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## THE NATURAL LAW FOR LAWYERS—A PRIMER

DAVID C. BAYNE, S.J.

IT WAS THE sanguine dream of this article that it was to be written for practical men by a practical man. In a word, this was to be the practical man's natural law. It was not meant to be a philosophical disquisition. It was not written for the abstract theoretician, the hair-splitting metaphysician, or the airy speculator. It was written for the active practitioner, for the law professor who for years has wondered where he could find, in one place and in simple straightforward terms, a concise statement of the concept of the natural moral law.

Among others, the natural law has labored under two principal handicaps. The first has been an obfuscation of the basic issue by the many inter-school debates among the natural law men themselves. Most of the writings have concerned themselves, as Dickens would put it, with mere buds on the parent tree in steady neglect of the main trunk of the problem. There has been a second handicap. Where a writer might well lay out an intelligent statement about the natural law it has almost inevitably been confined to a very small area and has not enabled the reader to see what he wanted, which was the view from the housetop. It is hoped that these handicaps will be overcome here. And to some extent, it is submitted, success has been achieved. But there is now a certain realization of failure because the natural law is admittedly a philosophical concept and it had to be, of necessity, treated as such, however anxious one might be to simplify it. Therefore, let it be said that every possible attempt was made to

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achieve the goal of a practical man's natural law but let the reader be tolerant where the very nature of the subject frustrates the attempt.

It was also thought that just as the practical man needed such an article so also was it necessary that the writer be in the same general class. With this very thought in mind, several years were spent and several articles were written in an attempt to establish the proper authority for just such an article as this. The first two attempts were pieces dealing with the Tucker automobile fiasco<sup>1</sup> and with the Deep Rock cases.<sup>2</sup> These were followed up by a rather detailed analysis of the state of the proxy in corporate affairs.<sup>3</sup> It is true that there were some forays into the more peculiarly moral<sup>4</sup> and into the ethico-legal<sup>5</sup> areas, but the entire purpose from the beginning has been to prepare for this article.

This line of thinking serves to introduce a comment on another grave handicap under which the natural law labors. On all sides the accusation has been levelled at the natural law that it fails in its practical application. There is certainly some justification in the allegation. The natural law can, to some, appear to be quite intelligible when discussed in its simpler, broader and more general principles, but all understanding ceases as soon as there is any attempt to apply these broad principles to modern, present-day problems of law. The attempt to meet this problem head-on resulted in *Kaiser-Fraser v. Otis, A Legal and Moral Analysis*.<sup>6</sup> In that article, the broad principles of the natural law, which are being laid out in this present article, were applied to a complex maze of facts centering around the misleading prospectus of Kaiser-Fraser and the astounding refusal of Otis and Company to go through with an underwriting agreement. It was this same thought and this same purpose that took these same natural-law principles and applied them to the present-day problems surrounding the proxy and its vote, expressed in testimony by this writer before the

<sup>1</sup> Bayne, *The Tucker Fiasco and the S.E.C.*, 81 *America* 153 (April 30, 1949).

<sup>2</sup> Bayne, *The Deep Rock Doctrine Reconsidered*, 19 *Fordham L. Rev.* 43 and 152 (1950).

<sup>3</sup> Bayne, *Around and Beyond the S.E.C.—The Disenfranchised Stockholder*, 26 *Ind. L.J.* 207 (1951).

<sup>4</sup> Bayne, *Essay on the Hebrew Civil Code*, 3 *Clev.—Mar. L. Rev.* 23 (1954) and *The Duties of a Lawyer to His Profession*, 23 *Detroit Lawyer* 163 (1955).

<sup>5</sup> Bayne, *The Bernat Case*, 12 *Commonweal* 146 (May 19, 1950).

<sup>6</sup> 2 *De Paul L. Rev.* 131 (1953).

Securities Exchange Commission in December, 1953.<sup>7</sup> These articles and this testimony were, in reality, the culmination rather than the beginning, and this article, in turn, is, in reality, the beginning rather than the culmination. This, then, has been the approach in preparing the way for the presentation of this statement on the natural law.

#### THE IMPORTANCE OF THE NATURAL LAW

Nor must it be thought that all of this distant laying-of-the-ground was overdone, or that the natural law was not worth it. Cardozo was right—nothing is more important than the philosophy of law underlying the law.<sup>8</sup> If one does not have a guiding set of principles it is obvious that no course whatsoever can be charted.

There is another thought, too, that impels this article. If it is true that the natural law is so important, and it *is* true, then anything that will help restore to the minds and attitudes of thinking men a respect for this natural law will be well worthwhile. It is regrettable to say that over the early years of this century the natural law was contemned on all sides.<sup>9</sup> John Dewey<sup>10</sup> and Justice Holmes<sup>11</sup> were par-

<sup>7</sup> See Official Report of Proceedings before the Securities Exchange Commission. In the Matter of Conference on Proxy Rules, Washington, D.C., December 16, 1953. This testimony and the testimony of conferees was gathered together, correlated and expressed in article form in Bayne, Caplin, Emerson and Latchman, *Proxy Regulation and the Rule-Making Process: the 1954 Amendments*, 40 Va. L. Rev. 387 (1954).

<sup>8</sup> "You may think that there is nothing practical in a theory that is concerned with ultimate conceptions. That is true, perhaps, when you are doing a journeyman's work of your profession. You may find in the end, when you pass to higher problems, that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in anything else.

"The genesis, the growth, the function and the end of law—the terms seem general and abstract, too far dis severed from realities, raised too high above the ground, to interest the legal wayfarer. But, believe me, it is not so. It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however, veiled, is in truth the final arbiter. . . . Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goal is there." Cardozo, *The Growth of the Law* 23, 25 (1931).

<sup>9</sup> Morris R. Cohen, for instance, has had some very severe things to say about the natural law over the years: "Natural rights are, and by right ought to be, dead. . . . While in this country only old judges and hopelessly antiquated text-book writers still cling to the supposedly eighteenth century doctrine," Cohen, *Jus Naturale Redivivum*, 25 *Philosophical Review* 761 (1916). Ten years later, John M. Zane spoke to this effect: "When we come to a general philosophy of law, writers are still chopping the old worthless chaff of what they call analytical or the historical or the *jus naturale*

ticularly voluble in attack on the natural law. These days are, however, happily passing and there is a growing tendency across our nation to admit the role of the natural law<sup>12</sup> not only in the history

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school, which have been the work of men not lawyers. They go on classifying, reclassifying, subdividing and re-subdividing the writers upon philosophy and their conceptions, which have never had the slightest influence on the actual development of the law. . . .

"What has always been needed is scientific study. The study asks for facts and facts alone, unclouded by hasty generalizations." Zane, Review of Custom and Right by Sir P. Vinogradoff, 35 Yale L. J. 1026 (1926).

<sup>10</sup> "The sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular." Dewey, Logical Method and Law, 10 Cornell L. Q. 27 (1924). A typical remark is Nathan Isaac's concerning the natural law philosophy of Chief Justice John Marshall: "*Exploded as this notion may seem to us, it is certainly in keeping with the philosophy of the eighteenth century.*" Isaac, John Marshall on Contracts, A Study in Early American Juristic Theory, 7 Va. L. R. 413 (1921). (Emphasis added.)

<sup>11</sup> See John C. Ford, S.J., The Fundamentals of Holmes' Juristic Philosophy, in Phases of American Culture (Holy Cross College Press, Worcester, Mass., 1942).

<sup>12</sup> "One thinks, for instance, of the succession of fashions in legal thinking and writing the 'movements,' to which everyone must for a time adhere and even carry to an extreme if he is not to be branded as outmoded, unintelligent, unoriginal. In 1890 I came to the bar in the heyday of historical jurisprudence. Every dabbler in jurisprudence took a fling at Austin. Holmes' Common Law eight years before had started a cult of the Year Books. Every law teacher who pretended to scholarship had to have a set of the Tottel Year Books whether he could read black-letter law French or not, and to trace the idea in the details of the law today to its beginnings in oracular utterances of the fourteenth and fifteenth centuries. About 1900 this fashion was succeeded by the mechanical economic interpretation. Marx's economic interpretation of history and Spencer's mechanical sociology, ingredients about as easy to mix as oil and vinegar, could be made into an attractive dressing for legal theories explaining the doctrine of Rylands v. Fletcher by differences between the land owning class and the traders in the cities in Tudor and Stuart England, or items in the law of employer and employee by the industrial revolution. About the time of the first World War a new fashion was set by Hohfeld's Hegelian logical analysis of rights which in the hand of its extreme devotees became a universal solvent for every difficult question in the science of law. In the period after that war the fashion changed to Freudian psychological realism, and we got for a time a science of law based on abnormal psychology. Today new fashions are beginning to be set by new types of logical approach; by neo-Kantian methodology or more attractively by a rising cult of natural law and call for a trek back to Thomas Aquinas and Aristotle. . . .

"Neo-scholasticism is compelling more serious attention to the theory of values as basic in the science of law, even if some of us are no more than somewhat worried by the give-it-up philosophies which teach that values have no place in a science. What I am seeking to bring out is the enthusiastic eagerness with which law teachers have followed one after another of these fashions, substantially one every decade, and how little has come of the extreme original and striking expositions of detail in terms of one or another in its heyday." Pound, Some Comments on Law Teachers and Law Teaching, 3 J. of Leg. Ed. 519, 520-521 (1921).

of our country<sup>13</sup> but in the principles and the foundation of our common law.<sup>14</sup>

With all these protestations of simplicity in laying out the foundation and basic elements of the natural law, it must be warned that the concept does have its intricacies. Patience, therefore, is in order. But again it would seem that the importance of the subject would well warrant such patience.

### THE CONCEPT OF THE NATURAL MORAL LAW

In laying this foundation nothing will be presupposed. Law in its broadest meaning will first be discussed. Then the kinds of law. Yet narrower, the eternal law as the pivotal base of all law will lead to a consideration of man and human acts. This prepares for the treatment of the natural moral law itself, its nature, origins, causes, and its properties of unity, universality, immutability and adaptability. With this, an elaboration of the concept in the civic life of man is possible.

#### FOUNDATIONS OF THE NATURAL MORAL LAW

##### THE CONCEPT OF LAW

When the word *law* is used in daily conversation there is such a multiplicity of variations as to warrant Webster in giving twelve separate listings under the term in his small desk dictionary. Hence there can be no talk of the natural moral law until these various meanings are unfolded.

As is the case with most words in any language the term law has taken on many patently metaphorical uses. Thus, for example, the laws of economics are no more than an orderly grouping of general maxims expressing the regular recurrence of observed phenomena, with no reference to the inner principle that is responsible for the recurrence. Such as these are laws only in a very loose sense.

Saint Thomas does not even mention these metaphorical applications of the term in his treatise on law. With one broad stroke he eliminates all uses that do not refer to the underlying reason for the constancy of the activity. *In the strict sense*, "Law is a rule and measure of acts, whereby man is induced to act or is restrained from act-

<sup>13</sup> Bayne, *The Supreme Court and the Natural Law*, 1 De Paul L. Rev. 216 (1952).

<sup>14</sup> Bayne, *Notre Dame's Natural Law Institute*, 82 America 433 (January 14, 1950).

ing; for *lex* [law] is derived from *ligare* [to bind], because it *binds one to act*.<sup>15</sup>

Thomas uses this definition as his starting point. He immediately adds that *reason* is the first necessary note in the definition of law. Law is an ordination to an end. "For it belongs to the reason to direct to the end, which is the first principle in all matters of action, . . ." <sup>16</sup> He makes a distinction, however, between the two ways that law can possess this reason:

Since law is a kind of rule and measure, it may be in something two ways. First, as in that which measures and rules; and since this is proper to reason, it follows that, in this way, law is in the reason alone. —Secondly, as in that which is measured and ruled. In this way, law is in all those things that are inclined to something because of some law; so that any inclination arising from a law may be called a law, *not essentially, but by participation as it were*.<sup>17</sup>

This means that the law is in the lawgiver *essentially* since it is in his intellect that it is found in its first and most perfect form; since it is his reason that is responsible for it. In the subject, however, the law is also found, and in varying degrees of perfection and participation. The subject, in so far as its ordered activity is the reflection of the reason and wisdom of the lawgiver, partakes of the reason that ordered it. It is in that sense participating in the law. The inclination in the subject to obey (the law in the subject) is not the law "essentially, but by participation, as it were."

Certainly Thomas agrees that another distinction must be made. He proceeds to show that law in the fullest sense is found only in rational beings. At the same time he gives further indication that reason is the first essential note to any law in the strict sense. True, he admits that all subjects partake of the reason of the lawgiver,—

. . . it is evident that all things partake in some way in the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends.<sup>18</sup>

—but he is clear that it is only in those subjects that have reason themselves that law is *properly* found.

<sup>15</sup> Thomas Aquinas, *Summa Theologica*, translated by Anton C. Pegis, Random House, New York, 1945, 2, 743. I-II, q. 90, a. 1. Unless otherwise indicated this translation is used.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, a. 1, ad 1, 2, 743. Throughout this entire article the emphasis is added unless otherwise noted.

<sup>18</sup> *Ibid.*, q. 91, a. 2, 750.

Even irrational animals partake in their own way of the eternal reason, just as the rational creature does. But because the rational creature partakes thereof in an intellectual and rational manner, therefore the participation of the eternal law in the rational creature is *properly* called a law, since a law is something pertaining to reason, as was stated above. (Q. 90, a. 1.) Irrational creatures, however, do not partake thereof in a rational manner, and therefore there is no participation of the eternal law in them, except by way of likeness.<sup>19</sup>

By rational creatures the law is clearly understood, the ends of the law are consciously striven for and known as ends. It is only analogously and secondarily that the irrational creature tends towards its end. Their natures do partake<sup>20</sup> of the reason of the lawmaker but they do so through instinct in the animate, and material lifeless natures in the case of the inanimate. Reasoning beings reflect the reason of the lawgiver in the fullest sense, In a less perfect way they exhibit the same rational qualities of foresight, adaptation of means to end, providence, that the lawgiver himself exhibits. Thus:

Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others.<sup>21</sup>

The work of the will in this matter cannot be overlooked. "To direct to the end"<sup>22</sup> has been designated as the work of the reason, and this is true. It is true, however, only in this sense that the reason recognizes the order that must be observed or followed, knows the means that will accomplish this end, and presents, as it were, the *rule* to the will. The reason *directs*, but it is to the will to *effect*. Once the proper order has been decided upon by the reason, the will must apply this order. Thus law is *formally* in the reason as the rule and measure, and *efficaciously* in the will.

<sup>19</sup> *Ibid.*, a. 2, ad 3, 2, 750.

<sup>20</sup> These will serve to illustrate the point more fully. "Irrational creatures neither partake of nor are obedient to human reason, whereas they do partake of the divine reason by obeying it; for the power of the divine reason extends over more things than the power of the human reason does. And as the members of the human body are moved at the command of reason, and yet do not partake of reason, since they have no apprehension subject to reason, so too irrational creatures are moved by God, without, for that reason, being rational." Aquinas, *S.T.*, I-II, q. 93, a. 5, ad 2, 2, 769. "Hence, some things are like God first and most commonly because they exist; secondly, because they live; and thirdly because they know or understand." Aquinas, *S.T.*, I, q. 93, a. 2, 1, 887. "Although in all creatures there is some kind of likeness to God, in the rational creature alone do we find a likeness of *image*, as we have explained above; whereas in other creatures we find a likeness by way of a *trace*." *Ibid.*, a. 6, 893. (Emphasis is Aquinas')

<sup>21</sup> Aquinas, *S.T.*, I-II, q. 91, a. 2, 2, 750.

<sup>22</sup> *Ibid.*, q. 90, a. 1, 2, 743.



Reason has its power of moving from the will, . . . ; for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law: or otherwise the sovereign's will would savor of lawlessness rather than of law.<sup>23</sup>

From this it can be declared that the lawgiver must first make a judgment in which he concludes to the reasonableness of the law. Next he wills that the law become binding. Finally he actually ordains through an act of the reason that the law is law. This last act of the reason is the ordination itself.

Thus far it has been seen that law in the proper sense can be applied only to rational creatures, that it is an ordination of reason. In unfolding his definition of law properly so called, Saint Thomas next inquires, in article 2 of question 90, whether the law can be directed to the good of individuals, to private groups or whether it must be directed to the good of all. He seeks to ascertain the *final cause* of law.

It has been seen that it is the work of the reason to order to an end. The ultimate end of human acts is beatitude.<sup>24</sup> The law that governs human acts must order to the beatitude of man.

Moreover, since every part is ordained to the whole as the imperfect to the perfect, and since one man is a part of the perfect community, law must needs concern itself properly with the order directed to universal happiness.

Consequently, since law is chiefly ordained to the common good, any other precept in regard to some individual work must needs be devoid of the nature of law, save in so far as it regards the common good. Therefore every law is ordained to the common good.<sup>25</sup>

The third essential note in the concept of law in the strict sense refers to the *efficient cause*.

A law, properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good belongs either to the whole people, or to someone who is the vicegerent of the whole people. Hence the making of a law belongs either to the whole people or to a public personage who has care of the whole people; for in all other matters the directing of anything to the end concerns him to whom the end belongs.<sup>26</sup>

<sup>23</sup> *Ibid.*, a. 1, ad 3, 2, 743, 744.

<sup>24</sup> Aquinas, *Summa Contra Gentiles*, Marietti, Taurini, 1894, III, C. 115 (The divine law principally orders man to God); C. 116 (The end of the divine law is the love of God). Both chapters will indicate this point.

<sup>25</sup> Aquinas, *S.T.*, I-II, q. 90, a. 2, 2, 744, 745.

<sup>26</sup> *Ibid.*, a. 3, 2, 746.

From a certain aspect each person is the law to himself. In the sense that has already been noted, each participates in the law of the law-giver in so far as each participates in the order of the lawgiver. It remains to the one who has the care of the community, however, to be the true source of the law. An individual in the community could not efficiently enforce the ordinations of the law. He would have no external force to apply.

A private person cannot lead another to virtue efficaciously; for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue, . . . But this coercive power is vested in the whole people or in some public personage, to whom it belongs to inflict penalties, . . . Therefore the framing of laws belongs to him alone.<sup>27</sup>

The last note in the concept of law is in many respects the most important, for "promulgation is necessary for law to obtain its force,"<sup>28</sup> and without it there is no obligation. So important did Saint Thomas reckon the promulgation that he made this categorical statement:

Wherefore no one is bound by a precept without knowledge of that precept; and therefore one incapable of knowing is not bound by precept; nor is anyone ignorant of God's precept bound to performance except in so far as he is held to know it. If, however, he is neither required to know it nor does he know it, he is no wise bound by it.<sup>29</sup>

With this it can be stated with Saint Thomas that the full definition of law in the *strict* and *proper* sense is: "*an ordinance of reason for the common good, promulgated by him who has the care of the community.*"<sup>30</sup>

#### KINDS OF LAW

Derived from the eternal law are several divisions or kinds of law. As direct reflections of the eternal law there are, first, the *natural moral* law governing human acts, and, second, the *law governing irrational creatures*. In the cases where the natural moral law requires explanation, determination and special sanction there is the support of the *positive human* law, both *ecclesiastical* and *civil*. It should be noted here also that for the supernatural order especially (but also as a help on the natural level) the *divine positive* law, both *old* and *new*, is a

<sup>27</sup> *Ibid.*, a. 3, ad 2, 2, 746.

<sup>28</sup> *Ibid.*, a. 4, 2, 747.

<sup>29</sup> Aquinas, *De Veritate*, Marietti, Taurini-Roma, 1931, q. 17, a. 3 (Vol. 2.); writer's translation.

<sup>30</sup> Aquinas, *S.T.*, I-II, q. 90, a. 4, 2, 747.

necessary branch of law. It is obvious that for the purposes of this treatment a consideration of the natural moral law as it stems from the eternal and founds the positive human law is all that is in order. The divine positive law will be by-passed. References that do occur to the positive human law will be made with the understanding that the ecclesiastical law must be subject to approximately the same limitations, qualifications and considerations as the civil.

#### ETERNAL LAW AS THE PIVOTAL FOUNDATION

Equipped with the concept of law in the strict sense it can be asked whether that law which is "a dictate of practical reason emanating from the ruler who governs a perfect community,"<sup>31</sup> can be posited of God and the providence of his universe?

As it is clear that the whole world and the entire universe is subject to the divine government, there can be no doubt that the whole community of the universe<sup>32</sup> is governed by the divine reason. So, just as the law of a kingdom is conceived and found in the reason of the king, so also does the rule of all things exist in the divine reason, and thereby the governance of the universe partakes of the nature of law. Since the divine reason, or anything divine, can in no wise have

<sup>31</sup> *Ibid.*, q. 91, a. 1, 2, 748.

<sup>32</sup> The exact interrelation between providence and the eternal law is perhaps best expressed in the following: "Divine providence is not properly called the eternal law, but something consequent on the eternal law. For the eternal law in God must be considered in God as we have principles of activity naturally known to us by which we are guided in our plans and choices, and which pertain to prudence or providence. Wherefore, in this way is the law of our intellect related to prudence as a principle is related to demonstration. And so it is in God. The eternal law is not providence, but is, as it were, the principle of providence. Wherefore, acts of providence are properly attributed to the eternal law, just as all acts of demonstration are referred to indemonstrable principles." Aquinas, *De Veritate*, q. 5, a. 1, ad 6 (Vol. 1); translation mine. In this it can be seen that the use of the divine providence is in the nature of an a posteriori proof. Also: "For the same reason is God the ruler of things as He is their cause, because the same cause gives being that gives perfection; and this belongs to government. Now God is the cause, not of some particular kind of being, but of the whole universal being, . . . Therefore, as there can be nothing which is not created by God, so there can be nothing which is not subject to His government. This can also be proved from the nature of the end of government. For a man's government extends over all those things which come under the end of his government. Now the end of the divine government is the divine goodness, as we have shown. Therefore, as there can be nothing that is not ordered to the divine goodness as its end, as is clear from what we have said above (q. 44, a. 4, 1, 431; q. 65, a. 2, 1, 611.), it is impossible for anything to escape from the divine government. Foolish therefore was the opinion . . . that the corruptible lower world, or individual things, or that even human affairs were not subject to the divine government." Aquinas, *S.T.*, I, q. 103, a. 5, 1, 956.

existence in time, that law of the universe existing in the divine reason must be as eternal as the divine essence itself.<sup>33</sup>

Just as in every artificer there preexists an exemplar of the things that are made by his art, so too in every governor there must pre-exist the exemplar of the order of those things that are to be done by those who are subject to his government. And just as the exemplar of the things yet to be made by an art is called the art *or* model of the products of that art, so, too, the exemplar in him who governs the acts of his subjects bears the character of a law, provided the other conditions be present which we have mentioned above as belonging to the nature of law. Now God, by His wisdom, is the Creator of all things, in relation to which He stands as the artificer to the products of his art, as was also stated in the First Part (q. 14, a. 8.). Moreover, He governs all the acts and movements that are to be found in each single creature, . . . Therefore, just as the exemplar of the divine wisdom, inasmuch as all things are created by it, has the character of an art, a model or an idea, so the exemplar of divine wisdom, as moving all things to their due end, bears the character of law. Accordingly, *the eternal law is nothing else than the exemplar of divine wisdom, as directing all actions and movements.*<sup>34</sup>

It is from this all-embracing government of the Eternal Legislator that all law derives its force and efficacy. As Saint Augustine says, referring to the eternal law:

. . . that law, which is called the highest reason, which must always be obeyed, and through which all the bad merit misery, the good a blessed life; through which, finally, that which we said ought be called temporal is properly managed and changed. . . . I see this law as eternal and incommutable. At the same time I also believe that you see that nothing is just and legitimate in that which we called temporal which man does not derive from the eternal; . . .<sup>35</sup>

This is certainly true, for law carries with it, as has been said, the notion of ordination of acts to an end. It is necessary that in all such beings tending towards an end that the force of the tendency should be derived ultimately from the force of the first mover or cause, since nothing that is moved is so moved except through the power and force of the first mover.

Therefore we observe the same in all those who govern, namely, that the plan of government is derived by secondary governors from the governor in chief. Thus the plan of what is to be done in a state flows from the king's command to his inferior administrators; and again in things of art the plan of whatever is to be done by art flows from the chief craftsman to the under-craftsmen who work with their hands. Since, then, the eternal law is

<sup>33</sup> Aquinas, *S.T.*, I-II, q. 91, a. 1, 2, 748.

<sup>34</sup> *Ibid.*, q. 93, a. 1, 2, 763.

<sup>35</sup> Aurelius Augustinus, *De Libero Arbitrio*, Migne, Paris, 1877, I, cap. 6, (15). Tom. XXXII, Pat. Lat., Mig.; I, Aug.

the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law. But these plans of inferior governors are all the other laws which are in addition to the eternal law. *Therefore all laws, in so far as they partake of right reason, are derived from the eternal law.*<sup>36</sup>

With this general understanding of the eternal law it should be asked immediately if it can be said to be a law in the strict and proper sense. Analyze its four elements. God as the Creator of all things is at the same time and in the same act of creation the Eternal Legislator and the just Remunerator. In the one marvelous act God *creates, ordains and sanctions*. He is Maker, Lawgiver, Judge. Of all possible lawmakers He most fully and truly is he "who has the care of the community."<sup>37</sup>

The final cause of the universe is God Himself. So also is the ultimate end of man, God Himself. Further God is best served by the attainment by man of eternal beatitude.<sup>38</sup> The eternal law directs man to God and to this beatitude of necessity. It is, therefore, directed "for the common good"<sup>39</sup> in the fullest sense also. Is it an ordination of reason? Wisdom Itself has ordained. The eternal law is part of the divine essence. And what of the promulgation of the eternal law? This is achieved through the natures of the subjects. The promulgation, therefore, is proportioned to the nature of the subject. In the case of irrational creatures the divine order is imprinted in their natures by means of an interior motive principle that acts without the drive of personal intellection of an end, but is rather the result of divine providence.

Now just as man, by such pronouncement, impresses a kind of inward principles of action on the man that is subject to him, so God imprints on the whole of nature the principles of its proper actions. And so it is in this way that God is said to command the whole of nature, . . . And thus all actions and movement of the whole of nature are subject to the eternal law. Consequently, irrational creatures are subject to the eternal law, through being moved by the divine providence; but not, as rational creatures are, through understanding the divine commandment.<sup>40</sup>

For our purposes, then, this eliminates irrational creatures from consideration. It was seen that ". . . because the rational creature partakes thereof in an intellectual and rational manner, therefore the partici-

<sup>36</sup> Aquinas, *S.T.*, I-II, q. 93, a. 3, 2, 765, 766.

<sup>37</sup> *Ibid.*, q. 90, a. 4, 2, 747.

<sup>38</sup> See footnote 9 *supra*.

<sup>39</sup> Aquinas, *op. cit.*, q. 90, a. 4, 2, 747.      <sup>40</sup> Aquinas, *S.T.*, I-II, q. 93, a. 5, 2, 768, 769.

pation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason, . . ."<sup>41</sup> Thus the promulgation of the eternal law in the case of rational creatures is achieved through their rational natures. "*And this participation of the eternal law in the rational creature is called the natural law.*"<sup>42</sup> This article is concerned only with rational creatures, human nature and human acts, for it is only with these that the natural law is concerned. A word, then, about this human nature and these human acts.

#### THE NATURE OF MAN AND HUMAN ACTS

That man is essentially above the brutes, that he has a rational soul, is a necessary postulate of this essay. It is of his essence to have a spiritual faculty joined with his merely animal body. It is true that man shares with the brute purely animal powers and to this extent it is correct to compare him with the brute. But it is for the essentially higher and spiritual soul, capable of rational cognition and rational appetite, that he is distinguished. The work of this rational soul enters into man's activity in a very intimate way. Thus we see in Saint Thomas' definition of a human act the full effect of this faculty.

Therefore, whatever so acts or is so moved by an intrinsic principle that it has some knowledge of the end, has within itself the principle of its act, so that it not only acts, but acts for an end.<sup>43</sup>

And then he goes on further to distinguish for us man from all other creatures.

On the other hand, if a thing has no knowledge of the end, even though it have an intrinsic principle of action or movement, nevertheless, the principle of acting or being moved for an end is not in that thing, but in something else, by which the principle of its action towards an end is imprinted on it.<sup>44</sup>

It is this combination of action proceeding with deliberation and without coercion from the internal principle of the will, and the fact that that action tends to a known end, that merits the designation free and voluntary. Thus those acts are called human which are proper to man as man, as a rational animal, which proceed from an internal principle with an intellectual cognition of the end as end.

. . . for this reason man, above all other animals, is said to be endowed with freedom of the will, because man is moved to will, not by an urge of nature as the brute, but by a judgment of the reason.<sup>45</sup>

<sup>41</sup> *Ibid.*, q. 91, a. 2, ad 3, 2, 750.

<sup>43</sup> *Ibid.*, q. 6, a. 1, 2, 227.

<sup>42</sup> *Ibid.*, a. 2, 2, 750.

<sup>44</sup> *Ibid.*

<sup>45</sup> Aquinas, *Summa Contra Gentiles*, I, C. 88 (*Voluntas Divina*), author's translation.

In approaching the discussion of the natural moral law itself it can be recalled that it is through this distinctly human nature that the eternal law of God is promulgated in rational creatures; that since this natural moral law is concerned only with rational creatures so also it is, ipso facto, concerned only with those human acts which flow from the human natures of those rational creatures.

NATURE OF THE NATURAL MORAL LAW  
ORIGINS

When Saint Thomas first began his discussion of law he stated that as a rule and measure of actions it could exist in two ways and still be the same law. It could be in the reason of the lawgiver as the rule ordering and it could be in the reason of the one governed as the rule to be followed. It was seen that the rule and measure of every being and action in the universe existed in the Divine Reason from all eternity and was known as the eternal law. Thus the eternal law extends to every creature subject to the divine providence and reaches these creatures through the individual natures of each. Through the eternal law each creature is directed to its respective end by the inclination imprinted in it.

Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law.<sup>46</sup>

So it can be said that the law governing the actions proper to man is the natural law when considered as existing in the reason of the one governed. It is part of the eternal law when considered as the rule ordering in the reason of the lawgiver.

It should be clear that the natural moral law could not be other than a participation of the eternal law and a promulgation of its decrees. No man could bind himself of himself. Self-binding leaves a man free to do one's own whim. He must go to a superior being. Further, he is patently subject to his Creator. Hence it is this Creator who is his lawmaker. Joining these concepts the only conclusion is that the Creator of man chose the natural law as an expression of his divine plans. The only difference, then, between the natural law and

<sup>46</sup> Aquinas, *S.T.*, I-II, q. 91, a. 2, 2, 750.

the eternal law whence it has its origin is that the natural law is the eternal *passively* considered.

It might be asked why this law is called *natural*? Principally because its very foundation and mode of promulgation is the human *nature* itself. Further, it comes from the Author of nature Himself, who ordained the natural order of the entire universe. The word can be used, moreover, in contradistinction to the supernatural order. By the natural law man's actions are governed irrespective of the life of grace. The law comes from God the Creator, not God the Saviour. That it possesses all the elements of a law in the strict and proper sense is clear from what has been said in this connection in regard to the eternal law.

#### CAUSES

The natural law looks *ultimately* to God as its end. Thus in following the order laid down by the divine reason man tends to God, merits beatitude for himself and further serves God in receiving the promised reward or punishment implicit in the very same natures that promulgate the law itself.<sup>47</sup> This is the ultimate end of the natural law. More proximately considered it is the common good. Man must be considered both as an individual and as a member of society. The natural law looks to the good of the individual as well as to the good of the member, but since it is the entire order that God as the Supreme Orderer must look to, it is the common good that must be His principal concern.

The *material cause* has been sufficiently indicated. It is only to rational creatures that the natural law looks. Rational creatures are capable of acts proper to the brute and human acts. It is only the *human* acts flowing from the rational nature that are objects of the natural law. Man as man is the subject. His acts as proper to him are the object.

The *efficient cause* ultimately considered is God Himself, the eternal law in the divine essence. Proximately considered it is the human nature of man.

It will aid in clarifying notions of the natural law to consider it under the various possible aspects. One might begin by considering it *formally*. Just as the speculative intellect produces universal prin-

<sup>47</sup> The entire question of sanction, as important as it is in itself, cannot warrant fuller treatment here.



ciples so does the practical intellect produce its universal moral principles. These universal moral dictates, practical judgments by which man knows he is bound to strive for the good, comprise the natural law formally considered.

. . . the precepts<sup>48</sup> of the natural law are to the practical reason what the first principles of demonstrations are to the speculative reasons because both are self-evident principles.<sup>49</sup>

Immediately, however, the distinction should be made between these judgments of the practical intellect (in which the natural law formally consists) and the habit or special aptitude in forming these moral judgments. This habit or special aptitude is called *synderesis*. Thus Saint Thomas distinguishes and thereby also tells us more of the natural law formally considered:

*Synderesis* is said to be the law of our intellect because it is a habit containing the precepts of the natural law, which are the first principles of human actions.<sup>50</sup>

At another time Saint Thomas thus defines the natural law: "That light of reason given us by God by which we know what we ought to do and what we ought to shun."<sup>51</sup> Considered from this aspect the natural law is a power, a faculty by which the principles of morality are formed. *Virtually* considered, therefore, the natural law is ". . . the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, . . ." <sup>52</sup>

#### NATURE THE NORM

Proceeding still further in this consideration, the natural law *fundamentally* considered is the human nature itself. It will be noticed that the approach in this essay has been step by step to the innermost aspect of the natural law. From the declared first principles, the law was next seen as the faculty itself. Now the natural law is viewed in its most ultimate aspect. True, considered actively and ultimately in the truest sense, this law is the divine plan, the eternal law, but passively it is man's nature imprinted in man as a reflection and participation of the divine order.

<sup>48</sup> A precept is a particular and single application of the law. Thus there are many precepts that form the whole of the law.

<sup>49</sup> *Ibid.*, q. 94, a. 2, 2, 774.

<sup>50</sup> *Ibid.*, a. 1, ad 2, 2, 773.

<sup>51</sup> Aquinas, *Opusculum III, In Duo Praecepta Caritatis*, P. Fiaccadori, Parma, 1859, (Vol. XVI, 0.0., 97, initio.) Writer's translation.

<sup>52</sup> Aquinas, *S.T.*, I-II, q. 91, a. 2, 2, 750.

At a first inspection of Thomas and the other Scholastics there would seem to be considerable discord in the matter of the fundamental norm of morality, the natural law fundamentally considered. Thus in one place we hear Thomas say: “. . . the proximate rule is the human reason, while the supreme rule is the eternal law.”<sup>53</sup> In another he says: “. . . this rule is the power itself of nature . . .”<sup>54</sup> Then Suarez would seem to have his own individual theory. Suarez indicates that the norm is the rational nature as such.<sup>55</sup> It is clear, indeed, that this rational nature must be viewed comprehensively and fully, with a full consideration to the end of human nature and reference to the ultimate norm of the eternal law. Donat in his treatise on the matter uses the phrase, as expressive of Saint Thomas, “the order and finality of the universe.” (In the original: *ordo rerum finalis*.)<sup>56</sup>

It can readily be shown that all these modes of expression resolve themselves into the same concept. Essentially all the Scholastics agree. Perhaps the best manner of expressing it is that of Donat when he says that fundamentally the natural law is the order and finality of the universe. The entire universe,—God, angels, men, brutes, plants, rocks and stones,—is ordered in one magnificent whole. “All things which are in the universe are ordered in some way, but all things do not have their order in the same way.”<sup>57</sup> With God the Creator, Orderer and Remunerator at the head governing all through His Divine Providence and ruled by His Eternal Wisdom, each creature is possessed of his own peculiar nature. This nature is endowed with special tendencies and inclinations driving it on to its own particular end and joining it in the common end of furthering man’s good proximately and thereby adding to the glory of God ultimately. These natures and the parts thereof are all interrelated in a total unity. God is superior to all. *Man* demands subservience from the *brute*, the *plant* and *inanimate matter*. Each nature has its own place in the whole; and must act in accord with the rule of the whole. In the center of this universe, as it were, is man with his rational nature and tendency to beatitude. Now when Suarez says that the norm, fundamentally, is man’s rational nature adequately considered, he is looking at the nature of man directly and considering only indirectly all other na-

<sup>53</sup> *Ibid.*, q. 21, a. 1, 2, 360.

<sup>54</sup> *Ibid.*

<sup>55</sup> See Suarez, *De Legibus*, II, XIII, 2.

<sup>56</sup> J. Donat, *Ethica Generalis, Editio Quarta*, F. Rauch, Innsbruck, 1935, 25.

<sup>57</sup> Aquinas, *In XII Libros Metaphysicorum*, P. Fiaccadori, Parma, 1859, Lib. XII, Lectio xii (Vol. XX, 0.0., 652).

tures surrounding man and man's relations to them. When Donat used the phrase "the order and finality of the universe" he was concentrating on the whole of the universe directly and then fitting man into the entire picture as a part, making him conform to the whole. When Saint Thomas says simply that it is "right reason" he is directing his attention to the fact that man through his reason must apprise himself of this order of things and thus conform.

With these considerations it would be well to follow Saint Thomas through the reasoning that has led, for example, Donat to state that the order and finality of the universe is the natural law fundamentally considered.

Now the due order to an end is measured by some rule. In things that act according to nature, this rule is the power itself of nature that inclines them to that end. When, therefore, an act proceeds from a natural power, in accord with the natural inclination to an end, then the act is said to be right; for the mean does not exceed its limits, viz., the action does not swerve from the order of its active principle to the end. But when an act strays from this rectitude, it comes under the notion of sin.

Now in these things that are done by the will, the proximate rule is the human reason, while the supreme rule is the eternal law. When, therefore, a human act tends to the end according to the order of reason and of the eternal law, then that act is right; but when it turns aside from that rectitude, then it is said to be a sin. Now it is evident . . . that every voluntary act that turns aside from the order of reason and of the eternal law is evil, and that every good act is in accord with reason and the eternal law. Hence it follows that a human act is right or sinful by reason of its being good or evil.<sup>58</sup>

Not only is man part of a great order and hierarchy to which he must conform, but within his own nature there are further subordinations which are governed by the same natural law, which are apperceived by right reason, guided by the inclinations of human nature:

. . . hence it is that all those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. *Therefore, the order of the precepts of the natural law is according to the order of natural inclinations.*<sup>59</sup>

This inner hierarchy of inclinations is an excellent reflection of the hierarchy of the universe. Thus there is a certain analogy or parallel between the order that man must observe in his use of other creatures in the universal order and the order that must subsist when he is faced with separate demands on the part of disparate inclinations within his own nature. So we see:

<sup>58</sup> Aquinas, *S.T.*, I-II, q. 21, a. 1, 2, 360.    <sup>59</sup> *Ibid.*, q. 94, a. 2, 775.

For there is in man first of all [and this is the first and lowest grade and obviously comparable to the merely material creatures in the universe as a whole] an inclination to good in accordance with the nature which he has in common with all substances, inasmuch, namely, as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law.<sup>60</sup>

Thus man must satisfy the demand of his nature for conservation. He must, moreover, respect the tendency of all other things to remain in existence, and thus not destroy needlessly.

Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals; and in virtue of this inclination, those things are said to belong to the natural law which nature has taught to all animals, such as sexual intercourse, the education of offspring, and so forth.<sup>61</sup>

On this second level we find the ordinations concerning man's purely animal needs and exigencies. The sensitive appetite is superior to that inclination "which he has in common with all substances," but must in turn subserve the rational, which is next treated:

Thirdly, there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination to know the truth about God, and to live in society; and in this respect, whatever pertains to this inclination belongs to the natural law: e.g., to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.<sup>62</sup>

This expresses the last grouping. It is clear that in this, there is the final rounding out of the whole order. In this group of precepts of the natural law are contained those which regulate man's conduct towards other men, his superiors, his inferiors, his equals. Here also are the precepts which dictate the care man must have of himself as a rational animal. Here is indicated the precedence of the rational over the sensitive and vegetative. It is here that man as man, not as animal or mere substance, is governed.

It is this human nature<sup>63</sup> (this *one* human nature, in spite of the analysis), adequately considered in relation to all other natures in the universe, which Suarez advances as the natural law fundamentally

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Such a norm obviously will involve ultimately the entire system of Scholastic philosophy. It is clear that a full understanding of man as man, in relation to his God, to his fellow men, to brute creation, to plant and inanimate creation will in the end cover the whole field of philosophy once the ramifications have been followed out. Here only the basic indications in so far as they pertain to this study have been given.

considered. It is this nature considered as part of, the central part of, "the order and finality of the universe" of Donat. When Thomas says:

But there are two rules of the human will: one is proximate and homogeneous, viz., the human reason; the other is the first rule, viz., the eternal law, which is God's reason, so to speak.<sup>64</sup>

it is this same concept that he has in mind.

By some reflection and a mulling over of these notions a fuller appreciation of the natural moral law can be had.<sup>65</sup>

#### PROPERTIES OF THE NATURAL MORAL LAW

Just as in the animal kingdom one species is set off and distinguished from another by certain essential characteristics that are peculiar to it and exclude it from another, so does the natural law have certain essential properties that are always and of necessity present wherever the natural law itself is found. These properties flow from the essence of the natural law, as it were, and are inseparably linked with it and distinguish it from all other law. Chief among these properties, and those which will be considered now, are the Dependence on the Eternal Law, Unity, Universality in regard to Subjects, Universal Knowability, and Immutability.

#### DEPENDENCE ON THE ETERNAL LAW

The fact of the dependence of the natural law on the eternal is perhaps so obvious and fundamental as to be overlooked in a consideration of the properties of the natural law, but the fact of this dependence is most important, for the natural law would be nothing without this dependence. It is through this that the nexus is made with God

<sup>64</sup> Aquinas, *S.T.*, I-II, q. 71, a. 6, 2, 568.

<sup>65</sup> An excellent final word: "There are present in all beings certain principles by which these beings are able not only to effect their own proper operations, but also by which they direct these operations to their end, . . . Thus in things acting from the necessity of nature there are principles of action proper to the essence of each by which their operations are directed conformably to their end; so in those beings which participate in cognition there are principles of cognition and appetite. Whence it follows that there is natural conception in the cognoscitive sense and a natural appetite or inclination in the appetitive power by which operation . . . is directed to its end. But man among all animals knows the true significance of finality and the relation of a work to its end, since a natural tendency is imprinted in his nature by which he is directed to act properly, and this is called the natural law. . . . In other beings, however, it is called a natural estimative power, for brutes are *forced* by nature . . . rather than regulated as it were *by their own free will*." Aquinas, *Commentum in IV Libros Sententiarum*, P. Fiaccadori, Parma, 1859, IV, d. 36, q. 1, a. 1 (VII). Translation and emphasis mine. The remainder of this section is worthwhile.

the Creator, Orderer and Remunerator. It shows mankind that the natural law is just another part of the divine plan of the universe, a work of Divine wisdom. It is only by reason of the Immutable Divine that there is absolute immutability of the law. In an age of relative values it connects men with the absolute of the Eternal Law, that is the Divine Essence, that is God Himself. Thus the natural and the eternal may be considered as one law from different aspects, though of course they are really distinct since the law in the nature of man is certainly only a reflection of the law in the Divine Essence.

#### UNITY OF THE NATURAL MORAL LAW

The plurality of precepts of the natural law has been noted above, and it has been pointed out that man is ruled with special ordinations corresponding to the multiplicity of inclinations of his nature. The next logical query is: do these many precepts of the natural law have any further unity than the grouping which have already been seen, or rather do they exist as separate and isolated commands? Saint Thomas answers immediately: "All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept."<sup>66</sup>

Thomas leads to an understanding of this unity of the natural law by drawing a parallel. He has already compared the work of the practical intellect to the work of the speculative. He continues in that vein:

Now a certain order is to be found in those things that are apprehended by men. For that which first falls under apprehension is *being*, the understanding of which is included in all things whatsoever a man apprehends. Therefore the first indemonstrable principle is that *the same thing cannot be affirmed and denied at the same time*, which is based on the notion of being and not-being: and on this principle all others are based, . . .<sup>67</sup>

From this unity in the speculative order he proceeds to the unity in the practical order.

Now as *being* is the first thing that falls under the apprehension absolutely, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action (since every agent acts for an end, which has the nature of good). Consequently, the first principle in the practical reason is one founded on the nature of good, viz., *that good is that which all things seek after*. Hence this is the first precept of law, that *good is to be done and promoted, and evil is to be avoided*. All other precepts of the natural law

<sup>66</sup> Aquinas, S.T., I-II, q. 94, a. 2, ad 1, 2, 775.

<sup>67</sup> *Ibid.*, a. 2, 2, 774.

are based upon this; so that all the things which the practical reason naturally apprehends as man's good belong to the precepts of the natural law under the form of things to be done or avoided.<sup>68</sup>

And this is the unity of the natural law.<sup>69</sup> At the base of every precept lies the one universal edict: *Do the good*. Permeating every act of the human nature as such is the first precept of the natural law: *good is to be done and evil avoided*.<sup>70</sup>

All the inclinations of any parts whatsoever of human nature, e.g., of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law, and are reduced to one first precept, as was stated above. And thus the precepts of the natural law are many in themselves, but they are based on one common foundation.<sup>71</sup>

This principle is ultimate, self-evident, indemonstrable.

<sup>68</sup> *Ibid.*

<sup>69</sup> Suarez indicates other special aspects from which the natural law may be said to be one. These come after he has elaborated the unity which is paramount, the unity in the order of evidence. He states: "Finally, it may be added that all natural precepts are united *in one end; in one author or lawgiver*, also; and *in the one characteristic of avoiding evil because it is evil*, and prescribing good because it is right and necessary; so that these suffice to constitute a moral unity." Francis Suarez, S.J., *De Legibus*, translation prepared by Williams, Brown and Waldron with revisions by H. Davis, S.J., in *The Classics of International Law: Selections from Three Works of Francisco Suarez, S.J.*, Oxford, London, 1944, 2, 218, 219. Henceforward, unless otherwise noted, all translations of Suarez will be from this work. The above was II, VIII, 2. These lesser aspects of the unity of the natural law are placed here in order not to detract from the unity of the one first great principle, which is deductively the first principle in the order of our knowledge and reductively the ultimate principle. Also: "Finally, all these precepts proceed, by a certain necessity from nature, and from God as the Author of nature, and all tend to the same end, which is undoubtedly the due preservation and natural perfection or felicity of human nature; therefore, they all pertain to the natural law." *Ibid.*, II, VII, 7, 2, 212.

<sup>70</sup> Suarez has this further to say: ". . . we must state that with respect to any one individual, there are many natural precepts but that from all of these there is formed one unified body of natural law. . . . The basis of this unity, apart from the common manner speaking, consists, according to St. Thomas, in the fact that all natural precepts may be reduced to one first principle in which these precepts are (as it were) united for where there is union there is also a certain unity." *Ibid.*, II, VIII, 2, 2, 218. This is put most clearly in another place: ". . . no one is doubtful as to the primary and general principles; hence, neither can there be doubt as to the specific principles, since these, also, in themselves and by virtue of their very terminology, harmonize with rational nature as such; and, therefore, there should be no doubt with respect to the conclusions clearly derived from these principles, inasmuch as the truth of the principle is contained in the conclusion, and he who prescribes or forbids the one, necessarily prescribes or forbids that which is bound up in it, or without which it could not exist. Indeed, strictly speaking, the natural law works more through these proximate principles or conclusions than through universal principles; for a law is a proximate rule of operation, and the general principles mentioned above are not rules save in so far as they are definitely applied by specific rules to the individual sorts of acts or virtues." *Ibid.*, II, VII, 7, 2, 212.

<sup>71</sup> Aquinas, *T.S.*, I-II, q. 94, a. 2, ad 2, 2, 775.

## UNIVERSALLY IN REGARD TO SUBJECTS

What has been seen thus far indicates that the natural law must apply universally<sup>72</sup> to all men. It is the very nature of man that embodies in it the law of nature, participating in the eternal law of God. Thus human nature itself is the norm. Granting, therefore, the presence in anyone of a human nature, subjection to the law of nature must also be admitted. Saint Thomas refers to the matter in his treatment of the Old Law, but it indicates well his word on the natural:

. . . the Old Law showed forth the precepts of the natural law, and added certain precepts of its own. Accordingly, as to those precepts of the natural law contained in the Old Law, all were bound to observe the Old Law, not because they belonged to the Old Law, but because they belonged to the natural law. But as to those precepts which were added by the Old Law, they were not binding on any save the Jewish people alone.<sup>73</sup>

Thus Christ could not abolish that part of the Old Law that contained natural law precepts, because these precepts were first of the law of nature and secondly of the Old Law, and being of human nature were not separable from it. Thus, in so far as those precepts were reflections of the natures of *all* men, and not specific ordinations for an individual group, such as the Hebrews, they were applicable to all men. Certainly if human nature is the natural law (in the sense set out earlier) and human nature is found in every man (or he is not a man), the natural law is also applicable to every man in so far as he is a man, which is the clearest sort of criterion of applicability. Denial of subjection to the natural law is, reducibly, denial of membership in humanity.

## UNIVERSAL KNOWABILITY

Since the Divine Wisdom sincerely intends that its internal plan of government be observed by all men, it must have apprised all men of this order, and that through the one manner of promulgation that it has chosen: the human nature, the natural law. It would be a damaging reflection on Divine Intelligence to posit the sincere desire to effect an order and concurrently declare that there were some persons who were essential to the prosecution of this order who were not informed of the plans to be followed. Every rational being who is to

<sup>72</sup> Some modern ethicists refer to an *objective* and *subjective* universality. These generally only import what we have termed "Universality in regard to Subjects," and "Universal Knowability," respectively. Nothing beyond terminology.

<sup>73</sup> Aquinas, *S.T.*, I-II, q. 98, a. 5, 2, 814.



perform acts in this order must be told what he is to do; must know the natural law.

Further, could the *Divine Goodness* constrain man, on pain of punishment, to obey its dictates without informing him of the dictates themselves? Man must know the natural law because only through the natural law can he attain to the full development of his nature. Were man not able to know his own nature, he could in no wise be held to the dictates of it.

It could be further noted that inasmuch as the natural law is embedded in the human nature it would be impossible for any man to have such a nature and not know the law. The knowability of the natural law is as universal as human nature.

The question always arises as to the *extent* to which man's knowledge penetrates into the content of the natural law. Recall that the natural law extends its dictates to every act of virtue. Does every man, therefore, know the natural law in its totality? Is he able correctly to arrive at every precept? This subject is somewhat intricate and requires discussion. There is no doubt about the more general principles.

It is therefore evident that, as regards the common principles whether of the speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all.<sup>74</sup>

However, after recalling that not all men are endowed with equal powers of reasoning, nor capable of subtle ratiocination, one would not expect all men to arrive at the correct conclusion when the process must proceed through many subtle and devious turns involving the application of broad principles, perhaps well enough known themselves, to a complex situation concerned with a multitude of facts and involving apparent conflicts. When it comes to the finer application of the general principles, however, it is not a question strictly of the knowability, but rather of possible deficiency in powers of intellection. On this very point there is considerable indecision in Saint Thomas. The problem does not become too acute in regard to this cognoscibility of the natural law, but comes home abruptly in the consideration which follows of the property of immutability. Even so it is better to follow the lead of Suarez in this presentation. Most of the modern Scholastics hold with him. In one brief paragraph he at once divides the precepts of the natural law into the three generally accepted categories and asserts the consensus as to their knowability.

<sup>74</sup> *Ibid.*, q. 94, a. 4, 2, 777.

. . . my opinion shall be briefly stated here, as follows: it is not possible that one should in any way be ignorant of the primary principles of the natural law, much less invincibly ignorant of them; one may, however, be ignorant of the particular precepts, whether of those which are self-evident, or of those which are deduced with great ease from the self-evident precepts.

Yet such ignorance cannot exist without guilt; not, at least for any great length of time; for knowledge of these precepts may be acquired by very little diligence; and nature itself, and conscience, are so insistent in the case of the acts relating to those (precepts) as to permit no inculpable ignorance of them. The precepts of the Decalogue, indeed, and similar precepts, are of this character. . . . However, with respect to other precepts, which require greater reflection, invincible ignorance is possible, especially on the part of the multitude, . . .<sup>75</sup>

There is generally some slight variance among authors as to what precepts are to be placed in which category, but there is not much difficulty. There is certainly none in regard to the *first principles*. Under these are included as a rule only paraphrases of the first great principle: *Do the good; avoid the evil*. And has been already seen, this is the first indemonstrable principle of the practical reason, forcing itself on the consciousness of every man in whatsoever he does. It is the counterpart of the principles of contradiction in the speculative order.

For those things which are recognized by means of natural reason, may be divided into three classes. First, some of them are primary and general principles of morality, such principles as: 'one must do good, and shun evil,' 'do not do to another that which you would not wish done to yourself,' and the like.<sup>76</sup>

Phrased another way: Live according to reason; Be virtuous. Injure no one. Or as Saint Thomas puts it in another place: "Hold to the middle; observe rectitude, and other phrases of the sort."<sup>77</sup> Of these there is no doubt. "Consequently, we must say that the natural law, as to the first common principles, is the same for all, both as to rectitude and as to knowledge."<sup>78</sup>

Among the secondary principles, those "conclusions derived from the first principles, conclusions, however, which are very proximate and easily deduced,"<sup>79</sup> are found: Children must honor their parents; Man must not kill; Man must not steal; Man must not commit adultery; Every man must be given his due; Lying is forbidden; Legitimate authority must be obeyed; and as Suarez says in one place: "justice

<sup>75</sup> Suarez, II, VIII, 7, 2, 221, 222.

<sup>76</sup> *Ibid.*, II, VII, 5, 2, 211.

<sup>77</sup> Aquinas, *Commentum in IV Libros Sententiarum*, III, d. 37, q. 1, a. 4 ad 2. Writer's translation.

<sup>78</sup> Aquinas, *S.T.*, I-II, q. 94, a. 4, 2, 778.

<sup>79</sup> Donat, 76. Writer's translation.

must be observed'; 'God must be worshipped'; 'one must live temperately'; and so forth."<sup>80</sup> These also are generally conceded to be known by all who have the ordinary use of their reason. Thus in isolated cases it is possible to find cases of those who have failed to come to the knowledge of *one* or *another* of these secondary principles. This could come about from defective social education over a period of years due to laxity of parents, or the purposive deprivation of the young. There are also cases of a nation or tribe erring on some *particular* precept through corruption. These isolated cases of error come, as Thomas says,

either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as, among men, theft, and even unnatural vices, . . . were not esteemed sinful.<sup>81</sup>

Yet even with these isolated cases of ignorance, it is agreed with Suarez above that these precepts

cannot be unknown to any one with the sufficient use of reason, unless by chance in the case of one or another where the rational nature has been corrupted by vices or perverted teachings, and yet this is not without personal guilt.<sup>82</sup>

This fact of universal knowability of the natural law is not left to stand on reason alone. Modern investigation has added further evidence and silenced the claims that human nature is mutable and deficient in the knowledge of the essential moral precepts. Outstanding among modern investigators is Schmidt, who gives us this report:

Among all Pygmy tribes of whom we have fairly full information, and also among Samoyeds, Ainu, North Central Californians, Algonkin, Tierra del Fuegians, and South-East Australians, He (the Supreme Being) is the author of the moral code.<sup>83</sup>

It can be concluded, then, that as far as these first and second principles of the natural law are concerned there is *universal* knowledge.

The last statement to be advanced is that the natural law is a single law with respect to *all times and every condition* of human nature. So Aristotle teaches . . . using the phrase '*everywhere and always*'; and Cicero . . . supports the same view; as does Lactantius . . . , who says: '*all nations in every time*,' &c.? The reason for these statements, indeed, is the same; namely, that the law in

<sup>80</sup> Suarez, II, VII, 5, 2, 211. By a short study of this section it will be seen that this grouping is Suarezian.

<sup>81</sup> Aquinas, *S.T.*, I-II, q. 94, a. 6, 2, 781.

<sup>82</sup> Donat, 77. Writer's translation.

<sup>83</sup> W. Schmidt, *The Origin and Growth of Religions*, translated by H. J. Rose, Dial Press, New York, 1931, XVI, 274.

question is the product, not of any (particular) state in which human nature is found, but of human nature itself in its essence. [And he adds that this is true, not only 'with respect to the universal principles of the natural law,' but also 'with respect to the conclusions drawn therefrom; . . .']<sup>84</sup>

It stands to reason, as was indicated at the outset of the treatment of this point, that the *Divine Wisdom* could not fail in the necessary promulgation of its plan, that it could fail in no wise in a necessary point of the eternal order, nor that the *Divine Goodness* could expect to punish a violation committed "without knowledge."<sup>85</sup>

As the practical intellect, however, descends more and more to the particular there enters in a greater and greater chance of error. In the so-called tertiary precepts of the natural law all admit there can be invincible ignorance, as Suarez pointed out above. These tertiary principles are yet very much a part of the natural law, but are derived from the first general order: *Do the good*, by a more difficult process of reasoning and are more remotely contained in the first principle.

Other conclusions require more reflection, of a sort not easily within the capacity of all, as is the case with the inferences that fornication is intrinsically evil, that usury is unjust, that lying can never be justified, and the like.<sup>86</sup>

To this group of more remotely deducible principles may be added the following: Duelling is evil; A joking lie is a lie (this would be a specification of that noted above by Suarez); Private property may be acquired; Divorce is an evil; Promises must be kept. It should be clear that it might take considerable ratiocination to arrive assuredly at some of these conclusions.<sup>87</sup> It should be noted here that throughout this discussion of the knowability of the natural law this article has been speaking of men as united in possible groups. Clearly an individual in some specific case at some specific time could be invincibly ignorant of any of the principles beyond the primary. Recall these general categorizations in dealing with the last two properties of the natural law: immutability and adaptability.

#### IMMUTABILITY AND ADAPTABILITY

Of all questions concerned with the natural law this one of immutability and adaptability has caused the greatest concern and misunder-

<sup>84</sup> Suarez, II, VIII, 8, 2, 222.

<sup>85</sup> Aquinas, *De Veritate*, q. 17, a. 3 (Vol. 2). Writer's translation.

<sup>86</sup> Suarez, II, VII, 5, 2, 211.

<sup>87</sup> Only hesitatingly is any specific principle categorized in the secondary or the tertiary, due to the impossibility of saying just where it should be with real certitude.

standing. It is the constant cry of the modern relativist that the natural law (because it does present an absolute norm) in its "arbitrariness" is incapable of dealing with the exigencies of the moment, the mutability of things temporal, the changes and flux of modern life. It is the fear of the Scholastic proponent that these challenges will not be adequately met, that the feature of the adaptability of the natural law will not be sufficiently indicated, that perhaps there is something of truth in these assertions of inflexibility.

#### IMMUTABILITY

In a certain very true sense Saint Thomas himself fell victim to such fears. He had heard from Aristotle so often of the variability of matter, of the contingency of the things of this life. This lack of stability in matter, and in things finite, he even ascribed to human nature. Prompted, as the case would appear, by the words of Aristotle, he seems to be not fully consistent with all he has said of the unvarying unity and stability in human nature. He is led to deny that human nature is in all places and all times essentially the same human nature, and he mitigates immutability in some of the precepts of the natural law. There were other forces pushing him to this besides Aristotle, it is true. He had the apparent instances of mutability in the scriptures and history. Actually these difficulties are answerable on other grounds, but he feels constrained to admit mutability to answer them. Further, his classification of the precepts themselves was not well done. This essay has gone to Suarez for that, it will be recalled. This inadequate classification gave Thomas a poor start in discussing whether or not these precepts were immutable, although he should have arrived at immutability irrespective of this categorization. More of this will be seen as we proceed. The fact is, however, that Suarez has handled the situation admirably and represents, as he did in the matter of the universal knowability, the consensus of the modern Scholastics.

In any law, change can be effected in one of two ways, either by *addition* or *subtraction*. The former is not strictly a change "since addition does not constitute a change when the earlier law is left in its entirety, but rather, there takes place a perfecting and extension which contribute to human utility, . . ." <sup>88</sup> Practically speaking, it is thus wise that the positive law is erected in many of its branches.

And, in like manner, Ulpian . . . says that the civil law is built up by the addition of various precepts to the natural law. Furthermore, the divine law, too,

<sup>88</sup> *Ibid.*, II, XIII, 1, 2, 257.

has added many precepts to the law of nature, as has the canon law to both of these. For, . . . human laws determine many points which have not been determined by the natural or the divine law, and which were not capable of being suitably determined by them.<sup>89</sup>

But where there is subtraction there is true change, that is, the actual removal of the law itself, or if the obligation of it. This true change in law can be effected "either as a change in a thing that becomes intrinsically defective, or as one occurring externally through some agent having the necessary power."<sup>90</sup> By the former it would happen that the law of itself would become useless or harmful or by some change inside itself would become irrational. Extrinsically, the change would come from the ruling authority. Thus in both intrinsic and extrinsic types of change the law could be totally abrogated, or, by a partial revocation, its total vigor could be derogated. Further there could be dispensation from the law in given cases.

Can the natural law become *intrinsically* deficient? Is intrinsic mutability of the natural law possible?

I maintain, then, that properly speaking the natural law cannot of itself lapse or suffer change, whether in its entirety, or in its individual precepts, so long as rational nature endures together with the use of reason and freedom (of the will).<sup>91</sup>

And this is the position of most of the modern Scholastics. This is most logical, certainly. Man's nature is always going to be animal and rational. A rational soul informing an animal body. If this is not so, the result is not a man, with a human nature. Yet it is man's nature, adequately considered, that is the foundation of the natural law. The stability of human nature postulates the unvarying immutability of the natural law.

The first proof of this view, indeed, is the fact that the natural law may be considered as existing either in God or in man. It cannot suffer change since it is an intrinsic property which flows of necessity from that human nature as such or (as some persons maintain) this natural law is the rational nature itself; and, therefore, a contradiction would be involved, if that nature should remain fitted for the use of reason while the natural law itself was abolished. If, on the other hand, the law in question is considered as it exists in God, then, as has been demonstrated above it is impossible not only for the said law to be abolished by a judgment of the divine intellect, but also for it to be abolished by that will, whereby He wills either to prescribe certain good things, or to avert certain evil things.<sup>92</sup>

The natural moral law in the mind of God is eternal and has been decided upon by Divine Wisdom from all eternity. There can be no

<sup>89</sup> *Ibid.*, 2, 257.

<sup>91</sup> *Ibid.*, II, XIII, 2, 2, 258.

<sup>90</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 2, 258, 259.

change there. The natural moral law in the nature of man is as immutable as that nature itself.

As to the difficulty that has arisen (in the case of Thomas, to be seen later) concerning the possible mutation of the precepts of the natural law, one may ask: How can there be any question of the mutability of the less general principles if there is no question of the mutability of the first principles? The secondary and tertiary principles are but reasoned conclusions from the first. Posit the immutability of the first and the immutability of the dependent principles follows of necessity.

For a judgment which is necessarily inferred from self-evident principles can never be false; and, therefore, it cannot be irrational or unwise. But every judgment derived from the natural law is of such a character that it rests either upon self-evident principles or upon deductions necessarily drawn therefrom; and, therefore, however much things themselves may vary, there can never be a variation in such judgment.<sup>93</sup>

From every consideration there can be no intrinsic mutability strictly speaking in any of the precepts of the natural law, neither the first which are *self-evident*, nor the second which are easily deduced from them and partake of their stability, nor the third which, though they require some ratiocination, nevertheless are still part of the law of nature and partake of its immutability.

There can be considerable discussion regarding the possible changes from outside the natural law, but the same essential conclusions remain. God is the author of the natural law. He has imprinted it in the nature of man. He determined freely on His course from all eternity. It would be a reflection on His Wisdom, His Goodness, His Holiness, to attribute the possibility of a change to His work. His initial act was free, but once the course was determined, He is by hypothesis necessitated to persevere in His course. The many subsidiary questions that arise in this connection are not sufficiently relevant to this article to warrant treatment. There is no power that can abrogate *extrinsically* the natural law. Neither man,

... the natural law cannot be subjected, in any of its true precepts, to abrogation, diminution, dispensation, or any other change of a similar sort, by means of any human law or power.<sup>94</sup>

nor God:

Furthermore, from the above remarks, it may incidentally be deduced that whenever the subject-matter of a precept is such that the rectitude or evil in-

<sup>94</sup> *Ibid.*, II, XIV, 5, 2, 268, 269.

<sup>93</sup> *Ibid.*, 3, 2, 260.

volved does not depend upon the divine power of dominion, the said precept is not only one which does not admit of dispensation, but it is also immutable in such a way that what is prohibited by it cannot *for any reason* be made licit.<sup>95</sup>

Further even:

Notwithstanding the foregoing, we must assert that God does not, properly speaking, grant dispensations with respect to any natural precept; but that He does change the subject-matter of such precepts or their circumstances, apart from which they themselves do not possess binding force, of themselves and without dispensation.<sup>96</sup>

#### ADAPTABILITY

And this brings this discussion very appropriately to the consideration of any possible mutability (or more properly, adaptability) in the natural law. It was on this point that Saint Thomas was ready to concede too much. Instead of realizing that all his difficulties could be answered by resort to principles other than mutability in the strict sense he derogated from the stability of human nature, admitted change in man's rational nature and hence the possibility of change in the law of that nature. Suarez treats of this problem of Thomas, and at the same time gives us an admirable introduction to a consideration of a very important feature of the natural law, its variability.

St. Thomas also makes this statement . . . , saying that the natural law, in so far as relates to its primary principles, is entirely immutable; while with respect to its conclusions for the most part, it is unchanging, yet it does change in certain cases, which are in the minority, owing to particular causes which then occur. St. Thomas confirms the above view, by means of the example afforded by the natural precept which commands that deposit shall be returned to the owner when the latter asks for it, a precept which is not binding in cases where the deposit is sought for the purpose of harming the commonwealth. The same argument may be applied in connection with the natural precept of keeping of secrets. . . .

. . . Finally, St. Thomas confirms this view by reasoning, arguing that speculative and natural science is characterized by more certitude than moral and practical science, while, nevertheless, in physical and natural science, although the universal principles do not fail, the conclusion—even those that are necessary—at times fail; therefore, the same may happen in moral matters, and accordingly, the natural law may undergo change. The truth of the consequent is proved by a parity of reasoning; for, just as physical matter is changeable, so also human affairs, which are the matter of the natural law, are much more changeable; and, therefore, that law itself is likewise subject to change since, even as it derives its specific form from its subject-matter, so does it imitate and participate in the very nature of that matter.<sup>97</sup>

<sup>95</sup> *Ibid.*, II, XV, 22, 2, 300, 301. Emphasis added.

<sup>96</sup> *Ibid.*, 26, 2, 304.

<sup>97</sup> *Ibid.*, II, XIII, 5, 2, 261.



This is the problem. In order to explain the apparent mutability that Thomas saw and also to point out the true variability and adaptability that is a necessity to proper working of the natural law, Suarez explains that in those things which comprise any given relation there are two possible changes, one which is intrinsic to the subject itself and another which is extrinsic.

However, all these statements, rightly explained, confirm rather than weaken our assertion. We should consider, then, that those things which stand in a certain equivalence and relationship, as it were, (to other things), are in two ways liable to actual change, or to virtual change (that is to say, a cessation of being), as follows: these things may change either *intrinsically, in themselves*—as when a father ceases to be a father, if he himself dies— or *extrinsically, simply through change in another*—as when a father ceases to be such, owing to the death of the son. For this cessation on the part of the father is not (actually) change, but is (merely) conceived or spoken of, by us, as being a manner of change.<sup>98</sup>

And this is applicable to considerations of the natural law in regard to its immutability and adaptability. For the natural law can never suffer any change *formally*,<sup>99</sup> as has been shown previously, but can, as it were, change *materially*, which is not a real change in the law itself, but in the matter with which the law deals. There is such formal change in the positive law, as is understandable. This is, in a sense, only part of the variability and adaptability of the natural law. This will be indicated briefly later in this section. It provides a stepping-off point to a further discussion of the positive law itself.

In the positive law, then, change may occur in the former of the two modes [Suarez is referring to the two types of change, formal and material, which he indicated above], for this law may be abrogated; whereas, with regard to the natural law, that is by no means the case, since, on the contrary, it is liable to change only in the second manner, that is, to change through changing subject-matter; so that a given action is withdrawn from the obligation imposed by the natural law (with respect to it), not because the law is abolished or diminished, since it is always and has been binding in this sense, but because the matter dealt with by the law is changed. . . .<sup>100</sup>

So when Thomas was referring to the mutability of the natural law “in some particular cases of rare occurrence,”<sup>101</sup> he was intending to speak of a change improperly so-called and say that “according to our manner of speaking and by an extrinsic attribution, it would seem, after a fashion, to undergo change,”<sup>102</sup> and he did not have any inten-

<sup>98</sup> *Ibid.*, 6, 2, 261, 262. Emphasis added.

<sup>99</sup> Those are the terms generally used by the moderns.

<sup>100</sup> *Ibid.*, 2, 262.

<sup>101</sup> Aquinas, *S.T.*, I-II, q. 94, a. 3, 2, 779.

tion, or should not have had, of impugning the formal immutability of the natural law.

Take the first principle of the natural law: Do the good. There is no chance here for any change in the circumstances surrounding the act to affect the principle itself. Also, if we proceed to the more particular: Lying is forbidden, which is on the second level, there is still not much room for limitation. These precepts apply in all their force in their blunt enunciation; there is no thought of an exception.

... while there are other precepts which can undergo a change in the matter involved and therefore do admit of limitation and exceptions of a sort. Consequently we often speak of these latter precepts as if they were framed in absolute terms under which they suffered an exception, the reason for this apparent exception being that those general terms do not adequately set forth the natural precepts themselves, as they are inherently. For these precepts, thus viewed as they are inherently, do not suffer any exception; since natural reason itself dictates that a given act shall be performed in such a way, and not otherwise, or under specific concurrent circumstances, and not unless these circumstances exist. Indeed, upon occasion, when the circumstances are changed, the natural law not only refrains from imposing the obligation to perform a certain act—such, for example, as the return of a deposit—but even imposes the (contrary) obligation to leave the act undone.<sup>103</sup>

And with this is found the first great adaptability of the natural law. The fundamental principles, the primary, secondary, tertiary, are to be applied to the concrete and singular instances of given acts. Since in every given case man is faced with a concrete singular act the broad principles must be adapted to the given case at hand. As Suarez noted, it is the circumstances often in any case that may change the morality of an act competely. Thus it is by the application of the three determinants of morality to the act under consideration and in the light of the broad principle applicable that the morality of an act is determined. Thomas, and Suarez after him, uses the example of the deposit that must be returned. The same example can be used to illustrate the basic immutability tempered with the ever-present adaptability of the natural law by following this example through its successive stages from the first principle on down. This will help to understand how there is no *formal* change in the law, and illustrate the part that a *material* change can play.

We have in our possession a deposit of money. The depositor comes to us. He requests the money. Under *any* circumstances we must: *Do the good*. If this is the only fact, or matter, at hand, we simply give

<sup>102</sup> Suarez, II, XIII, 9, 2, 264.

<sup>103</sup> *Ibid.*, 7, 2, 262, 263.

him the money. It is his. We would have done the same had we proceeded to: *A deposit must be returned*, for that, without more, was also clear in the case. We can now add the fact that the depositor advises us to hand the money over to an enemy of the country. To the case as altered we apply the determinants of morality. We see that the *act itself* is good, for: *A deposit must be returned*, and the depositor has a right to assign his deposit. But when we consider the end of the agent, the *ratio finalis* (the purposive intent) of the person to whom we are to hand the money, we realize that the natural law itself would have us return the deposit "to one who seeks it rightfully and reasonably."<sup>104</sup> It is as fully much the command of the natural law to act rationally (and to have that understood along with the promise of returning the deposit) as is: *A deposit must be returned*. To further illustrate, another circumstance apart from the *end of the act* and the *end of the agent* may impinge on the case. Were we to know that the man to whom the money was to be given was going to add further a crime to the fact of his aiding the enemy, there would be further reason for withholding the deposit, and further guilt in releasing it.

In any particular case, therefore, the immutable principles of the natural moral law are accompanied by a saving adaptability, or "change in the loose sense of the term, simply by metonymy and extrinsically, by reason of a change which occurs in the matter (dealt with by that law)."<sup>105</sup> Every particular application of the law is a combination of the general principle and the facts. With the general principle as the major premise the practical intellect, acting as conscience, applies the principles to the facts, invokes the criteria of morality and forms a judgment, then and there, as to the permissibility of the act. The natural law is in no wise arbitrary, no wise outmoded. This ever-variable adaptability answers perfectly those who speak of inflexibility, arbitrariness, antiquated maxims unfitted for the changes of modern life and the progress of the race and humanity. However the times may change, whatever the circumstances, there are always the immutable principles and precepts, conscience, the determinants of morality to cope with them. This is the adaptability of the natural law, the last of the properties.<sup>106</sup>

The foundation is laid. The natural law, part of the eternal, is the

<sup>104</sup> *Ibid.*, II, XIII, 6, 2, 262.

<sup>105</sup> *Ibid.*, 7, 2, 262.

<sup>106</sup> In a limited sense only, as will be shown.

base on which all the further, more particular considerations of this article will rest. This natural law—universal in applicability and knowability, one and immutable—intimately affects man in every phase of his life, private and public, business and social, domestic and civilian. This essay, however, has one chief interest over all possible applications of the natural law to the manifold life of man. For us it is *man as he lives in society* that is the prime concern. The natural law extends its influence most definitely into man's *life in society*. Ultimately, law as it governs man in his civic life is the culminating point of consideration. This article will build on to the natural law slowly, taking up first the *positive human law*, its *nature* and *dependence on the natural*; then a consideration of *natural rights*, and *justice*; and finally then, a discussion of *equity*, and the *duties of judges*.

## THE NATURAL LAW IN THE CIVIC LIFE OF MAN

### THE NATURAL PRECEPT OF SOCIABILITY

For it cannot be doubted but that, by the will of God, men are united in civil society; whether its component parts be considered; or its form, which implies authority; or the object of its existence; or the abundance of the vast services which it renders to man. God it is who has made man for society, and has placed him in the company of others like himself, so that what was wanting to his nature and beyond his attainment, if left to his own resources, he might obtain by association with others.<sup>107</sup>

So did Leo XIII express it almost seventy years ago. Rooted in the heart of man is this tendency to live with other men. Just as it is natural for man to eat, to sleep, to enjoy things intellectual, to produce offspring, it is a basic natural inclination to live in society.

Thirdly, there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination . . . to live in society; . . .<sup>108</sup>

This inclination was not placed in man by Almighty Wisdom out of whim. The actual needs of man, of man more than any other creature, demand the services and cooperation of his fellow men from birth to the grave, in every department of human existence,—mere sustenance, and bodily care and protection; training in simple animal activity; full development of the mind; help and guidance in the things of the spirit

<sup>107</sup> Leo XIII, "Humana Libertas," 1888, translated in *Social Wellsprings*, edited by Joseph Husslein, S.J., Bruce, Milwaukee, 1940, 128.

<sup>108</sup> Aquinas, *S.T.*, I-II, q. 94, a. 2, 2, 774.

and God. In short, his whole perfection. "It is not good for man to be alone,"<sup>109</sup> and that means in every way.

However, it is natural for man to be a social and political animal, to live in a group, even more so than all other animals, as the very needs of his nature indicate. For all other animals nature has prepared food, hair as a covering, teeth, horns, claws as a means of defense, or at least speed in flight. Man, on the other hand, was created without any natural provision for these things. But, instead of them all he was endowed with reason, by the use of which he could procure all these things for himself by the work of his hands. But one man alone is not able to procure them all for himself; for one man could not sufficiently provide one life unassisted. It is, therefore, natural that man should live in company with his fellows.<sup>110</sup>

Saint Thomas carries this argument further, indicating the various interdependence of man on man in the rational order as well.<sup>111</sup>

But it remains to Pius XII to touch at the essence of the matter and to give the complete *raison d'être* of this sociability of man. He has just spoken of the picture Saint Paul had of the unity of mankind.

A marvelous vision, which makes us see the human race in the unity of one common origin in God "one God and Father of all, Who is above all, and through all, and in us all;" (Ephesians, iv, 6.) in the unity of nature which in every man is equally composed of material body and spiritual, immortal soul; in the unity of the immediate end and mission in the world; in the unity of the dwelling place, the earth, of whose resources all men can by natural right avail themselves, to sustain and develop life; in the unity of the supernatural end, God Himself, to whom all should tend; in the unity of the means to secure that end.<sup>112</sup>

Looking at man under all these aspects one will find all the possible and necessary points where cooperation and mutual help and aid are

<sup>109</sup> Suarez, III, I, 1. Translation mine. Suarez handles this same point, as a commentary on Thomas, in this place. It is a discussion of the same general argument as is presented here, but follows the general practice of Suarez of giving a fuller treatment.

<sup>110</sup> Thomas Aquinas, *Opusculum XVI. De Regimine Principum ad Regem Cypri*, translated by G. B. Phelan, Sheed and Ward, London, 1938, 34, I, 1. Henceforward this translation will be used wherever this work is quoted.

<sup>111</sup> Thus Thomas continues: "Moreover, all other animals are able to discern by in-born skill what is useful and what is injurious; just as the sheep naturally regards the wolf as his enemy. Some animals even recognize by natural instinct certain medicinal herbs and other things necessary for their life. Man, however, has a natural knowledge of the things that are essential for his life only in a general fashion, inasmuch as he has power of attaining knowledge of the things which are essential for human life by reasoning from universal principles. But it is not possible for one man to arrive at a knowledge of all these things by his own individual reason. It is, therefore, necessary for man to live in a group so that each one may assist his fellows and different men may be occupied in seeking by their reason to make different discoveries, one, for example, in medicine, one in this and another in that." *Ibid.*, I, 1, 34, 35.

<sup>112</sup> Pius XII, *Summi Pontificatus*, translated and published by The Paulist Press, New York, 1939, paragraph 33, 11.

demand in society.<sup>113</sup> On every level of existence man needs man. So Pius concludes:

In the light of this unity of all mankind, which exists in law and in fact, individuals do not feel themselves isolated units, like grains of sand, but united by the very force of their nature and their eternal destiny, into an organic, harmonious mutual relationship which varies with the changing times.<sup>114</sup>

#### HUMAN POSITIVE LAW

Once man is seen as in society<sup>115</sup> it may be logically asked: What of him then? Is he to be left without more? Will man by merely possessing this inclination and realizing his need, thereby effect a society? Will the common good be furthered by the mere wishing of all men in that direction?

If, therefore, it is natural for man to live in the society of many, it is necessary that there exist among men some means by which the group may be governed. For there are many men together, and each one is looking after his own interest, the group would be broken up and scattered unless there were also someone to take care of what appertains to the common weal. In like manner the body of a man, or any other animal, would disintegrate unless there were a general regulating force within the body which watches over the common good of all the members. With this in mind Solomon says (Prov. XI. 14): "Where there is no governor, the people shall fall."<sup>116</sup>

Certainly this is logical. Once posit the precept to live in society, the corollary need of some one to order the society through positive enactments follows immediately. In all things where there is diversity there is the need for a unifying force.<sup>117</sup>

<sup>113</sup> Before leaving this point it is well to note that Thomas also uses the argument from conceptual language (*loquela*) to adduce the natural inclination to live in society. See Aquinas, *De Regimine Principum*, I, 1, 35.

<sup>114</sup> Pius XII, para. 37, 12.

<sup>115</sup> Note the general definition of society according to general view: a stable, moral union of many persons for the purpose of the common good to be attained by mutual cooperation. A perfect society is one that has at hand any and all requisites for the attainment of its particular end or aim. Of this type of society there are two: the church and the state. These distinctions will suffice for the present. Here will be considered only the state.

<sup>116</sup> Aquinas, *De Regimine Principum*, I, 1, 35, 36.

<sup>117</sup> "Consequently, there must exist something which impels towards the common good of the many, over and above that which impels towards the private good of each individual. Wherefore, also in all things that are ordained towards a single end there is something to be found which rules the rest. . . . So, too, in the individual man, the soul rules the body; and among the parts of the soul, the irascible and concupiscible parts are ruled by the reason. Likewise, among the members of a body, one is the principal and moves all the others, as the heart or the head. Therefore, in every group there must be some governing power." Aquinas, *De Regimine*, I, 1, 36. There is further elaboration in this paragraph and following ones on the underlying rationale of this need for a ruler.

Yet the unity of man is brought about by nature, while the unity of a society, which we call peace, must be procured through the efforts of the ruler.<sup>118</sup>

There are more specific considerations that serve to impress this need<sup>119</sup> for the rule of one who has the common good at heart. Ultimately all are reducible to the one aim: the common good and order. The first need is for sanction.<sup>120</sup> Some citizens deliberately and sinfully act contrary to the law of nature written in their hearts; for these<sup>121</sup> the lawmaker must impose punishment, lest the common good suffer through the baseness of a few.

Men who are well disposed are led willingly to virtue by being admonished better than by coercion; but men whose disposition is evil are not led to virtue unless they are compelled.<sup>122</sup>

Secondly, there are many men whose intellects are deficient in leading them to the knowledge of their social duties and obligations, for them the wisdom of the ruler is offered as *explicative* of the natural law. Thirdly, in many instances the manner of implementing the natural law itself is not provided for specifically in the natural law, thus there must be further law *determinative* of the natural law. These briefly are the impelling forces that demand a ruler and a law instituted by him.<sup>123</sup>

This discussion of the need of a lawgiver is an appropriate introduction to the necessary *properties* of this positive law. The lawgiver must be he "who has the care of the community,"<sup>124</sup> and could not be a private person. Only one representing the whole group has all the means at his hand for the proper governance of the whole.<sup>125</sup> No law is *just* that does not proceed from the person who is duly established over the community.

<sup>118</sup> *Ibid.*, I, 15, 103.

<sup>119</sup> Confer Thomas: *S.T.*, I-II, q. 95, a. 1, 2, 782 and following, where he discusses these somewhat more fully.

<sup>120</sup> Thus: "A private person cannot lead another to virtue efficaciously; for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue. . . . But this coercive power is vested in the whole people or in some public personage to whom it belongs to inflict penalties. . . . Therefore the framing of laws belongs to him alone." Aquinas, *S.T.*, I-II, q. 90, a. 3, ad 2, 2, 746.

<sup>121</sup> This does not deny positive sanction for positive law.

<sup>122</sup> Aquinas, *S.T.*, I-II, q. 95, a. 1, ad 1, 2, 783.

<sup>123</sup> These are mentioned here merely with a view to show the necessity of the positive law. Fuller elaboration will follow when consideration is given to the dependence of the positive on the natural law.

<sup>124</sup> *Ibid.*, q. 90, a. 4, 2, 747.

<sup>125</sup> On this see footnote 29 supra.

Next, any law must an ordination of reason. Thus

. . . when he [Isidore] goes on to say that it should be *just, possible to nature, according to the customs of the country, adapted to place and time*, he implies that it should be suitable to discipline. For human discipline depends, first, on the order of reason, to which he refers by saying *just*. Secondly, it depends on the ability of the agen, because discipline should be adapted to each one according to his ability of nature (for the same burdens should not be laid on children as on adults); and it should be according to human customs, since man cannot live alone in society, paying no heed to others. Thirdly, it depends on certain circumstances, in respect of which he says, *adapted to place and time*<sup>125a</sup>

All these considerations<sup>125b</sup> blend in to the local reasonableness of the law. All are required that a law be such as to command obedience.

Of all the properties of the positive law, the most necessary is that it be directed to the common good.

Now the intention of every lawgiver is directed first and chiefly to the common good; secondly, to the order of justice and virtue, whereby the common good is preserved and attained.<sup>126</sup>

There is really no other reason for having the lawgiver at all if he is not there to preserve the order of society and bend all his efforts to the good of the group.<sup>127</sup> Isidore remarks that they must be necessary and useful laws. Thomas comments:

The remaining words, *necessary, useful*, etc., means that the law should further the common welfare; so that *necessity* refers to the removal of evils, *usefulness*, to the attainment of good, . . .<sup>128</sup>

If the legislator departs from this end, the binding force of law ceases.<sup>129</sup>

The last note of any law is *promulgation*. This is, therefore, an essential property of the positive law. The subject must be able to know that whereto he is bound. There is never obligation "without knowledge."<sup>130</sup> Moreover, the words, once promulgated, must be clear, without ambiguity, so as to be adapted to the minds of all the people. When confusion and uncertainty arise from the ineptitude of the framer, the guilt and responsibility lie on the shoulders of the law-

<sup>125a</sup> *Ibid.*, q. 95, a. 3, 2, 786, 787.

<sup>125b</sup> See Aquinas, *S.T.*, I-II, q. 96, a. 4, 2, 795.

<sup>126</sup> *Ibid.*, q. 100, a. 8, 2, 842.

<sup>127</sup> Confer; Aquinas, *Summa Contra Gentiles*, III, 146, "On Common Good."

<sup>128</sup> Aquinas, *S.T.*, I-II, q. 95, a. 3, 2, 787.

<sup>129</sup> Confer: *Ibid.*, q. 96, a. 4, 2, 795.

<sup>130</sup> Aquinas, *De Veritate*, q. 17, a. 3. Writer's translation.



giver. It is he who must yield; the subject cannot be bound to such laws.

Thus Isidore expressed in one short sentence all the properties of the positive law when he said:

Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to time and place, necessary, useful; clearly expressed, lest by obscurity it lead to misunderstanding; framed for no private benefits, but for the common good.<sup>131</sup>

Through this all the essential notes originally postulated for any law can be seen. Progress from the precept of sociability, through the necessity of a ruler and rules, leads inevitably to the precept of obedience: *Legitimate authority must be obeyed*.

Moreover, the highest duty is to respect authority and obediently to submit to just law. By this the members of a community are effectually protected from the wrongdoing of evil men. Lawful power is from God, "and whosoever resisteth authority resisteth the ordinance of God." Wherefore, obedience is greatly ennobled, when subjected to an authority which is the most just and supreme of all. Where the power to command if wanting, or where a law is enacted contrary to reason, or to the eternal law, or to some ordinance of God, obedience is unlawful, lest while obeying man we become disobedient to God.<sup>132</sup>

This dictate of the natural law: *Legitimate authority must be obeyed*, is the foundation-stone for the whole positive law structure. It is through this precept that the positive law gains its vigor and force. This leads, moreover, directly into a discussion of what could be well called another property of the positive law, its complete dependence on the natural.

#### DEPENDENCE OF THE POSITIVE LAW ON THE NATURAL

This dependence of the positive law on the natural is the most thorough-going possible dependence. At the very outset it is the dictate: *Live in society* that carries with it the corollary command to inaugurate the positive law itself. The very existence of the positive law comes as an exigency of nature. The natural calls into being the positive.

Once in existence, the positive law receives its force and vigor from the precept of the natural law: *Obey just authority*. All the inclinations of nature lead man to this conclusion. Were man not commended by the higher law of God implanted in his heart, he would in no wise be bound to obey the enactments of his rulers.

Probably the most essential form of dependence that the positive

<sup>131</sup> Isidore, *Etymologiarum Libri Viginti*, Migne, Paris, 1877, Pat. Lat., Vol. 82, 203.

<sup>132</sup> Leo XIII, 123.

has on the natural comes in its subjection to the natural as to the ultimate norm of all its enactments.

Where the dependence of human right upon the Divine is denied, where appeal is made only to some insecure idea of a merely human authority, and an autonomy is claimed which rests upon a utilitarian morality, there human law justly forfeits in its more weighty application the moral force which is the essential condition for its acknowledgement and also for its demand of sacrifices.<sup>133</sup>

This *right reason* in man is absolute. There is no act that does not come under its scrutiny. Thus when man sets out to bind man by positive enactments he must first ask himself whether the enactments are in accord with the higher law of nature that is imprinted in his nature by God himself. Just as in every act of an individual or personal nature the natural law must be consulted, so too must every act of the human legislator consult the ultimate norm of the Eternal Law.

. . . it is manifest that the eternal law of God is the sole standard and rule of human liberty not only in each individual man, but also in the community and civil society which men constitute when united.<sup>134</sup>

This is nothing else than repeating the primary precept of the natural law: *Do the good*. This precept pervades the enactments of the positive law.

Saint Thomas expresses the reasoning behind this dependence on the natural law:

I answer that, . . . that which is not just seems to be no law at all. Hence the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right, according to the rule of reason. But the first rule of reasons the law of nature, as is clear from what has been stated above. Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.<sup>135</sup>

These are general dependencies, nevertheless they are most intimate and essential. There is a more detailed nexus between the positive and natural. This nexus is threefold and there has been forewarning of its nature. It is here that the positive builds, more patently, on the foundation of the natural that was established in the treatment earlier in this article of the concept of the natural moral law.

#### SANCTION

The first of these three derivations of the positive from the natural comes from the need of the natural law for some temporal *sanction*.

<sup>133</sup> Pius XII, 50, 14.

<sup>134</sup> Leo XIII, 121.

<sup>135</sup> Aquinas, *S.T.*, I-II, q. 95, a. 2, 2, 784.

True, the natural law has its adequate sanction in the hereafter. The sanction which the positive law supplies is such as will further the temporal good and order here and now desired. When it is understood that the natural law in its essence looks to the intrinsic morality of human acts, and that positive on the other hand does not penetrate into the soul and heart of man but merely considers his acts from the outside and insofar as they are extrinsically moral or not, this matter of sanction will become more clear. Thus the positive law as a sanctive agent supplementing the natural law, applies itself to the maintenance of the temporal order and the inducement to virtue.<sup>136</sup>

. . . the duty of the civil legislator is . . . to keep the community in obedience by the adoption of a common discipline and by putting restraint upon refractory and viciously inclined men, so, that, deterred from evil, they may turn to what is good, or at any rate avoid causing trouble and disturbance to the state.<sup>137</sup>

This need of sanction as a supplement to the natural law comes from the perversity of men.

. . . a (n) . . . impediment to the preservation of public good comes from within and consists in the perversity of the wills of men, inasmuch as they are either *too lazy* to perform what the state demands, or, still further, they are *harmful to the peace of society*, because, *by transgressing justice*, they disturb the peace of their neighbors.<sup>138</sup>

It is because of such as these that the positive law must impose punishments: "It is necessary that punishment be inflicted on evil-doers if peace is to be maintained among men."<sup>139</sup> It is clear from this that the

<sup>136</sup> Under this general need for coercive power on the part of the state should be mentioned the need to educate young citizens in habits of virtue, since "the habit of justice is effected by works; and thus wise does the civil law make men just, in so far as, through the training by works, it imprints the habit of justice in its observers." Aquinas, *In III Sent.*, d. 40, 1, 3. Writer's translation. St. Thomas has this to say: ". . . man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training. . . . Now it is difficult to see how man could suffice for himself in the matter of this training, since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all men are inclined, and especially the young, who are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue. And as to those young people who are inclined to acts of virtue by their own good natural dispositions, or by customs, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be dissolute and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that they . . . by being habituated in this way, be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment is the discipline of the laws." Aquinas, *S.T.*, I-II, q. 93, a. 1, 2, 783.

<sup>137</sup> Leo XIII, 120.

<sup>138</sup> Aquinas, *De Regimine*, I, 15, 104.

<sup>139</sup> Aquinas, *Summa Contra Gentiles*, III. Writer's translation.

*sole* sanative purpose of the positive law is not as a supplement of the natural-law precepts reiterated in the positive law. It must, perforce, carry with it its own sanctions for its own peculiarly positive-law enactments. This point will be clear when we distinguish the other two derivations of the natural law.

#### EXPLANATION

Saint Thomas groups the other two derivations from the natural law together.

But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from principles; . . . like that to which, in the sciences, demonstrated conclusions are drawn from the principles; . . . e.g., that *one must not kill* may be derived as a conclusion from the principle that *one should do no harm to no man*; . . . Accordingly, . . . those things which are derived in the first way are contained in human law, not as emanating therefrom exclusively, but as having some force from the natural law also.<sup>140</sup>

This burden of explaining the natural law is one of the chief duties of the positive law. It is essentially nothing else than *declarative* of the natural law. These *declarations* of the natural law supply a twofold exigency.<sup>141</sup>

In the earlier treatment of the knowability of the natural law it was seen that there were some precepts of the natural law that certain men at certain times had not reasoned to. This was due to several reasons resolving themselves into some form of corruption. This ignorance of the law was deemed vincible in the main, and hence culpable, but the fact remains that the ignorance is *de facto* present. A further group of precepts, more remotely derived from the first, was without the comprehension of some of the people and that invincibly and guiltlessly due to their intricacy and complexity.

<sup>140</sup> Aquinas, *S.T.*, I-II, q. 95, a. 2, 2, 735.

<sup>141</sup> Speaking of these reasoned conclusions of the natural law expressed by the positive, Leo XIII has this to say: "Of the laws enacted by men, some are concerned with what is good or bad by its very nature. They command men to follow after what is right and to shun what is wrong, adding at the time what is a suitable sanction. But such laws by no means derive their origin from civil society; because, just as civil society did not create human nature, so neither can it be said to be the author of the good which befits human nature, or of the evil which is contrary to it. Laws come before men live together in society, and have their origin in the natural and consequently in the eternal law. The precepts, therefore, of the natural law contained bodily in the laws of men have not merely the force of human law, but they possess that higher and more august sanction which belongs to the law of nature and the eternal law." Leo XIII, 120. The force and importance of these words cannot be stressed too greatly.

It was fitting that the divine law [Thomas is referring to the divine positive law, but the same may be said for the human positive with slight modifications] should come to man's assistance not only in those things for which reason is insufficient, but also in those things in which human reason may happen to be impeded. Now as to the most common principles of the natural law, the human reason could not err universally in moral matters; but through being habituated to sin, it became darkened as to what ought to be done in the particular. But with regard to the other moral precepts, which are like conclusions from the common principles of the natural law, the reason of many men went astray, to the extent of judging to be lawful things that are evil in themselves. Hence there was need for the authority of the divine [and the human positive as well] to rescue man from these defects.<sup>142</sup>

In short, the complexity of modern affairs; the intricacy of many moral problems; the maze of conflicting rules; the apparent clash of principle with principle, all lead our weak intellects to cry for the finished reasoning of the lawmakers and the assistance and supplementation of the positive law.

#### DETERMINATION

The third division of this threefold dependence of the positive on the natural law is that of *determination*.

But it must be noted that something may be derived from the natural law in two ways: . . . secondly, by way of a determination of certain common notions . . . the second is likened to that whereby, in the arts, common forms are determined to some particular. Thus, the craftsman needs to determine the common form of a house to this shape of this or that particular house . . . e.g., the law of nature has it that the evil-doer be punished, but that he be punished in this or that way is a determination of the law of nature. Accordingly, both modes of derivation are found in the human law. . . . But those things which are derived in the second way have no other forces than that of human law.<sup>143</sup>

It is this vast body of enactments that we generally think of when we first hear the term "positive law." In these positive precepts, however, the ever-present force of the natural law is present. The *right reason*, again, is behind the law. It is the precept of the natural law commanding us to: *Act according to reason*, that forces us to make an election from one of several indifferent possibilities, which in themselves have no greater desirability than that *some* choice *must* be made. Thomas gives us the rationale of this:

In all things which are ordered towards some end, wherein this or that course may be adopted, some directive principle is needed through which the due end may be reached in the most direct route. A ship, for example, which moves in different directions, according to the impulse of the changing

<sup>142</sup> *Ibid.*, q. 99, a. 2, ad 2, 2, 819.

<sup>143</sup> *Ibid.*, q. 95, a. 2, 2, 785.

winds, would never reach its destination were it not brought to port by the pilot.

Now, man has an end to which his whole life and all his actions are ordered; for man is an intelligent agent, and it is clearly the part of an intelligent agent to act in view of an end. Men, however, adopt different methods in proceeding towards their proposed end, as the diversity of men's pursuits and actions clearly indicates. Consequently man needs some directive principle to guide him towards his end.<sup>144</sup>

So, then, although the ship could go to port in any number of routes, some bad, some good, one of these routes must be chosen, action of some kind must be taken. This is the duty of the positive law in its *determinative* capacity. This branch of positive law draws on the natural-law principles: *Obey legitimate authority*,<sup>145</sup> more completely than the conclusioned declarations of the natural law itself. So also would its respective sanctions, in contradistinction to the sanctions supplementing the merely declarative principles.

It is worthwhile to hear Leo XIII speak on this same point.

Now, there are other enactments of the civil authority, which do not follow directly, but somewhat remotely, from the natural law, and decide many points which the law of nature treats only in a general and indefinite way. For instance, though nature commands all to contribute to the public peace and prosperity, still whatever belongs to the manner and circumstances, and conditions under which such service is to be rendered must be determined by the wisdom of men, and by nature herself. It is in the constitution of these particular rules of life, suggested by reason and prudence, and put forth by competent authority, that human law, properly so-called, consists. This law binds all citizens to work together for the attainment of the common end proposed to the community, and forbids them to depart from this end; and the same law, in so far as it is in conformity with the dictates of nature, leads to what is good, and deters from evil.<sup>146</sup>

Such, then, is the utter dependence and derivation of the positive from the natural. It has its *origin* and *being* from the exigencies of nature expressed in the precept: *Live in society*. Its *force*, *vigor*, *obligatoriness*, come from the natural-law precept: *Obey legitimate authority*. The *end* of the positive law is reducible to the end of man's nature. The specific *matter* of the positive-law enactments must look

<sup>144</sup> Aquinas, *De Regimine*, I, 1, 33.

<sup>145</sup> Saint Thomas indicates more specifically whence the obligatoriness of this group of positive-law precepts derives: "The human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural justice, and it is in such matters that positive right has its place. Hence, . . . in the case of the legal just, it does not matter in the first instance whether it takes one form or another; it only matters when once it is laid down." Aquinas, *S.T.*, II-II, q. 37, a. 2, ad 2. Translation here is that of the English Dominicans, Burns, Oates, London, 1915.

<sup>146</sup> Leo XIII, 121.

to the natural law as to an ultimate norm. It is always: *Do the good*. Whether as *sanctive*, *explicative* or *determinative*, the positive-law precepts are derived either mediately or immediately<sup>147</sup> from the natural. In fine

. . . the binding force of human laws lies in the fact that they are to be regarded as applications of the eternal law, and are incapable of sanctioning anything which is not contained in the eternal law, as in the principle of all law. Thus Saint Augustine most wisely says: "I think that you can see, at the same time, that there is nothing just and lawful in that temporal law, unless men have gathered it from this eternal law." (*De Libero Arbitrio*, I, 6, 15.)<sup>148</sup>

This step brings this article over into the positive law, and the nexus is complete.

#### HUMAN RIGHTS AND JUSTICE

Only laws and the obligatory duties consequent on, or collateral to, them have been discussed. A moment's consideration brings the realization that a just and wise and good Creator and Orderer of the universe would not impose *obligations* and *duties* on man without at the same time supplying the means whereby these duties can be fulfilled. In short, wherever man has a *duty* to do something, he has a *right* to the necessary means in performing that duty, and others have the consequent duty of respecting that right.<sup>149</sup>

Immediately parallel, therefore, to the whole body of *duties* imposed by the law, both natural and positive, is a homologous body of *rights* to the unhampered performance of those duties.<sup>150</sup>

<sup>147</sup> Since all law is based on the natural in some way, a distinction can be made between the immediacy and mediacy of this dependence. Consider this example: The Supreme Court may resort to principles already enunciated in the body of positive law. Thereby it depends *mediately* on the natural law. Or it may go directly to the principles of the natural law perhaps unexpressed in the Constitution or other positive laws. In this case it has *immediate* recourse to the natural law. In either case, however, if the court acts justly, it is either mediately or immediately dependent on the natural law.

<sup>148</sup> Leo XIII, 121.

<sup>149</sup> The term *right* is technically defined thus: A moral, inviolable power of possessing, doing or exacting something.

<sup>150</sup> It should be noted that the terms *duty* and *right* are not exactly coterminous. Every right, true, springs from a duty in the person possessing the right and carries the duty in *others* to respect the right; but every duty, on the other hand, does not give rise to a consequent right in *another* to exact the performance of the duty. For example, first I have the duty from the natural law to preserve my life. Therefore I have the right to the means to that preservation, and also consequently others have the duty to respect that right, and to be forced to do so. But, secondly, although I have the duty to give thanks, there is no consequent right in him to whom the thanks are due to exact the performance of that duty from me.

The natural law placed man in society with the precept of sociability. Now the natural law protects man in society with the *social precept of justice* in society: *Give every man his due*. From this precept flows forth all the rights of man as a social being. Thus the body of precepts of *Justice* is the body of precepts protecting the *rights* of man in the fulfillment of his *duties*. Thus the precept of Justice: *Act justly*, is a secondary precept of the natural law reasoned immediately from: *Do the good*.

The precepts of Justice<sup>151</sup> concern us most immediately because in them are the precepts governing man in his social and civil life in contradistinction to man as an individual.<sup>152</sup>

It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as the very name implies; indeed we are wont to say that things are adjusted when they are made equal, for equality refers to some other. On the other hand the other virtues perfect man in those matters only which befit him in relation to himself.<sup>153</sup>

Just as the first precept of the natural law embraced or permeated every act of man, so does the secondary precept: *Act justly* permeate every *social* act of man.

The parallel with the law is complete. There is a body of the *naturally just* concurrent to the peculiarly *natural-law precepts* and a body of the *positive just* parallel to the properly positive enactments. Every duty, natural, or positive, therefore, carries with it its corresponding right in justice.

#### COMMUTATIVE JUSTICE

Justice in its general use, as applicable to all of the various relationships which man as a member of society may have, is subject to several subdivisions according to the several types of relationships which man enjoys in society. The first of these is denominated: *Commutative Justice*. This subsists between two persons, *distinct* and *equal*. Thus it shares the same general note of justice in that each must give to each his due, and adds the specification that the parties concerned be distinct moral persons and equals. The two persons must be perfectly

<sup>151</sup> Justice, though strictly one of the cardinal virtues, is often referred to as the body of commands of that virtue.

<sup>152</sup> "Wherefore human law makes precepts only about acts of justice; and if it commands acts of other virtues, this is only in so far as they assume the nature of justice." Aquinas, *S.T.*, I-II, q. 100, a. 2, 2, 829.

<sup>153</sup> Aquinas, *S.T.*, II-II, q. 57, a. 1. Dominican translation.



distinct one from the other. This would eliminate one citizen, as citizen, in his relation to the state of which he was a member. When the word *person* is used, it designates a moral or juridical person. Commutative justice can subsist between any two equals, citizen and citizen, citizen and alien, a nation and nation, a corporation and a corporation, even a citizen and a nation insofar as that nation is a moral person and dealing equally with the citizen. The equality of the persons is essential to commutative justice. This arises out of the essential independence of man from the domination and will of another. Further, the matter dealt with in the commutation must also be equal.

. . . in commutations something is delivered to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of what belonged to the other.<sup>154</sup>

The three essentials to this specific form of justice, therefore, are equality between the persons, equality of the matter of the commutation and perfect distinction between juridical persons. We saw that the aim of all social precepts was the common good. Commutative justice protects the common good in particularly looking to the personal independence and liberty of each single person.

#### THE NATURAL RIGHT TO PROPERTY

Outstanding among the rights of commutative justice is the moral inviolable right of each man to acquire, hold as his own in a stable and permanent possession, alienate or otherwise use to his own proper advantage, the material goods of the earth. "For every man has by nature the right to possess property as his own."<sup>155</sup>

This demand on the part of man's nature for the right to have and use as his own the goods of the earth is certainly consonant with all the exigencies and inclinations of human nature that we have already seen.

In common with all creatures man is ordered by nature to conserve and perfect himself. But with man this duty takes on a singularly different aspect. The brute is ruled by instinct, but not so with man.

He possesses, on the one hand, the full perfection of the animal being, and hence enjoys, at least as much as the rest of the animal kind, the fruition of things material. But animal nature, however perfect, is far from representing

<sup>154</sup> *Ibid.*, q. 58, a. 5. Dominican translation.

<sup>155</sup> Leo XIII, *Rerum Novarum* (1891), translated and published by the American Press, New York, pp. 3, 4.

the human being in its completeness, and is in truth but humanity's humble handmaid, made to serve and obey. It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes his essentially from the brute. And on this very account—that man alone among the animal creation is endowed with reason—it must be within his right to possess things not merely for temporary and momentary use, as other living things do, but to have and to hold them in stable and permanent possession; he must have not only things that perish in the use, but those also which, though they have been reduced to use, continue for further use in after time.<sup>156</sup>

It is the whole of man's nature that demands property for himself and permanently. The rationale being alone is able to see the future, to desire unceasingly to provide for it, "being provident both for itself and for others."<sup>157</sup>

This becomes still more clearly evident if man's nature be considered a little more deeply. For man, fathoming by his faculty of reason, matters without number, linking the future with the present, and being master of his own acts, guides his ways under the eternal law and the power of God, whose Providence governs all things. Wherefore it is in his power to exercise his choice not only as to matters that regard his present welfare, but also about those which he deems may be for his advantage in time yet to come. . . . Man's needs do not die out, but for ever recur; although satisfied today, they demand fresh supplies for tomorrow. Nature accordingly must have a source that is stable and remaining always with him from which he might look to draw continual supplies. And this stable condition of things he finds only in the earth and its fruits.<sup>158</sup>

But to limit the exigencies of nature for private property only and solely to the physical needs would be absurd; nor did Leo intend this. Ultimately all the higher needs of man, moral, intellectual, spiritual, can be satisfied only if the stability of possession of the material goods of the earth is present.

Nature has implanted the duty of conservation, perfection, providence for the future, for the family: Nature has also given the right that is consequent, the right to the necessary means to fulfilment: the right to private property.

But certainly, further, right reason demands that the laborer be allowed the possession of the works of his labor.

Here, again, we have further proof that private property is in accordance with the law of nature. . . . Now, when man thus turns the activity of his mind and strength of his body towards procuring the fruits of nature, by such act he makes his own that portion of nature's field which he cultivates—that portion on which he leaves, as it were, the impress of his individuality; and it cannot but be just that he should possess that portion as his very own,

<sup>156</sup> *Ibid.*, p. 4.

<sup>157</sup> Aquinas, *S.T.*, I-II, q. 91, a. 2, 2, 750.      <sup>158</sup> Leo XIII, *Rerum Novarum*, 4.

and have a right to hold it without anyone being justified in violating that right.<sup>159</sup>

What else than the thought of possession of the fruit will induce man to work?

This analysis can go deeper. Essentially there is only one person who is going to be responsible for the perfection of each person, and that in the person himself. Each man has his own personal duties, his own eternal destiny, his own immortal soul, a distinct and separate personality, independence and liberty. All these insist that man should have the right to pursue his own needs, duties and obligations as an individual person. Ultimately, then, private property alone is consonant with the human nature, and is a fit and worthy means to the ends demanded.

#### THE JUSTICE OF CONTRACT

This is a corollary notion, in one sense, to the right of property. It is broader, true, but it follows directly. If man has the right to hold things *as his own*, he has the right to use them as he wishes, to dispose of them howsoever he desires.<sup>160</sup> Thus a contract is a means of disposing of the property held, and of acquiring more. It is a valid and appropriate means of passing the possession and control of material goods. It is, of course, broader than this, for it is merely the consent of two or more persons in some regard by which a right is conferred one to the other. This would include the wage contract, which, unless taken in a broad sense, is not over property.

Here, again, we see the personal independence and liberty of the human being as the substantiating factor for the essential validity of contracts. Man as free can bind himself. Man has the dignity and freedom of the human person. Man as owner has dominion over his goods and hence can dispose of them. If man respects the same liberty in others, therefore, he has the foundation of a society of commutative justice. This fact, then, of the personal destiny, personal

<sup>159</sup> Leo XIII, *Rerum Novarum*, 5.

<sup>160</sup> Lest there be any misunderstanding, it should be added that the precepts of social justice, looking to the common good, are always to be weighed in any concrete case. As Pius XI said, commenting on the words of Leo XIII on private property: "First, let it be made clear beyond all doubt that neither Leo XIII, nor those theologians who have taught under the guidance and direction of the church, have ever denied or called in question the twofold aspect of ownership, which is individual or social accordingly as it regards individuals or concerns the common good." Pius XI, *Quadragesimo Anno* (1931), translated and published by the America Press, New York, 12.

liberty, the independence of the will of others, has given man the right to contract freely.

For this reason, the binding force of contracts arises, in the main, from commutative justice. Once a man has validly entered into a contract he has the right to its fulfillment. There has been something given. The principle of commutative justice demands that its equal be returned. Thus commutative justice sees to the protection of this individual right.

The binding force of contracts, however, comes from another precept of the natural law as well. There is the nonjuridical precept of fidelity. Just as a man must not lie, man must keep his promises. To contract is to promise.

#### LEGAL AND DISTRIBUTIVE JUSTICE

*Legal Justice*<sup>161</sup> is the second great division of Justice. It looks to the rights of society as a whole. “. . . Legal justice . . . directs man immediately to the common good.”<sup>162</sup> Again the precept: *Give each man his due*, is present. This time it is from the aspect of those duties which each person has towards the community as a whole. The aim of legal justice is to protect the existence and foster the aims of the civil society. Thus whatever the common good of the group as a society demands, each member of the group, as well as the society itself, must look to.<sup>163</sup> Thus such just demands (which are patently legal) as taxes, observance of police regulations and the like, are postulated by legal justice. The less obvious requirements concerning the use of private property, consideration of the common good in the use of surplus wealth, and many such, are also of importance.

<sup>161</sup> There is a controversy today concerning the use of the term “social” as synonymous with “legal” when referring to justice. It seems to be the modern tendency among Scholastics and led by the Popes to so use the term *social justice* as the modern counterpart of legal justice. Context generally renders the use clear.

<sup>162</sup> Aquinas, *S.T.*, II-II, q. 58, a. 7. Dominican Translation.

<sup>163</sup> Thomas reconciles the striving for the common good with man's individual destiny in these words: “He that seeks the good of the many, seeks in consequence his own good, for two reasons. First, because the individual good is impossible without the common good of state, family, kingdom. Hence Valerius Maximus says of the ancient Romans that ‘they would rather be poor in a rich empire than rich in a poor empire.’ Secondly, because, since man is a part of the home and state, he must needs consider what is good for him by being prudent about the good of the many. For the good disposition of parts depends on their relation to the whole . . .” Aquinas, *S.T.*, II-II, q. 47, a. 11, ad 2. Dominican translation. Thus the ultimate end of society is the good of each single one of its citizens. The proximate end is the public prosperity. The state provides the common conditions and means, so that the citizens can themselves provide for themselves.

*Distributive Justice* is the last of the three main divisions of justice.<sup>164</sup> It is, in a sense, the inverse of legal justice. By the precepts of distributive justice the society as a group renders to the individual member what is his just due. Thus, under distributive justice, there must be an equal and proportionate distribution of benefits and burdens, proportioned to the merits and capacities to bear of the persons. Some must rule, some be governed. The wealthy must bear the greater burden; the poor must be cared for. The aim of distributive justice is to protect the rights of the individual to receive his due from the group. Man as citizen must not be forced to contribute more or receive less than his station and situation warrant.

. . . in distributive justice something is given to a private individual, in so far as what belongs to the whole is due to the part, and in a quantity that is proportionate to the position of that part in respect of the whole. Consequently, in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community.<sup>165</sup>

With this, we have seen that justice in all its divisions protects the common good of man in society.

#### EQUITY

The important question of *Equity* might well have come up specifically when in speaking of the immutability and adaptability of the natural law. At that point the conclusive statement was made: "There is no power that can abrogate . . . the natural law. Neither man . . . nor God." And the legal device of equity was and is no exception. Does this mean that equity can in no wise affect the natural law? This will become clear if Equity is defined, analyzed and distinguished from similar devices and practices.

Bear clearly in mind the distinction that was already made between immutability and adaptability of the natural law and then hear Suarez say:

. . . it behooves us to distinguish between the interpretation of a law and true *epieikeia*. For "interpretation law" is a term more broader than *epieikeia*; in-

<sup>164</sup> Thomas refers to a fourth, which we will not treat beyond this mention since it is self-explanatory: "The household community, . . . a threefold fellowship, namely, of husband and wife, father and son, master and slave, in each of which one person is, as it were, part of the other. Wherefore between such persons is not justice simply, but a species of justice, viz., *domestic justice*, . . ." Aquinas, *S.T.*, II-II, q. 58, a. 7, ad 3, Dominican translation. Emphasis added.

<sup>165</sup> Aquinas, *S.T.*, II-II, q. 61, a. 2. Dominican translation. As a final word on justice, read: Aquinas, *S.T.*, II-II. This in entirety gives Thomas' best word on the matter.

asmuch as the relationship between the two is that of a superior to an inferior, since every instance of *epieikeia* is an interpretation of law, whereas not every interpretation of law is, conversely, an instance of *epieikeia*. Cajetan . . . has noted this distinction, saying that often—or rather, always—laws require interpretation because of the obscurity or ambiguity of their terms or for other, similar causes; yet, not every interpretation of this kind is an instance of *epieikeia*, but only those interpretations in which we consider a law as failing in some particular instance, owing to its universal character—that is, owing to the fact that it was established for all cases and so fails to meet the requirements of some given instance that it cannot justly be observed with respect thereto. . . . Aristotle calls *epieikeia* a rectification of legal justice, since it interprets a law as not calling for observance in cases in which such observances would be a practical error and opposed to justice or natural equity, wherefore it is said to be a rectification of the law . . . other interpretations of law . . . may not relate to its rectification, but only to the explanation of its sense in regard to those points in which given laws are ambiguous.<sup>166</sup>

The natural law *itself*, therefore, is such that “no power . . . can abrogate it.” There can be no *emendation* of the natural law *in itself*; hence *no equity*. There is left opportunity for *interpretation* of the natural law as outlined in the discussion of its adaptability.

But the natural law is not considered only *in itself*. It has received expression in the natural-law *declarations* in the positive law.

Thus, the natural law may be considered either as it is in itself, just as it is conceived or dictated by right reason, or else as it is expressed in a certain number of set words, through some written law.<sup>167</sup>

This eliminates all possibility of the use of equity *in the case of the natural law in itself*, because equity results in a *formal* change in the law. Part of the adaptability is the interpretation of the natural law as explanation or re-declaration. The natural law in itself will often require interpretation or declaration, but *never* emendation.

But it is another matter in the case of the precepts of the natural law as they are expressed or declared by the positive law. Here equity is present.

. . . if the natural precepts are considered in so far as they have been established through positive law, then they admit of exception by *epieikeia*, especially in relation to the intention of the human legislator; although considered in themselves and (purely) as natural precepts, they do not, strictly speaking, admit of such *epieikeia*.<sup>168</sup>

The use of equity in this case arises out of the inability of human law to express adequately and completely the natural law. The natural law itself contains all possible contingencies within its precepts. It is

<sup>166</sup> Suarez, II, XVI, 4, 2, 312, 313.

<sup>167</sup> *Ibid.*, 5, 2, 313.

<sup>168</sup> *Ibid.*, 16, 2, 324.

only a matter of reasoning to the proper conclusion. The positive law, however, is to be taken, generally, at its letter. This results in cases which are not covered by the law since they are too particular.<sup>169</sup> Further, the positive law could fail completely in expressing the natural law. This would result in something actually contrary to the *natural just*. In addition to the use of equity in correcting precepts declaratory of the natural law, there is the further use in regard to *purely positive enactments*. When the positive law determines the natural law there is possibility that laws result that are contrary to the *positively just*. Here there is nothing intrinsically wrong, as was the case in the mal-declaration of the natural law itself, but there is injustice of some kind due to the circumstances of the case.<sup>170</sup> Thomas indicates this distinction:

Even as unjust laws by their very nature are either always or for the most part contrary to the natural just, so too laws that are rightly established fail in some cases, when if they were observed they would be contrary to the natural just. Wherefore in such cases judgment should be delivered not according to the letter of the law but according to equity, which the lawgiver has in view. . . . In such cases even the lawgiver himself would decide otherwise; and if he had foreseen the case he might have provided for it by law.<sup>171</sup>

It should be noted that, strictly, equity is not a part of the law, but a device to give adaptability to it. Wherefore, equity is administered by judges, or by the ruler acting in the capacity of a judge. Although equity effects *variability* of the positive law, it should be recalled that it is strictly outside it. Where the letter fails, equity interprets the spirit.

<sup>169</sup> So Thomas explains: "No man is so wise as to be able to consider every single case; and therefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion; but he should frame the law according to that which is of most common occurrence." Aquinas, *S.T.*, I-II, q. 96, a. 6, ad 3, 2, 799.

<sup>170</sup> "Since, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Hence, if a case arise wherein the observance of that law would be injurious to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule; but if it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great calamity for the city if the gates were not opened to them; and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common welfare, which the lawgiver had in view." Aquinas, *S.T.*, I-II, q. 96, a. 6, 2, 798.

<sup>171</sup> Aquinas, *S.T.*, II-II, q. 60, a. 5, 2. Dominican translation.

Actual variability of the positive law has been indicated indirectly already. That there is always some need for change is evident.<sup>172</sup>

#### THE JUDGE

The final rounding-out of the law comes with the judge; in him is the last safeguard, the last application of *right reason* in the form of "animate justice."<sup>173</sup> When the laws have been framed and embodied in the law of the land, there still remains the need for decisions of fact,—

Certain individual facts which cannot be covered by the law have necessarily to be committed to judges, . . . e.g., concerning something that has happened, and the like.<sup>174</sup>

—for interpretation, trial and conviction of malefactors, for imposition of sanctions.

It is the duty of the judge to effect justice, to be the living embodiment of the law.

A judgment is properly called the act of a judge insofar as he is a judge. The judge, moreover, is, as it were, the *voice of right*, and rights are the object of justice. Therefore the first meaning of the word judgment imports a definition or *determination of the just*, or right.

. . . A judgment, therefore, since it is the right determination of what is just, properly pertains to justice. Wherefore, the Philosopher says that "men have resort to the judge as to animate justice." (Ethic. Lib. v., cap. 4, ante med.)<sup>175</sup>

Every man in society is subject to the natural law, the precepts of justice. The judge is no exception. From the supreme ruler down,

<sup>172</sup> This matter does not warrant, in this article, more than a brief treatment here: "The king . . . should have for his principal concern the means whereby the multitude subject to him may live well. Now this concern is threefold: first of all, to establish a virtuous life in the multitude, . . . second, to preserve it once established; and third, having preserved it, to promote its greater perfection. . . . He performs this duty when . . . he *corrects* what is out of order, and *supplies* what is lacking, and, *if any of them can be done better, he tries to do it.*" Aquinas, *De Regimine*, I, 18, 102, 105. "The law can be rightly changed on account of the changed condition of man, to whom different things are expedient according to the difference of his condition." Aquinas, *S.T.*, I-II, q. 97, a. 1, 2, 801. "The purpose of human law is to lead men to virtue, not suddenly but gradually. Therefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from *all* evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils." Aquinas, *S.T.*, I-II, q. 96, a. 2, ad 2, 2, 792, 793.

<sup>173</sup> This is a phrase first used by Aristotle and adopted by Thomas, *S.T.*, II-II, q. 60, a. 1.

<sup>174</sup> Aquinas, *S.T.*, I-II, q. 95, a. 1, ad 3, 2, 784.

<sup>175</sup> *Ibid.*, q. 60, a. 1. Writer's translation.



through all the administrators of the state, the precepts of natural law and justice impose their obligation.

A judge's claim to be obeyed lies first in his proper possession of authority. Without this he cannot even begin to judge. Once established on his bench his foremost care must be to enforce the precepts of the natural law and justice. In all his actions prudence and right reason must be present.

A judgment is licit in so far as it is an act of justice. There are three essentials to the justice of a judgment. First, the judgment must spring from justice itself. Second, it must come from due authority. Third, it must be founded in the right reason of prudence. In any of these be lacking, the judgment will be iniquitous and illicit. In the first case, judgment is against the rectitude of justice; . . . in the second, the man judging has not the authority; . . . in the third, the certitude of reason is lacking, . . .<sup>176</sup>

From this may be seen, for example, the duties of the Supreme Court of the United States. In all things they are subject to the natural and positive just. Their authority must come from the duly established government of the United States. They must permeate their judgments with the reasonableness of prudence. Which is to say that they must be governed in their decisions by the natural law in all its multitude of implications and commands, in its ramifications from the first great precept: *Do the good*, on out to the most minute order derived therefrom. The natural law as briefly outlined in this essay is their guide and norm.

#### THE ADMINISTRATION OF THE LAW

We have now come to the point where we can consider the fundamental principles we have been outlining in a closer application to the *administration* of the law. We will not restate the principles; nor will the application be detailed. In fact, the manner in which the three branches of government, or any government, are effected and affected by the natural law should have been patent as we progressed.

*Mediately*, there is not a law or enactment of the United States government,—executive, legislative, judicial,—that does not found itself on the natural law. All lawmaking bodies in the United States must form the body of the positive law in accord with the standards which have been outlined above. The Constitution, therefore, either *declares*, *determines*, or *sanctions* the natural law.

In an given case a court decides according to the *written* laws of

<sup>176</sup> *Ibid.*, a. 2. Writer's translation.

the United States—statutes, precedents, the Constitutions (all mediately founded on the natural law),—unless one of four general situations arises.

First, *if there is no written law on the matter* and the matter requiring adjudication is *indifferent*, that is, not involving anything intrinsically moral or immoral, the court *determines* (in the technical sense herein used so often) the natural. This determination is guided by the supreme norms of human nature and the common good.

Second, *if there is no written law on the matter* and the situation involves matters intrinsically moral or immoral,<sup>177</sup> the court must go directly, *immediately* to the natural law and make a declaration of natural-law precepts. Here the matter is not indifferent. The court is held more strictly to the natural law.

It sometimes happens that something has to be done that is not covered by the common rules of actions, . . . Hence it is necessary to judge such matters according to higher principles than the common rules . . .<sup>178</sup>

Third, *if there is written law*, but it is contrary to the *naturally just*, the court must invoke *equity*. In this situation the court goes directly and *immediately* to the natural law. In this we have a mal-declaration of the natural law in the positive, and emendation through equity is in order.

Fourth, *if there is written law*, but it is merely contrary to the *positively just*, that is, that there is injustice resulting from the circumstances and not from intrinsic evil, the court again resorts to *equity*, but only in so far as the emendation corrects the positive law.

<sup>177</sup> This is a very important point because in many cases the S.T. has refused "to disregard settled principles." Thus in *McCandless v. Furland*, Mr. Justice Roberts would not, in his dissent, right the wrong because he said "This fact [the admitted evil], however much it might invite animadversion, ought not to induce the courts to disregard settled principles in an effort to deprive the respondents of the fruits of their scheme." 296 U.S. 140. P. 1 of dissent. This is a perfect instance where there is something which was not indifferent, but intrinsically evil-swindling, and the court should have gone directly to natural law!

<sup>178</sup> Aquinas, *S.T.*, I-II, q. 51, a. 4. Dominican translation.