An Analysis of St. Thomas Aquinas’s Position on the Relationship Between Justice and Legality

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I INTRODUCTION

St. Thomas Aquinas, the Angelic Doctor, was renowned for his genius. His masterful exposition of Christian theology, drawing upon Aristotle’s philosophy to form a solid intellectual foundation for Christian ideas, has formed the core of the Catholic Church’s teaching for almost a thousand years. Beyond Christianity, Aquinas has also exerted a major influence on legal philosophy. As the foremost expositor of natural law theory, natural law theorists to the present age owe a great debt to Aquinas’s discussion of law in his Treatise On Law. However, one aspect of Aquinas’s legacy has generated an inordinate amount of contention – his view of the relationship between justice and legality. Is an unjust law a law at all? Modern natural law theorists taking contradictory positions all claim to be faithful to Aquinas’s ideas on the matter. Some, taking a view that has been described as “strong natural law theory”, argue that Aquinas believed that the injustice of a law renders it legally invalid. Others, taking the position of “weak natural law theory”, argue that Aquinas perceived an unjust law as legally defective but still a law in a secondary sense. Even legal positivists, the traditional opponents of natural law theory, have proposed interpretations of Aquinas’s thoughts on the matter. They cannot all be correct.

This paper is directed at investigating what really Aquinas’s position was on the relationship between justice and legality. It will do so by taking a detailed look at Aquinas’s Treatise
On Law, the broader context of the *Summa Theologiae* (“the *Summa*”) within which the Treatise is situated, and Aquinas’s methodological and definitional approaches. The outline of the paper is as follows. First, it will describe the different positions that modern natural law theorists have taken on the relationship between justice and legality, with a view to identifying the key conceptual differences between strong and weak natural law theory. Second, it will briefly describe how Aquinas’s thought on this issue has been interpreted by modern legal theorists, to illustrate the extent of disagreement between interpreters of Aquinas. Third, it will provide an overview of Aquinas’s arc of argument in his Treatise On Law, to provide context for the subsequent deep-dive into Aquinas’s thought. Fourth, the paper will formulate a set of questions to be resolved, corresponding to the key conceptual differences between strong and weak natural law theory, and will then evaluate Aquinas’s text, context, and methodology to determine how Aquinas’s thought bears on these questions.

II Natural Law Positions On The Relationship Between Justice And Legality

While natural law theorists have offered a variety of interpretations of the relationship between justice and legality over the ages, two main schools of thought have crystallized – theorists have termed these schools “strong natural law theory” and “weak natural law theory”.¹ The focus of this section will be to identify the key differences between these two schools of thought as a foundation for the subsequent analysis of Aquinas’s thought.

It will be useful to first set out the common ground between both schools of thought, before articulating their differences. All natural law theorists affirm that law’s legality

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depends in some way on its moral content.² Put another way, in the natural law view, the substantive justice of a law has an impact on its legality.³ Different natural law theorists have different views on the degree of this impact, but all natural law theorists unanimously affirm the existence of such an impact. This affirmation sets natural law theory apart from legal positivism. Legal positivists, in contrast, affirm that the legality of law is independent of its moral content – the issues of law’s morality and its legality are distinct analytical inquiries, and one can achieve a comprehensive and accurate account of law without reference to its moral content.⁴

The key difference between strong and weak natural law theory lies in their conception of the precise impact of morality on legality. The strong natural law view interprets the morality of law as an “existence condition” for law, akin to how having three sides is a necessary requirement for a triangle.⁵ Just as a shape comprising more than three sides cannot be a triangle, the character of legality cannot be possessed by a manifestly unjust norm.⁶ As argued by Gustav Radbruch, a manifestly unjust law is not a law at all.⁷ A law, despite being validly passed by a legitimate law-making authority, is not a law at all if it surpasses an extreme level of injustice.⁸ Thus, a law that is substantively unjust is not just morally or legally defective – it cannot properly be called a law at all. Since unjust laws are not laws at all, on this view, they cannot possess any obligatory force.

⁴ Raz, above n 2, 17-22.
It should be noted at this juncture that some influential legal positivists, such as John Austin, have cast the position of natural law theory on the relationship between morality and legality as an extreme version of strong natural law theory – that all promulgated laws are necessarily moral.footnote{9} This conception of strong natural law theory is certainly not one that strong natural law theorists hold themselves, for good reason – such a proposition is easily disproven as an empirical matter. Strong natural law theorists do accept that legitimate law-making authorities can promulgate rules which are unjust, as an empirical fact about their law-making power.footnote{10} However, strong natural law theorists would hold that even if validly promulgated, these unjust rules are not laws.footnote{11}

Weak natural law theorists, on the other hand, interpret the morality of law as a “defectiveness condition” of law.footnote{12} In other words, the injustice of a law makes the law defective as a law.footnote{13} This should be carefully distinguished from the view that the injustice of a law makes a law morally defective – this would be a decidedly uninteresting proposition which cannot be meaningfully distinguished from the legal positivist position.footnote{14} Rather, the weak natural law position is that the injustice of a law makes a law legally defective. Thus, in contrast with the strong natural law position, morality does not spell a necessary existence condition for a law, but goes toward whether a law is one in the fullest sense, or is merely a law in a secondary sense of the term. On this view, it is possible to identify true legal propositions in a legal system without regard to morality, by considering whether they have been “authoritatively issued” and whether they are “socially efficacious”.footnote{15} But if one

\footnotetext[10]{West, above n 9, 834; Alexy, above n 3, 327.}
\footnotetext[11]{Alexy, above n 3, 328.}
\footnotetext[12]{Crowe, above n 5, 114-115.}
\footnotetext[13]{Murphy, above n 1, 136.}
\footnotetext[14]{Priel, above n 6; Murphy, above n 1, 131.}
\footnotetext[15]{Alexy, above n 3, 328.}
seeks to evaluate whether these propositions are indeed laws in the full sense, the justice of these laws must be taken into account. As a matter of law’s obligatory power, the weak natural law view holds that unjust laws do lose obligatory force – they do not “bind in conscience”.

However, in contrast to the strong natural law view, since these laws remain laws in a secondary sense, they are still capable of engendering obligatory force, albeit in a weaker sense. They can engender what John Finnis describes as legal-moral obligations, which are based on a recognition that an overall system of social ordering through law promotes security and stability, and thus can be a basis for a collateral moral obligation to obey an unjust law.

With the positions thus laid out, four key differences between the strong and weak natural law positions can be identified.

First, the two positions take a different definitional approach to law. The strong natural law position sees a definition of law as the specification of a set of conditions that must be fulfilled – failing any of which, the precept in question is not a law at all. The weak natural law position applies the central case method in its definition of law. It sees the criteria for a definition of law as a set of conditions which specify what law is in the fullest sense – and if certain conditions are not met, the precept in question can still be validly described as a law, but in a less central sense.

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16 Richards, above n 8, 1275.
19 Note that the application of the central case method is not unique to natural law theorists. H. L. A. Hart applied it to great effect as well – see H. L. A. Hart, The Concept of Law(Oxford University Press, 3rd ed, 2012) 1-17.
Second, as a consequence of their different definitional approaches to law, the two positions take a different view of the relationship between justice and legality. The strong natural law position views justice as a necessary condition for a norm to be a law, the absence of which means that a norm is not a law at all. In contrast, the weak natural law position views the justice of a law as a benchmark for determining whether it is a law in the focal sense. An unjust law remains a law, but is one in a less central sense.

Third, the two positions take different views on the effect of injustice on a law’s obligatory force. The strong natural law position views injustice as removing all obligatory power from a putative law – if an unjust law loses legal character altogether, it cannot possess any obligatory power as a law. The weak natural law position, in contrast, accepts that an unjust law can nevertheless still engender collateral moral obligations as a valid law in a legal system providing a means of social ordering.

Fourth, the strong natural law position views the positing of a law – i.e. the promulgation of a law by legitimate law-making authority – as a necessary but insufficient condition for a precept to be identified as a law. In contrast, the weak natural law position views positing as a necessary and sufficient condition for a precept to be identified as a law, such that there can be true legal propositions which are immoral.20

III COMPETING INTERPRETATIONS OF AQUINAS

Was Aquinas a strong or weak natural law theorist? There is no express answer to this question that can be found in his writings, for the simple fact that these theoretical categories did not exist in his time. As such, theorists since Aquinas have offered competing interpretations of Aquinas on the relationship between legality and justice.

In modern legal philosophy, one of the most notable legal theorists to propose a position on the relationship between justice and legality was Sir William Blackstone. Although he did not explicitly claim to develop Aquinas’s ideas, he drew heavily upon Grotius’s thinking on natural law, who was in turn inspired by Aquinas. Blackstone is particularly worthy of mention here, since Blackstone’s formulation on the question of the legality of unjust laws has been the subject of much attention by subsequent thinkers. Indeed, Blackstone is commonly perceived as the first modern proponent of the strong natural law position, because of his well-known argument that “no human laws are of any validity” if contrary to the natural law. It is this statement that has attracted much ridicule and criticism from legal philosophers after Blackstone, primarily for the accusation that he elided descriptive and normative aspects in his account of law.

It is worth noting, however, that although Blackstone was heavily criticized for affirming a strong natural law position, it is by no means so unequivocal that he did indeed take the position that his critics charged him to have taken. Just a couple of pages from Blackstone’s infamous assertion that human laws contrary to the natural law are of no validity, Blackstone argued that human laws which transgress natural law and divine law ought not to be obeyed – in his words, we are “bound to transgress” them. This argument suggests that Blackstone himself, so sharply criticized for taking the view that unjust laws are no law at all, certainly comprehended that unjust laws remained laws in some sense and were thus laws which could be transgressed.

Despite the fact that Blackstone’s view of the relationship between justice and legality was not unequivocally the strong natural law one, leading legal positivists such as Jeremy

22 For example, see Jeremy Bentham, A Fragment on Government (London, 1776) ix-xxv.
23 Blackstone, above n 21, 43.
Bentham, Austin, and H. L. A. Hart all attributed the strong natural law position to Aquinas and Blackstone.\textsuperscript{24} They characterized the natural law position as the strong natural law one, and criticized natural law theory on that basis. Austin criticized Blackstone in famously strong language: “to say that human laws which conflict with the divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.”\textsuperscript{25} It is worth noting that these legal positivists often go further to interpret the natural law position on justice and legality as the claim identified in the preceding section as an extreme version of strong natural law theory – the view that unjust laws are never promulgated and enforced.\textsuperscript{26}

Leading modern natural law theorists are unified in their efforts to correct the misperception that natural law theory is necessarily associated with this extreme version of strong natural law. However, modern natural law theorists remain divided on their interpretation of Aquinas’s precise position on the relationship between justice and legality. Robert Alexy and Radbruch view the strong natural law position as the one most faithful to Aquinas’s legacy.\textsuperscript{27} But Finnis and Robert George, proponents of the weak natural law position, disagree. As Finnis argues: “if we examine the writings of Thomas Aquinas – perhaps the greatest of natural law seminal thinkers – we cannot find a single passage in which he declares without qualification that unjust law is not a law at all.”\textsuperscript{28} Finnis takes the position that the “unjust law is not a law” maxim is either “flatly self-contradictory” or is a “dramatization” of Aquinas’s real point – which Finnis took to be


\textsuperscript{25} Kretzmann, above n 24, 101; Damich, above n 24, 79.

\textsuperscript{26} Kretzmann, above n 24, 101, 104.

\textsuperscript{27} Alexy, above n 3, 327; Radbruch, above n 7.

\textsuperscript{28} Damich, above n 24.
that an unjust law is not law in the focal sense, and is merely a law in a secondary sense.\textsuperscript{29} In a similar vein, George argues that legal positivists have misunderstood Aquinas, and suggests that Aquinas, as a weak natural law theorist, would in fact have affirmed Hart’s descriptive methodology and fleshed it out further by substantiating the specific inquiry within the internal point of view that Hart proposed.\textsuperscript{30} Natural law theorists such as Finnis and George seek to shift the focus of natural law theory away from the question of the effect of injustice on laws towards articulating a full justificatory account of law – an enterprise which they argue is more faithful to Aquinas’s intent than a narrow focus on the relationship between justice and legality.\textsuperscript{31}

This survey of competing interpretations illustrates that there have been significant variations in interpretations of Aquinas by modern legal theorists on the relationship between justice and legality. Beyond illustrating this point, however, this survey reveals an interesting picture about interpretations of Aquinas. The theorist to whom the strong natural law position has been most commonly attributed arguably did not take such a position at all – Blackstone. The theorists who are the most adamant in their characterizations of natural law theory as necessitating the strong natural law position are the legal positivists – no friends of Aquinas by any measure. These theorists, in their zeal to attack natural law theory, have even linked natural law theory to an extreme version of strong natural law theory – in other words, the least defensible and easily-attacked formulation.\textsuperscript{32} This, of course, does not settle the issue, since some modern natural law theorists have mounted a serious defense of the strong natural law position.\textsuperscript{33} However,

\textsuperscript{30} George, above n 17, 241.
\textsuperscript{32} Kretzmann, above n 24.
\textsuperscript{33} For example, Alexy, above n 3.
one might be justifiably cautious of an interpretation of Aquinas’s position most commonly advocated by his opponents.

**IV OVERVIEW OF AQUINAS’S TREATISE ON LAW**

With the context thus set, it is time to turn to Aquinas’s own words on the matter.

In order to obtain a clearer understanding of Aquinas’s intentions, it is useful to first understand the context of Aquinas’s arguments in his Treatise On Law. The Treatise was not intended to be a standalone work on legal philosophy. Rather, it was situated within a broader magisterial work focused on theology – the *Summa*. Specifically, the Treatise was situated within the section of the *Summa* on moral theology, as part of an exposition of the external influences on human acts or decision-making. Thus, his Treatise was not limited to human law, and covers a variety of different laws that bear on human action.

The outline of his arguments in the Treatise is as follows. Aquinas made his arguments about law over a span of eight questions in the *Summa*, running from QQ. 90-97. He began the Treatise by proposing a four-part definition of law in Q. 90 – a law is (1) a certain dictate of reason (2) for the common good, (3) made by him who has the care of the community, and (4) promulgated. He moved on in Q. 91 to apply this definition to four different types of law that have a bearing on human action and decision-making – eternal law, natural law, divine law, and human law. In Q. 92, he focused on the effect of law generally on human acts – one of his key areas of concern, given the situation of the Treatise in the moral theology section of the *Summa*. In QQ. 93-94, he sought to elucidate

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34 Aquinas, above n 17, [067]-[068].
36 Aquinas, above n 17, Q. 90 a. 4 corpus.
37 Aquinas, above n 17, Q. 91.
the features of the eternal law and natural law respectively. He dedicated QQ. 95-97 to a discussion of human law. In Q. 95, he examined human law as a concept in relation to the other types of law he had proposed – is human law useful, in view of the existence of the other types of law? And how does one derive human law from the natural law? In Q. 96, he considered the power of human law – what should human law look like? What is the nature of its obligatory power? Finally, in Q. 97, he discussed the principles that govern change in human law.

**V Aquinas’s Position On The Relationship Between Justice And Legality**

**A Methodology**

To determine Aquinas’s position on the relationship between justice and legality, I formulated four questions, corresponding to the key differences between the strong and weak natural law positions that I highlighted in Section II. Determining how Aquinas’s thought resolves these questions can help one to determine whether Aquinas was a strong or weak natural law theorist.

The questions I sought to answer as I studied Aquinas’s thought are as follows. First, was Aquinas’s definitional approach to law characterized by the provision of necessary conditions that must all be fulfilled, or by the use of a central case method? Second, did Aquinas view injustice as rendering a law legally invalid, or merely legally defective? Third, did Aquinas view the effect of injustice on law as rendering it entirely non-obligatory, or as still capable of engendering obligations in a limited sense? Fourth, did Aquinas view the valid positing of a law as a necessary and sufficient condition for the identification of true legal propositions, or as a necessary but insufficient condition? To resolve these questions, the main focus of my inquiry was the text of Aquinas’s Treatise On Law. My study was not limited to the Treatise, however – in order to obtain a better understanding of
Aquinas’s intentions and arguments in the Treatise, I also considered the broader context of the *Summa* within which the Treatise is situated, as well as Aquinas’s methodological and definitional approaches.

**B Whether Aquinas Defined Law Via Necessary Conditions Method Or Central Case Method**

First, we will explore Aquinas’s methodological approaches to determine if they shed light on his definitional approach to law.

To discern Aquinas’s definitional approach to *law*, it is instructive to consider the methodological approaches that Aquinas would have taken to the enterprise of *definition* as a general matter. As a thinker heavily influenced by Aristotle’s philosophy, Aquinas’s approach to definition was shaped by Aristotle’s Doctrine of the Four Causes. In brief, the objective of this approach was to explain a concept, not to provide an analytical tool to demarcate its boundaries and determine what lies within and without. Applied to a concept such as law, the Doctrine would be primarily directed at explaining what law is, rather than determining how one can identify laws. The Doctrine of the Four Causes seeks to explain a concept by elucidating its various causes: its Formal Cause, Final Cause, Material Cause, and Efficient Cause. The word “cause” in the Doctrine is used in a broader sense than in contemporary usage – here, it refers to “any factor that is necessary to bring about an effect through an intrinsic relationship to that effect”. The Material Cause is

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39 Henle, above n 38, 161-162.

40 This is not to say that Aquinas’s approach had nothing to say to the question of the identification of law. Rather, knowledge of Aquinas’s definitional approach merely illustrates that Aquinas’s first objective was explanatory – but this approach did supply Aquinas with the contours of the central case of law, which is relevant to the question of identification. See Henle, above n 38, 161.

41 Aquinas, above n 17, [182].
“that out of which or in which the effect is produced”. The Efficient Cause is “the cause that contributes to the effect by activity.” The Final Cause is “the cause that contributes to the effect by being desired” – in modern parlance, this may be described as the purpose of the effect. The Formal Cause “contributes to the effect by being in it and making it to be the kind of thing it is.” One will observe that Aquinas’s four-part definition of law corresponds to the Four Causes. Law’s Formal Cause is reason. Its Final Cause is the common good. Its Efficient Cause is promulgation by the one who has the care of the community. Its Material Cause is the “community or human acts within society”.

For present purposes, the key point to note from this discussion of Aquinas’s definitional method is that in the explanation of law through the Doctrine of the Four Causes, morality relates to law’s Final Cause. And in Aquinas’s account, a defective expression of the Final Cause does not mean that the entire effect in question ceases to exist – the effect’s existence is a separate inquiry from the effect’s Final Cause. The effect’s existence is defined by its Efficient Cause. An understanding of an effect’s Final Cause, in contrast, goes towards a fuller explanation of the nature of law – its central case. Aquinas’s definition of law is thus shaped by his metaphysics – that one cannot understand something fully without also knowing its end. This lends weight to the proposition that Aquinas’s definitional approach was not the necessary conditions method, but was instead directed at achieving full understanding of a concept – a method closely aligned with the central case method.

As an additional point on Aquinas’s methodological inclinations, one might add that a distinctive mark of Scholastic philosophy was the art of distinguishing, and that Aquinas

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42 Ibid [189].
43 Ibid [193].
44 Ibid [196].
46 Ibid [210].
47 Ibid [210].
48 Brewbaker, above n 35, 588.
was the Scholastic philosopher *par excellence*.\(^{49}\) The methodological technique of drawing careful distinctions between concepts has been described as “a standard part of Scholastic method.”\(^{50}\) Indeed, Aquinas himself frequently began his discussion of concepts by stating that a particular concept can have the same property in two ways, and then carefully distinguishing both ways to erase contradictions and clarify that both ways can be equally true.\(^{51}\) For example, in the context of law, Aquinas used this method to explain that human laws can be derived from the natural law in two ways – direct deduction and *determinatio* – in order to avoid the troublesome proposition that all human laws are the same everywhere, a proposition that would otherwise have seemed to follow from his earlier propositions that all human laws are derived from natural law, and that the natural law is the same for everyone.\(^{52}\) Aquinas also specifically applied this technique to the question of unjust laws, which we will discuss in more detail in the subsequent sections. At this point, it is sufficient to note that in view of Aquinas’s skill at Scholastic methodology, it would have been most unlikely for him to have perceived injustice as taking a norm out of the category of law entirely – it would have been much more in character with his Scholastic mind to characterize unjust laws as remaining a species of law but in a distinct sense from the central case.

As a final point on Aquinas’s methodological inclinations, it is significant to note that he was well-acquainted with Aristotle’s concepts of univocity and equivocity.\(^{53}\) Univocity describes concepts which have both the same name and meaning. Equivocality describes concepts which have the same name but which may have different meanings, depending on the context in which the concept is used.\(^{54}\) In this framework, a concept described by

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\(^{49}\) Damich, above n 24, 93.

\(^{50}\) Aquinas, above n 17, [059].

\(^{51}\) Aquinas, above n 17, [059].

\(^{52}\) Aquinas, above n 17, [063], Q. 95 a. 2.

\(^{53}\) Damich, above n 24, 85.

the same word has a *central or focal* meaning, yet the same word can be used to describe concepts which are related to that central meaning but in a less central way.\(^{55}\) Aquinas’s familiarity with these analytical devices suggests that his definitional approach would be shaped by these concepts – and a central case definitional approach matches the use of these devices much more closely than would a necessary conditions approach.

Second, observing Aquinas’s approach to ethics can shed light on how his definitional approach to law should be interpreted. In Aquinas’s definition of virtue, he was careful to distinguish between perfect virtue and virtues in the restricted sense. In brief, Aquinas held that people acquired perfect virtue only if they performed good acts imbued with the divine gift of charity – it is only such acts which are properly directed to “the ultimate end” of mankind.\(^{56}\) Good acts which are directed only at natural ends lead men to acquire virtues as well, but only in a restricted sense.\(^{57}\) In a similar vein, Aquinas argued that human acts are good insofar as they possess moral perfection in being, and are morally bad to the extent that they are deficient in their being, falling short of the perfection they ought to have.\(^{58}\) Indeed, Aquinas’s discussion of ethics is replete with uses of the central case definitional approach, and it stands to reason that he would apply a similar definitional approach to law, which he saw as a field situated within the domain of ethics.\(^{59}\)

Third, Aquinas’s discussion of law in the Treatise itself clearly evinces an application of the central case method. In Q. 90 a. 2, where he discussed, as part of his definition of law, whether law is necessarily ordered to the common good, he analogized the relationship between the common good and law to the relationship between heat and fire. Fire, described as the “hottest of all things”, is the central cause of heat – and other bodies are

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\(^{55}\) Finnis, above n 54, 96.


\(^{57}\) Ibid.


hot only “insofar as they have a share of fire”\textsuperscript{60}. In an analogous fashion, any precept “lacks the nature of law except insofar as it is ordered to the Common Good.”\textsuperscript{61} Aquinas elaborated upon this point in Q. 92 a. 1 – laws not perfectly ordered toward the common good are laws \textit{secundum quid}, i.e. laws in a certain respect, while laws properly ordered to the common good are laws \textit{simpliciter}, i.e. laws in the central sense.\textsuperscript{62}

Given that Aquinas incorporated the common good as part of his definition of law, these passages should shape our interpretation of the definition of law he offered in Q. 90 a. 4. Since Aquinas expressly conceived the relationship between the common good and law as governed by the central case method, this lends weight to Kretzmann’s argument that Aquinas’s definition of law has both evaluative and non-evaluative components.\textsuperscript{63} In Kretzmann’s view, the non-evaluative components of Aquinas’s definition, e.g. the requirement of promulgation by one who has care of the community, are necessary and sufficient conditions for something to be identified as a law in a \textit{technical} sense\textsuperscript{64} – they form the Efficient Cause of law, in Aquinas’s terminology. However, the evaluative components of Aquinas’s definition of law – for example, the requirement of being ordered to the common good – do not perform the same function, and are intended to explain the \textit{central} case of law.\textsuperscript{65}

In sum, there is a strong argument to be made for the proposition that Aquinas’s definitional approach, insofar as the justice of laws is concerned, was characterized by the central case method. As an aside, it is a touch ironic to note that despite the attacks of modern legal positivists on natural law theory, Aquinas, the father of natural law theory,

\textsuperscript{60} Aquinas, above n 17, Q. 90 a. 2. corpus.  
\textsuperscript{61} Ibid. Q. 90 a. 2. corpus.  
\textsuperscript{62} Ibid. Q. 91 a. 1. corpus.  
\textsuperscript{63} Kretzmann, above n 24, 112.  
\textsuperscript{64} Ibid.  
\textsuperscript{65} Ibid.
adopted a definitional approach to law that was actually rather akin to Hart’s own approach to defining the concept of law. For present purposes, the key point is that Aquinas’s use of the central case method suggests that Aquinas was more aligned with the weak natural law position than the strong natural law position. Aquinas did not view his definition of law as setting out a set of necessary and sufficient conditions that must all be met for a certain precept to be a law – rather, it was intended to be a full explanatory account of the central case of law.

C Whether Aquinas Viewed Injustice As Rendering A Law Legally Invalid Or Legally Defective

Moving from Aquinas’s definition of law to Aquinas’s discussion of unjust and tyrannical laws, we see Aquinas applying the central case method consistently. Even when Aquinas seemed the most vehement in declaring that unjust laws were not laws, he was generally careful to acknowledge that such laws were still laws in a limited sense.

For example, in Q. 92 a. 1, Aquinas took on the subject of tyrannical laws. He affirmed that “a tyrannical law, since it is not in accord with reason, is not a law in the full sense; rather, it is a perversion of law”. Taken in isolation, this statement may be taken to suggest that tyrannical laws are not laws – in support of the strong natural law position. But in the very next line, Aquinas was careful to note that such laws still have “something of the nature of law”. Similarly, in Q. 92 a. 3, Aquinas stated that since an unjust law deviates from reason, it “does not have the nature of law but rather of a sort of violence”. Yet, once again, he carefully reiterated immediately that “even an unjust law retains some

66 Hart, above n 19, 1-17.
67 Schaeffer, above n 24, 378; Kretzmann, above n 24, 114.
68 Aquinas, above n 17, Q. 92 a. 1 rep. 4.
69 Aquinas, above n 17, Q. 92 a. 1 rep. 4.
70 Ibid Q. 93 a. 3 rep. 2.
semblance of the nature of law, since it was made by one in power and in this respect it is derived from the Eternal Law”.  

As Kretzmann argues, it is thus clear that Aquinas did not mean that laws which do not accord with right reason are not laws at all – rather, “an irrational law is not a law unconditionally because it falls short of at least one of the moral conditions essential to full-fledged law, but it is a law in a certain respect because it satisfies the formal conditions sufficient to establish it technically as a law.” As such, in Kretzmann’s view, legal positivists accusing Aquinas of taking the strong natural law position, or even the extreme version of strong natural law, “are barking up trees Aquinas never considered climbing.”

However, these passages do not resolve the matter. There are other passages in the Treatise which can be taken to support the strong natural law position. Indeed, the strongest case for the strong natural law position can be found in Q. 95 a. 2 and a. 4. In these articles, Aquinas described unjust laws in terms that did not incorporate the “law simpliciter” language, and did not offer a subsequent affirmation of the legality of these laws. In Q. 95 a. 2, Aquinas quoted St. Augustine’s famous maxim, “That which is not just seems to be no law at all”, and went on to state that a law which “conflicts with the law of nature” is not a law, “but rather a perversion of law.” In a similar vein, in Q. 95 a. 4, Aquinas argued that a tyranny is “totally corrupt and therefore has no law.”

In view of Aquinas’s statements in these passages, how should one interpret Aquinas’s overall position on the relationship between justice and legality? It is suggested that there is no contradiction in Aquinas’s thought. His statements in Q. 95 a. 2 and a. 4, even when

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71 Ibid Q. 93 a. 3 rep. 2.
72 Kretzmann, above n 24, 115.
73 Ibid 116.
74 Aquinas, above n 17, Q. 95 a. 2 corpus.
75 Ibid Q. 95 a. 4 corpus.
taken in isolation, are actually inconclusive on the matter of whether injustice removes legal validity entirely from a law. Indeed, these statements can be read consistently with the position that injustice renders a law legally defective, but does not strip it of legality. Thus, Aquinas’s statements in these passages may potentially be read to support the strong natural law thesis, but crucially, they do not necessitate it – and in view of his careful qualifications of the effect of irrationality on law in Q. 92, the more consistent interpretation of his statements in Q. 95 a. 2 and a. 4 is the weak natural law one.

Another argument that may be raised to support the proposition that Aquinas thought that an unjust law would be invalid as law, rather than merely legally defective, rests on the fact that Aquinas’s quote of Augustine in Q. 95 a. 2 omitted the words “to me” that were in the original wording – Augustine’s original sentence was “that which is not just does not seem to me to be no law at all”.

76 Taken in isolation, the omission of the words “to me” may be interpreted as suggesting that Aquinas intended to convey in stronger terms than Augustine that an unjust law was indeed not a law at all, as an expression of his confidence in the proposition. However, while the fact of omission may be conceded to be true, this suggestion rests on a rather weak inference of Aquinas’s intent, and is difficult to square with Aquinas’s express affirmations of the limited legality of unjust laws elsewhere in the Treatise.

In sum, the better interpretation of Aquinas is that he viewed injustice as rendering a law legally defective, but not entirely legally invalid.

D Whether Aquinas Viewed Injustice As Rendering A Law Entirely Non-Obligatory

76 Kretzmann, above n 24, 100-101.
77 Kretzmann, above n 24, 101.
Turning our attention to Aquinas’s view on the effect of injustice on law’s obligatory force, it becomes quickly apparent that this was the real focus of Aquinas’s discussion of unjust laws. Aquinas was much more interested in the effect of injustice on law’s *obligatory force*, rather than its impact on legal *validity*. In Q. 96 a. 4, Aquinas described just laws as having “the power of binding in conscience”. On the other hand, unjust laws, reiterated again here to be “acts of violence rather than laws”, “do not bind in conscience”. The reiteration of Augustine’s maxim in this context suggests that Aquinas, in declaring that unjust laws are “acts of violence”, intended to convey the point that an unjust law loses *obligatory force*. This interpretation of Aquinas’s intent is in keeping with the situation of the Treatise within the moral theology section of the *Summa* – Aquinas’s arguments are better interpreted as directed first and foremost towards the effect of law on human actions and decision-making, rather than as analytical propositions about the concept of law.78 His account was not intended to be a jurisprudential account in the vein of modern legal philosophy, but an ethical-theological one.79 If Aquinas did not view injustice as primarily directed towards the issue of legal validity, this weighs heavily against the strong natural law view, which draws a robust connection between justice and legality.

In further support of the weak natural law view, Aquinas did not perceive injustice as rendering a precept entirely devoid of obligatory force. Indeed, in Q. 96 a. 4 itself, Aquinas was careful to note that one might be obliged to obey an unjust law “in order to avoid scandal or disturbances”. This suggests a more nuanced conception of the effect of injustice on law than is admitted by the strong natural law position – instead of a precept’s injustice rendering it entirely void of legal character, such that it loses all obligatory power, Aquinas accepted that the injustice of a law does lead it to lose obligatory force in the central

79 Brewbaker, above n 35, 601.
sense, but that the law can nevertheless oblige obedience in a secondary sense, to the extent that obedience to the law is required to prevent scandal and disorder in the legal system. Thus, Aquinas’s thought is closely related to Finnis’s concept of collateral moral obligations, and is better aligned with the weak natural law position.

E Whether Aquinas Viewed Valid Positing As A Necessary And Sufficient Condition To Identify True Legal Propositions

The final object of our inquiry is to determine whether Aquinas viewed the valid positing of a law as a necessary and sufficient condition for a precept to be a true legal proposition, or as a necessary but insufficient condition. At first glance, this may seem a strange inquiry to undertake in this context – the answer to this question would seem more directly related to resolving whether Aquinas is a legal positivist or a natural law theorist. However, this inquiry is relevant here, since the weak natural law position is indeed in agreement with the legal positivist position that one can identify a true legal proposition solely as a matter of social fact and pedigree, and that true legal propositions can be manifestly unjust. The strong natural law position would disagree with these points – thus, this inquiry is one that can distinguish a weak natural law position from a strong natural law one. This is not to say, however, that the weak natural law position is identical to the legal positivist one. The preceding sections should have made sufficiently clear that weak natural law theory affirms that morality is necessary to give a full account of law in the focal sense, which is a claim that legal positivists would not accept.

There are numerous indications in the Treatise On Law that Aquinas viewed the valid positing of a law as a necessary and sufficient condition for the identification of a true legal proposition. In Q. 91 a. 3, Aquinas accepted upfront that there are human laws which do not cohere perfectly with right reason – “human laws cannot have that infallibility that the

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80 Finnis, above n 20, 6-7.
demonstrated conclusions of the sciences have.” 81 Recall that one of the elements of Aquinas’s definition of law is that laws are a “dictate of reason”. In view of this, Aquinas’s acceptance that there are human laws which do not cohere perfectly with right reason would make no sense if Aquinas thought that irrational laws were not laws at all – Aquinas clearly thought that laws can be validly identified independent of their coherence with right reason, thus allowing them to be characterized as irrational laws in the first place.

In addition, in a passage that has already been highlighted above, Aquinas in Q. 92 a. 1 argued that laws not perfectly directed at the common good are laws secundum quid, while laws properly ordered to the common good are laws simpliciter. 82 His recognition of the fact that laws falling short of perfect ordering towards the common good are nevertheless laws suggests that Aquinas believed that valid positing is indeed enough to make something a true legal proposition.

Finally, Aquinas argued in Q. 97 a. 1 that human laws can and should change, as part of a natural progression of human reason to move from imperfection to perfection. Accordingly, human laws should change to adapt themselves better to the conditions of men as these conditions evolve. 83 He cited Augustine’s example of laws concerning the appointment of government officials – if the electorate is sober-minded and right-thinking, a law allowing them to select government officials is a good one, but if the people degenerate into corruption and poor judgment, the law can justifiably be changed to reserve the right of selection to “a few good men”. 84 Through his argument, Aquinas demonstrated a clear-eyed awareness that certain promulgated laws may not perfectly further the common good, and yet were still true legal propositions – indeed, if such

81 Aquinas, above n 17, Q. 91 a. 3 rep. 3
82 Ibid Q. 92 a. 1 corpus.
83 Ibid Q. 97 a. 1 corpus.
84 Ibid Q. 97 a. 1 corpus.
precepts were not laws at all in Aquinas’s mind, it would have been nonsensical for Aquinas to discuss the question of whether laws can and should change. The idea that Aquinas clearly recognized that unjust laws nevertheless possess some sense of legality by virtue of being positive law is bolstered by his argument in Q. 97 a. 2. There, he argued that while the injustice of a law is a good reason to change a law, this law-changing prerogative should be exercised with prudence – changes in law diminish the binding power of law, and laws should thus only change when “the damage done thereby to the common welfare is compensated by some other benefit”.  

As such, the weight of evidence leans strongly in favor of the view that Aquinas thought, in alignment with the weak natural law position, that true legal propositions can be identified validly as a matter of social fact.

**VI Conclusion**

In sum, Aquinas’s positions on the four questions I sought to answer by studying his work and his methodological techniques are as follows. Aquinas’s definitional approach to law was characterized by the central case method. He viewed injustice as rendering a law legally defective, rather than legally invalid. His discussion of the effect of injustice on law was focused on discerning its effect on law’s obligatory power, and he took the position that even an unjust law was capable of engendering legal obligations in a limited sense. Finally, Aquinas viewed the valid positing of a law as a necessary and sufficient condition for the identification of true legal propositions.

The picture of Aquinas’s thought that emerges from this inquiry is clear. Although often cited in support of the strong natural law position, a careful reading of Aquinas reveals

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85 Ibid Q. 97 a. 2 corpus.
that his thinking was much more closely aligned with that of the weak natural law position. The text of the Treatise On Law, the broader context of the *Summa*, and Aquinas’s methodological approaches all point unanimously to this conclusion. While a strong natural law interpretation of some of Aquinas’s statements is certainly plausible, the key difficulty is that these interpretations are not necessitated by Aquinas’s text. To hold Aquinas to the strong natural law position, one would have to blind oneself to all the other textual and contextual factors that point in the other direction.

As such, it is suggested that the more justifiable interpretation of Aquinas is that he took the weak natural law position on the relationship between justice and legality, and that weak natural law theorists have a stronger claim to Aquinas’s legacy than strong natural law theorists. It should be noted that this conclusion does not bear on the question of which position is the *better* one as a matter of internal coherence and normative desirability. That question, however, is a topic for another occasion.