.4 Conclusion

While it has been argued in this chapter that the text of *Bunreacht na hÉireann* can bear an interpretation which is broadly consistent with the Aquinas's theological account of the natural law, the objective of this chapter is not to defend a theological interpretation of *Bunreacht na hÉireann* but to prepare the way for showing in the subsequent chapters that a theological understanding of the natural law is *not* evident in the jurisprudence of the Supreme Court. In the following chapters particular attention to will be paid to the ways in which God, the common good and the relation of the proper good of an individual to the common good have been treated in the jurisprudence of the Irish Supreme Court. Two arguments are advanced. Firstly, it is argued that in cases on contraception, abortion and euthanasia the Supreme Court has inverted the relation of the proper good of an individual to the common good which is found in the Thomistic account of law. Secondly, it is argued that this inversion of the relation of the proper good of an individual to the common good evidences the metaphysics of subjectivity and the will to power.

Chapter 3 Finnis' New Natural Law Theory

3.1 Introduction

It is argued in this chapter that the "new" natural law theory of Professor John Finnis presupposes the metaphysics of subjectivity and evidences the social nature of political nihilism.

The general moral standards in Finnis' ethical theory are formulated in terms of basic practical principles (which indicate the basic forms of human flourishing as goods to be pursued) and basic methodological requirements of practical reasonableness (which provide the criteria for distinguishing between reasonable and unreasonable acts). Finnis holds that the basic forms of human flourishing are self-evident. He argues that that there forms of human flourishing that can be secured only through the institutions of human law and that there are requirements of practical reasonableness that can only be satisfied by the institutions of human law. Thus, a principal concern of Finnis' jurisprudence - which can be considered as an application of his ethical theory to law[267] - is the derivation of laws from the principles that have their force from their reasonableness.

It is argued in this chapter that, insofar as Finnis' "new" natural law theory is grounded on self-evident principles, it presupposes the metaphysics of subjectivity. The following four arguments are advanced in this chapter. Firstly, it is argued that, given Finnis' reliance on the self-evidence of the basic goods, coupled with his failure to make explicit both the understanding of human nature he presupposes and the theory of reference required for his ethical discourse, disputation with Finnis is liable to reach impasse.

Secondly, it is argued that Finnis' understanding of the self-evidence of the basic goods presupposes the self as the ground of truth and validity. Drawing on Heidegger's analyses of

[267] Seow Han Tan, "Justification in Finnis' Natural Law Theory" (2000) *Singapore Journal of Legal Studies* 590, at 592-594; Wagner, note 69, at v.

the subjectivity of the subject in his studies of Descartes, Kant, Leibniz, Nietzsche and Jünger, it is argued that:

(i) Finnis' account of retorsion presupposes a subject whose being is represented first and upon which the basic goods to be known are secured;

(ii) This priority of this Finnisian subject presupposes that beings are known as objects, that truth is configured as "being represented", and that freedom is the capacity to recognize and accept the true as the good;

(iii) The subjectivity of the Finnisean subject is established in an "ideal" moment prior to sociality (and so conceals the social relations which make its possible);

(iv) the subject, which "enters" the world of sociality to cancel its scepticism and its ethical and legal dubiety, "enters" the world ascribing values.

In other words, it is argued that Finnis' account of the self-evidence of the basic goods presupposes the metaphysics of subjectivity which evidences the social nature of political nihilism.

Thirdly, it is argued that Finnis' identification of the basic goods by means of a purposive method of analysis – in which reasons for various human activities are sought in the hope that knowledge of such reasons will assist in the accurate discernment of the specific requirements of intelligible human action - imports the metaphysical interpretation being which Heidegger finds in the Cartesian philosophy into Finnis' ethics. In subordinating the class of admissible reasons to the requirements of intelligible human action, the admissible reasons are those which can be given to the discerning subject so as to further the orderability of the world and, as such, can also be understood as presupposing the metaphysics of subjectivity and the rule of technology (*Technik*).

Finally, it is argued in this chapter that both Finnis' procedural account of the common good and his conception of God are consistent with the metaphysics of subjectivity.

3.2 Finnis' Account of the Nature of Law

Finnis aims to present an ethical discourse as distinct from a metaphysical reflection on human action and human sciences[268] and so while drawing on the work of Aquinas in his task of presenting such a genuinely ethical discourse, he classifies Aquinas's references to human nature as a "speculative appendage added by way of metaphysical reflection" to Aquinas's more primary ethical categories of 'good' and 'reasonableness'.[269] However, contrary to Aquinas,[270] he also holds that such an ethics can nonetheless refute certain meta-ethical claims on the basis of an ethical knowledge of the implicit commitments of such meta-ethical claims.[271]

The three elements of Finnis' theory of natural law are firstly, a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realised; secondly, a set of basic methodological requirements of practical reasonableness which provide the criteria for distinguishing between acts that are reasonable and acts that are unreasonable; and thirdly, a set of general moral standards.[272] He includes in the list of basic goods or "basic forms of human flourishing":

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[268] "Epistemologically, (knowledge of) human nature is not 'the basis of ethics'; rather, ethics is an indispensable preliminary to a full and soundly based knowledge of human nature. What one can and should say about human nature as a result of one's ethical enquiries is not mere rhetorical addition; it finds its place in the sober and factual account of what it is to be a human being." John Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983), at 21-22.

[269] Finnis, note 21, at 36.

[270] From the Thomistic perspective, it is not the job of a particular science such as ethics to justify or defend its starting points, rather, it is the job of the metaphysician to judge and defend the starting points of a particular science.
Lawrence Dewan, "St. Thomas, Our Natural Lights, and the Moral Order" in Dewan, note 126, at 202-201.

[271] "Ethics is genuinely reflexive. It can advance its understanding of the full human good by attending to the sort of good which leads one to engage in the pursuit of ethics. It can refute certain meta-ethical claims by showing how they refute themselves; for it is explicitly aware of the intellectual commitments one makes by making any rational claim at all." Finnis, note 268, at 5.

[272] "There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions, and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular

(i) the maintenance and transmission of life, health and safety;

(ii) knowledge and aesthetic experience;

(iii) excellence in work and play;

(iv) harmony between persons or sociability, friendship, peace and fraternity;

(v) inner peace;

(vi) peace of conscience or self-integration of feelings with practical intelligence and judgment; practical reasonableness;

(vii) religion or peace with God or harmony between humans and the wider reaches of reality's sources, principles and grounds; or peace with whatever more-than-human source of reality, meaning and value.[273]

Finnis argues that the basic goods are self-evident: knowledge of them is neither derived from any facts about human nature nor arrived at through a process of inference; rather it is acquired in a simple act of non-inferential understanding.[274] For example, by a simple act of non-inferential understanding one grasps that a basic good (such as knowledge), which is the object of an inclination which one experiences (such as curiosity) is an instance of a general form of the good.[275] These ends or purposes which are grasped as self-evidently worth while

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circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards." Finnis, note 21, at 23.

[273] Finnis, note 21, at 86-89; note 268, at 51; Wagner, note 69, at 37-38.

[274] "Thus it is simply not true that 'any form of natural-law theory of morals entails the belief that propositions about man's duties and obligations can be inferred from propositions about his nature'. Nor is it true that for Aquinas 'good and evil are concepts analysed and fixed in metaphysics before they are applied in morals'. On the contrary, Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason (and not just by metaphysicians), are per se nota (self-evident) and indemonstrable. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of the human being', nor are they inferred from a teleological conception of human nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate). Principles of right and wrong, too, are derived from these first, pre-moral principles of practical reasonableness, and not from any facts, whether metaphysical or otherwise..." Finnis, note 21, at 33-34.

[275] "One does not judge that 'I have [or everybody has] and inclination to find out about things' and then infer that therefore 'knowledge is a good to be pursued'. Rather, by a simple act of non-inferential understanding one

in non-inferential acts of understanding are grasped as such because they are intrinsically perfective of human nature.[276]

Finnis identifies the fundamental task of practical reasonableness as "self-constitution or self-possession"[277] and he includes in the set of basic requirements of practical reasonableness:

(i) a coherent plan of life;

(ii) no arbitrary preferences amongst values;

(iii) no arbitrary preferences amongst persons;

(iv) detachment and commitment;

(v) the (limited) relevance of consequences: efficiency, within reason;

(vi) respect for every basic value in every act;

(vii) the requirements of the common good;

(viii) following one's conscience.[278]

Finnis posits a subjective principle to prioritize the multiple basic goods implicated in any particular concrete choice or action:

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grasps that the object of the inclination which one experiences is an instance of a general form of the good, for oneself (and others like one)." *Ibid.*

[276] "The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have." *Ibid.*

"Neo-scholastic critics of the position Finnis defends have ignored the distinction between ontology and epistemology to which he appeals. They seem to have assumed gratuitously that anyone who maintains that knowledge of human goods is not derived from our prior knowledge of human nature must hold that human goods are not grounded in nature. The assumption however is unsound. There is not the slightest inconsistency in holding that (1) our knowledge of the intrinsic value of certain ends or purposes is acquired in non-inferential acts of understanding wherein we grasp self-evident truths, and (2) those ends or purposes are intrinsically valuable (and thus can be grasped as self-evidently worth while) because they are intrinsically perfective of human beings, i.e. beings with a human nature." Robert P. George, "Natural Law and Human Nature" in Robert P. George ed, *Natural Law Theory. Contemporary Essays* (Clarendon Press, 1992), at 35.

[277] Finnis, note 21, at 168.

[278] *Ibid*, at 103-125.

> In voluntarily acting for human goods and avoiding what is opposed to them, *one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will towards integral human fulfilment.*[279]

In other words, the point of morality is self-constituting choices which participate integrally in available basic goods. The rational intelligibility of the basic goods implicated in any choice or action becomes a moral directiveness when considered with a commitment to the first principle of morality. The avoidance of conflict among the basic values implicated in choice and action enables the moral agent to experience harmonious order in his agency.[280]

Finnis argues that there are basic forms of human flourishing "which can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy".[281] He identifies the two principal jurisprudential concerns of a theory of natural law: firstly, to identify the principles of the Rule of Law;[282] and secondly, to trace the ways in which laws are to be derived from unchanging principles that have their force from their reasonableness.[283] He defines the "fundamental notion of law" as

> a prescription of reason, by means of which rational and indeed conscientious and reasonable practical judgments about the needs of a complete community's common, public good, having been made and published by lawmakers, are understood and adopted by citizens as the imperium of their own autonomous, individual practical reason and will.[284]

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[279] John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press, 1987), at 283 (emphasis in the original).

[280] Di Blasi, note 54, at 16; Wagner, note 69, at 72, 74, 76.

[281] Finnis, note 21, at 3.

[282] "A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item in the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge and content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor." *Ibid*, at 270-272.

[283] "...the principle jurisprudential concern of a theory of natural law is thus to identify the principles and limits of the Rule of Law and to trace the ways in which sound laws, in all their positivity and mutability, are to be derived from unchanging principles – principles that have their force from their reasonableness, not from any originating acts or circumstances. " *Ibid*, at 351.

[284] John Finnis, *Aquinas* (Oxford University Press, 1998), at 258.

Thus, while Finnis definition bears some similarity to Aquinas's definition ("an ordinance of reason for the common good, made by him who has care of the community, and promulgated"), Finnis' definition differs in that it asserts that law is fundamentally understood as an imperium of autonomous reason and will of the subject.[285] Before defending the thesis advanced in this chapter - that Finnis' account of the natural law presupposes the metaphysics of subjectivity – some aspects of Finnis' ethical discourse are first reviewed.

3.3 Ethics, Metaphysics and Reference

In this section it is argued that Finnis' ethical discourse presupposes a theory of reference in which those who refer to basic goods are thereby obliged to conclude to all the implications of Finnis' description of those goods. It is also argued that given his reliance on the self-evidence of the basic goods to which he refers, coupled with his failure to make explicit the understanding of human nature he presupposes, disputation with Finnis is liable to reach impasse.

Since Finnis understands a speaker's asserting *p* to entail the speaker's acceptance of *p* or belief that *p* is true,[286] it follows that Finnis is committed to a theory of reference in which those who assert *p* are obliged to conclude to all the implications they realize their description has concerning the thought object *p*. Using Klima's terminology, Finnis presumes that such

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[285] Robert A. Gahl, "Who made the Law? God, Ethics, and the Law of Nature" in Di Blasi, Hochschild and Lagan eds, *Virtue's End* (St. Augustine's Press, 2008), at 119.

[286] "What is entailed by one's asserting that *p*, namely that one is asserting also that one accepts (believes) that *p* is true (is correct, is the case). For "*p* but [in asserting this] I don't care whether *p* is true or not" is absurd, pointless and (in a sense) self-contradictory (except in some special sense or context), or at least disqualifies one from treating one's assertion – or rather, "assertion" – as a contribution to serious discussion of, or reflection upon, whether *p* or not-*p*. It is of course possible to *suppose* that *p*, "for the sake of argument", in order to explore its implications. But even such explorations, with their limited aims, are likely to miscarry unless those carrying them out are trying to reach a judgment, if not about the truth of *p*, then at least the truth of some other proposition epistemically related to *p*. And the willingness to leave the truth of *p* undecided, from the outset right through to the close of the discussion, entails that what is supposed or said about *p* will remain *unasserted*, even if various logical relations are asserted during the exploration." John Finnis, "Self-referential (or Performative) Inconsistency: Its Significance for Truth" (2004) 78 *Proceedings of the American Catholic Philosophical Association* 13, at 16-17 (emphasis in the original).

reference must be "constitutive" rather than "parasitic".[287] Klima gives the following example:

> In guessing games, in which one has to find out what another person has in mind, though not allowed to ask directly, one asks for and receives information concerning the thought object the other person has in mind, trying to find out under what description the person identifies this thought object. But throughout this process, the questioner thinks of the same thought object as the answerer, without knowing under what description or name the answerer identifies this thought object.[288]

The person with something in mind makes "constitutive reference" to the thought object by endowing the mere thought object with properties in the sense that he conceives of the thought object as having some properties and is obliged to conclude to all the implications he realizes his description has concerning the thought object. The person who is guessing makes "parasitic reference" to the same thought object by merely intending to refer to the same thought object that the first person has conceived of. The person who is guessing need not conceive of the thought object under the same description and may even deny that the description in question in fact applies to the thought object. However, since words can signify what is thought of, whether it exists or not, the admission of objects of thought as objects of reference does not imply the extra-mental existence of the objects of thought: the phoenix, the unicorn and fictional characters in literature can be referred to and described without implying their extra-mental existence. Since referring is a context-dependent property of terms, the same expression in different propositional contexts may refer to different things, or refer to something in one context and to nothing in another, *eg* both pagans and Christians can use the same word 'God' in the same sense of 'the true God' so that when it is applied to an object such as the pagan's idol, they contradict each other.[289]

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[287] Gyula Klima, "Saint Anselm's Proof: A problem of Reference, Intentional Identity and Mutual Understanding" in Holmström-Hintikka ed, *Medieval Philosophy and Modern Times* (Kluwer, 2000), at 71.

[288] *Ibid*, at 78-79.

[289] *Ibid*, at 72.

In the absence of the proponent's elaboration of a theory of the world and experience by which an opponent can see that by his normal, "everyday commitment" to objects of the world and experience he is also committed to making constitutive reference to that which the proponent has identified as self-evident (and so is also obliged to conclude to all the implications of the proponent's description and cannot consistently think that what is referred to has properties inconsistent with the proponent's particular description), the disputants may not refer to the same thing under the same conception. Just as in proving to an atheist that there is a God requires that the atheist be shown that given the domain of thought objects the atheist is already committed to, he is also committed to making constitutive reference to something that the theist can justifiably identify for him as God (so that the atheist must conclude to all the implications he realizes his description has concerning God and cannot consistently think that God has properties inconsistent with that particular description), the new natural lawyer too must show his opponent that, given the domain of thought objects the opponent is already committed to, the opponent is also committed to making constitutive reference to something that the new natural lawyer can justifiably identify for him as a basic good. Failure to do so may result in the kind of impasse in which the new natural lawyer resigns himself to asserting "in the end, one understands or doesn't that *X* is a basic good" in the face of the opponent's "honest" assertion of a contrary description of *X*.[290] In sum, insofar as Finnis relies on the self-evidence of the basic goods without making explicit the understanding of the nature of man, the world and moral experience presupposed in his exploration of the evaluative implications of assertions, he fails to identify the implicit

[290] "In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, non-instrumental value, or something blocks that understanding and one does not perceive correctly. For the most part, our liberal friends, such as Stephen Macedo, honestly do not see any special point or value in such intercourse. For them, spouses have no reason, apart from purely subjective preference, ever to choose genital intercourse over oral or anal intercourse. And because oral and anal intercourse are available to same-sex couples, such couples have as much interest in marriage and as much right to marry as couples of opposite sexes." Robert P. George, *In Defence of Natural Law* (Clarendon Press, 1999), at 144.

commitments which would oblige an opponent to make constitutive reference to what Finnis identifies as the basic goods.

The difficulties posed by Finnis' reliance on the self-evidence of the basic goods have also been noted by others. Donnelly has noted that a good may be grasped as self-evidently good without any knowledge of what that goodness consists in.[291] Similarly, Lisska observes that in Finnis' account, man is obliged to respect basic goods, not because it is good to do so, but simply because practical reason grasps them as goods. Lisska argues that by failing to establish an intrinsic connection between the objectivity of practical reason and the nature of man, Finnis' theory lacks any real response to the ultimate "why" of moral life.[292] Illies has observed that insofar as the self-evidence of a basic good gives rise to an implicit value judgment about a necessary relationship between me and that self-evident basic good, the implicit value judgment does not entail that others have to value it as well.[293] The problem of reference as well as the observations of Donnelly, Lisska and Illies will be reviewed again in the light of the thesis defended in the remainder of this chapter - that Finnis' account of the natural law presupposes the subjectivity of the self as the ground of truth and validity.

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[291] "...the danger with a reliance on the self-evidence of practical principles, (providing that such reliance can be supported epistemologically), is that we may be brought to know, thereby, *that* certain goods are good and may have no idea in what that goodness consists. To know more about the goods than that they are good, to know what gives them the character of good, for example, may require something greater than an appreciation of how we come to know the goods as such. The self-evidence of good does not preclude, prevent or render unnecessary an examination of the possible source of good." Bebhinn Donnelly, "The Epistemic Connection between Nature and Value in the New and Traditional Natural Law Theory" (2006) 25 *Law and Philosophy* 1, at 21-22.

[292] "It just so happens that [Finnis's set of basic] goods corresponds to human well-being. But what establishes this causal relation? What the ontological position offers over the epistemological position is that this Aristotelian *aporia* is, at least in principle, resolvable. The state of well-being is the 'final cause' based on the structure of the 'formal cause', which is the set of dispositional properties determining the content of the essence. What George fails to do is to provide a justification for the connection between the human goods and the human person. According to Finnis/Grisez and George, this just 'happens'." Lisska, note 53, at 159-161.
Di Blasi, note 54, at 16.

[293] Christian Illies, *The Grounds of Ethical Judgment* (Oxford University Press, 2003), at 125-137.

3.4 The Self-evidence of the Basic Goods

Finnis proposes a retorsive argument as a test for the self-evidence of the basic goods.[294] In a retorsive argument,[295] the argument 'retorts' or 'turns' the objection of the sceptic 'back' against himself with the consequence that the necessity of the conclusion is not deduced from any presumed axioms and is seen to be true because it cannot reasonably be questioned and so cannot be false.[296] For example, Finnis establishes the self-evidence of the basic good of knowledge by arguing that "it cannot be coherently denied that truth is a not merely instrumental good":

> The sceptical assertion that knowledge is not a good is operationally self-refuting. For one who makes such an assertion, intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion worth making, and worth making *qua* true; he thus is committed to the proposition that he believes that truth is a good worth pursuing or knowing. But the sense of his original assertion was precisely that truth is not a good worth pursuing or knowing. Thus he is implicitly committed to formally contradictory beliefs.[297]

Finnis clarifies his argument by reference to two propositions:

> (A) "'I assert that *p*' entails 'I believe that *p* is worth asserting *qua* true.'"
>
> (B) "'I assert that *p*' entails 'I believe that truth is a good worth pursuing or knowing.'"

He describes proposition A as no more than a preliminary exploration of the "evaluative implications of assertions". He describes proposition B as the proposition of his argument

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[294] John Finnis, "Scepticism, Self-refutation, and the Good of Truth" in Hacker and Raz eds, *Law, Morality, and Society*: *Essays in Honour of H. L. A. Hart* (Clarendon Press, 1979), at 250-254; note 286, at 13-22; Joseph M. Boyle, "Self-Referential Inconsistency, Inevitable Falsity and Metaphysical Argumentation" (1972) 3 *Metaphilosophy* 25, at 26-44; Illies, note 293, at 44-63; Hansjürgen Verweyen, *Ontologische Voraussetzungen des Glaubensaktes* (Patmos-Verlag, 1969), at 109-158

[295] From the Latin: *retorquere* - to twist back.

[296] From a thomistic perspective, such an argument can be accused of confusing the agent and possible intellects: Harald Holz, *Transzendentalphilosophie und Metaphysik* (Mattias-Grünewald-Verlag, 1966), at 116.

[297] Finnis, note 286, at 16.
Finnis, note 21, at 74-75; note 294, at 258-267

which is clarified by reflecting on the conditions under which assertions are worth making.[298] Finnis explains that the primary locus of assertion is the judgment that is constituted by one's inner assent to a proposition.[299] Given the sceptic's "implicit commitments", Finnis argues that the sceptical assertion - that knowledge is not a good worth pursuing – involves a "self-referential, performative inconsistency" and an "operational self-refutation".[300] In other words, Finnis argues that an analysis of the implicit commitments of any interlocutor is sufficient to conclude 'I assert that *p*' entails 'I believe that truth is [a good] worth [pursuing or] knowing'[301] and so affirms truth as an intrinsic good.[302] Since Finnis holds that a judgment is objective if its assertion is warranted on the ground of self-evidence,[303] then, on the basis of the retorsive argument, he concludes that that the judgment "truth is objectively a good" is warranted and so is objective.[304]

In the following sections it is argued that Finnis' understanding of the self-evidence of the basic goods presupposes the self as the ground of truth and validity. It is argued that this presupposition of the self as the ground of truth presupposes the metaphysics of subjectivity identified by Heidegger in his analyses of Descartes, Kant, Leibniz and Nietzsche. While

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[298] "clarified by reflecting on the conditions under which assertions are worth making, worth testing, worth evaluating as true or false…worth profoundly disagreeing with." Finnis, note 286, at 17-18.

[299] "The judgment that is constituted by one's inner assent to a proposition which one's truth-and-knowledge-seeking enquiry, anticipating some such judgment, has identified as having the worth of truth and thus the assertibility – the paradigmatic assertibility – of truth." *Ibid*, at 18.

[300] "…the sceptic engaged in reflection, argument and discourse – worthy of the name and of the attention of others – is implicitly acknowledging the intrinsic good of truth and knowledge of it as a good that is pursuit-worthy." *Ibid*, at 20.

[301] Finnis, note 294, at 259, proposition (6).

[302] "'Truth is worth knowing' is to be understood as meaning that truth is a good to be pursued, and is good to attain in one's judgment; and ignorance and errors are to be avoided…'Truth is worth knowing' is to be understood as affirming that truth is an *intrinsic* good." Finnis, note 286, at 262 (emphasis added).

[303] "A judgment or belief is objective if it is correct; a proposition is objective if one is warranted in asserting it, whether because sufficient evidence is in, or because there are compelling grounds, or because…it is obvious or self-evident that in asserting it one asserts what is the case." *Ibid*, at 264-265.

[304] *Ibid*, at 264.

Heidegger's account of the metaphysics of subjectivity is studied in the remainder of this chapter, no attempt is made to elaborate the fundamental unity of Heidegger's philosophy. In particular, the relation between subjectivity and individual, personal, or psychological "I-ness" is not examined in this chapter (but reference is made to Heidegger's analyses of the reconciliation of the particular subject with the universal found in Descartes, Kant, Leibniz and Nietzsche). The relation between subjectivity and the nature of being (*Sein*) is also not examined in this chapter (but reference is made to both Jünger's and Heidegger's explication of the relation in terms of the Will to Power (*Wille zur Macht*)).

3.4.1 Retorsion

As Heidegger observed, the question which has dominated modern metaphysics is that of the method by which the absolutely certain and secure is sought by man himself for himself.[305] In occidental philosophy there is a long history of a radical return to subjectivity as the ground of epistemological validity (*Geltungsgrund*). Retorsion has been used as the foundation of a transcendental method in order to reflect upon the conditions of possibility of thought.[306] Just as the Cartesian method leads the radical doubter to grasp the necessarily

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[305] "What ground and basis is sought for modern metaphysics? The traditional guiding question of metaphysics – 'What is the being?' – is transformed at the beginning of modern metaphysics into a question of method, about the path along which the absolutely certain and secure is sought by man himself for man himself, the path by which the essence of truth is circumscribed. The question "what is the being?" is transformed into a question about the *fundamentum absolutum inconcussum veritatis*, the absolute, unshakeable ground of truth. This transformation *is* the beginning of a new thinking, whereby the old order passes into the new and the ensuing age becomes the modern." Heidegger, *Nietzsche* (Harper Collins, 1991), Volume IV, at 97.

"Welcher Grund und Boden wird in der neuzeitlichen Metaphysik gesucht? Die überlieferte Leitfrage der Metaphysik: Was ist das Seiende? wandelt sich im Beginn der neuzeitlichen Metaphysik zur Frage nach der Methode, nach dem Weg, auf dem vom Menschen selbst und für den Menschen ein unbedingt Gewisses und Sicheres gesucht und das Wesen der Wahrheit umgrenzt wird. Die Frage: Was ist das Seiende? wandelt sich zur Frage nach dem absolutum inconcussum veritatis, nach dem unbedingten, unerschütterlichen Grund der Wahrheit. Dieser Wandel *ist* der Beginn eines neuen Denkens, wodurch das Zeitalter zu einem neuen und die Folgezeit zur Neuzeit wird." Martin Heidegger, *Nietzsche II* (Gesamtausgabe 6.2, Klostermann, 1996), at 125.

All German texts of Heidegger's *Nietzsche I and Nietzsche II* (1961) are taken from the *Gesamtausgabe* volumes 6.1 and 6.2 and all English translations are taken from the four volume translation by Krell in the Harper Collins edition, 1991.

[306] Adrian Bardon, "Performative Transcendental Arguments" (2005) 32 *Philosophia* 69; Holz, note 296, at 129-143; Joseph Maréchal, *A Maréchal Reader* (Herder and Herder, 1970), at 65-97; Otto Muck, *The Transcendental*

implicated existence of the Cartesian *ego*, the method of retorsion leads the radical sceptic to grasp obliquely (*in actu exercito*) the manner in which truth as ineluctable affirmation exists in thought. This transcendental insight grasps truth neither simply as posited nor as a fact but rather in the "return into itself" (*reditio in seipsum*) ineluctable affirmation is identified with the incontrovertible certainty of truth and objectivity.[307]

In Finnis' account, the sceptic achieves a self-referential, performative inconsistency in asserting his scepticism since the sceptic's assertion itself presupposes the sceptic's implicit commitment to the proposition that he believes his sceptical assertion is worth making *qua* true. In describing the sceptical assertion as involving "self-referential inconsistency" and "self-refutation", Finnis presupposes the self, by virtue of its structure, as the ground on which validity and truth are affirmed. In other words, Finnis presupposes the priority of the self which asserts itself such that the truth of a proposition is determined by the conformity of the (self's) affirmation of the proposition with the self (which asserts itself). The basic value of knowledge (or truth) is affirmed subsequent to the establishment of the self (whose self-assertion manifests its implicit commitments) but the basic value is affirmed in the manner of "already needing to have been" the good implicitly acknowledged in self-assertion and in all the intellectual acts of affirmation, doubting and denial. In sum, although truth is affirmed as a self-evident basic good, it is dependent on the structure of the self.

3.4.2 The "mathematical being" of the Finnisian Subject

Using Heideggerian terminology, it can be said that Finnis' reliance on retorsion presupposes a subject as the "mathematical" moment in thought where mathematical means

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Method (Herder and Herder, 1968), at 167-180; Hans Wagner, *Philosophie und Reflexion* (Ernst Reinhardt Verlag, 1980), at 48-68; Verweyen, note 294, at 119.

[307] "The ineluctable affirmation is identified with the incontrovertible certainty of truth."
"Die nicht ausschließbare Affirmation wird mit der unumstößlichen Gewißheit von Wahrheit („verbal" verstanden) gleichgesetzt." Verweyen, note 294, at 112.

not "dealing with numbers" but rather "what is already known in advance".[308] The mathematical, as "what is already known in advance", is what is known "in general" and what makes knowledge of particular things possible. In this sense, it is in virtue of a prior "mathematical" knowledge of "bodilyness" or corporeality that a thing can be recognised as a body, and it is in virtue of a prior knowledge of "threeness" that a collection of apples can be recognised as three apples. (It is only by extension that the mathematical comes to mean the arithmetical and geometrical, as the easiest and most discernable examples of what can be known "in advance" in every knowing.[309]) As Heidegger noted, the Cartesian transformation of metaphysics on the basis of mathematics posits a *Vorbild* – a prior image or ideal - given in every specific thought that makes the interior unity of those thoughts possible. In the Cartesian philosophy, this prior *Vorbild* is the ineradicably self-evident being of the Cartesian *cogito* which represents itself to itself as the one thing of which it can be indubitably certain (*ens certum*) so that everything it knows, it knows on the basis of itself as already certainly

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[308] "For the Greeks *τὰ μαθήματα* means that which, in his observation of beings and interaction with things, man knows in advance: the corporeality of bodies, the vegetable character of plants, the animality of animals, the humanness of human beings. Along with these, belonging to the already-known, i.e., "mathematical", are the numbers. When we discover three apples on the table we recognise that there are three of them. But the number three, threeness, we know already. That is to say: the number is something "mathematical". Only because numbers represent, so to speak, the most striking of the always-already-known, and therefore the best-known instances of the mathematical, is "the mathematical" directly reserved as a name for the numerical. The essence of the mathematical is in no way defined by numerical." Martin Heidegger, "The Age of the World Picture" in Heidegger, *Off the Beaten Track* (Cambridge University Press, 2002), at 59;

"*Τὰ μαθήματα* bedeutet für die Griechen dasjenige, was der Mensch im Betrachten des Seienden und im Umgang mit den Dingen im voraus kennt: von den Körpern das Körperhafte, von den Pflanzen das Pflanzliche, von den Tieren das Tiermäßige, vom Menschen das Menschenartigen. Zu diesem schon Bekannten, d. h. Mathematischen, gehören neben dem Angeführten auch die Zahlen. Wenn wir auf dem Tisch drei Äpfel vorfinden, dann erkennen wir, daß es deren drei sind. Aber die Zahl drei, die Dreiheit, kennen wir schon. Das besagt: Die Zahl ist etwas Mathematisches. Nur weil die Zahlen das gleichsam aufdringlichste Immer-schon-Bekannte und somit das Bekannteste unter dem Mathematische als Benennung dem Zahlenmäßigen vorbehalten. Keineswegs aber wird das Wesen des Mathematischen durch das Zahlenhafte bestimmt." Martin Heidegger "Die Zeit des Weltbildes" in Heidegger, *Holzwege* (Gesamtausgabe 5, Klostermann, 1977), at 78.

All German texts from Heidegger's *Holzwege* are taken from the *Gesamtausgabe*, volume 5 (Klostermann, 1977), and all English translations are taken from the translation by Young and Haynes in *Off the Beaten Track* (Cambridge University Press, 2002).

[309] Thomas A. Fay, *Heidegger: The Critique of Logic* (Nijhoff, 1977), at 79-83; Hemming, note 115, at 380; note 65, at 239-240.

known.[310] In other words, the Cartesian *cogito*'s knowledge is reduced to the mathematical in the sense of being known by what is already known in advance. The "mathematical" being of the Cartesian *cogito* is posited alongside every thought and is that by which each thought is certainly known or secured in the sense of "being-secured as "subject-icity""[311]: the *cogito* is

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[310] "Descartes' metaphysical task became the following: to create the metaphysical ground for the freeing of man to freedom considered as self-determination that is certain of itself. This ground, however, not only had to be one that was certain. Since every measure taken from other domains was forbidden, it had, at the same time, also to be of such a nature that, through it, the essence of the freedom demanded was posited as a self-certainty. Everything that is certain from itself, must, at the same time, however, certify as certain that being from which such knowledge is certain and through which everything knowable is made secure. The *fundamentuum*, the foundation at the basis of this freedom, the *subiectium*, must be something which satisfies the aformentioned essential requirements. A *subiectum* distinguished in all these respects becomes necessary. What is this certainty which forms and provides grounds? It is the *ego cogito (ergo) sum*. This certainty is a principle which says that, simultaneously with man's thinking (at the same time and lasting an equal length of time), he himself is indubitably co-present; is, that is, given to himself. Thinking is representation, setting-before, a representative relation to the represented (*idea* as *perceptio*). To represent means here: of oneself, to set something before one and to make what has been set in place secure as thus set in place. This placing-in-securedness must be a calculating, since only calculation guarantees being certain, in advance and always, of that which is to be presented. Representing is no longer the apprehending of what presences within whose unconcealment the apprehending itself belongs, belongs, indeed, as its own kind of presence to the things that are unconcealedly present. Representation is no longer the 'self disclosure for...' but the 'grasping of...' That which presences does not hold sway, rather setting-upon rules. According to the new freedom, representation is now something that proceeds from itself into the region of the secured, a region which has first to be made secure. The being is no longer that which presences. Rather, it is that which, in representation, is first set over and against, with the character of an object. Representation, setting-before, is a making stand over and against as object which masters and proceeds against. In this way, representation drives everything into the unity of the thus-objectified. Representation means *coagitatio*." Martin Heidegger, "Age of the World Picture" in Heidegger, note 308, at 81.

"Die metaphysische Aufgabe Descartes' wurde diese: der Befreiung des Menschen zu der Freiheit als der ihrer selbst gewissenes Selbstbestimmung den metaphysischen Grund zu schaffen. Dieser Grund mußte aber nicht nur selbst ein gewisser sein, sondern er mußte, weil jede Maßgabe aus anderen Bezirken verwehrt war, zugleich solcher Art sein, daß durch ihn das Wesen der beanspruchten Freiheit als Selbstgewißheit gesetzt wurde. Alles aus sich selbst Gewisse muß jedoch zugleich jenes Seiende als gewiß mitsichern, für das solches Wissen gewiß und durch das alles Wißbare gesichert sein soll. Das fundamentuum, der Grund dieser Freiheit, das ihr zum Grunde Liegende, das Subjectum muß ein Gewisses sein, das den genannten Wesensforderungen genügt. Ein nach allen diesen Hinsichten ausgezeichnetes Subjectum wird notwendig. Welches ist dieses den Grund bildende und den Grund gebende Gewisse? Das ego cogito (ergo) sum. Das Gewisse ist ein Satz, der aussagt, daß das gleichzeitig (zugleich und gleich daurend) mit dem Denken des Menschen er selbst unbezweifelbar mit anwesend, d.h. jetzt: sich mitgegeben sei. Denken ist vor-stellen, vorstellender Bezug zum Vorgestellten (idea als perceptio). Vorstellen meint hier: von sich her etwas vor sich stellen und das Gestellte als ein solches sicherstellen. Dieses Sicherstellen muß ein Berechnen sein, weil nur die Berechenbarkeit gewährleistet, im voraus und ständig der Vorzustellenden gewiß zu sein. Das Vorstellen ist nicht mehr das Vernehmen des Angewesenden, in dessen Unverborgenheit der Vernehmen selbst gehört und zwar als eine eigene Art von Anwesen zum unverborgenen Anwesenden. Das Vorstellen ist nicht mehr das Sich-entbergen für..., sondern das Ergreifen und Begreifen von... Nicht das Anwesende waltet, sondern der Angriff herrscht. Das Vorstellen ist jetzt gemäß der neuen Freiheit ein von sich aus Vorgehen in den erst zu sichernden Bezirk des Gesicherten. Das Seiende ist nicht mehr das Anwesende, sondern das im Vorstellen erst entgegen Gestellte, Gegen-ständige. Vorstellen ist vor-gehende, meisternde Ver-gegen-ständlichung. Das Vorstellen treibt so alles in die Einheit des so Gegenständigen zusammen. Das Vorstellen ist cogtitatio." Martin Heidegger, "Die Zeit des Weltbildes" in Heidegger, note 308, at 107-108.

[311] "Gewißheit als Subjektität", Heidegger, *Metaphysik and Nihilismus* (Gesamtausgabe 67, Klosterman, 1999), at 155.

posited in advance of actual beings such that the basic manner of being (to be known by the *cogito*) is "being as representedness" (*Vorgestelltheit*) or "being represented" (to the *cogito*).[312]

It is argued here that insofar as Finnis secures the basic of good of knowledge by retorsive reference to the self which asserts itself, he presupposes a subject whose being is represented first, *ie* mathematically, and upon which the basic goods to be known are secured. This knowledge presupposes beings as objects and truth as "being represented" – a configuration of truth which is not found in Aquinas.

3.5 The "Cartesian" aspect of the "Finnisean" subject

In this section elements of Heidegger's account of the relation between subjectivity, truth and will are briefly reviewed before examining their significance for "Finnisian" subjectivity. In broad outline, Heidegger traces the unfolding of the metaphysics of subjectivity from Descartes (in which self-certainty transforms beings into objects and truth into the intellect's conformity with the representation of beings) to Nietzsche (in which self-certainty is found to be in consequence of the will to power and truth as a necessary condition (or value) for intensifying power). In section 3.5.1 below, the difference between Aquinas's and Descartes' accounts of truth is outlined and it is argued that Finnis' understanding of truth is Cartesian rather than Thomistic. From an analysis of the "Nietzschean" aspect of Finnisean subjectivity (in the section 3.5.4 below), the social nature of the political nihilism implicit in Finnis' metaphysics of subjectivity is outlined.

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[312] "But mathematics is not only a *Vorbild* of the most stringent knowledge, but the mathematical – being-secured – characterizes the basic manner of being as representedness."

"Aber die Mathematik ist dabei nicht nur ein Vorbild der 'strengsten' Erkenntnis, sondern das mathematische – das Gewißsein – kennzeichnet der Grundart des Seins als der Vor-gestelltheit." *Ibid.*
Hemming, note 115, at 382; note 65, at 239.

3.5.1 Subjectivity and Truth as "being represented" (*Vorgestelltheit*)

From his analyses of Descartes Heidegger understands subjectivity (*Subjektität*, also translated as "subject-icity" and "subject-ity") to be that stance toward being where the human being comports itself as 'subject' who determines all beings in their objectivity.[313] The objectification of the world is in an annihilation of all beings as such in their being, and their transformation into objects - things that stand over against man - subordinated to the command of production, *ie* production in the sense of being brought forth in objectification.[314] In this sense, the subjectivity of the subject is the site where presence can only appear as re-presentation[315] and such that objectiveness of the world becomes constant in representational

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[313] "Subjective": 2. where the human being [comports itself] as 'subject' - that is, being represented happens through him as the re-presenting 'I' and 'We' in general which is the standard for beingness. Subject-icity."
"»Subjektiv«: 2. Dies aber nur, wo der Mensch als »Subjektum«, d.h. die Vorgestelltheit durch ihn als das vorstellende »Ich« und »Wir« überhaupt das Maßgebende für die Seindheit ist. Subjektität." Heidegger, *Zur Auslegung von Nietzsches II. Unzeitgemässer Betrachtung* (Gesamtausgabe 46, Klostermann, 2003), at 142.
Charles Bambach, "Translating "Justice": Heraclitus between Heidegger and Nietzsche" (2006) 50 *Philosophy Today* 143, at 147.

[314] "Nature is brought before man by human re-presentation. Man sets up the world as the entirety of objectiveness before himself and himself before the world. Man delivers the world unto himself and produces Nature for himself. We must think of this production in its wide and diverse essence. Man tills Nature when it does not satisfy his representation. Man produces new things when they are lacking to him. Man rearranges things when they bother him. Man adjusts things when they distract him from his plans. Man displays things when he extols them for sale or use. Man displays himself when he emphasizes his accomplishments and advertises business. In manifold production, the world is brought to a stop and into position...It is man who, athwart the world as an object, turns out to be and displays himself as the one who deliberately asserts all this production. To put something before oneself in such a way that what has been put forth (and which has already been represented) determines all the modes of production in every respect is a fundamental trait of the attitude we know as the will. What is called will here is production, or rather production in the sense of deliberate self-assertion of objectification..." Martin Heidegger "Why Poets?" in Heidegger, note 308, at 215-216.

"Die Natur ist durch das Vor-stellen des Menschen vor den Menschen gebracht. Der Mensch stellt die Welt als das Gegenständige im Ganzen vor sich und sich vor die Welt. Der Mensch stellt die Welt auf sich zu und die Natur zu sich her. Dieses Her-stellen müssen wir in seinem weiten und mannigfaltigen Wesen denken. Der Mensch bestellt die Natur, wo sie seinem Vorstellen nicht genügt. Der Mensch stellt neue Dinge her, wo sie ihm fehlen. Der Mensch stellt die Dinge um, wo sie ihn stören. Der Mensch verstellt sich die Dinge, wo sie ihn von seinem Vorhaben ablenken. Der Mensch stellt die Dinge aus, wo er sie zu Kauf und Nutzen anpreist. Der Mensch stellt aus, wo er sein eigenes Leisten herausstellt und für sein Gewerbe wirbt. Im vielfältigen Herstellen wird die Welt zum Stehen und in den Stand gebracht...Der Welt als dem Gegenstand gegenüber stellt sich der Mensch selbst heraus und stellt sich als denjenigen auf, der all dieses Herstellen vorsätzlich durchsetzt. Etwas vor sich bringen dergestalt, daß dieses Vorgebrachte als ein zuvor Vorgestelltes alle Weisen des Herstellens in jeder Hinsicht bestimmt, ist ein Grundzug des Verhaltens, das wir als das Wollen kennen. Das hier genannte Wollen ist das Her-stellen und zwar im Sinne des vorsätzlichen Sichdurchsetzens der Vergegenständlichung... " Martin Heidegger "Wozu Dichter?" in Heidegger, note 308, at 287-288.

[315] Bogdan Costea and Kostas Amiridis, "The Movement of Nihilism as Self-Assertion" in Hemming, Costea and Amiridis eds, *The Movement of Nihilism* (Continuum, 2011), at 18-19.

production.[316] Thus, man as subject (as distinct from an "I-ness which is egoistically defined"[317]) presupposes a theory of what it is to be human, as a grounding of what there is:

> When, however, man becomes the primary and genuine *subiectum*, this means that he becomes that being upon which every being, in its way of being and truth, is founded. Man becomes the referential centre of being as such. But this is only possible when there is a transformation in the understanding of beings as a whole."[318]

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[316] "The objectiveness of the world becomes constant in representational production. This representing makes a presentation. However, what is present is present in a representation that has the character of calculation. This representing knows nothing of the immediately visible. What is immediately visible in things, the picture they offer to direct sensible intuition, falls away. Calculating production is "an action without image" (Rilke, *IX Elegy*). Facing the immediately visible image, deliberate self-assertion, in its projects, places a scheme based only on a calculated construction. When the world enters into objectification of factitious constructions, it is placed in the insensible, the invisible. This constancy of objectiveness owes its presence to a placement whose activity belongs to the *res cogitans*, that is, to consciousness. The sphere of the objectivity of objects remains within consciousness. The invisibility of the objectiveness belongs to the inwardness of the immanence of consciousness." Martin Heidegger "Why Poets?" in Heidegger, note 308, at 228-229.

"Das Gegenständige der Welt wird *ständig* im vorstellenden Herstellen. Dieses Vorstellen präsentiert. Aber das Präsente ist präsent in einem Vorstellen, das die Art der Berechnung hat. Dieses Vorstellen kennt nichts Anschauliches. Das Anschaubare des Anblickes der Dinge, das Bild, das sie der unmittelbaren sinnlichen Anschauung bieten, fällt dahin. Das rechnende Herstellen der Technik ist ein »Tun ohne Bild« (Rilke, *IX. Elegie*). Vor das anschauliche Bild stellt das vorsätzliche Sichdurchsetzen in seinen Entwürfen den Vorschlag des nur gerechneten Gebildes. Wenn die Welt in das Gegenständige des erdachten Gebildes eingeht, ist sie in das Unsinnliche, Unsichtbare gestellt. Dieses Ständige verdankt seine Präsenz einem Stellen, dessen Tätigkeit der res cogitans, d.h. dem Bewußtsein angehört. Die Sphäre der Gegenständlichkeit der Gegenstände bleibt innerhalb des Bewußtseins. Das unsichtbare des Gegenständigen gehört in das Innere der Immanenz der Bewußtseins." Martin Heidegger "Wozu Dichter?" in Heidegger, note 308, at 304-305.

[317] "The fact, therefore, that the authentic *subiectium*, the ego is named, does not mean that man now becomes an I-ness and is egoistically defined. It means only this: to be the subject now becomes the distinctiveness of man, of man as a being that thinks and represents. The human "I" is placed in the service of this *subiectum*. The certainty lying at the foundation of this *subiectum* is, as such, indeed subjective i.e. holding sway in the essence of the *subiectum*, but it is not egoistic. In the same way, everything that is to be secured by means of representing objectification, and is established thereby as in being, is binding for everyone." Martin Heidegger, "The Age of the World Picture" in Heidegger, note 308, at 83.

"Daß in der Grundgleichung der Gewißheit und dann im eigentlichen Subjectum das ego genannt ist, besagt nicht, der Mensch sei jetzt ichhaft und egoistisch bestimmt. Es sagt nur dies: Subjekt zu sein, wird jetzt die Auszeichnung des Menschen als des denkend-vorstellenden Wesens. Das Ich des Menschen wird in den Dienst dieses Subjectum gestellt. Die in diesem zugrundeliegende Gewißheit ist als solche zwar subjektiv, d.h. im Wesen des Subjectum waltend, aber nicht egoistisch. Die Gewißheit ist für jedes Ich als solches, d.h. als Subjectum, verbindlich. Insgleichen ist all das, was durch die vorstellende Vergegenständlichung als gesichert und somit als seiend festgestellt werden will, für jedermann verbindlich." Martin Heidegger, "Die Zeit des Weltbildes" in Heidegger, note 308, at 109.

[318] "Wenn aber der Mensch zu dem ersten und eigentlichen Subjectum wird, dann heißt das: Der Mensch wird zu jenem Seinden, auf das sich alles Seinde in der Art seines Seins und seiner Wahrheit gründet. Der Mensch wird zur Bezugsmitte des Seinden als solchen. Das ist aber nur möglich, wen die Auffassung des Seienden im Gansen sich wandelt." Martin Heidegger, "Die Zeit des Weltbildes" in Heidegger, note 308, at 88.

In particular, man as subject presupposes an anthropological theory in which the genuinely Christian understanding of beings as a whole is transformed.[319]

In the context of his analysis of the Cartesian demand for certitude and a methodically secure notion of truth, Heidegger identifies the Cartesian configuration of truth as *Vorgestelltheit* (which is also variously translated as "being represented", "representedness", "representationality" and "representation"),[320] *ie* truth as agreement of knowledge with beings as represented. As Heidegger explains, the subject, the representing "I" is essentially and necessarily *co*-represented in every representation ("I represent").[321] As Heidegger noted

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[319] Joanna Hodge, *Heidegger and Ethics* (Routledge, 1995), at 110.

[320] "Thus *sum res cogitans* does not mean "I am a thing that is outfitted with the quality of thinking", but, rather, "I am a being whose mode to be consists in representing in such a way that representing co-presents the one who is representing into representedness". The Being of that being which I am myself, and which each man as himself is, has its essence in representedness and in the certitude that adheres to it. But this does not mean that I am a "mere representation", a mere thought, and nothing truly actual; it means that the permanence of my self as *res cogitans* consists in the secure establishment of representation, in the certitude according to which the self is brought before itself. But because the ego cogito, the "I represent" is not meant as a particular process in an isolated "I", because the "I" is understood as the self, back to which representation as such is essentially referred and in that way is what it is – because of all this, the cogito sum in each case says something essentially more. The Being of the one who represents and who secures himself in the representing is the measure for the Being of what is represented as such. Therefore, every being is necessarily measured according to this measure of Being in the sense of certified and self-certifying representedness." Heidegger, note 305, IV, at 115.

"Sum res cogitans besagt also nicht: ich bin ein Ding, das mit der Eigenschaft des Denkens ausgestattet ist, sondern: ich bin ein Seiendes, dessen Art *zu sein* im Vorstellen besteht dergestalt, daß dieses Vor-stellen den Vor-stellended selbst mit in die Vorgestelltheit stellt. Das Sein des Seienden, das ich selbst bin, und das je der Mensch als er selbst ist, hat sein Wesen in der Vor-gestelltheit und in der dieser zugehörigen Gewißheit. Dies bedeutet aber nicht: ich bin eine »bloße Vorstellung« - ein bloßer Gedanke und nichts wahrhaft Wirkliches; es bedeutet: die Beständigkeit meiner selbst als res cogitans besteht in der sicheren Festgestelltheit des Vor-stellens, in der Gewißheit, gemäß der das Selbst vor es selbst gebracht ist. Weil jedoch das ego cogito, das »ich stelle vor«, nicht gemeint ist als ein vereinzelter Vorgang in einem abgesonderten Ich, weil das »Ich« als das Selbst verstanden ist, worauf das Vor-stellen als solches wesenhaft sich zurückstellt und so ist, was es ist, deshalb sagt das cogito sum jedesmal wesenhaft mehr. Das Sein des im Vorstellen selbst gesicherten Vorstellenden ist das Maß für das Sein des Vorgestellten und zwar als eines solchen. Deshalb wird notwendig nach diesem Maß des Seins im Sinne der gesichterten und sich sichernden Vorgestelltheit jegliches Seiende gemessen." Heidegger, note 305, II, at 145.

[321] „When Descartes grasps *cogitatio* and *cogitare* as *perceptio* and *percipere*, he wants to emphasize that bringing something to oneself pertains to *cogitare*. *Cogitare* is the presenting *to* oneself of what is representable. In such presenting-to lies something definitive, namely, the necessity of a designation for the fact that the represented is not only generally pregiven but is also presented to us as available. The presented-to, the represented – *cogitatum* – is therefore something for man only when it is established and secured as that over which he can always be master unequivocally, without any hesitation or doubt, in the radius of *his own* power to enjoin. *Cogitare* is not only a general and indeterminate representing, but also something that posits itself under the condition that what is presented-*to* no longer permits any doubt about what it is and how it is.

The *cogitare* is always "thinking" in the sense of a "thinking over", and thus a deliberation that thinks in such a way as to let only the indubitable pass as securely fixed and represented in the proper sense. *Cogitare* is essentially a deliberative representing, a representing that examines and checks: *cogitare* is *dubitare*. If we take

this "literally", we might easily fall into error. Thinking is not "doubting" in the sense that deliberative thought is everywhere brought to the fore, that every standpoint becomes suspect and all agreement prohibited. Doubting is rather understood as essentially connected with the indubitable, with the undoubted and its securement. What is always doubted in deliberative thinking is whether what is represented is in every instance securely established within the circle of the reckoning power to enjoin. That every *cogitare* is essentially a *dubitare* says nothing other than this: representing is securement. Thinking, which is *essentially* deliberating, accepts nothing as secured and certain – that is, as true – which is not proved before thinking itself to be the sort of thing that has the character of the doubt*less*, whereupon thinking as deliberative doubting is at the same time "finished", and the account is closed...

In the concept of *cogitatio*, there is a general stress on the fact that representing brings the represented *to* the one representing: that therefore the latter, *as* the one who represents, in every case "presents" what is represented, calls it to account; that is, grasps it and appropriates it for itself, seizes and secures it. For what? For further representing, which is willed everywhere as securement and which seeks to establish being as what is secured. But precisely what is it to be *secured*, and for what purpose is it to be brought to certitude?

We will discover this when we enquire more essentially into the Cartesian concept of *cogitatio*...Descartes says that every ego cogito is a cogito me cogitare; every "I represent something" simultaneously represents a "myself", me, the one representing (for myself, in my representing). Every human representing is-in a manner of speaking, and one that is easily misunderstood – a "self"-representing.

The following objection might be raised: If we "represent" the Freiburg cathedral to ourselves – that is, in this case, make it present for ourselves, because at the moment we do not perceive it in the flesh; or if we represent it as immediately standing before us, in the manner of a perception – then we are representing the cathedral and only the cathedral. That is what is represented. We do not, however, represent ourselves, for otherwise we could never represent the cathedral itself, purely for itself, and let ourselves be released to what representing here set up over against us, the ob-ject. Nor in fact does Descartes, by defining the *cogito* as *cogito me cogitare*, mean that with every representing of an object "I" myself, the one representing, am represented as such into the bargain and so become an object. Otherwise every representing would ultimately have to flit constantly back and forth between our objects, between the representing of the properly represented object and the representing of the one who is doing the representing (ego). Is the "I" of the one representing therefore merely indistinctly and incidentally represented? No.

Rather, the representing "I" is far more essentially and necessarily *co*-represented in every "I represent", namely as something toward which, back to which, and *before* which every represented thing is placed. For this I do not need an explicit turning toward and back to me, the one who is representing. In the immediate intuition of something, in every making-present, in every memory, in every expectation, what is represented is such fashion by representation is represented *to me*, place before *me*, and in such a way that I myself do not really become an object of a representing but am nonetheless presented "to me" in an objective representing, and in fact only in such representing. Since every representing presents the one who is representing and the represented object *to* the representing man, representing man is "co-presented" in a particularly unobtrusive way...[I]n every representing there is a representing person *to* whom what is represented in representation is presented, the representing person is involved with in and in every representing – not subsequently, but in advance, in that he, the one who is placing *before*, brings what is represented before *himself*. Because the representing person has already come on the scene, along with what has been represented within representation, there lies in every representing the *essential* possibility that the representing itself takes place within the scope of the one representing. Representation and the one who is representing are co-presented in human representing...

It has now been shown that *cogitare* is representing in the fullest sense, that we must conjoin in thought the following essentials: the relation to what is represented, the self-presentation of what is represented, the arrival on the scene and the involvement of the one representing with what is represented, indeed in and through representing...

For this reason one can also say – although this is misleading, representing is a co-representing of oneself. But above all we must realize that for Descartes the essence of representation has shifted its weight to the representing-to-itself of what is represented, whereby the human being who is representing decides in advance and everywhere on his own what can and should be accepted as well placed and permanent." Martin Heidegger, "The Cartesian Cogito as Cogito Me Cogitare" in Heidegger, note 305, IV, at 104-110.

"Wenn Descartes die cogitatio und das cogitare als perceptio und percipere faßt, dann will er betonen, daß zum cogitare das Auf-sich-zu-bringen von etwas gehört. Das cogitare ist ein Sich-*zu*-stellen des Vor-stellbaren. In dem Zu-stellen liegt etwas Maßstäbliches, d.h. die Notwendigkeit eines Kennzeichens dafür, daß das Vorgestellte nicht nur überhaupt vor-gegeben, sondern als verfügbar zu-gestellt ist. Zu-gestellt, vorgestellt – cogitatum – ist etwas dem Menschen also erst dann, wenn es ihm fest- und sichergestellt ist als das, worüber er von sich aus im Umkreis *seines* Verfügens jederzeit und eindeutig, ohne Bedenken und Zweifel, Herr sein kann.

Cogitare ist nicht nur überhaupt und unbestimmt ein Vorstellen, sondern jenes, das sich selbst unter die Bedingung stellt, daß das *Zu*gestellte in dem, was es ist und wie es ist, keinen Zweifel meht zuläßt.

Das cogitare ist immer ein »Denken« im Sinne des Be-denkens, und zwar eines Bedenkens, das darauf denkt, nur das Bedenkenlose als Sichergestelltes und im eigentlichen Sinne Vor-gestelltes gelten zu lassen. Das cogitare ist wesenhaft bedenkendes Vor-stellen, durchprüfendes, überrechnendes Vorstellen: cogitare ist dubitare. Wenn wir dies »wörtlich« nehmen, können wir leicht einem Irrtum verfallen. Denken ist nicht »Zweifeln« in dem Sinne, daß überall nur Bedenken vorgebracht werden, jede Stellungnahme verdächtigt und jede Zustimmung versagt wird. Das Zweifeln ist vielmehr verstanden als wesenhaft bezogen auf das Unzweifelbare, Bedenkenlose und dessen Sicherstellung. Was zum voraus und stets in dem bedenkenden Denken bedacht wird, ist dies, daß das Vorgestellte jeweils innerhalb des Kreises der berechnenden Verfügung sichergestellt ist. Daß alles cogitare wesenhaft ein dubitare ist, das sagt nichts anderes als: das Vor-stellen ist ein Sicher-stellen. Das Denken, das *wesentlich* Bedenken ist, läßt nichts als sicher-gestellt und gewiß, d.h. als wahr, zu, was nicht vor ihm selbst ausgewiesen ist als solches, das den Charakter des Bedenken*losen* hat, womit das Denken als Bedenken gleichsam »fertig«, worüber die rechnung abegeschlossen ist.

Überall leigt im Begriff der cogitatio der Ton darauf, daß das Vor-stellen das Vor-gestellte *zu*bringt und den Vorstellenden; daß somit dieser, *als* ein Vorstellender, das Vor-gestellte jeweils »stellt«, zur Rechenschaft zieht, d.h. anhält und für sich festmacht, in Besitz bringt, sicher-stellt. Wofür? Für das weitere Vor-stellen, das überall als Sicher-stellen gewollt und darauf aus ist, das Seiende als das Gesicherte festzustellen. Was jedoch soll und wozu es *sicher*-gestellt, in die Sicherheit gebracht werden?

Wir erkennen dies, wenn wir dem Descartesschen Begriff der cogitatio wesentlicher nachfragen...Descartes sagt: jedes ego cogito ist cogito *me* cogitare; jedes »ich stelle etwas vor« stellt zugleich »mich« vor, mich, den Vorstellenden (vor mich, in meinem Vor-stellen). Jedes menschliche Vor-stellen ist nach einer leicht mißdeutbaren Redeweise ein »Sich«-vorstellen.

Man könnte dagegen folgendes einwenden: Wenn wir uns jetzt das Münster »vor-stellen«, d.h. in diesem Falle: es uns vergegenwärtigen, da wir es im Augenblick nicht leibhaft wahrnehmen, oder wenn wir unmittelbar davorstehend es vor-stellen in der Weise des Wahrnehmens, dann stellen wir jedesmal das Münster vor und nur das Münster. Dies ist das Vor-gestellte. Nicht aber stellen wir uns selbst vor, denn sonst könnten wir doch niemals das Münster selbst, rein für sich, vor-stellen und uns in das loslassen, was hier das Vor-stellen entgegenstellt, den Gegen-stand. In Wahrheit meint Descartes mit der Bestimmung des cogito als cogito me cogitare auch nicht, daß bei jedem Vorstellen von einem Gegendstand auch noch, gleichsam als Zugabe, »ich« selbst, der Vorstellende, als ein solcher vorgestellt und zum Gegenstand werde. Denn sonst müßte im Grunde jedes Vorstellen ständig zwischen unseren Gegenständen hin- und herflattern, zwischen dem Vorstellen des eigentlich vor-gestellten Gegenstandes und dem Vorstellen des Vorstellenden (ego). Also ist das Ich des Vorstellenden nur verschwommen und nebenher vorgestellt? Nein.

Das vorstellende Ich ist vielmehr in jedem »ich stelle vor« weit *wesentlicher* und notwendiger *mit*vorgestellt, nämlich als dasjenige, auf das zu und auf das zurück und *vor* das jedes Vor-gestellte hingestellt wird. Dazu bedarf es nicht einer ausdrücklichen Zuwendung und Rückwendung zu mir, dem Vorstellenden. Im unmittelbaren Anschauen von etwas, in jeder Vergegenwärtigung, in jeder Erinnerung, in jeder Erwartung wird das solcher Art Vor-gestellte durch das Vorstellen mir vor-gestellt, vor *mich* gestellt, so zwar, daß ich selbst dabei nicht eigens zum Gegenstand eines Vorstellens werde, aber gleichwohl im gegendständlichen Vorstellen, und zwar allein durch dieses, »mir« zugestellt bin. Indem alles Vor-stellen den vor-zu-stellenden und vorgestellten Gegendstand auf den vorstellenden Mensch *zu*-stellt, ist der vor-stellende Mensch in dieser eigentümlich unauffälligen Weise »mitvorgestellt«...Weil es in jedem Vorstellen der vor-stellende Mensch ist, dem im Vor-stellen dessen Vor-gestelltes *zu*-gestellt wird, stellt sich der vorstellende Mensch in jedem Vorstellen mit ein – nicht nachträglich, sondern zum voraus, indem er, der *Vor*-stellende, je das Vor-gestellte vor *sich* bringt. Weil der vor-stellende Mensch sich wesenhaft schon bei dem Vor-gestellten innerhalb des Vor-stellens mit eingefunden hat, liegt in allem Vor-stellen die *wesenhafte* Möglichkeit, daß das Vorstellen selbst im Gesichtskreis des Vor-stellenden sich vollzieht. Das Vorstellen und der Vor-stellende sind im menschlichen Vor-stellen *mit*-vorgestellt...

In Bezug auf dieses hat sich jetzt gezeigt: cogitare ist Vor-stellen in dem erfüllten Sinne, daß dabei gleichwesentlich und zumal mitgedacht werden muß der Bezug auf das Vor-gestellte, das Sich-zustellen des Vorgestellten, das Sicheinfinden und Einstellen des Vorstellenden vor dem Vorgestellten, und zwar innerhalb des Vor-stellens und durch dieses.

...weshalb man, mißdeutbar allerdings, auch sagen kann: das Vorstellen ist ein Sich-mit-vor-stellen. Vor allem aber müssen wir feststellen, daß für Descartes dieses Wesen des Vor-stellens sein Gewicht in das Sicht-zu-stellen des Vor-gestellten verlagert hat, wobei der vorstellende Mensch zum voraus und überallhin von sich her entscheidet, was als gestellt und ständig gelten kann und darf." Martin Heidegger, "Das cogito Descartes' als cogito me cogitare" in Heidegger, note 305, II, at 132-139.

with regard to the definition of truth as adequation or conformity of thing and intellect, there are two senses of adequation which are not the mere inversion of each other. In one sense – which is found in Kant - it can mean truth as adequation of the intellect to the thing (*adaequatio intellectus ad rem*) while in another sense – which is found in Aquinas - it can mean truth as adequation of the thing to the intellect (*adequatio rei ad intellectum*). In each of the senses the terms 'mind' or 'intellect' (*intellectus*) and 'thing' (*res*) are thought differently.[322] The Cartesian configuration of truth as adequation of the intellect to the thing represented presupposes the first (Kantian) sense of adequation. In contrast, Aquinas holds that the primary sense of adequation (in the definition of truth as the adequation of thing and intellect (*veritas est adequatio rei et intellectus*))[323] is the adequation of thing to intellect (*adequatio rei ad intellectum*) in the sense of adequation between the thing and the idea in the

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[322] "The true, whether it be a matter or a proposition, is what accords, [it is] the accordant. Being true and truth signify accord, and that in a double sense: on the one hand, the consonance of a matter with what is supposed in advance regarding it and on the other hand, the accordance of what is meant in the statement with the matter. This dual character of the accord is brought to light by the traditional definition of truth: *veritas est adequatio rei et intellectus*. This can be taken to mean: truth is the correspondence of the matter to knowledge. But it can also be taken as saying: truth is the correspondence of knowledge to the matter. Yet truth so conceived, propositional truth, is only possible on the basis of material truth (*Sachwahrheit*) of *adaequatio rei ad intellectum*. Both concepts of the essence of *veritas* have continually in view a conforming to... and hence think truth as correctness. Nonetheless, the one is not the mere inversion of the other." Martin Heidegger, "On the Essence of Truth" in Heidegger, *Pathmarks* (Cambridge University Press, 1998), at 138.

"Das Wahre, sei es eine wahre Sache oder ein wahrer Satz, ist das, was stimmt, das Stimmende. Wahrsein und Wahrheit bedeuten hier Stimmen, und zwar in der gedoppelten Weise: einmal die Einstimmigkeit einer Sache mit dem über sie Vorgemeinten und zum andern die Übereinstimmung des in der Aussage Gemeinten mit der Sache. Diesen Dopplecharakter des Stimmens bringt die überlieferte Wesensumgrenzung der Wahrheit zum Vorschein: *veritas est adequatio rei et intellectus*. Das kann bedeuten: Wahrheit ist die Angleichung der Sache an die Erkenntnis. Es kann aber auch sagen: Wahrheit ist die Angleichung der Erkenntnis an die Sache. Zwar pflegt man die angeführte Wesensumgrenzung meist nur in der Formel *veritas est adaequatio intellectus ad rem* vorzubringen. Doch ist die so begriffene Wahrheit, die Satzwahrheit, nur möglich auf dem Grunde der Sachwahrheit, der *adaequatio rei ad intellectum*. Beide Wesensbegriffe der *veritas* meinen stets ein Sichrichten nach... und denken somit die Wahrheit als Richtigkeit. Gleichwohl ist der eine nicht die bloße Umkehrung des anderen." Martin Heidegger, "Vom Wesen der Wahrheit" in Heidegger, *Wegmarken* (Gesamtausgabe 9, Klostermann, 1976), at 179-180.

All German texts from Heidegger's *Wegmarken* are taken from the *Gesamtausgabe*, volume 9 (Klostermann, 1976), and all English translations are taken from the translation by McNeill in *Pathmarks* (Cambridge University Press, 1998).

[323] Aquinas, note 103, q. 1, a. 1, *resp.*; *Summa contra Gentiles*, note 99, I, *cap.* 59; note 71, Ia, q. 16, a. 1, *co.*

divine mind.[324] As Heidegger observes, truth in this sense essentially implies the coming of beings themselves as created, into agreement with the Creator, an "accord" with regard to the way they are determined in the order of creation.[325] In other words, the correspondence definition in Aquinas has a specifically *theological* resolution within the understanding of the

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[324] "Everything is said to be true absolutely, in so far as it is related to the intellect upon which it depends; and thus it is that artificial things are said to be true as being related to our intellect. For a house is said to be true that expresses the likeness of the form in the architect's mind; and words are said to be true insofar as they are the signs of truth in the intellect. In the same way natural things are said to be true insofar as they express the likeness of the species that are in the divine mind. For a stone is called true, which possesses the nature proper to a stone, according to the preconception in the divine intellect."
Unde unaquaeque res dicitur vera absolute, secundum ordinem ad intellectum a quo dependet. Et inde est quod res artificiales dicuntur verae per ordinem ad intellectum nostrum, dicitur enim domus vera, quae assequitur similitudinem formae quae est in mente artificis; et dicitur oratio vera, inquantum est signum intellectus veri. Et similiter res naturales dicuntur esse verae, secundum quod assequuntur similitudinem specierum quae sunt in mente divina, dicitur enim verus lapis, qui assequitur propriam lapidis naturam, secundum praeconceptionem intellectus divini. Aquinas, note 71, Ia, q. 16, a. 1, *co.*

"...Therefore, a natural thing...is said to be true inasmuch as it corresponds to the divine intellect in so far as it fulfils that which has been ordained for it by the divine intellect."
...res ergo naturalis...secundum adaequationem ad intellectum divinum dicitur vera, in quantum implet hoc ad quod est ordinata per intellectum divinum. Aquinas, note 103, q. 1, a. 2, *co.*

[325] "*Veritas* as *adequatio rei ad intellectum* implies... that, with respect to what it is and whether it is, a thing, as created (*ens creatum*), is only insofar as it corresponds to the *idea* preconceived in the *intellectus divinus*, i.e., in the mind of God, and thus measures up to the idea (is correct) and in this sense is "true". The *intellectus humanus* too is an *ens creatum*. As a capacity bestowed upon human beings by God, it must satisfy its *idea*. But the understanding measures up to the idea only by accomplishing in its propositions the correspondence of what is thought to the matter (*die Sache*), which in its turn must be in conformity with the *idea*. If all beings are "created", the possibility of the truth of human knowledge is grounded in the fact that matter and proposition measure up to the idea in the same way and therefore are fitted to each other on the basis of the unity of the divine plan of creation. *Veritas* as *adaequatio intellectus* (*humani*) *ad intellectum* (*divinum*) guarantees *veritas* as *adaequatio intellectus* (*humani*) *ad rem* (*creatam*). Throughout, *veritas* essentially implies *convenientia*, the coming of beings themselves as created, into agreement with the Creator, an "accord" with regard to the way they are determined in the order of creation." Martin Heidegger, "On the Essence of Truth" in Heidegger, note 322, at 138-139.

"Die *veritas* als *adequatio rei ad intellectum* meint...den christlich theologischen Glauben, dass die Sache in dem, was sie sind und ob sie sind, nur sind, sofern sie als je erschaffene (*ens creatum*) der im *intellectus divinus*, d.h. in dem Geiste Gottes, vorgedachten idea entsprechen und somit idee-gerecht (richtig) und in diesem Sinne "wahr" sind. Ein *ens creatum* ist auch der *intellectus humanus*. Er muss als das von Gott dem Menschen verliehene Vermögen seiner idea genügen. Ideegerecht ist aber der Verstand nur dadurch, dass er in seinen Sätzen die Angleichung des Gedachten an die Sache vollzieht, die ihrerseits der *idea* gemäss sein muss. Die Möglichkeit der Wahrheit menschlicher Erkenntnis gründet, wenn alles Seinde ein „geschöpfliches" ist, darin, dass Sache und Satz, in gleicher Weise ideegerecht und deshalb aus der Einheit des göttlichen Schöpfungsplanes aufeinander zugerichtet sind. Die *veritas* als *adequario rei* (*creandae*) *ad intellectum* (*divinum*) gibt die Gewähr für die *veritas* als *adequatio intellectus* (*humani*) *ad rem* (*creatam*). *Veritas* meint im Wesen überall die *convenientia*, das Übereinkommen des Seinden unter sich als eines geschaffenen mit dem Schöpfer, ein „Stimmen" nach der Bestimmung der Schöpfungsordnung. " Martin Heidegger, "Vom Wesen der Wahrheit" in Heidegger, note 322, at 180-181.

createdness of all things in God.[326] The correspondence definition of truth in Aquinas implies the *theological* belief that, firstly, with respect to what it is and whether it is, a created thing (*ens creatum*), is only in so far as it corresponds to the idea preconceived in the mind of God, and thus measures up to the idea, *ie* is correct, and in this sense is "true"; and secondly, the truth of a created thing is by virtue of God's creative causality, *ie* by act of divine will.[327] Indeed, as argued in chapter 1, it is precisely because the believer knows by faith that things are God's effects that demonstrations of the existence of God can proceed from knowledge of creatures. As Heidegger notes, such knowledge has no genuinely ontological foundation.[328]

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[326] "Heidegger argues that the full explication of the 'correspondence' definition found in the [Aquinas's] *Quaestiones disputatae* is that the truth of created things, having been already intended and made (literally created) to correspond to the ideas in the divine intellect, thereby supplies a guarantee for the correctness of the correspondence of things to the human intellect. In this sense, truth in the human intellect becomes a kind of passive faculty, which can always rely on the correctness of what it knows because what it knows has been intended to be so known by no less than God himself. Heidegger's point...is that Aquinas's understanding of truth has an explicitly theological resolution, and moreover, works within the understanding of being...as the createdness of all things (beings) in God, the *ens creatum*...the way in which Aquinas defines truth as far as it is understood in the human mind is so far uninvolved with a genuinely philosophical or ontological determination of truth that it can be seen *only* as a statement of theological belief." Laurence Paul Hemming, "In Matters of Truth: Heidegger and Aquinas", in Kerr ed, *Contemplating Aquinas: On the Varieties of Interpretation* (SCM Press, 2003), at 97-98.

[327] "Similarly, those who say that all things proceed from God by necessity of nature and not by a decision of will cannot admit ideas, because those who act impelled by the necessity of nature do not determine the end for themselves. This cannot be the case here, however, because, if a thing acts for an end but does not determine that end itself, it has its end determined for it by something else superior to it; and thus there would be a cause superior to God. This, of course, is impossible, since all who speak of God understand him to be the first cause of beings...This reason for affirming ideas, namely, on account of the previous planning of the works that are to be done, is suggested by Dionysius, who says in chapter V of *On the Divine Names*: "We say that exemplars in God are the intelligible characters of things that come to be, the individually pre-existing causes of subsistent beings. These, theology calls 'predefinitions'. They predetermine and cause godly and good inclinations in creatures. It is according to these that the supersubstance predefines and produces all things."
Similiter etiam secundum eos qui posuerunt quod a Deo procedunt omnia per necessitatem naturae, et non per arbitrium voluntatis, non possunt ponere ideas: quia ea quae ex necessitate naturae agunt, non praedeterminant sibi finem. Sed hoc esse non potest; quia omne quod agit propter finem si non determinat sibi finem, determinatur ei finis ab alio superiore; et sic erit aliqua causa eo superior: quod non potest esse, quia omnes loquentes de Deo intelligunt eum esse causam primam entium...Et hanc etiam rationem ponendi ideas, scilicet propter praedefinitionem operum agendorum, innuit Dionysius in V. cap. de divinis nominibus, *dicens:* exemplaria dicimus in Deo existentium rationes substantificas, et singulariter praeexistentes: quas theologia praedefinitiones vocat, et divinas et bonas voluntates existentium praedeterminativas et effectivas: secundum quas supersubstantialis essentia omnia praedefinivit et produxit. Aquinas, note 103, q. 3, a. 1, *co.*

[328] "Up to the distinct emergence of the mathematical as a fundamental characteristic of thought, the authoritative truth was considered that of Church and faith. The means for the proper knowledge of what is was obtained by way of the interpretation of the sources of revelation, the writ and the tradition of the Church. Whatever more experience and knowledge had been won adjusted itself (as if by itself) to this frame. For basically there was no worldly knowledge. The so-called natural knowledge not based on any revelation, therefore, did not have its own form of intelligibility or grounds for itself, let alone from out of itself. Thus what is decisive for the history of knowledge is not that all truth of natural knowledge was measured by the

However, as Heidegger also observed, the notion of truth as adequation can be detached from the theologically conceived order of creation and represented as a kind of world order or 'objectivity' without disturbing the notion of truth as adequation of thing to intellect.[329] In this new order, truth is still to be found more in the intellect rather than in things, not because of any kind of a relation, although a relation is required to discover it, but because of a willed intention or decision of the intellect. In this new order without God as the "exterior" unifying

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supernatural. Rather it is that this natural knowledge, disregarding this criterion, arrived at no independent foundation and character out of itself." Martin Heidegger, *What is a thing?* (Regnery, 1967), at 96-97.

"Bis zu dem augeprägten Hervorkommen des Mathematischen als eines Grunzugs des denkens galt als die maßgebende Wahrheit die der Kirche und des Glaubens. Die Ermittelung des eigentlichen Wissens um das Seiende geschah auf demWege der Auslegung der Offenbarungsquellen, der Schrift und der kirchlichen Überlieferung. Was sonst an Erfahrungen gesammelt und an Kenntnissen gewonnen wurde, gliederte sich wie von selbst in diesen Rahmen ein. Denn es gab im Grunde kein weltliches Wissen. Das sogenannte natürliche, nicht offenbarungsgemäßige Wissen hatte daher für sich und gar aus sich keine eigengestaltete Form der Wißbarkeit und Begründung. Nicht dies also ist wissenschaftsgeschichtlich das Entscheidende, daß alle Wahrheit das natürliche Wissen, unbeschadet jener Messung, aus sich zu keiner eigenständigen Begründung und Prägung gelangte." Heidegger, *Die Frage nach dem Ding: Zu Kants Lehre von den transzendentalen Grundsätzen* (Gesamtausgabe 41, Klostermann, 1984), at 96-97.

All German texts from Heidegger's *Die Frage nach dem Ding* are taken from the *Gesamtausgabe*, volume 41 (Klostermann, 1984), and all English translations are taken from the translation by Barton and Deutsch in *What is a Thing*? (Regnery, 1967).

[329] "But this order, detached from the notion of creation, can also be represented in a general and indefinite way as a world-order. The theologically conceived order of creation is replaced by the capacity of all objects to be planned by means of a world reason that supplies the law for itself and thus also claims that its procedure is immediately intelligible (what is "logical"). That the essence of propositional truth consists in the correctness of statements is thought to need no further special proof. Even where an effort is made – with a conspicuous lack of success – to explain how correctness is to occur, it is already presupposed as being the essence of truth. Likewise, material truth always signifies the consonance of something at hand with the "rational" concept of its essence. The impression arises that this definition of the essence of truth is independent of the interpretation of the essence of the Being of all beings, which always includes a corresponding interpretation of the essence of the human being as the bearer and executor of *intellectus*." Martin Heidegger, "On the Essence of Truth" in Heidegger, note 322, at 139.

"Aber diese Ordnung kann nun auch, abgelöst vom Schöpfungsgedanken, allgemein und unbestimmt als Weltordnung vorgestellt werden. An der Stelle der theologisch gedachten Schöpfungsordnung rückt die Planbarkeit aller Gegenstände durch die Weltvernuft, die sich selbst das Gesetz gibt und daher auch die unmittelbare Verständlichkeit ihres Vorgehens (das, was man für ‚logisch' hält) beansprucht. Daß das Wesen der Satzwahrheit in der Richtigkeit der Aussage besteht, hält man für ausgemacht. Auch dort, wo man sich mit einer merkwürdigen Vergeblichkeit abmüht zu erklären, wie die Richtigkeit zustande kommen soll, setzt man die schon als das Wesen der Wahrheit voraus. Desgleichen bedeutet die Sachwahrheit immer die Einstimmigkeit des vorhandenen Dinges mit seinem »vernünftigen« Wesensbegriff. Der Anschein entsteht, diese Bestimmung des Wesens des Seins alles Seienden, die jeweils eine entsprechende Auslegung des Wesens des Menschen als Trägers und Vollziehers des intellectus einschließt." Martin Heidegger, "Vom Wesen der Wahrheit" in Heidegger, note 322, at 181.

ground, the intellect which becomes the source of truth is no longer the divine intellect, but that of the subject.

It was argued in section 3.4.2 above that Finnis' reliance on retorsion presupposed the "mathematical" being of the Finnisean subject upon which the basic goods to be known are secured. In the retorsive reference to the subjectivity of the Finnisean subject, the affirmation of the proposition 'knowledge is not a good worth pursuing' was found not to correspond to the implicit commitments of the Finnisean self which asserts itself, *ie* the proposition was found to be false on failing to correspond with the (self-) representation (*Vorstellung*) of the Finnisean subject. Thus, it can be said that Finnis' securing of certain knowledge of the basic good of truth by retorsion presupposed the configuration of truth as being represented (*Vorgestelltheit*) such that the basic good is certainly known in the sense of "being-secured as "subject-icity"".

3.5.2 Freedom

The assertion of the subjectivity of the subject and the configuration of truth as being represented leads to new determination of the essence of freedom[330] in which freedom makes

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[330] "...man's claim to a ground of truth found and secured by man himself arises from that 'liberation' in which he disengages himself from the constraints of biblical Christian revealed truth and church doctrine. Every authentic liberation, however, is not only a breaking of chains and a casting off of bonds, it is also and above all a new determination of the essence of freedom. To be free now means that, in place of the certitude of salvation, which was the standard for all truth, man posits the kind of certitude by virtue of which and in which he becomes certain himself as the being that thus founds itself on itself... Liberation *from* the revealed certitude of the salvation of individual immortal souls is the liberation *to* a certitude in which man can by himself be sure of his own definition and task." Heidegger, note 305, IV, at 97-99.

"...daß der Anspruch des Menschen auf einen von ihm selbst gefundenen und gesicherten Grund der Wahrheit jener »Befreiung« entspringt, in der es sich aus der erstrangigen Verbindlichkeit der biblisch-christlichen Offenbarungswahrheit und der Kirchenlehre loslöst. Jede echte Befreiung ist aber nicht nur ein Ausbrechen aus den Fesseln und ein Abwerfen der Bedingung, sie ist zuvor eine neue Bestimmung des Wesens der Freiheit. Jetzt heißt Freisein, daß der Mensch an die Stelle der für alle Wahrheit maßgebenden Heilsgewißheit eine solche Gewißheit setzt, kraft deren er und in der er sich seiner selbst gewiß wird als der Seienden das dergestalt sich selbst auf sich selbst stellt... Die Befreiung aus der offenbarungsmäßigen Heilsgewißheit der einzelnen unsterblichen Seele ist in sich Befreiung zu einer Gewißheit, in der der Mensch durch sich selbst seiner Bestimmung und Aufgabe sicher sein kann." Heidegger, note 305, II, at 125-127.
Heidegger, "The Age of the World Picture" in Heidegger, note 308, at 81; Hemming, note 326, at 99-101; Costea and Amiridis, note 315, at 16.

its claim "in such a way that man in each case independently posits what man, founding himself upon himself, requires."[331] In other words, the expression of the subjectivity of the subject, as a continuous affirmation of human potentialities in the "manifold of what will be consciously posited by man as necessary and binding",[332] appears to modern man as the possibility in each case 'his' or 'her' own freedom. As Costas and Amiridis explain:

> The sense of empowerment that comes from the continuously repeated affirmation of the self-certainty that 'I', this particular 'I', may truly decide for itself what it is the 'I' can and will be, is, for Heidegger, 'possible only in and as the history of the modern age'. The 'manifold' manifests itself in precisely this apparent liberation of the self for the self, in each individual case, and as the desirability – political, cultural, economic – of this metaphysical individualism taken as the principle of the cultural body of the modern synthesis. Heidegger calls this the 'empowering of the essence of power'.[333]

In this sense of being free there is a coincidence between freedom and necessity: freedom is the capacity to recognize and accept the true as that which is to be pursued for its own sake.[334]

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[331] "For us, it remain important to see that the sort of freedom whose obverse is the liberation from faith in revelation does not simply lay claim to something generally necessary, but rather makes its claim in such a way that man in each case independently posits what man, founding himself upon himself, requires; that is to say, by the direction and the level of the way man represents himself and his essence." Heidegger, note 305, IV, at 98.

"Für uns belibt wichtig zu sehen, daß diejenige Freiheit, deren Kehrseite die Befreiung vom Offenbarungsglauben ist, nicht nur überhaupt ein Notwendiges beansprucht, sondern es dergestalt beansprucht, daß der Mensch von sich aus dieses Notwendige und Verbindliche jeweils setzt. Dieses Notwendige wird sich aber mit aus dem bestimmen, was der sich auf sich stellende Mensch benötigt, d.h. aus der Richtung und Höhe, aus der Weise, nach der hier der Mensch sich und sein Wesen vorstellt." Heidegger, note 305, II, at 126.
Costea and Amiridis, note 315, at 16.

[332] "Viewed metaphysically, the new freedom is the opening up of a manifold of what in the future can and will be consciously posited by man himself as something necessary and binding." *Ibid.*

"Die neue Freiheit ist – metaphysisch gesehen – die Eröffnung einer Mannigfaltigkeit dessen, was künftig als Notwendiges und Verbindliches vom Menschen selbst wissentlich gesetzt wrden kann und will." *Ibid.*

[333] Costea and Amiridis, note 315, at 17.

[334] "The historical background of the concept of freedom at issue here has little in common with the metaphysical and political notions of freedom prevalent in the Anglo-Saxon world. In the tradition which Heidegger stands, "freedom" does not mean primarily the ability to choose, unimpeded by heteronomous constraints (*liberum arbitrium*), but rather the capacity to recognize and accept the True as the Good, i.e. as that which is to pursued for its own sake (*libertas*). In this sense there is no conflict between freedom and necessity, but rather a coincidence...In this tradition freedom means, to give a schematic formula, the recognition and loving acceptance of the Necessary.... What must be understood is that the reality of the real, the Necessary, comes to be conceived here as subject to an essential historicity...In this understanding of reality, or to be more rigorous, of being, that makes possible Nietzsche's recognition of God's death, which is to be understood as the undermining of the foundation of a historical world. Thus, an understanding of freedom will depend not only on *what* is conceived to be Necessary, but also on *how* this is conceived." Javier A. Ibáñez-Noé, "Heidegger,

Given the "mathematical" being of the Finnisean subject and its configuration of truth as being represented (*Vorgestelltheit*), it is argued here that Finnis implicitly understands the subject to be free in the sense of recognising and accepting the true as that which is to pursued for its own sake. Thus, while Finnis' claims that the basic goods are pre-moral in that they represent the irreducible ends of human action rendering human activity intelligible, rather than goods that are imperative to pursue,[335] he also claims that human action in accordance with the requirements of human reasonableness is moral.[336] This identity of the true and the good is consistent with the metaphysics of subjectivity. Indeed, as Donnelly has observed, the principles of practicable reasonableness identified by Finnis are substantively normative.[337] In particular, if the freedom and necessity of the Finnisean subject are coincident, then Donnelly's distinction between knowing a self-evident good and knowing what the goodness of that good consists in[338] and Lisska's distinction between respecting a basic good because it is good to do so and respecting it because practical reason grasps it as

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Nietzsche, Jünger, and the Interpretation of the Contemporary Age" (1995) 33 *The Southern Journal of Philosophy* 57, at 71.

[335] Finnis, note 21, at 34, 62.

[336] *Ibid*, at 100-103.

[337] "How does the movement from pre-moral to moral occur?... one cannot deduce from the proposition that life is a good, in the pre-moral sense, that capital punishment is a just punishment for some perpetrators of murder, which is a moral claim...To put it another way, Finnis must derive from the 'is' of basic values the 'ought' of *moral* action not evident in the premises. However technically sophisticated the requirements of practical reasonableness, they cannot, by acting on basic goods, produce something, namely morality, that is not there in the first place. Morality cannot be the result of the action of the mechanical (principles of practical reasonableness) on the morally neutral (basic values). The 'bringing to bear' on these values, the 'participation in' or the 'working out' if attempted by principles of practical reason will result in supposedly illicit derivation of ought-propositions from is-propositions. If moral 'oughts' are, in fact, proposed we are, consequently, led to question the method that reaches them... scrutiny of the principles of practical reason reveals that they are much more than the mechanics of practical reason that one might expect from a list of such principles. Rather these principles are themselves substantively normative. Nowhere is this normativity more evident that in Finnis's third ('no arbitrary preferences among persons') and seventh (the common good) basic requirements of practical reasonableness. In these requirements the need for impartiality between persons is presented." Donnelly, note 68, at 112-113 (emphasis in the original).

[338] Donnelly, note 291, at 21-22.

good[339] do not apply. Similarly, insofar as Finnis's genuinely ethical account precludes a *telos* or ultimate end capable of justifying an objective hierarchy of the basic values which might guide individual choices and actions, Finnis posits a subjective principle to prioritize the multiple basic goods implicated in any particular concrete choice or action.[340] Consequently, the rational intelligibility of the basic goods implicated in any choice or action becomes a moral directiveness when considered with a commitment to the subjectively posited first principle,[341] *ie* consistent with the metaphysics of subjectivity, the point of morality is *self-constituting* choices (which participate integrally in available basic goods).

In sum, given the priority of the Finnisean subject, its configuration of truth as being represented (*Vorgestelltheit*) and the coincidence of freedom and necessity, the self-certainty of the subject is the justification of representation – a justification which might even be called "justice itself".[342]

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[339] Lisska, note 53, at 159-161.

[340] "In voluntarily acting for human goods and avoiding what is opposed to them, *one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will towards integral human fulfilment.*" Finnis, Boyle and Grisez, note 26, at 283 (emphasis in the original).

[341] Di Blasi, note 54, at 16; Wagner, note 69, at 72, 74, 76.

[342] "As the primary determination of its essence, subjectity requires that the representing subject assures itself of itself, which means that it also constantly assures itself of what it has represented as a particular something. In keeping with that assurance, the truth of beings as certainty has the character as security (*certitudo*). Self-knowing-itself (the place of certainty as such) is for its part a variant of the former essence of truth, namely the correctness (*rectitudo*) of representation. However, what is correct now no longer consists in the adequation to what presences unthought in its presence. Correctness now consists in adjusting all that is to be represented to the standard set in the knowledge-claim of the *res cogitans sive mens*. This claim appeals to the security that consists in the fact that representation and everything to be represented are driven together and gathered into clarity and distinctness of the mathematical *idea*. The *ens* is the *ens co-agitatum perceptionis*. Representation, now, is correct if it does justice to this claim of security. Demonstrated as correct in this way, representation, as made right and at our disposal, is justified. As security (*certitudo*), the truth of beings in the sense of the self-certainty of subjectity is fundamentally the justification of representation and what represents before the brightness proper to representation. Justification is the achievement of *iustitia* and is therefore justice itself. By being always a subject, the subject makes itself certain of its securing. It justifies itself before the claim to justice that it has itself set." Heidegger, "Nietzsche's Word: "God is Dead"" in Heidegger, note 308, at 182-183.

"Zur Subjektität gehört als die erste Wesensbestimmung, daß das vorstellende Subjekt seiner selbst und d.h. stets auch seines Vorgestellten als eines solchen sich versichert. Gemäß solcher Versicherung hat die Wahrheit des Seienden als die Gewißheit den Charakter der Sicherheit (certitudo). Das Sich-selbst-wissen, worin die Gewißheit als solche ist, bleibt seinerseits eine Abart des bisherigen Wesens der Wahrheit, nämlich der Richtigkeit (rectitudo) des Vorstellens. Aber das Richtige besteht nicht jetzt nicht mehr in der Angleichung an ein in seiner Anwesenheit ungedachtes Anwesendes. Die Richtigkeit besteht jetzt in der Einrichtung alles

3.5.3 Objectivity

As Illies has observed, given the sense in which Finnis uses the term 'objective',[343] objectivity concerns the status of the judgment but not its content.[344] Thus, even if Finnis' transcendental argument successfully establishes an implicit value judgment about a necessary relationship between me and knowledge - that I must value knowledge – the implicit value judgment does not transcend this evaluative perspective with the consequence that it is not entailed that others have to value it as well.[345] In other words, on the basis of Finnis' argument, if successful, I can claim consistently that I find my making true judgments necessarily a good that I have to regard, but this would not lead to the conclusion that I would have to regard everyone else as likewise being committed to the value of my making true judgments. In order to conclude that my making true judgments is a good anyone else has to regard[346] Finnis assumes an "objectivation principle" of the form: my necessarily making a

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Vorzustellenden auf das Richtmaß, das im Wissenanspruch der vorstellenden res cogitans sive mens gesetzt ist. Dieser Anspruch geht auf die Sicherheit, die darin besteht, daß alles Vorzustellende und das Vorstellen in die Klarheit und Deutlichkeit der mathematischen idea zusammengetrieben und dort versammelt werden. Das ens ist das ens co-agitum perceptionis. Das Vorstellen ist jetzt richtig, wenn es diesem Anspruch auf Sicherheit gerecht wird. Dergestalt als richtig ausgewiesen, ist es als recht gefertigt und verfügbar, gerecht-fertigt. Die Wahrheit des Seienden im Sinne der Selbst-Gewißheit der Subjektität ist die Sicherheit (certitudo) im Grunde des Recht-fertigen des Vorstellens und seines Vorgestellten vor der ihm eigenen Helle. Die Rechtfertigung (iustificatio) ist der Vollzug der iustitia und so die Gerechtigkeit selbst. Indem das Subjekt je und je Subjekt ist, vergewissert es sich seiner Sicherung. Es rechtfertigt sich vor dem von ihm selbst gesetzten Anspruch auf Gerechtigkeit." Martin Heidegger, "Nietzsches Wort »*Gott ist tot*«" in Heidegger, note 308, at 244.

[343] See n. 303 above.

[344] Illies, note 293, at 135-137.

[345] Illies gives the following two illustrations: "It can be objectively true that I regard X as a good for me alone – someone committed to a celibate life might well be so committed because of the positive value this life has for him and for those around him, but at the same time *not* believe that *everyone* should be celibate." Illies, note 293, at 135.
"If Alice helps herself to some tea, she makes an implicit positive value judgment. At least at the moment of action, and within the context of options available to her, she is committed to a limited amount of practical approval of her drinking tea. Certainly, this value judgment is restricted by the situation and might change within a minute (the tea might be unpleasant in some way). But *even at the very moment* of it being performatively expressed by Alice, there is no reason to conclude that she is committed to any rich judgment such as 'tea-drinking is a universal good'. We can only conclude transcendentally that, at some point, Alice regarded the object as being sufficiently good to merit her trying to attain it." *Ibid,* at 136.

[346] "Still...the resulting value judgment is peculiar. It is surely not simply 'subjective', if we understand 'subjective' as indicating a direct dependence upon free decision or preferences. Although the making of a particular judgment with truth-value is always a free practical enterprise, the particular resulting value judgment

positive value judgment about some *X* is a sufficient reason for me to judge *X* as an objectively positive value.[347]

Given Illies' detection of Finnis' implicit assumption of an "objectivation principle", it is argued here that Finnis' implicit assumption of an "objectivation principle" presupposes that each individual is potentially the same as every other such that the value judgments which bind one individual would bind all individuals. Such a presupposition can be considered as a working out of the subjectivity of the subject. As Hemming summarises:

> For Heidegger, all philosophy, as metaphysics, has depended (and especially since Descartes) on the reconciliation of the particular subject with the universal (what establishes it and makes it possible – metaphysically thought, its *cause*). Thus, the question is asked as to how *this being here* indicates *being in general.* The assertion *cogito, ergo sum* does no more or less than this in a particular way (hence why it is infinitely more important to Descartes to demonstrate the cause of the subject than to explicate the subject's being in the world) – it says that each subject, each *individuum*, is nevertheless potentially every other, it is potentially the same as any other. In this sense, the *cogito, ergo sum* discloses the universal *id est*, the "all" that *manifests* itself in "each" particular case.[348]

In sum, while aiming to found his ethics on self-evident principles, Finnis imports a metaphysical interpretation of the problem of being into his affirmation of the basic goods by means of his reliance on the priority of the subject. The implied "objectivization" principle operative in Finnis's transcendental argument can be considered as a consequence of the working out of the subjectivity of the subject.

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is necessarily implied once we form judgments of this kind...In this sense, the judgment is uncircumventable for everyone qua rational agent, and thus subject-independent. But this is not the same as saying that we could demand that all rational agents should acknowledge and respect it. After all, it might only be a good that *I* respect." Illies, note 293, at 137.

[347] Illies, note 293, at 125 (emphasis in the original).

[348] Hemming, note 65, at 238-243;
Martin Heidegger, *Metaphysische Anfangsgründe der Logik im Ausgang vom Leibniz* (Gesamtausgabe 26, Klosterman, 1978), at 106-111. (Translated by Michael Heim as *The Metaphysical Foundations of Logic*, (Indiana University Press, 1984); "The Age of the World Picture" in Heidegger, note 308, at 83; Daniel J. Selcer, "Heidegger's Leibniz and abyssal identity" (2003) 36 *Continental Philosophy Review* 303, at 318-319.

3.5.4 Summary

Heidegger identifies the selfhood of man, the concept of Being, the essence of truth and the manner of standard giving as the four elements which determine a fundamental metaphysical position[349] and he observes that for Descartes:

1. man as self is defined by referring the world back to man's representing;
2. beingness means the representedness through and for the subject;
3. truth means the certitude of self-representing and securing representation;
4. man is the measure of all things in the sense of the presumption of the de-limitation of representation for self-securing certitude. The standard measure places everything that can pass as a being under the reckoning of representation.[350]

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[349] "A fundamental metaphysical position is determined:
1. by the way in which man as man is himself and thereby knows himself;
2. by the projection of being on Being;
3. by circumscribing the essence of the truth of beings; and
4. by the way in which each respective man takes and gives "measure" for the truth of beings.
Why and to what extent the selfhood of man, the concept of Being, the essence of truth and the manner of standard giving determine in advance a fundamental metaphysical position, sustain metaphysics as such, and make it the articulation of beings themselves, are questions that cannot be asked by and through metaphysics. None of the four essential moments of a fundamental metaphysical position just cited can be conceived apart from the others; each of them characterizes the whole of a basic metaphysical position from a single perspective." Heidegger, note 305, IV, at 92.

"Eine metaphysische Grundstellung bestimmt sich:
1. durch die Art, wie der Mensch als Mensch er *selbst* ist und dabei sich selbst weiß;
2. durch den Entwurf des Seienden auf das Sein;
3. durch die Umgrenzung des Wesens der Wahrheit des Seienden;
4. durch die Weise, nach der jeweils der Mensch das »Maß« nimmt und gibt für die Wahrheit des Seienden.
Weshalb und inwiefern die Selbstheit des Menschen, der Begriff des Seins, das Wesen der Wahrheit und die Weise des Maßgabe zum voraus eine metaphysische Grundstellung bestimmen, die Metaphysik als solche tragen und sie zum Gefüge des Seienden selbst machen, dies läßt sich bereits nicht mehr aus der Metaphysik her und nicht mehr durch diese fragen. Keines der angeführten vier Wesensmomente einer metaphysischen Grundstellung kann abgesondert von den anderen begriffen werden, jedes kennzeichnet je schon in einer Hinsicht das Ganze einer metaphysiischen Greundstellung." Heidegger, note 305, II, at 120.

[350] "1. For Protagoras, man in his selfhood is defined by his belonging in the radius of the unconcealed. For Descartes, man as self is defined by referring the world back to man's representing;
2. For Protagoras, the beingness of beings – in the sense of Greek metaphysics - is a coming to presence in the unconcealed. For Descartes, beingness means the representedness through and for the subject.
3. For Protagoras, truth means the unconcealment of what is present. For Descartes, the certitude of self-representing and securing representation.
4. For Protagoras, man is the measure of all things in the sense of a measured restriction to the radius of the unconcealed and to the boundaries of the concealed. For Descartes, man is the measure of all things in the sense of the presumption of the de-limitation of representation for self-securing certitude. The standard measure places everything that can pass as a being under the reckoning of representation." Heidegger, note 305, IV, at 122.

It has been argued in this chapter that Finnis' account of the natural law (particularly his affirmation of self-evidence of the basic goods by means of a retorsive argument, and his positing of a subjective principle of morality) presupposes a fundamental metaphysical position in Heidegger's sense. In sections 3.7 and 3.8 below this fundamental metaphysical position will be shown to underlie Finnis' identification of the basic good by means of a "purposive method of analysis", his understanding of the common good as a set of essentially procedural considerations binding the individual in relation to others as a matter of individual, self-constituting, agency, and his conception of God.

3.6 The "Nietzschean" aspect of the "Finnisean" subject

In section 3.5 above Heidegger's analyses of the relationship between subjectivity and truth found in Descartes were briefly reviewed in order to show how the understanding of truth in the metaphysics of subjectivity presupposed in Finnis' account of the natural law is quite different from the theological account of truth found in Aquinas. In this section Heidegger's analyses of Nietzsche's understanding of self-certainty as a consequence of the will to power and of truth as a necessary condition (or value) for intensifying power are briefly reviewed in order to evidence the social nature of the political nihilism implicit in the metaphysics of subjectivity presupposed by Finnis.

"1. Für Protagoras ist der Mensch in seinem Selbstsein bestimmt durch die Zugehörigkeit in einen Umkreis des Unverborgonen. Für Descartes ist der Mensch als Selbst bestimmt durch die Rücknahme der Welt auf das Vorstellen des Menschen.
2. Für Protagoras ist – im Sinne der griechischen Metaphysik – die Seiendheit des Seienden das Anwesen in das Unverborgene. Für Descartes besagt Seiendheit: Vorgestelltheit durch und für das Subjekt.
3. Für Protagoras bedeutet Wahrheit Unverborgenheit des Anwesenden. Für Descartes: Gewißheit des sich vorstellenden und sichernden Vorstellung.
4. Für Protagoras ist der Mensch das Maß aller Dinge im Sinne der mäßigenden Beschränkung auf den Umkreis des Unverborgenen und die grenze des Verborgenen. Für Descartes ist der Mensch das Maß aller Dinge im Sinne der Anmaßung der Entschränkung des Vorstellens zur sich selbst sichern. Die Maßgabe unterstellt alles, was als seiend gelten kann, der Berechnung des Vor-stellens." Heidegger, note 305, II, at 152-153.

3.6.1 The "Ideal" Moment of the Finnisean Subject

In Finnis' account, the basic good of knowledge is recognised in the implicit commitments of the self which asserts itself, because in advance of the recognition, the representing of the good to be affirmed presupposed the priority of subject who is "mathematically" separate from the world. In other words, insofar as the self-evidence of the good of truth or any other basic good is secured by means of *reditio in seipsum* it is secured by reference to the "interior" certainty of the self – an interior "from" which the self then "enters" the world with its secure knowledge as a basis for action in the world.

While the subjectivity of the "Finnisean subject" is secured without reference to either the world or sociality, it does not mean that there are no social consequences arising from its self-assertion. Firstly, given the argument in the preceding sections - that Finnis' account of the self-evidence of the basic goods presupposed a metaphysics of subjectivity based on the will to truth and certainty – then, like the Cartesian subject which enters the exterior world to cancel its dubiety by acts of will,[351] the Finnisian subject enters the world to cancel its scepticism and its ethical and legal dubiety. Secondly, it is argued in the following section that the Finnisean subject's self-assertion takes place on the basis of a self-concealment of the social relations which already make it possible. Thirdly, it is argued in section 3.6.3 below that the Finnisian subject enters the exterior world ascribing values. These features of the Finnisean subject evidence nihilistic revaluation for the sake of valuation: the existing social relations whose existing value can in no way be justified or legitimated, are to be ascribed a new value, *ie* devalued for the sake of revaluation.

[351] Heidegger, "'The Age of the World Picture" in Heidegger, note 308, at 81; Hemming, note 152, at 446.

3.6.2 The Self-concealment of Social Relations

Heidegger argues that human existence is always a manner of being in the world.[352] He uses the metaphor of a snail to clarify that even the Cartesian method of doubt is a mode of being-in-the-world. In retreating into its shell, the snail has not separated herself off from the world, but is simply being-in-the-world in a different way, and in stretching out of its shell the snail does not enter into a relation with the world but merely modifies its already-being-in-the-world.[353] Similarly, the retreat from the dubiety of the world into the certainty of the

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[352] "Man is not only not separate from his world, but the representation of separateness and inseparability has here absolutely no foundation in the state of affairs of being-in-the-world."

"Der Mensch ist nicht nur nicht von seiner Welt nicht zu trennen, sondern die Vorstellung von Trennbarkeit und Untrennbarkeit hat hier überhaupt kein Fundament im Sachverhalt des In-der-Welt-seins." Martin Heidegger, *Zollikoner Seminare* (Klostermann, 1995), at 181.

[353] "We can say that the snail at times crawls out of its shell and at the same time keeps it on hand; it stretches itself out to something, to food, to some things which it finds on the ground. Does the snail thereby first enter into a relation of being in the world? Not at all! Its act of crawling out is but a local modification of its already-being-in-the-world. Even when it is in its shell, its being is a being-outside, rightly understood. It is not in its shell like water in the glass, for it has the inside of the shell as a world which it pushes against and touches, in which it warms itself, and the like. None of this applies to the relationship of being of the water in the glass or, if it did, we would have to say even of water that it has the mode of being of Dasein, it is such that it has a world. The snail is not at the outset only in its shell and not yet in the world, a world described as standing over against it, an opposition which it broaches by first crawling out. It crawls out only insofar as its being is already in the world. It does not first add a world to itself by touching; rather, it touches because its being means nothing other than to be in a world. This applies similarly to a subject to which knowing is ascribed. If it is posited as an entity which is supposed to have this possibility of being, it is thereby understood as an entity which is in the mode of being in a world. But this positing is performed blindly, without an understanding of what in principle is already implied in knowing." Martin Heidegger, *History of the Concept of Time* (Indiana University Press, 1985), at 166.

"Man könnte sagen: Die Schneke kriecht zuweilen aus ihrem Gehäuse und behält es dabei zugleich, sie streckt sich nach irgendetwas aus, nach Nachrung, nach gewisse Dingen, die sie am Boden findet. Kommt die Schnecke dadurch erst in ein Seinsverhältnis zur Welt? Nein! Das Herauskreichen ist nur eine örtlich Modifikation ihres Schon-seins-in-der-Welt. Auch wenn sie in Gehäuse ist, ist ihr Sein rechtverstandenes Draußensein. Sie ist in ihrem Haus nicht wie das Wasser im Glas, sondern sie hat das Innen ihres Hauses als Welt, daran sie sich stößt, das sie betastet, darin sie sich wärmt und dergleichen. Alles was vom Seinsverhältnis des Wassers im Glase nicht gilt, oder, wenn es zuträfe, auch vom Wasser, nötigte uns aufgrund dessen zu sagen: Wasser hat die Seinsart des Daseins, es ist so, daß es eine Welt hat. Die Schnecke aber ist nicht etwa zunächst nur im Haus und noch nicht in der Welt, einer sogenannten gegenüberstehenden Welt, um in ein solches Gegenübersein erst durch das Herauskreichen zu kommen. Sie kreicht nur heraus, sofern sie schon ihrem Sein nach in einer Welt ist. Sie legt sich durch Tasten nicht erst eine Welt zu, sondern sie tastet, weil ihr Sein nicht anderes besagt als in einer Welt sein. So ist es bezüglich eines Subjekts, dem man Erkennen zumutet. Setzt man es als ein Seindes, das diese Seinsmöglichkeit haben soll, dann wird es damit als Seindes verstanden, das in der Weise des Seins in einer Welt ist, nur daß man diese Setzung blind vollzieht, ohne Verständnis dessen, was grundsätzlich mit Erkennen schon gesagt ist." Martin Heidegger, *Prolegomena zur Geschichte des Zeitbegriffs* (Gesamtausgabe 20, Klostermann, 1979), at 224.

Cartesian *cogitio* by means of the method of doubt is a particular manner of being-in-the-world: it is a self-selection of the self (and a self-selection out of the self) in which the social context of general existence is the 'from where' where the self draws itself off.[354] While the subjectivity of the Cartesian subject is secured without reference to sociality it does not follow that there are no social consequences arising from the assertion of the *cogito*, but rather that the assertion takes place on the basis of a self-concealment of the social relations which already make it possible.[355] Similarly, it is argued here that since human existence is always a manner of being in the world, the Finnisean subject's *reditio in seipsum* is also a particular manner of being in the world in which sociality is the 'from where' where the Finnisean subject draws itself off. Like the assertion of the Cartesian *cogito*, the Finnisean subject's self-assertion also takes place on the basis of a self-concealment of the social relations. It is argued in the following section that Finnisean subject "enters the world" ascribing values.

3.6.3 The Metaphysics of Valuation

In his survey of the resurgences of modern man - Enlightenment, Positivism, Classicism, Nationalism, Communism, Individualism[356] - Heidegger also includes what he calls the 'type' (*Typus*) whose essence is neither in 'individuality' nor in the 'mass':

All German texts from Heidegger's *Prolegomena zur Geschichte des Zeitbegriffs* are taken from the *Gesamtausgabe*, volume 20 (Klostermann, 1979) and all English texts are taken from the translation of Keisel in *History of the Concept of Time* (Indiana University Press, 1985).

[354] Laurence Paul Hemming, "A Transcendental Hangover: Lévinas, Heidegger and the Ethics of Alterity" (2005) 18 *Studies in Christian Ethics* 45, at 61.

[355] "...no social relations are self-consciously *entailed* or *required* for the sake of the demonstration of the self-evidence *cogito, ergo sum*: the assertion takes place on the basis of a self-concealment of the social relations which already make it possible...this is the very basis for the capacity and in fact the activity of nihilism to hide and conceal the very means by which it effects what it eventuates" Hemming, note 65, at 240.

[356] "The securing of supreme and absolute self-development of all the capacities of mankind for the absolute domination over the entire earth is the secret goad that prods modern man again and again to new resurgences, a goad that forces him into commitments that secure for him the surety of his actions and the certainty of his aims. The consciously posited binding appears in many guises and disguises. The binding can be human reason and its law (Enlightenment), or the real, the factual, which is ordered and arranged by such reason (Positivism). The binding can be a humanity harmoniously joined in all its accomplishments and moulded into a beautiful figure (the human ideal of Classicism). The binding can be the development of the power of self-reliant nations, or the

> the creation of mankind that finds the shape of its essence neither in 'individuality' nor in the 'mass', but in the 'type'. The type unites in itself in a transformed way the uniqueness that was previously claimed for individuality *and* the similarity and universality that the community demands. But the uniqueness of the 'type' consists in an unmistakable prevalence of the same coinage, which nonetheless will not suffer any dreary egalitarianism, but rather requires a distinctive hierarchy.[357]

The category of the 'type' in the analysis of the modern age clarifies how self-assertion is at once individual but also the highest value that posits social relations.[358] While Heidegger identifies the Prussian army and the Jesuit order as the forerunners of modern man in the essential 'form' (*Gestalt*) of the 'type' (*Typus*),[359] his analysis is informed by the works of Ernst Jünger (1895-1998), especially Jünger's 'Total Mobilisation' (*Die Totale Mobilmachung*, 1930), *The Worker: Dominion and Form* (*Der Arbeiter*: *Herrschaft und*

"proletariat of all lands", or individual peoples and races. The binding can be the development of humanity in the sense of the progress of universal rationality. The binding can also be "the hidden seeds of each individual age", the development of the "individual", the organization of the masses, or both." Heidegger, note 305, IV, at 99.
"Die Sicherung der höchsten und unbedingten Selbstentfaltung aller Vermögen des Menschentums zur unbedingten Herrschaft über die ganze Erde ist die geheime Stachel, der den neuzeitlichen Menschen zu immer neueren und neuesten Aufbrüchen antreibt und zu Bindungen nötigt, die ihm die Sicherung seines Vorgehens und die Sicherheit seiner Ziele sicherstellen. Das wissentlich gesetzte Verbindliche tritt daher in vielen Gestalten und Verschleierungen auf. Das Verbindliche kann sein: die Menschenvernuft und ihre Gesetz (Aufklärung) oder das aus solcher Vernuft eingerichtete und geordnete Wirkliche, Tatsächliche (Positivimus). Das Verbindliche kann sein: das in allen seinen Bildungen harmonisch gefügte und zur schönen Gestalt geprägte Menschentum (Humanität des Klassizismus). Das Verbindliche kann sein: die Machtenfaltung der auf sich gestellten Nation oder die »Proletarier aller Länder« oder einzelne Völker und Rassen. Die Verbindliche kann sein: eine Menschheitsentwicklung im Sinne des Fortschritts einer Allerweltsvernüftigkeit. Das Verbindliche kann auch sein: »die verborgenen Keime der jeweiligen Zeit«, die Entfaltung des »Individuums«, die Organisation der Massen oder beides... " Heidegger, note 305, II, at 127-128.

[357] Heidegger, note 305, IV, at 99-100.
"Das Verbindliche kann auch sein:...die Schaffung eines Menschentums, das weder im »Individuum« noch in der »Masse«, sondern im »Typus« seine Wesensgestalt findet. Der Typus vereinigt in sich gewandelt das Einizigartige, das vormals vom Individuum beansprucht wurde, *und* das Gleichartige und Allgemeine, das die Gemeinschaft fordert. Aber das Einzigartige des »Typus« besteht in einer klaren Durchgängigkeit derselben Prägung, die gleichwohl keine öde Gleichmacherei duldet, sondern einer eigentümlichen Rangordnung bedarf. " Heidegger, note 305, II, at 128.

[358] "The introduction of the category of the 'type' in the analysis of the modern age helps us break through the conundrum that the setting up of the 'I', my own 'I' as reference point of valuation, leaves us with: modern man is not entangled in a war against all, the modern age is, as Nietzsche tell us, 'the most decent and compassionate age'. The decency of the modern age lies in the bind of the modern 'type' that Heidegger defines: self-assertive modern man who understands all too well that self-assertion is at once individual but also the highest value that posits or grounds the community. 'Modern man' is thus a form that results from the specific moment of highest valuation that characterises our epoch." Costea and Amiridis, note 315, at 17.

[359] Martin Heidegger, *Nietzsche: Der europäische Nihilismus* (Gesamtausgabe 48, Klostermann, 1986), at 185.

Gestalt, 1932) and *On Pain* (*Über den Schmertz*, 1934).[360] In his analyses of the total mobilisation inherent in waging a world-scale war, Jünger traced the forces of development by which wars were successively transformed from those of feudal lords, to those of kings, to those of the bourgeois which were then succeeded in the twentieth century by "wars of workers". In his analysis of the political developments which arise from, and transform, the nation-state and the means by which it binds the individual to it – an analysis which is based on his interpretation of Nietzsche - Jünger examined the 'type' (*Typus*) or 'form' (*Gestalt*) of the worker which he understood as a supra-empirical law of the present epoch which dominates the present history of the West. All persons, institutions, and nations are subject to this law to the extent that the spirit of the age takes hold of them, *ie* to the extent all individuals and communities become, wittingly or unwittingly, "workers", and all activities, including leisure, are transformed into activities of work. Jünger calls this process by which the control and domination of reality as a whole is secured by making each moment of reality into either a subject or an object of an all-encompassing work process "total mobilization". Jünger identifies the agent of mobilization as neither the individual, nor society nor the state but the metaphysical *Gestalt* of the worker.[361] Heidegger identifies Jünger's contribution as having interpreted Nietzsche's thought of the will to power as the description of the highest law of the age (as opposed to some poetic call for personal heroism, or an advocacy of imperial power and an ethics of nobility).[362]

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[360] "In the winter of 1939/40, I once again discussed parts of Jünger's book *Der Arbeiter* with a circle of colleagues; I learned that these ideas still seemed strange and disconcerting even then, until they were verified by "the facts."
"Im Winter 1939/40 habe ich dann noch einmal einem Kreis von Kollegen Jüngers Buch „Der Arbeiter" teilweise durchgesprochen und erfahren, wie damals noch diese Gedanken fremd waren und noch befremdeten, bis sie durch „die Tatsachen" bestätigt werden." Martin Heidegger, "Das Rektorat: Tatsachen und Denken" in *Reden und andere Zeugnisse eines Lebensweges 1910-1976* (Klostermann, 2000), at 375.
Martin Heidegger, "On the Question of Being" in Heidegger, note 322, at 295.

[361] Hemming, note 65, at 231-237; Ibáñez-Noé, note 334, at 57-65.

[362] "Ernst Jünger's work *The Worker* is important because, in a way different from Spengler's, it achieves what all the Nietzsche literature thus far has been unable to achieve, namely, to impart an experience of beings and the

Heidegger understands the subjectity of the subject in Descartes as determined out of the certainty of the self-presence of the *ego cogito* to consciousness.[363] From his analyses of Nietzsche he understands the stance toward being where the human being comports itself as 'subject' to be wilful,[364] *ie* a "self-assertion of the objectification of the world" in

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way in which they are, in the light of Nietzsche's projection of beings as will to power." Martin Heidegger, "On the Question of Being" in Heidegger, note 322, at 295.

"Ernst Jügers Werk »Der Arbeiter« hat gewicht, weil es, auf eine andere Art wie Spengler, das leistet, was bisher alle Nietzsche-Literatur nicht vermochte, nämlich eine Erfahrung des Seienden und dessen, wie es ist, im Licht von Nietzsches Entwurf des Seienden als Wille zur Macht zu vermitteln." Martin Heidegger, "Zur Seinsfrage" in Heidegger, note 322, at 390.

"What Ernst Jünger means by his idea and rule of the worker and what he sees in the light of this idea is the universal rule of the will to power within planetary history. Today everything is part of that reality, whether it is called communism, or fascism, or world democracy."

"Was Ernst Jünger in den Gedanken von Herrschaft und Gestalt des Arbeiters denkt und im Licht dieses Gedanken sieht, ist die universale Herrschaft des Willens zur Macht innerhalb der planetarisch gesehenen Geschichte. In dieser Wirklichkeit steht heute Alles, mag es Kommunismus heißen oder Faschismus oder Weltdemokratie." Heidegger, "Das Rektorat: Tatsachen und Denken" in Heidegger, note 360, at 375.
Ibáñez-Noé, note 334, at 62.

[363] "The metaphysics of modernity begins with and has its essence in the fact that modern metaphysics seeks the absolutely undoubtable, what is certain, certainty... [Descartes] seeks the *subiectium* in the course laid down for metaphysics, and as a result he (thinking truth as certainty) discovers the *ego cogito* as what is constantly present. So the ego becomes the subiectium, i.e. the subject becomes self-conscious. The subjectivity of the subject is determined out of the certainty of this consciousness...Beings (*subiectum*) present themselves, in fact they present themselves to themselves, in the mode of the ego cogito. This self-presenting, the re-presenting (representation), is the being of beings qua *subiectium*. Self-knowing itself becomes the quintessential subject. In self-knowing-itself all knowledge and all that can know is gathered... The subjectivity of the subject, as a gathering of this sort, is the *co-agitatio* (*cogitatio*), the *conscientia*, *Ge-wissen*, *conscience*. The *co-agitatio*, however, is intrinsically already *velle*, to will. With the subjectity of the subject, will comes to light as the essence of subjectity. Modern metaphysics of subjectivity, thinks the being of beings in the sense of the will." Martin Heidegger, 'Nietzsche's Word: "God is Dead"' in Heidegger, note 322, at 178, 182.

"Die Metaphysik der Neuzeit beginnt damit und hat darin ihr Wesen, daß sie unbedingt Unbezweifelbare, das Gewisse, die Gewißheit sucht... Insofern Descartes dieses subiectum in der vorgezeichnete Bahn der Metaphysik sucht, findet er, die Wahrheit als Gewißheit denkend, das ego cogito als das ständige Anwesende. So wird das ego cogitio sum zum subiectum, d.h. das Subjekt wird zum Selbstbewußtsein. Die Subjektität des Subjekts bestimmt sich aus der Gewißheit dieses Bewußtseins.... Das Seiende (subiectum) präsentiert sich, und zwar ihm selbst in der Weise des ego cogitio. Dieses Sichpräsentieren, die Re-präsentation (Vor-stellung), ist das Sein der Seienden qua subiectum. Das Sich-selbst-wissen wird sum Subjekt schlechthin. Im Sich-selbst-wissen versammelt sich alles Wissen und dessen Wißbares... Die Subjektität des Subjekts ist als solche Versammlung co-agitatio (cogitatio), die consceintia, das Ge-wissen, conscience. Die co-agitatio aber ist in sich schon velle, wollen. Mit der Subjektität des Subjekts kommt als deren Wesen der Wille zum Vorschein." Martin Heidegger, "Nietzsches Wort »Gott ist tot«" in Heidegger, note 308, at 238, 243.

[364] "The will is not a desire and not a simple striving for something; rather, will is in itself command (cf. *Thus Spoke Zarathustra*, parts I and II; in addition, *The Will to Power*; no. 668, from 1888). Command has its essence in that fact that the commanding master is conscious that he has at his disposal the possibilities of effective action. What is commanded in the command is the realization of this disposal. In the command, the one giving the command (and not just the one carrying it out) is obedient to this disposal and to the condition of giving at his disposal: this is how he obeys himself. In this way, by continuing to risk himself, the one giving the

consequence of will.[365] In this wilful self-assertion the world is posited as the entirety of objects that can be produced.[366] Since "power" (*Macht*) is the essence of the mode in which

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command is superior to himself. To command, which is to be carefully distinguished from merely ordering others about, is to overcome oneself and is more difficult than obeying. Will is gathering oneself together for the task at hand... Will strives for what it wills not just as for something that it does not have. Will already has what it wills. For will wills its willing. Its will is what is has willed. Will wills itself. It exceeds itself. In this way will as will wills above and beyond itself, and therefore at the same time it must bring itself beneath and behind itself. This is why Nietzsche can say (The Will to Power, no. 675, from 1887/8): "*To will* at all amounts to the will to become *stronger*, the will to grow..." Here "stronger" indicates "more power", and that means: only power. For the essence of power is to be master over the level of power attained at a particular time. Power is power only when and only for as long as it is an increase of power and commands for itself "more power"... Part of the essence of power is the overpowering of itself. This overpowering belongs to and springs from power itself, since power is command and as command it empowers itself to overpower the level of power it has at any time. So power is indeed constantly on the way to power itself... In the expression "Will to Power" the word "power" gives the essence of the mode in which will wills itself to the extent that it is command..." Martin Heidegger, 'Nietzsche's Word: "God is Dead"' in Heidegger, note 322, at 174-176.

„Der Wille ist kein Wünschen und kein bloße Wünschen und kein bloßes Streben nach etwas, sondern Wollen ist in sich das Befehlen (vgl. Also sprach Zarathustra I. und II. Teil; ferner Wille zur Macht, 668 a. d. J. 1888). Dieses hat sein Wesen darin, daß der Befehlende Herr ist im wissenden Verfügen über die Möglichkeiten des handelnden Wirkens. Was im Befehl befohlen wird, ist der Vollzug dieses Verfügens. Im Befehl gehorcht der Befehlende (nicht erst der Ausführende) diesem Verfügen und Verfügenkönnen und gehorcht so sich selbst. Dergestaltet ist der Befehlende sich selbst überlegen, indem er noch sich selbst wagt. Befehlen, was vom bloßen Herumkommandieren an den anderen wohl zu unterscheiden bleibt, ist Selbstüberwindung und schwerer als Gehorchen. Wille ist das Sichzusammennehmen in das Aufgegebene... Was der Wille will, erstrebt er nicht erst als etwas, was er nocht nicht hat. Was der Wille will, hat er schon. Denn der Wille will seinen Willen. Sein Wille ist sein Gewolltes. Der Wille will sich selbst. Er übersteigt sich selbst. Dergestalt will der Wille als der Wille über sich hinaus und muß sich so zugleich hinter sich und unter sich bringen. Deshalb kann Nietzsche sagen (Wille zur Macht, 676, a. d. J. 1887/8): »*Wollen* überhaupt, ist soviel wie *Stärker*-werden-wollen, Waschsen-wollen...« Stärker bedeutet hier »mehr Macht«, und dies besagt: nur Macht. Denn das Wesen der Macht beruht im Herr-sein über die je erreichte Machtstufe. Macht ist nur dann und nur so lange Macht, als sie Macht-Steigerung bleibt und sich das »Mehr an Macht« befiehlt... Zum Wesen der Macht gehört die Übermächtigung ihrer selbst. Diese gehört und entspringt der Macht selbst, sofern sie Befehl ist und als Befehl sich selbst zur Übermächtigung der jeweiligen Machtstufe ermächtigt... Indem Titel »Wille zur Macht« nennt das Wort Macht nur das Wesen der Weise, wie der Wille sich selbst will, insofern er das Befehlen ist." Martin Heidegger, "Nietzsches Wort »Gott ist tot«" in Heidegger, note 308, at 234-235.

[365] "In that man makes his essence autonomous, he rises into the willing of himself. With this up-rising of humanity into the will as the willing of himself all things at once and only now become objects. Man in his uprising and the world as object belong together. Man stands in rebellion in the world rendered as an object. Rebellious man permits the world to be only as an object."

"Indem der Mensch sein Wesen auf sich selbst stellt, steht er auf in das Wollen seiner selbst. Mit diesem Aufstand des Menschen in den Willen als das Wollen seiner selbst werden alle Dinge zugleich und erst zum Gegenstand. Der Mensch im Aufstand und die Welt als Gegenstand gehören zusammen. In der Welt als Gegenstand steht der Mensch im Aufstand. Der aufständische Mensch läßt nur die Welt als Gegenstand zu." Heidegger, *Nietzsches Metaphysik* (Gesamtausgabe 50, Klostermann, 1990), at 111.

[366] "Will, in the sense given here, is the self-assertion whose intention *has already* posited the world as the entirety of objects that can be produced. This will determines the essence of modern man, without his having known anything at first about its far-reaching consequences, and without his being able to know even today the will which, as the being of beings, is the source of this will that is willed. In such willing, modern man turns out to be the one who surges up – in every relation to everything and establishes this insurgency as absolute mastery. The whole inventory of objects, in which guise the world appears, is entrusted to, enjoined upon, the production that asserts itself, and so is subordinated to the command of production. Will has in itself the nature of command; for deliberate self-assertion is a way in which the situation of producing and the objectivity of the

will wills itself, the drive into more power involves the setting of conditions for the intensification of power.[367] In particular, given the wilful production of objects, truth is a

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world muster themselves together in an absolute and therefore complete oneness. In this self-mustering, the imperative character of the will is announced. With it, in the course of modern metaphysics, there comes to light the long-hidden essence of the will that has long since been essencing as the being of beings. Accordingly, human willing can also be in the mode of self-assertion only by forcing everything into its realm in advance, even before it surveys anything. For this will, everything, already and in advance and therefore in consequence, is relentlessly turned into the material of self-asserting production. Earth and its atmosphere are turned into raw material. Man becomes human material that is applied to goals that have been set out before him. The absolute self-assertion of the deliberate production of the world is unconditionally established as the condition of human command; this is a process that comes out of the hidden essence of technology." Heidegger "Why Poets?" in Heidegger, note 308, at 216-217.

"Das hier genannte Wollen ist das Sichdurchsetzen, dessen Vorsatz die Welt *schon* als das Ganze der herstellbaren Gegenstände gesetzt *hat*. Dieses Wollen bestimmt das Wesen des neuzeitlichen Menschen, ohne daß er zunächst um seine Tragweite weiß, ohne daß er heute schon wissen könnte, aus welchem Willen als dem Sein des Seienden dieses Wollen gewillt ist. Der neuzeitliche Mensch stellt sich in solchem Wollen als das heraus, der in allen Beziehungen zu allem, was ist, und damit auch zu ihm selbst, als der sich durchsetzende Hersteller aufsteht und diesen Aufstand zur unbedingten Herrschaft einrichtet. Das Ganze des gegenständigen Bestandes, als welcher die Welt erscheint, ist dem sich durchsetzenden Herstellen anheimgestellt, anbe-fohlen und so seinem Befehl unterstellt. Das Wollen hat in sich die Art des Befehls; denn das vorsätzliche Sichdurchsetzen ist eine Weise, in der sich das Zuständliche des Herstellens und das Gegenständliche der Welt zu einer unbedingten und darum vollständigen Einheit zusammen-nimmt. Darin, im Sichzusammennehmen, kündigt sich der Befehlscharakter des Willens an. Mit diesem kommt im Verlauf der neuzeitlichen Metaphysik das lang verborgene Wesen des langher wesenden Willens als des Seins des Seienden zum Vorschein. Dementsprechend kann auch das menschliche Wollen nur so in der Weise des Sichdurchsetzens sein, daß es zum voraus alles, ohne es schon zu übersehen, in seinen Bereich zwingt. Für dieses Wollen wird im vorhinein und darum in der Folge unaufhaltsam alles zum Material des sich durchsetzenden Herstellens. Die Erde und ihre Atmosphäre wird zum Rohstoff. Der Mensch wird zum Menschenmaterial, das auf die vorgesetzten Ziele angesetzt wird. Die unbedingte Einrichtung des bedingungslosen Sichdurchsetzens der vorsätzlichen Herstellung der Welt in den Zustand des menschlichen Befehls ist ein Vorgang, der aus dem verborgenen Wesen der Technik hervorkommt." Heidegger "Wozu Dichter?" in Heidegger, note 308, at 288-289.
Hemming, note 125, at 170-172.

[367] "In order for will, in the overpowering of itself, to be able to overcome the level it has reached at any given time, this level must already have been attained, secured, and retained. To secure a given level of power is the condition necessary for intensifying power. However, this necessary condition is not sufficient to ensure that the will is able to will itself, i.e. that a will to be stronger *is*, that an increase of power *is*. Will must look into the field of sight, must first open this field, in order that the possibilities from there (possibilities that indicate the way for an increase of power) show themselves in the first place. Will must set such conditions of willing-above-and-beyond-itself. Above all, the will to power must set conditions: conditions for the preservation and increase of power. Part of the willing is the setting of these conditions which belong together intrinsically. *Will*, in general, amounts to the will to become *stronger*, the will to grow – and also to will "the *means to that end*" (*The Will to Power*, no. 675, from 1887/88). The essential means are the conditions of the will to power itself that are posited by the will to power itself. Nietzsche calls these conditions "values". He writes (*Werke*, vol. XIII, "Nachgelassene Werke", §395, from 1885): "*In all will is an esteeming estimation.*" To esteem means: to constitute and ascertain value. The will to power esteems in that it constitutes the conditions of increase and fixes the condition of preservation. In accordance with its essence, the will to power is the will that posits values. Values are the conditions of preservation-increase within the being of beings. The will to power, as soon as it comes to light specifically in its pure essence, is itself the ground and realm for the dispensation of values." Martin Heidegger, 'Nietzsche's Word: "God is Dead"' in Heidegger, note 322, at 236-237.

"Damit der Wille in der Übermächtigung seiner selbst die jeweiligen Stufe übersteigen kann, muß diese Stufe zuvor erreicht, gesichert und festgehalten sein. Die Sicherung der jeweiligen Machtstufe ist die notwendige Bedingung der Überhöhung der Macht. Aber diese notwendige Bedingung ist nicht hinreichend dafür, daß der Wille sich wollen kann, d.h. daß ein Stärkersein-wollen, eine Machtsteigerung *ist*. Der Wille muß in ein

necessary condition for the preservation of power.[368] In other words, Heidegger understands the metaphysics of subjectivity on the basis of the "will to truth" (which he identifies as "a kind of will to power").[369]

Gesichtsfeld hineinblicken und dieses erst aufschließen, damit sich von daher allererst Möglichkeiten zeigen, die einer Machtsteigerung die Bahn weisen. Der Wille muß so eine Bedingung der Über-sich-hinaus-wollens setzen. Der Wille zur Macht muß zumal setzen: Bedingungen der Machterhaltung und der Machtsteigerung. Zum Willen gehört das Setzen dieser in sich zusammengehörigen Bedingungen. »*Wollen* überhaupt, ist soviel wie *Stärker*-werden-wollen, Waschsen-wollen – und *dazu* auch die Mittel wollen.« (Wille zur Macht, 675, a. d. J. 1887/88). Die wesenhaften Mittel sind die vom Willen zur Macht selbst gesetzten Bedingungen seiner selbst. Diese Bedingungen nennt Nietzsche die Werte. Er sagt (*Werke* XIII, 395, a. d. J. 1884) »In allem Willen ist *Schätzen*«. Schätzen bedeutet: den Wert ausmachen und festhalten. Der Wille zur Macht schätzt, insofern er die Bedingung der Steigerung aus- und die Bedingung der Entfaltung festmacht. Der Wille zur Macht ist seinem Wesen nach der Werte-setzende Wille. Die Werte sind die Erhaltungs-, Steigerungs-Bedingungen innerhalb des Seins der Seienden. Der Wille zur Macht ist, sobald er eigens in seinem reinen Wesen zum Vorschein kommt, selbst der Grund und Bereich der Wertsetzung." Martin Heidegger, "Nietzsches Wort »Gott ist tot«" in Heidegger, note 308, at 177.
de Beistegui, "Questioning Politics, or Beyond Power" (2007) 6 *European Journal of Political Theory* 87, at 88-111.

[368] "To preserve the levels of power which the will has attained at particular times requires that the will surround itself with that which it can reliably and at any time fall back on and from which its security is to be guaranteed. These surroundings enclose the enduring existence, at the immediate disposal of the will, of that which presences (*οὐσία* in the ordinary meaning of the word among the Greeks). This enduringness is however turned over into a permanence, i.e., into that which is constantly at one's disposal, only by its being brought to stand by having set it in place. This placing has the nature of a production that re-presents... Accordingly, truth is a condition set in the essence of the will to power, namely, the condition of the preservation of power. Truth, as this condition, is a value. However, because the will can will only on the basis of having something enduring at its disposal, truth is the value necessary for the will to power and originating from the essence of the will to power. The name of "truth" signifies now neither the unconcealment of beings nor the agreement of knowledge and object of knowledge, nor certainty as the delivering and securing of what has been represented. Truth – to be precise, truth that has its essential-historical origin in the modes of its essence indicated above – is now that securing which makes durables endure and which secures the surroundings out of which the will to power itself wills." Heidegger, note 308, at 179.

"Die Erhaltung der jeweiligen erreichten Machtstufe des Willens besteht darin, daß der Wille sich mit einem Umkreis von solchem umgibt, worauf er jederzeit und verläßlich züruckgreifen kann, um daraus seine Sicherheit zu bestreiten. Dieser Umkreis umgrenzt den für den Willen unmittelbar verfügbaren Bestand an Anwesendem (*οὐσία* nach dem alltäglichen Bedeutung dieses Wortes bei den Greichen). Dieses Beständige wird jedoch nur so zu einem Ständigen, d.h. zu solche, was stets Verfügung steht, daß es durch ein Stellen zum Stand gebraucht wird. Dieses Stellen hat die Art der vor-stellendes Herstellens... Demgemäß ist die Wahrheit eine im Wesen des Willens zur Macht gesetzte Bedingung, nämlich diejenige der Machterhaltung. Die Wahrheit ist als diese Bedingung win Wert. Weil der Wille aber nur aus dem Verfügen über ein Beständiges wollen kann, ist die Wahrheit der aus dem Wesen des Willens zur Macht für diesen notwendige Wert. Der Name Wahrheit bedeutet jetzt weder die Unverborgenheit des Seienden, noch die Übereinstimmung einer Erkenntnis mit dem Gegenstand, noch die Gewißheit als das einsichtige Zu- und Sicherstellens des Vorgestellten. Wahrheit ist jetzt, und zwar in einer wesengeschichtlichen Herkunft aud den genannten Weisen ihres Wesens, die beständigende Bestandsicherung des Umkreises, aus dem hier der Wille zur Macht sich selbst will." Heidegger, note 308, at 239-240.

[369] "But let us recall that Nietzsche himself explained Descartes' principle on the basis of the will to truth, and the will to truth as a kind of will to power. Consequently, Descartes' metaphysics is indeed a metaphysics of will to power, albeit an unwitting one." Heidegger, note 305, IV, at 179.

Heidegger understands the typical man to be the subject as subject which in its drive for security, *ie* in securing the indeterminate self over against its indeterminacy, distinguishes himself in his very self precisely with respect to, and over against, what he perceives to be what the common lot seek after[370] and in this context Heidegger understands rule or dominion to be the metaphysical essence of justice.[371] As Hemming explains:

> The drive to be highest, best, above the herd is experienced not as the assertion of a present (but yet unseen) state, but as a lack, something missing in the subject which is to be attained and, as willed to be made appear, thereby *will* be made to appear...However, the drive in to power is itself counterposed by the arrival of the moral in a particular form...Inasmuch as I distinguish myself from you, and separate myself from you (while remaining essentially the same: indeterminate...), I excite the demand for justice – for the levelling-off that can only be resisted by the possession of a stock of power. The stock can be accumulated money (or the power to access it, in the form of credit), but it can also be the enforcement character of the state, or an appeal to law, and so forth. This levelling-off is also the experience of a lack: of the drive and desire for justice over against stocks of power, themselves posited above all by those who exercise them in the very claim they make not to have them.
>
> Why is justice a higher form than the brute expression of power, asserted, we might say, as the sheer drive to greed and self-attainment through (the triumph of willed) self-assertion? Except that the essence of political nihilism is social, it is essentially disclosed through the relations between subjects – and therefore it is not what I can take *for myself* but always *what I can take with respect to you.* To say I self-identify as *X* means that in justice, you must accept me as that *X* that I say I am. To take requires justification... It is far more powerful to secure the indeterminacy of the subjectivity of the subject through justified differentiation than through the *un*justified... It is not the essence of nihilism to collapse all to nothing, to establish every thing that appears with merely nugatory value, a value without relativity because universally set at nought. Rather, nihilism is itself the assumption that every thing, already essentially valueless, or whose existing ("essential") value can in no way be justified, deferred to, or legitimated, calls forth and demands devaluation for the sake of revaluation. Everything is to be ascribed a value all over again.[372]

"Doch wir erinnern uns, daß Nietzsche selbst den Satz des Descartes aus dem Willen zur Wahrheit und diesen als eine Art des Willens zur Macht erklärt. Demnach ist Descartes' Metaphysik doch schon eine Metaphysik des Willen zur Macht, nur unwissentlich." Heidegger, note 305, II, at 211.

[370] "The opposite of what the common herd desire is necessary for the elevating of the typical man."
"Der Gegensatz aller Herden-Wünschbarkeit ist zur Erhöhung des Typus Mench notwendig." Martin Heidegger, *Nietzsche: Seminare 1937 und 1944* (Gesamtausgabe 87, Klostermann, 2004), at 66.

[371] "Dominion - as the metaphysical essence of justice, this as 'truth' of the highest will to power."
"Herrschaft – als das metaphysische Wesen der Gerechtigkeit; diese als „Wahrheit" des höchsten Willens zur Macht." Martin Heidegger, *Zu Ernst Jünger* (Gesamtausgabe 90, Klostermann, 2004), at 172.
Heidegger, 'Nietzsche's Word: "God is Dead"' in Heidegger, note 308, at 182-183.

[372] Hemming, note 65, at 244-245.
This will be taken up again in Section 9.4 below.

While rule is essentially ordering, *ie* it is essentially what orders into hierarchy and distinction, the emergence of the type transforms the way in which the ascription of value, hierarchy and distinction are to be understood.[373] As Hemming explains:

> Determining and rank-ordering are "to be understood therefore as metaphysical"...The subject does not so much "value" in terms of assert itself and then impose values on what it finds (thereby "choosing" the values it ascribes, rather like Adam giving names to the subordinate creatures of Eden). Rather, the unconditioned subject conditions itself through the values it ascribes – the subject is also subject to (subjected by) the means and manners of valuation.[374]

Thus Heidegger understands the political forms of the modern age – fascism, communism, world democracy (or what we might call globalisation) – are attained through the metaphysics of valuation and indicate the arising triumph of the subjectivity of the subject.[375] These political forms – all of which presuppose the State as the mode of political organization best equipped to maximize and rationalize the imperatives of power[376] - evidence the ever-

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[373] "The appearance of the worker as the form of the age (both the form the age produces, and the form which *is* how the age is to be understood) transforms the way in which hierarchy and distinction are to be understood....Heidegger [commenting on Jünger] concludes that the determining and rank-ordering are "to be understood therefore as metaphysical", which brings to the fore that "more decisive even than the worker is rank-ordering itself as the jointure of beings". The emerging form of the worker, as the decisive way in which all beings (ideas, concepts appearances, *things*) are set into relation with another, means not that the (type of the) worker himself is the decisive origin and apex of order, of *arche* as such, but that the type of the worker both conceals (by taking over and assuming the apex of ordering) and lets be seen rank-ordering, setting-into-relation, *arche*, as such. Heidegger derives this understanding from the *un*conditioned character of the subject." *Ibid*, at 246.

[374] *Ibid*, at 246-247.

[375] "If the worker is typified in the forms of fascism (Nazism), communism (Bolshevism), and Americanism, these are for Heidegger only the means by which the underlying metaphysics of valuation eclipses what Jünger refers to as the latest political forms (after the feudal, monarchical, and others). "World democracy" is not, therefore, either for Heidegger or for Nietzsche, a final form, understood as presence, but the manner of an overcoming, and emerging presen*cing*, something on its way and coming from before us. World democracy, as the triumph of something European (of which the American is only a latter form) on a planetary scale is attained through the metaphysics of valuation, which itself indicates the arising triumph of the subjectivity of the subject. This emerging is essentially "rank-ordering": it does not cancel difference, it produces it in order to arrive at all. The force of necessity cannot be overestimated: the subject, in order to arrive and be visible, must and does arrive visibly (already) ascribing values." *Ibid*, at 248.

[376] de Beistegui, note 367, at 96.

transforming manner of the capacity to take power over the claim to justice – a taking power which conceals the metaphysics of valuation.[377] As Hemming explains:

> Now every *thing* to be valued is at one and the same time devalued – separated from the manner and place of its appearing, from the world and being through being made a thing that can be valu*able* at all, even if its value is devaluation as such – and then ascribed a value which comes from no *beyond*, from no transcendent *one*, even if it is an event of transcend*ing*. The ascription of value is an event of subjectivity, it is the enactment of the intersubjective: it is not drawn off from the already-given unity of being (as the unity of the nothing which lets the world emerge in its pluriformity), rather it attains to unity constantly, and produces the drive to unity as its constant and ultimate goal. Valuations are in and of themselves relations, *the* relations of rulership, power, and command, even as they mask themselves as claims to justice. They arise from the powering-up of power itself, and in the iron logic of the values and positions they enforce, they do this best as necessities, as claims to the ascription of freedom...The securing of the subjectivity of the subject therefore turns out to be, not generalised revolution, but the continued, justified, and legitimated assertion of the subject in its claims to be secured through an overcoming inherent in all social relations as the very establishment and prior possibility of those relations.[378]

Heidegger argues that in the characterization of something as "a value" what is so valued is robbed of its worth. He identifies the metaphysics of subjectivity as necessarily built into the affirmation of any system of values and argues that only through a critique of the affirmation of value is it possible to think the essence of nihilism and not just reproduce it[379]:

> ...by the assessment of something as a value what is valued is admitted only as an object for human estimation. But what a thing is in its being is not exhausted by its being an object, particularly when objectivity takes the form of value. Every valuing, even where it values positively, is subjectivizing. It does not let beings *be*. Rather, valuing lets beings *be valid* – solely as the objects of its own evaluating activity. This peculiar effort to prove the objectivity of values does not know what it is doing. For even if one declares 'God' to be the highest value, it is still a diminishing of the

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[377] "Heidegger says "The ruler is – the one who has the means to alter the will to power – and knows that it supplies a courage which requires neither brutality nor "heroism" in the contemporary sense". The courage supplied will produce an *aristocracy* of those – of a "race" (we might say "order") – not yet seen, who will take command over the planet (will globalise themselves), through *the* ever-transforming manner of the capacity to take power over the claim to justice, as the concealment of the metaphysics of valuation. Only something on a truly planetary scale could attain to this – something, let us say, like the drive to save the planet itself. Nihilism on a planetary scale could appear exactly as the drive to set a new value on the planet as such and as a whole, with the legitimating force of incriminating everyone who fails to cooperate with the task in hand – a totalitarian goal nevertheless entirely exculpated from all accusations of a totalitarian motive because of its sheer urgency and necessity. *Not* to be seen to be saving the planet, even at the most trivial (let alone grandiose) level, is to be guilty of collaborating in the planet's destruction." Hemming, note 65, at 248-249.

[378] *Ibid*, at 249.

[379] Hodge, note 319, at 98.

> essence of God. This thinking in terms of value is the greatest blasphemy against being. To think against values therefore does not mean to beat the drum for the valueless and nullity of beings. It means rather to bring the clearing of the truth of being before thinking, as against subjectivizing beings into mere objects."[380]

It is argued here that, given the mathematical nature of the Finnisean subject presupposed in retorsion, the Finnisean subject's ascriptions of value - the goods to be pursued, the requirements of practical reasonableness to be satisfied, the general moral standards to be attained, the laws which can be enacted by the State - is an event of subjectity. These valuations which are in and of themselves relations of rulership and power even as they are articulated as claims to reasonableness, ethical propriety and justice. While the Finnisean subject's self-assertion takes place on the basis of a self-concealment of the social relations which already make it possible, its "emergence" into the world of sociality is essentially "rank-ordering" which is at once a concealment of the metaphysics of valuation.

3.7 The Purposive Method of Analysis

Even if Finnis establishes the self-evidence of the basic good of knowledge by a retorsive argument, it is difficult to see how the self-evidence of such other basic goods as religion and excellence in play could be established by a retorsive argument. However, Finnis also proposes "an essentially purposive method of logical analysis" to identify the basic goods:

> The most direct way to uncover the basic goods is by considering actions and asking "Why are you doing that?" and "Why should we do that?" and so on. Persisting with such questions eventually uncovers a small number of basic purposes of diverse kinds. These purposes arouse interest because their intelligible aspects are instantiations of the diverse basic goods.[381]

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[380] „...durch die Einschätzung von etwas als Wert wird das Gewertete nur als Gegenstand für die Schätzung des Menschen zugelassen. Aber das, was etwas in seinem Sein ist, erschöpft sich nicht in seiner Gegenständlichkeit den Charakter des Wertes hat. Alles Werten ist, auch wo es positiv wertet, eine Subjektivierung. Es läßt das Seinde nicht: sein, sondern das Werten läßt das Seinde lediglich als das Objekt seines tuns – gelten. Die absonderliche Bemühung, die Objektivität der Werte zu beweisen, weißt nicht, was sie tut. Wenn man vollends »Gott« als »den höchsten Wert« verkündet, so ist das eine Herabsetzung des Wesens Gottes. Das Denken in Werten ist hier und sonst die größte Blasphemie, die sich dem Sein gegenüber denken läßt. Gegen die Werte denken, heißt daher nicht, für die wertlosigkeit und Nichtigkeit des Seienden die Trommel rühren, sondern bedeutet: gegen die Subjektivierung des Seienden zum bloßen Objekt die Lichtung der Wahrheit des Seins vor das Denken bringen." Heidegger, 'Brief über den »Humanismus«' in Heidegger, note 322, at 349.

[381] Grisez, Boyle and Finnis, note 24, at 106-107.

It was argued in the preceding sections that Finnis imports a metaphysical interpretation of the problem of being into his affirmation of the basic good of knowledge by means of his reliance on the priority of the self in retorsion. It is argued in this section that insofar as Finnis' "purposive method of logical analysis" can be understood as relying on a Leibnizian first principle of science – that nothing is without a reason (*nihil est sine ratione*) - it too imports a metaphysical interpretation of the problem of being into the identification of the basic goods.

As Heidegger observed, the search for grounds is inevitably guided by what requires a ground since the ground is only sought for the sake of what is to be grounded (and so is circumscribed by the purposes associated with what is to be grounded), *ie* the search for what grounds involves the reduction of what grounds to the demands of what is to be grounded. This presupposes a Cartesian standard of truth as certainty: a grounding reason is a reason that can be given back to the subject – a subject that, since Descartes, grounds all knowledge.[382]

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[382] "Strictly speaking, for Leibniz, the principium rationis is the *principium reddendae rationis*. *Rationem reddere* means "to give back reason." What "back", and "back" to where?... The Latin language of philosophy says it more clearly: cognition is *representatio*. What is encountered is presented to a cognizing I, presented back to and over against it, made present. According to the *principium reddendae rationis*, cognition must render to cognition the reason for what is encountered – and that means give back (*reddere*) to cognition – if it is to be a discerning cognition. In a discerning cognition a reason is rendered to the discerning I. The *principium rationis* requires this. Therefore for Leibniz the principle of reason is the fundamental principle of rendering reasons." Martin Heidegger, *The Principle of Reason* (Indiana University Press, 1991), at 22.

"Das principium rationis ist für Leibniz, streng gedacht, das principium reddendae rationis. Rationem reddere heißt: den Grund zurückgeben. Weshalb zurück und wohin zurück?... Die lateinische Sprache der Philosophie sagt deutlicher: das Vorstellen ist re-presentatio. Das Begegende wird auf das vorstellende Ich zu, auf es züruck und ihm entgegen praesentiert, in eine Gegenwart gestellt. Gemäß dem principium reddendae rationis muß das Vorstellen, wenn es ein erkennendes sein soll, den Grund des Begegnenden auf das Vorstellen zu und d.h. ihm zurück (*reddere*). Im erkennenden Vorstellen wird dem erkennenden Ich der Grund zu-gestellt. Dies verlangt das principium rationis. Der Satz vom Grund ist darum für Leibniz der Grundsatz des zuzustellenden Grundes. " Martin Heidegger, *Der Satz vom Grund* (Gesamtausgabe 10, Klostermann, 1997), at 44-45.

All German texts of Heidegger's *Der Satz vom Grund* are taken from the *Gesamtausgabe* volumes 10 and all English translations are taken from the translation by Lilly *The Principle of Reason* (Indiana University Press, 1991).

"After Descartes, followed by Leibniz and all of modern thinking, humans are experienced as an I that relates to the world such that it renders the world to itself in the form of connections correctly established between the representations – that means judgments – and thus sets itself over against this world as an object. Judgments and statements are correct, that means true, only if the reason for the connection of subject and predicate is rendered, given back to the representing I... Nothing is without reason. The principle now says that everything counts as

In sum, under the authority of the principle of sufficient reason, grounds are only sought for the sake of securing the orderability of beings, *ie* for human mastery over beings.[383] Similarly, when Finnis seeks, by means of the purposive method of analysis, the reasons for various human activities in the hope that knowledge of such reasons may help him more accurately discern the specific requirements of intelligible human action, the reasons which emerge for the various activities will be circumscribed by the demands of this discernment -

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existing when and only when it has been securely established as a calculable object for cognition." *Ibid*, at 120-121.
"Nun wird aber seit Descartes, dem Leibniz und mit ihm das gesamte neuaeitliche Denken folgender Mensch als das Ich erfahren, das sich so aud die Welt bezieht, daß es diese in richtigen Vorstellungsverknüpfungen, d.h. Urteilen sich zu-stellt und so als Gegenstand sich entgegenstellt. Richtig, d.h. wahr sind die Urteile und Aussagen nur dann, wenn der Grund der Verknüpfung von Subjekt und Prädikat dem vorstellenden Ich zugestellt, auf dieses zurückgeben wird... Nichts ist ohne Grund. Der Satz sagt jetzt: Jegliches gilt dann und nur dann als seiend, wenn es für das Vorstellen als ein berechenbarer Gegenstand sichergestellt ist." *Ibid*, at 194-196. Shalini Pradeepa Satkunanandan, *The Turn: Plato, Kant, and Heidegger on the Encounter with the Ground of Obligation* (Ph.D. thesis, University of California, Berkeley, 2007), at xv-xvii.

[383] "The *principium rationis*, the principle of reason, becomes the fundamental principle of all cognition. This means: dominated by the *principium rationis* cognition becomes unmistakably rational, and governed by reason. From time immemorial *ratio* has meant not only "account" in the sense of that which stands to account for something else, that is, founds it. *Ratio* also means "account for" in the since of "vindicating", of confirming something as being in the right, of correctly figuring something out and securing something through such a reckoning. Reckoning in this broad sense is the way humans take up something, deal with it, and take it on, which means, in general perceive something. *Ratio* is a manner of perceiving, which means, it is reason. Rational cognition follows the *principium rationis*... The perfection of technology is only the echo of the demand for perfectio, which means, the completeness of a foundation. This demand speaks from out of the *principium reddendae rationis sufficientis*, from the fundamental principle of rendering sufficient reasons... Without really understanding it, we know today that modern technology intractably presses towards bringing its contrivances and products to an all-embracing, greatest-possible perfection. This perfection consists in the completeness of the calculably secure establishing of objects, in the completeness of reckoning with them and with the securing of the calculability of possibilities of reckoning...Modern technology pushes towards the greatest possible perfection. Perfection is based on the thoroughgoing calculability of objects. The calculability of objects presupposes the unqualified validity of the *principium rationis*. It is in this way that the authority characteristic of the principle of reason determines the essence of the modern, technical age." Heidegger, note 382, at 120-121.

"Das principium rationis, der Satz vom Grund wird zum Grundsatz alles Vorstellens. Dies beasgt: Das Vorstellen wird, vom principium rationis durchherrscht, jetzt ausgesprochen rational, von der Vernunft verwaltet. Denn «ratio» bedeutet von altersher nicht nur Rechenschaft im Sinne dessen, was anderes rechtfertigt, d.h. begründet. Ratio bedeutet zugleich Rechenschaft im Sinne von rechtfertigen, etwas als zu Recht bestehend, als richtig errechnen und durch solche Rechnung sichern. Dieses weit gedachte Rechnen ist die Weise, wie der Mensch etwas aufnimmt, vornimmt und annimmt, d.h. überhaupt etwas ver-nimmt. Ratio ist die Weise des Vernehmens, d.h. die Vernunft. Das vernünftige, rationale Vorstellen folgt dem principium rationis... Wir wissen heute, ohne es schon recht zu verstehen, daß die moderne Technik unaufhaltsam dahin drängt, ihre Einrichtungen und Erzeugnisse in die allumfassende, größmöglichste Perfektion zu treiben. Diese Perfektion besteht in der Vollständigkeit der berechenbaren Sicherstellung der Gegenstände, des Rechnens mit ihnen und der Sicherung der Berechenbarkeit der Rechnungsmöglichkeiten....Die moderne Technik treibt in die größmögliche Perfektion. Die Perfektion beruht auf der durchgängigen Berechenbarkeit der Gegenstände. Die Berechenbarkeit der Gegenstände setzt die unbeschränkte Geltung des principium rationis voraus. So bestimmt dann die gekennzeichnete Herrschaft des Satzes vom Grund das Wesen des modernen, technischen Zeitalters." Heidegger, note 382, at 196-197.

with the consequence that any possible reason for human action that cannot generate guidance on what intelligible human action requires will not count as a "reason". Thus Finnis imports a metaphysical interpretation of the problem of being into his identification of the basic goods by means of the purposive method of analysis in that reasons have to be "given back" to the discerning subject so as to further the (ethical and legal) orderability of man and man's world.

Finnis' account of the method of purposive analysis also raises a particular problem with regard to the good of knowledge. Finnis appeals to his interpretation of Aquinas in support of his argument that knowledge of the first practical principles must be acquired[384] and that the experience of pre-rational inclinations precedes and supplies the data for the intellect's insight into the basic human goods which are the ends specified by the first practical principles.[385] (In one text however, Finnis argues that practical knowledge of the human goods precedes and causes the inclination towards them[386] while later in the same text he reverts to his usual argument that the inclination towards the human goods is part of coming to understand them.[387]) Since the pre-rational inclinations supply the data for the intellect's insight into the

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[384] "...Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason (and not just metaphysicians), are *per se nota* (self-evident) and demonstrable. They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about 'the function of a human being'; nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate)." Finnis, note 21, at 33-34.
Finnis, note 284, at 88.

[385] "Aquinas considers that practical reasoning begins not by understanding [human] nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature, but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations." Finnis, note 21, at 34.
Finnis, note 268, at 51; note 284, at 93.

[386] "Confusion in these matters arises from many sources. One potent source is this. Anyone who is acting voluntarily is *motivated* (...by his reason for acting, his conception of a good to be attained by acting)...Indeed, we can say of him that he *wants* to be doing this act...Then people leap to the conclusion that we have here the sort of pre-rational desire that (some) philosophers imagine provides the basis for practical reasoning. But what we really have here are desires that (if we retain the 'basis' metaphor) are based upon practical understanding. These desires can be predicated of the person involved only because he is acting...for some reason which can be fully specified without referring to a desire." Finnis, note 268, at 35 (emphasis in the original).

[387] "...feelings and desires and inclinations of every kind are, as I have indicated, part of this coming to understand human goods." *Ibid*, at 51.

basic human goods, Finnis distinguishes them from 'intuitions' which might "occur in the absence of data or by virtue of any noticeable intellectual act".[388] Finnis describes reason's ability to distinguish between the possibilities given in experience that are truly desirable goods and those that he calls "dead-ends" as a "truly empirical" reflection upon the data which proceeds by purposive analysis[389] and he explicitly denies that the understanding of the good is derived or inferred from the experience of the inclination.[390] In sum, Finnis argues that knowledge of the first practical principles is neither innate nor inferred from either speculative principles or facts, rather it is acquired in the course of a reflection upon the data given in the inclinations but is not derived or inferred from the experience of the inclination.[391] Thus, Finnis does not give an account of the source of this knowledge other than to assert that it is preceded by a certain type of inclination. This assertion - that the prior experience of inclinations towards objects is necessary in order to provide data for the intellect's grasp of those objects as instances of basic human goods - raises a particular problem with regard to the good of knowledge. Finnis identifies curiosity as an inclination

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Klassen, note 69, at 292-294.

[388] "By an insight which is not an 'intuition' (because it is not made in the absence of data, nor by any 'noticeable' intellectual act) and not a deduction of inference from one *proposition* to another, one understands some of those inclinations as inclinations towards *desirable* objects, and some of those possibilities as opportunities rather than dead-ends." Finnis, note 268, at 51 (emphasis in the original).

[389] "Reflection on practical reasoning and human action is truly empirical when it seeks to understand human capacities by understanding their object(ive)s. Thus the revealing question is the question 'Why?'... [interpreted] humanly and intelligently as 'What for?' Only thus will one be able to describe one's actions as they really are, and oneself as the agent one really is. And only thus will the relations between desire and understanding in the identification and pursuit of human goods be accurately known...when one pursues the question 'What for?' to the point where no further such question is intelligent, one arrives, not at a 'contingent desire' or state of feeling...to be explained in turn by the mechanics, biology and/or psychology of 'human nature'. Rather, one arrives at the perception (i.e. the understanding or intelligent discernment) of a basic form of human flourishing in which, not one human being on one occasion, but somehow all human beings in appropriate circumstances can participate." *Ibid*, at 51-52.

[390] "One proceeds by reflecting on one's own wanting, deciding and acting; and this reflection must not be an attempt to peer inside oneself, or to catch oneself as it were in a mirror out of the corner of one's eye: those empiricist methods, based on the uncritical fancy that understanding is just a matter of opening one's eyes (or other senses) and looking, yield nothing but illusions." *Ibid*, at 51.

[391] Klassen, note 69, at 292-294.

which is often unaccompanied by any particular state of feelings but which nonetheless precedes and provides the basis for the intellect's grasp of the good of knowledge.[392] Reflection upon the experience of the inclination (curiosity) leads to the understanding of the general principle (that ignorance is to be avoided and that knowledge is to be pursued).[393] That this inclination is often unaccompanied by any particular state of feelings suggests that it is neither proper to the sensitive appetite nor the natural appetite but rather that it is proper to the rational appetite (or will) and so is a volition. Thus Finnis presents the general principle 'ignorance is to be avoided and knowledge is to be pursued' as an example of a first practical principle that presupposes a volition whose object it provides.[394] In other words, in the case of the good of knowledge, Finnis seems to suggest that there is an identity between the object of the inclination given in experience and the good known in virtue of such an experience while at the same time he denies both that knowledge of the good is innate and that it is derived or inferred (from either speculative principles or facts or the experience of the inclination). As Finnis' account leaves unexplained the source of this knowledge, it also leaves unexplained how the intellect can distinguish ends that are goods from ends that are "dead-ends".[395] It is argued here that Finnis' account can be understood in consequence of the metaphysics of subjectivity implicit in his identification and affirmation of the basic goods. In both his retorsive argument and his purposive analysis Finnis presupposes the self

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[392] "Curiosity is the name for the desire or inclination or felt want that we have when, just for the sake of knowing, we want to find out about something...Quite often, of course, the raising of questions is not accompanied by any particular state of feelings. Quite often the inclination is to be described, more colourlessly (and ambiguously), as 'having an interest'." Finnis, note 21, at 60-61.
Finnis, note 268, at 51; note 284, at 93-94.

[393] "In explaining, to oneself and others, what one is up to [in raising questions and getting to the truth of the matter], one finds oneself able and ready to refer to *finding out*, *knowledge*, *truth* as sufficient explanations of the point of one's activity, project, or commitment. One finds oneself reflecting that ignorance and muddle are to be avoided, simply as such and not merely in relation to a closed list of questions that one has raised." Finnis, note 21, at 60-61 (emphasis in the original).

[394] Finnis has also explicitly asserted the contrary, eg "None of [the first principles] presupposes the volitions whose objects it provides", Grisez, Boyle and Finnis, note 24, at 109.

[395] Klassen, note 69, at 295.

as the ground of certainty which is free in the sense of positing the ends which are to be pursued for their own sake.

3.8 The Metaphysics of Subjectivity in Finnis' Account of the Natural Law

It has been argued in this chapter that Finnis' account of the natural law presupposes a fundamental metaphysical position not dissimilar to that of Descartes. Two objections can be raised against this argument. Firstly, it could be objected that the question of the ontological status of subjectivity in Finnis' starting point is not vital for Finnis' enterprise of identifying the basic goods of human flourishing. Indeed Finnis draws an analogy between physics and practical reason:

> As it is possible to do physics without raising or pressing further questions so too to some extent it is possible to have a practical and theoretical understanding of practical reason's principles and their implications for reasonable choice, and so for individual and communal self-constitution without raising further or pressing questions.[396]

In response it is argued here that the apparently simple and self-evident terms 'rational', 'practical' and 'theoretical' are deceptively so and are markers for something with a long and difficult history. Insofar as the groundedness of the world is only in consequence of the subjectivity of the self, *ie* in consequence of the 'will to power' in that metaphysics that carries out the subject-object distinction, the world only comes to the self as an object or domain of objects harnessable at will for the self's purposes. Under this mode of thought, which Heidegger names "technique" (*Technik*), any ground – including the ground of ethics and obligation and indeed God - must further the orderability of man and man's world. Technique is not simply the rule of instrumental reason, rather technique is the will to order "for the sake of ordering"[397] and is the nontechnical and purely metaphysical ground of all

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[396] John Finnis, "Grounds of Law and Legal Theory: A Response" (2007) 13 *Legal Theory* 315, at 343.

[397] "Everywhere everything is ordered to stand by, to be immediately at hand, indeed to stand there just so that it may be on call for further ordering. Whatever is ordered about this way... we call...standing-reserve... Whatever stands by in the standing reserve no longer stands over against us as object." Martin Heidegger, "The

techniques.[398] Technique is different from other ways of disclosure in that its very logic denies that beings might be disclosed in any other way. It conceals that it is only *one* way of disclosure. It also denies that it has any metaphysical presuppositions and presents its way of ordering as self-evident.[399] Indeed Heidegger holds "it belongs to the essence of the will to power that the reality which it powers-up and produces is not allowed to appear as that reality which it itself brings to be."[400] More particularly, it is argued here that insofar as Finnis' identification of the basic goods presupposes the metaphysics of subjectivity criticised by Heidegger, Finnis' rationality results in an ethics and jurisprudence that is grounded in technical relations (*Technik*). It is argued in the following sections that these technical relations are evident in his conceptions of both the political common good and God.

3.8.1 The Common Good

Finnis identifies the common good of the political community as:

> 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.[401]

and as:

Question Concerning Technology" in *The Question Concerning Technology and Other Essays* (Harper Row, 1977), at 17.

"Überall ist es bestellt, auf der Stelle zur Stelle zu stehen, un zwar zu stehen, um selbst bestellbar zu sein für ein weiteres bestellen. Das so Bestellte hat seinen eigenen Stand. Wir nennen ihn den Bestand... Was im Sinne des Bestandes steht, steht uns nicht mehr als Gegenstand gegenüber." Martin Heidegger, "Die Frage nach dem Technik" in *Die Technik und die Kehre* (11th ed, Klett-Cotta, 1972), at 16.

[398] "...technique is neither a technique, nor the totality of all techniques, but the nontechnical and purely metaphysical ground of all techniques." Philippe Nonet, "Technique and Law" in Kagan, Krygier and Winston eds, *Legality and Community. On the Intellectual Legacy of Philip Selznick* (Rowman & Littlefield, 2002), at 64, n. 50.
The question of technique (*Technik*) is taken up again in section 7.3 and 8.3 below.

[399] Laurence Paul Hemming, "Heidegger and the Grounds of Redemption" in Milbank, Pickstock and Ward eds, *Radical Orthodoxy* (Routledge, 1999), at 104; Satkunanandan, note 382, at 130, 144-145.

[400] "Denn es gehört zum Wesen des Willens zur Macht, das Wirkliche, das er be-mächtigt, nicht in der Wirklichkeit erscheinen zu lassen, als welsche er selber west." Heidegger, "Zur Seinsfrage" in Heidegger, note 322, at 309.

[401] Finnis, note 21, at 154.

> A set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.[402]

The seventh requirement of practical reason - that the common good be favoured and fostered - requires the realization and fulfilment in tandem of all the individuals within the community. Since the fulfilment sought is that of the self-constitution of individuals through choices and actions in accordance with the first principle of morality, then the individual is to coordinate his conduct with that of others to safeguard the *possibility* of fulfilment for all. Thus, Finnis conceives the common good as a way of proceeding - which he describes in terms of "collaboration", "cooperation" or "coordination" - rather than a substantive end.[403] It is not an "end" or "good" but instrumental to such basic goods as friendship and marriage.[404] In other words, Finnis conceives the common good as a set of essentially procedural considerations binding the individual in relation to others as a matter of individual moral, *ie* self-constituting, agency. The common good of society is an instrument of the self's self-constitution. Using the language of Heidegger, it can be said that insofar as Finnis' conception of the common good arises from the rationality and morality of the metaphysics of subjectivity, it can be understood as a manifestation of technical thought (*Technik*) in consequence of the will to order.

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[402] *Ibid*, at 155.

[403] *Ibid*, at 138.
Lawrence Dewan, "St. Thomas, John Finnis, and the Political Good" in Dewan, *Wisdom, Law, and Virtue*, note 126, at 280-281; Froelich, "Ultimate End and Common Good" (1993) 57 *The Thomist* at 612; Wagner, note 69, at v, 148-150.

[404] Dewan, note 403, at 279-311.

3.8.2 The Existence of God

A second objection that might be raised against the argument in this chapter - that Finnis' account of the basic goods presupposes the self as the ground of validity in the manner characteristic of Cartesian thought - is that since Finnis has outlined an argument for the existence of God as the uncaused cause of all contingent states of affairs, then it would seem that Finnis understands God rather than the self to be the ultimate ground.

Finnis' argument for the existence of God as the uncaused cause of all contingent states of affairs (including the contingent state of affairs 'someone reading a sentence in this book') is constructed to satisfy Finnis' norm or principle of theoretical enquiry:

> If a theoretical question can be partially answered by positing a theoretical entity, and to do so allows the raising of further questions, which, if answered, might well provide a more satisfying answer to the initial question, then one ought to posit such a theoretical entity – unless there are good reasons for not doing so.[405]

In the light of this norm of theoretical enquiry Finnis posits the existence of the theoretical entity which he calls the 'uncaused causing state of affairs' and argues that:

> where the uncaused causing must differ [from the first-mentioned state of affairs (somebody reading a sentence in this book) and from the whole causing state of affairs which can partially explain the existing of the first-mentioned state of affairs], *if it is to explain what needs to be explained*, is in this: it requires nothing not included in itself. (That is the fact about it that we signify by 'uncaused'.)[406]

Finnis' argument for the existence of God then concludes:

> The uncaused causing state of affairs includes, as a prerequisite to its existing, a state of affairs that exists because of *what* it is, i.e. because it is what it is. It will be convenient to label this...state of affairs D...what the whole argument shows, with rational (not logical) necessity, is that if *any* state of affairs, that might not exist, exists, then D *must* exist; without it, no state of affairs that might not exist could exist. But some state of affairs, that might not exist, does happen to exist (*eg* the reader reading this sentence). So D must (this is not *logical* necessity) exist.[407]

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[405] Finnis, note 21, at 385.

[406] *Ibid*, at 386 (emphasis added).

[407] *Ibid*, at 387.

Thus the existence of God (as 'uncaused causing state of affairs' or D) is affirmed with *rational necessity* in order "to explain what needs to be explained" *to the rational enquirer.* However, as Clarke has observed:

> The very initial positing of God as cause of the world situates him within the primary a priori (a dynamic and existential, not a logical, a priori) analogous field of both intelligibility and being – of being precisely because this is demanded by intelligibility.[408]

Indeed, following Heidegger's observation of von Leibniz's formulation of the Principle of Reason as a Principle of Causality, it would seem that in Finnis' formulation, "God exists only insofar as the principle of reason holds".[409] The affirmation is one which is a necessary consequence of the rational nature of the self. This reveals the following peculiarity of Finnis' method: God is affirmed *subsequent* to the establishment of the self but is discovered in the manner of *already needing to have been*, in order to be the cause of the self in so far as it is. Applying Hemming's conclusions with regard to Heidegger's understanding of that theistic thinking which takes metaphysics for granted, it is argued here that Finnis' proof evidences

> a metaphysical thinking which speaks of God as a being, an existence, that renders and reckons the 'thing' God as an object, a reckoning reckoned by Subject. The God who appears, appears not in the realm of being but in the subject-object distinction.[410]

Finnis' argument seems to employ the "temporal mode of procedure of faith"[411] in a philosophically improper way. The believer comes to believe in God whom, in faith, the believer discovers first created him. In Finnis' argument, this temporal priority proper to faith seems to have been transposed to the order of being, so that God lies at the origin as the

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[408] Clarke, note 86, at 85.
Hemming, note 125, at 377.

[409] "Ins äusserste gesprochen, heisst dies: Nur insofern der Satz vom Grund gilt, existert Gott." Heidegger, note 382, at 43.

[410] Hemming, note 399, at 98.

[411] Hemming, note 125, at 50.

rationally accessible cause of all things, in virtue of the structure of the self. Finnis' fusion of theological and philosophical concerns into one region of thought is what Heidegger calls "ontotheology" and can be understood as a working out of the consequences of the will to power. Ontotheology, and the "ontotheological" foundation of law will be examined in the next chapter.

3.9 Conclusion

In this chapter it was argued that Finnis' account of the natural law (particularly his affirmation of self-evidence of the basic goods by means of a retorsive argument, his identification of the basic good by means of a "purposive method of analysis", his implied identification of freedom as the capacity to recognize and accept the true as that which is to be pursued for its own sake, his positing of a subjective principle of morality, his understanding of the common good as a set of essentially procedural considerations binding the individual in relation to others, and his conception of God) can be considered as a working out of the metaphysics of subjectivity identified by Heidegger. In common with modern (post-Cartesian) philosophy, it was argued that Finnis implicitly presupposes the subjectivity of the subject as the ground of truth and validity such the human knower comports himself as 'subject' who determines all beings in their 'objectivity'. The "Cartesian" aspect of this metaphysics of subjectivity evidences a configuration of truth not found in Aquinas, while the "Nietzschean" aspect evidences the subject's ascriptions of values, where values are relations of rulership, power, and command, even as they mask themselves as claims to ethical proprietary, reasonableness and justice.

In sum, notwithstanding the affinities between Finnis' "new" natural law theory and Aquinas's "theological" natural law theory, Finnis' theory cannot be reconciled with that of Aquinas. In the following chapters, some of the elements of the metaphysics of subjectivity are identified in the scholarly commentary on the Irish Constitution and in the case law of the

Irish Superior Courts. Since Finnis' new natural law theory presupposes the metaphysics of subjectivity identified by Heidegger it follows that Finnis' theory is not an "antidote" to the metaphysics of subjectivity and the movement of nihilism implicit within contemporary jurisprudence, rather, the application of Finnis' new natural law theory in interpreting *Bunreacht na hÉireann* is a participation in the movement of nihilism.

Chapter 4 Costello's Theses on the Natural Law and the Irish Constitution

4.1 Introduction

It is argued in this chapter that those methods of constitutional interpretation which rely on the authority of the Constitution to justify interpreting the Constitution in the light of Christian revelation, Christian philosophy or the natural law theory of Saint Thomas Aquinas presuppose the metaphysics of subjectivity.

Both the courts[412] and commentators on the Constitution[413] have held that the Constitution does not confer fundamental personal rights on citizens but recognises their existence. As Phelan explains:

> The Constitution does not provide, for example, that the basis of certain rights is natural law, nor provide for some of these rights. Such provisions would strengthen the argument that the people could change also that basis and those rights. What the constituent power did in the creation of the Constitution was *to recognise* that the basis of certain natural rights was in natural law, and recognised certain rights as inherent, around which it has organised its constitutional system. This is not a

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[412] "the Constitution does not confer rights on citizens of the State fundamental rights but recognises their existence as being antecedent and superior to positive laws and protects them accordingly...It does not follow, therefore, that because the Constitution ascribes to only some human rights, characteristics of inalienability and imprescriptibility, the Constitution should be construed as implying that other fundamental human rights lack these qualities, or that only those rights are superior to positive law which are so expressly described in the Constitution." per Costello J (as he was then) in *Murray v Ireland* [1985] IR 532, at 538-539.

[413] O'Higgins CJ writing *extra curia* in the Preface to Reid, *The Impact of European Community Law on Irish Constitutional Law*, at 1: see n. 38 above.

"In declaring the [Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill, 1995 to be in accordance with the Constitution, the Supreme Court declined to reverse the X case] and refused to accept that the natural law is the fundamental law of this State and that as such, it is antecedent and superior to all positive law. Its arguments appear to be made on the basis that the natural law is exterior to the Constitution." Irish Bishops' Conference, Statement on Civil Law and the Right to Life (1995) www.ewtn.com/library/BISHOPS/IRISHLIF.htm (visited 31st January 2011).

"Irish constitutional natural law is a source of law recognised in the text of the Constitution. A textual interpretation, or at most a harmonious interpretation of the Constitution discloses this. Irish constitutional natural law itself is not an interpretative approach but rather a source which contains its own principles of determination of specific rules, such as the protection of a particular right. In the text of the Constitution itself the natural law basis of Irish constitutional law is most clearly seen from the provisions on fundamental rights, from the provision on sovereignty, and from the Preamble." Phelan (1997), note 34, at 275.

The question of whether the explicit provisions of the written constitution can be understood as legally superior to the unwritten natural law is taken up in the following chapter.

> constitutive act. In the creation of the sovereign State, the popular sovereign recognised that it was itself bound to observe natural rights.[414]

This raises the question of the nature of recognition. In this chapter some of the extra curial writings of Mr. Justice Costello are reviewed in order to identify one sense of recognition operative in Irish jurisprudence. Costello argued that since the people who adopted the Constitution are recognised in the Constitution as a Christian people, then the courts are justified in interpreting the Constitution in the light of Christian revelation and Christian philosophy, particularly Christian natural law theory. Costello's argument continues that since judges must take and apply the Constitution as they find it, then it is not the judges' function to evaluate or debate the merits of the Christian natural law theory, but to apply that theory in determining whether rights claimed by litigants are personal rights which are constitutionally acknowledged and protected.

Five arguments are advanced in this chapter. Firstly, it is argued that, by relying on the authority of the Constitution to justify the interpretation of the Constitution in the light of Christian revelation and Christian philosophy, Costello's method of constitutional interpretation involves a philosophically improper transposition of knowledge proper to faith to the order of being and law. This transposition presupposes a relation between the popular sovereign's constitutional self-assertion and being created (*ens creatum*) not dissimilar to the relation between Cartesian subjectivity (the *ens certum* asserted in the *cogito ergo sum*) and being created (*ens creatum*).

Secondly, it is argued that Costello's methodological invocation of God is a concealment of power (*Macht*) which conceals the established and indubitable subject (the popular sovereign) who is the ground of the invoked Creator.

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[414] Phelan (1997), note 34, at 366 (emphasis in the original).

Thirdly, it is argued that Costello's theory of adjudication presupposes a Kantian conception of existential assertion in the determination of God as the ground of law and of constitutionally protected personal rights.

Fourthly, it is argued that Costello's theory of adjudication and constitutional interpretation can be considered as a working out of the possibilities originally projected in the establishment of the subjectivity of the subject. Costello's theory of adjudication is contrasted with the theory of adjudication suggested by Mr. Justice O'Hanlon's[415] extra curial writing. In O'Hanlon's theory of adjudication the conscience and belief of the judge are implicated in his judicial deliberation. It is argued that O'Hanlon's theory suggests a non-subjective theory of adjudication. It must be emphasised that, notwithstanding the references to the extra curial writings of Mr. Justice Costello and Mr. Justice O'Hanlon, the references to Costello and O'Hanlon in this chapter are not to be understood in any biographical sense, but as illustrations of different understandings of the being of being human, the configuration of truth and the nature of interpretation evident in scholarly commentary on the Irish Constitution.

Finally, it is argued in this chapter that Costello's method of interpreting the Constitution does not guarantee unanimity in the judicial determination of constitutionally protected personal rights.

4.2 Costello's theses

Writing *extra curia* Mr. Justice Costello advanced a method of constitutional interpretation which can be summarised in the following two theses:

1. Since the people who adopted the Constitution are recognised in the Constitution as a Christian people, then the courts can ascertain the nature of the human person whose

[415] Ordinary Judge of the High Court of Ireland 1981-1995.

personal rights are protected in the Constitution in the light of Christian revelation.[416] In particular, since the philosophical basis for the fundamental rights which the Constitution sought to protect should be in accord with the views of Christian philosophy, Saint Thomas Aquinas's exposition of the natural law is most relevant for the purpose of considering the role of natural law in the Irish Constitution.[417]

2. It is the function of judges to take and apply the theory of law adopted by the Constitution in interpreting the Constitution. In particular, in determining whether a personal right is protected by the Constitution, a judge must consider whether, by reference to the human person (whose nature can be ascertained in the light of Christian revelation) and the social and political order envisaged in the Constitution, the right is one which can be derived from natural law understood in accordance with Christian philosophy.[418]

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[416] "In [the Preamble to the Constitution] the enactment of the Constitution is declared to be made "in the name of the Most Holy Trinity from whom all authority and to Whom, as our final end, all actions both of men and States must be referred" and it proclaims the People's obligation "to our Divine Lord Jesus Christ, who sustained our fathers through centuries of trial". The people who adopted the Constitution are, it is clear, recognised as a Christian people. This leads to the conclusion that, if it is necessary for the courts to consider the nature of the human person whose personal rights are protected in Article 40 (3) (1), then the courts can properly ascertain that nature in the light of Christian revelation which the Constitution proclaims the people have accepted. It would follow then that the citizen whose rights are protected should be regarded as a human person made up of body and soul, created in God's image for a supernatural end, endowed with reason and conscience. Quite clearly there is due to such persons respect, and indeed reverence, both from fellow citizens and from the State, and the personal rights of such persons to such basic human goods as life, bodily integrity, work, can readily and logically be understood..." Declan Costello, "Natural Law, the Constitution, and the Courts" in Lynch and Meenan eds, *Essays in Memory of Alexis Fitzgerald* (Incorporated Law Society of Ireland, 1987), at 107-108.

[417] "For if the Constitution is one that has been adopted for a Christian people it would then be reasonable to conclude that the theory of law which it has adopted and the philosophical basis for the fundamental rights which it sought to protect should be in accord with the views of Christian philosophy rather than those of Roman lawyers or eighteen century rationalist thinkers. The classical exposition of natural law in the Christian tradition is that contained in the writings of Thomas Aquinas and his theory of law is obviously most relevant for the purpose of considering the role of natural law in the Irish Constitution." *Ibid*, at 110.

[418] "Firstly, if indeed it is a correct construction of the Constitution that this theory of law has been adopted by it then, having ascertained that this is so, it is not the courts' function to evaluate it. An individual judge may be dissatisfied by the proofs of the existence of God or he may be on the side of those who hold that all natural law theories are vitiated by a fallacy which purports (wrongfully, it is claimed) to derive norms of human behaviour from the facts of human nature, or, like Bentham, he may believe that "natural rights is simple nonsense; natural and imprescriptible rights rhetorical nonsense-nonsense upon stilts". But judges are lawyers not philosophers and must, be they Benthamites or orthodox Thomists, take and apply the Constitution as they find it. If it can correctly be inferred that the Constitution has adopted a theory of law which derives fundamental rights from natural law it is not the function of judges to debate the merits of the theory.

Secondly, in pursuing an inquiry under Article 40 (3) (1) as to whether a right claimed by a plaintiff is a "personal" right which obtains the protection of the Article, the courts are not required to consider theoretical questions as to the source of men's rights or why fundamental rights are superior to positive law. There have

4.3 Costello's first thesis

In this section it is argued that Costello's first thesis involves a philosophically improper transposition of the temporal mode of procedure of faith to the order of being and law – a transposition that is also found in Descartes' method.[419]

4.3.1 Ontotheology

A person may come to believe in God, who, in faith, he discovers first gave him to be. However a believer's profession of faith in "God, the Father Almighty, Creator of heaven and earth"[420] does not express his own self-establishment in the order of being but expresses his acknowledgment *proper to faith* of his having been created. Similarly, as the Preamble to *Bunreacht na hÉireann* attests, the Irish people came to believe in God revealed in Christ. However the believing people's invocation of "the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions of men and States must be referred" and its acknowledgment of their "obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial"[421] are not expressions of the people's self-establishment in the order of being or law but are invocations and acknowledgements proper to their faith – a

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been answered for them. Their task, as lawyers, is to consider whether, by reference to the human person and the social and political order envisaged in the Constitution, it can be said that the right is one which is constitutionally acknowledged and protected." *Ibid*, at 112-113.

[419] "Descartes establishes the 'I' of the *cogito* as the first indubitable thing that the self may know. In so doing, the *cogito* comes to something of which it may be even more certain – not because there are degrees in the order of certainty, but because of a certain priority with regard to time. God is discovered *subsequent* to the establishment of the self but is discovered in the manner of *already needing to have been*, in order to be the indubitable cause of the self and everything else that is (in so far as it is). God already is, but this is dependent on my knowing in virtue of who I am. The important point here is that this is the temporal mode of procedure of faith: I come to believe in a God who (in faith, I discover) first gave me to be. However, the proper temporal priority of faith is transposed improperly to the order of being, of philosophy itself, so that God lies at the origin as the philosophically accessible cause of all things, in virtue of the structure of the self, the subject." Hemming, note 125, at 50.

[420] "Credo in unum Deum Patrem omnipotentem, factorem caeli et terrae, visibilium omnium et invisibilium..." Canones et decreta dogmatica councilii Tridentini, sessio tertia, celebrata IV. Februarii 1546 in Hünermann ed, *Heinrich Denzinger, Enchiridion symbolorum definitionum et declarationum de rebus fidei et morum* (39th ed, Herder, 2001), at 597, n. 1863.
See note 120.

[421] Preamble to *Bunreacht na hÉireann*, note 224.

faith which acknowledges the temporal priority of Creation. Consequently, these faithful invocations and acknowledgements have been construed as an expression of the people's intention to adopt a Constitution consistent with their faith.[422] In contrast, insofar as Costello's first thesis relies on the authority of the Constitution to justify a court interpreting the Constitution in the light of Christian revelation and Christian philosophy,[423] Costello's thesis conflates the people's legally indubitable, self-assertion in the order of law, *ie* the people's adoption and enactment of the Constitution, with the people's expression of belief in the order of faith. The effect of this conflation is that knowledge proper to faith, *ie* knowledge of having being created, is transposed to the order of being and law. Thus, Costello's first thesis is "ontotheological",[424] *ie* under the guise of a legal method philosophical and theological concerns are fused into one region of thought so that questions concerning law are answered by means of an understanding derived from an article of faith. In consequence of this conflation God is the philosophically accessible cause of all things including the law and the human person who bears constitutionally protected natural rights. The priority which Costello's first thesis affords the Constitution implies that, as a matter of legal method, God is "discovered" subsequent to the people's constitutional self-assertion but is discovered in the manner of already needing to have been, in order to be the ground of law as Creator of the human person bearing constitutionally protected rights and the origin of the

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[422] "It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and with Christian belief." per O'Higgins CJ in *Norris v The Attorney General* [1984] IR 36, at 64.

[423] The question of whether the authority of the Constitution can be relied upon to justify the superior status of the natural law in Irish constitutional law is taken up again in chapters 5 and 7.

[424] "[The] fusion of faith and philosophy is what Heidegger named as ontotheology. It is the deprivation of the ground of the being of beings from a genuinely phenomenological enquiry...displacing the ground of that enquiry from the being of being-human to the being of God, with all the consequence that displacement entails. [Hemming's] enquiry has indicated that this supposes enquiry which yields a kind of self-evident truth (and so a 'natural' truth') is itself entirely consequent on a radical transformation of the being of beings, a transformation which actually disregards not only certain aspects of divine revelation or self-disclosure, but...disregards fundamental aspects of the way in which human self-experience is to be understood." Hemming, note 106, at 172-173.
Hemming, note 326, at 91.

fundamental personal rights derived from the natural law. Costello's first thesis implies that God and the natural law already are, but are dependent on the people's recognition. The effect of this conflation of faith and philosophy is that something belonging to revelation, to faith as such, namely, knowledge of Creation, becomes operative in law in such a way that it no longer matters whether faith is present, but remains at work in an entirely secularised context.[425] In sum, by conflating the orders of law and faith, Costello's legal method interprets the Christian people's recognition of God, not as a recognition proper to faith, but as a recognitive act of will, *ie* as an act of self-assertion in the order of law (and being) which "discloses" a God. Notwithstanding Costello's nomination of this "constitutionally asserted" God as creator and ground of the natural law, this God is grounded *by* the people through their constitutional self-assertion.

4.3.2 The Concealment of Power (*Macht*)

The disclosure of (an idea of) God subsequent to the people's constitutional self-assertion in Costello's legal method is not dissimilar to the discovery of God after the subject's self-assertion through the *cogito* in the Cartesian method.[426] As Hemming noted, the Cartesian 'discovery' and 'invocation' of God is a concealment of power (*Macht*).[427] Similarly, it is

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[425] Laurence Paul Hemming, "The Being of God: The Limits of Theological Thinking after Heidegger" (2004) 85 *New Blackfriars* 17, at 26-27.

[426] "...the [Cartesian] self, having demonstrated its indubitability to itself then proceeds to discover by taking up an aim, by a constructive process, a self-making as self-disclosing, that only the greatest, highest, most infinite being could have made this indubitable self possible in the first place. God is thereby made dependent on the secured indubitability of the self." *Ibid*, at 27.

[427] "God...is indubitably a function of the knowing self, by a mental act, purely referred to myself, and nothing beyond me. God is disclosed to the self 'within' the confines of the self. This means that being with God is entirely independent of any exterior experience I might have of the world. God is in consequence of a re-cognitive act of will... The divine names...are re-cited, and so invoked and *performed*. The divine names function as performative, a recitation, a deflection of power. To invoke this God is to proclaim the already established and indubitable subject. The power of this event, however, is concealed precisely because it is a citation. It is not God as such who founds the subject, but the interior projection forward into the highest possibilities of power. Even in Descartes, the subject as self-founding *then* proceeds to 'discover' itself as already having-been-found by God in a projection, even if a projection *back*. This is a projection from where I now stand, into the future, only to find a secure, but imaginary past. This God who Descartes cites is now a pure postulation of the intellect which will next, that is, subsequently, explain all that is exterior. Descartes says that

argued here that Costello's first thesis presupposes that God is a function of the people, purely referred to the Constitution, and nothing beyond the Constitution such that this God is in consequence of a re-cognitive act of will. This God is disclosed within the confines of constitutional self-assertion such that this God is entirely independent of any extra-legal experience that might be had of the world. Costello's "invocation" of such divine names as 'Creator' and 'source of law' and the references to Christian revelation function as performative and are a concealment of power in that they conceal the established and indubitable subject (the people) who is the ground of the invoked Creator. In other words, since the people are the ground of this Creator, it can be said that the God actually installed through self-assertion is the people, concealed from itself by means of an invocation, namely the invocation of the God of Christian revelation and Thomistic philosophy.

4.3.3 The Metaphysics of Subjectivity

It is argued here that insofar as Costello's legal method is founded on the indubitablity of the Constitution, this indubitable foundation is attained in an ideal moment established prior to world, sociality and legality.[428] More precisely, insofar as Costello's first thesis takes for granted the indubitablity of the Constitution such that God and the human person (as the bearer of constitutionally protected personal rights) are taken as occurring "within" the

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as I am founded by this God, because created by it, so *anything else* would likewise have been so founded. The establishment of the interior and exterior, boundaried and so bounded by my-self, is performed through an invocation, a prayer, an act of will, which itself discloses the subject it performs. God, as cause of the subject (deduced by an act of reason) is really thereby grounded *by* the subject through reason. God thereby becomes other to the subject, as that object which, occurring together with the subject *against* the dubitability of every other thing, occurs as the constitutive sufficient condition of the 'within' that subjectivity posits as the place wherein all knowing and certitude takes place. The dubitable 'without' (itself only established as subsequent to self-establishment and God-establishment) is thereby deprived of God, except, and insofar as, I grant that the God I find without is the God I cite within. The dubiety of the outside may now be cancelled through acts of will: I *enter* this exterior world to cancel its dubiety. Indeed the world only appears at all as something that occurs subsequent to the positing of the *cogito* and the projection of the *cogito*'s foundation on God. In this sense, and insofar as the epistemological structures of the subject remain transcendentally deduced, the *same* God can be presumed to be enacted through all my psychic acts." Hemming, note 152, at 447-448 (emphasis in the original).

[428] See section 3.6.1.

Constitution and "without" any extra-legal experience of the world and its history, Costello's first thesis takes for granted a radical separation of God, the world and the self-asserting people. By taking the human person to be created by God *subsequent* to the people's constitutional self-assertion, Costello's first thesis seeks to reconnect God, the world and the human person through the self-asserting people's emergence "into" world and sociality "from" the ideal moment prior to world and sociality.

Like the Cartesian or Finnisean subject which enters the exterior world to cancel its dubiety by acts of will, the self-asserting people in Costello's legal method enter the world to cancel its legal dubiety by an act of will. The "constitutional" God posited in the re-cognitative act of will is grounded by the people through their constitutional self-assertion. This God thereby becomes "other" to the self-asserting people, as that object which, occurring together with the self-asserting people *against* the dubitability of every other legal order, occurs as the constitutive sufficient condition of the "within" that the subjectivity of the self-asserting people posits as the place wherein all legal certitude takes place.[429] The God cited in Costello's first thesis is a pure postulation of the self-asserting people which will subsequently explain all that is "exterior", *eg* the source of natural legal rights and the nature of constitutionally protected personal rights. The dubitable "without" – in which the Costelloian judge pursues inquiries under Article 40.3.1° - is itself only established as subsequent to self-establishment and God-establishment, *ie* subsequent to the ideal, indubitable "within" of the self-asserting people.

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[429] "This discovery of God is, however, the discovery of the idea of God, and moreover, the necessity of God and that I know God to be God has been located in the same ideal realm where I established the self as certain. There is now an interior 'world' which the psyche inhabits and truly is. Everything exterior, as Descartes reminds us several times in his *Meditations on First Philosophy*, is still dubitable and capable of being known only with error. His concern to establish the indubitability of God is quite simple; God is necessary to guarantee the truth of what has now become the exterior world. If it were not for the idea of God, truth would simply assume the character of sets of non-objective psychological rules." Hemming, note 165, at 33-34.

This "emergence" of the self-asserting people into sociality and legality transforms the essence of truth with respect to certainty in a manner not dissimilar to the transformation wrought by the emergence of the Cartesian or Finnisean subject. In Costello's legal method the constitutional self-assertion is secured on the prior unity of the self-asserting people such that even the fact that the self-asserting people is itself caused by God is secured on the basis that the self-asserting people proceeded to discover itself as having-been-caused by God, *ie* in Costello's legal method, the self-asserting people's prior existence is discovered as a product of its own actuality.[430] In other words, even though Costello's legal method posits God as the first and prior cause of both the human person as the bearer of constitutionally protected natural rights and of the natural law from which natural personal rights derive, the certainty of this knowledge is secured on the prior representedness of the self-asserting people, *ie* truth is configured as being represented (*Vorgestelltheit*). While it can be argued that the priority of self-assertion in the order of knowing (*ordo cognoscendi*) in Costello's legal method does not disturb the essential priority of God over man and creation in the order of being (*ordo essendi*) as understood in Christian philosophy, Costello's legal method nonetheless transforms the conception of the essence of truth with respect to certainty.[431]

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[430] Hemming, note 65, at 239.

[431] See sections 3.4.2 and 3.5.1.

"...for Descartes knowledge that God is can be had with certainty, a priori, and is secured precisely on the security of the *cogito sum*...The means by which the *ordo essendi* itself is known has undergone a fundamental transformation: the question is not one of order, but of the character, and this means the certainty, of knowledge given in the *taxis* of order." Hemming, note 115, at 379.

"Heidegger's notebook of 1938-39 comments that the transformation of metaphysics on the basis of mathematics posits a '*Vorbild*' - a prior image or ειδος given in every specific thought that makes the interior unity of those thoughts possible. But the existence of the prior ειδος (*Vorbild*) or type (idea) was already supposed in the High Middle Ages: every idea was in the *mens Dei*, the mind of God, which secured the manifold appearing of every particular thing. The prior ειδος present in every case for Descartes, however, is not God and the *mens Dei*, but the unity of the *ego cogito* posited alongside every thought - even the thought of God - by which that thought is secured. Heidegger comments "but mathematics is not thereby not only a *Vorbild* of the most stringent knowledge, but the mathematical – being-secured – characterizes the basic manner of being as representedness." The representedness in this case is "being secured as subjectivity". The effect of this is that even though God remains posited as the first and prior cause of all things, nevertheless this certain knowledge is secured on the prior representedness of the *ego cogito*." *Ibid*, at 382.

Again, in common with the metaphysics of subjectivity presupposed in Finnis' account of the natural law, the subjectivity of the self-asserting people in Costello's first thesis is secured without reference to any social or legal underpinnings.[432] This self-assertion, which takes place on the basis of a self-concealment of the social and legal relations which already make it possible, becomes visible in the ascription of constitutional and Christian values. This "emergence" of the popular sovereign, which is attained through the metaphysics of valuation, evidences the arising triumph of subjectivity and the activity of political nihilism to hide and conceal the very means by which it effects what it eventuates.

4.3.4 Existential Assertions

As further evidence of the metaphysics of subjectivity presupposed in Costello's theses, it is argued here that Costello's theses presuppose a Kantian conception of existential assertion, *ie* that the primary referent of existential assertion is the self which asserts and not what is asserted.

Kant distinguishes between the real (or possible) and the actual so that for Kant to say that something is real means that it is possible and not that it is necessarily extant. Consequently, Kant argues that to take a thing, *eg* God, with all its real predicates such as omnipotence and omniscience, and to say that it exists is to assert nothing about the thing itself (which would have its predicates whether it existed or not just in order for it to be a concept).[433] Prescinding

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[432] See section 3.6.2 above

[433] "*Being* is obviously not a real predicate; that is, it is not a concept of something which could be added to the concept of a thing. It is merely the positing of a thing, or of a certain determinations, as existing in themselves. Logically, it is merely the copula of a judgment. The proposition "God is omnipotent", contains two concepts, each of which has its object – God and omnipotent. The small word "is" adds no new predicate, but only serves to posit the predicate *in its relation to the subject*. If, now, we take the subject (God) with all its predicates (among which is omnipotence), and say "God is" or "There is a God", we attach no new predicate to the concept of God, but only posit the subject in itself with all its predicates, and indeed, posit it as an *object* that stands in relation to my *concept*. The concept of both must be one and the same; nothing can have been added to the concept, which expresses merely that it is possible, by my thinking its object (through the expression "it is") as given absolutely. Otherwise stated, the real contains no more than the merely possible. A hundred real thalers do not contain the least coin more than a hundred possible thalers. For as the latter signify the concept and the former the object and the positing of the concept, should the former contain more than the latter, my concept

from the question of the proofs of God's existence and focusing on the interpretation of being, Heidegger observes that when I assert that something, *eg* God, exists, I add nothing to it in and of itself as a concept but express only its relation to me.[434]

Similarly, it is argued here that in Costello's legal method, the primary referent of existential assertions in constitutional interpretation is not what is asserted. What is implicitly

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would not, in that case, express the whole object, and would not therefore be an adequate concept of it. My financial position, however, is affected very differently by a hundred real thalers than it is by the mere concept of them (that is, of their possibility). For the object, as it actually exists, is not analytically contained in my concept, but is added to my concept (which is a determination of my state) synthetically; and yet the conceived hundred thalers are not themselves in the least increased through this acquiring existence outside my concept. By whatever and by however many predicates we may think of a thing – even if we completely determine it – we do not make the least addition to the thing when we further declare that this thing *is*. Otherwise it would not be exactly the same thing that exists, but something more than we had thought in the concept: and we could not, therefore, say that the exact object of my concept exists. If we think a thing every feature of reality except one, the missing reality is not added by my saying that this defective thing exists." Immanuel Kant, *Critique of Pure Reason* (Macmillan, 1929), at 504-505.

"*Sein* ist offenbar kein reales Prädikat, d.i. ein Begriff von irgend etwas, was zu dem Begriffe eines Dinges hinzukommen könne. Es ist bloß die Position eines Dinges, oder gewisser Bestimmungen an sich selbst. Im logischen Gebrauche ist es lediglich die Kopula eines Urteils. Der Satz: *Gott ist allmächtig*, enthält zwei Begriffe, die ihre Objekte haben: Gott und Allmacht; das Wörtchen: *ist*, ist nicht noch ein Prädikat oben ein, sondern nur das, was das Prädikat *beziehungsweise* aufs Subjekt setzt. Nehme ich nun das Subjekt (Gott) mit allen seinen Prädikaten (worunter auch die Allmacht gehöret) zusammen, und sage, *Gott ist*, oder es ist ein Gott, so setze ich kein neues Prädikat zum Begriffe von Gott, sondern nur das Subjekt an sich selbst mit allen seinen Prädikaten, und zwar den *Gegendstand* in Beziehung auf meinen *Begriff*. Beide müssen genau einerlei enthalten, und es kann daher zu dem Begriffe, der bloß die Möglichkeit ausdrückt, darum, daß ich dessen Gegenstand als schlechthin gegeben (durch den Ausdruck: er ist) denke, nichts weiter hinzukommen. Und so enthält das Wirkliche nichts mehr als das bloß Mögliche. Hundert wirkliche Taler enthalten nicht das mindeste mehr, als hundert mögliche. Denn, da diese den Begriff, jene aber den Gegendstand und dessen Position an sich selbst bedeuten, su würde, im Fall dieser mehr enthielte als jener, mein Begriff nicht den ganzen Gegenstand ausdrücken, und also auch nicht der angemessene Begriff von ihm sein. Aber in meinem Vermögenszustande ist mehr bei hundert wirklichen Talern, als bei dem bloßen Begriffe derselben (d.i. ihrer Möglichkeit). Denn der Gegendstand ist bei der Wirklichkeit nicht bloß in meinem Begriffe analytisch enthalten, sondern kommt zu meinem Begriffe (der eine Bestimmung meines Zustandendes ist) synthetisch hinzu, ohne daß, durch dieses Sein außerhalb meinem Begriffe, diese gedachte hundert Taler selbst im mindesten vermehrt werden. Wenn ich also ein Ding, durch welche und wie viel Prädikate ich will (selbst in der durchgängigen Bestimmung), denke, so kommt dadurch, daß ich noch hinzusetze, dieses Ding *ist*, nicht das mindests zu dem Ding hinzu. Denn sonst würde ich nicht eben dasselbe, sondern mehr existieren, als ich im Begriffe gedacht hatte, und ich könnte nicht sagen, daß gerade der Gegendstand meines Begriffs existere. Denke ich mir auch sogar in einem Dinge alle Realität außer einer, so kommt dadurch, daß ich sage, ein solches mangelhaftes Ding existiert, die fehelende Realität nicht hinzu, sondern es existiert gerade mit demselben Mangel behaftet, als es gedacht habe, sonst würde etwas anderes, als ich dachte, existieren." Immanuel Kant, *Kritik der reinen Vernuft* (Reclam, 1986) B 627.

[434] "What is posited in existential-asserting and is added to bare representation, to the concept, is 'a relation of the actual thing to myself'." Martin Heidegger, *The Basic Problems of Phenomenology* (Indiana University Press, 1988), at 41.

"Das, was gesetzt wird in der Existenz-Aussage und was hinzugesetzt wird zur bloßen Vorstellung, zum Begriff, ist 'ein Bezug des wirklichen Dinges zu mir selbst'." Martin Heidegger, *Die Grundprobleme der Phänomenologie* (Gesamtausgabe 24, Klostermann, 1989), at 54.

Hemming, note 125, at 13-14.

posited in Costello's assertion of God as the ground of the natural law, *ie* what is added to the concept of God as the ground from which the constitutionally protected personal rights derive (as expounded in Christian philosophy), is a relation of God to the self-asserting people. Similarly, what is posited in Costello's assertion of the existence of a constitutionally protected personal right, *ie* what is added to the concept of the human person as the bearer of natural rights (as known in the light of Christian revelation), is a relation of the human person to the self-asserting people. In other words, in Costello's legal method, to say that God as the ground of the natural law exists does not refer to God (and similarly, to say that it is the nature of the human person to bear constitutionally protected personal rights does not refer to the human person) but refers to the self-asserting people and the interpretation of being which is operative as the basis of that self-assertion.

4.3.5 The Forgottenness of Being (*Seinsvergessenheit*) and Nihilism

Costello's method seeks to disclose the nature of the constitutionally protected natural rights from an understanding of God known through Christian revelation. However, insofar as Costello's thesis construes self-assertion as having displaced the ground of the being of being human (and the being of law), whose being I could enquire into,[435] onto the God of Christian revelation, whose being is not transparently interrogable for me, the forgetfulness of being hides itself in Costello's thesis.

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[435] "What is really at stake for Heidegger is not whether or not a causal understanding of being is at issue in ontology, but what the ground is of the being for whom being is an issue (*Dasein*). Indeed this is precisely Heidegger's earlier definition of what *Dasein* is: 'To grasp the understanding of being means to understand that being to whose being-constituted the understanding of being belongs, the *Dasein*.' In other words the question of being can only arise as a question for that being who can interrogate itself as the being that it itself is. Every attempt to disclose the essence of God metaphysically, either through causation (meaning God as the prior cause of all things) or participation makes the being of God the ground of the being of being human. This displaces the ground of the being of being human from the very self that I am, whose being I can then enquire into, onto a being whose being is not transparently interrogable for me, namely God." Hemming, note 125, at 69, 88.

Insofar as Costello's method seeks to disclose the nature of constitutionally protected personal rights by means of God known through a Christian philosophy divorced from faith in God revealed in Christ, Costello's method seeks to "render" God philosophically accessible (in a Cartesian sense) so as to elucidate the nature of Irish law, rather than as working out of an understanding of God which depends on faith (in the Thomistic sense outlined in Chapter 1). Indeed Costello's identification of the exposition of natural law contained in the writings of Aquinas as being most relevant for the purpose of considering the role of natural law in the Irish Constitution suggests that Costello considers Aquinas's categories of causality and participation as appropriate to "rendering" God philosophically accessible. Insofar as God is brought forth as an object before a subject within this legal method, *ie* insofar as God's presence can only appear as re-presentation,[436] the forgetfulness of being hides itself in Costello's thesis. In sum, in Costello's legal method, I am no longer able to transpose myself into a relation with being and with the truth of being as the essential ground of human being.[437] Since the ontological difference is not in question Costello's legal method it can be described as nihilistic.[438]

4.4 Costello's second thesis

It is argued in this section that Costello's second thesis – that it is not the function of judges to evaluate the legal theory adopted by the Constitution but to apply that legal theory

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[436] "As soon as I think of God as *summum in semetipso bonum*, i.e. as highest good without including in this thinking the fact that it is *I* who think it, and so attempting to think God as highest good apart from creation or world, then what God as *summum bonum* has to give me in its naming collapses into metaphysical thinking and renders God a thing or being or object." *Ibid*, at 278-279.

[437] "...a fundamental occurrence hides itself: the forgetfulness of being in the sense of no longer being able to transpose oneself into a relation with being and with the truth of being as the essential ground of human being."

"...versteckt sich darin ein Grundgeschehnis: die Seinsvergessenheit im Sinne des Nichtmehr sich versetzen könnens in den Seinsbezug und in die Wahrheit des Seins als Wesensgrund des Menschen." Martin Heidegger, *Zur Auslegung von Nietzsches II. Unzeitgemässer Betrachtung* (Gesamtausgabe 46, Klostermann, 2003), at 83.

[438] "If humanity is understood as the basis of truth, then what gives man to be (being) in advance of itself becomes covered over. This in itself becomes the grounding of all metaphysics, which is also the founding of nihilism." Hemming, note 125, at 163.

in interpreting the Constitution – presupposes the metaphysics of subjectivity (in which truth is understood as certainty of representation). It is argued also that this method of interpreting the Constitution does not guarantee unanimity in the judicial determination of constitutionally protected personal rights.

4.4.1 Lived Experience (*Ereignis*) and Mortified Experience (*Entlebnis*)

In this section, the relation between experience, understanding and interpretation are examined in order to show that Costello's method of interpreting the Constitution presupposes the metaphysics of subjectivity.

Heidegger distinguishes between lived experience (*Ereignis*) and mortified experience (*Entlebnis*). In the lived experience of a thing, the thing is given uniquely for me as the thing that it is: I come across the thing and see it all in one go such that I and the thing are given together. Using Heidegger's famous example of the lectern, Hemming explains:

> The thing and I are one: all distance is collapsed. To be me at the moment of seeing the lectern is to be me-seeing-the-lectern. 'This-lectern-seeing', when I see it, is part of who I 'then' (when seeing it) am. 'How' I see it, the mood in which-I-and-it are disclosed will also be part of who 'I' (then) am. This 'how', in a sense, is part of my involvement in its being (for me).[439]

In Heideggerian terminology, the lived experience of the thing is an Event (*Ereignis*) that I en-own[440] in which my 'I' is fully historicized and comes into its own when it discovers itself as already ecstatically in the world. In the Event (*Ereignis*) there is neither 'external world' nor 'internal subjectivity'. In the Event (*Ereignis*) the intentional relation between the 'I' and the thing intended cannot be characterised in terms of separation or subject-object distinction, rather the Event (*Ereignis*) as the coming about of the my 'I' is also the mutual disclosing of essence. As Heidegger explains:

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[439] Hemming, note 125, at 160.

[440] *Ereignis*, with the sense of *Er-eignen*, literally, to make my own.
Hemming, note 125, at 157.

> Lived-experience does not go past before me in the manner of a thing which I posit, as object, but I myself e-vent it to me and it e-vents itself from out of its essence.[441]

Thus, in the lived experience my 'I' is fully present and comes to its own is a particular, vivid experience in which I en-own the thing. In this genuine historical, I-relatedness to the thing, which Heidegger also calls "enactment-historical",[442] the thing's essence "eventuates" itself to me.[443]

In contrast to the lived experience of a thing, Heidegger also refers to "de-lived" or "mortified" experience in which the thing does not touch me.[444] As Hemming explains:

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[441] Martin Heidegger, *Towards the Definition of Philosophy* (London: Athlone, 2000), at 62.

"Das Er-leben geht nicht vor mir vorbei, wie eine Sache, die ich hinstelle, als Objekt, sondern ich selbst er-eigne es mir, und es er-eignet sich seinem Wesen nach", Martin Heidegger, *Zur Bestimmung der Philosophie* (Gesamtausgabe 56/57, Klostermann, 1987), at 75.

All German texts from Heidegger's *Zur Bestimmung der Philosophie* are taken from the *Gesamtausgabe*, volume 56/57 (Klostermann, 1977), and all English translations are taken from the translation by Sadlerl in *Towards the Definition of Philosophy* (London: Athlone, 2000).

[442] 'vollzugsgeschichtlich' Martin Heidegger, *Phänomenologie des Religiösen Lebens* (Gesamtausgabe 60, Klostermann, 1995), at 93.
"An original historical understanding of his self and his existence..."
"Ursprüngliches historisches Verständnis seines Selbst und seines Daseins..." *Ibid*, at 73.

Hal St. John Broadbent, "Living the *Überfluß*: Early Christianity and the Flight of Nausea" in Hemming, Costea and Amiridis, note 315, at 74.

[443] "In lived experience where 'it worlds for me' and so es *erignet sich* such that my 'I' is fully present and, so to say, comes to its own is a particular, vivid experience. Here I receive no object, but in the lived experience where I myself en-own it, "its essence eventuates itself". That which I might formally have understood as *eine Sache*, an object which occurs to me in a process, now comes to me in a whole new way – an *Ereignis*. In *Ent-lebnis*, the opposite, mortified experience, a purely theoretical object occurs in a process which also produces a purely theoretical, dehistoricized 'I', an 'I' from which all I-content, I-relatedness has been denatured: a *Geschehnis*, an occurrence. This is nothing other than the transcendental 'I', the subject." Hemming, note 125, at 158.

[444] "As an experience, determining that something is the case is only a rudiment of experiencing, a de-experiencing. The objectifying, as cognition, is de-hinged and as such re-moved from authentic lived-experience. The objectified occurring, occurring as objectifying, knowing, we identify as *pro-cess*, it simply goes past, before my knowing I, and has only the relation to it of being-known, this paled-out I-relatedness is reduced to a minimum of lived experience. It is the essence of a thing and a thing-context, to give itself only and directly in cognition, that is in theoretical comportment and to give itself for the theoretical I. In the theoretical comportment I am addressed to something, but I do not live (as historical I) out toward this or that world-like." Heidegger, note 441, at 62.

"Das Feststellen als Erlebnis ist nur noch ein Rudiment von Erleben; es ist ein Ent-leben. Das Gegenständliche, das Er-kannte, ist als solches ent-fernt, aus dem eigentlichen Erleben herausgehoben. Das objektivierte Geschehen, das Geschehen als gegenständliches, erkanntes, bezeichnen wir als *Vor-gang*; es geht schlicht vor-bei, vor meinem erkennenden Ich, hat zu diesem nur den Bezug des Erkanntseins, diese abgeblaßte, auf ein Minimum von Erleben reduzierte Ichbezogenheit. Es ist das Wesen von Sache und Sachzusammenhang, sich

> In securing something as an object the 'I' of lived-experience must disappear such that it becomes removed from 'me' into an objective 'occurring' that simply goes past me as a process. It is de-lived in my taking up a purely theoretical comportment to it. It is not mine, though I can know it theoretically...Heidegger speaks of the theoretical I that is in consequence posited in theoretical knowing which replaces the true I-relatedness of the I to the thing given. He says the I is re-moved from which it knows so that the pro-cess can take place and pass me by.[445]

4.4.2 Costello's "Mortified Experience"

With regard to the second thesis, Costello argues:

> But judges are lawyers not philosophers and must, be they Benthamites or orthodox Thomists, take and apply the Constitution as they find it. If it can correctly be inferred that the Constitution has adopted a theory of law which derives fundamental rights from natural law it is not the function of judges to debate the merits of the theory.[446]

Thus, Costello's second thesis suggests that a judge's genuine, historical 'I'-relatedness to the phenomena under deliberation must be denatured. Judicial deliberation presupposes a rudiment of experiencing (*Entlebnis*). The Costelloian judge's determination of a plaintiff's claim to a constitutionally protected natural right in the light of Christian revelation and Christian philosophy involves an objectifying which is de-hinged and re-moved from the Costelloian judge's authentic lived-experience. Both the objectified occurring of 'the bearer of constitutionally protected rights' and 'Christian revelation' have the relation to the Costelloian judge's knowing 'I' of being-known and simply go past him as a process such that, although the Costelloian judge is addressed to the person bearing constitutionally protected rights and to Christian revelation, the Costelloian judge does not live as an historical 'I' out toward these "phenomena" but takes up a purely theoretical or "object historical"[447]

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nur und gerade im Erkennen, d.h. im theoretischen Verhalten zu geben und zu geben für das theoretische Ich. Im theoretischen Verhalten bin ich gerichtet auf etwas, aber *ich* lebe nicht (als historisches Ich) auf dieses oder jenes Welthafte zu." Heidegger, note 441, at 73-74. (emphasis in the original).

[445] Hemming, note 125, at 157.

[446] Costello, note 418, at 112.

[447] "objektiv-geschichtlichen", Heidegger, note 399, at 93.
Broadbent, note 442, at 82.

comportment to them. In other words, in the Costelloian judge's mortified experience (*Entlebnis*) a purely theoretical object occurs in a process which also produces a purely theoretical, dehistoricized 'I', an 'I' from which all I-content, I-relatedness has been denatured.[448] This theoretical cognition presupposes an intentional relation between the Costelloian judge's 'I' and the thing intended which depends upon the separation (*Entfernung*) of the Costelloian judge's 'I' from the thing intended. In sum, this theoretical cognition presupposes the subject - the transcendental 'I' – before whom things are placed as objects of cognition and this objectification presupposes truth as certainty of representation. As Heidegger argues:

> Making entities into objects for human beings completes itself in a placing before which aims at bringing every entity into view in such a way that calculating human beings can be certain of them, and that means have knowledge of them. It then turns into science as systematic investigation only when truth has changed into certainty of representation. It is in the metaphysics of Descartes that, for the first time, the being is defined as the objectness of representation and truth as the certainty of representation.[449]

4.4.3 O'Hanlon's "Lived Experience"

In contrast to the Costelloian judge's "mortified experience" (*Entlebnis*), Mr Justice O'Hanlon's extra curial references to the conscience and belief of the judge suggests that

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[448] Hemming, note 125, at 158.

[449] "Diese Vergegenständlichung des Seienden vollzieht sich in einem Vor-stellen, das darauf zielt, jegliches Seiende so vor sich zu bringen, daß der rechnende Mench des Seienden sicher und d. h. gewiß sein kann. Zur Wissenschaft als Forschung kommt es erst dann, und nur dann, wenn die Wahrheit zur Gewißheit des Vorstellens sich gewandelt hat. Erstmals wird das Seinde als Gegenständlichkeit des Vorstellens und die Wahrheit als Gewißheit des Vorstellens in der Metaphysik des Descartes bestimmt." Heidegger, "Die Zeit des Weltbildes" in Heidegger, note 308, at 87.

"Heidegger sees the German tradition of philosophy as offering a series of reinterpretations of Descartes' grounding of entities, grounding what there is in the process of representation to a subject. Heidegger claims that, with Descartes, human beings become the ground of knowledge. This, for Heidegger, is the significance of the emergence of the concept of the subject in the early modern period. In the foot note, he adds that this subject is reinterpreted by Leibniz as the monad, by Kant as transcendental imagination, by Fichte as infinite ego, by Hegel as spirit and by Schelling's interpretation of freedom as necessity of every entity...in an earlier essay Heidegger claims that Nietzsche's metaphysics is also determined in its structure, if not in its content, by the Cartesian move. The last term in this sequence of names for human beings as subject, then is, 'will to power'." Hodge, note 319, at 109.
Hemming, note 125, at 160-161.

O'Hanlon understands judicial deliberation as presupposing the judge's historical, I-relatedness to the "phenomena" under deliberation.

Writing *extra curia* Mr Justice O'Hanlon advanced two arguments. Firstly, he argued that since the Constitution expressly acknowledges that certain fundamental rights are 'inalienable', 'imprescriptible' and 'antecedent and superior to all positive law', and that all powers of government derive 'under God' from the people, then limitations are placed both on the scope of ordinary legislation and on the scope of constitutional amendment.[450] Secondly, O'Hanlon argued that since Article 6 of the Constitution recognises that the judicial power as one of the powers of government derived under God from the people, and since Article 34.5.1° mandates that every judge appointed under the Irish Constitution promises in the presence of Almighty God to uphold the Constitution and the laws, and since a faithful Roman Catholic in obedience to his Church's magisterial teaching on matters of faith and morals subscribes to the moral principle that the intentional destruction of innocent human life at any stage from conception to natural death is gravely wrong, then a Roman Catholic judge cannot enforce a law permitting and facilitating the commission of abortion.[451] O'Hanlon concludes:

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[450] "For the time being, however, the *Irish Constitution* remains unique among the constitutions of the world in the manner in which it recognises that there is a law superior to all positive law, which is not capable of being altered by legislation, or even by simple amendment of the Constitution itself...In the case of the 1937 Constitution, limitations are placed both on the scope of ordinary legislation and on the scope of constitutional amendment once the Constitution acknowledges – as it does in express terms – that certain fundamental rights are 'inalienable', 'imprescriptible' and 'antecedent and superior to all positive law'; that all powers of government derive 'under God' from the people, and that all authority comes 'from the Most Holy Trinity' to Whom, as our final end, all actions, both of man and States, must be referred." O'Hanlon, note 234, at 131-132.

[451] "And in their recent statement, the Irish [Catholic] Hierarchy, having re-affirmed the moral principle that the intentional destruction of innocent human life at any stage from conception to natural death, is gravely wrong, continued as follows:

> The principle admits of no exceptions. It does not depend on a particular religious conviction. The unborn child's right to life 'is a primary, natural, inalienable right that springs from the dignity of every human being'. That is the principle which ought to guide conscience and behaviour, whatever the Constitution or law may say.

Where, one may ask, does this leave Catholic members of a Government which introduces such a law [permitting abortion], or Catholic politicians who vote in support of it, or Catholic judges who are called upon to enforce the law? With regard to the Judiciary, the position is that every person appointed a judge under the *Constitution* must make and subscribe the following declaration:

> If [a Roman Catholic judge] *believes*, as I do, that any such 'law' would be repugnant to the Constitution and the natural law, and therefore null and void, then his *conscience* can remain clear. He can continue to uphold the Constitution and the laws made lawfully there under while refusing to give effect to any attempted legislation which offends against the Constitution and the moral law."[452]

In other words, in judicial deliberation the "O'Hanlonian" judge *himself* is also put into question. Not just the nature of a statute being interpreted, but the judge's own faithful understanding (which arises from his personal, historical experience), his conscience, his past commitments, *eg* his declaration upon entering office made in the presence of God,[453] and his sense of duty are all put into question in judicial deliberation.

Since O'Hanlon's second argument presupposes a twofold identification - that God to whom reference is made in the Irish Constitution is identified with God known in the light of faith (*lumen fides*), and that the natural law implicit in the Constitution is identified with the moral law affirmed by the Magesterium of the Catholic Church – the "O'Hanlonian" judge's deliberation can be described as theological in the sense that it presupposes knowledge of God acquired in faith (*fides*) and his judicial determination can be described as an act of faith (*credere*). From a phenomenological perspective, what the appeals to the conscience and faith of the O'Hanlonian judge draw attention to is that the O'Hanlonian judge's

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> In the presence of Almighty God I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (*or as the case mat be*) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me. [Art. 34.5.1]

Does the Catholic judge solemnly and sincerely promise and declare that he will uphold a law permitting and facilitating the commission of the 'unspeakable crime' of abortion? Does he ask God to direct and sustain him in so doing? In my opinion, the answer must be 'No'. Remember that *Article 6 of the Constitution* declares that 'All powers of government, legislative, executive and *judicial*, derive under God, from the people', thereby recognising the judicial power as one of the powers of government which is exercised under the *Constitution*.... Once [a law permitting abortion] finds its way onto the statute-book, should that occur, he has to ask himself whether the law is included in the laws which he solemnly and sincerely promised and declared that he would uphold. If it *is* a law, I fail to see how he can reconcile a promise and declaration in those terms with the tenets of his Faith, under which he accepts without qualification the teaching authority of the Church in matters of faith and morals. If he believes, as I do, that any such 'law' would be repugnant to the Constitution and the natural law, and therefore null and void, then his conscience can remain clear. He can continue to uphold the *Constitution* and the laws made lawfully thereunder while refusing to give effect to any attempted legislation which offends against the *Constitution* and the moral law." *Ibid*, at 133-135 (emphasis in the original).

[452] *Ibid*, at 135 (emphasis added).

[453] See section 2.2.

understanding has a character, a manner, and is never freed from the peculiarities and *existentialia* – the worldedness – in which it understands. In contrast to the reference to interiority implicit in the Costelloian judge's purely theoretical or "object historical" comportment to the things posited and so *already* known in consequence of the mathematical nature of subjectivity, the O'Hanlonian judge's act of faith (*credere*) can be considered as implicitly futural and as part of the continual accommodation to, or comportment towards, what is *to be* known, namely God's revelation of Himself (*fides*).[454]

4.4.4 Interpreting the Constitution

Given the Costelloian judge's mortified experience (*Entlebnis*) and the O'Hanlonian judge's lived experience (*Ereignis*), the nature of their interpretations of the Constitution is examined in this section.

Heidegger understands interpretation, not as an acquiring of information about what is understood, but as the working-out of the possibilities projected in understanding.[455]

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[454] Since the subjectivity of the subject could be manifest in religious forms no less than in legal forms, then any particular O'Hanlonian judge's appeal to conscience and faith might itself be a purely theoretical or object-historical comportment towards Christian revelation rather than a genuine deliberation in which that particular O'Hanlonian judge is personally implicated. For the purposes of this section, it is taken that the O'Hanlonian judge is personally implicated in his deliberation.

[455] "As understanding, Dasein projects its being upon possibilities. This *Being-towards-possibilities* which understands is itself a potentiality-for-Being, and it is so because of the way these possibilities, as disclosed, exert their counter-thrust upon Dasein. The projection of the understanding has its own possibility – that of developing itself. This development of the understanding we call "interpretation". In it understanding appropriates to itself that which is understood in a comprehending manner. In interpretation understanding does not become other, but rather it becomes itself. Interpretation is existentially grounded in understanding, and understanding does not arise from interpretation. Interpretation is not an acquiring of information about what is understood, but the working-out of the possibilities projected in understanding." Martin Heidegger, *Being and Time* (Blackwell, 1962), at 188-189.

"Das Dasein entwirft als Verstehen sein Sein auf Möglichkeiten. Dieses verstehende *Sein zu Möglichkeiten* ist selbst durch den Rückschlag dieser als erschlossener in das Dasein ein Seinkönnen. Das Entwerfen des Verstehens hat die eigene Möglichkeit, sich auszubilden. Die Ausbildung des Verstehens nennen wir *Auslegung*. In ihr eignet sich das Verstehen sein Verstandenes verstehend zu. In der Auslegung wird das Verstehen nicht etwas anderes, sondern es selbst. Auslegung gründet existenzial im Verstehen, und nicht entsteht dieses durch jene. Die Auslegung ist nicht die Kenntnisnahme des Verstandenen, sondern die Ausarbeitung der im Verstehen entworfenen Möglichkeiten." Martin Heidegger, *Sein und Zeit* (Gesamtausgabe 2, Klostermann, 1977), at 148.

Commenting on the hermeneutic circle – he who interprets must have already understood what it is he is interpreting[456] - Heidegger observes that the circle of understanding is not an orbit in which any kind of random knowledge moves, but is the expression of the existential *fore-structure* of *Dasein* itself.[457] The Costelloian judge interprets something *as* something, *ie* for the Costelloian judge, a thing to be known is known by being subsumed under an already known category. In Costello's legal method the nature of the person bearing constitutionally protected rights is known by being subsumed under the category of created beings, the nature of inalienable and imprescriptible rights is known by being subsumed under the category of Christian philosophy's natural law. This interpretation is a working out of a "Cartesian attitude toward being" in which truth is configured as representation (*Vorgestelltheit*) in consequence of the certainty of the self-grounding subject. Consequent on the relation between subjectivity and being created (*ens creatum*) implicit in Costello's first thesis, the ontological difference is not a question, but is decided, secured and certain such that (the Costelloian judge's) understanding decides in advance what any given thing might be. In other words, since truth in Costello's legal method is configured as the correspondence of any given thing with (the Costelloian judge's) pre-knowledge or representation of it, the

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All German texts from Heidegger's *Sein und Zeit* are taken from the *Gesamtausgabe*, volume 2 (Klostermann, 1977), and all English translations are taken from the translation by Macquarrie and Robinson in *Being and Time* (Blackwell, 1962).

[456] "All interpretation which is to contribute understanding, must already have understood what is to be interpreted." *Ibid*, at 194.
"Alle Auslegung, die Verständnis beistellen soll, muß schon das Auszulegende verstanden haben." *Ibid*, at 153.

"...we may define "*assertion*" as "*a pointing out which gives something a definite character and which communicates.*"...The pointing out which assertion does is performed on the basis of what has already been disclosed in understanding or discovered circumspectively." *Ibid*, at 199.
"*Aussage ist mittellend bestimmende Aufzeigung...* Das Aufzeigen der Aussage vollzieht sich auf dem Grunde des im Verstehen schon Erschlossenen bzw. umsichtig Entdecken. " *Ibid*, at 156.
Fay, note 309, at 23.

[457] "What is decisive is not how to get out of the circle but how to enter it in the right way. The circle of understanding is not an orbit in which any kind of random knowledge moves, but is the expression of the existential *fore-structure* of *Dasein* itself." Heidegger, note 455, at 195.
"Das Entscheidende ist nicht, aus dem Zirkel heraus-, sondern in ihn nach der rechten Weise hineinzukommen. Dieser Zirkel des Verstehens ist nicht ein Kreis, in dem sich eine beliebige Erkenntnisart bewegt, sondern er ist der Ausdruck der existentialen *Vor-struktur* des Daseins selbst." Heidegger, note 455, at 153.

interpretation of the Constitution in Costello's legal method is a working out of the possibilities originally projected in the establishment of the subjectivity of the subject. This working out of possibilities manifests itself as a search for grounds (in the sense of the Leibnizian first principle of science).[458] Indeed, like the Leibnizian search for grounds, the Costelloian judge's search for the ground of law can be considered as a hangover from transcendental philosophy.[459]

In contrast, the O'Hanlonian judge has to reach forward for just those experiences of the Constitution and the plaintiff claiming constitutionally protected rights in which his 'I' is fully present and comes to its own in a particular, vivid experience. In such reaching forward, in which his 'I' en-owns the Constitution and the Constitution's essence "eventuates" itself to him, the Constitution is put into question *as well as* the O'Hanlonian judge himself as the one knowing – a putting into question which includes his understanding, his conscience, his faith, his sense of duty. This understanding of deliberation presupposes the O'Hanlonian judge's 'I' as essentially ecstatic, *ie* groundless in the sense that, as ungrounded, everything it knows comes to it anew, in a properly or authentically original way. Consequently, in judicial deliberation and constitutional interpretation, the O'Hanlonian judge would not be able to rely systematically upon either the canons of interpretation or precedent determined by a higher court, but would exercise original, deliberative thinking in every case.[460] His saying of the law (*iuris dictio*) might even be called a "full original jurisdiction".[461]

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[458] See section 3.7 above.

[459] "Heidegger's point is that there could be no absolute system of morality or absolute ethics, because nothing could ground it... Is the quest to ground ethics, either in God, or the self, or the other, simply a hangover of transcendental philosophy, a demand left over from the over-determination of the subject, the *cogito*? In Levinas's ethics of alterity, the other ceases to be important at all, except as a pretext for the entry into the world of the same. But as Heidegger shows, I need no pretext for entering world; I am already the world that I am in (guilty or otherwise). The question is the manner of my being in the world." Hemming, note 354, at 64.

[460] Commenting on Heidegger's example of 'being together' in a pub, Hemming illustrates the nature of deliberation required to respect the relation between people – a respect which the O'Hanlonian judge would seek to exercise in his determination of litigants' rights and duties: "Heidegger concludes his example by saying, 'now, even if I on the other hand get up and accompany you to the door, it is never merely the same as when two

4.4.5 Uniformity of Judicial Interpretation

Costello's second thesis holds that, in interpreting the Constitution, a judge is required to rely on natural legal principles derived from Christian philosophy without necessarily accepting or believing them to be true. Using Klima's terminology, it would seem that the Costello presumes that judicial reference to natural law must be "parasitic" rather than "constitutive".[462]

When interpreting the Constitution, an "orthodox Thomist" judge may make constitutive reference to a natural legal principle derived from Christian philosophy under a particular description and conclude to all the implications he realizes his description has concerning that principle and cannot consistently think that the principle has properties inconsistent with that particular description. The "Benthamite" judge, or for that matter, the "orthodox Augustinian" judge or the "orthodox Franciscan" judge, in making parasitic reference to the natural legal principle derived from Christian philosophy by merely intending to refer to the same thought object that the orthodox Thomist has conceived of, may not conceive of it under

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bodies are merely moving themselves next to one another toward the door.' We can see immediately how Heidegger demonstrates that what is sought is an account of being with one another which takes account of the character of the relation between the two, and which takes account of the extent to which the relation itself is either one taken for granted (*das Man-selbst*) or in which one is already 'resolved', i.e. ontologically determinate. What differentiates the first 'being with another' from the second is that in the course of accompanying you to the door I open out and individuate you with respect to me and also thereby allow you to stand in a relation to me. This situation would be still more marked in the transition from where a group of people sit together in a tube train. We are together but unindividuated until the train stops and an elderly person or a person with a child gets on and you give up your seat to allow them to sit: at once individuating yourself and *in the very event of individuation* allowing both the relative difference between you and the one for whom you get up to come into relief. Nevertheless, there is no general ground on which this resolvedness or self-selection, could stand. It is different in every case: this means, in every case, a specific, contextual phenomenological description is required of the deliberative thinking brought to bear in every situation. This deliberative thinking may have sedimented out into mere manners or conventional behaviour (you have been taught it is 'good manners' to give up your seat to the elderly on trains), it may be a well-established practice or set of practices handed on from generation (there is a proper way to fire a gun or drive a car), or it may require a new decision, a new resolution. Most particularly, a new decision or resolution is risky: it could get matters wrong. 'Ethics', in this sense, is a business in which individual existences, and even existence as a whole (let us say, with respect to nuclear weapons) can be imperilled." *Ibid*, at 63-64.

[461] "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." *Bunreacht na hÉireann*, Article 34.3.4°.

[462] See section 3.3 above.

the same description as the orthodox Thomist and may even deny that the orthodox Thomist's description in fact applies to it. Consequently, Costello's second thesis does not guarantee unanimity in the judicial determination of constitutionally protected personal rights since the thesis, of itself, does not establish that judges, by their normal, "everyday commitment" to objects of the world and legal experience, are also committed to making constitutive reference to what the Costelloian judge would identify as a constitutionally protected natural right.

4.5 Conclusion

In this chapter it was argued that the method of constitutional interpretation which relies upon the authority of the Constitution to justify interpreting the Constitution in the light of Christian revelation and Christian philosophy presupposes the metaphysics of subjectivity. In particular, the following conclusions were reached:

1. *Ontotheology*: the effect of the conflation of faith and law is that something belonging to revelation, to faith as such, namely, knowledge of Creation, becomes operative in law in such a way that it no longer matters whether faith is present, but remains at work in an entirely secularised context.
2. *Concealment of Power*: the ground of the natural law and of the person who bears constitutionally protected personal rights is not the invoked God of Christian revelation but man (in the form of the self-asserting popular sovereign) who "makes his essence autonomous" and "rises into the willing of himself" by "an interior projection forward" into the highest possibilities of power (*Macht*).
3. *Nihilism*: God becomes "entangled" in the interpretation of the Constitution in consequence of the forgottenness of being (*Seinsvergessenheit*): 'God' is the form of the figure the concealed 'self' assumes in order to manifest itself.[463]

[463] "The whole force of Heidegger's argument, demonstrating how God first became entangled in metaphysics, is to show how the forgottenness of being, which is really the concealment of self-presence of the self, the 'I',

4. *Truth*: the establishment of the subjectivity of the subject effects a transformation of the essence of truth with respect to certainty such that truth is configured as conformity to being represented (*Vorgestelltheit*);

5. *Metaphysics of Valuation*: The self-asserting subject becomes visible in the ascription of values. It's claims to fidelity to the Constitution and its implied Christian philosophy masks its taking power over the claim to justice. This "emergence" of the self attained through the metaphysics of valuation indicates the arising triumph of the subjectivity of the subject and is symptomatic of the activity of political nihilism to hide and conceal the very means by which it effects what it eventuates. This will be examined again in the chapters on the case law of the Supreme Court.

6. Costello's method of interpreting the Constitution outlined in his extra curial writing presupposes the metaphysics of subjectivity. It is argued in chapter 6 that this method of interpreting the Constitution is presupposed by the *dicta* of Walsh J in the *McGee Case*.

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produced a 'God' who is in effect the form of the figure the concealed 'I' assumes in order to manifest itself." Hemming, note 125, at 261.

Chapter 5 Clarke's Theses on the Natural Law and the Irish Constitution

5.1 Introduction

In a number of articles Professor Desmond Clarke argues that if some provisions of the Constitution are understood as granting the unwritten natural law a constitutional status which is superior to other provisions of the written text, then the relation between the Constitution and the unwritten natural law is paradoxical.[464] Clarke argues that by applying logical and set theoretic techniques developed in the early decades of the twenty century to the text of the Constitution, the written Constitution can be understood as being legally superior to the unwritten natural law in a paradox free manner.[465]

Two arguments are advanced in this chapter. Firstly, it is argued that insofar as Clarke's argument confuses negation and denial, his analysis presupposes the configuration of truth as being represented (*Vorgestelltheit*) found in the metaphysics of subjectivity. Secondly, it is argued that insofar as Clarke's argument presupposes the identity of legal validity and a semantic notion of truth, his solution to the problem of paradoxes in Irish constitutional law by means of the imposition of requirements of logical consistency and formal constructability developed in twentieth century logic and set theory can also be understood in consequence of the metaphysics of subjectivity.

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[464] Desmond M. Clarke, "Emergency Legislation, Fundamental Rights and Article 28.3.3 of the Irish Constitution" (1977) 12 *Irish Jurist* (N.S.) 217; "The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon" (1993) 11 *Irish Law Times* 177; "Natural Law and Constitutional Consistency" in Quinn, Ingram and Livingstone eds, *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995), "The Role of the Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist* (N. S.) 187.

[465] Set theoretic arguments have also been applied to law to argue that morality pertains to law. For example, Carlson has argued that insofar as legal positivism reduces law to its rules of recognition, then the application of set theory to legal positivism reveals legal positivism as being contradictory and therefore invalid. Carlson argues that the only conceivable non-contradictory jurisprudence is one in which law cannot be defined according to rules of recognition and concludes that law cannot be separated from morality because set theory shows that at least one primary rule grounded in morality must be included in the set of primary rules. David Gray Carlson, "Russell's Paradox and Positive Law", Cardozo Legal Studies Research Paper No. 257, papers.ssrn.com/sol3/papers.cfm?abstract_id=1355652## (visited 9th February 2010); "What Set Theory can teach Legal Positivism" works.bepress.com/david_carlson/2/ (visited 1st June 2011).

5.2 Clarke's Argument

Clarke argues that the natural legal elements of the Constitution raise the problem of "potential paradoxes" not unlike the liar paradox[466]:

> The liar paradox occurs when, in one and the same language, we make statements about the truth-value of the statements themselves. If I say: 'My brother tells the truth and I agree with him', I leave myself open to the possibility of my brother saying something which I claim to be false. As a result, I both affirm and deny, directly and indirectly, one and the same proposition. A constitution which endorses the contents of an indeterminate, unwritten Natural Law and grants it a constitutional status which is superior to other provisions of the written text, stands in the same relation to this unwritten law as I do to my truth-telling brother. Such a constitution provides courts with a constitutional basis for appealing to an antecedent and superior law which may be inconsistent with the explicit provisions of the written constitution.[467]

Clarke identifies Natural Law limitations on the scope allowed the electorate in amending the Constitution as an example of a "potential paradoxes".[468] He also identifies the provisions for emergency legislation under Article 28.3.3°[469] as another such "glaring case of such inconsistency":

> The contradiction is between the following two claims which are equally supported by the text when understood in the light of the Natural Law [with the three features of independence, specificity and superiority]:
> (i) Some rights (derived from Natural Law, or those recognised by the Constitution as being antecedent and superior) are superior to all positive law (including, therefore, emergency legislation);
> (ii) The same rights are not superior to some positive laws (viz. emergency legislation which takes advantage of immunity from constitutional challenge under Article 28).[470]

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[466] The "liar paradox" is associated with Cretan poet Epimenides of Knossos (ca 600BC) whose *Cretica* contains the line "Cretans, always liars..." The line is also quoted without attribution in chapter 1, verse 12 of Saint Paul's Epistle to Titus.

[467] Desmond M. Clarke, "Natural Law and Constitutional Consistency" in Quinn, Ingram and Livingstone eds, *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995), at 35.

[468] Desmond M. Clarke, "The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon" (1993) 11 *Irish Law Times* 177.

[469] "Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law." *Bunreacht na hÉireann*, 28.3.3°.

[470] Clarke, note 467, at 34.

Clarke argues that the theory of types developed by Russell and Tarski in the early decades of the twentieth century can be relied upon to avoid such 'liar' paradoxes. In the theory of types a distinction is maintained between an 'object-language' and a 'meta-language'. An object-language consists of simple sentences which do not involve a truth predicate. Statements predicating truth or falsity of statements in the object-language are identified as belonging to the meta-language. A rule is also adopted which specifies that statements belonging to a meta-language cannot be members of that meta-language's object-language. Since statements predicating truth or falsity of statements in a meta-language can be considered as belonging to a meta-meta-language, then by application of the rule, all permissible statements are stratified into a hierarchy of levels (or types) from object-language to meta-language to meta-meta-language *etc.* In particular, the adoption of the rule renders all self-referential statements inexpressible in any language of the hierarchy of 'languages'. Similarly, Clarke argues that, given the common logical features of legal claims and truth claims, the adoption of a rule prohibiting self-referential legal statements ensures that the resultant legal framework is paradox free.[471] In particular, in the case of the Irish Constitution, Clarke proposes that "potential paradoxes" such as those arising from the provisions for emergency legislation under Article 28.3.3° and from limitations on the scope allowed the electorate in amending the Constitution (as have been implied by O'Hanlon),[472] can be avoided by granting a superior status to the text of the Constitution over that of the Natural Law:

> In effect: we accept Natural Law theory as a helpful interpretative tool in constitutional adjudication as long as it agrees with the written text of the Constitution (including amendments). In cases where they are inconsistent, the explicit text of the Constitution prevails. This is equivalent to...denying the legal superiority of Natural

[471] "...moral and legal claims have some of the same logical features as truth-claims, and they can generate paradoxes in a way which is both similar in structure and equally damaging. The remedy is also structurally similar to the remedy for the liar paradox; to remember what theory or legal framework we are working in when we make claims about other moral or legal claims, and to keep separate those types of claim which, if combined, would give rise to paradoxes." *Ibid*, at 24.

[472] See section 4.4.3 above.

Law or to depriving [the Natural Law] of the specificity it would require in order to contradict an explicit provision of a written constitution.[473]

5.2.1 Reformulation of Clarke's Paradox

The reasoning which leads to Clarke's paradox can be formulated into the following four steps:

1. From an examination of the references to natural, inalienable and imprescriptible rights in Articles 41.1.1°, 42.1, 42.5 and 43.1.1°, Clarke concludes that the Constitution "asserts" that the natural law is legally valid.
2. From an examination of Article 28.3.3° of the Constitution, which Clarke construes as asserting the legal superiority of some positive laws over the natural law in times of war and armed rebellion, Clarke concludes that the Constitution is not consistent with natural law as the natural law would "assert" that (Article 28.3.3° of) the Constitution is not legally valid. Similarly, Article 46.1 of the Constitution[474] can be construed as asserting the legal superiority of the positive laws on constitutional amendment over the natural law.
3. The relationship between the Constitution and the natural law implied by (1) and (2) above can formulated as a "constitutional" liar cycle[475] in which any attempt to assign legal validity to the Constitution results in a vicious circle:

   The Constitution asserts 'The Natural Law is legally valid'.

   The Natural Law asserts 'The Constitution is not legally valid'.

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[473] Clarke, note 467, at 35-36.

[474] "Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article." *Bunreacht na hÉireann*, 46.1.

[475] Jon Barwise and John Etchemendy, *The Liar* (Oxford University Press, 1987), at 22; Keith Simmons, *Universality and the Liar* (Cambridge University Press, 1993), at 4.

This "constitutional" liar cycle can also be formulated as a "Constitutional Liar" involving self-reference with negation:

The Constitution asserts 'The Constitution is not legally valid'.

4. The intuitive reasoning that shows the "Constitutional Liar" to be paradoxical might then run as follows:

   4.1 Assuming the Constitution's assertions are legally valid, and given that the Constitution asserts of itself (in the "Constitutional Liar") that it is not legally valid, then the following proposition is legally valid:

   (A) The Constitution is not legally valid.

   4.2 Since by (A) above, the Constitution is not legally valid, then what the Constitution asserts (in the "Constitutional Liar") is in fact the case, so what the Constitution asserts is true.

   (B) The Constitution is true.

   4.3 (A) and (B) are contradictory.

This reformulation of Clarke's paradox indicates at least two presuppositions in Clarke's claim that moral and legal claims have some of the same logical features as truth-claims. Firstly, the conclusion in 4.3 above follows only if 'true' is taken to mean 'legally valid', *ie* only if it is presupposed that the notion of legal validity is the same as a semantic notion of truth.[476] Secondly, the use of the conclusion (A) in 4.1 above as the premise in 4.2 above presupposes the identity of negation and denial. These presuppositions are examined in the following sections.

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[476] Given this identification of semantic truth and legal validity, the intuitive reasoning which leads to the paradox can be stated as follows:

4.1' Assuming that what the Constitution asserts is true, and given that the Constitutional asserts of itself that it is not true, then (A') The Constitution is not true

4.2' Since by (A') above, the Constitution is not true, then what the Constitutional asserts is in fact the case, so (B') The Constitution is true

4.3' (A') and (B') are contradictory

5.3 Negation and Denial

The negation of a proposition *p* is a "positive" statement in the sense that it states that there are facts of the world which make the proposition false *p* false. In particular, the fact of the falsity of a proposition *p* is a *semantic* fact and not a *worldly* fact. For example, the fact that the paper of this page is (at the moment) dry is a fact of the world which makes the proposition "The paper of this page is wet" false, but the fact of the falsity (at the moment) of the proposition "The paper of this page is wet" is a semantic fact. Denial is a "negative" statement in the sense that the denial of a proposition *p* states that there are no facts that make *p* true. To deny the proposition "The paper of this page is wet" is to deny that there are any worldly facts which make the proposition true.

Applying the analysis of Barwise and Etchemendy[477] to the reformulation of Clarke's paradox shows that that there in an intermediate step between 4.1 and 4.2 in the intuitive reasoning described in 4 above in which denial and negation are confused.

4.1 Starting from knowledge of the world, it is taken as a fact of the world that what the Constitution says is true (legally valid). On the basis of this worldly fact it is concluded that the Constitutional Liar's self-referential assertion is true, *ie* it is concluded that the proposition 'The Constitution is not true' is true. In other words, on the basis of a worldly fact, the proposition 'The Constitution is true' is false. However, the fact of the falsity of the proposition 'The Constitution is true' is a *semantic* fact and not a *worldly* fact.

Intermediate step The semantic fact of the falsity of the proposition 'The Constitution is true' is

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[477] "However described, the reasoning that makes the Liar look paradoxical has three distinctive stages. We first engage in a piece of meta-level argumentation which shows that the Liar cannot be true. Second, we objectify this conclusion and assume it to be a feature of the world, a feature that can influence truth and falsity. There is a clear movement from the realm of semantic fact to the typically non-semantic domain that our statements describe. The third step involves using this newly discovered feature of the domain of discourse as premise for a further piece of meta-level reasoning, reasoning that shows the Liar to be true. Whence the paradox." Barwise and Etchemendy, note 475, at 175.

construed as a *denial* that there are worldly facts which make the proposition 'The Constitution is true' true, with the consequence that the semantic fact is implicitly included as part of the situations that determine the truth or falsity of propositions.

4.2 On the basis of the "new" situation which now includes the semantic fact discovered in 4.1 construed as a denial, *ie* on the basis of the "new" situation in which there are no worldly facts which make the proposition 'The Constitution is true' true, it follows that the Constitutional Liar's self-referential assertion is true.

Thus, the progression from 4.1 to 4.2 in the reformulation of Clarke's argument involves an intermediate step in which negation is construed as denial with the consequence that the situations that determine the truth or falsity of propositions in 4.1, namely worldly facts, are not the same situations which determine the truth or falsity of propositions in 4.2, namely worldly facts and a semantic fact.[478]

5.3.1 The Truth of a Proposition

The Russellian understanding assumes that propositions refer to the world in its entirety. Since the Liar paradox shows that the falsity of the Liar proposition somehow lies "outside" this world, such propositions are deemed impermissible. What the analysis of Barwise and Etchemendy makes clear is that the "world" which propositions are "about" includes both

[478] Barwise and Etchemendy describe their approach to be in the spirit of Austin (as distinct from Russell): "According to Austin, a legitimate statement A provides two things: a historical (or actual situation $s|A$, and a type of situation $T|A$... While Austin did not use the term "proposition", it seems in the spirit of his account to identify what we will call the *Austinian proposition* expressed by A with the claim $s|A$, is of type $T|A$, and to individuate such a proposition by its two components, the situation referred to and the type of situation it is claimed to be. We call the first component the situation the proposition is about, *About(p)*, and the second component the proposition's constituent type, *Type(p)*." Barwise and Etchemendy, note 475, at 28-29.

worldly facts and semantic facts and that whereas worldly facts can establish a proposition to be false, the fact of the falsity of a proposition is not a worldly fact.[479]

Similarly, Clarke's argument assumes that, within the Irish constitutional context, statements about the universe of all legally valid propositions cannot be made as there would then be legal propositions, *eg* the "potential paradoxes" arising from the Constitution's references to the natural law's superior legal status, whose falsehood would somehow lie outside this universe of legally valid propositions. Clarke's construal of the semantic fact (of the falsity of a legal proposition) as a denial (of any worldly facts which make that legal proposition true) can be understood as presupposing truth as being represented (*Vorgestelltheit*). As the truth of legal propositions are determined by reference to the "world" which includes a denial of any worldly facts which make certain legal propositions true, the truth of the legal proposition is determined by its conformity to a prior representation of the world. In sum, insofar as Clarke's argument confuses negation and denial his analysis can be understood as presupposing the configuration of truth found in the metaphysics of subjectivity.

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[479] "Paradoxes in any domain are important: they force us to make explicit assumptions usually left implicit, and to test those assumptions in limiting cases. What's more, a common thread runs through the solution of many well-known paradoxes, namely, the uncovering of some hidden parameter, a parameter whose value shifts during the reasoning that leads to the paradox... There is a hidden parameter in the Russellian context which the Austinian diagnosis makes explicit: the portion of the world that the proposition is about. The Russellian assumes that this "portion" encompasses the world in its entirety... the Liar paradox shows that we cannot make statements about the universe of all facts. If we held on to the Russellian view of the propositions, the Liar would then force us to acknowledge an essential partiality in the world: there are propositions which aren't true, but whose falsehood somehow lies outside the universe of facts, outside the "world"." Barwise and Etchemendy, note 475, at 171-175.

Barwise's and Etchemendy's formulation of the liar paradox can be summarised as follows:

Let a situation be a collection of facts.
Let S denote a situation.
Let p denote the liar proposition.
1. On the basis of S, p is false;
2. New fact F: 'On the basis of S, p is false';
Let S' denote the situation consisting of S and the new fact F;
3. On the basis of S', p is true;
If S and S' are assumed to be identical then 1. and 3. are paradoxical.

5.4 Legal Validity and Semantic Truth

Insofar as Clarke's solution to the problem of "potential paradoxes" in Irish constitutional law is analogous to the solution to the problem of paradoxes found in Russell's theory of types and Tarski's semantic theory of truth, Clarke's analysis evidences a constructivist understanding which can be construed as originating within the metaphysics of subjectivity. The theories of Russell and Tarski are reviewed in the following sections and Clarke's constructivist understanding is examined in section 5.5 below.

5.4.1 Russell's Theory of Types

Russell's 1901 discovery of the existence within naïve set theory of predicates that could not be predicated of themselves gave impetus to the so called "Crisis of the Foundation of Mathematics" during the first decades of the twentieth century.[480] If such self-referential predicates could exist within set theory, then using classical logic, it would follow that all sentences (including contradictions) could be proved and so the inconsistency of mathematics would be proved. One of the responses to this crisis focused on the problem of establishing whether or not mathematics had a foundation that could be stated within mathematics itself. This led some to the search for axioms of set theory from which all mathematics might flow (comparable to the role which Euclid's axioms were thought to have within elementary geometry). For example, Russell's type theory sought to avoid the paradoxes arising within naïve set theory from the use of impredicative definitions (involving predicates that cannot be predicated of themselves) by two means: by abandoning Frege's fifth axiom[481] and by ordering the predicates into a hierarchy such that predicates at the lowest level apply only to

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[480] W. S. Anglin, *Mathematics: A Concise History and Philosophy* (Springer, 1994), at 213-220.

[481] Frege's fifth axiom can be loosely formulated as asserting that every (second order) predicate divides the universe into two mutually comprehensive and disjoint parts (sets); namely the part of the universe which consists of objects for which the predicate holds and the part of the universe for which the predicate does not hold.

objects and higher level predicates apply to the "objects" of lower levels. In other words, Russell's type theory prohibits paradoxes by prohibiting predicates involving self-reference with negation.

Using the terminology of set theory it can be said that the paradoxes of self-reference are avoided by adoption of an axiom of well-foundedness. The basic concepts of set theory are 'set' and 'membership': sets being collections of objects called members or elements. These members can themselves be sets (subsets) which have members of their own. Classical axiomatic formulations of set theory such as Zermelo-Frankel set theory with the Axiom of Choice (denoted ZFC) include an Axiom of Regularity[482] or Axiom of Foundation so that if the membership relation is "followed downwards", a "bottom"– atomic members that are not sets or are the empty set - is eventually reached. In other words, in classical axiomatic set theory, sets are well-founded in the sense that there are no infinitely descending chains of membership. From this perspective it might be said that the elaboration of axiomatic set theory starts "from the bottom up": starting with elements or "atoms", set theoretic objects are inductively constructed and everything not required, *ie* everything which is not constructible in this way, is forbidden.

5.4.2 Tarski's Semantic Theory of Truth

It is argued in this section that Tarski's semantic theory of truth also presupposes a kind of well-foundedness.

In seeking to give a satisfactory definition of the notion of truth which might prove useful in scientific methodology, Tarski proposed a semantic theory of truth[483] which can be roughly

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[482] The axiom of regularity can be loosely formulated as asserting that every non-empty set X contains some element y such that X and y are disjoint sets.

[483] Alfred Tarski, "On the Concept of Truth in Formal Languages" in Tarski, *Logic, Semantics, Metamathematics: Papers from 1934-1938* (Hackett Publishing, 1983); "The Semantic Conception of Truth and the Foundations of Semantics" (1944) 4 *Philosophy and Phenomenological Research* 341.

summarised as formulating two requirements that any theory of the truth of sentences ought to satisfy, namely material adequacy and formal correctness. Since the construction of a predicate for a formal language involves a multiplicity of possible semantic interpretations, Tarski's requirement of material adequacy limits the possible contents of the language.[484] Tarski's requirement of formal correctness limits the sentences of the language to those satisfying requirements of logical consistency and formal constructability. Beginning from a fixed object-language Tarski shows how to define a 'True' predicate in a meta-language which applies to exactly the true sentences of the object-language. He also identified minimum requirements which the meta-language must satisfy in order to allow the definition of the 'True' predicate: the meta-language must be capable of expressing everything expressible in the original object-language, it must contain devices for describing its syntax and it must have set-theoretic resources that go beyond those in the object-language. The consequence of these two requirements is that the assertion of the truth of a sentence can only be made as a formal requirement of the language in which the sentence itself is expressed, *ie* the truth of sentences is relative to the language in which they are expressed.[485] In particular, since Tarski's definition of truth presupposes the regimenting of scientific language into a hierarchy of levels, his notion of truth cannot apply to either natural languages or the notion of truth expressible in natural languages without adopting radical and artificial revisions of those natural languages.

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[484] The limitation is imposed by requiring that the "T-scheme" or "T Convention" holds:

> For every sentence "P" of an object language:
> "P" is true if and only if p
> where p translates into the meta-language the proposition expressed by "P" in the object-language.

[485] "...the concept of truth essentially depends, as regards both extension and content, upon the language to which it is applied. We can only meaningfully say of an expression that it is true or not true if we treat this expression as a part of a concrete language. As soon as the discussion concerns more than one language the expression 'true sentence' ceases to be ambiguous. If we are to avoid this ambiguity we must replace it by the relative term 'a true sentence with respect to the given language." Tarski, "On the Concept of Truth in Formal Languages", note 483, at 263.

In broad outline, Tarski's formalization of language proceeds in three steps. The first step involves the specification of non-logical predicates, logical operators, terms and sentences of the object-language for which truth is to be defined. In the second step the reference of the primitive non-logical constants of the language is defined by such semantic notions as the "denotation for variable free terms" (denotation of an object by a primitive name), "application of a predicate" (application of a primitive predicate to an object) and the "satisfaction"[486] of well-formed, atomic formulae. In the third step Tarski presents an inductive definition of truth in which the truth of complex sentences is assigned on the basis of the truth of their simpler constituents.[487] Consequently, the Tarskian notion of truth can be considered as grounded on the Cartesian introduction of "clear" and "distinct" ideas as primitive elements of the deductive method that forms the core of rationalistic scientific analysis.[488] Retracing the three steps in Tarski's formalization of language, it can be shown that the Tarskian reduction of language involves:

1. reduction of the semantic notion of truth to the semantic notion of satisfaction. (The inductive definition of truth can be viewed as the reduction of the satisfaction conditions of logically complex formulae to the satisfaction conditions of logically simple formulae);
2. reduction of the semantic notion of satisfaction to the semantic notion of the reference of the primitive non-logical constants of the language;

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[486] An assignment of values *a* satisfies a formula *F* if and only if taking each free variable in *F* as a name of the object assigned to it by *a* makes *F* a true sentence.

[487] Gila Sher, "What is Tarski's Truth" (1999) 18 *Topoi* 149; Scott Soames, *Understanding Truth* (Oxford University Press, 1999), at 71-73.

[488] "...the tarskian notion of truth, which grounds in turn on the cartesian introduction of "clear" and "distinct" ideas as primitive elements of deductive method that forms the core of rationalistic scientific analysis. To say that a statement expresses a true proposition, if this fact denotes a fact of reality, presupposes that there is an objective reality consisting of logical atoms, called facts. The propositions denoting these atoms are considered to be context free, i.e. they represent ideas, which are true in all contexts. Prototypes of these ideas are, of course, the mathematical ones. A mathematical proof has an "essentially" context free content that can be carried out under all circumstances." Constantin Thiopoulos, "Meaning Metamorphosis in Semiotic Topos" (1990) 16 *Theoretical Linguistics* 255.

3. reduction of the semantic notion of the reference of the primitive non-logical constants of the language to non-semantic notions, *eg* "physicalistically acceptable notions" such as logico-mathematical and physical notions.[489]

In sum, Tarski's semantic notion of truth presupposes a kind of "reductionism": starting from non-semantic notions, the sentences of the language are constructed by means of rules of reference and combination which themselves satisfy requirements of formality and logical consistency. In other words, the "reductionism" involved presupposes a kind of "well-foundedness".

5.5 Clarke's "constructivist" understanding

From these brief reviews of Russell's theory of types and Tarski's semantic theory of truth it would seem that, by referring to the Russell's and Tarski's theories as models for avoiding the "potential paradoxes" which arise from interpreting the Constitution as granting the natural law a constitutional status which is superior to other provisions of the written text, Clarke's analysis presupposes a principle of well-foundedness. Like Tarski's requirement of material adequacy of a formal language, Clarke's analysis seeks to limit the possible contents of legal language to the explicit written provisions of the Constitution in order to prevent a multiplicity of possible semantic interpretations of the predicate 'legally valid'. Like Tarski's requirement of formal correctness, Clarke's analysis seeks to limit the sentences of the language to those satisfying requirements of logical consistency and formal constructability or well-foundedness. The consequence of these two requirements is that the assertion of the legal validity of a proposition can only be made as a formal requirement of the language in which the proposition itself is expressed, *ie* the legal validity of propositions is relative to the

[489] John McDowell, "Physicalism and Primitive Denotation: Field on Tarski" (1978) 13 *Erkenntnis* 131, at 137; Sher, note 487, at 156-160.

"legal language" in which they are expressed. Clarke's proposed solution to the problem of "potential paradoxes" can be formulated in the following three steps:

1. The propositions in the "explicit text" of the Constitution are identified as forming part of a (legal) object-language which does not involve a truth predicate.
2. Those legal propositions which predicate truth or falsity of propositions in the object-language (and which may be derived from the natural law) are identified as part of a (legal) meta-language.
3. The assertion of the legal superiority of the propositions of the (legal) object-language over the propositions of the (legal) meta-language so as to avoid "potential paradoxes" can be considered as the application of a principle of well foundedness which prohibits statements belonging to the meta-language from also belonging to the object-language. By adopting this principle, the "Constitutional liar", which predicates falsity of itself, is excluded from membership of any language within the hierarchy of (legal) languages.

Prescinding from the question of the justification of the interpretative violence that might arise from attempting to create a hierarchy of legal languages (in order to avoid those "potential paradoxes" of self-referential legal propositions involving negation), self-reference is more ubiquitous than that which arises from the implicit references to the natural law. For example, in the case of an amendment of Article 46.1,[490] Article 46.1 would be the authority for its own amendment thereby giving rise to the paradox of self-amendment. From a formalist perspective,[491] the validity of an amendment to the Constitution is established by deductive inference:

> Rule: If A is done, then B is legally valid
> Fact: A is done
> Conclusion: B is legally valid

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[490] See n. 474 above.

[491] Peter Suber, *The Paradox of Self-Amendment in American Constitutional Law* www.earlham.edu/~peters/writing/psaessay.htm (visited 7th March 2009).

This deductive inference involves self-reference when the rule affirmed in the conclusion refers to the rule in the premise.[492] In other words, the imposition of requirements of logical consistency and formal constructability upon "legal language" analogous to the requirements imposed in Russell's theory of types and Tarski's semantic theory would result in the prohibition of self-reference in the hierarchy of legal languages. This would render not just self-referential propositions concerning constitutional natural law inexpressible in the hierarchy, it would also render Article 46.1 inexpressible. In other words, in seeking to establish the priority of the literal text of the Constitution over the requirements of the unwritten natural law, Clarke's proposed solution establishes the priority of the requirements of logical consistency and formal constructability over the literal text of the Constitution.

The following two arguments are advanced in the following sections with regard to Clarke's imposition of a principle of well-foundedness to prohibit self-referential legal propositions in Irish constitutional law. Firstly, the Principle of Well-foundedness is not indispensable for set-theoretic or logical analysis. Secondly, the principle can be understood as a consequence of the metaphysics of subjectivity.

5.5.1 The Principle of Well-foundedness

The Principle of Well-foundedness is not indispensable for set-theoretic or logical analysis. It is noteworthy that while the axiom of foundation has played an enormous role in the way scientists model the world, the axiom of foundation plays almost no role in mathematics, since if ZFC is consistent, then it can be shown that ZFC with an Anti-Foundation Axiom which allows non-well-founded sets (sets with infinitely descending chains of membership) is also consistent.[493] As Moss explains, the notion of a set (and the

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[492] Let A denote *Article N of the Constitution is amended according to Article 46.1*, let B denote *Article N* , then self-reference arises when *N* denotes *46.1*

[493] Barwise and Etchemendy, note 475, at 46.

propositions which are modelled by them) as inductively constructible suggests a peculiarly physical understanding:

> One place to look for a new conception [of a set] is in the metaphors we use when speaking of sets and the relation of membership. The fact that we often use *in* so often instead of *is a member of* is important because it suggests a spatial metaphor. We also speak of a set *containing* its elements, and we ask whether a set is *empty* or not. The iterative conception is consistent with the view that sets are containers. Under it, the relation of a set to its elements is that of a box to its contents, except that we identify all empty boxes. Note that a box might be inside a second box, but no box can be inside itself. The point of all this is that a metaphor, detectable from language, can support a conception.[494]

However, such a peculiarly physical understanding is inappropriate to model genuinely circular phenomena such as propositions which are about themselves, constitutional articles which refer to the constitution,[495] and legal conventions.[496] Indeed such a physical, constructivist understanding is also inappropriate to model the Thomistic account of natural law which is formulated in terms of the theological notion of participation.

It might be objected that a "non-wellfounded" set theory is impossible, *ie* it might be objected that a set theory in which circular phenomena including self-referential legal propositions are understood in terms of such non-wellfounded, non-physical or non-constructive terms such as 'participates in' and 'involves' is impossible since such a set theory would be without "atomic elements" from which more complex objects are constructed. In reply to this objection Aczel explains:

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[494] Lawrence S. Moss, *Review of Barwise's and Etchemendy's The Liar* in (1989) 20 *Bulletin of the American Mathematical Society* 216, at 224 (emphasis in the original).

[495] *Eg* Articles 28.3.3° and 46.1 of *Bunreacht na hÉireann*.

[496] "All social conventions, from language to laws to customs about which side of the sidewalk to use, are based on conventions shared by the community in question. Certainly, part of what it means is that those who accept some convention, say *C*, behave in a given way, but...another important part of what makes *C* a convention is that those who accept *C* also accept that *C* is a shared convention. For example, suppose that *C* is the convention that people walk or drive on the same side of the street. To accept *C* means that normally you should walk on the right. But it also means that you expect others to do the same thing, and indeed that you expect that *C* is a shared convention. Note that this is circular, since part of your understanding of *C* is that others understand the same thing." Jon Barwise and Lawrence Moss, *Vicious Circles* (CSLI Publications, 1996), at 4.

The question of the nature of the Rule of Recognition is taken up again in section 7.4 below.

> A non-well-founded set...has an infinite descending membership sequence; i.e. an infinite sequence of sets consisting of an element of the set, an element of that element, an element of that element and so on ad infinitum. What is extraordinary about such a set is that it would seem that it could never get formed; for in order to form the set we would first have to form its elements, and to form those elements we would have to have previously formed their elements and so on leading to an infinite regress. Of course this anthropomorphic manner of speaking about the formation of sets is only that; a manner of speaking. We humans do not physically form sets out of their elements, as sets are abstract objects.[497]

In sum, while well-founded set theory is not indispensable for either mathematics or logic, its constructivist semantic notion of truth is useful for the rationalistic scientific methodology grounded upon the requirement of "clear" and "distinct" ideas as primitive elements of the deductive method in Cartesian rationalistic science. It is argued here that Clarke's identification of legal validity with a semantic notion of truth is consistent with a "constructivist" understanding of law born of the Cartesian requirement of rationalistic scientific analysis. The foundation of formal logic upon the metaphysics of subjectivity is examined in the following section.

5.5.2 Mathematics, Logic and Technique

It was argued in section 3.4.2 above that the metaphysics of subjectivity presupposes the subject as the "mathematical" moment in thought where mathematical means not "dealing with numbers" but rather "what is already known in advance". For example, although modern science follows the scientific procedure of "observation, hypothesis, confirmation, law", it is essentially "mathematical" since what is recognised in experimentation must

[497] "A non-well-founded set...has an infinite descending membership sequence; i.e. an infinite sequence of sets consisting of an element of the set, an element of that element, an element of that element and so on ad infinitum. What is extraordinary about such a set is that it would seem that it could never get formed; for in order to form the set we would first have to form its elements, and to form those elements we would have to have previously formed their elements and so on leading to an infinite regress. Of course this anthropomorphic manner of speaking about the formation of sets is only that; a manner of speaking. We humans do not physically form sets out of their elements, as sets are abstract objects." Peter Aczel, *Non-well-founded Sets* (CSLI Publications, 1996), at xvii.

already have been known in advance.[498] Heidegger illustrates the priority of the mathematical over the empirical in Newton's codification of Galileo's observations concerning the movement of bodies.[499] He concludes that Newton's first law,[500] on which so much of modern science is based, is formulated not in terms of experience of some thing or object, but on the basis of the application of a determination of every thing or object:

> How about this law? It speaks of a body, *corpus quod a viribus impressis non cogitur*, a body which is left to itself. Where do we find it? There is no such body. There is also no experiment which could ever bring such a body to direct perception. But modern science, in contrast to the merely dialectical poetic conception of medieval scholasticism and science, is supposed to be based on experience. Instead it has such a law at its apex. This law speaks of a thing which does not exist. It demands a fundamental representation of things which contradicts the ordinary.

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[498] "There is first of all observation of certain related phenomena, which are duly noted in [statements recording the empirical phenomena]. There is next a projected hypothesis of what the explanation might be that would account for all the facts in the most satisfactory and economical way. There follows a series of experiments, or controlled experiences by which the hypothesis might be tested and thus confirmed or invalidated. But before observation can take place, it is clear that we must know in advance what we are looking for." Fay, note 309, at 81.

[499] In his *Discorsi*, which appeared in 1638, Galileo said: "Mobile super planum horizontale proiectum mente concipio omni secluso impedimento, iam constat ex his, quae fusius alibi dicta sunt, illius motum aequabilem et perpetuum super ipso plano futurum esse, si planum in infinitum extendatur." ("I think of a body thrown on a horizontal plane and every obstacle excluded. This results in what has been given a detailed account in another place, that the motion of the body over the plane would be uniform and perpetual if this place were extended infinitely".) In this proposition, which may be considered the precedent of the First Law of Newton, what we have been looking for has been clearly expressed. Galileo says: "Mobile mente concipio omni secluso impedimento." ("I think in my mind of something movable that is entirely left to itself.") This "to think in mind" is that giving-oneself-a-cognition about the determination of things. It is a procedure of going ahead in advance, which Plato once characterised regarding *μάθησις* in the following way...(Meno 85d) bringing up and taking up – above and beyond the other – taking the knowledge itself from out of himself." Heidegger, note 328, p. 91.

„In seinen 1638 erschienen Discorsi sagt Galilei: Mobile super planum horizontale proiectum mente concipio omni secluso impedimento, iam constat ex his, quae fusius alibi dicta sunt, illius motum aequabilem et perpetuum super ipso plano futurum esse, si planum in infinitum extendatur. »Ich denke mir einen Körper auf eine horizontale Ebene geworfen und jedes Hindernis ausgeschlossen: so ergibt sich aus dem, was an anderer Stelle umständlich gesagt ist, daß die Bewegung des Körpers über diese Ebene gleichförmig und immerwährend würde, wenn die Ebene sich ins Unendliche ausdehnt.« In diesem Satz, der als der Vorläufer des I. Grundsates von Newton gelten darf, kommt das, was wir suchen, ganz klar zum Ausdruck. Galilei sagt: »Mobile... mente concipio omni secluso impedimento - »ich denke mir im Geiste ein völlig selbst überlassenes Bewegbares«. Dieses »Sich-im-Geiste-denken« ist jenes Sich-selbst-eine-Kenntnis-geben von einer Bestimmung über die Dinge. Es ist ein Vorgehen, das Platon einmal bezüglich der *μάθησις* in folgender Weise kennzeichnet:...(Menon 85 d4) »heraufholend und hinauf – über das andere weg – nehmend die Erkenntnis selbst aus sich selbst«. Heidegger, note 328, at 91.

[500] "Every body preservers in its state of being at rest or of moving uniformly straight forward, except insofar as it is compelled to change its state by forces impressed";
"*Corpus omne persevare in statu suo quiescendi vel movendi uniformiter in directum, nisi quatenus illud a viribus impressis cogitur suum mutare.*" Issac Newton, *Principia Mathematica* (Cambridge University Press, 1972), at 54.

> The mathematical is based on such a claim, i.e. the application of a determination of a thing, which is not experientially created out of the thing and yet lies at the base of every determination of things...[501]

Unlike the medieval cosmology influenced by Aristotle, in which nature was conceived of as an inner capacity of a body, determining its form of motion and place, the Newtonian cosmology conceived of nature as the uniform space-time within which motion takes place and which is "mathematically" known in advance. Indeed, in the Newtonian cosmology, it is *only* in relations of places and temporal moments and in the measures of mass and forces that bodies may appear at all.[502]

Heidegger understands the "mathematical project" as a kind of surveying or laying out of the horizon within which things may appear.[503] Only those things may appear within this

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[501] „Wie steht es mit diesem Grundsatz? Er spricht von einem Körper, corpus quod a viribus non cogitur, einem sicht selbst überlassenden Körper. Wo finden wir ihn? Einen solchen Körper gibt es nicht. Es gibt auch kein Erperiment, das jemals einen solchen Körper in die anschauliche Vorstellung bringen könnte. Nun soll doch die neuzeitliche Wissenschaft im Unterschied zu den bloß dialektischen Begriffsdichtungen der mittelalterlichen Scholastik und Wissenschaft auf Erfahrung gründen. Statt dessen steht ein solcher Grundsatz an der Spitze. Er spricht von einem Ding, das es nicht gibt. Er verlangt eine Grundstellung von den Dingen, die der gewöhnlichen widerspricht. In einem solchen Anspruch beruht das Mathematische, d.h. die Ansetzung einer Bestimmung des Dinges, die nicht erfahrungsmäßig aus diesem selbst geschöpft ist und die gleichwohl aller Bestimmung der Dinge zugrunde liegt..." Heidegger, note 328, at 89-90.

[502] "There is a prior grasping together in this *mente concipere* of what should be uniformly determinative of each body as such, i.e. for being bodily. All bodies are alike. No motion is special. Every place is like every other, each moment like any other. Every force becomes determinable only by the change of motion which it causes – this change in motion being understood as a change of place. All determinations of bodies have one basic blueprint, according to which the natural process is nothing but the space-time determination of the motion of points of mass. This fundamental design of nature at the same time circumscribes its realm as everywhere uniform." *Ibid*, at 91.

"In diesem mente concipere wird im voraus solches zusammengegriffen, was einheitlich bestimmend sein soll für die Körperhaftigkeit. Alle Körper sind gleich. Keine Bewegung ist ausgezeichnet. Jeder Ort ist jedem gleich; jeder Zeitpunkt jedem Zeitpunkt. Jede Kraft bestimmt sich nur nach dem, was sie an Bewegungsänderung – diese Bewegungsänderung als Ortswechsel veranderen – verursacht. Alle Bestimmungen über den Körper werden in einen Grundriß eingezeichnet, wonach der Naturvorgang nichts ist als die räumlich-zeitliche Bestimmung der Bewegung von Massenpunkten. Dieser Grundriß der Natur umgrenzt zugleich ihren Bereich als einen überall gleichmäßigen." *Ibid*, at 92.
Fay, note 309, at 83; Hemming, note 125, at 201.

[503] "1. The mathematical is, as mente concipere, a project of thingness which, as it were, skips over things. The project first opens a domain where things – i.e., facts – show themselves.
2. In this projection there is posited that which things are taken a, what and how they are to be evaluated beforehand. Such evaluation and taking-for is called in Greek *ἀξιόω*. The anticipating determinations and assertions in the project are *ἀξιώματα*. Newton therefore entitles the section in which he presents the fundamental determinations about things as moved: *Axiomata: sive leges motus*. The project is axiomatic. Insofar as every science and cognition which is taken and posited in the mathematical project is one of such a kind as to set things upon their foundation in advance. The axioms are *fundamental* propositions.

projected horizon which are prefigured in the project.[504] Rather than let beings manifest themselves to thought, beings are submitted to an "interrogation" in which the type of answer which will be received is determined in advance by the conditions laid down in the questioning and experimentation to which those beings are subjected.[505] Thus, Heidegger understands the new sciences as experimental in consequence of the "mathematical" nature of subjectivity.[506] Similarly, he argues that the new form of modern science did not arise

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3. As axiomatic, the mathematical project is the anticipation of the essence of things, of bodies; and thus the basic blueprint of the structure of everything and its relation to every other thing is sketched in advance." *Ibid*, at 92.

"1. Das Mathematische ist, als mente concipere, ein über die Dinge hinwegspringender *Entwurf* ihrer Dingheit. Der Entwurf eröffnet erst einen Spielraum, darin die Dinge d.h. die Tatsachen, sich zeigen.
2. In diesem Entwurf wird dasjenige gesetzt, wofür die Dinge eigentlich gehalten werden, ale was sie und wie sie im vorhinein gewürdigt werden sollen. Solches Würdigen und Dafürhalten heißt greichisch *ἀξιόω*. Die im Entwurf vorgreifen den Bestimmungen und Aussagen sind *ἀξιώματα*. Newton überschreibt daher den Abschnitt, darin er die Grundbestimmungen über die Dinge als bewegte ansetzt: Axiomata, sive leges motus. Der Entwurf ist axiomatisch. Sofern sich jede Kenntnis und Erkenntnis in Sätzen ausspricht, ist die im mathematischen Entwurf genommene und gesetzte Erkenntnis eine solche, die die Dinge im vorhinein auf ihrer Grund setzt. Die Axiome sind *Grund-Sätze*.
3. Der mathematischen Entwurf ist als axiomatischer der Vorausgriff in das Wesen der Dinge, der Körper; damit wird im Grundriß vorgezeichnet, wie jedes Ding und jede Beziehung jedes Dinges zu jedem Ding gebaut ist." *Ibid*, at 92.
Fay, note 309, at 81.

[504] "5. This realm of nature, axiomatically determined in outline by this project, now also requires for the bodies and corpuscles within it a mode of access appropriate to the axiomatically predetermined objects. The mode of questioning and the cognition determination of nature are now no longer rules by traditional opinions and concepts...Natural bodies are now only what they *show* themselves as, within the projected realm. Things now show themselves only in relations of places and time points and in the measures of mass and working forces. How they show themselves is prefigured in the project. Therefore, the project also determines the mode of taking in and studying of what shows itself, experience, the *experiri*." Heidegger, note 328, at 93.

"5. Der so im Entwurf in seinem Grundriß axiomatisch bestimmte Bereich der Natur verlangte nun auch für die in ihm vorfindbaren Körper und Korpuskeln, eine *Zugangsart*, die allein den axiomatisch vorbestimmten Gegenständen angemessen ist. Die Art der Befragung und erkenntnismäßigen Bestimmung der Natur wird jetzt nicht mehr durch überlieferte Meinungen und Begriffe geregelt...Die Naturkörper sind nur das, als was sie sich im Bereich des Entwurfs *zeigen*. Die Dinge zeigen sich jetzt nur in den Verhältnissen der Örter und Zeitpunkte und den Maßen der Masse und der wirkenden Kräfte. Wie sie sich zeigen, ist durch den Entwurf vorgezeichnet; er bestimmt deshalb auch die Weise des Hinnehmens und der Erkundung des sich Zeigenden, die Erfahrung, das experiri." Heidegger, note 328, at 93.

[505] "However, because inquiry is now predetermined by the outline of the project, a line of questioning can be instituted in such a way that it poses conditions in advance to which nature must answer in one way or another. Upon the basis of the mathematical, the *experientia* becomes the modern experiment." *Ibid*, at 93.

"Weil aber jetzt die Erkundung durch den Grundriß des Entwurfs vorbestimmt ist, kann das Befragen so angelegt werden, daßes im voraus Bedingungen setzt, auf welche die Natur so oder so antworten muß. Auf Grund des mathematichen wird die experientia zum Experiment im neuzeitlichen Sinne." *Ibid*, at 93.
Fay, note 309, at 83.

[506] "Modern science is experimental because of the mathematical project." Heidegger, note 328, at 93.

because mathematics (in the sense of Descartes' analytical geometry, Newton's infinitesimal calculus or Leibniz' differential calculus) became essential determinants, but rather that these novel mathematical theories first became possible on the grounds of the mathematical character of thought.[507] In sum, Heidegger argues that

> The mathematical wills to ground itself in the sense of its own inner requirements. It expressly intends to explicate itself as the standard of all thought and to establish the rules which thereby arise.[508]

Similarly, Heidegger understands the "mathematization" and formalization of logic in consequence of the mathematical moment of subjectity.[509] As Fay summarises:

"Die neuzeitliche Wissenschaft ist experimentierend auf Grund des mathematischen Entwurfs." Heidegger, note 328, at 93.

[507] "6. Because the project establishes a uniformity of all bodies according to relations of space, time, and motion, it also makes possible and requires a universal uniform measure as an essential determinant of things, i.e. numerical measurement. The mathematical project of Newtonian bodies leads to the development of certain "mathematics" in the narrow sense. The new forms of modern science did not arise because mathematics became an essential determinant. Rather, that mathematics, and a particular kind of mathematics, could come into play and had come into play is a consequence of the mathematical project. The founding of analytical geometry by Descartes, the founding of the infinitesimal calculus by Newton, the simultaneous founding of the differential calculus by Leibniz – all these novelties, this mathematical in a narrower sense, first became possible and, above all, necessary on the grounds of the basically mathematical character of the thinking." *Ibid*, at 93-94.

"6. Weil der Entwurf seinem Sinne nach eine Gleichmäßigkeit aller Körper nach Raum und Zeit und Bewegungsbeziehungen ansetzt, ermöglicht und fordert er zugleich als wesentliche Bestimmungsart der Dinge das durchgängig gleiche Maß, d.h. die zahlenmäßige Messung. Die Art des mathematischen Entwurfs des Newtonschen Körpers führt zur Ausbildung einer bestimmten »Mathematik« im engeren Sinne. Daß Mathematik jetzt ein wesentliches Bestimmungsmittel wurde, ist nicht der Grund für die neue Gestalt der neuzeitlichen Wissenschaft. Vielmehr gilt: Daß eine Mathematik, und zwar eine solche besonderen Schlages, ins Spiel kommen konnte und mußte, ist die *Folge* des mathematischen Entwurfs. Die Begründung der analytischen Geometrie durch Descartes, die Begründung der Fluxionsrechnung durch Newton, die gleichzeitige Begründung der Differentialrechnung durch Leibniz, all dieses Neue, dieses Mathematische im engeren Sinne, wurde erst möglich und vor allem notwendig auf dem Grunde des mathematischen Grundzugs des Denkens überhaupt." *Ibid*, at 94.

[508] "Das Mathematische will sich selbst, im Sinne seiner eigenen inneren Forderung, begründen; es will sich selbst ausdrücklich als Maßstab *allen* Denkens herausstellen und die daraus entspringenden Regeln aufstellen." *Ibid*, at 101.

[509] "The characterization of the assertion as the connection of representation...became the basis for a view and treatment of logic which today and for a number of decades has been much talked about and is called symbolic logic. With the help of mathematical methods people attempt to calculate a system of the connectives between assertions. For this reason we also call this logic "mathematical logic"." *Ibid*, at 156.

"Die Kennzeichnung der Aussage als Vorstellungsvererknüpfung...ist die Grundlage für eine Auffassung und Bearbeitung der Logik geworden, die heute und seit einigen Jahrzehnten viel von sich reden macht und Logistik genannt wird. Mit Hilfe von mathematischen Methodien wird versucht, das System der Aussagenverknüpfungen zu errechnen; daher nennt sich diese Logik auch »mathematische Logik«." *Ibid*, at 159.

> [The conception of natural language as lacking in formalization] is an outgrowth of *das Mathematische* which has its roots in the anthropocentric view of the world implicit in Descartes' *ego cogito*. Thus, linguistic analysis, the development of metalinguistics, and symbolic logic are all part of the more general movement of metaphysics of the "Will to Will", which produced modern technology. As Heidegger notes, "metalanguage and sputnik, metalinguistics and technology are really the same thing". It is *Ge-stell*, the drive toward domination, of technicity (*Technik*) which impels it to develop a language which will be pure instrument, that is, formalized language. Formalization is essentially an extension of calculation, which is man's basic posture towards his world. It attempts in its symbolization to absolutely extrude from the symbol all multiplicity of meaning and rigidly fix it in one meaning. Within a formal system the emphasis is on consistency, freedom from internal contradiction, coherence, consequence and rigor.[510]

Indeed, in contesting the use of logic in constructing conclusive formal arguments, Heidegger designates the one-sided endorsement of formal logic without reflection on the emergence of logic from an historical evolution of thought as "irrationalism".[511]

It is argued here that by his endorsement of the application of Tarskian and Russellian formalism to law, Clarke is guilty of what Heidegger calls irrationalism. Insofar as Clarke's analysis presupposes legally valid propositions to be "constructed" from "elements" found within the literal text of the Constitution (according to a principle of well-foundedness which prohibits self-referential propositions involving negation) and such that every proposition not so constructible cannot count as legal, Clarke's analysis presupposes the "mathematical project" in which law is "already known in advance". The requirement of a principle of well-foundedness or Axiom of Foundation is symptomatic of the "mathematical" surveying or laying out of the horizon within which "the legal" may appear and indeed may appear only in the manner prefigured in the project. In particular, the natural law is allowed to appear,

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[510] Fay, note 309, at 89.

[511] "...irrationalism, as a renunciation of *ratio*, dominates unrecognised and unopposed in the defence of "logic" which supposes it can do without a reflection on the term *λόγος* and on the emergence of *ratio* out of *λόγος*." Heidegger, "Letter on Humanism" in Heidegger, note 322, at 265.

"...der Irrationalismus als Absage an die ratio herrscht unerkannt und unbestritten in der Verteidigung der »Logik«, die glaubt, einer Besinnumg und den *λόγος* und auf das in ihm gründende Wesen der ratio ausweichen zu können." Heidegger, "Brief über den »Humanismus«" in Heidegger, note 322, at 349.
Hodge, note 319, at 98.

neither as law nor justice, but as a tool of limited use in the interpretation of the literal text of the Constitution. Rather than let the Constitution and the natural law manifest themselves to thought, the literal text of the Constitution is submitted to an "interrogation" in which the type of answer which will be received is determined in advance by the conditions laid down in the method of interpretation. In other words, Clarke's method of interpreting the Constitution - with its drive towards formalization, calculation and instrumentalization which evidences the Rule of Technology (*Technik*) - can be understood as a consequence of the mathematical moment of the subjectity of the subject.

5.6 Conclusion

In this chapter it was argued that Clarke's detection of Liar paradoxes (which arise from interpreting some provisions of the Irish Constitution as granting the unwritten natural law a constitutional status which is superior to other provisions of the written text) arises from construing the semantic fact of the falsity of a legal proposition as a denial of any worldly facts which make that legal proposition true. This construal of negation as denial can be understood as determining the truth of a legal proposition by its conformity to a prior representation of the world (which includes the denial of any worldly facts which make certain legal propositions true), *ie* truth is configured as "being represented" (*Vorgestelltheit*). Clarke's proposed method of avoiding Liar paradoxes in constitutional interpretation can be understood as arising from the understanding of legal validity as satisfying requirements of logical consistency and formal constructability developed in twentieth century logic and set theory. This formalism can be understood in consequence of the "mathematical" moment of the subjectivity of the subject which lays out in advance the horizon within which, and the manner in which, the legal may appear.

Chapter 6 Contraception

6.1 Introduction

In this chapter it is argued that the Supreme Court's decision in the *McGee Case* evidences the taking power over the claim to justice which is at the same time a concealment of the metaphysics of valuation.

In the *McGee Case* the Supreme Court considered the constitutionality of a statute which made it a criminal offence for any person to import any contraceptive into the State. Three arguments are advanced in this chapter. Firstly, it is argued that the Court's establishing of a right to the use of contraception within marriage founded on Article 41 of the Constitution (family rights) is not consistent with the Thomistic understanding of law. Secondly, it is argued that the establishing of a right to use contraception founded on Article 40.3.1° of the Constitution (personal rights) evidences the emerging triumph of the subjectivity of the subject and the metaphysics of valuation. Finally, it is argued that Walsh J's *dicta* on the interpretation of the Constitution presuppose the metaphysics of subjectivity.

6.2 The McGee Case

In the *McGee Case* the Supreme Court considered the constitutionality of section 17 of the Criminal Law Amendment Act, 1935, which made it a criminal offence for any person to sell or expose, offer, advertise, keep for sale, import or attempt to import into the State any contraceptive. The effect of section 17 of the Act of 1935 on the plaintiff in the case was to deprive her of access to contraceptives for the purpose of limiting the size of her family which, in view of her medical condition, she and her husband had agreed to do.[512] The Court

[512] "The plaintiff, who is a married aged 29, lives in the restricted quarters of a mobile home with her husband who is a fisherman earning about £20 per week, with their four children who were born in December, 1968, in January 1970, and (the twins) in November, 1970. Her medical history shows that during each pregnancy she suffered from toxaemia; that during her second pregnancy she developed a serious cerebral thrombosis from which she nearly died, and which left her temporarily paralysed on one side; and that during her last pregnancy

found the statutory provision to be contrary to Article 40.3.1° (personal rights) and Article 41 (family rights) of the Constitution and invalid in law.[513] The judgments of the Court disclose the following reasons for this finding:

(i) *Contraception as a matter of private morality*: by unreasonably restricting the availability of non-abortifacient contraceptives for use within marriage, the statutory provision constituted an unjustified invasion of the privacy of husband and wife in their sexual relations with one another, since the decision of a husband and wife to avoid having children by means of contraceptives is a matter of private morality peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion is justified by the exigencies of the common good.[514] In particular, by making it a criminal offence to fail to comply with the

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she suffered from toxaemia which was complicated by hypertension. She had been advised by her doctor that if she became pregnant again there will be a very great risk that she will suffer a further cerebral thrombosis, which is an illness that apparently has a mortality rate as high as 26% in married women of her age and which would be apt to cause her disabling paralysis if it did not prove fatal. Confronted with that dire prospect, she has had to decide between sexual abstinence and the use of a contraceptive – no question apparently having arisen as to a surgical intervention. With the agreement of her husband, and having due regard to her husband, her children and herself, she decided in favour of contraception. Because of her medical history of vascular thrombosis and hypertension, her doctor advised against an oral contraceptive and recommended instead an intrauterine device which was to be used with a contraceptive jelly. The doctor fitted the device and gave her a small supply of the contraceptive jelly. This jelly was not made in this State, so she had to order a further supply from England. When the packet containing it was sent to her by post, it was intercepted and seized by Customs authorities because being a "contraceptive" as defined by sub-s. 4 of s. 17 of the Criminal Law Amendment Act, 1935, its importation is prohibited by s.42 of the Customs Consolidation Act, 1876, as applied by sub-s.3 of s.17 of the Act of 1935." per Henchy J, [1974] IR 284, at 322.
"She discussed with her doctor the best methods to avoid pregnancy. She was unable to operate properly the temperature method of birth control and because of her brief history of thrombosis, oral contraceptives were unsuitable for her." per Griffin J, *Ibid*, at 329.

[513] Walsh, Budd, Henchy and Griffin JJ assenting, Fitzgerald CJ dissenting.

[514] "It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be quite outside the competence of the State to dictate or prescribe the number of children which they might have or should have. In my view, the husband and wife have a correlative right to agree to have no children. This is not to say that the State, when the common good requires it, may not actively encourage married couples either to have larger families or smaller families. If it is a question of having smaller families then, whether it be a decision of the husband and wife or the intervention of the State, the means employed to achieve this objective would have to be examined. What may be permissible to the husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practice either total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence, it would be an intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom. On the other hand, any action on the part of either the husband and wife or the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.

statutory provision, the statute permitted investigative and judicial procedures which would necessarily involve an invasion of the privacy of the marital relations of the plaintiff and her husband.[515]

(ii) *Assistance in one's efforts to avoid putting one's life in jeopardy*: insofar as married persons for whom conception could more than ordinarily endanger their life were not exempted from the statutory provision, the statutory provision constituted a failure by the State in its obligation to ensure that there would be made available to such married women the means whereby such a conception might be avoided.[516]

The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion is justified by the exigencies of the common good... The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it... the rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life. It is undoubtedly true that among those persons who are subject to a particular moral code no one has a right to be in breach of that moral code. But when this is a code governing private morality and where a breach of it is not one which injures the common good then it is not the State's business to intervene. It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire." per Walsh J, [1974] IR 284, at 311-313.

[515] "If she fails to obey the prohibition in s.17, the law, by prosecuting her, will reach into the privacy of her marital life in seeking to prove her guilt...If the plaintiff were prosecuted for an offence arising under or by virtue of s.17 of the Act of 1935...there would necessarily be a violation of intimate aspects of her marital life which, in deference to her standing as a wife and mother, ought not to be brought out and condemned as criminal under a glare of publicity in a courtroom. Furthermore, if she were found guilty of such an offence, in order to have the penalty mitigated to fit the circumstances of her case, she would have to disclose particulars of her marital dilemma which she ought not to have to reveal. In my opinion, s.17 of the Act of 1935 violates the guarantee in sub-s.1 of s.3 of Article 40 by the State to protect the plaintiff's personal rights by its laws, it does so not only by violating her personal right to privacy in regard to her marital relations, in a wider way, by frustrating and making criminal any efforts by her to effectuate the decision of her husband and herself, made responsibly, conscientiously and on medical advice, to avail themselves of a particular contraceptive method so as to ensure her life and health as well as the integrity, security and well-being of her marriage and her family." per Henchy J, [1974] IR 284, at 326-328.

[516] "So far as [Article 40] is concerned...the state of health of the plaintiff is relevant. If...a prohibition on the availability of contraceptives for use in marriage generally could be justified on the grounds of the exigencies of the common good, the provisions of s.1. of Article 40 (in particular, the proviso thereto), would justify and would permit the State to discriminate between some married persons and others in the sense that, where conception could more than ordinarily endanger the life of a particular person or persons or particular classes of persons within the married state, the law could have regard to the difference of physical capacity and make special exemptions in favour of such persons. I think that such an exemption could also be justified under the provisions of s.3 of Article 40 on the grounds that one of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of the opinion also that not only has the State the right to do so but, by virtue of the terms of the proviso to s.1 and the terms of s.3 of Article 40, the State has the positive obligation to ensure by its laws as far as is possible (and in the use of the word "possible" I am relying on the text of the Constitution) that there would be made available to a married

Both of these reasons are examined in the following sections.

6.3 Contraception as a Matter of Private Morality

It is argued in this section that Walsh J's identification of a right to use contraception within marriage founded on Article 41 of the Constitution (family rights) is not consistent with the Thomistic understanding of law as directed to the common good.

6.3.1 Marital Privacy

Aquinas understands the goods of marriage to include intimacy (*fides*) and reproduction (*proles*).[517] Insofar as marital intimacy (*fides*) is a common good of the married couple which cannot be shared with others, it is not a common good of the whole community. Not being a

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woman in the condition of health of the plaintiff the means whereby a conception which is likely to put her life in jeopardy might be avoided which is a risk over and above the ordinary risks inherent in pregnancy. It would, in the nature of things, be much more difficult to justify a refusal to do this on the grounds of the common good than in the case of married couples generally." per Walsh J, [1974] IR 284, at 315-316.

"...is the prohibition effected by s. 17 of the Act of 1935 an interference with the rights which the State guarantees in its laws to respect, as stated in subs-s.1 of s.3 of Article 40[?] The answer lies primarily in the fact that the plaintiff is a wife and mother. It is the informed and conscientious wish of the plaintiff and her husband to maintain full marital relations without incurring the risk of pregnancy that may well result in her death or in crippling paralysis. Section 17 of the Act of 1935 frustrates that wish. It goes further; it brings the implementation of the wish within the range of the criminal law. Its effect, therefore, is to condemn the plaintiff and her husband to a way of life which, at best, will be fraught with worry, tension, and uncertainty that cannot but adversely affect their lives and, at worst, will result in an unwanted pregnancy causing death or serious illness with the obvious tragic consequences to the lives of her husband and young children...Section 17, in my judgment, so far from respecting the plaintiff's personal rights, violates them. If she observes this prohibition (which in practice she can scarcely avoid doing and which in law she is bound under penalty of fine and imprisonment to do), she will endanger the security and happiness of her marriage, she will imperil her health to the point of hazarding her life, and she will subject her family to the risk of distress and disruption. There are intrusions which she is entitled to say are incompatible with the safety of her life, the preservation of her health, her responsibility to her conscience, and the security and well-being of her marriage and family." per Henchy J, *Ibid,* at 325-326.

[517] "Matrimony is instituted both as an office of nature and as a sacrament of the Church. As an office of nature it is directed by two things, like every other virtuous act. One of these is required on the part of the agent and is the intention of the due end, and thus "offspring" is accounted as a good of marriage; the other is required on the part of the act, which is good generically through being about a due matter; and thus we have "faith", whereby a man has intercourse with his wife and with no other woman. Besides this is has a certain goodness as a sacrament, and this is signified by the word "sacrament"."
Respondeo dicendum, quod matrimonium est in officium naturae, et est sacrementum Ecclesiae: inquantum autem est in officium naturae, duobus ordinatur, sicut et quilibet alius virtutis actus: quorum unum exigitur ex parte ipsius agentis, et hoc est intentio finis debiti; et sic ponitur bonum matrimonii proles: aliud exigitur ex parte ipsius actus, qui est bonus in genere ex hoc quod cadit supra debitam materiam; et sic est fides, per quam homo ad suam accedit, et non ad aliam: sed ulterius habet aliquam bonitatem, inquantum est sacramentum; et hoc significatur ipso nomine sacramenti. Thomas Aquinas, *Summa Theologica Tertiae Partis Supplementum*, q. 49, a. 2, *co.*

common good of the whole community, then, from a Thomistic perspective, it does not fall within the State's competence to direct acts towards its attainment by means of law.[518] Insofar as Walsh J understands marital privacy to include marital intimacy (*fides*), then Walsh J is in agreement with Aquinas in finding that "the sexual life of a husband and wife is of necessity and by its nature an area of particular privacy"[519] into which the State cannot intrude.

6.3.2 State Compulsion to beget Children

Aquinas argues that, since all men are equal, man is subject only to God in matters which pertain to one's body.[520] He argues that since no man stands to another as an end stands to

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[518] That Aquinas understands reproduction (*proles*) to be both a common good of the married couple and of the community – whose attainment the State is competent to regulate by means of law – is examined in section 6.3.4 below.

[519] See n. 514 above.

[520] "...there are two reasons, for which a subject may not be bound to obey his superior in all things. First on account of the command of a higher power. [Quoting Augustine, *De verb. Dom. viii*:] "*If a commissioner issue an order, are you to comply if it is contrary to the bidding of the proconsul? Again, if the proconsul command one thing, and the emperor another, will you hesitate to disregard the former and serve the latter? Therefore, if the emperor commands one thing and God another, you must disregard the former and obey God.* Secondly, a subject is not bound to obey his superior, if the latter command him to do something wherein he is not subject to him. For Seneca says [*De Beneficiis iii*]: *it is wrong to suppose that slavery falls upon the whole man: for the better part of him is excepted. His body is subjected and assigned to his master, but his soul is his own.* Consequently in matters touching the internal movement of the will man is not bound to obey his fellow-man, but God alone. Nevertheless man is bound to obey his fellow-man in things that have to be done externally by means of the body: and yet, since by nature all men are equal, he is not bound to obey another man in matters touching the nature of the body, for instance in those relating to the support of his body or the begetting of children. Wherefore servants are not bound to obey their masters, nor children their parents, in the question of contracting marriage or of remaining in the state of virginity or the like. But in matters concerning the disposal of actions and human affairs, a subject is bound to obey his superiors within the sphere of his authority; for instance a soldier must obey his general in matters touching on the execution of the duties of his service, a son his father in matters relating to the conduct of his life and the care of the household; and so forth."
...ex duobus potest contingere quod subditus suo superiori non teneatur in omnibus obedire. Uno modo, propter praeceptum maioris potestatis... si quid iusserit curator, numquid tibi faciendum est si contra proconsulem iubet? Rursum, si quid ipse proconsul iubeat, et aliud imperator, numquid dubitatur, illo contempto, illi esse serviendum? Ergo, si aliud imperator, aliud Deus iubeat, contempto illo, obtemperandum est Deo. Alio modo, non tenetur inferior suo superiori obedire, si ei aliquid praecipiat in quo ei non subdatur. Dicit enim Seneca, in III de Benefic., errat si quis existimat servitutem in totum hominem descendere. Pars eius melior excepta est. Corpora obnoxia sunt et adscripta dominis, mens quidem sui iuris. Et ideo in his quae pertinent ad interiorem motum voluntatis, homo non tenetur homini obedire, sed solum Deo. Tenetur autem homo homini obedire in his quae exterius per corpus sunt agenda. In quibus tamen etiam, secundum ea quae ad naturam corporis pertinent, homo homini obedire non tenetur, sed solum Deo, quia omnes homines natura sunt pares, puta in his quae pertinent ad corporis sustentationem et prolis generationem. Unde non tenentur nec servi dominis, nec filii parentibus obedire de matrimonio contrahendo vel virginitate servanda, aut aliquo alio huiusmodi. Sed in his quae pertinent ad dispositionem actuum et rerum humanarum, tenetur subditus suo superiori obedire secundum

means, then there is no justification for the State requiring a man's dispositions or self-regarding conduct to conform to the interests of another and identifies precepts concerning such dispositions as pertaining to morality.[521] In finding that it is a matter exclusively for the husband and wife to decide how many children they wish to have and that it is outside the competence of the State to dictate or prescribe the number of children which they might have or should have,[522] Walsh J is in agreement with Aquinas that a married couple enjoy "marital privacy" in the sense of not being subject to an external compulsion to beget children. However, it is noteworthy that neither Walsh J nor any of the other judges explicitly justify the State's lack of competence on the ground of equality under God - a justification which could be founded on the Constitution's acknowledgement of God as the final end, to Whom "all actions of men and the States must be referred". Insofar as a couple's "marital privacy" is outside the competence of the State to dictate or prescribe, then, from a Thomistic perspective, Walsh J's *dicta* that the

> right cannot be directly be invaded by the State it follows that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible.[523]

is unproblematic. Similarly, insofar as a couple's "marital privacy" is governed by a couple's "private morality" it is also unproblematic that Walsh J holds that:

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rationem superioritatis, sicut miles duci exercitus in his quae pertinent ad bellum; servus domino in his quae pertinent ad servilla opera exequenda; filius patri in his quae pertinent ad disciplinam vitae et curam domesticam; et sic de aliis. Aquinas, note 71, IIa IIae, q. 104, a. 5, *co.*

[521] "...man is not ordained to his neighbour as to his end, so as to need to be disposed in himself with regard to his neighbour... Hence there are no judicial precepts [of the Mosaic Law] ordaining man in himself, all such precepts are moral: because the reason, which is the principal in moral matters, holds the same position, in man, with regard to things that concern him, as a prince or judge holds in the state."
...Sed homo non ordinatur ad proximum sicut finem, ut oporteat eum disponi in seipso in ordine ad proximum... Et ideo non sunt aliqua praecepta iudicialia ordinatia hominem in seipso, sed omnia talia sunt moralia, quia ratio, quae est principium moralium, se habet in homine respectu eorum quae ad ipsum pertinent, sicut principes vel iudex in civitate. Aquinas, note 71, Ia IIae, q. 104, a. 1, *ad.* 3.
Finnis, note 284, at 239-241.

[522] [1974] IR 284, at 311-312.

[523] [1974] IR 284, at 314.

> It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire.[524]

However, it is argued in the following sections that notwithstanding the fact that Walsh J's use of the term "private morality" can be construed as being consistent with Aquinas, the sense in which Walsh J actually uses the term is not consistent with Aquinas's understanding of law.

6.3.3 The Reach of Human Law

With regard to the reach of human law, Aquinas distinguishes between "internal acts of the will", which are not directly observable by another, *eg* intention and knowledge, and exterior human acts, which are observable by another, and holds that human law is concerned only with external actions insofar as they impinge upon the tranquillity of the State while divine law is concerned with those interior acts of man insofar as they might militate against the attainment of heaven.[525] In other words, the State's (human) law is directed to the (State's intrinsic) common good of temporal order, and so regulates men's external acts only, whereas the divine law is directed to the (extrinsic) common good of God Himself and so regulates men's interior acts of will. Consequently, Aquinas holds that the State has no competence "in matters touching the internal movement of the will" since in such matters man is only subject

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[524] [1974] IR 284, at 313.

[525] "...Again it must be observed that the end of human law is different from the end of Divine law. For the end of human law is the temporal tranquillity of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state. On the other hand, the end of the Divine law is to bring man to that end which is everlasting happiness; which end is hindered by any sin, not only of external, but also of internal action. Consequently, that which suffices for the perfection of human law, viz., the prohibition and punishment of sin, does not suffice for the perfection of the Divine law: but it is requisite that it should make man altogether fit to partake of everlasting happiness."
...Est autem sciendum quod est alius finis legis humanae, et alius legis divinae. Legis enim humanae finis est temporalis tranquillitas civitatis, ad quem finem pervenit lex cohibendo exteriores actus, quantum ad illa mala quae possunt perturbare pacificum statum civitatis. Finis autem legis divinae est perducere hominem ad finem felicitatis aeternae; qui quidem finis impeditur per quodcumque peccatum, et non solum per actus exteriores, sed etiam per interiores. Et ideo illud quod sufficit ad perfectionem legis humanae, ut scilicet peccata prohibeat et poenam apponat, non sufficit ad perfectionem legis divinae, sed oportet quod hominem totaliter faciet idoneum ad participationem felicitatis aeternae. Aquinas, note 71, Ia IIae, q. 98, a. 1, *co.*

to God. Since Aquinas understands human law to be concerned with external actions he also understands that it is unable to punish or forbid all vices.[526] Examples of such vices include vices which cannot be controlled[527] and less grievous vices from which it is impossible for the majority to abstain.[528] However the permitting of a vice is not equivalent to the approval of that vice.[529] As Dever explains:

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[526] "Besides the natural and the human law, it was necessary for the directing of human conduct to have a Divine law. And this for four reasons... Thirdly, because man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements that are hidden, but only of exterior acts which appear: and yet for the perfection of virtue it is necessary for man to conduct himself aright in both kinds of acts. Consequently, human law could not sufficiently curb and direct interior acts; and it was necessary for this purpose that a Divine law should supervene. Fourthly, because, as Augustine says [De Lib. Art. i. 5. 6] human law cannot punish or forbid all evil deeds, it would do away with many good things, and would hinder the advance of the common good, which is necessary for human intercourse. In order, therefore, that no evil might remain unforbidden and unpunished, it was necessary for the Divine law to supervene, whereby all sins are forbidden."
Respondeo dicendum quod praeter legem naturalem et legem humanam, necessarium fuit ad directionem humanae vitae habere legem divinam. Et hoc propter quatuor rationes... Tertio, quia de his potest homo legem ferre, de quibus potest iudicare. Iudicium autem hominis esse non potest de interioribus motibus, qui latent, sed solum de exterioribus actibus, qui apparent. Et tamen ad perfectionem virtutis requiritur quod in utrisque actibus homo rectus existat. Et ideo lex humana non potuit cohibere et ordinare sufficienter interiores actus, sed necessarium fuit quod ad hoc superveniret lex divina. Quarto quia, sicut Augustinus dicit, in I de Lib. Art., lex humana non potest omnia quae male fiunt, punire vel prohibere, quia dum auferre vellet omnia mala, sequeretur quod etiam multa bona tollerentur, et impediretur utilitas boni communis, quod est necessarium ad conversationem humanam. Ut ergo nullum malum improhibitum et impunitum remaneat, necessarium fuit supervenire legem divinam, per quam omnia peccata prohibentur. Aquinas, note 71, Ia IIae, q. 91, a. 4, *co.*

[527] "Human law is said to permit certain things, not as approving them, but as being unable to direct them. And many things are directed by the Divine law, which human law is unable to direct, because more things are subject to a higher than to a lower cause. Hence the very fact that human law does not meddle with matters it cannot direct, comes under the ordination of the eternal law. Consequently, it does not follow that human law is not derived from the eternal law, but that it is not on a perfect equality with it."
Ad tertium dicendum quod lex humana dicitur aliqua permittere, non quasi ea approbans, sed quasi ea dirigere non potens. Multa autem diriguntur lege divina quae dirigi non possunt lege humana, plura enim subduntur causae superiori quam inferiori. Unde hoc ipsum quod lex humana non se intromittat de his quae dirigere non potest, ex ordine legis aeternae provenit. Secus autem esset si approbaret ea quae lex aeterna reprobat. Unde ex hoc non habetur quod lex humana non derivetur a lege aeterna, sed quod non perfecte eam assequi possit. Aquinas, note 71, Ia IIae, q. 93, a. 3, *ad* 3.

[528] "As stated above [a. 90, aa. 1, 2], law is framed as a rule and measure of human acts. Now a measure should be homogenous with that which it measure, as stated in *Meaph. X*, since different things are measured by different measures. Wherefore law laws imposed on men should also be in keeping with their condition... Now possibility or faculty of action is due to an interior habit or disposition: since the same is not possible to one who has not a virtuous habit, as is possible for one who has. Thus the same is not possible to a child as to a full-grown man: for which reason the law for children is not the same as for adults, since many things are permitted to children, which in an adult are punished by law or at any rate are open to blame... Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vice, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others; without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike."
Respendeo dicendum quod, sicut iam dictum est, lex ponitur ut quaedam regula vel mensura humanorum actuum. Mensura autem debet esse homogenea mensurato, ut dicitur in X Metaphys., *diversa enim diversis mensuris mensurantur. Unde oportet quod etiam leges imponantur hominibus secundum eorum*

This limitation of civil statute clearly applies to the area of personal virtues and vices. While civil law does forbid certain vicious acts such as murder and theft, and requires certain acts of virtue such as caring for one's children and paying one's debts, it cannot "forbid all vicious acts" nor can it prescribe "all acts of virtue". Aside from the fact that it would supplant the need for eternal law, why cannot civil law be enacted to prohibit all vicious activities? The goal of human law is the temporal tranquillity of the state and not eternal salvation. Given this goal of temporal peace and order, Aquinas notes that the mandate of human law is to prohibit "whatever destroys social intercourse" and not to "prohibit everything contrary to virtue". The main reason for civil law's inability to prohibit all vice is that it cannot effect a full internal reform of an individual. An individual in their personal moral life is wounded by original sin and can only be restored by God's grace. Therefore the coercive and educating power of human law is inefficacious in this realm. Aquinas asserts, then, that human law cannot "exact perfect virtue from man for such virtue belongs to few and cannot be found in so great a number as human law has to direct"... His general principle, by which the state would tolerate [a vice such as] prostitution without approving it, is that human laws "leave certain things unpunished on account of the condition of those who are imperfect, and who would be deprived of many advantages, if all sins were strictly forbidden and punishments appointed for them". What Aquinas seems to suggest is that civil statute should not place too much of a moral burden on its citizens.[530]

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conditionem...Potestas autem sive facultas operandi ex interiori habitu seu dispositione procedit, non enim idem est possibile ei qui non habet habitum virtutis, et virtuoso; sicut etiam non est idem possibile puero et viro perfecto. Et propter hoc non ponitur eadem lex pueris quae ponitur adultis, multa enim pueris permittuntur quae in adultis lege puniuntur, vel etiam vituperantur. Et similiter multa sunt permittenda hominibus non perfectis virtute, quae non essent toleranda in hominibus virtuosis. Lex autem humana ponitur multitudini hominum, in qua maior pars est hominum non perfectorum virtute. Et ideo lege humana non prohibentur omnia vitia, a quibus virtuosi abstinent; sed solum graviora, a quibus possibile est maiorem partem multitudinis abstinere; et praecipue quae sunt in nocumentem aliorum, sine quorum prohibitione societas humana conservari non posset, sicut prohibentur lege humana homicidia et furta et huiusmodi. Aquinas, note 71, Ia IIae, q. 96, a. 2, *co*.

[529] "As stated above [I-II, q. 96, a. 2] human law is given to the people among whom there are many lacking in virtue, and it is not given to the virtuous alone. Hence human law was unable to forbid all that is contrary to virtue; and it suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them but by not punishing them."
Ad primum ergo dicendum quod, sicut supra dictum est, lex humana populo datur, in quo sunt multi a virtute deficientes, non autem datur solis virtuosis. Et ideo lex humana non potuit prohibere quidquid est contra virtutem, sed ei sufficit ut prohibeat ea quae destruunt hominum convictum; alia vero habeat quasi licita, non quia ea approbet, sed quia ea non punit. Aquinas, note 71, IIa IIae, q. 77, a. 1, *ad* 1.

[530] Vincent M. Dever, "Aquinas on the Practice of Prostitution" (1996) 13 *Essays in Medieval Studies* 39, at 43-44.
Dever gives the example of prostitution which "Aquinas maintains (1) that prostitution is a species of lust that is one of the capital vices that wreak the greatest havoc on the human soul and leads them to other sins; (2) that it is a mortal sin that threatens the proper rearing of children and by extension threatens the common good of society; and (3) that it violates the natural law and matrimonial union" and explains:
"Given this strong condemnation of fornication and prostitution, it would seem obvious that Aquinas would want to engage every force against them, especially civil law. Oddly enough he does not. Instead he notes that the state should allow fornication and prostitution to exist for the sake of the common good. Relying on the well-known passage from Augustine's De ordine, Aquinas advocates tolerance of prostitution by noting [in *Summa Theologiae* IIa IIae, q. 10, a. 11]: "Accordingly in human government also, those who are in authority rightly tolerate certain evils, lest certain goods be lost, or certain evils be incurred: thus Augustine says [in De ordine 2.4]: If you do away with harlots, the world will be convulsed with lust." If these social practices were to be suppressed, the reaction might be such as to threaten the peace of society...." *Ibid*, at 43.

Thus, from the Thomistic perspective, having regard to the moral imperfections of the citizenry and the other goods at stake, the decisive issue in determining whether the State may seek to regulate those private activities of citizens which impinge upon the common good by means of the criminal law is whether the citizens' reaction to the legal suppression of those activities might be such as to threaten the social order. In this sense Henchy J is in agreement with Aquinas in finding that State should not subject its citizens to invasive investigative and judicial procedures unless the common good requires State intervention by means of the criminal law.[531] Indeed Henchy J's *dicta* on the seven deadly sins which he pronounced in another case are not inconsistent with the Thomistic understanding.[532]

6.3.4 Contraception

Aquinas understands the human desire to reproduce as an inclination to secure the common good of the species which is subject to the rule of reason[533] and he describes as

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[531] See n. 515 above.

[532] "What are known as the seven deadly sins are anathematised as immoral by all Christian Churches, and it would have to be conceded that they are capable, in different degrees and in certain contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual...the sanctions of the criminal law may be attached to immoral acts only when the common good requires their prescriptions as crimes." *Norris v Attorney General* [1984] IR 36, at 78.

This understanding has also been event in papal government

> "In regard to prostitution, the papacy was at odds with civil authorities as when it spoke out against unreasonable search by officers of the court looking for adulterers and concubines in the homes of townspeople. Pope Paul II [1417-1471] decreed that searches of this kind be conducted on condition of a formal written request." Dever, note 530, at 48.

and in Aquinas's understanding of the government of religious communities:

> "The rulers or directors of human communities, eg a religious congregation or a state, has absolutely no right or authority to require anyone to disclose a secret sin which does not affect that community's public well-being. Only the effect on public well-being is the concern of human judges." Finnis, note 284, at 241-242.

[533] "...And yet if the inclination of sensuality be considered as it is in other animals, thus it is ordained to the common good, namely, to the preservation of nature in the species or in the individual. And this is in man also, in so far as sensuality is subject to reason."
Et tamen si consideretur inclinatio sensualitatis prout est in aliis animalibus, sic ordinatur ad bonum commune, idest ad conservationem naturae in specie vel in individuo. Et hoc est etiam in homine, prout sensualitas subditur rationi." Aquinas, note 71, Ia IIae, q. 91, a. 6, *ad.* 3.

inordinate any emission of semen which is incompatible with the natural good of preserving the species.[534] Indeed, in response to the objection, that sins against nature through which no one harms another are not the most sinful among the sins of lust,[535] Aquinas argues that the harm which is done by such sins is to the very possibility of man's right judgment concerning his life[536] and to the very possibility of human well-being which is indissociable from the relation to God.[537] Indeed Aquinas argues that it is precisely because it is necessary for the

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[534] "...Now, though the male semen is superfluous in regard to the preservation of the individual, it is nevertheless necessary in regard to the propagation of the species... Nor, in fact, should it be considered a slight sin for a man to arrange for the emission of semen apart from the proper purpose of begetting and bringing up children... the inordinate emission of semen is incompatible with the natural good of preserving the species. Hence, after the sin of homicide whereby a human life already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is impeded."
Semen autem, etsi sit superfluum quantum ad individui conservationem, est tamen necessarium quantum ad propagationem specei... Nec tamen oportet reputari leve peccatum esse si quis seminis emissionem procuret prater debitum generationis et educationis finem... inordinata vero seminis emissio repugnat bono naturae, quod est conservatio specei. Unde post peccatum homicidii, quo natura humana iam in actu existens destruitur, huiusmodi genus peccati videtur secundum locum tenere, quo impeditur generatio humanae naturae. Aquinas, *Summa contra Gentiles*, note 99, III, *cap.* 122.

[535] "It would seem that unnatural vice is not the greatest sin among the species of lust. For the more a sin is contrary to charity the graver it is. Now adultery, seduction and rape which are injurious to our neighbour are seemingly more contrary to the love of our neighbour, than unnatural sin, by which no other person is injured. Therefore the unnatural sin is not the greatest among the species of lust."
Videtur quod vitium contra naturam non sit maximum peccatum inter species luxuriae. Tanto enim aliquod peccatum est gravius, quanto magis contrariatur caritati. Sed magis videntur contrariari caritati proximi adulturium et stuprum et raptus, quae vergunt in iniuriam proximi, quam peccata contra naturam, per quae nullus alteri iniuriatur. Ergo peccatum contra naturam non est maximum inter species luxuriae. Aquinas, note 71, IIa IIae, q. 154, a. 12, *obi.* 1.

[536] "It is to be said that in any domain the corruption of the principle on which all else depends is what is worst. Now the principles of reason are those things that are in function of nature; for reason, those things being presupposed that are determined by nature, disposes the others in the way that agrees with nature. And this is apparent both in the speculative and in practical matters. And thus, just as in speculative matters errors concerning those things knowledge of which is naturally implanted in man is most serious and most unseemly, so also in matters of action to act against what is determined in function of nature is most serious and unseemly. Therefore, since in sins that are against nature a man transgresses that which is determined in function of nature regarding sexual activity, hence it is that in such matter this sin is most serious."
Respondeo dicendum quod in quolibet genere pessima est principii corruptio, ex quo alia dependent. Principia autem rationis sunt ea quae sunt secundum naturam, nam ratio, praesuppositis his quae sunt a natura determinata, disponit alia secundum quod convenit. Et hoc apparet tam in speculativis quam in operativis. Et ideo, sicut in speculativis error circa ea quorum cognitio et homini naturaliter inditia, est gravissimus et turpissimus; ita in agendis agere contra ea quae sunt secundum naturam determinata, est gravissimum et turpissimum. Quia ergo in vitiis quae sunt contra naturam transgreditur homo id quod est secundum naturam determinatum circa usum venereum, inde est quod in tali materia hoc peccatum est gravissimum. Aquinas, note 71, IIa IIae, q. 154, a. 12, *co.*

[537] "It is to be said that just as the order of right reason is from man, so also the order of nature is from God himself. And therefore in sins against nature, in which the very order of nature is violated, injustice is done to God himself, the one who orders nature. Hence, Augustine says in *Confessions* 3 "... In fact, the social relation itself that we ought to have with God is violated when the same nature of which He is author is polluted by perversity of sexual passion."

common good of the human species that the process of reproduction must be controlled by human reason.[538] Since Aquinas understands the desire to reproduce as guided by reason and ordered towards the common good, then, given his definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated", reproduction falls within the purview of law.[539] Since the good of reproduction (*proles*) is a common good, then from a Thomistic perspective, it is also a superior good to the good of marital intimacy (*fides*) which can be shared only by the couple.[540]

Given the definition of "contraceptive" in section 17(4) of the Act of 1935, namely, "any appliance, instrument, drug, preparation or thing, designed, prepared or intended to prevent pregnancy resulting from the sexual intercourse between human beings", then for the

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*Ad primum ergo dicendum quod, sicut ordo rationis rectae est ab homine, ita ordo naturae est ab ipso Deo. Et ideo in peccatis contra naturam, in quibus ipse ordo naturae violatur, fit iniuria ipsi Deo, ordinatori naturae. Unde Augustinus dicit, III Confess...*Violatur quippe ipsa societas quae cum Deo nobis esse debet, cum eadem natura cuius ille auctor est, libidinis perversitate polluitum. Aquinas, note 71, IIa IIae, q. 154, a. 12, *ad* 1.
Dewan, note 403, at 264-265.

[538] "The more necessary a thing is, the more it behooves one to observe the order of reason in its regard; wherefore the more sinful it becomes if the order of reason is forsaken. Now the use of venereal acts, as stated in the foregoing Article, is most necessary for the common good, namely the preservation of the human race. Wherefore there is the greatest necessity for observing the order of reason in this matter: so that if anything be done in this connection against the dictate of reason's ordering, it will be a sin."
Respondeo dicendum quod quanto aliquid est magis necessarium, tanto magis oportet ut circa illud rationis ordo servetur. Unde per consequens magis est vitiosum si ordo rationis praetermittatur. Usus autem venereorum, sicut dictum est, ets valde necessarius ad bonum commune, quod est conservatio humani generis. Et ideo circa hoc maxime attendi debet rationis ordo. Et per consequens, si quid circa hoc fiat praeter id quod ordo rationis habet, vitiosum erit. Aquinas, note 71, IIa IIae, q. 153, a. 3, *co.*

[539] "...Since, however, the union of the sexes is directed to the common good of the whole human race and common goods depend on the law for their determination as stated above [in Ia IIae, q. 90, a. 2], it follows that this union of man and woman, which is called matrimony, is determined by some law."
Sed quia concubitus ordinatur ad bonum commune totius humani generis; bona autem communia cadunt sub determinatione legis, ut supra habitum est, consequens est quod ista coniunctio maris ad feminam, quae matrimonium dicitur, lege aliqua determinetur. Aquinas, note 71, IIa IIae, q. 154, a. 2, *co.*

More precisely, in the absence of any ordering to a "higher common good" within the twofold ordering of goods (*duplex ordo*), the State is competent to regulate its attainment by means of law.
De Koninck, note 60, at 73, 105-107, 205-364; Eschmann, note 185, at 123-165; "Bonum *commune melius est quam bonum unius*. Eine Studie über den Wertvorrang des Personalen bei Thomas von Aquin", (1994) 6 *Mediaeval Studies*, 62; Kempshall, note 185, at 114-115.

[540] See section 1.6.4.

purposes of the *McGee Case*, the contraceptive intention can be defined as the intention to prevent pregnancy resulting from the sexual intercourse between human beings. From this definition of contraceptive it follows that insofar as contraception involves the use of appliances, instruments, drugs, preparations or things, contraception is only contingently related to sexual intercourse and is not part of the sexual act (and so is not part of marital intercourse). To engage in contraception involves a choice (and accompanying actions) which are distinct from the choice to engage in sexual intercourse, *eg* to consume a contraceptive pill or to undergo a surgical vasectomy are not sexual activities. This contraceptive choice is "contra-life" in the sense that it is a choice *to do* something to prevent the beginning of a new human life and as such involves *willing* that new human life *not be realised.*[541] In particular, insofar as the use of contraception is an "exterior human act which is observable by another", then from a Thomistic perspective, it is a concern of human law insofar as it impinges upon the tranquillity of the State. In contrast, sexual abstinence is not contra-life in that it involves a choice *not to do* something and, as such, involves merely *not willing* that the new human life be realised.[542] From a Thomistic perspective, such choices and willing are interior acts which do not fall within the domain of human law, and so in finding that "if the State were to attempt to intervene to compel such abstinence, it would be an intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom"[543] Walsh J is in agreement with Aquinas.

Since the contra-life will of a contracepting couple involves "a practical (though not necessarily an emotional) hatred of the new human life which [the couple] project and

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[541] Grisez, Boyle, Finnis and May, note 25, at 402.

[542] *Ibid*, at 373.

[543] [1974] IR 284, at 312.

reject",[544] then, from a Thomistic perspective, it could be said that contraception is a vice that militates against the common good of the self-preservation of the community. While such vice cannot be approved, the question arises as to whether it should be suppressed by State law or permitted for the sake of the common good.[545] Walsh J departs from the Thomistic understanding in finding:

> If the husband and wife decide to limit their family or to avoid having children by contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion is justified by the exigencies of the common good.[546]

and again:

> that the rights of a married couple to decide how many children, if any they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or endanger human life.[547]

Firstly, Walsh J construes the right of a married couple to decide how many children, if any they will have, *ie* their freedom from State compulsion to beget children, as a limitation on the right of the State to regulate acts which are not part of marital intercourse, namely the use of non-abortifacient contraceptives. Secondly, Walsh J construes the use of non-abortifacient contraceptives in certain circumstances as not impinging upon the common good. However, insofar as the use of non-abortifacient contraceptives is a vice that militates against the common good of the self-preservation of the community, then from a Thomistic perspective, the use of such contraceptives impinges upon the common good. Thirdly, since contraception impinges upon the common good, then it cannot be a matter of "private

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[544] Grisez, Boyle, Finnis and May, note 25, at 373.

[545] See section 6.3.3 above.
The toleration of a social evil is not a choice of evil but tolerating its existence in order to avoid the loss of a good or the bringing about of another evil. Aquinas holds that no moral evil can be intentionally willed.
Dever, note 486, at 48, n. 51.

[546] [1974] IR 284, at 312.

[547] [1974] IR 284, at 313.

morality" which "is outside the authority of the State to endeavour to intrude into".[548] Fourthly, taking into account the moral imperfection of the citizenry, State intrusion to suppress the vice could be justified by the common good provided the citizens' reaction to that legal suppression was not such as to threaten the peace and order of society. It is noteworthy that while Walsh J observed that:

> The validity or otherwise of a law may depend upon an existing state of facts or upon the facts established in litigation as indicated by the Supreme Court in *Ryan v The Attorney General* [1965] I.R. 294. To control the sale of contraceptives is not necessarily unconstitutional *per se*; nor is a control on the importation of contraceptives necessarily unconstitutional. There may be many good reasons, grounded on considerations of public health or public morality, or even fiscal or protectionist reason, why there should be a control on the importation of such articles. There may also be many good reasons, grounded on public morality or public health, why their sale should be controlled. I use the term "controlled" to include total prohibition.[549]

neither he (nor Henchy J) expressly considered whether the "existing state of facts" disclosed that the suppression of the practice of contraception by means of the enforcement of section 17 of the Criminal Law Amendment Act, 1935 would threaten the order of society.

6.3.5 Justified State Intervention into Marital Privacy

In this section two of Walsh J's examples of justified State intervention into marital privacy are examined.[550] Walsh J's first example concerns the essential welfare of the State:

> in the case of dangerous falls in population threatening the essential welfare of the State, the State would be justified in taking such steps to ensure that in general, even if married couples could not be compelled to have children, they could at least be hindered in their endeavours to avoid having them where the common good required the maintenance or increase of the population.[551]

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[548] [1974] IR 284, at 313.

[549] [1974] IR 284, at 307-308.

[550] Walsh J also gives a third example: "the law might very well prohibit for health reasons the importation of some if not all contraceptives from sources outside the country if, for example, there is a risk of infection from their use." [1974] IR 284, at 314.
As this example is only contingently related to contraception - it concerns the State's competency in defending public health – it is not examined here.

[551] [1974] IR 284, at 313.

Notwithstanding the practical difficulties in hindering couples - how could the State hinder an abstemious couple in their abstinence? – Walsh J's example raises the issue of the measures that the State can enact in exigent times. Insofar as the use of contraception is a vice that militates against the common good of the welfare of the State, Walsh J's example suggests that the State can seek to legally suppress this vice in exigent times but not in non-exigent times. In suggesting that in exceptional or exigent times the law can direct acts to the common good by hindering the practice of the vice of contraception contrary to the common good of reproduction (*proles*), but that in non-exigent times the practice of the same vice is both permitted and protected by law for the purposes of the attainment of a private, unsharable good of marital intimacy (*fides*), Walsh J's example suggests that at different times different goods are legally superior and that exigency is the test for determining which good law is to be directed toward.

This conclusion is also supported by Walsh J's second example of justified State intervention into marital privacy:

> It is not impossible to envisage a situation where the availability of contraceptives to married people for use within marriage could be demonstrated to have led to or would lead to such an adverse effect on public morality so subversive of the common good as to justify State intervention by restricting or prohibiting the availability of contraceptives for use within marriage or at all. In such a case it would have to be demonstrated that all the other resources of the State had proved or were likely to prove incapable to avoid this subversion of the common good while contraceptives remained available for use within marriage.[552]

While a Thomist jurist would hold that the practice of contraception is contrary to the common good, he might nonetheless conclude that the practice be permitted where its legal suppression would threaten the peace and order of society, in this second example Walsh J considers the suppression of the practice of contraception to be justified only when the incapacity of all other resources of the State to avoid the subversion of the common good

[552] [1974] IR 284, at 314.

arising from the adverse effects on public morality occasioned by the availability of contraception for use within marriage can be demonstrated. In other words, whereas a Thomist jurist would permit the practice of contraception when its legal suppression would threaten the order of society, Walsh J would prohibit the practice of contraception when its legal suppression might "restore" the order of society. Whereas in the Thomist view, the preservation of the common good of order acts as a limit on the legal pursuit of the common good (in the sense of being a ground for the permission of a vice contrary to the common good), in Walsh J's view, the preservation of order acts as a limit on the pursuit of a private good at the expense of the common good (in the sense of being a ground for the prohibition of that vice contrary to the common good). In other words, having abandoned the Thomistic understanding of law as always directing acts towards those goods which are common to both the married couple and the whole community, Walsh J identifies exigency, *eg* dangerous falls in population threatening the essential welfare of the State and adverse effects on public morality subversive of the common good, as the criterion for determining which good law is to be directed toward.

It is noteworthy that the phrase "the exigencies of the common good" occurs only once in the Constitution - in Article 43.2.2° - in the context of the State's delimiting of the right to private property.[553] From a Thomistic perspective, Article 43.2.2° can be considered as being consistent with the Thomistic understanding of distributive justice in which the common good of the order of the community (*bonum commune*) is maintained by the proportional distribution of common goods (*bona communia*) of property.[554] From the Thomistic perspective, exigency is a criterion for disposing common goods (*bona communia*) according

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[553] *Bunreacht na hÉireann*, Article 43.2.2°: see note 250.
In the context of an analysis of the imposition of a limitation on property rights, Budd J in the High Court held that "...the word "exigencies" has a connotation of more then "useful", "reasonable" or "desirable"; it means "necessary" and implies the existence of a pressing social need." *An Blascaod Mór Teoranta v Commissioners of Public Works (No 3)*[1998] IEHC 38 at p. 111.

[554] See section 1.6.8 and 2.3.2 above.

to the common good (*bonum commune*) and not, as in Walsh J's examples, for determining whether law is directed towards the common good (*bonum commune*) or proper goods (*bonum suum*) which are not common.

In sum, Walsh J's examples of justified State intervention suggest that, in exigent times, the good of marital intimacy (*fides*), which in the Thomistic perspective is outside the reach of the State law but is subject to the moral law, is subject to the State law. It is argued here that by failing to have regard to the Constitution's twofold order, Walsh J fails to have regard to God "to Whom, as our final end, all actions of men and the States must be referred" with the consequence that the distinction between the reach of the moral law (directed to the good of God) and the reach of the State law (directed to the good of order) is abolished. In Walsh J's perspective all citizens' activities – including self-regarding conduct directed to unsharable goods – can be subordinated to the State law. This failure to have regard to the subordination of the common goods is symptomatic of the confusion of the distinct formalities under which man can be considered[555] – a confusion from which both the "personalist" and the "totalitarian" conceptions of the relationship between the individual members of the community and the whole community arise.[556] On the basis of this confusion of the distinct

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[555] See section 1.6.3 above

[556] "...it is contrary to the very nature of the common good to be, as such, subordinated to a singular unless the singular has itself the note of common good. Saint Thomas means to say only that man is not ordered only to political society. He is not according to all that he is part of political society since the common good of that society is only a subordinate common good. Man is ordered to the society only insofar as he is a citizen. Although man, the individual, member of a family, civil citizen, celestial citizen, etc. are the same subject, they are formally different. Totalitarianism identifies the formality 'man' with the formality 'citizen'. For us, on the contrary, not only are these formalities distinct, they are subordinated one to another according to the order of goods. But it is this order of goods, first and final causes, and not man purely as man that is the principle of the order of these formalities in the same subject. Personalism reverses the order of goods and accords the greatest good to the lowest formality in man. What the personalists understand by the person is, in truth, what we understand by pure individual, quite material and substantial and enclosed in itself, and they reduce rational nature to sensible nature which has the private good as its object. Man cannot be subordinated to the good of political society alone; he should order himself to the good of the perfect universal whole which every lower common good should be expressly ordered. The common good of political society should be expressly ordered to God, both by the chief citizen and by the citizen who is a part, each in his own way. This common good requires, of itself, this ordination. Without this express and public ordination, society degenerates into the State, rooted and enclosed in itself." De Koninck, note 60, at 102-103.
See section 1.6.4 above.

formalities under which an individual can be considered, Walsh J's conception of legal order oscillates between the "personalist", *ie* the legal superiority of the individual's private, unsharable good, and the "totalitarian", *ie* the legal superiority of the good of the State in times of exigency.

From a Heideggerian perspective Walsh J's examples of the subjection of law to the requirements of exigency can be understood as illustrating how command is exercised through the ever-transforming manner of the capacity to take power over the claim to justice. Exigency might appear as the drive to set new values, *eg* in which the pursuit of State welfare is accorded the highest legal value. Such a drive to set new values might appear with the legitimating force of incriminating everyone who fails to cooperate with the task in hand. The averting of the exigent circumstances might appear as a totalitarian goal nevertheless entirely exculpated from all accusations of a totalitarian motive because of its sheer urgency and necessity such that not to be seen to avert the exigent circumstances, even at the most trivial level, is to be guilty of collaborating in the imminent destruction.[557]

6.3.6 Constitutional Right to Contraception

Walsh J also finds that Article 41 positively protects, and not just permits, the right of a married couple to use contraception:

> It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire. In my view, Article 41 of the Constitution guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and, as such, assumes the status of a right so guaranteed by the Constitution. If this right cannot be directly be invaded by the State it follows that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible...In my opinion, s.17 of the Act of 1935, in so far as it unreasonably restricts the availability of contraceptives for use within marriage, is inconsistent with the provisions of Article 41 of the

[557] See section 3.6.3 above.

> Constitution for being an unjustified invasion of the privacy of husband and wife in their sexual relations with one another.[558]

Insofar as the use of non-abortifacient contraceptives within marriage might serve a married couple's pursuit of their private good of marital intimacy (*fides*) and frustrates the couple's and the community's common good of reproduction (*proles*), the affording of constitutional protection to the use of non-abortifacient contraceptives within marriage without regard to the peace and order of society is not consistent with the Thomistic understanding of law. In contrast to the Thomistic understanding, in which the law might permit vices contrary to the common good where the legal suppression of those vices might injure the State's good of peace and order, Walsh J's affording of constitutional protection to the practice of such a vice contrary to the common good can be construed as not just permission but as approval.

From a Heideggerian perspective, the fact that a prohibition on contraception is part of the moral code of the Roman Catholic Church and that it was this "private morality" which the Supreme Court sought to ensure would not be imposed upon the plaintiff[559] contrary to her freedom to determine her own private morality with regard to her marital relations, Walsh J's understanding of the freedom to determine one's private morality evidences Heidegger's observation that the historical significance of Christianity no longer lies in what it is able to fashion for itself, but in the fact that since the beginning of modern age Christianity has to be that *against which* the new freedom and power of the subject must be distinguished.[560]

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[558] [1974] IR 284, at 314.

[559] "The question of whether the use of contraceptives by married couples within their marriage is or is not contrary to the moral code or codes to which they profess to subscribe, or is or is not regarded by them as being against their conscience, could not justify State intervention. Similarly, the fact that the use of contraceptives may offend against the moral code of the majority of the citizens of the State would not *per se* justify and intervention by the State to prohibit their use within marriage." per Walsh J, [1974] IR 284, at p. 313.

[560] "That Christianity continues to exist in the development of modern history; has in the form of Protestantism abetted that development; has asserted itself successfully in the metaphysics of German Idealism and romanticism; was in the corresponding transformations, adaptations, and compromises in every instance reconciled with the spirit of the times, and consistently availed itself of modern accomplishments for ecclesiastical ends – all of that proves more forcefully than anything else how decisively Christianity is bereft of the power it had during the Middle Ages to *shape history*. Its historical significance no longer lies in what it is able to fashion for itself, but in the fact that since the beginning of and throughout the modern age it has to be

6.3.7 The Transformation of Marriage

It is argued in this section that the decision in the *McGee Case* departs from the traditional law on marriage and nullity.

Consummation has traditionally been recognised by civil[561] as well as by ecclesiastical authorities[562] as an essential element of marriage. A marriage is regarded as consummated once the parties have engaged in "ordinary and complete, not partial and imperfect" sexual intercourse after the solemnisation.[563] For example, in 1945 the English Court of Appeal affirmed the traditional doctrine when it held that a husband's use of a sheath and his practice of *coitus interruptus*, against the wishes of his wife, amounted to wilful refusal to

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that *against which* the new freedom - whether expressly or not – must be distinguished. Liberation *from* the revealed certitude of the salvation of individual immortal souls is the liberation *to* a certitude in which man can by himself be sure of his own definition and task." Heidegger, note 305, IV, at 99.

"Daß in der Entfaltung der neuzeitlichen Geschichte das Christentum wiederbesteht, in der Gestalt des Protestantismus diese Entfaltung mitfördert, in der Metaphysik des deutschen Idealismus und der Romantik sich zur Geltung bringt, sich in entsprechenden Abwandlung, Angleichungen und Ausgleichen jeweils mit der herrschenden Zeit verstönt und die modernen Errungenschaften jeweils für die kirchlichen Zwecke ausnützt, das beweist stärker denn alles andere, wie entscheiden das Christentum seine mittelalterliche, *geschichtsbildende* Kraft eingebüßt hat. Seine geschichtliche Bedeutung liegt nicht mehr in dem, was es selbst gestalten vermag, sondern darin, daß es seit dem Beginn der Neuzeit und durch diese hindurch stets dasjenige bleibt, *wogegen*, ausgesprochen oder nicht, die neue Freiheit sich absetzen muß. Die Befreiung aus der offenbarungsmäßigen Heilsgewißheit der einzelnen unsterblichen Seele ist in sich Befreiung zu einer Gewißheit, in der der Mensch durch sich selbst seiner Bestimmung und Aufgabe sicher sein kann." Heidegger, note 305, II, at 127.

[561] George, note 290, at 154, n. 24; Tony Honoré, *Sex Law in England* (Duckworth, 1978), at 16-18; Norman St. John-Stevas, *Life, Death and the Law: Law and Christian Morals in England and the United States* (Eyre & Spottiswoode, 1961), at 56-57; Alan Joseph Shatter, *Shatter's Family Law* (4th ed, Butterworth, 1997), at 209-219.

[562] "A marriage that is *ratum et consummatum* can be dissolved by no human power and by no cause, except death."
Matrimonium ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest." *Codex Iuris Canonici*, 1983, can. 1141.

Sane quod Dominus in Evangelico dicit, non licere viro, nisi ob causam fornicationis uxorem suam dimittere [Mt 5,32; 19,9], intelligendum est, secundum interpretationem sacri eloquii, de his, quorum matrimonium carnali copula est consummatum, sine qua matrimonium consummari non potest, et ideo, si praedicta mulier non fuit a viro suo cognita, licitum est ei ad religionem transire. Pope Alexander III (1159-1181), "Ex publico instrumento" in Denzinger, note 420, at 331, n. 745.

[563] *D---e v A---g* [1845] 1 Rob. Eccl. 279.

consummate the marriage, thus entitling the wife to a decree of nullity.[564] du Parcq LJ opined:

> We are of the opinion that sexual intercourse cannot be said to be complete where a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents the termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principle end, of marriage is intentionally frustrated.[565]

Two years later the English Court of Appeal abandoned the traditional doctrine when it refused to grant an order that a marriage was null and void as a result of the wife's insistence that her husband wear a sheath (to which the husband agreed under protest).[566] In holding that with regards to consummation

> ...not the consent of marriage as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man.[567]

the English Court of Appeal rejected the ancient legal understanding of the consummation of marriage as sexual intercourse open to the possibility of procreation. Indeed, Lord Jowitt opined that:

> It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principal end of marriage as understood in Christendom...[568]

Since the decision in the *McGee Case* is authority for the proposition that the decision of a husband and wife to avoid having children by means of non-abortifacient contraceptives is a matter of private morality peculiarly within the joint decision of the husband and wife (and

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[564] *Cowen v Cowen* [1945] 2 All ER 197.

[565] [1945] 2 All ER 197, at 199.

[566] *Baxter v Baxter* [1948] 1 AC 274.

[567] per Jowitt LC, quoting approvingly from Stair's *Institutions* 1681, [1948] 1 AC 274, at 289.

[568] [1948] 1 AC 274, at 286.
St. John-Stevas, note 561, at 56-57.

one into which the State cannot intrude unless its intrusion is justified by the exigencies of the common good), then it is arguable that a marriage can be "consummated" by an act of sexual intercourse which is not open to procreation, *ie* it is arguable that the Courts may not declare a marriage void on grounds of non-consummation where the couple have engaged in sexual intercourse using non-abortifacient contraceptives.[569] It is also arguable that the decision in the *McGee Case* is authority for the proposition annunciated by Lord Jowitt - that procreation is not one of the principal ends of marriage. In other words, it is arguable that the judgment in the *McGee Case* effects a rejection of the traditional law on marriage and nullity.

6.3.8 Summary

Walsh J's judgment diverges from the Thomistic understanding of law and the Thomistic interpretation of constitution's twofold order in two ways.[570] Firstly, by affording legal and constitutional protection to citizens' pursuit of their private, unsharable good (such as marital intimacy) even where that pursuit impinges upon the good common to the citizen and the State (such as self-preservation), the good to which law is directed is not that of the whole and of its parts, but that of the part limited by the good of the whole (or more precisely, limited by the requirements of the good of the whole in times of exigency). Secondly, by disregarding the subordination of the (intrinsic) common good of order to the (extrinsic) common good of God, the distinction between the reach of the State's law (directed to the good of order) and the reach of the moral law (directed to the good of God) is abolished with the consequences that all citizens' activities can be subordinated to the State law.

It is also noteworthy that in affirming the constitutionally protected freedom to pursue one's private morality – even where that private morality impinges upon the common good –

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[569] George has examined whether other non-reproductive sexual acts can actualizes marital union in "Marriage and the Liberal Imagination" in George, note 290, 139; and in "What Sex can be: Self-Alienation, Illusion or One-Flesh Union", *ibid*, 161.

[570] See section 2.3.1 above.

the decision in the *McGee Case* departs from traditional legal doctrine on marriage and nullity and evidences the fact that the historical significance of Christianity lies in being that *against which* the freedom and power of the subject is distinguished. The subject's taking power over the claim to justice is taken up in the following section.

6.4 Assistance in One's Efforts to avoid putting One's Life in Jeopardy

It is argued in this section that the Supreme Court's identification of a right to use contraception within marriage founded on Article 40.3.1° of the Constitution (personal rights)[571] evidences the emerging triumph of the subjectivity of the subject and the metaphysics of valuation.

Given the medical condition of the plaintiff in the *McGee Case* for whom pregnancy constituted a risk over and above the ordinary risks inherent in pregnancy likely to put her life in jeopardy, and given the informed and conscientious wishes of the plaintiff and her husband to maintain full marital relations without incurring the risk of pregnancy that might result in the plaintiff's death or in crippling paralysis, the Court found, not only has the State the right to do so, but by virtue of the terms of the Article 40.3.1°, the State has the positive obligation to ensure by its laws that, as far as is possible, that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which is likely to put her life in jeopardy might be avoided.[572] In Thomistic terminology, it can be said that the plaintiff sought to pursue that unsharable good of marital intimacy (*fides*) notwithstanding the risk that a pregnancy might put her own life in jeopardy. As the jeopardising of one's own life in the pursuit of an unsharable good can be considered to be contrary to the duty to protect, or at least not endanger, human life, it can be considered to be

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[571] "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." *Bunreacht na hÉireann*, Article 40.3.1°.

[572] See n. 512 and n. 516 above.

contrary to the good common of oneself and of the whole community. Rather than forego her pursuit of the unsharable good, *eg* by practicing sexual abstinence, the plaintiff sought to minimize the danger to her life arising from conception by using contraceptives. In other words, the practice of contraception, which from a Thomistic perspective is a vice contrary to the common good of reproduction, is construed as a form of self-defence which the State, by virtue of Article 40.3.1°, is bound to assist. Thus, Article 40.3's requirement that the State's laws respect, and as far as practicable, protect and vindicate the personal rights of the plaintiff is construed as a requirement that the State's laws vindicate the personal rights of the plaintiff "as an individual human being" and "as a member of a family" but not "as a member of the whole community" or "as a citizen of the State", *ie* Article 40.3.1° is construed without regard to the common good.

In Heideggerian terminology, this construal of Article 40.3.1° without regard to the common good can be understood as evidencing the metaphysics of subjectivity. More precisely, the understanding of the nature of law in the *McGee Case* - as that which directs acts towards the attainment of private, unsharable good at the expense of the common good - can be understood as an assertion of the typical man (*Typus*), *ie* the assertion of the subject as subject which in its drive for security - in the sense of securing the indeterminate self over against its indeterminacy - distinguishes herself in her very self precisely with respect to, and over against, what is perceived to be what the common lot seek after.[573] The plaintiff's lack of certainty and security with regard to the consequences of her sexual incontinence conducted in compliance with the (impugned) statute prohibiting the importation of contraceptives[574] can be understood in terms of the typical man's (*Typus*) drive to distinguish

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[573] See section 3.6.3 above.

[574] Henchy J articulated this in terms of "being condemned" to "a way of life which, at best, will be fraught with worry, tension, and uncertainty" since by her observance of the (impunged) law the plaintiff "will endanger the security and happiness of her marriage, she will imperil her health to the point of hazarding her life, and she will subject her family to the risk of distress and disruption." [1974] IR 284, at 325-326.

himself from the common lot – a drive which is experienced as a lack which excites the demand for justice. The plaintiff's challenge to the constitutionality of the State's criminal law can be understood in terms of the typical man's drive and desire for justice as the drive over against stocks of power (exercised by the State). The plaintiff's establishing of the legal superiority of her private, unsharable good of marital intimacy (*fides*) over the common good of reproduction (*proles*), and the securing of constitutional protection for her pursuit of her private unsharable good *at the expense of* the common good, can be understood in terms of the powerful securing of the indeterminacy of the subjectivity of the subject through *justified* differentiation, and as such, it evidences the metaphysical essence of justice as rule or dominion and the social nature of political nihilism. It evidences the ever-transforming manner of the capacity to take power over the claim to justice which is at once a concealment of the metaphysics of valuation. As a revaluation of the legal order it can be understood as presupposing the nihilistic assumption that every order, whose existing value can in no way be justified or legitimated, calls forth and demands devaluation for the sake of revaluation. Finally, insofar as the personal right of the plaintiff to contraception was established in consequence of a construction of Article 40.3.1° without regard to the common good, the certainty and security of the plaintiff (with regard to the consequences of her sexual incontinence conducted in compliance with law as understood prior to her taking the case) is secured without reference to sociality. In this sense, the plaintiff's assertion can be understood as taking place on the basis of a self-concealment of the social relations which already make it possible and so evidences the very activity of nihilism to hide and conceal the very means by which it effects what it eventuates.

6.5 Walsh J's *Dicta* on the Constitution and the Natural Law

In this section Walsh J's *dicta* on the Constitution and the natural law are examined. It is argued that Walsh J's *dicta* evidences the metaphysics of subjectivity discussed in chapters 3, 4 and 5.

6.5.1 Ontotheology, the Forgottenness of Being and the Concealment of Power

In his judgment in the *McGee Case* Walsh J held that, on the basis of the Constitution's acknowledgement of Christianity in the preamble and its reference to God in Article 6, the constitutionally protected natural human rights can be understood in accordance with a Christian theological understanding of the natural law.[575] It is argued here that Walsh J's reliance on the authority of the Constitution in concluding that the constitutionally protected natural rights pertain to the theological understanding of the natural law involves the same ontotheological conflation of faith and law implicit in Costello's first thesis.[576] Consequently, notwithstanding Walsh J's affirmation of the Christian theological understanding of the natural law, his judgment presupposes the metaphysics of subjectivity, and so is not reconcilable with Aquinas's theological understanding of the natural law. Indeed Walsh J's understanding of the natural law as "promulgated by reason" suggests that man can recognize the natural law's inherent rationality and binding force and, as it were, promulgate the natural law to himself – an understanding found in the "new" natural law theory of Finnis and not in the theological natural law theory of Aquinas.[577] Walsh J's *dicta* imply an ontotheological conflation of faith and law in which the recognition of God is not a recognition proper to faith, but a recognitive act of will, *ie* an act of popular self-assertion in the order of law (and being) which "discloses" God – a God which is the form of the figure the concealed 'self'

[575] See n. 3.

[576] See section 4.3.1 above.

[577] See sections 1.4 and 3.5 above.

assumes in order to manifest itself. Thus, God becomes "entangled" in Walsh J's interpretation of the Constitution in consequence of ontotheology which is itself in consequence of the forgottenness of being (*Seinsvergessenheit*). Walsh J's affirmation of the Christian theological understanding of the natural law is a concealment of power (*Macht*) in that it conceals the established and indubitable subject which is the ground of the invoked God.[578]

6.5.2 Pluralism and Theological Opinion

Walsh J opined:

> In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from the natural law... In this country it falls finally upon judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable.[579]

and he concludes:

> The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideals of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be for all time. It is given in the light of the prevailing ideas and concepts.[580]

Walsh J's rejection of theological opinion on grounds of pluralism implies that that any interpretation of the nature and extent of constitutional natural rights derived from faithful knowledge of the natural law, regardless of the truth of the conclusions of such an interpretation with respect to law, can not, by virtue of its derivation, be constitutionally acceptable. His *dicta* suggest that a constitutionally permissible interpretation of the nature

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[578] See section 4.3.2 above.

[579] [1974] IR 284, at 318-319.

[580] [1974] IR 284, at 319.

and extent of the constitutional natural rights is predicated on what might be called an "objective" understanding of God, nature and law, *ie* an understanding of God, nature and law which are known prior to, or independent of, faith and which can be known in the light of prevailing ideas and concepts.[581]

Walsh J's exclusion of faithful knowledge from constitutional interpretation can be understood as the imposition of a "scientific restriction" on the class of valid reasons which arises from the incompatibility between experience and method. Insofar as an experience, such as religious experience, is presumed not to be systematisable in the sense that, given the right conditions, it would be reproducible for anyone in the same way, it is presumed that such experience constitutes a class of experience that some can have but that others cannot even potentially have. It is argued here that Walsh J's appeal to a constitutional principle of pluralism to exclude knowledge gained from experience which is presumed not to be potentially repeatable and reproducible can be understood as the presupposition that a uniform, general, sense of the "one who has experience" is given in every legal question and that it is this uniform, general 'one' which informs the elaboration of the principle of pluralism.[582] This presupposition of a uniform, general, sense of "one who has experience", *ie* a purely theoretical, dehistoricized 'I' in whose "mortified" experience (*Entlebnis*) a purely theoretical object occurs[583]- imports a metaphysical understanding of man into law. In this metaphysical understanding human cognition no longer bears any reference to futurity but refers only to "objective" or "represented" (*vorgestellt*) things, be they law or human being. From a Heideggerian perspective, Walsh J's "scientific restriction" on the class of constitutionally valid justifications or reasons can be understood in consequence of the

[581] The doctrine of prevailing ideas is examined in section 6.5.3 below.

[582] Hemming, note 161, at 60.

[583] See section 4.4.2 above.

"mathematical" nature of subjectivity. Walsh J's understanding of law presupposes the "mathematical project", *ie* the surveying or laying out of the horizon within which the legal may appear in the manner prefigured in the project.[584] Rather than let law manifest itself to thought by a deliberation upon the essence of law, the law is submitted to an "interrogation" in which the type of answer which will be received is determined in advance by the conditions laid down in the questioning to which legal phenomena are subjected. In this sense, Walsh J's understanding of law can be understood as "experimental" or "methodological" in consequence of the "mathematical" nature of subjectivity. This restriction of knowledge to experimental knowledge can be understood as being in consequence of the Leibnizian principle of reason (in Heidegger's sense of a giving back reasons to a subject (*principium reddendae rationis*)).[585] By application of this principle Irish constitutional law loses it connection to God, nature and justice revealed in history and *experience* and comes instead to be a mere technical means to bring about the *experimental* grounds and reasons set for it. In other words, in restricting knowledge of law to knowledge of the reasons, grounds and justifications for law, Walsh J subordinates law to its justification or rationalizations,[586] a subordination which presupposes the metaphysics of subjectivity with its Cartesian conception of truth as being represented (*Vorgestelltheit*) and its calculating, scientific and technological mode of thought (*Technik*).

6.5.3 Prevailing Ideas and Concepts

It is argued here that Walsh J's appeal to prevailing ideas and concepts in interpreting the Constitution evidences a failure to deliberate by having regard for what in Heideggerian

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[584] See section 5.5.2 above.

[585] See section 3.7 above.

[586] Berkowitz, note 64, at 7.
This will be taken up again in section 7.3.3 and 9.3 below.

terminology might be called the anonymous interpretation of "the They" (*das Man*). Heidegger describes the anonymous, faceless social forces which dominate public opinion and which hold forth prescriptive norms which determine what "one" should do as the "dictatorship of 'the They'" which drains away individuality:

> We take pleasure and enjoy ourselves as *they* take pleasure; we read, see, and judge about literature and art as *they* see and judge; likewise we shrink back from the 'great mass' as *they* shrink back; we find shocking what *they* find shocking. The "they", which is nothing definite, and which we all are, though not as the sum, prescribes the kind of Being of everydayness.[587]

"The They" (*das Man*), which fosters an averageness or levelling down, is a "nobody" to whom each undifferentiated *Dasein* has already surrendered itself in its Being-amongst-one-another in its "everydayness".[588] Heidegger uses the expression "idle talk" or "idle conversation" (*Gerede*) to refer to the everyday mode of communication.[589] "Idle

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[587] Heidegger, note 455, at 164.
"Früher wurde gezeigt, wie je schon in der nächsten Umwelt die öffentliche »Umwelt« zuhanden und mitbesorgt ist. In der Benutzung öffentlicher Verkehrsmittel, in der Verwendung des Nachrichtenswesens (Zeitung) ist jeder Andere wie der Andere. Dieses Miteinandersein löst das eigene Dasein völlig in die Seinsart »der Anderen« auf, so zwar, daß die Anderen in ihrer Unterschiedlichkeit und Ausdrücklichkeit noch mehr verschwinden. In dieser Unauffälligkeit und Nichtfestellbarkeit entfaltet das Man seine eigentliche Diktatur. Wir genießen und vergnügen uns, wir *man* genießt; wir lesen, sehen und urteilen über Literatur und Kunst, wie *man* sieht und urteilt; wir ziehen uns aber auch vom »großen Haufen« zurück, wie *man* sich zurückzieht; wir finden »empörend« was *man* empörend findet. Das Man, das kein bestimmtes ist und das Alle, obzwar nicht als Summe, sind, schreibt die Seinsart der Alltäglichkeit vor." Heidegger, note 455, at 126-127.

[588] "Thus the particular Dasein in its everydayness is disburdened by the "they"...In these characters of Being which we have exhibited – everyday Being-among-one-another, distiantiality, averageness, levelling down, publicness, the disburdening of one's Being, and accommodation – lies that 'constancy' of Dasein which is closest to us. This 'constancy' pertains not to the enduring Being-present-at-hand of something, but rather to Dasein's kind of Being as being-with." *Ibid*, at 165-166.

"Das Man entlastet so das jeweilige Dasein in seiner Alltäglichkeit...In den herausgestellten Seinscharakteren des alltäglichen Untereinanderseins, Abständigkeit, Durchschnittlichkeit, Einebnung, Öffentlichkeit, Seinsentlassung und Entgegenkommen liegt die nächste »Ständigkeit« des Daseins. Diese Ständigkeit betrifft nicht das fortwährende Vorhandensein von etwas, sondern die Seinsart des Daseins als Mitsein." *Ibid*, at 127-128.
Brian Leiter, "Heidegger and the Theory of Adjudication" (1996) 106 *Yale Law Journal*, 106 (1996) 253, at 262-271; Wrathall, note 165, at 114; Susan Zickmund, "Deliberation, Phronesis and Authenticity" (2007) 40 *Philosophy and Rhetoric* 406, at 407.

[589] "The expression "idle talk" is used here not in a disparaging sense, but to signify the positive phenomenon which constitutes the kind of Being of everyday Dasein's understanding and interpreting." Heidegger, note 455, at 211;
"Der Ausdruck »Gerede« soll hier nicht in einer herabziehenden Bedeutung gebraucht werden. Er bedeutet terminologisch ein positives Phänomen, das die Seinsart das Verstehens und Auslegens des alltäglichen Daseins konstitutiert." Heidegger, note 455, at 167.

conversation" (*Gerede*) does not mean merely oral communication but a mode of engagement or of dealing with matters without regard to the matters themselves and possibly without ever having seen or experienced them.[590] As Heidegger explains:

> Accordingly, when men who have to deal with a matter do so solely on the basis of idle conversation about it, they bring the various opinions, views and perceptions together on an equal basis. In other words, they do so on the basis of what they have picked up from reading and hearing. They pass along what they have read and heard about the matter without any sensitivity for the distinction of whether or not that opinion or their own is actually relevant to the matter. Their care in discovering does not apply to the matter but to the conversation. And idle conversation, which rules precisely on the basis of lack of basis, provides such discovery with the consolidation of its rule as a way of being of Dasein.[591]

In contrast to "idle conversation" (*Gerede*) Heidegger understands "conversation" or "discourse" (*Rede*) in terms of communication with regard to matters themselves, *ie* like the archaic English sense of being "conversant" or "engaged" with the world, Heidegger understands "conversation" (*Rede*) as that which "articulates meanings and makes possible a way of acting in the world" and which "tends towards or aims towards achieving a participation with others in a common orientation to the world".[592] Thus Heidegger holds

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[590] "Idle talk is not restricted to oral communication in speaking; much more idle talk today comes from what is written...and what is picked up by reading. Such reading takes place characteristically without understanding the subject matter, but in such a way that the reader – there are purported to be such readers in the sciences as well – acquires the possibility of dealing with matters with great skill without ever having seen them...." Heidegger, note 353, at 269.

"Gerede ist nicht eingeschränkt auf die lautliche Mitteilung im Sprechen, sondern heute erwächst noch viel mehr Gerede aus dem Geschriebenen....[und] aus dem Angelesenen. Das Anlesen vollzieht sich charakteristischerweise ohne Sachverständnis, aber so, daß ein solcher Leser – es soll auch in den Wissenschaften solche Leser geben – die Möglichkeit sich aneignet, in einer weitgehenden Geschicklichkeit von den Sachen zu handeln, ohne sie je gesehen zu haben." Heidegger, note 353, at 372.

[591] Heidegger, note 353, at 269-270.
"Daher kommt es, daß, wenn Menschen, die über eine Sache handeln sollen, lediglich aus dem Gerede darüber handeln, sie die verschiedenen Meinungen Ansichten und Auffassungen auf einer Ebene zusammenbringen, d.h. aus dem Lesen oder Hören aufgerafft haben, über die Sache ohne die Unterschiedensempfindlichkeit weiterreden, ob in jener Meinung oder in der eigenen eine eigentliche Sachlichkeit liegt oder nicht. Die Sorge des Entdeckens gilt nicht der Sache, sondere der Rede, und das Gerede, das gerade aufgrund einer Bodenlosigkeit herrscht, gibt ihm die Verfestigung seiner Herrschaft als einer Seinsweise der Daseinauslegung." Heidegger, note 353, at 372.

[592] "To understand the idleness of idle conversation, we need to say a word about the communicative function of conversation. Heidegger insists that "conversation is...essentially communication", which means simply that it is always characterised by the possibility of being shared with others. But this does not mean that what is communicated is necessarily understood by some particular person in each case. "Communication", Heidegger

that, while the participants in "idle conversation" (*Gerede*) may learn precisely how to define what is said about the subject of conversation, how to articulate its extension and the claims conventionally made about it, they "lack a sense for the way a conversance with the object primes us to respond to the world by showing us what is relevant in the current situation, given our self-understanding and self-interpretation".[593] However, "the groundlessness of idle talk does not bar its entry into the public arena but directly promotes it since idle talk is just the possibility of interpreting something without first making the matter one's own".[594] In

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explains "means making it possible to acquire or pick up for oneself that about which the conversation is, that is, making it possible to come into a relationship of coping and being toward it" (GA 20: 362). So conversation is communication – or, perhaps more accurately, communicative – in that it articulates meanings which open up a way of acting in the world. Communications "are grasped as possibilities" (GA 24: 298). The possibility is fulfilled in understanding the communication, where this means responding to the meanings articulated for the one who is conversing: "the understanding of communication is participation in revealing" (GA 20: 362). The communicative function of conversation, Heidegger also notes, "can recede, but is never absent" (GA 20: 364). Thus conversation is, as communicative, something that tends towards or aims towards achieving a participation with others in a common orientation to the world (GA 2: H 168). When we articulate meanings through our conversant comportment, they "become accessible" to others (GA 2: H 272). When others understand or become aware of our communication, the join us in "an uncovering being-towards the entities discussed" (GA 2: H 224)... When a conversation succeeds, when the parties pick up what is being communicated to each other, they are made ready for an engagement with people and things in the world by sharing with each other a mode of understanding comportment toward the common things we encounter in the world, as well as a disposedness or a sense for the way things matter. In the process, conversation articulates or lifts into salience that about which we converse [das Beredete], and the way in which we understand or relate to the thing [das Geredete]. *Das Geredete* is manifest because "that with which the conversation is concerned [*das Beredete*] is always, in conversation, 'talked to' in a definite regard and within certain limits" (GA 2: H 162)." Wrathall, note 165, at 110-111.

[593] Wrathall, note 165, at 112.
"Idle conversation, in short, is a mode of engagement with people and things in which a genuine readiness is not cultivated. Heidegger calls the result a kind of "floating" – a failure to be grabbed or disposed in any way by the things we encounter. We "keep ourselves in" the idle conversation, meaning: we have no "original" and "genuine" relationships to the entities in the world." *Ibid*, at 114

[594] "The groundlessness of idle talk does not bar its entry into the public arena but directly promotes it. For idle talk is just the possibility of interpreting something without first making the matter one's own. Idle talk, which anyone can pick up, dispenses us from the task of genuine understanding. This *free-floating interpretation, which belongs to everyone and no one*, dominates everydayness, and Dasein grows up in such temporally particular interpretation, and more and more into it. This interpretation of the world and of Dasein, which is prevalent and consolidated as idle talk, we shall call the *everyday way in which Dasein has already been interpreted*. Every Dasein moves in such an interpretation, which for the most part coincides with the way the generation of a particular time has been interpreted and which is modified with the time. This way of being interpreted includes what one says about the world and Dasein in public being-with-one-another. What one says has taken the lead in all interpretation and thus taken over the temporalization of understanding." Heidegger, note 353, at 270.
"Die Bodenlosigkeit des Geredes versperrt ihm nicht etwa den Eingang in die Öffentlichkeit, sondern begünstigt ihn gerade; denn das Gerede ist ja die Möglichkeit der Auslegung von etwas ohne vorgängige Zueignung der Sache. Das Gerede, das jeder aufraffen kann, entbindet gerade von der Aufgabe eines eigentlichen Verstehens. Man kann mitreden und wird im Gerede ernst genommen. Diese *freischwebende Auslegung, die keinem und allen gehört*, beherrscht die Alltäglichkeit, und das Dasein wächst jeweilig in einer solchen Auslegung auf und

other words, since the participants in idle conversation (*Gerede*) do not participate in a shared orientation towards things in the world, they orient themselves to the situation by arrogating the things "one" says and "one" does as "prescribed" by the "dictatorship of 'the They' (*das Man*)".

Walsh J's interpretation of the Constitution "in the light of the prevailing ideas and concepts" can be understood as an interpreting which does not make the interpretation the judge's own. Insofar as the appeal to prevailing ideas and concepts dispenses with the task of genuine understanding and conversance with the matter, Walsh J's interpreting presupposes a theoretical, dehistoricized "Costelloian" judicial 'I' in whose "object historical" comportment to the world purely theoretical objects are given in "mortified" experience (*Entlebnis*)[595] and whose deliberations are determined by "idle conversation" (*Gerede*). Insofar as the appeal to prevailing ideas and concepts fails to establish what is relevant in the case being considered, given our self-understanding and self-interpretation, it denotes a failure to deliberate, *ie* it denotes a failure to articulate meanings which make possible a way of acting in the world and which aim towards achieving a participation with others in a common orientation to the world. Insofar as judicial interpretation presupposes an interpretation of the world and of being human which is prevalent and consolidated as idle talk (*Gerede*) and which coincides with the way the generation of a particular time has interpreted the world, then it follows that "no interpretation of the Constitution is intended to be for all time". In other words, the varying interpretations of the Constitution arise, not because of any knowledge of the essence

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mehr und mehr hinein. Diese als Gerede herrschende und verfestigte Auslegung der Welt und des Daseins bezeichnen wir als die *alltägliche Ausgelegtheit des Daseins*. Jedes Dasein bewegt sich in einer solchen Ausgelegtheit, die zumeist mit der Ausgelegtheit der Generation einer bestimmten Zeit zusammenfällt und sich mit ihr modifiziert. Diese Ausgelegtheit beschließt in sich, was man im offentlichen Miteinandersein über die Welt und das Dasein sagt." Heidegger, note 353, at 372.

[595] See section 4.4.2 above.

of law, but because of the "ungroundedness" of "idle talk" (*Gerede*) in any genuine engagement with the world.

6.6 Conclusion

In this chapter it was argued that the Supreme Court's affirmation of a constitutionally protected right to use contraception within marriage founded on Article 41 (family rights) effects a rejection of the Thomistic understanding of law and the Constitution's twofold order. Firstly, the good to which law is directed is not the good of the whole and of its parts, but the good of the part which can be subordinated to the good of the whole in times of exigency. Secondly, by disregarding the subordination of the intrinsic common good of order to the extrinsic common good of God, the distinction between the reach of the moral law (directed to the good of God) and the reach of State law (directed to the good of order) is collapsed with the consequences that all citizens' activities can be subordinated to the State law.

It was also argued that the Court's interpretation of Article 40.3.1° (personal rights) can be understood as a revaluation of the legal order in consequence of the emerging triumph of the subjectivity of the subject. It was argued that the plaintiff's claim to justice and to assistance in her efforts to avoid putting her own life in jeopardy evidences the metaphysical nature of justice as rule or dominion and the social nature of nihilism. The directing of State law to the attainment of private, unshareable goods *at the expense of* the common good can be understood in consequence of the assertion of the subject in its drive for security which distinguishes itself in its very self precisely with respect to, and over against the power of the State and the good common. Indeed, the affirmation of the constitutionally protected freedom to pursue one's private good (*fides*) at the expense of the common good (*proles*) by means of contraception evidences the fact that the historical significance of Christianity lies in being that *against which* the freedom and power of the subject is distinguished.

Finally, it was argued that Walsh J's understanding of the natural law evidences ontotheology, the forgottenness of being (*Seinsvergessenheit*) and the concealment of power (*Macht*). His oft quoted *dicta* on the interpretation of the Constitution "in the light of prevailing idea and concepts" can be construed as presupposing an interpretation of the world and of being human which is prevalent and consolidated as "idle talk" (*Gerede*) and, as such, his *dicta* evidence a failure to deliberate and to articulate meanings which make possible a way of acting in the world and which aim towards achieving a participation with others in a common orientation to the world.

In the following chapters it is argued that the somersaulting changes in Irish laws in the 25 years following the *McGee Case* evidence the emerging triumph of the subjectivity of the subject in which the metaphysical nature of justice as dominion, the social nature of nihilism and the transformation of law to regulation are manifest.

Chapter 7 Abortion

7.1 Introduction

It is argued in this chapter that the Supreme Court's decisions in the *X Case* and the *Abortion Information Case* evidence the Court's vindication of constitutional rights without regard to the common good. They evidence the metaphysical inversion of the relation between law (*Recht*) and posited law (*Gesetz*) and manifest what Heidegger calls the rule of technique (*Technik*) or the will to "order for the sake of ordering" (*bestellbar zu sein für ein weiteres bestellen*). It is worth noting that this distinction between *ius* (*Recht*) and *lex* (*Gesetz*) is not traditionally a distinction between *ius gentium* – often called the *ius naturale* in Justinian – and the *ius civile*.

7.2 The X Case

In the *X Case* the Attorney General unsuccessfully sought an injunction to restrain a fourteen year old girl, pregnant as a result of rape, from travelling to Britain to procure an abortion.[596] On the evidence of a psychologist, the High Court was satisfied that there was a danger that the fourteen year old mother would commit suicide if she were obliged to carry her baby to term.[597] The Supreme Court held[598] that where, as a matter of probability, there

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[596] "Upon the facts proved in the High Court, the first defendant was, in the month of December, 1991, raped, and as a result of such rape became pregnant of which fact she and her parents became award at the very end of January 1992. The rape was then reported to the Garda Síochána and a statement given by the first defendant to them of the facts surrounding the alleged rape. All the defendants were distraught as a result of the revelation of the fact of rape and as a result of the fact that the first defendant was pregnant and after careful consideration all of them reached a decision that she should travel to the United Kingdom and undergo an operation for abortion. The family informed the Garda Síochána of the fact and inquired from them whether any particular process was available for testing the foetus so aborted in order to provide proof in any subsequent charge of the paternity of the accused. The Garda Síochána apparently submitted the inquiry to the Director of Public Prosecutions and he in turn communicated the information thus arising to the Attorney General. The Attorney General on the 7th February, 1992, having applied *ex parte* to Costello J in the High Court, obtained an order of interim injunction restraining the first defendant and the other defendants from leaving the country or from arranging or carrying out a termination of pregnancy of the first defendant." per Finlay CJ, [1992] 1 IR 1, at 41.

[597] "I am satisfied that the only risk put forward in this case to the life of the mother is the risk of self destruction. I agree with the conclusion reached by the learned trial judge in the High Court that that was a risk which, as would be appropriate in any other form of risk to the life of the mother, must be taken into account in reconciling

was a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, then such termination is permissible[599] under Article 40.3.3° of the Constitution,[600] and that self-destruction was such a real and substantial risk to the life of the mother which can only be avoided by termination of her pregnancy.[601]

It is argued in the following sections that Court vindicated the constitutionally protected right to life of the respondent without regard to the common good (in the Thomistic sense) and without regard to the social order maintained by the criminal prohibition of suicide and abortion. The establishing of a constitutional right to abortion evidences the ever-transforming manner of the taking power over the claim to justice and the concealment of the metaphysics of valuation.

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the right to life of the unborn and the rights of the mother to life... In my view, it is common sense that a threat of self-destruction such as is outlined in the evidence of this case, which the psychologist clearly believes to be a very real threat, cannot be monitored in that sense and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide." per Finlay CJ, [1991] 1 IR 1, at 55.
"I feel that that [the defendant] might commit suicide or decide to terminate [her pregnancy] herself by throwing herself down the stairs or something like that." Evidence of the psychologist quoted by Hederman J, *Ibid*, at 70.

[598] Finlay CJ, McCarthy, O'Flaherty, Egan JJ, assenting; Hederman J dissenting.

[599] "I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, then such termination is permissible under Article 40.3.3° of the Constitution." per Finlay CJ, [1992] 1 IR 1, at 54.

[600] "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right." *Bunreacht na hÉireann*, Article 40.3.3°.

[601] "I am, therefore, satisfied that on the evidence before the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy." per Finlay CJ, [1992] 1 IR 1, at 55.

7.2.1 The Crimes of Suicide and Abortion

Aquinas gives three reasons for judging suicide "altogether unlawful".[602] Firstly, insofar as man is a substantial being, he has a natural inclination towards his self-preservation,[603] then suicide is contrary to man's own nature and so is contrary to the natural law.[604] In this sense, suicide is not a sin against justice in the sense of what is due to others.[605] Secondly, suicide is contrary to the ordering of the citizen (part) to the State (whole),[606] and in this sense, suicide is an injustice to the community. Thirdly, life belongs to God and in this sense suicide is an

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[602] "It is altogether unlawful to kill oneself, for three reasons."
Respondeo dicendum quod seipsum occidere est omnino illicitum triplici ratione. Aquinas, note 71, IIa IIae, q. 64, a. 5, *co.*
Lawrence Dewan, "Suicide as a Belligerent Tactic" in Dewan, *Wisdom, Law, and Virtue*, note 126, at 342-345; Elenore Stump, *Aquinas* (Routledge, 2003), at 331.

[603] Aquinas, note 71, Ia IIae, q. 94, a. 2, *co.*: see n. 179.
See section 1.5 above.

[604] "...First, because everything naturally loves itself, the result being that everything naturally keeps itself in being, and resists corruptions so far as it can. Wherefore suicide is contrary to the inclination of nature, and to charity whereby every man should love himself. Hence suicide is always a mortal sin, as being contrary to the natural law and to charity."
... Primo quidem, quia naturaliter quaelibet res seipsam amat, et ad hoc pertinet quod quaelibet res naturaliter conservat se in esse et corrumpentibus resistit quantum potest. Et ideo quod aliquis seipsum occidat est contra inclinationem naturalem, et contra caritatem, qua quilibet debet seipsum diligere. Et ideo occisio sui ipsius semper est peccatum mortale, utpote contra naturalem legem et contra caritatem existens. Aquinas, note 71, IIa IIae, q. 64, a. 5, *co.*

Given Aquinas's doctrine that we naturally love God, considered as the author of nature, more than ourselves and that in charity we supernaturally love God, considered as the author of supernatural blessedness, more than we love ourselves, the reference to charity can be understood as contrary to the supernatural order.
Aquinas, note 71, Ia IIae, q. 60, a. 5; Ia IIae, q. 109, a. 3; IIa IIae, q. 26, a. 3.
Dewan, note 602, at 344.

[605] "Murder is a sin, not only because it is contrary to justice, but also because it is opposed to charity: in this respect suicide is a sin in relation to oneself. In relation to the community and to God, it is sinful, by reason also of its opposition to justice."
Ad primum ergo dicendum quod homicidium est peccatum non solum quia contrariatur iustitiae, sed etiam quia contrariatur caritati quam habere debet aliquis ad seipsum. Et ex hac parte occisio sui ipsius est peccatum per comparationem ad seipsum. Per comparationem autem ad communitatem et ad Deum, habet rationem peccati etiam per oppositionem ad iustitam. Aquinas, note 71, IIa IIae, q. 64, a. 5, *ad* 1.

[606] "...Secondly, because every part, as such, belongs to the whole. Now every man is part of the whole community, and so, as such, he belongs to the community. Hence by killing himself he injures the community, as the Philosopher declares [Ethic. V. 11]".
...Secundo, quia quaelibet pars id quod est, est totius. Quilibet autem homo est pars communitatis, et ita id quod est, est communitatis. Unde in hoc quod seipsum interficit, inuiuriam communitati facit, ut patet per philosophum, in V Ethic. Aquinas, note 71, IIa IIae, q. 64, a. 5, *co.*

injustice against God.[607] From a Thomistic perspective, this criminalisation of suicide can be justified insofar as suicide is an offence against the community which is contrary to the common good of order. Thus Aquinas's justification of capital punishment presupposes that even the right to life is referred to the common good.[608] He gives the example of the judicial execution of a thief and argues that the judge who authorises the execution is justified insofar as he wills the execution for the sake of the common good, where as the thief's wife, who wills that her husband not be executed, is justified only insofar as she wills that her husband not be executed for the sake of the lesser, private good of her family.[609] Indeed it was in

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[607] "...Thirdly, because life is God's gift to man, and is subject to His power, Who kills and makes to live. Hence whovere takes his own life, sins against God, even as he who kills another's slave, sins against the slave's master, and as he who usurps to himself judgment of a matter not entrusted to him. For it belongs to God alone to pronounce sentence of death and life, according to Deut. Xxxii, 39 *I will kill and I will make to live.*"
...Tertio, quia vita est quoddam donum divinitus homini attributum, et eius potestati subiectum qui occidit et vivere facit. Et ideo qui seipsum vita privat in Deum peccat, sicut qui alienum servum interficit peccat in dominum cuius est servus; et sicut peccat ille qui usurpat sibi iudicium de re sibi non commissa. Ad solum enim Deum pertinet iudicum mortis et vitae, secundum illud Deut. XXXII, ego occidam, et vivere faciam. Aquinas, note 71, IIa IIae, q. 64, a. 5, *co.*

[608] "...Now every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole demands the excision of a member, through it being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community as part to whole. Therefore if it be dangerous and infectious to the whole community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since a little leaven corruptheth the whole lump (1 Cor. V. 6)."
...Omnis autem pars ordinatur ad totum ut imperfectum ad perfectum. Et ideo omnis pars naturaliter est propter totum. Et propter hoc videmus quod si saluti totius corporis humani expediat praecisio alicuius membri, puta cum est putridum et corruptivum aliorum, laudabiliter et salubriter abscinditur. Quaelibet autem persona singularis comparatur ad totam communitatem sicut pars ad totum. Et ideo si aliquis homo sit periculosus communitati et corruptivus ipsius propter aliquod peccatum, laudabiliter et salubriter occiditur, ut bonum conservetur, modicum enim fermentum totam massam corrumpit, ut dicitur I ad Cor. V. Aquinas, note 71, IIa IIae, q. 64, a. 2, *co.*

[609] "...Now a thing may be considered in various ways by reason, so as to appear good from one point of view, and not good from another point of view. And therefore if a man's will wills a thing to be, according as it appears to be good, his will is good: and the will of another man who wills that thing not to be, according as it appears evil, is also good. Thus a judge has a good will, in wiilling a thief to be put to death, because this is just: while the will of another – eg, the thief's wife or son, who wishes him not to be put to death, inasmuch as killing is a natural evil, is also good. Now since the will follows the apprehension of the reason or intellect; the more universal the aspect of the appreciated good, the more universal the good to which the will tends. This is evident in the example given above: because the judge has care of the common good, which is justice, which has the aspect of good in relation to the common estate; whereas the thief's wife has to consider the private good of the family, and from this point of view, she wishes her husband, the thief, not to be put to death...But a man's will is not right in willing a particular good, unless he refer it to the common good as an end: since even the natural appetite of each part is ordained to the common good of the whole."
...Contingit autem aliquid a ratione considerari diversimode, ita quod sub una ratione est bonum, et secundum aliam rationem non bonum. Et ideo voluntas alicuius, si velit illud esse, secundum quod habet rationem boni, est bona, et voluntas alterius, si velit illud idem non esse, secundum quod habet rationem mali, erit voluntas etiam

relation to the common good that medieval theorists first called some rights of mothers within the community 'inalienable',[610] and in this sense, Finlay CJ's regard for the position of the respondent within her family and society can be considered as being not inconsistent with a Thomistic reference of the mother's rights to the common good.[611] Similarly, Walsh J's *dicta*, quoted approvingly by McCarthy J, concerning the rights and obligations of a pregnant mother,[612] and the *dicta* of Hederman J (dissenting) concerning the duty of the State,[613] are

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bona. Sicut iudex habet bonam voluntatem, dum vult occisionem latronis, quia iusta est, voluntas autem alterius, puta uxoris vel filii, qui non vult occidi ipsum, inquantum est secundum naturam mala occisio, est etiam bona. Cum autem voluntas sequatur apprehensionem rationis vel intellectus, secundum quod ratio boni apprehensi fuerit communior, secundum hoc et voluntas fertur in bonum communis. Sicut patet in exemplo propositio, nam iudex havet curam boni communis, quod est iustitia, et ideo vult occisionem latronis, quae habet rationem boni secundum relationem ad statum communem; uxor autem latronis considerare habet bonum privatum familiae, et secundum hoc vult maritum latronem non occidi...Non est autem recta voluntas alicuius hominis volentis aliquod bonum particulare, nisi referat illud in bonum commune sicut in finem, cum etiam naturalis appetitus cuiuslibet partis ordinetur in bonum commune totius. Aquinas, note 71, Ia IIae, q. 71, a. 10, *co.*

[610] Riesenberg, note 202, at 177.

[611] "In vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, and with persons on whom she is dependent, with, in other circumstances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur." per Finlay CJ, [1992] 1 IR 1, at 53.

[612] "When a woman becomes pregnant she acquires rights which cannot be taken from her, namely, the right to protect the life of her unborn child and the right to protect her own bodily integrity against any effort to compel her by law or by persuasion to submit herself to an abortion. Such rights also carry obligations the foremost of which is not to endanger or to submit to or bring about the destruction of that unborn life." per Walsh J, *S.P.U.C. v Grogan* [1989] IR 753 at p. 767, quoted approvingly by McCarthy J, [1992] 1 IR 1, at 82.

[613] "The extinction of unborn life is not confined to the sphere of private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. Therefore the termination of pregnancy other than a natural one has a legal and social dimension and requires a special responsibility on the part of the State. There cannot be a freedom to extinguish life side by side with a guarantee of protection of that life because the termination of pregnancy always means the destruction of an unborn life. Therefore no recognition of the mother's right of self determination can be given priority over the protection of the unborn life. The creation of unborn life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle; act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy. The State's obligation is to do all that is reasonable possible having regard to the importance of preserving life." per Hederman J (dissenting), [1992] 1 IR 1, at 72.

"This is a very extreme reaction to pregnancy, even to an unwanted pregnancy. But as was pointed out in this Court in *S.P.U.C. v Coogan* [1989] I.R. 734 the fact that a pregnancy is unwanted was no justification for terminating it or attempting to terminate it. If there is a suicidal tendency then this is something which must be guarded against. If this young person without being pregnant had suicidal tendencies due to some other cause then nobody would doubt that the proper course would be to put her in such supervision as would counteract such tendency and do everything possible to prevent suicide. I do not think the terms of the Eight Amendment or indeed the terms of the Constitution before the amendment would absolve the State from its obligation to vindicate, and protect the life of a person who had expressed the intention of self-destruction. This young girl

consistent with individual rights and obligations understood by reference to the common good. Indeed, it had been held in an earlier case (concerning a mother's waiver of her natural and constitutional right to the custody of her non-marital child by means of her consent to the child's adoption), that:

> Natural rights may be waived or surrendered by persons who enjoy them provided such waiver is not prohibited either by natural law or by positive law.[614]

For centuries the criminal law was unequivocal: suicide was considered as an act of *felo de se*, a felony against oneself and a species of murder.[615] At common law, abortion was not treated as a species of homicide (as the law of homicide only applied where the victim was born and achieved existence independently of the mother) but was treated as a misdemeanour.[616] Moreover, the fact that the suicidal person was suffering from intolerable anguish could serve as no justification for suicide, since motivation under the common law could only affect the severity of the punishment, not culpability itself. As both suicide[617] and

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clearly requires loving and sympathetic care and professional counselling and all the protection which the State agencies can provide or furnish. There could be no question whatsoever of permitting another life to be taken to deal with the situation even if the intent to self-destruct could be traced directly to the activities or the existence of another person." per Hederman J (dissenting), *ibid*, at 75-76.

[614] per Walsh J, *G. v An Bord Uchtála* [1980] IR 32, at 71.

[615] *Hales v Petit* 1 Plowd Comm. 253, 75 ER 387 (1561-1562).
Attempted suicide was also a crime: *R v Doody*, 6 Cox Criminal Cases [1854] 463.
In the past, in common with other crimes, suicide was punishable - even when successfully performed, eg, financial sanction of forfeiture to the Crown of possessions held by the person who had committed suicide. In applying fiscal sanctions to suicide, the law treated suicide like many other crimes against the Crown. A second punishment uniquely applied: the mutilation of the body by driving a stake through it and its burial at a crossroad. These sanctions were practiced throughout the eighteenth century, and were still on the books during the first part of the nineteenth century. By the time of the *X Case* no criminal punishments were applied in English law, the only legal effects being the possible denial of an Anglican burial service and the avoidance of a life assurance policy.
Shai J. Lavi, "Autopoiesis, Nihilism and Technique: On Death and the Origins of Legal Paradoxes" in Oren Preez and Gunther Teubner eds, *Paradoxes and Inconsistencies in the Law* (Hart Publishing, 2006), at 262; St. John-Stevas, note 561, at 233-241.

[616] Kingston and Whelan, note 43, at 53-54.

[617] The crime of suicide was subsequently abolished by s. 2(1) of the Criminal Law (Suicide) Act, 1993. By virtue of s. 2(2) of the Act of 1993, aiding, abetting, counselling or procuring the suicide or an attempted suicide of another is an offence liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

abortion[618] were crimes at the time of the *X case*, then the waiver or surrender of the right of the respondent to protect her own life and to protect the life of her unborn child could not be permitted either by the natural law understood in a Thomistic sense or by the criminal law then in force. However, the respondent in the *X case* was allowed to invoke her right to life under Article 40.3.3° while she was threatening to commit the crimes of suicide[619] and attempting to procure an abortion.[620] By threatening to commit suicide, the respondent was threatening to act contrary to her own and her unborn child's right to life as well as contrary to the common good of order (maintained by the criminal prohibition of suicide). The Court majority found that by virtue of Article 40.3.3° the plaintiff had a right to abortion in such circumstances.[621] This finding can be construed as permitting the plaintiff to waive or surrender her right to protect her unborn child from abortion in circumstances where her

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[618] The criminal prohibition on abortion is contained in ss. 58-59, Offences against the Persons Act 1861. That it is also an offence for a woman, who is actually pregnant at the time, to attempt to procure an abortion was established in *The People (Attorney General) v Coleman* [1945] IR 237.

[619] "Elsewhere in law some such doctrine as 'waiver' is imported so that the owner of a legal right cannot turn around and claim to rely on a right which he (or she) has attempted to undermine. Yet in this case, X was allowed to invoke the right to life while she herself was threatening suicide." Morgan, note 43, at 26.

[620] While the question of *mens rea* is not examined here, the evidence of the psychologist accepted by the Court is of interest in this regard: "[The defendant] did not seem depressed but [the psychologist] said that "she "coldly expressed a desire to solve matters by ending her life". In his opinion, in her withdrawn state "she was capable of such an act, not so much because she is depressed but because she could calculatingly reach the conclusion that death was the best solution." per Costello J (as he was then) in the High Court, [1992] 1 IR 1, at 8.

[621] Indeed it was implicitly assumed throughout the Supreme Court proceedings that Article 40.3.3° permitted abortion: see Sunniva McDonagh ed, *Attorney General v X and others. Judgments of the High Court and Supreme Court with Submissions Made by Counsel to the Supreme Court* (Incorporated Council of Law Reporting for Ireland, 1992.) With regard to this assumption, Walsh J commented *extra curia*:

> "The claim that [the 8th Amendment] permits direct termination has never been fully argued. In the 'X' case it was conceded. There was no *legitimus contradictor* to argue against such a construction..." quoted in O'Hanlon, note 212, at 11.

However, the Supreme Court reaffirmed its interpretation of Article 40.3.3° in the *Abortion Information Case*:

> "In the proceedings arising out of the President's reference of the *Regulation of Information (Services outside the State for the termination of Pregnancies) Bill 1995* to the Supreme Court pursuant to Article 26 of the Constitution, counsel for the unborn submitted *inter alia* that *Attorney General v X* was wrongly decided because the Attorney General had wrongfully conceded that the provisions of the Eight Amendment envisaged a lawful abortion taking place in the State. The Supreme Court held that it was "...satisfied that in the consideration of the issues raised in [*Attorney General v X*] and the conflicting constitutional rights involved, the proper principles were applied to the interpretation of the relevant provisions of the Constitution and in the determination of the issues raised therein and rejects this submission." [1995] 1 IR 1, at 43.

suicide was contingent on the continuation of her pregnancy.[622] Just as Walsh J found in the *McGee Case* that, given the physical health of the applicant in the *McGee Case*, the applicant has a right under Article 40.3.1° to avoid putting her own life in jeopardy by the use of contraception, similarly the Court in the *X Case* found that, given the mental health of the respondent in the *X Case*, the respondent has a right under Article 40.3.3° to avoid putting her own life in jeopardy by obtaining an abortion. From a Thomistic perspective it can be said that insofar as the right to life of the respondent in the *X Case* was considered without regard to the common good and without regard to the social order maintained by the criminal prohibition of suicide and abortion, Article 40.3.3°'s requirement that the State have due regard to the right to life of the mother in its defence and vindication of the equal right to life of the unborn was construed as a requirement that the State's laws vindicate the right to life of the mother "as an individual human being" and "as a member of a family" but not "as a member of the whole community" or "as a citizen of the State".

From a Heideggerian perspective it can be said that the transformation of the understanding of law evident in the Court majority's interpretation of Article 40.3.3°, from that which directs acts to the common good, to that which directs acts to a private good without regard to the common good can be understood in consequence of the assertion of the subject in its drive for security - in the sense of securing the indeterminate self over against its indeterminacy by distinguishing herself in her very self precisely with respect to, and over against, the common good of the State.[623] Insofar as the respondent's pursuit of certainty and security with regard to her pursuit of such private, unsharable goods as her mental health, her

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[622] "What is surprising about the majority judgments, however, is the manner in which they equate the threat of suicide with life-threatening conditions of a physical nature as a real and substantial risk. Regrettably none of the majority judgments go into any detail defending this equation." Hogan and Whyte, note 41 (3rd edition), at 802-803.

[623] See sections 3.6.3 and 6.4 above.

friendships and her education[624] were secured without reference to the common good, the respondent's assertion can be understood as taking place on the basis of a self-concealment of the social relations which already make it possible and so evidences the very activity of nihilism to hide and conceal the very means by which it effects what it eventuates.

7.3 The Abortion Information Case

Prior to the decision in the *X Case* the Supreme Court had decided that, pursuant to the provisions of Article 40.3.3° of the Constitution, it was unlawful to the give information with regard to the identity, location and method of communication with clinics outside the State for the purposes of having an abortion lawfully available in another State.[625] In the wake of the

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[624] "[The psychologist] considered that the psychological damage to her of carrying a child would be considerable and that the damage to her mental health would be devastating. His report was supplemented by oral testimony." per Costello J (as he was then) in the High Court, [1992] 1 IR 1, at 8.

"In the course of his report [the psychologist] states:- "...As [the plaintiff's] pregnancy proceeds, the psychological damage of carrying a child that she has emotionally rejected, and which she blames for the ruination of her life could be considerable. She is only too aware that her schooling will suffer, that she will have to repeat a year and lose her friends. Her sense of being a victim, and of self blame will increase. There is no doubt that in my mind that the damage of this pregnancy to her mental health is going to be devastating."... Later the witness [i.e. the psychologist] stated "I believe we are in a dilemma whatever happens this child [i.e. the defendant] now. The damage – and it is a question of minimizing the damage. It was my belief minimizing it would be best achieved by minimizing the episode, by putting some certainty into her life." per Hederman J (dissenting), [1992] 1 IR 1, at 66-68.

[625] "The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40, Section 3m sub-section 3 it is a direct destruction of the constitutionally guaranteed right to life of that unborn child. It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn. As part of the submission on this issue it was further suggested that the right to receive and give information which, it was alleged, existed and was material to the case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40 section 6, sub-s 1 of the Constitution, since it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child. This ground of appeal, therefore, fails" per Finlay CJ, *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open-Door Counselling Ltd* [1988] IR 593, at 625.
In *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753 the Court reiterated its judgment given in *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open-Door Counselling Ltd* [1988] IR 593.
[1995] 1 IR 1, at 28-31.

decision in the *X Case* the Fourteenth Amendment to the Constitution was enacted.[626] The *Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995*, which was introduced to give legislative effect to the provisions of the Fourteenth Amendment to the Constitution, prescribed the conditions subject to which certain information likely to be required by a woman for the purposes of availing herself of abortion services lawfully available outside the State could be given to individual women or the general public. The Bill was referred by the President to the Supreme Court pursuant to Article 26.1.1° of the Constitution for a decision as to whether the provisions of the Bill were repugnant to the Constitution. In deciding that the Bill was not repugnant to the Constitution, the Supreme Court held[627]:

> Were it not for the enactment and provisions of the Fourteenth Amendment to the Constitution, the provisions of the Bill in so far as they permitted the dissemination of such information would undoubtedly be repugnant to the Constitution.[628]

Counsel appointed by the Court in order to advance arguments against the constitutionality of the Bill based on the right to life of the unborn had submitted that:

> (i) any provision in the Constitution or in any legislation which would permit or render lawful the giving or obtaining of such information was contrary to the natural law right to the life of the unborn which was acknowledge by the Eight Amendment to the Constitution;
> (ii) the natural law is the foundation upon which the Constitution was built and ranks superior to the Constitution;
> (iii) no provision of the Constitution or of any Act enacted by the Legislature or any judicial interpretation thereof can be contrary to Natural Law, and if it is, cannot be enforced.[629]

In rejecting these submissions the Court held:

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[626] The Fourteenth Amendment to the Constitution inserted the following words into Article 40.3.3°: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

[627] Hamilton CJ, O'Flaherty, Egan, Blaney and Denham JJ.

[628] [1995] 1 IR 1, at 24.

[629] [1995] 1 IR 1, at 37-38.

> It is fundamental to this argument that, what is described as 'the natural law' is the fundamental law of this State and as such is antecedent and superior to all positive law, including the Constitution and that it is impermissible for the People to exercise the power of amendment of the Constitution by way of variation, addition or repeal, as permitted by Article 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and, if they purport to do so, such amendment had no effect. The Court does not accept this argument.[630]

By reference to Articles 5,[631] 6,[632] 15.4,[633] 26.3.1°,[634] 28.2,[635] 34.1,[636] and 35.2[637] as well as the declaration to "uphold the Constitution and the law" which is required to be made and subscribed by a person appointed a judge under the Constitution, the Court established that all the organs of the State, the Oireachtas, the executive and the judiciary are subject to the Constitution and the law.[638] The Court quoted approvingly from the judgment of Walsh J in the *McGee Case* that in a pluralist society, the Courts cannot as a matter of constitutional law be asked to choose between the differing views of experts on the interpretation by the

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[630] [1995] 1 IR 1, at 38.

[631] "Ireland is a sovereign, independent and democratic state" *Bunreacht na hÉireann*, Article 5.

[632] "All powers of government, legislative, executive and judicial, derive under God, from the people whose right it is to designate the rulers of the State and, in the final appeal, to designate all questions of national policy, according to the requirements of the common good." *Bunreacht na hÉireann*, Article 6.1.
These powers of government are exercisable only by or on the authority of the organs of State established by the Constitution." *Bunreacht na hÉireann*, Article 6.2.

"It is the people who are paramount..." per Budd J, *Byrne v Ireland* [1972] IR 241, at 295 and 299, quoted approvingly by Hamilton CJ, [1995] 1 IR 1, at 38.

[633] "The Oireachtas shall not enact any law which is any respect is repugnant to the Constitution or any provision thereof." *Bunreacht na hÉireann*, Article 15.4.1°.
"Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid." *Bunreacht na hÉireann*, Article 15.4.2°.

[634] "In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to the Constitution or to any provision thereof, the President shall decline to sign such Bill." *Bunreacht na hÉireann*, Article 26.3.1°.

[635] "The executive power of the State shall, subject to the provisions of the Constitution and the law." *Bunreacht na hÉireann*, Article 28.2.

[636] "Justice shall be administered in Courts established by law appointed in the manner provided by this Constitution...." *Bunreacht na hÉireann*, Article 34.1.

[637] "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law." *Bunreacht na hÉireann*, Article 35.2.

[638] [1995] 1 IR 1, at 39-40.

differing religious denominations of either the nature and extent of the natural rights as they are to be found in the natural law.[639] The Court held:

> From a consideration of all the cases which recognised the existence of a personal right not specifically enumerated in the Constitution, it was manifest to the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with the ideas of prudence, justice and charity; and that the courts had at no stage recognised the provisions of the natural law as superior to the constitution.[640]

and concluded:

> The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the Constitution were subject and at no stage recognised the provisions of the natural law as superior to the constitution. The People were entitled to amend the Constitution in accordance with the provision of Article 46 of the Constitution and the Constitution so amended by the Fourteenth Amendment is the fundamental and supreme law of the State, representing as it does the will of the People.[641]

It is argued in the following sections that in rejecting theological opinion and in asserting the supremacy of the will of the people the Court has implicitly adopted an understanding of positive law as "an expression of will justified or at least rationalised through science."[642] Both of these elements – will and science - are reviewed in the following sections.

7.3.1 The Supremacy of the Will of the People

A judge appointed under the Irish Constitution cannot judge until he determines which law he is bound by – the positive law or the law antecedent and superior to all positive law.[643]

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[639] [1995] 1 IR 1, at 42-43.
See section 6.5.2 above.

[640] [1995] 1 IR 1, at 43.

[641] [1995] 1 IR 1, at 43.

[642] Berkowitz, note 64, at 4.

[643] "...Sophocles' *Antigone* has become a paradigm for the distinction of positive law over and against natural law. If Antigone's burial of Polynices is held up as an explicit following of the natural law, Creon's judgment sentencing her to death is considered the epitome of legal positivism. Creon reflects the core teaching of the "source thesis of positive law – that the validity of law depends exclusively on facts that can be objectively determined without resort to moral argument": for a legal positivist, "to adjudicate is to promote justice by being

As the answer to the question of which law is binding presupposes some conception of what law is, it follows that the positive law referred to in the Irish Constitution cannot be articulated merely by a theory of adjudication separate from an understanding of law. The understanding of law implicit in the Supreme Court's assertion that the Constitution as the will of the people is the fundamental and supreme law of the State echoes Nietzsche's account of the relationship between higher law (*Recht*) and positive law (*Gesetz*) which exists by virtue of being posited (*gesetzt*) and laid down by a will empowered so to will:

> The most decisive act that the supreme power performs...is the institution of *Gesetz*, the imperative declaration of what in general counts as *Recht* in its eyes, and what counts as *Unrecht*...*Recht* and *Unrecht* exist, accordingly, only after the institution of *Gesetz*...To speak of *Recht* or *Unrecht* in itself is quite senseless.[644]

As Nonet explains:

> Nietzsche's concept of *Gesetz* does not refer to anything like positive laws or legislatures. Positive law here means neither posited laws, i.e. instances of positive legal enactment, nor the totality of posited laws that constitutes a positive legal system, nor positive legal systems in general, nor even the process by which such laws are posited. *Gesetz*, in Nietzsche's sense, is rather that fundamental understanding of law which first opens the possibility of positing laws and instituting arrangements for such positing. Positive law so conceived is prior to any instance of posited law, or of means of positing law. In the language of [Heidegger's] *Sein und Zeit*, the concept must be thought not ontic – pertaining to beings (*das Seinende*) – but ontological – pertaining to *das Sein*, an element of the prior understanding of being within which beings come to be known. Elsewhere, and more commonly, Nietzsche speaks of the positing of values (*Wert setzen*) instead of *Gesetz*. Positive law springs from the self-

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an instrument of law". As a theory of judgment, positivism claims to be agnostic about the question of law itself. Yet positive law cannot be merely a theory of adjudication separate from an understanding of law. Creon cannot judge until he has determined which rule of law – Antigone's natural law or Creon's own proclamation – he is to submit to. The question of judging cannot be asked without implicating the question of knowing law, and the effort to know the law presupposes some conception of what law is." *Ibid.*
(It should be noted that it is Aristotle - in *Rethoric* I (13 Loeb ed.) 1373b.2 - who suggests that Antigone appeals to the natural law against Creon's edict. In line 456 of the text of Sophocles Antigone does not refer to natural law.)

[644] Friedrich Nietzsche *On the Genealogy of Morals* (Vintage, 1967), at 75.

"Das Enscheidenste aber, was die oberste Gewalt gegen die Übermacht der Gegen- und Nachgefühle thut und durchsetzt – sie thut es immer, sobald sie irgendwie stark genug dazu ist – ist die Aufrichtung des *Gesetzes*, die imperativische Erklärung darüber, was überhaupt unter ihren Augen als erlaubt, als recht, was als verboten, als unrecht zu gelten habe... Demgemäss giebt es erst von der Aufrichtung des Gesetzes an „Recht" und „Unrecht" (und nichr, wie Dühring will, von dem Akte der Verletzung an). *An sich* von Recht und Unrecht reden entbehrt alles Sinns..." Friedrich Nietzsche, *Zur Genealogie der Moral* in Nietzsche, *Sämtliche Werke* (*Kritische Studienausgabe*, Band 5, Deutscher Taschen Verlag, 1980), at 328.

> assertion in and by which man assumes "the right [*Recht*] of masters [*Herren*] to set values", that is, from the moment man understands himself in accordance with the essence of "life" as power to will, and this will as will to power.[645]

In asserting the will of the people as represented in the Constitution as the fundamental and supreme law of the State, the Supreme Court's decision evidences the conception of law as *Gesetz* – a conception which presupposes a metaphysical understanding of being within which beings come to be known and valued in consequence of the self-assertion of the commanding will. It is on the basis of this metaphysical preconception that the possibility of positing laws in the Nietzschean sense becomes possible. In other words, this metaphysical preconception evidences the emerging triumph of the subjectivity of the subject in which the "egoism of the will" is understood as justice itself.[646]

7.3.2 Legitimacy (*Legalität*)

It is argued here that the judgment in the *Abortion Information Case*, in which the metaphysical inversion of the relation between *Recht* and *Gesetz* is manifest, evidences the emergence of law as legitimacy (*Legalität*) in the Weberian sense.[647] As Weber explains:

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[645] Philippe Nonet, "What is Positive Law?" (1999) 100 *Yale Law Journal* 667, at 671.

[646] "At the risk of annoying innocent ears, I propose the following: egoism pertains to the essence of the noble soul; I mean the immovable faith that to a being such as "we are" other beings have to be subordinate by their nature and sacrifice themselves to us. The noble soul accepts this fact of its egoism without any question mark, also without the feeling that there is anything harsh, compelled, or arbitrary in it, but rather as something that may be grounded in the fundamental law of things:- if it sought a name for it, it would say "it is justice itself." Friedrich Nietzsche, *Beyond Good and Evil* (Vintage, 1966), at 265.

"Auf die Gefahr hin, unschuldige Ohren mißvergnüt zu machen, stelle ich hin: der Egoismus gehört zum Wesen der vornehmen Seele, ich meine jenen unverrückbaren Glauben, daß einem Wesen, wie » wir sind« andere Wesen von Natur untertan sein müssen und sich ihm zu opferen haben. Die vornehme Seele nimmt diesen Tatbestand ihres Egoismus ohne jedes Fragezeichung hin, auch ohne ein Gefühl von Härte, Zwang, Willkür darin, vielmehr wie etwas, das im Gesetz der Dinge begründed sein mag; - suchte sie nach einem Namen dafür, so würde sie sagen »es ist die Gerechtigkeit selbst«." Friedrich Nietzsche, *Jenseits von Gut und Böse* in Nietzsche, *Sämtliche Werke* (*Kritische Studienausgabe*, Band 5, Deutscher Taschen Verlag, 1980), at 219.

[647] "The validity of claims to legitimacy may be based on:...rational grounds - resting on the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)...In the case of legal authority, obedience is owed to the legality of the legally established impersonal order. It extends to persons exercising the authority of office under it by virtue of the formal legality of their commands and only within the validity of the authority of the office." Max Weber, *Economy and Society* (University of California Press, 1978), at 215.

> Legal authority rests on the acceptance of the validity of the following mutually inter-dependent ideas.
> 1. That any given legal norm may be established...with a claim to obedience...;
> 2. That every body of law consists essentially in a consistent system of abstract rules which have normally been intentionally established. Furthermore, administration of the law is held to consist in the application of these rules to particular cases; the administrative process is the rational pursuit of the interests...within the limits laid down by legal precepts...;
> 3. That thus the typical person in authority, the "superior", is himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands...;
> 4. That the person who obeys authority...as it is usually stated...obeys only "the law".[648]

Firstly, given that prior to the *X Case*, the eight and the fourteenth amendments to the Constitution the Court had affirmed the unlawfulness of both abortion and the distribution of abortion information, and subsequent to the *X Case* and the amendments the Court affirmed the lawfulness, in certain circumstances, of both abortion and the distribution of abortion information, the judgment in the *Abortion Information Case* suggests that any legal norm can be established with a claim to obedience. Secondly, since the judgment explicitly disregards an understanding of law as founded in natural law and does not disclose regard having been had for either justice, truth, God, custom or tradition, the judgment also suggests that no non-positive limit can be posited as legal and that the law consists in a set of positive rules.

"[Die] Legitimitätsgeltung [der Herrschaft] kann...primär sein...rationalen Charakters: auf dem Glauben an die Legalität gesatzter Ordnung und des Anweisungsrechts der durch sie zur Ausübung der Herrschaft Berufenen ruhen (legale Herrschaft),... Im Fall der satzungsmäßigen Herrschaft wird der legal gesatzten sachlichen unpersönlichen Ordnung und dem durch sie bestimmen Vorgesetzten kraft formaler Legalität seiner Anordnung und in deren Umkreis gehorcht..." Max Weber, *Wirtschaft und Gesellschaft* (5th ed, Mohr, 1980), at 124.

All German texts from Weber's *Wirtschaft und Gesellschaft* are taken from the *Studienausgabe* (5th ed, Mohr, 1980) and all English translations are taken from Roth's and Wittich's translation *Economy and Society* (University of California Press, 1978).

[648] *Ibid*, at 216-217.
"Die legale Herrschaft beruht auf der Geltung der folgenden untereinander zusammenhängenden Vorstellung,
1. daß beliebiges Recht...gesatzt werden könne mit dem Anspruch auf nachachtung...;
2. daß jedes Recht seinem Wesen nach ein Kosmos abstrakter, normalerweise absichtsvoll gesatzter Regeln sei, die Rechtspflege die Anwendung dieser Regeln auf den Einzelfall, die Verwaltung die rationale Pflege von...Interessen innerhalb der Schlanken von Rechtsregeln...;
3. daß also dert typische legale Herr, der "Vorgesetzte", indem er anordnet und mithin befiehlt, seinerseits der unpersönlichen Ordnung gehorcht, an welscher er seine Anordnungen orientiert,...
4. daß - wie man dies mesit ausdrückt - der Gehorchende...nur "dem Recht" gehorcht."
Ibid, at 125.

Thirdly, by referring to Articles 5, 6, 15.4, 26.3.1°, 28.2, 34.1, and 35.2 of the Constitution as well as to the judicial declaration in order to establish that all the organs of the State, the Oireachtas, the executive and the judiciary are subject to the Constitution and the law, the judgment suggests that the posited rules constitute an "impersonal order" in the sense that "they relieve the subjects from the burdens of personality, i.e. the responsibility of the self for itself to itself."[649] In particular, it relieves a judge of his personal responsibility to deliberate and reduces his role to one of the impersonal application of systematic technique. Fourthly, as the Oireachtas, the executive, the judiciary and the citizens are subject to the Constitution and the law, the difference between subjects is levelled out as all obey the same posited set of impersonal rules.

Following Weber, it is argued here that the significance of the Supreme Court's affirmation of legality (*Legalität*) in the *Abortion Information Case* is that the law imparts certainty, not in the sense of reducing the arbitrariness of positive law, but in the sense of increasing the calculability to the conduct it governs.[650] Given the Court's affirmation of the unlawfulness of both abortion and the distribution of abortion information prior to the *X Case*, in holding that the Courts had at no stage recognised the provisions of the natural law as superior to the Constitution and in reaffirming the rejection of theological opinion as a guide to the Court's interpreting of the Constitution, the Court excluded the possibility of reducing the arbitrariness in positive law by reference to non-posited law.[651] Indeed, the exclusion of

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[649] Nonet, note 398, at 56.

[650] "*Die eigentlich beherrschende Bedeutung*, the properly dominant significance" of legality lies in its capacity to govern conduct "*nach berechenbaren Regeln*, in accordance with calculable rules" [Weber, *Wirtschaft und Gesellschaft*, at 562-563], by which phrase Weber means not so much that the rules can themselves be calculated, as that they impart calculability to the conduct they govern. Owing to it, human operations can be made to function with machine-like precision, speed and reliability. "The peculiarity of modern culture, especially of its technical-economic under-structure, requires precisely this 'calculability' of consequences. [Ibid.]" Nonet, note 398, at 56.

[651] "Strictly speaking, and perhaps contrary to common usage, "legal" and "legality" are formulations *not* of the root English word "law", but of the Latin *lex*, *legis*, *legere*, whence *legalis* and *legitalitas*, and the French *légal* and *légalité*. Now, by age-old tradition, the Roman *lex* is thought to stand is the same relation to *ius*, as the

non-posited limits on law and the relief of the judge's personal responsibility to deliberate can be understood as aiming towards the increase in the calculability of the judge's decisions. The effect of the decision in the *Abortion Information Case* is that the distribution of abortion information is not only legalized but that it is also regulated in accordance with the provisions set out in the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995. Such regulation increases the calculability of the conduct which the law seeks to govern. Using more Heideggerian terminology, it can be said that the emergence of law as legitimacy (*Legalität*), in which law imparts certainty in the sense of increasing regulation and organization, evidences the ways in which technique (*Technik*),[652] *ie* the systematic reduction of all thinking to "calculation" and of all beings to "resources" at the disposition of man, engulfs man.

7.3.3 Science

As argued in sections 5.5.2 and 6.5.2 above, Heidegger understands the "mathematical project" as a kind of surveying or laying out of the horizon within which things may appear. In the *Abortion Information Case* a horizon in which law may appear is laid out. Rather than let law manifest itself to thought – a manifestation which historically has often been articulated in terms of justice, good, the natural law, God, religion, custom, tradition, or the nature of man – the Supreme Court's assertion that the courts had at no stage recognised the provisions of the natural law as superior to the Constitution, together with its rejection of theological opinion and its affirmation of the Constitution as the fundamental and supreme

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German *Gesetz* stands to *Recht*. *Lex*, i.e., *Gesetz*, designates that part of law which is strictly articulated in pronouncements of the human *legis*lator by way of *Satzung*, *setzen*, *ponere*, *legere* (in Greek λέγειν, λόγος), to pose, to lay down, and which may therefore in English be called "positive law". For over two millennia, up until the modern age, such positive law was known to be fraught with human error, affected by the contingencies of time and place, and thus always dependent upon its accordance with a higher law, that would enshrine lasting truth, and the proper name of which was *ius*, *Recht*, *droit*. Only from *Recht* might one hope that it will "*progressively reduce the degree of arbitrariness in positive law and administration.*"" Nonet, note 398, at 53.

[652] Nonet, note 398, at 64; Satkunanandan, note 382, at 130, 144-145.
See sections 3.8, 5.5.2 and 8.3.

law of the State, representing as it does the will of the People, evidences the laying out of a horizon in which the law may appear, a horizon in which the natural law, God, religion, custom and tradition are excluded. The understanding of law which is manifest within this projected horizon is that law is not only posited through democratic will, but also that the law's authority is legitimated by that democratic will, *ie* law is reduced to a mechanism of decision making.[653] The law is upheld (by the Court) as valid simply because it is issued by a sovereign (recognised by the judges), namely, the popular sovereign. This understanding of law, with its drive towards certainty and control, can be understood as a consequence of the mathematical moment of the subjectity of the subject.

As argued in section 3.7 above, Heidegger understands the search for grounds as being inevitably guided by what requires a ground and so is circumscribed by the purposes associated with what is to be grounded. In the *Abortion Information Case* the grounds sought for law evidence the reduction of what grounds to the demands of what is to be grounded. The reduction of law to a mechanism of decision making evidences the reduction to a ground which is transparent, orderable, and "harnessable" at will for man's purposes. In other words, the *Abortion Information Case* evidences the authority of the principle of sufficient reason, in which grounds for law are only sought for the sake of securing human mastery and, as such, it evidences the metaphysics of the subjectivity.

7.4 The Basis of the Legal Validity

In this section, Doyle's argument on the basis of the legal validity of the Irish legal system and his observations on Irish law as a self-constituting, self-referential, ("autopoietic") social system are reviewed. It is argued in this section that the understanding of law as a self-

[653] Berkowitz, note 64, at xiii.

constituting, self-referential, ("autopoietic") social system evidences the rule of technique (*Technik*).

Doyle argues that in the *Abortion Information Case*, in rejecting the "natural law argument" against the constitutionality of the Bill[654] and in accepting the "popular sovereignty argument" in favour of the constitutionality of the Bill,[655] the Supreme Court was "compelled to identify the basis of the legal validity of the Irish legal system".[656] However, as Doyle observes, since both of these arguments purport to draw their authority from the constitutional order itself,[657] "the *Abortion Information Case* was a deeply unsatisfactory attempt to resolve

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[654] "The natural law argument, therefore, consists of two claims. The first is a claim of political morality that the natural law is the ultimate source of authority of the Irish legal system. By making this claim of justification, the natural law argument transcends, at least rhetorically, the boundaries of positive legal argumentation to identify the ultimate source of authority for the legal system. The second derivative claim is that the specific constitutional measures must comply with the precepts of the natural law in order to be validly part of the legal system. Unlike the first claim, this is a claim of positive law, a legal rule about the boundaries of the legal system. The claim of positive law is based on the antecedent of political morality." Doyle, note 47, at 59.

[655] "Equivalent to the natural law, the popular sovereignty argument consists of two related claims. The first is a claim of political morality that the people are the ultimate source of authority of the Irish legal system. By making this claim of anterior justification, the popular sovereignty argument transcends, at least rhetorically, the boundaries of positive legal argumentation to identify the ultimate source of authority for the legal system. The second, derivative claim is that the specific constitutional measures must only represent the will of the people-ascertained at referendum-in order to be validly part of the legal system. Unlike the first claim, this is a claim of positive law, a legal rule about the boundaries of the legal system. The claim of positive law is based on the antecedent of political morality." *Ibid*, at 60.

"The circularity of argumentation manifests itself in a further and related way. The popular sovereignty argument purports to locate the source of validity in the people. It is they who have the authority to amend the Constitution. However, "the people" is a construct of the Constitution, a product of Art.2 and Art. 16.1.2. These two provisions constitute "the people" in the sense of validity under the popular sovereign claim. It is clearly a construct of the Constitution in the first instance and of statutory law in the second instance. If the Constitution is a construct of the people, the people are equally a construct of the Constitution and any search for the source of validity between the two leads into a circle of analysis." *Ibid*, at 62.

[656] *Ibid*, at 56.

[657] "The paradox of a higher law the content of which is determined by the agents of positive law reflects a deeper paradox. Duncan argues:

> "The difficulty...is that the theory that the natural law stands above the Constitution is being justified by the terms of a human instrument, the Constitution, which is itself subject to the natural law. That Constitution cannot be both subject to the natural law and the legal justification for that subjection."

...the Constitution (and *a fortiori* judicial decisions) cannot, argues Duncan, be cited as authority for the superiority of natural law to positive law. But the same argument applies to the popular sovereignty thesis: the Constitution (and *a fortiori* judicial decisions) cannot be cited as authority for the superiority of the people to positive law. The natural law argument and the popular sovereignty argument as to the source of legal validity are both contingent on positive law. The former locates the source of legal validity outside the Constitution in the natural law, while the latter locates the source of validity outside the Constitution in the popular will. In the former image, the Constitution derives its authority from the natural law and is valid only to the extent that it complies with the natural law: it was on this basis that the 14th Amendment was argued to be invalid [by

the conflict in Irish constitutional law between the popular sovereignty argument and the natural argument".[658] Doyle illustrates this by reference to the Court's placing reliance upon Walsh J's *dictum* in the *McGee Case* that "it falls upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable."[659]:

> Walsh J's *dictum* had two dimensions. On the one hand he accepted the existence of rights antecedent to positive law; on the other hand he maintained that it was the role of judges to determine what those rights were. This apparent paradox goes to the core of the legal validity problem. In order for legal force to be given to antecedent rights, they must be realised in positive law. That necessity for realisation in some way diminishes their antecedent status... The paradox is that of the agent of positive law (the judge) determining what is superior to positive law.[660]

In addressing the question of how law is identified, Doyle observes with regard to Hart's positivist theory of law[661] and Dworkin's conception of law in terms of constructive morality[662]:

> If one attempts to explain the origins of a legal system in a way that gives descriptive priority to the agents of positive law,[663] one produces the paradox of the chicken and

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O'Hanlon]. In the latter image, the Constitution derives its authority from the people and is valid to the extent that it represents the popular will. On this basis, the 14th Amendment could not but be valid." Doyle, note 47, at 62.

[658] *Ibid*, at 62.

[659] [1974] IR 284, at 318.

[660] Doyle, note 47, at 62.

[661] "If [as Hart maintains] law is a union of primary or secondary rules, one faces the question of what constitutes a rule...Hart's answer is that officials rely on secondary rules of recognition. In order to identify the rules of the system, officials refer to another rule which lays down the criteria for the recognition of rules. This establishes a chain of validity, whereby the legal validity of each rule is tested against another rule. At some point one reaches the ultimate rule of recognition, the legal validity or invalidity of which cannot be tested against any other rule. By providing an ultimate criterion for the recognition of legal rules, the rule of recognition establishes the unity and coherence of the legal system. This conclusion raises the central question of how the rule of recognition itself is identified, both by Hart and by legal officials." *Ibid*, at 65.

[662] "The problems persist even if one conceives of law in terms of constructive morality, adopting Ronald Dworkin's theory. Dworkin's theory encourages circularity in that it uses descriptions of the legal system to guide future development of the legal system. Although this form of legal reasoning may sometimes be acceptable, it becomes problematic when applied to the issue of legal validity. For in this instance descriptions of the legal system are used to identify a principle which purports to be antecedent to the legal system." *Ibid*, at 56.

[663] By "agents of positive law" Doyle means the actors of a positive legal system such as judges, officials, and lawyers. *Ibid*, at 56, n. 1.

> the egg. This is because the agents of positive law in a given system must view the ultimate source of validity as binding in order for it to become the ultimate source of validity, but it cannot be viewed as binding unless it is the ultimate source of validity.[664]

Given this paradox, Doyle suggests that circularity and self-referentiality be considered as lying at the core of legal theory and suggests the theory of autopoiesis as an example of such a theory. In the autopoietic theory law is understood as a self-founding system defined in terms of communicative self-reference, recursiveness and self-reproduction. Some of the elements of this theory are reviewed in the following section.

7.4.1 Autopoiesis

The word "autopoiesis" was coined by the Chilean biologists Marturana and Verla in the 1970s to describe the self-referential, self-replicating qualities of biological systems.[665] It was introduced into sociology and legal theory by Niklas Luhmann [666] and Gunther Teubner[667] and

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[664] Doyle, note 47, at 56.

[665] Gunther Teubner, "Introduction to Autopoietic Law" in Gunther Teubner ed, *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, 1988), at 1.
"The human body is made up of millions of cells. Within each cell thousands of chemical reactions are taking place all the time, the responsibility of microscopic enzymes which, with infinite subtlety build and re-build the functional chemical elements of the cell, which literally builds itself over and over and reproduces itself by splitting. The 'picture of the cell as a self-regulating mechanism, continually changing, yet continually stable, is one of the most important and significant results of modern bio-chemistry. All body components are in a constant state of flux. Protein, lipid, and nucleic acid molecules are constantly being renewed, old molecules are being broken down and new ones synthesized to take their place. In the past fifty years 'It became clear that one, perhaps the major function of the living cell was the constant re-creation of itself from within'. 'Under normal conditions, the average cell is probably synthesizing several thousand new protein molecules every minute', and 'the control and regulation of the cell, not only in its day-to-day running, but in its entire cycle from birth to death, and indeed the entire cycle from life to death of the body itself, can be interpreted biochemically, provided we are always prepared to... embrace the structural properties of the cell as a whole, as a *system*'. This systematic aspect of the working of metabolic pathways within the cell depends upon a remarkable range of chemical feed back actions and reactions and realizing this '...biochemists seized on...new information concepts in order to probe the ways in which the cell controlled and regulated its own metabolism'. 'Autopoiesis' as an idea derives historically from 'homeostasis', the term which describes natural states which are kept stable by complex systems of information and control (ie inbuilt cybernetic systems). Familiarly our blood, for example, is kept at a roughly stable level regarding temperature, pH (acid/alkaline) factor, sugar etc. Autopoiesis goes a step further. It refers to the stability of constituent parts, of structure, maintained by self-recreation." Anthony Beck, "Is Law an Autopoietic System?" (1994) 14 *Oxford Journal of Legal Studies* 401, at 403.

[666] Professor of Sociology, University of Bielefeld, 1968-1998.

has been the subject of considerable academic attention.[668] Like the cellular system which is understood as using only its own elements and their arrangement as material for its development, "an autopoietic system constitutes the elements of which it consists through the elements of which it consists" and is operationally closed in the sense that "all operations always reproduce the system".[669] While the material of autopoietic biological systems are physical and biological entities and their interactions, when society is considered as an autopoietic system, the material which constitutes the social systems is "communication". As Goodrich explains:

> For Luhmann society is composed of systems and their environments and is to be understood exclusively in terms of communicative events rather than actions or persons. The social system exists independently of the psychic systems that inhabit its environment and act at some considerable remove from the systems of communication that constitute the social...Systems theory aspires to observe the self-constitution of the social world through the differentiation of communicative systems from their environments...order is created from noise. Society is composed of a plurality of colliding systems and rationalities, and these exist side by side, indifferent or epistemically blind to each other, without subjectivity or totality, the social whole itself being conceived as a disaggregated multitude of systems continuously in the process of differentiation in a context of contingent environmental noise. At the level of system, which is to say at the level of our knowledge of society, all that exists are systems and these are autonomous, closed units of self-reproduction, be it economy, politics or law that happen to be at issue...law must be conceived as a closed system: 'the law is completely autonomous at the level of its own operations'. There is no law outside of law, to which it should be added that law carries with it no special privilege within the order or multitude of discourses. Law is one system amongst many, and

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[667] Professor of Private Law, University of Bremen, 1981-1992; European University Institute Florence, 1993-1998, Professor of Comparative Law and Legal Theory, London School of Economics, 1998-2009; Professor of Private Law and Legal Sociology, Goethe University, Frankfurt am Main, 2007-present.

[668] A small, unrepresentative sample of the secondary literature on autopoietic legal theory includes Beck, note 665; Drucilla Cornell, "The Relevance of Time to the Relationship between the Philosophy of the Limit and Systems Theory" (1991-1992) 13 *Cardozo Law Review* 1579; Doyle, note 47; Peter Goodrich, "Anti-Teubner: autopoiesis, paradox, and the theory of law" (1999) 13 *Social Epistemology* 197; Lavi, note 615; Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1991-1992) 13 *Cardozo Law Review* 1419; "The Unity of the Legal System" in Teubner, note 665; Münch, "Autopoiesis by Definition" (1991-1992) 13 *Cardozo Law Review* 1463; M. B. W. Sinclair, "Autopoiesis: Who Needs It?" (1992-1993) 16 *Legal Studies Forum* 81; Gunther Teubner, "Autopoiesis in Law and Society: A Rejoinder to Blankenburg" (1984) 18 *Law and Society Review* 291.

[669] Niklas Luhmann, "The Unity of the Legal System" in Teubner, note 665, at 14, 15.
Sinclair, note 668, at 81.

> just as law is blind to the disorder of co-evolving social systems, so too the social systems within which law is placed are largely deaf to the noises created by law. [670]

In particular, law exists as a specialized system of communication or information processing.[671] The legal system is self-constituting, in the sense that it produces its own elements, structures, processes, boundaries, identity and unity.[672] It is self-referring,[673] self-describing[674] and self-regulating.[675] Consequently, legal propositions or norms are understood within a self-generating system of communication which both defines relations with the outside environment, *eg* with such social subsystems as the political, economic, and health systems, and provides itself with its own mechanisms of justification.[676] In sum,

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[670] Goodrich, note 668, at 199-200.

[671] "Law exists only as communication (or, in psychological terms, as the prospect of communication). Communication here means a synthesis of information, communication and comprehension, and not merely the action of communication as such." Luhmann, note 669, at 17.

[672] "A simple example of this in the English system is found in the rules of precedent: they are uttered by the discourse of the courts themselves. Furthermore rules of procedure are often created by the courts. What materials may be taken into account to interpret statutes are often created by the judges, who may also decide the limits of their own jurisdiction: in each case it is the legal discourse constituting its own fabric and extent." Beck, note 665, at 406-407.

[673] "In the English system, judicial communications refer to the rationes and obiter dicta in other judicial communications. Statutory material...means only what the judges say it does. Furthermore, judges use presumptions and canons of construction devised by other judges." *Ibid*, at 407.

[674] "The law, legal discourse, says what law is. As distinct from creating new laws, judges and legal academics purport to state the law as it is. However, there is a fundamental and subtle difference between the description of law in the legal discourse of the courts and that of the academics. Plainly the nature of academic writing is (in part at least) a description of the law. But academics only count as part of legal discourse if the legal discourse of the courts says so. This distinction is achieved by allotting the power and authority to utter proper or official descriptions to some discourse but not to any other." *Ibid*, at 408.

"Self-observation and self-description are related concepts which denote the way in which the system reconstructs its own operations in such a way as to inform its future development. Taken together, self description and self-observation open up a new plane in the system – second order cybernetics. Legal doctrine is the second-order cybernetics of law, in the sense that it is through legal doctrine that self-observations and self-descriptions are incorporated into the legal system to inform its future development." Doyle, note 47, at 81.

[675] "Teubner describes self-regulation as the dynamic variant of self-organisation [i.e. the ability of the system to spontaneously produce an autonomous order]: a system is self-regulating if it is able to build up and stabilise its own structures but also to order them according to its own criteria." *Ibid*, at 81.

[676] "Identifying itself by its binary code [legal/illegal], and distinguishing itself from its environment by the specificity of that code, the legal system knows of no fundamental norm (grundnorm) representing its unity within societal system. There is no way to introduce the unity of the system into the system...Norms , then, are purely internal creations serving the self-generated needs of the system for the decisional criteria without any corresponding "similar" items in its environment. Historically, there is no beginning except an always renewed reconstruction of the past. Logically, there are no apriorities, but simply circular, reciprocal conditioning of the

"autopoiesis conserves law as an autonomous system that achieves normative closure through "epistemological constructivism"."[677]

Doyle argues that the decision in the *Abortion Information Case* evidences the Irish legal system's production and change of the norms which it uses as a basis for its development. In the series of cases prior to the *Abortion Information Case* the Courts had developed a natural law doctrine in their development of the protections afforded by Irish constitutional law. In the *Abortion Information Case* the Irish legal system's self-constituted identity as a system based on popular sovereignty was used as the criterion of the legal system's future development. Doyle concludes that "...the Irish legal system can be understood as an autopoietic legal system and that the *Abortion Information Case* can be understood as a crucial event in the formation and closure of that system."[678]

7.4.2 The "Technological" Nature of Autopoiesis

Given the "paradox of the chicken and egg" which arises in attempting to explain the origins of a legal system in a way that gives descriptive priority to the agents of positive law, Doyle concludes:

> The circularity of legal validity argumentation results from positive lawyers' unsurprising focus on positive law. If one maintains that focus, one must either accept autopoiesis as a description of law or one must be fundamentally critical of the current practice of legal argument.[679]

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code and programs." Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1991-1992) 13 *Cardozo Law Review* 1419, at 1428.

[677] Cornell, note 668, at 1583.
"Epistemological "constructivism" concludes...that what the system, at the level of its operations, regards as reality is a construct of the system itself. Reality assumptions are structures of the system that uses them. This can be clarified once more using the concept of recursiveness. The system controls the environment, operationally accessible to it, by verifying the consistency of its own operations, using for this a binary system which can record agreement or non-agreement. Without the form of consistency control, no memory could arise, and without memory there can be no reality." Niklas Luhmann, "Closure and Openness: On Reality in the World of Law" in Teubner, note 665, at 335.

[678] Doyle, note 47, at 84.

[679] *Ibid*, at 84.

Doyle's conclusion suggests that the acceptance of autopoiesis as a description of law is a "dissolution" of the paradox of the circularity of legal validity argumentation. It is argued in this section that Doyle's account of the circularity of legal validity argumentation presupposes the metaphysics of subjectivity while the theory of autopoiesis evidences what Heidegger calls the rule of technique (*Technik*) or the will to "order for the sake of ordering" (*bestellbar zu sein für ein weiteres bestellen*).

In Doyle's formulation of the problem of the existence of the ultimate source of legal validity,[680] the requirement of the descriptive priority of the agent of positive law functions like the indubitablity of the *cogitio* in the Cartesian method. Like the Cartesian God, whose existence is discovered as "already needing to have been" in order "to be" the ground of the *cogito*, and so is discovered as something of which the *cogito* "can be more certain - not because there are degrees in the order of certainty - but because of a certain priority with regard to time",[681] the ultimate source of validity must be recognised as "already needing to have been" in order "to be" the certain and ultimate source of validity for the agent of positive law.[682] Just as the Cartesian *cogito*'s "invocation" of the divine names powerfully conceals the self-asserting subject's grounding of the invoked God and the subject's emergence "into" the world to cancel the dubiety of all that is "exterior" to it, that which is invoked under the name of "ultimate source of validity" must be at once the product of the actuality of the agent of positive law and the means by which dubiety in the legal system is to be cancelled. Just as the "mathematical" being of the Cartesian *cogito* is posited alongside every thought and is

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[680] See n. 661 above.

[681] Hemming, note 125, at 50.

[682] "The question to be considered is how a rule of recognition first comes to be treated by officials as a legally binding obligation? On the one hand, the existence of the rule of recognition depends on its being used and accepted within the system by the officials. On the other hand, officials cannot accept the rule of recognition as an obligation before it exists. In short, it is the acceptance of the rule of recognition as legally binding which makes it legally binding. Once accepted, it mandates its own acceptance. In this way, the existence of the rule of recognition raises the problem of the chicken and egg." Doyle, note 47, at 66.

that by which each thought is certainly known in the sense of "being-secured as "subject-icity"",[683] the existence of the ultimate source of legal validity presupposes the "mathematical" being of the agent of positive law posited along side every legal thought. Just as the emergence of the Cartesian *cogito* configures truth as "being represented" (*Vorgestelltheit*), the priority of the agent of positive law in the legal *ordo cognoscendi* transforms the means by which the legal *ordo essendi* is known. In sum, Doyle's formulation of the circularity of legal validity argumentation presupposes the subjectity of the subject.

It is arguable that Doyle's proposal that autopoiesis be accepted as a description of law (in order to avoid the paradox of the circularity of legal validity argument arising from a Cartesian formulation of the problem of the existence of the ultimate source of legal validity) also imports the metaphysics of subjectivity into his theory of law since autopoiesis presupposes that reality is determined by the operations of an observer.[684] Since the same event can be classified according to different theoretically conceived formalities, *eg* a

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[683] See sections 3.4.2 and 4.3.3.

[684] Schweitzer has attempted to identify the philosophical origins of the self-organisation theories underlying the neurobiology of Maturana and Varela, as well as the constructivism which derives from them, in German idealism, particularly Kant, Fichte and Schelling.
Stefan Schweitzer, "Deutscher Idealismus, Autopoiese und Radikaler Konstruktivismus. 1. Teil: Eine ideengeschichtliche Rekonstruktion" (2007) 15 *Electroneurobiología* 3 http://electroneubio.secyt.gov.ar/index2.htm (visited 27th May 2011).

"Until our times, the relationship of German Idealism and the system-theoretical biological theory of autopoiesis of Maturana and Varela had remained chiefly in the dark. In contrast, the connections between radical constructivism and the theory of autopoiesis are well known. Maturana and Varela, in their writings, make reference to ideas and view on radical constructivism, eg those of Ernst von Glasersfeld and Sigfried Schmidt. Systems can act and never react and this affords the epistemological ground: "Reality is consequently the territory of objects, and thus, it is that which can be delimited as real. Therefore there is no doubt about this, i.e. about what reality is: to wit, an area that is determined by the operations of the observer." So one comes to the philosophical-epistemological position of radical constructivism, a position that "by continuing sceptical and constitutive theoretical reflections, conceives each form of cognition – even the cognizer itself – as a construction of an observer. Recognizing does not mean the passive figuration of an external objective reality, but denotes a process of original production, i.e. the construction of a cognitive world. The real world itself is no experienciable reality; reality is rather always agreed to, observed, invented, therefore constructed reality"."
Stefan Schweitzer, "In the History of Ideas, Constructivist Pedagogy stems from German Idealism" (2007) 15 *Electroneurobiología* 3, at 78-79; http://electroneubio.secyt.gov.ar/index2.htm (visited 27th May 2011).

payment of money could be considered as both an economic "event" and a legal "event",[685] the understanding of reality, *ie* the understanding of the self-constitution of the social world through the differentiation of communicative systems from their environments, presupposes the theoretical distinction of these subsystems. Insofar as these analytical or theoretical distinctions "objectively" describe the real, they presuppose the subjectivity of the theoretician or observer.[686]

It was argued above that the effect of the decision in the *Abortion Information Case* is that the distribution of abortion information is not only legalized but that it is also regulated and that such regulation increases the calculability of the conduct which the law seeks to govern.

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[685] "The legal system can only be separated from other analytical systems once and for all in the analytical sense...The notion of structural couplings [phenomena that occur outside the legal system and which contribute to its evolutionary success] is an invention by Luhmann forced upon him by mounting criticism which demonstrates that the *empirical* autonomy of systems is very much constituted by factors external to those systems...An autopoietic system reproduces itself because it has the capacity to reproduce itself *empirically* and not merely *analytically*. An autopoietic legal system would have to reproduce its definition of legally right or wrong *empirically* in this case. This is, however, far from being the case in reality, because the empirical definition of legal right or wrong, the legal code, and more importantly, the legal program, depends not on clear-cut legal concepts, but on the cultural concepts of justice, on the people's trust in courts, on the legal profession's power, on payments for legal services, and on political considerations. Thus, empirically, the definition of what is legally right or wrong is simultaneously a legal, cultural, communal, economic, and political act. The autonomy of the legal system in modern societies is not due to the wonderful coincidence of autopoiesis and structural coupling in the evolutionary process, but a very fragile outcome of on-going and never-ending cultural, communal, legal, economic, and political struggles over the definition of the legal code and program." Münch, note 668, at 1463.

[686] Goodrich has suggested that while the autopoietic theory of law makes modest claims to knowledge, it is a means by which the primacy of the scholar in the production of law is asserted. Given Goodrich's observation, it is arguable that such assertion of the primacy of the scholar is at once a concealment of power and a taking command over the claim to justice symptomatic of the metaphysics of subjectivity.
"Autopoiesis dresses in liberal garb. Law is one discourse, one system of communication amongst many. It claims to knowledge are no greater and are probably considerably weaker that those of other sciences. It plays at society in the sense that it judges social and administrative actions without the means of fully apprehending the social subsystems that it seeks to regulate and govern. Law, which endeavours to understand the social through its pathology, through the juridical resolution of conflicts, has little affinity with or means of comprehending a sociality that is both global in its operations and actuarial in its logics of governance. It is for this reason presumably that social science, the sociology of autopoiesis, must stand in for, indeed displace, the archaic epistemologies or monotheistic epistemic of what is historically a profoundly Christian idea of law." Goodrich, note 668, at 207.

"...the autopoietic claim to conflate the veridical and the juridical in a sociological law of laws functions as a re-assertion of the primacy of the scholar in the production of law. Autopoiesis comes bearing the gift of the truth, if truth is a knowledge of the real, even if that knowledge is paradoxically predicated upon nothing more determinate that elective affinities between social structures and their scholarly elaboration." *Ibid*, at 208.

It is argued here that the "structural couplings" of the legal system and other systems[687] evidences what Heidegger calls the rule of technique (*Technik*) or the will to "order for the sake of ordering" (*bestellbar zu sein für ein weiteres bestellen*). This argument is illustrated by reference to the *Ward of Court Case* which is examined in the next chapter. As the *Ward of Court Case* concerns the constitutionality of withdrawing artificial means of feeding from an incapacitated patient so as to "allow her to die", it can be considered as an instance of the structural coupling of law and medicine. It is argued in the next chapter that the decision in the *Ward of Court Case* brings the practice of euthanasia or mercy killing under the domain of law by regulating its medical practice and so it can be said that the structural coupling of law and medicine resulted in the legal regulation of euthanasia. It is also argued in the next chapter that the regulation of the death of the ward in the *Ward of Court Case* evidences the transformation of law from that which regulates human behaviour for the sake of attaining a common good to that which regulates human behaviour for the sake of regulation – regulation which drives towards the inscription of all aspects of the individual's life within the legal order such that even the ward's vitality and biological processes become part of the "human resources" or "standing reserve" to be medically and legally controlled. It is also argued in the next chapter that this transformation of law evidences what Heidegger identifies as technology (*Technik*) or the will to order "for the sake of ordering".

In sum, given the arguments in the next chapter, it is concluded here that the structural coupling of law and medicine in the *Ward of Court Case* evidences the rule of technique (*Technik*). In other words, insofar as the structural coupling between analytically or theoretically distinguished social subsystems is an element of an autopoietic theory of law

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[687] "For Luhmann, the legal system remains cognitively open while normatively closed. That is, while all norms are constituted internally, there is scope for the incorporation – through structural couplings – of information. Structural couplings are forms of simultaneous relations between social systems which allow one system to react against disorder from another system. They provide a continuous influx of disorder against which the system maintains or changes its structure. But information does not enter the system from the outside; instead the system has a choice whether to reconstruct the information according to its own code." Doyle, note 47, at 79.

which "objectively" describes the real, then what the theory actually describes is the unfolding of technical relations within the real.

7.5 Conclusion

It was argued in this chapter that the Supreme Court's interpretation of Article 40.3.3° (right to life) can be understood as a revaluation of the legal order in consequence of the emerging triumph of the subjectivity of the subject. Like the *McGee Case*, the *X Case* evidences the understanding of law as that which directs acts to the attainment of private goods at the expense of the common good. This transformed understanding of law can be understood in consequence of the assertion of the subject in its drive for security by distinguishing itself in its very self precisely with respect to, and over against the common good. It was also argued in this chapter that the decision in the *Abortion Information Case* evidences the metaphysical inversion of the relation between law (*Recht*) and posited law (*Gesetz*). By virtue of this metaphysical inversion, law is transformed into legitimacy (*Legalität*), in which law imparts certainty, not in the sense of reducing the arbitrariness of positive law, but in the sense of increasing the calculability of the conduct it governs. This drive towards calculability evidences the rule of technique (*Technik*).

A remarkable feature of the "somersaults" in Irish law in consequence of the decisions in the *X Case* and the *Abortion Information Case* is that abortion and the distribution of abortion information were not only legalized but that they were also regulated. In the next chapter the legalization and regulation of euthanasia in consequence of the Supreme Court's decision in the *Ward of Court Case* is examined. It is argued that the prescribing of circumstances, conditions and procedures under which such previously illegal actions may now take place evidences an understanding of law which regulates human behaviour for the sake of regulation.

Chapter 8 Suicide and Euthanasia

8.1 Introduction

In this chapter it is argued that the Supreme Court's decision in the *Ward of Court Case* evidences the manifestation of what Heidegger calls the will to order "for the sake of ordering" by which law is transformed from that which regulates human behaviour for the sake of attaining a common good, to that which regulates human behaviour for the sake of regulation.

In the *Ward of Court Case* the Supreme Court considered the constitutionality of withdrawing artificial means of feeding from an incapacitated patient and so allowing her to die. The following three are arguments are advanced in this chapter. Firstly, it is argued that the Court's formulation of the withdrawal of artificial means of feeding from the ward in terms of "allowing the ward to die" is properly formulated as "not allowing the ward to live". Secondly, it is argued that this withdrawal can properly be called euthanasia or "mercy killing". Finally, it is argued that the Court's permitting of euthanasia or mercy killing evidences the increasing inscription of the individual within the legal order whose end is regulation for the sake of regulation.

8.2 The Ward of Court Case

In the *Ward of Court Case* the ward of court had been in a near persistent vegetative state for almost twenty three years.[688] Because of this condition, her mother - the committee of the person of the ward – sought orders of the High Court:

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[688] "Over two decades ago the ward, who was then 22 years old, underwent a minor gynaecological operation under general anaesthetic. During the procedure she suffered three cardiac arrests resulting in anoxic brain damage of a very serious nature. Since that catastrophe the ward has been completely dependent on others, requiring total nursing care. She is spastic as a result of the brain damage...She cannot swallow. She cannot speak. She is incontinent.... She is in a condition which is nearly, but not quite, what in modern times has become known as persistent or permanent vegetative state (P.S.V.)...the ward's heart and lungs function normally. Assuming that she is adequately furnished with nutrition and hydration (nourishment), her digestive system operates normally as do her bodily functions, although bowel movements require some assistance, but as

(i) to consent on behalf of the ward to the withdrawal and termination of the means of nutrition and hydration, whether by nasogastric or gastrostomy tube;

(ii) to consent on behalf of the ward to the non-treatment of any infections or other pathological conditions of the ward save in a palliative way to avoid pain and suffering; and

(iii) to authorise the ward's committee and family to make such arrangements as they considered suitable and appropriate for the admission of the ward to an institution which would not find it contrary to their philosophy and ethics to proceed in accordance with the consensus and decisions made.[689]

The Supreme Court held that the High Court's *parens patriae* jurisdiction permitted the High Court to make the orders sought.[690] While the majority were not united on all grounds, the judgments disclose the following grounds for the withdrawal and termination of the means of nutrition and hydration: that such withdrawal was in the ward's best interests,[691] lawful and in pursuance of the ward's constitutional rights[692] to privacy,[693] self-determination,[694] bodily

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she cannot swallow and as her teeth are spastically clenched together, she cannot receive nourishment in the normal way and as already stated, is and has had to be tube-fed since the catastrophe. Assuming that she continues to be nourished by tube, she could live for many years... The ward has no capacity for speech or communication... She has minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes... [with] some minimal purposive content... There is no prospect whatsoever of any improvement in the condition of the ward." per Hamilton CJ, quoting from the judgment of Lynch J in the High Court [1996] 2 IR 79 at 107-108.

[689] [1996] 2 IR 79, at 101.

[690] Hamilton CJ, O'Flaherty, Blayney, Denham JJ assenting; Egan J dissenting.

[691] "I find that it is in the best interest of the ward that the abnormal artificial nourishment, whether by nasogastric or by gastrostomy tube, should be terminated, thus ceasing to prolong her life to no useful purpose and allowing her to die in accordance with nature..." per Lynch J in the High Court, [1996] 2 IR 79, at 99; quoted approvingly by Hamilton CJ (at 128), Blayney J (at 143) and Denham J (at 169).

[692] "I am satisfied that if she were mentally competent that she would have, in the circumstances of her condition, the right to forego the treatment or to have the treatment discontinued and that the exercise of that right would be lawful and in pursuance of her constitutional rights. Neither the requirements of the common good nor public order or morality, in the circumstances of this particular case, require that the exercise of the ward's constitutional rights be restricted." per Hamilton CJ, [1996] 2 IR 79, at 126.

[693] "The right to individual privacy is one of the unenumerated personal rights recognised by Article 40, s. 3 which the courts have identified...there are very powerful arguments to suggest that the dignity and autonomy of

integrity[695] and dignity.[696] It is noteworthy that in upholding the orders of the High Court, the decision is permissive rather than mandatory.[697]

8.2.1 "Allowing to die" and "Not allowing to live"

Although there was no doubt that the ward was alive[698] and that the Court was very much alive to the fact that a decision on the life or death of the ward had to be made,[699] it was

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the human person (as constitutionally predicated) require the State to recognise that decisions of life and death are, generally speaking, ones which a competent adult should be free to make without restraint, and that this freedom should be regarded as an aspect of the right to privacy and should be protected as a 'personal right' by Article 40.3.1..." per Hamilton CJ, [1996] 2 IR 79, at 125.

"Part of the right to privacy is the giving or refusing of consent to medical treatment." per Denham J, [1996] 2 IR 79, at 131.

[694] "The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care or treatment." per Hamilton CJ, [1996] 2 IR 79, at 126.

[695] "There is no doubt but that the ward, if she were mentally competent, had the right, if she so wished, to forgo such treatment or, at any time, to direct that it be withdrawn even though such withdrawal would result in death...Such treatment is intrusive, constitutes and interference with the integrity of her body and cannot be regarded as normal means of nourishment." per Hamilton CJ, [1996] 2 IR 79, at 124.

[696] "A constituent of the right to privacy is the right to die naturally, with dignity and with minimum suffering. This right is not lost to a person if they become incapacitated or insentient. An unspecified right under the Constitution to all persons as human persons is dignity – to be treated with dignity." per Denham J, [1996] 2 IR 79, at 163 *et seq*.

[697] "...the supreme Court decision is permissive rather than mandatory. Accordingly, no medical professional is compelled by the court's consent to withdraw treatment...Yet it is paradoxical that the Supreme Court decision, which was based on principles of bodily integrity and privacy and on the view that such treatment was not in the ward's best interests, should lead to the situation where health care professionals can violate those principles by continued treatment and act against the patient's purported best interests." Dermot Feenan, "Death, Dying and the Law" (1996) 14 *Irish Law Times* 90, at 95.

[698] "It is the fact that indubitably the ward is alive. All life is sacred." per O'Flaherty J, [1996] 2 IR 79, at 131.

[699] "The finding by the learned trial judge that the ward...would choose the withdrawal of such abnormal, artificial feeding resulting in an immediate reduction of bodily functions and their attendant indignities and a peaceful death in accordance with nature within two weeks or so was based on evidence from the family which he found to be clear and convincing." per Hamilton CJ, [1996] 2 IR 79, at 115.

"The stark dilemma that presents itself for resolution is: given the sanctity of life; given the right to self-determination and given an incompetent who cannot herself make a choice, since I hold that an incompetent does not lose the constitutional right of self-determination she would otherwise have had, how should the court exercise the choice for her because, as already indicated, a choice has to be made one way of the other." per O'Flaherty J, [1996] 2 IR 79, at 132.

"A decision has now to be made whether to continue the medical treatment or not. To continue the treatment is as much a decision as not to do so. If the decision is to continue medical treatment, a consent has to be given on

asserted by some of the judges in the majority that the case was not about euthanasia either in the sense of "putting down the old and infirm, the mentally defective or the physically infirm"[700] or in the sense of "the termination of life by a positive act".[701] The facts established that, while the ward was in a condition which was nearly, but not quite, a persistent or permanent vegetative state, she was not dying: "assuming she continues to be nourished by tube, she could live for many years".[702] As she was completely dependent on others and not yet dying, her death would not come unless a definitive action was taken by others. This definitive action would have to deprive the ward of conditions for living and so cause her death. While the judges in the majority described the definitive action in terms of the "termination of abnormal artificial nourishment" and "withdrawal of invasive medical treatment", the termination coupled with the "non-treatment of any infections or other pathological conditions of the ward save in a palliative way to avoid pain and suffering" meant subjecting the ward of a regimen of starvation with accompanying palliative care.[703] Since it was precisely because the ward was *not* dying that nourishment had to be stopped, then what the majority described in terms of "allowing to die", *eg* "allowing to die in

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behalf of the ward for the invasive medical treatment. If the decision is to cease the medical treatment, a consent on behalf of the ward has also to be given." per Denham J, [1996] 2 IR 79, at 158.

"The removal of the tube would, as already stated, result in the death within a short period of time. It matters not how euphemistically it is worded. The inevitable result of removal would be to kill a human being." per Egan J (dissenting), [1996] 2 IR 79, at 136.

[700] "...the issues in the present appeal...are not about euthanasia and are not about putting down the old and infirm, the mentally defective or the physically infirm but are about the question whether, under our law and Constitution, artificial feeding and antibiotic drugs may be withheld from the ward, who is and has been more than twenty three years in a coma and has no hope of recovery, when it is accepted that if that is done, the ward will shortly thereafter die." per Hamilton CJ, [1996] 2 IR 79, at 120.

[701] "The case is not about euthanasia; euthanasia in the strict and proper sense relates to the termination of life by a positive act. The declarations sought in this case concern the withdrawal of invasive medical treatment in order to allow nature to take its course...In my judgment, this case is not about terminating a life but only to allow nature to take its course..." per O'Flaherty J, [1996] 2 IR 79, at 130-131.

[702] per Lynch J, in the High Court, [1996] 2 IR 79, at 108.

[703] The administration of a regimen of sedation, starvation and dehydration has been called "sedated starvation". Teresa Iglesias, "Ethics, Brain-Death, and the Medical Concept of the Human Being" (1995) 1 *Medico-Legal Journal of Ireland* 51, at 55.

accordance with nature",[704] "allowed to slip away naturally"[705], "allowing nature to take its course"[706] is more properly described by Iglesias as "not allowing to live".[707] In sum, notwithstanding the terminology used by the majority, it is argued here that the decision amounted to a consent to the deliberate or intentional causing of the ward's death by starvation. Since the deliberate or intentional causing of a person's death by any form of bodily harmful deprivation, *eg* by deprivation of nourishment,[708] is homicide, the decision amounted to a consent to a form of homicide. Indeed, such bodily harmful deprivation was

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[704] per Lynch J in the High Court, [1996] 2 IR 79, at 99; quoted approvingly by Hamilton CJ (at 128) and by Blayney J (at 143).

[705] "the best interests test, i.e. whether it is in the best interests of the ward that her life, such as it is at present, should be prolonged by the continuation of the abnormal, artificial means of nourishment or whether she would be allowed to slip away naturally by the withdrawal of such abnormal, artificial means..." per Hamilton CJ, quoting from the judgment of Lynch J in the High Court, [1996] 2 IR 79, at 115.

[706] "We are concerned here only with allowing nature to take its course and for the ward to die with dignity." per O'Flaherty J, [1996] 2 IR 79, at 131.

[707] "...we are obliged not to intend to cause [a vegetative patient's] death by act or omission. Medically speaking this intent will be manifest in an act or omission which will always amount to interventions which are *bodily harmful*, be they "sedated starvation" or any other method of depriving the patient of the bodily care he or she is due. When the decision to "allow to die" means, in the concrete, doing something "not to allow to live", (that is what is sought by the procedure is *to make the patient dead*) the patient will have *to be harmed bodily*, for if bodily the patient receives the necessary nutrition and care, because his or her organism is not in a dying condition, he or she will not die. So something bodily harmful must be done to the patient for him or her to die. This is homicide." Iglesias, note 703, at 56.

[708] In *Brophy v New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986) where the Supreme Judicial Court of Massachusetts permitted the discontinuation of nutrition and hydration for a patient in a persistent vegetative state upon the request of the wife-guardian and the family. The trial judge found that if nutrition and hydration were withheld from the patient, he would "suffer terribly for a period of time ranging from five days to three weeks before dying of starvation and dehydration. During that time, his body would experience the following effects from lack of food and water:

(i) his mouth would dry out and become caked or coated with thick material,
(ii) his lips would become parched and cracked and fissured,
(iii) his tongue would become swollen and might crack,
(iv) his eyes would sink back into their orbits,
(v) his cheeks would become hollow,
(vi) the mucosa (lining) of his nose might crack and cause his nose to bleed,
(vii) his skin would hang loose on his body and become dry and scaly,
(viii) his urine would become highly concentrated, causing burning of the bladder,
(ix) the lining of his stomach would dry out causing dry heaves and vomiting,
(x) he would develop hyperthermia (high body temperature),
(xi) his brain cells would begin drying out causing convulsions,
(xii) his respiratory tract would dry out, giving rise to very thick secretions, which could plug his lungs and cause death,
(xiii) eventually his major organs would fail, including his lungs, heart and brain." Court transcript *Brophy v New England Sinai Hospital Inc.*, N-4152 S.J.C (Massachusetts), at 4-5.

contrary to the codes of professional conduct of the Medical Council[709] and An Bord Altranais[710] as well as contrary to the ethics of the institution caring for the ward.[711] Remarkably, although the Chief Justice emphasised that the Court could not sanction steps to terminate life,[712] and that there was no right to terminate a life,[713] and although the decision of the House of Lords in the case of *Airedale N.H.S. Trust v Bland*[714] was considered by Lynch J in the High Court and by Hamilton CJ, Blaney and Denham JJ in the Supreme Court, the Supreme Court did not engage in any detailed analysis of the criminal law dimensions of the case.[715] Insofar as the intention in depriving the ward of medically administered nutrition was to bring about her death, *ie* to kill the ward, then whether that intention was carried out by means of a "positive action" or by means of omission does not make it any the less a

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[709] "It is the view of the Council that access to nutrition and hydration is one of the basic needs of human beings. This remains so even when, from time to time, this need can only be fulfilled by means of long established methods such as nasogastric and gastrostomy feeding." Statement of the Medical Council on the *Ward* case, reported in the *Medico-Legal Journal of Ireland*, 1 (1995), at 60.

[710] "In this specific case, a nurse may not participate in the withdrawal and termination of the means of nutrition and hydration by tube." Statement of An Bord Altranais on the *Ward* case, reported in the *Medico-Legal Journal of Ireland*, 1 (1995), at 60.
Tomkin and McAuley suggest that "a State facility be constituted where lawful withdrawal of treatment is professionally carried out in accordance with appropriate ethical standards." David Tomkin and Adam McAuley, "*Re A Ward of Court*: Legal Analysis" (1995) 1 *Medico-Legal Journal of Ireland* 45, at 50.

[711] "A reply to the points of claim was delivered on behalf of the institution which is caring for the ward...in which was joined on the points of claim and furthermore para. 18 pleaded as follows:- Whatever order or determination this Honourable Court may be disposed to make upon the application of the family, the institution ought not be required to do any act contrary to its philosophy and code of ethics and there is no legal basis for any such requirement." At the substantive hearing it was accepted by the family and by all the other parties that this plea of the institution was valid and that no order should be made by the Court against the institution, the obedience to which would contravene the philosophy and code of ethics of the institution." per Hamilton CJ, [1996] 2 IR 79 at p. 110.
While the court did not make an order against the institution, neither did it make the order requested by the institution in its reply to the points of claim.

[712] "It is important to emphasise that the Court can never sanction steps to terminate life." [1996] 2 IR 79, at 120.

[713] "No person has the right to have terminated his or her life, or to have accelerated his or her death." [1996] 2 IR 79, at 124.

[714] In *Airedale N.H.S. Trust v Bland* [1993] A.C. 789 the House of Lords considered the criminal law aspects of withdrawing medical treatment from a patient in a persistent vegetative state.

[715] Feenan, note 697, at 96.
In particular, there are no *dicta* clarifying the nature of intent in Irish criminal law or the application of section 4 of the Criminal Justice Act 1964.

homicidal intent. Whether that homicidal intention was carried out by the ward herself, were she mentally competent to do so, or by her Committee acting on her behalf with the consent of the Court, merely determines whether the resulting homicide can be categorised as being suicide or euthanasia.

Whereas s. 2(1) of the Criminal Law (Suicide) Act, 1993 merely decriminalised the act of suicide, *ie* removed the "negative" prohibition by means of penal sanction on suicide, the majority decision, in which the withdrawal of the artificial means of nutrition and hydration was construed as being in the ward's best interests and in pursuance of her constitutional rights to privacy, self-determination, bodily integrity and dignity, suggests that, in such circumstances, suicide is a rational act, and that the law "positively" protects the ward's right to perform suicide in such circumstances. Given this construction, there is a sense in which the withdrawal of the artificial means of nutrition and hydration by others, *ie* euthanasia, is not murder but a "particular way of committing suicide". In sum, there is a sense in which the majority's decision grounds the legitimacy of euthanasia on the legitimacy of a rational act of suicide.[716]

8.2.2 Mercy Killing

The distinguishing features of "mercy killing", *ie* euthanasia performed by a layperson rather than a doctor, include not just the suffering of the patient that the killing is meant to

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[716] In his study of the history of euthanasia in the United States, Lavi observed:
"The move to legalize euthanasia was tied up from its very inception with the legality of suicide...The right to commit suicide became dependent on the rationality of suicide. The prevailing view [in the 19th Century] was that not all suicides should be seen as illegitimate, only those that stemmed from irrational motivations. This new approach to the problem of suicide was, in an important way, diametrically opposed to the older legal tradition expressed by Blackstone...While for Boehm [author of an 1895 article entitled "The Right to Commit Suicide"] suicide was socially legitimate only if rational, for Blackstone, almost to the contrary, it is illegal and illegitimate only if it is rational...Under the old legal regime, suicide that was committed while the person was of sound mind was viewed as a threat so sovereignty both temporal and divine, since it was performed in defiance of the Crown. The suicide of the insane, on the other hand, could be treated with forgiveness. However, with the decline of sovereignty – not only as a political form but, more importantly, as a way of perceiving the legal order and threats to it, suicide posed a new challenge to the social order. But this time the challenge was not to sovereignty, but rather to the rational organization of society. It was therefore irrational suicide that now posed the greater threat." Lavi, note 615, at 261, 264.

relieve but also the relationship of care between the perpetrator and the patient. An examination of reported cases of mercy killings in the United States from the 1920s to the 1960s indicates that the perpetrator's commitment to care for the patient underlies the killings, that the most common relationship in such killings is that between parent and child and that the overwhelming majority of the killings occurred without the consent of the patient.[717] In the *Ward of Court Case*, the Court was alive to the High Court's duty of care of the ward arising from its *parens patriae* jurisdiction[718]: from its examination of the case law, it was established that the jurisdiction requires that the care of a ward take precedence over the management and protection of her estate.[719] In the High Court, Lynch J held that in exercising its *parens patriae* jurisdiction, "the Court should approach the matter from the

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[717] Lavi, note 66, at 144-155.

[718] While the Court's finding on the vesting of the jurisdiction is not considered in this chapter, it is noteworthy that Tomkin and McAuley have questioned whether the jurisdiction has actually vested in the Courts: "The question which, it is submitted, is not fully answered, in this decision, is by what mechanism the royal prerogative formerly delegated to the Lord Chancellor, and later to specific Supreme Court judges, has passed after independence, to newly constituted courts?...The position is therefore that at no stage was there a valid transfer of the Crown prerogative from the Crown to the courts established under the 1922 Constitution. If not so transferred to the 1922 courts, it could not have passed to the 1937 courts. For this to have been done, it would have been necessary to pass the *parens patriae* jurisdiction to the State, by Constitutional article or by specific legislative enactment, or both. This was never done, and in [*Byrne v Ireland* [1972] IR 241], the court expressly recognised that any prerogative which had not been transferred expressly would not vest in the State, but would lapse." Tomkin and McAuley, note 710, at 46.

[719] "As stated by Ashbourne L.C. in the passage [from *In re Godfrey* (1892) 29 L.R. Ir. 278] quoted above:-

> The single purpose of the Crown is to benefit this afflicted class [of idiots and lunatics] is to benefit this afflicted class by confiding them to the care of its highest Judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the Sovereign extends over all idiots and lunatics, whether so found by legal process of not. That high prerogative duty is delegated to the Lord Chancellor, and there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care directing such inquiries and examinations as justice to the idiots and lunatics may require. The Queen puts the care and commitment of the custody of idiots and lunatics before the care of their estates, thus showing with unmistakable clearness that the first and highest care of the Lord Chancellor should be given to the personal treatment of this afflicted class.

When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution: there is no statute which in the slightest degree lessens the court's duty or frees it from the responsibility of exercising parental care. That duty includes giving directions with regard to the care, maintenance and well-being of the ward. While a committee of the person of a ward is appointed by the court, such committee is subject to the directions of the court and all decisions with regard thereto are made by the court." per Hamilton CJ, [1996] 2 IR 79, at 106.

standpoint of a prudent, good and loving parent".[720] Indeed, it was asserted that the family of the ward was a loving and caring family whose *bona fides* in seeking orders permitting the withdrawal of the medically administered nutrition and hydration of the ward - which would lead to the ward's death - were not in question.[721] In sum, given that the ward's death was brought about by an "omission", namely, the deprivation of nourishment, rather than by the "commission" of an act by a medical professional, given the High Court's *parens patriae* jurisdiction founded upon its duty to care for the ward, and given the absence of the ward's consent to the killing,[722] the Court's "not allowing the ward to live" can be called a "mercy killing" since there is a sense in which it was "motivated" by the duty to care for the ward. However, insofar as mercy killing is at once a "performance" of a duty to care and the annihilation of that duty, it raises the question of the self-interest that may be implicit in relieving oneself of the burden of that care.[723] Thus, notwithstanding the Court's finding that the withdrawal of the medically administered nutrition and hydration was in pursuance of the

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[720] "The Court should approach the matter from the standpoint of a prudent, good and loving parent in deciding what course should be adopted." per Lynch J, in the High Court, [1996] 2 IR 79, at 99.

[721] "In fact no issue as to the *bona fides* of the family arises in this case for decision. It was accepted by all the other parties and I accept that all the members of the family are completely *bona fide* and wish that the course which they propose be followed only because they honestly and indeed fervently believe that that course is in the true best interests of the ward... The mother of the ward in this case is such a [prudent, good and loving] parent." per Lynch J, in the High Court, [1996] 2 IR 79, at 91, 99.

"The ward's family is a loving family." per Denham J, [1996] 2 IR 79, at 148.

[722] "The mother further stated that in over two decades of visiting, she had got no response whatever from the ward. She said that the ward just stares and that there is nothing in it unless it be "please let me go". In her view the ward is in a horrendous situation. One of the ward's sisters said that whenever she visits the ward, the latter cries and the sister interprets her reaction, if it is not merely reflex and if she has any emotion, as asking to be let go and the sister emphasised that the ward's wishes should be respected." per Lynch J, in the High Court, [1996] 2 IR 79, at 88.

[723] "A sincere commitment to care underlies most reported cases of mercy killing. But the desire to relieve the suffering of a close family member is not the only motivation underlying the practice....What makes it a complex phenomenon is precisely the way in which care for another is accompanied by care for oneself, and the altruism of the merciful deed is joined by the self-interest of relieving oneself from the burden of care. For a physician to ethically perform euthanasia, he must assure himself and others that the killing is purely for the sake of the suffering patient, and that the physician has nothing personally or institutionally to gain, otherwise his act will be morally tainted. With mercy killing, however, it is impossible to separate motives in this way. The special relationship of care is at once the source for both altruistic and egotistic motivations. Self-interest does not taint the moral character of the deed but, on the contrary, gives the act its unique moral aspect. Mercy killing is at once a performance of the duty to care and the annihilation of that duty." Lavi, note 66, at 152-157.

ward's rights to privacy, self-determination and bodily integrity, the granting of the orders sought also effectively relieved the High Court of its responsibility of caring for the ward.

8.3 Transformation of the Law

For centuries the criminal law made no distinction between the life of a dying patient, an incapacitated patient and any other human life: shortening life – one's own[724] or another's - by a few minutes or a few years was equally considered murder. From the perspective of the ancient criminal law, the distinctions drawn in the majority's judgments, *eg* between terminally illness and incurable illness,[725] and the various descriptions of the ward's life, *eg* "no life at all",[726] "not living a life in any meaningful sense",[727] "life without any acceptable meaning"[728] and "what technically is life, but life without purpose, meaning or dignity"[729] are all irrelevant.[730] Even if the motive for killing the ward was to end her suffering from

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[724] At common law suicide was as an act of *felo de se*, a felony against oneself and a species of murder: see section 7.2.1 above.

[725] "A distinction was drawn in the medical evidence between a patient who is terminally ill on the one hand and a patient who has an incurable disease on the other hand. A person is terminally ill who is suffering from a progressive disease which will result in his death within a matter of months and probably at the outside not more than six months...The ward is suffering from a terminal disease in the forgoing sense of a progressive condition..." per Lynch J in the High Court, [1996] 2 IR 79, at 95.

"An issue in this case was whether the ward was terminally ill or chronically ill. It is quite clear from the evidence that, without the benefit of the nourishment provided by the treatment being afforded to her she would die within a short period of time and in this regard, she must be regarded as 'terminally ill'." per Hamilton CJ, [1996] 2 IR 79, at 124-125.

[726] "The ward may be alive but she has no life at all." per O'Flaherty, [1996] 2 IR 79, at 130.

[727] "...the quality of life of ward's life was never in issue; she is not living a life in any meaningful sense." per O'Flaherty, [1996] 2 IR 79, at 131.

[728] "But now the advance of medical science may result in rendering the patient a prisoner in a ward from which there may be no release for many years without any enjoyment or quality of life: indeed without life in any acceptable meaning of that concept except in the sense that by means of various mechanisms life is kept in the body." per O'Flaherty J, [1996] 2 IR 79, at 131.

[729] "...I would regard the best interests of the ward to be that the choice that should be made is that nature should take its course in this case without artificial means of preserving what technically is life, but life without purpose, meaning or dignity." per O'Flaherty J, [1996] 2 IR 79, at 134.

[730] It is unfortunate that these descriptions of the ward are capable of suggesting meanings not dissimilar to such terms as "life devoid of value" (*wertloses Leben*) and "life unworthy of being lived" (*lebensunwertes Leben*) which came into usage in German jurisprudence and medicine in the 1920s and which were used in the

intolerable pain,[731] then under the common law, her killing would not be justified as motivation could only affect the severity of the punishment, not culpability itself.

It is argued here that the Supreme Court's judgment in the *Ward of Court Case* evidences a transformation of law from a traditional understanding - in which law directs acts to the common good, such that euthanasia and suicide (acts by which the ward is not "not allowed to live") are legally suppressed by penal sanction - to an understanding in which law is an instrument of order for the sake of order and in which the medical practice of suicide and euthanasia is regulated for the sake of regulation.[732] Notwithstanding the terminology of "withdrawal of invasive medical treatment" used in the High Court and Supreme Court judgments, it is argued here that the facts of the *Ward of Court Case* disclose little to do with medical, *ie* curative, treatment. Indeed, the fact that there was "no prospect whatsoever of any improvement in the condition of the ward"[733] suggests that there was no available medical treatment to cure the ward's near P.S.V. condition. However, notwithstanding the inadequacy of medical knowledge and technique to *cure* the ward, a peculiar feature of the decision in the *Ward of Court Case* is that the references to "withdrawal of invasive medical treatment" and to the "non-treatment of any infections or other pathological conditions of the ward save in a palliative way to avoid pain and suffering" suggest the deployment of medical knowledge and

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authorizations giving effect to Nazi Germany's Euthanasia Program for the Incurably Ill (*Euthanasie-Programm für unheilbaren Kranke*) in February 1940. No doubt such similarities were unintended. Agamben, note 219, at 136-159.

[731] "...I am satisfied that although the ward is not fully P.V.S. she is very nearly so and such cognitive capacity as she possesses is extremely minimal. A fully P.V.S. person cannot feel pain and has no capacity for pleasure or displeasure and even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse that if she were fully P.V.S." per Lynch J in the High Court, [1996] 2 IR 79, at 88.

[732] Lavi, note 66, at 262.

[733] per Hamilton CJ, [1996] 2 IR 79, at 108.

technique in *killing* the ward.[734] Lavi has argued that the application of technique with no hope of curing the patient aims to end the *helplessness* of the patient by hastening the patient's death and, as such, the application of technique merely satisfies the demand that "something be done".[735] It is argued here that the legal regulation of euthanasia or mercy killing evidences the application of law merely to satisfy the demand that "something be done". The Court's consideration of the ward's right to have invasive medical treatment withdrawn on the grounds of her right to privacy and bodily integrity evidences the increasing inscription of the death of the ward within specifically medical alternatives - alternatives which are legally "regulateable".[736] It is argued here that the understanding of technique

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[734] "Whereas in past centuries the medical doctor would commonly leave the bedside when it was clear that the patient was hopelessly ill...Only in the 19th century did the treatment of the dying, as such, become a medical concern, and thus medically governed. The new competence of the medical profession proceeded neither from new scientific knowledge nor from innovations in medical technique. On the contrary, the physician's role at the deathbed was secured long before he had any medical treatment to offer the dying patient. It is precisely this paradox that physicians did *not* have the means to cure dying patients, but nevertheless became the new governors of the process of dying, that characterizes the rise of dying as a medical problem. And it is precisely out of this paradox that the final shift in euthanasia takes place: from the benign duty of easing death to the troubling practice of hastening death. Despite the hopelessness and the inevitable decline associated with the dying condition, and perhaps, precisely because of it, the medical profession followed a deeper calling to attend the deathbed. The physician's new duty was to remain with the dying patient to attend to the very end, despite the fact that nothing of the *materia medica* in his possession was of any avail. What the physician had to offer the dying patient was a new kind of treatment in the face of immanent despair: hope....As opposed to otherworldly salvation or even to complete recovery in this world, both of which depend on external measures of success, "intelligent hope" offered a promise of self-referential medical treatment of the dying...Medical technique was summoned to save the patient from dying, not by curing him, but by hastening death [creating the] disposition of hope, i.e. the possibility of technique to become the modern art of dying." Lavi, note 615, at 256-258.

[735] "The hope was not for a cure, but for an end to helplessness. Even if medicine could not promise immortality, it insisted on its power to win small and reliable victories. It is always the desire of medicine to offer some hope to the dying patient, even when all seems to be doomed. Indeed, this defines the modern art of dying...In the age of medical therapeutics and technique, hope became a call for action. Awaiting death was no longer fitting for the modern science of dying, which demanded that something be done...So if medicine could not create hope, it should hasten death." Lavi, note 66, at 59-60.

[736] "Beyond the question of *who* will make the final decision [about the end of a patient's life] – which sets patient autonomy against medical authority – lies the more important question of *what* kind of decision will be made. This latter question draws on patient autonomy and medical authority. The answer to the question, even if given by the patient, is formed within the medical context. Thus the patient may choose to reject life-prolonging treatment or even palliative care, but the law will require him or her to form this decision in the light of alternatives. The mechanism by which the law guarantees the medical structuring of the patient's decision is known as "informed consent". Under this requirement, attending physicians must present the patients and discuss with them all existing alternative treatments. Informed consent should not be understood naively as offering all available information to patients, nor should it be understood as a subtle attempt to pressure patients to change their mind, although in many cases this may happen. Rather, informed consent is a means by which

implicit in the majority's judgment is not simply the rule of instrumental reason, but rather what Heidegger identifies as the will to order "for the sake of ordering". As Heidegger famously observed, the essence of technology is nothing technological.[737] *Technik* in the Heideggerian sense, which is translated as "technique", "technicity" and "technology", is not technology but an almost inescapable manner of thinking in which objects lose their character as objects which "stand against" us and become fungible, disposable, changeable energy "standing in reserve" (*Bestand*) for whatever human purposes.[738] Heidegger uses the term "enframing" (*Ge-stell*) to refer to this revealing of beings as reserve (*Bestand*).[739] He argues that insofar as things can only appear as standing reserve (*Bestand*), the forgetfulness of being hides itself in Enframing (*Ge-stell*) and that the rule of technique (*Technik*) "completes" itself

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the patient's autonomy is structured within the regulatory regime of modern medicine." *Ibid*, at 167-168 (emphasis in the original).

[737] "Technology is not equivalent to the essence of technology. When we are seeking the essence of "tree", we have to become aware that that which pervades every tree, as tree, is not itself a tree that can be encountered among all the other trees. Likewise, the essence of technology is by no means anything technological. Thus we shall never experience our relationship to the essence of technology so long as we merely conceive and push forward the technological, put up with it, or evade it. Everywhere we remain unfree and chained to technology, whether we passionately affirm or deny it. But we are delivered over to it in the worst possible way when we regard it as something neutral; for this conception of it, to which today we particularly like to do homage, makes us utterly blind to the essence of technology." Heidegger, "The Question concerning Technology" in Heidegger, note 397, at 17.
"Die Technik is nicht das gleiche wir das Wesen der Technik. Wenn wir das Wesen des Baumes suchen, müssen gewahr werden, daß jenes, was jeden Baum als Baum durchwaltet, nicht selber ein Baum ist, der zwischen den übrigen Bäumen antreffen läßt. So ist denn auch das Wesen der Technik ganz und gar nichts Technisches. Wir erfahren darum niemals unsere Beziehung zum Wesen der Technik, solange wir nur das Technische vorstellen und betrieben, uns damit abfinden oder ihm ausweichen. Überall bleiben wir unfrei an die Technik gekettet, ob wir sie leidenschaftlich bejahen oder verneinen. Am ärgsten sind wir jedoch der Technik ausgeliefert, wenn wir sie als etwas neutrales betrachten; denn diese Vorstellung, der man heute besonders gern huldigt, macht uns vollends blind gegen das Wesen der Technik." Heidegger, "Die Frage nach der Technik" in Heidegger, note 397, at 5.

[738] Heidegger, "The Question Concerning Technology" in Heidegger, note 397, at 17; Satkunanandan, note 382, at 129-145.
See sections 3.8, 5.5.2 and 7.4.2 above.

[739] "Enframing means the gathering together that belongs to that setting-upon which sets upon man, i.e. challenges him forth, to reveal the real, in the mode of ordering, as standing reserve. Enframing means that way of revealing which holds sway in the essence of modern technology and which is itself nothing technological." Heidegger, "The Question Concerning Technology" in Heidegger, note 397, at 27.
"Ge-stell heißt das Versammelende jenes Stellens, das den Menschen stellt, d.h. herausfordert, das Wirkliche in der Weise des Bestellens als Bestand zu entbergen. Ge-stell heißt die Weise des Entbergens, die im Wesen der modernen Technik waltet und selber nichts Technisches ist." Heidegger, 'Die Frage nach dem Technik' in Heidegger, note 397, at 20.

when its questionability is concealed under its character of self-evidence.[740] In the *Ward of Court Case*, even the ward's vitality and biological processes become part of the "human resources" or "standing reserve" to be medically regulated and legally ordered. The majority's decision to regulate euthanasia evidences the law's failure to develop a non-technical framework for judging euthanasia as well as the subordination of life and autonomy to the rule of technique (*Technik*).[741]

In contrast to the Thomistic understanding, in which law strives to regulate human conduct, but does so with the purpose of achieving a (common) good, the understanding of law in the *Ward of Court Case*, is that of legal regulation, not merely as a means, but rather as an end in itself. In the Thomistic understanding civil law directs human acts so that the peace and order of society can be attained while divine law directs acts so that salvation can be attained.[742] Similarly, the Code of Conduct of the Medical Council can be understood as regulating the practice of doctors so that the health of patients is attained.[743] In contrast, in the *Ward of Court Case*, the death of the ward is made amenable to regulation without regard to the attainment of either of the goods in the twofold constitutional order, *ie* the common

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[740] "But Enframing does not simply endanger man in his relationship to himself and to everything that is. As a destining, it banishes man into that kind of revealing which is an ordering. Where this order holds sway, it drives out every other possibility of revealing. Above all, Enframing conceals that revealing which, in the sense of *poiēsis*, lets what presences come forth into appearance. As compared with that other revealing, the setting-upon that challenges forth thrusts man into a relation to that which is, that is at once antithetical and rigorously ordered. When Enframing holds sway, regulating and securing of the standing-reserve mark all revealing. They no longer even let their own fundamental characteristic appear, namely, this revealing as such." *Ibid*, at 24.

"Allein, das Ge-stell gefährdet nicht nur den Menschen in seinem Verhältnis zu sich selbst und zu allem, was ist. Als Geschick verweist es in das Entbergen von der Art des Bestellens. Wo dieses herrscht, vertreibt es jede andere Möglichkeit der Entbergung. Vor allem verbirgt das Ge-stell jenes Entbergen, das im Sinne der ποίησις das Anwesende ins Erscheinen her-vor-kommen läßt. Im Vergleich hierzu drängt das herausfordernde Stellen in den entgegengesetztgerichteten Bezug zu dem, was ist. Wo das Ge-stell waltet, prägen Steuerung und Sicherung des Bestandes alles Entbergen. Sie lassen sogar ihren eigenen Grundzug, nämlich dieses Entbergen als ein solches nicht mehr zum Vorschein kommen." *Ibid*, at 20.

[741] Lavi, note 66, at 170-171.

[742] See section 1.2 above.

[743] "The Council wishes to draw attention to its publication *A Guide to Ethical Conduct and behaviour and to Fitness to Practice*; and emphasis the following paragraphs:- 13.01 Doctors must do their best to preserve life and promote health of the sick person..." Statement of the Medical Council on the *Ward* case, note 709, at 60.

good and God.[744] While death has traditionally been referred to in terms of man's (unregulatable) natural end and the (unregulatable) Will of God, in the *Ward of Court Case*, death is referred to in terms of ("regulateable") medical practice such that the determination of the time of death "shifts from the province of nature to the intercession of technique."[745] Given the ward's general good physical health and continuing vitality, the uncertainty as to the timing of the ward's death was removed by legally prescribing medical conditions under which the ward's physical health and continuing vitality could be destroyed by starvation. This *legal* prescription achieved the *legal* or regulatory end of regulating both the ward's death and the carer's caring for the ward. In order for this regulation to take place, the ward's death had to undergo a "legal transformation" in which its connection with those things which could not be regulated, such as its occurrence as the ward's natural end, were severed.

In sum, the Supreme Court's decision in the *Ward of Court Case* not only legalizes the practice of euthanasia or mercy killing but also regulates it by prescribing the conditions and procedures under which the killing may take place.[746] While the withdrawal of the medically administered nutrition and hydration is construed as being in pursuance to the ward's constitutional rights to privacy, self-determination, bodily integrity, the legal regulation of the ward's death evidences the increasing inscription of the individual within the legal order.[747]

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[744] See section 2.3.1 above.

[745] Lavi, note 615, at 256.
"The desire to master the hour of death gradually expanded: dying was medicalized, and the treatment of the dying patient became regulated by medical technique. Mastery over death, in other words, was not in consequence of the growing power of medicine but rather the reverse." *Ibid.*, at 270.

[746] "...patients' rights have come under the sway of technical mastery. This is true not because autonomy is denied the dying patient but rather because autonomy is incorporated into the regulatory regime. As autonomy becomes part of regulation, it acquires two distinct discernible characteristics: it becomes bounded and constructed." Lavi, note 66, at 166-167.

[747] Agamben, note 219, at 121.

8.4 Conclusion

It was argued in this chapter that while s. 2(1) of the Criminal Law (Suicide) Act, 1993 merely decriminalized suicide, the decision in the *Ward of Court* case affords positive legal protection to the right to commit suicide, construes euthanasia as a "particular way of committing suicide", and brings the practice of euthanasia or mercy killing under the domain of law by regulating its medical practice. This regulation of an individual's death evidences the transformation of law from that which regulates human behaviour for the sake of attaining a common good to that which regulates human behaviour for the sake of regulation and which drives towards the inscription of all aspects of the individual's life – including an individual's vital biological processes - within the legal order.

Given the ancient legal prohibitions of suicide and murder, given the impermissibility of withdrawing nourishment and hydration under the codes of ethics of the Medical Council, An Bord Altranais, the institution which was caring for the ward, and the moral teaching of the Church to which the ward belonged[748] - the Supreme Court's decision in the *Ward of Court Case* suggests that the law has become self-referential, in that the taking of undesired life by either euthanasia or suicide becomes justified merely because the law says so. Such saying of law (*iuris dictio*) is indeed a sentence of death.

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[748] "The ward of the family profess the Roman Catholic faith" per Lynch J in the High Court, [1996] 2 IR 79, at 90.
"The ward and her family profess the Roman Catholic faith" per Denham J, [1996] 2 IR 79, at 155.

The moral teaching of the Catholic Church is found in the *Catechism of the Catholic Church*:
"The fifth commandment forbids direct and intentional killing as gravely sinful." *Catechism of the Catholic Church* (Veritas, 1994), at 488, [2268].
Quintum praeceptum tamquam peccato graviter obnoxium proscribit homicidium directum et voluntarium. Catechismus Catholicae Ecclesiae [2268] http://www.vatican.ca/latin/latin_catechism.html (visited 11th May 2011).
Ibid, [2277], [2278], [2280], and [2281].

Chapter 9 Blasphemy

9.1 Introduction

It is argued in this chapter that the Supreme Court's decision in the *Corway Case* evidences the metaphysics of subjectivity and that the Defamation Act 2009 enacted in the wake of the *Corway Case* evidences the metaphysical essence of justice as rule or dominion.

9.2 The Corway Case

In the *Corway Case* the Court refused to allow the institution of a criminal prosecution for blasphemy upon petition of a man "professing and endeavouring to practice the Christian religion through membership of the Roman Catholic Church" who had "suffered offence and outrage by reason of the insult, ridicule and contempt shown to the sacrament of the Eucharist"[749] as a result of a Sunday newspaper's publication of a cartoon accompanying an article on the fifteenth amendment to the constitution which provided for the dissolution of marriage in certain circumstances. The cartoon, whose caption read 'Hello progress – bye, bye Father?' depicted a vested priest offering the Holy Eucharist to three prominent politicians who were turning away and waving goodbye.[750]

The Court held that, notwithstanding the Constitution's proscription of blasphemy,[751] the Court's certainty that the crime of blasphemy exists and its certainty that the Christian religion is one of the religions protected from insult,[752] the court could not authorise the

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[749] [1999] 4 IR 485, at 494.

[750] The caption itself was a play on a slogan of an anti-divorce campaign 'hello divorce – goodbye daddy'.

[751] "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law." *Bunreacht na hÉireann*, Article 40.6.1°.

[752] "There is no doubt that the crime of blasphemy exists as an offence in Irish Law because the Constitution says so. It says that the publication or utterance of blasphemous matter "*is an offence which shall be punishable in accordance with the law*"...From the wording of the Preamble to the Constitution it is clear that the Christian religion is one of the religions protected from insult by the constitutional crime of blasphemy..." per Barrington J, [1999] 4 IR 485, at 501.

institution of criminal prosecution for blasphemy against the Respondents on the grounds, *inter alia*, that the common law of blasphemy related to the established church and an established religion that pre-dated the enactment of the Constitution and could not have survived the enactment of the Constitution which guarantees equality before the law (Article 40.1) and freedom of conscience (Article 44.2.1°), that the court was not an arbiter of religious truth and the lack of legislative definition of blasphemy.[753] In giving the judgment of Court, Barrington J held:

> The Constitution also introduced (in Article 40.1) a specific guarantee of equality before the law to all citizens as human persons. The effect of these various guarantees is that the state acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But Article 44 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.[754]

Barrington J then asked "Would the constitutional guarantees of equality before the law and of the free practice of religion be respected if one citizen's religion enjoyed constitutional

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[753] "In [the current state of law], and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists...the Court could not see its way to authorising the institution of criminal prosecution for blasphemy against the Respondents." per Barrington J, [1999] 4 IR 485, at 501-501.

As Cox has observed, the absence of legislative definition in other areas of law has not prevented the Court from deciding weighty matters of life and death in cases involving innocent human beings, it is unclear why the absence of a legislative definition of blasphemy was particularly significant in this case:

> "It might be argued in defence of the Supreme Court that the basis for the decision [in the *Corway Case*] was a respect for the constitutionally required separation of the powers of government. After all, Article 40.6.1(i) refers to blasphemy being a crime punishable *by law* and under Article 15 of the constitution, the legislature is deemed to be the sole law making body in the state...such reluctance to judicial activism is entirely inconsistent with the traditional approach of the Supreme Court.
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> Article 40.3.3 of the Constitution, for example, protects the right to life of the unborn in terms vaguer than those used in the straightforward blasphemy clause. This clause refers to respect and vindication of this right being made by the state *through its laws*. Yet the Irish High and Supreme Courts have used this clause to resolve intricate problems in respect of abortion, covering issues of travel, information and the practice of abortion itself. Similarly, from a silent constitution the court has found a right to have a feeding tube removed from a patient in a near permanent vegetative state, thereby allowing her to die. Why, with such a history of activism behind it, the Supreme Court suddenly felt need to defer to the law making power of the legislature in respect of arguably one of the clearest phrases in the constitution is uncertain." Cox, note 46, at 58 (emphasis in the original).

[754] [1999] 4 IR 485, at 500-501.

protection from insult but others did not?" and proceeded to answer in the negative, albeit implicitly, by quoting approvingly from an earlier judgment of Walsh J (which was delivered before the passing of the Fifth Amendment to the Constitution,[755] but which Barrington J held applied, *mutatis mutandis*, with even greater force to the present text of Article 44):

> Our Constitution reflects a firm conviction that we are a religious people. The preamble to the Constitution acknowledges that we are a Christian people and Article 44, s. 1, sub-s. 1, acknowledges that the homage to public worship is due to Almighty God but does so in terms which do not confine the benefit of that acknowledgement to members of the Christian faith. In Article 44, s. 1, of the Constitution the State recognises the existence of the several denominations there named, including the Jewish Congregations, as well as all other unnamed ones existing at the date of the coming into operation of the Constitution. This declaration is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination, and it does not permit the State to do so.[756]

9.3 Equality and Freedom of Conscience

Although Barrington J's judgment does not consider the earlier judgment of Walsh J in the *McGee Case*,[757] Barrington J's judgment is consistent with that of Walsh J. Whereas Walsh J's judgement in the *McGee Case* affirms, on grounds of pluralism, that any interpretation of the nature and extent of constitutional natural rights derived from religious knowledge of the natural law, can not, by virtue of its derivation, be constitutionally acceptable, Barrington J's judgment in the *Corway Case* suggests that, on grounds of equality and freedom of conscience, any reliance upon religious knowledge in interpreting the nature

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[755] The Fifth Amendment to the Constitution deleted the entirety of Article 44.1.2° which read:

> "The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."

The Fifth Amendment to the Constitution also deleted the entirety of Article 44.1.3° which read:

> "The State also recognises the Church of Ireland, the Presbyterian Church, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and other religious denominations existing in Ireland at the date of the coming into operation of this Constitution."

[756] per Walsh J in *Quinn's Supermarket v The Attorney General* [1972] IR 1 at 23-24, quoted approvingly by Barrington J [1999] 4 IR 485, at 502.

[757] See section 6.5.2 above.

of the constitutional crime of blasphemy, can not, by virtue of its origin, be constitutionally acceptable. It is argued here that, just as Walsh J's principle of pluralism in the *McGee Case* presupposes a uniform, general, sense of the "one who has an experience" and imports a metaphysical understanding of man into law - a metaphysical understanding in which the being of being human no longer bears any reference to futurity but refers only to an "objective" notion of human being in consequence of the "mathematical" nature of subjectivity - Barrington J's construction of the Constitution's guarantees of equality and freedom of conscience in the *Corway Case* also presuppose a general, uniform sense of the "one who has experience" is given in every legal question and that it is this uniform, general 'one' which informs the elaboration of the principles of equality and freedom of conscience.[758] Just as Walsh J's principle of pluralism in the *McGee Case* can be considered

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[758] A comparable understanding of objectivity, truth, faith and reason is found in the judgment of Lord Laws in the Court of Appeal in dismissing an application for permission to appeal against a decision of the UK's Employment Appeal Tribunal brought by an employee of a relationships counselling service. The employee – a Christian who believed that homosexual activity is sinful - was dismissed after having failed to give a satisfactory undertaking to his employer to counsel same-sex couples on same-sex sexual issues in accordance with the employer's equal opportunities policy.

> "The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on footing that in reason it merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one is or can be so bound, unless by his own free choice he accepts its claim.
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> The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option of the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself. " per Laws LJ, *McFarlane v Relate Avon Limited* EWCA Civ B1 (29 April 2010), at [23], [24] (emphasis in the original).

as a "scientific restriction" on the class of constitutionally valid justifications, Barrington J's principles of equality and freedom of conscience in the *Corway Case* can also be considered as a "scientific restriction" on the class of constitutionally valid justifications in consequence of which Irish Constitutional law loses it traditional and natural connection to God, nature and justice and comes instead to be a mere technical means to bring about the grounds and reasons set for it. In other words, it evidences the metaphysics of subjectivity (with its Cartesian conception of truth and objectivity) and its scientific and technological mode of thought (*Technik*).

9.4 Defamation Act 2009

After the decision in the *Corway Case* the Oireachtas introduced a new criminal offence in which "blasphemous matter" is defined, not in terms of the derogation of the honour belonging to God, but in terms of causing outrage among those with religious sensibilities.[759] It is argued here that this legislative enactment evidences what Heidegger calls the "unfolding of the dictatorship of 'the They'" (*das Man entfaltet seine eigentliche Diktatur*).[760] It is argued here that not only did the Court fail to deliberate on the nature of blasphemy in the *Corway Case*,[761] but that given the judgment *Corway Case*, the manner in which the Oireachtas has given effect to the constitutional offence of blasphemy - by requiring that the offence be established by reference to prevailing religious sensibilities - has the effect of ensuring that no deliberation on the nature of blasphemy is required. Consequently, the legal treatment of blasphemy is arrogated to the things "one" says and "one" does as "prescribed"

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[759] s. 36(2), Defamation Act 2009:

> ...a person publishes or utters blasphemous matter if-
> (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and
> (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.

[760] See section 6.5.3 above.

[761] [1999] 4 IR 485, at 501: see n. 753 above.

by the "dictatorship of 'the They' (*das Man*)". Such a legal treatment presupposes an interpretation of the world and of being human which is prevalent in what Heidegger calls "idle talk" (*Gerede*). By failing to deliberate, both the Courts and the Oireachtas failed to articulate meanings which make possible a way of acting in the world and which aim towards achieving a participation with others in a common orientation to the world.

By defining the new offence in terms of causing outrage among those with religious sensibilities, there is a sense in which the Defamation Act 2009 also evidences the metaphysical essence of justice as rule or dominion. Insofar as religious outrage can be construed as a demand for justice, *ie* the levelling off of the stocks of power of the "blasphemer" by the "outraged" appeal to the enforcement character of the State, there is a sense in which the Act of 2009 can be construed as being nihilistic. Since the essence of political nihilism is social and is disclosed through the relations between subjects (such that the indeterminacy of the subjectivity of the subject is more powerfully secured through justified differentiation among subjects than through unjustified differentiation), then in the drive of the religious person (of *X* religion) to self-attainment through willed self-assertion, to say 'I self-identify as *X*' means '*in justice* you must accept me as that *X* that *I say* I am'.[762] In sum, given the Court's and the Oireachtas' failure to deliberate on the nature of blasphemy, the Act of 2009 facilitates the religious person's self-attainment through willed self-identification to manifest itself as an outraged claim to justice to which the blasphemer will, by force of law, be made to submit.

The metaphysical essence of justice as dominion is also suggested by the Courts' consideration of other recent legislation, *eg* the European Convention on Human Rights Act 2003.

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[762] See section 3.6.3 above.

9.5 European Convention on Human Rights Act, 2003

It is argued in this section that the metaphysical essence of justice as rule or dominion is also suggested by the *dicta* of McKechnie J in the case of *Foy v An t-Ard Cláraitheoir.*[763]

9.5.1 The Foy Case

The applicant in the *Foy Case* was born in 1947 and registered as being of the male sex with the Christian name of Donal Mark. He married in 1977 and is the father of two children. In 1992 he underwent irreversible gender reassignment surgery and subsequently lived as a female person. In 2002 the applicant sought an order correcting the original entry in the Register of Births to record under the heading "Sex" the letter "F" for female instead of "M" for male and under the heading "Name" "Lydia Annice" instead of "Donal Mark". McKechnie J, refusing the relief sought, found that, given the medical and scientific evidence, the Register General was correct in the entry in the register in respect of the applicant. He held that in the circumstances the Registrar had no power or authority to make any corrections and that the applicant's constitutional rights had not been violated. McKechnie J also held that by reason of the absence of any provision which would enable the acquired identity of the applicant to be legally recognised in the State, the Sate was in breach of its positive obligations under Article 8 of the European Convention on Human Rights. He also held that as various provisions of the Civil Registration Act 2004 prevented the Registrar from making the applicant's requested corrections in the Register of Births, those provisions constituted a bar to the effective recognition of the applicant's Article 8 rights in the State. McKechnie J granted a declaration of incompatibility pursuant to section 5 of the European Convention on Human Rights Act, 2003.[764] McKechnie J concluded his judgment:

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[763] *Foy v An t-Ard Cláraitheoir* [2007] IEHC 470. Hereafter referred to as the *Foy Case*.

[764] The effect of the declaration is that the Taoiseach is required to lay a copy of an order containing the declaration before each house of the Oireachtas. The applicant can apply to the Government through the

> ...Those who suffer from [the condition of gender dysphoria or gender identity disorder] have an incurable and irresistible conviction of belonging to the other sex...
>
> For those persons affected with this condition, and in particular those who have undergone gender reassignment surgery, there seems to be a burning desire to have their new sexual identity recognised, not only socially but also legally. This urge to have that identity fully and all respects accepted by the law is at the core of the transsexuals plight. This explains why so many, often after painful surgical procedures, are still driven to publicly embark on a fight for legal identity which frequently is humiliating and unsuccessful. Those at the forefront of such a quest many years ago, faced a public and a legal system which was much less sympathetic and much less understanding than hopefully what it is today. Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life. All persons by virtue of their being are so entitled.[765]

McKechnie J's references to those suffering from gender dysphoria or gender identity disorder being "driven by this need", having an "irresistible conviction" and a "burning desire to have their new sexual identity recognised, not only socially but also legally" suggests the drive of the subject to distinguish himself in his very self precisely with respect to, and over against, what the common lot seek after is experienced, not as the assertion of a present state, but as a lack, something missing in the subject which is to be attained and, as willed to be made appear, thereby *will* be made to appear.[766] Given the findings of the Court with regard to the medical and scientific evidence and the Court's determination that the applicant's constitutional rights had not been violated, there is a sense that the Court's finding that Irish law does not effectively recognise a transsexual person's rights under Article 8 of the Convention is consistent with the understanding of justice as rule or dominion. The drive of the person suffering from gender identity disorder manifests itself as the desire and demand

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Attorney General for an *ex gratia* payment under ss 4 of s. 5 of the Act of 2003 and the granting of the declaration may also have implications for the court's discretion with regard to costs.
[2007] IEHC 470, at [106], [110].

[765] [2007] IEHC 470, at [116], [118].

[766] Hemming, note 65, at 244-245.
See section 3.6.3 above.

for justice as rule or dominion in which the willed self-identification of the transsexual person means that *in justice* others must accept that transsexual person as being of the gender that that the *transsexual person says* they are. In finding that Irish law does not effectively recognise a transsexual person's Article 8 rights (and in making the declaration of incompatibility pursuant to section 5 of the Act of 2003), the applicant has progressed in the attaining to her new value. In this sense, the decision in the *Foy Case* evidences the emerging triumph and willed assertion of the subject in which the claim to justice conceals the social nature of nihilism and its metaphysics of valuation.

9.6 Conclusion

Like the elaboration of the principle of pluralism in the *McGee Case*, the Supreme Court's elaboration of principles of equality and freedom of conscience in the decision in the *Corway Case* presupposes an objective conception of being human given in every legal question and evidences the metaphysics of subjectivity. It was also argued that there is a sense in which the Defamation Act 2009 and the European Convention on Human Rights Act 2003 evidences the metaphysical essence of justice as rule or dominion, *ie* justice as a relation of rulership, power and command.

Conclusion

The Natural Law and the Irish Constitution

While the text of the Constitution expressly recognises God and affirms the existence of rights antecedent and superior to all positive law, contemporary judicial and scholarly interpretation of the Constitution treat God and the natural law as "things" whose meaning is no longer manifest for the understanding of Irish law. Like Stonehenge – a thing which still exists but whose meaning and purpose has been lost to modern man – it would seem that God and the natural law in contemporary Irish law have fallen into oblivion.[767] Heidegger observes that when things in the present have fallen into oblivion, it is the world of the thing which is no longer.[768] He argues that it is metaphysics that grounds an age or an epoch through a particular interpretation of beings and through a particular comprehension of

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[767] Hemming, note 115, at 390; Tadashi Otsuru, *Gerechtigkeit und ΔIKH. Der Denkweg als Selbstkritik in Heideggers Nietzsche-Auslegung* (Verlag Königshausen und Neumann, 1992), at 129-134.

[768] "The antiquities preserved in museums (household implements, for example) belong to a 'time which is past' yet they are still present-at-hand in the 'Present'...The implements have become fragile or worm-eaten 'in the course of time'. But that specific character of the past which makes them something historical, does not lie in this transience, which continues even during the Being-present-at-hand of the equipment in the museum. What, then, is past in this equipment?...Nothing else than the *world*...The *world* is no longer. But what was formerly *within-the-world* with respect to that world is still present-at-hand", Heidegger, note 455, at 431-432.

"Im Museum aufbewahrte »Altertümer«, Hausgerät zum Beispiel, gehören einer »vergangenen Zeit« an und sind gleichwohl noch in der »Gegenwart« vorhanden. Inwiefern ist dieses Zeug geschichtlich, wo es doch *noch nicht* vergangen ist? Etwa nur deshalb, weil es *Gegenstand* historischen Intresses, der Altertumspflege und Landeskunde wurde? Ein *historischer Gegenstand* aber kann dergleichen Zeug doch nur sein, weil es an ihm selbst irgendwie *geschichtlich ist.* Die Frage wiederholt sich: mit welchem recht nennen wir dieses Seinde geschichtlich, wo es doch nicht vergangen ist? Oder haben diese »Dinge«, obzwar sie heute noch vorhanden sind, doch »etwas Vergangenes« »an sich«? *Sind* sie, die vorhandenen, denn noch, was sie waren? Offenbar haben sich die »Dinge« verändert. Das Gerät ist »im Lauf der Zeit« brüchig und wurmstichig geworden. Aber in dieser Vergänglichkeit, die auch während des Vorhandenseins im Museum fortgeht, liegt doch nicht *der* spezifische Vergangenheitscharakter, der es zu etwas Geschichtlichen macht. Was ist aber dann an dem Zeug vergangen? Was *waren* die »Dinge«, das sie heute nicht mehr sind? Sie sind doch bestimmte Gebrauchszeug – aber außer Gebrauch. Allein gesetz, sie stünden, wie viele Erbstücke im Hausrat, noch heute im Gebrauch, wären sie dann geschichtlich? Ob im Gebrauch oder außer Gebrauch, sind sie gleichwohl nicht mehr, was sie waren. Was ist »vergangen«? Nicht anderes als die *Welt*, innerhalb deren sie, zu einem Zeugszusammenhang gehörig, als Zuhandenes begegneten und von einem besorgenden, in-der-Welt-seienden Dasein gebraucht wurden. Die *Welt* ist nich mehr. Das vormals *Innerweltliche* jener Welt aber ist noch vorhanden." Heidegger, note 455, at 380 (emphasis in the original).

truth.[769] Following Heidegger, it was argued in this dissertation that the falling into oblivion of both God and the natural law in contemporary judicial and scholarly interpretation of the Irish Constitution can be understood in consequence of the metaphysics which grounds the current age.

With regard to the first "fact" upon which the arguments in this dissertation are based, namely the transformation in the "legal status" of God and the natural law in the jurisprudence of the Supreme Court during the period 1973-1999 – a transformation which might be called a "falling into oblivion" of God and the natural law – it was argued that the 'God' which is "entangled" in the natural law theories underlying the *dicta* of Walsh J in the *McGee Case* and the extra curial writings of Costello J is produced in consequence of what Heidegger calls the forgottenness of being (*Seinsvergessenheit*). The forgottenness of being is the concealment of self-presence of the self and the 'God' it produces is the form of the figure the concealed self assumes in order to manifest itself. In the natural law theories of Walsh J and Costello J the 'God' who grounds the natural law and the constitutionally protected rights is the form the subjectivity of the self-asserting subject assumes in order to manifest itself in law.[770] In this metaphysics of subjectivity, beings are interpreted as objects and truth is conceived as being represented (*Vorgestelltheit*).[771]

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[769] "In metaphysics, reflection of the essence of beings and a decision concerning the essence of truth is accomplished. Metaphysics grounds an age in that, through a particular interpretation of beings and through a particular comprehension of truth, it provides the age with the ground and essential shape. This ground comprehensively governs all decisions distinctive of the age. Conversely, in order for there to be adequate reflection on these phenomena, their metaphysical ground must allow itself to be recognised in them." Heidegger, "The Age of the World Picture" in Heidegger, note 308, at 57.

"In der Metaphysik vollzieht sich die Besinnung auf das Wesen des Seienden und eine Entscheidung über das Wesen der Wahrheit. Die Metaphysik begründet ein Zeitalter, indem sie ihm durch eine bestimmte Auslegung des Seienden und durch eine bestimmte Auffassung der Wahrheit den Grund seiner Wesensgestalt gibt. Dieser Grund durchherrscht alle Entscheidungen, die das Zeitalter auszeichnen. Umgekehrt muß sich in diesen Erscheinungen für eine zureichende Besinnung auf sie der metaphysische Grund erkennen lassen." Heidegger, "Die Zeit des Weltbildes" in Heidegger, note 308, at 69.

[770] See sections 4.3.5 and 6.5.1 above.

[771] See sections 3.5.1 and 4.3.3 above.

The Somersault in Irish Law

Writing in 1930 on the forces at play in the period immediately before the triumph of Nazism, Jünger observed:

> Patriotism comes to be overtaken by a nationalism shot through with new, powerful elements of consciousness. In Fascism, in Bolshevism, in Americanism, in Zionism, in the movements of coloured peoples, advance is made into progress that would have been formerly unthinkable; in effect it performs a somersault, in order to continue its movement on a very simple level after a circle or circular movement of artificial dialectic.[772]

Heidegger understands all these political movements - Fascism, Marxism, world democracy (which we might now translate as globalization) - as arising on the same metaphysical basis. He argues that despite its fragmentation into multiple political forms, it is a single movement of nihilism (*Bewegung des Nihilismus*)[773] that is involved.[774] Indeed, Heidegger understands nihilism as the prevailing condition of the end of modernity and understands metaphysics in the sense of "the fundamental structure of beings in their entirety" to be the "realm for the essence and event of nihilism".[775] Insofar as metaphysics conceives God as a ground of beings, then nihilism is also the event of the "death of God" where the "death of God" is:

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[772] "Der Patriotismus wird durch einen modernen, stark mit Bewußtseinselementen durchsetzen Nationalismus abgelöst. Im Faschismus, im Bolschewismus, im Amerikanismus, im Zionismus, in den Bewegungen der farbigen Völker setzt der Fortschritt zu Vorstößen an, die man bisher für undenkbar gehalten hätte; er überschlägt sich gleichsam, um nach einem Zirkel der künstlichen Dialektik seine Bewegung auf einer sehr einfachen Ebene fortzusetzen", Ernst Jünger, "Die totale Mobilmachung" in Jünger ed, *Krieg und Krieger* (Junker & Dünnhaupt, 1930) at 27, translated in Hemming, note 65, at 232.

[773] Heidegger, "On the Question of Being", note 322, at 292.

[774] "...the universal rule of the will to power within planetary history. Today everything is part of that reality, whether it is called communism, of fascism, or world democracy."
"...die universale Herrschaft des Willens zur Macht innerhalb der planetarisch gesehenen Geschichte. In dieser Wirklichkeit steht heute Alles, mag es Kommunismus heissen oder Faschismus oder Weltdemokratie." Heidegger, note 360, at 375.

"To all movement of nihilism belongs an essential hiding and covering up, precisely *in* the manner in which it eventuates what it effects. And here we should remind ourselves of the fourth and fifth of Jünger's list of political forms: Zionism and the movements of coloured peoples. These are names that, once unsurprising, *now* have the power to embarrass us, and as embarrassments, precisely illustrate the capacity and force of the movement of nihilism to render certain kinds of political phenomena only through silence." Hemming, note 65, at 237 (emphasis in the original).

[775] "The realm for the essence and event of nihilism is metaphysics itself, always assuming that by "metaphysics" we are not thinking of a doctrine or only of a specialized discipline of philosophy but of the

> not an atheistic doctrinal principle, but the formula for the basic experience of an event in western history.[776]

He argues that this basic experience, which comes about as an event in history, is an experience of a need or necessity of revaluation which Nietzsche calls "Nihilism".[777] Heidegger does not understand the essence of nihilism as the collapse of all to nothing, but as a need to revaluate (in consequence of the godlessness arising from the death of the metaphysical God) which manifests itself as the will to power.[778]

Following Heidegger, the falling into oblivion of God and the natural law in the constitutional jurisprudence of the Irish Supreme Court can be viewed, not as an atheistic doctrinal principle, but as an expression of the basic *experience* of nihilism. The assertion of

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fundamental structure of beings in their entirety, so far as this entirety is differentiated into a sensory and supersensory world, the former of which is supported and determined by the latter. Metaphysics is the space of history in which it becomes the destiny of the supersensory world, ideas, God, moral law, the authority of reason, progress, the happiness of the greatest number, culture and civilization to forfeit their constitutive power and to become void. We are calling this essential ruin of supersensory its putrefaction. Unbelief in the sense of apostasy from the Christian doctrine of faith is therefore never the essence or the ground of nihilism; rather it is always only a consequence of nihilism; for it could be the Christianity itself represents a consequence and a form of nihilism." Heidegger, "The Word of Nietzsche: "God is Dead"", note 308, at 165.

"Der Bereich für das Wesen und das Ereignis des Nihilismus ist die Metaphysik selbst, immer gesetzt, daß wir bei diesem Namen nicht eine Lehre oder gar nur eine Sonderdisziplin der Philosophie meinen, sondern an das Grundgefüge des Seienden im Ganzen denken, sofern dieses in eine sinnliche und übersinnliche Welt unterschieden und jene von dieser getragen und bestimmt wird. Die Metaphysik ist der Geschichtsraum, worin zum Geschick wird, daß die übersinnliche Welt, die Ideen, Gott, das Sittengesetz, die Vernuftauthorität, der Fortschritt, das Glück der Meisten, die Kultur, die Zivilisation ihre bauende Kraft einbüßen und nichtig werden. Wir nennen diesen Wesenszerfall des Übersinnlichen seine Verwesung. Der Unglaube im Sinne des Abfalls von der christlichen Glaubenslehre ist daher niemals das Wesen und der Grund, sondern stets nur eine Folge des Nihilismus; denn es könnte sein, daß das Christentum selbst eine Folge und Ausformung des Nihilismus darstellt." Heidegger, "Nietzsches Wort »*Gott ist tot*«", note 308, at 221.

[776] Heidegger, "The Will to Power as Art", note 305, at 156.
"Das Wort »Gott ist tot« ist kein aetheistischer Lehrsatz, sondern die Formel für die Grunderfahrung eines Erignisses der abendländischen Geschichte,", Heidegger, "Der Wille zur Macht als Kunst", note 305, at 158. Hemming, note 399, at 98.

[777] "What is this experience? What kind of need is experienced in it, as a need that makes a wending of the way necessary, a needful wending that calls for revaluation and thereby a new valuation? It is that propriative event in the history of Western man which Nietzsche designates by the name *nihilism*." Heidegger, "The Eternal Recurrence of the Same", note 305, II, at 173.
"Welches ist diese Erfahrung? Welche Not wird in ihr erfahren als das jenige, was eine Wende und damit die Notwendigkeit einer Umwertung und damit eine neue Wertsetzung ernötigt? Es ist jenes Ereignis in der Geschichte des abendländischen Menschen, das Nietzsche mit dem Namen »Nihilismus« bezeichnet." Heidegger, "Die ewige Wiederkehr des Gleichen", note 305, I, at 389.

[778] Laurence Paul Hemming, "Who is Heidegger's Zarathustra?" (1998) 12 *Literature and Theology* 268, at 282-283; note 65, at 245.

popular sovereignty as the highest constitutional value can then be understood as an expression of the will to power consequent upon the need or necessity of revaluation, itself in consequence of the death of God. In particular, insofar as nihilism is a basic experience and the prevailing condition of the end of modernity, it follows that the understanding of Irish judges (and scholarly commentators on the Irish Constitution) at the end of modernity arise from out of this basic experience and prevailing condition. Consequently, it need not be assumed that the judges (or litigants before the Irish courts or scholarly commentators) consciously intend to effect a revaluation of the legal order or would ever articulate their intention or the consequences of their decisions in such terms, rather, in manifesting the will to power, the constitutional interpretation of Irish judges (and scholars) can be understood as arising from that which Heidegger spoke of. In sum, it is argued in this dissertation that the jurisprudence of the Irish Supreme Court during the period from 1973 to 1999 also arises on the same metaphysical basis as Fascism and Communism: it is but a particular form of the single movement of nihilism. From this perspective, the somersaulting changes in Irish law can be understood as revaluations evidencing the self-securing of the subjectivity of the subject – revaluations which are not generalised revolution, but the continued, justified, and legitimated assertions of the subject in its claims to be secured through an overcoming inherent in all social relations.

Commenting on the celebrated quotation from Marx's *Theses on Feuerbach* "Philosophers have only *interpreted* the world differently; what matters is to *change* it", Heidegger observed:

> When this statement is cited and when it is followed, it is overlooked that changing the world presupposes a change in the representation of the world. A representation of the world can only be won by adequately interpreting the world.[779]

[779] "We must first ask: 'What is Society?' and have to consider that today's society is only the absolutising of modern subjectivity. "Philosophers have only *interpreted* the world differently; what matters is to *change* it." When this statement is cited and when it is followed, it is overlooked that changing the world presupposes a change in the representation of the world. A representation of the world can only be won by adequately interpreting the world."

As Hemming explains, "the anticipated revolution has already occurred as a representational thought for those committed to revolution".[780] The somersaulting movements in Irish law, which can be understood in terms of the subject's self-securing through an overcoming inherent in all social relations, can be understood in consequence of the representational thought which defines the metaphysics of subjectivity.

An Alternative

Given the movement of nihilism it might seems that there is no possibility of "bringing the thought of justice into an articulated connection with the essence of truth".[781] How might an articulation of the thought of justice escape the objective and calculative thought which arises from the metaphysics of subjectivity? Would not such an articulation be "incomprehensible", "poetical" or "mystical" in the most pejorative senses of those words? Given the difficulties inherent in such an articulation, only the briefest outline can be indicated here.

Heidegger identifies the forgottenness of being (*Seinsvergessenheit*) as lying at the heart of modernity's nihilism – a forgottenness which is accomplished in the metaphysical priority of the subject which effects a disjunction of being and being human. This disjunction lies at the heart of metaphysical understanding of justice as dominion and law as regulation. Departing from the objective norms and objective truth of the metaphysics of subjectivity and

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" [..man muß] zuerst fragen: „Was ist Gesellschaft?" und muß darüber nachdenken, daß die heutige Gesellschaft nur die Verabsolutierung der modernen Subjektivität ist. „Die Philosophen haben die Welt nur verschieden *interpretiert*; es kömmt darauf an, sie zu *verändern*." Bei der Zitation dieses Satzes *und* bei der Befolgung dieses Satzes übersieht man, daß eine Weltveränderung eine Änderung der Weltvorstellung voraussetzt und daß eine Weltvorstellung nur dadurch zu gewinnen ist, daß man die Welt zureichend interpretiert." Martin Heidegger, "Martin Heidegger im Gespräch (17. September 1969)" in Heidegger, note 360, at 703 (emphasis in the original).

[780] Hemming, note 65, at 236.

[781] "Nowhere is the slightest attempt to be found [in Nietzsche] to bring the thought of justice into an articulated connection with the essence of truth." Heidegger, note 305, III, at 137.
"Vor allem findet sich nirgends der geringste Versuch, den gedanken der Gerechtigkeit ausdrücklich aus den ersten Gründen seines Denkens mit den Eröterungen über das Wesen der Wahrheit in einen gestaltetrn Zusammenhang zu bringen." Heidegger, note 305, I, at 570.

returning to the pre-Socratic sources – Heraclitus,[782] Anaximander[783] and Parmenides[784] - Heidegger proposes a translation of *δικε* (*dikē*) not as *Gerechtigkeit* ("justice") but as *Fug* ("fugal jointure") in the sense a joining-enjoining order (*fugend-fugende Fug*) that brings all beings together contrapuntally within the fugal structure of being.[785] This suggests a non-juridical understanding of justice as adjustment to the jointure of being. Such adjustment might arise from the freedom of letting the real *be* rather than requirement that the real *be represented.*

While the norms of adjustment within the fugal order of being are non-objective, a non-objective or indeterminate norm is not equivalent to no norm at all, *eg* the claims of technical rationality and calculative thinking find no place within the adjustments required by the "laws of friendship" which Aristotle understood to be the very basis of society.[786] Similarly, the boundary along which the sea meets the sand on the seashore may be ever-changing and indeterminate but can still be transgressed. In seeking to adjust within the fugal jointure of being, in each case, in each decision, deliberation rather than ground is what is required. The

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[782] Martin Heidegger, *Seminare* (Klostermann, 1986).

[783] Martin Heidegger, "Anaximander's Saying" in Heidegger, note 308, at 242;
"Der Spruch der Anaximander" in Heidegger, note 308, at 321.

[784] Martin Heidegger, *Parmenides* (Klostermann, 1982).

[785] Charles Bambach, "Translating "Justice": Heraclitus between Heidegger and Nietzsche" (2006) 50 *Philosophy Today*, 143; Oren Ben-Dor, *Thinking about Law in Silence With Heidegger* (Hart, 2007), Robert Bernasconi, "Justice and the Twilight Zone of Morality" in John Sallis ed, *Reading Heidegger: Commemorations* (Indiana University Press, 1993); Fred Dallmayr, "Heidegger on Ethics and Justice" in Arleen B. Dallery and Stephen H. Watson eds, *Transitions in Continental Philosophy* (SUNY Press, 1994); Françoise Dastur, "Heidegger on Anaximander. Being and Justice" in Charles E. Scott and John Sallis eds, *Interrogating the Tradition* (SUNY Press, 2000); Karin De Boer, "Giving Due: Heidegger's Interpretation of the Anaximander Fragment" (1997) 27 *Research in Phenomenology* 150; Jacques de Ville, "Rethinking the Notion of a 'Higher Law': Heidegger and Derrida on the Anaximander Fragment" (2009) 20 *Law and Critique* 59; Ulrich Haase, "Δίκη and IUSTITIA, Or: Between Heidegger and Nietzsche" (2007) 38 *Journal of the British Society for Phenomenology* 18; David Michael Kleinberg-Levin, "The Court of Justice: Heidegger's Reflections on Anaximander" (2007) 37 *Research in Phenomenology* 385; Philippe Nonet, "Antigone's Law" (2006) 2 *Law, Culture and the Humanities* 314; Philippe Nonet "Judgment" (1995) 48 *Vanderbilt Law Review* 987; Jan Patrick Oppermann, "Anaximander's Rhythm and the Question of Justice" (2003) 14 *Law and Critique* 45; William V. Spanos, "Heidegger's Parmenides: Greek Modernity and the Classical Legacy" (2001) 19 *Journal of Modern Greek Studies* 89.

[786] Nonet, note 398, at 59-66.

judicial deliberation by which the adjustment within the order of being required in a particular case is discerned - a deliberation in which the judge himself may be put into question - might well be called the discernment of the "natural law". Such deliberation might be required in each case so that "justice shall be administered in the courts established by law by the judges appointed in the manner provided by the Constitution".[787]

[787] *Bunreacht na hÉireann*, Article 34.1.

Appendix

The dissertation contains several technical terms drawn from the works of Aquinas and Heidegger. Given that these technical terms are drawn from elaborate philosophical works treating of different topics by prolific authors from different historical periods, it is difficult to give short, unambiguous explanations of these terms. The short explanations of the terms given below are not to be taken as comprehensive definitions of the terms, rather they indicate the general sense of the terms as used within this dissertation. The pages of the dissertation in which these terms are considered are also indicated.

Act of belief (*credere*)
In Aquinas's theory of cognition, understanding does not arise through the knower's thinking about thinking but rather through the knower's manner of being present to beings other than itself. Aquinas articulates one manner of being present in terms of acts of belief (*credere*). For example, a student must, by acts of belief (*credere*), believe his teacher who already enjoys the possession of the principles towards which the pupil is gradually progressing, in order to learn and understand the subject he is studying. Similarly, in Aquinas's theory of cognition, the human knower sees or understands in the manner in which he has been prepared to see by his habituation in the subject to be understood. With regard to the cognition of the natural law, the human knower must, by acts of belief (*credere*), believe in God to come to know God as the promulgator of the natural law..... 68-72, 96, 182-183

cogito
See *Subjectivity*
See *Mathematical Nature of the Subject*

Death of God (*Gott ist tot*)
Heidegger uses Nietzsche's term "the death of God" and the "Event of Nihilism" to refer to different aspects of the same phenomena:

(i) The transformation of the relation between truth and certainty from that found in the medieval philosophy to that found in the Cartesian philosophy;
(ii) the self-assertion of the subject as the ground of truth and certainty;
(iii) the dissolution of the metaphysical conception of God as the ground of being and truth within Western

thought;
(iv) the historical emergence of the (evaluating) subject who continuously and wilfully ascribes values manifest in the political, social and legal forms of the modern age..... 121-130, 138-150, 304-307

Faith (*fides*) — Aquinas holds that God is knowable only insofar as He reveals Himself and that He cannot be encountered in advance of any encounter He initiates. Aquinas understands faith (*fides*) to be the character of God's self-disclosure (as distinct from the contemporary sense of faith as the intention of the believer). With regard to the cognition of the natural law, it is by virtue of God's self-disclosure (*fides*) that the human knower can come to knowledge of God and to recognise Him as the promulgator of the natural law..... 68-72, 95-98, 180-183

Fidelity (*fides*) — Aquinas also uses the word *fides* for marital fidelity or marital intimacy..... 215-216

Forgettonness of being (*Seins-vergessnheit*) — Heidegger holds that "to grasp the understanding of being" means "to understand that being to whose being-constituted the understanding of being belongs", *ie* to grasp the understanding of being means to understand what Heidegger calls *Dasein* (which might be translated as the "being of being human"). Heidegger uses the term "the forgottenness of being" to refer to the attempt to displace the ground of the being of being human from the very self that I am, whose being I can enquire into, onto a being whose being is not transparently interrogable for me, *eg* God[788]..... 175-176, 238-239

God (in Aquinas) — Aquinas holds that God is transparent only to God and that He is known by the created human intellect only in so far as God discloses Himself to the human intellect, *ie* by faith (*fides*). Although God is "defined" in Aquinas's philosophical theology as "something that is existing above all things, which is the principle of all things and is removed from all things" and although his philosophical theology articulates understandings of God in terms of causality (in which God is understood as the prior cause of all things) and participation (in which God is understood as source of the perfections in things), Aquinas's philosophical theology presupposes a

[788] Hemming, note 125, at 69, 88

theory of truth, analogy and demonstration such that his philosophical theology discloses nothing of the being of God. Rather Aquinas's philosophical theology and his theories of truth and analogy can be understood as the working out of knowledge of God given in faith (*fides*) and so can be properly described as theological.

In particular, since Aquinas identifies Eternal Law, which is identical with God Himself, as the ground of the natural law, it follows that the ground of the natural law is transparent only to God and is known by man, not by means of his philosophical analysis, but only in so far as God discloses Himself to man in faith (*fides*), *ie* knowledge of the natural law is properly theological..... 52-58, 66-73

God (in Heidegger)

Heidegger is not concerned with the knowledge of God known in the light of God's self-disclosure (*fides*) in history, but with the metaphysical conception of God known by a rational deduction in the Cartesian and post-Cartesian philosophies. The metaphysical God, who is known as the cause of the subject by an act of reason, is grounded by the subject through reason. The metaphysical God is disclosed within the confines of the self-asserting subject and is independent of any experience that might be had of the world.

The application of, or "invocation" of, such divine names as 'Creator' and 'source of law' to this metaphysical God is a concealment of power (*Macht*) in that it conceals the established and indubitable subject who is the ground of the invoked God.

The event of the "death of God" is the dissolution of the metaphysical conception of God as the ground of being and truth within Western thought..... 159-161, 169-172

Mathematical Nature of the Subject

In the Heideggerian sense "mathematical" means not "dealing with numbers" but rather "what is already known in advance" or what is known "in general" and what makes knowledge of particular things possible. In the Cartesian philosophy, the ineradicably self-evident being of the Cartesian subject (*cogito ergo sum*) represents itself to itself as the one thing of which it can be indubitably certain so that everything it knows, it knows on the basis of itself as already certainly known. In this sense Heidegger argues that the Cartesian subject's knowledge is reduced to the mathematical as the "mathematical" being of the Cartesian subject is posited alongside every thought and is that by which each thought is certainly known or secured..... 117-120, 205-210

Metaphysical essence of justice as 'rule' or 'dominion' (*Herrschaft als das metaphysische Wesen der Gerechtigkeit*)
Heidegger understands the subject's (nihilistic) ascription of values for the purposes of securing its certainty and ordering of the world as being manifest as a claim to justice. The subject's valuations are in and of themselves relations - relations of rulership, power, and command - even as they mask themselves as claims to the ascription of freedom and to justice. The subject's valuations evidence the essence of nihilism as being social, *ie* it is disclosed through the relations of power and command between subjects..... 140-149, 235-237, 297-301

Metaphysics of Subjectivity (*Metaphysik der Subjektivität*)
See *Subjectivity*
Heidegger understands subjectivity to be that stance toward being where the human being comports itself as 'subject' who determines all beings in their 'objectivity'. This stance towards being transforms the nature of truth from that found in the medieval philosophy to that found in the Cartesian philosophy. Heidegger calls the Cartesian and post-Cartesian philosophies with their transformed relation between truth and certainty the "Metaphysics of Subjectivity"..... 121-130

Metaphysics of Valuation
See *Metaphysical essence of justice*

Movement of Nihilism (*Bewegung des Nihilismus*)
See *Nihilism*
Heidegger understands nihilism not to be simply one historical movement among others, but the fundamental movement (*Grundbewegung*) of history. The movement of nihilism describes all the major ideologies of the twentieth century: Fascism, National Socialism, Socialism, Communism, Liberalism and what Heidegger called American and World Democracy (and what we might call globalisation)..... 304-307

Nihilism (*Nihilismus*)
Nihilism in the Heideggerian sense is not the collapse all to nothing but the self-grounding subject's assumption that every thing's essential value can in no way be justified, legitimated or grounded independently of the subject and such that every thing has to be continuously assigned a value by the subject. Heidegger describes nihilism as the subject's need or "necessity of devaluation for the sake of revaluation". Heidegger elaborates the historical emergence of nihilism, *ie* the historical and social manifestation of the continuous wilful ascription of value to things, *eg* in the movements of twentieth century politics, in terms of the emergence of the subject which is presupposed in the metaphysics of subjectivity (with

its Cartesian transformation of the relation between truth and certainty, its calculating, scientific and technological mode of thought and its continuous drive for certainty)..... 140-149

Technology (*Technik*) — *Technik* (also translated as technique) in the Heideggerian sense refers to an almost inescapable manner of calculative *thinking* which strives for certainty and seeks to impose order for the sake of order. Heidegger understands *Technik* as an aspect of the working out in history of the consequences of the emergency of subjectivity (with its Cartesian transformation of truth and certainty)..... 156-157, 205-211, 239-241, 286-291

Subjectivity — Heidegger understands subjectivity (*Subjektität*, also translated as "subject-icity" and "subject-ity") to be that stance toward being where the human being comports itself as 'subject' who determines all beings in their 'objectivity'. In this sense, the subjectivity of the subject is the site where the presence of things can only appear as re-presentation (by the subject / to the subject) and such that objectiveness of the world becomes constant in representational production (by the subject). The subject, the representing "I", is essentially and necessarily co-represented in every representation. Man as subject is that being upon which every being, in its way of being and truth, is founded, *ie* man becomes the referential centre of being as such..... 121-130

Truth — While in both the medieval and Cartesian philosophies the truth of a thing is understood as a conformity or adequation between the 'thing' and the (intellectual representation of the thing in the) intellect, both the nature of 'thing' and 'intellect' are thought differently in the two philosophies. In the medieval philosophy the primary sense of truth is the adequation of the created thing to the pre-conceived idea in the Mind of God. In the Cartesian philosophy truth is primarily the adequation of the human intellect to the thing as represented..... 121-130

Truth as "being represented" (*Vorgestelltheit*) — See also *Subjectivity*
Heidegger identifies the Cartesian configuration of truth as *Vorgestelltheit* (which is also variously translated as "being represented", "representedness", "representationality" and "representation") in which truth is primarily the agreement of knowledge with beings as represented (by the subject who is the being upon which every being, in its way of being and truth, is founded)..... 121-130

Will to Power (*Wille zur Macht*)

In Heidegger's usage, power (*Macht*) designates a phenomenon that it not so much political, as it is metaphysical or ontohistorical. Power (*Macht*) is anonymous, all-encompasing, impersonal, pre-individual and constitutive of social structures. It is not the power or force (*Gewalt*) which is in the hands of the politically powerful, but rather that which distributes and organizes relations between subjects, who become the subjects they are through these relations. In this sense power (*Macht*) is a principle of action that forces men and women to act in a certain way.

As de Beistegui explains "Power is the power to disclose beings in their effectiveness and efficiency, their producibility, productivity and reproducibility, in short, their 'machinability'. As such, it is accompanied by a series of process of 'rationalization': of labour, of economic productivity, of social practices and political discourses, of scientific research, etc. It is nature itself that is envisaged as effectiveness, efficiency, reserve and power. And it can be only to the extent that beings as a whole are held and represented as what can be calculated in advance and predicted, and so subjected to planning, control and domination. Power is revealed not in military displays and power relations, in institutions and work relations alone; it is also revealed in the will-to-plan-and-control that has permeated all sectors of life, from the sciences to the economy, from the factory to the home."[789]

Heidegger understands power (*Macht*) to be intrinsically willful: it is self-moving and constantly aiming to surpass and enhance itself, to increase its power, to move towards hyperpower. He calls this drive towards self-enhancement and self-empowering the "will to power" (*Wille-zur-Macht*). Heidegger understands the evaluating power of the subject, metaphysics itself and its notion of truth as "being represented" (*Vorgestelltheit*) all to be manifestations of the will to power..... 140-149, 169-170, 259-262, 304-307

[789] Miguel de Beistegui, "Questining Politics, or Beyond Power" (2007) 6 *European Jornal of Political Theory* 87, at 93.

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