

To the Sources of Law^{*}

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CAN WE recognize animals to have the rights of subjects? Do rights have a certain relation to justice? Are rights susceptible to progress? Are they necessarily connected to a governmental structure? Should a society promote a particular vision of life among its members?

In our time, these questions are no longer considered shocking. The fact that such questions are often raised today shows that their basis—the modern foundations of law—is no longer evident, that it no longer consists of widely accepted truths. The paradox is that modernity doubts its objectives, its legitimacy, and its *raison d'être* at the very moment that it is more influential than ever before. It is as if the critical principle that gives modernity its identity has come to devour itself after having destroyed its natural prey. That which is generally labeled “postmodernity” proclaims the motto that all values and concepts can be called into question. This incertitude about philosophical foundations entails another, much more paralyzing one in practical matters. Ethics and law long ago adapted themselves to the slumber of metaphysics and the silence of nature. Particularly in the realm of law, the solution has consisted of falling back on the sovereign power of the nation or the state, the power that assures law its efficacy, and of falling back on the societal power of common morals, the power that provides the law with its justification. Such a solution imposed itself because it was obligatory, and because it corresponded to a widely shared worldview. Yet these two pillars, common morals and law, have themselves been relativized. On

^{*} Originally: “Aux sources du droit,” in *Thomistes, ou De l'actualité de saint Thomas d'Aquin* (Paris: Éditions Parole et Silence, 2003), 197–213. Translation by Bernhard Blankenhorn, O.P.

what common philosophical position can one depend henceforth to develop the law? Certainly, there is universal agreement about the “progress of modernity.” But this agreement ceases as soon as one seeks the content of this progress and the way to maintain it. It is not surprising when the practitioners of law generally ignore these debates because of indifference, lack of time, discouragement, or ideology. Instead, some claim that, in the absence of philosophical insights, we should place our trust in good common sense, or in the mysterious invisible hand that supposedly presides over the destiny of the liberal system.

The crisis of the foundations of law nevertheless points to a formidable potential for renewal. For pluralism’s dissolving effect on philosophical systems clears up a space that had been filled with a fog of *a priori* principles, impenetrable until now. The temptation to end these discussions with a skeptical, cynical smile is great, that is to say, the temptation to turn pluralism into a new and dominant system. Yet an evasive answer should not fool us. Skepticism is the ultimate refuge of the critical enterprise, an enterprise that is reluctant to apply its own principles to itself. Modernity should see its own deconstruction through to its end, and in every way. The crucial question is: “How?” Here a retrieval of Thomas Aquinas promises to be fruitful. First, he offers a useful foundation for the analysis of actual difficulties and their causes. Second, he is not part of the model in crisis. Third, his teaching can take part in a rediscovery of the natural axis of law, namely, a wisdom of justice. Today, common sense still grasps that everything which frames social relations falls under the law, beyond any nuance that someone might add: on the one hand, the juridic phenomenon is limited (to social relations), and, on the other hand, this phenomenon unifies itself in a common norm (which the law frames). That said, this preliminary description lends itself to several ways of understanding the law, of which two are dominant: positivism and formalism.

Western Positivism or Administrative Law

The Triumph of Practical Positivism

The grave problems in contemporary Western law are well known: an explosion of regulations (360,000 French and 20,000 European Union texts were in force in 1990), laws that are specialized to an extreme—obscure, incoherent, and of a technocratic nature; a growing suffocation in the legal process (40,000 cases were pending in France’s Supreme Court at the end of the year 2000), the laborious mastery of a crumbling yet ever-growing law, a diminishing quality in juridic judgments and acts. All of this explains the flight to technique for the sake of maximum juridic

security. Modern law's survival instinct expresses itself in two fundamental objectives: (1) the necessity to mimic society's evolution, the condition of law's relevance, and (2) the preservation of its internal coherence, of its organic unity and rationality, the condition of its efficiency. This technical tendency is not without consequences for the content of the law. In the standardization of procedures and acts, in the extreme specialization of rules, and in the functionalization of concepts, one impoverishes the general principles, automates reasoning, and calculates while losing perspective. But in fact, such over-investment in the methods of law hides the importance of its ends. That which is called positivist thought lives from an understanding of law as juridic engineering, a game of constructing social relations. Positivism theorizes this understanding in order to better justify it. At least one juridic recipe should correspond to each type of case and be applicable without consideration of its timeliness, its moral value, or its conformity with the highest human aspirations.

An Easy Theoretical Leap

The condition of relevance for the norm that underlies the positivist atmosphere, and according to which "one must adapt the law to the facts," leads, often unconsciously, to the addition of a functional determination to the definition that has been retained by common sense. Because its function is to manage a complex world, law *ought to serve* the framework of social relations, that is to say, it *ought* to be content with pondering individual pre-existing interests. In other words, law *ought* to be dependent on the facts. Such an objective implies a double condition of neutrality; first, law should be only a framework, it should not judge the content of individual interests (negative neutrality); and second, it should be a coherent framework (positive neutrality). The notion of law as framing social relations has a three-fold meaning: (1) it follows the evolution of these relations (condition of relevance); (2) the law only follows them, that is, it does not direct social relations (condition of negative neutrality); and (3) in order to follow these relations without guiding them, the law must essentially consist of a technical task (condition of positive neutrality). Theoretical positivism draws its strength from this, that its three fundamental components (relevance, negative neutrality, and positive neutrality or efficiency) are partially true. Thus, it is evident that the law should always adapt itself to the facts. But should it necessarily submit itself to them? Also, the law necessarily appears as a framework when it imposes itself on individuals from the outside. But should the law renounce the guidance of individuals? Finally, like all knowledge, the law develops its own technical instruments. But must the law be reduced to these instruments? Theoretical

positivism gives an affirmative response to these three questions, and adds that there is no other solution today. Practical positivism proclaims that "since there is no agreement on the true and the good, the best strategic option is to fall back on the minimum consensus." Theoretical positivism adds that "we should renounce in advance the whole search for a consensus at a higher level." Thus, positivism acknowledges its kinship with liberalism, that voluntary blindness before the ends of the individual and of society, that secularism of the second degree in which each actor ought to keep his motivations to himself, and not only his religious motivations (first degree), but also his ethical motivations. Such an attitude assigns ethics a folding chair at the back of the theater. One does not ask it to play its role in the performance itself, but only to applaud at the fitting time. Yet is this relegation of ethics truly necessary? Furthermore, is it even reasonable?

Ethics on Demand

Positivism is always on the lookout for new social realities that it can manage: whether it be an advance in biology, an evolution of the family, a demand of minority groups, or, on the mundane side of things, a vacuum left by new technologies, one quickly identifies a "juridic gap" that must be filled, sometimes with justification. Perhaps biologists are in need of more embryos left over after medically assisted procreation in order to advance their research. One must therefore concoct a new supervisory mechanism that is compatible with the existing juridic system. In order to "give meaning" to this act, to demonstrate that one is not a barbarian, one will search the smorgasbord of circulating ideas to justify the new *modus operandi*: if the parents have no use for an embryo, it is disposable. The lawmaker, reassured by this ethical fantasy conceived on demand, can fulfill the duties of his office. He is now ready for the next social request. For in a positivist atmosphere, the law always marches behind the facts. It is modern to the extent that it is in proximity to the facts. Furthermore, one will not say that a society refuses cloning, for example, but that "it is not mature." This means that, since the cloning of human beings is within our reach, society still opposes something that is inevitable, an opposition arising from strong moral inhibitions, from which we will be liberated with the progress of time. It will suffice to relaunch regularly the debate on the promotion of euthanasia, the post-natal suppression of profoundly handicapped persons, or the legalization of illegal drugs. This incessant return of debates has been with us for the last twenty years. While affirming the primacy of the law's function over its content, positivism does not oppose itself to ethics. Rather, the law pretends to dispense itself from ethics.

When the Law Empties Itself of Its Content

The conceptual game that positivism engages in is not without consequences for its own notions. Thus, in the famous Perruche case in France, it was asked whether a handicapped person could obtain compensation from the doctor who did not detect the handicap during the pregnancy and thereby impeded an abortion. On the one hand, a doctor covered by his professional insurance proved to be an ideal target. On the other hand, the doctor's mistake played no causal role in the production of the handicapped person, since this was only a diagnostic error. Nevertheless, for some legal writers, by impeding an abortion, the doctor was indeed the cause of the existence of a "diminished life." The legal reasoning is false. In order to hold someone responsible, one places the burden on a causality that designates no more than a vague relation between an act and the final state, and not the relation between an act and the effect that it produces. In order to award the requested compensation, the Court of Appeals expanded the notion of responsibility while detaching it from its objective content (the obligation to make reparation for damage that was caused), thus inaugurating a regime of responsibility without responsibility. Family law furnishes another good example of a juridic category's utter detachment from reality. Proceeding from the "traditional" type of family, sociology has expanded the notion to all situations that it encounters (shattered, reconstituted, or single-parent families, and so on), and reorganized all of them as equals in the category of "family." This conceptual evolution established by decree, like an entry within an index of terms, presents jurists with a formidable challenge, for a relation of descent is the only common denominator in all the situations henceforth included in the category of family. This kind of alignment of the law with sociology leads to the assimilation of family law to the law of descent, so that the term "family" becomes nothing more than a linguistic convention. Such a tendency explains at least a good part of the difficulty involved in the construction of a coherent family politics. The hollow meaning of juridic concepts also enables the return of a certain number of archaic notions, ideas that were thought to belong exclusively to ancient societies. For example, the recent reform of divorce in France has revived the right of repudiation, though without explicitly saying so. This regression to archaic notions can only have the appearance of progress because elements constitutive for conjugal union recognized by the law have gradually deteriorated since the nineteenth century. Finally, the positivist ideal of the moral neutrality of law thanks to technique shows itself to be illusory: by its very nature, the law creates a hierarchy, thereby establishing a hierarchy of moral values. Therefore, the renunciation of

explicit values as a matter of principle leads to the law's submission to moral fads. The positivist moralizes like a charlatan. When the Court of Appeals in the Perruche case held the doctor responsible, it subordinated human action to the logic of compensation. When the jurist characterizes the family only by the line of descent, he subordinates the communal to the individual. Finally, when the legislator reintroduced the law of repudiation, he subordinated the assistance that is owed by the marital promise to unending emotional fluctuations. By morally neutralizing juridic concepts in order to render them technically malleable, positivism blinds the law, turning it into a toy for any and all dominant forces.

Law vs. Humanism

The reduction of juridic goals to an optimal administration of moral pluralism leads the humanist sources of law either to enslave themselves to a communal utilitarianism or to retreat to the distant ether of the "horizon of meanings." The rights of the human being—which in fact have a twofold nature, at once demanding and idealist, normative and super-normative—are especially prone to instrumentalization: too absolute to be applied without restriction, yet too general to furnish their own criteria of application, one thus leaves to pragmatism the task of making them concrete. That is to say, in the present situation, at the very moment that they could exercise their normative role, the rights of human beings *de facto* submit their substantial content to the grip of a mechanistic neutralization. The pious invocation of these rights can thus protect the better part of their substance while camouflaging those aspects which are not so good. The most recent fruit of Western conscience, the crime against humanity, risks the same fate. Unlike other crimes, in which both the matter and the intention for a reprehensible act are circumscribed, the crime against humanity combines a multitude of acts under one roof: the denial of the human being's humanity by his like. If these words have any meaning, then the recognition of the existence of such a crime presupposes the spirituality of conscience and its infallibility. There are acts of such a sort that the human being, because he is human, cannot say that his conscience does not recognize their criminal nature, regardless of the motives and circumstances. Yet by definition, all of this escapes positivism, for the latter cannot maintain the specificity of the crime against humanity in the face of related notions such as the crime of war, the crime of the nation-state, or the duty of memory. Deprived of its metaphysical and spiritual roots, the crime against humanity does not hesitate to appeal to the unjust "justice of the conquerors," which is also called vengeance. When good intentions no

longer consist of anything but warm sentiments, justice is only one step away from injustice. This is precisely what the recent French law against discrimination in the business world demonstrates. The very notion of discrimination implies a moral appreciation of the acceptance of persons. The law claims that a difference in the treatment of one's employees is discrimination, is contrary to justice. But if the legislators agree on the general principle of the fight against discrimination, then the diversity of moral situations inevitably leads them to a blanket condemnation of all differences in treatment, with the exception of motives such as the ability to work or professional competence. In other words, by sidelining the fundamental question of justice, by evading the moral question, the warm sentiments of the legislator have led him to reduce the human being to his economic value.

The Crisis of Juridic Formalism

Judgment at the Heart of Law

Positivism has found a crucial pillar in the modern exaltation of technique. Positivism has also found a semblance of triumph in the landscape of postmodernity's philosophical ruins. As we have seen, this success owes much to the idea that technique can attain a neutrality proper to the foundation of law by developing without any reference to ethics. But the choice of moral neutrality is already a moral choice by which one voluntarily suspends reflection at the very threshold of ethical judgment. Positivism does not transcend moral pluralism, but rather remains on the sidelines in order to escape the human question *par excellence*: "In a particular situation, what is the good that I ought to do or the justice that I should serve?" The French law against discrimination discussed above is marked by this somewhat childish pre-morality that neither wishes nor knows how to confront its spontaneous generosity with concrete reality, which neither wishes nor knows how to judge. And yet, one cannot make law without judging the facts, and one cannot judge without stepping back and appropriating ethical principles that are independent of the facts. Whether or not an act ought to be categorized as discriminatory, or whether or not an injustice ought to be called discrimination, implies a judgment. In both juridic qualifications and definitions, an ethical judgment on the nature of discrimination occurs. In the absence of such a judgment, the law, having appropriated the judgment of facts, contents itself with the classification, assembly, and deduction of hollow concepts. Kant and Rawls perfectly understood this pre-moral regression that is constitutive of positivism.

Legality: The Foundation of a Pluralist Justice

The openness of law and politics to the necessity of ethics clashes with the fundamental objection of positivism: how can we reconcile judgment or justice with pluralism? How can we judge—perform a moral act—while remaining morally neutral, without imposing on some persons certain conception of the good and the just that they do not share? In short, how can we save humanism without opening the way to totalitarianism? One solution is to avoid the difficulty, or at least to reduce its significance, while constructing a public ethics, a political justice, beyond any particular moral convictions. Such a distinction intuitively justifies itself by the claim that life in society requires of everyone, whatever their convictions, a minimum of obedience to the commonly recognized laws, or to the dominant consensus. But this claim, one that positivism also accepts, is not sufficient to realize the expected ethical openness, for by itself it does not preserve the dominant consensus from anti-humanist errors. Therefore, an additional step must be taken, which is the determination of the objective political conditions that make justice possible. These conditions intervene at two levels, one juridic, the other political. If the law can judge the facts in the first place, this happens not on the basis of particular ethical conceptions but simply in virtue of the general ethical conviction that the law ought to assert its authority over the facts, that it must be obligatory: the essence of law is legality and nothing but legality. In the name of ethical demands, that which is called juridic formalism opposes the primacy of the rule to the positivist priority of the social fact. Like positivism, juridic formalism adds a functional determination to the definition it has received from common sense: the law *ought* to frame social relations because it is the nature of law to declare “what ought to be done.” Just as an individual humanizes himself by opening himself up to moral demands, so a society humanizes itself when it assents to the law, as it orders the public sphere of individual action. Secondly, the legal framework is inseparable from the political framework that assures its efficacy—thanks to the public force of the state that administers the law—and its impartiality—thanks to the democratic process. Through the principle of legality, the law does not content itself simply with assuring the optimal administration of moral pluralism, as positivism would prefer. Rather, the principle of legality assigns to the law the task of guaranteeing the equality and integration of individuals in the social body. Thus, the members of society are led to go beyond the limited horizon of their individual interests. Rights and duties structure the space of their autonomy while leaving everyone the freedom to have their own personal opinions. In this way, the political structure that integrates certain moral principles into the public domain through the

democratic process establishes and guarantees the legality of the juridic system (political justice) by which the facts can be judged (law). Finally, the concept of legality allows the establishment of a formal justice, that is, a justice that does not judge the content of the facts—thus safeguarding private autonomy—but judges only their conformity with the juridic and political forms that are the conditions of justice. Once this task is accomplished, juridic formalism assumes and makes official the dialectics that positivism confidently proclaims to be self-evident. The table summarizes our main points.

Table 1

Dialectic	Positivist Evidence	Principle of Formalism
Between the private and public spheres	The primacy of individual autonomy	The realm of individual autonomy is distinct from the realm of inter-subjective relations
Between fact and norm (or nature and law; or the <i>is</i> and the <i>ought</i>)	The primacy of fact as the law seeks a harmony among individual aspirations	The primacy of the norm, distinct from facts as required by ethics
Between ethics and the law	The law is a morally neutral technical framework	The law is distinct from ethics, a consequence of the preceding distinctions
Between technique, and technique and justice	In the end, the law consists of technical arbitration	Justice is born of a just political order; of the universality of moral values defended by the state, and of the juridic order's rationality.

What Is in Store for Formalism?

Formal justice is concerned with offering a minimal moral framework for the life of society. Against the deviations of moral pluralism and in the face of totalitarian temptations, formal justice constructs the democratic principles of a nation-state's law, equality, and legality or normative coherence. Nevertheless, formal justice reacts differently, depending on whether it encounters the first or the second danger, the parasite or the predator. The predator engages in a direct, frontal attack on the principles of formal justice: totalitarianism denies the political structure upon which formal justice rests. This is not the case with the pluralism that formal justice is, by its very nature, called not to fight but to master. When a society attains a certain unity around some fundamental values, pluralism is weak and encourages public debate. However, when society experiences

a crisis of conscience that leads to the destruction of foundational concepts, pluralism is strong and paralyzes public debate. The principles acquired from formal justice slow down the process of destruction for a time before collapsing on themselves, due to a lack of internal solidity. Such is the development that the West has experienced in the last half-century, the breaking point having come at the end of the 1960s.

One can learn at least three lessons from this formalist misadventure. First, because it does not accept the content of the principles that it maintains—the essential condition for remaining above particular moral opinions—formal justice knows only how to solidify humanist accomplishments—its phase of progress—or how to restrain their erosion—its phase of deconstruction. Formal justice is a certain politeness among members of the same culture, and is acceptable to the extent that persons essentially belong to the same cultural milieu. Paradoxically, its moral neutrality is the cause of its impotence in the face of postmodern positivism.

Second, by the connection that it establishes between judgment and legality, formalism opens the law to ethics at the same time that it separates the two. Henceforth, ethics remains a political or a private affair. That is to say, formalism delivers the law, the juridic practice in its most concrete form, over to positivist errors and technocratic reasoning.

Third, now that formalism has *de facto* lost its dominant position, one can question the relevance of a strategy that consists in sacrificing the quest for agreement on the true and the good in order to assure a minimal and thus universal consensus. Is it wise to exchange one's access to ethics—which access positivism refuses—for the voluntary and definitive reduction of ethical pretensions to legality alone, that is, to an externalist morality or the semblance of morality? More precisely, is it so evident that justice ought to be separated from ethics and law, that justice is something other than ethics, and is thus located somewhere else than in the law? In other words, does contemporary pluralism offer the chance to escape an artificial construction of relations among politics, law, and ethics? For not only is this construction unable to respond to the contemporary questions of jurists—of which we have given several examples in the first part—but it also declares that the most ambitious reflections from the moral point of view are idealistic, and that all thought which does not take formalism as its point of departure is unsuited to public debate. Yet to share the humanist concerns of formalist justice does not oblige one to subscribe to its method, nor to content oneself with its objectives. For in reality, legality is only at the frontier of ethics; it is not its path.

The Wisdom of Justice

Christian Claims

Biblical Revelation is well aware of the two temptations at work in positivism and formalism. When the Lord reveals himself to Israel as the Just One, as the one who loves and does all in justice, he invites his People to find their way back to the path of the one God “and walk in his ways,” that is, by practicing justice. This journey is difficult. Israel experiences the depth of sin that hardens its heart: liberation from such slavery is beyond strictly human knowledge and strength. The Torah, the Law which once again gives the meaning of justice to human beings, is thus necessary for conversion. The Law traces the path of mystical union with God by adherence to the commandments, which denounce the slavery of evil, so as to re-open the way to a lost relationship. The practice of justice is at the heart of salvation. To practice justice is to live in the righteousness of the Law given by God, so as to be able to act in the image of God. To practice justice is to participate in the divine work by works that are conformed to it. Thence come the two fundamental characteristics of biblical justice: objectivity and integrality.

First of all, there is an objective measure of justice—the law in the proper sense—because creation is a divine work that bears the traces of Goodness and forms a totality ordered to the manifestation of this Goodness. Consequently, the relations among creatures find their measure in this order of creation. Justice has an objective moral constitution because creation has a real ontological constitution. The failure to grasp the latter hinders access to the former. To lose the objective rule of discernment between the just and the unjust that a wise outlook on creation procures means to lose the capacity to govern oneself in the midst of the flow of events. Thus, one could criticize positivism, which, having reduced sapiential objectivity to a technical outlook, now submits to the demands of the facts. It is a fatal *fait accompli*: its ethic consists in the attempt to justify the lack of spiritual liberty that one has experienced, that is, to justify one’s submission to social determinations.

The second trait of biblical justice is its integrality. Salvation should descend into the heart of the human being as profoundly as sin has entered into him. The prophets did not cease to recall that a work of justice that does not involve the whole person has no value in the eyes of God. For a work of justice involves a person’s relationship with God and his neighbor. Integral justice places the human being face-to-face with his neighbor and with God, while making the law a guide to open him to the truth of relationship and its demands. By contrast, formal justice places the

human being face-to-face with the law; it makes the law the end term of justice, simply requiring that one be in conformity with the law and satisfy its precepts. To restrict oneself to formal justice is thus the permanent temptation of those who want justice without conversion, of those who want to be acquitted without being engaged in relationships beyond those they choose to accept. The New Covenant definitely considers such an attitude to be imperfect. Christ has shown, to the point of shedding his blood, that justice begins, progresses, and completes itself in charity, because one finds justice only with the righteousness of the love of God and neighbor. The consequences for the philosophy of law are important: a determination of the just ought to consider what is spiritually at stake: the primacy of the human being's supernatural end, the fact that partial goods are ordered to the Sovereign Good (the order of the temporal realm is just only if it is at the service of the spiritual), the dignity of the human person, the pre-eminence of the common good over the individual good, etc. In summary, Christian claims come to regard justice as the first place where the effects of charity ought to manifest themselves.

Christian Philosophies

The Jewish culture is not the only one open to the role of objectivity and integrality in the realm of justice. Certainly, the light of Revelation gives these conditions their full clarity and significance, by demonstrating their origin in the doctrine of creation and in the newness of Redemption. But this light is accessible to natural reason, provided that reason benefits from sufficient intellectual honesty and courage as well as moral virtue. Inversely, theology ought to appropriate philosophy in order to seek and formulate the concrete implications of Christian claims. Through the effort of a constantly renewed conversion to the fire of the Gospel, human beings and societies accumulate an experience of justice whose major elements are outlined by the sages and the saints. This work of ordering for the sake of expressing the truth, one that is constitutive of knowledge, may lead to syntheses that are quite diverse in their accents, but that nevertheless respond to substantially identical claims. Among such syntheses, that of Aquinas distinguishes itself by its capacity to discern the truths that all thought or all practices worthy of the human person bear within themselves, as well as by the capacity to give these truths their proper place in light of the Christian claims concerning justice. What Thomas can bring to the philosophy of law today is not an alternative way of thought that is just one more system to be incorporated into pluralism. Rather, Thomas reminds pluralism that there is only one possible way out of postmodernism.

Beyond Postmodernity

As we have seen, a simple way to characterize positivism and formalism is to ask how they understand the following formula: "The law is that which frames social relations." In effect, both approaches to the law oppose one aspect of the juridic phenomenon against another—the fact against legality, or the converse—for the sake of establishing the law by assigning it a unique function. For positivism, the law *ought* to serve social relations. For formalism, the law *ought* to frame the facts. Both approaches are capable of justifying the law's function. Positivism tells us that if the law does not adapt itself to the social reality, then it cannot efficaciously frame that reality—and indeed, this is the problem with formalism. The latter asks the following question: If the law has nothing with which to oppose certain social errors, how can one keep society from sinking into totalitarianism? But since these two functions both affirm something true about the law, is it necessary to choose one or the other, to consider them to be mutually exclusive? Is there no possibility of combining the two?

Jürgen Habermas has recently proposed a solution. He claims that the essence of the law is found not so much in that which ought to be done, but rather in the procedure by which it ought to be done. This proposition unifies the two functions not by combining their true aspects, but only by retaining that which they have in common, that is, the idea that the law has a unique function, one that is then reduced to the demands of a procedure. The sole foundation of the law would thus be the procedural function of democracy.

But as the latest evolutions of this philosophy show, this approach has certain disadvantages and fails to reap any benefits. For in the end, the solution that Habermas offers proclaims that the only thing about which we can still be somewhat certain after more than two centuries of reflection is that, in order to build a society, we have to appropriate the means of conversation. How much effort has been expended just to produce a platitude! Without knowing it, Habermas has demonstrated how postmodernity is the natural fruit of modernity, how a formalism anxious about its own survival has been definitively neutralized by positivism, producing an empty shell, a system of procedures. Nevertheless, without knowing it, Habermas leads us to the solution: the essence of the law does not reside in that which formalism and positivism have in common, that is, the idea that the law has a unique function. Rather, the essence of the law consists in that which this exclusivity of function signifies, the truth that there are essential dimensions of the law that one cannot compromise. From this perspective, positivism teaches us that the law comes to exist out of the facts. Formalism responds to this insight by insisting that

the law is not identical with the facts, that there must be an ethical judgment of the facts in order to determine them. Positivism retorts that, in order to be objective, this judgment cannot add something that is not already contained in the facts. Formalism responds that this added something, so as to constitute a moral requirement and duty, should be determined in relation to the facts but not by the facts alone. Since the fact in question is a relation among individuals, this duty will be a debt, something owed to another and not to oneself. But the measure of a relation is the task of justice, for it seeks to establish a balance of relations, a certain equality, a certain equity. Thomas can thus conclude from this discussion that the law is that which is objectively due to another according to an equality that is in things, and that to determine the law is the proper object of justice. In short, when one focuses on the content of the functions affirmed by positivism and formalism while leaving aside the affirmation of their exclusivity, which is the condition of avoiding the platitude of a system of procedures, one arrives at the definition of law that Thomas, inheritor of Aristotle, gives us.

The Law of the Human Being Who Remakes the World

Although positivism and formalism share a certain common content, with each other and also with Thomism, a problem remains. For in the former two, we find the very idea that is postmodernity's great obstacle: the law ought to have an exclusive function. Here, positivism and formalism find a common ground, one that they defend vigorously against the reality of the juridic phenomenon, despite the practical and theoretical impasses to which it leads. All of this indicates that we have come to the heart of the debate. The underlying presupposition of the principle of a *necessary unique function* is this: that the human being does not receive meaning from the real, but rather gives meaning to the real, which lacks it. This signifies that all thought (*necessity*) begins in a foundational decision, and that it unfolds into a projection upon the world (*function*) that is exclusive of other possible projections (*unique*). Thus, the human being cannot seek the truth, but rather, he constitutes his own truth (with more or less success) according to an ideal that, having developed its rational consequences, forms a system of thought.

Two major implications follow. First, since nothing is given, the whole discipline of law exists only insofar as there has been a particular law to produce it. The former identifies itself with the latter. Law is essentially legalism applied to a social ideal. Second, law determines itself in a theoretical way. The basic features of a society are thus determined in the abstract, within the social ideal to be implemented. Thus, law is constantly in tension with its practical realization, and it is always frustrated by the

inevitable discrepancy between the initial ideal and the eventual result. The presupposed point of departure involves another consequence, that the quality of a system of thought or of an ideal depends not on its truth but on its capacity for universality: its theoretical capacity to integrate other systems while conserving rational coherence, and its practical capacity to gain general adherence through an ideal that has a firm grasp on reality. Ways of thought that seek the true and the good are thus immediately disqualified as intolerant, for they judge the content of systems. Meanwhile, demanding ethical doctrines are rejected as “angelism,” since such ways of thought do not accept the human being as he is. In short, since themes such as truth and the good divide us, we should content ourselves with finding a good, pragmatic, rational strategy, one that is perfect because it is universal and allows us to manage pluralism. In this framework, Christian justice, with its demands for objectivity and integrality, appears as a typical example of a bad strategy.

Law and Conversion

The assurance and apparent sufficiency of postmodern discourse have succeeded, in an inverse proportion to its content, in impressing more than one Christian in our day. One might be consciously or unconsciously tempted to espouse its theses, but only if one is willing to lead a schizophrenic life, torn between henceforth-private convictions and a public life. Such an approach puts the Christian life at risk. The notion of strictly private convictions contradicts the faith, for it threatens to dispense with the Christian demand for justice. The exclusion of faith convictions from public life shatters hope, for the Christian who does not proclaim Christ no longer lives from the eternal goods. Charity withers away, for by this approach, we abandon our neighbor in his weaknesses and needs. To work no longer for the evangelization of human relations, those objects of the law, is to take up Cain’s response to God: “Am I my brother’s keeper?” To feel for another’s suffering is not the same as healing it.

Thomas Aquinas, a good doctor of the intellect, provides us with the diagnosis and the remedy. The diagnosis begins with the realization that pluralism has always existed. If it seems insurmountable today, that is because the human being has the ambition of conquering and mastering the world, not as a steward, but as a creator—even as his utopian projects have collapsed, one after the other; as his pride prevents him from recognizing his fall; and as he prefers to doubt the truth rather than his own whims. Contrary to postmodernity’s claim, the truth does not divide, but rather it manifests our divisions and enables us to overcome them. Without the truth, there is only room for strategies of intellectual domination, for

conceptual systems that pretend to attain a universality that the Creator of the universe alone can give. The truth is universal. To aim at anything less is to condemn oneself to provincialism. Under the latter regime, it is useless to embark on the quest for a concept that might furnish an ultimate foundation of law, to construct a utopia of universal justice, to launch the pursuit of a social ideal, to try to come up with a strategy for the juridic management of moral pluralism. Wisdom begins with humility, by agreeing to respond only to the questions that really present themselves, and not to those for which we would like to see God seek our counsel. Thus, one expects of the jurist, politician, and philosopher the wisdom and courage necessary to articulate the law and defend justice in certain situations. The law's task is to make concrete determinations, not theoretical decisions. The law does not produce something, but rather articulates it. The ability to articulate the law is a practical wisdom, a wisdom of the just person, one that is acquired with experience, and for which technical competencies are indispensable yet secondary. It is easier to re-create the world in one's head, according to one's own standards, than to control one's passions, one's partisan prejudices, one's instinctive judgments, one's pre-conceived reasoning, one's cowardice, one's tendency to let a particular law judge in one's place. It is difficult to see the good of one's neighbor and of society in every situation, to order everyone's pretensions according to their true significance, to qualify the facts according to their nature, to reason without error, to judge or to legislate without being swayed by social pressures, and to protect the weak against the strong. It is true that, as with everything that concerns the moral life, objective and integral justice are hard to establish and defend. Thomas is aware of this when he prescribes the wisdom of the just person as a unique remedy. Yet he also knows that everything which depends on the human being definitely depends on his conversion, not on his structures, or techniques, or strategies, or even his norms. In our sinful situation, this conversion is impossible without the illumination and grace received from Christ. For this reason, the challenge of postmodern pluralism, a challenge so perilous for the societies affected by it, gives Thomas's doctrine immense relevance. As he becomes disillusioned with the dream of an earthly paradise, the human being can again become conscious of the importance of salvation. We need an abundant and balanced wisdom, one that can reconnect our daily life with the mystery of Christ the Savior. To study law, morals, or politics at the school of St. Thomas is to respond to the pressing invitation of the Second Vatican Council: Christians have a great responsibility for the societies in which they live, for they alone know by faith that "only in the mystery of the incarnate Word does the mystery of man take on light" (*Gaudium et Spes*, §22).