I

LAW ITSELF, IN GENERAL: QUESTIONS 90–92

Before Reading Question 90

St. Thomas views law as a rule and measure of distinctively human acts. As we see still more clearly later on, this makes it something *right* for humans to follow, something that "binds in conscience."[1] If we ask what conditions an enactment would have to satisfy in order to be such a thing, he replies that it must be an ordinance of reason, for the common good, made by those who have care for the community, and promulgated. To paraphrase, it must be something the mind can recognize as right, it must be good for community as such rather than just serving a special interest, it must be made by public authority rather than private individuals, and it must be made known – a secret or hopelessly obscure law is not a law at all.

Notice that this is a *fundamentally moral* approach to the definition of law. Against it stands something called legal positivism, the approach to law so dominant in contemporary law schools that law students may never hear of another. However, what positivists say is often misunderstood. Many positivists are perfectly happy to agree that law *ought* to be moral and just; that is not what they deny. So-called inclusive positivists even concede that at least in some legal systems, the question whether an enactment is moral plays a part in deciding whether it is a law in the first place, so that is not what they deny either. However, positivists insist

[1] The background is I-II, Q. 79, Art. 13, where St. Thomas remarks that "conscience is said to witness, to bind, or incite, and also to accuse, torment, or rebuke." In I-II, Q. 96, Art. 4, he will ask whether human law binds in conscience. The answer is that it does when it is just, because only then is it truly law, as defined here in Q. 90.

that even though such moral elements may sometimes be demanded, they are not logically necessary to the validity of law *as law*. *That* is what they deny.

To St. Thomas, the positivist enterprise would seem confused. For what does the positivist *mean* by the validity of law as law? Does he mean its authority? But authority is a *moral* concept – it means it is right that the precept be followed. If the positivist concedes this, then he has conceded St. Thomas's view. We may as well go on to the rest of St. Thomas's analysis – law is an ordinance of reason, for the common good, and so on.

But positivists don't think that authority *is* a moral concept. Some of them think that the term "authority" refers merely to the fact that law comes from a power people are accustomed to obey. Others think it refers simply to the fact that most of the time people do act as law tells them to. In the former case, we have Thomas Hobbes's and John Austin's definition of law as the command of the sovereign; in the latter case, H.L.A. Hart's definition of law as a system of conventional social rules.[2]

Neither definition works even on its own terms. The Hobbesian–Austinian definition leads to a circularity, because in order to know what law is we must consult the sovereign, but in order to know who the sovereign is, we must consult the law. Although the Hartian definition is not circular, it leads to an infinite regress. Law is something conventionally acknowledged to be a law. Acknowledged to be what? A law. But a law is what? Something conventionally acknowledged to be a law. And so on, ad infinitum.[3]

As viewed from St. Thomas's perspective, the circularity of the Hobbesian–Austinian definition and the infinite regress of the Hartian definition arise from two still deeper problems with legal positivism. The first: Generally speaking, people do not habitually obey edicts or conventions unless they do consider them right – or else they obey with resentment, because they *deny* the authority of these edicts. That is a moral issue. The second problem: Edicts and conventions are not self-interpreting. Generally speaking, even to figure out *what they mean* it is necessary to consider what is right. If we refuse to do so, we are literally

[2] See Thomas Hobbes, *Leviathan* (1651), John Austin, *The Province of Jurisprudence Determined* (1832), and H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961, 1994). On the Continent, positivism is most often associated with Hans Kelsen, especially his work *Pure Theory of Law* (1934).

[3] My thinking concerning this double problem is in debt to conversations with my colleague, Robert C. Koons.

unable to obey, because we cannot figure out what is expected of us. That is a moral issue too.

I owe my favorite illustration of the latter point, that we must consider what is right even to know what the law means, to Professor Charles E. Rice. The 1932 *Restatement of Contracts* declares, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[4] Put more simply, if breaking a promise would cause injustice, then the promise is binding – but the *Restatement of Contracts* does not explain what "injustice" means. It expects readers to know that already. Now suppose language like this were contained in statutory law. In such a case, courts would be forced to work out some of the implications of the unwritten principles of justice, even if they were utterly deferential and their motive were merely to figure out what the statute meant by "injustice."

An Objector may say that in such a case the legislature has legislated badly. It should not have used undefined terms like "injustice" in the first place. It should have defined them. Go ahead, then; replace that word with a string of other words. What will result? Merely that the words in the string will also need definition. Suppose the Objector defines injustice as the violation of justice; then he must define justice. Suppose he defines justice, à la the *Corpus Juris Civilis* of Justinian, as "to live honesty, to hurt no one, to give everyone his due"; then he must define living honestly, hurting no one, and giving everyone his due. His difficulty is not vanishing; it is expanding, for although he can replace many undefined terms by defined terms, he cannot keep this up until nothing undefined is left. Unless he cheats, by allowing circularities, there will always be some rock-bottom undefined terms in terms of which all the rest of the terms are defined – and some of those undefined terms will inevitably have moral meaning. The moral of this story is that positive or man-made law points beyond itself; for the core of its meaning, it inevitably depends on morality.

The problem with defining authority in terms of a mere habit of obedience, then, is that both the willingness to obey and the ability to obey depend on recognized morality. If the positivist is trying to define morality out of the picture, then his enterprise is futile.

[4] *Restatement of Contracts* (American Law Institute, 1932), Section 90, "Promise Reasonably Inducing Definite and Substantial Action."

Suppose the positivist accepts these points. There is another move he might make, another way he might try to escape from the trap. He might become, so to speak, a hyper-positivist. That is, he might admit that authority is a moral concept, but say, "So what? Just as law is a system of conventional social rules, *so morality itself* is a system of conventional social rules – a custom, a convention, something we construct or invent." He would no longer say, like the old-fashioned sort of positivist, that law is independent of things, like morality, that we do not invent. Instead he would say that even if it does depend on morality, *we invent that too*. From law on down, it's constructs all the way!

Unfortunately for the hyper-positivist, this move would be equally futile, because it would miss morality's point. The whole idea of a moral law is that it binds us whether we like it or not. If it really were just a social convention – if we could make it up and change it to suit ourselves, so that we weren't bound unless we wanted to be – *then it wouldn't be morality.*

St. Thomas denies that the basic structure of morality is a construct. It is not rooted in human will and power. Rather it is rooted in nature, in the structure of creation, in the constitution of the human person – in something we cannot change by human will and power. In fact, as we will see, he holds that morality *stands in judgment* on human will and power. The good and the right are not things we invent, but things we discover. They are not constructs, but gifts. These gifts are the fount of the law.

St. Thomas's Prologue to Questions 90–92: Of the Essence of Law

TEXT	PARAPHRASE
[1] *We have now to consider the extrinsic principles of acts.* [2] *Now the extrinsic principle inclining to evil is the devil, of whose temptations we have spoken in the First Part, Q. 114. But the extrinsic principle moving to good is God,* [3] *Who both instructs us by means of His Law, and assists us by His Grace: wherefore in the first place we must speak of law; in the second place, of grace.*	Earlier in this *Summa,* we discussed the sources of acts, but we discussed only those sources that lie within us. Now we must turn to the sources that lie outside us. One such source is the devil, who prompts us to do evil. However, we have considered his temptations already. The other is God, who prompts us to do good, and who does so in two different ways. First, he prompts us through law, which *teaches* us to do good; this is the topic of the *Treatise on Law,* to which we are about to turn. Second, he does so through the gift of grace, which *strengthens* us to do good; this is the topic of the *Treatise on Grace,* which comes afterward.

[1] In general, acts are the ways in which potentialities are brought into actuality. Here, St. Thomas is referring only to human acts, the ways in which the potentialities within human nature are brought into actuality. The principles of these acts are their beginnings, the sources from which they spring; *principium* is the word that Latin uses where Greek uses *arche* and English uses *beginning*. A good example is the first verse of the Gospel of John:

Greek	**En arche** en ho Logos, kai ho Logos en pros ton Theon, kai Theos en ho Logos

Latin (Vulgate)	**In principio** erat Verbum et Verbum erat apud Deum et Deus erat Verbum
English	**In the beginning** was the Word, and the Word was with God, and the Word was God.

St. Thomas says we now pass to the extrinsic principles of human acts, those that originate outside us, because he has already discussed their intrinsic principles, those that lie within us. As he has explained, their intrinsic principles are powers and habits. Powers, or capacities – means by which we act – have been discussed in I, Q. 77–83. Habits, or dispositions – tendencies that incline us to act in one way rather than another – have been discussed in I-II, Questions 49–77.

God is described as an extrinsic principle because He is distinct from us – he is not one of our own powers or habits. To say this is in no way to deny that we may experience his operations internally, for example when His grace pricks our conscience. For an analogy, we may think of how a signet ring impresses its form on the wax.

[2] St. Thomas speaks of us being "moved" or "inclined" to evil rather than coerced to evil, because we have free will. He remarks earlier in the *Summa,* in I, Question 83, Art. 1, that without free will, "counsels, exhortations, commands, prohibitions, rewards, and punishments would be in vain." So the fact that our acts have extrinsic as well as intrinsic principles does not deprive us of personal responsibility.

We are moved to good by God. What is God? St. Thomas explains in I, Question 2, that if knowing what God is means knowing God's very essence, then we do not know what God is, for our intellects will not possess this knowledge until they are uplifted to the vision of God in heaven. As St. Paul wrote, "We see now through a glass in a dark manner; but then face to face. Now I know I part; but then I shall know even as I am known."[5] Yet even in this life we have a "general and confused" knowledge of God's existence. How so? Because the longing for perfect happiness that leaves nothing to be desired is implanted in us by nature; because everything to which our nature inclines us must exist, otherwise the desire would be pointless; and because it can be shown that such perfect happiness is not found in any created thing, but only in God. We can work out by reasoning many things *about* God, even though these fall short of knowing his essence: For example that he exists, that he is the first cause of all that is, that he is perfect in power, knowledge, and

[5] 1 Corinthians 13:12.

goodness, and that he is infinite, unchangeable, and eternal (I, Q. 2–26). Revelation takes us still further.

Although the topic of the devil is off the path of the *Treatise on Law,* a brief digression may not be amiss. There is, and can be, only one God, one uttermost good, one uttermost source of being. Satan is not another God – a negative God, so to speak – but only a created rational being, a fallen angel. St. Thomas observes that there is a fine gradation in created beings, from the lowest to the highest. If angels did not exist, then there would be an unexplained gap in this gradation. For this reason, he finds the biblical claims about angels to be reasonable not only from a theological but also from a philosophical point of view, for even though angels are infinitely short of God, these finite, non-bodily intellects occupy the rung between our finite, bodily intellects and God's infinite, non-bodily intellect. Now just as humans can sin through abuse of the gift of free will, so can angels, although, because angels are much greater, the consequences of their sins are much worse. The sin of the devil was desiring to be independent of God, desiring to have no happiness except that which he could provide to himself. From this desire arose an even more dangerous desire: "Since, then, what exists of itself is the cause of what exists of another, it follows from this furthermore that he sought to have dominion over others" (I., Question 63, Article 2.) The desire for dominion – a desire that we will also recognize in our own fallen selves, if we are honest – is what moves the devil to invent temptations.

[3] Law is an extrinsic principle of acts because it is promulgated by God, and in this sense comes from outside us. As we will see in Questions 91 and 93, however, in another sense it is inside us, for it finds an echo in our own created being; natural law is the "participation" of the rational creature in the eternal law. For this reason, obedience to God's law in no way diminishes human freedom. On the contrary, being made in his image,[6] we are most true to ourselves precisely when we are most true to him. This also shows that when Immanuel Kant distinguished between autonomy, or self-legislation, and heteronomy, or passive subjection to the law of another, he was posing a false alternative. To use an expression of John Paul II, the human sort of freedom is a third kind of thing, a "participated theonomy."[7]

[6] Genesis 1:27.
[7] John Paul II, encyclical letter *Veritatis Splendor* (6 August 1993), Sections 38–41.

Grace is the free gift of God – something God gives to us not because we have earned it, but *gratis* (I-II, Question 110, Art. 1). In this sense, even our nature is grace – as Russell Hittinger has reminded us, the "first grace" – because we did nothing to merit the gift of being.[8] However, the expression "grace" is normally used in a different sense, for those further gifts that assist nature and even raise it beyond its native powers. There are many kinds of supernatural grace, and the precise relationship between nature and grace is complex and subtle. But though nature is different from grace, it is made for and anticipates grace, as the dock is made for and anticipates the ship.

Here, of course, St. Thomas is distinguishing grace not from nature but from law. Like the distinction between nature and grace, the distinction between law and grace can be exaggerated so that it turns into a sheer contradiction. Our participation in the eternal law is itself an undeserved gift; our nature might have been so made that we were blindly pulled around by our impulses, yet we have been given a role in God's providence, something the subrational creatures cannot enjoy. But a further gift is the divine help that enables this participation to unfold. The need for extra help is charmingly conveyed by a parable in John Bunyan's *Pilgrim's Progress*.[9] A man attempts to sweep a parlor, but his efforts merely drive the dust into the air, and the room is as dirty as before. After a maid has sprinkled the dust with water, the man is able to sweep the dust into a pile and get rid of it. Law is like the broom; grace is like the sprinkling of water. Bunyan himself, committed to an un-Thomistic contradiction between law and grace, intended the parable to convey the point that the broom is useless. But the parable is better than Bunyan knew. What actually happens is that although the broom is useful and necessary, the sprinkling is also necessary so that the broom can achieve its end. So St. Thomas would view the matter.

[8] Russell Hittinger, *The First Grace: Recovering the Natural Law in a Post-Christian World* (Wilmington, DE: ISI Books, 2003), p. xi. Hittinger borrows the expression from a letter of retraction by the presbyter Lucidus, following the condemnation of certain doctrines at the Second Council of Arles in A.D. 473.

[9] John Bunyan, *The Pilgrim's Progress from This World to That Which Is to Come, in the Similitude of a Dream* (1678), Part 1, Section 2. The work is in the public domain and is available at many locations on the Internet, for example at www.ccel.org and www.bartleby.com.

[1] *Concerning law, we must consider: (1) Law itself in general; (2) its parts.* [2] *Concerning law in general three points offer themselves for our consideration: (1) Its essence; (2) The different kinds of law; (3) The effects of law.*	The *Treatise on Law* is in turn divided into two parts. The former part, Questions 90–92, considers law as such, and the latter part, Questions 93–108, considers each of the various kinds of law in depth. The former part is further divided into Question 90, which takes up the essence of law, Question 91, which presents a brief preface to the various kinds of law, and Question 92, which discusses the results that law brings about.

[1] By the topic of law itself in general, St. Thomas means the general matters that serve as preliminaries to the discussion of law; by the parts of law he means its kinds. The various kinds of law are thus discussed twice: First, by way of orientation, in Question 91, under the rubric "law itself in general"; then, more fully, in Questions 93–108, under the rubric "its parts."

[2] The essence of a thing is what defines it – *what it is*. In contemporary analytical philosophy, the essential qualities of a thing are often regarded as the properties it would have in all logically possible worlds. St. Thomas, however, is not thinking about logically possible worlds. What he means by the essential qualities of a thing are the properties it must have to be the kind of thing that it is, rather than some other kind of thing. Contemporary speech is uncomfortable with such ideas. We imagine that the essence of a thing is in the eye of the beholder. On the contrary, the essence of a thing is its underlying reality, the most fundamental thing about it, the thing about it *because of which* the other true things about it are also true.

The question St. Thomas proposes to discuss is the essence of law, but the idea may be clearer if we think of a more familiar essence, the essence of man. Man – the term includes both men and women – is our species. Rational animal is his definition, and expresses his essence. Animal is his genus, making him different from the angels, who are rational but not animal. Rationality is what distinguishes him from other species of animals, such as cats.

Animality and rationality are man's essential qualities, by contrast with, say, civilization and literacy. The latter are called "accidental" qualities, not in the sense that they come about by chance (after all, only a rational animal could *achieve* civilization and literacy), but in the sense

that an uncivilized and illiterate man would yet be a man.[10] The definition of man as rational animal is not necessarily meant to exhaust his essential qualities, but only to say enough about them to get on with. No doubt, if Martians came into the picture, we would have to say more, if only to distinguish *that* kind of rational animal from *this* kind.

To say that the parts of law are the kinds of law is simple and clear. However, to prevent confusion later on we must add that St. Thomas distinguishes between several senses in which something can be called a part of something else. The *integral* parts of a principal thing (of a "something else") are the distinct elements that must concur for its perfection or completion. Thus, the roof is an integral part of a house. The *subjective* parts of a principal thing are its species or kinds. Thus, the species ox is a subjective part of the genus animal. The *potential* parts of a principal thing are various things connected with it, directed to certain secondary acts or matters, which do not have its whole power. Thus, filial piety, the reverence of children for their parents, is a potential part of the virtue of justice; it has something in common with justice because justice is giving to others what is due to them, but it does not have the full power of justice because it is impossible to give parents an equal return for what one owes them.[11] By the parts of law, then, St. Thomas means neither its integral nor its potential parts, but its subjective parts.

St. Thomas says that after a discussion of the essence of law culminating in its definition, and a brief distinction of its kinds, he will discuss its effects. The effects of law are the things that law does. For example, law commands, so in one sense a command may be called an effect of law. Law is also intended to accomplish certain results in the habits of the persons subject to it, so in another sense these habits may be called effects of the law.

[10] We might add that the characterization of man as a rational animal does not imply that the rational potentiality is always fully actualized, nor does it imply that those whose rational potentiality is not fully actualized are less than men. Children, persons with brain injuries, and even fools are full-fledged members of the human species and heirs to its dignity. Aristotle may seem to have disagreed, having famously remarked that "he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god" (Aristotle, *Politics,* trans. Benjamin Jowett, Book 1, Chapter 2.) However, Aristotle was referring to beings who *by nature* have no need for society. Persons in the categories I have mentioned certainly have need of it, but they are held back by immaturity, injury, or foolishness from fully enjoying its benefits.

[11] Strictly speaking, filial piety is a *quasi*-potential part of justice, but for present purposes the distinction between integral, subjective, and potential parts is sufficient. See II-II, Q. 80, Art. 1.