Rule of Law and the Virtue of Justice: The Socrates of Plato’s *Crito* and a Pair of Later Moral Issues

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Abstract: The author considers, first of all, recent and fairly recent interpretations of Plato’s dialogue the *Crito*, arguing that the character Socrates, whose expressed ideas probably correspond in major detail to the convictions of the historical Socrates, is not saying that the laws of Athens demand unquestioning obedience. The dialogue is rather an account of the debate that goes on in Socrates’s mind itself. A strong consideration in this debate is clearly the rule of law; but equally strong is Socrates’s lifelong commitment to carry out what, in the end, he regards as the most reasonable course of action. The author then considers two contemporary ethical issues: our way of coming to know the natural law and the proper understanding of laws that allow of exceptions. Regarding the first, he argues—consistently with what we find not only in the *Crito* but also in Aristotle and Thomas Aquinas—that we come to know the natural law through being immersed in the laws and customs of a particular society: the more just the society, the better access to the natural law it provides. Regarding the second, he argues that an article in Aquinas is sometimes interpreted as suggesting that the realm of concrete human experience is beyond the reach of law. He argues, in the spirit of the historical Socrates, that the rule of law is equivalent to the rule of reason and that this does reach into the realm of concrete human experience, where exceptions are sometimes recognized as contained in the law.

I. Introduction

Plato’s early dialogue *Crito* has often elicited negative reactions because of the main reason Socrates gives in the dialogue for not leaving Athens and so consenting to the sentence of death issued against him by a jury of his fellow citizens. For he says there that he will not leave because that would be to disobey the laws of Athens. Writes George Grote in the nineteenth century:

This dialogue puts into the mouth of Socrates a rhetorical harangue forcible and impressive, which he supposes himself to hear from personified Nomos [law] or Athens, claiming for herself and her laws plenary and
unmeasured obedience from all her citizens, as covenant due to her from each. He [Socrates] declares his own heartfelt adhesion to the claim.²

More recently (that is, in 1979), A. D. Woozley criticizes what he calls “the parental authority argument” in the *Crito*. He writes: “But to allow that the state’s right to obedience from its subjects is such [as the parental authority argument suggests] is to concede to the state a metaphysical status which belongs to myth rather than to reason.”³ Largely owing to Richard Kraut’s masterful study *Socrates and the State*, which appeared in 1984, interpretations of the *Crito* tend now to be more sensitive to the subtle juggling of ideas that occurs there.⁴ But there is still little agreement on the role the rule of law plays in the dialogue.

What we have, I believe, in the *Crito* is Plato’s account of how Socrates’s conscience habitually operated and, in particular, how it operated in the face of his sentencing to death. The *Crito* depicts the operations of the virtue of justice: not—or not simply—the arithmetical and geometrical operations of the fifth book of Aristotle’s *Nicomachean Ethics*—but the operations of that moral virtue, justice, in a just soul. Aristotle himself speaks of any virtue as an “aiming”: like the aiming of an archer.⁵ An archer’s skill comes down ultimately to his having “a feel” for how to strike a target: possibly a moving target. This feel certainly grows out of what he has learned in his training as an archer: how a bow works, the differences among arrows, how accurate a shot can be at what distance, in what conditions, and so on. But, given these basic principles, the skilled archer still, at the moment of releasing the arrow, must rely on his “sense” that that is the angle, the direction, and the moment to let it fly.

In what follows, I expound, first of all, how I understand the *Crito*. By most accounts, the Socrates as portrayed in that dialogue is very close to the historical Socrates. Since the dialogue was written and rendered public not long after the death of Socrates, any misrepresentation of Socrates’s well-known beliefs and attitudes would have been spurned out of hand. The historical Socrates maintained that he was incapable of definitive answers in the practical sphere. The Socrates of the *Crito* is this same Socrates. This does not mean, however, that he regards the sphere of concrete human actions as ultimately unintelligible, as does the Socrates in Plato’s *Republic* (see 331c1–9). He is committed to seeking always reasonable answers to moral questions—which is to say answers that are consistent with the moral truths of which he is quite sure.⁶ Having set out these ideas from the *Crito*, I then bring them to bear upon a pair of issues, arising especially in Aristotle and Thomas Aquinas, who find rather more intelligibility in the practical sphere than either Plato or the Socrates of the *Crito*, but whose insights have often been missed by contemporary authors, even by some who regard themselves as continuing the Aristotelian-Thomistic tradition.

II. The Socrates of the *Crito*

The basic story line of the *Crito* is familiar to us all. Socrates has already been condemned to death—ordered by the jury to drink the hemlock—although there
has been a delay of some weeks because of a custom in Athens that no one could be executed until the ship sent every year to Delos to honor Apollo returned. It appears that Socrates has yet a day or two to decide whether to accept the sentence and take the poison or to escape to another city, which would be easy enough. His old and good friend Crito comes to the prison and attempts to persuade Socrates to escape, arguing that both his friends and family would be better off and, indeed, that it would be unjust for him to remain. Socrates presents some of his reasons for not escaping, and then he introduces a chorus of characters of his own who present yet more reasons. “What if,” he suggests to Crito, as we were making our escape, “the laws and the commonwealth” should present themselves and ask, “O Socrates, what is it you have in mind to do?” The laws then argue, in tones of authority, that Socrates ought to accept the sentence—which he decides to do. There the dialogue ends.

That the situation is not one in which the correct choice is immediately apparent is indicated by Plato right from the beginning of the dialogue. Crito arrives in the morning and is present as Socrates awakes, who tells him that he has had a dream of a beautiful woman who quotes Homer to him: “On the third day, you would come to fertile Phthia” (44b3). This oracle is ambiguous. On the one hand, Phthia is a city in Thessaly, from which area Crito hails; so the oracle could mean that Socrates is to go off with Crito to Thessaly. On the other hand, the words of the oracle are the words of Achilles in the Iliad, who chooses not to go the Phthia (also his home) but back into battle where (apparently) he dies for the honor of Athens.

The beautiful woman has indicated to Socrates nothing definitive. Nor does Socrates find Crito’s arguments wholly persuasive; and so, having heard him out, he says to him, “We must investigate whether one ought to act in that manner or not, for I—not just at the moment but always—am one who is persuaded by no other of my own reasonings than that one which seems to me, on thinking it through, the best” (46b3–6). Appearing in this remark is a word that occurs in one form or another repeatedly and conspicuously throughout the dialogue: πείθεσθαι (or πείθειν), “to be persuaded.” The word itself has been an object of controversy, for one way of avoiding the conclusion that Plato is arguing in the Crito that, in the end, we must all simply obey the law, has to do with the meaning of that word as it appears in the argument that Socrates assigns to the voice of the laws. At one point, the laws speak of themselves as “fatherland” [πατρίς—51a9], more holy and estimable even than one’s own mother and father, and then tell Socrates that he ought “either to persuade it [the fatherland] or do whatever it commands and suffer in silence whatever it orders one to suffer” (51b3–5). That refrain, “persuade [πείθειν] or obey,” occurs a number of times (51b9–c1 and 51e7) in the subsequent discourse—where it certainly sounds like the ultimatum that (I believe) it is. But it has been pointed out that the key word πείθειν might be translated as “to try to persuade.” Understanding the situation thus would allow for disobedience, as long as a sincere effort is made to persuade the commonwealth that its judgment is wrong.

This solution strikes me (and several others commentators) as implausible. If all Socrates has to do in order to leave Athens with ethical consistency is to attempt to persuade the fatherland, why does he not just do that and be done with it? The
fact is, however, that the persuasion of which Plato speaks is not the hit-or-miss persuasion that occurs in forensic situations, where orators or sophists attempt to win over other minds; it is occurring in the mind of Socrates himself, who is persuaded (as we have seen) by “no other of [his] own reasonings than that one which seems to [him], on thinking it through, the best.” Socrates cannot bring himself to consent to Crito’s solution of an escape because to do so would be to consent to there remaining in his practical reasoning—in his conscience—an inconsistency. Such a situation is unlike failing to persuade a jury—which one can do (that is, fail to persuade) and still maintain one’s intellectual self-respect. The point of this (internal) debate is to overcome any such internal conflict.

The laws speaking within Socrates present strong arguments which conflict with the arguments presented by Crito. They argue, for instance, that Socrates’s friends and children would probably be worse off if he flees (53a8–b3, 54a5–b1) and (most prominently) that by remaining in Athens for so long without rejecting its laws he has, in effect, accepted them as binding—if not upon all living there—then upon him. The laws themselves acknowledge that their arguments are not “compelling” in either sense of that word. “We propose things,” they say; “we do not churlishly give orders to do whatever we command.”9 So, it may indeed be that there is no hard and fast principle telling Socrates to accept the sentence of death rather than to flee. Nonetheless, the arguments adduced by the laws are strong. As he says, he will go with the piece of reasoning that seems to him, “on thinking it through, the best.” By sticking to this methodology—and rejecting the argument that seems to him not the best—he eliminates from his practical reasoning the unease of serious doubt.

That this is what is going on in the *Crito* is an aid in understanding a puzzling remark that Socrates makes as he is introducing the voice of the laws into his conversation with Crito. As we have seen, Socrates raises at one point the prospect that the laws might present themselves and ask, “O Socrates, what is it you have in mind to do?”—that is, by fleeing, as Crito suggests he should. And then the laws add:

Do you conceive of that which you propose to do as anything other than to destroy us and the entire city in as much as in you lies? Or does it seem to you that the city can exist and not be overthrown in which judgments issued have no force but are rendered moot by private persons and so destroyed?10

But how is it that this one instance of defying a judgment—which the laws themselves (later in this same discourse) recognize as unjust (54b8–c3)—would destroy the laws and “the entire city”?21 Might not such defiance even cause the city to reconsider its way of selecting juries, its rules for the admission of evidence, and so on? But, again, this argument is not really about winning and losing arguments in tribunals or assemblies or about changing legal procedures. It is about taking seriously strong arguments and being consistent in one’s own thinking. If such considerations in fact do not matter—if consistency itself does not matter—, how can law survive? How can civilization survive?
III. Natural Law

I would like now to discuss two issues of contemporary interest in ethics. They correspond to the two sides of the Socratic coin: the one side imaging the fundamental role of law in ethical decision making; the other, law’s reasonability. The first issue concerns our way of coming to know the natural law; the second, the proper understanding of laws that allow of exceptions. The intellectual structure within which these issues arise is a Thomistic one. I do not claim, of course, that Thomas Aquinas knew the *Crito*—in all likelihood he had never heard of it—but the foundations of his ethical theory are Aristotelian, and Aristotle, I would argue, shared two things with the Socrates of the *Crito*: the belief that the basis of ethics is to be found in law (or laws)—both written and unwritten—and the conviction that genuine law is reasonable.12

This concept, “genuine law,” *pace* the authors mentioned earlier, is present throughout Plato’s early works. The way that Plato, in the *Crito* but also in other dialogues, understands the various levels of law bears a marked resemblance to the hierarchy of laws that Thomas inherited from Augustine, according to which human (temporal) law falls under natural law and natural law under eternal law (or God himself).13 The *Apology of Socrates* belongs to the same period in Plato’s career as the *Crito*, during which he was primarily interested in passing on his master’s teaching. In the work (it is not really a dialogue), Socrates recounts how he defied the “unjust” [ἀδικόν] and “ unholy” [ἀνόσιον] order of the Thirty Tyrants to bring in the innocent Leon of Salamis to be executed.14 “For that regime [ἀρχὴ], however strong it was, did not frighten me into doing something unjust [ἀδικόν τι],” he says; “but, when we left the Rotunda, the four went to Salamis and fetched Leon; I, however, walked away homewards” (32c8–d7). Just prior to this remark, Socrates also recounts that he voted, when Athens was still a democracy, against the condemnation of certain generals who had failed to gather up the dead after the battle of Arginusae. He describes that condemnation as illegal.15

It is apparent that Plato considered both condemnations—not only that of the generals but also that of Leon—to be illegal; both the decisions of democratic assemblies and “executive actions” are for him, therefore, answerable to a law of a higher rank. We find, of course, a somewhat different situation in the *Crito*—and yet a certain hierarchy of laws is also there in evidence. The laws, as we have seen, recognize that the condemnation of Socrates was unjust, and yet they maintain that the jury followed proper procedure, according to what we would call positive law. The personified laws also speak of a law (or laws) above themselves. They tell Socrates that, should he leave Athens, they will be angry with him while he lives but, “also in the netherworld, our brothers, the laws in Hades, will not receive you kindly, knowing that you undertook to destroy us, in as much as in you lies” (54d6–8). So, it is clear that Socrates (along with Plato) recognizes levels of law, not unlike what we find in Thomas.

But the crucial question is, how does Socrates—or anyone, for that matter—come to know the higher laws? As I have been arguing, Plato’s *Crito* is about conscience: the operations of Socrates’s conscience; but it is clearly not about what
is sometimes called “personal conscience.” Near the end of the dialogue, Socrates compares the various voices—or arguments—in the dialogue to persons afflicted by a corybantic frenzy who are finally tamed by the music of flutes: the voices in his mind agree in the end that the option most consistent with the moral convictions already established there is to remain in Athens. But these voices correspond to realities outside his mind: to the arguments of his friend Crito and, most especially, to the rule of law as discoverable by honest and open immersion in the political culture of Athens. Socrates’s frenzy ultimately comes to rest, then, in genuine law such as is consistent with a higher law. How then do we come to know the higher law? By a similar—but always critical—immersion.

One very common contemporary answer to the question “How do we come to know the higher laws?” is that we recognize that law which is above human law—that is to say, the natural law—in the basic human goods such as life, knowledge, self-integration, and practical reasonableness. According to this approach, the first precept of practical reason directs us towards good (“good is to be done and pursued”), this precept being specified (or “determined”) with respect to the basic human goods. Reference to these goods constitutes the entire sense of these “determinations” of the first principle, which are the basic precepts of the natural law. This approach has the advantage of providing an explanation of how the natural law can be said to be known, at least in its most general contours, by everyone. The precepts of natural law, in that they direct one’s thinking toward life, knowledge, etc., are “self-evident.” This quality, self-evidence, is to be associated—or so the argument goes—with the expression, per se notum quoad nos, as employed in the much studied article of the Summa theologiae on the number of the precepts of the natural law: Summa theologiae 1-2.94.2.

But the same approach is very different from what we find in Plato—and, as I would argue, from what we find in Thomas Aquinas. Basic in Plato are not goods but laws. The laws in the Crito insist with Socrates that he has in effect made an agreement to obey them in so far as he has never rejected them, by whom he has been formed. They make also an allusion to the “right of passage” in the education of young men in ancient Athens, at which point one has been deemed worthy and has beheld both the way things are done in the city and us the laws.

This set of presuppositions comes into the Thomistic tradition. Aristotle speaks of the requisite period of formation in the first book of the Nicomachean Ethics, where he says that, in ethics, we must begin with the things intelligible to us, either composites or sensibilia, as opposed to things (such as the first principles of geometry) that are intelligible simpliciter. “For this reason,” he says, “it is necessary that one, who would assist competently at lectures regarding things that are noble, just and (generally) political, be brought up well in the customs.” In Thomas’s commentary he identifies what is learned in this ethical novitiate as the things that are magis nota quoad nos.

Not insignificant here is the idea that a young person comes only gradually to understand the bases of ethics; but also important for present purposes is the idea that what one comes to understand are not, strictly speaking, self-evident precepts about
human goods but rather laws and customs with determinate content—which are, however, consonant with our basic inclinations such as are indeed oriented towards goods. These are what Thomas says, in the article on the precepts of natural law (ST 1-2.94.2), are *per se nota quoad nos*: “intelligible in themselves” not *solis sapientibus* (not solely to the wise) but “even to us.” Plato acknowledges in the *Crito* that the various systems of law are not equally suited to this task of instilling in youth the first principles of justice. The personified laws of Athens describe Thessaly—which certainly had a legal system—as “full of disorder and licentiousness” (53d3–4) and so as relatively unsuitable for bringing up children. Nonetheless, it is within a system of laws that a young person arrives at a grasp of the precepts that correspond to the higher law. The better the system, the more access it provides.

It might be argued that, in the passages in the commentary on the *Ethics* here cited, Thomas speaks not of things that are *per se nota quoad nos* (as in ST 1-2.94.2) but of things that are *magis nota quoad nos*. In this same section of his commentary, however, he makes the same distinction that we find in ST 1-2.94.2 between the sort of knowledge a mathematician has and that which is required for ethical thought or practice—and there can be little doubt that he would put that in ethics which is known *per se quoad nos* (as in ST 1-2.94.2) on the *magis nota quoad nos* side of the distinction drawn in the commentary—that is, among the things that one knows not qua theoretician but at the level of moral perception. Such things are learned, especially in our day, in good families and good schools. He also says in this section of the commentary, as part of his remarks on the things that are *magis nota quoad nos*, that a man who is an expert in human matters “can be possessed of these principles of actions either on his own as one who considers them *per se*, or he can easily pick them up from another.”

Locating the bases of ethics in propositions simply about self-evident goods makes it very difficult to defend a number of distinctions that are part of the natural law tradition. According to this approach to natural law, performing an immoral action is a matter of intending and choosing contrary to the goods mentioned in the first precepts rather than a matter of acting not in accordance with precepts having explicitly to do with the type of actions at issue.

At the beginning of the corpus of ST 2-2.64.7 on killing in self-defense, Thomas Aquinas says that, in the case of self-defense by a private individual, where the death of the assailant is beside the agent’s intention (*praeter intentionem*), such an act can be moral (given proportionality of the means employed). Those who understand the first precepts of natural law as simply about self-evident goods interpret Thomas as saying here that what makes such acts moral is the fact that the agent makes no choice going contrary to the good of (human) life. But there’s a problem with this. Later in the same corpus Thomas acknowledges that killing in war and capital punishment *are* intended but he also says that they are permissible (provided no other factors such as private animosity enter in).

If one holds that a choice against a basic good (as mentioned in the appropriate first precept) is decisive in natural law ethics, this is inexplicable—or, at least, inexplicable in a convincing manner. But that is not the basis upon which Thomas
makes the two affirmations. The first (that private self-defense can be moral) mentions as a preliminary point that any action gets its species from what is intended, not from what is beside the intention. A species of acts, however, can contain either good acts or bad acts. Thomas’s point about what is within or outside of one’s intention has nothing directly to do with whether the acts are good or bad: for or against the natural law. And so that preliminary point cannot be the basis of Thomas’s assertion that private self-defense is not immoral.31

The primary component in that basis is rather the principle that “it is natural for anything to maintain itself in being, as far as that is possible.” In invoking this principle Thomas does not mean to suggest that even this principle is morally determinative with respect to all cases in which a private citizen kills an attacker, for in the same breath he says that such a killing, if it involves disproportionate means, is immoral. The idea is rather that, given the larger moral and legal complex in which it is situated, which includes the various species of acts, this particular species is permissible as an instance of maintaining oneself in being, as far as that is possible.

The second affirmation (that those with the appropriate public authority are permitted to intend to kill) depends upon a different set of concrete moral and legal factors and (to repeat) not upon whether the choice goes—or does not go—contrary to a precept whose whole sense is the idea that human life is good. Thomas mentions in this regard “the case of the soldier fighting against the foe and of the minister of a judge struggling with robbers.” Such “intentions to kill” are permissible because “the public good” requires it. Or, as Thomas puts it, “it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good.” Such acts are of a different species from acts of private self-defense.

A similar problem confronts those who, by invoking the basic human goods, wish to defend the Church’s distinction between (immoral) artificial contraception and (moral) natural family planning (NFP). For it is apparent that couples who practice the latter intend and choose not to have a child—that is why it’s called family planning—and yet that is also the reason why artificial contraception would be immoral: that is, because its intention is to impede the good of a prospective life.

In contrast then to approaches to the natural law that look primarily to precepts regarding the basic human goods, it is much easier and more plausible to say that the moral difference between these various types of acts depends upon what is reasonable and so recognized in sound law, whether written or unwritten. It is reasonable, that is, on such a basis to maintain that a soldier’s deliberate killing in battle or a young couple’s choice to begin a family a year or two later is acceptable human behavior but that intentionally killing even a threatening neighbor or deliberately thwarting the inherent purpose of the marital act is not.

There are wholly understandable reasons why a scholar might want to disassociate natural law from “law”—that word rumbling with the appropriately ominous timbre—by associating it rather with intended good (or goods): they are the same reasons that have prompted negative reactions, especially in fairly recent years, to the Crito and to Socrates’s decision to remain in Athens because the laws call for that.
The desire to avoid, when expounding one’s preferred ethical theory, denunciation as “legalistic” is not without sense. But, as argued above, the position advocated in the *Crito* cannot be described as legalistic. Not only is it recognized there that some cities are governed by bad laws but, as we know, the Socrates who speaks there was prepared in certain cases to disobey even the laws of Athens, which system of laws he regarded as good. The just person is the person, formed by the laws in upright behavior, who seeks to determine honestly and with logical rigor what is the best thing to do in whatever situation.

IV. Laws that Allow of Exceptions

We find this same combination of high regard for laws and virtuous commitment to justice as distinct from the legalistic in Aristotle—and, by derivation, also in Thomas Aquinas. In the first five chapters of book five of the *Nicomachean Ethics*, Aristotle sets out what were described above as the “arithmetical and geometrical operations” of justice; that is to say, his account of the types of “universal” justice: distributive and corrective (or commutative) justice. In the succeeding six chapters, he addresses a number of connected issues, explaining more fully and precisely what he understands by justice. In chapter 7, he divides political justice into natural political justice and legal political justice. Legal political justice is conventional, he says, and so “not by nature” ([οὐ φύσει—1134b30]), although even natural political justice is “moveable” or “changeable.” And then in chapter 10, he considers ἐπιείκεια (reasonableness) and τὸ ἐπιεικὲς (the reasonable). These words—ἐπιείκεια and τὸ ἐπιεικὲς—could be translated ‘equity’ and ‘the equitable’; but, since those terms are today instinctively understood as legal terms, in the present context it is best to avoid those translations, so as to obviate any suggestion that ἐπιείκεια and τὸ ἐπιεικὲς have to do with the “merely legal.” In the Liddell-Scott-Jones *Greek-English Lexicon*, the primary—and more literal—meaning given for ἐπιείκεια is ‘reasonableness.’ Some recent translations of the *Nicomachean Ethics* render the word as ‘decency.’

Regarding the reasonable, Aristotle remarks rather paradoxically—but quite accurately—that:

‘Just’ and ‘reasonable’ are the same thing and both are good but the reasonable is better. This, however, brings to the fore the aporia that the reasonable is just—not, however, the just according to the law but rather a correction of the legally just.
spect to justice is directed not toward the worse but who diminishes the difficulties, even while having the law as his aid, is reasonable [ἐπιεικής].”35 Aristotle’s saying that the person he has in mind “is inclined to prefer and to do” [προαιρετικός καὶ πρακτικός] the right and reasonable thing is clear indication that he is referring now to a character trait: a moral virtue in the strict sense.

Plato is depicting this same virtue in his portrayal of the Socrates of the Crito: a man who takes the law seriously—to the point of dying in obedience to it—but is also committed to the exercise of reason, the very essence of law. This same virtue comes into Thomas Aquinas, who, in a frequently cited article of the Summa, basically repeats the Aristotelian position on reasonableness (ἐπιείκεια) and its relationship to law. Thomas says in ST 1-2.94.4—that is, just two articles after the article about the precepts of the natural law—that, although the common principles of practical reason enjoy “a certain necessity” [aliaqua necessitas], “the more one goes down into proper principles, the more one encounters defect [defectus].”36 And then: “In matters of action, there is not the same truth or practical rectitude for all with respect to the proper [principles], but only with respect to the common [principles].”37

The defectus of which Thomas speaks here is not a characteristic of the moral situation to which a lower proper principle (or precept) of practical reason pertains—or, more precisely, fails to pertain. It has to do rather with the relationship between a lower “proper” principle and the situation under consideration. There is a disparity. The principle speaks of something that does not apply to the situation at hand. So, the defectus has nothing immediately to do with either the proper principle itself or with the situation to which it refers. The word defectus refers only to the mismatch between the two. There is a disparity between law as formulated and law as it should be applied.38 This is not to deny that in a sense there is something inadequate about the principle in as much as it “fails” to apply to the situation; the point is rather that (as we shall see more clearly shortly) the principle was never meant so to apply to such situations.

It is also important to acknowledge that there is nothing negative or lacking in that to which the proper principle “fails” to refer. Thomas’s position is not that these states of affair are somehow defective or unintelligible. This point has been missed in a couple of recent ecclesial documents: to wit, the International Theological Commission’s “In search of a universal ethic: a new look at the natural law” (2009) and Pope Francis’s apostolic exhortation Amoris laetitia (2016). Both of these documents translate the remark about encountering disparity between proper principle and concrete situation in a way that suggests that, as we enter into the realm of concrete moral situations, the situations themselves become indeterminate.

The Theological Commission’s document translates the relevant piece in the following manner:

although there is some necessity in the general principles, the more we descend to particular matters, the more we encounter indeterminacy. . . .

In matters of action, truth or practical rectitude is not the same for all in its particular applications, but only in its general principles.”39
Amoris laetitia has a similar rendering of the same passage, speaking, however, at least in the English translation, not (as in the Theological Commission’s translation) of “particular matters” and “particular applications” but (in both cases) of “matters of detail.” But both translations simply ignore the word twice repeated here: propria, which clearly makes reference not to “particular matters” or “matters of detail” but to proper principles—which (again) occasionally fail to apply to particular cases.

The relevant section of Amoris laetitia has to do with the application of “rules” to possibly irregular marriage situations. Such an interpretation of Thomas’s words can easily be used to argue that, in particular cases, there is no way that we can ever say whether a valid marriage was ever contracted, for such matters are inherently indeterminate. The document speaks in this section of having recourse to “discernment”—which is fine, as long as the discernment is conducted with the assistance of the rationality embodied in law or (as Aristotle puts it) “even while having the law as [one’s] aid” (EN 5.10.1138a1–2). The problem is that, once reason and the rule of law have been excluded, all that is left is things like personal preference, self-deception, and ideology.

It is not impossible to mount a defense of such translations (or, actually, interpretations) of ST 1-2.94.4. In Thomas’s own commentary on Aristotle’s chapter on reasonableness (EN 5.10), he writes: “Because the matter of human actions is indeterminate, thus it is that their measure—which is the law—must be indeterminate, as if not always being in the same state.” He also occasionally speaks as if there were something defective in the situations to which a law would—but ultimately does not—apply, thereby giving the impression that there is a realm in human experience beyond the reach of reason and so of law. But those remarks are more plausibly understood as his saying that, because in human affairs one intelligible state can easily change into another—when, that is, in a particular situation, a morally relevant “circumstance” is present—human affairs are such that possibly qualifying factors cannot be put into laws.

In other words, Thomas is not saying in ST 1-2.94.4 that the realm of human experience is beyond the reach of practical reason: quite the contrary. He cites there an example that occurs also in Plato. A “proper conclusion,” he says, from the common principle “act according to reason” is that “deposits are to be returned.” This proper conclusion (or principle) is in general true, he says, but “it can happen that to do so would be harmful and, as a consequence, irrational.” Suppose that the deposit left with one is a weapon and that its owner demands its return so that he might fight against the commonwealth (the patria). Thomas finds absolutely no indeterminacy here. It would be irrational, he says—and, therefore, contrary to the common principle that he cites (“act according to reason”)—to return the weapon.

He cites this same example in his commentary on the passage in EN 5.10 where Aristotle says that “the defect [ἁμάρτημα] is not in the law or in the lawmaker but in the nature of the affair” and that, were the lawmaker present when the law actually misses its mark, he would certainly correct the shortcoming and legislate accordingly (1137b17–24). This section of his commentary concludes with the remark: “and so here it is necessary to bring the legally just into line with the naturally just.”
The case mentioned in no way eludes the reasonability—the light—of justice. As Aristotle says, “‘just’ and ‘reasonable’ are the same thing and both are good but the reasonable is better” (EN 5.10.1137b10–11). There are occasions when one must take into consideration the supposed—but no less authentic—mind of the legislator” or “the intention of the law.”

V. Conclusion

The Socrates of the Crito conducts his inquiry at the level of moral perception: the level at which any moral agent senses when he is about to do something wrong—or not quite right—but the practically wise man can explain why and counsel accordingly. It is, of course, true that in Socrates’s inquiry an important and ultimately decisive factor is the voice of the laws. But just as important even there, is what is often missed in readings of the Crito: that this Socrates has unswerving confidence that reason can bring us as close as is possible to moral truth. If one is conscientious in applying reason—including especially the reason inherent in law—in debate with others and with oneself, one will have fulfilled one’s moral obligation toward the truth and can proceed with a clean conscience.

This is the core meaning—the substance—of Socrates’s personal axiom that he knows nothing other than that he knows nothing. His knowing-that-he-knows-not is his knowing that moral situations are such that he must be constantly open to the recognition of additional factors (or “circumstances”). Without minimizing in any way the role of law in moral formation and ethical decision making—and that is the main message of the Crito—it must also be affirmed that the practically wise man is one who is aware that the law itself recognizes (at a certain level) the possibility of defectus. This is not, however, a defect of reason in moral reality itself. Quite the contrary: the defectus has to do with the intelligibility—the inherent reason of—the particular situation that presents itself to the moral sensibility of the practically wise man.

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Notes

1. I thank a number of people who made comments on an earlier version of this paper, including Michael Bradley, Randall Smith, Jennifer Frey, Alessandra Tanesini, Kristján Kristjánsson, Luca Tuninetti, Arianna Fermani, and Germain Grisez.
2. George Grote, Plato, and the other Companions of Sokrates, v.1 302.
4. Richard Kraut, Socrates and the State.
5. EN 2.6.1106b6–7; see Kevin L. Flannery, Action and Character according to Aristotle, 163–169.
6. In the *Crito*, for instance, he states in the strongest terms that he believes that we ought never voluntarily to act unjustly or to requite wrong with wrong. See 47a13–c4, 48a4–b6, and 49d5–e2. And in the *Apology*, he states quite flatly says that he knows this; that is, he says he knows that one should not do injustice or disobey a superior, whether man or god: τὸ δὲ ἀδικεῖν καὶ ἀπειθεῖν τῷ βελτίον καὶ θεῷ καὶ ἀνθρώπῳ, ὅτι κακὸν καὶ σιγήρον ἔστιν οἶδα (29b6–7). But he also knows that moral situations are such that he must be constantly open to the recognition of additional factors—and in that sense he knows nothing. One finds this attitude also at *Gorgias* 508e6–509a7 where the character Socrates, acknowledging his own ignorance, expresses a commitment to rational inquiry regarding ethical matters. Writes R. E. Allen: “The man who in the *Apology* knew only that he did not know does not in the *Crito* lay claim to full knowledge of justice and virtue. The *Crito* presents, not demonstration, but dialectic, with the provisional quality which dialectic entails. But when dialectic has been carried through as far as possible and when such degree of clarity has been attained as human limitation permits, one must act—act on the conclusions that appear true” (R. E. Allen, *Socrates and Legal Obligation*).

7. The words “the laws and the commonwealth” translate οἱ νόμοι καὶ τὸ κοινὸν τῆς πόλεως (50a6–9). Burnet points out that “[i]n *Lysias* 16 § 18 τὸ κοινὸν τῆς πόλεως is opposed to ἰδιῶται, ‘private citizens’” (John Burnet, *Plato: Euthyphro, Apology of Socrates, and Crito*, ad 50a8).

8. *Iliad* 9.363: ἠματί κε τριτάτῳ Φθίην ἐρίβωλον ἵκοιμην. In the *Crito*, however, the words are addressed to Socrates and so are in the second person: Ὦ Σώκρατες, ἠματί κεν τριτάτῳ Φθίην ἐρίβωλον ἵκοι (44b1–3).

9. προτιθέντων ἡμῶν καὶ οὐκ ἁγριώς ἐπιταττόντως ποιεῖν ἃ ἂν κελεύωμεν (52a1–2).

10. ἀλλο τι ἢ τούτῳ τῷ ἔργῳ ᾧ ἐπιχειρεῖς διανοῇ τοὺς τε νόμους ἡμᾶς ἀπολέσαι καὶ σύμπασαν τὴν πόλιν τὸ σὸν μέρος; ἢ δοκεῖ σοι οἷόν τε ἐκείνην τὴν πόλιν εἶναι καὶ μὴ ἀνατετράφθαι, ἐν ᾗ ἂν αἱ γενόμεναι δίκαι μηδὲν ἰσχύωσιν ἀλλὰ ὑπὸ ἰδιωτῶν ἄκυροί τε γίγνωσιν καὶ διαφθείρονται (50a9–b5).


12. Regarding “reasonable law,” one notes that Aristotle recognized that some version of the principle of non-contradiction applies in practical reason and that the solutions to moral problems not resolvable by applying general precepts are to be found through the application of reason. See *Metaphysics* 4.4.1008b12–19; also *Nicomachean Ethics* 6.10.1142b31–33, 6.3.1144b17–32, 9.2.1164b27–1165a14. In the *Rhetoric* 1.13.1373b4–6, Aristotle speaks of two kinds of law [νομός]: the “proper” [ἴδιος] and the “common” [κοινός]. Proper law, he says, can be either written or unwritten; “common law,” he says, “is according to nature [κοινὸν δὲ τὸν κατὰ φύσιν].” A couple of chapters previously he speaks of the latter as “as many unwritten things [ὅσα ἄγραφα] as are regarded as agreed upon by all” (*Rhet.* 1.10.1368b8–9). Obviously, however, “common law” can be talked about and taught: Aristotle engages in such activity in the *Rhetoric* itself and elsewhere (*Nicomachean Ethics* 5.7.1134b18ff., for instance). If such things are agreed upon, they must be propositional.

13. See *ST* 1-2.91 and, in Augustine, *De libero arbitrio* 1.6.48–49 and *Contra Faustum Manichaeum* 22.27.


15. παρανόμως (32b4), παρὰ τούς νόμους (32b6).
16. Burnet makes reference in this connection to Aristotle’s *Politics* 8.7.1342a7–11, where he speaks of certain possessed individuals [κατοκώχιμοι] who achieve catharsis through melodies.

17. In the *Phaedo*, a later dialogue, the character Socrates, as he approaches death, says that he is most concerned to convince himself of the soul’s immortality (*Phd. 91a9–b1*). This is his attitude not just regarding the issue of the soul’s immortality but regarding all argumentation.

18. See Germain Grisez, *Christian Moral Principles*, 5D. Says Grisez in introducing that section: “Since human goodness is found in the fullness of human being, one begins to understand what it is to be a good person by considering what things fulfill human persons. Things which do so are human goods in the central sense—that is, intelligible goods” (121).

19. “The general determinations of the first principle of practical reasoning are these basic precepts of natural law. They take the form: Such and such a basic human good is to be done and/or pursued, protected, and promoted” (Grisez, *Christian Moral Principles*, 7D, 180).


23. ἐπειδὰν δοκιμασθῇ καὶ ἴδῃ τὰ ἐν τῇ πόλει πράγματα καὶ ἡμᾶς τοὺς νόμους (51d3–4). See also Aeschines, *In Timarchum* 18.5–4: ἐπειδὰν δ’ ἐγγραφῇ εἰς τὸ ληξιαρχικὸν γραμματεῖον, καὶ τοὺς νόμους εἰδῇ τοὺς τῆς πόλεως; also Aristotle, *Athenian constitution* 42.

24. ἀρκτέον μὲν γὰρ ἀπὸ τῶν γνωρίμων, ταῦτα δὲ διττῶς· τὰ μὲν γὰρ ἡμῖν τὰ’ ἁπλῶς (EN 1.4.1095b2–3). See Thomas Aquinas, *Sententia libri Ethicorum*, 1.4.120–122 (§52). The sensibilia of which Thomas speaks here are moral sensibilia: see again Flannery, *Action and Character* according to Aristotle, ix–x, 1–38. I translate the word γνωρίμον (γνώριμος) as “intelligible” for reasons that have to do both with Aristotle and with Thomas’s interpretation of Aristotle. (See Herbert Weir Smyth, *Greek Grammar*, 858.9 which notes that adjectives whose nominatives end in -ιμος often denote “able to” or “fit to.” The Liddell-Scott-Jones *Greek-English Lexicon* translates the adverbial form of γνώριμος as “intelligibly.”) Aristotle’s discusses the “to us/simpliciter” distinction in the first chapter of the *Physics*, where he explains that “the intelligible to us and the intelligible simpliciter are not the same” [οὐ γὰρ ταῦτα ἡμῖν τὰ γνώριμα καὶ ἁπλῶς—*Phys*. 1.1.184a18]. In fact, the simpliciter (simply) intelligible may not be known at all. This suggests that “known” is not the best translation of γνώριμος. Aristotle also speaks of that which is intelligible simpliciter as intelligible (or more intelligible) “by nature” [τῇ φύσει—*Phys*. 1.1.184a17]. In his commentary on this chapter, Thomas says that the things which are nobis magis nota are intelligibilia in potentia (Thomas Aquinas, *In octos libros physicorum Aristotelis expositio*, 1.1, §7). He also says that that which is *magis notum naturae* is not more *notum* by nature but rather more *notum* “with respect to itself and with respect to its proper nature”: *Non ergo dicit notiora naturae, quasi natura cognoscat ea; sed quia sunt notiora secundum se et secundum propriam naturam*. So Thomas’s own understanding of the word *notum* coincides with Aristotle’s understanding of γνώριμος.

The translation of *notum* as ‘intelligible’ is consistent with Luca Tuninetti’s decision, in his definitive study of the *per se notum* in the thought of Thomas Aquinas, in order to avoid
immediate association with epistemological issues, to translate per se notum as selvberstandlich [“self-understandable”] (Luca F. Tüninetti, ‘Per se notum: Die logische Beschaffenheit des Selbstverständlichen im Denkens des Thomas von Aquin’, 9). (That which is understandable is not yet understood.) I am grateful to Germain Grisez for urging me to clarify my position with respect to these matters.

25. διὸ δεῖ τοῖς ἔθεσιν ἥχθαι καλῶς τὸν περὶ καλῶν καὶ δικαίων καὶ ὅλως τῶν πολιτικῶν ἀκουσόμενον ἰκανός (EN 1.4.1095b4–6).


27. Thomas Aquinas, Sententia libri Ethicorum, 1.4.125–129 (§52).

28. Talis autem, qui scilicet est expertus in rebus humanis, vel per se ipsum habet principia operabilium quasi per se ea considerans, vel de facili suscipit ea ab alio (Thomas Aquinas, Sententia libri Ethicorum, 1.4.150–153 [§54]).

29. “Nothing prohibits there being two effects of a single act, only one of which is intended, the other being beside the intention. Moral acts, however, receive their species according to what is intended, not from that which is beside the intention, since this is per accident. . . . From the act of someone defending himself, a double effect can follow. One indeed is the preservation of one’s own life; the other is the killing [occisio] of the assailant. Such an act, therefore, in as much as intended is the preservation of one’s own life, does not have the character of something illicit, for it is natural for anything to maintain itself in being, as far as that is possible” (ST 2-2.64.7c).

30. “But because it is unlawful to take a man’s life, except for public authority acting for the common good . . . , it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man [intendens hominem occidere] in self-defense, refer this to the public good, as in the case of the soldier fighting against the foe and of the minister of a judge struggling with robbers—although even these sin if they are moved by private animosity” (ST 2-2.64.7c).


32. I follow here the division of chapters used in the Revised Oxford Translation; according to this division, EN 5 finishes at Bekker line 1134a16. Aristotle calls universal justice also legal, but, in order to avoid confusion, it is best to avoid that label here. I examine Thomas’s interpretation of the first five chapters of EN 5 in a paper scheduled to appear in a festschrift for David Solomon edited by Raymond Hain.

33. The word used is κινητὸν (1134b29). Since in this section Aristotle is contrasting the justice of the gods (who are unmoved movers), ‘moveable’ is perhaps the better translation. They are moveable in the sense that they belong to the human rather than the divine realm.

34. ταῦταν ἄρα δίκαιον καὶ ἐπιεικές, καὶ ἀμφοῖν σπουδαίοιν κρεῖττον τὸ ἐπιεικὲς. ποιεὶ δὲ τὴν ἀπορίαν ὅτι τὸ ἐπιεικὲς δίκαιον μὲν ἐστίν, οὐ τὸ κατὰ νόμον δὲ, ἀλλ’ ἐπανόρθωμα νομίμου δικαίου (EN 5.10.1137b10–13).

35. ὁ γὰρ τῶν τοιούτων προαιρετικός καὶ πρακτικός, καὶ ὁ μὴ ἀκριβοδίκαιος ἐπὶ τὸ χείρον ἄλλ’ ἐλαττωτικός, καίπερ ἔχουσιν τὸν νόμον βοηθόν, ἐπιεικῆς ἔστι (1137b35–1138a2). My translation tracks fairly closely William of Moerbeke’s Latin translation (a revision of the translation of Robert Grosseteste) apparently used by Thomas: “Taliun enim electivus
et operativus, et non acrivodikeos ad deterius, sed minoratius, quamvis habens legem adiuvantem, epikes est."

36. “[E]tsi in communibus sit aliqua necessitas, quanto magis ad propria descenditur, tanto magis inventur defectus” (*ST* 1.2.94.4). In ethics, principles (or precepts) that do not allow of exceptions—such as ‘do not murder,’ ‘do not commit adultery,’ and ‘do not lie’—are located in immediate proximity to the common principles such as, “act according to reason”; principles such as ‘deposits are to be returned’ [*deposita sint reddenda*] are located farther away. Thomas borrows the terms “common” and “proper” from the harder sciences. Certain principles are called ‘common’ because they are shared with other such sciences (although in each science even the common principles are appropriated to the individual science); a science’s own principles are, therefore, its ‘proper’ principles. Thomas sees the distinction between *principia communia* and *principia propria* in the opening lines of Aristotle’s *Physics*: “Ad rationem autem pertinet ex communibus ad propria procedere, ut patet ex 1 *Physica*” (*ST* 1.2.94.4). See also Thomas’s comment on *Phys.* 1.7.189b30–32 (Thomas Aquinas, *In octos libros physicorum Aristotelis expositio*, 1.12.2 [§ 99]).

37. “In operativis autem non est eadem veritas vel rectitudo practica apud omnes quantum ad propria, sed solum quantum ad communia” (*ST* 1.2.94.4c).

38. Elsewhere Thomas uses the word *deficere* in the sense of disparate, that is, without any sense of (as we understand the word) deficiency. He says, for instance, in the *Quaestiones disputatæ de malo*: “omnis effectus per se habet aliquid analogiam sui causae, vel secundum eandem rationem, sicut in agentibus univocis, vel secundum deficientem rationem, sicut in agentibus equivocis” (*De malo* 1.3.161–163). Thomas is alluding here to *Metaph.* 7.9.1034a21–28, commenting upon which he identifies three ways in which an effect might be related to a cause per se. The first involves nothing but univocity; he uses the example of fire generating fire; in this case, “the form generated has prior existence in the generator according to the same mode of being and in similar matter” [“quando forma generati praecedit in generante secundum eundem modum essendi, et simili materia”—in *Metaph.* §1444]. The second such per se relationship involves univocity and equivocity, as when the idea of a house, in the architect’s mind, generates a house—which is different with respect to matter but not form (in *Metaph.* §1445). The third involves nothing of univocity, as when the heat produced in a cure precedes the heat that is part of health (there being no formal correspondence between heat and health, nor is there a material correspondence) (in *Metaph.* §1446). All three are described as per se relationships, although in *De malo* 1.3c Thomas describes at least the third (and perhaps also the second) as deficiens. Thomas makes use of the same passage in *Metaph.* 7.9 in *Quaestiones disputatæ de veritate* 11.2c.

39. The document was written in French, which, in paragraph 53 (section 2.5) has: “plus on aborde les choses particulières, plus il y a d’indétermination. . . . Dans le domaine de l’action, la vérité ou la rectitude pratique n’est pas la même chez tous dans les applications particulières, mais uniquement dans les principes généraux.” The corresponding Latin runs: “etsi in communibus sit aliqua necessitas, quanto magis ad propria descenditur, tanto magis inventur defectus. . . . In operativis autem non est eadem veritas vel rectitudo practica apud omnes quantum ad propria, sed solum quantum ad communia.”

40. “Although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. . . . In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles.” The translation and use of *ST* 1.2.94.4 occurs in section 304 of *Amoris laetitia*. The Italian has: “Sebbene nelle cose generali vi sia una certa necessità, quanto più si scende alle
cose particolari, tanto più si trova indeterminazione. [...] In campo pratico non è uguale per tutti la verità o norma pratica rispetto al particolare, ma soltanto rispetto a ciò che è generale” (not even mentioning, that is, that what are general are principles). The Spanish has: “en los principios generales haya necesidad, cuanto más se afrontan las cosas particulares, tanta más indeterminación hay. [...] En el ámbito de la acción, la verdad o la rectitud práctica no son lo mismo en todas las aplicaciones particulares, sino solamente en los principios generales.”

41. Later in ST 1-2.94.4, Thomas writes: “Et hoc tanto magis inventitur deficere, quanto magis ad particularia descenditur.” The word hoc refers to proper principle, “deposita sint reddenda.” It is this principle that is said sometimes to fail of application; the moral situation itself, however, is still susceptible to moral analysis.

42. “Quia enim materia humanorum operabilium est indeterminata, inde est quod eorum regula, quae est lex, oportet quod sit indeterminata, quasi non semper eodem modo se habens” (in EN 5.16.169–173 [§1087]).

43. In this same chapter of the commentary, he compares the lawgiver to the natural scientist who says that men have five fingers although he knows that, “by an error of nature,” they might have more or less than five (in EN 5.16.11–115 [§1084]). See also in EN 5.12.180–196 (§1028), where, following Aristotle (EN 5.7.1134b34–35), he speaks of a principle of nature giving men the stronger right hand, although some people can become [fieri] ambidextrous, with the result that their left hand is as strong as their right (“contingit ut in paucioribus aliquos fieri ambidextros qui sinistrum manum habent ita valentem ut dexteram”). There is nothing lacking in those who make themselves ambidextrous. However, in the earlier Sent. 3.37.4 obi. 2 (“cum contingat aliquos ambidextros esse”), Thomas understands Aristotle to be speaking of those who are ambidextrous rather than become so. In his response, he appears to regard ambidexterity as a defectus: “potest in paucioribus aliquis fieri ambidextros qui sinistrum manum habent ita valentem ut dexteram”. There is a similar remark at ST 2-2.57.2 ad 1, where Thomas accounts for exceptions to the law by noting that it can happen that the will of a man is depraved; if human nature was always upright, there would be no such exceptions. But even here in ST 2-2, as in Sent. 3.37.4 obi. 2 (“difformem et mutabilem”), he is as ready to attribute the disparity to mutability as to deformity (“Natura autem hominis est mutabilis; et ideo id quod naturae est homini potest aliando deficere”).

44. On the proper understanding of “circumstances,” see Flannery, *Action and Character according to Aristotle*, chapter 4. Thomas explains in this same section of ST 1-2.94.4 that, the more stipulations a legislator might attach to a proper principle, the more likely it is that, in a particular situation, it will not correspond to the concrete moral truth determinable by reason. (“Et hoc tanto magis inventitur deficere, quanto magis ad particularia descenditur, puta si dicatur quod deposita sunt reddenda cum tali cautione, vel tali modo.”) I understand him to be saying that, the more particular a legislator gets, the more likely it is that a countervailing morally relevant “circumstance” might present itself. This would not happen, however, in situations involving actions that are evil according to their species (see ST 1-2.18.8–9). An act evil in its species cannot become a good act with the addition of a positive factor. For instance, an act of adultery or a lie does not lose its lack of inherent intelligibility if it is performed for a good remote end. This is not to say, however, that in certain situations an act lacking in intrinsic intelligibility might not be of minimal moral gravity. The lie told to Nazis at the door (“there are no Jews here”) is unlikely to be other than a venial sin.

45. See Republic 1.331c1–d3. Many scholars believe that this first book is an early dialogue to which, in his “middle period,” Plato added the subsequent nine books. The book
constitutes in itself a complete dialogue in which Socrates is seeking the definition of justice. One proposal would be that justice means telling the truth and returning that which one has received. But, says Socrates, “everyone would say that, if one receives from a friend, a man of sound mind, weapons and if, having gone mad, he demands them back, one ought not to return them and one who returns them would not be just—nor should one be willing to tell the whole truth to someone who is in this condition.” In the metaphysical sections of the subsequent books of the Republic, it appears that Plato is prepared to say that the answers to such concrete moral questions is beyond the reach of reason since knowledge is only of the Forms. But the theory of the Forms belongs to Plato, not Socrates.

46. “Apud omnes enim hoc rectum est et verum, ut secundum rationem agatur. Ex hoc autem principio sequitur quasi conclusio propria, quod deposita sint reddenda. Et hoc quidem ut in pluribus verum est, sed potest in aliquo casu contingere quod sit damnosum, et per consequens irrationabile, si deposita reddantur; puta si alius petat ad impugnandam patriam” (ST 1.2.94.4c). For another such example, see ST 1-2. 96.6.

47. I go into these matters more thoroughly in Kevin L. Flannery, “Determinacy in Natural Law,” 763–773.

48. See in EN 5.16.116–151 ($1085–1086). Thomas also employs here another example concerning a law prohibiting foreigners from scaling the city walls but which does not apply when they are actually defending the city.

49. “et ideo secundum iustum naturale oportet hic dirigere iustum legale” (in EN 5.16.150–151 [§1086]).

50. See Sent. 3.38.4c (where Thomas speaks of the intentio legislatoris and also of not returning a deposited weapon) and ST 1.2.96. 6 ad 2. See also 2-2.120.1 ad 1, where Thomas, in connection with reasonableness [epieikeia], says that “to follow the words of the law in matters when one ought not is immoral.” He goes on then to quote the Codex Justinianus (1.14.5 “Codex Justinianus,” 68a): “There is no doubt that he fights against the law who, seizing upon the words of the law, strives contrary to the intention of the law” [“contra legis nititur voluntatem”]. The same law (which doubtless Thomas knew) goes on to say that a lawgiver will say some things explicitly; “others, it is permitted to gather from the intention of the law as if expressed” [“cetera quasi expressa ex legis liceat voluntate colligere”]. See also EN 5.10.1137a31–1138a3. See also Russell Hittinger, “Thomas Aquinas on the Natural Law and the Competence to Judge,” 279–280.

Bibliography


