Adams, 4th ed.

What about a situation in which human law fails to conform to natural law? It is here that Aquinas's naturalism has potentially far-reaching consequences. As he makes clear in the reading, the force of a human law necessarily depends upon its justice: human enactments or measures that contravene natural law are not laws "but a perversion of law"; they are "acts of violence" and do not bind in conscience. Although it is still debated exactly what Aquinas meant by such statements, these remarks have seemed to many to imply that any human "laws" at odds with natural law have no legal validity. Even entire legal systems, Aquinas suggests, if they are evil "perversions" of natural law (for example, the legal regime of the Nazis) may stand invalidated on that ground.

Martin Luther King, Jr.'s famous "Letter from Birmingham Jail" is included here to illustrate one way in which Aquinas's views on the relationship of natural to human law can be translated into political action and moral commitment. Writing from a jail cell in Alabama in 1963, King responds to criticisms of his disobedience to the segregationist statutes of the South by appealing to a "higher" law—the natural law—and invokes the core naturalist claim that these human enactments, these racist statutes, have forfeited their status as "law" by virtue of their obvious immorality.

Legality and Justice: A *Fictional Case*

CARLOS NINO

[I]magine we are in the city of Nusquam today and the date is November 25, 1948. The Allied Forces' Military Tribunal for the Far East meets to deliver its judgment against the twenty-eight people accused of crimes against the peace and crimes against humanity. After hearing the arguments of the prosecution and the defense and having received the evidence offered by both parties, the members of the court issue the following opinions:

Justice Sempronius

Distinguished colleagues: We are gathered here to deliver judgment about deeds that were part of what was doubtless the most abhorrent event in the history of humanity. The men sitting here were among those contributing to the suffering of millions of people. Moved by a messianic world view, they conspired to wage an unjust war and committed egregious abuses during that war. They violated fundamental principles of human dignity by causing deaths, inflicting torture, and persecuting people without cause under a totalitarian system of government. Defense counsel does not deny the deeds but questions the legal characterization which make the deeds punishable. Defense counsel maintains that these people have committed acts which, whatever their moral value, were perfectly legitimate according to the law in force at the time and place in which they were committed. The defendants, according to this thesis, were public officials who acted in observance of legal norms enacted and enforced by the proper bodies of the Japanese empire. The defendants were not only authorized to do what they did but in some cases were obliged to act in that manner. Defense counsel reminds us of an elementary principle of justice which the civilization that we represent has long accepted and which was ignored by the regime for which the defendant worked—*nullum crimen, nulla poena sine lege praevia,* proscribing imposition of a penalty for an act which was not prohibited at the time when the act was performed but was, on the contrary, lawful. We would be contradicting our own philosophy and adopting the one we say we are

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combating if we ignored this principle and punished the defendants.

These are the arguments of defense counsel. But I believe that one of the greatest services that this court may lend to humanity is to debunk once and for all the absurd and atrocious doctrine enclosed in the thesis of the defense counsel. According to him, a legal system is established each time a human group succeeds in imposing a set of rules on a certain society and gathers enough power to enforce its rules, regardless of the moral content of those rules or the moral legitimacy for enacting them. This has been encapsulated in the obscene slogan "The law is the law," which has served to justify the most abhorrent oppressions. Since ancient times, however, lucid thinkers have demonstrated the fallacy of this proposition with compelling arguments.

They have shown that above the rules enacted by men there is a system of immutable and universal moral principles—sometimes called "natural law"—which establish patterns of justice and rights that belong to men simply because they are men. The positive rules enacted by men are only law insofar as they do not contradict those principles. When we confront rules like the ones which authorized the acts we are judging, calling them "law" denaturalizes this sacred name. What is the difference between these rules and those of a criminal organization except that the former have been more stable because they have ignored in a more radical way elementary principles of justice and morality? Defense counsel's position implies that judges should submit themselves to the internal order of the criminal organization they are judging.

Since the rules of the regime to which the defendants belonged do not constitute a true legal system, they are incapable of legitimizing the acts which were taken in their name. To ignore the rules of the regime, and to apply directly the moral principles blatantly violated by those acts in order to punish the acts in question, does not, thus, violate the principle of legality. . . . I vote, consequently, for the conviction of the defendants.

Justice Caius

I share the moral sentiments that my distinguished friend Sempronius has made of the acts we are here to judge. In formulating and expressing them, however, I am acting not as a judge but as a human being and as a citizen of a civilized nation, and I do not believe we are allowed as judges to rely on those moral judgments to arrive at a decision in this trial.

Moral judgments are subjective and relative. Historians and anthropologists have shown how they have varied with time and space. What a people at a certain time considers to be morally abominable, another people at another time considers to be perfectly reasonable and legitimate. Can we deny that an authoritarian regime such as the one we are confronting generated a moral conception which was honestly endorsed by most of the society of this country? The idea that an immutable and universal "natural law," which is accessible to human reason, exists is, in the best of cases, an illusion that emerges from projecting our own feelings onto external reality. In the worst case, it is a manifestation of cultural imperialism which may be enforced only by virtue of military victory.

One of the noblest ideals of humanity is that social conflicts should be solved not according to the capricious moral feelings of those who happen to be in power, but according to settled legal rules: This is the ideal of the rule of law. The legal system of a community is a system of rules the content and scope of which may be objectively verified through empirical means, independently of our subjective valuations. Each time we encounter established institutions like courts of justice and a set of norms which are enacted and enforced by a human group that has the monopoly of means of coercion in a defined territory and which exercises force in a stable way, we face a legal system which can perfectly well be identified as such, regardless of our moral assessment of the value of its rules. Moreover, those rules can provide solutions for most if not all conceivable cases, especially if we accept that there is an implicit rule of closure in any legal system that permits those acts which are not explicitly prohibited. There is no doubt that there are relationships between law and morals—law is influenced by moral ideals—and that from the moral point of view the law should reflect the moral values that we happen to endorse. But this is not essential to the identification of law as such. And once we identify a legal system, we must recognize the binding quality of its rules and the legitimacy of the acts done in accordance with them.

The implications of this approach to this case are crystal-clear: We are confronting acts which were authorized by a genuine legal system, which was recognized as such by our own countries before the declaration of war. It is true that we are not judges of that system and thus obliged to apply its norms. But the rules of our own legal system contain the principle of legality and, thus,

direct us to take into account what was legal at the time and place of the commission of these acts. Distinguished colleagues: Let us oppose the barbarism of this regime with our deep respect for the rule of law. Consequently, I vote for acquitting the defendants.

Justice Ticius

The opinions of my learned colleagues have perplexed me. I am conscious of our historical responsibility to advance clear and compelling principles which express the response of the civilized world to barbaric deeds such as those judged here. However, I cannot find in the previous opinions elements that allow us to infer those principles. My friend Sempronius has said that there are principles of morality and justice which are universal and accessible to human reason. On the contrary, my friend Caius denies that these principles exist and has asserted that moral principles are subjective and relative. Both positions seem unsatisfactory to me.

The first does not tell us how we know those principles and how we avoid the charge that we are imposing our feelings on others whom we consider, in an elitist way, more ignorant or morally inferior to us, when perhaps they are only weaker. The position of Caius also raises serious doubts: Is it really true that when we morally condemn acts like those we are confronting here, we are only expressing our emotional states or voicing the prejudices of our society? From the fact that societies and men differ in their moral evaluations, can one infer that all of them are equally reasonable and just? Is it reasonable to assume that we cannot judge people according to the principles we deem valid but only according to those they themselves assume, whatever they are? Is it possible to make moral judgments and to assume at the same time that opposite moral judgments may be also valid?

I confess that the two previous opinions leave me in an uncomfortable position. I am not convinced by the arguments so far given to justify principles of justice, yet I am not prepared to accept that they are subjective and relative. But we can leave this difficult matter to the philosophers, since in the end it is not relevant for our task. Even if we adopted a skeptical position about the foundation of ethical judgments, we cannot but formulate them, and if we do so, we are committed to act in accordance with them. We are not here to justify our ultimate ethical principles. What we need to decide is whether, as judges, we must apply those principles in order to decide this case or whether we must exclusively apply the legal norms which in fact authorized the acts committed by the defendants. For Sempronius this disjunctive does not arise, since for him identifying legal norms requires that they pass through the filter of moral principles. I cannot accept this stance and I agree with Caius's rejection of it. The law must be identified on the basis of factual and empirical features. This is the way in which we should proceed in order to adopt a scientific approach to the legal system and prevent mixing law and morality, which only serves to confuse the content of both. When we go to an unknown community and want to know what its legal rules provide, it is absurd that we answer the members of that community by resorting to our moral judgments. Not all who speak of the "imperial law" adhere morally to its content, and Sempronius sometimes has to resort to cumbersome circumlocutions in order to speak of that system without calling it "law."

I am uneasy with my colleague Caius's position. He tells us that the rules of a legal system are binding at the time and place in which they are in force. But what does this mean? If this only implies that these rules prescribe certain behavior, this is true, but the same is true of the orders of a robber. If, instead, Caius means that there is a different obligation to observe the legal rules—one which does not apply to the orders of the robbers—the question is, from where does that obligation emerge? The answer cannot be that it emerges from another legal rule, since this would invite the question of whether we are obliged to obey that legal rule, and at some point we would run out of legal rules. The only response is that the obligation emerges from another set of norms which is intrinsically obligatory and whose bindingness does not need to be supported by other norms. But the only norms that are supposed to have these properties are norms which, if they exist, do not exist on the basis of some enactment and therefore do not provoke the question of how "ought" could be derived from "is." These are norms of an ideal system of morality.

Consequently, for all his moral skepticism, when Caius speaks to us of the bindingness of the legal norms that he recognizes on the basis of pure facts, he is resorting implicitly to a moral principle. He is being inconsistent when he claims that we, as justices, must leave aside our moral convictions, since he is relying on some legal principle. Moreover, the moral principle upon which my friend Caius relies seems dubious. There are some reasons of security, order, and peace

which may establish some duty to observe the existing legal order, even when its content is objectionable. But it is entirely implausible to assume this principle is absolute and not to acknowledge that it is overridden when weightier moral values, such as the preservation and promotion of fundamental rights, are at stake. If a judge of the time in which these deeds were committed had ignored the legal system in force in defense of human dignity, we would not have condemned him but would have praised him highly. Could we proceed otherwise with regard to this very court and our own behavior? Certainly not!

Both the principle of effectiveness of international law and the principle *nullum crimen, nulla poena sine lege praevia* of the civilized municipal systems are important principles to be scrupulously observed in normal circumstances, since they express moral ideals of national sovereignty, personal security, and social peace. But no moral value is absolute, and there is an urgent need for the court to affirm the value of human dignity and inviolability of the person. Therefore, the laws permitting these acts should be completely disregarded. I vote for the conviction of the defendants.

Legal Positivism

JOHN AUSTIN

Lecture 1

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. . . .

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are included, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects: laws set by God to his human creatures, and laws set by men to men.

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. . . . As contradistinguished to the rules which I style *positive morality*, and so on which I shall touch immediately, the aggregate

From John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954), pp. 9–25, 30–32, 134, 184–186, 193–195. First published in 1832.