Lecture #16
St. Thomas Aquinas
Summa Theologicae
Treatise on Law:
4. Human Law

Outline of Lecture

- Law & Morality:
  - Why do we need human law?
  - What is the proper relation between law & morality?
- Law & Obligation: To what extent is there a moral obligation to obey the law?

Why We Need Human Law

- The Problem
  1. Any species that has natural law, by which each individual knows (is instructed) what
     he ought & ought not do, does not need any additional law by which they tell one
     another what to do.
  2. Human beings have natural law . . .
  3. So, human beings do not need any additional law (e.g., human law).
- St. Thomas’ Reply (95.1)
  - Nature provides the foundation (intellect) by which we know what we ought to do.
  - But discipline (from others) is also needed.
    - E.g., holding us back from inviting pleasures.
    - For some, the ordinatio which can come from parents (admonitions) is enough.
    - For others, the ordinatio which comes from the community (law) is necessary.
      - The means here is force & inducement of fear.
      - The ends are peace & virtue.
  - So, law is necessary as the only effective way of developing virtues in some & of
    ensuring peace for all.

The Relation between Human Law & Morality (St. Thomas’ View)

1. All good human law is derived from natural law (i.e., morality) (95.2).
   - “Every human law has the nature of a law insofar as it is derived from natural law.”
   - There are two kinds of such derivation:
     1. As a conclusion from principles (as in scientific argument)
        - The location of a planet at a given time is deduced from location at an earlier time
          and from laws of motion.
        - The wrongness of euthanasia is deduced from the wrongness of killing the innocent.
     2. By way of determination of common notions (as in producing a play)
        - Exactly how an actor should read his lines is determined by the text, but not deduced
          from it.
        - Given that murderers should be punished, one might “determine” that the
          punishment for first degree murder should be life in prison without parole.
        - Or, given that drivers should drive safely, we set the speed limit at 55 mph or decide
e          to drive on the right side of the road
2. Not all human law derived from natural law is good human law (96.2).
   - For each of the vices, there are sometimes good reasons to use human law to repress it.
   - But there are limits to what human law can do.
     - Any human law that would do more harm than good should not be adopted.
     - Some human laws derived from natural law would do more harm than good.
     - So, some human laws derived from natural law should not be adopted.

Determining the Limits of Good Law

- So, some matters of morality should not become matters of law (see previous slide), but how strong is this constraint?
- That depends in part on the end to which law is the means
  - For St. Thomas, those are two
    • peace, i.e., a concord of wills on real goods
    • virtue, especially excellences of character
  - For classical liberals (< liber, free) [i.e., European liberals, American libertarian]s
    • freedom from harms & constraints imposed by others so that we can be free to live life however we choose (to pursue happiness in the sense of satisfying our desires)

Liberalism (or Libertarianism)

- Defenders include
  - John Stuart Mill, in On Liberty
  - The American Civil Liberties Union (on some issues)
  - The American Library Association (on some issues)
- Principles
  - Its Axiology—The supreme value of freedom
    • “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.”— Planned Parenthood v. Casey (1992)
  - Its Sociology—A deep suspicion of institutions
    • Cf.—the emphasis on the dangers of “censorship”
      - the hostility towards tapping phone calls of suspected terrorists
  - The liberal justification of laws (When should law be made?)
    - Laws are needed to prohibit some other-regarding actions.
      • We must protect everyone’s rights, since these might be violated by others.
      • Laws are not permitted with regard to actions that only affect ourselves.
        - We should be free to do what we want in these areas.
          - e.g., use of marijuana or pornography
Some Questions for Liberals (or Libertarians)

- Is consent sufficient for self-regarding actions?
  - Should dueling be legal?
  - Should a person be able to practice medicine without a license (as long as the patients know)?
  - Should a physician be able to prescribe untested medicines to willing patients?
  - Should people be free to use marijuana? opium?

- Do the classic cases of self-regarding actions really have no effect on others?
  - Aren’t we all harmed by widespread drunkenness or pornographic entertainment?
    - Are not all who live in a society full of drunkards & dirty old men harmed?

Some Questions for Thomists

- (Leaving aside the criticisms of those who think that there is no more to goodness than subjective preferences)
- How confident can we be that the government will both
  - identify real goods correctly?
  - implement only effective means to achieve those ends?

A Thomistic Alternative to Liberalism

- Principles
  - Its Axiology
    - There are other values besides liberty.
      - The values of good character
        - E.g., honesty, sobriety, chastity
      - Freedom might be seen as a value only for people who have virtue
        - That's why we put criminals in jail.
  - Its Sociology — A certain confidence in institutions
    - This is vague; there is room for a range of degrees of confidence.
    - But, for example
      - librarians will generally make good judgments about what books are suitable for children’s libraries
      - Allowing the NSA to monitor terrorist communications (even without warrants) won’t turn the US into East Germany.
- The Thomistic limiting factor in making laws (When should immoral conduct not be criminalized?)
  - Cost-benefit analysis: There is still some cost to making moral matters legal matters.
    - It should not be done when it would be too expensive
    - Or too intrusive
      - Certain kinds of parental punishments might reasonably be criminalized
      - But judicial review of every punishment would make parenting impossible.