

## FREEDOM AND EQUALITY IN MARKET EXCHANGE: SOME NATURAL LAW REFLECTIONS

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Sound economic policy, morally upright economic judgment and action, and a stable web of economic institutions and agents are all essential for human well-being. The absence of any of these things creates crucial obstacles to the flourishing of persons, both individually and socially. A natural law theory is, in essence, a critical and reflective account of the constitutive aspects of the well-being and fulfillment of human persons and their communities, and of the requirements that human well-being place on human actions. So the project of bringing natural law theory to bear on questions of economics is entirely to the good. The natural law tradition, manifested in thinkers such as Plato, Aristotle, and St. Thomas Aquinas and his successors, has typically attended to some of the crucial concerns at the intersection of economic activity and human well-being. Natural law thinkers have addressed the nature of property and of charitable obligations, the role of money and money lending, and the context of moral principles governing relations between states in ways that continue to influence the West's common thinking. Yet insights of the natural law tradition on such matters have also become occluded as new theories, new situations, and new technologies have shaped the context in which economic choice and action take place.

The purpose of this Essay is to identify both the natural law justification for a free market—hence the Essay's concern for *freedom*—and the broad natural law understanding of the primary moral norm governing that market—hence the Essay's concern for *equality*. Both freedom and equality, properly understood, are essential to the natural law account of the market as presented by its greatest proponent, St. Thomas Aquinas.<sup>1</sup>

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1. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 127 n.V.1 (1980).

Separate either from the other and the account will cease to be recognizable as genuinely belonging to the natural law tradition.

Aquinas famously provided a rather pessimistic account of the justification for private property. The goods of the earth are in one sense to be held in common: They exist for the benefit of all persons and have no particular person's name attached to them by nature.<sup>2</sup> Yet, if men hold and dispose of property in common, various problems will arise. Aquinas noted in particular that people will care less adequately for what they do not think of as their own.<sup>3</sup> Communal ownership can also lead to confusion over what should be done with the property. This uncertainty can lead to quarrels. Private property is thus justified for the purpose of procuring and dispensing of goods, but property is still common in regards to the use to which it is put.<sup>4</sup>

John Finnis has offered an important addendum to this pessimistic justification. Private property contributes to the freedom and autonomy of individuals, which benefits them in the task of becoming self-constituting, flourishing human beings.<sup>5</sup> In the natural law tradition, freedom is not treated as good in itself; it becomes good, however, because it allows human beings to participate actively in shaping their own lives.<sup>6</sup> As Aquinas wrote, practical reason is our very participation in the eternal law: God chooses to guide us towards our perfection not by instilling in us principles of direction that determine our actions, but by allowing us, through our own knowledge of those principles, to direct ourselves towards our fulfillment and to decide for ourselves whether or not to act.<sup>7</sup> In this "participated theonomy," we are active cooperators with God in shaping our lives in accordance with His plan.<sup>8</sup> We can thus identify God's call to each individual to share in that self-shaping project as that person's "vocation."<sup>9</sup>

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2. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, Q. 66, art. 2.

3. *Id.*

4. *Id.*

5. FINNIS, *supra* note 1, at 169.

6. *See id.* at 90.

7. *See* AQUINAS, *supra* note 2, at I-II, Q. 91, arts. 2-3.

8. *See* Pope John Paul II, Encyclical Letter, *Veritatis Splendor* ¶ 41 (Aug. 6, 1993), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html).

9. *See* Germain Grisez, *Natural Law, God, Religion, and Human Fulfilment*, 46 AM. J. JURIS. 3, 22 (2001).

Such self-shaping is greatly enhanced by the institution of private property. Private ownership allows agents to decide how they will procure and dispose of property in accordance with, and in service of, their vocation in a way that would not otherwise be possible. So, to Aquinas's reasons for private ownership we can add another perhaps more fundamental one: private property is instrumentally necessary for our active self-constitution because it enables certain crucial forms of vocation-enabling freedom.

By its very nature, property ownership creates the potential to engage in commercial activity. With private property comes authority to procure and dispose of it. In any realistic appraisal of the world, it will be clear that it is simply impossible for most, perhaps all, persons to appropriate for themselves all and only those goods they need to meet basic needs and the needs of their vocation. Exchange of goods—mutuality of procurement and disposal—is a social inevitability if persons are to flourish, a necessity giving rise to the custom of promissory, and eventually contractual, obligation and a common currency.

These customs are a necessary prerequisite to a formal marketplace, for a social practice must exist before its conventions may be formalized by legal rules. Nonetheless, these social practices are responsive to human needs and are already shaped by normative considerations, especially fairness. It is only fair that, having been done a good by another by obtaining a good or service, I should reciprocate and provide the other with the good I have agreed to provide. Moreover, such mutual provisions should accord with some reasonably commensurating framework of value, such that what I receive is roughly equal to what I have given.

These principles can serve as the basis for an account of "the market" and its moral justifications. The market essentially consists of a practice of exchange, the creation of capital, and the existence of credit. The most fundamental justification of the market is fairness. Fairness justifies a moderately free market, but it also justifies—morally, socially, and, again, legally—the regulation of that freedom. The structure of the natural law approach here mirrors that of the approach to private property: There is no unregulated freedom, no freedom for its own sake *anywhere* in a natural law account of *anything*. Freedom should exist only in service of genuine human goods. Freedom is instrumentally good not simply, and not even primarily, because it enables a group of people to pursue the good more efficiently than they could as individuals. The efficiency of a free market is important, and invisible

hand mechanisms are likewise necessary for an accurate assessment of a reasonable allocation of goods. But freedoms, including market freedoms, are essential primarily because they enable the fulfillment of obligations and the self-constituting activity of reasonable agents.<sup>10</sup> In short, market freedom is an instrument that enables the pursuit of one's personal vocation. It is this vocational obligation, rather than freedom, that should ultimately be protected by, or in spite of, a free market.

Assuming that agents are not self-sufficient, an exchange of goods and labor is a rational necessity.<sup>11</sup> What principle should govern such exchange so that the exchange may be said to be just? What motives should, normatively, be operative for agents engaged in such exchange? The principle is fairness, and the motive is need. Each consideration looks to the other in a way that justifies reliance on market mechanisms, as the following argument makes clear. An exchange is fair when it leaves neither the buyer nor the seller worse off than before. The exchange must therefore be one in which each agent parts with something of value equal to what the other agent receives. Equal value, however, is determined by need. The buyer has need for some good or service and the seller has need for money relative to what he has to offer. The needs of the seller for money include compensation for time, expense, skill, and labor expended on what is sold. Thus, need is not an entirely simple and univocal notion. Instead, it requires further interpretation before it will assist us in determining whether an exchange is fair. Finnis notes:

The normal manifestation of need {indigentia} is preference {praeeligere}: so 'need' amounts in these contexts to 'demand'. The conventional institution of money {numisma} enables us to measure demand, i.e. the demand of the buyer who has money and of the seller who needs {indiget} money and has what meets the buyer's demand {indigentia}. The normal measure of something's value, therefore, will be the price it would currently fetch 'in the market {secundum communem forum}', i.e. in deals between any willing sellers and buyers in the same locality and time-frame, each party being aware of the thing's merits and defects.<sup>12</sup>

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10. See FINNIS, *supra* note 1, at 81–90.

11. The exchange of money will be addressed subsequently.

12. JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 201–02 (1998) (citations omitted).

Suppose, however, that Smith possesses such urgent private need of some good or service from Jones that he would willingly pay more than the market price for it. Such a need, Aquinas holds, cannot change the just price, even though Smith will, in a sense, gain more than Jones gets, because the difference in the exchange—the surplus value received by Smith—derives not from anything about Jones the seller—the labor he has put into it, the price he can get in the free market, or his other needs or losses—but from a condition of Smith himself. For Jones to sell at more than market price is therefore for him to sell what is not his; it is for him to receive something for nothing.<sup>13</sup>

Wariness of receiving something for nothing drives Aquinas's market ethic. Receiving something for nothing clearly violates the idea of equality in exchange and is thus unfair. The same principle of equality in exchange also militates against an untrammelled desire for profit. Again, it is worth noting that even if a market driven only by "base" desires were to work to the advantage of everyone, this market would not be just for the natural law lawyer; the just market is structured from the outset by general justice, a virtuous orientation towards a common good that includes fair treatment of all by all within its scope.<sup>14</sup>

Three realities together form the essential stratum of exchange: goods, labor, and money. A common structure of argument justifies a free market across each of these strata. The natural law account adds limits to this freedom. It creates obligations to dispose of *superflua* (wealth in excess of that necessary to pursue one's vocation), to provide aid to those in desperate need, and to provide for a governmental role in case voluntary giving ever runs out, removing to that extent the provision of some goods and services from the market. At the end of this Essay, I will suggest some further limiting considerations. For now, it is sufficient to provide the justificatory structure for a natural law account of reasonable reliance on the market.

Before addressing briefly the question of the regulation of markets, I turn first to the third of the realities that may be exchanged: money. The natural law tradition is well known for its suspicion of usury.<sup>15</sup> Many understand usury as loaning money at interest.

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13. See AQUINAS, *supra* note 2, at II-II, Q. 77, art. 1.

14. See *id.*

15. See Brian M. McCall, *Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice*, 60 S.C. L. REV. 707, 711–12 (2009).

This characterization, however, reflects a simplistic understanding of what precisely Aquinas was objecting to, and it does an injustice to his thought. Aquinas distinguishes between a thing and its use.<sup>16</sup> In many cases, the use of a thing can be exchanged—bought and sold—without the thing itself being bought and sold. In such cases, the owner of the thing can ask both for the thing to be returned and for a price for its use. In other cases, however, the existence of a thing and its use cannot be separated. For example, one cannot usually rent bread: its use involves its consumption. In these cases, a price can be put on the thing, but one cannot both ask for the thing back and charge for its use. In selling its use, one sells the thing and vice versa. The use belongs entirely to the one who has obtained the loan unless, for example, the creditor enters into a cooperative for-profit arrangement, sharing risks as well as possible rewards with the debtor.

One must, therefore, charge what the money is worth in “loaning” it to another. Because money is worth what it is worth, it seems that Aquinas’s account would preclude any charging of interest. But it does not. One may charge for what has been lost in giving over the money—the opportunity, for example, to invest the money for gain.<sup>17</sup> One may also charge a fee for failure to repay the debt on time. To charge interest beyond the possible investment income, plus a possible fee for failure to repay, however, is to charge for what is no longer within the creditor’s rights: the use of the money itself. It is this further charge to which Aquinas objects.

How, then, can one determine what constitutes a reasonable interest rate? If such interest, apart from late fees, is intended to compensate for loss—what could have been gained had the money remained in the owner’s possession—and if one keeps in mind that such a loss is in a sense speculative, then one charges reasonably “if one takes as the measure of loss of profit . . . the general or average return on morally acceptable investments in a genuine capital market available to the lender.”<sup>18</sup> Moreover, these morally acceptable investments include, in a way that the contem-

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16. See AQUINAS, *supra* note 2, at II-II, Q. 78, art. 1.

17. Note that not all investments are “loans” to someone else. If I buy stock in a company, the dividends they pay me are not “interest” but are nonetheless a return on my investment.

18. FINNIS, *supra* note 12, at 209.

porary market economy makes more fully available than in Aquinas's day, "shares in commercial and productive associations."<sup>19</sup>

It is surely possible to see how such principles can be violated, however, in an unrestricted market. The needs of some for money, for example, can be exploited through interest rates far in excess of the "general or average" rate of market return. Or consider the following two-fold misadventure in money described recently by Amartya Sen:

The moral and legal obligations and responsibilities associated with transactions have in recent years become much harder to trace, thanks to the rapid development of secondary markets involving derivatives and other financial instruments. A subprime lender who misleads a borrower into taking unwise risks can now pass off the financial assets to third parties—who are remote from the original transaction.<sup>20</sup>

It seems highly implausible that this secondary market in derivatives is always problematic. Yet it seems clear that the system that gave rise to the problems Professor Sen referenced went afoul of a Thomistic understanding of the market in at least two ways.

The first was the moral failing of investors actively seeking something for nothing. When the practical impossibility of this scheme made itself clear, the scheme collapsed under its own weight. One of the widely noted and significant moral defects of the institutional structures surrounding the economic crisis of 2008 relates to employment practices. If any of the chief executives of the various Wall Street financial firms had *refused* to pursue profit from the credit bubble, they would almost certainly have been fired. In addition to its susceptibility to criticism from the standpoint of long-term prudence, this imposed behavior violated the Thomistic standpoint's emphasis on equality in exchange.

Professor Sen also focused on a separate consideration equally essential to the Thomistic account. In his brief discussion of the regulation of buying and selling by the law, Aquinas notes that human law is unable to prohibit everything that is contrary to virtue.<sup>21</sup> He implies, however, that the law should be concerned in the market context with deceit.<sup>22</sup> This emphasis is sound; it is clear that

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19. *Id.* at 210.

20. Amartya Sen, *Capitalism Beyond the Crisis*, N.Y. REV. BOOKS, Mar. 26, 2009, at 27, 28.

21. AQUINAS, *supra* note 2, at II-II, Q. 77, art. 1.

22. *See id.*

deceit constitutes the largest barrier to both freedom and equality in exchange because both values are encouraged by a mutual understanding of the *worth* of what is being traded. But again, structural features leading up to the economic crisis militated against the transparency for which Aquinas called. These features included the complexity and modularity of the transactions, the collusion of ratings agencies with financial firms, and the ability of agents across the board to carry out transactions while casting a blind eye to the economic health of their transaction partners.

Such failures, and others within the free market, suggest the need for *both* moral underpinnings *and* transparency. The moral underpinnings include the virtue of general justice, a general willingness to play fair, to forego the pursuit of profit for its own sake, to accept the principle of equality of exchange, and to see the market as an institution within which all can benefit. Transparency and openness in the market require appropriate levels of state regulation, adequately protected from insider interests and charged with the protection of fairness amongst participants.

In a natural law account, private property, the market, and the state itself ultimately exist for the sake of individuals and families. *They*, rather than money, must be the life of the market. Thus, in the domain that was central to the developing economic crisis beginning in 2007, no scheme of regulation or its absence can be adequate that does not recognize *both* of the following desiderata: first, that individuals and families should be benefited by schemes for the provision of credit that make possible ownership of property highly conducive to prosperous family life, such as a house, *and* second, that such schemes must not encourage irresponsible borrowing. At a more basic level, no doubt, families must return to an understanding of moral formation in which virtues such as thrift and hard work are encouraged and children are taught the importance of being trustworthy. As we have seen, the erosion of these values has been devastating for society's financial institutions. Just as large-scale economic institutions and practices must look to families and individuals as ultimate beneficiaries, so too must those families and individuals remain the moral bedrock for cultivation of the virtues necessary for a fair and free market.