PREFACE

If St. Thomas were now as well-known as the stature of his thought warrants, this study would not have been written. Laying no claim to the discovery of truth, it but transmits a view of law that was common currency for our far ancestors. For Scholastics themselves the work has no message, for what it tells they have always known. Its one purpose is to present with as much clarity and unity as possible certain aspects of St. Thomas' philosophy of law. The central theme examined is the primacy of the natural law with respect to systems of man-made law. Like any art legislation must start from nature; artificial laws must be constructed somehow from natural laws. The only question is, how can we make best use of nature in those political matters that are subject to our free disposal? Thomism presents a view of human nature and a general technique for deriving positive laws from the law of that nature. This study is primarily concerned with this less fundamental question of derivation. Presupposing the truth of the immutable and general law of human nature, it investigates the manner in which St. Thomas holds that law to be related to the contingent and concrete laws of living states. Our problem, therefore, is but another facet of reason's prime and ever-present object, the one and the many. There is no explanation that is not a synthesis.

The indebtedness contracted by the writer in the preparation of this work is difficult to acknowledge in a few words. For the opportunity to engage in university study he is indebted to his parents, first of all, and to the Knights of Columbus, who endowed the fellowship that made possible his years at the Catholic University of America. He thanks also all of his teachers in the School of Philosophy at the Catholic University; especially Msgr. Fulton J. Sheen, who directed the writing of this dissertation, and the Very Reverend Ignatius Smith, O.P., Dean of the School of Philosophy, and Reverend Lorenzo McCarthy, O. P., who read and criticized the manuscript.

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CHAPTER I

THE PROBLEM

No apologia is needed for choosing to deal with such a subject as the philosophy of law. Whatever be the reputation of any particular philosophy, it is admitted on all sides that some philosophy of law is necessary. To be sure, there are those—and these the loudest—who are calling for less generalization in law rather than more, who insist that the salvation of our legal order lies in our rooting out all reliance on legal principle and legal concept. But to bother at all to defend such nominalism is to philosophize; by their very opposition to any philosophy of law with a general content, these men testify to the importance of a general view.

The causes of this wide interest in jurisprudence are probably social. Men feel a need for deep changes in the social order, and they realize the importance of the law as an agency of social control. If institutions are to be abandoned, the law that supports them must be changed. If new social forms are to be introduced, new law must be made, to provide for their maintenance and to apply them to the concrete realities of particular social milieux. And there are institutions—such as private property—which few men wish to discard, but with which in their present state, most men are dissatisfied; the laws that implement such institutions are felt to be inadequate and in need of modification.

Now, dissatisfaction with a legal system can conceivably arise from two kinds of reasons: 1) the times are different, therefore the law of our fathers must be altered; 2) the law under which we live is infused with a false philosophy of society.

No sensible philosophy will deny that, to a certain extent, the first reason for changing a given body of law is always present. Time does march on: concrete features do appear, evolve, and then disappear from the face of society. The body of law that might be perfect for one generation could not, in every detail, be suitable for the next.[1] Furthermore, no such perfect body of

[1]With regard to the present lag between law and social needs see Pound, *Interpretations of Legal History*, p. 146; and Cairns, *Law and Social Sciences*, pp. 161-167.

law has ever existed; it is men who fashion rules of law, and where are the men who will claim to have an infallible grasp of truth?

The second kind of reasons for desiring change in our legal structure holds in the minds of most contemporary students of jurisprudence. There is pretty general agreement that the theory of law dominant since the nineteenth century embodies some fundamental errors of social philosophy. A good deal of present thinking in jurisprudence is at bottom a reaction against these errors.

Let us look at three of those errors in philosophical doctrine which present-day jurists desire to correct.

1. A conception of law and government that completely separates the legislative power from the judicial, circumscribing the function of the judiciary to the bare role of applying the law as promulgated by the law-makers. According to this view, the law as it leaves the hands of the legislators is perfect and detailed, requiring no supplementary effort on the part of the judge beyond the mere establishment of the nexus between the general rule and the concrete situation. Thus the judge is absolved from any concern about the reasons behind the rule of law given him for application; all he need do is to syllogize, to recognize the relevance of a rule to a certain set of facts. Jurisprudence is conceived to be a department of learning cut off from other sciences; since the jurist is required to know only what the law is and how to apply it, and since he has nothing to do with the social reasons prompting the legislation, he need not bother himself about the connection between law and society.[2] Consequently, the law comes to be regarded as a system without any function in society, an isolated universe in itself; and for

[2] "With the moral or political aspects of this controversy, we, as lawyers, have nothing to do, for professionally the function of the lawyer is to accept that which exists and deal with exigencies as they arise. We are only concerned with the effect of the struggle upon the *corpus juris*, since the law, being the resultant of the forces in conflict, must ultimately be directed in the direction of the stronger, and be used to crown the victor." Brooks Adams, *Centralization and the Law*, pp. 132- 133. Cited by Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, 25, p. 591.

the jurist progress comes to mean not bettering the law as an instrument for social improvement but perfecting its internal coherence of principle, concept, and rule. In other words, this view of jurisprudence errs in two respects: rules of law are presumed to be amenable to perfect and mechanical application, and law in general is conceived apart from its proper functional role in society.[3]

With such a philosophy of law St. Thomas would be as impatient as its contemporary critics. Legislators, being men only, cannot know social facts with such conclusiveness that their general legal solutions will find a perfect correspondence with the infinitely varying cases of the future. Indeed, of the different fields of reality accessible to our minds, the domain of practical science is most fraught with factors that decrease certitude: "The practical sciences enjoy only the smallest degree of certainty because of the many circumstances that must be taken into consideration."[4] Not only is the mind short-sighted, but the very subject-matter of this science is intractable. "Moral matter is such that perfect certitude is not proper to it."[5] Both Aristotle and St. Thomas prepare for the inevitable deficiencies of human law with their doctrine of equity. "This is the nature of *epicheia*, that it be directive of law where law falls down because of a particular case."[6]

Nor is the suggestion that law can be considered apart from society any less incompatible with Scholastic jurisprudence. St. Thomas' very definition of law includes its purposiveness: *rationis ordinatio ad bonum commune.*

> "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting. . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts . . . since it belongs to the reason to direct to the end. . . . Consequently, it follows that law is something pertaining to reason."[7]

[3] Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, 24, pp. 141, 591ff., and 603. Frank, *Law and the Modern Mind*, p. ix.

[4] *In I Metaph.*, ii.

[5] *In I Ethicorum*, iii: "Materia autem moralis talis est, quo non est ei conveniens perfecta certitudo."

[6] *In V. Ethicorum*, xvi: "Haec est natura ejus quod est epiiches, ut sit directivum legis ubi lex deficit propter aliquem particularem casum."

[7] *Sum. Theol.*, I-II, 90, 1.

The essence of a reasonable act is its finality, and the first requisite of law is reasonableness. This purposiveness, this innate direction towards the common good, is law's reason for being. Law is the unifying principle of an order, an organized whole, and any order finds its explanation in the purpose behind the unification. Without the role of means towards the common good, any single rule of law is not only useless, it is unjust, and is not really a law at all.[8]

2. The second doctrine against which contemporary jurisprudence is reacting is a corollary of the first. Blindness to the fact that law is essentially a means rather than an end in itself leads to an insensitivity towards the law's function as dispensor of justice. The judge's primary concern becomes, then, rather to decide the case before him in conformity with the laws and rules and precedents the applications of which he deems his sole duty, than to effect a remedy in conformity with justice. The current temper in jurisprudence is the disposition to recognize not only that no judge has ever been able to apply law without letting his own moral judgment affect his choice and application of legal principles and precedents, but also that the sense of justice *should* be impressed into service along with the other sources out of which the judge derives his decision.[9] When Pound calls upon jurists for a greater "individualization of justice,"[10] he is begging them to exercise their judicial duties under the realization that the truly adequate and useful disposition of a suit is the equitable one; that where traditional law would seem to work injustice there should be no hesitancy in appealing instead to evident justice.

Few contemporary thinkers are aware that the classical doctrine of natural law not only permits but demands such a practice. They regard natural law as synonymous with immutable perfection and abstract withdrawal from concrete realities. Pound, however, calls natural law the great "liberalizing force" in the law:

[8] *Sum. Theol.*, I-II, 90, 2; 96, 1; 96, 4.

[9] See J. Schwering, "Das natürliche Recht und die Rechtsphilosophie der Gegenwart," *Stimmen der Zeit*, 130, 153-162.

[10] E. g., *Interpretations of Legal History*, pp. 153-155. Cambridge, 1930.

> "The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical jurist is always making, and his insistence upon what ought to be law is binding law because of its intrinsic reasonableness, have been the strongest liberalizing forces in legal history."[11]

With the current desire thus to "moralize" the law Scholastic jurisprudence unreservedly concurs. "The public power is entrusted to princes that they may be the guardians of justice," says St. Thomas.[12] *It is necessary for the maintenance of society* that justice, the giving to each man his due, be sought and preserved:

> "whatever is necessary for the maintenance of human society is naturally becoming to man: such are to observe the rights of others and to refrain from doing them any harm."[13]

Judgment, which "properly denotes the act of a judge as such," is "lawful in so far as it is an act of justice"; if it lacks justice, it is "faulty and unlawful."[14]

3. The third difference between the new jurisprudence and that of the nineteenth century is a matter of pure philosophy, the nature of man. It is a point at which modern philosophers of law come very close to the classic doctrine of the natural law, for they are at last, under the pressure of social developments, perceiving the falsity of the individualistic interpretation of man. In many departments our working law is dominated by the conception of man as a free and independent individual, *with the accent on independent; reflecting the influence of* Rousseau's wild view of human nature, the tendency has been to regard man as essentially an independent individual, and only secondarily a member of society—in Taparelli's philosophical language, man was considered to be able to act socially without being social in nature.[15] The controlling premise of this philos-

[11] "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, 24, 608.

[12] *Sum, Theol.*, II-II, 66, 8; 62, 8. Cf. I-II, 73, 10.

[13] *Cont. Gent.*, III, 129.

[14] *Sum. Theol.*, II-II, 60, 1 and 2.

[15] Il faut avant tout reconnaître et expliquer la notion, l'existence de la

ophy of law was the principle of freedom; as far as possible the rules of law were molded and interpreted to express this principle: not to secure the common good but to protect individual rights was the objective which legislators were to keep in mind, and which, in point of fact, judges also accepted—often unconsciously—as their first principle.

As early as the third quarter of the nineteenth century opponents of this error arose and exercised an influence upon jurisprudence,[16] and the movement grew steadily, until now the danger is rather from the opposite extreme, an exaggeration of the needs of society as such to the neglect of imperative needs of the individual as such. But at least in opposing the individualism of the nineteenth century the present movement in jurisprudence is endorsed by Scholasticism. We have seen the place held by the concept of the common good in St. Thomas' idea of law, how as the final cause of order and society it is the life-blood, the indispensable ingredient, of every jural relation.

> "Whatever is for an end should be proportionate to that end. Now the end of law is the common good. . . . Therefore human laws should be proportionate to the common good."[17]

This first of all social principles finds its ontological basis in the very nature of man: it is more than a capacity for social life that man has, it is a need rooted in the bottom of his nature; and, like other fundamental needs of his nature, it generates a complementary norm, the duty to live in a manner congruous with the needs of the social whole.

Scholastic jurisprudence is thus seen to be at one with several of the dominant directive principles of contemporary jurisprudence. It is one purpose of this study not only to expand into clearer detail the above intimations of this fact but also to indicate where certain doctrines of contemporary thinkers in jurisprudence fall short of, and diverge from, the Scholastic view.

société, pour pouvoir ensuite en déterminer les lois, les devoirs et les droits; la théorie de l'être social doit donc précéder celle de l'action sociale." Taparelli D'Azeglio, *Essai Théorique de Droit Naturel,* I, 166.

[16] E.g., Ihering, Marx, Spencer, Post, Gierke, Ward. See Pound, "Fifty Years of Jurisprudence," *Harvard Law Review,* 50, 557-582.

[17] *Sum. Theol.,* I-II, 96, 1.

However, my chief objective is to trace one theme of St. Thomas' thought, the relation of natural law to positive law, the misconception of which by non-Scholastics appears to me to be obstructing the modern adoption of the jurisprudence of natural law.

In two important respects the Scholastic doctrine of the relation between natural law and positive law is misunderstood: 1) the connection between the natural law and the eternal law, and 2) the immutability of the natural law. I shall attempt here only to sketch the true Scholastic position in both of these questions, reserving a more complete presentation for subsequent chapters.

1. The current misconception of the Scholastic doctrine concerning the relation between the natural law and the eternal law.

The following are typical expressions of this misconception:

> "Grotius secularized the work of the law by supplanting the *corpus mysticum* of the Scholastics with the human *appetitus societatis.*"[18]
>
> "Aquinas distinguished between natural tendencies . . . and the precepts of reason . . . and held (with the Stoics) that natural law is the divine, eternal law as revealed to, as shared by the mind of a rational creature, and is the source of human law (i. e., the positive law of States);" and Gentilis, Grotius, and Hobbes substituted philosophy for the theological basis.[19]
>
> "In the Middle Ages the law of nature and of reason which held such an important place in the Stoic philosophy of the Later Roman Empire was given definite and specific application in the canon law courts. To secure additional sanction from Aristotle, Cicero and Justinian for the civil jurisdiction of the clergy, it became advantageous to identify the law of nature with the law of God and to apply the principle in the application of law to concrete cases."[20]

These examples of a common notion of Scholastic natural law

[18] Georges Gurvitch, *L'idée du droit social,* p. 175. Paris, 1931. Cited in R. G. Renard, "Thomisme et droit social," *Revue des sciences theologiques et philosophiques,* 23, p. 54.

[19] Macdonnell and Manson, *Great Jurists of the World,* p. 312. 1914.

[20] Charles Grove Haines, "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal,* 25, p. 619.

show a failure to distinguish between nature and the supernatural. They embody the naïve opinion that, if St. Thomas and the medieval Church preached natural law, then natural law had been absorbed into the body of revealed dogma; consequently, there is the implication that unless you believe in that body of supernatural dogma, you will be unable consistently to subscribe to the medieval concept of natural law.

Such a judgment shows an ignorance of one of the greatest achievements of the medieval mind, its comprehension and expression of the distinction between faith and reason, grace and nature. Only when that distinction is seen can the higher unity of the two be properly understood. The question is: Is the Scholastic doctrine of the natural law, together with the specific contents of that law, deduced from the articles of faith? The absurdity of supposing that it is will become evident when we follow the Thomistic exposition of the meaning of natural law. For the present, consider the mere fact that the principles of the natural law are conceived by St. Thomas to hold for all times and all peoples,[21] and who is going to suggest that the medieval Scholastics knew of no other historical religion than Christianity?

Are we then to conclude that Scholastic natural law is completely mundane, with no reference to things divine? Not at all. "The natural law is nothing else than the rational creature's participation of the eternal law,"[22] which is itself "the very Idea of the government of things in God the Ruler of the universe."[23] The explanation lies in the fact that there are two aspects of theology, natural and supernatural, the former the work of reason alone, the latter the work of reason illuminated by the light of grace. The existence of God can be known by natural reason, from a study merely of "the things that are made."[24] By further reasoning, the concept of the eternal law is reached and the conclusion that the natural law is man's participation in that eternal law. But it is not true that the *content* of the natural law is arrived at by a process of deduction from

[21] *Sum. Theol.*, I-II, 94, 4; 94, 6.
[22] *Ibid.*, 91, 2.
[23] *Ibid.*, 91, 1.
[24] *Ibid.*, I, 2, 2.

the eternal law. In our natural knowledge of God—the kind involved here—we learn by way of "the things that are made"; the specific content of the eternal law is reached only by the usual pedestrian method of reasoning and experience. It is with one and the same humble method and starting-point that we proceed to the knowledge of God's existence and to the knowledge of the rules we must follow if we are to live the life that is natural—and therefore good—for human beings. Doubtless the results of these two investigations react upon each other, and not without great significance for human life: the knowledge that a supreme Creator, and therefore Master, exists is bound to make all the difference in the world in the answer to the question whether the individual will actually live according to the code that his reason has uncovered. But the fact remains that except for the duty of worship the discovery that God exists does not involve the discovery of what the moral code is: the natural law is not a deduction from the eternal law. The relation between them lies not in the method whereby we attain our knowledge of the natural law, but rather in the final insight that the law of nature is prescribed by the eternal law; God, who gave us reason as part of our nature, is seen to command us to follow the ideals which that reason discovers to be the proper good of that nature: the standards of reason are the commands of God.[25]

The truth is, then, that in investigating the content of the natural moral law St. Thomas needs no recourse to faith. Consequently, it is reason and experience alone which lead us likewise to a knowledge of that part of the natural moral law which

[25] The relation between God and creature in the dynamic order is a reflection of the ontological relationship: "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, and the principle holds for all orders of creatures without distinction." Gilson, *The Spirit of Medieval Philosophy*, pp. 334-335.

is relevant to the guidance of society; in this respect what is true of ethics is also true of jurisprudence. Hence, unless the above distinctions are taken into consideration, it is misleading to label the medieval theory of law "theologico-philosophical".[26] The theological character of medieval jurisprudence, though of great concrete effect in individual lives and social forms, is not necessary to the discovery of natural law; hence there is no justification for dismissing natural-law jurisprudence as a philosophy ineligible for inspiring and guiding the positive law of our own secular civilizaton.

2. The current misconception of the Scholastic doctrine of the immutability of the natural law.

The most recent period of history during which a philosophy of natural law controlled the thinking of most jurists and writers on law occurred during the eighteenth century and the beginning of the nineteenth. These believers in natural law conceived of it as a complete system of the rules of social conduct, a system comparable to one in mathematics, where from a few most general and abstract axioms and definitions the many individual theorems are derived. Given nothing but the first principles and definitions, by deductive logic alone you can arrive at all the propositions necessary for an understanding of the particular mathematical entities. In terms of human society, postulate your conception of the natural man, and you need nothing but logic to bring you to a knowledge of the acts appropriate to his nature. Legislatures become chambers of logic. Positive rules of law are conclusions of syllogisms, the premises of which state propositions declaring aspects of the nature of man.

Such was the method of Rousseau, Montesquieu, Pufendorf, Cousin's spiritualist followers, and others.[27]

> "For the philosophers of the eighteenth century," says Renard, "the noun 'law' had the same signification in the two expressions, 'natural law' and 'positive law,' that is, a complete system of norms for regulating social relations."[28]

[26] Dean Pound's tag for our doctrine.

[27] Cathrein, *Recht, Naturrecht und positives Recht,* p. 278. Deploige, *Ethics and Sociology,* p. 277. Pound, *Law and Morals,* pp. 33, 87-97. Macdonell and Manson, *Great Jurists of the World,* chapter on Pufendorf. Pound, *Introduction to the Philosophy of Law,* Chapter I.

[28] Renard, *Le Droit, l'ordre, et la raison,* p. 134.

Granting that such a complete system of positive laws achieved perfect realization and ministered adequately to the needs of a given society, what is going to happen when those needs change? There's the rub. Such a system of positive law presupposes both a static human nature and a full and perfect knowledge of that nature. The being of man is considered to be as constant and eternal as the nature of a triangle, his history as predictable as the deduced attributes of that triangle. No wonder that subsequent generations of legal thinkers rebelled against the natural law; for, when need of social changes arose, the exponents of the natural law had no place to turn; their philosophy was rigid from center to circumference—one could not prune a branch without destroying the trunk; denying a theorem meant impugning an axiom. What more natural in the succeeding thinkers than a renunciation of the whole philosophy from top to bottom, especially since the premises of that philosophy were individualistic and out of accord with the new temper and needs. The Historical school of jurisprudence, acceding to ascendancy, denounced the natural law as a dead thing, too inorganic to be relevant to the living organism of society.[29] Members of this school went to the extreme of abandoning all belief in the possibility of any abstract principle's having the binding power of law;[30] they reasoned that if the abstract principles of eighteenth-century natural law fell down before the demands of an evolving society, then abstract principles as such are not feasible in legal philosophy. This positivistic spirit in law is with us today in the person of the realist.[31] The attitude towards natural law is this: if natural law is conceived of as ramifying into concrete rules, then our experience with eighteenth-century natural law warns us that immutable principles are a bar to progress; if natural law is immutable because it is taken as purely abstract,

[29] Cathrein, *Recht, Naturrecht und positives Recht,* p. 278.

[30] Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review,* 24, p. 149.

[31] E. g., Jerome Frank: "The law in the sky, above human experience, is valueless to the wayfaring man. Principles, rules, conceptions, standards, and the like, may be law for lawyers, regardless of whether such law ever comes into contact with the affairs of life. But not for the rest of humanity. To mere humans, law means what the courts have decided and will decide, and not vague, 'pure' generalizations." *Law and the Modern Mind,* p. 55.

then it does not pertain to the concrete realities that confront the lawyer and the judge.

Dean Pound has done much to dispel the fear of natural law as a philosophy suitable only to a static society. He recognizes the difference between eighteenth-century natural law and that of the seventeenth century, which he calls the "classical" natural law:

> "Much of the disrepute of natural law at present comes from thinking of it in terms of the identification of an ideal form of familiar legal institutions with the postulated eternal immutable law of nature, which obtained at the end of the eighteenth century, rather than in terms of the classical creative natural law of the seventeenth century."[32]

He opposes the various deterministic explanations of legal history on the grounds that the development of systems of positive law cannot be understood unless account is taken of the ideals that the law-makers have had in mind.[33] Now the natural law was such a dynamic ideal in the seventeenth century, constituting an historical proof that there is no justification for identifying natural law with the idea of social stagnation.

Are we then to conclude that Pound and the other members of the sociological school of jurisprudence subscribe to the Scholastic natural law? By no means. It is only after remodeling the classical concept of natural law that they can bring themselves to accept it. And the very aspect of the old natural law which they abrogate is its immutability. When Pound pleads for a reïnstatement of ideals in the legal order, he has in mind no permanent ideals, no ideals that outlast the present time and place.

> "Had the seventeenth- and eighteenth-century jurisprudence urged that positive law got its validity from being declaratory of ethical custom of the time and place—or perhaps better from being declaratory of idealized ethical custom of the time and place—it would not have broken down so completely at the end of the eighteenth century."[34]

[32] *Law and Morals*, p. 33.

[33] "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, 24, pp. 608, 495, 598.

[34] *Law and Morals*, p. 87.

Here is no recognition of an immutable code of morality, by which all codes of positive law are to be judged. Law must be fashioned under the influence of ideals, yes, but those ideals never stand still—they find their expression in the "sense of mankind *for the time being* as to what is just and right."[35] Pound's own misconception of the immutability of natural law as Scholasticism conceives it is shown in his statement that, of the two objectives Kohler finds in the legal order, the maintenance of existing values of civilization and the creation of new ones, the Middle Ages considered the former the end of law.[36]

I said that one important reason for the modern appraisal of Scholastic natural law as neither true nor the answer to current problems in jurisprudence lies in a failure to understand what we mean when we say that the natural law is immutable. In the pages that follow I shall try to present the outlines of the Scholastic view of law in a way that will make clear my reasons for that statement. What the present-day thinkers want above all is a view of law which will permit—nay, require, and point the way to—certain changes in our legal order. These changes, however, must not shake the authority of the law. From the time when the divine sanction ceased to be of weight in the laws of the West, says Pound, the law-givers

> "have had to wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable desires."[37]

Scholastic jurisprudence, of course, is the last to deny that the divine sanction is, *de facto*, behind the just laws of all societies; but it also maintains that, unless its natural law is adopted as the philosophy inspiring the legislation and administration of justice in even a secular society, that society will effect no balancing of the tension between the need for change, on the one hand, and the need for stability and authority on the other.

[35] "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, 24, p. 608. Italics mine.

[36] *Interpretations of Legal History*, pp. 144-145.

[37] *Introduction to the Philosophy of Law*, p. 19.

Scholasticism's answer to this dilemma is, in brief, this: Two aspects characterize the making of laws and the development of bodies of law: a principle of immutability and a principle of change and variety. Rules of law dealing with the same kind of social situation vary both as among peoples and as among periods in the history of one people. Nevertheless, within certain limits all those positive laws that vary in their governance of similar social facts derive their obligatory force ultimately from the natural law. There is no just rule of law that is not infused with the breath and strength of natural law. Natural law is not a *deus ex machina* whose pertinence waits upon the appearance of a gap in the positive law, when the judge has no place else in precedent or statute to turn to; it is not one among several sources of law but the first among all sources, endowing them with all the moral force they possess.

Yet natural law as such is not concrete. Were no man ever to perform a human act in a definite temporally and spatially circumscribed location, the natural law would be of no concrete existence. For natural law to operate, actual human beings in material milieux are necessary. Natural law, in this respect, is as (Aristotelian) physical form to matter: without the matter it cannot exist, but once the composite substance exists, the form rather than the matter gives actuality—obligatoriness—to the whole.

Is this to say that the natural law has the character of a Kantian transcendental Idea, denoting a method rather than a reality? The neo-Kantian jurist, Stammler, described it as just that.

> "The old jurists were wrong when they sought for a determinate law of absolute significance. But they would have been on firm ground if they had striven for a natural law with a changing content—that is, precepts of right and law which contain a theoretically just law under relations empirically conditioned."[38]

"There is not a single law that, as far as its content is concerned, is *a priori* true."[39]

[38] Stammler, *Wirtschaft und Recht*, 2 ed., p. 181. Cited in Pound, *Law and Morals*, p. 106n.

[39] "Es gibt keinen einzigen Rechtssatz das seinem positiven Inhalt nach a priori feststände." Stammler, *Richtiges Recht*, p. 117. Cited in Joseph Schwering, "Das natürliche Recht und die Rechtsphilosophie der Gegenwart," *Stimmen der Zeit*, 130:158.

Pound's view is like this. The only abiding norm that he ventures to set down for positive law is that it must fit itself to the ethical ideals of the community it governs. By that criterion of positive law there could be in existence at one and the same time two societies whose laws were each as just as laws can and ought to be, but whose social ends were diametrically opposite; by that criterion of positive law, the law of a community of gangsters is just and perfect, as long as it expresses and adequately implements the aspirations of the individual members of that community.

Such is not the meaning of immutability in the Scholastic description of the natural law. Not every possible rule of human law can take unto itself the morally obligatory force of natural law. Natural law is not only the spirit animating every just rule of law, it is also an abiding guide that sets certain limits within which justice is to be found. Variety is possible, indeed inevitable, within that area, but there is no such thing as a justice of infinite variability.

The boundaries that are set to the variability of positive law are determined by the nature of man. Because that nature contains an immutable form, as well as a great capacity for change, the acts conformable to it will necessarily be restricted. Not every act is a natural act. Hence the concept of justice, of natural law, is inaccessible apart from the concept of the nature of man. Each view of jurisprudence, since the ends of laws cannot but be moral values, rests ultimately upon a metaphysical conception of the human good.

But what are those boundaries of legitimacy? What determines the position of the lines dividing the just from the unjust? Your answer to this question depends upon your conception of the nature of man. Laws are guides of human conduct. Since they have thus a merely instrumental function, their ends will be the ends of the men they govern. And since the goods men ought to seek can be ascertained only by first knowing what kind of creatures men are, evaluation of laws rests upon a philosophical conception of the nature of man. Hence the most fundamental

difference possible between schools of jurisprudence is a difference in ethical views. This is exactly the point where Scholasticism is most profoundly at odds with the reigning schools of jurisprudence. The ultimate conflict here, as in all fields of social thought, is over the definition of man.

The purpose of my examination of Thomistic jurisprudence is not, however, the ambitious one of stating and proving St. Thomas' description of human nature. Mine is the more modest intention of presenting a subsidiary doctrine, which, though less profound, is just as indispensable to a proper knowledge of the nature of law. I desire only to set forth the relation between natural law and human law. The philosophical problem is this: Why am I obliged to keep the laws promulgated by the government under which I live? Granting that I have an immutable nature, how it is possible that I am obliged to obey, at successive times, two legal ordinances of contradictory content? If natural law is one for all societies, descriptively as well as normatively, whence its variety? If it is immutable, and permeates all just positive law, whence the changes that occur in positive law?

Furthermore, how can natural law be both the leaven of progress and the rock of authority? If natural law is the necessary and proper guide for legislator and administrator of justice, then am I permitted to disregard any enactment or decision that is contrary to natural law? If so, then how, in this world where such injustices occur daily, can the natural law be considered a power for stability? If not, then are there not some laws, thus combining injustice with obligatoriness, which are empty of the inspiration of the natural law of eternal justice?

Involved in St. Thomas' answers to these questions will be countless illustrations of his sense of the contingency of this world and his knowledge of the hard reality of facts. His realism is all too unknown to modern jurists. Their forte is facts, and, though some of them are in quest of ideals and principles, they hesitate to go for help to a period which they have been taught is Platonic and other-worldly to an unhuman degree. Thomistic jurisprudence is a synthesis of facts and ideals, a science at once descriptive and normative. The ideals, far from ignoring or contradicting the facts, are built upon them; and,

once clearly seen, they are applied to human life only with the sharpest sensitivity to the practicable. The ideals are immutable and eternal, but our perception is always incomplete and our capacity limited.

> "The natural law is a participation of the eternal law . . . and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of Nature. But the reason of man is changeable and imperfect: wherefore his law is subject to change. Moreover, the natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies."[40]

[40] *Sum. Theol.*, I-II, 97, 1, ad 1.

CHAPTER II

THE METAPHYSICS OF NATURE AND ORDER

In reaction to the extreme individualism of the immediate past, the present world, in thought and in action, is transferring its devotion to social wholes. In the world of action the pendulum is quite obviously swinging away from the view that the state exists only to preserve the rights of an essentially unsocial individual. Certain thinkers go so far as to regard the group as the fundamental form of humanity: know the group as such, they say, and you know its members better than if you investigated the individuals first; in so far as the action of any individual is predictable, it is so from a knowledge of the groups to which he belongs.

Even if we grant this untenable position of social determinism, then, unless we are to abandon hope of improving society, we must consider the realm of ends. It is immediately clear that social improvement is only a means of getting at the individuals. We write new laws and abrogate old ones not to build a magnificent structure of law for its own sake nor to fashion a beautiful legal dress solely for the adornment of the state. Law is a means, a means whose only rightful function is the service of human needs. And human needs have but one locus: the person. Rulers must legislate, no doubt, for the common good rather than for the interests of private individuals and limited classes, but the common good is not a good at all unless it find its ultimate repose in the heads, hearts, and bodies of the citizenry.

> "[Civitas] est primitus facta gratia vivendi, ut scilicet homines sufficienter invenirent unde vivere possent: sed ex ejus esse provenit, quod homines non solum vivant, sed quod bene vivant, in quantum per leges civitatis ordinatur vita hominum ad virtutes."[1]

This being the case, it is imperative that legislators and jurists know what the human person is. Disagreement here at the

[1] *In I Pol.*, i. See also *In I Eth.*, xix. By *virtutes* Aristotle and St. Thomas mean not only habits of moral perfection but also habits of intellectual excellence and bodily strength; in short, skills in any department of life. Compare our word *good*: a bad man can have a good head on his shoulders.

heart of all thinking about practical matters, in the philosophy of man, is the deepest reason why there is now no influential jurisprudence of natural law. To uphold a law of nature that transcends human laws, both giving them obligatoriness when promulgated and counselling their alteration or abolition when their usefulness has passed, is to project into the dynamic world of social change an idea of human nature. Pound's identification of natural law with creative law, applying the phrase as a generic label for all jurisprudentialists with a program for change, does but fragmentary justice to the traditional natural law. The law of nature is the law of a determinate nature, of a specific mode of being. This is why the natural law is one and immutable in space: it is the law of a certain species of beings, it is the law of all men in their common, essential character. The law of nature transcends nations because the division of mankind into political groups is not the final and fundamental classification. Differences between peoples are metaphysical accidents, the essential definition of man being one that describes all men. The doctrine of natural law is the doctrine of the unity of the human species. Unless you hold it you have no moral grounds for opposing the current injustices of anti-Semitism, of the Aryan myth, of the violation of treaties, or of the mistreatment of subject races.

As I have already said, the purpose of this work is not to propound the Scholastic definition of man. I presuppose it rather, and go on from there to an explanation of the diversification and concretization of the one natural law in the many and changing positive laws of human societies. Now, to understand how the natural law thus infuses all just positive law, its unity and force remaining unimpeached amid the complexity and variety of the rules of law it both measures and inspires, it is necessary to learn the meaning of *nature* and of *order*.

Aristotle begins his investigation of the meaning of the word *natural* by turning to its ordinary use as a correlative to *artificial*. He observes that the characteristic mark of an artificial thing is its stationariness, its lack of an immanent principle of change. A bed, in so far as it is a bed, does not alter; if it falls apart after long usage, that is because it is not wholly an artifi-

cial thing, but contains as its material, natural substances. Aristotle accordingly constructs this definition:

> "nature is a source or cause of being moved and of being at rest in that to which it primarily belongs, in virtue of itself and not in virtue of a concomitant attribute."[2]

The latter part of the definition excludes from the class of natural entities all those things that get their motion either from the natural wholes comprising the material out of which they are artificially constructed, or from the natural things to which they belong as accidents to a substance. St. Thomas gives the definition Scholastic dress, "Natura est principium motus et quietis in eo in quo est, primo et per se, et non secundum accidens,"[3] and finds an appropriate etymology for the word in *nativitas;* it is an easy transition from the concept of the generation of living things to that of the movement of things in general. The metaphysical bases for facts of movement and change are principles of that movement, and the name for those metaphysical realities is likewise *natures.* Again, metaphysics finds it necessary to postulate in those metaphysical natures two principles to account for the factual change, form and matter—principles that are, moreover, of importance in the knowledge process, for form is the knowable element in things, the *essence* or *quiddity,* while matter is in itself unintelligible. This meeting of the ontological and the noetic has its effect on the meaning of *nature,* the word being derivatively applied to the knowable aspect of a thing, as when we say, "This is the nature of my difficulty." Thus substance, essence, and principle of activity all have a claim to the name *nature,* since they all signify the same reality; nevertheless St. Thomas distinguishes among the respective aspects of that reality which are specially connoted by each, and nature refers precisely to the "essence of the thing in as much as it is related to the thing's proper activity."[4]

Observe that we began with the common-sense notion of *natural* and ended up in metaphysics. The transition is legiti-

[2] *Physics,* 192b, 20-23.

[3] *In II Physicorum,* i.; *Sum. Theol.,* III, 2, 1; I, 29, 1 ad 4; *De Ente et Essentia,* 1.

[4] *De Ente et Essentia,* 1.

mate, for common sense is really, if indistinctly, metaphysical; but there is a difference between common sense and metaphysics. Nature is a metaphysical concept, and it is important to understand why we must go to metaphysics to get an explanation of the change we experience in the world of actuality. We learn to know that world by way of two instruments, the senses and the intellect. Neither is sufficient by itself: the senses are the reporters of the existent world, the intellect the editor who extracts the meaning from the dispatches, sees the connections between events, discovers their causes and laws, and even makes reliable predictions. We know that there are two kinds of cognitive activity going on because there are two characteristics in our knowledge which could not co-exist in one and the same act: our knowledge is both concrete and abstract, that is, individual and universal. The concrete character of sensations is patent: the content of every sight and sound is circumscribed by a definite location in space and time; I see that green color right there and hear those particular sounds. Whereas the intellect deals in definitions, meanings: the content of my idea of a triangle fits all three-sided plane figures, no matter the particular quantity of space they occupy, or their particular position in time.

Now the most advanced abstraction that the intellect makes, or can make, yields the most general object of knowledge, being. Every single object we know is a kind of being; at the heart of every proposition we pronounce lies the *is* that links subject with predicate. Now metaphysics is concerned with being, not particular cases of being, but being in general. The metaphysician asks the questions, What is the content of the notion, *being* or *thing?* How much do I know about an object when I know that it is *something?* There does not seem to be much practical importance to such questions, at first glance, and it is true that metaphysics by itself would not constitute a liberal education; your metaphysician *qua* metaphysician cannot tell the difference between a tree and a turnip. Yet consider the faculty of reason, which is nothing else than intellect in motion. The mathematician, by reason alone, builds a whole geometric system from a handful of axioms and definitions; his only task, once these latter are posited, is to knit them together and draw out their implications. The only guides he needs for this process are the

principles of contradiction and identity. Where does he get these principles? From metaphysics. From the intellect's knowledge of pure being. The metaphysician's first conclusion in his examination of the content of *being* is that every being is one; if it were double, rather than single, then it would be two beings, not one. It is such fundamental insights as these that make up the metaphysician's stock in trade. The conclusions he arrives at are principles effective in all thought, for the proper object of his interest is implicit in every object of intellectual knowledge: being is the first object of the intellect. Because of this, all other sciences presuppose and depend upon metaphysics.[5]

Now it is one of these metaphysically perceived truths that actions are always the actions of things. Any man can test the above claim that metaphysics is indispensable to all thought by trying to call before his mind the idea of a movement detached from a thing, or a meaningful verb that does not denote a substantive. Scholasticism sees an absolute truth in this axiom that actions always belong to subjects. But, you say, Kant could be right, this necessity in thought could be a necessity contributed by the mind. To answer this objection would entail the exposition of a whole metaphysics; suffice it to say that such a view of the intellect's relation to reality is abortive of all thought. Consider the consequences. If any of the propositions that the intellect perceives to be necessarily true are not designations of necessities inhering in being itself, then we have no starting point for an incursion into reality. We must doubt even the principle of contradiction, which is the very soul of thought. All the conclusions of metaphysics are of a piece with that principle; all of them have as sure an insight into the being of things. The necessity of the axiom, *actiones sunt suppositorum,* is, then, a necessity seen in the internal constitution of being; if any object of thought is an action, then necessarily it belongs to a substance.

Now the ultimate definition that Aristotle and St. Thomas give for nature is a metaphysical definition; it is what the intellect sees in the face of being. It is requisite to the nature of

[5] *Sum. Theol.*, I, 79, 7; 5, 2. *In De Trinitate*, V. Maritain, *The Degrees of Knowledge*, p. 51. New York, 1938.

being, that activity belong to a subsistent thing. As a matter of terminology, the substance, or essence, of the thing is called its nature when our idea includes the connotation, "principle of activity."

The fact that Aristotle and St. Thomas have this in mind when they use the term *nature* is of first importance for our study of natural law. Nature is essentially a dynamic thing. Force is of the stuff constituting it. In so far as it is a nature, a substance is in movement, in the process of realization. In the language of Aristotelianism, a nature (where it is distinct from its acts, that is, in all creatures) is ever in the process of the actualization of potencies. Movements that register an impression upon our senses must have some foundation in substantial being; their home, their actual point of origin, is the nature of the moving thing. ***Nature is essentially a dynamic concept.***

Metaphysics goes on to a deeper knowledge of nature. One of the properties it finds in being is goodness; everything, in so far as it is being, is good. Goodness adds nothing to *being,* it is merely *being* regarded in its relation to desire. The reality signified by each idea, being and good, is one and the same; the justification for the existence of two separate notions about the same thing lies in the fact that our idea of good includes the connotation, being as related to "desire." As Aristotle puts it, "The good is that which all things desire," meaning not that being is good because it is desired, but that it is desired because it is good. We are not speaking of moral goodness, but a goodness that transcends all categories of being. It is a concept necessary if we are to explain the general contingency of the world. As Aristotle's "definition" implies, we cannot understand the "desire" which lies at the root of all experienced reality. Things are ever in action, and such action presupposes a privation of some sort; things would not change unless there were some new determination possible; a goal is metaphysically necessary. If changing being is to be intelligible, there must be a determinate final cause for the evolution:

> "To an agent that did not tend to any definite effect all effects would be indifferent. But what is indifferent to many things does not do one of them rather than another; hence from an agent to whom both sides of an alternative

> are open, there does not follow any effect, unless by some means it comes to be determined to one above the rest; otherwise it could not act at all. Every agent, therefore, tends to some definite effect, and that is called an end."[6]

As a commentator of St. Thomas says,

> "There is no activity without direction, and no direction without two terms, the second of which, after the action, is called the *result*, and before the action, the *end*. To say that there are results but no ends is like saying that a direction can be determined by a term which is still absolutely non-existent. A result without an end is an effect without a cause."[7]

Hence we arrive at another aspect of natures. Natures, as principles of activity, embody finality, for activity is inexplicable apart from finality. The first characterization of nature, "principle of activity," we now fill in with the note, "defined by a definite end." It is the end that defines a nature. The thing's nature, the ontological spring of its empirical action, is also the determiner of the way it will act, determiner by virtue of the peculiar end that it embodies. The future is wrapped up in the present. In some beings this finality is present in the intellect, in others it resides in the "natural disposition" of the agent. In both kinds of beings there is that intimate connection between nature and end, nature and the good. The principle of a thing's action is its nature, and it is the nature that defines the action: the good tended toward will be the good *of that nature*. The thing will perfect itself according as it acts naturally, that is, attain the end that defines it. If its natural activity is impeded in any way, the end will not be so fully attained, and the thing will be the poorer for it.

Note that in going from nature as principle of activity to nature as also measure of that activity, we have not left the realm of metaphysics. These determinations of the nature of nature have all risen from the exigencies of *being;* active being is unintelligible, self-contradictory, unless natures are posited which both cause and delimit the activity of a thing. However, we are still unable to differentiate between a being with one

[6] *Cont. Gent.*, III, 2, 'Si agens," tr. by Fr. D'Arcy in *Thomas Aquinas*, pp. 145-146.

[7] Sertillanges, *Foundations of Thomistic Philosophy*, p. 179. St. Louis, 1931.

nature and a being with another, and as long as we remain within metaphysics we shall remain ignorant of the distinctions between specific natures, for metaphysics is concerned only about one general aspect of things: their being; and specific natures are not deducible from our direct intuition of being. What knowledge we possess about these is the product of a lower degree of abstraction than the metaphysical. By admitting sensible qualities (known abstractly, of course, in the intellect) into the object of our knowledge, we can secure a more or less specific acquaintance with natures. Not natures in themselves, but natures as expressed in their empirical manifestations. That there are such empirical signs of ontological natures is a testimony of the physical and biological sciences, whose success is measured by the regularity they find in the processes of Nature. The linking of proper action to a determinate nature is not the task of experimental sciences; they presuppose, rather than investigate, the nature itself, for it is an *intelligible essence* not accessible to the methods of science. Nevertheless, it is these "presupposed ontological non-observables" that are the ultimate cause of the determinism which scientific laws define, with varying degrees of precision, in the different departments of sensible phenomena.[8]. Scientists, taking for granted the existence of natures, seek to delimit the natural properties, which, as emergent into the world of sensible action, are tangible to scientific instruments. The complementary relation existing between philosophy and the natural sciences is here clearly evident: the philosopher's knowledge is incomplete, falling short of the specific determinations of physical things; yet it is indispensable to the intelligible explanation of reality—the regularity discovered by science must have a cause, and this need is filled by the metaphysical doctrine of natures: the activity of a thing is at bottom an *élan* which issues from its nature; it exhibits a regularity because the nature is a defined nature, at no moment completely indifferent to all alternatives of action. Both *that* a thing acts and *how* it acts are necessary effects of the nature it possesses.

Necessary? Determinism? If every thing has its own proper activity, impelled and determined by the end embodied in its nature, an activity which is the only one posible to that na-

[8] Maritain, *The Degrees*, pp. 31-32.

ture, then why is it necessary for the scientist to go to such labor in ascertaining these proper activities? Why must experiments be controlled, in order to eliminate *variable* factors? If a thing's activity flows from the thing's nature as an effect from a necessary cause, it should perfectly mirror the nature, and the surrounding conditions should be irrelevant to our observation.

We must be careful in our understanding of the necessary character of the nature-activity relation. The issuance of a proper action from a determinate nature is not an absolute necessity, it is contingent upon the working of other natures. The action will follow from the nature, *if* nothing interferes, and the truth is that in physical reality there is no isolation. Things express their natures in every act, but in no act wholly. Hence the scientist's difficulty in his quest for absolute rules of natural behavior; the best he can hope for is increasingly accurate approximations. If we would know natures we must be prepared to deal in averages. The necessity shows up only in the general course of change: we must back away from the concrete world until we lose sight of the individuals if we want to find continuous lines of behavior; plant-life in general has a biography, but the day of a dandelion is unpredictable.[9] The more abstract the description the more closely it approaches a necessary truth. This is not to say that, since only singulars exist, truth must be illusory: my ignorance of the exact weather for the ninth of next August does not preclude my being reasonably certain that it will be warmer then than it is now, in December. And the certitude of such general propositions bespeaks the existence of determinate—therefore unchanging—natures, centers of outgoing energy, the ultimate determinants of the complex events that occur at the sensible level.[10]

Now all of these attributes of nature are helpful in understanding the Thomistic notion of natural law and its implementation and partial effectuation in man-made law. St. Thomas applies the word *law* to the natural tendencies in physical things only seldom, and then in a figurative sense, as when he speaks of "ipsae naturales inclinationes rerum in proprios fines, quas

[9] Aristotle, *De Generat. et Corrupt.* II, 11; 337a34-337, 155.

[10] *In III Sent.*, d. 37, 1, 3.

dicimus esse naturales leges";[11] laws are properly the rules and measures of only rational beings.[12] Yet the two worlds are not completely disparate in their formal constitution; there does seem to exist an analogy between the tendency of a physical thing to express its nature and the obligation of a rational being to express his. The distinctive cosmic status of rational beings we shall examine in the next chapter; in preparation for that investigation we must carry away the following truths about physical natures: The distinctive thing about a nature is its dynamic character. It is the thing's intelligible essence as productive of the thing's activity. All natures have this in common: they are forces, *intentiones,* "reaching out" for an unpossessed good.[13] They fall into genera and species by virtue of the peculiar directions of these tendencies, directions determined by the ends set them. Each nature is limited in two ways: by its characteristics, for it cannot act except in conformity with itself; and by its milieu, for it exists in a world full of other active natures. Events emergent into the empirical world of actuality are always complexes of the effects of the imperfectly realized intelligible natures. Hence the contingency and the imperfect rationality of the actual.

. . . . .

Besides this vertical relation of essential causes to existential effects there appears in the universe of these latter actualities a correlation on an horizontal plane.[14] The events effected by the collaboration of different natures fall into unified patterns. At one remove from the basic singular natures, these unities themselves take on the character of natural wholes, becoming, as it were, quasi-natures, integrated and differentiated by the determination they receive from their own proper ends. Hence there are two kinds of organization, that which unifies the parts of a singular nature, and that which binds those singular natures

[11] *De Div. Nom.*, X. i.

[12] *Cont. Gent.*, III, 114, "Quum lex."

[13] E. A. Pace, "The Teleology of St. Thomas," *The New Scholasticism,* 1, p. 223.

[14] For the material of this discussion on order I am largely indebted to J. M. Marling's *The Order of Nature in the Philosophy of St. Thomas Aquinas.* Washington, D. C., 1934.

together at a higher level. Only this latter kind of unity is called an "order"; for it is a requisite of an order, that it be a unity of diverse things. For an order to exist, three conditions are necessary: 1) there must be an existential diversity of parts, i. e., the parts must be subsistent beings;[15] 2) these members of the order must be linked by a certain common relation;[16] and 3) a specifying principle which makes the relation to be of a certain kind, i. e., a *ratio ordinis,* the idea according to which the members are related.[17] This idea governing the organization is its *raison d'être,* the purpose which the order fulfills. In so far as they are parts of an order, individual beings are the matter of the order, and the *ratio ordinis*—the end—is its form.[18].

Hence there are two kinds of finality in the world, the finality of individual natures and that of orders. And the orders themselves are organized into hierarchies, one subserving another. In the animal kingdom individual natures are organized into larger wholes, as in bisexual reproduction and in the communal life of gregarious creatures. These integrations within one kingdom are useful to the life and activity of the natures of a higher kingdom. "Plants are for the sake of animals, and animals are for the sake of men."[19] Now all of this interweaving of natures into orders, of individual goods into common goods, entails no multiplication of actualities. Only individuals exist; orders are in them, and have no existence apart from them. This is not to say that individuals organized in a whole are not different from, and something more than, the same number of unrelated individuals; it is only to insist that the difference is a difference within the individuals themselves. In the very structure of the individual nature there exists in predetermined

[15]"quia ejusdem ad seipsum non est ordo." *De Potentia,* VII, 11.

[16]Si autem quae distinguuntur in nullo convenirent, unius ordinis non essent." *In De Div. Nom.,* IV, i.

[17]"Includit etiam tertio rationem ordinis, ex qua etiam ordo in speciem contrahitur. Unde unus est ordo secundum dignitatem, alius secundum ordinem et sic de aliis." *In I Sent.,* d. 20, 1, 3 ad 1.

[18]"omnes partes sunt propter perfectionem totius, sicut et materia propter formam; partes enim sunt quasi materia totius." *Sum. Theol.,* I, 65, 2. "Forma autem alicujus totius, quod est unum per ordinationem quamdam partium, est ordo ipsius: unde relinquitur quod sit bonum ejus. *In XII Metaph.* xii.

[19]*In XII Metaph.,* xii.

form the higher orders to which that individual belongs. To be sure, in its finality an order is like a nature: the purpose is the defining, the unifying principle. But an order is really only a quasi-nature, for it is not a principle of activity distinct from the constituent individual natures.

For St. Thomas the greatest of all orders is the universe itself. His description of this order illustrates beautifully the requirements of order in general. The essential element, he says, is the purpose. When we wish to assign a purpose to any whole—for example, man—we find four things to be true: 1) each single part exists for the sake of its activity, as the eye for seeing; 2) the more "ignoble" parts are for the sake of the more "noble," as the senses for the intellect, and the lungs for the heart; 3) all the parts exist for the sake of the perfection of the whole, in the relation of matter and form; and 4) the whole man is for the sake of his own particular extrinsic end, namely, to enjoy God. Now these same things are true of the whole which is the universe: all creatures—its parts—find their end in their proper activity and perfection; the less noble creatures are for the sake of nobler ones, as, for example, the lower animals for man; single creatures are for the sake of the perfection of the whole universe; and the whole universe, together with its single parts, is functional with respect to God, its end, inasmuch as in its parts, by a kind of imitation, God's goodness is represented: the universe exists *ad gloriam Dei.*[20] The universe thus has its intrinsic and its extrinsic end, its own organization and the glory of God, respectively. The purpose of an army is twofold in the same manner: internal order is necessary for the perfection of the army in itself, but this is only a means to a transcendent purpose, that in the mind of the director of the battle.[21] In order to be a good soldier, each member of the army must perform the functions of his station; in so doing he helps achieve the unity and perfection of the army in itself, and at the same time subserves the leader's objective. Likewise for each denizen of the universe, a number of alignments and ends merge to form its single nature; in its natural activity it achieves other ends in addition to its own private destiny.

[20]*Sum. Theol.,* I, 65, 2.

[21]*In XII Metaph.,* xii.

The relation of one class of creatures to the universal whole, however, is exceptional. By virtue of its ability to know and to love, the rational being, unlike other creatures, does not glorify God only by means of its membership in the universe. Its direction towards God is direct and immediate: "creaturae rationales speciali quodam modo supra hoc habeant finem Deum, quem attingere possunt sua operatione cognoscendo et amando." [22]

We turn now to the subject of man, to investigate his nature and its law (Chapter III, Natural Law), and the special way in which he enters into an order (Chapter IV, Human Law).

[22] *Sum. Theol.*, I, 65, 2.

CHAPTER III.

THE NATURAL MORAL LAW

We have seen that for St. Thomas the universe is a truly unified system, an orderly whole. In spite of the diversity of their natures, all things are related to each other in their participation of the universal unity. However, this common element shared by their activities—and hence by their natures—does not preclude the plurality of natures. The universe is an order, and an order presupposes distinction among the things ordered; "omnia quae sunt in universo, sunt aliquo modo ordinata, sed non similiter omnia habent ordinem, scilicet animalia marina, et volatilia, et plantae." [1] What, then, is the peculiar nature of our special object of interest, man? He is in the universe, and therefore a member of the universal order, but how is his participation peculiar, how does he differ from the other members of that order?

We are moved to the same question once we have examined natures in general. Things must enclose a principle explaining their activity, some source of the movement they enjoy. Furthermore, since no action would take place unless it were limited to the effectuation of one out of several possible alternatives, this spring of activity in a thing must have some sort of definite form, enclosing in a pre-established way the end of the action. This positing of natures, we saw, is not only a metaphysical necessity, a belief based upon a requisite perceived in *being;* it is also both a principle and a *probatum* of science. All things have natures. But what everything has in common cannot serve as a *fundamentum divisionis.* What is it that differentiates one thing from another? It must be a principle included in the nature, for the nature *is* the thing, the thing as active. Again we come to the problem, What is the pecularity which distinguishes the human nature from all other natures? Before we can know that some activity is natural for man, and some not, we must know that there is a determinate nature in man.

It has been the prevailing mood in modern thought, especially since Darwin, to minimize the difference between man and animal, to attend only to similarities and to conceive of differences in terms of quantity rather than quality. Man is the animal

[1] *In XII Met.*, xii.

with the highest degree of neural complexity; psychology is a department of biology. The view has its repercussions in ethics: nature is called in to sanction certain conduct, but the only nature recognized is that of the animal—as Chesterton put it, "because there is no morality in nature, there is no natural morality." Indeed, such a use of the term *nature* was current long before the age of modern philosophy. As we noted above, Aristotle began his discussion of nature by examining the opposition expressed in popular language between *natural* and *artificial* (or man-made). And in the terminology of St. Thomas himself the word *natural* often denotes things infrahuman:

> "Secondly, nature in man may be taken as contrasted with reason, and as denoting that which is common to man and other animals, especially that part of man which does not obey reason. And in this sense, that which pertains to the preservation of the body, either as regards the individual, as food, drink, sleep, and the like, or as regards the species, as sexual intercourse, is said to afford man natural pleasure."[2]

This is the sense in which

> "certain special sins are said to be against nature; thus, contrary to sexual intercourse, which is natural to all animals, is unisexual lust, which has received the special name of the unnatural crime."[3]

However, such is not the connotation in the term *natural law*. Here the object is human nature in itself, that is, a special kind of animality. The differentia dividing the genus "animal" in Scholasticism is well-known: *Homo est animal rationalis.* I shall not try to demonstrate that the difference between man and the other animals is one of kind; that would lead us too far away from the problem we are investigating. Nevertheless, one aspect of such a proof is pertinent to our interest in the natural law and the peculiar manner in which man possesses the causal principle, nature.

The nature belonging to a physical (that is, nonliving) thing is wholly determined in its action. Such a thing inclines in only

[2]I-II, 31, 7. (Hereafter, unless otherwise indicated, all references will be to the *Summa Theologica.*)

[3]I-II, 94, 3 ad 2.

one direction, and that towards the end which befits the essence of the thing. Ascending the scale of beings, we come upon a great difference in the activity of beings that possess knowledge. Part of the activity natural to a knower is the assimilation, so to speak, of the forms of other things. As Aristotle said, "reason is . . . of such a character as to *become* all things,"[4] and St. Thomas echoed him:

> "Et sic anima hominis fit omnia quodammodo secundum sensum et intellectum, in quo cognitionem habentia ad Dei similitudinem quodammodo approprinquant, in quo omnia praeexistunt."[5]

Whereas the physical things are impelled only towards that one goal that befits their determinate nature, in knowing beings the horizon of appetible objects is widened to include things they apprehend.[6] However, knowledge alone does not bring freedom; only that knowledge which is peculiar to man completely liberates the nature from a determined history. Brutes are subject to a kind of psychological determinism. Although the power of apprehension extends the range of their activity to the perception and consequent conation of objects outside them, thus releasing them from the domination of the blind inner force of physical natures, nevertheless necessity still rules—the step is but from prison cell to prison yard. Insofar as man is an animal he too shares in this limitation; of themselves the senses—animal parts—have no choice in their actions; their power is limited to concrete objects, as is their consequent natural inclination. "According as they [the sensitive powers] act from natural instinct, they are ordained to one thing, even as nature is."[7] The behaviorists are quite consistent when, after excluding any perceptive faculty above sensation, they conclude that man is a machine the actions of which are touched off automatically by concrete stimuli, an organism superior to lower natures only in the variety and range of those eligible stimuli; in that case too

[4]*De An.*, III, 5; 430a10.

[5]I-II, 80, 1.

[6]Et haec superior inclinatio pertinet ad vim animae appetitivam, per quam animal appetere potest ea quae apprehendit, non solum ea ad quae inclinatur ex forma naturali. *Ibid.*

[7]I-II, 50, 3.

it is to be expected that the study of animals will take a major place in human psychology.

The true hallmark of humanity is the possession of a new technique of knowledge, a process that cannot be reduced to terms of sensation. We have already taken notice of the distinction between sensation and intelligence, image and idea, and here again it is the supremely relevant consideration; presupposed in a special way by metaphysics, more fundamentally it is the cachet of all distinctively human knowledge. Now, in establishing that the recognition of the presence of intellect entailed a commitment to the validity of metaphysics, we were interested in but one aspect of intellectual activity: the apprehension of truth. But in the problem of natural law our direct concern is the human being as active. We now want to know how the presence of intellect affects the dynamic side of man, what modification it effects in the working of the natural principle of activity. How do the acts issuing from the nature of man differ from those of his generic fellows, the other animals?

Is it legitimate thus to assume that intellect shows itself in the acts of man? Granting that all human life has its speculative moments when it walks in the garden of universals, is it necessarily true that every man completely bridges the two worlds, infusing all his living with thinking? No, it is not. There are hundreds of things a man does every day which fall outside the category of *human acts*.[8] The statistician of men's individual acts would have to conclude that man is rarely human. The definition "rational animal" is essential in both its parts; we must not forget that the specific superiority of man does not destroy the generic community. St. Thomas is careful to delimit the meaning of *human act*, and in his definition we see the answer to our question, What effect does the presence of intellect have upon human activity?

> "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."[9]

[8]Cf. I, 82, 4; and *Cont. Gent.*, III, 154.
[9]I-II, 6, 1.

Then it is knowledge of the end that makes an act voluntary, and only those acts which have been performed in view of an end are human acts. Is it not true, though, that according to Thomistic metaphysics all natures without exception act for an end? Right: unless the end were pre-existent in some way, determining the choice between alternatively possible acts, no being would ever act. The question here, however, is with regard to the locus of that pre-existent end. Physical things do possess an intrinsic principle of activity, but the end for which they act is possessed only in a concretized manner:

> "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. Wherefore suchlike things are not said to move themselves, but to be moved by others."[10]

Things that know the end for which they act possess that end as an intrinsic principle, along with the intrinsic principle of action as such.[11]

However, there are two ways in which an end is known, only one of which is operative in distinctively human action.

> "Perfect knowledge of the end consists in not only apprehending the thing which is the end, but also in knowing it under the aspect of end, and the relationship of the means to that end. And such knowledge befits none but the rational nature. But imperfect knowledge of the end consists in mere apprehension of the end without knowing it under the aspect of end, or the relationship of an act to the end. Such knowledge of the end is exercised by irrational animals. . . . "[12]

Thus does St. Thomas disengage the differentia of human action. It is not enough that the end be perceived—it is not distinctively human in me that my mouth waters at the sight of food, although perception of an end is entailed in that act. The end must be grasped as an end; food becomes a humanly perceived end only

[10]*Ibid.*
[11]For a compact presentation of St. Thomas' description of the human act, see Gilson's *Saint Thomas d'Quin*, Chapter II.
[12]I-II, 6, 2.

when it is apprehended as something bearing the character of the good as such. Now the good as such is an abstract notion, not limited to any concrete individual thing; it is an aspect of things, not to be apprehended without an abstractive process. Just as intellect is the decisive, differentiating factor in the essences of knowing beings, so is it in differentiating the activity of those beings. The action that is motivated by an abstract idea bears the signature of the intellect: the

> "sensible good is always a concrete thing: the animal perceives a certain good thing and goes after it. Not so is the usual and proper object of desire in the case of man. Whilst the animal is incapable of distinguishing in the thing perceived *that which precisely constitutes its goodness,* it is the characteristic of man who knows things in an abstract way to consider goodness thus abstractly, and consequently the desire engendered by this knowledge has for its proper object not the concrete good but the good as such, the abstract good or that by reason of which concrete things are desirable and worthy to be sought."[13]

Or in the language of St. Thomas,

> "Brutes are moved towards the end not as beings considering that by their motion they can attain the end—which is proper to an intending being [that is, a rational being with an *intention*]—but as things which desire an end are moved by natural instinct towards an end, as moved by another even as other things are moved naturally."[14]

Hence in man we find a new manner of natural activity. Since he is a being, the metaphysical concept of nature is still applicable to his activity: the nature of any man is the principle of his activity, at the same time that it is defined by an end. But the new mode in which the end inspires the activity introduces an essentially different kind of activity. The most remarkable aspect of this new form of natural activity is the freedom that accompanies it. In physical beings the nature is confined to the expression of one blind force, which tends in a certain direction only because "the form whence action results is . . . stamped into the very texture of the thing."[15] In animal

[13]Mercier, *A Manual of Modern Scholastic Philosophy,* I, 263-264.

[14]I-II, 12, 5. Cf. I-II, 13, 6. *De Veritate,* 17, 3; 24, 12. *In IV Sent.,* d. 33, 1, 1. *Cont. Gent.,* III, 111.

[15]E. A. Pace, "The Teleology of St. Thomas," *New Scholasticism,* I, p. 219.

natures the end plays a new rôle: activity begins by an impulsion engendered by the perception of outer things, as well as by the force springing from the physical character of the animal body; but necessity still rules. True freedom comes in with man. The end governing natural activity undergoes another transformation in its functioning in human beings; because he can know the good in its essence, man can choose between concrete goods—he is freed from the animal's necessary subservience to external rule. The liberation is not total; man, like other bodies, is limited to activity in conformity with the laws of mechanics, and as an animal he is a complex of biological events and needs. Nevertheless there is a part of him that escapes the domination of matter.

How does the presence of reason effect this liberation? Irrational animals are linked to things, the drives in their nature are fulfilled in the attainment of those concrete things. The animal instincts in men are still linked to concrete things, but reason—knowing *essential* reality, in this connection the *good*—is not thus satisfied by any one or several concrete goods. Because it apprehends the good in general, it is lifted up and out of submergence in the contingent world of time and place.[16] With its power of comparison it can hold two possible concrete goods before its eyes at one time for evaluation. With that same power it can judge the suitability of a certain concrete good at a certain moment in time, by measuring it against the notion of the good in general. By such deliberations it also judges among the inclinations that the animal aspect of man's nature sends out clamoring for attention. Furthermore reason is not only a judge weighing and ordering the impulses of animal nature; reason is a very part of the human nature. Man is a *rational being.* As part of the principle of activity in the human being, reason is not only a judge, it is itself a claimant, with its own need and its own satisfaction.[17] Its *élan* finds one

[16]*Cont. Gent.,* III, 112.

[17]"For St. Thomas reason does not merely serve as a subjective light in a virtuous life, the eye so to speak, which sees the duties to be performed, but . . . it constitutes rather the very end of moral action since it is by reason or intellect that man reaches his final end. . . . When St. Thomas employs the phrase *secundum rationem* it seems to have suggested to him the two conceptions of reason at one and the same time. He thought of reason as a light

expression in the office of arbitrator of the animal instincts, but this fulfillment, though necessary, is not all that reason demands. With the power of apprehending objective truth (essences and causes, the ultimate principles constituting being) comes the need of getting that knowledge; with the capacity for knowing God comes the need for worshipping him; with the knowledge of man's nature comes the desire to live with other men (for other reasons than the merely materialistic ones) and the need for dealing with them on a rational level; with the perception of beauty—an intuition of reason—comes the need for expressing it; with the power of speech—again the gift of reason—comes the love of speech for its own sake.

All these facets of the life of reason have their basis in reason as principle of activity. Just as a horse's moving toward a pile of hay is an event effected by a natural inclination, so is a man's taking medicine the expression of a natural inclination:

> "ex hoc homo dicitur prae caeteris animalibus liberum arbitrium habere, quia ad volendum judicio rationis inclinatur, non impetu naturae, sicut bruta."[18]

Hence rational beings, like all other active beings, have natures; and a human nature, like all other natures, shows a twofold character: it is a principle of activity, and, in expressing an end, it specifies, gives a determinate character to, that activity.

Precisions in St. Thomas' terminology mirror man's possession of this double aspect that is found in any nature. He distinguishes between intellect and reason on the one hand, and will on the other. "The will is the name of the rational appetite;"[19] it therefore refers to the human nature as a principle of activity, the source of activity: "motus voluntatis est inclinatio quaedam in aliquid; et ideo sicut dicitur aliquid naturale,

or measure and also of it as nature. But what is important to notice is that the concept of reason as nature is the more important one and that the other is merely a consequence of that." Rousselot, *Intellectualism*, p. 198 and note.

[18] *Cont. Gent.*, I, 88, "Voluntas divina." Cf.: "Habet enim humana mens duas contrarias inclinationes. Unam quidem in bonum, ex. instinctu rationis. . . .Alia inclinatio inest humanae menti ex inferioribus [i. e., the instincts of animal nature]."

[19] I-II, 6, 2 ad 1.

quia est secundum inclinationem naturae."[20] Intellect and reason, however, are powers of apprehension, the intellect the power of intuition of essences and first principles, and reason the power of combining and dividing and inferring—discursive intellection. This cognitive side of man brings into the structure of the human act the defining principle of nature, the end. Just as all natures impel their possessors towards an end, so does man's nature impel him towards an end, an end which is is presented and defined by his intellect and reason. Since both these powers are parts of one nature, the acts of that nature will be the effects of both acting together.[21] Before there is any volition, there is an intuition of the good in general, and in this respect it is intellect that enjoys priority. Yet in the reason's deliberation over alternative concrete goods presenting themselves to the agent in a particular spatio-temporal location, the will's urge towards the general good is the impetus that sets to work the evaluating reason; for

> "the will wills naturally not only the object of the will [the general good], but also other things that are appropriate to the other powers; such as the knowledge of truth, which befits the intellect; and to be and to live and other like things which regard the natural well-being; all of which are included in the object of the will, as so many particular goods."[22]

Thus the *élan* of will takes over and adopts as its own all the many inclinations—including the intellect in search of means to the end—making up the complex creature, man. By virtue of reason's perception of the diversity of needs and of suitable concrete goods, the unity of the will's inclination towards the good in general ramifies into a plurality of particular inclinations towards those concrete goods. Each of these particular inclinations is inspired by the breath of reason-guided will as a necessary condition of a human act. Without that deliberate volition at its heart the act would not be a human act; with it, the act is human, even though—as is usually the case—it involves the use of other powers and members of the organism. Any human act—good or bad—whether it is merely a thought or

[20] I, 82, 1.

[21] I-II, 17, 1.

[22] I-II, 10, 1.

involves also an external operation, must be a considered, chosen deed, incorporating the two factors of volition of end and consequent deliberation over means.[23]

Two consequences, important for our study of law, result from the intellect's contribution to voluntary acts, those acts which are peculiarly natural to man. We saw that the end is the defining principle in the natural activity of any being. Now since the end of a human act is the end as apprehended, there is nothing to prevent a man from frequently acting for a mistaken end:

> "in order that the will tend to anything it is requisite not that this be good in very truth, but that it be apprehended as good. Wherefore the Philosopher says (*Phys.* ii.) that 'the end is a good or an apparent good.' "[24]

This simple fact—that human reason is fallible—is responsible for a good deal of the variety found in both moral codes and legal systems.

Again, reason's share in voluntary acts shows itself in the nature of command.[25]. A command, says St. Thomas, can be levied on oneself or on another;[26] the essential thing is that the commander and the commanded be capable of understanding, for command is an act of reason. Such a description is startling to us, who associate the idea of command more with the ideas of sheer authority, mastery, and control. Does St. Thomas exclude these elements completely? No, it is just that reason is the dominant note:

> "Command is an act of the reason, presupposing, however, an act of the will . . . Now the first mover, among the powers of the soul, to the doing of an act is the will. . . . Since, therefore, the second mover does not move, save in virtue of the first mover, it follows that the very fact that the reason moves by commanding is due to the power of the will."[27]

The human act derives its creative force from the human nature;

[23] I-II, Questions 6-17.
[24] I-II, 8, 1. Cf. 13, 5, ad 2.
[25] I-II, 17.
[26] 17, 3 ad 1.
[27] I-II, 17, 1.

more particularly, since it is a distinctively human expression, from the will; hence commanding, itself a human act, is rooted in the will, which is one of those natural inclinations in reality which are "principia omnium supervenientium".[28] But the end desired by the will is an object that the reason presents and illuminates, thereby giving form and shape—the essential element of a thing or act—to the volitional *élan*. The essence of a command lies in the content as "declared or intimated" by the reason in either of two ways:

> "First, absolutely: and this intimation is expressed by a verb in the indicative mood, as when one person says to another: 'This is what you should do.' Sometimes, however, the reason intimates something to a man by moving him thereto; and this intimation is expressed by a verb in the imperative mood; as when it is said to someone: 'Do this.' "[29]

Although this description fits the commands of one person to another, the most common command is that issued by the reason to inferior inclinations in the same human nature: it is within the individual himself that reason enjoys a primacy over will; otherwise, indeed, there would be no foundation for a jurisprudence that insisted on the precedence of reason over will in social law-giving. And with reason enthroned within the individual—the only actual entity constituting the social whole—there can be no legitimate reversal of the order of these powers in social authority.

Law

Up till now we have been occupied with the rational being, active by virtue of the nature within it, directed in that activity by virtue of the end as apprehended by reason. We have regarded reason in both its aspects, as an inclination with its own exigencies and as a light revealing the path into the future for the nature as a whole, evaluating inclinations to be satisfied at a particular time and place. However, we have looked upon reason almost exclusively in its ontological character, that is, as a power, a faculty in the human nature which performs acts

[28] II-II, 155, 2.
[29] I-II, 17, 1.

of judgment. Now St. Thomas insists that law is of the reason. But law is evidently not the power of reason, it is not the light itself, it is rather the object illuminated. This is what St. Thomas means when he calls law an extrinsic principle of human acts,[30] in opposition to the intrinsic principle of reason as a faculty.

> "Just as, in external action, we may consider the work and the work done, for instance the work of building and the house built; so in the acts of reason, we may consider the act itself of reason, i. e., to understand and to reason, and something produced by this act."[31]

Of the three products of reason—idea, proposition, and argument—law comes under the second, the proposition. "It belongs to the law to command and to forbid,"[32] and, as we saw, the form of a command is an "intimation or declaration," a statement of something to be done. It is time now to look at these propositions which reason produces for the sake of human action. Our problem: What is the natural law? But first, What is law in itself, whether natural or otherwise?

St. Thomas' first step in defining law is to establish its rational character. He begins by referring to the everyday notion of law as something regulating our acts: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting."[33] He then links to this ordinary connotation the results of his investigation of human acts, which are the material that law molds and directs: "Now the rule and measure of human acts is the reason, which is the first principle of human acts." In a succinct clause he sums up the whole argument he has previously presented in support of the primacy of reason in human acts; "since it belongs to the reason to direct to the end, which is the first principle in all matters of action."[34]

Since law is a rule of action, and all action is essentially determined by its end, the end takes its place as the most essential part of a law. The law is a product of reason, and in practical matters reason is ruled by the end, hence reason's place in propositions of law is as a medium, a subsidiary thing with its *raison d'être* outside itself, namely, in the end of action. We must think of the end, then, as the very kernel of law. Law is rational because it is for a human end, and in human action the end is discovered, apprehended, and presented by reason.

[30] I-II, 90, *Proemium.*
[31] I-II, 91, ad 2.
[32] I-II, 90, 1, *Sed contra.*
[33] I-II, 90, 1.
[34] *Ibid.* Cf. *Cont. Gent.*, III, 114, and 115.

In characterizing the end of law, St. Thomas points to another aspect of the teleology that permeates reality: the order in things, the universal ends within individual ends. Law is not simply an ordination of reason for the sake of a good, but rather, "every law is ordained to the common good";[35] "any other precept in regard to some individual work must needs be devoid of the nature of a law, save in so far as it regards the common good."[36] Since we are here speaking of the essence of law—hence of the laws of morality as well as the laws of rulers—and since all human acts are subject to the moral law, thus to introduce the common good into the very definition of law is tantamount to a declaration that every human act encloses an essential reference to the common good of all men. It is a bold avowal of the solidarity of mankind.

This good to which all laws are directed is common in two respects, both of which are based upon the unity of the human species: "the first principle in practical matters, which are the object of practical reason, is the last end: and the last end of human life is bliss or happiness"; [37] this is the one ultimate which all men seek in every conscious moment, the first motive presupposed in every practical act just as the principle of identity is formally prior in every act of the speculative reason. To say that men share the common goal of happiness is only another way of stating that rational beings, as rational, have a grasp upon the good as such and that their idea of that good is the ground of all their voluntary acts: the finality of their activity, different from that of infrarational natures, is operative by virtue of their own personal intuition of the activating end. The good which enters into the definition of law is common in this respect because all men are alike in their possession of rea-

[35] I-II, 90, 2.
[36] *Ibid.*
[37] *Ibid.*

son and will; the happiness which is the last end for all men is a happiness that depends upon reason.[38]

St. Thomas supplies a second signification for *common,* one gained from a consideration of the nature of man's happiness:

> "since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness."[39]

Could there be a more definitive statement of the sociality of man? Bear in mind that we are here investigating the *essence* of law, that consequently our resultant description must fit every kind of law, the moral as well as the law of the state. It is evident, then, that St. Thomas conceives of the ends of personal action as inevitably bound up with social ends. "Universal happiness" conditions individual happiness. If the individual is to achieve his end, act naturally, become as perfect a human being as possible, he must be a part of a community; living by and for himself, he is not a whole man. Teleologically considered, every human act I perform—since human acts are ruled and measured by law—includes, in its end, a reference to the human acts of other men, whether these other men are my fellows in the community of all men or in that of my country; the ends of my fellows and the ends of groups to which I belong are all intertwined within the end peculiar to me as an individual. The good of the order is assimilated into the goods of the members, the goods of the members are unattainable apart from the good of the order.[40]

Law, then, is 1) an ordination of reason, 2) directing human acts towards the common good. From the second of these requisites follow two others. Since law is a principle of coordination in a human order, with its purpose the common good, its institution belongs "either to the whole people or to a public personage who has care of the whole people: since in all other matters the directing of anything to the end concerns him to whom the end belongs."[41] Here St. Thomas, speaking of but

[38] I-II, 1, 7 and 8.
[39] *Ibid.*
[40] See Chap. II.
[41] I-II, 90, 3.

one kind of law—that of the state—appears to forget that his present task is to define the essence of law in general. In what sense can it be said that "the whole people" is the rightful originator of the natural moral law? However, St. Thomas' discussion of the latter makes it clear that it too shares in this third note of law—its institution by one "who has care of the whole people"—for the establishment of the natural moral law is nothing more than the creation of a human nature, which includes among its endowments a capacity for knowing itself, that is, for reading the law it must live by. Obviously the lawgiver here is the nature-maker, God.

Finally, before a rule of reason, formulated by a ruler for the sake of the common good, can become a law, it must be promulgated.[42] Otherwise, indeed, the rational creatures whose actions it is designed to guide will not be able to grasp it as a means to the good; they will not be given the opportunity to use it as a directive in their deliberate acts. To the objection that promulgation cannot be essential to a law since in one case—the natural law—no promulgation is needed, St. Thomas answers: "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[43] This is not to be construed as a credo in Lockian innate ideas. St. Thomas knows well enough that no intellectually held idea or proposition exists which has not been abstractively wrested from the data of the senses; he would count it absurd to conceive of the intellect as an eye perceptive without lifting its lids, the external senses.[44]

Law, then, is "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[45] In these four characters we find a complete definition, one that limns the essence of all law—eternal, natural, and human. We can understand now why St. Thomas refused to designate as laws those natural inclinations compris-

[42] I-II, 90, 4.
[43] I-II, 90, 4 ad 1.
[44] The process which yields our knowledge of the natural law will be examined in the section immediately following.
[45] I-II, 90, 4.

ing the activity of the infrahuman world. Reason is the very soul of law. To it are linked the other attributes of law: reasonable action is for an end; the end must be common because men are social, and it can be common only because men can, by virtue of their possessing reason, communicate with each other in a common end; the efficient source of law, the director of the whole community, must be reasonable, for only reason can impart the unity of order to a multitude, fusing the acts of individuals into the harmony of a whole; and the law must be promulgated because its recipients are beings that act for an end only by seeing the end presented to the reason as a good.

. . . . . .

The Natural Moral Law

Upon the eternal law, which is the most extensive system of proclamations of practical reason, all other legal orders are based. We do not mean the law of God disclosed by Bible and Church—more deep-lying than a revelation occurring in time, the eternal law is the "very Idea of the government of things in God the Ruler of the universe."[46] The fact that a *lex aeterna* operates is learned along with the fact that there exists a transcendent Cause for the universe, and it depends upon the same intellectually perceived, metaphysical truths. Those grounds for the existence of the eternal law do not concern us here, for, as I have already said, the idea of the natural law, together with the content of its prescriptions, can be grasped without reference to the ontological basis of nature. When St. Thomas declares that the natural law is "the rational creature's participation of the eternal law", he does not presume as a necessary condition of such a participation, that the rational creature must needs know the eternal law as such before he can see himself as subject to the natural law.

> "Hence the Psalmist, after saying: 'Offer up the sacrifice of justice,' as though some one asked what the works of justice are, adds: 'Many say, Who showeth us good things?' in answer to which question he says: 'The light of Thy countenance, O Lord, is signed upon us':[47] thus implying that 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."[48]

Signatum est super nos lumen vultus tui, Domine: eternal law and natural law are not two distinct laws in man, the natural flowing from the eternal; they are one and the same law[49]—by apprehending dictates of the natural law you are participating in a knowledge of the eternal law. Subjective awareness of God's having promulgated the natural law is not a necessary prerequisite for the perception of the obligation to follow that natural law.

The natural law's participation in the eternal law, like anything else pertaining to a nature, shows a double aspect: when we attend to the identity of content obtaining in the natural law and in the human department of the eternal law, we are looking only at the formal side of the law: what reason reveals as our duties is what the divine law commands. The participation, however, comprises another element, the dynamic. The two aspects of any creature's share in the eternal law are inseparable, for they are the principles necessary to activity, the power and its shape, the urge and its direction.

> "Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of 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."[50]

We have already examined the character of the inclinations proper to the nature of man, how the power of reason has the capacity for infusing the whole animal nature of man, and what new inclinations above those of our animality enter with the introduction of reason. Now, reason's own inclination to

[46] I-II, 91, 1.
[47] *Psalms*, iv, 6.
[48] I-II, 91, 1.
[49] I-II, 91, 2, objection 2 and its answer. See also 71, 2 ad 4: "Whatever is irregular in a work of art is unnatural to the art which produced that work. Now the eternal law is compared to the order of human reason as art to a work of art. Therefore it amounts to the same that vice and sin are against the order of human reason, and that they are contrary to the eternal law."
[50] I-II, 91, 2. See Roland-Gosselin, p. 62.

rule man and to attain to other ends surpassing the lower drives of his nature is nothing more nor less than the natural law in its dynamic aspect.

> "Among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore 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."[51]

Indeed, this dynamic aspect of natural law is, in a sense, prior to the natural law taken as a system of practical rules, for these latter propositions are attained only by the reason in operation, that is, by reason fulfilling its natural appetite for knowledge.

> "Every act of reason and will in us is based on that which is according to nature . . . for every act of reasoning is based on principles that are known naturally, and every act of appetite in respect of the means is derived from the natural appetite in respect of the last end."[52]

The nature of man is such that he strains towards a knowledge of being—here it is the apprehending intellect that is functioning—and this naturally acquired intuition propels man towards the goodness of the being he has beheld—and here it is the will at work.

But what of the ramifications of this instinctive intuition of the good? To them we must look if we are to unfold the natural law in its formal content. I repeat, however, that our objective is not to develop that formal side of the natural law into its explicit injunctions and prescriptions. We shall rest content after following St. Thomas only into the fringe of the subject, for that is all that is necessary for our interest in the relation between the natural law and the human law. What we desire is an understanding of the conditions under which the one human nature impels man to such a variety of acts, all natural, all attributable to the inclination at the heart of human movement, all towards a single general end. Once we see clearly the cause

[51] *Ibid.* Italics mine.
[52] *Ibid.*, ad 2.

and conditions of the divarication occurring where the aorta forks into two smaller arteries, there is no call to descend to the capillaries.

In his explicit discussion of natural law, the problem engendered by variety and change is before St. Thomas' mind from the start. Here are the questions he puts to himself: If a man's nature is something abiding, where is the locus of its law, what is the manner of its continuous presence in the soul? Does the natural law contain several precepts or one only? Does the natural law prescribe all virtuous acts? Is it the same in all men? Can it be changed? Can it be abolished from the heart of man?[52] Unity, immutability, eternality in things human! These stumbling-blocks for modern moralists and jurists were difficult ideas too for the thirteenth-century mind, with its sharp sensitivity to the contingency and change besetting man's earthly history.

We already know the first step that leads from human nature to human act: simultaneously with its natural intuition of being, the intellect sees the good, and therewith the end of all action. When being is its formal object, the intellect is *speculative;* when good is that object, then it is *practical.* The parallel between these two sides of intellectual activity does not stop here, at intuition, it holds just as truly in the further act of judgment. In speculation "the first indemonstrable principle is that 'the same thing cannot be affirmed and denied at the same time,'" a judgment that follows immediately upon the intellect's juxtaposing its concept of being and its concept of not-being (derived by the mind's power of constructing for any idea it possesses, *X*, another idea whose content is negative thereto, X); "and on this principle all others are based, as is stated in *Metaph.* iv." In the practical reason the first indemonstrable principle is constructed by means of the same technique of dividing a positive idea from its contrary. Since the practical reason's first positive idea is of the good—that is, of "that which all things seek after"—the proposition which the reason holds as the logically first principle of all its practical thinking is this: "Good is to be done, evil avoided." By the selfsame act of knowing the

[52] These are the problems posed in the six successive articles of the question dealing with the natural law: I-II, 94, 1-6.

good, I know that it is to be done; knowledge of the good is the bridge between speculation and life. And since natural law is the measure of human action, we have here the first precept of the natural law.[53]

Such is the unity of the natural law. Just as the principle of non-contradiction rules the speculative reason, so is this single, simple principle the presupposition, the necessary ingredient, of all acts of the practical reason:

> "All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good or evil belongs to the precepts of the natural law as something to be done or avoided."[54]

Now, the good in general—*id quod omnia appetunt*—is relative in its essence, relative to the natures of the things that seek it. For every specific thing there is a specific good to be sought; for every particular act, a concrete particular good. The only common aspect in the many concrete goods, bringing them under the category of good, is the fact they are sought. Hence to give specific content to the good that the first precept of the natural law commands be done, we must turn our attention to the specific seeker thus commanded. "Man," as Ernest Hello says, "may be defined as a creature of needs"; and his life is one continuous search for their satisfaction. The search, in St. Thomas' language, is the result of the motive power of many "natural inclinations".

These inclinations St. Thomas groups according to the metaphysical grades in human nature: as an individual substance each man seeks the maintenance of that substantiality, i.e., the preservation of existence, the character of substance: "by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law."[55] Further, as animal, man is inclined towards additional goods, such as sexual intercourse and the education of offspring, and these also are part of the natural law. And, as we have seen, the crown of man's nature, reason, likewise evokes new needs and new inclinations:

[53] I-II, 94, 2.
[54] *Ibid.*
[55] *Ibid.*

> "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; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things. . . ."[56]

At the heart of the moral order, then, we discover plurality. In the human nature itself—the essence of every man—the natural law diversifies itself, by reason of the microcosmic complexity of man, into many rules of behavior centered in the many natural inclinations.[57] Yet the pluralism is not definitive—"All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept."[58] Seized by the intellect, acting as the executive of life (here the light lighting the good rather than lighting truth as such), the general all-inclusive command, *Do the good,* implies by its very indeterminacy the completion it receives in the diversification into concrete goods satisfying concrete inclinations; yet no less it is still, in the completed human acts, the vivifying principle—the form, the spirit—of all human action. The plurality of our conduct is infused with this unity. The manifold inclinations are prerequisite for the completed action—even as in the complete action of any nature—but they are without *human* significance apart from their endorsement by the will.[59] They become human only when they are brought under the rule of the intellect, when they are in truth a concretization of the general mandate, *Do the good.* In this way is the natural law one. "Although reason is one in itself, yet it directs all things regarding man; so that whatever can be ruled by reason, is contained under the law of reason."[60]

We must not, however, be deceived by the apparent simplicity of the first precept as St. Thomas states it. At bottom it is far from the simple proposition that it appears to be. The mere *concept* of the good bears no connotation of "human"; it signifies a relativity, true, but a relativity not to a specific nature,

[56] *Ibid.*
[57] Gilson, *Saint Thomas d'Aquin,* p. 235.
[58] I-II, 94, 2, ad 1.
[59] This is why, properly speaking, only the will is good or evil.
[60] I-II, 94, 3 ad 3. Cf. also ad 2.

but to some nature in general. In the normative *proposition,* "Do the good," however, the good is defined by being considered as related to the specific *human* nature: it is "*I* must do the good," "I must do what is *good for me.*" And before "I" and "good" can be bound together in a single judgment, there must be grasped concepts of both these terms, of "I" as well as of "good." Behind that judgment, then, there reposes a reflex concept of the self, of the self as capable of choice and of acting for an end, in other words, a concept of man as a rational nature. Hence other formulations of the first precept are possible: "Act rationally," "Follow reason," "Live virtuously," or as St. Thomas himself suggests, *medium tenere, rectitudinem servare, et alia hujusmodi.*[61] But these are nothing more than various expressions of the same thing; every human act is proposed and performed under the consciousness that the agent must do that which is good for him.

With the discovery of this first precept we are face to face with the first immutability to be found in the natural law. Man's grasp of this first truth of the practical order is ineradicable. In all its deliberations and decisions about acts to be done, the intellect is alive to the necessity of doing good and avoiding evil. Presupposition of this principle is a necessary condition of human action: a human act is a deliberate act in view of an end; the agent in knowing the end as an end knows it as a good befitting a need that he apprehends in himself, in other words, he knows it as something to be acquired; by thus seeing the good, the agent therewith sees it as something to be done. It is evident, then, that the first precept of the natural law stands both unvarying as between men and unchanged through every single act —good or bad—that any individual moral agent performs. Does this mean that man knows no error in morality? No, it means only that no mistake is possible at this level of knowledge, no matter how easily we err in judgments of concrete moral facts.[62]

The importance of this immutable aspect of the natural law cannot be exaggerated. It is because we cannot escape our first intellectual apprehension of the human good, that we cannot ever escape the responsibility of our deliberate acts. Infrahuman

[61] *In III Sent.,* d. 37, 1, 4, ad 2.
[62] *De Ver.* 16, 3; 17, 1; 17, 2.

creatures have sight neither of the good in general nor of their peculiar good; as a result, they are not moral agents, they are under no *obligation* to act one way rather than another. We saw that freedom follows upon man's perception of his general good; now, freedom is accompanied by obligation: because we know the good in its essence, in the abstract rather than in mere concretized shapes and situations, we are lifted up out of the opaque night of necessary action into the daylight of choice; because we *can* choose between concrete goods, we are *obliged* to choose, and the first command in the natural law, which we apprehend at the same time that we grasp the good in general, is *Do the good.* Below the human level the casual *liaison* between a thing's nature and its activity is the causality of physical necessity; in man, though still a necessity, it is now not a physical but a moral necessity. The *élan* of nature is transmuted by the addition of reason: our rational nature impels us towards intellection, and intellection, by virtue of its grasp of the human good in general, brings both free activity and a rule of that free activity. By this special, sublimated nature that we possess we are given not an overpowering push that sends us willy-nilly through a lifetime of active days, but a push that goes only so far as to set us thinking, thinking about ends and means, unveiling to us the general obligation to live according to the truth we discover. The new necessity that comes from thought is a seen necessity rather than a felt necessity—I see what I *must* do *if* I am to achieve a certain end.[63] Now the first precept of the natural law formulates that obligation in its most general possible form, *Do the good.*

It is just because of its extreme generality that the principle can enter into every concrete practical judgment we make, bearing along with itself its obligatoriness. I am obliged to follow whatever decision my reason makes in a moral problem; it is my

[63] *De Veritate,* 71, 3: Of the two kinds of necessity the first, of coaction, rules infrahuman beings; the second can be imposed on the will: "Secunda necessitas voluntati imponi potest; ut scilicet necessarium sit hoc eligere, si hoc bonum debeat consequi, vel si hoc malum debeat vitare. . . . Actio autem qua voluntas movetur, est imperium regentis et gubernantis. . . . Ita etiam se habet imperium alicujus gubernantis ad ligandum in rebus voluntariis illo modo ligationis qui voluntati accidere potest, sicut se habet actio corporalis ad ligandum res corporales necessitate coactionis." See Taparelli, I, pp. 56-76.

duty to do that which my reason tells me is good for me, at every concrete juncture. Because the variety of possible concrete goods is infinite, the first principle of obligation must be as general as it is, presenting only the bare relation obtaining between the agent and the human good as such. In its formal aspect the first precept is extremely deficient; the human good in general, which it commands us to do, cannot be realized as such. Concreteness is the inevitable characteristic of human events, and no single isolated act of ours can achieve the essential human good. But however empty of content the first precept may be, however paltry the knowledge of concrete goods its notion of the good *per se* affords, the command, *Do the good,* does, nevertheless, formulate the obligation we live under. This dynamic function of the first precept is as real and necessary for every human act as its formal content is insufficient for so much as a single complete human act. In this intuition of the *ought* the dynamic energy of nature is converted into a rational form: any thing's nature is the source of all its activity, and in man this dynamic urge becomes, by virtue of the rational character of the nature, a perception of moral obligation, which is the soul of every human act.

In at least this one respect, then, the human acts of every human being are all performed under the white light of the natural law's first command. Does this unity of the natural law persist as we descend into precepts embodying decreasingly general delimitations of the good? Do all men find certain identical concrete goods to be invested with the obligatoriness of the first precept? That is, are men agreed, the world over, that human nature is characterized by certain identical explicit needs, over and beyond the universal need to do the good as one sees it?

To answer this question St. Thomas reverts again to the parallelism that exists between the speculative and the practical reason.[64] The two primitive intellectual intuitions, of *being* and of the human *good*, yield, respectively, the principle of identity and the first principle of the natural law. Now, in both lines of thought every man goes beyond these first fruits; again, in both there are remote truths that escape the knowledge of unlearned men—"thus it is true for all that the three angles of a triangle

[64] *In V Eth.*, xii; I-II, 94, 4.

are together equal to two right angles, although it is not known to all."[65] However, there is one important difference between the two: whereas on a speculative question two men cannot hold contradictory views unless one of them be in error, in practical matters this seeming anomaly can exist. Take, for example, the moral rule 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; for instance if they are claimed for the purpose of fighting against one's country."[66]

Hence, according to the varying circumstances there can be two contradictory practical judgments, each valid—viz., "I ought to return this depositor's goods," and "I ought not to." This difference between the products of the speculative reason and those of the practical is imputable to the matter they deal with, for, whereas speculative science is concerned only with abstractions, the purpose of practical science—the guidance of human acts—brings it face to face with particulars, concrete situations. Now the intellect is not capable of knowledge of the individual as such, all of its apprehensions being abstract; hence, metaphysical certitude is impossible in moral matters:

> "We can know in a general way what God wills . . . . But we know not what God wills in particular."[67]

> "omnis sermo qui est de operabilibus, sicut est iste, debet tradi typo, idest exemplariter, vel similitudinarie, et non secundum certitudinem . . . causae singularium operabilium variantur infinitis modis."[68]

> "omnia quae sunt apud nos justa aliqualiter moveantur."[69]

Hence a science of *necessary* truths is possible only under an abstractive method that precludes pronouncements about concrete particular facts; a science, therefore, such as ethics, purposing

[65] I-II, 94, 4.
[66] I-II, 94, 4.
[67] I-II, 19, 10, ad 1. Cf. 91, 3, ad 1.
[68] *In II Eth.*, ii.
[69] *In V Eth.*, xii.

to legislate for concrete situations, is doomed from the start, by a deficiency of its instrument the intellect, to fall short of the perfect (because abstract) certitude of metaphysics.

This is not to say that the science of ethics is illusory, that no universally valid truths exist beyond the first precept, that nothing is truly natural to man except his apprehension of obligation in the abstract, that no duties are universal save the duty to hearken to the voice of duty. In the first place, there are certain concrete acts prohibited by the first precept—although we cannot know certainly what positive act God wills us to do in certain situations, we do know that certain acts may *not* be performed in certain situations: we may not take another's property when our need is not extreme, we may not break our promises, etc. But there is also certitude to be found in general positive precepts, a certitude attainable only upon withdrawal from the realm of the concrete; and the greater the abstraction, the greater the necessity and immutability of the resultant positive commands:

> " . . . the more we descend to matters of detail, the more frequently we encounter defects. . . . In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles . . . the greater the number of conditions added, the greater the number of ways in which the principle may fail."[70]

Because human beings are not pure being, but only concretizations of being, *entia mobilia,* the humanly natural will not be the same for all men. Rules prescribing acts of a concrete character are part of the natural law in the sense of holding in many cases, rather than in all:

> "ea enim quae sunt naturalia apud nos sunt quidem eodem modo ut in pluribus, sed ut in paucioribus deficiunt; sicut naturale est quod pars dextra sit vigorosior quam sinistra, et hoc in pluribus habet veritatem; et tamen contingit ut in paucioribus aliquos fieri ambidextros, quia sinistram manum habent ita valentem ut dextram: ita etiam et ea quae sunt naturaliter justa, ut puta depositum esse reddendum, ut in pluribus est observandum, sed ut in paucioribus mutatur."[71]

[70] I-II, 94, 4.

[71] *In V Eth.*, xii.

In thus commenting on Aristotle, St. Thomas, however, is careful to add that abstract ideals, ideals derived deductively from the *essential notion* of humanity, are themselves objectively immutable, as immutable and eternal as the first precept of the natural law, whatever the mutability of that notion may be in the minds of individual men:

> "Est tamen attendendum quod quia rationes rerum mutabilium sunt immutabiles, sic quicquid est nobis naturale quasi pertinens ad ipsam hominis rationem, nullo modo mutatur: puta actiones et dispositiones motus mutantur ut in paucioribus. Et similiter etiam illa quae pertinent ad ipsam justitiae rationem nullo modo possunt mutari, puta non esse furandum, quod est injustum facere. Illa vero quae consequuntur, mutantur ut in minori parte."[72]

The mutability of moral rules, then, is limited to the lower levels —for example, so concrete a rule as that deposits must be returned to the depositor. At these levels it can actually happen that in one circumstance Rule A holds, and in another circumstance Rule A^1, its contradictory. At a level of more advanced abstraction, however, rules do exist which are indefectible according to their *ratio,* their essence: e. g., the prohibition of theft (except for cases of extreme need). However, we are not to conclude that a rule at this level cannot be forgotten by some men, and its opposite accepted as good; "thus formerly, theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans, as Julius Caesar relates (*De Bello Gall.*, vi)."[73] Under such a social tradition the thief, because ignorant of the objective wrong he is committing, is not guilty in the sight of God, since ignorance is one of the factors introducing variability into human nature and men's moral codes. There are, then, two kinds of mobility afflicting the natural law: the mobility of many rules at the concrete level, where these rules hold only in a majority of cases; and, in rules that are objectively applicable, an accidental mobility, consequent upon human ignorance.

Let us summarize St. Thomas' delimitation of the immutabil-

[72] *Ibid.*

[73] I-II, 94, 4. Cf. *Cont. Gent.* III, 141, where St .Thomas remarks that punishments, if they are to be just, must vary between levels of culture, according to *differences in axiologies.*

ity of the natural law. In but one aspect the natural law is ineradicable from the heart of man, namely in its first precept, *Do the good,* and in precepts immediately derived therefrom, as "*medium tenere, rectitudinem servere, et alia hujusmodi,*"[74] precepts deriving from notions of man and of the human good that are native to the intellect. To a certain point in a scale of decreasing abstraction this abstract human good is unfolded, following the multiplicity of human needs and inclinations, in a number of rules that *objectively* belong to the natural law—and are therefore immutable objectively, according to the essential notion of *humanity*—but which may be absent from certain individuals' or people's apprehension of the natural law; as in the case of corrupted moral codes which permit theft, or again concubinage.[75]. Still another level must be distinguished in the natural law, a level which introduces not only subjective, but also an objective, mutability; at this level are to be found those rules of morality which hold in most cases, but not in all. In those cases where they are relevant the rules at this third level are still charged with the obligatoriness of the first precept of the law, for they are still essentially a development of the precept, *Do the good.* Instead of being straight deductions from the notion of man and the notion of the good, and thus remaining in the realm of abstract essence, they are *applications* of such deductions to a shifting material. An example of the second level of the natural law—the level of pure deduction—is the rule of justice, "Give to other men their due." A third-level concretization of this rule is the prohibition of killing. In general, it is unjust and therefore wrong to kill other men; in special situations, however, killing is not only permissible, it is demanded by the very rule of justice that in general prohibits it—for example, a policeman is bound, by the justice the State owes its subjects, to kill—as a last resort —the man who is planning to murder. The two obligations, 1) not to kill, in general, and 2) to kill in such particular circumstances, both flow from the natural law: in order to do good one must be just, and in order to be just one must generally let others live, but now and then kill them.[76]

[74] *In III Sent.*, d. 37, 1, 4, ad 2.

[75] *In IV Sent.*, d. 33, 1, sol. 1, ad 1.

[76] I-II, 100, 8, ad 3: "Sic igitur praecepta ipsa decalogi, quantum ad rationem justitiae quam continent, immutabilia sunt; sed quantum ad aliquam determinationem per applicationem ad singulares actus (ut scilicet hoc vel illud sit homicidium, furtum vel adulterium, aut non), hoc quidem est mutabile. . "

For the second time, then, we are confronted by a diversification of the natural law, a diversification attended by no diminution of the force of obligation that is the dynamic heart of the law. The first diversification that we discovered arose from the multiplicity of the individual human being's needs and corresponding inclinations—ramifications occurring at what we have just called the second level of the natural law. There we found that both the one, all-inclusive, rational inclination at the heart of man and the plurality of expressions of that inclination are equally necessary for man's natural activity; *distinguer pour unir.* Now again, in the third level of moral rules, the natural law discloses itself as a union of the one and the many, the one infusing the many, the many completing the one. Not only does the first precept ramify on the side of the individual nature on account of the diversity of human needs and inclinations; but it undergoes a multiplication as a result of the need to apply it in shifting milieux. In order to do the good in concrete cases, man must sometimes follow one rule and sometimes the opposite, according to the vagaries of the external subject-matter of his acts; because he is an imperfect substance, a nature far from self-sufficient, and because the external goods he requires as supplementation and completion of his deficient—and therefore moving—being are largely material and therefore changing ceaselessly, man cannot live his days under the rule of a law that is both unchanging and detailed. What is required for such a nature as man's, is a law that is in some way both unchanging and flexible, unchanging because his nature is not without its abiding needs—notably, the need to do the good as reason sees it—flexible because the good he seeks is always concreted in things moving and contingent.

Hence the beautiful relevance of the natural law: it is pliant enough to govern the satisfaction of every human need, no matter how variant the circumstances; yet tough enough to preclude, in all its divarications and adaptations, any diminution of its original force, its primary unity. The two qualities are only apparently contradictory—a whip loses none of its sting in

coiling to fit the contour of a flank, and the natural law, in the bendings and branchings made necessary by the moving face of things, loses none of its central force of obligation. It is because our nature obliges us to do the rational good *in general,* that we are obliged to submit all our particular inclinations to the adjudication of reason. The immutable first precept contains all other precepts—yes, even at times opposite precepts—the one permeates the many, pluralization in contingencies involves no petering out of the first push of nature: *the natural is immutable.*

We observed that St. Thomas adds to this factual and historical immutability of the natural law an ideal immutability that does not stop at the first precept. This further immutability, he says, is objectively implicit in the first precept, for it is the attribute of general precepts that are but deductions from the first. We must distinguish thus between objective and historical immutability because the two are not coterminous: although the first precept is necessarily, and therefore historically, present in the conscious life of every man, such is not the case with the immediately derived precepts, the precepts of the second-level. That corrupted codes sometimes sanction contradictions of the genuine human good is a fact painfully patent to any observer of the modern world. To hold that necessary deductions, though implied by the first precept, are at times missing in historical codes is, of course, to accuse men of inconsistency, and Scholasticism's prolonged pleading with the modern world's moralists has been really nothing more than an appeal for logic. If man is by nature a moral agent, a being with a sense of obligation, a sense of control over his acts—and few deny this—then man is under the first precept of the natural law; and this dynamic aspect of natural law entails, as usual, the formal and directive aspect, for the first precept implies a determinate nature in the agent, and the needs of this nature are defined in the second-level precepts of the natural law, thereby yielding a definition of the formal aspect of natural law, a more precise, though still abstract, formulation of the dynamic obligation to do the good. Accept the first precept, say the Scholastics, and you must accept the others. If man is obliged to do the good, then it must be that he is free, and he consequently must be treated as a person rather than as a thing. If man is obliged to do the good, then it must be true that his good is not already contained within him—else there would be no need for activity—and he has the consequent duty of learning to know the proper end of his life, the true nature of his happiness. If man is obliged to do the good, and if there are forces in him that do not of themselves cooperate to effect what he has learned to be his true happiness, then he is obliged to whip these forces into line. And so on down the list of general precepts derived from the two elements of the first precept, obligation and human needs—precepts that are still general and objectively immutable, and therefore above the objective variability of the third level, yet nonetheless definite determinations of the general human good of the first precept.

Our interest, however, is not in all of these implications of the first precept—that would entail the writing of a textbook in ethics. We are concerned with just one of them, the precept of sociability, for it is in the natural need and duty of sociability that we find the bridge leading from the natural law to the human law, the indispensable guarantor of the latter's validity. If man-made law can be shown to be a lineal descendant of the first precept of the natural law, then its obligatoriness is settled, our duty towards society will become merely part of our single-minded natural inclination to do the human good in general. Then at least one demand that modern jurists make of a philosophy of positive law will be satisfied, the establishment of law's claim to the obedience of its subjects. However, we shall not examine all that St. Thomas has to say in proof of the naturalness of society—the argument is both well-known and accessible in many books; besides, as I have said, the purpose of our present investigation is, assuming the Scholastic definition of man's nature, simply to note the continuity of the law of that nature throughout its diversification into concrete acts and rules of action. At this juncture, then, we shall excuse ourselves from treating of more than one or two aspects of St. Thomas' doctrine of the sociability of human nature, just enough to help establish the concomitant continuity and discreteness that characterize the relation between natural and human law.

One of St. Thomas' proofs, less shop-worn than others have become by now, rests upon the peculiar character of our intel-

lectual knowledge. In one respect we human beings are less fitted even for bare living than our fellow animals the brutes, who "are able to discern by inborn skill what is useful and what is injurious; just as the sheep naturally regards the wolf as his enemy," and as "some animals even recognize by natural instinct certain medicinal herbs and other things necessary for their life."[77] This vitally necessary equipment of instincts in the lower animals operates automatically—like particular situation always evoking like particular response—and the fitting of organism to environment is adequate to the life of the individual and the preservation of the species. But the endowment of intellect (as we have already noted) dissolves that useful bond between particular internal inclination and particular external good, and thereby incapacitates a good deal of that equipment of instincts; for intellection means a sight of the general good and a withdrawal from immediate and direct knowledge of particulars as such. Man has power of attaining knowledge of particular goods only by reasoning from general principles, a process long and arduous. It is the price we pay for our freedom of choice, for choice is possible only when an intellect apprehends two or more particular goods as participations of a general good. And it is a very low price—in truth, a reasonable price—when one considers the capacity it brings for an ultimate knowledge far above that of the animal instincts and, not to leave the level of material needs, a progress towards an animal existence far more enjoyable than that of our instinct-ruled brethren the brutes. But before the talisman, intellect, can fertilize and improve life, this stringent condition of its operation must be fulfilled—namely, the difficult intellectual journey from first principles to the particularities requisite for material existence. And here is where society enters in:

> "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."[78]

[77] *De Regimine Principum*, I, i.
[78] *Ibid.*

Now, although man's need for society, in this one respect, is thus traceable to the inherent and ineradicable inability of the human intellect to grasp reality any other way than abstractly, nevertheless his capacity for social life is likewise a consequence of his rationality, but in this case, of the positive ability of the intellect to see, by virtue of his abstractive power, the true essence of reality. If this were the only cause of our need for society, one might paraphrase St. Thomas' epistemological epigram—"The certitude of reason is from the intellect, but the necessity for reason is from a defect of the intellect."[79]—and say that the sociability of man is from the intellect, but the need for society is from a defect in the intellect.

But how does our sociability arise positively from our possessing intellect? St. Thomas lists the diverse needs and natural inclinations that arise from the complexity of human nature, the urge to preserve existence, which man holds in common with all substances; the urge to reproduce, held in common with all animals; and finally the third kind of inclinations, peculiar to him alone as rational. In the category of rational inclinations falls the 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 know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination."[80]

Reiteration of this belief that only the rational creature can be social is found in St. Thomas' description of the virtue of justice, that one of the four cardinal virtues whose distinctive quality lies in the fact that it deals not with the moral conquest of the agent's internal powers but with the proper execution of his social actions: justice, like other virtues, is a quality inhering in

[79] II-II, 49, 5, ad 1. Here reason, of course, means the distinctively human method of knowledge, that of a discursive, abstracting, dividing and comparing intellect. A higher kind of intellect would grasp all truth intuitively—the way the human intellect grasps the *primum cognitum*, being—and consequently have no need of the reasoning process.
[80] I-II, 94, 2.

the individual's rational nature—just action is action conformable to an apprehended equality, and equality is inaccessible to animal sense knowledge; it can be seen and stated only by the peculiarly intellectual act of comparison. There is no doubt, then, that for St. Thomas sociability is a product of rationality.

But what about the animal instinct of reproduction? Is not that a natural inclination impelling man into the social life? And are we to say that social life is absent among the brutes? Here we are again faced with the radical difference elevating man above the rest of creation. We have noted how carefully St. Thomas acknowledges this chasm by refusing to dignify infrahuman activity—however orderly and constant—with the name "law". The same distinction, and for the same reason, obtains in contrasting the society of men with a "society" of gregarious insects. "As Augustine says . . . quoting Tully, 'a nation is a body of men united together by consent to the law and by community of welfare.' "[81] Law enters into the very essence of human collectivism, and law itself implies a community of men, as men, for it is the rule of *human* acts. The two ideas, law and society, are correlatives; and neither is applicable outside the universe of human things, for they both presuppose, in the social agent living as subject to the law, an apprehension of the common good, of the common end *as common end.* Such an idea bears the relativity and duality essential to all knowledge of the good-as-such—before an end can be recognized as a good that would complete an insufficiency in the seeking agent, obviously both the seeker and the goal must be held in view at one and the same time—and it also contains the new note of *common;* hence the two terms of reference, the seeker and his appropriate goal, are now conceived of as sociable seeker and social goal. By knowing man as needing the help of society—a knowledge based upon the many arguments for the naturalness of society—I know an aspect of his peculiar good, I know him as bound to live in society; but society is impossible without the conscious endeavor of its members to live in a manner compatible with the unity of the social whole: hence each member is obliged to further the *common good.*

It is, then, a precept of the natural law that we must live as

[81] I-II, 105, 2.

social beings, a precept of the second-level, immediately derived from the idea of humanity, the definition of man as a rational animal. Like all things pertaining to nature, the precept of sociability is a synthesis of two aspects: there is the dynamic element impelling a movement, imposing an obligation, and there is the formal element, defining that obligation. Social needs entail social obligations.

The facts of social life dictate a further, less general, statement of the natural obligation of sociability. All men possess a natural inclination to live in society, yes, but for each merely to express that inclination is not to effect a society: the good resultant for the individual from the common good is evident enough to evoke in the individual a natural inclination towards its prosecution, but the unified common good would never come into being if it waited upon the bare efforts of the multitude of individuals.

> "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 where 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. . . . With this in mind Solomon says (Prov. XI, 14): 'Where there is no governor, the people shall fail.' "[82]

Now, this is an assertion of the necessity of positive law. Not only must man be sociable if he is to lead a natural life, but he must live under a man-made legal system, for society is otherwise impossible. In the chapters that follow we shall examine St. Thomas' exposition of "human law", i. e., the law promulgated by human legislators for the government of society. We shall ask him first to tell us why such law is necessary if men are to live socially, why the general precept of sociability is not a sufficient cause of social unity. In the answer to that question we shall have hold of the general end, the *raison d'être* of man-made law. Furthermore, we shall then be ready to discern another diversification of the natural law, this one exemplifying in the social order the diversification of the third-level precepts in the order of human natural activity in general.

[82] *De Reg. Prin.,* I, i.

CHAPTER IV.

THE SOCIAL PRECEPT OF THE NATURAL LAW

If the natural law is a rule and a measure that presents itself through the working of our distinctively human possession, reason, then it would seem that another law, additional to the products of reason, is unnecessary. The life of reason is possible and indeed imperative for all of us, inasmuch as we are human; then why are we not self-sufficient in our individual governances? What need exists for subjection to an authority outside ourselves? The law governing the conduct of any active being is part and parcel of the nature of that being; the manner of the thing's behavior, the direction of its movement, is an effect of its formal nature. The act of creating an imperfect and therefore dependent being and the act of creating a nature are one and the same operation. Now, although we are free to depart from nature, we are endowed with a light that outlines our nature and its proper channels of expression, an immanent and private light intimately a part of each one of us as an individual person. To what purpose, then, another light? Furthermore, if we are to act rightly, we must never leave the path selected by that personal guide within us; would not, then, another authority be not only superfluous but downright misleading?

Such is the tenor of the first objection St. Thomas deems conceivable against his thesis that human law is both authoritative and necessary.

> "It seems that there is not a human law. For the natural law is a participation of the eternal law. . . . Now through the eternal law *all things are most orderly,* as Augustine states.[1] Therefore the natural law suffices for the ordering of all human affairs. Consequently there is no need for human law."[1a]

Strangely enough, this is an excellent statement of individualism, that modern social creed so intoxicated with the truth that man is rational and consequently a person, that it is insensitive to the fact, equally true, that he is social. And the answer to this extremism is nothing else than the reminder that our individuality is not absolute, that even in the operation and development of our rational faculty, the very endowment that renders us persons, we are not independent and self-sufficient units:

[1] *De Lib. Arb.* i. [1a] I-II, 91, 3, Obj. 1.

> "The light of reason is placed by nature in every man, to guide him in his acts towards his end. Were man intended to live alone, as many animals do, he would require no other guide to his end. Then would each man be a king unto himself, under God, the highest King, inasmuch as he would direct himself in his acts by the light of reason given him from on high."[2]

As we have already concluded, man needs society both for bare living and for living well, and an indispensable part of living well is to act on the knowledge of derived principles of the natural law that are necessary for good living, a knowledge not to be obtained without the help of other men. The individual's dependence upon society, however, is susceptible of closer description than this, and to this task we now turn, the better to perceive the truth that human laws—man-made, but nonetheless authoritative and obligatory—are a natural and necessary consequence of the social precept of the natural law. Conscious that mankind is unintelligible apart from society—even though its only ontological incarnation is the individual—we attend now to the character of this necessary complement of human nature, in the quest of a more precise knowledge of the structure that binds individuals into collectivities.

We already possess a concept expressive of supra-individual unities: the concept of *order.*[3] Besides the unity of the parts and powers of an individual—the undividedness of a substantial entity—there is the unity that organizes these separate existents into a higher (if not substantial) whole, the unity of order. Before an order can exist, two conditions must be fulfilled: the members must be existentially separate, and they must bear a relation to one another, a relation that imparts a determinate character to the whole as such, making it distinguishable from other orders. Since the members are existentially divided, the order has no being, and consequently no activity, purely its own: both its acting and the direction in which it acts are caused by the individual natures. Nevertheless, because and insofar as

[2] *De Reg. Prin.,* I, i.

[3] See above, Chap. II.

they share a common relation, the members do act as a unity; they form, as it were, a *quasi-nature.*

Now if we dissect the nature of an individual human being, we find, as we have seen, a set of inclinations towards activity, an inherent and unshakable self-dissatisfaction; for every created being, as the price of its imperfection, inclines towards realities outside itself. Each transitive, other-regarding operation natural to man signifies an order to which he belongs. Thus, as an animal he enters into a common order with the plants, whereby he secures the food necessary for completing and sustaining his imperfect and dependent bodily existence. We saw that one such ordination arises between him and the fellows of his species as the result of both his animality and his rationality, the inclination to the social life. This ordination between man and man is the object of our special interest now. What, we ask, characterizes the social orders into which man as man enters?

Since the social needs of man are various, social orders to which he belongs are likewise not of an identical stamp. However, if we press the process of abstraction far enough we can regard all his social relations in one concept: the idea of *justice.* This concept is normative, because we are dealing with the orders *natural* to man, the social relations responding to his natural needs rather than those that have too often characterized his actual history. The social command of the natural moral law, *Act justly,* is general enough to take in every social act, nevertheless significant enough to state the essence of every good social act as such. Ulpian defined that essence centuries ago, and St. Thomas, following him, says, "The proper act of justice is nothing else than to render to each one his own."[4] To look upon all orders into which man naturally (i. e., ideally) enters as so many particular embodiments of justice is to look at the individual members rather than the orders they form, for justice is a virtue resident in the souls of men; such a perspective reminds us forcefully that individual human beings are the fundamental realities of social groups. Four cardinal virtues are present in the soul of the good man as forms that determine

[4] II-II, 58, 11.

his activity to goodness in the four fields of activity;[5] justice is distinguished from the other three by virtue of its governing his relations to other men:

> "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 its 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."[6]

In *justice,* then, we have an extremely general concept descriptive of that virtue which determines the individual's nature in such a way as to dispose him to conduct himself naturally in his social affairs: whenever his acts have a significance for other men, he must take care that he neither removes from what they now have, that which is "due to them": nor fails to yield what they have coming to them out of that which they do not at present possess. Two important notes, then, characterize justice: its essence is "*reddere unicuique quod suum est*"; and, by implication, there is connoted a separation between the two terms of the justice-relation. That we are confronted here by an "order" is now evident: we have discovered a certain relatedness uniting two existentially separate beings. "Justice properly speaking demands a distinction of *supposita,* and consequently is only in one man towards another" [rather than in one part of an individual towards another part].[7]

From the fact that the persons concerned enjoy separate subsistence we detect another character of justice:

> "it is in respect of external actions and external things by means of which men can communicate with one another, that the relation of one man to another is to be considered; whereas it is in respect of internal passions that we consider man's rectitude in himself. Consequently, since justice is directed to others, it is not about the entire matter of moral virtue,[8] but only about external actions and things, under a

[5] II-II, 58, 11.
[6] II-II, 57, 1.
[7] II-II, 58, 2.
[8] I. e., all the processes comprising the human act: cognition, deliberation, counsel, and choice, as well as the external operations designed to effect the good chosen.

certain special aspect of the object, in so far as one man is related to another through them. . . . A man's internal passions, which are a part of moral matter, are not in themselves directed to another man, which belongs to the specific nature of justice; yet their effects, i. e., external actions, are capable of being directed to another man."[9]

Now, although justice presupposes an otherness between men who enter into a social relation, it no less bears the affirmative signification of some kind of unity of relatedness, which forms the factual ground for the obligation of acting justly, and since nature assigns varying degrees of unity to obtain between man and man, there should correspond to these different levels varying embodiments of justice. St. Thomas distinguishes between these degrees in justice by reserving the term *"simpliciter justum"* for but one of the lines of social intercourse, and describing all others as *"justum secundum quid"*, that is, the relatively just. If we arrange all possible cases of social coordination on a scale proceeding from highest integration to lowest, we shall be proceeding from cases of relative justice (themselves of varying intensity) to cases of pure justice. Exemplifications of the *simpliciter justum* differ from the various *justa secundum quid* by the greater separateness of terms, or, conversely, a lower unity of relatedness. The just, like any relation, is an equilibrium of two principles, oneness and diversity; heighten the effect of one to the exclusion of the other, and the relation of justness disappears. Owning a dog permits no play of justice, for the dog is completely possessed by the owner; dog and man are, as it were, one; whereas the owner's neighbor is under no requirement of justice towards the dog (except in relation to the human owner), for here the disparateness between dog and man precludes so close a relation as that of justice.

St. Thomas clarifies this distinction when he treats of justice as diversified in the Ten Commandments.[10] Our relation to God, governed by the first three commandments, exemplifies justice only in a metaphorical sense, because a gulf separates

[9] II-II, 58, 8 and ad 3.
[10] II-II, 122.

divinity from humanity, and God is not really affected by any relations with other beings; we use the term justice to characterize our duties to God legitimately, however, because of the extent to which, from the debtor's side, duties to God resemble duties to neighbor, which are the material of true justice. The last six commandments govern our relations with our neighbors, each controlling one of the particular fields of social intercourse in which the *justum simpliciter* can obtain. The Fourth Commandment states the first step that must be taken if we are to perfect ourselves as doers of the *justum secundum quid.* Inside the family there is missing the individualism requisite for the hegemony of simple justice; if justice is, properly speaking, the rule of our *ad-alterum* acts, then, says St. Thomas, it is not perfectly in force in filial or parental action, for the child (so to say) *belongs to* the parent—the great unity binding the two terms exclude this relation from the class of the *simpliciter justum*; the child's debt to his parents and their duty towards him are qualitatively different from relations existing between man and neighbor.

> "The household community, according to the Philosopher,[11] differs in respect of 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 there is not justice simply, but a species of justice, viz. domestic justice, as stated in *Ethic.* V."[12]

Domestic justice does not completely exclude the *simpliciter justum,* for the household, though the closest of communities, is still an order and not a substantial unity. As persons men can never be *merely* parts, in the way that food loses its identity and becomes a part of the organism:

> "A son, as such, belongs to his father, and a slave, as such, belongs to his master; yet each, considered as a man, is something having separate existence and distinct from others. Hence in so far as each of them is a man, there is justice towards them in a way: and for this reason too there are certain laws regulating the relations of a father to his

[11] I *Politics.*
[12] II-II, 58, 7 ad 3.

son, and of a master to his slave; but in so far as each is something belonging to another, the perfect idea of *right* or *just* is wanting to them."[13]

But as members of a family persons achieve the greatest unification possible to man, and the family whole exacts more service from its members than any other collectivity natural to man.

Because the State is natural to man, families do not exist alone, but find themselves united in more populous collectivities, the highest of which is the State. Because the State is necessary for the highest human development, it is natural for the individual human being to be a citizen of a State as well as a member of a family. The naturalness of the State makes perfect otherness between citizens impossible, for, to the extent to which they are parts of a whole, citizens are not free to take only themselves into account in their private transactions. With its terms characterized by the lowest possible unity and the greatest possible separateness, the relation obtaining between "concitizens" is the only one St. Thomas finds capable of realizing the *justum simpliciter;* the citizens as such belong to each other only to the extent that they are fellow parts of the broadest of all totalities, the State, and they are thus in the best possible position to render to *each other* his due.[14]

Thus far we have been looking up at social orders from the viewpoint of their individual parts, observing the effect common membership in the same order has upon the intercourse of persons, how its constant presence reduces the abstract freedom of those persons to enter into a private and independent agreement. The orders as such have, then, an activity and an end, enabling them to modify what would be the conduct of the abstract person. When parents discharge their duty of caring for their children, they are acting not to fulfill strict justice towards their children (for the children as persons have done nothing requiring repayment) but to realize the family common good, which is realized, for the most part, in the parents, who (so to say) own the children. Similarly, children owe more to their parents than to other men, not because of justice, but because their parents

[13] II-II, 57, 4.
[14] II-II, 57, 4.

are the closest representations of the common good of the family. In the end of the loosest order, the State, we find the most impersonal example of the common good, yet it also has its claim to the service of the order-members:

> "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 the family, state, or 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. . . ."[15]

> "It is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it."[16]

The common good, then, is the final and formal cause of any social order as such; the order is a quasi-nature seeking its own preservation and progress. The members of the social order can further their own good only by ever bearing in mind the good of the order. Individual good and common good are one to this extent, that the individual is carried higher by the prosperity of the whole; sociality is so much a part of him that he cannot achieve the true human good apart from a life that, far from violating, must deliberately serve, the common good.

. . . . . .

If such is the individual's dependence upon society, then we are ready to render more explicit the natural-law command to act socially. We saw that fulfillment of this very general precept is accomplished by conduct infused with the virtue of justice, and that justice finds expression in degrees that vary according to the unity of the social order within whose framework the just act is performed. Now, since the state-order demands to be taken into account when we act to effectuate the social precept of the natural law, it appears that there must be

[15] II-II, 47, 11, ad 2.
[16] I-II, 92, 1 ad 3. Cf. II-II, 39, 2 ad 2; 61, 1 ad 3; 26, 3.

still another kind of justice than the domestic justice within the household and the *simpliciter justum* between citizens. Our obligation to further the common good of the state is the obligation to perfect within us what St. Thomas calls the virtue of *legal justice,* or as it is now often called, *social justice.*

> "Justice . . . directs man in his relations with other men. Now this may happen in two ways: first as regards his relations with individuals, secondly as regards his relations with others in general, in so far as a man who serves a community serves all those who are included in that community. Accordingly, justice in its proper acceptation can be directed to another in both these senses."[17]

It is called legal justice because for most people its fulfillment is generally accomplished by keeping the law of the State, whose function it is to define and determine the common good. Now, although all of the state-order as such must be bent upon effectuating the common good, it is in the ruler and his administrators that legal justice finds its fullest embodiment: "Justice is in the sovereign as an architectonic virtue, commanding and prescribing what is just; while it is in the subjects as an executive and administering virtue."[18]

Legal justice binds parts to the whole in the relation not of the *simpliciter justum* but of the *justum secundum quid.* Our duty towards the common good is not so tangible and precise a thing as the obligation of rendering our fellow citizen his due, because there is lacking the necessary separation of the terms of the relation: in owing a debt of justice to the common good, we are to a certain extent in debt to ourselves; hence legal justice falls short of exemplifying strict, simple justice, and takes its place beside *domestic justice,* of whose component relations "just" can be predicated only "*secundum quid*". The sole case of simple justice is that governing citizens who are, prior to their collaborative work, which entails the obligation of strict justice, related only in so far as they are both members of the state-order; this norm Scholastics call *commutative justice*:

> "besides legal justice, which directs man immediately to the common good, there is a need for other virtues to direct him immediately in matters relating to particular goods: and these virtues may be relative to himself or to another individual person. Accordingly, just as in addition to legal justice there is a need for particular virtues to direct man in relation to himself, such as temperance and fortitude, so too besides legal justice there is need for particular justice to direct man in his relations to other individuals."[19]

Commutative justice and legal justice differ not only because they bind different pairs of terms—commutative justice linking one part of the state-order with another part, and legal justice linking the part with the whole—but also because the nature of the relation differs. The idea of justice *per se* denotes an "equality", an "adjustment": an act is perfectly just if its termination finds each party in possession of exactly as much as is due him of the things or services the act involved. The equalizing operation can be based upon either of two criteria: either the equality can be between things, so that each party gives and receives exactly the same quantity of goods; or the equality can be one of proportion, where, persons being taken into account, the distribution is proportional to the worth of the recipient. Commutative justice is of the former kind:

> "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 that which belonged to the other."[20]

A third kind of justice relates the social whole as such to the members. Since the state is purely instrumental to the happiness of its citizens, the products of its operation as a quasi-nature must be distributed to the persons it is designed to serve, it must render to them their due. *Distributive justice,* since it governs the allocation of goods acquired by cooperative effort, must follow the principle of proportional equality, each person's share in the enjoyment of the communally acquired goods

[17] II-II, 58, 5.
[18] II-II, 60, 1 ad 4.
[19] II-II, 58, 7.
[20] II-II, 61, 2.

being quantitatively equated with his respective contribution to the production of those goods:

> "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 importance of 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." [21]

To insist upon this differential treatment of individuals under distributive justice is merely realistically to recognize 1) the inequalities of position that are necessitated by the organicity of the state—some must rule and some must obey, if unity is to exist;[22] and 2) the natural inequalities that appear in the concretized units of abstractly equal man:[23] "consciously superior citizens are not at all likely to devote a goodly measure of their abilities to the promotion of the public welfare if they see that their superiority is not recognized in the distribution of the common goods (of honors as well as of wealth)."[24] Proportional distributive justice, though immediately concerned with lining the pockets and wreathing the brows of the citizenry, is at the same time but a technique used by the social whole acting as a unitary quasi-nature in pursuit of its own end, the common good; the closer the realization of distributive justice within a state, the more prosperous the whole as such.

[21] II-II, 61, 2. Cf. *In III Pol.*, vii: "Justum aequale videtur esse vel consistere in quadam aequalitatem secundum proportionem; quae non solum attenditur ex parte rerum, quae distribui debent, sed ex parte suppositorum, quibus debet fieri distributio."

[22] I. *Pol.*, ii.

[23] "In hominibus ex ipsa nativitate videmus quod est quadam distinctio: ita quod quidam sunt apti ad hoc ut subjiciantur, quidam vero ad hoc quod principentur." I. *Pol.*, iii. "Ille est naturaliter principans et dominans qui suo intellectu potest praevidere ea quae congruunt saluti, puta causando proficuta et repellendo nociva: ille autem qui potest per fortitudinem corporis implere opere quod sapiens mente praeviderit, est naturaliter subjectus et servus." I *Pol.*, i.

[24] "Homines gratiosi qui alios excellunt in operibus virtutum, dissident de honoribus, si aequales eis reddantur, et non majores quam aliis: et ideo indiget legislator ordinare aliquid circa honores: ut scilicet aliquis honor determinetur, qui non detur nisi bonis, et alius honor sit quo etiam malus, idest deficiens a virtute, uti possit: et sic servabitur pax in civitate." II *Pol.*, viii.

It is evident that the justice that should govern the distribution of communally owned goods is not an example of simple, strict justice, wherein there is no difference between the quantity expended and that gained; for the communal activity of the citizens produces, over and above the aggregate individual expenditures, a profit that, divided, tips the scale in favor of the receipts, thus precluding commutative justice's exact one-for-one correlation of goods given and goods received. Hence distributive justice takes its place beside domestic justice and legal justice as another exemplification of the *justum secundum quid.*

We have been classifying the types of justice, first, according to the pairs of terms between which the relation of justice is applicable—person to person, whole to part, part to whole—and secondly, as examples of either the simply or the relatively just, noting that in only that justice wherein the whole as such is not involved are the conditions of the simply just fulfilled—namely, commutative justice. Another grouping of the three justices reveals further resemblances: in both commutative and distributive justice the *terminus ad quem* of the equalizing process essential to justice is the individual, hence it is possible to regard them as cases of individual justice, and legal justice as social justice; then we observe that individual justice lends itself to rigorous and almost mathematical computation (ideally, at any rate, if not perfectly in the practical order), but that the group member's obligation to the social whole, however real it may be, is not easily amenable to precise determination.[25] This is true with regard to our duty of promoting the common good of any institution, the family and other orders as well as the State. Individual and social justice also differ in the freedom they involve for the persons concerned: you can be part of an institution through no volition of your own, a fact diminishing in no way your obligation to serve social justice and promote that institution's common end; whereas relations under the jurisdiction of individual justice are instituted voluntarily by the individuals concerned. Again, an institution has a longer life than the transaction subject to individual justice, its *raison d'être* being fundamental to the more permanent of human needs. Of all social relations, commutative transactions reveal

[25] Renard, Georges, *Le Droit, l'ordre, et la raison,* pp. 340-341.

men at their lowest degree of sociability; as members of institutional groups men have a common purpose more or less identical, but in commutations they are not collaborating, so much as merely momentarily concurring in a concrete act.[26] Generally speaking, then, as compared with social justice, individual justice more closely embodies the idea of the *justum simpliciter*: its terms are more clearly individuated, and the relation is less an intrinsic part of the persons involved.[27]

The distinction between individual justice and social justice is very important in another respect, namely, the dynamism of the common good. In a business contract—a "commutation" typical of those subject to individual justice—the parties engage themselves to perform acts that are quite detailed in nature: for five hundred dollars, payable within two months from this date, I agree to deliver on such and such a date a specified quantity of merchandise of a specified kind. In an institution the end is much more general, answering, as I have said, a deeper and more permanent human need. Now, there follows from the generality of the end an effect of great social importance: the dynamic character of the institution. As a quasi-personality it pursues its own end, the purpose for which it was founded, but in the realization of that general end the *concrete* results for the members are less predictable than they are in "commutations", where they have been planned. An institution is more adaptable to changes in the milieu than a commutation, for the very reason that the latter's effectuation is so intimately dependent upon specific circumstances. If the harvest fails, the contract for the sale of future wheat is a total loss to the seller; but membership in an institution saves the farmer: the State is interested in that single commutation only in so far as it is related to the general welfare of the farmer; the indefiniteness of the State's end allows a greater adaptability to concrete changes, indeed dictates that flexibility.[28]

[26] II-II, 58, 9: "The common good is the end of each individual member of a community, just as the good of the whole is the end of each part. On the other hand the good of one individual is not the end of another individual. . . ."

[27] G. Renard, *Le Droit*, pp. 342-347.

[28] Compare R. G. Renard, "Thomism," pp. 77-79, where the common good of commutations is termed "static" and that of institutions "dynamic."

Exaggeration of the role of either individual or social justice has created among modern jurists the extremist views of individualism and collectivism in varying intensities, the latter predominating at the present moment. Scholasticism insists upon the ideal of balancing both justices, since one as well as the other represents a specification of the general social precept of the obligatory natural law: if we are to act socially, we must both render our neighbor his due and promote the common purposes of the institutions to which we belong. These are precepts of the natural law, phrasing exigencies of our very nature; we know this because we see that we are dependent upon our neighbors and institutions for so much of our happiness. Now if individual happiness is contingent upon the assistance of others, then our obligation to realize our own happiness entails the obligation to establish, as far as we are individually able, the necessary conditions of social coöperation; and among those conditions is found the fulfillment of both individual and social justice, for men would never engage in the cooperation entailed in commutations and institutions unless they were confident that such cooperation would be profitable.

Such a rationale for the obligations to neighbor and to social justice may seem at first glance the expression of an egoistic morality: I respect my neighbor as a person only because in the absence of such deference he will refuse to extend me the helping hand I need; I remember the common good only for what the common good can contribute to my happiness. This, however, is to misrepresent the philosophy of the natural law. Natural law's first and all-inclusive injunction is "Do the human good," and in the concept of "human" the differentia is rationality. We must live according to the law that reason finds best for man's needs, and that law includes, as we have seen, the command to act in such a way that social cooperation will be possible, for social coöperation is needed for human development. The egoism in this view is the unavoidable egoism of the human *nature*, rather than of the *individual*: the individual must act according to his nature, even though such a course may lead to personal losses in the instrumental goods of life; he must work for the common good, even though occasions arise when such a

devotion brings death. Now such behavior is not among the agenda of an ethics of selfishness.

In his enumeration of the virtues St. Thomas describes a number of them as "annexed to justice" because they possess only part of the essence of justice.[29] In treating of one of these, *pietas,* he evaluates various social relations according to the contribution they make to the person's *being*—and *a fortiori* his happiness. Now, since the particular formal note of justice that *pietas* (respect, worship, devotion) shares is that of *debitum,* "something owed," in this scaling of the kinds of *pietas* we have seen another presentation of the relative value of the various social wholes natural to man. To God, of course, we owe the most important form of *pietas,* worship; and the other two objects of *pietas* are, in declining order, parents and fatherland. The rationale for this assessment lies in the importance of these factors for our well-being: it goes without saying that we are infinitely indebted to God, who is the first cause of every created being, in its existence as well as in its activity, the universal cause whose concourse is absolutely indispensable for the operaton of all secondary causes; as primary among the secondary causes of our existence and growth, our parents have first claim to the devotion and respect of *pietas,* and next comes our country, at all stages of our life a major contributor to our well-being. And by virtue of these first objects of *pietas* we are obliged to love and honor affiliated beings: "In our devotion (*cultu*) to our parents is included devotion to brothers and sisters, because they are offspring of those same parents. . . . And by devotion to our country is meant also devotion to our fellow-citizens and to all friends of our country."[30] It is true, of course, that living natural lives entails collaboration with others than our relatives and fellow-citizens, but such associations bear less import for our essential nature: "associations with relatives and fellow-citizens are more referred to the principles of our *being* than are other associations."[31] Once more, then, St. Thomas expounds the naturalness of the social life: we simply cannot get along without others; outside the social matrix we cannot be ourselves.

[29] II-II, 80, 1.
[30] II-II, 101, 1. Also 101, 3.
[31] *Ibid.,* ad 3.

And if we are to mold our life to the pattern of this insight into our true nature, we have the duty of answering the inflow of building and sustaining forces with a personal exertion of devotion and care for those outside agents of help, an exertion whose intensity should be various even as our dependence is various.

. . . . . .

Summary

Such, then is the first step in the concretization of the natural law in social matters; the general injunction to act justly and give others their due reduces itself to more precise determinations of that duty, diversifying into less general types of justice. The rationale of this diversification is found in the same set of "normative facts" as the rationale for the first undifferentiated command of justice in general: man's need for social life in general is analyzable into specific needs, and these specific needs must be answered by specific justices; from the need for short-time cooperation with a fellow-citizen arises the norm of commutative justice, whereas the need of relatively permanent associations engenders the norms dictating observance of legal and distributive justice—from an examination of human needs we learn human norms, man's imperfections make evident the goals that should attract him.

Till now, however, we have not left the realm of morality pure and simple, we have yet to reach the level of the positive law, where lies the nub of our problem. Our inquiry into the character of nature and order in general yielded 1) the apprehension of nature as a principle with two significant aspects—dynamically, it is an *élan;* formally, an *élan* given shape by a final end—and 2) the truth that an order is a multiplicity of individual natures organized into the unity of a quasi-nature, whose activity is unified by virtue of a synchronization of those individual natures' final ends.[32] We next considered man as an exemplification of these principles, discovering first that although nature is transformed in man by the introduction of reason, it loses in the process neither its dynamism nor its determinateness—reason rather transmuting the former into the obligatoriness, the latter into the differentiated precepts, of

[32] See above, Chapter II.

the discerned natural law.[33] We saw too that that natural law, functioning as the directive form of the human nature, ramifies from one first, all-inclusive command into many more specific precepts, losing in the process none of its obligatoriness. Finally, presuming man to be under the biological and intellectual necessity of living in social orders, we have related that normative fact to the natural law, inferring from our need of society the natural obligation to live socially, and perceiving that that obligation diversifies to include in its prescription whatever conduct is indispensable for the establishment and maintenance of those social orders; thus does natural law exact conduct shaped by commutative, legal, and distributive justice. The central, reason-discerned command, "Do the good," pours its obligatoriness into these special determinations of the human good. The ends of the social orders—the common goods that they as quasi-natures pursue—help give form to the obligations of the individual natures, and their rational dynamism thereby receives a social direction. "The common good is the end of each individual member of a community, just as the good of the whole is the end of each part."[34]

Now these things are true apart from any state-imposed positive law; they are of the natural law, the law inscribed in the heart of man. The natural law both precedes and informs the human law, ethics is presupposed by jurisprudence. It is to the human law that we must now turn our attention, for our desire is to ascertain the relation between these two laws.

[33] Chapter III.
[34] II-II, 58, 9 ad 3.

CHAPTER V.

THE OBLIGATORINESS OF HUMAN LAW

The social orders above discussed are creatures of the natural law, and the distributive justice and legal justice that bind them together are among its social commands, obligatory because their execution is the fulfillment of exigencies that honey-comb our individual existences. But a further delimitation of legal justice is requisite before its object, the common good, can be attained in the measure sufficient for the effectuation of a living state, a unified ordering of smaller orders. It is St. Thomas' contention that, in spite of each individual's rationally perceived imperative need of a social order higher than the family, that social order will not materialize except under the agency of the state; in other words, the growth of the interfamily common good is not automatic, an effect following inevitably from a spontaneous coöperation of individual families. Rather, that common good is the child of public authority, reared not without the use of rod, and guided often into paths the subjects as individuals would contemn. "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."[1] "The notion of law contains two things: first that it is a rule of human acts; secondly, that it has coercive power."[2] The need for coercive power is an eloquent sign that the formation and maintenance of a state is no mere irrepressible out-pouring of individual lives. The executors of any such historical production are to be thanked for the good they do in the individual's life: "*ille qui civitatem instituit, abstulit hominibus quod essent pessimi, et reduxit eos ad hoc quod essent optimi secundum justitiam et virtutes.*"[3]

At first glance this looks like an antinomy in nature, the need for an external authority contradicting the immanence of the individual's guide, reason: if it is our nature, our only morality, to give over our whole life to the control of our reason, then how can it be good for us to relinquish certain social aspects of that life to the control of an authority outside? St. Thomas

[1] *De Reg. Prin.*, 1, xv.
[2] I-II, 96, 5.
[3] *In I Pol.*, i (1253a36).

answers that our very reason itself prescribes the existence of such an external, authoritative power, that the common good of groups of families requires the existence of a central agent fitted with powers of coercion; in other words, that legal justice will never be realized unless there exists in society an organ whose proper function consists in the prosecution of the common good. Now, three conditions in the life of mankind comprise the normative facts imposing this our latest determination of the natural law: 1. Some individuals misuse their freedom of choice and deliberately violate socially necessary rules of natural law. 2. Many individuals, in all honesty and blamelessly, fail to win through to a perception of all the socially necessary rules of natural law, and the sociality of their conscientious conduct suffers accordingly. 3. Finally, in many occasions of social cooperation or mere social contact, neither one alternative nor another appearing best for effectuating the socially necessary harmony, an arbitrary choice must be made and collectively adopted. Each of these three general facts shows us that civic authority is socially, and therefore morally, necessary. Let us look at St. Thomas' discussion of them.

1. Bad will in individuals necessitates a strong-armed public authority for two main reasons: The existence of an agent devoted to nothing else than the good of society as a whole has no ultimate justification beyond the increase of happiness it brings to the individual citizen. The first reason why bad will necessitates the existence of such an agent arises directly from this ultimate functional character of the state: citizens with badly ordered lives must be helped into the path of social virtue, which is, of course, the only path that leads to true happiness. This function of human law is the first that occurs to St. Thomas' mind when he approaches his formal treatment of human law. Nature, he says, does not turn us out into the world perfected wholes, organisms fully implemented for fashioning the highest possible human life; we are fitted only with certain beginnings (*quaedam initia*) of the necessary faculties and skills. As in the physical needs of life, where man is given not the full outfitting that other animals enjoy but merely reason and hands, tools that require the complement of industry if even an animal existence is to be conserved, so in the spiritual preconditions of the happy, the good, life:

> "man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training. . . . However, 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 man is 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 good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be depraved, and prone to vice, and not easily amenable to words, it is necesary for such to be restrained from evil by force and fear, in order that . . . they, by being habituated in this way, might 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 laws."[4]

It is interesting that, however sensitive he may be to the indispensability of freedom in the moral act—only deliberate acts are human acts—nevertheless St. Thomas does not contemn the inclusion of corporeal compulsion among the technics of character-training. The acquisition of true virtue—that is, goodness of will—is facilitated by working violence on the external members of the will's owner. Repeated conformity to a rule of external action produces a habit in the soul, and the good habit predisposes the will to an ultimate good intention: "*justitia acquisita ex operibus causatur; et per hunc modum lex civilis homines justos facit, inquantum per exercitium operum, habitum justitiae in observatoribus causat.*"[5] In inquiring "whether it is lawful for parents to strike their children",[6] St. Thomas cites these passages from Scripture: "He that spareth the rod hateth the child,"[7] "Withhold not correction from a child, for if thou strike him with the rod, he shall not die. Thou shalt beat him with the rod, and deliver his soul from hell";[8] and concludes that

[4] I-II, 95, 1, "Whether it is useful for laws to be framed by men" Cf. II-II, 33, 6; *In III Sent.*, d. 40, 1, 2.

[5] *In III Sent.*, d. 40, 1, 3.

[6] II-II, 65, 2.

[7] *Prov.* xiii, 24.

[8] *Prov.* xxiii, 28.

"a parent can lawfully strike his child . . . that instruction may be enforced by correction." Now, just as a state—the most self-sufficient of human societies—is a more perfect community than the family, so does the coercive power of the ruler exceed that of the parent:

> "the governor of a city has perfect coercive power; wherefore he can inflict irreparable punishment such as death and mutilation. On the other hand the father and the master who preside over the family household, which is an imperfect community, have imperfect coercive power, which is exercised by inflicting lesser punishments, for instance by blows, which do not inflict irreparable harm."[9]

Here, then, we have the first reason why bad will evokes the need of human law: before evilly inclined citizens, especially the tractable young, can become socially virtuous, they must be exposed to the benevolent despotism of coactive human law. A second reason lies not immediately in the functional nature of the state—its essential rôle as instrumental to the happiness of the citizens—but in the State as a quasi-nature with its own proper end, the common good: antisocial persons must be coerced by human law not only for the sake of their own personal welfare but also for the sake of the common good. In other words, legal justice requires that their criminal propensities be brought under control. Those who are "depraved and prone to vice, and not easily amenable to words" must be "restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace."[10] Peace is of the essence of the common good: "just as a man can do nothing well unless unity within his members be presupposed, so a multitude of men which lacks the unity of peace is hindered from virtuous action by the fact that it fights against its very existence as a group."[11] There is no need to labor the point that individuals' antisocial dispositions and deeds hold back the development of the state-totality; in general, three forces work to crush out the life of this quasi-nature; the first is the obvious and unavoidable deterioration of public officials

[9] II-II, 65, 2, ad 2.
[10] I-II, 95, 1.
[11] *De Reg. Prin.*, I, xv.

from old age; the third is the equally obvious attacks by neighboring states from without; whereas

> "a second 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."[12]

Against this second enemy of the state's existence the ruler is bound, "by his laws and orders, punishments and rewards," to restrain "the men subject to him from wickedness, and encourage them to works of virtue, following the example of God, Who gave His law to man and requites those who observe it with rewards, and those who transgress it with punishments."[13] "*Civitas fiat una et communis propter quamdam disciplinam legum recte positarum.*"[14] "It is necessary that punishment be inflicted on evil-doers if peace is to be maintained among men"; [15] the assurance that God will punish transgressions of the natural law is too often powerless to dissuade men from antisocial wrong-doing—they "belittle the punishments inflicted by God"—so "divine providence has ordered that on earth there be men who, by inflicting sensible and present punishments, compel certain persons to do right."[16] This is not to say that the whole natural law must needs be implemented by a temporal sanction—indeed, in great sectors of that law, in our duties to God and to self, human judging and therefore human sanction is impossible. But there surely does exist a minimum amount of justice which must be practised among men if the interfamily society is to exist; it simply will not do to wait till eternity for the sanction of the rules enforcing this minimal sociality.[17] Mankind being far below the universal personal perfection requisite for the success of a regime of natural law *sans* human sanction,

[12] *Ibid.*
[13] *Ibid.*
[14] *In II Pol.*, v. (1263b37).
[15] *Cont. Gent.* III, 146, "Bonum non."
[16] *Ibid.*, "Quia vero."
[17] See Cathrein, *Recht, Naturrecht und positives Recht*, pp. 228, 229: "Die Gebote des natürlichen Sittengesetzes sind in diesem Leben nur mit einer ganz

and a unified society being necessary for individual development, it is imperative that the social precept of the natural law receive some implementation by force.

The most extreme form that this force can take is, of course, capital punishment, and at times even it is legitimate; in other words, so important is the need of maintaining the peace that is the first necessity of the common good, that those who jeopardize that peace must be removed from the community:

> "The good of the community surpasses a particular good of the individual. Therefore, the particular good must give way, that the common good may be maintained. Now, the life of a few pestilential individuals is a hindrance to the common good, which is the harmony of the human community. Therefore such men should be cut off by death from the society of their fellows. . . . 'Know you not that a little leaven corrupteth the whole lump?'[18] . . . The fact that the wicked, while alive, are able to amend, does not prevent their being justly slain; because the peril that threatens through their remaining alive is greater and more certain than the good to be expected from their amendment. . . . And if they are so obstinate that even in the hour of death they do not turn their hearts from malice, it is probable enough that they never would have."[19]

> "If a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good."[20]

ungenügenden Sanktion versehen. Für die Beziehung des Menschen zu sich selbst und zu Gott ist das auch nicht notwendig. Gott hat die Ewigkeit für sich, und hienieden soll der Mensch in seinen Entschliessungen frei sein. . . . Anders verhält es sich in Bezug auf die Gebote, welche das Verhalten der Menschen innerhalb der Gesellschaft untereinander und zur Gesamtheit regeln. . . . Der Zweck des Staates: Friede und Ordnung, muss notwendig erreicht werden, und zwar nicht in einer fernen Zukunft, sondern schon jetzt in der Gegenwart. Er würde aber tatsächlich in den meisten Fällen nicht erreicht, wenn die Beobachtung der Gesetze dem guten Willen der einzelnen überlassen bliebe. In einer grossen Menschenmenge wird es immer viele geben, welche nicht der Vernunft, sondern ihren selbstsüchenden Trieben folgen und sich über all Rechtsschränken hinwegsetzen würden, wenn sie nicht gewaltsam, durch *Androhung und Verhängung von Strafen* in die Rechtsschranken zurückgewiesen würden. Das Gesetz muss mit dem Schwert in der Hand sich Achtung erzwingen, sonst wäre es für viele nur eine Vogelscheuche. Für die grosse Menge gilt der Grundsatz Spinozas: 'Der Haufe schreckt, wenn er nicht fürchtet (*terret vulgus, nisi metuat*)."

[18] *Corinthians*, v. 6.

[19] *Cont. Gent.*, III, 146, *"Bonum commune"* and *"Haec autem."*

For two reasons, then, there must be some agent of social control possessed of the power of coercion, first "in order to prove an efficacious inducement to virtue"[21] for those who need compulsion, and secondly, in order that the peace so bound up with the common good may be maintained and the happiness of others unimpaired. In other words, although every man enjoys an insight into the needs of his nature and consequent freedom and obligation to live in conformity with that vision, some men choose to forsake this responsibility and live lives that disrupt their communities; these men and their communities can be helped in the attainment of social virtue by the use of force: therefore, it is of the natural law that coercion be used as an instrument wherewith the human good is done. The natural law calls human law into the service of man, reason seeks the aid of force, justice carries a sword.

2. Let us suppose, however, that all men became as good as they could be, that they acted always as their conscience required. Would the need for human law vanish? No, decidedly not. For men are deficient not only in character but also in intellect: all but a few of the individuals making up any social whole, being ignorant of most of the facts of any social problem or predicament, are incapable of arriving at the morally good solution. Everyone knows what justice is, but no one knows every form it may take in the countless *"hic-et-nunc"* that arise in the infinite criss-crossing of social relations. In other words, we are not naturally possessed of all of the natural law. The amount of natural law that comes to us as an inseparable adjunct and expression of our undeveloped nature, and is therefore the birthright of all men, is but a pittance, whatever its importance as a potency. Indeed, it is for this very reason—among many others—that the social life is a necessity for man; no one knows all of justice, and few know even the minimum that is requisite for the existence of a society larger

[20] II-II, 64, 2. Cf. 64, 6, and I-II, 87, 3, ad 1.

[21] I-II, 90, 3, ad 2. Cf. 92, 2 and 99, 6, ad 2.

than that of the family. It is necessary that a central agent of social control be operative not only as coercive but also as informative: "law is an ordination of *reason*." The function of external authority, then, is defined by two needs, the need of force where wills are bad, and in intellects the need of guidance. Before human law can be deemed necessary for the improvement of man's knowledge of moral rules, two conditions must exist: an inadequacy of their natural knowledge of the socially necessary rules of justice, and the efficacy of human law to supplement that inadequacy. St. Thomas finds that both of these conditions obtain.

As we have noted time and again, the naturally held first principles of the natural law are far and away too general and abstract to be given concrete embodiment without preliminary delimitation:

> "it belongs to the Divine law to direct men to one another and to God. Now each of these belongs *in the abstract* to the dictates of the natural law, to which dictates the moral precepts (of the Ten Commandments) are to be referred: yet each of them has to be determined by Divine or human law, because *naturally known principles are universal*, both in speculative and in practical matters."[22]

As natural furniture of our minds we possess, not decisions for particular social situations, but general directive principles.[23] In spite of the fact that the natural law by essential definition is "the rational creature's participation of the eternal law,"[24]

> "the human reason cannot have a full participation of the dictate of the Divine Reason, but according to its own mode, and imperfectly. Consequently, as on the part of the speculative reason, by a natural participation of Divine Wisdom, there is in us the knowledge of certain general principles, but not proper knowledge of each single truth, such as that contained in the Divine Wisdom; so too, on the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases. . . . Hence the need for human reason to proceed further to sanction them by law."[25]

[22] I-II, 99, 4. Italics mine.

[23] Müller, p. 21: "Darum vermag das Naturrecht wohl Direktiven zu geben für das gesellschaftliche Leben und es auch etwa noch in seinen Grundzügen zu ordnen; für eine genäurer Regelung des Rechtsleben dagegen reicht es nicht aus. Es bedarf einer schärferen Fixierung und einer Ergänzung durch partikuläre Vorschriften."

[24] I-II, 91, 3.

This first inadequacy of the natural law as operative in individuals is found in every man, as one of the limitations of human nature. It can be remedied by industry with the instrumentality of reason: principles of the natural law "*sunt per industriam hominum excognitata.*"[26] "Many things are done virtuously to which nature does not incline at first; but which, through the inquiry of reason, have been found by men to be conducive to well-living."[27] "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."[28] However, it is not an easy matter to descend from naturally held first principles to the socially necessary concrete rules, for social situations are often so complex, the product of so many relations, that few can claim even a reasonable certitude for their solutions; such situations are like the more infrequent events in physical nature, which, being effected by the concurrence of a multitude of forces, are unpredictable for all save those whose learning is wide enough to include a knowledge of those many forces.[29] Besides this incompleteness of the participation of minds in general in the natural law, arising from the weakness of their comprehension of complex realities, there is a further handicap for reason in the presence of passions; often the sub-rational drives of our nature, singly or in groups, become so strong that not only do they disdain the order that reason should impose on them, but they actually take a hand in reason's cognitive rôle, twisting its insights, adulterating its judgments. Thus, especially where his own personal welfare is in the balance, the individual's pronouncements upon justice and injustice are often wide of the mark. Furthermore, at periods and places in his history man

[25] *Ibid.*, ad 1.

[26] *In V Eth.*, xii.

[27] I-II, 94, 3.

[28] I-II, 94, 5. Here "natural law" seems to denote merely the naturally held first principles of the natural law.

[29] *In III Sent.*, d. 37,1,3.

appears to permit these passions to elevate their unruliness into the status of custom, and thus material violations of even the more easily discerned precepts of the natural law often achieve in the deluded minds of men the sanctity of the moral code.[30]

It is, therefore, helpful to human happiness, and consequently a command of the natural law, that an authority be set up with the power to state and sanction the natural law, both in its easier social precepts and in those more difficult conclusions accessible only to wise men.

> "The written law is said to be given for the correction of the natural law, either because it supplies what was wanting to the natural law [i. e., the naturally held first principles of the natural law]; or because the natural law was perverted in the hearts of some men, as to certain matters, so that they esteemed those things good which are naturally evil: which perversion stood in need of correction."[31]

Human law is, then, necessary as a light supplementing each individual's native perception of those moral truths of justice and injustice which must govern men's lives if there is to be the uniformity of action demanded by communal living.[32] Human law is, so to say, the pooled wisdom of the wise men of many generations. Because in many "the judgment of reason is darkened from an over-indulgence of their passions, wise men should have custody of the law, in order to keep these darkened ones in a knowledge of the law."[33]

> "For there are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: e. g., 'Honor thy father and thy mother,' and 'Thou shalt not kill, Thou shalt not steal': and these belong to the law of nature absolutely.[34] And there are certain things which, after a more careful consideration, wise men deem obligatory. Such belong to the law of nature, yet so that they need to be inculcated, the wiser teaching the less wise: e. g., 'Rise up before the hoary head, and honor the person of the aged man.' . . ."[35]

[30] *In III Sent.*, d. 37, 1; and ad 3.

[31] I-II, 94, 5.

[32] See Cathrein, pp. 225-226.

[33] *In III Sent.* d. 37, 1, ad 3.

[34] This is not to say that there are not at times customs that sanction the violation of these normally grasped precepts, e.g., theft was once permitted by the Germans (I-II, 94, 4).

For these reasons, then—namely, the complexity of the morality of many social problems, the intrusion of passions into private decisions about justice in relation to oneself, and the possibility of taking advantage of the presence of wise men by giving their weighed conclusions the permanence of written law—the natural law dictates the institution of human laws. These considerations are well reflected in St. Thomas' statement of Aristotle's reasons for preferring written law to the day-by-day law of judges:

> "As the Philosopher says,[36] 'it is better that all things be regulated by law than left to be decided by judges: and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case. Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. Thirdly, because law-givers judge in the abstract and of future events: whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted. Since then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible,[37] for the law to determine how to judge, and for very few matters to be left to the decision of men."[38]

[35] I-II, 100, 1. See also *X Eth.*, xvi.: "Illi enim qui sunt experti circa singula, habent rectum judicum de operibus, et intelligunt per quas vias et qualiter hujusmodi opera perfici possunt, et qualia opera qualibus personis vel negotiis concordant. . . . Sic igitur ex legibus congregatis non potest fieri aliquis legis positivus, vel judicare quales leges sint optimae, nisi habeat experientiam."

[36] *Rhet.* i.

[37] "Certain individual facts that cannot be covered by the law have necessarily to be committed to judges, as the Philosopher says in the same passage: for instance, 'concerning something that has happened or not happened,' and the like." I-II, 95, 1, ad 3.

[38] *Ibid,* ad 2.

3. Finally, the natural law requires the supplementation of human law in those social situations where none of the possible solutions is the evidently preferable one, but where some course must be determined, promulgated, and adopted by all if the common good is to be maintained or furthered. Here it is not primarily a case of difficulty in the ascertainment of the natural law; it is possible that the nature of such problems as these be as accessible to the youngest child as to the President's Brain Trust. Neither intelligence nor political experience suggests that it is better for automobiles to drive on the right side of the highway rather than on the left, that as a deadline for the securing of license plates March first is better than March second, or that the ballots be on pink paper rather than on yellow. There is nothing in the nature of the objects concerned that dictates the choice; it is the legislator's will rather than his intellect that decides. Or again, cases arise where each of the alternatives has advantages in its favor, but none seems best, and the matter is put to a vote or the solution determined by a compromise; half of the experts holding out for twenty, and half for thirty, an ordinance is finally promulgated setting the speed limit at twenty-five miles per hour. There are innumerable situations like these where the legislator is forced to be arbitrary.

Whereas Aristotle expresses this distinction by setting into opposition that which is naturally just and that which is legally just, St. Thomas prefers a terminology that will avoid this suggestion that all human law is arbitrary. He denotes the arbitrary element by the word "positive":

> We have seen that "the 'right' or the 'just' is a work that is adjusted to a man in two ways: first by its very nature, as when a man gives so much that he may receive equal value in return, and this is called *natural right*. In another way a thing is adjusted or commensurated to another person by agreement, or by common consent, when, to wit, a man deems himself satisfied if he receive so much. This can be done in two ways: first by private agreement, as that which is confirmed by an agreement between private individuals; secondly, by public agreement, as when the whole community agrees that something should be deemed as though it were adjusted and commensurated to another person, or when this is decreed by the prince who is placed over the people, and acts in its stead, and this is called *positive* right."[39]
>
> "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 the Philosopher says[40] that 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."[41]

In his detailed study of the Mosaic Law St. Thomas finds that a large part of that legislation is positive, owing its determinations rather to the Divine Will than to the Divine Reason: "For the Divine law commands certain things because they are good, and forbids others because they are evil, while others are good because they are prescribed, and others evil because they are forbidden."[42] Like those of any law, the Old Law's prescriptions are three in kind: the *moral* precepts "derive their binding force from the dictate of reason itself," that is, from the object—this or that particular good—that the intellect apprehends; moral precepts, then, are of the natural law, they express in the form of a command the naturally just. Other precepts bind, not because of the nature of the things they command, but because of the fact that they are instituted; the seat of their obligatoriness is not what they command, but that they are commanded. In the Old Law these arbitrary precepts are of two kinds, according to a difference in the human acts they govern: *ceremonial* precepts command or prohibit certain forms of man's worship of God, and *judicial* precepts regulate the social intercourse of men; both of these kinds of legal rules prescribe acts which in themselves "do not imply an obligation of something due or undue."[43] Another way of saying the same thing is that justice of this kind "*ordinat ad alterum . . . circa id quod non principaliter est virtus. . . .* "[44]

However, we have already concluded that the only just law

[39] II-II, 57, 2.
[40] *In V Ethic.*, xii.
[41] II-II, 57, 2, ad 2. Cf. 60, 5, ad 1.
[42] *Ibid.*, ad 3.
[43] I-II, 104, 1. Cf. 104, 4, ad 2.
[44] *In III Sent.*, d. 33, 3, 4, Solution 5.

is an ordination of reason; that the good human act is the act in conformity with our nature, whose essential peculiarity is the attribute of reason; and that a man acts rationally only when he acts for an end apprehended as an end. But then it would seem that there is no place for any but natural law, for the basis of differentiating positive law from natural law is nothing else than the absence, in the situation it governs, of a natural, reason-discerned commensuration between the thing commanded and the subject who is called upon to obey; by definition, positive law operates only in the area of morally indifferent alternatives, where before the ruler's promulgation one's way could lie in one direction or in another, and this legitimately. And what are we to say of St. Thomas' fundamental social doctrine, that "the end of any multitude gathered together is to live virtuously,"[45] that "the intention of any legislator is to render those good for whose governance the laws are fashioned," and that consequently "precepts of law ought to be about acts of virtue"?[46] In what possible sense could the arbitrary rules of law be said to be designed for the development of virtue in the citizenry? How am I made better by being required to drive on the right side of the road? It is easy enough to understand that the ruler's *raison d'être* is the promotion of goodness when we regard only his function of sanctioning socially necessary precepts of the natural law and stating for the benefit of the ignorant citizens its less easily apprehended requirements; but how can it be better, more natural, for the subject to perform this concrete act, *X*, which before enactment was no better than its opposite?

That obedience to laws that are solely positive in character is a form of justice Aristotle intimates by his terminology:[47] the legally just is different from the naturally just, yet it is a type of just, and therefore embodies the *debitum* that is at the heart of all obligations of justice. But if it embodies an obligation of justice then it is a part of the natural-law precept of justice, and how can a member of the class of just relations be also divided off from that class, the positive just as opposed to the natural just? We cannot both affirm and deny an identity between

[45] *De Reg. Prin.* I, 14.
[46] *Cont. Gent.*, III, 115.
[47] *In V Ethic.*, xii.

the natural just and the positive just. The contradiction dissolves when we see that the positive just is indirectly derived from the natural just, showing itself to be, in reality, not sheer arbitrariness but a compound of reason and will, with reason still the ultimate source of obligatoriness. We intimated this truth when we described this third dependence of natural law upon human law as obtaining in situations where there is no morally preferable alternative, but where some course must be adopted by all if the common good is to be maintained and furthered. The natural law dictates not a specific rule but only that some rule must be enforced. Driving on the right side of the street is not commanded by the natural law; what is commanded is that rules be laid down which will organize traffic to the highest point of speed and safety. St. Thomas' example is that of punishment: natural law requires only that some punishment be meted to offenders in gravity proportionate to their delict, and leaves to the legislator's will the specifications of kinds and exact degrees.

A distinction, therefore, presents itself in the methods whereby natural law obliges men's wills in particular concrete situations. In one situation my conscience decides that a certain act must be performed, or avoided; in another situation the ruling of my conscience is not completely specific, but takes a more or less general form: "It is your duty to jump out of the way of this bull; you may jump to the north or to the south, but jump you must." It is evident that the generality of the ought in this command impugns no iota of its force. The conditions of his existence are such that at almost every juncture man has a choice among several ways of fulfilling his nature, but his first rule of action, "Do the human good," "Fulfill your natural needs," remains inviolable, even as his nature remains essentially the same throughout different periods and in different milieux. At times it is natural, i. e., good, for us to choose but one explicit end to effect, one explicit act to perform; at other times, and more often, the natural and good thing to be done is to choose and effect any one act of several. The obligation to act is equal in each case: nature's dynamism does not diminish; it is not the *élan* of nature that varies here, but its formal aspect.

St. Thomas expresses this difference in terms of law by dis-

tinguishing between two modes whereby human laws can be derived from the natural law:

> "something may be derived from the natural law in two ways: first, as a conclusion from premisses, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law by way of conclusions; e. g., that 'one must not kill' may be derived as a conclusion from the principle that 'one should do harm to no man': while some are derived therefrom by way of determination; e. g., the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature."[48]

The first of these methods of derivation is the kind involved in the second ground for the existence of human law; because many men are unable to conclude by reason and experience to all the socially necessary precepts of the natural law, human law must show them the conclusions of wiser men. The second method, that of determination, St. Thomas proffers as that whereby the positive just is derived from the natural just. Now if he is able to make good this claim that laws embodying the positive just, as well as those stating and sanctioning the natural just, are really, if less directly, derived from the natural law; the arbitrariness of so many rules of human law will be sublimated to rationality, thereby enabling every human law to be ethical, i.e., natural and consequently obligatory for the citizen's will. If his suggested method of determination be itself a demand of human nature—just as the natural duty of self-preservation commands that I determine arbitrarily a direction for my flight from the bull—then there will no longer appear to be a contradiction between his recognition of the positive, irrational element in human law and his dicta that "the end of any law . . . is to make men good";[49] that law by definition—and

[48] I-II, 95, 2. See also *In III Sent.*, d. 37, 1, 3.

[49] *Cont. Gent.*, III, 116, *"Finis cujuslibet."*

therefore even the human law that encloses a positive element—is an ordination of *reason,* and the enforcement and following of it an affair of morality.

Now why is this method of determination itself commanded by the natural law? It is clear enough that we are obliged arbitrarily to fix a direction for our bull-flight; obliged because we are obliged to stay alive, arbitrarily because neither north nor south can claim superiority. Hence the rationality of our bull-flight dominates a certain incidental arbitrariness and constitutes the essence of the act. The seeming irrationality of the will's choice of direction rests ultimately upon an end grasped by the reason. The positive element is dictated by the natural. But what is this ultimate reason for the positive element in law, what truth of the natural law commands the irrational element in human law, what exigency of our nature requires us to follow paths arbitrarily laid down by our rulers?

> "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 by the most direct route. A ship, for example, which moves in different directions, according to the impulse of the changing winds, would never reach its destination were it not brought to port by the skill of 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."[50]

If we lived as hermits individual reason would suffice for the determination of arbitrary choices, and indeed it does now in all our nonsocial adventures, as when we fled from the bull. But too many of our natural needs call for collaboration with

[50] *De Reg. Prin.*, I, i, italics mine. Compare Taparelli, I, 172: "Doués d'intelligence et de liberté, les membres d'une société doivent tendre par différents moyens à une fin commune; ils peuvent choisir parmi ces moyens: mais comme des moyens divers et opposés feraient disparaître l'unité sociale et détruiraient l'essence de la société, il faut un principi intelligent qui puisse régir les intelligences, et imprimer la même tendance à toutes les volontés."

other men, and in by far the greater part of the situations arising in the effectuation of those needs north is as good as south, and but one must be selected.[51] In these areas of arbitrariness, before the social end, the purpose for which men come together in any community, can be attained, there must be some choice made and universally adhered to. The immediate purpose of publicly built and used roads, quicker transportation, is unattainable unless certain arbitrary regulations are imposed upon drivers; once promulgated, these regulations partake of the force of natural law, for the end of roads is to fulfill a natural need of man (derived ultimately from his first end, happiness, hence a part of the general human good that ought to be done), and the attainment of that end is possible only if certain arbitrary decisions are enforced. The rationality of the end infuses the unreason of the means and renders them natural and obligatory: "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 by the most direct route."[52]

Once again, then, we have uncovered an exigency in the conditions of man's development necessitating the institution of an authoritative promulgator of human law. The first such exigency was the fact that willingness to follow the socially necessary precepts of the natural law is frequent enough among men to render social living impossible, thereby requiring a human law for the sanctioning of those precepts. Similarly, ignorance of certain socially necessary precepts of the natural law is common enough to bring about the same disunity among men, unless these precepts were stated by the human law. Now a third need for human law has presented itself, arising not from the weakness of men's intellects or wills but from the character of the natural law itself: the natural law often lacks the concreteness that is necessary for the existence of social collaboration.

Now although in all three of the causes of human law it is to an insufficiency in the natural law that human law owes its

[51] Cathrein, p. 227.: "Der . . . *bei weitem grössere Teil der positiven Gesetze* enthält nicht notwendige Schlussfolgerungen aus dem natürlichen Sittengesetz, sondern nähere Bestimmungen desselben." Italics mine.

[52] *De Reg. Prin.*, I, i.

existence, nevertheless, it is to that same insufficient natural law that human law owes its obligatoriness. But is this not a contradiction of the law of identity, are we not finding one and the same thing to be both the privation and the perfection of the completed entity? How can the natural law be both the poverty requiring supplementation and, as it were, the efficient cause of that supplementary richness? It is easy to see that the first two poverties lie not in the natural law but in the souls of men; it is not the natural law that is deficient, but men's wills and intellects. However, the third ground for the naturalness of human law derives from an insufficiency of the natural law itself. Now how can natural law both require the help of human law and be the principle that gives it authority once it has existence?

A resolution of this difficulty is facilitated by the distinction between the *élan* of the natural law and its formal determinations: the *élan* is the obligatoriness of the natural law, in the realm of natural-law propositions the force analogous to the dynamic principle, nature, in the realm of active beings; the forms of natural-law precepts are determined by the various needs of man's nature and the milieux in which they are satisfied. In no sense is the obligatoriness of natural law deficient and needful of supplementation by a human agent; men are free to violate rules of natural law, but they are not free to abrogate the ought their reason apprehends: "Human reason is not . . . the measure of things that are from nature."[53] "Just as the written law does not give force to the natural just, so neither can it diminish or annul its force, because neither can man's will change nature."[54] However, the form that the natural law possesses in the precepts reason hands down for the governance of certain concrete situations is often too general to be realized in a concrete act unless concretization be supplied by an arbitrary act of the will—in individual action, the will of the individual moral agent; in social action, the ruler's will. "The juridicial will is not generative of Order; it adheres to it and enriches it by its adhesion and by all the realities that it leads in."[55] Thes

[53] I-II, 91, 3 ad 2.

[54] II-II, 60, 5, ad 1.

[55] Renard, *Le Droit, l'ordre, et la raison*, p. 146.

realities that that will produces are not among the obligations of the individual citizen until the legislator introduces them, using them for the completion of the general precept of the natural law. Hence it does not seem quite true that

> "the laws proclaimed specially by the authority of princes and of collectivities that they represent add . . . absolutely nothing to the content of the natural law; their function is only to define it and make it more precise, in order that those who do not know it or who will not follow it may find all made and imposed for their acceptance the deduction that draws from the universal principles of the law of nature the particular conclusions required by life in society."[56]

The third function of human law is exactly this, to add to the content of the natural law where the social precept of the natural law requires this additional specification. In social action the obligation to make that concretization arises from the natural-law precept of sociality: We have need of society for our full development, and society cannot exist unless in the many areas of morally indifferent alternatives some one course is chosen and adhered to by all; the natural law thus requires that its own general form be specified by arbitrary additions. Hence men are obliged, when these matters concern only private individuals, to come to an agreement among themselves; or, in affairs affecting the social whole, to effect a

> "public agreement, as when the whole community agrees that something should be deemed as though it were adjusted and commensurated to another person, or when this is decreed by the prince who is placed over the people, and acts in its stead. . . ."[57]

Because the natural law requires the existence of a human authority with the function of determining its generalities, it is possible for all human law to be infused with the natural law: "every human law has just so much of the nature of law as it is derived from the law of nature";[58] the necessary arbitrary enactments of the civil authority are rational and natural because

[56] Gilson, *Saint Thomas d'Aquin,* p. 238.
[57] II-II, 57, 2.
[58] I-II, 95, 2.

the common good requires them; the natural-law precept exacting promotion of the common good entails the institution of a civil authority with the power of enforcing an arbitrary enactment. Precepts owing their incorporation into the law to the method of determination do not become natural-law precepts, for the commensuration they establish between man and another thing does not arise from the nature of that other thing, but solely from the man's need of that thing as of an arbitrarily chosen instrument:

> "Artificial things are not reduced into natural things so that nature is the first and chief principle of them, but insofar as art uses natural instruments for the making of the artificial thing. Similarly, ceremonial precepts of positive law are not reduced to natural law so that their force comes from the latter; they get this element from the will of the law-maker, who in instituting the law makes use of natural reason, if the law is rightly instituted."[59]

Natural reason enters into the consideration of the law-maker when he apprehends the general natural-law precept which commands that a determinative choice be made. The end-product of this collaboration of reason and arbitrary choice is a human law embodying the natural right and the positive right:

> "Laws are written for the purpose of manifesting both these rights, but in different ways. For the written law does indeed contain natural right, but it does not establish it, for the latter derives its force, not from the law, but from nature; whereas the written law both contains positive right and establishes it by giving it force of authority."[60]

. . . . . .

We have discovered three natural needs in man calling for the institution of human law. Because of the shortsightedness of many intellects, indeed of all individual intellects under the complexity of highly developed civilization, men need to be

[59] *In III Sent.,* d. 37, 1, 3, ad 2.
[60] II-II, 60, 5. See *III Sent.,* d. 37, 1, 5, Sol. 2, where St. Thomas shows how all three kinds of precepts in the Mosaic Law (moral or natural, ceremonial, and judicial) conjoin in the formal constitution of the Third Commandment. Also in I-II, 99, 3 ad 2; and 99, 4.

shown the way to the just denouement of many a social tangle. Again, in seeking for the just regulation of social intercourse even expert reason and experience are often brought to a standstill, and, since the common good is not to be stayed, an authoritative *will* must tip the scales in the ultimate decision. Finally, because without the support of force the legal precepts derived from the natural law would be infringed often enough to destroy social life, there is needed a human sanctioning of the natural and the positive just. In other words, the institution of human law, of human formulation and execution of socially necessary rules of action, is enjoined by the natural law. The general precept demanding this institution is the precept of sociality: human nature remains immature and undeveloped unless fructified by an existence in a society of greater breadth and diversity than the family; but such a society is impossible without a unified civil authority that issues and sanctions statements of socially necessary precepts of natural law or of derivations therefrom; therefore human law is a natural institution, vitalized with the obligatoriness of natural law.

This doctrine of the threefold need for human law finds an interesting application when St. Thomas asks whether human law and organized states would have been necessary had man never fallen from the condition of innocence. He concludes that there would still have had to be a ruler and those ruled:

> "first, because man is naturally a social animal. Because of this men in the state of innocence would live socially. But there could be no social life among many men unless some one presided, looking after the common good; for many things, insofar as they are many, tend towards many objects, one however towards one. This is the reason why the Philosopher says that wherever you find many things unified you always find one that is principal and directive.[61] Secondly, it would be *mal à propos* for one superior to others in knowledge and justice not to dedicate that excellence to their profit; this is why it is said,[62] 'As every man hath received grace, ministering the same, one to another.' "[63]

It would seem that in his first reason for considering human

[61] Beginning of *Politics.*
[62] I *Peter* iv, 10.
[63] I, 97, 4.

law natural to man in the state of innocence, St. Thomas has in mind the need for a single authority who would make the needed arbitrary decisions. Since men's wills would be perfectly receptive of the good, there would be no need of a sanction for the natural law; and the educative function of human law is dealt with in the second reason; hence the first argument must refer to the natural law's frequent generality and its consequent insufficiency in the face of the concrete material it must govern. In Eden, as now, communal life would generate junctures organizable by any one of a number of amoral rules, and the order required by the common good would not spring into existence automatically, notwithstanding the impeccability of men's wills, for there would be no concrete natural-law precept to follow. Hence, without "public agreement, as when the whole community agrees that something should be deemed as though it were adjusted and commensurated to another person," or the decree of the public authority, "who is placed over the people and acts in its stead,"[64] men's collaborative and concurrent actions would lack the uniformity upon which the social welfare rests.

Human law, together with a ruler to fashion and sanction it, is therefore indispensable for the development of man's capacities; as such, it is obligatory, binding *"in foro conscientiae"*:[65] the rational dynamism of natural law pours into man-made law and gives it a legitimate claim upon men's wills, endows it with true authority. The very grounds of this obligatoriness, we have noted, involve, in each of the three reasons, the natural-law precept of legal justice: human law is invoked as an educative, determinative, and sanctioning instrument of natural law only because the good of the community requires it. This quasi-nature, the social totality, could not grow to a level of greater usefulness for its members—indeed, could not even exist as a whole —unless there existed a central agent whose specific function it is to foster the common good as such by the issuance of human laws stating, determining, and sanctioning the natural-law precepts *that are necessary for the common good.* Thus in its very definition human law is directly an implement of only the common good of the members of the state-order, the good of that

[64] II-II, 57, 2.
[65] I-II, 96, 4.

order as a quasi-nature seeking its own well-being and development. In other words, a very definite end determines the direction in which human law canalizes the obligatoriness it derives from nature. Having examined his grounds for the *obligatoriness* of human law—its dynamic aspect—let us now follow St. Thomas' treatment of its formal side, which is determined generally and essentially by its end, the common good.

CHAPTER VI

THE TELEOLOGICAL DETERMINANT OF HUMAN LAW: THE COMMON GOOD.

Since human law is designed to help men lead the best possible lives, its end is ethical; that it operate is a demand of the natural law—to "Do the good" men must live under the guidance of man-made laws. Human law is not, however, all of the natural law: called into being as an instrument for the building of a social order, it has as its immediate end not any good, but the unity of that order, the common good; it fosters the growth of virtue within men's souls only through the medium of creating and maintaining the common good: "*the intention* of every lawgiver is directed first and chiefly to the common good; secondly, to the order of justice [i. e., individual justice] and virtue, whereby the common good is preserved and attained."[1] Hence if there be precepts of justice and virtue that are not directly related to the common good, they will be outside the jurisdiction of human law. The general end of human law, as of any norm instinct with the natural law, is, then, the human good; and its specific end, the special aspect of the human good *to which it is devoted, is the common good.* In philosophical terminology, its material object is the good; its formal object, the common good.

It is clear that, as subject to the exigencies of the human good in general, human law must never command precepts violatory of the natural law. The common good is never located outside the human good. The good of the state is unthinkable if it impede or destroy the good of man: the natural law, the needs of man's nature, rules all human conduct: "every human law has just so much of the nature of law, as is derived from the law of nature."[2] Hence, before a piece of legislation can be projected as useful for the common good, it must fulfill one or the other of two conditions; either it must be useful for the human good—i.e., commanded by the natural law—or it must deal with amoral matter. This is but another way of saying that

[1] I-II, 100, 8.
[2] I-II, 95, 2.

all human law must be derivable from the natural law, either by way of direct deduction or by way of arbitrary determination. Now how is the common good related to each of these types of derivation? The answer to this question will help us to understand the rôle of the common good in the formation of human laws.

That aspect of human laws which is *determinative* of the natural law is easily seen to be motivated by the common good. The only possible reason for stating and sanctioning the positive just is the good therewith worked for the social whole, for the positive just emerges from the will of the lawgiver only where the choice is among amoral alternatives. An amoral act is one with no significance for the good of the agent: it works no good, else it would be moral, and it works no evil, else it would be immoral. Hence for a legislator to select for incorporation into human law a course of action that is in itself neither good nor bad is to act solely and simply for the common good, which requires that some one of these amoral courses of action be adopted by all. Such positive legislation is derived from the natural law by way of determination, and the general natural-law precept that is determined commands none other than the common good itself. Legal justice, which devotes itself to the good of the community as a whole, constitutes the link between the human good and positive law.

The point of practical importance here is the necessity that the choice be among amoral possibilities. No matter how helpful a given measure would be for strengthening the country as a whole, it cannot be legitimately legalized if it be contrary to the moral law. This is only to say that the common good is not the absolute good. It is limited by the nature of the men it is designed to develop.

> "Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting.[3] Again, everything that is ruled and measured must have a form proportionate to its rule and measure. Now both these conditions are verified of human law: since it is both something ordained to an end, and it is a rule or measure ruled or measured by a higher measure. And this higher measure is twofold, viz,

[3] Aristotle, *Physics*, II.

> the Divine law and the natural law, as explained above.[4] Now the end of human law is to be useful to man, as the Jurist states.[5] Wherefore Isidore in determining the nature of law lays down, at first, three conditions—viz., that it *foster religion*, inasmuch as it is proportionate to the Divine law; that it be *helpful to discipline*, inasmuch as it is proportionate to the natural law; and that it *further the common weal*, inasmuch as it is proportionate to the utility of mankind."[6]

Of these three conditions set by Isidore of Seville it is the third—that it further the common weal—which dominates the formation of the positive aspects of human law. This condition is placed last among the determinants of human law because human law is but "a rule or measure ruled or measured by a higher measure," and as such it must operate only within an area delimited by that higher measure, the natural law.[7]

But how do human laws that declare the natural law effect the common good? In the first place, some human laws declare rules that are directly deducible from the natural-law command of legal justice, the only virtue whose object is the common good as such—e.g., "that no man should work for the destruction of the commonwealth, or betray the state to its enemies."[8] Protection against insurrection is the most important single duty of the state, since it is a crime directed diametrically against the common welfare.[9] Such rules are derived from the natural law by deduction, rather than by determination. No doubt determination will take a hand in the further concretization that is needed before these rules will be effective controls of human conduct (as, e.g., in setting the exact form of a traitor's punishment), but the step from the command of legal justice to the anti-treason precept is an act not of the will but of the reason; betrayal of country is seen to be in its very nature an immoral

[4] I-II, 95, 2; 93, 3.

[5] *Pandect. Just.* i.

[6] I-II, 95, 3.

[7] The relation of the Divine law to the human law is outside the scope o our problem. At any rate, what is true of the human law's subjection to th natural law is not abrogated by the further subjection to the Divine law, fo the supernatural order does not destroy the natural.

[8] I-II, 100, 8.

[9] II-II, 40, 1; 42, 1 & 2.

act: from my duty to promote the common good I immediately infer the wickedness of an act designed for its subversion. Again, it is clearly a matter for the adjudication of reason whether or not any of the many public projects that governments now undertake actually promote the common good, i.e., strengthen the country, effect a greater unity, establish an economic milieu better adapted for the citizens' attainment of personal happiness. All such projects have their *raison d'être* in the natural-law command of legal justice, and the human precepts needed for their effectuation are all, partly at least, reasoned declarations of this injunction to further the common good.

Not only does the natural-law precept of legal justice require rulers to make laws forbidding crimes diametrically against the common good, but it also limits those rulers in all their legislation: their eye must ever be on the common good, rather than the good of some private group, or of the present generation only:

> "Whatever is for an end should be proportionate to that end. Now the end of law is the common good; because as Isidore says,[10] 'laws should be framed, not for any private benefit, but for the common good of all the citizens.' Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another,[11] as Augustine says.'"[12]

Here we are presented with another negative declaration of the demands of legal justice, this one dealing with the act of legislation itself: Rulers must not violate legal justice by effectuating the good of some only of the many generations of citizens that belong to the state throughout its entire existence. The common good, being the good of the state itself, is the good of all members of the state. This is the reason legislation is usually general in form: it looks to the governance of a multitude of

[10] *Etym.* ii.
[11] *De Civ. Dei.* xxii.
[12] I-II, 96, 1.

concrete situations. And when, as is usually the case, a statute or decision governs directly the activity of only some of the citizens, its justification resides solely in the good it indirectly works for the social totality—as in certain laws, called privileges, which work a twofold good, looking to the good of both the community and certain individuals. "Since the 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 a law, save in so far as it regards the common good."[13] Natural law exacts obedience to human law only because human law has the function of establishing *"aliquid utile communitati."*[14]

> When "an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory . . . such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance."[15]

Thus legal justice is the soul of human law, of the precepts declaratory of the natural law, as well as of those determinative. Are we then to conclude that, of all the virtues that prompt and govern the behavior of the good man, only legal justice is legitimately enjoined by human law? What of commutative and distributive justice, and what of prudence, temperance, and fortitude—are these of no concern to human law? The answer is, of course, that they are. Providing the end of human law, the common good, so requires, any one of these other virtues may become an objective of human law:

> "The species of virtues are distinguished by their objects. . . . Now all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude: thus matters of fortitude may be achieved either for the safety of the state, or for upholding the rights of a friend, and in like manner with the other virtues. But law . . . is ordained to the common good. Wherefore there is no virtue whose acts cannot be prescribed by the law."[16]

[13] I-II, 90, 2.
[14] *In V Eth.*, ii.
[15] I-II, 96, 4.
[16] I-II, 96, 3.

From another point of view, too, all virtues are the goal of human law; for any virtue forms part of the citizen's individual good, and the common good—like the end of any order as such—rests ultimately in the particular goods of the members of the social order:

> "Now it is evident that all who are included in a community stand in relation to that community as parts to a whole; while a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole. It follows therefore that the good of any virtue, whether such virtue direct man in relation to himself, or in relation to certain other individual persons, is referable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, in so far as it directs man to the common good. It is in this sense that justice is called a general virtue. And since it belongs to the law to direct to the common good, as stated above, it follows that the justice which is in this way styled general, is called *legal justice,* because thereby man is in harmony with the law which directs the acts of all the virtues to the common good."[17]

In this sense the individual citizen's possession of even so self-regarding a virtue as temperance—moderation in physical appetites—constitutes a contribution to the common good.

However, as we have already seen, the essential nature of legal justice lies in the fact that it is directly referred to the common good as such. St. Thomas distinguishes between this essential direction of legal justice and the power it possesses: admitting that among the consequences of serving the common good there is to be found growth in any of the other virtues, nevertheless there is a place for the concept of a virtue that is directly devoted to the common good. This virtue, legal justice, is the only immediate desideratum of the human legislator; all other virtues, however much we may need them in order to carry out the ruler's commands, are but by-products of the law, or merely instruments for effecting the law's end, the common good.

> "There is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good—either immediately, as when certain things are done directly for the common good—or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace."[18]
>
> "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."[19]

Here, then, we have the primary principle guiding the legislator in his selection of the virtuous acts to be commanded by his precepts and the vicious acts to be illegalized: the general concern for the common good is immediately concretized in laws of taxation, military service, and other such regulations directly declarative of legal justice; mediately, however, human law declares those other natural-law precepts whose realization in the citizens' lives is a *conditio sine qua non* of the common good. We recognize that the state as a quasi-nature cannot attain its end, the common good, unless the individual citizens are purified of many of their antisocial propensities, a fact that we have already found to constitute one of the radical reasons for the existence of human law. Legal justice is unattainable without a preliminary private excellence in the citizens. It is the old story that the efficacy of political measures depends upon the private morality of the citizens.

On innumerable occasions St. Thomas employs this first principle of legislative action, that the end of human law is the common good:

> "human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and suchlike."[20]

[17] II-II, 58, 7. Also *In V Eth.,* ii.

[18] I-II, 96, 3.
[19] I-II, 100, 8.
[20] I-II, 96, 2.

"*Audacia* seems to refer to the assailing of others. Consequently it belongs to those sins chiefly whereby one's neighbor is injured: and these sins are forbidden by human law, as stated."[21]

[St. Thomas is instructing the King of Cyprus.] "A further requisite when choosing a site for the founding of a city is this—it must charm the inhabitants by its beauty. For a charming spot will not readily be abandoned nor will a multitude of inhabitants readily flock to a place that is not pleasant, because the life of man cannot endure without enjoyment. . . . However, since an excess of enjoyment unduly draws man to indulge in pleasures—a thing most harmful to a city—it is necessary to be moderate in its use. . . . Men who have become dissolute through pleasures usually grow lazy and, neglecting necessary matters and all the pursuits that duty lays upon them devote themselves wholly to the quest of pleasure, on which they squander all that others had so carefully amassed; and thus, reduced to poverty and yet unable to deprive themselves of their wonted pleasure, they are exposed to the temptation to steal and rob, in order to have the wherewithal to indulge their craving for pleasure. It is, therefore, harmful to a city to superabound in delightful things, whether it be on account of its situation or from whatever other cause."[22]

"inter naturales actus, sola generatio ad bonum commune ordinatur; nam comestio et aliarum superfluitatum emissio ad individuum pertinent, generatio vero ad conservationem speciei. Unde, quum lex instituatur ad bonum commune, ea quae pertinent ad generationem prolis oportet legibus ordinari, et divinis et humanis."[23]

"the Divine law is instituted chiefly in order to direct men to God; while human law is instituted chiefly in order to direct men in relation to one another. Hence human laws have not concerned themselves with the institution of anything relating to Divine worship except as affecting the common good of mankind: and for this reason they have devised many institutions relating to Divine matters, according as it seemed expedient for the formation of human morals; as may be seen in the rites of the Gentiles."[24]

[21] *Ibid.*, ad 1.

[22] *De Reg. Prin.*, II, 4.

[23] *Cont. Gent.*, III, 123. Cf. *In Sent.* d. 33, 1, sol. 2, ad 4: Fornication is a graver sin than gluttony, because of its social implications.

[24] I-II, 99, 3.

"human law is given to the people, among whom there are many lacking virtue, and it is not given to the virtuous alone. Hence human law is unable to forbid all that is contrary to virtue; and it suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them, but by not punishing them. Accordingly, if without employing deceit the seller disposes of his goods for more than their worth, or the buyer obtains them for less than their worth, the law looks upon this as licit, and provides no punishment for so doing unless the excess be too great. . . ."[25]

"Human laws leave certain things unpunished, on account of the condition of those who are imperfect, and who would be deprived of many advantages, if all sins were strictly forbidden and punishments appointed for them. Wherefore human law has permitted usury, not that it looks upon usury as harmonizing with justice, but lest the advantage of many should be hindered."[26]

Here St. Thomas, while denying its morality, defends the legality of usury in his time on the ground that to prohibit it would work great harm to the common good; the imperfect men, subjected to a law exacting a perfection beyond their capacity,

"would break out into yet greater evils: thus it is written: 'He that violently bloweth his nose bringeth out blood';[27] and that 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,' i.e., the precepts are despised, and those men, from contempt, break out into evils worse still."[28]

"the positive law aims principally at the common good of the multitude. It sometimes happens, however, that opposition to a certain evil works great harm to the community; therefore, positive law sometimes permits something, not because it is just, but in order that the community may not suffer a greater incommodity. As God, too, permits certain evils to be done in the world so the good things which he knows how to elicit from these evils may not be impeded.

[25] I-II, 77, 1, ad 1.

[26] I-II, 78, 1.

[27] *Prov. xxx*, 33.

[28] I-II, 96, 2, ad 2.

And in this way the positive law permits usury because of the many useful things that some men often derive from the exchange of money, although it be usurious."[28]

Likewise, injury to the common good is the aspect of vice and wrongdoing which measures the punishment applied by human law:

"retribution according to justice is rendered to a man by reason of his having done something to another's advantage or hurt. It must, moreover, be observed that every individual member of a society is, in a fashion, a part and member of the whole society. Wherefore, any good or evil done to the member of a society redounds on the whole society: thus, who hurts the hand, hurts the man. When, therefore, anyone does good or evil to another individual, there is a twofold measure of merit or demerit in his action: first, in respect of the retribution owed to him by the individual to whom he has done good or harm; secondly, in respect of the retribution owed to him by the whole of society. Now when a man ordains his action directly for the good or evil of the whole society, retribution is owed to him, before and above all, by the whole society; secondarily, by all the parts of society. Whereas when a man does that which conduces to his own benefit or disadvantage, then again is retribution owed to him, in so far as this too affects the community, forasmuch as he is a part of society: although retribution is not due to him in so far as it conduces to the good or harm of an individual. . . ."[29]

"man can be punished with a threefold punishment corresponding to the three orders to which the human will is subject. In the first place a man's nature is subjected to the order of his own reason; secondly, it is subjected to the order of another man who governs him either in spiritual or in temporal matters, as a member either of the state or of the household; thirdly, it is subjected to the universal order of the Divine government. Now each of these orders is disturbed by sin, for the sinner acts against his reason, and against human and Divine law. Wherefore he incurs a threefold punishment; one, inflicted by himself, viz., remorse of conscience; another, inflicted by man; and a third, inflicted by God."[31]

[28] *De Malo*, 13, 4 ad 6.
[29] I-II, 21, 3.
[31] I-II, 87, 1.

The ruler's duty to formulate and apply punitive law arises, we have already seen, from the normative fact that, if no such sanctions operated, infraction of rules of socially significant action would be frequent enough to preclude social living. "It is necessary for punishment to be inflicted on evil-doers, for the maintenance of peace among men";[32] and "a multitude of men which lacks the unity of peace is hindered from virtuous action by the fact that it fights against its very existence as a group."[33] In punishing delicts, the state's first and ruling intention is to promote the common good. St. Thomas assigns this task to the ruler as an activity necessary if the state is to maintain itself against that "impediment to the preservation of the public good" which

> "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."[34]

It is, then, only the social aspect of men's offenses that draws them under the state's sword of justice. This is borne out in St. Thomas' statement that

> "the punishments of this life are medicinal rather than retributive. For retribution is reserved to the Divine judgment which is pronounced against sinners 'according to truth.'[35] Wherefore, according to the judgment of the present life the death punishment is inflicted, not for every mortal sin, but only for such as inflict an irreparable harm, or again for such as contain some horrible deformity."[36]

That is, human judges inflict mortal harm on perpetrators of certain mortal sins, rather to remedy a bad social condition—the criminal's moral and physical harmfulness for the community—than to levy exact retribution, measured *sub specie aeternitatis*. "The life of a few pestilential individuals is a hindrance to the common good, which is the harmony of the human community.

[32] *Cont. Gent.*, III, 146.
[33] *De Reg. Prin.*, 1, 15.
[34] *Ibid.*
[35] *Rom.* ii, 2.
[36] II-II, 66, 6.

Therefore such men should be cut off by death from the society of their fellows."[37] Thus social considerations affect human law's computation of retribution:

> "when a man despoils another of his property against the latter's will, the [culpable] action surpasses the passion [i.e., the punishment], if he [the culprit] be merely deprived of that thing, because the man who caused another's loss, himself would lose nothing, and so he is punished by making restitution several times over, because not only did he injure a private individual, but also the common weal, the security of whose protection he has infringed."[38]

All virtues, then, are represented in the domain ruled by human law; however, not all acts of all the virtues, but only those which are significant for the common good. The legislator, as it were, looks out upon the panorama of social events through a lens that is opaque to all acts that lack the coloration of the common good. However, it is possible to make this objective a little more precise by recalling St. Thomas' description of the virtue of legal justice. Legal justice is a kind of justice, and as such it bears the characteristics of justice in general: the just act is always interpersonal, and its distinctive characteristic consists in the fact that it establishes or observes an equality, a "commensuration", between the two terms. Relevant to us here, in our attempt to bound the area of legitimate legislating, is the just act's *ad-alterum* aspect. St. Thomas holds that the very nature of society confines legislative action to this aspect of the citizen's conduct:

> "human law is ordained for the civil community, implying mutual duties of man and his fellows: and men are ordained to one another by outward acts, whereby men live in communion with one another. This life in common of man with man pertains to justice, whose proper function consists in directing the human community. 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."[39]

Acts of interest to the human law can be found, then, only

[37] *Cont. Gent.*, III, 146.
[38] II-II, 61, 4.
[39] I-II, 100, 2.

within the class of *ad-alterum* acts; and the acts of other virtues, which govern only internal relations between man's reason and his passions, become the concern of human law only when they bear an *ad-alterum* aspect. The reason for this lies in the fact that social intercourse, for the maintenance and improvement of which human law is instituted, consists in nothing more nor less than these interpersonal relations: "men are ordained to one another by outward acts, whereby men live in communion with one another." If men live in common only by means of outward acts, and the communal life is the child and the *raison d'être* of human law, then it is evident that outward acts are the proper matter for the legislator's attention and control.

Then the common good cannot be effected by acts that are not subject to the norm of justice. Now, we have already seen that the legislator, by means of promulgations declarative and determinative of the common good, commands civic attention to *legal justice*. What a commutative and distributive justice, the other two species of the virtue that governs *ad-alterum* acts? To what extent does the legislator declare natural-law precepts enjoining commutative justice between citizens and distributive justice in the state's treatment of its populace? In other words does individual (i.e., commutative and distributive) justice have any significance for social (i.e., legal) justice? The civil authority is primarily and principally taken up with the common good, the objective of social justice; we already know that it is in discharge of this function that rulers promulgate laws that point directly at the effectuation of the common good; we have also seen that the ruler's primary and immediate objective is unattainable unless he extend his sword to the sanctioning of certain acts of all other virtues than legal justice, but that the nature of social intercourse limits the number of such acts to those that are *ad-alterum*, i.e., to acts governable by the norm of justice. The question now is, How far does the ruler's care of the common good carry him into the fields of individual justice; to what extent does the effectuation of the common good entail the declaration, determination, and sanctioning of the natural-law precepts of commutative and distributive justice?

If we give a more precise content to the term "common good", we shall be better able to determine what dependence, if

any, it has on individual justice. The ultimate end of a group of men can, of course, be no different from the ultimate end of the members, for the group is existentially identical with the members; the common good must take its place as an implementation of the good life in the individual citizens. Now,

> "For an individual man to lead a good life two things are required. The first and most important is to act in a virtuous manner (for virtue is that by which one lives well); the second, which is secondary, and, as it were, instrumental, is a sufficiency of those bodily goods whose use is necessary for an act of virtue."[40]

But before we can translate these requisites into terms of the common good of the social totality, we must recognize the fact that for the populace to take the shape of a state some unifying force must be at work. Hence, in addition to the two requisites to the good life in the individual, for whom unity is to a great extent a natural endowment, a third exists for the totality, viz. a conscious effort towards unity.

> "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. Therefore, to establish virtuous living in a multitude three things are necessary. *First* of all, that the multitude be established in the unity of peace. Second, that the multitude thus united in the bond of peace, be guided to good deeds. For just as a man can do nothing well unless unity within his members be presupposed, so a multitude of men which lacks the unity of peace is hindered from virtuous action, by the fact that it fights against its very existence as a group. In the third place, it is necessary that there be at hand a sufficient supply of the things required for proper living, procured by the ruler's efforts."[41]

We have already noted the three forces of disintegration whose ubiquity makes social unity the fort to be stormed rather than the inherited homestead. Of the three of these—the mortality of public officials, bad will infecting the conduct of both officials and citizens, and the threat of enemies from without—only the second concerns us here.

[40] *De Reg. Prin.*, I, 15.

[41] *Ibid.* Italics mine. See also *De Reg. Prin.*, I, 5, where peace is called *"praecipuum in multitudine sociali."*

> "A second impediment to the preservation of public good . . . 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 neighbours."[42]

Peace, the indispensable condition of social existence, itself rests upon the cornerstone of commutative justice—for that is the kind of justice involved when men "disturb the peace of their neighbors". We recall St. Thomas' first reason for the existence of coercive human law:

> "since some are found to be depraved, and prone to vice, and not easily amenable to words, it is necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace. . . ."[43]

The civil authority's first end is the common good, the first requisite of the common good is social unity, i.e., peace, and indispensable for the maintenance of peace is the preservation of justice: human law prescribes those virtuous acts which are

> "ordainable to the common good, either immediately—as when certain things are done directly for the common good—or mediately—as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace."[44]

We conclude, then, that commutative justice is a necessary means to the common good:

> "Whatever is necessary for the maintenance of human society is naturally becoming to man: such are to let every man have what is his and to abstain from injuring him (*unicuique quod suum est conservare, et ab injuriis abstinere*)."[45]

That the observance of distributive justice is a function of human law is evident from a consideration of unjust laws. A

[42] *De Reg. Prin.*, I, 15.

[43] I-II, 95, 1.

[44] I-II, 96, 3.

[45] *Cont. Gent.*, III, 129.

law can be contrary to the human good in three ways, the third of which involves unjust distribution:

> "either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form as when burdens are imposed unequally on the community, although with a view to the common good."[46]

Here St. Thomas is looking at the notions of common good and justice in themselves, and not in relation to each other; i.e., for the moment he is turning his mind away from the objective good, in order reflexively to regard the concepts whereby we know that objective good. Only conceptually are justice and the common good separable; only conceptually can it be held possible for a law to exist which, while aiming at the common good, at the same time would fail to observe the proportion that justice requires in the treatment of the citizens: or conversely, a law which, while designed for the private good of the ruler, would be just by virtue of the correct proportion it observed in taxing the citizens. The true common good and true justness are not separately realizable. Nevertheless, this abstract approach is useful for the sake of clarification. Another example of it is to be found in the formal distinction between God's goodness and His justice:

> "both goodness and justice cause distribution, but in different ways: goodness is as a final principle, not determining the special mode of distribution, whereas justice is as an efficient principle determining the special mode of distribution."[47]

Applied to things human, this distinction yields these values for the common good and distributive justice in society: the common good is comprised of 1) immediately, the prosperity of the totality as a quasi-nature, and 2) ultimately, the sum of all the benefits the citizens receive as a result of their communal effort; and distributive justice determines the distribution of

[46] I-II, 96, 4.

[47] *In IV Sent.*, d. 46, 1, 1, Sol. 2 ad 2.

that common good according to the proportionate worthiness of the citizens. Hence in this abstract way we could conceive of a prosperous state, its barns bulging with the common good, but its wealth flagrantly maldistributed; actually, however, that state would not deserve the epithet "prosperous", its wealth would not really be a "common good", for no more than without the enforcement of commutative justice can the true common good exist without the presence of distributive justice. Distributive justice requires that a "proportional equality" be observed in the distribution of communally gained goods, the better citizens receiving a proportionately larger share of wealth and honors—"*sic*," says St. Thomas, "*servabitur pax in civitate.*"[48]

Human law must, then, both implement commutative justice and observe distributive justice if the common good is to be truly effectuated: "*Societas conservari non potest sine justitia* (i.e., justice in general: commutative and distributive, as well as legal)." However, a difference is to be observed in the common good's dependence upon these two justices: commutative justice is indispensable to the common good, "necessary for the maintenance of human society";[49] whereas distributive justice, though essential to the good society, is not indispensable to the *existence* of society. This difference becomes apparent when we consider the existence of unjust governments. "A government becomes unjust by the fact that the ruler, paying no heed to the public welfare, seeks his own personal advantage,"[50] thereby sinning against distributive justice, which commands and controls the allocation of common goods among the members of the state. Countries with such governments do exist—and often under conditions where obedience is still morally requisite—whereas a country where commutative justice is not enforced is an impossibility, for men simply do not collaborate with others

[48] II *Pol.*, viii. Also II, ix: "Illi enim qui sunt in civitate gratiosi, utpote nobiles et virtuosi existentes indignabuntur si aequalia recipiant sint digni majoribus. Sicut enim contra justitiam esse videtur, ut aequales inaequalia habeant, ita injustitia est, ut inaequales aequalia habeant. Et ex hac causa frequenter majores sunt aliis molesti et seditiones movent. Per justitiam enim conservatur pax civitatis, transgressio vero justitiae est seditionis causa."

[49] *Cont. Gent.* III, 129.

[50] *De Reg. Prin.*, I, 3.

unless they are reasonably sure that the agreements entered into will be fulfilled.

If individual justice is an instrument intimately bound up with the common good, then human law must seek to realize it. Does this mean that every human law that runs counter to either commutative or distributive justice therewith loses its claim to obedience? Not at all, says St. Thomas. Unjust laws

> "are acts of violence rather than laws; because, as St. Augustine says,[51] 'a law that is not just, seems to be no law at all.' Wherefore such laws do not bind in conscience, *except perhaps in order to avoid scandal or disturbance,* for which cause a man should even yield his right, according to Matthew, v. 40, 41: 'If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two.' "[52]

Observe that the exception is not merely a matter of decorum, deferring to a mere gentlemanly desire to avoid an unpleasantness; on the contrary, it enjoins an obligation of obedience to such unjust laws, when nonobservance of them would bring scandal or disturbance. In other words, there are times when keeping the peace is more important than getting or retaining what is due us (excepting, of course, absolutely inviolable rights to worship and serve God, our ultimate end—the *raison d'être* of all these instrumental possessions); times, i. e., when the common good outweighing the individual good, social justice dictates the nonobservance of individual justice. In general, the common good—the end of human law—requires the implementation of individual justice (commutative more than distributive); in specific cases, however, the common good is prejudiced by the prosecution of individual justice.

St. Thomas invokes this principle as a guide to both subjects and rulers. Subjects must take the common good into account when they are commanded to obey a law that violates individual justice, and rulers must often defer to the common good rather than declare and enforce individual justice. Let us look at each of these in turn.

In case the tyranny of any unjust government is excessive,

[51] *De Lib. Arb.* i.
[52] I-II, 96, 4. Italics mine.

then, indeed, it is lawful for the ruler to be overthrown, not by private persons,[53] but by public authority, that is, by the people as a whole:

> "if to provide itself with a king belong to the right of any multitude, it is not unjust that the king set up by that multitude be destroyed or his power restricted, if he tyrannically abuse the royal power. It must not be thought that such a multitude is acting unfaithfully in deposing the tyrant, even though it had previously subjected itself to him in perpetuity; because he himself has deserved that the covenant with his subjects should not be kept, since, in ruling the multitude, he did not act faithfully as the office of a king demands."[54]

However, this course is lawful only when the tyranny is "unbearable"; although by nature tyranny is unjust, the common good is usually better served by tolerating such injustice:

> "Indeed, if there be not an excess of tyranny it is more expedient to tolerate for a while the milder tyranny than, by acting against the tyrant, to be involved in many perils which are more grievous than the tyranny itself. For it may happen that those who act against the tyrant are unable to prevail and the tyrant, thus provoked, rages the more. Even if one should be able to prevail against the tyrant, from this fact itself very grave dissensions among the people frequently ensue: the multitude may be broken up by factions either during their revolt against the tyrant, or, concerning the organization of the government after the tyrant has been overthrown. It also happens that sometimes, while the multitude is driving out the tyrant by the help of some man, he, having received the power, seizes the tyranny, and fearing to suffer from another what he did to his predecessor, oppresses his subjects with a more grievous slavery. For this is wont to happen in tyranny, namely, that the second becomes more grievous than the one preceding, inasmuch as, without abandoning the previ-

[53] "It woud . . . be dangerous both for the multitude and for their rulers if certain persons should attempt on their own private presumption, to kill their governors, even tyrants. For to dangers of this kind, usually the wicked expose themselves more than the good." *De Reg. Prin.*, I, 6.
[54] *De Reg. Prin.*, I, 6.

ous oppressions, he himself thinks up fresh ones from the malice of his heart. . . . "[55]

It is to be noted that the decisive factor in this choice to suffer injustice is the common good. So important is the common good that it often outweighs particular injustices occurring under a tyrannical government. In other words, the natural law in such cases actually pours its obligatoriness into unjust commands, forbidding disobedience thereto.

Also from the point of view of the ruler the common good often restrains and modifies the enforcement of individual justice. This doctrine of St. Thomas' is evident in his views on punishment. In the first place he disabuses us of the notion that adequate punitive justice is wrought by any but the Divine Judge: "retribution is reserved to the Divine judgment, which is pronounced against sinners 'according to truth' (*Rom.* ii,2)."[56] From God's point of view,

> "All who sin mortally are deserving of eternal death, as regards future retribution, which is in accordance with the truth of the divine judgment," but the punishments inflicted by human law, and by God temporally "are more of a medicinal character; wherefore the punishment of death is inflicted on those sins alone which conduce to the grave undoing of others."[57]

Vengeance, consisting in "the infliction of penal evil on one who has sinned," is "lawful and virtuous so far as it tends to the prevention of evil."[58] Besides being incomplete and imperfect as compared with the justice of God, the punitive justice effected by human law, is, then, primarily directed not at retribution but at protection of the common good.

However, just as the enforcement of commutative justice, though not the primary end of all human law, is nevertheless a necessary means to that primary end; so, too, retribution, the commutative justice of punishment, though not the first and guiding purpose of punitive law, must nevertheless figure largely in the determination and application of that law, playing the

[55] *De Reg. Prin.*, I, 6.
[56] II-II, 66, 6, ad 2.
[57] II-II, 108, 3, ad 2.
[58] II-II, 108, 1 and 3.

rôle of chief instrument in the realization of law's proper end, here as in all law the common good: "A severe punishment is inflicted. . . . First, on account of the greatness of the sin, because a greater sin, other things being equal, deserves a greater punishment."[59] When, in reckoning the amount of punishment, we employ this determinant, we are imperfectly applying the measure God employs in the future life.

> "As St. Augustine states[60] human judgment should conform to the divine judgment, when this is manifest, and God condemns men spiritually for their own sins. But human judgment cannot be conformed to God's hidden judgments, whereby He punishes certain persons in temporal matters without any fault of theirs, since man is unable to grasp the reasons of these judgments, so as to know what is expedient for each individual. Wherefore according to human judgment a man should never be condemned without fault of his own to an inflictive punishment, such as death, mutilation or flogging. But a man may be condemned, even according to human judgment, to a punishment of forfeiture, even without fault on his part, but not without cause: and this in three ways.
>
> "First, through a person becoming, without any fault of his, disqualified for having or acquiring a certain good: thus for being infected with leprosy a man is removed from the administration of the Church: and for bigamy or through pronouncing a death sentence a man is hindered from receiving sacred orders.
>
> "Secondly, because the particular good that he forfeits is not his own but common property: thus that an episcopal see be attached to a certain church belongs to the good of the whole city, and not only to the good of the clerics.
>
> "Thirdly, because the good of one person may depend on the good of another: thus in the crime of high treason a son loses his inheritance through the sin of his parent. . . . By the judgment of God children are punished in temporal matters together with their parents, both because they are a possession of their parents, so that their parents are punished also in their person, and because this is for their good lest, should they be spared, they might imitate the sins of their parents, and thus deserve to be punished still more severely."[61]

[59] I-II, 105, 2 ad 9.
[60] *De Lib. Arb.* iii.
[61] II-II, 108, 4, and ad 3.

The force of the common good is evident in these cases of *poena sine culpa*, as the end commanding a seeming violation of individual justice; the bishop who contracts leprosy loses his see, not as retribution for some wrong he has done, but to prevent the spread of the disease; the child loses his title when his parent commits treason, for, more than another, a child of a traitor is likely to be an enemy of the common good.[62] When discussing the function of the judge, St. Thomas implies that human law can justly apply even "inflictive" punishments (i.e., those harming the person) where no fault exists; for he charges the judge with the duty of deciding cases on only the testified evidence, even should he as a private person possess knowledge that would reverse the decision—and this with regard to any kind of decision, whether or not it condemns the defendant to inflictive punishment.[63]

Besides in these unusual cases, where punishment is applied to innocent persons, the common good shows its strength in modifying the punishment that retribution by itself would effect:

> "A severe punishment is inflicted not only on account of the gravity of a fault, but also for other reasons. First, on account of the greatness of the sin, because a greater sin, other things being equal, deserves a greater punishment. Secondly, on account of an habitual sin, since men are not easily cured of habitual sin except by severe punishments. Thirdly, on account of a great desire for or a great pleasure in the sin: for men are not easily deterred from such sins unless they be severely punished. Fourthly, on account of the facility of committing a sin and of concealing it: for suchlike sins, when discovered, should be more severely punished in order to deter others from committing them."[64]

The justice of God is perfect retribution, the amount of the punishment corresponding to the gravity of the sin—which, of course, depends upon the deliberateness with which the wrong act was done—but the chief purpose of human punishment is to enforce human law, and the first end of human law is the common good; hence retribution is employed only as a means to the

[62] See also I-II, 87, 8, ad 3.
[63] II-II, 67, 2.
[64] I-II, 105, 2 ad 9.

common good, punishment is primarily and essentially medicinal and deterrent:

> "punishments instituted by God in the next life correspond to the gravity of the fault; whence the Apostle says,[65] 'the judgment of God is according to truth against them that do such things.' Not so with the punishments of the present life, inflicted whether by God or by man: for here at times the lesser fault is punished by the graver punishment, in order to avoid a great danger; for the punishments of this life are taken as medicines."[66]

And not only does the common good require a modification of the sentence that justice *sub specie aeternitatis* would levy, but at times it even dictates the total commutation of a just punishment: e.g., in discussing the punishment due a whole multitude for its sins, St. Thomas says,

> "if there is hope of many making amends, the severity of vengeance should be brought to bear on a few of the principals, whose punishment fills the rest with fear; thus the Lord commanded the princes of the people to be hanged for the sin of the multitude.[67]
>
> "On the other hand, if it is not the whole but only a part of the multitude that has sinned, then if the guilty can be separated from the innocent, vengeance should be wrought on them: provided, however, that this can be done without scandal to others; else the multitude should be spared and severity forgone. The same applies to the sovereign, whom the multitude follow. For his sin should be borne with, if it cannot be punished without scandal to the multitude: unless indeed his sin were such that it would do more harm to the multitude, either spiritually or temporally, than would the scandal that was feared to arise from his punishment."[68]

But there is no need to prolong this documentation. Clearly, St. Thomas recognizes that human law but imperfectly implements individual justice, here with regard to the commutative justice of human punishments, as before with regard to distributive justice, which is violated by tyrants. Under human law

[65] *Rom.* ii, 2.
[66] *De Malo*, 2, 10, ad 4. Cf. *IV Sent.*, d. 46, 1, 2.
[67] *Num.* xxv.
[68] II-II, 108, 1 ad 4.

individual justice often bows to legal justice, the common good takes precedence over the individual good. For the sake of the common good, the tyrant's injustices are more often left unrequited, other factors than the degree of sinfulness enter into the determination of the gravity of a punishment, some injustices are altogether untouched by the ruler's scourge, and innocence sometimes suffers—all this with the permission, nay even at the command, of the human law. It is facts like these that lead many jurists to cleave the political from the ethical, refusing to exalt to the kingdom of the good an order shot through with such immorality. Such is not St. Thomas' doctrine; he refuses to exclude even these aspects of human law from the jurisdiction and inspiration of the natural law: although human law falls short of enforcing all of justice, and although it is imperfect in what enforcement it does accomplish, nevertheless it still bears the dynamic obligatoriness of the natural law; for these imperfections in human law are grounded in the nature of man as he is.

Are we to conclude then that the law of nature encloses an antinomy, that the realization of its social precept involves a contradiction of its precepts of individual justice, that our fulfillment of legal justice obliges us to violate our duties to our neighbor? This is the collectivist's arraignment of the natural law. He insists that for a self-consistent program of moral action, the sociality precept must be recognized as the source of the whole moral law; moreover, since the precept of sociality is not adequately realizable apart from the state, the state is made the ultimate arbiter of the ramified contents of that first precept. Now this is certainly not St. Thomas' view. As we have seen, the precept of sociality is itself but a derivation; man's social needs—its ontological basis—constitute but one aspect of his exigencies, and that not the most ultimate:

> "Man is not ordained to the body politic, according to all that he is and has; and so it does not follow that every action of his acquires merit or demerit in relation to the body politic. But all that man, is, and can, and has, must be referred to God. . . ."[69]

The clash between individual justice and social justice under

[69] I-II, 21, 4, ad 3.

human law dissolves into mere apparency when we recognize 1) that human law is not an end in itself, but merely a means to the happiness of the person, a means achieved only through control of things external; and 2) that the end of human law, the common good, is nonetheless a higher moral value than the particular goods individual persons lose when the common good requires a legal neglect of individual justice.

1. Human law is essentially but an instrument, an instrument designed immediately for the common good and mediately —by way of the common good—for the happiness of the person. As such, there is no immorality in human law, no obstruction of the ultimate happiness of the person, if law effect the common good now in one way, now in another. The morality of human law depends, not upon its effectuation of individual justice, but upon its service to the person through its implementation of the common good. If the common good require it to stay its hand in the administration of individual justice, there is here no backsliding from its obligation to the person. In the first place individual justice brings to the claimant no good essentially connected with his final end. The materials involved in individual justice are often but not always instrumental in the attainment of happiness. Indeed, human law is incapable of touching upon the things essential to the person's ultimate goal:

> "it must be observed that the end of human law is different from the end of Divine law [the revealed law]. For the end of human law is the temporal tranquillity of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state. On the other hand, the end of the Divine law is to bring man to that end which is everlasting happiness; which end is hindered by any sin, not only of external but also of internal action."[70]

Again, no law is cogent unless it is backed by machinery to execute it, and a necessary arm of this machinery is the judge, who decides whether or not the law was broken; now, only external actions are open to the certain judgment of men,[71] hence human law is limited to the control of external acts.

[70] I-II, 98, 1.

[71] St. Thomas recognizes that human law must to some extent investigate

> "Man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear: and yet for the perfection of virtue it is necessary for man to conduct himself aright in both kinds of acts. Consequently human law could not sufficiently curb and direct interior acts; and it was necessary for this purpose that a Divine law should supervene."[72]

We have seen, too, that the punishments imposed by human law are subject to the same limitations. To perform its medicinal function, that is, to reach the inner *locus* of vice and virtue, human law can do nothing but apply bodily punishments:

> "the civil law, although the purpose of its coercive punishments is to induce virtue, nevertheless constrains in these punishments not the soul but the hand only."[73]

Now, the ultimate human good consists not in the perfection of the body, but in the perfection of the soul, where resides man's distinctive possession, reason. But the organicity binding men together in the social life is effected in "outward acts, whereby men live in communion with one another";[74] the stuff of social relations is our bodily existence, rather than our spiritual. Therefore, the state, which acts as the principle organizing those outward acts, cannot be the agent leading us to our highest happiness. It has place in the good life as an efficacious means, for those outward acts are necessary steps towards the good life, but it will not be the final executive of the final end.

> "The intention of the lawgiver is twofold. His aim, in the first place, is to lead men to something by the precepts of the law: and this is virtue. Secondly, his intention is brought to bear on the matter itself of the precept: and this is something leading or disposing to virtue, viz., an act of virtue. For the end of the precept and the matter of the precept are not the same: just as neither in other things is the end the same as that which conduces to the end."[75]

internal acts, as in applying punishments differentiated according to the various degrees of guilt (I-II, 105, 2, ad 9). (Compare Renard, *Le Droit*, p. 27; and Gutberlet, pp. 128-129.) Nevertheless, its incursions into the hidden realm of intentions is never anything but a means to the enforcement of some law that deals with external acts.

[72] I-II, 91, 4. See also 100, 9.

[73] *In III Sent.*, d. 40, 1, 2, ad 5.

[74] I-II, 100, 2.

These "acts of virtue", which are the proper matter of legal control, are the outward acts that touch other men's lives; the legislator's hope is that, by commanding these, he can ultimately modify men's souls so that these same outward acts will proceed from virtue rather than from the fear of punishment.[76] His punitive legislation is built on the same conception of end and means. He is not a physician, by a forthright operation extracting vices from the soul of man; he must work through external things, curing the culprit's will by removing corporeal goods. Now these goods of body or of external possession, the matter (as opposed to the end) of punitive law, are far from the highest goods of human nature:

> "the sovereign good is man's beatitude [happiness], which is his last end: and the nearer a thing approaches to this end, the higher must it be placed as a good of man. The nearest thing to that end is virtue, and everything else that is of use to man in well-doing, whereby he attains to beatitude. After this comes the right disposition of reason, and of the powers subject thereto. And after this the well-being of the body, which is requisite for facility of action. Lastly come those things that are without, which we employ as helps to virtue."[77]

We are in a position now to understand how the common good can at times require the neglect of individual justice, with no sacrifice of the unity of natural law. The goods that are involved in social intercourse are not the ultimate goods of human nature; they are merely instruments. Now, when one of these instruments fails to discharge its usual function of supporting the ultimate good, it must be discarded in favor of some other instrument. Such is the case when the common good requires legal neglect of individual justice. By and large, the effectuation of individual justice is instrumental in the realization of the common good, and through it the ultimate good of man; but it hap-

[75] I-II, 100, 9, ad 2.

[76] I-II, 95, 1.

[77] *Cont. Gent.*, III, 141.

pens now and then that the effectuation of individual justice would harm the common good—to overthrow a ruler at his first act of injustice would entail a train of evils that would far outweigh the evil consequences of his act. In such cases, to prefer the common good to the individual good is merely to recognize that the common good is the more potent instrument of human happiness. Individual justice involves goods that are merely means to the final human good, hence to neglect it at times is not necessarily to forego that final good, but actually the better to realize it:

> "evil is a privation of good. And since man's good is manifold, viz., good of the soul, good of the body, and external goods, it happens sometimes that man suffers the loss of a lesser good, that he may profit in a greater good, as when he suffers loss of money for the sake of bodily health, or loss of both of these, for the sake of his soul's health and the glory of God. In such cases the loss is an evil to man, not simply but relatively; wherefore it does not answer to the name of punishment simply, but of medicinal punishment, because a medical man prescribes bitter potions to his patients, that he may restore them to health."[78]

For this reason it could be useful and good for human law to dole out punishment with the help of other measures than that which weighs the guilt: just as the child possesses through no personal fault propensities that punishment serves to remove, so is it possible that human law could profitably punish innocent adults, providing some higher good be therewith effected. Implicit in this proviso is the proposition that the goods removed by the punishment be not spiritual; goods directly associated with our final goal are not to be touched by human law, for that would entail a subjection of higher things to lower, of end to means:

> "a medicine never removes a greater good in order to promote a lesser; thus the medicine of the body never blinds the eye in order to repair the heel: yet sometimes it is harmful in lesser things in order to be helpful in things of greater consequence. And since spiritual goods are of the greatest consequence, while temporal goods are least important, sometimes a person is punished in his temporal goods without any fault of his own. Such are many of the punishments inflicted by God in this present life for our humiliation or probation. But no one is punished in spiritual goods without any fault on his part, neither in this nor in the future life, because in the latter punishment is not medicinal, but a result of spiritual condemnation."[79]

[78] I-II, 87, 7.

Thus the obligation to suffer undeserved punishment — a phrase really covering all legal neglect of the prosecution of individual justice—involves no contradiction of the unity of the natural law: the final end of nature, the happiness of persons, remains intact, no matter what pattern the means to that end may take. But we are not to infer that all undeserved punishment serves a good purpose, and is therefore to be tolerated. Comes a time when the tyrant's violation of distributive justice becomes so excessive that the ultimate good of the subjects is endangered —for, as we have seen, the ultimate good does require that the lesser goods be generally possessed. Not every undeserved punishment is good, and stamped with the obligatoriness of natural law. There must be a reason for it, it must serve a purpose. Under human law this reason is the common good. So soon as the common good, which depends for its existence upon a goodly substratum of realized individual justice, is jeopardized by the excess of the tyrant's violation of distributive justice, the time of toleration is over, and the natural law swings its obligatoriness behind the enforcement of the precept of distributive justice. Again, the common good requires some neglect or violation of commutative justice in punitive law, but so soon as these injustices become a threat to the common good, the natural law withdraws its support from their neglect in favor of their prohibition and punishment. Finally, it is the common good that requires other factors than retribution to enter into the computation of punishments. No departure from strict individual justice is good and dictated by the natural law unless it have a reason, and that reason the common good. This consideration introduces a second Thomistic doctrine, completing the explanation of why a partial neglect of individual justice is sometimes obligatory.

2. The common good is a higher good than the particular goods of which individual citizens are deprived when individual justice is neglected for the common good. The grounds for this

[79] II-II, 108, 4. See also I-II, 87, 7 and 8.

truth have the simplicity of arithmetic: The common good sought by the law is constituted by the sum of the goods that are instrumental to the happiness of the citizens. Now before the legislator or judge decides at any juncture whether or not to apply strict individual justice, he must investigate this question: What will enforcement do to that social aggregate of instrumental goods? If it will increase the aggregate, then it is commanded by the natural law. If it will decrease the aggregate, then the natural law commands non-enforcement. It matters not that the aggregate includes the goods of other persons than him who will stand to lose by the non-enforcement of individual justice. This is the price every man must be ready to pay for the contribution society makes to his being and development. To do the human good, we must do the social good, even though this entail the loss of genuine goods: "The good of the community surpasses a particular good of the individual. Therefore, the particular good must give way, that the common good may be maintained."[80] Like any parts of a whole, we must be ready to defer to the good of the whole that owns us, for

> "every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. . . . Now every individual person is compared to the whole community as part to whole."[81]

To this extent, then, Utilitarianism is right, and the ruler must legislate in favor of the greatest number. One proviso, however, is inviolable: The good of society is preferable to the good of the individual person *only in so far as the individual is part of society*, and, as we have observed, the person is part of society only with respect to instrumental goods. Hence it is only these instrumental goods that may be sacrificed for the social whole. Only in the field of acts legitimately controlled by the state—the external acts, i.e., which are governable by justice—may, and must, the good of the greatest number prevail.[82]

[80] *Cont. Gent.*, III, 146.

[81] II-II, 64, 2.

[82] "Tenetur autem homo homini obedire in his quae exterius per corpus sunt agenda. . . . Deo subjicitur homo simpliciter quantum ad omnia et interiora et exteriora: et ideo in omnibus ei obedire tenetur. Subditi autem non subjiciuntur suis superioribus quantum ad omnia, sed quantum ad aliqua determinate; et quantum ad illa medii sunt inter Deum et subditos; quantum ad alia vero immediate subduntur Deo, a quo instruuntur per legem naturalem vel scriptam." II-II, 104, 5, and ad 2.

Two conditions, then, make it necessary for human law at times to disregard individual justice: 1) the goods involved in individual justice, since they are attached to bodily *ad-alterum* acts, are not indispensable to perfect human happiness, which "cannot consist in goods of the body";[83] 2) nevertheless, these external goods are to such an extent helpful in our attainment of that happiness, and we are to such an extent dependent upon the state for our acquisition of them, that, where circumstances exclude any other course, we are obliged by the natural law to sacrifice our own instrumental goods to the good of that state—the common good. Since no single instrumental good is indispensable to the attainment of our final end, the natural law *permits* the occasional rejection of any such good; it *commands* that rejection whenever such an act will leave the rest of the citizens with a greater amount of these instrumental goods.

. . . . . .

The common good, then, is the end of human law. Because men would remain undeveloped outside of society, and because society is impossible without human law, human law is charged with the obligatoriness of the natural law.[84] Because of the same normative facts the *form* of human law, its dominating end, is the common good: the state is an order, a quasi-nature with a single end, and the laws devised for knitting men together into that necessary order take their form from their purpose, the common good. Whatever is required for the common good is material for human legislation. Since any virtue can serve the common good, the act of any virtue may be commanded by human law; since only some acts of each virtue serve the common good, the ruler may command only some human acts. Since justice is the virtue relating man to man, and the human law is devoted to just that purpose—namely, to link man to man—human law will control only acts that are governable by justice; acts of other virtues will be subject to legal control only in so

[83] I-II, 2, 5.

[84] See above, Chapter V.

far as they possess an interpersonal aspect. More specifically still, *legal* justice is the objective of human law, for legal justice is the justice which governs man's relations to the common good. Since legal justice depends largely upon the realization of individual justice, human law must for the most part define and enforce commutative and distributive justice. But whenever such enforcement would harm rather than benefit the common good, individual justice must remain unenforced. Hence, the purpose of human law, the common good, determines both the form of each statute and whether or not it will be enforced in a given instance.

Thus both the obligatoriness and the form of human law come from the natural law, by way of the common good. If we are to live according to our nature, we must submit to the social order to which that nature obliges us to belong, obeying the laws that knit it together. Those laws must get their content from the exigencies of the order; since the order is the answer to natural needs, its own exigencies will likewise be natural: the form of human laws derives from the nature of man; the end of human laws is an end of the human nature, impelling its activity and shaping its direction.

CHAPTER VII.

THE VARIETY AND VARIABILITY OF HUMAN LAW

In instructing the King of Cyprus St. Thomas divides the ruler's duties into three very general objectives:

> "the king . . . should have for his principal concern the means by which the multitude subject to him may live well. Now this concern is three-fold: 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 [last] duty when . . . he corrects what is out of order, and supplies what is lacking, and, if any of them [i.e., his measures in fulfillment of his first two duties] can be done better he tries to do it."[1]

Change, then, will occur in human law: the ruler must modify any one of its regulations if by so doing he will better the social life of its subjects. Immediately it is evident that St. Thomas is far from believing that any human government is beyond alteration, or that there is anything in the nature of state law to preclude all growth. We have seen enough of his thought to know that the immutable natural law, far from preventing human law from adapting itself to changing social conditions, actually commands this adaptation: the law of nature requires its creature, the state, to fashion legislation that will enable a certain concrete group of human beings to attain in the fullest measure possible the goods that social life produces; and for St. Thomas any concrete reality is a changing reality—indeed the function of the natural law in its essential definition is to act as the rule and measure of human change. The only immutability of the natural law is the immutability of incompletely determinate principles, principles that can be realized in actuality only when the abstraction is filled out by concrete facts, and concrete facts are events in the world of *ens mobile*. Of all the principles of the natural law, the precept of legal justice, which generates the existence of the state, is most subject to the mercy of variant facts:

> "the things pertaining to the common good must be dis-

[1] *De Reg. Prin.*, I, 15.

pensed diversely, according to the diversity of men; that is why such things were not regulated in the Ten Commandments [which were promulgated for the governance of *all* peoples], but were left to the control of the judicial precepts."[2]

"The general principles of the natural law cannot be applied to all men in the same way, on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people."[3]

The most obvious cause of variety in the human laws as among different countries is the arbitrary ingredient in man-made law. Few human laws are purely declaratory of rules of natural law, and where the detailed determination of a general moral precept is the work of arbitrary choice, there is no reason for different states to adopt the same solution. Because of this, the laws of adjoining states may differ in thousands of details. The only element their arbitrary rules share in common is their participation in the natural law, which commands in each case that for the sake of the common good some choice be adopted and rendered obligatory by the authority of the state.

What of that part of human law which is declaratory of the natural law? The natural law may be the norm of human nature, and human nature the common possession of all men, but we have no reason to infer from this that there can then be no diversity among the human laws that state and sanction rules of nature: we have already discovered a flexibility and variety in the natural law itself, apart from the representations it finds in bodies of man-made law, and we can be sure that at least an equal degree of diversity will variegate declaratory human law. Let us first review these variables in the natural moral law.

In two different ways the natural law is mutable. 1. *Subjectively*: before the rules of morality become realized in men's lives they must be apprehended by men's minds, for moral conduct—as well as immoral—is impossible unless it is preceded by deliberation. A human act is an act performed for an end that is seen as an end. The will, seat of all virtue and human goodness, cannot operate without a previous act of the

[2] II-II, 122, 1, 3.
[3] I-II, 95, 2, 3.

intellect. The result is that however short our behavior may fall of the standards set by the intellect, it can never surpass them. We deserve no merit for good works we are not conscious of. Because of this subjective aspect of all morality the natural law is, in a sense, subject to the domination of human error. For the mind of man is not infallible; the complete absolute truth is his no more in the question of what is the good than in any question about reality. Because an act can be good only when it is sponsored by the intellect, it can be subjectively good even when error infects the intellectual command it fulfills.[4] Consequently, such an act is in conformity with the agent's nature and is inspired by the natural law, for at least the first precept of the natural law is being realized. The natural law, then, enjoys—or suffers—this first flexibility: by virtue of the extreme generality of its first precept it infuses all conscientious human acts, taking unto itself the diametrically opposite conduct of different men and peoples.

2. *Objectively*, of course, the natural law lacks this particular mutability. It is not objectively true that "There is nothing either good or bad, but thinking makes it so." Man, like every existent being, possesses a determinate nature, characterized by needs impelling its motion, and by corresponding ends directing that motion. Although man is free to act contrary to nature, to neglect some of these needs in favor of others, he cannot change the form of nature; he can neither create new natural needs nor completely abolish any of those he possesses: "Human reason is not the measure of things that are from nature";[5] "just as the written law does not give force to the natural just, so neither can it diminish or annul its force, because neither can man's will change nature."[6] Man is, then, possessed of a determinate nature; his action is undetermined only to the extent that he is free to choose not to order and control his natural inclinations according to the good of the whole. However, the natural law—the rational plan of organization of our inclinations—does possess an objective mutability, grounded, we have already seen, in the generality of its precepts. Only after ab-

[4] *De Ver.*, 16, 3; 17, 2. I-II, 76, 1.
[5] I-II, 91, 3, 2.
[6] II-II, 60, 5, 1.

stracting universals from actual concrete events and conditions does our intellect achieve necessary and immutable rules of action. The natural law is the human participation in the eternal law that God has given every last created nature, yet the participation is subject to the limitations of the participant: "We can know in a general way what God wills. . . . But we know not what God wills in particular." [7]

> "man has a natural participation of 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." [8]

It is only in standing a little way off from the human scene, that our limited mind can apprehend definite and unchanging rules of action, immutable rules; for it is only from such a position that it secures an idea of human nature. We know with necessity that our relations with others must be governed by the equalizing rule of justice, but practically any single just act we perform could be in certain conditions wrong. Justice itself commands now one thing, now another—most of the time homicide is a sin, but now and then it is commanded by natural law. This variability in the natural acts of man is mirrored in the variability we find in infrahuman natures. Scientific laws are always hypothetical and general: *if* certain conditions are fulfilled, certain results will follow. Since, however, the conditions are never perfectly realizable, all laws are statistical in character.

As a rationale for this, Aristotle and St. Thomas suppose that the activity of every individual thing is determined on the one hand by the thing's nature, and on the other by its relations with other things. Since no corporeal thing acts outside a system of other corporeal things, no corporeal nature can express itself fully as an independent nature; its acts will all be conditioned by the acts of other natures; the laws describing its natural activity will be statistical rather than perfectly precise. And these laws will be graded according to their universality and necessity: the more necessary a generalization will be, the farther will it be removed from concrete materialization—

[7] I-II, 19, 10, 1.
[8] I-II, 91, 3, 1.

"a body at rest will remain at rest unless acted upon by some outside force" is a necessary proposition in Newtonian physics, true, but where will you find a body at rest? The laws of human nature are analogous:

> "In natural things there is a three-fold cursus of things. For some are always, they never fail; they are from the nature, and they cannot be impeded. Some, however, are frequently, failing in a few. But some are rare, or in the lesser part. Now those which are always are the cause and origin of those which are frequently and rare; whence also the latter are reduced to the former. . . . [Likewise] Some laws are indited in reason itself, and are the first measure and rule of all human acts, and these can in no way fail, as neither can the regimen of reason fail, so that there would be some occasions when it ought not to operate; and these laws are called the *jus naturale*. Some laws there are, however, which according to their content enclose the notion that they ought to be observed, although their observation may be impeded by certain circumstances; for example, the rule that a deposit ought to be returned to the depositor is impeded when it would involve the return of a sword to a madman; and these laws resemble those things that happen frequently in nature; and therefore they may be reduced directly and immediately to the natural law. . . . There are other laws, however, which according to their content seem to fix no obligation that they be observed, but which acquire obligatoriness from certain circumstances which make it right for them to be observed: and laws of this kind resemble those events that happen rarely in nature." [9]

> "It happens sometimes that something has to be done which is not covered by the common rules of actions, for instance in the case of the enemy of one's country, when it would be wrong to give him back his deposit, or in similar cases. Hence it is necessary to judge of such matters according to higher principles than the common laws. . . ." [10]

Thus it is that the natural law can infuse its obligatoriness into propositions commanding contradictory acts; not only subjectively, because of individual consciences, but also objectively, because of differences in circumstances. This is what St.

[9] *In III Sent.*, d. 37, 1, .3
[10] II-II, 51, 4. Cf. *In IV Sent.*, d. 33, 1, 1, ad 4.

Thomas means in his frequent deprecations of the certainty of ethics as compared with metaphysics:

> "in moral investigation, as also in physical, we attend to that which occurs in many [rather than in all] cases."[11]
>
> "Some kind of certainty is found in human acts, not indeed the certainty of a demonstration, but such as is befitting the matter in point. . . . "[12]
>
> "It is because the infinite number of singulars cannot be comprehended by human reason, that 'our counsels are uncertain.'[13] Nevertheless experience reduces the infinity of singulars to a certain finite number which occur as a general rule, and the knowledge of these suffices for human prudence."[14]
>
> "According to the Philosopher, 'equal certainty should not be sought in all things, but in each matter according to its proper mode.'[15] And since the matter of prudence is the contingent singulars about which are human actions, the certitude of prudence cannot be so great as to be devoid of all solicitude."[16]
>
> "In human acts, on which judgments are passed and evidence required, it is impossible to have demonstrative certitude, because they are about things contingent and variable. Hence the certitude of probability suffices, such as may reach the truth in the greater number of cases although it fail in the minority."[17]
>
> "In the business affairs of men there is no such thing as demonstrative and infallible proof, and we must be content with a certain conjectural probability such as that which an orator employs to persuade."[18]

The substance of St. Thomas' doctrine is this: because of the complexity of concrete reality and the finitude of the mind, it is impossible for any man, however wise, to lay down completely concrete directions for an agent's conduct in a future

[11] *De Malo*, 8, 1, 4.
[12] II-II, 60, 3, 1.
[13] *Wis.* ix. 14.
[14] II-II, 47, 3, 2.
[15] *Ethic.* I.
[16] II-II, 47, 9, 2.
[17] II-II, 70, 2.
[18] I-II, 105, 2, 8.

concrete situation. Since the intellect can know only in a universal fashion, and living action is a matter of particulars; the intellect is not a completely competent moral director. The best it can do is to employ its abstract notions of human nature and conditions of human life. As we have already observed, these abstractions are good for two things: first, they operate negatively to eliminate certain acts that would contradict the natural needs of man, assuming that their hypothetical conditions are fulfilled factually—e.g., that this man, *X*, is innocent, and therefore not to be killed by the State—secondly, they operate positively to oblige us to perform certain acts, again assuming that the facts fulfill their hypothetical conditions.

Now, if such be the variability of the natural moral law, then human law, a development of it (by virtue of either declaratory or determinative derivation), can be expected to rise no higher than its source: we may be sure that human law will be at least equally mobile. It too, in the first place, will be infected by intellectual error, whether in formal law or in custom, which "has the force of a law, abolishes law, and is the interpreter of law."[19] Now men often err in their customs, even in the condoning of such antisocial acts as fornication[20] and theft.[21] A wrong custom ingrains itself so deeply into men's minds that it almost becomes part of their nature: "*consuetudo vertitur in naturam; unde et habitus ex consuetudine generatur, qui inclinat per modum naturae,*"[22] an inclination is a desire, and "everyone easily believes what he desires";[23] the false precepts of bad custom seem truer to us than the true precepts they contradict.[24] There is no doubt, then, that St. Thomas recognizes that human law could be, and often is, afflicted with this *subjective* mutability.

However, St. Thomas refuses to admit that it is possible for

[19] I-II, 97, 3.
[20] *In IV Sent.*, d. 33, 1, 1, ad 1: "in gentibus quantum ad multa lex naturae obfuscata erat; unde accedere ad concubinam malum non reputabant; sed passim fornicatione quasi re licite utebantur."
[21] I-II, 94, 4.
[22] *In II Metaph.*, v.
[23] II-II, 60, 3.
[24] "quia consuetudo causat habitum consimilem naturae, contingit quod ea quae sunt consueta sint notiora." II *Met.*, v.

any moral error to be incorporated into a body of human law. In certain general, incompletely determined principles of human law he finds almost universal correctness and unanimity among nations. The universality entitles these principles to the designation *jus gentium*, "law of nations." (Note that he does not give this term its later denotation, namely, international law.) The variable part of human law he calls the *jus civile*, and he ascribes this twofold character of human law to the twofold manner whereby human laws are derived from the natural law:

> "to the law of nations belong those things which are derived from the law of nature as conclusions from premisses, e.g., just buyings and sellings, and the like, without which men cannot live together, which is a point of the law of nature, since man is by nature a social animal, as is proved in *Polit.* i. But those things which are derived from the law of nature by way of particular determination belong to the civil law, according as each state decides on what is best for itself."[25]

St. Thomas anticipates an objection to this view of human law: If the *jus gentium* is common to all nations, why not recognize it as included under the law of nature, rather than conceive of it as a mere derivation therefrom? His answer presupposes his earlier characterization of the law of nature as, properly speaking, merely the first insight into the kingdom of human ends, namely, the perception of the first precept, "Do the human good":

> "The law of nations is, indeed, in some way natural to man, in so far as he is a reasonable being, because it is derived from the natural law [that is, the all-inclusive command, "Do the human good"] by way of a conclusion that is not very remote from its premisses. Wherefore men easily agreed thereto. Nevertheless it is distinct from the natural law, especially from that natural law which is common to all animals."[26]

It seems that here he applies the term "natural law" only to the inclinations we are born with, namely, all the animal instincts, together with the primary, radical inclination to live

[25] I-II, 95, 4.
[26] I-II, 95, 4, 1.

according to reason, i.e., to do all the good as one sees it. This is the conception of natural law that he employs in his attempt to reconcile Isidor of Seville's division of *jus* into natural, civil, and the *jus gentium*. Such a division supposes a distinction between the *jus gentium* and the natural law, and the distinction for St. Thomas lies in just this fact, that the term "natural law" signifies (besides the inclinations of our animal nature) simply the first and ineradicable proposition of the whole moral law. There are other rules of conduct *natural* to us, but they are natural as dervations determining the first insight into human nature and not in the sense that they, like the first, are innately possessed; they are rules of conduct that we must learn, either from experience or from the instruction of other men.

Note the cause St. Thomas finds for the almost complete unanimity that the various codes and customs of human law display in the precepts of the *jus gentium*:

> "to the law of nations belong those things which are derived from the law of nature as conclusions from premisses, e.g., just buyings and sellings, and the like, without which men cannot live together. . . ."[27]

The *jus gentium* embodies the *conditiones sine qua non* of communal living. One of these conditions, for example, is the commutative justice that must govern business transactions; as we have seen, a large measure of enforcement of this virtue is absolutely indispensable to the bare existence of society, for unless he has a reasonable expectation of the promisee's fulfillment, no man will commit himself to a relation of social cooperation. In another discussion of the *jus gentium* St. Thomas mentions as examples the socially necessary rules, that treaties be adhered to, and that legates be granted safe conduct;[28] it is evident that the observance of these is requisite for social living. We have already noted another indispensable condition, namely, the existence of a unified civil authority; if a ruler, a promulgator of human laws, be required for communal life, then among the

[27] I-II, 95, 4.
[28] "Illud jus, quod consequitur propriam inclinationem naturae humanae, scilicet ut homo est rationale animal, vocant juristae jus gentium, quia eo omnes gentes utuntur, sicut quod pacta sint servanda, et quod legati apud hostes sint tuti, et alia hujusmodi."

principles of the *jus gentium* must needs be found the precept of obedience to state authority. Now there is a reason why all nations find the *jus gentium* embodied in, or presupposed by, their own laws: men share a common nature, and therefore the social needs of that nature, together with their expression, will be common to all men. The laws of nations resemble each other because the men they govern possess common needs, and consequent common problems. Under the pressure of essentially the same conditions men react in essentially the same way.

It was necessary to underline the community that St. Thomas finds in men's laws, the better to understand his picture of their variety. The precepts of the *jus gentium,* we must remember, are general and therefore in need of determination before they can govern human conduct, which is particular. Hence no *jus gentium* without a *jus civile*; it is one of the injunctions of the *jus gentium*—because it is a requisite of collective life—that there be a *jus civile,* a body of concrete prescriptions organizing the social acts of the citizens of a country into the form required by the generalities of the *jus gentium.* Before business men will observe commutative justice to the extent required if there is to be future cooperation among them, the various kinds of business relations must be sharply—often arbitrarily—defined; without that precise and detailed delimitation, commutative justice could not be enforced by civil authority; and unless it is enforced by civil authority, enough violation will occur to destroy the socially necessary assurance that one's commitments will bring one profit. Thus does the general *jus gentium* precept of legal justice inspire the very details of the *jus civile;* the one and the many depend upon each other, the many completing the one, the one vitalizing the many. We have already drawn the easy inference that in their arbitrary aspect the concretely determined rules of human law will vary among nations, for wills do not coincide in establishing the "positive just" except "by agreement, or by common consent."[29] In such enactments—arrangements, as it were, of the law's finger-tips—we meet the first objective variability of man-made law. It causes, in the first place, a variety as among the human laws of different nations. But it also lays any one legal system open to temporal variability, for these

[29] II-II, 57, 2.

voluntaristic determinations are designed to govern concrete realities, and concrete realities are changing realities. Because of a shifting of circumstances courses that were once amoral become immoral, losing therewith their legitimacy. Wherever you have particular entities and concrete events, says St. Thomas, there you have mutation; human laws govern men, and men are units of *ens mobile,* maintaining and improving their existence by using, and adapting themselves to, a universe whose stuff is likewise *ens mobile*: "universal rules cannot always be applied to particulars, and especially in mobile things, which are not always to be found in the same condition."[30]

Thus, the mobility of the facts they govern makes it necessary for the precepts of the *jus civile* to be modified; whenever "anything can be done better, the ruler tries to do it."[31] However, not every change in relevant circumstances generates a need for a change in the precept in question; if that were the case, then the *jus civile* would lose all its socially necessary stability, for no individual human law is perfectly applicable to the situations it purports to govern: "it is impossible that a law be instituted which did not fail in some case."[32]

> "Manifestum est autem quod de quibusdam intellectus noster potest aliquid verum dicere in universali, sicut in necessariis in quibus non potest defectus accidere. Sed de quibusdam non est possibile quod dicatur aliquid verum in universali, sicut de contingentibus, de quibus etsi aliquid sit verum ut in pluribus, ut in paucioribus tamen deficit. Et talia sunt facta humana: de quibus dantur leges."[33]

The *jus civile,* like the secondary precepts of the natural moral law, which it partially implements, may not be absolutely applicable to life, but it is amenable to a statistical application. Here then is a second kind of mobility inherent in human law, arising from the same conditions that preclude universal applicability in concrete rules of the moral law:

> "every law is directed to the common weal of men, and derives the force and nature of law accordingly. Hence

[30] *Cont. Gent.,* III, 76.
[31] *De Reg. Prin.,* I, 15.
[32] II-II, 120, 1.
[33] *In V Eth.,* xvi.

the Jurist says: 'By no reason of law, or favour 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.'[34] Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet in some cases is very hurtful. 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. Wherefore if a case arise wherein the observance of that law would be hurtful 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 loss to 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 weal, which the lawgiver had in view.''[35]

Just as it brings about an objective mutability in the less general precepts of the natural moral law, the inadequacy of the intellect's only cognitive instrument, the universal idea, precludes perfection in the natural law's derivative, human law:

> ''No man is so wise as to be able to take account of every single case; wherefore 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 should frame the law according to that which is of most common occurrence.''[36]

The imperfect applicability of law introduces the need for a special technique of securing justice, namely, equity. But if laws were written for individual concrete cases, rather than for classes of cases, there would still be the need for a judge to decide upon the relevance of the law to the situation. As it is, there is all the more need for an official to perform that function. Laws are always general, linking universal concepts, whereas the social events they order are particular; hence there must be somebody to ascertain the law's applicability: ''judgment . . . denotes a decision of what is just'';[37] it is ''the execution of justice by an application of the reason to individual cases in a determinate way.''[38] Reason's abstract idea of some form of justice is to be applied to the particular actual event under examination; in terms of virtue, a just judgment results from the collaboration of two virtues: ''judgment is an act of justice in so far as justice inclines one to judge aright, and of prudence in so far as prudence pronounces judgment.''[39] Prudence involves the ability to apply abstractions to concrete facts:

> ''there belongs to prudence not only the consideration of the reason, but also the application to action, which is the end of the practical reason. But no man can conveniently apply one thing to another, unless he knows both the thing to be applied, and the thing to which it has to be applied. Now actions are in singular matters: and so it is necessary for the prudent man to know both the universal principles of reason, and the singulars about which actions are concerned.''[39a]

A judge, then, must be a master of ''jurisprudence'', one who knows well both the law and the facts of the disputed case:

> ''Certain individual facts which cannot be covered by the law 'have necessarily to be committed to judges,' as the Philosopher says,[40] for instance, 'concerning something that has happened or not happened,' and the like.''[41]

Now if laws, being general, at times prove inadequate and even wrong in the face of the subtle actual, then their action must be blocked on those occasions in order to prevent an injustice.

> ''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,

[34] *Pandect. Justin.* i.
[35] I-II, 96, 6.
[36] *Ibid.*, ad 3. Cf. *In V Eth.*, xvi; and *In III Sent.*, d. 37, 1. 4.
[37] II-II, 60, 1, 4; 60, 5.
[38] I-II, 99, 4, 2.
[39] II-II, 60, 1.
[39a] II-II, 47, 3.
[40] *Rhet.* i.
[41] I-II, 95, 1, 3.

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."[42]

"because human acts, with which laws are concerned, consist in singular contingents, which can vary in infinite ways; it would be impossible to fashion an indefectible law, and legislators attend rather to what happens in the majority of cases, making this the pattern to which they cut the laws; but in certain cases to enforce such laws would be contrary to the equality of justice and contrary to the law's end, the common good. . . . In such cases it is evil to follow the posited law, and the good lies in setting aside the words of the law and following the requirement of justice and common utility. To this end is ordained *epicheia*, or, as it is called among us, equity."[43]

"It is the nature of equity to be directive of law where law fails on account of a particular case."[44] Equity's setting aside of a human law entails no violation of legal justice, which demands that for the sake of the common good we obey the laws of our state, for "equity destroys not the simply just, but the just as determined by the law."[45] In deciding to set aside the law in favor of equity, judges do not judge the law—this is *verboten* for them—they only judge the applicability of the law to a particular set of human facts.[46] "Equity . . . differs from legal justice in so far as it implements the intention of a rule of law in those cases to which the form of the law does not apply",[47] "legal justice directs us towards the letter of the law, and equity towards the intention of the legislator."[48] Both equity and the justice determined in laws are human instruments for the realization of true legal justice, but equity is the superior of the two, for "legal justice is directed according to equity."[49]

[42] II-II, 60, 5, 2. Cf. I-II, 97, 4, 3.
[43] II-II, 120, 1.
[44] *In V Eth.*, xvi.
[45] II-II, 120, 1, 1.
[46] *Ibid.*, ad 2.
[47] *In III Sent.*, d. 33, 3, 4, Sol. 5.
[48] *Ibid.*, ad 5.

To recognize human laws' need of rectification by equity is certainly to recognize their mutability. The cause of this mutability lies ultimately in the imperfection of the mind. Were we equal to God in knowledge, we should not have to construct general laws, for we should know particulars directly and perfectly. Nevertheless we may regard this mobility of each rule of the *jus civile* as an objective mobility, in order to differentiate it from the mobility that arises from men's ignorance. *Ignorance* is a relative term referring not to all nescience but to only the nescience of the humanly knowable. The subjective mutability of natural law—and the consequent subjective mutability of declarative human law—is an effect of ignorance, whereas the present mutability exists for the wisest of men. It is because of these limitations natural to human knowledge, and not because he believes in a radical indeterminacy in things, that St. Thomas permits himself to speak of the contingency of particulars; even though his language be as strong as the following:

> "[Aristotle] shows that this defect [namely, the imperfect applicability of any human law] does not vitiate the rectitude of law, or of the legal just. He says that although it may happen in certain cases that observance of the law results in a wrong [*peccatum*], nevertheless the law is legitimate; because that wrong is imputable, not to the law, which was imposed in conformity to reason, nor to the legislator, who took account of the condition of the matter, but *to the nature of the thing*."[50]

St. Thomas does not mean that under identical external conditions a thing's nature impels it now one way and now another. The *peccatum* lies not in prevarication but in infirmity. The nature is not powerful enough to reveal itself fully in every one of the thing's acts; for, as we have already observed,[51] corporeal

[49] II-II, 120, 2.
[50] *In V Eth.*, xvi: "Ostendit quod praedictus defectus non tollit rectitudinem legis vel justi legalis; dicens quod licet peccatum accidat in aliquibus ex observantia legis, nihilominus lex recta est, quia peccatum illus non est ex parte legis, quia rationabiliter posita est, neque ex parte legislatoris qui locutus est secundum conditionem materiae, sed *est peccatum ex natura rei*." Italics mine.
[51] See above, Chapter II.

natures are so burdened with matter, potency, that every act proceeding from their *élan* receives modification at the hands of the forces of other natures. Corporeal events are always products of the collaboration of many natures. An analogous complexus of goods, ends, determines the naturally just in any set of social facts, and because of the infinite number of possible ways in which these goods can become interrelated, no law can predict the naturally just for every future pattern of relatedness in these goods. The "*peccatum* in the nature of the thing" is not an indeterminacy in the direction of the natural inclination but a limitation in the force of that inclination, rendering its expression amenable to modification by the impingement of outside forces.

Human law is then characterized by this second—an objective—mutability, which arises from man's natural (and therefore profoundly good) dependence upon matter, the principle of changeability. The dependence carries with it no diminution of the force human law derives from the law of nature: matter being an intrinsic part of the nature of man, material goods are absolutely essential to the development of that nature, and as a result the life of man is inescapably linked with the changes that beset matter. Before the rational principles of the law of nature can be actualized, they must be wedded to material facts, and the resultant union will number change among its constant characteristics. In terms of human law the rational form of justice achieves concretion in the actual facts of social life only by passing through the increasingly materialized determinations of first the natural, and then the human, law. The materialization goes on first in the order of general precepts, beginning with the moral precepts obliging rulers to legislate for the common good and citizens to obey, and descending therefrom into specific human laws; the final step in the actualization of justice occurs when men perform their social acts according to the obligations delineated by those general laws: "Justice is in the sovereign as an architectonic virtue, commanding and prescribing what is just; while it is in the subjects as an executive and administering virtue."[52] But a step often intervenes between the legislated general rule and the concrete act: on many occasions a judge is

[52] II-II, 60, 1, 4.

necessary for the applying of the legal rule to a particular pattern of social relations, not only in order to evaluate the applicability of competing legal rules, but also in order to withhold the application of a rule where that application would be unjust:

> "Even as unjust laws by their very nature are . . . 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."[53]

It is in such cases that we find human law varying in conformity to equity and commanding a course opposite to the ordinary fulfillment of the rule in question; here the final step in the concretization of justice is taken by the judge, who, playing the *rôle of an "animated justice,"*[54] must time and again divert the flow of natural-law obligatoriness from its ordinary channel into the particular direction demanded by a peculiar set of circumstances. The novelty of the course in no way impedes its naturalness; the natural law is still operating, obliging both judge and litigant to serve the common good.

We are now familiar with two types of change in human law: the change that arises from man's varying knowledge of the good and the change that follows upon the mobility of material circumstances. And we have noted that both are but reflections of identical changes that affect man's moral life, his pursuit of the human good in general.

The third and final mutability of human law, being peculiar to the pursuit of the common good, is shared by the moral law only in so far as the common good is part of the human good. We may designate the new variable as the public susceptibility to legal control. The ruler must reject any legislative proposal that could not be enforced, and it is generally admitted that no law is enforceable which lacks the endorsement of the public mind.[55] St. Thomas points out the improvement evident in the reasonableness of a maturing youth:

> "law is framed as a rule or measure of human acts. Now

[53] II-II, 60, 5, 2.

[54] A phrase of Aristotle's (*Nic. Ethics*, Bk. V) used by St. Thomas, II-II, 60-1.

[55] Contemporary writers on law are sufficiently aware of this need. In

> a measure should be homogeneous with that which it measures, as stated in *Metaph.* x, since different things are measured by different measures. Wherefore laws imposed on men should also be in keeping with their condition, for, as Isidore says, law should be 'possible both according to nature and according to the customs of the country.'[56] Now possibility or faculty of action [*potestas sive facultas operandi*] is due to an interior habit or disposition: since the same thing is not possible to one who has not a virtuous habit as is possible to one who has. Thus the same is not possible to a child as to a full-grown man: for which reason the law for children is not the same as for adults, since many things are permitted to children which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man.''[57]

We have already seen that it is because the popular *facultas operandi* is under-developed that many just acts enjoy no place in human law, and this as a requirement of the common good, the unity and peace of the community:

> ''The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore 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; thus it is written: 'He that violently bloweth his nose, bringeth out blood';[58] and that 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.'[59] i.e., the precepts are despised, and those men, from contempt, break out into evils worse still.''[60]

fact, their sensitivity to it is equalled only by their indecision and ignorance in the field of values. Consider this statement of Thurman Arnold's: "Today, when sophisticated men speak of democracy as the only workable method of government, they mean that a government which does not carry its people along with it emotionally, which depends on force, is insecure. They mean that it is better for a government to do foolish things which can have popular support than wise things which arouse people against it. They mean that if a man is not contented, material comforts will do him no good. They mean that the art of government consists in the technique of achieving willing popular acceptance; that what people *ought* to want is immaterial; that democratic government consists only in giving them what they *do* want; that progress in government can come only by improving the wants of the people through the technique of removing their prejudices; and, finally, that the removal of prejudice must come first or material and humanitarian progress, imposed by force, will fail." *The Folklore of Capitalism.* New Haven. 1937. Pp. 44-45.

[56] *Etym.* ii.

[57] I-II, 96, 2.

If the matter of legitimate legislation is thus limited by the subjects' capacity for obedience, then a change in that capacity will invite a change in the boundaries of the field of sanctioned justice:

> ''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.''[61]

The law's purpose is, through fulfilling the exigencies of the common good, to lead the citizen to his final individual good; however thickly this ultimate goal may become overlaid with a welter of instrumental measures, the law is fundamentally an educator. Now the success of a pedagogue is measured not only by the truth of his text but also by the quality of his technique; he must be skillful in adapting the truth to the uneven capacities of his tyros: ''*Verba docentis ita debent esse moderata ut proficient, non noceant audienti.*''[61a] ''Human discipline [*disciplina*] depends first on the order of reason,'' i.e., the law's injunctions must be just;

> ''secondly, it depends on the ability of the agent; because discipline should be adapted to each one according to his ability, taking also into account the ability of nature (for the same burden should not be laid on children as on adults) . . . .''[62]

More generally considered, this relation of law to the men it governs is fundamental to all art, which is ''the right reason about things to be made.''[63]

[58] *Prov.* xxx. 33.

[59] *Matth.* ix. 17.

[60] I-II, 96, 2, 3.

[61] I-II, 97, 1.

[61a] *De Trin.*, II, 4.

[62] I-II, 95, 3.

[63] I-II, 57, 3. See also *In I Metaph.*, i., where art is set off from science,

> "Every plan of operation is varied according to diversity in the end, and diversity in those things subjected to the operation, as the way of operating in art is diverse according to the diversity of end and of matter; for a physician works differently in repelling disease and in conserving health, and differently according to the diversity in the complexion of the bodies he is treating; likewise is it necessary in governing a city to observe a different plan of order according to the diverse conditions of the subjects and according to the diversity of ends for which they are organized—for different must be the disposition of soldiers, so that they be prepared to fight, and artisans, so that they are well adapted to their work."[64]

We recall that St. Thomas used this same comparison in speaking of the second mode of derivation from the natural law:

> "the second mode is likened to that whereby in the arts general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape."[65]

Besides the purely arbitrary element entering into this determination, there is also the empirical: the application of the general natural-law principles must vary according to the variability of the facts that enter into the determination; especially must that determination take into account the variable we are now examining, the public susceptibility to legal control. Such account was taken in the greatest work of legal art ever executed on earth: in the Incarnation God changed His own positive law, abrogating the Mosaic law of preparation in favor of the New Law of maturity:

> "A second reason [for the New Law's coming late in time] may be taken from the perfection of the New Law. Because a thing is not brought to perfection at once from the outset, but through an orderly succession of time; thus one is first a boy and then a man. And this reason is stated by the Apostle:[66] 'The [Mosaic] Law was our pedagogue in Christ that we might be justified by faith. But after the faith is come, we are no longer under a pedagogue.'"[67]

wisdom, and prudence: "Ars vero dirigit in factionibus, quae in materiam exteriorem transeunt, sicut aedificare et secare: unde dicitur quod ars est recta ratio factibilium."

[64] *Cont. Gent.* III, 111, "Omnis ratio."

[65] I-II, 95, 2.

[66] *Gal.* iii, 24, 25.

St. Thomas' appreciation of the law-giver's obligation to take into account the public susceptibility of legal control is shown in a thousand details of his commentary on the Mosaic Law; e.g.:

> "The purpose of the law was to induce men to have reverence for the divine worship, and this in two ways: first, by excluding from the worship of God whatever might be an object of contempt; secondly, by introducing into the divine worship all that seemed to savour of reverence. . . . Wherefore, in order to obviate contempt for the ministers, it was prescribed that they should have no bodily stain or defect: since men so deformed are wont to be despised by others."[68]

That this factor must be recognized also by human legislators St. Thomas implies in his approval[69] of St. Augustine's rationale for varying political forms:

> "If the people have a sense of moderation and responsibility and are most careful guardians of the common weal, it is right to enact a law allowing such a people to choose their own magistrates for the government of the commonwealth. But if, as time goes on, the same people become so corrupt as to sell their votes and entrust the government to scoundrels and criminals, then the right of appointing their officials is rightly forfeit to such a people, and the choice devolves to a few good men."[70]

For another example of St. Thomas' application of this technical legal principle we may recall his statement that rulers must differentiate punishments according to the varying axiologies of the culprits, recognizing that one man's poison is not another's:

> "But as it is a necessary condition of punishment to be not only the privation of a [true] good, but also opposed to the will; and as not every man's will appreciates goods at their true value: it happens sometimes that the privation of a greater good is less opposed to the will, and for this

[67] I-II, 106, 3.

[68] I-II, 102, 5, 10. See also especially 101, 3.

[69] I-II, 97, 1.

[70] *De Lib. Arb.*, 1.

reason seems to be less penal. Hence it is that many people, who esteem higher and know better sensible and bodily goods, fear corporal punishment more than spiritual. And in the estimation of such men the order of punishments is apparently the reverse of that given above [namely, the true order]."[71]

Custom is the most important single determinant of the people's susceptibility to legal control. We have already noted the great effect St. Thomas finds it works, first, on men's beliefs, and then, of a consequence, on their human acts: "*consuetudo vertitur in naturam; unde et habitus ex consuetudine generatur, qui inclinat per modum naturae*";[72] if such is custom's rôle in men's activity, then it is obvious that it cannot lightly be overruled—indeed the mere fact that a proposed measure would run counter to custom can be enough to preclude its usefulness for the common good and hence its desirability as a law:

> [St. Thomas is speaking of custom's power to abolish a law.] "Human laws fail in some cases: wherefore it is possible sometimes to act beside the law; namely, in a case where the law fails; yet the act will not be evil. And when such cases are multiplied by reason of some change in man then custom shows that the law is no longer useful, just as it might be declared by the verbal promulgation of a law to the contrary. If, however, the same reason remains, for which the law was useful hitherto, then it is not the custom that prevails against the law but the law that overcomes the custom: *unless perhaps the sole reason for the law seeming useless be that it is not 'possible according to the custom of the country'*, which has been stated to be one of the conditions of law. For it is not easy to set aside the custom of a whole people."[73]

There is no mistaking the lesson to be drawn from a consideration of custom's great influence upon the public susceptibility to legal control: change in law must be gradual.

> "human law is rightly changed in so far as such change is conducive to the common weal. But to a certain extent the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed unless in some way or other the common weal be compensated according to the extent of the harm done in this respect. Such compensation may arise either from some very great and very evident benefit conferred by the new enactment; or from the extreme urgency of the case, due to the fact that either the existing law is clearly unjust or its observance extremely harmful. Wherefore the Jurist says[74] that 'in establishing new laws there should be evidence of the benefit to be derived, before departing from a law which has long been considered just.'"[75]

In this respect, then, the analogy between law and art breaks down, for in art, the field of the *factibile*, the rules of action

> "derive their force from reason alone: and therefore whenever something better occurs the rule followed hitherto should be changed. But 'laws derive very great force from custom,'[76] as the Philosopher states; consequently, they should not be quickly changed."[77]

As always, the ruler must take the common good as the touchstone of legitimate legislation: the natural law in its general precept of legal justice commands him to weigh the greater good against the lesser; and whenever changing a certain rule of law would deeply unsettle popular respect for the law in general, the fault in the existent law must indeed be grave before the pointer of the natural law will swing towards *Change*.

It is interesting to find that although he by no means was the founder of the method now employed by social science St. Thomas did hold a doctrine that is necessarily assumed by such a method, namely, the existence of general forms—descriptive, scien-

[71] *Cont. Gent.*, III, 141, "Sed quia." Also I-II, 105, 2, 9.
[72] *In II Metaph.*, v.
[73] I-II, 97, 3, 2. Italics mine.
[74] *Pandect. Justin.* i.
[75] I-II, 97, 2.
[76] *Polit.* ii.
[77] I-II, 97, 2, 1. In his commentary on the passage cited from Aristotle's *Politics* (II, xii) St. Thomas' language is even stronger: "sed lex nullum habet robur ad hoc quod persuadeatur subditis, quod sit bona, nisi per consuetudinem; quae quidem non fit nisi per multum tempus. Unde qui facile mutat leges, quantum est de se, debilitat legis virtutem."

tific laws—of human activity.[78]. Indeed the first premise of his whole ethics is the proposition that reason is able to abstract from experience rules of human action which state a causal connection between act and result, between the good life and happiness. However, his philosophy includes a doctrine that relates him even more closely to the modern method in social science, namely, the extent to which he holds human activity to be determined. The free, truly personal part of human activity is far outweighed by the determined, with respect to the number of acts each can claim:

> "There is a twofold nature in man, rational nature and the sensitive nature. And since it is through the operation of his senses that man accomplishes acts of reason, there are more who follow the inclinations of the sensitive nature than who follow the order of reason: because more reach the beginning of a business than achieve its completion. Now the presence of vices and sins in man is owing to the fact that he follows the inclination of his sensitive nature against the order of his reason."[79]

If moral growth follows upon the infusion of reason into one's life, then freedom—an effect of rationality—will be found in lesser degree at the beginning of that line of progress, and the more backward agent will be the more determined in his action. That majority which follows the inclinations of the sensitive nature will be in greater subjection to the influence of infrarational inclinations, which are nothing more than the blind drives we share with the brutes. Hence the possibility of a science that could (statistically) predict men's actions:

> "Some future contingencies can be known by men . . . as already existing in their causes: for when causes are known, whether in themselves or in certain manifest effects thereof that are called signs, it is possible for men to have foreknowledge of certain future effects. Thus a physician foresees death or health from the state of the forces of nature which he diagnoses from the pulse, urine, and other like signs. . . . Now among natural causes the highest and

[78] See Deploige, *The Conflict between Sociology and Morals*, pp. 270ff., where a number of texts from St. Thomas are assembled to show his awareness of the possibility of a science of ethics.

[79] I-II, 71, 2, 3.

> furthest removed from our knowledge are the powers of heavenly bodies . . . all bodies in this lower world are ruled through the powers and movement of higher bodies. . . And although heavenly bodies are unable to cause a direct impression on the intellective part of the soul, as we have proved, yet many there are who follow the bent of their passions and their bodily inclinations, which the heavenly bodies are clearly able to influence: for none but the wise, who are few, are able to curb these passions by their reason. Hence also they [evil spirits who in order to mislead men dazzle them with prophecies] are able to foretell many things regarding human actions: albeit sometimes even they fail in their forecast, on account of free will."[80]

The wild medieval belief in the heavenly bodies' influence on men's actions might perhaps be finding a rather belated corroboration in the recent discovery of the bombardment our bodies' atoms receive from the cosmic rays that incessantly sift through us. Of significance for us here, however, is not St. Thomas' science but the fact that there is no incompatibility between his rational ethics and the determinism requisite for a prognosticatory science of human actions. The normative doctrine of the natural law implies no exclusion of material influences on our lives; indeed it must needs suppose them since it is but the rule of activity natural to us, and body as well as reason enters into the constitution of our nature. Apparent at once is the value of such a prognosticatory science for the legislator's measurement of the public susceptibility. It will not only be useful to the legislator, it will be obligatory. The natural law imposes on him a general obligation to employ every available legitimate instrument for the effectuation of the common good.[81]

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We have found three variables in human law: the legislator's knowledge of the natural law, the facts in adaptation to which

[80] *Cont. Gent.*, III, 154. Cf. I-II, 9, 5, 3.

[81] A curious deduction may be drawn from St. Thomas' description of human nature, not at all calculated to displease the legislator: the measurability of a social stratum's susceptibility to legal control is in direct proportion to that stratum's need for authoritative guidance. The men most enslaved by their sensitive nature, and therefore the most predictable in their lives, are

the general precepts of the natural law must be given determination, and the popular susceptibility to legal control. This variety and change in human law is a result of a variety and change in real, concrete men and their real, concrete needs. Human law ought to change when the natural law, through reason's apprehension, swings it obligatoriness behind the injunction of change; the obligation is made known to us through the agency of our insight into the common good, which here, as in all questions of government, must be the one decisive, normative fact. The natural law is no geometry with theorems as rigid as axioms; its rigidity extends only so far as the determinateness of human nature, and since that nature exists nowhere except in union, radical and mysterious, with indeterminateness—evidenced in all the phenomena of *ens mobile,* the generation and corruption, growth and decay, learning and forgetting—the laws of that nature must themselves reflect that coalition. There results the divorce between necessity and concreteness in the law: only the general is universally necessary, and only the concrete exists. Yet the two are inextricably one; the concrete, through all its changings, gives glimpse of a universal nature (as in the *jus gentium*) and the general enjoys no realization apart from the concrete.

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the ones on whom custom has the tightest hold, and whose lack of readiness for a new law would be of greatest danger to the common good, were a mistake made and such a law promulgated; whereas in the more rational men of the higher moral brackets a lesser degree of predictable subjection to physical determinants will be more than offset by a greater ability and readiness to throw over custom in favor of the new law. Thus, where mistakes in measurement are more frequent there is less danger that harm will ensue.

CHAPTER VIII. CONCLUSION

This study examines one aspect in particular of St. Thomas' synthesis of natural law and human law: the problem of uniting the one and the many in law, the universality of the law of nature and the diverse and changeable particularities of the laws of states.

The problem lies at the root of the intelligible explanation of any facet of the material world. The nature of any material thing is a philosophically apprehended object in which two aspects are distinguishable (but not separable): a nature is (a) the thing's essence, taken as (b) the principle of its activity. The thing's essence embodies a distinctive and immutable end that determines the direction of the thing's distinctive activity. However, the direction of a thing's concrete (sensible) activity is not completely determined by the thing's formally immutable (intelligible) nature but is greatly and always modified by the activity of other material things. The formally immutable nature achieves concretion only in acts that are formally mutable. Hence our knowledge of the laws of its natural activity can be expressed only in hypothetical propositions.

In the essence of man is found, in addition to materiality, vitality, and animal sensitivity, the distinctive form of rationality. Peculiar to human beings is an activity for ends intellectually apprehended *as ends.* The most general such end is the human good, an idea of which is the inevitable product of the intellect's operating as an instrument of human activity; therefore the first precept of the natural law, *Do the human good,* is inevitably part of every command of the practical reason. This first precept is the only determinant necessarily and universally ingredient in every good human act ever performed. Nature as dynamic principle manifests itself at the human level of material reality in this universal obligation to do the good as one sees it. The immutability of this rational dynamism is matched by a *formal* immutability only after we have abstracted away all the reality of a human act except the bare notion of the human good as such, for men can be inculpably ignorant of any one of the secondary precepts of the natural law. All natural-law determinations of the human good as such—i.e., all precepts less general than the first—are subjectively mutable.

Because man has a determinate nature shared by all members of the race, there exist natural laws of human activity which are objectively immutable, and which give definite determination to the abstract notion of the good. Precepts at the second level of the natural law define the activity that is necessary for human happiness. But the necessity characterizing these precepts is possible only by virtue of their lack of complete concreteness. And at the third level of derivation from the first precept we find greater concreteness, but this at the price of necessity; third-level rules of natural activity hold frequently but not always, for circumstances (i.e., the activity of other corporeal natures) often cause man's concrete good to vary from its statistical norm. Hence this level of the moral law presents objective as well as subjective mutability. It is to be noted, however, that the objective mutability of these conditional third-level precepts entails no diminution of the obligatoriness of the law of nature: when circumstances illegitimatize the fulfillment of a third-level determination of a second-level generality, it is the second-level generality itself that commands the setting aside of the ordinarily applied precept.

All material natures embody ends that link their activity with the activity of other natures; things so related constitute an order, a quasi-nature with an end common to all the component individual natures. Such an order is observable among men: because the human nature remains incompletely developed apart from membership in a social order, one of the second-level determinations of the human good commands man to be sociable: to do the human good he must observe the requirements of justice, rendering to neighbor and to the social order as a whole their just due. The obligation to be sociable encloses the more particular obligation to obey human laws: the social order would disintegrate without an authority to sanction, declare, and give sufficiently concrete determination to the socially necessary precepts of justice. In other words, a) the dynamic principle of activity within the nature of the individual inclines him—through the rational dynamism of obligation—to the obedience of his ruler's laws; and b) the concrete directions of that natural inclination—the formal determination of the individual's social activity—are legitimately set by the just ruler.

Since human law's *raison d'être* lies in its function of organizing men for their own individual good into a social whole, the first and controlling determinant of the form of every human law is the common good. Only those human acts that affect the unity and prosperity of the communal order are subject to the control of the political authority. The immediate proper object of human law is legal justice; only secondarily and derivatively is human law concerned to implement individual justice and the other moral norms.

The final terminus of man's nature-impelled activity, the target of his nature's *élan*—in short, his true happiness—lies in God, an object directly completive of a spiritual rather than a bodily need. (This is one of the several Thomistic doctrines constituting unexamined premises of this study.) However since the *ad-alterum* acts that make up the field of activity organizable by the norm of justice answer to bodily needs, the state, whose proper function is the implementation of justice, is but an instrument serving man's ultimate happiness. Therefore, 1) the state can never legitimately remove spiritual goods; and 2) any one of the non-spiritual goods, each of which is instrumental to our final happiness but never inextricably involved in it (e.g., property or even life), is legitimately removable by the state when the common good requires it. The common good can overrule an individual's good only because and in so far as the individual is part of the social whole; and the individual is part of the social whole only with respect to his dependence upon the whole for the material instruments of his spiritual progress. Only in the sphere of material instruments is the social whole greater than the individual part. Within that sphere it is not immoral for the state to prefer the common good to the individual good—as in withholding individual justice, a bodily good, in a particular case or class of cases—providing the individual's deprivation is motivated by the common good.

Two conditions make it possible for the common good, the prime teleological determinant of human law, to require a change in laws: 1) the imperfection of our knowledge of the human good and 2) in the individual natures whose acts comprise the matter to be informed by the law, a mobility caused by the changeability of concrete facts. As a consequence of their de-

pendence upon these two shifting foundations human laws are legitimately amenable to both abrogation and dispensation. In the presence of new facts or new knowledge about abiding facts the natural-law precept of legal justice dictates change where that change would lead to an increase of the common good. And since no concrete rule of law is perfect enough to be universally applicable to all cases of the situation its words cover, the common good requires not changes in law as numerous as the cases of inapplicability, but a technique of flexible application, namely, equity.

Change in law must be slow. If the law is to effect the common good of the multitude of individuals whose happiness is its ultimate end, it must adapt itself to one concrete, contingent fact above all others, namely, those individuals' susceptibility to legal control. Observation of this indispensable rule of political pedagogy will of necessity make for legal conservatism; the desk drawers of political experts will always be full of projects of reform that are waiting upon the education of the people. The thing is unavoidable. The common good cannot be abstracted from the personal good of the individual citizen, who cannot be expected greatly to change at the signing of a statute or the rendering of a decision. Legal control is an art that depends upon the materials as well as the artist.

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In a number of points St. Thomas is seen to agree with contemporary jurists. For him as for them the law is purely functional, to be served only because it is our servant. It must therefore follow whither the common good leads, and since the common good is conditioned by infinite factual changes, the law too must conform to these conditions. Yet although law is not above improvement, since the common good is not above acquiring new needs; more often it is below improvement, for the reason that the people, its master, are not yet ready to rise. Because law is but an instrument of the common good, and concrete facts are inextricably a part of the personal ends making up the common good, the law-giver must be not only a moralist but also a social scientist and even a natural scientist. Finally, so dependent is the individual upon society, that when the occasion arises in which

the common good can be served in no other way, he must recognize that claims in individual justice are often swallowed up in the claims of social justice, that the good of the part is less than the good of the whole.

At bottom, however, St. Thomas' doctrine of the functionality of law is quite different from that of the dominant contemporary view. In both the law is but an instrument, and in both it is an instrument for effecting the common good. But so soon as we examine their notions of the common good we find an unresolvable dissimilarity separating them. Few thinkers of our time define man as anything but a highly developed animal with no needs beyond highly refined animal needs. Under such a view of man there can be no inviolable limits set to the state's power over the individual: if human needs are solely material then in every aspect of the individual's good the common good is greater, for the bloc of material goods constituting the common good is always greater than the (likewise material) goods of an individual citizen. For St. Thomas, on the other hand, the functionality of the law is matched by the functionality of the material goods that comprise the common good: the law serves individual persons in their pursuit of an end that surpasses the material goods effectuated by the state. Hence the common good is less than the complete good of a single citizen.

The first essential for a true philosophy of law is, then, a true notion of the nature of man. With man defined as a rational and therefore spiritual animal, the legal system takes its proper rôle in society; and its end, the common good, receives its due weight within the individual's complete good. The universal presence of reason in the individual human natures making up the social whole sets, on the one hand, an immutable goal for the law-maker—namely, the infusion of reason into all human acts accessible to legal control—and, on the other hand, it fixes the duty of the citizens to obey state law, even when that law exacts a break with custom. Only when both law-maker and citizen acquire a sense of their own rationality and freedom and sociality, and a sensitivity to justice consequent upon that realization; only when men recognize that human law is both the creature and the completion of the law of their own ineradicable nature—only then will the legal system possess both the stability and the flexibility that are imperative for social progress.

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