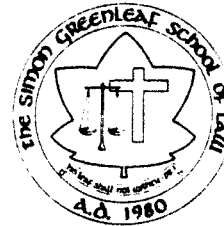


the SIMON GREENLEAF



LAW REVIEW

A Scholarly Forum of Opinion Interrelating  
Law, Theology & Human Rights

featuring  
in this number

Francis Schaeffer on Christian Faith and Human Rights  
Abortion: Justice Harry A. Blackmun and the *Roe v. Wade*  
Decision

The Natural Law According to Thomas Aquinas  
California Criminal Justice: A System in Search of Itself  
Critical Reviews of the Gay Scene, Jaworski's *Crossroads*,  
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**THE SIMON GREENLEAF LAW REVIEW**  
**A Scholarly Forum of Opinion Interrelating**  
**Law, Theology & Human Rights**

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**EDITOR'S  
INTRODUCTION**

## EDITOR'S INTRODUCTION

The Simon Greenleaf School of Law has been gratified not only by the phenomenal growth of the institution itself during its first three years of operation in the United States, but also by the reception accorded to its *Law Review*. Quite plainly, a deep and genuine need has existed for a graduate school of law, apologetics, and human rights which would uncompromisingly offer revelational answers to a faltering secular society; and equally plain is the fact that a scholarly journal expressing these vital perspectives is being read and appreciated by an impressive audience here and abroad.

In line with the Renaissance orientation of our first number, this second issue of the *Simon Greenleaf Law Review* cuts a wide and deep swath. Francis Schaeffer offers a new and original treatment of human rights from the perspective of historic, biblical Christianity. Our own professor David Prescott performs detailed surgery on the California criminal justice system in a book-length essay that advances the issues more than perhaps any other material in print. The Thomistic natural law tradition has its scholarly spokesman in Professor Elmer Gelinas, who delivered the essay here published for the first time to an enthusiastic audience of Simon Greenleaf students and guests at our International Seminar in Theology and Law, held conjointly with the International Institute of Human Rights in Strasbourg, France. Janet LaRue, an honors law student at Simon Greenleaf, offers a sensitive, moving, and scholarly defense of the right to life and a devastating critique of the logic of Justice Blackmun's treatment of abortion in the *Roe v. Wade* decision. Another student (now alumnus), Craig Savord, supplies an interesting legal note on "check kiting" - - which should have the pragmatic value of deterring potential subscribers to the *Law Review* from

sending us bad checks! Finally, the editor and staff review a number of challenging recent publications that tie together law, theology, and human rights: Leon Jaworski's spiritual autobiography, John Whitehead's *Second American Revolution*, and other items both English and French to whet the reader's bibliographical appetite.

And all this is set out in the spirit of the Reformation maxim, *Soli Gloria Deo*, grounded in Scripture itself: "Not unto us, O Lord, not unto us, but unto thy name give glory, for thy mercy, and for thy truth's sake" (Psalm 115:1).

J. W. M.

## CHRISTIAN FAITH AND HUMAN RIGHTS

by

Francis Schaeffer



Editor's Note: On Sunday evening July 25, a Swissair mini-jet brought Francis and Edith Schaeffer from Geneva, Switzerland, to Strasbourg, France, to participate in Simon Greenleaf's annual summer session at the International Institute of Human Rights.

Some twenty-five Christian students had been studying human rights for a month preceding the Schaeffers' visit, under the guidance of Dr. John Warwick Montgomery, Simon Greenleaf's dean and the director of its European program. Total enrollment this year at the International Institute of Human Rights reached two hundred from sixty countries--including third-world and iron-curtain nations. The Simon Greenleaf students were thus able to witness for Christ in the context of the most prestigious human rights teaching program in the world.

The Schaeffers shared an informal lunch of Alsatian-French specialties with the Simon Greenleaf students in the cellar of a medieval restaurant that had once belonged to the Cathedral chapter of Strasbourg. This was a rare privilege for the participants, since the Schaeffers' heavy speaking, writing, and film schedules and Dr. Schaeffer's health have necessarily reduced opportunities of this sort in recent years.

On Monday afternoon, Dr. Schaeffer delivered a major lecture on Christian faith and human rights at the law faculty of the University of Strasbourg under Simon Greenleaf auspices, and received from Dr. Montgomery his diploma and hood representing the honorary Doctor of Laws degree bestowed upon him at Simon Greenleaf's May commencement.

Here follows the text of Dr. Schaeffer's original lecture, edited for publication by the author himself.

The theme which was suggested to me is Why Religion Is Essential to Human Rights. The question turns at a single point. That is, who, or what, gives anything which may be called rights. This is the single question upon which all else turns.

The modern mentality is "it is my right" (and we can think of gay rights or "the right of privacy" for example) without ever thinking through the question of upon what basis I can claim *anything* to be my right.

The founding fathers of the United States used the expression "inalienable rights", but they had thought through the reason why such a phrase was not utter nonsense. They had thought it through, and they understood why what they said was not foolishness. This was based upon a Creator who gave the rights to us, and everything turned at that point.

All the freedoms the founding fathers of the United States laid out rested on this, and this specifically included the right to be free from tyranny, and a right and a responsibility to stand against all forms of tyranny. This was an *inalienable* right because there was a Creator who gave this right.

And note that while some of the founding fathers were indeed deists, yet the general consensus of thinking was that the Creator was the Judeo-Christian God. One can think, for example, of Blackstone's *Commentaries* which were so prevalent and important in that day, and how clearly Blackstone outlines that there were two bases for law: one nature, and the other was God. And specifically he related nature to the fact that it had been formed by the Creator, and he relates God to the Scriptures in which God had spoken. Or, one can even think of Benjamin Franklin, who is known as a deist and probably was,

and yet as one reads his speeches in Congress and in other places, one is profoundly impressed by the fact that though a deist he might have been, yet, nevertheless, his thought-forms were very much influenced by the Judeo-Christian concept of God.

One of the distinctions of the Judeo-Christian God is that not all things are the same to Him. That at first may sound rather trivial, but in reality it is one of the most profound things one can say about the Judeo-Christian God. He exists; He has a character; and not all things are the same to Him. Some things conform to His character, and some are opposed to His character. This is in clear distinction, for example, from the Hindu or the Buddhist concept of God. To these gods, everything is the same, so that there is no distinction between good and evil, cruelty and non-cruelty, between tyranny and non-tyranny. In such a setting, speaking of inalienable rights or human rights would be meaningless, because to the Hindu or Buddhist the final reality -- their concept of God as the all, the everything -- would give no voice, no word, as to why anything is bad; why anything is humanness or anything is lack of humanness. In such a setting, human rights are meaningless. The proof of this is very easy to ascertain. All one has to do is to look at the Hindu situation in India itself with its caste systems. There are no intrinsic human rights. I would say in passing one only has to walk the streets of Bombay to feel the implications of this in practice.

Moving into the western world, we can contrast the results of the American revolution to the French revolution and the Russian revolution. The American revolution, rooted in a Creator to whom not everything is the same, could not only talk about inalienable rights as given by the Creator, but

could and did produce a country in which those rights had meaning in practice. Compare this to the French and the Russian revolutions, built on the denial of the existence of any such Creator. Both inevitably brought forth tyranny and no intrinsic rights to the individual human being. The French revolution led inevitably to the guillotine, not only for the nobles but for literally thousands of peasants who also died in the tyranny which followed the French revolution. And then it led quickly to chaos, and that quickly led to the rise of Napoleon in an autocratic rule to overcome the chaos.

The Russian revolution as it was taken over by the Leninists--and you must always remember that the revolution was not brought forth by them, but was stolen by them--led immediately, at once, to tyrannical rule in which the individual had, and has at this moment, no intrinsic rights. The state arbitrarily gives any "rights" that there are, and it can take them away arbitrarily anytime the elite, who govern, desires to do so. There are no intrinsic rights.

The results in the Soviet state, and situation in the Soviet block, is not a fluke. It is the inevitable result of the system. Without a Creator who gives the rights, and who is greater than the state, the lack of human rights is naturally inevitable. There is nothing greater than the state to judge it by. There is nothing to which the individual can appeal as giving him or her "rights" in opposition to the arbitrary rulings of the state. Without such a Creator there can be no absolutes. There is no basis for absolutes in personal values, but there also can be no absolutes by which to judge the state.

Now moving into the present West where there is such an outcry for rights--my rights--we must ask: does the basis

which gave the inalienable rights still exist? The answer is, unhappily, largely a negative. Let us notice that it was not only the United States which had its *form-freedom balance* based upon the reality of the creator God to whom not everything was the same. Here we speak of the balance in government of forms and order without tyranny--freedom without chaos.

All the northern European countries which developed this balance were the countries which had known the Reformation. Prior to the Reformation, Western Europe had something of this balance, especially in England, with Henry de Bracton, the Magna Charta, and British common law. But the Reformation focused this by seeing that the basic authority, not only for religious matters, but for law as law, was centered *only* in the Scriptures. The final authority was not Scripture and the church, but, equally, it was not Scripture and the king. It was *Scripture only* -- not only for religious truth, but as a basis for law. Out of this came the form-freedom balance which was unique in human history. This existed in northern European nations, and those like the United States and Canada, Australia, New Zealand, etc., which came forth from Northern Europe. It was never perfect, one can think of the too often poor view of race and an all too often lack of emphasis upon a compassionate use of accumulated wealth, yet human rights flourished in these countries in a unique fashion. In these countries, there were inalienable rights for there was Someone, who gave those rights; and therefore the state was not the final authority.

But, unhappily, in our own day, the consensus has changed in the northern European countries and in the total western world. Today, increasingly, the final reality is no longer comprehended to be the infinite personal God who exists objec-



tively and who created all else, and to whom not everything is the same. Today increasingly in the total western world the final reality is seen to be only material, or energy which has existed forever, and the present form it has taken exists only by pure chance. This has become the increasing consensus of the western world.

Now notice: this final reality is really, when you think about it, very much related to the eastern concept of their gods. We may think of the western materialistic concept as absolutely opposite to eastern mysticism and eastern gods, but philosophically they are basically the same. That is, for the final reality, all things are the same. As with the eastern gods, there is no intrinsic difference between cruelty and non-cruelty, tyranny and non-tyranny, and there is no basis for human rights or for a unique concept of human life.

Such a perspective gives no value system--and it cannot. And, even more terrifying if we understand it, is that not only does it give no personal value system, but it gives no basis for law--no basis for law whatsoever. And, more terrifying still, it cares nothing about human existence, and certainly it is totally silent about any reason to speak of human rights. Thus, just at a time when everyone is shouting for his or her rights, the basis which gave a reason for there being human rights is being destroyed.

No one could have said it better than Jacques Monod, who was, as I'm sure most of you know, a French Nobel prize winner in biology. Some years ago he wrote a book called *Chance and Necessity*. It was a best-seller both in France and then in the Anglo-Saxon world. He himself very dogmatically held that this is all there was, that is, that the final reality is only material or energy shaped by pure chance. He summarized that conclusion of his own position by saying that there was no

way to distinguish the "ought" from the "is": one of the most pregnant sentences that has been written in our lifetime. On the basis of this conception of final reality, there is *no* way to distinguish the ought from the is.

In this setting, finite man, with all his limitations, *must* make himself the measure of all things and all values. Humanism must come forth from the concept of the final reality being only material or energy shaped by pure chance. Man, spelled with a capital "M", *must* make himself the measure of all things. This is why we properly may call our time the age of humanism.

All too often I think the word humanism is thrown around without people understanding the profundity of what is involved here. We must understand that if man accepts that final reality, rather than being the Creator, is only material or energy, which has existed forever, and it is shaped in its present form by pure chance, it follows that man *must* be the measure of all things. First of all, he must be the measure of all knowledge. Those of you who know anything about epistemology should be brought up short. Man is finite, yet he must be the measure of all knowledge. This means he never can be finally certain of anything. He can never come to a final conclusion in the area of knowledge. Then, beyond that, he must be the measure of all things in regard to personal values. And still beyond that, man must make himself the measure of all things concerning law.

In this setting, my rights only rest upon the Will and power of the strongest. This fits both the Marx-Engels-Lenin viewpoint, and it equally fits the concept of Oliver Wendell Holmes, Jr. I refer to Oliver Wendell Holmes' evolutionary

approach--and in my books *How Shall We Then Live* and *A Christian Manifesto* I use his own words to show that this is indeed his position--an evolutionary position of evolving biological life, and evolving law, and also the root concept of the survival of the fittest--not just biologically, but in law. This was not Holmes' view alone; it has become the general concept of law today, which not only rejects God's law, but with mathematical certainty therefore rejects a strict understanding of the Constitution. One follows the other. What we are left with is that law equals a small group of people's finite decisions as to what is good for society at the given moment. And behind them, the will of the strongest. On that basis what do my "rights" any longer mean?

With a belief in the Creator, the Constitution's view of inalienable rights was a protection of the individual against both the mob and the state. The Constitution, if you read it carefully, was drawn up by the thirteen colonies for exactly that purpose, to protect individuals on the one hand from the mob, and on the other hand from the federal state.

This protection was for everyone, but it peculiarly was a protection for the weak. Today the weak do not have a chance. Regard the unborn infant, and the newborn child who is allowed to starve to death because he or she does not come up to someone's concept of what is an adequate standard for life. And down the road a bit, the aged, who are seen and certainly will be increasingly seen as a demographic burden and nuisance, economically and socially. We can think of Oliver Wendell Holmes' spelling it out that man as man has no more unique importance than a grain of sand. With such a position as this, the weak have no protection. The weak have no inalienable rights, because the concept of the Creator to whom everything is not the same, has largely been cast aside.

I say with all sobriety, and I mean this, that if I were a minority group member today, I would be filled with concern. And I would say that if you are about twenty-five years of age today, you should be very very, troubled, because if you live for another fifty years with today's demographic changes, what is to protect you as the aged when you are a political, social, and economic burden? To those who are allowing the devaluation of human life and the devaluation of law we say: even if you do not hold to human dignity in principle, pragmatically if you are about twenty-five years of age you should be deeply concerned because you should realize that down the road you yourself will have no inalienable rights.

Even Will and Ariel Durant, who were avowed humanists, and who received the humanist pioneer award in 1976, said in *The Story of Civilization*: "Moreover, we shall find it no easy task to mold a natural ethic strong enough to maintain moral restraint and social order without the support of supernatural consolations, hopes and fears." History, experience, and logic prove that is is not only difficult, as the Durants suggest, but *impossible*. The results of Jean-Jacques Rousseau, Voltaire, the French Revolution, Marx--Engels--Lenin, and the Soviet failure concerning human rights demonstrate the point within our own general era of history.

The Greek and the Roman gods were a much better foundation for the *polis*, the state, than is the modern concept of the final reality being material or energy, shaped by pure chance. They had a better basis than modern man for attempting something in the midst of the *polis*. But the Greek and the Roman gods were not enough either. There was no Greek city-state, regardless of what your university professors have told you, which produced the human rights the Reformation

produced--not one. One does not have to read Plato's *Republic* to understand this; all you have to do is to go back to research the Durants again--their analysis of the failures of the Greco-Roman states--for this to be obvious.

What is needed to produce the balance of form and freedom in government which we have enjoyed so thoroughly is the Judeo-Christian God who is the Creator of all else. The Judeo-Christian God to whom not all things are the same. The Judeo-Christian God who, as the Reformation affirmed, has spoken in the Scriptures.

There is an unbreakable link between the existence of this God and the unique dignity and worth of the individual human being made in His image. And there is an unbreakable link between the existence of this God and any sufficient basis for law, and specifically for inalienable rights.

Without this, the society, and especially the State, *is* the final authority; and when the individual is trampled, there is then no adequate basis upon which to raise a voice against it.

## THE NATURAL LAW ACCORDING TO THOMAS AQUINAS

by  
Elmer Gelinus

EDITOR'S NOTE: The essay to follow was delivered in France in the summer of 1980 by Professor Gelinus (B.A. in Philosophy, University of Western Ontario, M.A. and Ph.D., University of Toronto), Chairman of the Department of Philosophy, St. Mary's College, California. It is published here for the first time. Professor Gelinus' lecture was sponsored by Simon Greenleaf's International Seminar in Theology & Law, held conjointly each year with the International Institute of Human Rights in Strasbourg, France.



Professor Gelinus (left), Dean Montgomery, and two students on the Bastille Day outing in medieval Riquewihr during the 1980 Simon Greenleaf summer session (Alsace, France).

My primary interest in presenting this talk to you today is to discuss a problem that I believe is created by Thomists who misunderstand Aquinas' teaching on Natural Law. But for those of you not familiar with his writings, permit me first to summarize a few points of his teaching on law in general, and on natural law in particular.

As you perhaps know, Aquinas' principal treatise on law is found in the Second Part of his *Summa Theologiae* (Ques. 90 - 108--some 200 pp.) which proceeds in a Scholastic question format. There are four questions on the nature of law: (1) Is it an ordinance of reason? (2) What is the purpose of law? (3) Who may legislate? (4) Must law be promulgated? In reply to these questions he argues: 1. That law *is* a command of reason in spite of, among other opinions, the notion that some hold that law is nothing other than the *will* of the sovereign, as Hobbes was to insist in his *Leviathan* a few centuries later. 2. Aquinas insists that law must be for the *common* good; an edict benefitting an individual (such as the sovereign) would be simply that, a rule or decree, but even if just, it would not be a law properly so called. A consequence of this is that the sovereign himself, in some sense, is under the law. 3. Law must be given only by the one or many people in charge of the community. "Passing a law is the right of either the whole community or the public person who has the care of the community," because "to direct anything to the common good belongs either to the whole people or to someone who is acting in the name of the people", and lastly, law must be promulgated. Only at the end of his investigation of these four points does Aquinas formulate his definition of law. "Thus", he says, "from these four Articles the definition of law may be put together and it is simply this: Law is an edict of reason, promulgated by him who has the care of the community, to

promote the common good."

The care that the author takes to establish the definition is noteworthy, especially in view of the modern custom of simply asserting one's definition and expecting the reader to accept it. If the reader does not accept a definition, he will not accept anything that follows from that definition--which frequently is the remainder of the treatise. Often a definition is "explained" (as was customary in Scholastic manuals), but rarely defended. Aquinas, on the contrary, as a good Aristotelian, will argue for his definition point by point, taking into consideration some of the most forceful contrary notions and attempting to refute them. Whether one ultimately agrees with Aquinas' definition of law or not, one would have to admit that it is not arbitrary--it is, in fact, painstakingly *concluded* at the *end* of the first question (The Nature of Law).

Having established a general definition of law, Thomas inquires about the general classes of law, leaving aside the particular subdivisions, such as the Law of Nations (*jus gentium*) for a later analysis. He examines in detail the four principal kinds of law: eternal, natural, human and divine.

Now, although the ultimate source of law is the eternal law of God, which is the exemplar in the divine wisdom moving all things to their proper ends, this eternal law is not to be equated with *divine law*, which is a special kind of promulgation of the eternal law, namely, by way of a revelation, such as is found described in the Old and New Testaments. And, on the other hand, even though the natural law is promulgated by God, it, too, is to be carefully distinguished from the divine law, as he explains later. (Q. 91, a. 4)

One may wonder why Aquinas begins with the eternal law, since it is the least known to us and thus his order of treatment of the various kinds of law seems to violate his frequently asserted notion that we must begin with what is better known to us. The answer is that Thomas is a Christian thinker who grounds his theology in what to him is most certain--the revealed word of God which over and over speaks of God's eternal law. This may serve as a reminder that Aquinas' formal treatise on law is found in a work of *theology*. However, let us leave aside the specific questions on eternal, divine, and human law, and briefly consider the Thomistic teaching on natural law which is perhaps the most important section of his treatise on law.

Immediately after his discussion of eternal law Aquinas introduces the question on natural law, asking simply, "Is there a natural law in us?"

From the very phrasing of the question it should be obvious that the author means to restrict this sort of participation of the eternal law to rational creatures only: "The natural law is simply a rational creature's participation of the eternal law." (Q. 91, a. 2c) Contrary to the view of some modern Thomists, Aquinas does not view the natural law as embracing creatures below man, nor as applicable to the infrarational tendencies of man himself (*cf. infra*, reply to obj. 3; Q. 94, a. 2, reply to obj. 2; see also my article in *45 Proceedings of the American Catholic Philosophical Association*, 130).

But, if the natural is not instinctive, e.g., as we might say "it is natural for a bird to fly," nor natural in the sense that we say "it is natural for a stone to fall downwards," how can it be

natural? If law is found in the rational creature only, it must pertain to his reason, as we saw earlier (Q. 90,1). Law does indeed direct our natural inclinations, but it is reason channelling these desires and tendencies (*cf.* Q. 94,2). Now, if every law is an ordinance of reason, in what sense is it *natural* if that term is distinguished from *reason*? It is clear that Thomas is not opposing what is natural to what is done by reason since he begins by noting how every rational activity is grounded in self-evident principles which are known intuitively, not by ratiocination, and thus known naturally to an intellectual being (*cf.* Ia, Q. 79, 12). Also, every desire of a means to an end is grounded in our natural desire for the ultimate end (*cf.* Ia, Q. 82, 1). The desire may be rational, or infra-rational, but it is not the natural law. Only when a desire is regulated by reason may it be said to pertain to such a law (Q. 94, 2). Aquinas mentions these inclinations here, first, because finality is of the very essence of the practical order, and, secondly, because the ultimate human drive in this order is man's *natural* willing of his end, happiness. The will cannot help but be attracted to its proper end and hence does not choose it, but necessarily, i.e., naturally, wills it. Thus all of man's knowing and willing are grounded on the natural tendencies and operations of these distinctively human faculties. The natural law, then, is the primary directive ordinance of all human actions to their end. Thus it is natural in the sense that it is *humanly* natural to man's nature as a *rational* animal.

In the *CONTRA* of the Question (91, art. 2), Thomas Aquinas establishes that there is a natural law in us by an argument from a text of Scripture accompanied by its Gloss. Perhaps because the Pauline text (*Rom.* 2:14) had not explicitly used the term *natural law*, Aquinas appeals to the

authority of the commentator. But it is important to note that a theological, not a philosophical, argument is present here. This is not to imply that the existence of the natural law cannot be known by human experience. It is simply to note that Thomas Aquinas did not argue in this way. He is a theologian writing a theological treatise and hence argues from what is best known and most authoritative to the theologian, namely, Sacred Scripture and theological writings.

But this theological stance of the author should not lead us to think that for him the natural law is known only by a divine revelation. The very point of Aquinas' argument is that there is a law known to man without revelation--a law followed by non-believers--who, as he says, "have no written law"; and we even have scriptural authority for such a natural law in all men. Now, how does he prove that this law exists? Not by examining the so-called laws of nature, nor empirically verifying it by investigating the history of human cultures--approaches taken by later "Thomists". Aquinas' appeal is either to Scripture or to his own teaching on Divine Providence, not to empirical data. Thus modern "Thomists" may have an approach that is more in the philosophic order, but nevertheless should not be labelled Thomistic.

How does this law manifest itself in us? Thomas' answer is simple: "The natural law is that by which every man is aware of, and realizes, what is good and what is evil." This does not mean that everyone will be in agreement as to what is good and what is evil--unless it concerns the general principles such as do good and avoid evil; harm no one; do no injustice. Regarding such principles, Aquinas asserts (Q. 94, 4) that the natural law is the same in all men, while in particular conclusions drawn from these principles there is room for differences of opinion

and exceptions (*id.*).

The concluding paragraph of the *REPLY* (91, 2) indicates that the light of reason is the power by which man distinguishes good from evil--which is the function of natural law--and thereby places Thomas Aquinas among those who hold that human nature was not destroyed by the fall. By reason man is aware of what is right and wrong. Basically, this does not require any special revelation or grace. This is not to say that the natural law is sufficient for salvation, but it is to view nature as that on which grace will build, not replace.

The question is sometimes asked: Is the natural law innate? Aquinas' answer would be: Man has an innate habit (not requiring repeated acts for its acquisition) of grasping first principles in both the theoretical and the practical orders, although the exercise of this habit may be impeded by immaturity or some other cause. Perhaps Thomas Aquinas would prefer to call these principles or precepts "natural" rather than "innate" since they are an endowment of nature, not an acquisition due to repeated acts of the mind. A child doesn't have to be trained to see color or desire food--these are natural, not acquired capabilities. So, too, the formulation of the fundamental principles of morality is a natural, not an acquired capability, although in this case, the obstacle of immaturity, or, insufficient rational ability must be overcome first. As soon as man is able to apply reason to an analysis of his moral acts, he naturally is aware of "do good and avoid evil," and other similar general precepts of the moral order. In this sense, the natural law is "natural" if not innate.

Let us now review the central text of Thomas' natural law doctrine, namely Question 94, article 2, of the *Prima Secundae*.

It asks: "Does the natural law contain many precepts or only one?"

The deceptively simple question posed by this article scarcely suggests the profound and thorough analysis of natural law that is to be found in it. The *CONTRA* answers the question by comparing the precepts of the natural law with the principles of the theoretical intellect. Just as the latter are many, so there are many precepts of the natural law. However, Aquinas is not satisfied with such a simple answer by analogy. His *REPLY* probes the underlying metaphysical, psychological as well as moral principles involved.

His analysis begins with a review of "self-evident principles", and then proceeds to establish how, and the order in which these principles are formulated. Since "being" and its opposite are first known and are included in every subsequent knowledge, the first principle in the theoretical order must be grounded on these notions whether we formulate it as: "To be is not the same as not to be," or, "To affirm is not the same as to deny." All other principles are based on this principle of non-contradiction.

Now "good" is what we are first conscious of in the practical order, the realm of action, since everything that acts, acts for an end, that is to say, for a good. The first principle in this order is thus: "the good is that which all desire" -- the notion of "good" from Aristotle. Now since the practical order involves choosing and doing, this first principle becomes prescriptive, and, as such, is then a precept: "Do good; avoid evil." Like the principle of non-contradiction, it will be the basis of all other precepts -- in this case, in the practical order. Whatever the practical intellect naturally grasps as real human

good will be formulated into a precept authorizing its attainment or forbidding its opposite. Thus, all these naturally grasped precepts, though many in themselves, are rooted in the law of nature as things to be done or avoided. The natural law, therefore, is composed of many precepts though all are ultimately grounded in the supreme practical precept: Do good, avoid evil. Furthermore, Aquinas wants to establish a certain precedence of the precepts after the first and basic one. Thus, he appeals to the "order of our natural inclinations." Inclination or tendency of nature grounds his natural law teachings. Human nature seen as dynamic, as tending toward certain goals that perfect it, not human nature understood as an immutable essence, is the key to his theory. In this sense, it is not a "metaphysical" view of human nature. It is rather a "moral" approach: What is man's good? What makes him happy? More specifically, what are his fundamental inclinations or tendencies? It is more a question of "what does man want?" than "what is man?" Thomas' natural law teachings are part of his ethics, not his metaphysics. Whether or not *nature* acts for an end, *man* certainly does. He does seek certain goods or goals. That is all Thomas needs for his natural law ethic.

Some of these goods, accompanied by the inclinations toward them, man shares with every other natural substance, even those which lack knowledge. For example, every being seeks its own preservation either knowingly or not. But the "instinct" for self-preservation is not a *law* since a law must be a rational rule of conduct for a social, political animal. For example, a plant "striving" (as Darwin would say) to survive in a desert manifests this basic inclination, which for Aquinas is not a law, but rather a regularity of nature. Man's similar instinct for self-preservation is likewise not a law, but his choices, made by his rational appetite (or, will) *are* governed

by the natural law to foster and safeguard this instinct. Law is an ordinance of reason, hence, "those actions which preserve human life and prevent the opposite are formulated into precepts of the natural law." These are commands regulating social action, not infrarational drives of nature. Man may share these inclinations with creatures which lack knowledge, but it is man's reason which formulates the precepts which will best lead to their fulfillment within the context of his life in a community.

A second set of goods are common to men and animals. The inclinations here are associated with food, sex, offspring and other tendencies found within man as an animal. Thus, the natural law will prescribe a reasonable use of food and sex and care of children, always keeping in mind what the common good requires.

A third class of goods and inclinations are proper to man as a rational animal. These specifically human tendencies include man's desire to know the truth and to live in society. The precepts regulating these inclinations will require that man avoid ignorance and the offending of his neighbor.

Thus, a sort of hierarchy of natural good and inclinations suggests a hierarchy of precepts to assist in their realization. The tendencies man shares with all other beings are basic; those he shares with animals are secondary as, perhaps, being less necessary; those found only in himself as rational would rank third. This third category may contain the highest and noblest inclinations, but not the most basic. Thus, the precepts guiding such activities would be of lesser importance than those which regulate the first two categories of human tendencies. For example, "Thou shalt not kill" would take

precedence over "Thou shalt return borrowed goods as promised."

The *reply to Objection 2* of the same article gives Aquinas the opportunity to make clear just how each of man's inclinations comes under the natural law. Some have said that man's sex drive is natural, and, therefore, the natural law requires sexual fulfillment whenever sexual desire occurs. Thomas Aquinas would say the inclination is natural to man, but the natural law is a rational guide for its use. Hence, only a *reasonable* use of such faculties and fulfillment of such instincts is what the natural law allows. Again, we see that law is restricted to rational beings only and within these beings to those actions that are governed by reason. It would not be Thomistic, then, to speak of the natural laws governing sex unless one means the application of reasonable regulations of the sex appetite and acts. No tendency or desire, as such, comes under the natural law, but only to the extent that it is ruled by reason.

So much for a brief review of Aquinas' natural law doctrine. The remainder of my remarks here will be to offer my own opinion regarding the unpopularity of the Thomistic teaching on natural law; this opinion can be briefly expressed as primarily a failure on the part of Thomas' disciples correctly to understand and expound the writings of their master.

I shall try to substantiate this claim by attending to three points: first, the theological setting of Aquinas' treatise on law; second, the importance of intellectual custom for the acceptance of a teaching; and thirdly, the special character of a moral conclusion drawn from the natural law.



## 1.

*The Theological Setting*

Although there are references to natural right and natural law in many of St. Thomas' works, the only *ex professo* treatment of natural law in his writings is found, not in a philosophical treatise but deep within his theological masterpiece, the *Summary of Theology*. What is significant about this fact? First, the treatise on law is written by a believing Christian and for believing Christians--in fact, for beginners in theology as he tells us in his introduction to the *Summa*. Hence his concern in the treatise on law is largely with theological problems, for the most part with interpreting various passages of Sacred Scripture that deal with law. As we noted earlier, Aquinas does not establish the existence of natural law by an inductive process that would appeal to elements of man's experience of the universality of some principles or rules of human conduct--such as Aristotle does in the fifth book of the *Ethics* when he distinguishes what is naturally just from what is just only by convention. No, his first appeal is to Scripture and the well known Gloss that equates "natural law" with what the Gentiles "do by nature". He explains that the Natural Law is the rational creature's participation in the external law which in turn is known by those who accept the existence and providence of God. The *Summa* as a theological treatise begins with a consideration of God and His attributes which are best known and therefore examined first by one whose function is to explain the Sacred Writings. But these matters are treated last by the philosopher as least known to him.

It is helpful to note this strictly theological order and context

by reviewing what St. Thomas says in his brief introduction to his treatise on law: "We have now to consider the extrinsic principles of acts. Now the extrinsic principle inclining to evil is the devil, of whose temptations we have spoken in the *First Part* (Q.114). But the extrinsic principle moving to good is God, who both instructs us by means of His Law, and assists us by His Grace: wherefore in the first place we must speak of law: in the second place, of grace". (Ia, IIae, 90, Intro.)

Does that sound like a philosopher appealing to the natural experience of his listener? No, it is a theologian talking to believers. The reader of Aquinas' treatise on law may want to rearrange Aquinas' writing to make it more acceptable to the method and style of philosophy, but he will do so as an innovator, rather than as a follower of the Angelic Doctor. This is not to say that Thomas Aquinas would disapprove of using his theology of natural law for philosophical purposes, but one should always be aware of the profound changes in order, method and criterion of truth required of a philosopher who would adapt a theological treatise to his own use.

My main point here is that, to do justice to Aquinas, we must read and contemplate what he wrote in the context and order in which he wrote it. To make the medieval theologian serve *our* contemporary philosophical needs is to risk a misunderstanding of him at best, and at worst to invite a total rejection of a natural law teaching as enunciated by one of the greatest thinkers of all time. For example, one way in which Aquinas is summarily dismissed may be seen in a typical "great books" or philosophy class discussion of the treatise on law. A participant usually complains that Aquinas' acceptance of natural law is grounded in his belief in the existence and providence of God which is not covered in the treatise being read and thus is gratuitous on Thomas' part. When it is pointed

out that the treatise on law was being read out of context and that the author had treated God and His attributes much earlier in the work, the participant may then reply that, without faith, a modern reader would hardly share Aquinas' notion concerning God since such matters are philosophically problematic. It is thus assumed by many of our contemporaries that the Thomistic teaching on natural law rests on an antiquated theology which in turn is dependent upon an Aristotelianism which has long since been rejected.

Now, whether or not Thomas' theology and philosophy are passe, it remains true that his natural law teaching is grounded in his view of God. And Aquinas himself points out that only a few by philosophy will prove the existence of God and still fewer will know of His universal providence. If this is so, how many of our modern readers will be ready to accept the philosophical validity of Aquinas' treatise on law? It should not surprise us then to see Thomas Aquinas rejected by those who share neither his faith nor basic philosophical principles. But for followers of Aquinas to organize a treatise of "purely philosophical ethics" and incorporate within it a natural law teaching derived from the regularities of nature or the common consent of mankind, and to claim such a treatise is "*ad mentem Divi Thomae*" is to risk betraying their mentor and exposing his teaching to unjustified criticism.

## 2.

*The Importance Of  
Intellectual Custom*

There is another important consequence of the fact that the Thomistic treatment of natural law is written by a believer for believers. It is this: the believer is inclined to accept philosophical positions that accord with his faith and to reject

those that do not. This is the force of custom which becomes as second nature to us and explains why we think that positions are philosophically evident when in fact they are not, as Aquinas himself points out (*C.G.* I, 11). Thus a believer who reads in countless passages of the Old and New Testament that fornication is morally wrong will have little difficulty in accepting a philosophical argument to that effect. But what of a person who has not heard of Sacred Scripture and moreover is disposed through custom to condone fornication? Will he be likely to accept a philosophical argument condemning it? St. Thomas tells us that the pagans who were converted to Christianity had to be explicitly instructed about the immorality of fornication because they, as a rule, did not think it was wrong. The believer held from revelation and reason that it was wrong; the non-believer did not. When the non-believer of our post-Christian era finds the believer's arguments about fornication to be unconvincing, should one accuse the non-believer of blindness or moral insensitivity? Perhaps not, if one recalls the Thomistic teaching on the force of custom. The Christian's appeal to natural law is likely to be radically different from a non-believer's.

The power of custom may also help explain why within the Christian community today there are so many different opinions about moral matters that are ostensibly all derived from the same natural law. Christians taking opposite positions on divorce, birth control, war, capital punishment (to name a few) frequently claim that their arguments are grounded in the teaching of the natural law. And many times one group of Christians argues that a certain practice is sinful because it is forbidden by the natural law and another group which condones the practice will reject the natural law itself as a figment of the imagination or an unwarranted intrusion of philosophical rationalism into a theological question. Precisely because of Thomas' teaching on the force of custom would I find this comment by Vernon Bourke rather un-Thomistic:

Notice that I do not conclude that artificial contraception is wrong simply for Catholics. I say that it seems to me to be wrong for all human beings . . . For a Mohammedan, an atheist, or a Protestant to use contraceptives is, to my mind, just as unreasonable as it is for Catholics--providing we are viewing this problem on a purely natural basis. (*What Modern Catholics Think about Birth Control* ed. Wm. Birmingham, [New York: New American Library, 1964] p.25.)

I presume that his phrase, "just as unreasonable" implies that the non-Catholic is committing as grievous a sin as a Catholic in practicing birth control when viewing the problem on a purely natural basis. I doubt if Aquinas would agree with Bourke here.

It appears that a great deal of discrepancy between traditional Roman Catholic moralists and other Christian moralists is traceable to divergent opinions about the knowability and authority of the natural law. And much of the disagreement between the traditional Catholic and the liberal modern Catholic is rooted in their differing attitudes towards natural law. Certainly these attitudes are grounded in a differing intellectual custom. The traditional Catholic moralist has had a philosophical and theological education quite different from other Christians and, indeed, quite different from most contemporary Catholics. This fact does not authorize a value judgment about the correctness of the various positions; it simply suggests that the force of custom may help to explain divergences of opinions on moral matters.

Now, while the unbeliever may reject a natural law teaching because it seems to imply the existence of an Unknown God, the same may not be said of Christians and other theists. Why, then, do many believers refuse to accept the natural law? One reason may be the rationalism referred to above. Many Christians prefer to derive their moral opinions

from the Gospel and to leave to the philosophers the task for formulating a rational ethics based on man's fallible and, perhaps, corrupted reason. Such a philosophical ethics, they would hold, can be of little service to fallen man, redeemed by Christ and living by faith. For these Christians, what do pagan philosophers like Plato, Aristotle, and Marcus Aurelius have to teach a man who has been saved from his fallen nature and darkened reason and is living in grace by the clear light of his Savior's teaching?

Yet Aquinas, certainly a believing Christian, did find a place for a natural law doctrine and he put it in the heart of his theology of how God moves us to good by His instruction. Clearly the *Epistle to the Romans* which indicates how the pagans written one was the scriptural authority for Thomas' teaching:

. . . pagans who never heard of the Law but are led by reason to do what the Law commands may not actually "possess" the Law, but they can be said to be the Law. (*Rom. 2:14*).

Even the Old Testament bore witness to this rational light within man since he shares in God's intelligence in his natural ability to discern what is good and what is evil (Ia, IIae, 91, 2c; cf. Ps. 4:6). As a Christian, then, Thomas Aquinas accepts the authority of Holy Scripture for his natural law doctrine. And as a philosopher, he finds this doctrine quite compatible with God's Providence. The reason of man most fittingly participates in God's governance of the world because not only is man capable of knowing God's plan--that is to say, what God wants man to do in order that he may achieve his goal--but also man is a ruler of himself and others by his practical reason which is able to receive God's instruction in the natural law.

It is likely that Thomas Aquinas also professed a natural law teaching because of his philosophical predecessors. For example, Plato's notion of "universal justice" in terms of which one seeks to change unjust laws (*Phaedo, Crito*), and Aristotle's distinction between what is "just by nature" and what is "just by convention" (*Eth. V, 7*) or his explicit natural law statements (*Rhet. I, 13*):

Law is either particular or universal; by "particular" law I mean that which an individual community lays down for itself (a law partly unwritten, partly written); and by "universal" law I mean the law of nature. For there is a natural and universal notion of right and wrong, one that all men instinctively apprehend, even when they have no mutual intercourse nor any compact. This evidently is the law to which Sophocles' Antigone alludes when she says that, despite [Creon's] interdict, it is right to bury [her brother] Polyneices; the implication being that it is right according to nature (*cf. Antigone 456-7*).

Also the strong natural law philosophy of the Stoics which found its way into the *Institutes* of Justinian no doubt gave Aquinas all the support concerning the natural law that he may have needed. And his view of human nature as fallen, but not destroyed--such that grace perfects rather than supplants nature--made it likely that a natural law teaching would find an important place in his thinking.

Yet Aquinas does not exaggerate the role of natural law. Divine law, known by revelation, must supplement it in many significant ways--most of all by providing us with a knowledge of what one must do to be saved, since natural reason cannot tell us how to attain a supernatural beatitude.

Another important reason why revealed divine law must

come to the aid of natural law is "on account of the uncertainty of human judgment". Hence for man to "know without doubt what he ought to do and what he ought to avoid", a revealed divine law was given him (Ia, IIae, 91, 4c). Aquinas even says that "the natural reason of man was clouded by the lusts of sin" (IIa, IIae, 22, 1 ad 1) and that a divine law had to be revealed by God "because the law of nature had become obscured by man's sins" (IIIa, 60, 5 ad 3).

If it is granted that the natural law must be supplemented by a revealed law, how can the believer expect the non-believer to possess the same precision and certitude in moral matters as himself, instructed, as he believes, in great detail by a God who does not deceive? Of course, the believer could lose his moral awareness through sin; but, ideally speaking, his awareness of good and evil through an acceptance of divine law by faith certainly supplements what a man might know by the natural law alone. Again the point is simply this: the existence of the natural law in all men does not guarantee an equal awareness of what is good and what is evil. Those who argue, for example, that fornication is always wrong by the clear teaching of natural law, must be prepared to present the rational evidence for their position or else risk their opponent's rejection of a natural law position entirely. In short, the power of custom should never be overlooked.

### 3.

#### *The Special Character Of A Moral Conclusion*

My third and last reason why Aquinas is misunderstood is because of a failure to appreciate what he says about moral conclusions. Why should those who accept the same divine revelation and who share a common intellectual custom have

differences of opinion about what is right and wrong? Undoubtedly, theologians have answers to this question, but Thomas Aquinas himself might be able to help us here, especially if the moral matter has not been dealt with conclusively by Scripture. Two believers might well argue on opposite sides of a moral question, e.g., Can there be a just war?--both appealing to the natural law for support. How is this possible when they would not disagree about a scientific or mathematical conclusion? Aquinas would reply that practical conclusions are not the same as the conclusions that one draws in the theoretical sciences. The conclusions of a practical science like ethics follow usually, but not necessarily, from moral principles. There are exceptions; for example, one need not always return a borrowed weapon when he has promised to do so --the old illustration from Plato's *Republic*. And (quoting St. Thomas), "the more we descend further into detail the greater the number of ways in which the principle, i.e., that one must return borrowed goods, may fail". There is a text in the *Sentences* that puts Thomas' notion succinctly:

Because human acts must vary according to the different conditions of persons and times and other circumstances, such conclusions derived from the primary principles of the natural law do not follow in such a way as to be always binding, but only in most cases. Indeed, the whole of moral matter is like that, as the Philosopher says in the *Ethics*. (*In IV Sent. 33, I 2c.*)

This text reminds us of the necessity of looking at each moral choice as unique--that is, with its own peculiar set of circumstances that may affect the morality of the act. Incidentally, a failure to do this is one reason, I think, why "situation ethics" has become so popular at the expense of a natural law ethics that ignored such Aristotelian and Thomistic principles.

Exactly how to weigh each factor involved in a moral choice may easily create differences of opinion concerning moral problems where the Sacred Writings have not given the believer clear guidelines. A proper grasp of Thomas Aquinas' teaching on natural law should not lead us to expect unanimity in these matters, but rather quite understandable differences of opinion.

Let us consider for a moment what could be the fundamental reason for neglecting or ignoring Aquinas' view that moral conclusions are true only in a majority of cases. Clearly, for some time now the Thomistic manuals in moral philosophy have presented the reader with extremely detailed moral rules that are "always and everywhere" true. It seems to me that this is an attempt to construct a moral order and moral science that would enjoy a certitude found only in the theoretical sciences. And, indeed, these modern Thomists do speak of the parallel between the moral and the physical--so much so, in fact, that they model the moral order on the physical. Jacques Maritain asserts: "... natural law is something as real in the moral realm as the laws of growth and senescence in the physical" (*The Rights of Man and Natural Law* [New York: Scribner, 1943], p. 62). Dom O. Lottin echoes this notion: "In a word, physical law is the principle of order of these natural activities. It is the same in the moral order" (*Principes de Morale* [Louvain, 1947], p. 125; my trans.).

On the contrary, following Aquinas, I would say that the moral law is not modelled on the physical; rather the physical is like the moral to the extent that the physical law may be referred to as a law at all, since, according to St. Thomas, it "cannot be called law except by way of a similtude" (Ia, IIae, 91, 2 ad 3; cf. 94, 2 ad 2). The authentic Thomistic teaching is that "law is found only in the rational creature" (C.G. III, 114); or again: "... the natural law is nothing else than the rational

creature's participation of the eternal law" (I, IIae, 91,2c). Hence, properly speaking, natural law is not divided into physical and moral; it is equated with the moral: "All the inclinations of any parts whatsoever of human nature, e.g. of the concupiscible and irascible parts, insofar as they are ruled by reason, belong to the natural law" (*id.* 94, 2 ad 2). From this, it is clear that there is nothing in the rational creature that may be said to belong to the natural law except what is ruled by reason and only insofar as it is ruled by reason.

Such a Thomistic position seems to preclude what is often called "biologism", namely, taking the natural "laws" and inclinations of subrational nature as constitutive of the moral character of a human act. Rather, for Thomas Aquinas, it is only insofar as these tendencies, which occur so regularly, are subject to reason and ruled by it, that they are said to belong to the natural law. In short, nothing below reason is part of the natural law. When, for example, the Encyclical of Paul VI, *Humanae Vitae* speaks of man's intellect discovering "in the power of giving life biological laws which are part of the human person", one must ask if these "laws" are found in the person qua person, that is, insofar as a person is rational. For Aquinas, such "laws" are not laws properly so called; they can be called laws only in a derived sense--by way of some similitude. Only to the extent that these "regularities" or inclinations are ruled by reason are they said to belong to natural law. In other words, the use of these "laws" under the rule of reason would alone lift them from the amoral area of so-called "biological laws" to the realm of the moral. Of themselves, they do not belong to the natural law. What is biologically "right"--or perhaps one should say "fitting"--of itself is not the norm for the moral rectitude of an action.

If Aquinas insisted that moral conclusions were true only for the most part and that what is physically most regular is not

necessarily the criterion for what is morally right, why have textbooks "*ad mentem divi Thomae*" ignored the mind of Thomas? I should like to suggest that Thomists, in their effort to overcome relativism in morals, have attempted to ground natural law on the "unchanging laws" of nature, even if that means only so-called "biological laws" found in the regularities of human subrational activity. By so doing, modern students of Thomas Aquinas have unconsciously made the master responsible for notions he never expressed.

While not denying that man has a nature and that certain physical and psychological "laws" govern it, the authentic "*natura hominis est mutabilis*" (IIa, IIae, 57, 2 ad 1; cf. *In IV Sent.* 33, I, 2 ad 1; 26, I, 1 ad 3; *In Ethica* 1026 f.): the nature of man is changeable. This is not to subscribe to the position of a Sartre who denies that man has an essence, nor to agree with the situationists who imply there are no norms of morality at all. It is, however, to be aware that the whole of moral matters according to Aquinas deals with the conclusions that must be drawn from the evident, general principles of morality (Ia, IIae, 94, 4c). These conclusions are true and applicable most of the time. The follower of Aquinas should not be trying to establish "moral laws" that reflect the regularity of the so-called "laws" of the universe, or the conclusions of mathematics. Once he has gotten beyond the supreme principles of the natural law, the Thomist is in the area where rules admit of exceptions; they are correct and to be followed *ut in pluribus*, i.e. in most cases. By trying to give moral laws the universality and regularity that one discovers in the so-called "laws of nature", the student of Aquinas not only parts company with his master; he also leaves himself open to critics who agree with Aquinas that human nature is variable, that moral conclusions do not follow with the regularity found in the theoretical sciences, and that the moral species of an act is not directly

deducible from the physical. (*In IV Sent.* 26, I, 3 ad 5; *cf. S. Theol.* Ia, IIae, 94, 3 ad 2.) It is this misunderstanding of Aquinas that has made many modern Thomists vulnerable in their exposition of the natural law.

I am suggesting then, in conclusion, that a return to the authentic teaching of Thomas Aquinas may prepare the ground for clearer, truer insight into the age-old notion of natural law. Such an understanding should enhance the prospects for a fruitful dialogue with those who at present, partly because they have been given an incorrect view of Thomistic natural law, find themselves at odds with what they believe is the teaching of Thomas Aquinas.

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