

WHAT IS LAW?

I. Two Methodological Approaches

- A. Atomistic Approaches: nature of individual laws is basic; legal systems are systems of individual laws
- B. Holistic Approaches: nature of legal systems is basic; laws are aspects of a legal system

II. Three Substantive Views

A. Natural Law Legal Theory

- 1. There is a necessary (conceptual) connection between law and morality.

B. Legal Positivism

- 1. No necessary (conceptual) connection between law and morality (denial of NLLT).
- 2. Law is a species of rules or commands.

C. Legal Realism

- 1. Law is not a species of rules or commands—rules are not central to the concept of law (denial of LP).
- 2. Behavior of courts is central to the concept of law.
- 3. (Usually) a rejection of NLLT, as well.

III. A Crude Map

| | NLLT | LP | LR |
|-----------|---------|--------------|----------------------------|
| Atomistic | Aquinas | Austin | Frank, Holmes Llewellyn |
| Holistic | Fuller | Kelsen, Hart | Gray |

IV. Classical Natural Law Legal Theory—A Species of Natural Law Legal Theory

A. Specific Characteristics (distinction from NLLT, generally)

- 1. Natural Law Ethical Theory: A specific moral theory according to which moral rules are inherent in the nature of the universe and are discoverable by human reason in just the same ways that scientific laws are.
- 2. Necessary connection between law and morality is at the level of individual rules. There are two primary ways this has been interpreted.
 - a) “Bold” Classical NLLT: On this view, a rule’s being morally permissible is a *necessary* condition for it being (human) law and a rule’s being morally required is a *sufficient* condition for it being (human) law. Aquinas suggests this, saying: “Nothing stands firm with regard to practical reason, unless it be directed toward the last end which is the common good. Now whatever stands to reason in this sense has the nature of law” (p. 52). But this is not Aquinas’s considered conception of human law.

b) “Modest” Classical NLLT: A rule’s being morally permissible is a necessary condition for it being law. That is, a rule is a rule of law only if it is compatible with moral rules. Aquinas’s explicit definition of law says: “Law is nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community” (p. 52).

(1) Ambiguity:

(a) Weak Requirement: The content of the rule of law must be compatible with the content of moral rules.

(b) Strong Requirement: It must be consistent with moral rules that a rule with the content in question be a rule of law.

B. Aquinas’s Theory

1. Background: Voluntarism v. Rationalism. Is law a product of reason or of will?

Code of Justinian (Justinian the 1st, Code published in 529 A.D.): “Whatsoever pleaseth the prince, has the force of law”—interpreted to mean ‘*is* law’.

Aquinas was endorsing Rationalism against this sort of voluntaristic theory.

2. Assumptions:

a) It is the essence of law that it binds in conscience (is morally obligatory). He claims that ‘*lex*’ (law) is derived from ‘*ligare*’ (to bind).

b) Only God can bind in conscience (moral equality of human beings).

c) Thus, we can be bound in conscience to a political authority only if this bindingness is somehow derived from God.

(1) Ruler as Divine—ruled out

(2) Rule by Divine Right: possible, but not Aquinas’s answer, I don’t think.

(3) Human law is law only insofar as it is derived from the natural law (which reflects or exemplifies the eternal law, God’s law). Humans cannot *create* law (in the genuine sense) because we cannot create bindingness.

3. Plausibility

Aquinas is attempting to deny political absolutism (absolute and unlimited duty to obey the sovereign) within a framework that conferred authority on the dictates of the sovereign in virtue of their being derived from God’s law.

(i) One must obey the law because it is derived from God’s will. (It only looks as if it comes from a human ruler.) [Theory of Political Obligation]

(ii) God wills nothing unjust.

Therefore (iii) That which the ruler decrees that is unjust is not derived from God’s will (which is why one doesn’t have to obey it).

Therefore (iv) That which the ruler decrees that is unjust is not law.

Natural Law Legal Theory seems more plausible when you appreciate the framework in which Aquinas was working and what he was trying to do within that framework.