Clearing up some Natural Confusions about Natural Law

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Introduction

In his article "Some Natural Confusions about Natural Law," Philip Soper introduces what he calls *the natural law dilemma*:

> The dilemma of natural law is that, though it insists that the "higher law" of morality be used to test the claims of human institutions to determine obligations through law, the theory does not offer any advice about how to implement this "higher law" test **in an actual legal system**. Thus, even if one embraced the natural law idea, one could not escape the fact that the "higher law," by reference to which positive law is to be judged, must ultimately be invoked and interpreted by fallible human institutions, judicial or otherwise. Since humans can always be wrong in making these judgments, fiat (in the positivist's sense) will inevitably remain the last stop in any argument about what should be done from the legal point of view.[1]

By framing the problem in this way, Soper identifies two drastic outcomes that seem to result from natural law legal theory.[2] For if the

[1] Philip Soper, "Some Natural Confusions about Natural Law," *90 Michigan Law Review,* 2413 (Emphasis in text)).

[2] Soper distinguishes between natural law *moral theory*, which asserts that moral truths are objective and attainable through the use of reason, and natural law *legal theory*, which asserts that there is a necessary connection between positive law and morality, as opposed to

natural law legal theorist claims that the morality of positive law can only be tested in reference to a "higher law," he must also accept the fact that only fallible human institutions can do the testing. As a result, natural law legal theory seems to collapse into either legal positivism, because the law will ultimately be determined by what the fallible human authority says it is, or anarchy, because it must be left up to each individual citizen to determine whether the law ought to be followed.[3]

The aim of this paper will be to show that, when the procedural requirements in the lawgiving process and the moral claims of authority are *properly understood*, natural law legal theory does not produce Soper's dilemma.[4] Following St. Thomas Aquinas' teaching in his treatise on law, I will expose why the dilemma is not a real dilemma for natural law, properly understood, first, by developing the role of authority in specifying what human law should contain with respect to natural law, and second, by returning to some of Soper's more recent views about the claims that authority should have concerning the moral obligation to obey the law.

The Elements of Law

Aquinas defines law as "an ordinance of reason for the common good, made by him who has care of the community, and promul-

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legal positivism, which claims that this connection does not exist (Cf. Soper, "Some Natural Confusions," 2394-2395).

[3] "Fiat, it seems, must either always control – or it can never control (the law can never be said to impose obligations just because some person, including a judge, has decided it is morally appropriate)," (ibid., 2412); "It represents a charge that natural law legal theorists have always confronted; namely, that their theory has a built-in bias toward anarchy…" (ibid.).

[4] Soper himself, though he did pose the dilemma, does not presently hold to the position that natural law legal theory collapses into either legal positivism or anarchy. (Cf. Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002), 91-99). What his dilemma does effectively show is that the two problematic outcomes mentioned above arise for natural law legal theory when there is an inadequate understanding of what that theory actually claims. The reason why these outcomes are problematic for natural law is clear. Legal positivism, in claiming that there is no necessary relationship between law and morality, directly opposes the natural law position. Anarchy, on the other hand, is a position that undermines the very idea of law and authority, and hence, from a natural law perspective, this is not an acceptable outcome either. In this paper I will try to argue that when natural law legal theory is properly understood it is not produce these undesired results.

gated."[5] Analyzing the five elements contained within this definition, we will arrive at the first goal of our inquiry, namely, to determine the role of authority in translating[6] natural law into positive law.

For Aquinas, law, whether natural or positive is an ordinance of reason. This is readily seen when we consider Aquinas' division of the different types of law in the *Summa Theologiae*.[7] His analysis of law begins with the *eternal law* – the fountainhead of all law, which is nothing other than Divine Mind's providential rule over the universe.[8] As such, the eternal law is an ordinance of reason in the mind of God.[9]

After the eternal comes the *natural law*: our participation in the eternal law through the natural use of our reason. Our knowledge of natural law, however, which we understand in the form of general precepts, needs to be made more specific still. These specifications, which Aquinas calls the *human law*, are elaborated by practical reason and crafted, as it were, into positive law: positive because it is "posited" by the human authority.

But human law and positive law are not necessarily synonymous. For instance, some laws are divinely revealed; that is to say that they are made known to us through divine intervention and are not of human making. Nevertheless, this type of law can also be considered positive since it sets down, or posits, specific norms for human conduct, usually as it concerns to our relationship with God. Although God often reveals this sort of law through human mediation (most often in the form of a prophet or a scribe), the actual positing of this law is directly from God. As positive law, it differs from human law in that it not the product of human convention. Furthermore, it differs from the natural law in that it is not attainable to us through the exclusive use of our reason, since "the human reason cannot have a full par-

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[5] "Et sic… potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata," (St. Thomas Aquinas, *Summa Theologiae*, I-II, Q. 90, a. 4, c.).

[6] Understood here as the way in which lawmakers *specify* how natural law should be embodied in positive law (Cf. Robert P. George, "Natural Law and Positive Law," in *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), 108). We will see that the "translation" of natural law into positive law takes place in the form of a "*determinatio*."

[7] Cf. Aquinas, *Summa Theol*., I-II, Q. 90, a. 1-a.4.

[8] "Et ideo ipsa ratio gubernationis rerum in deo sicut in principe universitatis existens, legis habet rationem" (ibid., I-II, Q. 91, a. 1, c.).

[9] Strictly speaking reason as such is an operation of the human intellect, which is not found in God. Thus Aquinas speaks of reason in a much wider sense when referring to *divine reason*. Here it should be taken to mean the divine mind (Cf. ibid., I-II, Q. 93, a. 1, c.).

ticipation of the dictate of the Divine Reason, but according to its own mode, and imperfectly."[10] Accordingly, Aquinas gives this type of law a name of its own: *divine law*.

In this analysis of law we can distinguish the first two elements contained in Aquinas' definition of law. Law is an *ordinance*, but more specifically, it is an ordinance *of reason*.[11] If law were merely a command, then the legal positivist would be right: the law would be reducible to what the ruling authority says it is, simply because it has the power to give orders and make others obey.

But the law is not merely a blind order or the sheer imposition of will without the guiding principles of reason. As seen in all of the four varieties of law mentioned above – all of which conform to St. Thomas' definition of law – law consists in reason's ordering something or someone towards a desired end. Hence by "an ordinance of reason," we are to understand that "all law proceeds from the *reason and will* of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason."[12]

The next element in the definition gives the purpose of the law: for the *common good*. When laws serve *exclusively* the interest of those who issue them or favor *disproportionately* one group over another at the expense of the common good, they are to that extent unjust. Some people, including Philip Soper himself, would question whether they should even be called laws.[13] According to Aquinas' definition, at any rate, laws that do not serve the common good are laws in name only, for rather than being just, they are, in effect, corruptions of the law.[14]

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[10] Ibid., I-II, Q. 91, a.3, ad. 1.

[11] Law is *primarily* in the reason, and *secondarily* in those things that are governed or directed by reason toward their end, that is to say, governed by law (Cf. ibid., I-II, Q. 90, a. 1, ad. 1). But the will, by its very nature, is inclined to its object as presented to it as a good by practical reason (Cf. ibid., I-II, Q. 94, a. 2, c). Hence the law is not in the will except insofar as the will is governed by reason in its activity. Thus it is shown that law is primarily in reason and secondarily in the will. No law, therefore, be it positive or otherwise, is a sheer imposition of the will.

[12] Aquinas, *Summa theol*., I-II, Q. 97, a. 3, c.

[13] Cf. Soper, *The Ethics of Deference*, 91. This seems to raise the question about who should decide when the authority is no longer acting for the sake of the common good. For the answer to this question and for the subsequent reasons why this does not lead to anarchy (and hence back into Soper's dilemma).

[14] "… non erit lex sed legis corruptio" (Aquinas, *Summa theol.,* I-II, Q. 95, a. 2, c); "…lex mihi esse non videtur, quae iusta non fuerit" (St. Agustine, *De libero arbitrio*, I, 5, 11).

This brings us to a key point in our discussion. The fourth element of Aquinas' definition of law concerns the principle of authority and its role in issuing laws. Aquinas tells us that law is "made by *him who has the care of the community*."[15] To a certain extent, we can compare the task of enacting legislation to the role of a father[16] in caring for his family. In order to ensure the proper order with in his household (which is nothing other than a small community) the father has the right and obligation to give orders to the members of his family and to see to it that they are followed. If they are not followed the offenders – in this case, his children – may expect to be punished.

In a more extensive way, the task of making laws for large communities pertains to the legitimate authority who has the care of such communities, i.e. cities, states or nations. It is important to stress that political authorities possess the faculty of issuing laws due to the fact that the very nature of society – people living together, united by certain bonds that order their lives toward a particular end[17] – demands it. For the very principle of their authority is founded on the need to order the human affairs within society toward the common good. *Someone*, therefore, must make the appropriate decisions for the sake of ordering society toward its proper end, and this person is the one who has the care of the community.[18] Otherwise there would be a state of disorder and chaos, and for that matter, there would be no society at all.

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[15] I have not included the concept of "making" as one of the elements within the definition of law. This is for two reasons. First, the original Latin text does not use this term. Second, the concept of "making" cannot apply to eternal law in the same way that it applies to human law, since eternal law is nothing other than God's providence, which is one of God's acts. But God's acts are coextensive with his nature, which exists from all eternity and is therefore not-made. On the other hand, one could argue that when God creates the creature, he creates the law that governs its nature, and in that sense, God makes law.

[16] This does not apply exclusively to the adult male authority figure within the household, but to whoever has the authority over a given household: father, mother, grandparent, stepparent, legal guardian, etc.

[17] Aristotle *Politics* III 1280b15-1281a2.

[18] "It is also because, as the theory of *determinatio* implies, many problems of social life can be solved in more than one, perhaps many, different reasonable ways. So in relation to this wide range of problems, agreement that some form of co-ordination is required will be much easier to reach than agreement about the appropriate form of co-operation is. Even if disagreement about what the appropriate form of co-ordination could in practice be settled by some other means, it rarely could be settled peacefully and fairly without an authoritative decision" (John Finnis, *Aquinas: Political, Moral and Legal Theory* (Oxford: Oxford University Press, 1998), 269); Cf. Soper, *The Ethics of Deference*, 96.

As we will see further on, this point is crucial in understanding why the authority's role in issuing binding laws does not ensnare lawmakers in Soper's dilemma. But before moving on to discuss the procedural requirements that authority must follow in enacting positive law, there remains one final element in the definition of law that needs to be addressed. In order for a law to be binding, that is to say, in order for it to have the force of law, it must be *promulgated*.

From a practical standpoint, the need for promulgation within human society is readily seen.[19] Unless people are properly informed about matters pertaining to legality – what side of the street they are supposed to drive on, where they are allowed or not allowed to smoke, what percentage of their income they are required to surrender to the government in the form of paying taxes, what type of food items they are permitted to bring into the country – they cannot be accused of doing wrong for acting contrary to the reasoned will of the competent authority. In other words, unless the law is promulgated, would be offenders cannot be said to have broken any law. It follows that while government officials have the right to give orders, by the same token they have the duty of making their orders known to the public. For without promulgation, their orders could not be followed, and therefore would be no law at all.

Thus, according to the natural law position, a law is nothing other than "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[20] Once the terms of this definition have been satisfied, laws made in accordance with these terms have obligatory force and therefore must be obeyed. *But to understand why they must be obeyed, even in the event that the content of the law may contain a flaw, one must first understand what the claims of legal authority (acting in good faith) are regarding the obligation to obey*. For now, we will postpone the grounds for legal obligation until after we have explained the way in which the legitimate

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[19] It is not as obvious, however, how the notion of promulgation applies to types of law other than human law. But as it is part of the definition of law in general, law needs to be promulgated for rational human beings, but to all other creatures as well. God promulgates his laws to all of creation through his governance over the entire universe through providence, which is nothing other than the eternal law. He thus communicates, or promulgates as it were, to each creature the "laws" governing their nature by fashioning them in such a way. Thus, although they are unaware of it, laws are promulgated to non-rational creatures through rules fashioned by God, the creator, who governs their nature.

[20] See note 5 above.

authority "determines" how human law should be crafted in such a way that it properly meets the moral requirements of the natural law.

"Determinations" of Law

Having discussed the various types of law and the elements that compose the definition of law, we are now at a point where we can analyze the procedure by which positive law is derived from natural law. To aid our discussion we will pose the following question: if the natural law is supposed to come to us "naturally" through the correct use of right reason, why is there even a need for humans to make positive law? In answer, Aquinas tells us that natural law is known to practical reason in the form of general precepts, the first precept being "do good and avoid evil."[21] Through this general understanding of the first moral precept the human person readily acknowledges himself as a moral agent, responsible for his actions.

But the mere awareness of the fact that one has moral obligations says nothing about how one must behave in contingent matters, such as, what side of the street to drive on and how much of one's income to pay to the government in the form of taxes, or even why one must pay taxes in the first place. Hence, "human reason needs to proceed to the more particular *determination* of certain matters."[22]These determinations (*determinationes*), when they conform to the conditions stipulated by the definition of law, are precisely what we call positive law, or in Aquinas' own terms, human law.[23] "Thus, a morally valid authority, in a sense, derives the positive law from the natural law; or… translates natural principles of justice and political morality into rules and principles of positive law."[24]

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[21] "Hoc est ergo primum praeceptum legis, quod bonum est faciendum et prosequendum, et malum vitandum. Et super hoc fundantur omnia alia praecepta legis naturae…" (ibid. I-II, Q. 94, a. 2, c.). The more literal translation, "Good is to be done and pursued, and evil avoided," shows that practical reason grasps the first principle as an obligation, something that one ought or ought not to do.

[22] Ibid., I-II, Q. 91, a. 3, c (Emphasis is mine).

[23] "Et istae particulares dispositiones adinventae secundum rationem humanam, dicuntur leges humanae, servatis aliis conditionibus quae pertinent ad rationem legis…" (ibid.). Of course one may find cases where *positive* laws do not correspond to the prescribed conditions, but for this reason they would be considered unjust.

[24] George, "Natural Law and Positive Law," 108.

It is along these lines, then, that we will be able to determine how the competent authority translates natural law into positive law. In other words, having already seen that it pertains to the one who has care of the community to promulgate laws for the sake of the common good, we must now consider how these determinations are derived[25] from the first precepts of natural law in such a way that they become positive law – and binding – for us.

Aquinas speaks of two ways in which something is derived from the natural law: "First, as a conclusion from premises, secondly, by way of determination of certain generalities."[26] In the first way laws are derived as conclusions from the first precepts of natural law. For example (the one Aquinas provides) the conclusion one must not kill is derived from the general precept one should do harm to no man.[27] These types of laws, being derived directly from the first precepts of the law, have the force of natural law and oblige compliance from all men at all times. Yet they are still very general, and therefore they need further determination.

For instance, from the precept of natural law that one should not endanger one's own life or the lives of other people we can arrive at the conclusion that one should drive safely. This, however, says nothing about what side of the street one should drive on or when one should be expected to stop at an intersection. Doubtless, these are determinations that need to be made in order to ensure safety on the highway. Once the public authority reaches an appropriate conclusion it drafts and promulgates laws on specific matters. Henceforth, such laws are binding, even though they do not hold for all people at all ti-

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[25] "To say that all human laws are derived from the natural law does not mean that all the specific determinations of human law must already be contained within the natural law. All human laws are derived from the natural law in the sense that all human laws — if they are to be called laws in the normative sense of the term — must contain specific determinations that promote the common good, and the good for individuals, within a particular society. Since all human activity is ordered to the good by virtue of the natural law, it follows that all positive law that promotes social and individual good (i.e., all human law in the normative sense) receives its orientation from the natural law, and is therefore derived from the natural law," (Michael Baur, "Natural Law and the Legislation of Virtue: Historicity, Positivity, and Circularity," in *Vera Lex* (2001), 58)

[26] Aquinas, *Summa theol.,* I-II, Q. 95, a. 2, c. "The derivation of human law from natural law *is not immediate and direct*, but takes place through what Aquinas calls "determination." (Baur, "Natural Law and the Legislation of Virtue," 57 (Emphasis is mine.)).

[27] Cf. Aquinas, *Summa theol.,* I-II, Q. 95, a. 2, c. The fact that this general precept needs to be determined further can be seen in the fact that the natural law justifies the taking of human life in certain instances, such as in self-defense, just war and capital punishment.

mes. Otherwise, these determinations of law would inevitably lead to contradictions: people in London drive on the left side of the street while people in the New York drive on the right side of the street; if specific determination of the law were to oblige all people of all times, then Londoners and New Yorkers could rightfully accuse one another of violating the natural law. But this is manifestly absurd.

Thus, the second way in which laws are derived from the natural law leads to determinations which, unlike the laws derived in the first way, "have no other force than that of human law."[28] Nevertheless, all human laws, when they are just – we will consider the state of affairs concerning unjust laws in the next section – oblige in conscience, in as much as their moral content is ultimately derived from the eternal law,[29] whose author is God himself.

The upshot of this part of the discussion is that *whoever has the care of the community always promulgates laws in conformity with the natural law* provided that he does not exceed the bounds of his authority and that his ordinances are directed toward the common good.[30] Human laws, fashioned accordingly, are mere instantiations of natural law from whence they are derived.

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[28] Ibid. However, in saying that these laws only have the force of human law, Aquinas is making the point that these laws do oblige, and their obligatory force arises from the fact that they have been posited (by the appropriate authority, for the sake of the common good and promulgated). To this Finnis add the following. "The precise requirements imposed in laws made by *determinatio* would indeed have no moral force but for those laws' enactment, and the lawmaker had no moral duty to make precisely those laws. But once such law has been made, its directiveness derives not only from the fact of its creation by some recognized source of law (legislation, judicial decision, custom, etc.), but also from its rational connection with some principle or precept of morality (Finnis, *Aquinas*, 267). Hence human law's obligatory force rests both in its being posited by the proper authority, and in its moral content, as having been derived (by means of deduction or *determinatio*) from the natural law.

[29] "Respondeo dicendum quod leges positae humanitus vel sunt iustae, vel iniustae. Si quidem iustae sint, habent vim obligandi in foro conscientiae a lege aeterna, a qua derivantur;" (ibid., I-II, Q. 96, a. 4, c.); "…manifestum est quod *omnia participant aliqualiter legem aeternam*, inquantum scilicet ex *impressione eius habent inclinationes in proprios actus et fines*…. [lux] rationis naturalis, quo discernimus quid sit bonum et malum, quod pertinet ad naturalem legem, nihil aliud sit quam *impressio divini luminis in nobis*. Unde patet quod lex naturalis nihil aliud est quam participation legis aeternae in rationali creatura" (ibid., Q. 91, a. 2, c. (Emphasis is mine.)).

[30] Another stipulation should be mentioned regarding the form of the law. The burden of the law should be fairly distributed proportionate to the needs and abilities of those who are under the law (Cf. ibid., Q. 96, a. 4, c). For instance, on these grounds a government may favor a graduated tax system, based on the varying levels of income, rather than a flat tax system (or vice versa), and in certain cases may exempt certain parties from paying taxes – all with a view toward the common good.

As such, they oblige the human conscience, which by nature assents to the first principles of natural law.[31] Hence, "it is meaningful and correct to say that the legislator… makes the natural law effective for his community by deriving the positive law from the natural law."[32] Nevertheless, due to the fact that human lawgivers are fallible individuals, it is inevitable that theirs efforts to make good laws will at times miscarry. In the following sections we will study the conditions for when a law fails to measure up to the criteria for justice regarding its author, end, and form. We will also consider whether or not a person may still be obliged to follow a law, even if it does not meet all of the required standards of legality. Finally, we will see that when citizens discern that a particular law's content is unjust, the state may still expect them to comply with what the law says, based on the authority's having made the good faith attempt to act as it saw best in the interest of its citizens.[33]

"Perversions" of Law

Having seen the criteria for when laws are said to be just, and thus binding, we will now consider the conditions under which a law is unjust. Once we have finished discussing the conditions for unjust laws we will entertain the question of whether a person may still be obliged in conscious to follow the law. Aquinas divides unjust laws into two large – sometimes overlapping – categories: laws that are contrary to the human good and laws that are contrary to the divine good.[34] Within the first heading, the criteria for unjust laws parallel the ones for just laws: laws can be contrary to the human good in one of three ways, regarding author, end and form.

Regarding the *end*, a lawmaker issues an unjust law when he "imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory."[35] Examples of such laws would include a lawmaker's decision to raise taxes

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[31] "…dicendum quod synderesis dicitur lex intellectus nostri, inquantum est habitus continens praecepta legis naturalis, quae sunt prima principia operum humanorum" (ibid., I-II, Q. 94, a. 1, ad. 2); Cf. *In II sententiarum* D. 24, Q 2 a. 4.; Cf. *Summa theol.,* I, Q. 79, a. 12.

[32] Cf. George, "Natural Law and Positive Law," 109.

[33] Soper, *The Ethics of Deference*, 96-97, et passim.

[34] Cf. Aquinas, *Summa theol.,* I-II, Q. 96, a. 4, c.

[35] Ibid.

solely in order to raise his own salary or to pass legislation that favors a certain lobbying group only in order to secure his own reelection.[36]

It is not always easy to assess when the authority errs in this way, since it depends in great part on whether or not it has made the honest attempt to serve the common good. But to question this is to question the integrity of the authority itself and since this depends, in part, on the good intentions of the group or individual in question, it is not always easy to judge.[37] The only way to discern an answer to this question, unless the authority outwardly expresses that it has wicked intentions, is to consider the results: does the law *disproportionately favor* the person in charge and simultaneously impose *unfair burdens* on sectors of society, or society at large?

If the answer is yes, then it may be safe to assume that the authority is not acting in good faith for the sake of the common good, but rather for his own "cupidity or vainglory." For this reason, Aquinas qualifies his statement concerning laws that are unjust according to their end by calling them "burdensome" laws.[38] Hence, whenever a lawgiver levels an excessive burden on others and reaps the benefits for himself, he does not have the common good in mind, in which case, his laws are unjust. Whether or not one should have to follow such laws is a matter that we will soon address.

Having mentioned the burden of the law, we now move on to consider how a law may be unjust according to its *form*. Aquinas adds that even a law with the common good in mind may still be unjust if "burdens are imposed unequally on the community."[39] Again, it is not always easy to say when the law errs in this regard, as it is often the case that certain individuals or sectors of society have to bear the brunt of the law for the sake of the common good. Here the qualifying word he uses is "unequally" or "disproportionately." That is to say that even if the vast majority of society benefits from the law, the law would be unfair – and hence unjust – if a given group of individuals

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[36] Cf. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1992), 360.

[37] The lawgiver's intention is a necessary condition but, as we will see later, the good faith attempt to foster the common good does affect whether the citizen is under moral obligation to obey the law.

[38] "…sicut cum aliquis praesidens *leges* imponit *onerosas* subditis non pertinentes ad utilitatem communem," (ibid. (Emphasis is mine.)).

[39] "…cum *inaequaliter* onera multitudini dispensantur," (Aquinas, *Summa theol.,* I-II, Q. 96, a. 4, c. (Emphasis ismine.)).

should suffer *disproportionately* as a result. Such laws would include those which oppress the poor by adding undue stress to their economic condition, as in the case of excessive taxation. If laws that impose *excessive* burdens on certain members of society are not somehow redressed or offset by further acts of the law – tax relief for lower income families, for example – they become "acts of violence rather than laws."[40]

Finally, a law may be contrary to the human good in respect to its *author* when the lawgiver oversteps the bounds of his authority in issuing a particular law. Now, as we have already seen, not just any man can make laws, but only the one who has the care of the community. But the position of being in charge of the community does not give a person the right to issue just any law, as the previous two criteria for when a law is unjust clearly show. Yet the act of enacting laws that exceed the range of one's authority – not withstanding the possibility that lawmakers may sometimes err while attempting to act in good faith – is a grave perversion of the law, for in this case, the lawmaker usurps the authority – and hence the rights – of another authority, often a higher one.

This brings us to Aquinas' second category of unjust laws, those which oppose the divine good, by which he means any human law that contradicts the divine law. After giving the example of laws commanding idol worship, he goes on to add (in a response to one of his objections) that "This argument[41] is true of laws that are contrary to the commandments of God, which is *beyond the scope of (human) power*. Wherefore in such matters human law should not be obeyed."[42]

In this passage, St. Thomas raises three points regarding laws in opposition to the divine good. First, he is referring to laws that are contrary to the commandments of God, which would include but not be confined to the laws of the Decalogue: such as, "You shall not murder. You shall not commit adultery. You shall not steal. You shall

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[40] Ibid.

[41] i.e., the argument from the second objection, which reads: "The judgment of conscience depends chiefly on the commandments of God. But sometimes God's commandments are made void by human laws," (Aquinas, *Summa theol.,* I-II, Q. 96, a. 4, ob. 2). The key point, that the judgment of conscience depends chiefly on the commandments of God, is what he will use to turn the argument around in the response to this objection: God's commandments are not made void by human laws, but vice versa.

[42] Ibid*.,* I-II, Q. 96, a. 4, ad. 2 (Emphasis is mine.).

not bear false witness against your neighbor,"[43] and so on. Hence, as an example, any order that would entail taking the life of innocent human beings,[44] something clearly contrary to natural law, would, at the same time, be violating the divine law as well.[45] The abortion laws in China would seemingly fall under this category.

Second, he indicates that these laws are unjust by opposing the human good as regards their author, by saying that they are "*beyond the scope of human power*." This in and of itself would result in a perversion of the law, since it automatically qualifies as an unjust law according to its author. But the real issue here is not so much a matter of who is breaching authority, as whose authority is being breached. If the creature is laying claims to authority that is not his, but God's alone, then such an act amounts to the usurpation of divine authority. Accordingly, the legislator who passes laws that violate the divine good errs grossly by taking upon himself a claim to authority that belongs to God alone, thus surpassing the parameters of human authority. Consequently, he violates the human good as well. Thus the act of issuing such a law is doubly illicit.

Finally Aquinas points out that in cases where human law oversteps its bounds and contradicts divine authority, *it should not be obeyed*. This is stated more emphatically in the body of the article where he says that it is never licit to obey such a law under any circumstances.[46] Though he immediately goes on to support his reasoning with an argument from divine authority so as to make his point clear,[47] from a philosophical perspective the thrust of this argument is latently contained in the objection to which he is responding: "The judgment of conscience depends chiefly on the commandments of God."[48] As a result, if a human law contradicts divine authority, it should never be

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[43] Ex. 20:13-16. These laws of the Decalogue are apparent to human reason as well, and as such are in someway contained in the natural law. Thus even if one did not know of the laws of the ten commandment, he would be obliged not to obey laws at odds with the precepts contained within them: "Obviously, if the law purports to require its subjects to do things of the sort that no one should ever do, it cannot rightly be complied with; one's moral obligation is not to obey but to disobey. And if it purports to authorize such acts (e.g. rape, theft, or infanticide), its authorization is morally void and of no effect" (Finnis, *Aquinas*, 272).

[44] Notwithstanding the principle of double effect.

[45] "The murder of a human being is gravely contrary to the dignity of the person and the holiness of the Creator" (*Catechism of the Catholic Church*, 2320).

[46] "Et tales leges nullo modo licet observare," Aquinas, *Summa theol.,* I-II, Q. 96, a. 4, c.

[47] "We ought to obey God rather than man" (Acts 5:29).

[48] See note 41 above.

obeyed, since the conscience is bound, first and foremost, by divine authority. *As a result,* St. Thomas concludes, *one is obliged in conscience never to obey any human law that contradicts the divine law*.

At this point in the argument we are entering into conflict with Soper's dilemma gain. For in saying that one must never obey a law at odds with the divine good, doesn't Aquinas grant the citizen a certain margin within which to decide whether a given law enters into conflict with what he or she believes to be the divine law? And subsequently, does this not mean that the citizen can then decide whether or not he or she ought to obey the law?

In a pluralistic society where the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[49] the answer (to the first question at least) appears to be yes, since within such a society citizens are then at liberty to profess their credence in the religion of their choice. This, in turn, seems to leaves the door open for citizens to make claims based on what they believe to be "divinely mandated" religious obligations that are at odds with the laws of the state. But if Aquinas is right in saying that the citizen must never obey any law that contradicts the divine law (as he or she understands it to be), then why does this not lead to anarchy?

In answer to this question, we have to start by saying that it is doubtful whether Aquinas had the notion of a pluralistic democracy in mind when wrote his "Treatise on Law" within the *Summa*, (though this is not to say that he was unaware of such a notion). In order to understand the full intent of the author, it is always fitting to consider the time and geopolitical situation in which he lived. And so, one ought to approach this text and interpret it within the context of Medieval Christendom, where all men of good will recognized the universal authority of the *one true God of Christianity* and the *establishment of his Kingdom* on earth.[50] When thus perceived within this non-pluralistic worldview where the temporal ruler was considered to be a steward ruling in God's stead,[51] the concept of divine usurpation makes more sense and the words "obey no law at odds with the divine law" take on a meaning entirely different from the one they have within context of a pluralistic democracy. For when the state recognizes

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[49] U.S. Constitution, amend. 1 (Free Exercise Clause).

[50] Cf. Aquinas, *On Kingship,* II, 2.

[51] Cf. ibid., II, 3; cf. ibid., II, 4.

only one Church, there can be little dispute among the citizens about what the divine law commands.

However, regarding the duty to obey the demands of conscience, Aquinas clearly held that one is *always* obliged to follow one's conscience (regardless of cultural or historical circumstances), even in the case of an erring conscience.[52] And therefore, he would hold that an individual in a pluralistic democracy is still obliged to obey what he or she believes to be the divine law, because the divine law binds the conscience.[53] *But this does not mean that the state is obliged to make provisions for every individual's conscience*.[54] In a pluralistic democracy whose constitution disallows the favoring of one religion over another the law remains the law[55] despite whatever the individual's religiously informed conscience may demand.[56] If an individual's religious duty commands him to do something that is against the law, and he does it, he breaks the law.

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[52] But it is important to understand the proper sense in which one is bound by conscience: "For conscience is said to bind in so far as one sins if he does not follow his conscience, but not in the sense that he acts correctly if he does follow it" (Aquinas, *Disputed Questions on the Truth*, Q. II, a. 17, c.).

[53] Cf. ibid.

[54] In a case where two members of the North American Church claimed that their First Amendment rights were violated when they were fired from their jobs and subsequently denied unemployment compensation for having ingested peyote *for sacramental reasons*, The United States Supreme Court held that "The Free Exercise Clause [of the first amendment] permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use" (Employment Div., Ore. Dept. Of Human Res. V. Smith, 494 U.S. 872 (1990)). This decision was held on the grounds that "although a State would be 'prohibiting the free exercise [of religion]' in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons" (ibid.).

[55] But in order to keep from falling back into positivism, we must add the following. The law remains the law when the competent authority, acting in good faith, has done its best to ensure that the law meets all of the requirements of a just law according to author end and form. In the event that a lawmaker should enact a law with the intention of contradicting the divine law, that law would definitely be unjust.

[56] In this regard, Justice Scalia, in his opinion concerning the right for members of the North American Church to use sacramental peyote (See note 54 above), made the following observation. "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs" (Dept. Of Human Res. V. Smith).

Thus, from the natural law tenet that one must never obey a law at odds with the divine law, it does not follow that it is ultimately up to each individual's conscience whether a given law contradicts the divine law and ought not to be obeyed. This is not to say that a devout individual may never find herself in a position where she must decide whether or not she may have to break the law on the grounds that she must follow her own religiously informed conscience. But in this case, if she should decide that breaking the law is the only morally licit option based on her religious convictions, she does so knowing that she may have to pay the penalty for breaking the law. As long as the law remains in place and can potentially be enforced, there is no question of anarchy.

Hence, even in the event that the public authority should pass an unjust law (in any of the ways described above) the citizen still does not have right to disregard the law *strictly on the grounds that he or she deems it unfit to follow*. For if the law can remain a law even when it obliges (or forbids) something that violates (or is prescribed by) an individual's personal religious beliefs – thereby violating the divine good as far as that individual is concerned – then, *a fortiori*, a law can remain a law, and hence enforceable, when it seems to violate the human good as well. That is to say that one may still be obliged to obey the law, even when it is evidently unjust according to author, end, or form regarding the human good. In this respect St. Thomas claims that "[unjust] 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."[57]

In his book, *The Ethics of Deference*, Philip Soper seems to hold a similar view. For he concurs with Aquinas and Augustine in saying that "if the law is too unjust, then it 'is no law at all.'"[58] In another place he adds, as Aquinas does, that there still may be reasons why one may be expected to obey a law when it appears to be unjust:[59] "Only in extreme cases of wicked law, not ordinary cases of injustice, will the law lose its ability to claim that coercion is morally justi-

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[57] Aquinas, *Summa theol.,* I-II, Q. 96, a. 4, c.

[58] Soper, *The Ethics of Deference*, 91; Cf. Aquinas, *Summa theol.,* I-II, Q. 95, a. 2, c.; Cf. Agustine, *De libero arbitrio*, I, 5, 11.

[59] Though he maintains that the authority's coercive claims can only be justified when the authority believes that the content of the law is just and that the citizen's correlative duty to obey the law is content-dependent.

fied."[60] That is to say that the law is still legal (to the extent that it is enforceable), since by Soper's own standards, the law's ability to claim that coercion is morally justified can only be rooted in the authority's belief that the content of the law is moral.[61] Consequently, if the law lacks the morally justifiable ability to coerce (which derives its force from the moral content of the law), then it would be too unjust and not a law at all.

John Finnis, however takes a different approach to the question of whether "an unjust law is no law at all" and adds the "Thomistic" distinction between the law *simpliciter* and law *secundum quid* (i.e. qua unjust). This distinction, he says, needs to be made in order to keep the statement from being a flat contradiction: "an unjust LAW is not a LAW." Finnis holds that it is still a law in *an important respect*: "it is the command of a superior to his subordinates (and in this respect is calculated to render the members of the community 'good', through their compliance with it – not [of course] good *simpliciter*, but good relative to that [tyrannical, unreasonable] regime)."[62] Hence, Finnis does not hold, and questions whether St. Thomas held, that an unjust law is no law at all, *strictly speaking*.

He also believes that citizens may still find reasons to obey, "such unjust laws in order to uphold respect for the legal system as a whole…"[63] That is to say that one must also take into consideration the justice of the whole system of law and not only the injustice of the law in question when deciding if a law is or is not to be followed.[64] This, however, is not the opinion held by Soper, who holds that in cases of "too-unjust" or "wicked" law, the law is no law at all.

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[60] Soper, *The Ethics of Deference*, 97.

[61] "The only claim one can derive from the concept of law *as a matter of legal theory* is the weaker claim (I will explain below what this weaker claim amounts to) of coercive authority; in particular, the only reasons law claims citizens have for following the law are content-dependent ones (obey the law because the content is just) or coercive ones (obey the law because we have the right to impose sanctions if you don't). Law does not claim that citizens have content-independent reasons to obey or that citizens have reasons to defer to the law just because it is law" (ibid., 54) (Emphasis in text).

[62] Finnis, *NLNR*, 363-364. (Brackets in text).

[63] Ibid., 365.

[64] "If an unjust stipulation is, in fact, homogeneous with other laws in its formal source, in its reception by courts and officials and in its common acceptance, the good citizen may (not always) be morally required to conform to that stipulation to the extent necessary to avoid weakening 'the law', the legal system (of rules, institutions, and dispositions) as a whole." (ibid., 362).

The question for Soper, then, must be, "how does one discern the difference between cases of "too unjust" law (what he also calls "wicked law") and ordinary cases of unjust law and who does the discerning?" In response Soper says the following:

> The state's ability to deny moral culpability and thus to distinguish itself from a coercive system, reaches a limit when the law that is enforced is so unjust as to override the excuse that "*we acted in good faith as we thought best*." The instances in which this limit is reached in practice are likely to be rare for two reasons: (1) it is only serious moral error (*which no reasonable person could in good faith fail to acknowledge*) that limit's the law's ability to make the normative claim of justice; (2) the decision that even this extreme case will itself have to be made by a potentially fallible institution…[65]

In other words, there can be occasions when a law is too unjust to oblige compliance. These cases of "too unjust" law occur when, *as a matter of practical reasonableness*,[66] it is clear to all reasonable people that the public authority can no longer claim that "*we acted in good faith as we saw best*." So, in answer to the question about how one discerns that a law is too unjust, Soper affirms that it is a matter of practical reasonableness: no reasonable person could fail to acknowledge it. Hence, laws commanding willful murder, such as abortion laws in China (once it becomes recognized that abortion is, in effect, an act of willful murder), would qualify. To the question concerning who does the discerning (in the absence of a competent authority), the answer again seems to be, reasonable people, although Soper admits that in practice, the decision that a law has surpassed its reasonable limits has do be made by a fallible institution, i.e. a tribunal of some sort.

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[65] Ibid., 97 (Emphasis is mine).

[66] Practical reasonableness not only tells the citizen when a law is too unjust, but first and foremost, it tells the citizen when the law is just. "For Aquinas,… the important thing about the lawgiver's *imperium* is not that it represents an act of decision, and indeed of decision to 'impose an obligation'; that fact is take for granted. The important thing is that the expressed *imperium*, the promulgated 'intention of the legislator', represent to the subject an intelligible determinate pattern of action, which, having been chosen by the lawgiver to be obligatory, can actually *be obligatory in the eyes of a reasonable subject* because the ruler's *imperium* can (for the sake of the common good) *be reasonably treated by the subject* as if it were his own *imperium*" (Finnis, *NLNR*, 340) (Emphasis is mine).

However, it is for that reason that Soper says that cases of wicked law are bound to be rare. But since it is only in extreme cases of wicked law that the law loses its power to demand compliance, the prospect of anarchy will also be rare. That is to say, *in almost all cases of law*, even in instances of what Soper calls "ordinary cases" of unjust law, *people will have reasons to obey the law, not only on the basis of avoiding disturbance or scandal, but even on the basis of moral conten*t. What remains to be seen in order for this to hold is how it can be the case that even in so called "ordinary cases" of unjust law there can still be content based reasons for obeying the law. Once it has been shown how this can be the case, it will be understood why natural law legal theory does not lead to anarchy or legal positivism, and subsequently, why Soper's dilemma is not a real dilemma.

Having completed our account of what we believe to be the proper understanding of natural law legal theory, relevant to the purposes of this paper, we will now reassess the natural law dilemma, introducing the reasons that Soper gives for why authority claims that the citizens' duty to obey is based on the moral content of the law, even in cases where the law's content may contain flaws. We will then conclude that these claims of authority regarding the citizens duty to obey and its own right to enforce the law are what prevent natural law legal theory from giving way to either anarchy or legal positivism. At that point the misunderstandings that lead to the mistaken outcomes of the natural law dilemma will then be clear.

Soper's Dilemma Revisited

Philip Soper presents the natural law dilemma as follows.

> Natural law opposes the suggestion that "mere" convention, or human fiat, has the last word in determining the "legal" obligations within a society. These conventions are, according to the natural lawyer, to be tested by reference to "true morality" and enforced only if they do not depart too far from what such moral standards require. The dilemma is that only human institutions can do the testing. A legal system might adopt natural law legal theory, and self-consciously encourage officials and citizens to test legal validity by reference to true morality. Yet in *governing* its citizens, the state and its representatives still must act on their own best assessment of what true morality requires. Thus, in the end,

> any decision about what morality requires will be made by fallible human institutions and, if enforceable as law, will be enforced just because someone says so, not necessarily because the decision is right.[67]

The first claim in this appraisal of the natural law legal theory is entirely correct: natural law legal theory opposes legal positivism in saying that the mere positing of law does not give the ultimate foundation for legal obligation. A second valid point that Soper makes here is that, for natural law, the law must have some "true" moral content. Otherwise, the authority could make no claim that the law is morally binding. As a result, the state would not have moral grounds on which to oblige citizens to obey the law, and hence, all its claims to enforce the law would be based on sheer coercion. That is to say the obvious: if there is no real connection between law and morality, the result is legal positivism.

Hence the authority must claim that the law has at least some moral content in order to ground its claim to the use of force when the time comes to enforce the law. Otherwise it will either have to renounce its claim to be able to enforce the law or accept the fact that it is a purely (amoral) coercive system. However, Soper adds:

> There may be claims that one has the right to enforce the right to enforce the norm even if a subject correctly concludes that there are no reasons – indicative or intrinsic – that justify the subject's acting as the norm prescribes. It may be that such a claim is *justified* only if the authority *believes* there are reasons (indicative or intrinsic) for complying with the prescribed action (a conclusion that this study endorses).[68]

Here Soper's point runs tantamount to saying that even if the citizen is correct in holding that the law is flawed based on its content, the authority may still have the right to insist that the citizen must obey and to enact punishment if the citizen refuses to obey, because it believes that the law's content is correct.

Why this does not amount to positivism is the question that we must soon address. But the fact that the authority believes the law's content is morally correct, implies that someone must have already

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[67] Soper, "Some Natural Confusions," 2412.

[68] Soper, *The Ethics of Deference*, 55 (Emphasis in text).

used some means to verify the law's morality. And so the first question we must ask is how does one test the law's morality, who does the testing and what "measure" does he use in order to do the testing. Soper's natural law dilemma frames the problem in an interesting way, by establishing the following triad: a law, a legislator and the supposed standard of "true morality" up against which the legislator must "test" the law's validity. As we will now see, this set up for assessing legal validity seemingly leads to an infinite regress, unless it ends in legal positivism. Accordingly, the following scenario unfolds.

To begin with, the legislator (or judge) looks at the law, and then he looks at his standard of "true morality"[69] and based on his own judgment, decides whether this law is or is not valid. But whoever this judge is, he is still a fallible human being. His assessment of the "true morality" may be wrong. Therefore, either we take his word for it, in which case it remains enforceable as law "just because someone says so" (positivism), or someone else – yet another fallible individual – must test his decision. Against what? Nothing other than "true morality." And thus a second person will proceed with the same course of action, and then another, and then another, and so on.

We need not draw it out any further in order to see where this process is leading: it either goes on *ad infinitum* or ends with the judge's "fiat." Since it cannot go on forever, we are left with the end result of what appears to be legal positivism.

Before going on to explain why natural law legal theory does not ultimately collapse into legal positivism, I would like to point out what I believe to be an error in the way the problem is framed. In doing so, I hope to elucidate what may be a potential source of some possible misunderstandings about natural law legal theory.

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[69] Finnis in his assessment of the process of adjudication gives us some insight into what for this standard of true morality will normally take when a judge is trying to evaluate the morality of a law. "This specific standard will usually be a specification of some very general principle, such as fairness…" (John Finnis, "On The Incoherence of Legal Positivism," in *Philosophy of Law and Legal Theory: an Anthology*, ed. by Dennis Patterson (Malden: Blackwell Publishing, 2003), 136). He then goes on to make the point that we are about to argue for: "But such a specification – a making more specific – of general moral principle cannot proceed without close attention to the way classes of persons, things and activities are already treated by the indubitably posited law" (ibid.). In other words, from the perspective of natural law legal theory, natural law and positive law cannot be "compared" with each other as if they were two "separate realms," since the standard by which positive law is measured up to the natural law can only be assessed through our understanding of natural law *as embodied in concrete instances of positive law,* because the"standard" is "*already part* of the law" (ibid.) (Emphasis in text).

As we mentioned earlier, legislators specify the way in which positive law should be crafted so as to embody the natural law by way of a *determination*. But the natural law dilemma is set up in such a way as to suggest that the legislator has to compare," as it were, the positive law to the natural law in the form of true morality. In doing so he treats the positive law and the natural law as if they were two separate realms.

But human law, properly understood as law, is not something other than or separate from the natural law. The relationship between human law and natural law can be compared to that between the natural law and the eternal law. For as the natural law – the human person's *participation* in eternal law through the use of right reason – is not something separate from the eternal law, so likewise, human law – a practical *determination* of natural law by way of practical reasonableness – is not altogether separate from the natural law, but rather it is a practical specification of it.[70] In fact, natural law, otherwise restricted to general and abstract principles, is known to us only through its practical instantiation. The important question that must then be asked is how these practical instantiations in the form of "'purely positive' law can create moral obligations which did NOT exist until the moment of enactment"[71]

The practical instantiations of natural law which take the form of human positive law are moral (being derived as it were from the natural law) and create the obligation to obey, not because these new norms were formally contained in the natural law as such (i.e. as morally binding norms) but because the demands of practical reasonableness (itself an instantiation of natural law) requires that citizens comply with what the competent authority has deemed as just under the given circumstances. Accordingly, "the contents of a just and validly enacted rule of law such as 'do not exceed thirty-five m.p.h. in city streets' are NOT required by morality until validly posited by the legal authority with jurisdiction… to make such a rule."[72]

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[70] "Natural law and positive law do not stand alongside one another as two separate actualities, the former of which provides an external criterion for measuring the goodness or badness of the latter. Instead, natural law becomes knowable as natural law only insofar as it is made determinate in concrete instances of positive law," (Baur, "Natural Law and the Legislation of Virtue," 67).

[71] Finnis, "On The Incoherence of Legal Positivism," 140 (Emphasis in text).

[72] Ibid. (Emphasis in text).

As a result, "every appeal to natural law in order to pass judgment on the moral worth of positive law is inevitably an appeal to natural law as it is embodied and made determinate in (actual or hypothetical) positive laws and practices."[73] It is not as though one must turn one's gaze toward some idealized "true morality" in order to gauge the positive law itself. It is this way of posing the problem that leads to the "vicious circle"[74] or infinite regress that we saw earlier, which would ultimately lead to legal positivism if it actually were the case that we were dealing with two distinct realms of positive and natural law. However, judging positive law in the light of natural law does not entail observing two entities and comparing them. Rather it is an exercise in practical reasonableness.

But regardless of whether there is any flaw in the way the natural law dilemma is set up, we still have not resolved the paradox that the dilemma seems to raise. That is, why fallible human judgment does not inevitably lead natural law legal theory to collapse into legal positivism. For if we accept Soper's proposal that moral content of human law must somehow be evaluated, then no matter how the "test" is to be performed, Soper is right to point out that "only human institutions can do the testing," and that "any decision about what morality requires will be made by fallible human institutions and… will be enforced just because someone says so."[75]

The last part of the second statement is precisely what we are trying to resolve, namely, whether or not the element of human fallibility leads to legal positivism. We will put this matter aside for the moment and focus on the valid points that Soper makes with these claims. The first statement is absolutely true: no one denies that only human institutions can do the testing. The first part of the second assertion is no less true: natural law legal theory recognizes, as a matter of fact, that any person who holds a position of authority is necessarily a fallible human being. Hence, any moral assessment of the law will be made by a fallible human being or institution.

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[73] Baur, "Natural Law and the Legislation of Virtue," 68.

[74] Admittedly, then, there is a certain amount of circularity involved, but not a vicious circle or an infinite regress, as Baur points out: "Just as one cannot step outside of the medium of knowing in order to determine whether one's knowing "measures up" to being, so too one cannot step outside of the medium of actual practices and positive laws in order to determine whether actual practices or positive law measure up" to the natural law," (Baur, "Natural Law and the Legislation of Virtue," 68).

[75] Soper, "Some Natural Confusions," 2412.

Nevertheless, natural law legal theory still holds that human authority is necessary and valid due to the fact that someone must make the appropriate decisions for the sake of ordering human society towards its appropriate end. As a result the person who legitimately holds the position of authority within a political community has the right and obligation to enact laws and to enforce them when necessary (despite his weaknesses and limitations). Furthermore, it is part of the very definition of law that the law is made by the one who has the care of the community. These are all tenets of natural law which make the role of (the legitimate) authority part of the procedural requirement of enacting just laws.

Consequently, a law would be illegitimate *unless* it were made by the competent authority. Hence, the human element does not defeat the natural law position; rather, it is an indispensable element of it, provided that the person in question is the one who has the care of the community. For this reason, Robert George says:

> The Natural Law itself requires that… someone (or a group or institution) be authorized to accomplish it. Because no human individual (or group or institution) is perfect in moral knowledge or virtue, it is inevitable that even conscientious efforts to translate the natural law into positive law, whether directly or by *determinationes*, will sometimes miscarry. Nonetheless, the natural law itself sets this as the task of the legislator and it is only through his efforts that the natural law can become effective for the common good of the community.[76]

The problem, however, has nothing to do with the *need* for authority. All legal systems with the exception of anarchy (*ex definitio*: it opposes the very concept of a legal system) will recognize this much. The problem that Soper wants to raise is something that George readily admits, namely, that only *fallible* people can assess the law's morality. But does this inescapable element of human fallibility necessarily lead to legal positivism, as the natural law dilemma says that it does? In *The Ethics of Deference*, Soper suggests that it does not.[77]

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[76] George, "Natural Law and Positive Law," 109.

[77] I do not mean to suggest that Soper wishes to argue expressly against his own natural law dilemma in *The Ethics of Deference* but I have taken some of what he says there as a response to the questions that the natural law dilemma raises. In other words, the dilemma presented in his article "Some Natural Confusions about Natural Law" poses a challenge to

Clarifying Natural Law Legal Theory

In "Some Natural Confusions about Natural Law" Soper states:

> If any theory of adjudication that permits a human decision to have the force of law is, in the end, a positivist legal theory, one possible explanation for what a natural law legal theory must be is this: a natural law legal theorist must admit that no decision has the force of law just because someone said so – judge or legislator. The point of the theory is to urge the citizen to recognize that fiat must always in theory yield to the citizen's own assessment of the reasons for and against action.[78]

The claim being made is that if natural law legal theory refuses to recognize that human decision has the force of law (which is being equated here with legal positivism), it must ultimately yield to "the citizens own assessment of reasons for and against action," which amounts to anarchy. But *natural law theory does recognize human decision as having the force of law*.[79] For when the one who has the care of the community specifies the way in which the precepts of natural law are to be practically instantiated within society for the sake of the common good, those instantiations (once they are promulgated) are morally binding for the citizens within that society. For it is in this way that human law derives its force from the natural law.[80]

The objective now is to show why recognizing (fallible) human decision as having the force of law does not lead to legal positivism. In order to do this we must first point out the difference between the following two statements: (1) human decision has the force of law; (2) law's binding force is based exclusively on human decision. From a natural law perspective the law compels obedience because of the moral content of the law, and not because "someone says so," even if it is

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the natural law legal theory. Some of his arguments in *The Ethics of Deference*, which I will expose here, meet that challenge and respond to it.

[78] Soper, "Some Natural Confusions," 2416.

[79] "Most human laws, even just ones, do not simply reproduce the requirements of morality (i.e. of the natural moral law). But just human laws do have moral authority and thus, by entailment, moral obligatoriness. They have this authority because they have an intelligible relation to morality's permanent principles and precepts, a relation which Aquinas was the first to clarify and name " (Finnis, *Aquinas*, 266). This relation is the lawmaker's *determinatio* (Cf. ibid.).

[80] Cf. Aquinas, *Summa theol.,* I-II, Q. 95, a. 2, c. This is not the same as saying that it *has* the force of natural law.

true that "someone must decide." The apparent weak point that the natural law dilemma picks out is that the one who must decide is a fallible individual; hence the fact that a fallible person has to decide ultimately gives way to law being law because someone says so. In his later work Soper responds to this objection:

> The state's claim to be acting justly, in short, is not a claim that it is infallible but only a claim that it is not culpable. The claim is all that is needed to distinguish the normative legal system from that of the gunman writ large. But even this claim has its own limitations. The state's ability to deny moral culpability, and thus to distinguish itself from a coercive system, reaches a limit when the law that is enforced is so unjust as to override the excuse that "we acted in good faith as we thought best."[81]

Hence in order to justify its claims, the state does not need to claim that it is infallible,[82] but only that it is not culpable just in case it should happen to err in making a legal decision. As Soper points out, this does not excuse the state from acting in whichever way it pleases. It can always exceed its bounds in exercising legal authority even to the point of enacting wicked laws. But as we have already mentioned above, such laws are extreme cases and are found to be rare in an ordinarily stable political climate. So, he suggests that a state's legal claims are morally valid and binding provided that it acts "in good faith" in doing what it "thought best." The weight of this position hinges on the condition that the state makes the right moral claims with regard to its own laws.

According to Soper, a state's moral claims can vary in strength: they can be strong, weak (or ordinary).[83] The strong claim is *content-independent*: it holds that the content of the law is morally correct, but *even if it were not correct, the citizen would still have reasons to follow it*. But if the obligation to obey the law is not entirely based on

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[81] Soper, *The Ethics of Deference*, 96-97.

[82] Positivism, on the other hand, must uphold that the state *is* infallible if the "fiat" is to have any binding force. Otherwise, due to the separation between law and morality, the citizen will have no other reason to obey the law. However, unless positivists can provide the grounds on which citizens are *morally obliged* to obey, their theory can only uphold that the state's infallibility rests on its power to inflict punishment, which itself seems to lack any sort of moral justification. Hence it may claim coercive authority, but it cannot claim that there is a correlative duty to obey on the citizen's part (Cf. Soper, *The Ethics of Deference*, 55).

[83] Cf. ibid., 77.

that moral content this position will eventually lead to positivism, due to the fact that fallible individuals – even ones who are acting in good faith – will eventually make wrong decisions. The citizens, however, will still be obliged to obey the law. Yet if these reasons to obey the law are not based on the law's moral content, the state cannot claim that the citizens have a moral duty to obey.[84] In the end, any right to coercion that the state claims, will not be met with a correlative duty to obey on the citizen's part, and hence the state's imposition of force will lose all grounds of moral justification.

Thus, Soper says that the strong moral claim is incompatible with the natural law position.[85] The other alternative is the ordinary moral claim, which unlike the strong claim is a *content-dependent claim*: it holds that the citizen's reasons for obeying the law are purely based on content.[86] However, due to the intrinsic fallibility of human authority, there are bound to be occasions when one is obliged to follow the law even when one judges the law to be unjust. Otherwise, given that the duty to obey is strictly based on content, it would be up to the citizen to judge whether the law's content is correct and whether the law ought to be obeyed. Soper overcomes this obstacle by introducing *the minimal claim*: "…the minimal normative claim of the state typically involves two claims: the claimed right to enforce and the claim that the norms being enforced are *believed* to be just – the content is *believed* to be correct."[87]

The minimal claim is content-dependent: the reasons for obeying the law (qua law) are based on the fact that authority acting in good faith for the good of the community regard it to be just. This does not override the fact that the authority may err in making laws. But "to avoid inconsistency, one does not need to add the additional claim that

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[84] Aquinas, however, says that *citizens* may find moral reasons to obey the law that are not based on content, such as, "in order to avoid scandal or disturbance" (Aquinas, *Summa Theol*., I-II, Q. 96, a. 4, c.). This natural law argument says that the citizen may have the moral obligation to comply with what the law says, not merely because it is the law but for the sake of the common good, which is the purpose of all law, including the natural law. But the argument does not aim at preventing the state from falling into a purely coercive, positive law regime. Soper on the other hand is arguing that if the *state* is to justify its claims that it has the right to enforce the law with due punishment, it can only do so on the grounds that it *believes* that the content of the law is correct (thus backing its claim that the citizens have a duty to obey the law as such).

[85] Cf. Soper, *The Ethics of Deference*, 99.

[86] Cf. ibid.

[87] Ibid., 80 (Emphasis is mine).

subjects also have content independent reasons to defer to the state's judgment when that judgment is wrong,"[88] for as we have already seen this would lead to positivism. Instead, the state only needs to claim that it has the right to enforce the law that it *believes* to be just.

The minimal moral claim rests on three assumptions: (1) state authority has the right to exist and its duty is to promulgate laws for the good of society; in exercising its authority the state (2) *acts in good faith* and (3) *seeks to do what it sees as best*. In this way it vouches for the law's content, which it believes to be just. The state's judgment may be fallible, but as long as it acts in good faith in the interest of the common good, it is not culpable for making wrong decisions.[89] Thus, the procedural requirement for law's being enacted by the competent authority is reconciled with the fact that this same authority is a fallible individual (or institution). *As long as the authority acts in good faith when seeking to do what is best for the community*, though it may be fallible, it will not be morally responsible for any misfortunate outcome that should result from erroneous judgment, unless the judgment was so inexcusably wrong that no reasonable person would fail to recognize that it should have never been made. It follows that "if [legal systems] are not to collapse into coercive systems, [they] must in short admit that all standards tentatively identified as law… will count as valid law only if they are not too unjust and thus remain capable of supporting a good-faith claim that using coercion to enforce the law is morally permissible."[90]

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[88] Ibid., 81. Again, Aquinas' claim that *citizens* should obey for reasons that are not based on the law's content, i.e. in order to avoid scandal or disturbance, puts the moral onus on the *citizens* for the sake of the common good. Soper, on the other hand, is focusing on the validity of *state's* claim that it has the right to enforce the law, which is a different issue. If the state were to compel citizens to obey for content-independent reasons, its use of coercion would no longer be justified. Hence in order to be consistent with the natural law position, the *state*, must claim that the citizens' reasons to obey are entirely content-dependent. To this effect, Finnis says the following: "If an unjust stipulation is, in fact, homogeneous with other laws in its formal source, in its reception by courts and officials and in its common acceptance, the good citizen may (not always) be morally required to conform to that stipulation to the extent necessary to avoid weakening 'the law', the legal system (of rules, institutions, and dispositions) as a whole. *The ruler still has the responsibility of repealing rather than enforcing his unjust law*, and in this sense has no right that it should be conformed to. *But the citizen*, *or official, may meanwhile have the diminished collateral, and in an important sense extra-legal, obligation to obey it*" (Finnis, *NLNR*, 362) (Emphasis is mine).

[89] Soper, *The Ethics of Deference*, 75.

[90] Ibid., 97.

The good faith claim and the minimal moral claim ensure that citizens have content-based reasons for obeying the law so as to prevent natural law legal theory from collapsing into legal positivism. Moreover, by making these claims, the authority can make the further claim that its citizens have the duty to obey the positive law and, in the case of disobedience, it can justifiably enforce the law with criminal punishments. In this way, the combined claims also prevent natural law legal theory form giving way to anarchy. It is clear, then, that the natural law dilemma which Soper presents in his article, "Some Natural Confusions about Natural Law," does not produce these outcomes.

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Summary: *In "Some Natural Confusions about Natural Law," Philip Soper argues that the natural law legal theory seemingly gives rise to the following dilemma: it either gives way to legal positivism or collapses into anarchy. The aim of this article is to show that, when the procedural requirements in the lawgiving process and the moral claims of authority are properly understood, natural law legal theory does not produce such a dilemma. Following St. Thomas Aquinas's teaching in his treatise on law in the* Summa Theologiae*, I examine (1) the proper role of authority in determining what human law should contain with respect to natural law and (2) the reasonable claims that authority ought to have concerning the citizen's moral obligation to obey the law. With regard to these claims, it will be determined that whenever the competent authority acts in good faith when seeking to do what is best for the community, it can justifiably enact punishments to enforce the law in the case of civil disobedience. In such a way, the natural law legal theory avoids both of the undesired outcomes of anarchy and legal positivism*.

Key words: Natural Law, St. Thomas Aquinas.

Parole chiave: Legge naturale, Tommaso d'Aquino.