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The foundations of legal obligation.

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THE FOUNDATIONS OF LEGAL OBLIGATION.

BY

ROBERT A. KOMINAR

B.A. (Hons.) University of Windsor (1973)

A Thesis, Submitted to the Faculty of Graduate Studies through the Department of Philosophy in Partial Fulfillment of the Requirements for the Degree of Master of Arts at the University of Windsor

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ABSTRACT

The importance of understanding the nature of legal obligation derives from the need for man to understand himself and the nature of the relationships that he must sustain in human existence; one of these relationships is with the law. Legal philosophy is ultimately based on philosophical anthropology. It is the purpose of this thesis to demonstrate this position.

The work is systematic and critical. The two figures of St. Thomas Aquinas and William Blackstone are compared and contrasted. Aquinas is singled out as an example of those thinkers who see law as ultimately derived from and based on human reason. Blackstone exemplifies the beginnings of the modern movement which identifies law with the absolute will of a lawgiver, and which denies that the reason must be allowed to condition the content of law. Blackstone was selected due to his position in the initial stages of this school of thought. Due to the fact that he is not a pure exponent of legal positivism and insists on keeping one foot in classical natural law theory, we are able to locate, through his thought, the basic disagreement between natural law and legal positivism.

We find our conclusion to be that legal positivism,
often referred to as the will-theory of law, holds to an unacceptable view of human existence, and in doing so causes a great deal of suspicion to be cast upon its understanding of law and obligation. No theory of law that loses sight of the essential demands of human nature can ever hope to adequately account for the nature of law or the relationship that man sustains with it, i.e. legal obligation.
In the February 11, 1974 edition of the New Yorker magazine, there appeared a comic in which a rather defiant-looking individual is being arraigned before a magistrate. The caption consists of the following words, spoken by the judge: "You are charged with getting caught stealing." The subject of this comic is the subject of this thesis. The importance of legal obligation does not vanish once it emerges from the sanctuary provided by philosophical speculation. As with all moral reflection, it is undertaken with a view towards action. The proof of the theory lies in its harmony with man's social nature.

An understanding of legal obligation provides a focal point from which one can profitably view the essence of many legal-philosophical problems. The controversy between natural law and legal positivism has its heart in the question as to whether a law commands obedience because of its intrinsic nature or because it is backed up by some powerful coercive body. It is but a short step to questions that wonder if law is essentially a work of man's rational nature or an absolute and undetermined will of a lawgiver. Is the law capable of commanding any action or are there limits to what it can justifiably do? Is the lawgiver himself bound by the law or does his control over the
restraining power that the law yields exempt him from obligation? Are there situations where laws do not command obedience even though properly enacted? Are there situations where civil disobedience is justified and are there instances where it is commanded? If such cases occur how are we to recognize them? How does one know to what extent an individual must submit his will to the commands of the State?

All these questions are of immense practical consequence in our society today. Without an understanding of why men ought to obey the law they cannot be answered satisfactorily. To study obligation is to study oneself, to locate his exact position between the commands of the lawgivers and the ends of political society. It is Socrates' encouragement to "Know thyself" that spurs our study.

The method we will adopt is twofold. The first chapters of our work will deal, in a philosophical-historical manner, with two different approaches to the problem of legal obligation, those of St. Thomas Aquinas and Sir William Blackstone. Each thinker will be viewed in the context of the general legal and philosophical understandings prevalent at his time. In the last chapter we will attempt to set out the basics of an understanding of obligation that keeps constantly before it the demands that human nature makes on life. We hope to show that only with such an understanding can the concept of law ever be in harmony
with the necessities that our human existence presents us with. Whether we arrive at an understanding that lawyers will rejoice over is not nearly as important as that it be one which every human being can freely exist along side of.

R.A.K.

University of Windsor

May 1974
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INTRODUCTION

This thesis is about a problem which is to be found in the legal thought of the present day. It arises when we ask from where the law derives its power to issue commands that ought to be obeyed by the human beings they are addressed to. More succinctly, why is man obligated to obey the law? In keeping with the contention that an actual problem has arisen in connection with this issue the real thesis in what follows lies in the suggestion offered as a remedy.

The notion that legal thinking is ultimately based upon philosophical anthropology is a foundational idea that pervades these pages. It is a claim that many contemporary thinkers in the anglo-american legal tradition would dispute. Nonetheless, we hold that it is both true and important. The final aim of the text is to lead the reader to the point where he cannot help but seriously wonder how we as human beings could ever reach the point of denying that what we are must shape and direct the laws that govern us. The work then is formally systematic as opposed to historical. The hope is to illuminate a problem and not historical events.

St. Thomas Aquinas and Sir William Blackstone
serve in this thesis as points of departure. Their insights into the nature of law will provide the lamps we need to light our way. They are aids in reaching a point of understanding. These two great thinkers do not enter here for objective viewing, but as men who have provided clues to the solution of a problem.

One final point must be mentioned here. In the text St. Thomas' treatment of the natural law and its relationship to positive law is absent, and it is absent for a purpose. Our primary interest here is in civil law, or positive law, and the obligation that men have to obey that law. Along with our thesis that obligation to obey the law arises out of human nature, goes the belief that the traditional vocabulary of natural law, though attempting to express the same insight, can be an unnecessary stumbling block to many today who have not maintained solid ties with classical thought. Aquinas, of course, is a prime source for classical natural law thought and it is our view that his views on legal obligation can be preserved outside of the philosophical framework and vocabulary which they were framed in. Thus, even though the letter of his thought is in certain ways absent from this thesis the spirit definitely is not.

This thesis is a natural law thesis. What we are doing here is reminding about something in natural
doctrine that seems to have been forgotten both by its critics and defenders, i.e., that natural law doctrine results from man's reflection upon his own nature and life. Natural law doctrine is a rendering of what man sees when he views himself in the mirror of self-inspection. To hold that natural law exists is to hold that man possess a nature that determines the moral appropriateness of actions he may engage in.

Much of traditional natural law thought has concentrated on elucidating just what the counsels of human nature are. Our task here is different. What we are attempting to do is first determine just what kind of being man is and then ponder action in the light of this knowledge. We view law in terms of human existence itself. It is really quite tragic to realize that many able thinkers are offended by natural law today, for this means nothing other than that they are offended by their own human nature. If doing away with an effective and at many times beautiful vocabulary will help call these alienated men back to the true source of life and order then the contemporary defenders of natural law ought to consider the relative importance of achieving true community and maintaining the historical prominence of St. Thomas Aquinas.

Given the purpose of this work we might add that the final chapter ought to be read first, in terms of
logic if not in time. Whether it can be understood without the two preliminary sections will depend on how close a connection the reader has maintained with classical natural law, thought.
THE LEGAL THEORY OF ST. THOMAS AQUINAS

The presence of the law in the mediaeval world cannot be denied. It was an age that was attuned to the motifs and ultimate resolution that the law promised man. It saw the beginnings of the stir that was to arise between customary and enacted law, between the law's insistence that it must rule man and man's attempt to dictate the law.

Law, as it pervades the daily existence of men, is a powerful thing. Few take it lightly. Certain men are subject to another force that the law exerts, the force of attraction it commands as part of God's creation, the intellectual force it possesses as a source of wonder. The minds of men are often driven to lay bare the workings of the world. Some yearn not only to know the world as it is, but also why it is that way. As far back as Socrates we can see this pitch strained to its highest in that man's wonderings about who he was and what it meant for him to have a turn at life. Christianity promoted this interest of man in himself by assuring him that there were answers to his questions.

The law was a natural source of wonder for man, it was all around him. What was there that drove him to embrace law rather than anarchy? The question of the point
of linkage between man and law was one that intrigued many of the great minds of mediaeval Europe. We propose to deal here with the reflections of one of the greatest of mediaeval thinkers as he studies this question.

St. Thomas Aquinas was a theologian and a philosopher, not a lawyer or professional jurist. His interest in the law stemmed from his interest in man, particularly man as a social being. His concern was not with litigation or court structure, but with the "living social principle behind law."¹ In what way were the apparent necessities of human social life connected with the legal order? What did the inherent structure of the law demand in the way of social organization? Could any type of law integrate with true human community? These are the problems that mark off the area that Aquinas was concerned with. How does the law relate to the man who must obey it?

Once we get past the outward signs of the presence of a legal order: the law enforcement agencies, the courts, the writs, we arrive at the law that is only expressed through these trappings. It is at this level that St. Thomas ponders the law. And this is in keeping with his position, for anything dealing with the specific day to day operation of the legal machinery falls within the purview of the lawyer, not the theologian.

Aquinas was an interpreter of the recently recovered texts of Aristotle and was greatly influenced by the Philosopher. Particularly, he came to work in terms of
the Aristotelian conception of four-fold causality. He sets out to investigate the nature of law, its way of being in the world, and does it in terms of this causal scheme. Our unpacking of Aquinas' definition of law will show the influence of Aristotle's ideas. We will first encounter the stuff that law is actually made of, then the source that makes it, then the job it is made to do, and finally the reason that human beings are obligated to obey it.

The Stuff of Law - Command

When we take a first look at the legal system we immediately notice that the laws that are present here are not quite the same as the laws that scientists deal with. Scientists tell us that there are laws at work in the universe which can describe how different bodies and forces are related, and, from these laws we can predict, with varying degrees of accuracy, what will occur in the future. Now there are jurists, Justice Holmes is a good example, who see a great similarity between the legal order and the predictive laws of science.\(^2\) Aquinas is not among the members of this group. For him it is not at all obvious that laws serve to inform us about what the de facto situation in society is. Indeed, we seem to hear more about the law when someone acts outside it. The law that prohibits murder does not purport to say that since it exists murder does not. Actually if murders were not committed some thinkers would hold that there would be
no necessity for a law prohibiting it, i.e. there would—be no crime of murder. But St. Thomas does not think that the law can be dealt with in such a cavalier manner. There is something more permanent in law that enables it to exist independently of whether people observe it or not. The law of murder is not identical with the crime it proscribes. In fact, the actual criminal act exists only in terms of the laws that define and deal with it. Thus the actual occurrence of murders in the world is not, logically, the specific subject of the law of homicide. For St. Thomas law is not descriptive, at least not entirely, and certainly not most importantly.

But if law is not descriptive, i.e. does not tell us the way that the world actually is, then what is it? It cannot be denied that it does in some way link up to situations in the world. The taking of a human life by another human being is a concept that most people would understand. In fact, the law insists that everyone must be able to work with it. The concept of murder has a meaning for our lives and the law in some way must deal with that meaning. Yet, this dealing does not consist of merely pointing out cases that fit the legal definition of murder, or predicting that when A is in possession of an unlawful handgun and is angry with B, chances are that B will be murdered. The law recognizes murder whether people shoot and strangle each other or not. The law comments on the relationships arising in the situation where A shoots B by approving or disapproving of them. Law therefore is a
prescriptive judgement.

The law that is enforced by the government fits nicely into this picture. The lawgivers are seen to exercise their judgement on certain clearly defined situations, deciding whether or not the society will tolerate them. Once the lawmakers have made their decision they proceed to command the act to be undertaken or avoided. This quality of insistence we recognize as an essential element in law. The law consists of commands, not helpful, but nonimperative, bits of advice elicited from a friend. We are not free to disregard the dictates of the law to the same extent that we can disregard counsel.

One important question Aquinas is concerned with in regard to commanding is: Where does the necessity that exists in a legal command originate? Does a command have its air of urgency because of something that is intrinsic to its nature, or, is it necessary to obey a command because some external force which usually accompanies commands exerts the needed pressure? St. Thomas deals with this problem by determining whether commands are reasonable in themselves or whether their observance is willed by another. We can rephrase this by asking: Is a command an act based upon reason or upon the will? This way of framing the question has had a great significance for jurisprudence.
How could anyone possibly think of a command as an act of reason and not of sheer will? Is it not obvious that laws issue from the will of the lawgiver? Many had observed that cigarette smoking was detrimental to health, i.e. it was an unreasonable act in many ways, but still it was only when the government, through a law, willed it to be so that tobacco companies ceased advertising on television. How can reason ever go any farther than recognizing that an action is in accord with its standards of good and bad? The answer St. Thomas proposes requires an understanding of his thoughts on the relationships that exist between the faculties of will and intellect in the human person.

Aquinas' position is that commanding is an act of reason. He says,

the burden of the law is to prescribe or prohibit. Such executive commanding issues from the reason.

But when we understand St. Thomas as holding that commands are essentially rational we must not assume that the human faculty of will plays no part at all. Indeed, St. Thomas provides us with a fully worked out account of the interaction of intellect and will in the human act. Command (imperium) is a phase of the human act that occurs within the structure of the whole. Commanding is something that human beings do, but it is something that is done in company with other phases of action.
concern with the concept of command will centre around two questions: What is the essential character of the act of commanding; and, Why does the law come into existence at this precise moment of human action?

According to Aquinas human action is that type of action over which man exercises complete control. This control originates in man's ability to move himself towards his ends and is lodged in his nature. But moving towards the perfection of one's nature involves the two human faculties of intellect and will, for they are our major points of contact with the transcendent world.

All human action is an interweaving of intellect and will, of exhibiting and moving, or directing and pursuing. They point to two facets of human existence, those of apprehending the ultimate perfection of man and moving towards that perfection. Though Aquinas insists that a true human action is unified he allows the philosopher to arrest its course in order that he may understand the changes that occur in the agent between the initiation of an action and resting in its completion.

Action originates when a human being is confronted by the world. All existence is striving for perfection of nature. Nature is not perfected as it stands and a human being must strive for a good that lies essentially outside of him, i.e. in the world, if he is to be fully human. The faculties of intellect and will provide the
necessary links between man and the transcendent world. The intellect is the path by which the world travels into the existence of man and the will serves as the bridge which leads from man's inner life to the outside. But willing and knowing, of themselves, are only connecting points between man where he is and man where he would be. They do not in themselves have any definite effect outside of the agent.

The initial stages of the human act, referred to as the order of intention, are preparatory for the practical action which follow upon them. If man is to make a move at the end of an action there must be a process which plans just what will happen. The intentional phase of action has two basic operations, the aspiring to an end and the ascertaining of possible means to that end. As we noted the will and the intellect are ever interpenetrating and winding around each other. At the initiation of the act the intellect apprehends a good as a desirable end and causes the will to wish for the attaining of that end. But even here the will has moved the intellect to apprehend an end. The will wills that the intellect apprehend the good but this occurs only in the context of the intellectual judgement that the end is truly desirable and fitting to be pursued. The end is then reflected upon: Is it a possible option for this agent at this time? But the end is nothing
without means to it and so the agent must investigate, differentiate, and ultimately choose between means.

This then is the sphere of intention, action that takes place solely within the agent. It is in a sense the drafting of a piece of legislation, beginning with a purpose to be achieved and outlining ways to get there. But once the proposal is ready the agent must either shelve it or move out into the world in order to achieve it. He must cross over from the order of intention to the order of execution, i.e. to the order of practical action. The will must either move on to something else or move the agent to appropriate actions directed towards the securing of the desired end and thereby allow the action to be completed.

Between the order of intention and the order of execution is the moment of human action that St. Thomas calls command. It is command which mediates the transition from the interior life to the outside world. Command therefore holds a special place in the analysis of human acts. It both preserves the momentum stored up in intentional activity and provides the impetus for the accomplishing of true practical action.

Command can be viewed both as the final phase of the order of intention and the first moment of the order of execution. When seen in terms of wrapping up the process of intention command is the culmination of the legislative activity and issues in a statement that "These
means will be followed to this end. Viewed from the vantage point of execution however, command appears in the imperative formula "Do this."

The question now arises as to whether this act of commanding is essentially one of will or one of intellect. And it is possible to determine this from the position it occupies in the structure of the human agent. We recall that by time the stage of commanding is reached the end of the agent is known and the best means to that end have been identified. We also recall that after the command is issued the agent will actually execute the means chosen, with a view towards arriving at the end. Which bridge is required at this point, the will or the intellect? Is motion directed from the world into man or is it a moment when man is reaching out to the world?

Is it the function of reason or will to bridge the gap between intention and execution? When we consider just what is involved we can see that both play a part in the act of commanding, but that it is essentially an intellectual process.

The order of intention began with a desired end and proceeded to make that an end for the particular agent. Since the agent was not perfected at the time, the end had to be pursued by some means and the agent was pushed to determine what means were available, and then, which
would be most fitting. The order of execution began with the proposed means and is directed towards the achieving of the initially desired end. Now, according to St. Thomas, the will is the motive power in human beings and the intellect is the organiser. When the moment of command comes we already have a set of means and an end to be achieved. What then is needed at the moment, a push from the will, or ordering and directing from the intellect? Aquinas gives a clear answer. Action on the part of the intellect is required for the will cannot execute any action until it has been informed by the intellect. If the moments of execution involve the actual bringing about of an end by way of certain means then the intellect is required at the end of the intentional moment to order the means to the end. Command is the moment in the human act when means and end are fused into a unity. It is a pivotal point which lies on the border between intention and execution, and points in both directions, looking towards the end and means—of intention and saying "This", and simultaneously towards execution and declaring "shall be." But only the intellect is capable of perceiving and understanding the order that exists between means and ends and therefore of making use of the action of the intentional order. Only the intellect is capable of overseeing the execution of an action and insuring that the previous judgements are
observed and carried out faithfully by the will. Therefore, we conclude that command is essentially an act of intellect. St. Thomas describes command in the following way.

Command belongs both to the will and reason but in different respects. It belongs to the will in so far as a command implies an inclination; it belongs to reason in so far as this inclination is distributed and ordained to be carried out by this or that individual. (13)

The faculty of will does have a place in command. Aquinas states that "command is an act of reason based upon an act of will."14 We must recall that command does not just occur out of nowhere. It is only found in the company of other psychological acts.15 Previous to the issuing of a command the choice has been made by the will to command action. The will wills that the intellect set about ordering the means to the desired end. Thus, we may say that in itself command is of the intellect but when considered in context it is of the will, for the act of ordering is brought about by a presupposed desiring of the end. Therefore those thinkers who seize upon the will aspect of command are incorrect in their assessment of the essential nature of the act of command. Commanding is essentially about the ordaining of means to an end, and according to St. Thomas,

Willing is not ordering, but a tending towards an object within the plan of reason. (16)

The confusing of the functions of will and intellect has
great significance for the study of jurisprudence, for ultimately the distinction is anchored in the ontological roots of law and obligation. The best way to steer away from such difficulties is to always keep in mind the kind of being that man is.

We can now use St. Thomas' thinking on the nature of command as a basis for explaining why law arises at this moment in the human act.

Commanding is ordering, not in the sense of coercing, but rather, in the sense of creating or establishing an ordered relationship of means and ends in a situation. To be able to order is to be able to see all the important facets of a situation and then perceive the relationships that exist between them. To order is to make a cosmos out of a chaos. The perception of relationships is the function of reason. However, command is not contemplation; it is not wholly within the order of intention where this occurs. There is more to commanding than perceiving relationships, and this explains why a command does not issue out of every consideration of means to end. It is essentially an act of judgement, a form of communication. Professor Bayne describes the command of law in the following way:

\[ \text{Command} \] confirms the intellect's satisfaction with the essence of the law by pronouncing that the law should now have existence as well. It passes on to the will its reasoned conviction that the law should be executed and promulgated. And it partakes of the dynamism set in motion by the intellectual acts formed at the outset of the legislative process.
The law has a certain end to pursue and therefore is always formed in terms of that end. But law is also about the means to that end. The command of law provides the necessary means to reaching the ends of the legal community. The legislative process in the human is concerned with finding means to desired ends. Determining the ends of a community is not a specifically legal task; law comes on the scene with values and goals, in a sense a morality, already present. Thus, according to St. Thomas’ principles law must be command for it deals with the ordering of means to a desired end and thereby bringing about the end.

But when we regard law as a command of reason we are placing a limit on the content a law can have. Law is dictated by reality in as much as the intellect responds to impressions of the world and does not alter that world. We find reality as it is. All that a man can will, according to Aquinas, is that which the intellect presents to it as good.

It is clear that reason comes before will and directs its activity, in that the will tends towards its object in the setting of reason, which presents to it the object of desire.

Law, as a rational command, puts a bridle on the power of the lawgiver, for he will be limited to revealing the law and will not be able to impose an "arbitrary" will, or an "unreasonable" will upon his subjects. Aquinas
comments on what one may expect from a true lawgiver in
the following passage.

Since law is nothing but a rational plan of operation,
and since the rational plan of any kind of work is
derived from the end, anyone capable of receiving the
law receives it from him who shows the way to the
end.

(19)

It also follows that the subjects of a law are determined
by the nature of law. Aquinas says that "He is fit to
be commanded who is fit to understand."20 Thus, there
are conditions as to who ought to obey a law as well as
to who can proclaim one. No doubt St. Thomas would
agree that a person who was mentally incapable of
grasping the nature of his actions should not be subject
to the criminal law, but equivalently, everyone who is
capable of such knowledge ought to be bound by its
commands.

St. Thomas describes law as a measure or rule for
human acts,21 and if law is command this makes sense. The
law that is enacted or sought after must conform to the
essential structures that exist in the situation it will
rule, structures that have already been clarified. It
seems that we are on the level of St. Paul's statement
that every man is a law to himself. Everyone that is
human has the faculty of reason and the faculty of will.
Does it follow that everyman is a lawgiver from this? Is
one free from obeying the dictates of the law to the
extent that he thinks he is conducting his life rationally?
Does this not ultimately lead to antinomianism? Or is there something else necessary if a law is to be truly a law? In the next section we will consider a restriction that St. Thomas puts on those who are responsible for making and enforcing the law.

The End of Law - The Common Good

If law for Aquinas is a means to an end it is important to know just what the possible ends it can pursue are. Can a lawgiver randomly turn his desires into law, or are there choices of ends which the law is prevented from making, due to a restriction caused by the actual nature of the law? St. Thomas conceives law to be limited in this way and that it does have an end, or better, a class of ends, that is proper to it. This end he calls the common good.

The notion of the common good, or as it is often referred to as, the public good, is often subject to misunderstanding. Though it seems clear that it is not the good of any particular individual, it is not quite so evident that it is not the sum total of the goods of the individuals in a group. The common good is an end whose essence is that it is the good of a community. The community is considered here as an indivisible entity, which cannot be broken down into its constituent parts without losing its essence. This is true of a community even though we grant that it is made up of individual
persons, each having their own proper ends. St. Thomas says, "the purpose of law is to be useful to man." But the end, or purpose, of the law is actually the common good. Therefore we may conclude that the common good is also useful to man. But what does this usefulness consist in? It certainly is not mere utility. The point to be made here is that even though the common good is an end that man pursues it is not the ultimate and final end for him. Even though the achieving of the common good is desirable it is also useful in perfecting existence, for as Aquinas maintains, to be part of a community is an element necessary for true human existence. Thus, even though the common good has intrinsic value it also can be viewed as valuable in terms of a higher good that it promotes. Therefore, the common good is that which is useful to the community in achieving its final goal.

We can begin to analyze the concept of a common good by considering just what it is that is useful to a community, as opposed to an individual or a group which promotes the self interests of certain individuals.

The end of any entity is that which is good for it, good according to its nature or essence. In this sense the good for man is that which is natural for him.

The central notion is that which is in accordance with human inclination; this is not any inclination that men as a matter of fact have,
but that range of inclinations that would be shown by a standard man who is taken as the norm somewhat the same way as "the reasonable man" is taken as the norm in English law. Rational, reflective, and experienced men may be supposed to come nearer the standard than others, though in making this supposition there may and perhaps must be a certain irony: for these, too, are fools and sinners, and inclination even in such men is always subject to scrutiny and criticism. (24)

St. Thomas is of the faith that there is a certain sense in which being human is open to objective observation and though life allows man an almost infinity of variations there is always a ground theme that they must be played on. 25

Now something can either be good in itself or good because it is a means to something which is good in itself. Thus we believe that health is a possession that is good _per se_, something that men ought to strive after for its own sake. On the other hand, eating raw carrots rather than gumballs is only good in relation to the health that will result. It seems strange to say that a carrot is intrinsically better than a piece of candy. Some however would want to claim that these means to ends are actually morally indifferent, but St. Thomas does not defend this position. 26 What such thinkers are observing is that with any relative good one can always ask why it is good, but with absolute goods this question is out of place. Moral reasoning has to end at some point. It has to have some absolute principles. When we have reached
the point where we feel the need to stop questioning we
have reached the level of our absolute goods. A critic
might suggest that this is just the point he is making:
these absolute principles are chosen at random, capriciously,
relatively. The notion of a natural good for mankind is
irrational. But this critic makes a grave error in assuming
that just any set of values will work for man. Though the
possible choices for values many seem wide open, in reality,
they are quite limited. Professor Cameron, gives the
following sketch of the situation.

We could not say that killing harmless people was
an innocent act or good act simply by choosing a
moral principle that would make it so, for no
man could want human life to be conducted in this
way, that is, no one could think such a morality.
Of course, one could speculate about the
consequences of the adoption of such a principle.
But this would not be "to think a morality" for
moral thinking is always with a view to action.

We can notice the similarity here to Wittgenstein's
thought in the notion that morality is not something that
one "chooses" or "speculates" about. Whatever "thinking"
a morality might entail it certainly is tied up with
actual human relationships and lives that accompany the
thoughts. In reality, this is all that St. Thomas is up
to in his idea that the human race has natural ends.
There do seem to be limits to what we can really accept as
true human behaviour. As Cameron says, "we could not say
what a society in which mendacity and cruelty were virtues
would be like." Ethics and the moral life are connected
with existing human beings and therefore should not lose themselves in abstract speculation. It is true that ethics and law make generalizations from the individual cases but unlike pure speculative thought they must once again return to the individual source to make the all important application. Instances and examples never lose their importance for moral matters.

If the good of any being is that end towards which it is propelled by its natural inclinations, then when these ends are achieved the entity will truly exist and no longer struggle with becoming. An entity can rest when it becomes its essence, when it is as it should be.

What then is the difference between the good of an individual and the good of a group? Any good is a cause of movement of a being towards its essence. In the case of the individual the essence will be to exist as an individual, to be a "single one". To be one of a group of individuals is to seek one's own good in the company of others seeking their own ends. The goods proper to individuals, either alone or en masse, are such that they cause the person himself to be perfected. Thus, food is a particular good in that every individual requires it in order to complete his existence. Goods such as this are pursued to the exclusion of others. They, of essence, cannot be shared. One must have food himself and cannot rely on a community stomach to gain his nourishment for
him. Another example of a private end is religious faith. Everyone must do his own believing as he must do his own dying. Individual goods are goods that cannot be communicated to all equally either because they are limited in supply or are meaningless in social contexts. For every ten pounds of meat that Joe X eats there is ten pounds less food in the world for another to live on. Faith in God must be maintained by the individual because salvation is of the person and not the society or state. When a group of individuals attempt to gain an individual end their mass effort does not alter the quality of the end they seek. Their collective power may make their efforts more effective than those of single individuals but they are still working only for themselves.

The common good however is not an end that relates essentially to isolated, individual interests, whether they are expressed by one individual or the programmes of a social organization. It is a good that is proper to a community considered as an entity with ends of its own. A community does consist of individual persons, each of whom is equally a member of it. A community has an essentially open membership, for old members always die and new ones may take their place, the community remaining identical throughout such changes. The openness of a community should be enough to prevent its identification with its members, for even though these constantly change the
community does live on. The community is in an important sense timeless. Each of its members must partake of the common good as all others do, no more and no less. There is no peace for one man and not his neighbour. It seems then that the common good cannot be something that is in finite supply or of a definite duration. The common good cannot be dwindled by increasing numbers possessing it. Producing ten billion pounds of beef cannot be an end of the common good for eventually even this will run out, but increasing the ability to create a constant food supply can be. This is often referred to as the standard of living.

The common good is essential in order that particular goods can be achieved. As Aquinas says,

Now this [the common good] comprises many things; hence the law should cover all manner of personalities, occupations and occasions. Many types of people make up the political community, a variety of business serves its common interest, and, as Augustine observes, law is not instituted as a temporary measure but to persist throughout generations of citizens. (30)

Whatever interest an individual may have in time it cannot be in existence throughout generations of men, for each of us is only allotted one generation of life. The common good provides the general conditions in society which serve as the framework for individual goods which are the proper objects of individuals and interested groups.

What does this mean for the law? What capacity
will the law serve in if it is restricted to pursuing
the common good? Clearly the notion of the common good
makes apparent the dangers inherent in too much law. For
St. Thomas, once the law begins to mingle in the affairs
of definite individuals it is being untrue to its calling,
and in this sense evil and repressive. Only insofar as
pieces of legislation or customs of the courts that deal
with individuals or isolated groups have an effect on the
common welfare can they be considered as good laws.

Aquinas, despite this restriction on the ends of the
legal order, does not arrive at a theory of law which
limits the power of the law in any radical way. For if man
is in an important way a being whose nature calls him to
live in community with others of his kind, then the common
good of that community will be an important part of life.

Basically the common good is a creation of the
situations necessary for harmonious social existence. If
men live in societies it will be left up to them to
develop themselves as individual existers and to actualize
their potentialities. It will be up to the law to
maintain a society in which people can live. Aquinas tells
us that this is the chief obligation of the lawgiver.

The intention of every lawgiver is directed first
and chiefly to the common good; secondly to the
order of justice and virtue, whereby the common good
is preserved and attained.
The law has the charge of keeping the external forms and institutions of social life in order. If individuals are unjustly hurt by the workings of its regulations then the law can call its powers of equity in to relieve the suffering. But this concern is secondary for the lawgiver. Life does not take place for our kind in chaos but is essentially a developing of order and harmony that burrows deeper into the hearts of men all the time. Originally, there was built the outward structure of life, i.e. the society, and afterwards individuals were charged with creating beauty, wealth, and happiness within this shell. The laws is the preserver of this shell and compels the members of society to work within the framework of institutions available. It is in this sense that law is usually considered to be a conservative force, for its task is essentially preservative, but preservative of value and if value is lacking then the law provides it.

With reference to St. Thomas' views Thomas Gilby writes,

they [the laws] did not make men good but rather established the outward conditions in which a good life can be lived. Hence the preliminary definition adopted at the beginning of his treatise in the Summa Theologica, that law was the rule and measure whereby a person was induced to or restricted from certain acts. (32)

As we noted before morality is tied up with action, with a "form of life", and it follows from this that thought of a purely speculative nature cannot be of great importance to the law. Since its concern is not directly
with the well-being of the individual person it mainly concerns itself with acts that manifestly harm or aid the community. Everything else it tolerates even if it does not condone.

There are certain things which a society must have if it is to continue to exist and it is not up to the person qua individual exister to see that these are provided. The person has his own ends to pursue and cannot be expected to lay them aside. The task of providing for the wants of society falls upon those who are appointed to care for the common good. Their burden is a heavy one for they not only have to look after the needs of the community but must also tend to their own personal welfare. When one neglects his own existence he may become a kind of person one would not like to have ruling over him.

Aquinas is very realistic in what he expects from man. Though not as severe as St. Augustine, he has no illusions about individuals breaking down, and through generous and altruistic motives, providing society with its needs, either material e.g. tax monies, or immaterial e.g. orderly travel along the highways. Men have a social existence but they also have their private existences and the competition in this arena can be so fierce that one has little time left to worry about the ends of the State.
This may result from the government being taken away from the direct control of the citizens. When they arrive at a point where the lawgiver is merely "that man" people become resentful of the demands placed on them. Citizens can come into conflict with the legal order, and this is understandable when the law seems to issue not from reason but from the superior will of another human being.

Now Aquinas can see why this conflict between the citizen and the legal order could arise, but he also sees a problem involved with any decision to break the law or to engage in civil disobedience. The problem is this: the individual person who pits his own good against that of the community does not yet grasp the good which the community is trying to achieve, viz., the necessary social conditions for the proper pursuit of particular goods. When this is the case there can be little chance for legitimate clashes of interest. A genuine conflict only arises in extreme situations, and even then disobeying the law must be justified with a particularly horrifying cause of action. St. Thomas did not believe that it was an easy thing for a society to neglect all the requirements of the common good. It could not be intrinsically evil and still continue to exist in the form of anything we would call a community. Professor Cameron expands on this point.
Even the worst state can scarcely avoid doing much that has to be done if human life is to be possible. Obedience to the state is in respect of this or that sort of conduct it requires of us, so that even in a very bad state it cannot be true that everything the State forbids is allowed and everything the State enjoins is to be resisted. (33)

If we remember that the State commands by means of law and that law is based on reason then a perverse will on the part of the lawgiver becomes less important in one's actual relationship to the law as a whole. Aquinas thinks the State is a second nature to man, whereas society in general is a natural fact of existence. They are parts of life that we cope with. If they wander from their true purposes and interfere with private concerns then they must be set aright, not destroyed.

Individuals, through lack of knowledge, may clash with the law, or they may decide to pursue goals in spite of the restrictions that the law places upon their actions. In any case, the law has to keep the social order intact and thus has to deal with offenders against the law of the land. If it is ignorance of the law that is the cause of the disobedience then the law must inform the offender of the ends it is pursuing. The law does have an important educative function. It must school its citizens on how to be good social beings. Aquinas describes this necessary knowledge as follows:

The virtue of being a good citizen consists in being well subordinated to the governing principle; thus virtue in our emotional powers of desiring and contending lies in their being well under the reason's control. (35)
The law must rely for its supremacy on its rationality, and this must take precedence over the wills of both the citizen and the lawgiver. When we learn what the laws of any society are we are learning the relationships that are seen as necessary if that society is to continue to exist.

We might wonder what happens when the law cannot teach the values of society with complete effectiveness. In the Christian tradition this will always be the case due to man's nature as a sinful being. The *de facto* situation is that people do place their wills over and against the commands of the law. The law obviously cannot throw up its hands and utter an "I tried." The community must pursue its ends independently of what the individual thinks of those ends. This of course assumes that the rule is one of law and not of tyranny. The law, the ordinances of reason willed by duly appointed lawgivers, is not a respecter of persons. Even if vast numbers of people disapprove of taxation of incomes and decide not to pay any more tax, the law cannot rescind all tax laws if there is no other way of obtaining monies necessary for the maintenance of the society. The fact that the offender is a member of the society does not carry any weight for the law must protect society from both inside and out. Large scale immorality can destroy a civilization as easily, if not more easily, than an attacker's bomb can.
If the law does not successfully control the citizenry by educating them it must fall back on its role as dispenser of coercive force. For Aquinas coercion is not an indispensable facet of legal life. The idea of law as rational command still carries a meaning even if no one is ever forced into obedience. Law would still exist if prisons, policemen, and weapons were not needed. Whether or not a legal system would exist is another question.

Men are coerced into external conformity with the laws as well as persuaded by rational argument to live well. What is for modern man the distinguishing mark of the State's authority, that it alone can kill offenders against the laws and take away their liberty, is seen as something accidental, for sin is not part of the order of nature. (37)

Because of sin there will always be the recalcitrant individual who will not, or possibly cannot, obey the commands that the law issues. In St. Thomas' language, there will always be unreasonable men around, men who have not come very close to approaching their natures as rational beings. And even though the law qua educator addresses itself to the reasonable and good man, the law qua instrument of coercion is concerned only with the unreasonable or evil willed.39 The law functions in a society where law abiding citizens are the norm, the accepted form of life, but nonetheless, the opposite can occur. The law needs to have a clincher ready in case of an emergency. Thomas Gilby comments on St. Thomas' thought.
Doing your duty and enjoying yourself could coincide — St. Thomas was no puritan. He supposed no conflict between law and liberty — the virtuous were never coerced, for they were free and lawful men, prompt to render the justice of obedience. Positive laws as such did not contain explicitly moral values; they were observed because put forward by legitimate authority for the sake of the community ease and agreement and perhaps to safeguard some social decencies. The proper response to them in the normal course of things was provided by ordinary legalist justice.

(40)

Professor Cameron explains Aquinas' thought by drawing a distinction between dominium in itself and dominium in the concrete.41 In the former, there is no conflict between the rule of law and the freedom of man, while in the latter, due to corrupt rulers and limits on intelligence, there may be servile as well as free relations existent in the community.

Since morality is essentially an inward thing for man, Aquinas does not believe that the law has the job of enforcing all the moral standards of the community. He says on this matter,

Law is laid down for the great number of people, of which the majority have no high standard of morality. 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 have to be stopped if human society is to be maintained, such as murder and theft and so forth.

(42)

Yet this does not say that law does not, in some way, embody the moral standards of the community, for St. Thomas continues.
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 evil, lest, not sturdy enough to bear the strain, they break out into greater wrongs.

As Lord Devlin says, even though the law does not forbid all vice it will not allow the vicious person to use the structures of society to propagate evil or profit from its existence, e.g. houses cannot be used for brothels in England even though prostitution is not forbidden in the criminal law. The law only enforces morality to the extent that immoral action is harmful to the community's interests.

Murder is wrong on religious and ethical grounds for various reasons. But, it is legally proscribed only because society could no longer exist as it does if it allowed its citizens to wantonly destroy human life at their whim. The law links with morality in the sense that man cannot change his ethical attitude towards murder and hence, must shape his society in the light of this fact. Lord Devlin is on to something when he insists that England must retain her Christian heritage if she is to survive, whether or not her citizens are of the faith, for it is here that we find the repository of all insight on the practical matters involved in living together as a society.

The law is not concerned with the fact that David X was
murdered, but with the fact that murder is a possible relationship for one person to take up with another. Relationships such as those spawned by such an act do not add to the cement of society and must be forbidden and prevented from forming. The law must also heal the wounds that the community suffers when crimes are committed; retributive punishment is not all evil, in that it is not completely unnatural.\(^4\) We can see a distinction operating between modern criminal law which enforces the morality of the community, and tort law which has the community provide nothing more than a neutral service in creating a forum for settling private disputes. It is hard to envisage a society crumbling when someone finds a snail in their gingerbeer.\(^4\)

If the law does not prohibit all vices then neither does it have the task of promoting, actively, all virtues.\(^4\) Once the basic demands of society are met the individual can do what he will with his life. Though the man who obeys the law willingly is probably also the moral man, the law does not have this as its concern. Ethics not only requires the individual to refrain from murdering but to refrain because of certain motives, intentions or obligations. It peers into his secret life. One can act as though he respected the law but really mock it, and the law does not worry. But ethics will not stand for any such fooling
around, and lack of seriousness. The law is not concerned with why we obey it in the end, as an old Roman legal maxim relates, *Finis Praecepti Non Cadit Sub Lege*, the aim of the law does not fall under the obligation of keeping it. Whatever motive we obey out of is féme. St. Thomas would be shocked at the suggestion of the law controlling thought, for even if it were disgustingly immoral or sick, it could not in itself harm the community. We could have any number of crazy people running around, so long as they remained within the limits the rest of us have to observe.

The law is prepared for us no matter what motive we have for obedience, and St. Thomas is aware of this.

That men obey the law from the fulness of virtue is not always the case; sometimes it is from fear of punishment, sometimes from the prompting of mere reasonableness, which, as we have noticed, is the beginning of virtue. (49)

It is true that St. Thomas does think that there is an inherent obligation to obey law, and that this arises out of the nature of law itself. The law presupposes political obligation, obligation to live in society with others, and legal obligation arises as a necessary means to achieving the ends of man's political nature. If one obeys the law then the law automatically assumes that it is obeyed because one agrees with its ends, i.e. the law presumes that it is addressing a reasonable man. If, on the other hand, one decides to disobey the legal commands then the law is likewise not concerned with motives in this case.
with motives in this case. People may have many reasons for obeying the law, respect, fear, self-advantage, but none of these are essentially legal concepts. What the law does assert is that its commands are obligatory.

The Thomistic notion of the common good does not conflict with the individual goods of human beings, for their life is life within a community. Thus, if there arises a case where the legislator cannot demonstrate that he is directing the citizenry to the common good, then St. Thomas refers to his laws as warped and misformed, and in need of adjustment. He does not say that a twisted law is in no way a law, for its final cause is only one of the four aspects that define it. Nevertheless if citizens must accept the common good as a goal so must the lawgiver.

The common good for Aquinas, rather than being a shackle on man and his freedom to pursue his destiny, as it becomes for those who employ a collective good understanding of it, is the guarantor of man's diversity and the freedom to control his own life. If it is good for a society to have the arts flourish and if certain conditions must be maintained for this to take place, then providing them by way of legal commands in no way sells man into servitude. To say that the law takes away from man the freedom to pursue objectives which the law does not condone can only mean for St. Thomas that the law takes away from man the freedom to do what is in no way reasonable for man
to do. The law patrols at the boundaries of man's moral nature, and only tries to prevent man from overstepping them. As far as these boundaries stretch that far does the law reach. As vague and changeable as those limits are, that vague and changeable is the law. But equally, as constant and everpresent as the nature of man is, that constant and present is the law. The law is a bond that ties man to himself.  

Thus far Aquinas has told us that law is a command of reason which has the common good of the community as its end. We may think that this is a sufficient definition of law, for all that seems to be missing is the putting of the command into effect. But according to St. Thomas not just anyone can issue a legal command. Laws must be dictated by those who have been given the authority to do so. In the next section we will consider the source, i.e. the efficient cause, of the law, legal authority.

The Source of the Law - Authority

Though Aquinas means to be down to earth in his assessment of law, the definition we have so far seems to be more proper to a professor of law than to a lawgiver. There is something missing here which does not allow the definition to square with our actual experience of law. The missing link is the fact that only certain people are in a position to dictate law. Just what is it that these men have that other citizens do not?
St. Thomas isolates another characteristic of law when he observes that lawgivers, who are truly lawgivers, act with authority. Those in authority have charge of maintaining the common good. As A.P. D'Entreves says,

The first and easiest, and the most widespread legitimation of power is that which involves the need for order, and describes order as the greatest benefit that can be secured by the State. (53)

Authority is a concept that Aquinas uses to characterize a legal community's way of handling the day to day administration of law. Thus Aquinas thinks that although a community's lawgiver possesses, even by birth, the political authority to govern it, this political legitimacy is not enough to ensure that his commands will have the full character of law.

Every human lawgiver is also an individual and has his own ends to pursue. But when acting as a lawgiver, he must strive for the common good even if it is not pleasant for him personally. The lawgiver does not have friends, or relatives and does not have the same ties to such people that the person who has the office of lawgiver does. Contemporary law draws this distinction by contrasting the lawgiver as just another human being with the lawgiver in his corporate personality. Authority does not arise in an individual person but only in the corporate personality. Only such a personality, itself timeless, could govern a timeless community. As a lawgiver an
individual human being is a mouthpiece for the expression of the common good. When he speaks for himself he does not pronounce the law. Not everything that issues from the mouth of the lawgiver is said *ex cathedra*.

Many legal systems provide their lawgivers with as many of the private goods of life as they can, at least, the material ones, in order that the lawgivers can devote more time to the securing of the common good. This works for needs such as food, shelter and clothing, but when the lawgiver is constantly satisfied with respect to all his personal goods, he may tend to forget his moral obligations and this certainly cannot aid him in developing good law. The law must never give the impression that legality is the whole of life.

The lawgiver has authority only to the extent that he pursues the ends of the community. These ends are rationally knowable and subject to public inspection. A lawgiver cannot will something to become law unless it is in agreement with reason. Aquinas refers to acts of will on the part of a lawgiver that are not according to the rule of reason as acts of tyranny and violence.

A tyrannical law is not according to reason, and therefore is not straightforwardly a law, but rather a sort of crooked law. (55)

St. Thomas does not say, as many others in the natural law tradition have said, that an unreasonable and therefore unjust law is no law at all. (56) Law is a
specific combination of many causes and though it may err in its reasonings about the means it must pursue in any given case, it may still possess the character of authority. Authority belongs to the legal system as a whole. The question of how far one ought to go in obeying an unreasonable government must be decided in an actual situation, and the decision will be touchy. Certainly for St. Thomas there is the presumption that the legal system in potentially always of value and deserves obedience on this count alone. Professor Cameron describes the problem in the following way.

No one doubts that in the purely legal sense the State is omnicompetent, and that if and when the command of the State is resisted on grounds of conscience or of interest, there is no body of recognized rules to which a cogent appeal can be made. (57)

Authority is a limited concept and this itself places restrictions on the possible cases where it can be disobeyed. The authority of a human being is, as Professor Cameron says, "vicarious", that is to say, held and handled by him as another's deputy, for it is derived from God and its presence is known through reason. But whatever lies within the confines of reason is subject to being made into law and in this sense the content of law is open to the will of the lawgiver. Reason really does not limit law very much, in the practical sense. Father Gilby explains St. Thomas' concept of authority as
a necessary element of lawmaking in this way.

[In the case of] political laws as such, laws which did more than reinforce a precept of morality, expediency was the ground on which they were settled. They became what has been in fact enacted, what should be accepted, and what will be enforced. They bound in conscience not because they were logically implied in the moral law, but because they have been prudentially added and willed by just authority. (58)

But reason deals only in generalities and it only tells us the principles of how to decide what law should be in any given case, i.e. the necessary means to a desired end. It does not tell us what the end sought should be. This knowledge of ends is something engrained in the community at an even deeper level than the law occupies. These means must be determined by observation and prudence on the part of the lawgiver. It is worth listening to Professor Cameron discussing this point.

For man in history and for us, as men of our own time, the criterion of nature is rather a guide to the character of morality than a ready and easy means of settling what we ought to do in particular situations. We cannot reasonably suppose that we are free from the moral blindness of men before us — think how many good men have seen nothing wrong with chattel slavery and judicial torture, how many Christians have seen the killing of heretics as a duty — and we have therefore no grounds for going in for the romanticism of many rationalists who have supposed that we have only to use our intelligence and draw up lists of crisply worded natural laws and natural rights and (more importantly) to apply these to concrete situations. More, even where almost everyone concurs about a given end ... much of what is proposed as a means to this end is a matter for technical appraisal and not for primitive common sense. (60)

A municipality's decision to regulate road traffic
does not indicate what the actual speed limit on a given road ought to be. This is a matter for civil engineers to decide. There may be people who disagree with the findings and wish another limit to be adopted, but if it is necessary for the common good that only a certain speed be allowed then the protests of the dissidents will have to be overruled.

Another reason for having lawgivers is that some citizens, in fact, do not abide by the laws. These disruptive persons have to be prevented from destroying society and so there may come a time when coercion becomes necessary. But legal coercion is only tolerable when the offender is judged as harming the common good. It is necessary in a practical sense for men do not always see the advantages offered by harmonious social life.

The need for coercive power is an eloquent sign that the formation and maintenance of a state is no mere irrepressible out-pouring of individual lives.

Sanction is not specifically a characteristic of law but rather a necessary consequence of it. When lawgivers act as authority for exacting sanctions they wield the power of the law itself, not their own. If the law forbids certain cruel methods of punishment, then the lawgiver is not free to employ them. The sanction of law is a drastic solution to a problem that ideally never will arise, but that the law is prepared
to meet if it occurs. Only when conduct is taken to extremes and injures the community does the law feel compelled to exact sanctions to maintain order. As it is given to certain men to decide what the law dictates in certain cases, so it is given to them also to determine what actions will constitute a breach of their commands. The law does not deal in trivialities but someone must decide when a deviation from the norm is trivial.

The law is meditated upon and revealed to the citizens by the lawgiver and at times forcibly imposed upon the evil man. It rules and commands and does not give advice which can be accepted or neglected by the citizen. Aquinas would maintain that law could exist without the sanction of punishment, for if men managed to act reasonably, as the law assumes they will, there would be no need for it. But this does not indicate, in Aquinas' view, that if men were basically good and reasonable there would be no need for law itself. To St. Thomas this would make no sense, for the case of the perfectly reasonable man lies at the unachieved apex of the legal order, not in its negation. He did not identify law with the coercive order. Relationships would have to be maintained even in a world without crime or sin, and so, law would still exist as the revelation of the good life in human society. Law concerns itself with men as they are in order to move them towards being what, ideally, they ought to be.
Legal authority is reasonable, for authority itself is a result of man's rational nature. Lawgivers do not will themselves into power; their authority stems from their legitimacy and not their coercive abilities. To say this in contemporary terms, legal authority is not, in Aquinas' view, a function of effectiveness.

Law is manifested at different levels of government, since conditions for the maintenance of society have varying degrees of generality. Thus Aquinas does speak of eternal law, natural law, divine law, and human law. The concept of law is one of great generality and St. Thomas' division of it is an attempt to put order into analytical thought. All four types of law fit St. Thomas' basic definition of law, as a command of reason issued by one who has the care of the community, directed towards securing the common good of that community, and promulgated. However, he goes on to distinguish eternal law from human law on the basis of their differing sources of authority, the eternal law proceeding from God and human law from lawgivers. Natural law and divine law are distinguished in terms of their manner of promulgation, natural law being made known naturally to man through his own powers of reason and divine law being revealed directly by God. Each type of law deals with a different aspect of a person's existence.

For St. Thomas the proper mode for change in law is
gradual reform, for this is in keeping with the way that societies actually grow. The law is too much anchored to the ground to allow systematic overhauls of its essentials. St. Thomas had the mediaeval idea of custom before his mind when he pondered law. Father Gilby says,

Law and politics accordingly were social arts which preserved the continuity of tradition and at the same time adapted the life of the community to fresh conditions. Vain to expect them to build up a system of consistent propositions. The construction was haphazard. Like the English Common Law, they were worked up more by judges, practitioners and men of affairs than by teachers. The sententialia just were not the enunciation of rules but the discernment of living meaning and its application to particular cases. (64)

St. Thomas reminds lawgivers that law is best instilled in citizens through education and this takes time to acquire. They had best be careful as to what they originally enact as law rather than try to constantly repeal laws that do not work, for soon they will have anarchy on their hands. 65

Though law is gleaned from reasonings about a man's relationships with others of his kind, it still acquires its effectiveness from authority, contemplation turned outwards. Those who maintain that St. Thomas has a too intellectualistic theory of law, one not of any use in practical matters, have probably neglected his stress on authority. 66 Though he never would have conceded that force was the best form of persuasion, or that obeying the law out of fear of reprisal was the
noblest motive one could have, it might become the lawgiver's duty to use coercive means, and he should not shirk his tasks. Even for the lawgiver's duty is rather the last bulwark against wrong acting than the highest motive for right acting."67

St. Thomas disagreed with St. Augustine on this point of the necessity of using force. The reign of law was not a concession to the reign of sin, as Augustine thought. Law may be necessary to lead man back to God but it is necessary because the state of innocence was still a state of human possibility. Human nature was not altered essentially by grace, and law is still what it was before, a guide for human action. If man has a nature then law is man's reflection upon that nature undertaken with a view towards action. The relationships that exist between the ends of humanity and the restrictions put upon man, because he must seek his perfection in this world, are essentially legal.

After the apex of the Middle Ages, legal thought began to take another turn, one away from the paths opened up by Aquinas. The following aptly summarizes Aquinas' intuition of the nature of law.

Laws are guides of human conduct. Since they have thus a merely instrumental function, their ends will be the ends of the men they govern. And since the goods men ought to seek can be ascertained only by first knowing the kind of creatures men are, evaluation of laws rests upon a philosophical conception of the nature of man. (68)
This stream of thought begins to fade away after the high Middle Ages. The consequences of this forgetting about the ultimate foundations of the legal order will be investigated in our last chapter. The mediaevals drew constantly on the thought of philosophers, who were at that time deeply concerned with the nature of man, and in this way kept in touch with the demands human nature made on the law.

The jurists treated law and institutions as social artefacts, [Aquinas] observed, for they have to keep to facts, and define the political and civil in terms of the constitution actually in force. The philosophers on the other hand, looked rather to the whole purpose of the organized community in the light of its natural origins and purposes. (69)

St. Thomas was writing as a social philosopher and theologian, not a jurist. But he was not a thinker who only provided man with escape routes into the hereafter when things got rough. There is no question that St. Thomas describes a law that we can recognize as our own.

Now that we have seen that law for St. Thomas is an ordinance of reason for the common good and made by authority who has the care of the community, we have only to investigate the reasons that the law can supply when we ask why we are obligated to obey it. We will end our discussion of Aquinas' legal theory with an enquiry into the obligation of law.
The Intention of Law - Legal Obligation

It is a fact of social existence that men live under law. It is another fact of social existence that the law claims obedience from the citizens of the political community, it obligates them to obey its commands. It is this intentional reaching out of the law that establishes a bond with human existence, for its aim is to prescribe for human actions. What is the basis of this relationship? What is there about law that couples it to human life in such a way that men ought to obey its commands? This is the question that St. Thomas deals with when he considers the relationship of law to man. That the relationship exists no one questions; that it is of a certain nature is open to public observation and verification. But below the surface there are the roots of law that embrace and cling to human life. To find the foundation of legal obligation we must determine the point where it touches the life of man.

Aquinas never systematically deals with the concept of obligation in the Summa Theologiae, yet it serves for him as the sign of all just and true law. Just as the concept of sanction enters into legal thought as an effect of law, so does the concept of obligation. A just command, given by legitimate authority, aimed at the common good, will create an obligation in the one it is
addressed to. The question is: How is this done?

St. Thomas begins his treatment of law by considering the etymology of the word, and relates that it derives from *ligando*, the Latin word for binding or obliging. To study the law is to study obligation. Aquinas holds the position that wherever there is just law there is also obligation.

Human positive laws are either just or unjust. If they are just, they have binding force in the court of conscience. (72)

But we must remember that a just law was not any order issued by a lawgiver. It had to fulfill the criteria set out in the definition of law.

It seems that St. Thomas found the roots of obligation in the definition of law that he provided. There was something in that definition that accounted for the necessity of obeying the commands of law. Was it the fact that the law was commanded by one in authority, or that it was directed towards the common good, or that it was reasonable? Aquinas answers that all three qualities of law, added together, go to making it just, and therefore obligatory.

Laws are said to be just [and therefore obligatory] on three counts: from their end ... from their authority ... and from their form. (73)

By considering each quality or cause of law separately we will illustrate the obligation contained in each.

What does St. Thomas notice in the end or purpose
of law that contributes to its obligatory character? We can recall that the end that the law pursues is the common good of the political community, i.e., those goods which are communicable to all citizens equally. They are the necessities that enable social life to continue its existence, such as peace, health, and order in society. Man is essentially a social creature who needs the society of others of his kind if he is to survive. It is clear that if the individual men are to survive, then society, in some form or other, must also survive. The task of the law is to insure that it does.

According to St. Thomas, individual human existers have a natural tendency to seek the good of their own being, to fulfill their human nature. The basic drives of life are effects of this universal tendency to seek the good. The end of human life, happiness, is the goal all men strive for, even though they often mistake the path to it. The fundamental drive to actualize happiness in one's existence is the first source of obligation, the original "ought" in human life. It is the prime necessity that we are all subject to.

The necessity that one is subject to on account of an end or goal that he pursues is not physical but moral necessity. Physical necessity is a species of wholly intrinsic necessity, and derives from the form or substance of an object. Something is physically necessary when the
stuff it is made of, or the form it is made in, restrict its possibilities for novel action and development. It is physical necessity that causes a rock to fall every time it is released from a height. But necessity can also arise from a source that transcends the necessitated object. It can also be created by an efficient or final cause. The difference between the two main types of necessity is that intrinsic necessity cannot be overcome while extrinsic necessity can. One cannot help but be what one is, but one can have an effect on relationships between the self and external objects. Extrinsic necessity is rooted outside the object and becomes necessary only when a relationship is established between two things.

The type of necessity that the law imposes on persons is extrinsic, moral necessity, or necessity on account of an end.

The ultimate rationale of the conscience obligation in the law lies in the absolute moral necessity incumbent upon any government to reach, or at least strive to reach, the one goal of any state -- the peace, happiness, and domestic tranquility of the citizens -- the common good. (??)

It is necessary that laws be obeyed if the common good is to be achieved. Often moral necessity is referred to, but wrongly, as hypothetical necessity, since it takes the form: if this end is to be achieved, then these means are to be employed. But although human law is seen to be obligatory if the end that is the common good is to be
actualized, this end is in fact necessary for human beings, due to their natures as social creatures; so law is a necessary means to a necessary end.\textsuperscript{78}

But St. Thomas tells us that law also derives its obligation from the authority that commands it. What is it that an authorized lawgiver can add to the moral necessity of employing necessary means for achieving the common good?

Law is a means to an end for Aquinas. The end of the law is always before it and moulds its actual form. But human beings are not exhausted by their social natures. They have ends that concern them in capacities other than as citizens. Consequently, people do not always attend to the common good, and more often than not, seek their personal ends first. But the maintenance of the social order is necessary and its needs must be provided. Men have therefore found it necessary to institute persons who have as their social task the more or less constant looking after the interests of the community, these men are lawgivers.

Many times it will be necessary to choose between indifferent and competing means to the common good. In these cases the lawgiver will ascertain all the information he can about the situation and make an informed, prudential judgement as to which will be adopted. This decision will become the resolve of the entire community. A legal community is not a substantial being, i.e. a being whose
parts have no existence as separate things, but rather it is an accidental whole, i.e. a whole whose parts consist of separate things, and whose unity arises out of ordered relationships that are maintained between the various parts. It is referred to as "accidental" being because relation is a category of accident and not of substance, according to Aristotle.79

Lawgivers are necessary if a legal order is to be effective. Professor Bayne, S.J. offers the following description of the role of a true lawgiver.

Since moral obligation has its source in the finality of the common good, the lawmaker has in no way control over its presence or absence. The legislator may well conclude that the common good does not demand any legislation whatsoever. He will then refrain from legislating. But if he determines that legislation is necessary, the given statute that he determines upon obliges in conscience whether he wishes it or not. His determination that some means must be chosen, and further selection of that means, eo ipso induces moral obligation. (80)

The lawgiver possesses authority, and thus commands obedience, because he is the medium through which the necessary means to the common good are made known. He has authority of his own and thus power to obligate men, but he has no control over the obligation arising from the end of the law or from its rational form. Legal obligation arises partially from the lawgiver but not wholly from him. His power is real but derivative from the whole.

Many legal and political thinkers have felt that
authority was the main, if not sole, source of the law's obligation. It is another factual observation to note that in the legal order the lawgiver commands a vast amount of coercive force which enables him to penalize those who disobey. Since human beings do not happily respond to punishment, it has occurred to some, that the threat of retribution is enough of a reason for a duty to obey the law.

Aquinas does not agree. Sanctions do not provide any ontological link between man and law. Instead of explaining why men ought to obey the law they only explain why certain men fear to break it. It is essentially a psychological explanation and not a philosophical one.

Constraint, however, is not the proper description of man's situation, for this is not an obligation imposed on a formless desire, imposed by force by a superior power, but a statement of man's necessity to be himself in his action. The fact that this principle states an objective order, in human nature and action, may give to the individual the sense of meeting up with an external, constraining force, but this psychological situation need not confuse a philosophical analysis. (32)

The universal criticism made against sanction being the basis of obligation is that it only deals with lawbreakers and does not provide an answer as to why good men obey the law and support its goals. According to Aquinas, sanction is only a remedy that the lawgiver has at his disposal when dealing with sores on the legal community. There could easily be law without sanction, but not without obligation.
Authority is necessary in political society and ought to be obeyed because it commands means that are necessary in realizing the common good. This, however, does not allow the inference that the obligation that results from authority can be collapsed into the general moral obligation one has to become what, ideally, one ought to be. Aquinas tells us that,

artificial things are not reduced into natural things so that nature is the first and only principle of them, but insofar as art uses natural instruments for the making of artificial things. Similarly, ceremonial precepts of positive law are not reduced to natural law so that their force comes from the latter; they get this element from the will of the lawmaker. (83)

The lawgiver commands specific means to a specific end, and "legal obligation is related to moral obligation as what is specifically and in detail necessary for the common good is related to what is generally and in large necessary." 84

It follows then that the commands of the lawgiver may bind the subject even if they do not perfectly promote the common good. Lawgivers are humans and can commit acts of violence or ignorance just as a subject can. When they join in undesirable actions they are not commanding in harmony with the source of their authority, which as we said previously, is essentially vicarious. 85 In the case of a bad law one may still be obligated to obey if some good is to be derived from obedience. A law may be unjust and still lead to the common good in the
long run.

If the lawmaker's intention bears on true good, namely the common good regulated by divine justice, the consequences will be for men through the law to become quite simply good. If, however, the intention is not for good without reservation, but for something that serves his own profit or pleasure, or against divine justice, then keeping the law will make men good, not simply, but relatively. (86.)

In obeying the lawgiver one is actually obeying the commands of the means-end relationship. So long as the actions commanded do not subvert the ends of human nature, they are prima facie obligatory. The personality of the lawgiver is not of any consequence. Whether or not the lawgiver is a scoundrel or grafter, his commands, if possible for men to fulfill, obligate in conscience.

A positive law is binding in that what it commands should be fulfilled, not in that its further purpose in the mind of legislator has to be shared. Thus there is no breach of positive law when the outward performance is not matched by inward dispositions; as when a man pays his taxes while thoroughly disapproving of the government's policies. (87)

A lawgiver should never forget that he is a human being. This means that he shares in the needs of the social life along with his citizens. He is obligated to pursue the necessary means to the social end, i.e. he too must obey the law even though the laws that address him are not identical to those which address subjects. What lawgivers usually are exempt from is the threat of sanction, for they normally control it. However, in a government with division of powers even the lawmakers can be made subject to the rule of law, and thus, sanction.
Lawgivers are only free from the restraining force of law not from its obligation; and so this is the reason that the lawgivers in any society should be the best men in it, for they must be trusted to obey the law without the threat of sanction.

A sovereign is described as being exempt from law with respect to its coercive power, for, to be precise, nobody is compelled by himself, and the law has restraining force only from the sovereign's power. (88)

This leaves us with the obligation that arises from the form of law, from the fact that it is a command of reason. In essence this is the primary source of obligation for Aquinas, reasonableness. Rational necessity, moral necessity, hypothetical necessity, all amount to the same thing. The means-end relationship between law and the actualizing of the common good indicates that two points are to be welded, but it is the faculty of reason that traces the links that could possibly join the two. Obligation is essentially a relationship and it is the reason that perceives relationships.

It is the reason itself, as such, which presents itself as obligatory... (There is a question of) the rational necessity manifesting itself to freedom, necessary without necessitating; here it seems is the essence of obligation. (89)

One is obligated to obey a rational command for only it can provide the light on the road to the common good.

We are told that we ought to obey the law because
it seeks the common good which we all must help to realize; we ought to obey the lawgivers because they reveal the necessary means for achieving the common good; we ought to obey rational commands because reason is the guarantee that the road the lawgivers indicate we should follow is the true and good one.

Obligation in Thomistic thought has its foundations in reality, in the reality of human nature and destiny. It is the power of truth and goodness. Professor Stevens says,

The truth commands the will, because the true and the good are but aspects of the same being at which the will's inclination is directed and which the intellect naturally perceives. It is because human action is essentially a product of both intellect and will, and both the true and the good are values essential to this action that the truth commands in its own name, and with its own authority. (90)

Obligation arises out of the demands of human nature as it makes its way through social existence and guides man through society to his final end.
THE LEGAL THEORY OF WILLIAM BLACKSTONE

The key to understanding Aquinas' idea of the nature of law is found in remembering that it depended, ontologically, on the nature of man for its specific character. When men obeyed the commands of the lawgiver, Aquinas thought, they were, providing those commands were just, obeying the dictates of their own natures. Needless to say, such an understanding of law does not provide an easy point of departure for anyone who might argue that the law is an imprisoning institution, that serves only to deprive man of that freedom which is rightfully his. Aquinas did not define law as Austin would come to do as a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him" for the dominance of what came to be known as the natural law school kept a check on all such moves.

The incorruptibility of the law did not mean, however, that a lawgiver could not be unfaithful to his appointed tasks. With the law as firmly grounded as it was in the nature of man, it became possible to recognize acts of violence on the part of the lawgiver as well as in the actions of citizens. This notion was to become the foundation of the tradition that natural lawyers guarded. A law, even a duly enacted law, i.e. valid in terms of all legal and procedural rules, could still fail to be a
law in the complete sense, and to the extent that it did fail to meet certain criteria it was not law but violence. Though one had an obligation to obey true law, for the structure of law itself implied such an obligation, the case had to be reassessed when acts of legislative violence were under inspection. However much the lawgiver insisted that even acts of his that appeared to justify and unreasonable to the citizenry were obligatory, the fact still remained that the obligation to obey such laws differed from the obligation to obey true laws. Obligation is a relationship that exists between man and an end that he pursues. If the end that the law pursues is essentially different from the end sought in an act of violence, then the obligation to pursue that end will be, of necessity, different. Whatever a tyrant is and whatever duty of obedience one may owe him, he is not a lawful authority.

The natural law tradition was an outcome of the understanding of man current in the Middle Ages. But the tradition lasted and found exponents long after the medieval philosophy of man had, by and large, been put away in a relic chest. Some odd things have happened in legal theory as a result of the unhitching of law from its ontological foundations in human nature. The most obvious example is to be seen in the rise of the school of legal
positivism, which many view today as the key to understanding legal matters. But it is worthwhile to remember that legal positivism, just as any other legal philosophy, requires that along with the preferred understanding of the nature of law goes a parallel understanding of the nature of man. Even though positivists seldom openly discuss human nature when discoursing on the law, their assumptions on this subject are open for inspection. The question we might ask ourselves here is whether we can conceive of adopting a new notion of what is involved in being human in order to accept what seems, on the surface, to be a convincing understanding of the nature of law? Which do we ground in the nature of the other? Which do we know first?

In this chapter we will investigate a fascinating figure in the history of legal theory, Sir William Blackstone. This eighteenth century thinker provides us with a clear picture of the problem involved in legal obligation. We will try to show that he is at one and the same time attempting to hold onto a conception of human nature that goes hand in hand with the natural law, and also grasping at a new theory of the nature of law that requires an essentially different notion of the nature of human existence than the mediaevals knew. When did this new human creature come onto the scene? In what ways is he different from the man of history? The confusion, universally recognized in Blackstone's thought though
diagnosed as many different problems, will indicate the queer situations that can arise when the attempt is made to unite contradictory understandings, or actually divorce the law and human nature. Blackstone scholarship is much concerned with exactly what Blackstone was up to when he wrote his famous Commentaries on the Laws of England, in the latter half of the eighteenth century. Was he functioning as a legal philosopher and jurisprudent, an historian of law, an apologist for the English legal system, a reformer of the common law, or a practising lawyer? Whatever Blackstone may have been doing in any other capacity our only concern is with his legal philosophy. We are not specifically concerned with what he thought about the English common law as it existed in the eighteenth century, but rather with what he thought about the nature of law in general, the nature of man, and the relationship that exists between man and law; i.e. obligation.

Blackstone on the Nature of Law in General

The Commentaries, aside from describing the law as it existed in England in 1765, also provide us with an introductory section that deals with the nature of law in general. It is from this section that we will draw most of our material.

Blackstone has been accused by many of being a
thinker, so confused in fact that no one seems able to agree where he should be placed in the annals of legal thought. The battle continues to rage as to whether he was a reformer of the legal system, or, as Bentham suspected, a defender of the status quo. More germane to our purpose is the question of whether he more properly belongs in the ranks of those who view the law as an act of reason, or with those who see law as primarily an act of the lawgiver's will. Rather than attempt to argue that Blackstone was a true and faithful exponent of either school, we will attempt to illustrate that he really had a foot in each. But we are not advocating in this thesis the same position that Professor Shapiro takes when he characterizes Blackstone as a fence straddler.² There is a theme present in his work that overrides the confusion present, and it is in the light of this theme that all the contradictory passages have their meaning clarified. Whether the motif Blackstone plays upon is an acceptable one or not cannot be allowed to cloud the fact that one is present. Given the prominence of positivistic legal thought today we should not be surprised that Blackstone's legal thought is often overlooked today, for it is essentially metaphysical in character.

Blackstone comes up for a turn at legal theorizing at a transitional moment in history. He lived in an age that was experiencing both the death of the mediaeval
civilization and the birth pangs of the modern age of reason. Rather than wholly opting for the knowings and unknowings of one age or the other, Blackstone carefully charted a course in his thought that attempted to reap the best of both worlds. Our thesis here is that this is exactly what he did. He held onto the mediaeval notion of human nature but traded in the understanding of law that went with it for a new one that in many ways seemed to be more in accord with the de facto political situation he was confronted with. Instead of attempting to understand the new political events in terms of what men had always claimed to know about their own kind of being Blackstone found it easier to just abstract from human thoughts in order to systematically look at the law. Whether or not he intended this movement to be purely heuristic is not important for when he returns to the subject of obligation he will have to tie his legal theory up with a theory of human nature.

Blackstone begins his introductory section on the nature of law in general by describing it as a rule of action.

Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. (3)

This may seem an odd statement when we remember that its source is a legal text. What could he mean by
saying that law applies both to animate and inanimate things? Are we to start arraigning and imprisoning rocks? Blackstone is caught up here in the eighteenth century quest for order in nature. A rule is what measures order, or correlation between things. Not only were the activities of human beings capable of being rationally understood, but the actions, or better the motions, of the whole cosmos could be taken in by the human mind. Law covers the whole spectrum from passive matter, through plantlife, and animals, to the spiritual being of man. Just as one could scientifically study the motives and reasons that human beings had for doing things as they did, i.e. the paths they traced over and over again as they worked their way through life, so one could now trace connections of cause and effect in inanimate nature. The observed constancies of motion in nature led men to talk of necessity in the way things happened. The analogy to human law is obvious; Blackstone spoke of law, in the general universal sense of the term, as a relationship between things that had a sort of necessity attached to it.

Blackstone has come under fire recently from H.L.A. Hart for his identification of human law and observed constancies in nature. Blackstone goes on to infer that law is

a rule of action, which is prescribed by some superior and which the inferior is bound to obey.
Blackstone introduced the notion of prescription into his account of universal law in order to explain the necessity mentioned above. He was not far enough into the self-confidence of the later Enlightenment to not be troubled by explanations of the world's motions in terms of pure chance. The world was still God's creation. It was given its direction by God. Even though science was suggesting that God was not guiding the world personally through space and time, that first push was important. Hart claims that Blackstone is making the standard mistake of all legal thinkers in the natural law tradition "from Aquinas onwards". He is blurring the necessary distinction between descriptions of the fact that many motions in the universe are observed not to vary, and the prescriptions given by lawmakers that certain actions must not vary from the provided norms. Hart cannot allow Blackstone to refer to laws of nature, in the scientific sense, as prescriptions, for there is no prescriber to be found. It is difficult to imagine a legal order without lawmakers, though a customary society might approach it. Prescription in the legal order involves a whole legal system which enforces the law's commands. Professor Hart passes over Blackstone's idea that inanimate nature is bound to obey natural laws for it does not possess an intelligence that can provide alternatives. Whether or not Blackstone has committed an
indiscretion in working in terms of a primeval push given to the world by God need not detain us any longer, for he quickly narrows the subject of his investigation.

We are offered a more restricted description of the subject matter of the Commentaries in the following passage.

Laws in their more confined sense . . . denote the rules not of action in general, but of human action or conduct; that is, the precepts by which man . . . a creature endowed with both reason and freewill, is commanded to make use of both those faculties in the general regulation of his behaviour. (6)

Blackstone recognizes, as most thinkers do, that there are distinctly human actions, actions that are proper to man qua man. Human beings, as instances of physical objects, fall when dropped from a height according to the same pattern that rocks are observed to; but their specifically human conduct is regulated in a manner that physical motion is not. The characteristic peculiar to human action is that it is free, free from physical necessity. Human beings exist in possibility and not complete actuality. Human actions need to be prescribed, guided or directed. Men have the option of deciding which activities they will engage in and which they will shun, in other words, how they will attempt to be human and how not. Blackstone is moving in this area when he speaks of freewill. His ideas stress that for human beings law is something that necessarily has to be
pursued, but it is a path that one needs to be put on before it can be followed. Man has the faculty of reason which enables him to perceive differences in the possible actions that he could engage in. His reason draws distinctions and his will freely chooses one alternative. Blackstone reveals the motive for truly human action as being the happiness of the individual. Thus universal law for human beings consists in the necessity of man's freely choosing to pursue his own happiness.

Now there is much in the above that St. Thomas would agree with. He agrees that the end of man is to pursue happiness. He also sees law as essentially a rule or measure of human action. He concurs that both the reason and the will have a part to play in determining what a law is. Aquinas also speaks in terms of necessity and command in this legal writing. This supports our thesis that Blackstone, when he speaks at this general level, is actually speaking more about man than law, and that his view of human nature is essentially in accord with the mediaeval view. The notion of human positive law has yet to be filled out in the Commentaries.

So far, Blackstone has only spoken of God and the things which he ordained in the universe, more specifically, the things he ordained for man. Man is a creature, according to Blackstone, that the Creator wanted to be free, and thus is a creature of possibility, a being
with a future that was undefined and had to be sought after. Bottles and chairs may be unable to be anything except what God makes them, but men are different. As Blackstone says, man is a being "that has no rule to pursue but such as he prescribes to himself." 11 It is on the nature of this required direction of human life that Blackstone and Aquinas part company, for Blackstone finds it necessary to introduce a transcendent final cause into the picture where Aquinas can find the end of law within man himself.

Blackstone is discussing law in general, law as it applies to every individual's life. He agrees that there are certain rules which everyone is subject to simply because they are human beings. These are the prescriptions laid down by God at the time of creation and indicate his plan for the human race. He says of them,

When [God] created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. (12)

Blackstone emphasizes that God limits man's freedom by means of the law that he prescribes. This is a notion that we do not find in Aquinas. It has been suggested that this line of thought can be attributed to Blackstone's theological presuppositions.

Instead of reason discovering the natural law, Blackstone made revelation declaratory of whatever abstractions many have existed in natural law. In
fact, given the corrupt state of our reason Scripture was all one knew of the impulse to true felicity and of the ordinances of the natural law which would lead to it. (13)

It seems from this that Blackstone thought of law as coming into the world to deal with sin, a notion that we find in Augustine and Luther. He also seems to say that revelation is necessary because sin has impaired man's intelligence to the degree that he is unable to deduce the metaphysical principles of law himself.\textsuperscript{14} It is true that these two points are separate issues. The inability of man to know the demands of the law is not necessarily the inability to deduce a metaphysical principle of action. Blackstone does not take time to consider whether the commands of God are reasonable or not; whether they might not be necessary on the basis of their rationality alone. He does not consider that there may be a relationship of necessity holding between being truly human and not slaughtering every blue eyed baby. The suggestion that there is nothing else a man could reasonably do in certain cases, and still remain a human person, implies restrictions on freedom for Blackstone. His conception of the will is that it is not conditioned in any way by the reason. What the reason perceives as in keeping with human nature does not at all affect the will's choice of action. There is no general tendency in man to will what the reason sees as good. Even if human
nature declares an action to be inhumane and evil, the will, according to Blackstone, may still freely choose to pursue it. This understanding of the nature of will is bound to give rise to conflict in matters of human action. Two absolutely free wills may come into conflict which they cannot rationally resolve, for since there is absolutely no relation between them they will not share even the canons of moral argumentation. The notion of an absolutely free, because completely unconditioned, will destroys the possibility of moral reasoning and argument. This will have serious repercussions in the law, which as Lord Justice Denning notes, is best served by the powerful, rational arguments presented by both sides of a dispute.

During the period of the Enlightenment God became a mystery to man, but in a way that he never was before. He had moved to some corner of the universe and had become inaccessible. No one was sure any longer how much he actually did to sustain the universe. He had become so transcendent that all one could say of his ways was that they were the way he willed them to be. The plan of creation had become impenetrable and so God's reasonableness gave way to concentration on his omnipotence. This shift away from God whose creatures shared his image in some obvious way to a God who was wholly other, was accompanied by a shift away from the mediaeval curiosity about the way God
intended things to be, and gave the enlightened man more room to move in the intellectual arena. No longer did things ultimately have to be reconciled with a master plan that was housed in a religious dogma. Though the ways of God did not make clear sense, one had no choice but to accept them; for man still depended on his Creator for life.

A state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct. (16)

Obeying the dictates of nature was a purely practical move, for man could not do anything else and survive. In other words, the dictates of the law are to be discerned within the world by lawgivers, yet these lawgivers must always recognize that their power is circumscribed by a transcendent source of human morality. The eighteenth century worked with a concept of God who had disappeared behind the scenes of creation. Though his presence at creation was acknowledged his present involvement in the world was not noticeable. We are compelled to look at law from our earthly vantage point even though it derives its meaningfulness elsewhere.

Now that Blackstone has told us that a universal law exists he begins to fill in a bit of its content.

He has laid down only such laws as were founded in those relations of justice, and existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil...which he has enabled human reason to discover so far as necessary for the conduct of human actions. (17)
The good for man is what God wills as good. The good is capable of being known to the extent that man needs to get by. God has also revealed his commands in Scripture to make human life easier and more certain. Here man can find, already laid out for him, the laws he would arrive at were he not impaired intellectually by the state of sin.

With the thought of Blackstone it is necessary to consider his ideas on the law of human nature in order to make any sense out of his theory of positive law. In the case of St. Thomas one can understand his view of human law without explicitly employing his formal treatment of natural law, insofar as all law for Aquinas is reasonable and therefore understandable. This certainly does not deny the relationship between natural law and positive law, or underestimate its importance. But positive law, for Aquinas, has distinctive features and can be an object of study in itself. Blackstone speaks about the same things that Aquinas does but does not employ them in an understanding of human law. We will see the confusion in Blackstone's explanation of legal obligation and note its source.

**Blackstone on Human Positive Law**

In Blackstone's thought, besides the natural, universal law of human nature, there exists a distinctly human law, or to use his own terminology, a municipal law.
In his day it had become a very powerful weapon in the hands of the British parliament. He needed to communicate the source of this power in his discussion of law. He begins with the following well known definition of law.

Municipal law is properly defined to be "a rule of civil conduct prescribed by a superior power in a state, commanding what is right and prohibiting what is wrong." (18)

This definition is in keeping with his more general description of law presented earlier. In effect, all he is doing is bringing law in general down to the state level. The jurisdiction of municipal law is smaller than the jurisdiction of natural law. Here parliament and not God prescribes appropriate actions for citizens. Since citizens are also human beings they are subjects of God as well as of the state and must obey the commands he gives also. All men literally possess at least dual citizenship. Therefore, the lawgiver must command the observance of what is right and the avoidance of what is wrong, i.e. he must never contradict God's injunctions with his own.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. (19)

For Blackstone the law of nature serves as a framework in which all human laws must be contained. If this is
the case what could be the purpose of having human law? What could it be but a repetitive mouthing of the ordinances of God by human lips?

If the sovereign in a state were merely a mouthpiece of God, then Blackstone admits that no human law would ever be necessary, contra Aquinas. But the lawgivers enact many statutes and God has revealed little to man, indeed it seems as though he has not said a word in centuries. Clearly then, lawgivers are doing something that the natural and revealed law are not. According to Blackstone this extra task of the lawgiver is the maintenance of the state. Man has duties towards God and his fellowman simply in his capacity as an individual human person, but Municipal or civil law regards him also as a citizen and bound to other duties towards his neighbour, than those of mere nature and religion; duties which he has engaged in by enjoying the benefits of the common union.

(21)

What God and human nature have to say to man is pre-civil and addressed to man qua individual human person. They would be sufficient to guide man only if he remained in isolation from others of his kind. But this is not what happens. Men come together to live in societies and these need guarantees of support for continued existence. The natural law had nothing to say on matters of human relations existing in political orders. States were the creation of man, not God, again contra the understanding of Aquinas.
There is, it is true, a great number of indifferent points in which both the divine law and the natural law leave man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy.

Blackstone argued, in the typical eighteenth century manner, for an understanding of society which viewed it as an institution men entered, voluntarily, at a certain stage in their development. It was an organization that was not necessary for human beings, but nonetheless, one that was convenient and practical, and man limited his own freedom, by consent, and in his own interest, in entering it.

In Blackstone's explicit theory, society and law add little or nothing to human life, their role is preservative. Correspondingly natural law looks back to the naked individual in his state of nature as a standard. Again, since natural law can be completely stated in abstraction from society, there is little relation of derivation between natural and positive law.

He is accepting the eighteenth century theory of social contract as the basic description of the way things occurred in human development. Human nature prescribed conduct only in a pre-social setting. Political life-together was one option among many; but when it was chosen rules for its maintenance had to be set up. Thus Blackstone was aware of an ontological necessity in the nature of a thing. Provided the choice to pursue a certain end was made then there were means that had to be employed in arriving at that end. Society needed someone to administer
its needs. This administrator was the source of human law.

Now why did human beings set up societies in the first place? Blackstone argues that the only true and natural foundations of society are the wants and fears of individuals. (24)

Communities have purposes, they must allay the wants and fears of individuals. In the state of nature a man always needed to fear being destroyed by another, but at least he could fight back with all the power and resources he commanded. There was some chance of winning the battle for he was still fighting other men. Yet he might also lose. Political states removed the uncertainty involved in certain clashes of will and interest. When a man displeased the lawgiver such a vast force descended upon him that he had no hope of escape. The purpose of the law was to preserve at all costs the needs of society over the needs of the individual, which often tended to be mere desires.

Blackstone found it necessary to ascribe personality to the state itself. He was part of the movement that saw the need to conceptualize legal existence. He says,

a state is a collective body, composed of a multitude of individuals, united for their safety and convenience and intending to act together as one man.

(25)

Men did not have a right to condemn laws made by the state as long as the laws were within its jurisdiction, for the
state had a being of its own and pursued its ends independently. It was in reality a "legal person."

The idea that the state had an existence of its own, possessed its own reason and will, led to the acceptance of the notion of absolute sovereignty. Thus Blackstone says,

> there must be in all [states] a supreme, irresistible, absolute, uncontrollable authority, in which the jura summi imperii, or the rights of sovereignty reside.

(26) The legal sovereign had come to occupy the place which Blackstone reserved for God on the cosmic scale. The sovereign was a ruler who stepped in to fill the gaps that God had left, either intentionally at creation, or as a result of his absence from earthly affairs. His power was no longer vicarious, but absolute within its own realm.

The problem that confronts Blackstone with his new metaphysical creation, i.e. the sovereign, is reconciling its absolute right to govern according to its free will with the restriction that it "Command what is right and prohibit what is wrong." The sovereign had an absolute right to make laws for man qua citizen, yet individuals had an absolute right against the sovereign body in that his commands could not encroach upon those already laid down by God for their private conduct. In effect Blackstone had miraculously created a real schizophrenic man, a man
with two distinct beings. Each of these existences of man had its own sovereign, a source which provided rules of action for it. But can the existence of man be dualized like this? Blackstone's hope was that by dividing up jurisdictions he could avoid conflicts. He set about the task of sharing duties.

First of all, man was ruled by God for no one could ever escape his jurisdiction.

The law of nature being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from the original. (27)

There could be no argument that natural law had a hold on man's obedience. The law of the state was different. It was an artificial creation, one that man could either accept or reject. If anything had to be sacrificed in a conflict it would be municipal law, for man could not stop being a subject of God's as easily as he could stop being obedient to the state. In other words, the citizens of a state are also human beings; this is the source of their substance, as Aquinas puts it. If a state were to continue to exist it had to continue to preserve the foundations on which it was built, i.e. human existence. Therefore, it seemed clear to Blackstone that the state would never come into conflict with individual ends, and in this way could be
granted absolute powers to govern. Professor Gough sums up Blackstone's faith in the following way.

The imagination might conceive the possibility of parliament enacting unjust laws, but in actuality he obviously thought such conduct improbable. (28)

According to Professor Gough, Blackstone recognized the legal implications of legislative sovereignty, but also believed that the legislators knew that they were duty bound to protect the rights of individuals. They had a moral obligation to keep their hands out of certain matters. But equally, the citizens could not expect their administrators to bow to the desires of individual conscience.

[It is not necessary that] there is any contradiction between the sovereignty of Parliament and a doctrine of a higher law critique of the exercise of that sovereignty. As Blackstone might have said the courts may bow to Parliament, rather than to the higher law, but it does not follow that individual conscience should similarly be subject; and vice versa. (29)

Professor Finnis has here illustrated how Blackstone gave the law and human nature two separate paths to follow.

Blackstone may glory in the fact that he seemed to be able to save both the sovereignty of the law and the rights of the individual against that sovereignty. But has he carried this out in an acceptable way? His method of viewing law is the first sign of the dawn of the age of positivism. Law is no longer concerned with what
is actually good and just. Indeed, it is only concerned with actions that are ethically indifferent.

Blackstone believes that there is a class of actions that is ethically neutral, and men engage in them or avoid them on the basis of the lawgiver's command.

With regard to things indifferent in themselves the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanours, according as the municipal legislator sees proper, for promoting the welfare of society and more effectually carrying out the purpose of civil life.

Obviously an offence like vagrancy would not be against man's pre-social nature, and thus, the natural law. According to Blackstone it only becomes illegal when the lawgiver of the community declares it to be so. This is the basis of his distinction between acts mala in se, acts bad in themselves, and acts mala prohibita, acts bad only because prohibited by law. It is with regard to acts mala prohibita that human law is concerned.

The only situation Blackstone envisages where human law can be concerned with something that is right or wrong by nature occurs when it becomes necessary for the state to specify certain modes of doing a thing, e.g. stealing is wrong and prohibited by nature, but it is human law that will determine whether theft has occurred when an individual takes something he in good faith believes belongs to him already.

This then is Blackstone's understanding of the nature
of human law. It is the prescription of a sovereign in a state and addressed to man qua social being, or citizen. The relationship that exists between citizen and lawgiver is one of inferiority to superiority. There can be no clash of men in legal matters for the law is dictated only by one will, that of the sovereign, and the sovereign is irresistible and uncontrollable. But man need not fear the absolute power of the sovereign, for he has this power only within a certain area, and human rights for individuals remain in operation, except for the few things relinquished in order to enjoy the benefits of the state. Thus, man, for Blackstone, is both an isolated moral individual and a member of a political community. He has duties both to God and the state. He must pursue his own purposes and at the same time bow to the demands of the law. It is now time to bring all these threads in Blackstone's thought together and discuss his understanding of legal obligation.

**Blackstone on Legal Obligation**

Obligation is a relationship that exists between man and just law. It is a relationship that depends both on the nature of man and the nature of law, for it receives its specific form from the being of the objects that it unites. Blackstone has a confusing understanding of legal obligation because he has not taken enough into account the
demands that human nature places on all law. He developed his theory of man apart from this theory of law.

The main point of concern with Blackstone is with his distinction between acts **mala in se** and **mala prohibita**. Blackstone speaks of the obligation involved in these actions in the following way.

In regard to **natural duties** and such offences as are **mala in se**; here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only **positive duties**, and forbid only such things as are not **mala in se** but **mala prohibita** merely, annexing a penalty to noncompliance, here I apprehend conscience is not farther concerned than by directing a submission to the penalty, in case of our breach of those laws; for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would be a very wicked thing; if every such law were a snare for the conscience of the subject. (31)

Blackstone is here describing two distinct types of obligation. There is the obligation of the law of nature and the obligation of municipal law. It is in keeping with Blackstone's faith that the being which the law deals with in each case is different, and thus subject to different relationships with the law.

In the case of the law of nature and the law of revelation, man is obligated to obey the law since he is dependent on God for his existence. God created man to be free and so he does not physically restrict any action which a man may choose to undertake. What God does do is indicate that certain ways of acting are sinful and thus
against his will. If man chooses to undertake such actions then he will not find his way to eternal happiness, which ought to be his prime goal. The sort of obligation referred to here is normally termed obligation in conscience, for the obligation comes entirely from within the person who sees the law as a means of achieving a desired end. Men obey the laws of good and evil because it is good for them to do so.

Blackstone speaks of the natural law as guiding moral conduct and so we can make the inference that the obligation to obey natural law is equivalent to moral obligation, i.e. one that belongs to man qua moral being. As long as man is subject to the world of good and evil he is morally obligated to do the right and abstain from the wrong. 32

In the case of municipal law the situation is different. Man is not obligated to obey these laws at the pain of being eternally damned, for there is nothing intrinsically right, in the moral sense, about the actions that the lawgiver enjoins, and likewise, nothing morally wrong in disobeying them. Where then does the obligation of obey municipal law arise? Blackstone sees the law of the political community as presenting man with a disjunctive proposition which he must decide on, and he outlines it as follows.
In these cases the alternative is offered to every man "either abstain from this, or submit to such a penalty" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. (33)

With human positive law, if it does not in any way deal with acts mala in se, there is no moral obligation to obey or disobey it. All that can be said about it is that it is a conventional arrangement which the law will enforce. The state and the law were created to end personal conflicts between individuals. They did this by pitting all individual interests against those of the state, in the case of matters that were essentially non-moral, and therefore, not prejudged by God. Just as the state of nature saw individuals attempting to impose their wills on others, so in society the law is seen as imposing its will, i.e. the will of the sovereign, on the subjects. But when we ask why anyone should obey the commands of the sovereign we are at a loss for an answer.

Blackstone argues that no one is obligated, morally, to obey municipal law. One does not have an intrinsic moral obligation to obey the will of the sovereign. What the sovereign does have in his possession is an immense amount of force which can be used against a recalcitrant citizen. Blackstone says,

Legislators and their laws are said to compel and oblige, not that by any natural violence they so constrain man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligations but because, by declaring and exhibiting a penalty against
offenders, they bring to pass that no man can easily choose to transgress the law. (34)

In other words, the sovereign tells his subjects that they really do not have to obey his will, but if they choose not to then sanctions will be exacted on them. The question to ask is whether the sovereign, only considered as a member of the legal system, has any extra-legal obligation? Is he really able to wall himself off from the moral life of the community? Does a sovereign have to submit to the law of nature, or does his complete isolation within the conceptual framework of the legal system absolve him of all moral limitations on power? Blackstone has created an intriguing situation: on the one hand, the sovereign, as a human lawgiver, is bound to observe the demands of the law of nature, which actually limits his power, but on the other hand, the lawgiver, as legal sovereign, is not subject to the natural law -- even to the demand that he observe it -- because he is not a human being but rather a legal person, and hence is not addressed by it. Thus the lawgiver can shift around from the role of sovereign to the defender of moral justice as it suits his needs. It may seem that a lawgiver is an individual with extra duties, as the mediaevals thought, but according to Blackstone's theory, he actually is a person who can, legally, evade all duties.

Blackstone is able to retain the absolute sovereignty of the lawgiver by conferring on him a
special metaphysical status, that of a "legal person".
The legal sovereign is not logically to be identified
with any given holder of that office. Thus a lawgiver, in
his capacity of sovereign of the community, has no moral
restrictions upon his conduct. He is absolute. It
follows from this that his actions are also not subject
to moral blame or praise. The sovereign is able to make
anything the content of a law, so long as he acts in
accordance with the demands of his post, i.e. he must
observe the procedural rules laid down by the legal
tradition and constitution in order that there be
certainty that he still holds the office. The notion of
acting within established procedure is termed legal
validity. A valid law is one which is commanded by a
duly appointed lawgiver and does not vary, in its
creation, from established legal form.

In the lawgiver's capacity as a human being, i.e.
as one who holds the office of sovereign, he does have
moral obligations to man and God just as any citizen does.
He must refrain from wantonly killing people like the
man on the street must do. Thus, to the extent that the
sovereign retains his identity as a human being there are
certain situations he could not command the law to bring
about. Anything which frustrated the purposes of human life
could never become the content of law.

Professor Lewis is correct in his assessment of
Blackstone's treatment of obligation.
Blackstone appears to be explaining that what is legally valid depends upon what the lawmaker commands, regardless of whether what he commands conforms to or contradicts God's revealed and natural laws. At the same time, however, he reports that when a man decides in his conscience that a positive law contradicts God's laws he may think himself under no obligation to obey it. In other words, Blackstone has walled off the topic of moral obligation from the question of legal validity. Validity seems to be constituted solely by the sovereign's will; moral obligation to obey laws, on the other hand, has its source in men's consciences.

Blackstone's understanding of law and obligation is often referred to as the purely penal theory of law. Its essence is the notion that law divides up all possible actions of human beings into two classes, those allowed or promoted by law, and those which are forbidden. On the side of those forbidden the lawgiver has placed his coercive power, as something tacked on in order to ward people off. In effect, all the penal laws say is that if one chooses to undertake forbidden actions then he will be subject to a penalty if caught. The only obligation here is to oneself, and that is the obligation not to submit one's person to any unnecessary suffering.

The lawmaker could just as easily promise to bestow goods upon all citizens who obey his will, but Blackstone tells us that this, though theoretically equivalent to punishment, would not work as well, for the dread of evil is a much more forcible principle of human action than the prospect of good. The lawgiver cannot depend on the citizens to obey his
commands and so must bolster his case with sanction. Sanction is not really a source of obligation, as we demonstrated in the previous chapter. Blackstone himself says, when talking of the crime and sin of murder that,

those human laws, that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation in foro conscientiae to abstain from its perpetration. (38)

Sanction in Blackstone's thought is a practical addition to municipal law, which is now without obligation on the part of the citizen. Indeed this is what he is doing for he informs us that obligation to obey does not arise within us, but rather, in the lawmaker.

Our obedience to the law depends not upon our approbation, but upon the maker's will. (39)

But since the lawgiver does not address us as moral beings he cannot lay claim to our moral obligation to obey his laws. The only thing that he can substitute for obligation is the fear that results from the threat of punishment, but then again even punishment only addresses man qua human being, for a legal citizen is not afraid of punishment, he cannot feel pain.

This then is Blackstone's theory of legal obligation. It arises from all valid laws, but only in the form of threatened legal sanction. It is this threat of coercion that is the law's principle source of obligation. Blackstone is forced to this position for he has ruled out as extra-legal all moral sources of obligation.
What are we to make of Blackstone's theory? Where is he to be placed in the history of legal thought? By way of a brief summary we can now show that Blackstone used a concept of man that does not mix with his concept of law.

Blackstone talks of man as a moral being, with natural duties to God and his fellow humans. The classical natural law tradition regards this as an essential element in legal thinking. Humans have as one of their life tasks to fulfill their being. It is the area of morality that passes judgement on whether or not they succeed in doing it. To this point Blackstone is a member of the natural law tradition and is in the company of Aquinas.

When he comes to speak of municipal law, Blackstone emphasizes the strength that it wields. He must account for this strength at its source. The sovereign of the state is seen to take the place of God, commanding the laws, i.e. indicating what will be enforced. But, since Blackstone considers the law to be an act of an absolutely free will there arises the possibility that the commands of God and those of the sovereign may conflict, for the sovereign is not one of God's creations and therefore is not subject to his laws. How can Blackstone get around this? He does it by dividing up the jurisdictions of natural and positive law. God will deal with man as he
created him, i.e. as an isolated individual unit, and the sovereign will deal with man as man has decided to live, i.e. in a political society. Since Blackstone argues that the state is a conventional arrangement that man was free to take part in or not, he assumes that it is acceptable to God, since not forbidden. Therefore, the requirements of the state cannot contradict the requirements of human nature, for they are one allowed mode of human life. We might say that Blackstone has drawn a complete divorce between crime and sin. The natural law only deals with matters that are essentially moral in nature and the municipal law deals with the intrinsically amoral.

Therefore, we can conclude that Blackstone has taken man as a moral creature and admitted all that goes along with that condition. Also, he ascribes to man a second "legal" nature which is required for his theory of law. He needed such a category to accommodate the notion of absolute sovereignty, which in turn was based on the absolute, unconditioned, freedom of the lawgiver's will. Such a notion of human will, as completely unaided by reason, is at odds with the classical natural law conception of will as rational appetite.

Professor Finnis has noticed the problem in Blackstone's work and comments on it in the following passage.
The concept of the common good, whose component values might ground the varying manifold of positive laws, has virtually disappeared. The only natural good is the individual and presocial, and the great ends of the law are the protection of preexisting individual rights.

The idea that social existence is natural and necessary for human life is not found in Blackstone. The law is not seen as ministering to the individual citizen's social needs, but to the will of a metaphysical entity, the sovereign. In the thought of Aquinas we saw that the law was a means to an end that man had as a naturally social being. The common good of the community is good for man due to his social nature. Blackstone has fallen into the trap of Hellenistic dualism that has plagued Christianity since the beginning, and thus regards man as somehow having to choose between two worlds, this and the spiritual.

Aquinas is able to find the foundation of obligation in human nature and its ends, for everything that the law does is seen to proceed from that nature. Contrary to much popular opinion today Blackstone, the precourser of positivism, and not Aquinas, is the source which grounds law in questionable metaphysical speculation. The sovereign is not absolute in Thomistic thought, for he must see to it that the law follows its appointed tasks, the securing of the common good. The lawgiver must apply his reason in order to perceive which relations will lead
that good and then must command that these be undertaken. Citizens are obligated to obey the lawgiver's commands because they are essentially reasonable and thus, open to public inspection and having their binding power verified. Provided one can not show that they prevent man from achieving the common good they are obligatory.

Blackstone's main trouble is that he has an odd understanding of what it means to be a human being with moral duties. One cannot lay out in a few phrases what is involved in being human, this can only be done by viewing an actual life, and so one cannot lay out in a few commands what the ethical requirements of human life are. The notion that there are actions that are intrinsically amoral neglects the idea that in every action we are either being true to our nature or not. A theory of law that installs an absolute sovereign above the demands of human nature ends up subverting that nature.

Blackstone ended up with one foot in natural law and the other in positivism. He never let go of a moral understanding of human nature but insisted that it was not recognized by law. The immense power of the law made it seem useless to conceptually justify what the lawgivers did, for practically speaking, they could do anything they wanted to. We may end our treatment of Blackstone by wondering if it is enough to be able to criticize the law from the outside? Can we allow it such freedom that it neglects to criticize itself?
LEGAL OBLIGATION AND HUMAN EXISTENCE

The purpose of this chapter is to explore in detail the relationship that we have referred to throughout as obligation. It is the relationship that exists between man and the law. We have seen that in the thought of Thomas Aquinas, legal obligation had its foundation in a means-end relationship existing between the necessities of human social existence and the means necessary for attaining them. In the legal philosophy of Blackstone we saw that some have viewed legal obligation as arising outside of the actual law. He proposed that the law did not really obligate man, at least in the sense that Aquinas meant. Rather the fear aroused in the citizens by the threat of sanction for noncompliance served in the stead of obligation. This, coupled with the idea that the sovereign would never enact a law contrary to God's ordinances, caused Blackstone to insist that in almost every case it was wiser and more expedient for the citizen to obey the law than it was for him to disobey.

Thus we have defined, in the persons of Aquinas and Blackstone, the two main directions that one can take in investigating legal obligation. Aquinas takes the road that teaches that obligation is to be found in the law itself, i.e. in the body of precepts that regulate
social existence. This method would define and locate obligation without considering the power possessed by political functionaries in the state at any given time. The law binds as strongly in times of weak rulers as it does in times of strong ones. Blackstone, on the other hand, insists that any obligation that the municipal law of the state may have can only come from the coercive power that the sovereign commands. It is the power that the law has to punish offenders that makes the citizens obey it. Thus, for Blackstone, the actual personality of the lawgiver is important. The extent to which he can create obligation will depend upon exactly what coercive power he controls. Where for Aquinas the obligation of the law is always present and the same, Blackstone works in terms of an obligation that can vary with political power shifts. For Blackstone a weak sovereign will issue commands that are less obligatory than a powerful one will, simply because he has less to back himself up with.

We may now ask which of these conceptions is the correct one. Immediately someone will object that possibly they both are correct. Could it not be that in some cases legal obligation arises from the law itself and in others it issues from the power commanded by the state? Can we not imagine cases where men obey the law because they agree with the end it seeks to promote, such as the prohibition of rape, and at the same time think of a
situation where the law is obeyed because one fears the penalty that will follow upon apprehension, e.g. when one declines to run a red light at four in the morning after coming to a full stop and observing that no other traffic is on the road? Do not cases like this one suggest that a comprehensive definition of legal obligation is out of order?

This objection was mentioned in order to draw a distinction that will be assumed in all that follows. The above examples of reasons why people obey the law are not in any sense dealing with the concept of obligation, but rather with motivation. The concept of obligation is concerned with the question: Why ought men obey the law? The inquiry into motivation for obeying the law can be framed in terms of this question: Why does this man obey law A, and is it the same reason he has for obeying law B? The concept of obligation deals with the relationships that exist between man and law, as such, it must deal both with the nature of man and the nature of law. Motive need not be concerned with the nature of law at all. Men may obey the law without ever considering that the law is actually obligatory. Indeed, it seems probable that most men never have thoughts about the obligation of law at all. They obey due to a habit of obedience; as Austin claimed they did, and this habit may or may not be based on an understanding
of the actual nature of law. Thus we cannot say that in every instance where a man obeys the law he obeys because he is obligated to do so, though we can say that he ought to obey because he is obligated, for the idea of obligation may never enter his head and we should be wary of assuming that such thoughts must be in there somewhere. For an example let us consider the rapist who happens to never cheat on his tax return, nor has he ever robbed a bank or committed arson, or taken part in any misdemeanor. He is purely and simply a good and honest citizen except that he cannot resist unescorted young women. Though this man obeys the law as it relates to larceny, taxation, arson, gambling, vagrancy, etc., we would still probably hesitate to say that he considered these laws to be obligatory while the laws relating to rape were not. It might be safe to say that this is a case of a man who has no thoughts about legal obligation. He obeys and disobeys laws for reasons other than their being obligatory.

The topic of this chapter is legal obligation and not motive for obeying the law. What the de facto truth is about man's motives for obeying the law is the subject of a sociological investigation and not the concern of philosophy. The obligation to obey law may exist even if no one ever obeys the law and also may go unconsidered even if everyone obeys.
Why ought men to obey the law? We cannot hope to adequately answer this question without first looking at the relationship that exists between the law and man. How is it that man is related to a conceptual entity like law? What sense does it make to claim that he is tied to such an aery thing? After we have clarified the notion of obligation we will be in a position to say something important about the nature of law itself. In the end we hope to have shown that obligation rests on a foundation in the nature of human existence and that any legal theory which is not openly aware of the nature of human existence can never hope to adequately account for the nature of law as it exists in our life, for the hallmark of law as human beings experience it, is legal obligation.

The claim that men ought to obey the law is often phrased in terms of having an obligation to obey. The word obligation is derived from the Latin verb ligare which translated means, to bind, to connect, or to unite. When a man is obligated he is connected to something; he is not completely isolated, for binding is always binding to something. Obligation seems to be an indication that man transcends his isolation, or as it would have been phrased in the eighteenth century, his state of nature. It points and directs him to a reality other than his own present desires and surroundings. But it does more than point out social ties and fade away; it actually joins man to the reality that it points out. Obligation is a
relationship that sustains the connection of man and law. It alone can transform human life into "life under law."

Obligation being a relationship must be understood in terms of the objects that it unites, i.e. what is bound and what it is bound to. We must now fill in the concept of obligation by considering the nature of man and the nature of law.

One of the most basic characteristics of law is that it is universal in applicability, binding all who come under its jurisdiction. Philosophers have had differing thoughts on just how far one could extend the arm of the law. They have wondered whether it stopped at the borders of the state or whether it somehow pervaded all of existence, the mediaevals holding firmly to the latter view. But there was never any question that given the extension of the law all persons under its power were equally subject to its commands. There is an old legal maxim that states that the law is no respecter of persons, which is actually an attempt to convey the universality of the law. Laws addressed to specific persons, promoting the goods of specific individuals, have always been suspect in legal thought. Whether law was conceived as seeking the common good of the political community, as Aquinas thought of it, or as maintaining the existence of the state, as Blackstone believed; the idea that law was capable of being directed at particular citizens was
rejected.

Law in this sense is radically social, for it deals with the relationships that exist between men, not with the men in themselves. It is no accident that the figure of Justice has bandaged eyes. The differences that separate one man from another are not of interest to the law. All men are equal under law. Whether one is intelligent or dull, rich or poor, black or white, young or old, is of no consequence when it comes to having the obligation to obey the law. Law is concerned with social matters in the sense that it is concerned with all men together, because with no single person.

This does not in any way deny the reality of individual existence or that individuals are the ones who actually obey and disobey law and suffer legal sanctions. It is not accurate to say that law does not recognize the unique, individual person; rather, it sees everyone who seeks its protection as such. What basis in reality is there for the law to take such a stance? Is it not more important to take notice of individual differences than it is to refer to some illusive similarity all men have?

How does the law manage to extend itself to all men? What can it mean to say that the same relationship of obligation exists between a bricklayer and the law and a politician and the law? What do these men have in
common? If we are unable to find the common ground where the law touches all men then our concept of legal obligation is useless, for we are immediately plunged back into the pit of varying motives for obedience.

We are referring to law in a general sense, law being any ordering of relationships that exist between men. It could be municipal law, provincial law, federal law, international law, or natural law. And we are talking also of man in general, not specifically Canadians, poor men, Indians, or females. So when we ask what it is for man to be obligated to obey the law we want to know the relationship that exists between human nature and having one's relations with others of his kind ordered by law.

What is it then that all human beings have in common? The answer, their existence as human beings. This is not meant to be an empty assertion, the kind logicians fear, for it bears filling out. When we begin to ask what humanness really is we are stopped, for it is a wondering that does not await an answer in the usual sense. One must already be in possession of the answer in order for the question to arise. It is a question asked with the assumption that everyone knows what the answer is, for they are existing human beings all the while. It does not take large sums of money, great intelligence, white skin, or a career as bookkeeper to be human. All specific differences that are found in
some men and not in others are not relevant to the nature of true human existence. Whatever it takes to be one of our kind, it is something that everyone has.

We are not hunting for a mysterious metaphysical property, which is called "humanness". We are seeking an observation which indicates to all men that there is something in their lives that is similar to lives that all other men lead. It is something so basic that no one ever questions that there are others of his kind in existence, yet to define this similarity is not simple. It is our form of life, that which simply is not questioned, and thus, plays a part in every conceivable language game we play, including those employed in the law.

So many things in life are more clear than what exactly is involved in just being human. Everyone knows that qua lawyer or magistrate, a man has the duty of seeing that the legal system does its job, but does anyone know with the same precision what his duties as a human being are? In other words, do I come into the world with a bundle of oughts, or are my obligations tacked on to me accidentally in life? We all know of the prestige that societies accord to their doctors, lawyers and professors, but does anyone actually know if it is important or trivial to just be the unique person one is? Does anyone know if death is the end of existence or if there is a beyond to which we carry the lives we forge on earth? Socrates located the essence of human
life in these concerns that all men share. They are questionings that come home to every man that is alive and every man that ever did or will live. Yet they are not about any metaphysical structure in human life. They are concerns that no one ever considers questioning the validity of.

The level of the universally human is one that ponders the goals of human life. It is the level where man cares about what he should be doing with his life, and what kind of life he ought to be creating. But this notion that man has a choice in the kind of existence that he leads tells us something important about being human. It tells us that though everyone has the capacity for a truly human life, one may choose not to live that life, or neglect its demands, or deny its value. In short, one may end up not living a human life, in the strict sense, even though he was born of human parents and raised in human society. It tells us that humanity is the goal that individuals strive after. In Aristotelian terminology, we are all potentially human but must seek to actualize this potential if we are to live the good life.

We can say then, without fear of philosophical backlash, that men are beings with certain common concerns and goals. This is not the place to discuss the issue, but we hold that men at all times have had the same concerns and goals, for no one has been able to demonstrate that men
at any time in the past were essentially different from men today. We have no cause to assume that there are different ways of being human at the basic level we are speaking of. Being a human being is not a task that involves novel conceptualizations of life-styles.

No matter what idea one has of humanness, all men have as their goal the fulfilling of their natures. They are born with this "ought", for their being born involves their being naturally directed towards the actualization of their potential. It is in this seeking for an end, a purpose, a goal for human existence, that we find human nature, for it is a sign that an end exists. Man's most basic knowing about his life is that true existence requires action and change, growing, therefore, an end to grow towards. The meaning of all striving and seeking lies in the end sought. As one contemporary work on the metaphysics of the means-end relationship puts the point:

Operation can never be its own end, that is nothing operates just for the sake of operating. Just as it is impossible that seeing be the thing seen, so it is impossible that the thing sought be the seeking for it.

We have reached a point now where it is fruitful to ask what this understanding of human existence has to offer an inquiry into the foundations of legal obligation. We must recall that we ventured into the above thoughts about philosophical anthropology when we were seeking the level of commonality where the law touched all men. The
unity that all men share is at the basis of their existence, and takes shape in their existential concerns. Man recognizes his fellows when he sees them searching for the same ends that he does. But up until now, the man whom we have spoken of could well have been an isolated unit, for in seeking out his own happiness and fulfillment it does not seem logically necessary that he have any social intercourse. If all humans have the potentiality to actualize their being then why do they need other humans?

There is a fatal assumption that is made by many thinkers who ponder things legal and political and moral, and this assumption is that human society is an artificial construction of man's mind. It was originally devised, so this theory says, to account for the loss of freedom that some philosophers thought man had suffered in civil society. Without this assumption of the loss of freedom there would never have been any reason to assume that there ever was a state that man lived in, other than in society with others of his kind. What would give one reason to suggest such a state? The fact that the concept was devised, and devised to account for a certain speculative problem, is telling against it. Man can no more think himself into society than he can think himself into or out of morality.

But if society is natural rather than artificial, at least to the extent that our forms of life are always
lived within it, is there anything we can say about its nature? What is living in social relation?

We want at all costs to avoid making the state, or society in general, into some reified metaphysical entity, while still maintain that it has a reality all its own. This reality it has is a moral reality for it is concerned with the ends of human existence. Professor John Wild accounts for the reality of human groups as follows.

[The state] exists in the same way that a purpose exists in the mind of an individual agent before it is actually realized. Such a purpose can be shared by many minds. (7)

The social organizations that men belong to are human purposes; they are goals that men strive to achieve. Professor Wild continues,

the human group is a set of ordered activities in different individuals unified by a single end. (8)

Since men have a single end as a result of their common nature, it makes sense to say that they form a natural group, the purpose of which is the pursuit of the common good. The modern state is merely an organized instance of such natural grouping. Society will be natural wherever there are shared purposes. There is no need for a social contract to cause men to pursue the same ends, for the search is a natural one, an unquestionable one, one that every man is driven to by his nature. When we speak of human nature, i.e. the only true way of being human, we are of necessity speaking of a common end to
human action.

Just as individuals have ends that they wish to achieve so do societies. It is just as natural and true to human existence to help actualize the ends of human community as it is to actualize one's private ends, for in reality part of one's self-actualization must take place in a social context. All ends that one has in common with other men are potential grounds for conflict, for though the ends are the same, often the means employed to achieve them are different and incompatible. Society, as Professor Wild mentioned, is a set of ordered activities.

Part of actualizing one's human nature is knowing that it takes place in the presence of others. Though the ethics involved in making human choices may isolate one from the direct assistance of other beings, ethics being concerned with action on the part of individuals, nonetheless, the action which follows ethical contemplation takes place in a public forum. An essential part of living the human life is establishing relationships with others of one's kind, that allow one to be true to one's nature, and thus true to the knowledge that human society is a shared purpose to which one has a tendency to contribute.

St. Thomas spoke of these shared purposes of human society as common goods. They were common because they were communicable to all equally. One did not need any special qualifications in order to share in them.
There is no need to be wealthy in order to enjoy the blessings of peace; no need to possess great intelligence to appreciate the security of liberty and property. The common good is the natural end of human society. The ultimate good for man is that he fulfill his human nature. This is one point at which all men initially aim. The political common good is that cluster of relative ends, leading to the final end, which must take place in human community. Every individual exister is ultimately responsible for the self that he creates, but how that self will fare in the face of others depends upon the admitting of shared purposes and the common decision to maintain order in social existence.

It is only now that we can return to our topic of legal obligation, for until now the nature of man and society that he lives in were not filled in and without an appreciation of their natures there could be no real understanding of legal obligation.

We referred to legal obligation as that relationship that united man to the law, to the ordering of human society. When one questions this union, seeks for its foundation, he asks the question: Why should men obey the law? We are now in a position to answer that question. Human beings are creatures with a purpose, an end that they are driven to by their nature. Existence takes place in societies, which are in essence, shared purposes. Law is the ordering of
human society to a form that will be able to achieve, as best as possible, the common good of the people. The reason men ought to obey the law is that if they want to realize their common good, which must partly take place in society, then they must follow the dictates of the law which spell out, at least minimally, the necessary means to achieving that end. But the end desired in this case is also a necessary end for humans. Therefore, the law is a necessary means to a necessary end.

Human beings are related to something outside their present state of affairs, i.e. their end, the true human person. More specifically, their end is to become a true human person in the midst of other human beings who have the same end before them. The fact that their natural drives propel them towards this end is enough to keep it before their consciences at all times. Human beings are always related to true human existence. The relationships that exist between the way a man is and the way that he ought to be is termed obligation.

The most prevalent kind of obligation is moral obligation. It results from the necessity imposed upon man due to his nature. Professor Thomas Davitt, S.J. defines obligation in the following way.

Obligation is the moral necessity of choosing to perform an action because it is necessary for an end.

These are natural ends. The obligation one has to perform
acts in accordance with human nature is moral obligation, or, obligation in conscience. It confronts man in his ethical existence and generally binds him to the actualization of his nature. Moral obligation insists on the necessity of just being human before one becomes human through any specific mode. Working at the general level that it does, moral obligation becomes the foundation for all other types of obligation.

But our topic is legal obligation. What sort of bond between man and the law exists? In the words of St. Thomas we see that law is a directive judgement which orders the necessary means to the end of the common good. Legal obligation will be the necessity of choosing means necessary for the securing of the political common good. As such, it is essentially social in character. Obligation, whether legal or moral, is of the same nature. The only difference that exists between the two types of obligation is the end they seek. But this is enough to base a distinction on, for the end shapes the means.

Pursuing the common good is a more definite activity than pursuing one's personal end, for it is a definite means to the ultimate end. Maintaining the common good is maintaining the relationships that exist between men in political society. When the state is rightly ordered a situation of peace prevails among the citizens and they can trust that their persons, property,
and liberty will be secured by the law. At the base of human existence we have an indefinite number of individuals, all with different capacities, limitations and desires. At the peak we have the one goal that all human actions tend toward. In between, somewhere, exists the common good, not allowing every action that an individual wishes to undertake, yet not so close to the final end of man that it allows only one direction of action. Society and law are filters that individuals must pass through in order to reach their ultimate good.

The law is the means that the state employs to order and direct the relationships that exist between different members of the political community. It has the function of insuring that all individuals stay within the borders outlined by the common good. It provides the necessities of social existence. All men have an obligation to obey the law that does seek the common good, for they are by nature social beings and as such are obligated to pursue the necessary means to insure the continuation of that social life.

This then is the foundation of legal obligation. It is the relationship of necessity that exists between an intrinsically social being and the factual demands of social existence. If one is human then he is essentially social. If one is social then he must follow paths that allow the continuation of social existence. This and
nothing more is the foundation of legal obligation. With this understanding we can now tackle a few of the problems related to legal obligation.

Legal philosophers have long debated the value of the phrase "an unjust law is no law at all." Traditionally the natural law school was thought to hold that if a law did not meet all the requirements of justice it could not be a law, no matter how much coercive power backed it up. Along with this the positivist insisted that a duly enacted law, whether or not it was actually just, was a binding command. At times this problem arose in the form of questions concerning the limitations there were on the content of law. Was form the only thing that counted? Was the sovereign free to enact anything he willed, or did the nature of law itself restrict the types of commands that would fit the mould of true law? The theory of obligation that we have outlined enables us to answer the question. We agree with the positivist that human law requires a source, an authority that makes the prudential judgement about what is to be the law of the land. Someone must be charged with the care of the common good for society, as we have discovered, is not a fantastic metaphysical personality who can decide and provide for himself. One or more human persons must be charged with the responsibility of keeping the needs of the social system before their minds, and these people will be lawgivers.
Their job will be to investigate and declare what the common good of all demands in the form of action. Individuals will be obligated to obey their commands because of the observable, rational connection between means that they command and the end that all seek. But we also recognize with natural lawyers that there are limitations on the content of law. Law is a means to an end and is limited to commanding actions that lead man to the end he is pursuing. But the end of the law is the being of true human personality in a social setting. A law that does not promote this end will be unjust, and to that extent not a true guide, not a true law. This is the position that St. Thomas took. He did not maintain that an unjust law was not a law but that it was a twisted and distorted law, something like a compass that did not quite point to true north. Even though the actual law is in some way unjust, it may still be a good enough guide to get one where he is ultimately aiming. Such a law would serve as a map that lacked sufficient detail to enable one to detour around obstacles. In any case one is not automatically to assume that he is not obligated to obey those who are entrusted with the power to make laws every time they fail to reveal the shortest, and easiest course through the perils of social life. In fact the opposite is more reasonable. One is obligated to obey the law in all cases, except where obedience would be in flagrant contradiction with the
demands of human nature. 10

Law has both a source and a content and they both play an essential part in legal obligation. If the natural law tradition has not realized this then it is creating a bad philosophy. Originally the obligation comes from the content, the actual means commanded for the reaching of the common good. But social existence being what it is, political society found it necessary to trust the maintenance of the common good to people who could devote all their time and energy to it. Since decisions often had to be made between competing, but equally good, means to an end, someone had to make the decisions that were binding on all. Thus, the government was instituted as an authority, one charged with the task of finding and promulgating the law. One has an obligation to obey the commands of the lawgivers because he commands that which is obligatory in itself, not because he has the power to back up his commands. The phrase "an unjust law is no law at all" then is not very informative about actual legal situations, for it neglects the importance of authority issuing commands of law. But to say that authority is an essential aspect of human lawmaking is not to deny that law is limited to seeking the end that is provided for it.

Inquiries about the content of law also wonder if law is essentially an act of reason or an act of will. By now it should be clear that we agree with St. Thomas that
law is an ordering of means to an end and that ordering is a function of reason, for only it can perceive relationships. Law itself obligates man, and not the lawgiver who commands it, because it is essentially rational in character. If man could reach the common good by any means that he chose, moral, immoral, selfish, intelligent, capricious, then the notion of legal obligation would be meaningless. Where there is no rational connection there is no hypothetical connection and hence no obligation to act in a certain way and to avoid others. The necessity of reaching the common good in such a situation would be parallel to physical necessity, where objects would be driven to act in determinate ways and could do nothing else. There is no pursuit of a goal in such a case, for one is already as much of what he ought to be as he is going to be. There can be no meaningful obligation in any case where one cannot deny the obligation. Law is a thing that can be disobeyed and will continue to be such until men can no longer step away from their human nature.

Thus, a legal theory like Blackstone's, or later Austin's, which places obligation outside of the actual law and in the power of the sovereign to sanction disobedience, will not be acceptable to anyone who takes time to check the demands made by human nature on the law. The lawgiver's authority comes immediately from the law which in turn obeys the dictates of reasonableness. Man
Is a reasonable creature, ultimately, because God created him so. The lawgiver does not have authority outside of God's plan. Though the political system gives authority to legislate, and this authority depends on the type of system in existence, it is the end being sought that gives the de facto lawgiver authority to command.

We mentioned before that the law is no respecter of persons and this includes the person of the lawgiver, who can commit acts of violence just as any citizen can. The power of the lawgiver that enables him to punish those who refuse to respect and promote the social necessities, is one of the many extras that an individual may come to possess in his life. Being in possession of political power does not give one access to a different kind of human life that anyone else has.

Sanction in itself cannot create legal obligation for it only comes into play when an obligation has been denied. The threat of violence may provide strong motive for men to obey the law, especially in those who do not obey out of a desire to secure the common good. The one thing that the physical necessity of sanction cannot provide is a connection between means and ends where one does not naturally exist. Obligation arises out of the structure of the natural world.

If a lawgiver cannot provide a rational connection between his commands and the ends of the community, then he
cannot be said to create an obligation, and hence be ruling
by law. If he is able to demonstrate such a connection
in his laws then it is the necessity that arises out of the
connection, the factual necessity, that is the prime
source of legal obligation. When one attempts to
disassociate law from human nature, as Blackstone
ultimately did, one is bound to give an account for obligation
in terms of persuasive psychological motives provided by
the lawgiver and the force which he commands.

The final point we will consider here is the status
of what are referred to as "purely penal laws" and
"imperfect obligations". A purely penal law is thought to
be one which does not obligate in conscience, but only
because of the penalty involved in getting caught. In
other words, these laws; examples might be tax laws,
customs regulations, running a red light when no traffic
is in sight, do not deal with matters that are intrinsically
right or wrong, but only prohibited because the lawgiver
has declared them so. They are in effect Blackstone's
laws mala prohibita. It is assumed that since these laws
do not deal with matters that are of great moral
significance one is not obligated in conscience to obey
them, at least not in the way that one is obligated not
to rape and murder. In fact, the only obligation in
these cases is the necessity of submitting to the penalty
if apprehended.
Purely penal laws will not be able to hold up under our analysis of law and obligation. They simply neglect the fact that law aims at an end, that it is purposive activity. The fact that a law may not deal with a matter of great moral consequence does not affect its ability to create an obligation. Stopping at red lights and waiting until they turn green before proceeding is a means to the end of safety on the public highways, an end which no one questions the desirability of. It may seem bothersome to wait at a light but it serves a purpose. It builds the habit of action in certain situations, and the slow process of habit forming is the way that most law is learned. It provides an established order in traffic situations. If the law allowed a vehicle to proceed when the way was completely clear, someone would still have to decide when the way was clear. There are dangerous drivers on the road, people who one would not trust to make such prudential judgements for themselves. Someone has to be the unbiased judge of what safe driving is. The safety of certain practices is a matter for empirical research and not "common sense" or private opinion. If safety engineers indicate that it would be possible to replace the light with a stop sign and the government still installs a light then this decision is the decision for all and no one has the right to treat the traffic light as though it were a stop sign.
All laws obligate in conscience in that obedience to them maintains the necessities of social life and thus promotes the actualizing of the human person. Penalties cannot obligate and physical necessity which they impose on man is at odds with our understanding of obligation. To the extent that any law, whether it is concerned with weighty moral matters or not, maintains the social order then it obligates all citizens under its jurisdiction.

The concept of imperfect obligation does not add much to legal theory either. It assumes that any law which does not provide some sort of sanction for its violation, or does not provide one with a cause of action in a court of law, cannot obligate a person in the way a law of perfect obligation can; perfect obligations being those which a court views as authorizing it to put its coercive power to work in a supplicants favour. It is the power of compulsion. Imperfect obligations are often spoken of as "merely moral obligations". But we have seen how the notion of sanction does not play any part whatsoever in obligation. When the sanction is present it does not provide the obligation and when it is absent obligation is not taken away. What has occurred in the theory of imperfect obligation is that enforcability of a law has been confused with the obligation to obey it. A distinct means-end relationships will exist between the imperfect obligation and the common
good and this is all that is necessary for the existence of an obligation. Whatever reason the lawgiver has for not annexing a penalty to certain laws, it is certain that this omission does not hinder their ability to order and direct human affairs. 11

We have shown that obligation is the mark of all true law and that it is founded on human nature. Legal obligation is a recognition of the "oughts" that every man carries into the social world with him. In his quest to understand himself a man will inevitably run up against the law. Whether he meets the law as a force that restricts his freedom or a power that clears the way for the expression of all that is good and true, will depend on the kind of being he desires to possess. The law cannot tell us what we ought to be; we have other sources for that knowledge. The law will ever wait patiently on man, always in the faith that we do not wrong it unless we wrong ourselves.
CONCLUSION

The study of law from the aspect of legal obligation is of great benefit in resolving many problems in legal philosophy and jurisprudence. No matter what can be gained from a purely internal study of law, such as the one that Professor Kelsen has undertaken, it cannot provide an understanding of law as it actually arises in our human experience. A system like Kelsen's has a beauty all its own, but it is a beauty that has to be admired from a distance. The law is not much like living under a universal system of declared norms. Law touches man at the level of obligation and causes him to remember the necessities that are part of his life.

Today we live in an era that is saturated, or so it seems, with law. If any age needed to be wary of the threat of too much law it is ours. The vast amount of legislation and case law that confronts us makes it very difficult to gauge whether each and every law actually is promoting the common good. Only in the most glaring cases do we become concerned. We are, more than any period of the past, left in the hands of those who govern us, yet those who govern are refusing everyday more and more to justify their commands. Law today is well on its way to becoming the autonomous discipline that the mediaevals
insisted it must never become. The situation we face is put eloquently in the following passage.

Throughout history, law has laid claim to final authority in ordering the mundane relations of men in social organization: law has admitted itself to be the highest achievement of rationality in secular affairs; law has magnanimously offered itself to men as the only hope of order and peace in society. Yet at the very moment when men need principles of order in social organization more critically than ever in history those who tell us 'what' the law is cannot tell us 'why' it is law. (1)

How easy it is to shrug off questions that demand a justification of the law; a justification that is not merely an apology on the part of someone who holds power but that issues from the intrinsic rationality of the law itself. When a sovereign claims that he can do anything he wills, the question naturally follows as to whether or not there are certain things that he ought not to do. No one doubts that the lawgivers of the powerful nations today can do many things that do not speak highly of their understanding of and concern for human existence. No one can look at the laws of the Nazi era in Germany and doubt that they served as guides to desired ends. No one doubts that a brutal police officer can do a great deal to compel some people to obey the law. But the ability of a legal system to do what it wills can never justify its continued existence in the midst of human beings who, of necessity, are seeking after a definite goal.

Present day legal thought has, in its aversion to
metaphysics, ignored thoughts about the nature of man, as if man were something that was just thought up from nowhere, and in doing so have made the law into an academic curiosity, a fate which it does not deserve. Could this be a sign that the law needs a new life? It is only because knowings about man have fallen on bad days that law is viewed by many as a restrictive force and an enemy of freedom.

But man has not died, and the goal of the true human person still exists. What is needed is a renewal of contemplation of human existence, a new rational awareness of man's purposes on earth. If this is metaphysics then it is time to resurrect it. Legal positivists allow that the existence of the law enables man to continue to live, for the force it commands is strong enough to prevent individuals from constantly clashing with one another. But this is not the law we have been investigating here, for it is a law that only holds antagonists apart, not one that joins companions together. It is not the law of which Professor Carl Friedrich can say "it is the means to make certain that men do not only live, but live well."²

Throughout we have attempted wherever possible to avoid speaking in terms peculiar to the natural law tradition, though it should be apparent that it is our point of departure. There is a need today to restate the natural law in terms that are not philosophically loaded
against its acceptance. Only the natural law regards man, at the level of his being human, as the fountain and source of all law, whether it be man-made or man-discovered, to use Father Davitt's terminology. Natural law is the only legal theory that keeps front and centre the ends of human existence, and thus is the only philosophy that can claim that law truly does not restrict man's freedom, for the only thing that law binds man to is himself. The thought of Jesus will always be the basis of natural law theory; Law was made for man, not man for the law.
NOTES

1. The Legal Theory of St. Thomas Aquinas


2. Consider Justice Holmes' famous definition of law as the prophecy of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. ("The Path of the Law", 10 Harvard Law Review p. 457, 1897.) Holmes considered the "bad man" to be the basis of legal thinking and decided that such an individual was only concerned with law insofar as it enabled him to predict the outcome of certain forms of behaviour.


4. On the point that law is not counsel, vide, ST, 1a2ae, '92, 2ad2.

5. Vide on command ST, 1a2ae, 17, 1.

6. Summa Theologiae, 1a2ae, 90, 1.

7. Summa Theologiae, 17, 3.

8. Summa Theologiae, 1a2ae, 1; 1.

9. Summa Theologiae, 1a2ae, 6, 1.


11. Vide Summa Theologiae, 1a2ae, 16, 4.

12. On the order of intention and order of execution, vide, Summa Theologiae, 1a2ae, 1, 4. and also appendix 1 to volume 17 by Father Gilby.


14. Summa Theologiae, 1a2ae, 17, 1.

15. Summa Theologiae, 1a2ae, 17, 3.

16. Summa Theologiae, 1a2ae, 12, 1ad3.

17. "Nothing can direct itself to an end unless it knows the end, for the one directing must have knowledge of that to which he directs." De Veritate, quest 22, art 1.
18. *Summa Theologiae*, 1a2ae,13,1. Also *vide De Veritate*, quest 22, art 5.


20. *Summa Theologiae*, 1a2ae,17,5.

21. *Summa Theologiae*, 1a2ae,90,1. On the nature of human acts *vide*, 1a2ae,6, esp. article 1.

22. Examples of the common good being referred to as the public good are "No subject can lawfully do that which has a tendency to be injurious to the public or against the public good." Lord Truro in *Egerton v. Brownlow* (4 H. B. Cases 1, 1853) and "In substance common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well settled public opinion relating to man's plain palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation." Wanamaker, J. in *Pittsburgh, C., & St. L. RY. Co. v. Kinney* (95 Ohio St. 64; 1916)

23. *Summa Theologiae*, 1a2ae,95,3.


25. Though the two thinkers are not often compared there is a striking resemblance between St. Thomas' ideas on human nature and Kierkegaard's development in the *Concluding Unscientific Postscript*.

26. Since human nature has an end St. Thomas insists that the means used in achieving that end must also partake of good and evil, for it the perfection of human nature is the goal for man only acts promoting it will be good.

27. Cameron, p. 31.


29. Kierkegaard reminds us of the folly of individual philosophers, e.g. the Danish Hegelians, forgetting that they themselves are not Philosophy and therefore are forgetting their true nature when they begin to "live" in terms of and for the completion of a philosophical system. The fact that a group of men work on philosophical matters does not alter the fact that philosophy is not a true end for human existence. Kierkegaard too is aware of the difference between a private good and a common good. In general see, Soren Kierkegaard, *Concluding Unscientific Postscript* trans. Swenson and Lowrie, Princeton: Princeton
University Press, 1968, passim.

30. Summa Theologiae, 1a2ae, 96,1.
31. Summa Theologiae, 1a2ae, 100,8.
33. Cameron, p. 58.

34. Though we have not dealt with this point, Aquinas does insist that promulgation is essential to any true law. Vide Summa Theologiae, 1a2ae, 90,4.

35. Summa Theologiae, 1a2ae, 92,1.

36. Though it is true that not every end pursued by a legal order is based on a consensus, it is nonetheless true that there are certain ends which must be accepted by everyone. This must be a logical must and is expected of everyone, without exception. In Canada, for example, we have a Bill of Rights which provides some of the foundational beliefs of our society. In this sense then consensus does form the basis of community action. The notion that human community is possible without some shared purposes is really quite odd, for even our speaking of a common language and the forms of life that embody that language imply shared experience.


38. Individuals who are mentally incapacitated would be an exception to the assumption that all human beings are capable of rationally grasping the commands of law. But this does not imply that those suffering from mental handicaps are either excused from obeying the law, or outlaws that must be harshly dealt with. The law, as guardian of the common good, does have the right to take whatever steps are necessary in order to ensure that those who cannot grasp the law by themselves are not given great opportunities or enticements to disobey. There may be cases where it is justifiable to confine mental patients against their wills.

39. The law per se for St. Thomas is not concerned with the evil man, but seeks to educate the good man in the necessities of social existence. The law does not presuppose that crime will take place, at least not logically. According to St. Thomas the law attempts to regulate behaviour before it occurs, while for a thinker like Holmes, the law only follows up certain forms of completed behaviour with sanctions.
40. Gilby, p. 177.
41. Cameron, p. 24.
42. Summa Theologiae, 1a2ae, 96,2.
43. Summa Theologiae, 1a2ae, 96,2ad2.
44. It is essential to remember here that Lord Devlin's point is to distinguish between toleration and approval. There is no vice that the law does not condemn, but there are certain human actions, which though not worthy of praise, nonetheless the law does not forbid, in that they do not obviously erode the foundations of society.
45. It is interesting to ponder whether "crimes without victims" actually harm society even though they do not "harm" any given individual. Lord Devlin is of the opinion that a society cannot allow its moral structure and heritage to be undermined if it is to continue to exist. Thus, crimes without victims, e.g. homosexuality, gambling, prostitution, cannot be allowed to exist in any manner which would alter the society's ethical attitude towards them.
46. There might be something odd in the notion that a community suffers wounds and not the individuals in that community. This has formed the basic distinction between tort law and criminal law. I am not certain that the distinction is as clear as many would like it to be.
48. Summa Theologiae, 1a2ae, 96,3.
49. Summa Theologiae, 1a2ae, 92,1ad2.
50. It should be remembered that we are speaking about obligation and not motivation, and if this is kept in mind one can see that the law can never reach the point of admitting that the end an individual lawbreaker is striving for could supersede its own. To admit this would be to deny the whole theme of the end of the law itself, i.e. the care of the community. If the concept of motive enters into law we find it at the procedural level and not the substantive. In the criminal law, for example, one's motive in committing a crime is not relevant in determining the presence of mens rea. This is determined by objective standards, such as the reasonable man test. A criminal act is a specific and well defined state of affairs in the world and a person's motive cannot alter his position in
relation to that state of affairs. Where the concept of motive does play a part in criminal law is in its procedural aspects, where the judge is at liberty to alter the sanction by weighing it against the failure of a human being to achieve the qualities of the reasonable man. An individual who is mentally incompetent, or emotionally unstable, or dead drunk, is forbidden just as absolutely to murder, rape and steal as the reasonable man is. It is only in the court's reaction to the established guilt of the offender that motive may play a substantial part in the criminal process. The consideration of motive in procedural law mitigates the sometimes harsh judgements of the substantive criminal code. (For an excellent treatment of this point, vide Jerome Hall, General Principles of Criminal Law, 2nd ed., esp. chap. III)

51. Summa Theologiae, 1a2ae, 92.1a4.

52. It is in this sense that law is essentially a moral phenomenon. As Kierkegaard said, ethics is that in which every individual is assigned to himself. Thus even though the law does not enforce all of the community's morality it is founded on the moral sense of the people. Cf. Lord Coleridge who says, "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement." (Queen v. Instan, 1 Q.B. 450, 1893)


54. The lawgiver who pursues the ends of the state is not the same person in law as the human being who holds the office. The notion of vicarious authority has given way to the idea that the lawgiver simply employs the power that exists in the corporation of the crown, a power which is unlimited and eternal, to reflect the source it has in the eternal and omnipresent law. Thus it is often held that the lawgiver can do no wrong. The question is: Does this mean that the person of the lawgiver is exempt from the ethical and legal duties of others due to his position in the legal system; or does it mean that the lawgiver qua lawgiver cannot be brought before the society's courts for judgement and thus enjoys procedural immunity from prosecution? The mediaeval view of law could not make sense out of the former explanation but could out of the latter.
55. *Summa Theologiae*, 1a2ae, 92,1ad4.

56. Aquinas cites St. Augustine: "There never seems to have been a law where justice was not present." Then it appears that even Augustine agrees that all law has something good and noble about it, even though it may be hard to bear at times. *Vide. Summa Theologiae*, 1a2ae, 96,4.

57. Cameron, p.1.

58. Gilby, p. 171.

59. It is the task of ethics and natural law, sprrlemented by divine revelation, to provide man with his ends. Human positive law only is concerned with the means necessary to the achieving of those ends.

60. Cameron, p. 36.


62. We should note that there are two different kinds of sanction, internal and external. Sanction in general consists of the good or evil that an individual encounters as a result of obeying or disobeying the law. It is not to be confused with the motive men have for obeying the law. An external sanction is one that is added on to a command, such as imprisonment or fines for disobedience, and the payment of bounty for killing animals or trapping outlaws. Internal sanctions are the goods and evils which follow naturally upon obedience or disobedience. When one does not carry a concealed weapon he enjoys the increased safety of the community that results. It is the sense of extrinsic sanction that Aquinas does not regard as a logically necessary facet of law.

63. *Summa Theologicae*, 1a2ae, 96,5.

64. Gilby, p. 172. Justice Holmes does seem to be on to this point when he asserts, "The life of the law has not been logic; it has been experience."

65. The life of the law may be experience but one must remember that there are limits to the experience of human beings. The structure of human existence does put a structure on law. For one attempt to outline such a structure, *vide. Lon Fuller, "Eight Ways to Fail to Make a Law" in The Morality of Law*, New Haven: Yale University Press, 1964, pp. 33 ff.

66. An example can be found in Huntington Cairns, *Legal Philosophy from Plato to Hegel*, Baltimore: Johns Hopkins Press, 1949, p. 183.
68. Kreilkamp, p. 23.
69. Gilby, p. 122.
70. Summa Theologiae, 1a2ae, 90,4.
71. Summa Theologiae, 1a2ae, 90,1.
72. Summa Theologiae, 1a2ae, 96,4.
73. Summa Theologiae, 1a2ae, 96,4.
74. Aquinas' legal philosophy is not logically dependent on any given form of social organization or political system. As long as the situation is in agreement with the demands of human nature it cannot possibly be evil. Yet, it is possible that certain systems of social organization will be able to realize the common good in a more direct and effective way than others, and in this sense they would be more desirable.
75. For St. Thomas' treatment of man and his ends vide. Summa Contra Gentiles, III, chaps. 2,3.
76. Law cannot be the subject of physical necessity for absolutely essential to it is the understanding that it can be disobeyed. The necessity of law is not physical compulsion. Therefore it is wrong to desire law to "lock up" all those who threaten to break the law and thus prevent them from committing any illegal act. The law must preserve the notion of the human person as responsible agent. Again, it is only the bad-man theory of law, which is very prominent today, that thinks of law in terms of physical necessity.
78. Vide. Summa Theologiae 1a2ae, 96,4c and 96,6c. Along with this one must recall that law is also obligatory for St. Thomas because of its form and authority.
80. Bayne, p. 102.
81. For a complete discussion see Bayne passim.
84. Davitt, The Elements of Law, p. 83.
85. For the notion of vicarious authority there is no better source than Cameron's Images of Authority.
86. Summa Theologiae, 1a2ae, 92, 1.
88. Summa Theologiae, 1a2ae, 96, 5ad3.
89. Stevens, p. 203.
90. Stevens, p. 203.

2. The Legal Theory of William Blackstone

8. St. Thomas Aquinas, Summa Theologiae, 1a2ae, 93, 5.
9. Summa Theologiae, 1a2ae, 17, 1.
10. Summa Theologiae, 1a2ae, 95, 3.
15. Witness the rise in popularity of deism among intelligent men.
18. Commentaries, I, p. 44.
25. Commentaries, I, p. 52. The italics are mine.
27. Commentaries, I, p. 41.
30. Commentaries, I, p. 55. Blackstone here opposes the view of classical natural law theory in his assumption that there are actions that are ethically indifferent. Even though he speaks in terms of the law as a guarantor of human happiness he does not connect this with the notion that every human action either aids one in attaining his end or does not, and in this sense is always of ethical significance.
32. Many may insist that this is rampant a priorism but this author nonetheless finds it difficult to even get as far as imagining what a world would be like in which true evil was desirable and good was to be avoided.
33. Commentaries, I, p. 58.
34. Commentaries, I, p. 57.
36. For purely penal law theory consult, Bayne, Conscience, Obligation and the Law, esp. Pt I, chap. ii Blackstone is here identified as an exponent of this theory. Cf. p. 27.
37. Commentaries, I, p. 56. Blackstone cites John Locke as the source of this passage.

38. Commentaries, I, p. 42.

39. Commentaries, I, p. 44.


41. Father Gilby says the following about Aquinas' theory of law. "Though St. Thomas opened the way for a study of civil law stripped of metaphysical and ethical reference, his jurisprudence remains teleological, related to the purposes of law, which themselves lie beyond the legal scheme. Between Community and Society, p. 255.

3. Legal Obligation and Human Existence


2. This is the ideal situation though. It is the case where an ethically responsible person submits himself to the rule of law in order to promote the public good.

3. Cf: Martin Heidegger who defines human persons as those beings whose being can become a question for them.

4. Kierkegaard distinguishes between being human in the strict sense and being human in the loose sense. The loose sense of existence is referred to when we assume an individual is human because he was born of human parents, grows up in society, etc. The strict sense, however, refers to the idea that man has certain task which he must undertake if he is to truly develop his nature. In this sense not every child born of man is human to the same extent or in the same way. In general vide, Søren Kierkegaard, Concluding Unscientific Postscript, trans., Swenson and Lowrie, Princeton: Princeton University Press, 1941.


10. Examples might be laws that command one to commit suicide, perform an abortion or mass sterilization, engage in prostitution, systematically slaughter Jews, deny the faith that one believes, or any number of others. Whether or not such laws could be justly disobeyed depends on whether their actual form demands that a man do what morally ought not do. I personally believe that these are contradictions of human nature and ought not be tolerated, but the examples are arguable. The point is that if any laws contradict human nature then there may be grounds for disobedience.

11. An excellent sample of a binding law which does not carry with it any external sanction is a law granting diplomatic immunity to an ambassador of a foreign nation. No one assumes that foreign representatives are to be allowed to openly engage in crime while they are in Canada, yet if they do engage in it the law does not prosecute them. Another instance is the ceasing of all legal action against an individual when the statute of limitations expires with respect to the crime he has committed. Surely no one would want to say that the law approves of murder as long as one is crafty enough to avoid apprehension for a given number of years.

4. Conclusion


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