

LAW AND VIRTUE: AQUINAS AND AUGUSTINE

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The theme of this article is ambitious, and I hasten immediately to intimate a modesty in the venture which is perhaps not obvious in the title. Perhaps the first thing to say is that I shall simplify the import of the word virtue, for a thorough account of its meaning in the thought of both of our authors would occupy a disproportionate amount of time. I shall take it to mean moral goodness, though later it will be necessary to gloss that expression too. So we shall be concerned with law and goodness according to the thinking of Augustine and Aquinas. Subject to the gloss just mentioned, one might say that our concern is with the relationships between law and morality.¹

H. L. A. Hart has distinguished four questions which may be put concerning the relationships between morality and law. The first is whether the development of law has been influenced by the development of morals and vice versa. The second is whether some reference to morality must enter into the definition of law. The third is whether the law is open to moral criticism. And the fourth is whether it is the business of the law to enforce morality as such.²

To the first of these it is possible to answer yes, without here going into detail. One needs only to think of the interaction between moral notions and legislation concerning, for example, racial equality or labour relations, to see that there is a reciprocal influence between law and morals. One helps the other, one bears the other along. Moral insight generates legal reform, law may promote an improvement in moral performance.

Hart's second and third questions have been much discussed, both in the history of jurisprudence and in our own time. Again, we needn't rehearse ancient debates about natural law and positivism. It will perhaps do simply to recall the Nuremberg trials following the Second World War: the rejection of the defence of superior orders, and the recognition that some acts are 'crimes against humanity'. Even among philosophers who would not wish to subscribe to a notion of a 'natural law' there is a deep reluctance to dissociate morality and law totally.

And of course it is hardly necessary to stress the currency of Hart's fourth question: is the business of the law to enforce morality? The question evokes exchanges between John Stuart Mill and James Fitzjames Stephen but its more immediate resonance is with the modern debate between Hart and the late Lord Devlin.³ Nor is it definitively settled; for even if its theoretical dimension is not as much discussed as it used to be, its practical application remains actual. In my own country we have had recent active experience of the question, following a decision of the Supreme Court last year in what has become known as the X case. The morality and law concerning euthanasia is perhaps the most recent version of the question in Britain.

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1. This article is adapted from a paper delivered to the Ecclesiastical Law Society at Ripon on 23 April 1993.
 2. H. L. A. Hart, *Law, Liberty and Morality* (OUP 1968), p. 1f.
 3. Cf Patrick Devlin, *The Enforcement of Morals* (OUP 1965).

The law and virtue, law and goodness, law and morality: issues which remain current, which in one or another guise come up for discussion again and again. It would be wrong to seek in the Christian tradition the answers to the precise questions which emerge in modern experience. The ethos of North Africa in the twilight of the Roman Empire, the realities of law and of life in the Europe of the High Middle Ages: these are not the same as in the global village at the end of the second millenium. And yet Hart's questions are valid for them too; and the spirit of our tradition may be still instructive. Law, grace and liberty are perennial themes in our inheritance, and Augustine and Aquinas are chief among those who have fashioned our grasp of them.

I said earlier that we should have to gloss the word goodness in our context here. Our age is able to think of goodness in terms of a moral goodness not necessarily related to a religious or transcendent plane; we can think of good without God, goodness apart from 'holiness'. We are familiar with what is known as the autonomy of morals: the notion that morality can stand on its own feet, that it has an intrinsic worth, that it doesn't need buttressing by religious notions, least of all notions of a divine authority or of eternal sanctions. But for Augustine and Aquinas the *eudaimonia* of which Aristotle had spoken, the happiness which was the end of the good life, was nothing less than union with God or the vision of God. True goodness and holiness were one, the truly virtuous was the saint.

And that union, that vision, *beatitudo*, was grace. It was undue to human creatureliness, the less due because of the human creature's sin. And the faith, hope and charity in which *beatitudo* is inchoate are also grace: gifts which enhance and transform the human, and make it fit for the vision and for a sharing in the life of God. It is not that the 'natural' virtues have no worth; each of our authors in his way affirms their value, and Aquinas especially is emphatic that grace does not destroy nature but enhances it. But of themselves these virtues are not ordained to a supernatural *telos*. They become so only through the work of grace.

So when we speak of law and virtue as envisaged by Aquinas and Augustine we are thinking theologically, not philosophically. When we ask about the meaning of law in their perspective, our question is about law and salvation. Hart's questions hold, but they are transposed, seen now against a larger, richer backdrop. And here another caveat is called for. Augustine's theology of grace is complex, his reflections on free will and good and evil among the more difficult parts of his thought. He has been called the theologian both of Catholicism and of the Reformation, a designation which gives notice of the subtlety and complexity of his mind. Aquinas is more systematic, though not less subtle. The modesty of the present undertaking both requires and warrants simplifications, but we shall need to be on guard lest we distort.

I said a moment ago that Aquinas is the more systematic, and we shall see the force of this later. Augustine, in contrast, is an 'occasional' writer, his works – in Christopher Dawson's phrase – *livres de circonstance*. Much of his writing was done as bishop of Hippo, in response to this or that pastoral necessity, sometimes bearing traces of the heat of the moment. Moreover his education was the typical Roman education in rhetoric, in which he would have studied the great masters of Latin literature, chief among them Cicero, imbibing their thinking and learning their style. The training was a training in advocacy, in the court or in the forum: the style and art was in essence the style and art of the debater.⁴

4. An excellent account of the life and thought of St. Augustine is to be found in Peter Brown, *Augustine of Hippo* (Faber and Faber 1967).

And this is another reason why we have to take care in our reading of Augustine. His treatment of law is not, as Aquinas' is, a systematic treatment. Such thoughts as he has about it are scattered throughout his work, in varying contexts; sometimes explicit, sometimes to be inferred, as when he writes of justice and the true republic in *De Civitate Dei*. There is however one work in which he addresses the subject of law more comprehensively than elsewhere, though again only incidentally, and it will suit our purpose to make it the focus of our attention. The work is *De Libero Arbitrio*, begun at Rome in the year 387-388, a year after his baptism by St. Ambrose at Milan, and completed in 395 at Hippo, after he had been ordained priest. The part of the work which concerns us is Book One.⁵

De Libero Arbitrio Voluntatis, as the name implies, has to do with the freedom of the will, but with particular reference to the problem of evil, a pre-occupation of Augustine's since his Manichean days, and one to which he was to return before the end of his career in the great controversy with the Pelagians. It is in the form of a dialogue with a friend Evodius, and the question of law arises incidentally as they discuss the question of the source of evil.

For their first concern is with why we do evil, and they clear the way by considering what evil-doing is. Evodius mentions some particular evil deeds – adultery, homicide, and sacrilege – all of which are forbidden by the law. But they agree that these are not called evil just because forbidden by law; rather does the law forbid them because they are wrong. Augustine presses Evodius to the point where the latter concurs with him in the proposition that *libido* is the evil element in adultery.

Libido is difficult to translate, the more so perhaps because of its associations with psychoanalytic theory now. In Augustine's thinking it signifies the internal source of one's 'de-ordination', of disruption of due order in the person and in society, deflecting the will toward lesser goods and away from the *Summum Bonum*, God. It is an interior 'principle', a movement of will which turns away from God and invests itself in what is not God. And so the evil of adultery, Augustine says explicitly, is not 'in the overt act itself'; and he cites the case of a man 'who does not have an opportunity to lie with another's wife; but nevertheless, if it is somehow obvious that he would like to do so and would do so had he the opportunity, he is no less guilty than the man taken in the very act'.⁶

Thus he draws attention to the internal dimension of goodness and of evil-doing, to the fact that goodness or badness reside not just in the externally observable act or omission but in the 'heart'. He is of course echoing the teaching of Jesus, as when for example he condemned hatred and lust in Matthew's version of the Sermon on the Mount.⁷ The point will arise again when we come to look at what Aquinas has to say about the power of the law to enforce virtue and to prohibit vice.

A second item of interest is Augustine's distinguishing between human law and the law of God. The distinction arises when the friends come to discuss the case of someone who kills his master for fear of the torture which the master inflicts or will inflict upon him. Evodius considers this wrong, though he agrees

5. Hereinafter *D.L.A.* The translation here used, entitled *On Free Choice of the Will*, is that by Anna S. Benjamin and L. H. Hackstaff (The Library of Liberal Arts, Bobbs-Merrill Inc. 1964).

6. *D.L.A.* par. 20.

7. Mt. 5: 21-22, 27-28.

that not all killing is sinful; 'For when a soldier kills an enemy or the judge or official puts a criminal to death, or when, by chance, a man unwillingly or unwisely lets a weapon escape from his hand, I do not think that these men sin when they slay a man'.⁸

At first he sees the difference between the cases in terms of legality: 'For the former man acts according to the law or not contrary to the law; while the crime of the man who slays his master because of his fear of punishment is not approved by any law.'⁹ But Augustine says 'Again you bring me back to authority', and reminds him that the purpose of the discussion is 'to understand what we believe in',¹⁰ to ascertain what it is that makes it right for authority to legislate thus.

The detail of their argument need not detain us; its upshot in terms of our concerns is that there is a difference between the purview of 'the law of divine providence' and that of 'the law that is written to rule the people'.¹¹ 'The law of people deals with acts it must punish in order to keep peace among ignorant men, insofar as deeds can be governed by man; these other sins have suitable punishments from which, I think, only wisdom can free us'.¹² From this they move to a closer examination to the connection between eternal law and human law.

This section opens with Augustine's asking '... let us examine carefully ... how far evil deeds are to be punished by the law that governs people in this life. Then let us see what remains, to be punished by divine providence inevitably and in secret'.¹³ And he bids Evodius 'First tell me whether the law that is published in writing is helpful to men living in this life'.¹⁴ To which, of course, the answer is yes; and Augustine goes on to raise the question whether the law in certain circumstances might be changed, precisely so as to serve the public good.

The example which he takes is of a law providing for the election of magistrates by a given nation. '... [I]f a nation is well ordered and serious, a most watchful guardian of the common interest whose every citizen places the public good above his private interests, is not the law rightly made under which the people are allowed to elect magistrates of their own choice through whom their own welfare – that is, the public welfare – is administered?'¹⁵ But if the nation should become depraved, 'isn't it right that at such a time a good man ... should take the power of conferring offices from this people and reduce the government to a few noblemen or even to one?'¹⁶

Whatever we may think of this kind of solution to the problem of political corruption, Augustine's central point is simple and clear. The arrangements of human law (temporal law, as they agree to call it at this point) must conform to what is just and right. And they do so inasmuch as they conform to the 'law of the highest reason' (*summa ratio*) which alone is immutable and eternal.¹⁷ In temporal law, Augustine says, 'there is nothing just and lawful which men have not derived from eternal law. If a nation at one time confers offices justly and at

8. *DLA* par. 25.

9. *loc. cit.*

10. *DLA* par. 26.

11. *DLA* par. 40.

12. *Ibid.*

13. *DLA* par. 42.

14. *DLA* par. 43.

15. *DLA* par. 45.

16. *DLA* par. 46.

17. *DLA* par. 49.

another time, still quite justly, does not confer offices, this change, although it is temporal, is just; for it has been derived from eternal law, under which it is always just for a serious people to confer offices and for a fickle people to be unable to do so'.¹⁸

So much for Augustine and law and virtue, at least for the moment. It may be seen that even in *De Libero Arbitrio*, where if only by the way he concentrates on the theme for a while, there is nothing comprehensive or systematic about his approach. He is interested only incidentally. Not so with Aquinas, whose so-called 'Tract on Law' is a methodical examination of every aspect of his theme. The Tract comprises Questions 90 to 97 of the *Prima Secundae*, and it begins with an enquiry into the nature, kinds and effects of law in general. This is followed by a close examination of each of the main kinds Eternal Law, Natural Law and Human Law.¹⁹

When discussing the effects of law, one of Thomas' questions is whether it is an effect of law to make people good. And when treating human law he considers whether it is the business of the law to restrain all vice or to prescribe all acts of virtue. With these questions we are at the core of our own concern; but first, some introductory remarks.²⁰

The first thing to notice is Thomas' relative optimism concerning law's significance. The very setting of the treatise is the first clue. For the movement of thought in the *Prima Secundae* is from the human being's natural desire for God to the inbreak of the Gospel of Grace. Within the movement there is an acknowledgment of grace's loss through sin; and it is at this point that Thomas introduces a discussion of law in its various forms. A sense of his 'placing' of law is exactly conveyed even in the words with which the tract is prefaced: '*Consequenter considerandum est de principiis exterioribus actuum. Principium autem exterius ad malum inclinans est diabolus, de cuius tentatione in Primo dictum est. Principium autem exterius movens ad bonum est Deus, qui et nos instruit per legem et iuvat per gratiam*'.²¹

'*Nos instruit per legem*': law is one of the ways in which God brings us up, instructs us, builds us up, in virtue. Recall for a moment Augustine's conception: even in the passages which we have looked at it is plain that he thinks of law as coercive, as punitive even. Law is there, as the commentators put it, '*propter peccatum*', to curb our waywardness, to punish our sinfulness. Thomas will not ignore the coercive element, but his dominant conception is of law as directive, as educative. And so he breaks with the prevalent contemporary view, deriving ultimately from Augustine, albeit that Augustine is in so many ways Aquinas' source and authority.

The same optimism reappears in the final article of Question 92, which asks whether it is an effect of law to make people good. The heart of the answer is that it is, though, as we shall see, this is later importantly qualified in respect of human law. Yet from the outset he has an exalted view of even man-made law. Having established the existence of an Eternal Law whereby, 'the whole community of the universe is governed by God's mind', and of a Natural Law which is 'a sharing in the Eternal Law by rational creatures', he sees the law-maker's task as one of reasoning from Natural Law's principles to certain 'more specific arrangements', called human laws inasmuch as they 'fulfil the essential conditions

18. *DLA* par. 50.

19. The translation here used is that by Thomas Gilby in vol. 28 of the Blackfriars translation of the *Summa Theologiae*.

20. What follows is adapted from my *Church, State, Morality and Law* (Gill and Macmillan 1992).

21. Introduction to the 'Tract on Law', *Summa Theologiae* Prima Secundae (hereinafter *1a 2ae*).

of law already indicated'.²² These conditions have been set out in an examination of the nature of law: it is an ordinance of reason, made in aid of the common good, by whomever has charge of the community and promulgated.²³

Here is a view of human law which links it not just with the moral law but with God's design for the whole creation. In that design each creature has its purpose, each moves towards its goal. 'Among (beings) intelligent creatures are ranked under divine providence the more nobly because they take part in providence by providing for themselves and others'.²⁴ The human creature's goal is God, toward whom we move drawn by grace but freely. The human role is therefore creative, constructive: men and women, under God, have to make something of themselves and of their world, discovering and respecting the divine design.

So in Aquinas' view the making of law is in service of virtue; and law is derived (*derivetur*) from morality in two ways. First it may be deduced, as a conclusion is deduced from a premise: for instance, 'You must not commit murder' may be inferred from 'You must do harm to nobody'. Second, a law may be one of a number of alternative options for securing the realisation of a moral insight. So, for example, morality requires that crime be punished but it is for the lawmaker to choose the form which the punishment should take ('the punishment settled is like a determinate form given to natural law').²⁵

This is important, for it shows that though law in Thomas' mind always 'translates' a moral viewpoint, it is not always as by direct and necessary inference. Another way of putting this is to say that a particular piece of legislation, though it embodies a moral insight, may not be the only way in which the insight is concretised; and there is room for debate concerning the appropriateness of any particular item of lawmaking. 'The first process (deduction) is like that of the sciences where inferences are demonstratively drawn from principles. The second process is like that of the arts, where a special shape is given to a general idea, as when an architect determines that a house should be in this or that style'.²⁶

There is therefore an art of lawmaking and it is not the same as the art of the moralist, and its autonomy must be respected. This autonomy does not bespeak an indifference to morality: we have seen that both kinds of lawmaking render, even if in each case differently, an essentially moral insight. It does however mean that the moralist is not necessarily competent to say what the form of a law must be; and that whoever would do so must have regard to all the factors which may pertain to the care of the community in view of a common good.

Earlier I alluded to an optimism on the part of Aquinas concerning the place of law: it is one of the media which God may use to 'bring us up' (*instruere*) in virtue. And indeed he answers affirmatively the question 'Is making men good an effect of law'? At that point he is thinking of law in general, including God's law in its various forms, and not about the specific potential of human law, concerning which, as it turns out, his expectations are modest.

22. *1a 2ae* Q. 91, art. 3.

23. *1a 2ae* Q. 90.

24. *1a 2ae* Q. 91, art. 2.

25. *1a 2ae* Q. 95, art. 2.

26. *loc. cit.*

This question is first considered in a general way when he asks about the utility of man-made law. Although we have an 'innate bent' for virtue, yet 'to come to its fullness we need education:

Now for the young apt for deeds of virtue by good natural disposition or by custom or, better still, by divine gift, all that is required is the fatherly discipline of admonition. Not all the young, however, are like that; some are bumptious, headlong in vice, not amenable to advice, and these have to be held back from evil by fear and force, so that they at least stop doing mischief and leave others in peace. Becoming so habituated they may come to do of their own accord what earlier they did from fear, and grow virtuous. This schooling through the pressure exerted through the fear of punishment is the discipline of human law.²⁷

Later he asks whether it is the business of law to restrain all vice or enforce every virtue. It will be convenient if we take the second question first.

We have seen, says Thomas, that law is ordained to the common good, and in principle there is no virtue of which some activity cannot be prescribed by law. 'Nevertheless human law does not enjoin every act of every virtue, but those acts only which serve the common good, either immediately, as when the social order is directly involved from the nature of things, or mediately, as when measures of good discipline are passed by the legislator to train citizens to maintain justice and peace in the community.'²⁸

Moreover the law *per se* can touch only the external. Aquinas says that one may speak of an act of virtue in two senses; 'First, to refer to the deed of virtue, thus, for instance, the fair dealing in which justice is engaged, or the brave action in which courage is engaged. Secondly, to refer to its being done in the virtuous style of a good man: as such it always springs from virtue, and does not fall under the precept of the law, but is the end to which the lawgiver intends the law to lead.'²⁹ Again a reminder that there is an internal dimension to goodness which cannot be as it were enforced.

But should the law try to restrain every vice? The core of the answer is no; for

Law is laid down for a great number of people, of which the majority have no high standard of virtue. Therefore it does not forbid all the vices from which upright men can keep away, but only those grave ones which the average man can avoid, and chiefly those which do harm to others and which have to be stopped if human society is to be maintained, such as murder, theft and so forth.³⁰

Earlier he had observed that 'laws should be appointed to men according to their condition', and he quotes Isidore as remarking that law should be possible 'both according to the nature and custom of the country'.³¹ As we do not expect from a child the standard of virtue of an adult, so 'many things may be let pass in people of mediocre morals which cannot be countenanced in their betters.'³²

27. *1a 2ae* Q. 95.

28. *1a 2ae* Q. 96, art. 3.

29. *1a 2ae* Q. 96, art. 3, ad 2.

30. *1a 2ae* Q. 96, art. 2.

31. *1a 2ae* Q. 96, art 3.

32. *loc. cit.*

Here the notion of law as educative is maintained but there is a realism about its potential. Aquinas accepts as a fact that the majority 'have no high standard of morality' and he believes that the law must be accommodated accordingly. A later passage amplifies: 'The purpose of human law is to bring people to virtue, not suddenly but step by step. Therefore it does not all at once burden the crowd of imperfect men with the responsibilities assumed by men of the highest character, nor require them to keep away from all evils, lest, not sturdy enough to bear the strain, they break out into greater wrongs'.³³

Thomas' attitude here is far from a modern recognition of pluralism of moral value: differences of moral belief and performance are rooted in waywardness, and the law's accommodations are necessitated by regrettable practical necessity. The point to notice though is that he does not seek to impose ideal standards; not does he expect the law to bring about virtue in the full sense.

But notice especially that he has distinguished between the art and concerns of the lawmaker and those of the moralist as such. Moral value is reflected in the law but the law's role is not the simple promotion of morals. There may be more than one way to express in concrete command and prohibition the requirements of humanity's flourishing, and it is for the lawmaker to discover what is best. He will not try to enforce every possible virtue nor repress all vice.

And notice also the pertinent criteria: law enjoins the kind of virtuous behaviour which serves the common good, 'either immediately, as when the social order is directly involved from the nature of things, or mediately, as when measures of good discipline are passed by the legislator to train citizens to maintain justice and peace in the community'. And it prohibits chiefly those actions 'which do harm to others and have to be stopped if human society is to be maintained'. Murder and theft are the only two examples given but they are perhaps sufficiently suggestive.

Law and virtue, Aquinas and Augustine: what has our sketchy review revealed? Perhaps we can summarise by reference to Hart's questions; not to his first question – about the interrelationships in the respective developments of law and morality – for this would require a history, but to the other three.

The most straightforward one to answer is Hart's third question: whether the law is open to moral criticism. For, as we have seen, both Augustine and Aquinas in their different ways consider that legality and morality are not the same, and that the law must conform to justice. Aquinas stops short of saying that a law which is not just is not a law: 'A tyrannical law is not according to reason, and therefore is not straightforwardly a law, but rather a sort of crooked law (*perversitas legis*). All the same it possesses some quality of law in wanting the citizens to be good'.³⁴ Augustine is more blunt when he has Evodius say that 'in temporal law there is nothing just and lawful which men have not derived from eternal law'.³⁵

From these remarks their answers to Hart's second question might be inferred. Again, Augustine seems clearer, especially if what he says here is read in conjunction with the passage in *City of God* where he goes so far as to say that a republic or commonwealth which is not just is not a true republic.³⁶ Aquinas is

33. *1a 2ae* Q. 96, art. 3, ad 2.

34. *1a 2ae* Q. 92, art. 1, ad 4.

35. *DLA* par. 50.

36. *De Civitate Dei*. Bk. XIX, ch. 21.

reluctant to say that what is not just is no law: '*non est simpliciter lex, sed magis quaedam perversitas legis*'. And yet he defines law as an ordinance of reason, and one might suppose that this implies the necessity of conforming to morality or goodness. What is certain is that neither author could envisage the sort of positivism which would cut law adrift from morals altogether.

It is in reference to Hart's fourth question, the question known to us as that of the enforcement of morals, that our authors are most instructive. As usual Aquinas is the more explicit and systematic, but Augustine too provides a clue. Evodius says 'The law of the people deals with acts it must punish in order to keep peace among ignorant men, insofar as deeds can be governed by man'.³⁷ Augustine approves the distinction between what is punishable by the law of the land and what is better left to providence: 'The law which is made to govern states seems to you to make many concessions and to leave unpunished things which are avenged nonetheless by divine providence -- and rightly so'.³⁸

Thomas' position is in essence the same; indeed he cites these passages of Augustine. But, as we have seen, he expands the Augustinian insight in a manner which is alike sensitive to the realities of daily living and to the potential of law for the encouragement of virtue. It is part of law's purpose to bring people to virtue, but 'step by step' rather than suddenly. Human law can touch only external observance, not the mind and heart. Law is in aid of a common good, and should enjoin or prohibit only those acts which concern the common good, without the prohibition of which society would disintegrate. His mention of murder and theft may perhaps be taken to suggest a minimalist conception of the law's role.

I have already intimated that it would be wrong to insinuate that the standpoint of Aquinas -- and still less that of Augustine -- is that of a modern. But I suggest that the tenor and spirit of their approaches are nevertheless instructive. It is well to be aware that at the heart of the Christian tradition of theologising on law there was considerable subtlety, founded in a sense of the practical and the humane. In serving virtue law's prospects are modest: goodness cannot be forced. The making of law and its administration is always open to moral criticism but the priest may not usurp the ruler's role.

³⁷ *DLA* par. 40.

³⁸ *DLA* par. 41.