CHAPTER V

ST. THOMAS AQUINAS

In astonishment I ask myself how was it possible that such truths, once expressed, could have been forgotten by our Protestant scholars. What errors they might have spared themselves had they heeded these truths! I might not have written my book had I recognized them, for the basic thought that was important to me I find already in this mighty thinker in perfect clarity and in the most precise formulation.

Rudolf von Jhering

ST. THOMAS sat down to compose his treatise on law at a significant moment in the history of jurisprudence. Most probably the treatise was written in 1269 or 1270. For the preceding one hundred and fifty years the mind of the West had given itself over to jurisprudence to an extent which is historically unique. “Of all the centuries,” Maitland¹ wrote, “the twelfth is the most legal. In no other age, since the classical days of Roman law, has so large a part of the sum total of intellectual endeavor been devoted to jurisprudence.” It was the period of the Glossators, of Irnerius, of the famous “Four Doctors”—Bulgarus, Martinus, Jacobus, and Hugo,

The Latin text is that of the Leonine Edition, edited by the Pontifical College of Editors. The standard English translation of the Summa Theologica was made by the Fathers of the English Dominican Province (1920) 21 vols. A two volume selection based upon this translation has been prepared by Professor Anton C. Pegis. It includes the material of interest to the legal student, and the translation has been revised, corrected and annotated. Basic Writings of Saint Thomas Aquinas, ed. Pegis (2 vols. 1944). The quotation at the head of the chapter is from Maritain, St. Thomas Aquinas (1933) 19.

¹ Pollock and Maitland, Hist. Eng. Law (2nd ed. 1899) 111. “Before the end of the century,” Maitland adds, “complaints were loud that theology was neglected, that the liberal arts were despised, that Seius and Titius had driven Aristotle and Plato from the schools, that men would learn law and nothing but law.”
of their followers Azo, Hugolinus, Accursius, and many others. Law provided a subject matter upon which the great resources of the medieval intellect could test itself. It yielded particularly to the mighty weapon of the medieval mind—the so-called scholastic method. Through the process of dialectical analysis the medieval lawyers were able to systematize legal thinking, to state the basic ideas with clarity, to develop the logical consequences of legal principles, to reconcile apparent contradictions, to define, classify, distinguish, to make interconnections manifest and to eliminate irrelevancies—in short, to subject legal thinking to perhaps the most intensive logical analysis it has ever known.

Parallel with the revival of jurisprudence, there came the influx of knowledge to the Latin West from Greece, Byzantium and Islam. As early as the second quarter of the twelfth century the translators began the work of putting Greek and Mohammedan philosophy and science, and Byzantine theology into Latin. For the most part the scholars of the early middle ages, knowing no Greek, had been confined to Latin sources. By the time St. Thomas came to write he had available for study the philosophy and logic of the Greeks in Latin translations. Those translations were as literal as they could be made; their word by word reproduction of the originals would not suit modern tastes, and they would be rated scarcely more than barely adequate by modern tests, but for St. Thomas, who knew no Greek, they were precisely the tools he needed. Their literalness was a guarantee that whatever interpretative impulses may have inspired the translators were kept to a minimum. St. Thomas' insight into Aristotle is due in no small part to the word for word method of the translators.

Of greater significance for juristic thinking, however, than the legal activity of the twelfth century and the transmission of Greek knowledge to Western Europe was the shift in the point of view in legal philosophy induced by the rise of Christianity and other factors. Cicero² had based his legal

² de leg. 1. 22 et seq.
philosophy on the nature of man. He held that reason and a sense of justice had been implanted in man by Nature and were derived ultimately from God. Although all men possess the sense of justice and know right reason they are nevertheless corrupted by the practice of separating the useful, or what is expedient, from justice. This theory culminated in the idea of the world immanence of natural law and rests on the two basic Stoic ideas of God as the "First Cause" and the Logos as the principle of order. Because of the adoption of the theory by the Roman jurists of Imperial times it became woven into the doctrines of positive law. But a major difficulty at once presented itself for solution. Natural law was identified by the Fathers of the Church with the law of God as expressed in the "law and the Gospel." Natural law was therefore immutable and was the source of positive law. But positive law was frequently contrary to natural law; it was also frequently opposed to the social ideals of the Church. A solution of the difficulty was attempted by adopting the idea of a Primitive State in which a pure law of nature operated unimpaired; unjust laws and institutions could therefore be explained as due to Original Sin. However, this attempted solution also contained a difficulty. Were positive law and government to be looked upon as generally evil things inasmuch as they did not belong to the primitive state of man? A final solution was reached on the theory that the appearance of sin in the world completely changed the conditions proper to human life, and that while positive law and government were a result of sin they were also a remedy for sin. Thus it was possible to maintain that while government was not a natural institution it was at the same time a divine one. This argument, which has its roots in the doctrines of St. Paul, culminated in the important idea of a relative natural law. Man's natural powers were impaired but not wholly destroyed by

\^The tradition was carried on by St. Irenaeus, Justin Martyr, St. Ambrose, St. Augustine, St. Gregory the Great, and St. Isidore. For the full history see 1 Carlyle, History of Medieval Political Theory in the West (1903) c. XI. 1 Troeltsch, The Social Teaching of the Christian Churches (1931) 151.
the Fall; his sense of justice led him to create a body of law which everywhere nearly all men obey—the *ius gentium*. This law of custom comes after the law of nature; there was also a third form, the *ius civile*, representing the law of a particular state. Thus, the Christian theory of natural law had several parts: a pure natural law of the primitive state, a relative natural law of the fallen state, and the positive law, with all its intolerable provisions; to these elements was added the theocratic idea of a true goodness expressed through the Church by the love of God which gave a divine strength to the elements of natural law within the state. This theory of the Church is complex, obscure and difficult to cast into a form that is not contradictory. It represents on the one hand an effort to reconcile the conflicting doctrines of Cicero, Seneca, the Stoics, the Christian teachings, the juristic theories of the Roman lawyers and, on the other, an attempt to adjust the resulting theory to the actual conditions of the world so that the Church could exert her full powers in the social and political realm. However unsatisfactory the theory may be in the final result, its decisive significance must be emphasized. “It is the real ecclesiastical doctrine of civilization,” Troeltsch writes, “and as such it is at least as important as the doctrine of the Trinity, or other fundamental doctrines.”

It was against this background that St. Thomas developed his theory of law. In its completed form his theory stands as one of the great achievements of thirteenth-century thought, critical, original, fully adjusted to the complex nature of the world it is intended to encompass. Of the philosophies of law founded explicitly on a theological basis none surpasses it and only that of Suárez approaches it.

**The Definition of Law**

In the Thomistic scheme the theory of law is part of an elaborate metaphysical, psychological and ethical system. It

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St. Thomas Aquinas takes its immediate departure from a consideration of the human act. Moral behavior is first explained in terms of the will which is directed by reason and habit. However, this explanation is intrinsic; there are also extrinsic principles which affect the human will. One extrinsic principle inclines to evil and is the devil; the other moves to good and is God. This second principle falls into two parts: Law and Grace. Through the instruction of God's Law and the Assistance of His Grace we are helped to do right.

Two important results have been at once achieved by this analysis. Law has been given a firm theological foundation and it has been marked off as a separate domain of study. When we contrast St. Thomas' treatment of law with that of Plato the significance of the latter's achievement is immediately apparent. Plato's extraordinary insight into the problems of law are sparks generated in the midst of a discussion of any subject matter—dialectics, politics, love, art. Since there is no order in his analysis there are gaps in his theory. But the scholars of the thirteenth century had a passion for classification and their theory of classification was a sophisticated one. It was of such fundamental importance that St. Thomas treated it at the very beginning of the Summa Theologica. It was fundamental because the distinction taken between the sciences will influence the choice of facts and the perception of problems. Sciences are differentiated, St. Thomas held, according to the point of view from which they regard their subject matter. That is to say, all sciences are occupied with objects which constitute their material; but every science sees that material from a different position, and that position is the point of view from which the mind is brought to a focus on the material. Thus, the mind is able to abstract from the material an aspect which is susceptible of separate study. Many sciences are concerned with the same object: for example, physiology, psychology, ethics, economics, sociology, law,

5 Summa Theol. I, q. 1, art. 1. All references hereafter will be to the Summa Theologica unless otherwise indicated.
politics, anthroplogy, etc., all deal with human behavior. Their differentiation lies in the fact that the points of view from which they consider the object common to them are different. An important consequence of this approach is that the propositions established in one field are not necessarily valid in another. It is for this reason that the law is unable to accept without modification many of the results of ethical inquiry.

Law is defined by St. Thomas as an ordinance of reason for the common good, made by him who has care of the community, and promulgated. In this definition there is plainly an attempt to reach a comprehensive position that will embrace all law, the eternal and the natural as well as the human; there is also an effort to include what is regarded as ethically necessary. In his definition St. Thomas is thinking primarily of legal precepts. He is not thinking of the lawyer's law of the present-day realists—the idea that law, as Llewellyn puts it, is whatever is done officially.

It is advisable to consider separately the elements that make up St. Thomas' definition. It is first an "ordnance of reason." Inasmuch as it is an ordinance it is a command and is therefore distinguished from hortatory precepts. In this view statutes which direct certain conduct but which are not provided with sanctions for their violation are not to be regarded as establishing rules of law. This idea, which was shared by Austin and Gray, is defective in so far as it fails to specify the place of such statutes, which are not uncommon, in the legal order. However, it is directed at the solution of a real difficulty: What is the distinction between law, which apparently carries an obligation of obedience, and counsel, which merely advises on conduct? "Reason" raises more important considerations.

St. Thomas points out that law is a rule or measure of acts whereby one is induced to act or restrained from acting. He argues that that is apparent from the etymology of the word lex, which he derives from ligare, to bind, because law binds

* I-II, q. 90, art. 4.
one to act. In modern terminology law creates a duty. We thus have human behavior submitting to the authority of a rule or a principle, respecting it as its measure, and recognizing a duty to obey it. Now the first principle of human acts is the reason; indeed, no other principle by which to measure human behavior was admissible. The modern substitutes for reason—authority, experience, *Volksgeist*, utility—have since crowded reason very much from the scene, but in the thirteenth century the supremacy of its position in matters of this sort was incontestable. Since reason is the universal rule and measure of action law then becomes an obligation prescribed by reason.

A principle which the common law has made its own is asserted here. That principle holds that the choice between alternative rules of law shall rest upon a deliberate balancing of possible ends and means and shall take account of all the facts. It stands in direct opposition to the equally well-established principle that the will of the sovereign is law. This latter idea is an inheritance from the Byzantine period of Roman law; St. Thomas saw that it could not be reconciled logically with the doctrine he was propounding and he therefore drew the necessary conclusion that the unreasonable directions of a sovereign may bear the nominal title of laws but are not real laws.\(^7\) In the common law the principle of reasonableness has performed very much the same function that the law of nature has performed in continental law. So long ago as the sixteenth century the two ideas were regarded as identical\(^8\) and that fact has been given explicit recognition in modern case law.\(^9\)

That law must be for the common good is an ideal difficult to apply but is one nevertheless which has left its mark on the legal order. It rests on the ethical idea that the final end of life is happiness and that an individual guided in his conduct by reason always seeks happiness. Laws therefore are rules

\(^7\) I-II, q. 90, art. 1.

\(^8\) Saint Germain, *The Doctor and Student* (1874) 12.

\(^9\) *Johnson v. Clark*, 1 Ch. 303, 311 (1908).
of conduct which have as their final end the realization of happiness. However, since there are no limits to the good at which law aims, it is not restricted to the good of particular persons; therefore, it is always directed to the common good. Here, again, St. Thomas makes the deduction that a precept limited to individual circumstances is devoid of the nature of a law, save in so far as it affects the common good. That last saving clause points directly to the difficulty which stands in the way of any precise application of the ideal. Before 1789 the legal privileges of the nobles under the Ancien Régime were defended as being necessary for the common good. We still recognize that there is an element of truth in the view that special privileges sometimes lead to the common good, as in the franchises, tax exemptions, subsidies, and special powers granted utilities, corporations and other bodies by modern law. In American law the influence of the ideal is directly apparent in the numerous constitutional provisions forbidding special legislation and requiring general laws wherever applicable. But exceptions have had to be made to this rule. Thus, private acts are allowed which compensate individuals for claims founded on contracts with the state, private acts which remove a cloud on the title of land acquired from the state, private statutes providing compensation for the negligence of the state, and, at one time, legislative divorces were also permitted.

A law, properly speaking, therefore, regards first and foremost the order to the common good. Now the responsibility to order anything to the common good belongs either to the whole people, or to someone who is the vicegerent of the whole people. Therefore, 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 any thing to the end concerns him to whom the end belongs. To this argument St. Thomas adds the argument from the idea of sanction. A private person cannot lead another to virtue efficaciously: for he can only advise, and if his advice is not
taken, it has no coercive power, such as the law should have, in order to have 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 alone to the holder of this power.

This idea, particularly when joined to the theory of sovereignty, has commended itself to many thinkers. It is under a cloud today in the main because it does not direct us with sufficient determinateness to the law with which the courts are concerned. Court law can be assigned a place in the Thomistic system, but it cannot be deduced from St. Thomas’ theory without the aid of the theory of sovereignty. But the idea of sovereignty is itself under strong attack today, and the whole conception will have to be restudied.

"Laws are said to be promulgated," said Festus, 10 "when they are made known to the people for the first time, when, as it were, they are exhibited to the multitude." Promulgation, as a necessary element in the lawfulness of law, has had varying fortunes. That a man should be informed of the laws he was expected to obey seems a desirable ideal. Caligula’s practice of writing his severe tax statutes in minute letters on a tablet which he then hung up in a high place with a view to subjecting the unwary to penalties, has usually been a ground of complaint against him. 11 In Japan, before 1870, the laws were given only to the officials who were charged with their administration. This practice was in accordance with the Chinese maxim “let the people abide by, but not be apprised of, the law.” In the common law system it was decided as long ago as 1365 that “everyone is bound to know what is done in Parliament, although it has not been proclaimed in the country; as soon as Parliament has concluded any matter, the law presumes that every person has cognizance of it, for Parliament represents

10 De Verborum Significatione (1839) 14.123.10. There is a pun here (promulgari, provulgari) which cannot be translated. For Roman law, see Bonfante, Storia del diritto Romano (1909) 252.
11 Dio’s Roman History 59.28.11.
the body of the realm.”  In the United States promulgation is apparently not always necessary, inasmuch as some secret Federal statutes have been enacted.\(^\text{13}\) Assuming that promulgation is desirable the question at once arises to what lengths shall it be carried. Our present-day American system assumes that the mere printing and distribution of the statutes in book form is sufficient. Hobbes\(^\text{14}\) strongly objected to this practice which also prevailed in England. “I know that most of the statutes are printed,” he said; “but it does not appear that every man is bound to buy the book of statutes, nor to search for them at Westminster or at the Tower, nor to understand the language wherein they are for the most part written.” His solution was to have the statute books circulated as widely as the Bible and to make certain that every man that could read had a copy. The Code Napoleon and subsequent enactments provided that the promulgation of laws shall result from their insertion in the Bulletin des Lois (later the Journal Officiel) and were binding from the moment their promulgation could be known; and that the promulgation should be considered as known in the department of the Imperial residence one day after that promulgation, and in each of the other departments of the French empire after the expiration of the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The provision has been widely copied in Latin America.

“The provision shows a striking difference between the French and the English mind,” Gray remarks.\(^\text{15}\) “A Frenchman says a man cannot know the law until he has heard or seen it; it is unjust to hold a man bound by a statute which he could not know; the further a man lives from the seat of Government the longer will it be before the news of the making of a statute reaches him; and not to have a provision like that


\(^{13}\) 3 Stat. 471-472 (1846).

\(^{14}\) 6 Works (1840) 28.

\(^{16}\) Nature and Sources of the Law (2nd ed. 1924) 165.
of the Code Napoleon would be the greatest injustice. An
Englishman would be likely to say: Who reads the *Bulletin
des Lois*? If it contains a statute which is of great importance,
the whole country will know that such a statute has been
passed by the Legislature long before it is promulgated. If
the statute is not one that has excited public interest, the
arrival of the *Bulletin des Lois* at the *chef-lieu* of a department
is one of the most insignificant factors in the general knowledge.
Is it immediately known by one in a thousand or one in
twenty thousand of the inhabitants? It is foolish to worry
about one or more grains of sand in such a heap of ignorance.
Does any man know all the Law governing his actions? It is
a serious evil to complicate the Law, and offer tempting
opportunities for litigation by making a statute applicable
to some citizens on one day and to other citizens on another.”

In *Panama Refining Co. v. Ryan*, decided in 1935, the case
reached the United States Supreme Court before it was dis-
covered that a provision of the Petroleum Code on which the
controversy in part hinged had been eliminated by an unpub-
lished Executive Order. The Court commented on “the failure
to give appropriate public notice of the change in the section,
with the result that the persons affected, the prosecuting
authorities, and the courts, were alike ignorant of the altera-
tion.” 16 In order to prevent the occurrence of similar cases
and to bring administrative documents to public notice the
*Federal Register* was established. It seems clear that promul-
gation is a firmly established ideal of the legal order but its
meaning in practice is still vague and inconclusive.

There are no elements in St. Thomas’ definition of law which
were not insisted upon by Plato. Like St. Thomas, Plato bases
law ultimately on a theological foundation, 17 insists that it is
a form of reason, 18 holds that it must be made for the common
good, 19 by the guardians of the community, 20 and, inasmuch as
its function is to teach men to lead the good life, assumes

16 293 U. S. 388, 412.
17 *Laws* 624A, 835C.
18 *Laws* 714A, 875D, 890D, 957C; *Rep.* 532E.
19 *Rep.* 466A, 519E.  
20 *Rep.* 520D et seq.
that it will be notified to them. Nevertheless, the fact that St. Thomas put forward a comprehensive definition represents an advance over Platonic thinking, at least with respect to the philosophy of law. His definition shows an improvement in methodology which has important consequences. Through the instrumentality of the definition he is striving to realize the ideal of system. That procedure possesses both negative and positive aspects. Negatively it means that many characteristics which Plato and others have assigned to law are rejected by St. Thomas as not essential to an understanding of the nature of law or as deducible from more fundamental elements. Positively it means that the elements which St. Thomas holds to be vital are brought into relation with each other and with the even more basic components of a wider system; by that process we are more likely to discover if the propositions of the definition have a special import than if they are considered by themselves and without reference to other facts. Plato asserted that law seeks to be the discovery of reality. That proposition would have little or no meaning if we were unable to relate it to other Platonic propositions which make it intelligible. St. Thomas' procedure also means that he is aiming at completeness—that he believes he has set forth all that is necessary to be taken into account to enable us to grasp the nature of law. Such a position has large advantages. It brings to an issue the crucial contents of the theory and permits it to be tested immediately from the point of view of omissions, surplusage, and alternative propositions.

For the philosophical system for which it was framed St. Thomas' definition of law is apparently satisfactory. It is, of course, accepted by modern Thomists; it is also the one still generally followed in canon law circles. It is rejected by

21 Laws 680C, 705E. Plato did not develop the idea of promulgation qua promulgation; rather, he took it so much for granted, even to the extent of arranging that the laws should be written in a persuasive and readable form, that the idea that there might be secret laws did not occur to him. He thought of law very much as did the Hebrew lawgiver: "This law is no vain thing for you, it is your life, and through this ye shall prolong your days upon the land whither ye go over Jordan to possess it." Deut. 92. 47.
students of positive law because their philosophical assumptions are different. Their opposed assumptions lead them to definitions of law which would be as inadequate for St. Thomas’ purposes as his is for theirs. Their relative definitions of law represent a return to Aristotelian practice and a repudiation of the effort to catch all legal phenomena within the net of a single formula. At the level of utility there is no question of ultimate truth or falsity. In the centuries since it was devised St. Thomas’ definition has exhibited immense vitality; it has routed numerous competitors and still exhibits in its field undiminished power. By that test it has been more successful than any other definition of law ever proposed.

**Natural Law**

St. Thomas’ legal writings are more than the working out of a jurisprudence adjusted to thirteenth-century thinking. They are also an epitome of the major juristic principles which had come down to him tested by all the resources of Scholasticism. His summing up is so complex and, at the same time, so unified that it is difficult to disentangle his primary assumptions. Certain principles should however be stated. He believed that the universe was an orderly system and that law operated throughout its whole extent. God was the Supreme Ruler, and inasmuch as law was derived ultimately from God, it was supreme in the State. In the famous words found in Bracton the King rules under God and the law, or in Pindar’s phrase “Law is Lord of all.” Furthermore, man is a rational being: that is the differentia which in Scholasticism divides the genus “animal.” All creatures are governed by rules and move toward ends, but man alone is conscious of them. We must look, therefore, to the nature of man for an understanding of law. Through his nature he participates in the Divine Reason which he is under a duty to discover and obey. Thus the human legal order takes its origin in the efforts of man as a rational creature to follow the dictates of the Divine Reason.

\[22 \text{ De Legibus, Folio 107.}\]
In order to achieve his ideal of completeness St. Thomas found it necessary to recognize four kinds of law—the eternal law, the natural law, the human law, and the divine law. Since the whole community of the universe is governed by Divine Reason, the very Idea of the government of things in God the Ruler of the universe has the nature of a law; and since the Divine Reason's conception of things is not subject to time but is eternal, this kind of law must be called eternal. Natural law is man's participation in the eternal law. All things subject to Divine providence are ruled and measured by the eternal law; but man as a rational creature is subject to Divine providence in a more excellent way, in so far as he partakes of a share of providence by being provident both for himself and others: and this participation of the eternal law in man is called the natural law. The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than man's participation in the eternal law. Thus, man knows the precepts of the natural law, not as a matter of faith, but through a rational examination of his own nature. To the extent the natural law is thus ascertained man is participating in the eternal law; but it is important to note that natural law is not discovered through an inspection of the eternal law. Human laws are the particular determinations drawn by human reason from the precepts of natural law. 

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23 I-II, 91, art. 1.
24 I-II, 91, art. 2. The ontological distinction between the eternal and the natural law has been well expressed by Gilson. 'The eternal law is one with the Wisdom of God which moves and directs to their end all things it has created. And so we may say with St. Augustine that God 'concreated' the natural law along with all things that he called into existence; just as, in virtue of their existence, they participate analogically in the Divine Being, so, in virtue of the fact that the law of their activity is inscribed in their essence, in the intimate structure of their being, they participate analogically in God's eternal law. How could they receive one without the other? The natural law is to the eternal law what being is to Being.' The Spirit of Medieval Philosophy (1936) 334.
25 I-II, 91, art. 3.
law to fit distinct conditions. Divine law is the body of 
precepts promulgated for mankind by God Himself and revealed 
in the Scriptures. All kinds of law therefore lead back to God.

It is advisable to glance briefly at St. Thomas’ theory of the 
eternal and divine law in view of their connections with his 
natural law doctrine. Eternal law is nothing but Divine 
Wisdom directing all actions; it is also the divine law, the 
twofold law of God revealed in the Old and New Testaments. 
But natural law is a participation in us of the eternal law. 
Why, therefore, do we need the divine law? St. Thomas 
suggests four reasons: (a) Man’s final end is beyond his 
natural ability and it is necessary that he be directed to it 
by a law given by God. (b) Human judgment is uncertain, 
especially on contingent and particular matters; hence there 
are different and contrary laws. The divine law informs man 
without any doubt what he ought to do and what he ought 
to avoid. (c) Human law can deal effectively only with 
exterior acts which are observable; but for the perfection of 
virtue it is necessary for man to conduct himself rightly in both 
his exterior and interior acts. Divine law will direct interior 
acts. (d) If human law attempted to prohibit all evil actions 
it would do more harm than good; but the supervention of 
divine law forbids all sins. It should not be supposed that 
this argument is St. Thomas’ answer to ethical relativism. 
Since he held that the right is not right because God wills it, 
but that God wills it because it is right, then right has a 
meaning apart from God’s will.

To his natural law theory St. Thomas did not hesitate to 
ascribe a positive content. Modern defenders of natural law 
are able to make out a strong case for its necessity in the light 
of some juristic methods; but since all efforts to concretize 
natural law have failed to stand the test of rigorous criticism 
they are chary in suggesting new ideals. St. Thomas’ ideals 
are put universally; in that respect his proposals differ from 
those of modern jurists who seek to meet the usual criticisms

**I-II, 91, art. 4.**
levelled against Scholastic natural law by positing their ideals for a civilization of the time and place. But St. Thomas' justification, altogether apart from matters of faith, is that his precepts follow from a theory of the nature of man. St. Thomas' claim to put his precepts universally is based on the assumption that man everywhere exhibits the same basic psychology and physiology. That does not mean, however, that St. Thomas was able to clothe his ideals with a sufficient determinateness to make them useful in the solution of actual cases where the law, because of its generality, or for other reasons, stood in need of such assistance. It is hardly necessary to add that modern ideals exhibit the same defect.

Acting on the proposition that "good is that which all things seek after," St. Thomas concludes that the basic precept of the natural law is that "good is to be done and sought after, and evil is to be avoided." It should be noted that St. Thomas has cast an observed characteristic of human conduct into the form of a precept. He regards it as the fundamental precept of natural law and holds that all other natural law precepts are deductions from it. By basing his precept on a rule of human behavior he has avoided the charge of being arbitrary. He has identified "good" with the object sought and "evil" with the object avoided. Whatever is sought therefore as a good, or avoided as an evil, belongs to the precepts of the natural law as something to be done or avoided. Furthermore, since good has the character of an end of action, and evil the contrary character, it follows that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and their contraries as evil and objects of avoidance. If St. Thomas intends the argument to be taken strictly it is so far tautological. If it is a fact that all men always seek good, then nothing substantial has been added if we say all men ought always to seek good. From what he has said, however, he deduces that the order of the precepts of natural law corresponds exactly to the order of man's natural inclinations.
Man is first of all a substance, a being. At this ontological level his inclination to good is one common to all beings: self-preservation. Therefore whatever is a means of preserving human life, and of warding off whatever tends to destroy it, belongs to the natural law. This is the first precept of the law of nature. Man is secondly a living being. At the biological level his inclination to good is one which he has in common with other animals and is exemplified by sexual intercourse, the education of offspring and so forth. Man is thirdly a rational being. His inclination to good at the sociological level requires him to know the truth about God, to live in communities, to shun ignorance, to avoid offending those among whom one has to live, and to fulfill similar duties. Altogether, these are the primary natural laws.

Through his doctrine of the existence of an order among the precepts of natural law St. Thomas was able to rank the precepts in importance. This in part prepared the way for his allowance of the mutability of some of the applications of natural law precepts. The doctrine was an adaptation of the Aristotelian principle of the primacy of individual substance, the foundation presupposed by all the other categories. St. Thomas held that just 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. Hence the first principle of the practical reason, and hence of natural law, is based on the nature of good. St. Thomas laid great stress upon the self-evident character of the idea of good as the substratum of the first principle of the practical reason. The view that certain principles were self-evident and their truth apprehended through a special faculty (Nous) was a dogma of Aristotelian logic; the idea was apparently derived from Euclidean geometry which was regarded as a model of precise thinking. With the recognition that Euclidean axioms are not unquestionable first principles, but postulates that possess significance only from the point of view of the use to which they can be put, the idea of "self-evidence" has dis-
appeared as a legitimate mode of argument. What is really valuable, however, in St. Thomas' analysis, is his conception of levels of order. It is a remarkable anticipation of the current tendency in sociological thought, which reduces all material phenomena to the inorganic, the organic, and the interorganic or societary. St. Thomas' classification and the modern one both recognize the inseparability of material phenomena and the reciprocity and interdependence of the different levels. “All observable phenomena,” Comte wrote, “may be included within a very few material categories, so arranged that the study of each category may be grounded on the principal laws of the preceding, and serve as a basis for the next ensuing.” St. Thomas' grasp of the importance of this methodological principle was as firm as that exhibited by present-day social thought.

As jural ideals, putting aside whatever value they may possess as moral precepts, St. Thomas' natural laws are plainly defective. It is impossible to imagine their being able to determine any crucial case. However, even as jural ideals they are not altogether devoid of positive value. Ideals are an ineliminable aspect of the legal order. Their precise formulation has been a never ending task of the philosophy of law; in large part it has been a process of trial and error. St. Thomas' efforts at a careful statement of them are valuable as a pioneer attempt; his principles are materials for subsequent generations to modify and reshape into more perspicuous guides.

Not all virtuous acts are claimed by St. Thomas to be prescribed by the natural law. He allows for the discovery of the virtue of certain acts through independent rational inquiry. In order to reach this result he is forced to distinguish two meanings of the word virtuous. If we speak of acts of virtue, considered as virtuous, then all virtuous acts belong to the natural law. For to the natural law belongs everything to which a man is inclined according to his nature, and since man is a rational animal there is in every man a natural
inclination to act according to reason; and this is to act according to virtue. Consequently, all acts of virtue are prescribed by the natural law, since man's reason naturally dictates to him to act virtuously. However, if we speak of virtuous acts, considered in themselves, then not all virtuous acts are prescribed by the natural law. For many things are done virtuously, to which nature does not incline at first; but which, through rational inquiry, have been found by men to be conducive to well-living. This argument opens the way for St. Thomas to insist later on the Platonic principle that human law is necessary as a discipline to train men to virtuous acts.

It is St. Thomas' position that the natural law is immutable, but here, again, he is forced to make a distinction, inasmuch as, an experienced moralist, he knew it to be the part of wisdom to allow for the possibility of an exception to any concrete moral rule. His distinction follows from the difference which he asserts between the speculative and the practical reason. The first is concerned with necessary things, which cannot be otherwise than they are, and its proper conclusions therefore contain the truth without fail. The second is occupied with contingent matters which are the domain of human actions; consequently, although there is necessity in the general principles, the more we descend to the particular, the more frequently we encounter defects. Accordingly, then, St. Thomas holds that in speculative matters truth is the same in all men, both as to principles and as to conclusions; although the truth is not known to all as regards the conclusions, but only as regards the principles. But in matters of action, truth or practical rectitude is not the same for all as to what is particular, but only as to the general principle. And where there is the same rectitude with respect to matters of detail, it is not equally known to all.

It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all. As to the

27 I-II, 94, art. 3.
proper conclusions of the speculative reason, the truth is the same for all, but is not equally known to all. Thus, it is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all. But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all. Thus, it is right and true for all to act according to reason; and from this principle it follows that goods entrusted to another should be restored to their owner. Now this is true for the majority of cases; but it may happen in a particular case that it would be injurious, and therefore unreasonable to restore goods held in trust, e.g., if they are claimed for use in a war against one's own country. This principle has less applicability the more we descend into detail. It will be of little assistance in determining whether goods held in trust on numerous conditions should or should not be restored to their owner. The same point had been insisted upon by Plato in the Republic, where Socrates pointed out that it was impossible to affirm without qualification that it was always just for a bailee to return to the owner objects which had been entrusted to him. Plato put the case of weapons acquired from a friend who was in his right mind, but who subsequently went mad and demanded them back.

Consequently, St. Thomas concludes, we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are attempted deductions from the general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail as to both. Thus Caesar reported that theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans. It is interesting to note here that St. Thomas seems to be expressly providing for the relativity of moral behavior, a conception which has been often advanced as being inherently opposed to the idea of natural law.

In spite of its immutability the natural law can be changed
in two ways, provided the word "change" is understood in St. Thomas' meaning. It can be changed by way of addition, since many things for the benefit of human life have been added over and above the natural law, both by the divine law and by human laws. It may also be changed by subtraction, so that what previously was according to the natural law, ceases to be so. In this sense, the natural law is altogether unchangeable in its first principles; but in its secondary principles, which are the detailed proximate conclusions drawn from the first principles, the natural law is not changed, it remains right in most cases; but it may be changed in some particular cases of rare occurrence, through some special causes hindering the observance of such precepts, as in the case of goods deposited on trust. 28

As a logical system St. Thomas' theory of natural law has much to recommend it. When we compare it with the Platonic and Aristotelian doctrines of the unwritten law, and with Cicero's theory of the natural law, it is apparent how much in the way of definiteness and extension has been added to the idea. However, in order to encompass the facts of both the legal and moral orders, St. Thomas has been forced to sacrifice concreteness for generality. But the generality he has achieved is so extensive that opposite principles can be subsumed, as he recognized, under his primary postulates. In a developed legal system the judges do not need guidance of the order of generality St. Thomas offers them. To be told to do good and to avoid evil is a meaningless injunction in the judicial process so far as concerns any help it renders in the decision of concrete cases. A theory of natural law, to fulfill a useful function in any system of developed law, must be sufficiently specific, or permit the drawing of specific deductions, to guide the judge in the decision of cases which the law fails to cover. Should the police in their pursuit of criminals be allowed to tap the wires of suspects? By no process of sound logic can the answer to that question, which is typical of those which courts must

28 I-II, 94, arts. 4-5.
decide, be deduced from St. Thomas' premises. It is for that principal reason, putting aside the shift in the philosophical point of view since his time, that St. Thomas' theory has ceased to be a direct influence in contemporary legal thought. The ends he sought to achieve through a system of natural law are, after a period of eclipse, now the subject of revived speculation. His great contribution was in insisting upon a rational approach to the problem.

**Human Law**

Natural law, St. Thomas held, was written in the hearts of men, and its general precepts could not be blotted out. Now the natural law is a participation of the eternal law, and through the eternal law all things are ordered. It would seem therefore that the natural law suffices for the ordering of all human affairs and that consequently there is no need for human laws.

To avoid this difficulty St. Thomas appeals first to the logical procedures of thought generally. He had already established the proposition that a law is a dictate of the practical reason, and that in both the practical and the speculative reason the same reasoning process takes place, for each proceeds from principles to conclusions. He argues that in the speculative reason from naturally known indemonstrable principles we draw the conclusions of the various sciences; the knowledge of these sciences is not imparted to us by nature but is acquired by the efforts of reason. Similarly from the precepts of the natural law, as from general and indemonstrable principles, the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law are observed. Thus man has a natural participation in the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human
reason to proceed further to sanction them by law. However, human laws have a particular infirmity. St. Thomas takes the Aristotelian position that the practical reason is concerned with practical matters, which are singular and contingent; but not with necessary things, with which the speculative reason is concerned. Therefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences of the type of geometry.  

This argument establishes the necessity of human law insofar as the natural law is concerned. Putting to one side the theory of natural law, are human or statutory laws necessary? In the ideal tradition of Western thought they are apparently held to be undesirable, since there is usually an effort to exclude them in the construction of Utopias. Are not men more to be induced to be good willingly by means of admonitions, than against their will, by means of laws? Animate justice is better than inanimate justice, which is contained in laws. Is it not better for the execution of justice to be entrusted to the decision of judges, than to frame laws in addition? Every law is framed for the direction of human actions; but human actions are about particular things, which are infinite in number. But matters pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each one of them. Is it not better for human acts to be directed by the judgment of wise men, than by the framing of laws?

To these questions St. Thomas gives the general Platonic answer. Man has a natural aptitude for virtue, but in its perfection virtue can be acquired only by training. It can scarcely be argued that man can give this training to himself, inasmuch as the essence of it requires man to abstain from immoderate pleasures to which he is inclined; this is especially true of the young, who are more capable of being trained. Man must therefore receive this training from some one else. Paternal training, i.e., admonition, suffices for those among

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29 I-II, 91, art. 3.
the young who are inclined to acts of virtue by their good natural dispositions, or by custom, or by the gift of God. But the dissolute, who will not heed admonitions, must be restrained by force and fear. In time they will be inculcated with the habits of virtue and will do willingly what formerly they did from fear. Training of this kind, which compels obedience through fear of punishment, is the discipline of laws. Therefore, if man is to have peace and virtue, it is necessary for laws to be established. As Aristotle observed, man is the best of animals when perfected, but he is the worst of all when severed from law and justice. Through his reason man can find ways to satisfy his lusts and evil passions, an accomplishment not open to other animals.

St. Thomas reinforced this general argument with some additional observations. He conceded that men who are well disposed are led to virtue more willingly by admonitions than by coercion; but evilly disposed men must be forced to be virtuous. Again, not all men are fit to be judges, and even the justice which the judge is supposed to administer can be perverted; thus it is necessary for the law to determine, whenever possible, how to judge, and to leave few matters to the decision of men. Certain matters, of course, must necessarily be committed to judges. Legislation cannot determine, for example, in advance whether an event has or has not happened.

St. Thomas’ argument for law as a necessity of human society is entirely an ethical one. In its insistence upon the good life as a primary aim of human association it is characteristically Greek in its point of view. The approach today is different. Now there is an attempt to show that law in some sense is an essential constituent of society generally, altogether apart from its function as an instrument in the promotion of ethical conduct. Suárez’s conception of the human animal as the “legal man,” so vital is law to him, and Bagehot’s theory of man as “a custom-making animal,” were steps in the direction of the present-day position. Nineteenth-century anthropology and, to a considerable extent, current sociology, advance the
view that legal systems are unnecessary in primitive life, inasmuch as man at that level is restrained by other forces, such as religion, and is inherently law-abiding. This view is disputed by some modern anthropologists who insist, in Malinowski’s words, that “there must be in all societies a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere good-will, too personally vital to individuals to be enforced by any abstract agency. This is the domain of legal rules.” This position has wide, but far from unanimous, support. It is an effort to account for the social structure at the level of descriptive empiricism. St. Thomas’ theory envisages a different objective, namely, the task of ordering society on a rational basis.30

Is every human law derived from the natural law? St. Thomas accepts the ancient tradition that an unjust law is no law. Consequently, human laws have exactly the nature of law to the extent they are derived from the natural law. If a human law does not follow the natural law, it is not a law but a perversion of law. But there are two modes of derivation from the natural law. Some enactments are deduced from natural law premises. Thus “killing is unlawful” may be derived from the principle “one should do harm to no man.” Other enactments are applications of principles, as when a builder adapts the general form of a house to some particular shape. Thus it is a principle of the law of nature that a wrong-doer shall be punished, but the manner in which he shall be punished is an application of the principle. Human law discloses both modes of derivation; but inasmuch as the former are not mere legal enactments they partake of some of the force of natural law; the latter have the force of human law only.

Many different conclusions, however, can be derived from the same premise, and the same premise can be applied in many different ways. It was therefore necessary for St. Thomas

30 I-II, 95, art. 1. Suárez, Tractatus de legibus deo legislatore (1612) Bk. I; Bagchot, Physics and Politics (1878) 141; Malinowski, Crime and Custom in Savage Society (1926) 67-68.
to introduce an additional standard by which to measure human laws. If he adopted derivation from natural law as the sole test of the legitimacy of human law, he could be confronted with legal systems that conformed fully to that measure but which had no relevancy to society as a functioning association. He found this further test in the Aristotelian doctrine of teleology. He held that the form of anything that has an end must be determined proportionately to that end, e.g., the form of a saw must be suitable for cutting. Furthermore, the form of anything that is ruled and measured must be proportionate to the rule and measure. Human law satisfies both these conditions. Its measure is the divine law and natural law. It is ordained to an end, which is to be useful to man. Thus human law conforms to the measure of the divine law when it is virtuous; it conforms to the measure of the natural law when it is just, possible to nature, in accordance with the custom of the country, and adapted to the time and place; it conforms to the criterion of usefulness when it is necessary, when it is clearly expressed (so that harm will not follow from the law itself), and when it is not framed for private benefit, but for the common good. These tests mean, among other things that human law will vary with the time and place, and properly so.

At this point in his argument St. Thomas raised the question of the power or authority of human law. Its end was the common good. Was its power to achieve that end unlimited? We have been taught today, in Pound’s happy phrase, that there are limits to effective legal action. The admonition of Shelley’s schoolmaster, “Boys, be pure in heart or I’ll flog you,” well illustrates one of the inherent limitations of the legal order. “Whenever the offense inspires less horror than the punishment,” Gibbon wrote from another point of view, “the rigour of penal law is obliged to give way to the common feelings of mankind.” St. Thomas’ general conclusion does not differ materially from that of modern legal analysis; but he thought of the problem in much wider terms than does the present day
jurist. Contemporary analysis has narrowed the question to a consideration of the failure of law in specific cases. Thus the requirement that money be paid as redress for injury to the character or reputation of an individual is often insufficient compensation. The modern jurist asks himself if it is not possible that some other remedy can be devised to meet this inadequacy of the law of defamation. That approach is perhaps the most remunerative one to increase the effectiveness of a legal order. St. Thomas’ analysis, however, was confined to a treatment of the general problem.

He had first to decide whether laws should be framed for the community or for the individual. Specifically, since decrees are framed with individual actions in mind it would seem that law is framed not only for the community, but also for the individual. Again, human acts are about individual matters, and therefore law should be framed, not for the community, but rather for the individual. Further, law is a rule and measure of human acts. But a measure should be certain. Since, therefore, in human acts no general proposition can be so certain as not to fail in some individual cases it seems that laws should be framed not in general but for individual cases.

However St. Thomas’ position was that whatever is for an end should be proportionate to that end. Inasmuch as the end of law is the common good, human laws should be proportionate to the common good. But the common good consists of many things which the law, in order to function properly, must notice. It must take account of persons, matters and times in all their multitudinous aspects. Since the community is comprised of many persons, its good is procured by many actions, and it is established to endure for a long time.

To the specific objections he replied that law is composed of more than decrees. Again, if there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many things. Further, we must not seek the same degree of certainty in all things. Consequently in contingent matters,
such as natural and human things, it is enough for a thing to be certain, as being true in the greater number of instances, though at times, and less frequently, it fail.\textsuperscript{31}

Our experience with the National Prohibition Law taught us some of the evils involved in the endeavor to repress some conduct by law. Although the end of law is the common good, the law is not the sole agency to accomplish that result. As St. Thomas remarks, "Man is not ordained to the political commonwealth to the full extent of all that he is and has."\textsuperscript{32} He is firmly of the opinion that it is not a function of human law to control all undesirable behavior. If a law is a measure of human acts, then it ought to be homogeneous with that which it measures. Hence laws must take account of the differences among men. In St. Thomas’ theory the springs of action take their origin in habit or disposition, and thus a man possessed of virtuous habits will be able to accomplish tasks beyond the range of one who has not formed such habits. For this reason St. Thomas insists that a child is not held to the same legal accountability as an adult. In Anglo-American law the legal irresponsibility of children under seven rests upon a different ground, namely their mental incapacity or, as Blackstone phrases it, their "defect of understanding." This ground would also permit the adoption of the rule of Chinese law which exempts from punishment persons of advanced age. St. Thomas points out that society allows by custom conduct which in a perfectly virtuous man would be intolerable. Human law itself is framed, not for the perfectly virtuous, but for human beings generally. Therefore human law does not prohibit all the vices from which the virtuous abstain, but only the graver excesses from which it is possible for the majority to abstain. It prohibits chiefly those excesses that are injurious to others, without the prohibition of which society could not be maintained, such as murder and theft. At this point St. Thomas’ ethical approach exhibits a deficiency of analysis

\textsuperscript{31} I-II, 96, art. 1. \quad \textsuperscript{32} I-II, 21, art. 4.
which the present-day empirical reduction of the problem appears to have overcome. In the modern theory it is insisted that legal power is inherently limited whatever may be the wishes of the community. As Morris Cohen has pointed out, any proposal to repeal the New York State statute making adultery a crime would arouse widespread resentment. Many thousands of divorces have been granted for the offense, yet there are hardly any convictions for the crime. The statute is simply too difficult to enforce.

Human law, St. Thomas observes, aims at educating men in virtue by gradual steps, and not suddenly. Hence it makes no attempt to impose upon the multitude of imperfect men the burdens which are borne by the virtuous, viz., that they shall abstain from all evil. Otherwise, as Spinoza was to argue later, these imperfect persons, unable to carry the burden of such precepts, will be instigated to greater evils. This is ancient wisdom. "He that violently bloweth his nose, bringeth out blood." 33 Again, if "new wine," i.e., precepts of a perfect life, is "put into old bottles," i.e., into imperfect men, "the bottles break and the wine runneth out," 34 i.e., the precepts are rejected and the men out of contempt rush into worse evils. 35

However, in St. Thomas' theory, since the law is ordained to the common good, there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe all virtuous acts, but those ordainable to the common good. However, human law prohibits some acts of each vice and also prescribes some acts of each virtue. 36

St. Thomas was of the opinion that human laws, if just, have the power of binding in conscience. 37 He also considered at some length whether all are subject to law. This question at times takes on a practical importance. It appeared at one stage of the proceedings that the trial of Louis XVI could not be continued constitutionally. However, the report of the

33 Prov. XXX, 33.
34 Matt. IX, 17.
35 I-II, 96, art. 2.
36 I-II, 96, art. 3.
37 I-II, 96, art. 4.
Committee of Legislation maintained that the nation was sovereign and was above its own constitution. St. Thomas addressed himself to the specific question whether the just, the spiritual, and the sovereign were subject to law. He pointed out that there were two essential elements in law: it is a rule of human conduct and it has coercive powers. Hence man is subject to law in two ways. When law is viewed as a rule of human conduct, whoever is subject to the power that frames the rule is subject to the rule framed by the power. Thus the citizen of one country is not bound by the laws of another country since he is not subject to the authority of that country. Again, the subject of a proconsul should obey his laws, but not in cases in which the subject receives his orders from the emperor. In those instances he is not bound by the mandate of the lower authority, since he is directed by that of a higher. This is, of course, a basic principle of American constitutional law, which traces most authority to the Constitution. Thus in Kilbourn v. Thompson, 103 U. S. 168 (1880), it was held that the sergeant-at-arms of the House of Representatives should have disregarded orders of the House which were contrary to the Constitution.

When law is viewed in the light of its coercive power St. Thomas held that the wicked, but not the virtuous, were subject to its commands. Coercion acts contrary to the will; but the will of the good is in harmony with the law and there is thus no occasion to call the power into operation. The spiritual are not subject to laws inconsistent with the guidance of the Holy Ghost, but an effect of that guidance is to subject men to human authority. The sovereign is exempt from the coercive power of law inasmuch as he cannot coerce himself, and law has no coercive power save from the authority of the sovereign. In that sense, if the sovereign disobeys the law, he is exempt from its penalties, because there is no one to pass sentence upon him. In its directive force, however, the sovereign is subject to the law by his own will, and he should obey it voluntarily. This is St. Thomas’ effort to rationalize
the Roman law doctrine of legibus solutus, that the Emperor was above the law.\textsuperscript{38}

Aristotle had maintained that the law had no power to compel obedience except the force of habit, and habit only grows up in a long lapse of time, so that lightly to change from the existing laws to other new laws is to weaken the power of the law. "Law must be stable and yet it cannot stand still," Pound \textsuperscript{39} has written in a now classic sentence. "Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change." St. Thomas inquired whether human law is changeable, whether it should be always changed whenever anything better occurs; whether it is abolished by custom, and whether custom obtains the force of law.\textsuperscript{40}

If human law is derived from the natural law, which is immutable, human law is also immutable. It is also the essence of law to be just and right; but that which is right once is right always. Therefore that which is law once should be always law. To these arguments St. Thomas answered that law is a dictate of reason for the direction of human acts. Just changes of human law may spring therefore either from reason or from the condition of men whose acts are regulated by law. With respect to the former, it seems in accordance with nature for human reason to advance gradually from the imperfect to the perfect. We know that the teachings of the early philosophers were imperfect, and that they have been corrected by later thinkers. In practical matters the same rule obtains. Those who devise the structure of society are not able to take everything into consideration, and their institutions reveal many deficiencies which subsequent lawgivers must correct. With respect to the condition of man, it is right to

\textsuperscript{38} I-II, 96, art. 5.

\textsuperscript{39} Interpretations of Legal History (1923) 1.

\textsuperscript{40} I-II, 97. "If I had the choice," writes Shorey, "of putting into the hands of a student of Aristotle the commentary of Thomas or the book of some recent interpreter of Aristotle, I would choose the medieval schoolman as more educative in sensible methods and less likely to mislead and confuse the student." Platonism Ancient and Modern (1938) 90.
change the law when man's condition changes. Law must be adapted to the time and place. St. Thomas cites an example from St. Augustine: 41 If the people have a sense of moderation and responsibility, and are careful guardians of the common welfare, a law allowing such a people to choose their own magistrates is a proper one. With the passage of time, if the people become corrupt, barter their votes, and entrust the government to scoundrels and criminals, then the people rightly forfeit their power to appoint their public officials, and the choice devolves upon a few good men.

Human law is rightly changed, in so far as such change is conducive to the common weal. To a certain extent, however, the mere change of law is of itself prejudicial to the common good, because custom itself is a main instrument in law observance. We know that statutes contrary to common custom, though right in themselves, seem burdensome. Hence, when law is changed, the binding power of the law is diminished, inasmuch as a custom is set aside. Hence human law ought not to be changed, unless the gain to the public advantage on one side is enough to balance the loss on the other.

It is clear to St. Thomas that custom could obtain the force of law. It is clear also that law may be altered by men's words, e.g., by legislation which directs a change. Hence, also, by repeatedly multiplied acts, which make a custom, law may be altered, and even established. Custom could also operate to repeal a law. 42

With respect to human law it should be noted finally that St. Thomas distinguished the ius gentium from the ius naturale. The former falls short of the latter, because the latter is common to all animals, while the former is common to men only. 43 Elsewhere, he says that positive law is divided into

41 De Lib. Arb. i. 6.
42 St. Thomas' argument here follows closely that of D. I, 3, 32. For an interpretation of the provision in the Digest and the abrogation of statutes by disuse, see Gray, Nature and Sources of the Law (1924) 190 et seq.
43 II-II, 57, art. 3.
the *ius gentium* and the *ius civile*. The *ius gentium* is a part of positive human law to the extent that it is law, but a part of the natural law to the extent that it is just. It thus occupies an intermediate position between natural and positive law, but it derives its binding force from both.

**INTERPRETATION**

By the thirteenth century the Fathers of the Church could be cited both for and against the proposition that the letter of the law should prevail. Thus on the basis of a sentence from St. Augustine it was claimed that the letter of the law should prevail over the intention of the lawgiver. St. Hilarius, on the contrary, could be brought forward in support of the principle that we should take account of the motive of the lawgiver, rather than his very words.

St. Thomas' solution follows strictly from his general conception of the nature of law and is in the nature of a compromise. Every law is ordained to the common welfare of men, and has so far the essence and force of law. Hence, the rule of the *Digest*: By no reason of law, or favor of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man. But we often see that the observance of a law is in accord with the common good in many instances, but, in some cases, is clearly harmful. The lawgiver cannot have every single case in view, and he must frame laws for the majority of cases, keeping the common good in mind. Hence, if a case arises in which the observance of a law would be harmful to the general welfare, it should not be observed. This rule is not applicable to everyone. If observance of the letter of the law does not involve a sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state. That right is confined to those in authority, who have the power to make

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*I-I, 95, art. 4.*

*I De Vera Relig. XXXI.*

*De Trin. iv.*

*I D. 1. 3. De Leg. et Senat.*
exceptions to the laws. However, if there is a sudden peril so that delay is impossible, the necessity brings with it a dispensation, because necessity knows no law.\(^{48}\) In stating this last rule it appears from the context that St. Thomas is thinking of cases of military necessity. In American constitutional law, the doctrine in cases of military necessity is that "the emergency gives the right";\(^ {49}\) in other cases it is stated that "while emergency does not create power, emergency may furnish the occasion for the exercise of power."\(^ {50}\)

Substantially the same argument is used by St. Thomas in discussing the end of equity\(^ {51}\) and the judicial process.\(^ {52}\) When the observance of the letter of the law is against the equality of justice and the public good it is equitable to disregard it; similarly, if the observance of the law's letter would be contrary to the natural law, it may be disregarded. Again, he who is placed over a community has the power of making exceptions to the human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may waive the precept of the law.\(^ {53}\)

**JUSTICE AND THE JUDICIAL PROCESS**

Ulpian's definition of justice as the constant and perpetual wish to give each man his due is accepted by St. Thomas provided it is understood correctly. In order to make it conform with his psychology he recast it to read: Justice is a habit whereby a man renders to each one his due by a constant and perpetual will.\(^ {54}\) Its fundamental idea is some kind of equality, and therefore it is proper to justice to direct man in his relations with others.\(^ {55}\) Aristotle's thinking is a potent factor in much of St. Thomas' discussion, and he follows him in

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\(^{48}\) I-II, 96, art. 6.
\(^{51}\) II-II, 120, art. 1.
\(^{52}\) II-II, 60, art. 5.
\(^{53}\) II-II, 58, art. 1.
\(^{54}\) II-II, 57, art. 1.
\(^{55}\) II-II, 57, art. 1.
the distinction between "distributive" and "commutative" justice.\textsuperscript{56} His analysis, however, is elaborate, and he endeavors to bring into a consistent system Aristotle's thoughts on the subject and what appears to him meritorious from the thought of the intervening centuries. We may pass over the main discussion which is devoted to a consideration of justice as a moral virtue, and examine his idea of legal justice, which is given a concrete content in the description of the \textit{judicium} or the judicial process.

Human acts, about which laws are framed, are so many singular occurrences of infinite possible variety. Hence it is impossible for any rule of law to be established that should in no case fall short of what is desirable.\textsuperscript{57} Now a judge's conclusion is like a particular law regarding some particular fact.\textsuperscript{58} Men have recourse to a judge, as Aristotle observed, as to animate justice.\textsuperscript{59} Three conditions must be fulfilled for a judgment to be an act of justice: first, it must proceed from the inclination of justice; secondly, it must come from one who is in authority; thirdly, it must be pronounced according to the right ruling of prudence, or in accordance with that intellectual discernment which perceives the golden mean of moral virtue and the way to rescue that mean.\textsuperscript{60} Judgment must not be formed from suspicions, that is, from slight indications;\textsuperscript{61} doubts should be interpreted in favor of the accused;\textsuperscript{62} judgment should be pronounced according to the written law;\textsuperscript{63} in order for the sentence of the judge to have coercive power it is necessary that the judge have jurisdiction; a judge's judgment should be based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person; finally, in criminal cases, the judge cannot condemn a man unless the latter has an accuser.\textsuperscript{64}

In accusation the punishment of another's crime is intended.

\textsuperscript{56} II-II, 61, art. 1.  
\textsuperscript{57} II-II, 120, art. 1.  
\textsuperscript{58} II-II, 67, art. 1.  \textit{Cf.} I-II, 96, art. 1. ad 1.  
\textsuperscript{59} I-II, 65, art. 1.  
\textsuperscript{60} II-II, 60, art. 2.  
\textsuperscript{61} II-II, 60, art. 3.  
\textsuperscript{62} II-II, 60, art. 4.  
\textsuperscript{63} II-II, 60, art. 5.  
\textsuperscript{64} II-II, 67.
In the case of a crime that conduces to the injury of the commonwealth St. Thomas held that a man is bound to accusation. In criminal cases the accusation should be put in writing. The accuser must be on guard against utterance of false accusations out of malice, collusion, and of withdrawing from the accusation. However, the accusation may be quashed by the sovereign who has the care of the common good. An accuser who fails to prove his indictment must suffer the punishment of retaliation. In support of this rule, St. Thomas argues that where the procedure is by way of accusation, the accuser is in the position of intending the punishment of the accused. It is the duty of the judge to establish equality of justice between them; and equality of justice requires that a man should himself suffer whatever harm he has intended to be inflicted on another, according to the lex talionis. Consequently it is just that he who by accusing a man has put him in danger of being punished severely, should himself suffer a like punishment. This rule, which in one form or another had prevailed since the days of ancient Greece, continued throughout the Middle Ages and is given modern expression in the provision now common to many countries that innocent victims of unjust convictions shall be compensated by the State. In English law in the Middle Ages when a court occasionally permitted a witness to testify, the court’s action protected the witness against proceedings for maintenance.

A defendant is duty bound to tell the judge the truth, which the latter exacts from him according to the form of law. He is not bound to divulge all the truth, but only such as the judge can and must require of him according to the order of justice. By not answering questions which he is not bound to answer he is merely acting prudently. However, he must never defend himself with calumny, guile or fraud. A man may appeal if he believes he is unjustly oppressed by the judge, but an appeal ought not to be allowed merely for the sake of delay. Also it ought not to be permitted from a

* II-II, 68.
judgment of arbitrators who were chosen by the litigants, since the litigants themselves by their choice approved of the judgment beforehand. These considerations do not in St. Thomas' opinion, apply in the case of an ordinary judge since his authority does not depend on the consent of those who are subject to his judgment. A man justly condemned to death must submit to the punishment, but if the sentence is unjust he may resist it to the point where a public scandal might ensue. St. Thomas believed that he might also endeavor to escape from prison, thus reversing Socrates' opinion. However, the commentators of St. Thomas are far from agreeing on the validity of this conclusion.

St. Thomas went into the question of evidence with great care. His discussion is important because it shows him grappling with a problem which English law was not to settle for several centuries. At the time St. Thomas wrote it was "a general rule that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to witness.'" In 1291-92 the king attempted to force certain magnates to take an oath with respect to the existence of specific facts. They maintained that there was no precedent for such a proceeding, and they refused to take the oath until they had consulted with their peers. Not until Parliament intervened with legislation in 1562 was it settled that witnesses could be compelled to testify to the court. Holdsworth points out that canonist theories of evidence were in the air in the thirteenth century in England, and that Bracton knew something of them. If this influence had continued it is quite possible that the English law of witnesses and evidence would have been worked out at a much earlier date than it actually was. But the result would have been, Holdsworth believes, a procedure modelled on that of the canon law, which would have eliminated the jury. "The jury would have been treated as witnesses; and, at a later date,
the wish to reconcile the rules as to the strict proof required by the law, with the need to suppress crime, would have introduced into England, as into other states, the use of torture as a regular part of the judicial procedure."

This danger was averted, but it meant several centuries delay in the development of the use of witnesses.

At the outset St. Thomas raised the fundamental question whether there is a duty to give evidence. The rules he laid down in answer to the question were framed in accordance with the nature of the case in which the witness was to testify. The first class involves a witness subject to a superior whom he is bound to obey in matters of justice. In that case he is bound to give evidence on those points which are required of him in accordance with the order of justice, e.g., on manifest things. He is not bound to give evidence, however, on secret matters. In the second class the witnesses' evidence is not called for by a superior authority. Under those circumstances, if his evidence is required to deliver a man from an unjust punishment, he is bound to give it; but he is not bound to give evidence tending to the condemnation of a man unless compelled by superior authority. St. Thomas attempts to support this rule with the argument that if the truth of such a matter is concealed, no particular injury is inflicted on anyone. How he reconciles this doctrine with his theory of the common good is not clear. In the same vein is his conclusion that a danger which threatens the accuser is of no moment since he risked the danger of his own accord. It is otherwise with the accused who is in danger against his will.

If the testimony of the witnesses is in conflict with respect to matters of substance (i.e., matters of time, place or person), then the evidence, in St. Thomas' opinion, is of no weight. He rejects the evidence on the ground that the witnesses are manifestly speaking of different matters. He puts the case of a witness who says that a certain thing happened at such and such a time or place, while another says it happened at a

different time or place. St. Thomas believes they are not speaking of the same event. If there is complete disagreement on such matters between the witnesses for the prosecution and defence, and if, on either side, they are of equal number and standing, the accused should have the benefit of the doubt. St. Thomas laid it down as a general rule that the judge ought to be more inclined to acquit than to condemn. It is possible, however, for the witnesses for the same side to disagree. In those circumstances the judge must use his discretion in determining which side to favor; he should take into consideration the number of witnesses, their standing, the favorableness of the suit, the nature of the matter involved and the evidence. The testimony of a witness who contradicts himself when questioned about matters he has seen and heard should be rejected; this rule is not to be applied, however, if he contradicts himself on matters of opinion and report.

The evidence is not to be regarded as weakened if there is a discrepancy in the testimony on minor matters of fact, as for instance, whether the weather was cloudy or fine, whether the house was painted or not. For the most part men are not apt to notice such things and easily forget them. It was clear to St. Thomas that discrepancies of this kind render the evidence more credible. If the witnesses agree in every particular, even in the minutest details, it gives rise to the legitimate inference that they have conspired together to say the same thing. This is a question, however, in St. Thomas' opinion, that must be left to the prudent discernment of the judge.

The authority of evidence is not infallible but probable; consequently the evidence for one side is weakened by whatever strengthens the probability of the other. St. Thomas approached this matter through a consideration of the rules with respect to the competency of witnesses. Sometimes a witness's testimony is weakened through some fault of his own, as in the cases of unbelievers, persons of evil repute, and those guilty of a public crime. Sometimes there is no fault on the part of the witness. Thus we have the cases of insufficient
reason, as in children, imbeciles and women; cases of personal feeling, as in enemies or persons united by family or household ties; cases of external condition, as in the poor, slaves, and those under authority. In the latter instance it may be presumed that they might easily be induced to give evidence against the truth. Rules of this character were listed by Bracton, Fleta and Britton as stating grounds on which jurors could be challenged. Salmond points out that the lists were influenced by the rules of the canon law. Thus, he writes, "the canon law rejected the testimony of all males under fourteen and females under twelve, of the blind and the deaf and dumb, of slaves, infamous persons, and those convicted of crime, of excommunicated persons, of poor persons and women in criminal cases, of persons connected with either party by consanguinity and affinity or belonging to the household of either party, and of Jews, heretics and pagans." Although these rules were devised for jurors, some of them were adapted to the new class of witnesses in the fifteenth and sixteenth centuries.

An advocate is not always bound to defend suits of the poor but only when conditions of time, place, and circumstances require it. If a contrary rule prevailed he would have no time left for other business. An advocate who is defective in skill should be debarred from practice. A lawyer provides both assistance and counsel for the party for whom he pleads. Hence, if knowingly he defends an unjust cause, he sins grievously and is bound to make restitution of the loss unjustly incurred by the other party by reason of the assistance he has provided. If, however, he defends an unjust cause unknowingly, thinking it just, he is to be excused according to the measure in which ignorance is excusable. An advocate, however, may believe at the outset that the cause is just, and discover afterwards, while the case is proceeding, that it is

II-II, 70.
unjust. In those circumstances he ought not to retire from the case in such a way as to help the other side or so as to reveal the secrets of his clients to the other party, but he can, and must, give up the case or induce his client to abandon it or to make some compromise without prejudice to the opposing party. A cause is not unjust in criminal matters merely because the client is guilty. It was once thought to be simony to sell the fruit of the mind since it was the sale of a spiritual thing. However, St. Thomas held that a lawyer might sell his advice, provided he takes a moderate fee with due consideration for persons, for the matter in hand, for the labor entailed, and for the custom of the country.\(^2\)

**Conclusion**

There can be only admiration for the skill with which St. Thomas has knitted together the threads of legal speculation. He has done no less than to present the first systematically complete philosophy of law in the history of jurisprudence. His great synthesis combines the juristic tradition based on the data of Roman law and the Decretals of Gratian, the theological tradition of St. Augustine, the philosophical traditions of Plato, Aristotle, and Stoicism, the positive law of the Old and New Testaments, some principles from Germanic law, and other elements. Altogether he put forward a system which is a model in the inclusiveness of its approach and the rigor of its development. But he did more. He related that philosophy of law to a system of philosophy which itself was equally comprehensive; but his legal philosophy was not a mere adjunct of his philosophical system. His theory of the legal order is tied as closely to his theory of morals as it in turn is related to his view of the nature of man, which itself is directly affected by his metaphysics.

It is true, as the opponents of scholasticism urge, that the Thomistic system culminates in a theology, and is, therefore,

\(^2\) II-II, 71.
throughout its whole extent not a philosophy but a theology. In practice, so far as the legal aspects of the system are concerned, this charge is immaterial. Truth for the thirteenth century could be known either by means of revelation or reason, and it was plainly St. Thomas' intention to construct a legal system the justification of which rested on rational grounds. His philosophy as a whole was directed ultimately towards the problems of revelation and faith; but it could in its legal aspects, at any rate, be tested at all points by the processes of reason.

St. Thomas' contribution to the philosophy of law may perhaps be summed up as an insistence that law, to achieve its ends, must be regarded, not as a mere external, arbitrary set of rules, but as dependent, in greater part, upon intrinsic factors which extend from habit to expressed ideals. That idea stands in direct opposition to the police conception of the state, to the theory that law is solely a guardian of rights or interests, and to the notion that all social ends can be realized through the mere promulgation of rules of conduct. Neither the Ancient World nor the Middle Ages ever accepted the validity of that latter position; but it is implicitly the view of much modern speculation.