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THE NATURAL LAW THEORY OF ST. THOMAS AQUINAS*

Susan Dimock

Introduction

In this essay I present the core of St. Thomas Aquinas's theory of law. The aim is to introduce students both to the details of Aquinas's particular theory of law, as well as to the features of his view that define what has come to be known as "the natural law" conception of law more generally. Though the essay is for the most part exegetical, some of the more important implications of the natural law position are raised for further thought and to pave the way for the study of alternative views that have been developed in the subsequent history of the philosophy of law.

One brief note about the structure of the essay will complete my introductory remarks: The essay tries as far as possible to present Aquinas's theory in his own words. Material taken directly from Aquinas appears in italic type throughout, with the origin of the quotation given in parentheses following the text. All of the material is taken from Aquinas's *Summa Theologica*; the translation from Latin is that of the Fathers of the English Dominican Province.[1]

I. Of the Essence of Law

Aquinas begins his discussion of law with a consideration of the nature or essence of law in general. In this way he sets the tone and task of future jurisprudence or philosophy of law. What makes a particular rule or directive a law? What is it that all laws have in common and which gives them the force of law? This is the search for the nature of law as law. In the course of his discussion of this matter Aquinas offers the following "definition of law": law is *nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated* (Question *90:* Of the Essence of Law, Article *4* "Whether Promulgation is Essential to a Law?"). We shall do well to begin our discussion of Aquinas's philosophy of law with an explication of each of the four component parts of this definition.

1.1 Law Is an Ordinance of *Reason,*

> *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 *the reason, which* is *the first principle of human acts . . . since it belongs to the reason to direct to the end, which* is *the first principle in all matters of action, according to the Philosopher [Aristotle]. . . . Consequently it follows that the law* is *something pertaining to reason (Q.90, Article 1 "Whether Law Is Something Pertaining to Reason?"?.*

In arguing that law is an ordinance of reason, Aquinas is appealing to "practical reason", which provides practical directions concerning how one ought to act, rather than to "speculative reason", which provides us with propositional knowledge of the way things are. Since law aims to direct actions, and practical reason governs how we ought to act, law falls within the scope of reason.

To understand how practical reason directs us to action, however, we must be able to specify an "end" at which our action aims (a goal or objective

that we hope to achieve). Reason then directs us to take those steps that are necessary to the achievement of our end. Thus, to say that law is an ordinance of practical reason is to say that there must be some end at which is it is directed. Aquinas identifies that end as "the common good".

1.2 *Law Has As Its End the Common Good:*

> *[T]he 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 needs 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. . . Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as perfect to imperfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness. Wherefore the Philosopher. . . says that we call those legal matters just, "which are adapted to produce and preserve happiness and its parts for the body politic," since the state is a perfect community, as he says in* Politics *i, I.*[2]
>
> *. . . 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 in so far as it regards the common good. Therefore every law is ordained to the common good (Q.90, Article 2 "Whether Law Is Always Directed to the Common Good?"?.*

In this article Aquinas makes clear his belief that happiness is the final end of human action and the first principle of practical reason. In other words, the end of all we do, when we act in accordance with reason, is happiness. In so far as law is an ordinance of reason, it too must aim at happiness. But the happiness at which the law must be directed is not the happiness of any particular individual or privileged group (such as the rulers), but the happiness of the whole as the perfect community.

The insistence that law must be aimed at the common good serves a number of purposes in Aquinas's theory of law. Together with the insistence that law is an ordinance of reason, the requirement that law serve the common good denies the truth of a widely held maxim which had been adopted from the Roman jurists: "Whatever pleases the sovereign, has the force of law" [Ulpian, *Digest* i, ff.]. This maxim had not only been accepted by subsequent philosophers, but by the Christian church as well. Yet it seems to imply that the will of the sovereign, however arbitrary, is sufficient to make law. Thus, the aim of law might simply be the sovereign's personal good. This Aquinas denies. He argues that in making law the sovereign (of whom we will say more shortly) must aim not merely at his own good, but at the good of all.

The good of all, however, should not be understood to mean the individual good of those subject to the law aggregated in some way. It is not just any individual interests that the sovereign may seek to serve in making law, even if those interests are shared by the majority or even all of the subjects. Rather, to say that the law must serve the common good is to say that it must serve the interests that all have *as members of* the perfect community or body politic. To understand which interests these are, some brief comment on what Aquinas means by the perfect community is needed.

Drawing both on Aristotelian philosophy and Christian theology, Aquinas holds that only within political society can human beings achieve the happiness that is appropriate to them. This is so for a number of reasons. First, human beings are born without the natural advantages that brute animals have with respect to satisfying their physical needs. In order to live, a multitude of individuals is needed, each performing different tasks according to a division of labour and in keeping with their varying skills and talents. This diversity must be brought into unity or order through law, which governs economic activity within society. Moreover, human beings require political society not only to meet their biological needs, but also to satisfy their uniquely human intellectual and spiritual needs. For Aquinas believes that, just as we seek our own biological preservation and the success of our offspring, so too do we seek knowledge, culture and religious enlightenment. These goods are attainable only through the order that political society makes possible. The conditions of an orderly society, in *so* far as they make possible the fulfillment of our needs and the highest hap-

piness we can achieve on earth, are thus goods that are truly common to all members of the community. It is the aim of law to secure these goods.

1.3 Law Is Made by Him Who Has the Care of the Community:

> *A law, properly speaking, regards first and foremost the order of the common good. Now to order anything to the common good belongs either to the wholepeople or to someone who is the viceregent of the wholepeople. And therefore the making of a law belongs either to the wholepeople or to a public personage who has the care of the wholepeople, since in all other matters the directing of anything to the end concerns him to whom the end belongs (Q.90, Article 3 "whether the Reason of Any Man Is Competent to Make Laws?'?.*

There are a number of issues raised in this article, which concerns who is authorized to make laws. The obvious answer from the text quoted is that, because the laws are to govern the whole people, they must be made by the whole people or by their representatives. Thus it may seem that Aquinas is committed either to democratic or representative government. This conclusion would be premature, however.

Rather, following both Aristotle and St. Augustine, Aquinas believes that the relationship of political authority, between the ruler and the ruled, is natural. There are some who are naturally fit to rule, and others who are naturally fit to follow the ruler's commands, Those who are most fit to rule are those in whom virtue is most perfect They are to rule with the goal of providing the unity and order necessary for those ruled to achieve material, intellectual and moral/spiritual well-being.

Moreover, Aquinas believes that these natural political relations must contain a coercive component. Before the Fall, when all desired what was truly good, the ruler had only to lead by example and instruction; after the Fall, however, men could no longer be trusted to seek the true good or to pursue that good voluntarily. Thus, there came to be added to the ruler's authority the coercive power of making laws and compelling obedience through the threat of penalties for those who transgress the law. The power to punish—to deprive others of their life, liberty or property—was thus annexed to political rulers, and it was so, on Aquinas's view, by divine authorization. Indeed, within canon law it was held that "All power comes from God" (St. Paul's Epistle to the Romans).

That Aquinas is not an advocate of democratic governance may also be seen in his political writings[3], where he makes it clear that the form of legitimate government may be monarchical (rule by one), aristocratic or oligarchic (rule by a few), or timocratic or democratic (rule by the many or all). The modern notion that all legitimate government derives in some way from the will or consent of the governed is foreign to him. Indeed, for the most part Aquinas favours monarchy—though he recognizes that what form of government is best for a given political community depends upon the material circumstances and cultural/moral development of the community in question.

1.4 Law Must Be Promulgated:

> *[A] law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Whereforepromulgation is necessary for the law to obtain its force (Q.90, Article 4 "Whether Promulgation Is Essential to a Law?'?.*

In this article Aquinas is making the seemingly common-sense observation that laws must be made public. According to this requirement, a secret law, or a law willed only in the heart of the ruler, would fail to be law. And one reason for this requirement is quite simple: People can use the law as a rule and measure for their conduct only if they know what the law enjoins or forbids them to do.

There is another reason to insist upon promulgation, however, which is normative rather than pragmatic. Aquinas believes (as we shall see) that there is a general obligation to obey just laws and that individuals may be punished for disobedience. This is the normative sense of "the binding force which is proper to a law". But both the obligation to obey the law and the permissibility of punishing those who violate it presuppose that the laws which people have an obligation to conform to can be known by them. It would surely be morally wrong

to hold people responsible and punishable for violating laws they could not be aware of.

1.5 The Validity Conditions for Law:

Question 90, which we have been considering, lays out Aquinas's answer to the question: what is the essence of law? What must be true of any rule or directive if it is to be law? One way of thinking about this is to say that Aquinas has provided *validity conditions* for law. In order to be valid law, a practical directive must be an ordinance of reason; it must be issued by the person or group who holds law-making authority within the community; it must be directed toward the common good; and it must be promulgated. Any directive which fails to meet one or more of these conditions thereby fails to be valid law. . . .

11. Of The Various Kinds of Law

In Question 91 Aquinas identifies four kinds of laws that are of interest to us. To fully understand Aquinas's theory of law, it is necessary to understand not only the essence of each kind of law here identified, but also the relations between them. One way of working through this somewhat difficult discussion of the various kinds of law is to ask the following five questions of each kind: (1) by whom is it made? (2) to whom is it directed, or whom does it bind? (3) to what end is it directed? *(4)* how is it promulgated? (5) is it a dictate of reason? In this way we can apply the conditions for valid law which Aquinas laid out in the previous question to better understand why the various kinds of law here discussed are, in fact, laws.

II.1 Eternal Law:

> *[A] law is nothing else but a dictate of practical reason emanating from the ruler who governs the perfect community. Now it is evident, granted that the world is ruled by divine providence . . . 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 Proverbs viii. 23, therefore it is that this kind of law must be called eternal (Question 91: Of the Various Kinds of Law, Article 1 "Whether There Is an Eternal Law?"?. . . .*

It is sufficient, for those who do not accept the theological underpinnings of Aquinas's view, to think of eternal law as comprising all those scientific (physical, chemical, biological, psychological, etc.) "laws" by which the universe is ordered. It must be kept in mind by those who wish to take this route, however, that what we call scientific laws could not properly be considered laws by Aquinas were they not also expressions of the divine will. This is because for Aquinas a law must necessarily have a law-maker.

II.2 Natural Law:

> *[L]aw, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, since a thing is ruled and measured in so far as it partakes of the rule or measure. Wherefore, since all things subject to divine providence are ruled and measured by the eternal law. . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others the rational creature is subject to divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and others. Wherefore 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. . . .[T]he 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 partici- pation of the eternal law (Q.91, Article 2 "Whether There Is in Us a Natural Law?"?.*

This is a crucial article for understanding Aquinas's theory of law. Though God is once again the legislator of this law, and the natural law is a proper subset of the eternal law, it differs from the

eternal law as binding only rational creatures The idea is that, in virtue of having reason and free will, rational creatures are not bound merely to obey eternal law through instinct or inclination, as irrational creatures are bound, but may participate more fully and more perfectly in the law Through "natural reason", which we have through divine creation, we are able to distinguish right from wrong Through free will, we are able to choose what is right In so far as we do so, we participate more fully in eternal law rather than merely being led blindly to our proper end, we are able to choose that end and so make our compliance with the eternal law an act of self-direction as well In this way the law comes to be in us as a rule and measure; it is no longer merely a rule and measure imposed upon us from an external source "Although [the Gentiles] have no written law, yet they have the natural law, whereby each one knows, and is conscious of, what is good and what is evil" [Romans ii 14]. When we order our own actions in accordance with what is good and shun what is evil, we follow the natural law and participate in the eternal law rather than being merely acted upon by that law

We turn now to the all-important question of the end to which natural law directs rational creatures. Aquinas provides the following discussion of this matter

> *[The precepts of the natural law are the self-evident first principles of practical reason.] Now 'good' is the first thing that falls under the apprehension of the practical reason, which is directed to action, since every agent acts for an* ***end*** *under the aspect of good Consequently the first principle in the practical reason is one founded on the notion of good, viz., that* good is that which all things seek after. *Hence this is the first precept of law, that* good is to be done and ensued, and evil is to be avoided ***All*** *other precepts of the natural law are based upon 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*
>
> *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* ***the*** *order of the precepts of the natural law is according to the order of the natural inclinations Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances, inasmuch as every substance seeks the 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 Secondly, there is in man an inclination to things that pertain to him* ***more*** *specifically, 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 natural law "which nature has taught to all animals," [Justinian,* Digest *I, tit i] such as sexual intercourse, education of offspring, and so forth Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him 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 (Question 94 Of The Natural Law, Article 2 "Whether the Natural Law Contains Several Precepts, or Only One?")*

There is a great deal that requires comment upon in this passage The first is the understanding of practical reason upon which Aquinas is relying At the basis of this form of reasoning are indemonstrable first principles These are definitions, which are self-evident in the sense that if a person knows the meaning of the terms then they must immediately recognize the truth of the principle The first principle of practical reason is "Good is that which all things seek after" The first precept of natural law, drawn from this principle as a conclusion is "Good is to be done, evil avoided" In this case it is an action-guiding principle, and the conclusion of reasoning from it will be a directive about what action one ought to take.

Before we can draw any conclusions about which specific actions we ought to undertake from our first principle, however, we need an intermedi-

ate proposition concerning what is good or evil. Thus we need something like "The education of offspring is good, because it satisfies our natural inclination to procreate and to live together in on-going societies." The conclusion is "Therefore, we ought to perform those actions necessary for the education of our children." In this way we proceed from the first precept of the natural law to specific conclusions about what we ought to do or what the natural law directs us to do.

This means that, in order to understand what the natural law demands of us, we must be able to identify what is good and what is evil, *so* that the former may be pursued and the latter avoided. Aquinas thinks that we can do this by examining human nature. In taking this tack Aquinas is adopting an "essentialist" view of human nature, claiming that there are some characteristics or inclinations which are essential to human beings, and that our good consists in acting in accordance with those characteristics and inclinations. He identifies in the passage quoted three principal sets of interests which are essential to our nature in the relevant sense: those we have as living creatures, such as the interest in self preservation; those we have as animals, such as the interest in procreation; and those we have as rational creatures, such as the interest in living in society and exercising our intellectual and spiritual capacities in the pursuit of knowledge. Once we have filled out such a view of what is essential to human flourishing, based on our fundamental nature, we can determine by practical reason what is good for us and what bad. In this way natural law is an ordinance of reason.

This kind of essentialism about human nature, which implies that our most important ends are predetermined and that at base we all have common interests, has come into disfavour in contemporary philosophy. But it is important to note that, even if one rejects this foundation for determining what is good, as a natural law theorist one must provide an alternative which has the following characteristic: it must provide an "objective" conception of the good. That is, whatever the good is, it must be good independently of our believing it is good. We shall return to this idea later,

This discussion provides the basis of an answer to the question: What is the end toward which the natural law directs us? The natural law directs us to the good, as determined by those interests which we all share in virtue of our nature as human beings, and away from evil, which are those things that are incompatible with human flourishing. Thus we might think of the natural law as containing the basic precepts of the correct moral code.

The natural law is known to men innately: in creating men as rational creatures God has implanted within them knowledge of the first principles of the natural law. Thus *we must say that the natural law, as to general principles, is the same for all, both as to rectitude [validity] and as to knowledge (4.94,* Article *4* "Whether the Natural Law Is the Same in All Men?"). Both through natural inclinations and the divine light we are informed of our proper acts and ends.

But if the natural law directs us to our common good, to those things which allow us to flourish in accordance with our nature, and all action aims at what is good; and if, furthermore, all men know what the natural law commands, and are naturally inclined to follow it, how is it that we sometimes pursue evil? How is it that human societies differ as greatly in their basic organizations as they do around the world and at different times? And why is natural law alone not enough to govern human behavior: why do we need human laws as well? Aquinas recognizes that his account raises these and related questions, and he provides the following answer.

> *[T]o the natural law belongs [sic] those things to which a man is inclined naturally; and among these it is proper to man to be inclined to act according to reason. Now the process of reason is from the common [general] to the proper [specific],* as *stated in* Physics *i [Aristotle] The speculative reason, however,* is *differently situated in this matter, from the prac- tical reason. For, since the speculative reason is busied chiefly with necessary things, which cannot be otherwise than they are, its proper conclusion, like the universal principles, contain the truth without fail. The practical reason, on the other hand, is busied with contingent matters, about which human actions are concerned; and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. . . . [I]n matters of action, truth or practical rectitude is not the same for all, as to matters of detail but only as to general principles; and where there is the same rectitude in matters of detail, it is not equally known to all . . . Thus it is right and true for all to act according to reason: and from this principle*

itfollows as a proper conclusion, that goods *entrusted to another should be restored to their owner. Now this is true for the majority of cases: but it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance if they are claimed for the purpose of fighting against one's county. And this principle will be found to fail the more, according as we descend further into detail, e.g., if one were to say that goods held in trust should be restored with such and such a guarantee, or in such and such a way; because the greater the number of conditions added, the greater the number of ways in which the principle may fail, so that it is not right to restore or not to restore.*

Consequently we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of details, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail, both as to rectitude, by reason of certain obstacles . . . and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature; thus formerly theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans, as Julius Caesar relates [De bello Gallico] *(Q.94, Article 4).*

Here Aquinas offers three different reasons why human beings may fail to act according to the natural law, and why they might disagree about what is good (he will offer more reasons in what follows). The first two might be considered to arise from the same source, namely, the very general and indeterminate nature of natural law when it is applied to specific matters of human action The first difficulty that the general nature of natural law creates is that the conclusions which are drawn from it using practical reason are not universally valid. For instance, even though the natural law clearly proscribes violence, there are exceptions to this rule: in the case of self-defense, for example, or a just war, violence may be justified. Thus as we attempt to deduce more specific rules from the natural law, exceptions arise, general rules have to be modified to fit exceptional circumstances, and so on. Secondly, because natural law provides only very general rules, which must be applied to specific cases by fallible human beings, error is possible concerning the exact content of the natural law, even when it is being interpreted by good people. Finally, though the most basic demands of natural law are known to all through natural reason, reason is sometimes perverted or overwhelmed by passion and bad habits, as the example of the Germans sanctioning theft illustrates. Thus although it is our nature to follow reason, we sometimes are led to vice by impulses which run contrary to reason. Human law remedies these defects by giving determinate content to the law and by providing an additional motive to obey it: the fear of punishment.

II.3 Human Law:

[A] law is a dictate of the practical reason. . . [I]t 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 determination 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,* Articles *2, 3 and 4). Wherefore Cicero says in his* Rhetoric *that "justice has its source in nature; thence certain things came into custom by reason of their utility; afterward these things which emanated from nature and were approved by custom were sanctioned by fear and reverence for the law" [Cicero,* De inventione rhetorica, *ii] (Q.91, Article 3 "Wether There Is a Human Law?").*

Here the purpose of human law is to render determinate the precepts of the natural law, and make it known what is required in particular cases in light of a society's specific circumstances. Human law is needed to clarify the demands of natural law, not only because the natural law's generality and human moral failings give rise to problems in our knowing and applying the natural law, but also because the natural law is sometimes *underdetermined;* it can be fulfilled in a variety of ways, all equally good. Aquinas stresses this issue of underdetermination in the following passage.

> *But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises; secondly, by way of determination of certain generalities. The first way is like to that by which, in the sciences, demonstrated conclusions are drawn from the principles, while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law by way of conclusions, e.g., that "one must not kill" may be derived as a conclusion from the principle that "one should do harm to no man"; while some are derived therefrom by way of determination, e.g., the law of nature has it that the evildoer should be punished; but that he be punished in this or that way is not directly by natural law but is a derived determination of it.*
>
> *Accordingly, both modes of derivation are found in the human law. But those things which are derived in the first way are contained in human law, not as emanating therefrom exclusively, but having some force from the natural law also. But those things which are derived in the second way have no other force than that of human law (Q.95, Article 2 "Whether Every Human Law Is Derived from the Natural Law?"?.*

This discussion indicates that the underdetermined nature of the natural law leaves open room for variations within legal codes in different communities. For while the most basic principles of all human legal codes must be derived deductively from natural law "as conclusions", and so must be the same for all communities, those human laws which are derived "by determination" allow societies to tailor their legal codes to fit their particular circumstances and needs. Thus we can have a diversity of positive (human) laws in different communities: when human laws are enacted as particularizations from general principles, it is sometimes possible that different communities will choose different particular laws to give content to the general principles, just as different communities will give different particular shapes to their houses, despite the fact that houses have a general form (walls and a roof designed to provide shelter from the elements).

In drawing this distinction between those human laws that are derived deductively from natural law, on the one hand, and those which are mere determinations, on the other, Aquinas marks an important division within the category of human laws. For those laws that fall into the first group have not only the status of human law but also of the natural law. As such, they must direct behaviour in accordance with the correct moral code. This has the implication that any violation of such laws is not only a legal offense but also an offense against morality, i.e., a sin or vice. Such offenses, we say, are *mala in se*, for they involve actions that would be wrong independently of and prior to being made illegal. Murder is a *mala in se* offense, for it is morally wrong quite independently of being legally prohibited. Those laws which are derived from natural law in the second way, however, and which have only the force of human law, lack this independent moral status. When the human law prohibits actions that are not themselves morally wrong, we call such offenses *malaprohibita*. They are legal offenses, but not moral offenses, and one who commits them is guilty of legal wrongdoing but not also of an independent sin or vice. Thus, for example, in many jurisdictions there is a legal prohibition against persons under a certain age driving a car. Let's suppose the age is 16 years. Now, no one would want to say that driving when under the age of 16 is independently immoral or vicious, though it is equally clearly illegal. And this law may well be justified as a law derived in the second way from natural law: for having such restrictions on the use of dangerous machines like cars serves the common good. Thus while *mala in se* offenses are universally and invariably wrong, their wrongness being deductively derived from natural law, the class of *malaprohibita* offenses contains room for considerable variation across different communities.

Let us return now to our more immediate topic, which concerns the many reasons why we need human law. As we saw in our previous discussion, it is not only the generality and underdetermined nature of the natural law that explains why it must be supplemented with human law. A different reason is to be found in the moral failings of human beings: for we sometimes fail to willingly follow the dictates of natural law.

> *[M]an has a natural aptitude for* virtue, *but the perfection of virtue must be acquired by man by means of some kind of training. . . . Now it is difficult to see how man could suffice*

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for himself in the matter of this training, since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is inclined, and especially the young, who are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue. And as to those young people who are inclined to acts of virtue, by their good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be depraved and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training which compels through fear of punishment is the discipline of laws. Therefore, in order that man might have peace and virtue, it is necessary for laws to be framed. . . (Question 95 Of Human Law, Article 1 "Whether It Was Useful for Laws to be Framed by Men?").

Aquinas speaks here of two additional reasons why human laws are needed. First, they provide an educative effect upon those who do not pursue virtue willingly. In this way they promote virtue. But they do so by coercion, by threat of force (punishment) and the fear that threat engenders. This may itself lead to virtue, for what one does in the beginning out of fear can become habitual; when one habitually refrains from evil and does as virtue requires, then one has become virtuous. And this leads to the second role for human law, especially as backed up by the threat of coercive sanctions. it deters those who would do evil from actually doing it, and thus Serves the goals of peace, security and order. . . .

Despite the fact that human law is needed for these reasons as a supplement to the natural law, Aquinas believes that valid human law is derived from the natural law. This is so because he believes that human law must meet one further validity condition to be genuine law: it must be just. Now this requirement is really only relevant to human law, since the law given by God cannot be unjust. But because human law is made by people, who are fallible as well as susceptible to vice, it is possible that a law-maker might try to make laws which are unjust. Aquinas denies that such are valid laws, on the grounds that human law must be derived from natural law (as an ordinance of reason), and so it cannot be unjust. Rules only have the binding force appropriate to law if they are just.

> *As Augustine says, "that which is not just seems to be no law at all" [De libero arbitrio]; wherefore the force of law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right according to the rule of reason. But the first rule of reason is the law of nature . . . Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a peruersion of law (Q.95, Article 2 "Whether Every Human Law Is Derived from the Natural Law?'?.*

What are we to say of Aquinas's insistence that human laws have the binding force of law only if they are just? This seems, in some ways, an extraordinary claim, given that we are all familiar with things that seem to be human laws but which are clearly unjust, e.g., the slave laws of the United States before the Civil War, or the Nazi laws in Germany which sent millions of Jews to the death camps. Aquinas does not deny that such directives have the form of law, but he insists nonetheless that they fail to be genuine laws, that they fail to have the binding force of law. They lack that force, and the status of law, because they fail to conform with the dictates of justice which are contained within the natural law which is an ordinance of right reason.

> *Human law has the nature of law in so far as it partakes of right reason, and it is clear that, in this respect, it is derived from the eternal law But in so far as it deviates from reason, it is called an unjust law and has the nature, not of law, but of violence Nevertheless even an unjust law, in so far as it retains some appearance of law, through being framed by one who is in power, is derived from the eternal law, since all power is from the Lord God, according to Romans xiii. 1 (Question 93, Article 3 "Whether Every Law Is Derived from the Eternal Law?")*

To say that "unjust laws" fail to have the bind-

ing force of law we must consider briefly what Aquinas calls the power of law "to bind a man in conscience". This is the power of law to impose a moral obligation of obedience upon those to whom the law applies. In discussing this question, Aquinas directly deals with this obligation, as well as specifies in more detail his conception of justice.

> *Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Proverbs viii. 15: "By Me kings reign, and lawgivers decree just things." Now laws are said to be just—from the end, when, to wit, they are ordained to the common good—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man, in all that he is and has, belongs to the community, just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part in order to save the whole, so that on this account such laws as these which impose proportionate burdens are just and binding in conscience and are legal laws.*
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> *On the other hand, laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in the respect of form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws, because, as Augustine says, "A law that is not just seems to be no law at all." Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right . . .*
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> *Secondly, laws may be unjust through being opposed to the divine good: such are the laws of tyrants inducing to idolatry or to anything else contrary to the divine law; and laws of this kind must nowise be observed because, as stated in Acts v.29, "we ought to obey God rather than men" (Q.95, Article 4 "Whether Human Law Binds a Man in Conscience?")...*

. . . [Here] Aquinas gives some content to his conception of justice and its relation to law. He outlines various ways in which a law may fail to be just: it may aim at the good of the lawgiver only, rather than at the common good; it may exceed the authority of the lawgiver; it may impose disproportionate burdens upon some of the people; it may be contrary in its directives to the divine law as known through revelation. In each of these cases, the law denies to those who are governed what they are due. Thus they can demand as their due that the ruler make laws which are directed to the common good rather than to his personal glory; that they be allowed to worship God; that they be ruled only within the limits of proper authority; and that the ruler not impose disproportionate burdens upon some for the benefit of others. This last requirement may lend itself to misunderstanding, however, in light of Aquinas's insistence that justice concerns the relations between persons and demands an equality of some kind. For Aquinas is not advocating an egalitarian society or insisting that the benefits and burdens of society be distributed equally. Indeed, he believes that class divisions and even slavery are natural relations. But he does insist that justice demands that the burdens and benefits of society be distributed proportionately and in the service of the common good. This allows that unequal burdens can be placed upon some, when that is needed for the good of the whole. Thus, for example, we can demand that the young and strong provide military service in defense of the society, and in so doing impose a heavy burden upon them that is not shared by all, provided that it be necessary for the common good and they receive compensatory benefits from society in other areas.

In all of the cases of unjust laws that he considers, Aquinas declares that such laws lose their binding force. In all but the last case, we may disobey such laws, though we must not do so at the risk of causing "scandal and disturbance". Scandal and disturbance signify a break-down of the order which is the foundation of human society, a loss of peace and security, as would be found in a situation of massive civil unrest or civil war. This should not be risked, even if that requires obeying laws which are unjust in terms of the end, author or form. The final

case, however, involving laws which are contrary to divine law, such as a law requiring that everyone abstain from Christian worship would be, is different: we must not obey such laws, regardless of the consequences. . . .

To say that we all have an obligation to obey (just) laws raises a different question, however: does it require that in every instance we must obey the letter of the law, even if doing so would be ruinous or cause great hardship to the common good? This issue was thought by Aquinas to raise the question of whether those who are subject to law are competent to interpret it and perhaps decide, in a given case, that the real intentions of the lawgiver would be better served by an action which is contrary to the letter of the law. He answers that it is sometimes permissible for those subject to the law to interpret the intentions of the lawmaker and decide not to obey the letter of the law.

> *[E]very law is directed to the common weal of men and derives the force and nature of law accordingly. Hence the Jurist says: 'By no reason of law or favor of equity is it allowable for us to interpret harshly and render burdensome those useful measures which have been enacted for the welfare of man" [Ulpian,* Digest *i. 3]. 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, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore, if a case arises wherein the observance of that law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it is an established law that the gates of the city are to be kept closed, this is good for 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.*
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> *Nevertheless it must be noted that if the observance of the law according to the letter does not involve any sudden risk needing instance 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 who are in authority and who, on account of such like cases, have the power to dispense from the 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 (Q.96, Article 6 "Whether He Who Is Under a Law May Act Beside the Letter of the Law?").*

Thus we find Aquinas recognizing that blind obedience to the letter of the law is not desirable. While we must avoid a situation wherein every person feels competent to judge the law and decide he shall obey it only as it serves his own interests, we must equally avoid the situation wherein great harm is done to the common good out of servile obedience to the law. In his example of the besieged city, Aquinas notes one case in which the law ought not to be obeyed. But there are others, readily imaginable: in case of a fire within the city, for example, the law also ought not to be obeyed. These are exceptions to the general rule, but they cannot themselves be written into the law, both because they are too numerous and too unforeseeable. To attempt to write all the possible exceptions into the law would make the law too complex to be useful as a general rule and measure for human action. Thus we must be content to use general laws, while recognizing that exceptional cases may arise in which obedience to the letter of the law must give way to the spirit of the law, which aims always at the common good.

As these articles make clear, Aquinas believes that one important purpose of human laws is to make men virtuous. . . .

Human law is limited, however, in the extent to which it can aim to make men fully virtuous. In the first place, there are many forms of vice that do not fall within the prohibitions of human law.

> *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 vices 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 such like (Q 96,*

Article 2 "Whetherit Belongs to Human Law to Repress All Vices?").

Likewise, human law does not proscribe all virtues, but only those which are ordainable to the common good (Q.96, Article 3 "Whether Human Law Prescribes Acts of All the Virtues?"). This defect in human law is rectified, however, with the addition of the final type of law: divine law.

II.4 Divine Law:

> *Besides the natural and the human law it was necessary for the directing of human conduct to have a divine law. And thisfor four reasons. First, because it is by law that man is directed how toperform his proper acts in view of his last end. And indeed, if man were ordained to no other end than that which is proportionate to his natural faculty, there would be no needfor man to have anyfurther direction on thepart of his reason besides the natural law and human law which is derivedfrom it. But since man is ordained to an end of eternal happiness which is inproportionate to man's naturalfaculty . . . 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.*
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> *Secondly, because, on account of the uncertainty of humanjudgment, especially on contingent andparticular matters, different peopleform differentjudgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in hisproper acts by a law given by God,for it is certain that such a law cannot err.*
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> *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.*
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> *Fourthly, because, as Augustine says, human law cannotpunish orforbid all evil deeds; since while aiming at doing away with all evils, it would do away with many good things, and would hinder the advance of the common good, which is necessary for human intercourse [De libero arbitrio i, 5, 6]. 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 (Q.91, Article 3 "WhetherThere Was Any Needfor a Divine Law?"?.*

Divine law is directed to the common good of mankind as beings capable of salvation and eternal happiness. That is its end. It is promulgated in the words of divine revelation and the pronouncements of the Pope. Because men cannot know, by natural reason unassisted by divine revelation, what God demands of them in order to be worthy of eternal happiness, divine law is needed in addition to natural and human law. It is also needed because human law must confine its attentions to the actions of persons; since having good motives and not merely doing the right thing is also part of virtue, and law aims to make men virtuous, human law must be supplemented with divine law. Moreover, as Aquinas points out, if human law were to attempt to prohibit and punish all vices, many good things would become exceedingly difficult or impossible to achieve. For instance, suppose that the human law attempted to forbid backbiting gossip, on the grounds that it is vicious; in order to enforce such a law, the privacy and trust which is necessary between spouses, friends, co-workers and others would have to be severely restricted. Given that the price of enforcing such a law would certainly outweigh the benefits of it, such a sin as gossiping ought not to be made an object of human law but must be left to God to judge of and punish.

X *Natural Law Theory: Aquinas's Legacy*

Although Aquinas developed his theory of law within the context of a Christian world-view, much of what he says remains relevant within modern secular societies. And in many ways the issues he raised continue yet to dominate the philosophy of law. Furthermore, the natural law theory of which he is taken to be the founder still attracts thoughtful adherents today, both Thomistic and secular. What,

then, is the natural law theory?

Though there are many differences dividing natural law theorists on a myriad of issues, the following is meant to capture the central tenets of the natural law position First, natural law theorists typically accept from Aquinas some version of the claim that law is a rule and measure In more modern parlance, law is a system of rules by which human beings are to direct their behavior But they also accept from Aquinas the view that the system of rules is supposed to direct human behavior *aright* What is distinctive to the natural law position *is* the insistence that the direction provided by the law must be toward ends that are rationally defensible or objectively good, law must direct behaviour toward the common good It is this requirement, that all genuine law aims at what is truly good, not just for the ruler but also for the ruled, that sets natural law theory apart from a great many others

The insistence that law has as its end the common good makes natural law theory teleological Teleology is the view that some things (perhaps all) have an end or function proper to them, and that they cannot be fully understood without reference to that end or function. So, for example, we cannot fully understand the essence of a knife without reference to its end, which is to cut things Now one need not be a teleologist about everything in order *to* be a natural law theorist But one must be a teleologist about law itself That is, one must believe that law has an end, which is truly good, and that all genuine law aims at that end, there is some end which law must serve, *qua* law Stated in terms of functions, the natural law theorist is committed to the view that law has some function, which is objectively good, and we cannot fully understand law independently of that function. Now there have been many functions proposed as essential to law the preservation of order, to assist us in achieving the good appropriate to our nature, to make us virtuous, and so on It is important to keep in mind, however, that it is not only natural law theorists who may attribute an essential function to law, one might think that the purpose of law is just to ensure obedience to the sovereign, and yet not be a natural law theorist One will only be offering a natural law position if the end or func-tion claimed to be essential to law must be objectively good. The important point to all of this is that if one does offer such a position then one makes moral conditions validity conditions of law.

To say that valid law must have a certain moral content in order to be valid is to say that we cannot identfy something as genuine law by its form or structure alone, we must look also to its content to determine whether it is law For Aquinas and most natural law theorists who have followed him, this requirement takes the form of providing necessary conditions of law it is necessary, though not sufficient, for something to be a human or positive law that it be aimed at the common good and that it be just That is, it is enough to make a law invalid that it aim at something which is contrary to the common good or that is unjust Thus "an unjust law is no law at all" has come to be one of the defining tenets of the natural law position

Because there is a necessary connection between genuine law and morality, one further conclusion is licensed Not only do we have a prudential reason to obey the law namely to avoid punishment, but we also have a moral obligation to obey the law, which derives from its independent justification or objective rightness While the former may hold even with respect to "unjust laws", the latter holds only because the law, as genuine law, enjoins what we already morally ought to do This is so directly in the case of *mala in se* offenses, which we ought to refrain from because they are both immoral and illegal, and indirectly in the case of *mala prohibita* offenses, which we ought to refrain from because doing so serves the common good As Aquinas makes clear, however, the moral obligation binds us to the spirit of the law and not merely to its letter

This conception of crime as being not only illegal but also immoral leads us to the final noteworthy feature common amongst natural law theorists they have usually been committed to a retributivist theory of punishment Though the natural lawyer's defense of retributivism cannot be fully explained or justified here, it typically consists of a defense of the following claims Because those who break the law thereby also commit a sin, they deserve punishment Their moral culpability makes them fit subjects of retribution. This is in keeping with justice, moreover, because it is just that those who do wrong suffer harm for due equality is served when good is returned for good, and evil for evil Whether the natural law theorist must adopt a retributive theory of punishment is an interesting question that we cannot explore here; we must be content with simply noting that Aquinas himself accepted the connection between his theory of law and retributivism in punishment.

This concludes our brief discussion of natural law theory. Though I have attempted to identify

those tenets that are most common to the natural law tradition, this account must surely be deemed inadequate even for that purpose: for the natural law tradition embodies a diversity and richness of views that make it impossible to capture in an essay such as this. I shall be content, however, if I have succeeded it presenting and explicating Aquinas's particular brand of natural law theory in sufficient detail to enable those who may be interested to pursue the many controversies which surround it. I have not been able to enter into those controversies here, nor have I been able to critically assess the many tenets that I have just sketched I leave such commentary and criticism to the history of jurisprudence.[4]

1 Published by Burns, Oates and Washbourne, Ltd , London, **Publ**ishers to the Holy See, 22 volumes, 1912–36

2 When Aquinas refers to the "perfect community" he does not mean some ideal or utopian state, but rather he means **only** the whole community of individuals united in a particular way A perfect community is one in which a multiplicity of individuals are brought together, their diverse activities coordinated and directed to the attainment of their common end

3 See especially St Thomas Aquinas, ***De Regimine (On Kingship)*** trans G B Phelan and I T Eschmann (Toronto PIMS, 1949)

4 I would like to thank David Braybrooke, who many years ago taught me that Aquinas has much to say even to a secular society. I would also like to thank Eric Cavallero for his many helpful comments on an earlier draft of this essay