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-ARTICLE-

## THE BIBLE AS A LAW BOOK? THOMAS AQUINAS ON THE JURIDICAL USES OF SCRIPTURE

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### TABLE OF CONTENTS

I.	Introduction.....	78
II.	Reason, Revelation and Law: Setting the Stage .....	83
	A. Natural Law, Human Law and Determinations .....	84
	B. Human Finitude and Fallenness .....	85
	1. Human Finitude .....	86
	2. Human Fallenness.....	89
III.	The Rest of the <i>Treatise</i> : the Uses of Scripture in Human Law .....	92
	A. Law as Divine Instruction .....	92
	B. Scripture as “Higher Law” .....	96
	1. Scripture and the Divine Good .....	96
	2. Scripture, Natural Law and the Human Good .....	98
	a. Thomas’s Analytical Toolkit .....	98
	b. The Old Law and the New Law.....	100
	c. The Old Law’s Precepts: Ceremonial, Judicial and Moral .....	101
	i. Ceremonial.....	101
	ii. Judicial .....	102
	iii. Moral.....	105
IV.	Getting Specific: The Use of the Moral Precepts in Lawmaking .....	111

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*Abstract*

Thomas Aquinas's *Treatise on Law* (hereinafter "*Treatise*") is enjoying a resurgence of interest among legal scholars. It is excerpted in leading legal philosophy texts, assigned in jurisprudence courses and even cited in law journal articles and legal monographs on a wide range of subjects. Although the *Treatise* consists of nineteen chapters ("questions"), the average student of legal philosophy is likely to have been exposed only to portions of the first eight and little, if any, of the last eleven.

The *Treatise* is not a short work, and most of the editorial decisions are both practically necessary and pedagogically understandable. Nevertheless, omitting the "rest" of the *Treatise* has had some unfortunate consequences. The omitted questions include the bulk of Thomas's account of the relationship of theological revelation to human law, a subject of increasing importance in contemporary debates about religion and politics. The omissions also tend to reinforce the impression that Thomas's natural law system can be hived off from his religious and cultural context. To be sure, Thomas does make the familiar natural law claim that there are moral truths that all human beings must know merely by virtue of being human. However, the deeper one goes into the *Treatise*, the clearer it becomes that Thomas's treatment of natural law is part of a complex and theologically-informed understanding of nature, reason, revelation and the unfolding story of God's action in the world.

This article expounds and analyzes the role of Scripture in Thomas's account of legislation and judging, arguing that Thomas leaves only modest room for the Bible to influence human law directly. After explaining some key theological presuppositions that underpin Thomas's account of law generally, the article shows how Thomas divides the laws found in Scripture into several overlapping categories, only one of which (the "moral law" found in the Old Testament) has any direct continuing relevance for the Thomistic jurist. Even here, Scripture serves mostly to confirm the moral truths that human beings (at least the "wise" ones) already know.

Nevertheless, it would be an overstatement to conclude that the Bible is completely irrelevant to the Thomistic jurist. The Scriptures bear witness to the grace of Christ, which, in Thomas's account, is critical to the jurist's proper exercise of his or her vocation. Moreover, the Thomistic jurist's understanding of law is shaped by Scripture's account of nature, the human person and ethics. While these theological starting points may not always make much difference in legal

details, they do lead Thomas (and presumably his followers) to a vision of law that is famously at odds with many modern accounts.

## I. INTRODUCTION

In the past few decades, Thomas Aquinas's *Treatise on Law* has made a surprising comeback among legal scholars. It is now excerpted in leading legal philosophy texts,<sup>2</sup> assigned in jurisprudence courses and even cited in law journal articles on a wide range of subjects.<sup>3</sup> The *Treatise*, which is a section of Thomas's *Summa Theologiae*, consists of nineteen questions dealing with various aspects of, and kinds of, law. Thomas's definition of law is expansive enough to include civil laws (which Thomas calls "human law"), Scriptural commands ("divine law"), God's design and governance of the universe ("eternal law") and the law of nature.

Despite the resurgence of interest in the *Treatise*, however, the average student of legal philosophy is likely to have been exposed to portions of its first eight questions (Questions 90-97) but little, if any, of the last eleven. This editorial selection is entirely understandable and can even be seen in anthologies that appear to have been compiled by Thomas's admirers.<sup>4</sup> Questions 90 through 97 provide the reader whose primary interest is jurisprudence with Thomas's famous definition of law, a survey of the various types of law Thomas recognizes, his

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<sup>2</sup> See, e.g., GEORGE C. CHRISTIE & PATRICK MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 86-133 (1<sup>st</sup> ed. 1995); M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 132-37 (6<sup>th</sup> ed. 1994); STEPHEN E. GOTTLEIB, BRIAN H. BIX, TIMOTHY D. LYTTON & ROBIN L. WEST, JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 183-88 (2d ed. 2006).

<sup>3</sup> See, e.g., the following articles published in the first half of 2009: Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo Penalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009); Lee J. Strang, *Originalism and the "Challenge Of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927 (2009); John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513 (2009); Ronald J. Colombo, *Book Review, Exposing The Myth of Homo Economicus Moral Markets: The Critical Role of Values in the Economy*. Paul J. Zak, ed., 32 HARV. J.L. & PUB. POL'Y 737 (2009); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317-18 (2009); Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 NOTRE DAME L. REV. 1529, 1566 (2009); Brian M. McCall, *From Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice*, 60 S.C. L. REV. 707, 715, 718, 726 (2009); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 643 (2009); Jeremy Waldron, *Can There Be A Democratic Jurisprudence?*, 58 EMORY L.J. 675, 685 (2009).

<sup>4</sup> See, e.g., SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS (William P. Baumgarth & Richard J. Regan, S.J. eds. 1988) (including QQ. 90-97, 100 and Article 1 of Q. 105); ST. THOMAS AQUINAS, TREATISE ON LAW, (Regnery Publ'g, Inc. 2001) (1956) (including QQ. 90-97). In defense of these editions, some of the material covered in QQ. 98-108 is covered briefly in Q. 91.

classic exposition of natural law and its relationship to human law and Thomas's primary comments on the form, function and limits of human law. By contrast, questions 98-108 focus on issues that are not only more obviously theological and biblical, but also treat subjects that are far more obscure to modern readers and far less relevant to contemporary legal theory and practice: What is the purpose of the Old Testament's legal system (the "Old Law")? To what extent are Christians bound to observe the Old Law? How does the law set forth in the New Testament (the "New Law") compare to the Old? What is the New Law's purpose and effect?

The primary purpose of this article is to examine one of the central concerns of the usually omitted portion of the *Treatise*—the relevance of the Bible to the work of the jurist.<sup>5</sup> There are at least three ways in which, for Thomas, Holy Scripture is potentially relevant to the enterprises of legislating and judging. First, Scripture transmits the Christian gospel—the good news of the means by which the broken relationship between God and the human person may be restored, and the sinner liberated from the bondage of sin. The gift of infused grace affects the moral orientation of the Christian believer, including the jurist, and thus has consequences for the jurist's exercise of his or her vocation, as well as for the shape of the society that human law must govern.<sup>6</sup> Second, Scripture is relevant to the general understanding of the world that underwrites Thomas's account of law. "Nature," for example, is not "the amoral scene of Darwinian struggle,"<sup>7</sup> but rather the particular world that God in his wisdom and power has chosen to make and to which the human person has been fitted. Human beings are more than merely physical organisms; they are bearers of the divine image—morally responsible

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<sup>5</sup> Thomas's preferred term is "scripture" (*scriptura*) rather than "Bible" (*Biblia*), which, according to the *Corpus Thomisticum*, does not appear in the *Summa*. In this paragraph, which deals with contemporary implications of Thomas's work, I have used "Bible." Elsewhere in the article I have usually followed Thomas's own usage.

<sup>6</sup> The most important part of the divine law is the New Law, which is only secondarily a written set of commandments. First and foremost, the New Law is the new internal motivation and orientation toward service to God and neighbor that exists when "love . . . is poured into [human] hearts by the grace of Christ." THOMAS AQUINAS, *SUMMA THEOLOGIAE* [hereinafter "ST"] IaIIae at 91.5. Unless otherwise noted, citations to this work are taken from ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* (1265-74) (Fathers of the English Dominican Province trans., Christian Classics 1981). Citations are in the following form: AA.B, with AA identifying the number of the Question and B representing the article number within the question. For example, IaIIae 91.5 refers to article 5 of Question 91 within the First Part of the Second Part of the *Summa*. IIaIIae 66.1 refers to article 1 of Question 66 within the Second Part of the Second Part of the *Summa*. "Obj." refers to one of the objections in any given article and "ad" denotes a response to one of the objections. See also PAMELA M. HALL, *NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS* 65-91 (1994) (discussing the significance of the New Law in the lives of the faithful).

<sup>7</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 235 (1990).

inhabitants of a created order that includes animate and inanimate objects, angels and demons, and into which God himself has entered in the person of Christ. Finally, Scripture itself is potentially relevant to the jurist as a source of law<sup>8</sup>—a book of laws and precedents on the jurist’s shelf to be consulted along with the other legal authorities.

It is this third possible use of Scripture—as a source of law—that is the main focus of this article: How much attention should the faithful jurist pay to the law found in Holy Scripture? The question of the possible relevance of Scriptural commands to civil law is not merely a matter of abstract intellectual interest. Biblical-theological arguments are increasingly deployed in the public square.<sup>9</sup> Moreover, the Scriptures are full of rules and laws, and the question of the ongoing political significance for religious believers of rules handed down in a divinely-inspired text is a recurring one.<sup>10</sup>

This article is also, albeit indirectly, a plea for future attention to the neglected sections of the *Treatise*. Although the omission of the latter part of the *Treatise* is understandable, it has some unfortunate consequences. First, it tends to reinforce the impression that Thomas’s natural law system can be hived off from his religious and cultural context. To be sure, Thomas makes the familiar natural law claim that there are some moral truths that all human beings must know merely by virtue of being human. However, the deeper one goes into the *Treatise*, the clearer it becomes that Thomas’s account of natural law is part of a complex and theologically-informed

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<sup>8</sup> Cf. Craig G. Bartholomew, *Introduction, in A ROYAL PRIESTHOOD?*, 1, 12-19 (Craig Bartholomew, Jonathan Chaplin, Robert Song & Al Wolters, eds., 2002) (cataloguing various ways in which Scripture is used in ethical argumentation).

<sup>9</sup> For analysis concerning the appropriateness of such argumentation, see generally ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE* (1997); see also CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986); MICHAEL J. PERRY, *UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Kent Greenawalt, *What Are Public Reasons?*, 1 *J.L. PHIL. & CULTURE* 79 (2007); Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 *J.L. PHIL. & CULTURE* 159 (2007); John Rawls, *The Idea of Public Reason Revisited*, 64 *U. CHI. L. REV.* 765 (1997); Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 *SAN DIEGO L. REV.* 817 (1993).

<sup>10</sup> At least that is the case when Christians find themselves in a position to exercise political power. Oliver O’Donovan argues forcefully that Christian political influence is the result of the success of the church’s more fundamental missionary enterprise and “is constituted not by the church’s seizing alien power, but by alien power’s becoming attentive to the church.” OLIVER O’DONOVAN, *THE DESIRE OF THE NATIONS* 195 (1996). It is the result of Christians asking questions like, “how shall I, as someone responsible for making *these* decisions, make them in obedience to Christ’s command?” *Id.* at 196. The earliest Christians obviously were without significant political influence and thus faced a very different set of questions, as indeed, Christians in the West face a different set of political questions than they did in the Christendom era.

understanding of nature, sin, reason, revelation and the unfolding story of God's action in the world. Indeed, in this respect, it can be misleading to focus even on the full *Treatise*, as though Thomas intended his work in Questions 90-108 to constitute a stand-alone treatment of law that could be read in abstraction from the larger structure of the *Summa*.<sup>11</sup>

Reading the "rest" of the *Treatise* also clarifies the shape of Thomas's account of law in the work's more familiar portions. For example, one can see clearly in the latter part of the *Treatise* the central place of *determinations* in Thomas's overall account of law. The idea that general principles must be reduced to particular rules ("determinations") by persons in authority is not merely an incidental feature of the relationship between natural law and human law, but turns out to be an essential feature of human law generally.<sup>12</sup> Thomas also elaborates on other important matters in the neglected portions of the *Treatise*, such as the importance of custom for law and the connection between law and friendship.<sup>13</sup> These matters warrant a full investigation in their own right, but can only be touched upon here.

Part I of this article provides a brief sketch of Thomas's account of natural law, human law and the sources of legal variation. Civil laws vary from place to place and from time to time because rulers face differing circumstances when addressing otherwise similar questions of law. Human finitude and the effects of the Fall on human reason are also significant causes of variation. This discussion will be familiar to readers acquainted with the usual excerpts of the *Treatise*, but is nevertheless included because it provides a necessary backdrop to Thomas's account of the appropriate juridical uses of Scripture.

Part II analyzes Thomas's account of Scripture's primary role for the jurist—*viz.*, reducing (some of) the uncertainty that results from human finitude and fallenness—as well as

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<sup>11</sup> See Mark Jordan, *The Pars Moralis of the Summa Theologiae as Scientia and as Ars*, in *SCIENTIA UND ARS IM HOCH- UND SPÄTMITTELALTER* 469, 471 (Ingrid Craemer-Ruegenberg and Andreas Speer, eds., 1994).

<sup>12</sup> See, e.g., ST IaIIae 99.3, 99.4, 100.11, 103.1, 104.1, 104.3, 108.1.

<sup>13</sup> Thomas argues that the ultimate purpose of law, of whatever kind, is to "establish[] friendship, either between man and man, or between man and God." *Id.* at 99.1 ad 2. *Cf.*, *id.* at 99.2 ("[J]ust as the principal intention of human law is to create friendship between man and man; so the chief intention of the Divine Law is to establish men in friendship with God."). Since true friendship is the result of charity, see ST IaIIae 23.1; see also *id.* at 26.4 ad 3; STEVEN ANTHONY EDWARDS, *INTERIOR ACTS: TELEOLOGY, JUSTICE AND FRIENDSHIP IN THE RELIGIOUS ETHICS OF THOMAS AQUINAS* 10 (1986) ("The operative motivations in natural friendship, as [Aquinas] saw it, reduced to usefulness-for-me, pleasure-for-me. True friendship, by contrast, was not a natural phenomenon, but a gift of God's grace."); see generally DANIEL SCHWARTZ, *AQUINAS ON FRIENDSHIP* (2007). Charity is available only through the infusion of divine grace. ST IaIIae 24.2. It appears that a ruler's faith may be more critical to the establishment of good law in Thomas's system than is usually thought to be the case.

the way it performs this role. Thomas's argument rests on a mixture of biblical interpretation and theological and philosophical argument. He begins with the claim that law (of whatever kind) is a rule or measure of human action. Since lawmaking and judging are matters of human action, to the extent that Scripture provides guidance to the jurist, such guidance will take place through the *laws* Scripture contains (the "divine law"). An important consequence of this approach is that Thomas has already dramatically limited the amount of Scripture that is germane to the jurist's work; only the commandments found in Scripture are directly relevant.

Thomas then calls upon the various kinds and categories of law to analyze the relevance of the biblical commands. The first set of precepts with which the jurist must be concerned are those given for the purpose of facilitating the human person's achievement of spiritual beatitude. Rulers may not act in contravention of these, whether by commanding subjects to engage in idolatrous worship or by forbidding religious works commanded by God.

The more complicated question is whether the biblical commands have anything to say about the more mundane matters that occupy the bulk of the civil law. Thomas approaches this question by noting that laws come in three general categories—moral, judicial and ceremonial. The laws found in Scripture may be further divided into the Old Law and the New Law. The Old Law includes the precepts found in the Old Testament, and the New Law consists (at least secondarily)<sup>14</sup> of the precepts found in the New Testament. Invoking these categories alongside his philosophical account of law generally—and especially the inevitable role of human rulers in making the "determinations" that are necessary to operationalize general rules as a practical matter—Thomas eventually concludes through a process of elimination that only the moral and judicial precepts of the Old Law have any continuing relevance at all for the faithful ruler, and that only the moral precepts of the Old Law have any binding force.<sup>15</sup>

Part III takes up the question of specifically how, in Thomas's account, the moral precepts of the Old Law can be identified and how they serve to regulate human law. Once identified, the moral precepts stand as binding sources of moral guidance because they represent authoritative sources of the natural law. As such, they would be useful to earthly rulers, even if they underdetermine the decisions those rulers must actually make. Unfortunately, Thomas is

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<sup>14</sup> See *supra* note 6 (explaining that the New Law is primarily a matter of internal motivation).

<sup>15</sup> Moral precepts found in the New Testament are also binding in principle but make no changes to the fundamental moral content of the Old Law. See *infra* Part II.

vague about which passages of Scripture (other than the Ten Commandments) fit into this important category. This article suggests several possible ways of interpreting his definition so as to identify the authoritative statements of the natural law contained in Holy Scripture. None, however, proves entirely satisfactory.

In the end, Scripture is of great significance to the jurist in Thomas's understanding. Its significance as a source of law will vary according to the condition of the ruler and the people. A wise and faithful ruler may not need to consult Scripture very often in the course of performing his or her job. Such a ruler would presumably not be inclined to enact laws that prevented the faithful from fulfilling their religious duties and would also be aware of the requirements of the natural law. Thus Scripture's main functions as a law book— setting forth the religious duties of the faithful against which the ruler may not legislate and removing uncertainty about the demands of natural law—become important primarily when the ruler is inclined to stray from the light of sanctified reason. Nevertheless, Scripture is of critical, if indirect importance as the source of the background narrative through which the jurist interprets the world and as the medium through which the Gospel—in which is found the source of the divine grace that is indispensable to rule well—is revealed.

## II. REASON, REVELATION AND LAW: SETTING THE STAGE

One of Thomas's plainest statements of the role of Scripture occurs relatively early in the *Treatise*. In Question 91, Article 4, Thomas explains the four reasons why it was necessary for God to promulgate the divine law. First, human beings needed to be instructed in religious matters, since they could not naturally know how to obtain their supernatural end of fellowship with God. Second, Scripture helps human beings “know without a doubt what [they] ought to do and what [they] ought to avoid”<sup>16</sup> when their judgment would otherwise be uncertain. Third, divine laws were needed because human beings, having no ability to judge the hidden “movements” of the heart, are incompetent to legislate with respect to such matters, even though such legislation is needed. Fourth, human law cannot punish everything that humans know to be

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<sup>16</sup> ST IaIIae 91.4

evil; the divine law thus intervenes to explicitly forbid wrongs that are permitted under human law.

The second purpose for the divine law is the most important in Thomas's account of the relationship between Scripture and human law. Scripture's usefulness is not limited to religious matters: "[O]n account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result."<sup>17</sup> Accordingly, "it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err."<sup>18</sup>

This statement is puzzling at first blush; Thomas is, after all, famous for his endorsement of the natural law—the natural human knowledge of good. He holds that reason is a divine gift that fits us for moral life in this world: "the light of natural reason . . . is nothing else than an imprint on us of the Divine light."<sup>19</sup> Moreover, goodness and reasonableness are inseparably intertwined; the divine command is not the expression of a sovereign's arbitrary will, but rather the reasonable will of a supremely wise and loving Being who has given human beings everywhere all that they need to live a virtuous life.<sup>20</sup> If the enterprise of making and using human law is one of the ordinary forms of human moral action, why would human beings need help with this mundane task? Is reason inadequate after all?

### A. Natural Law, Human Law and Determinations

Thomas's position with respect to these matters is not as easy to summarize. His official position is unquestionably that human reason is sufficient for good lawmaking, but the totality of the *Treatise* suggests that his views are a good deal more complex. To begin with, Thomas's expectations about the connection between morality and human law are lower than many would expect. Although Thomas is known for grounding human law in natural law, he holds that the connection can occur in either of two ways.<sup>21</sup> The human laws with the strongest connection to

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 91.2.

<sup>20</sup> See HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY*, ch. 2 (1998). The text refers to natural, not theological virtues.

<sup>21</sup> See ST IaIIae 95.2.

natural law are those whose contents are connected to natural law “as conclusions from premises[.]”—e.g., laws against theft, murder, adultery, etc.<sup>22</sup> These laws merely repeat the basic precepts of natural law and thus, in Thomas’s scheme, draw their force not only from having been enacted, but also from their status as part of the natural law. Most human law, however, is not so tightly connected with the natural law, but rather concerns decisions that are necessary to operationalize natural law norms. Thomas calls these laws “determinations,” and again, most human law fits in this category.<sup>23</sup> Examples include laws that specify legal processes, set remedies and punishments, fix the specific rules for making and interpreting contracts or the conditions of property ownership. These laws need not bear any close connection to any particular principle of natural law and may be expected to vary according to time and place.<sup>24</sup> Nevertheless, Thomas holds that they are derived from the law of nature in a loose sense because they are made in accordance with human reason, assuming they are aimed at the common good, made by the proper authorities, are promulgated and otherwise meet the requirements for “law.”<sup>25</sup>

## B. Human Finitude and Fallenness

The sort of variation we might thus expect from legal determinations—variation according to the circumstances of the ruler(s) and the people—does not seem problematic enough to warrant divine intervention in the form of the promulgation of a special divine law. Question 94, however, suggests that the trouble may run deeper. In Article 4, Thomas addresses the question of whether the natural law is the same for everyone—i.e., whether the same law of nature applies at all times and places. While Thomas answers the question in the affirmative, he makes clear that this is true only at the general level; human beings know by nature a few basic moral truths and are “inclined to act according to reason.”<sup>26</sup> Even so, this does not mean that acting according to reason always leads people to the same conclusions, even under the same

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<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 95.2; 100.8 ad 3 (speaking of human “jurisdiction”); *id.* at 102.2 ad 3, 104.1. For an excellent discussion of the place of “determinations” in Thomas’s thought, *see* JOHN FINNIS, AQUINAS 266-74 (1998).

<sup>24</sup> *See* ST IaIIae 95.2 & ad 3.

<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 94.4.

circumstances, and this for a number of reasons, having to do both with the nature of the world in general and human beings in particular.

### 1. Human Finitude

Thomas, drawing on Aristotle, holds that reasoning begins with general principles and then proceeds to matters of detail.<sup>27</sup> This is true of both theoretical reasoning, which is undertaken for the purpose of learning the truth about things that one cannot change, and practical reasoning, which is motivated by the need to decide what to do.<sup>28</sup> Although theoretical and practical reasoning are “not distinct powers,”<sup>29</sup> the fact that they are working toward different ends has consequences for the outcomes of the reasoning process. Theoretical reason deals mostly with things that human beings cannot change and that operate in a reliable natural order; to the extent that it draws on true starting points and that the reasoning faculty is functioning properly, its conclusions are always reliable.<sup>30</sup> Decisions about what to do deal with “contingent matters”—which are not the necessary workings of an order beyond the control of human reason; instead, they are determined, at least in part, by the free choices of human beings. Thomas claims that, “although there is necessity in the general principles [of practical reasoning], the more we descend to matters of detail, the more frequently we encounter defects.”<sup>31</sup> Theoretical truth, whether general or detailed, is the same for everyone everywhere at all times (though everyone may not know it), but when it comes to reasoning about what is to be done, “truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles.”<sup>32</sup> Even when the details turn out to be the same, there is still the additional limitation (in common with theoretical reason) that not all people will be aware of the truth; many will be mistaken or altogether ignorant.<sup>33</sup>

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<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> ST Ia 79.11 (“[T]o a thing apprehended by the intellect, it is accidental whether it be directed to operation or not, and according to this the speculative and practical intellects differ.”).

<sup>30</sup> *See* ST IaIIae 94.4.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

The examples Thomas gives help clarify his somewhat obscure abstract description. The wise know that “the three angles of a triangle are together equal to two right angles.”<sup>34</sup> One can thus safely conclude from that general truth that if the figure before one is a particular triangle *PQR*, the sum of its angles will be equal to 180 degrees.<sup>35</sup> Thomas contrasts this situation with the application of the general natural law/practical reason principle that “goods entrusted to another should be returned to their owner.”<sup>36</sup> We cannot imagine a triangle *PQR* whose angles do not sum to 180 degrees, but we can, and Thomas does, imagine a particular situation in which the natural law principle does not hold: one should not “restore goods held in trust . . . if they are claimed for the purpose of fighting against one’s country.”<sup>37</sup> Moreover, the more detailed a rule, the more situations we can think of in which it ought not to be applied.<sup>38</sup>

Thomas also holds that although humans “participate” in God’s wisdom,<sup>39</sup> this participation is far from complete.<sup>40</sup> The natural moral knowledge that is written on the human heart is, according to Thomas, “a natural participation of the eternal law *according to certain general principles but not as regards the particular determinations of individual cases . . .*”<sup>41</sup> God may know the right answer to every conceivable moral question with certainty,<sup>42</sup> but even the most capable humans do not. All persons are not created equal in terms of their capacity to exercise practical reason. Some people, and thus some rulers, are wiser than others.<sup>43</sup> Therefore, one should not be surprised when wise rulers reach better conclusions about law than others do.

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<sup>34</sup> *Id.* at 33.3.

<sup>35</sup> Even in connection with natural events that are beyond human control, Thomas can think of principles that do not always hold true: “[N]atures subject to generation and corruption fail in some few cases on account of some obstacle . . .” *Id.* at 94.4.

<sup>36</sup> ST IaIIae 91.4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“And this principle will be found to fail the more, according as we descend further into detail, e.g., if one were to say that goods held in trust should be restored with such and such a guarantee, or in such and such a way, because the greater the number of conditions added, the greater the number of ways in which the principle may fail, so that it be not right to restore or not to restore.”); *Cf. id.* at 96.6 ad 3; *id.* at 60 (discussing the relationship between law and equity in terms of the limits of legislative foresight).

<sup>39</sup> Indeed, this human sharing in the divine wisdom (the eternal law) is what Thomas says the natural law is. *See id.* at 91.2.

<sup>40</sup> *See* William S. Brewbaker III, *Thomas Aquinas and the Metaphysics of Law*, 58 ALA. L. REV. 575, 609 n.217 (2007) (explaining Thomas’s account of participation); *see also* ST IaIIae 97.1 ad 1 (contrasting human and divine reason and describing the former as “changeable and imperfect”).

<sup>41</sup> ST IaIIae 91.3 ad 1 (emphasis added). Thomas does not address the question of whether every conceivable moral question has a “right answer.”

<sup>42</sup> *See id.* (such answers are “contained in the eternal law”).

<sup>43</sup> *Id.* at 95.1 ad 2, 95.2 ad 4, 100.3, 100.5 ad 1.

In fact, Thomas presents a picture of human reason that, in both its theoretical and moral dimensions, develops with time and communal experience and requires work.<sup>44</sup> Just as human learning has advanced in theoretical knowledge over time, so, too, have rulers advanced over time in their knowledge about how best to govern the community. Early rulers, says Thomas, were not “able by themselves to take everything into consideration” and thus “set up certain institutions which were deficient in many ways.”<sup>45</sup> As time passed, these institutions “were changed by subsequent lawgivers who made institutions that might prove less frequently deficient in respect of the common weal.”<sup>46</sup> In fact, Thomas goes as far as asserting that some arrangements represent “additions” to the natural law when they are “devised by human reason for the benefit of human life.”<sup>47</sup>

One can also see Thomas’s developmental and communal conception of human reason at work in his high regard for the legal force of custom. Following earlier authorities,<sup>48</sup> Thomas argues that “custom has the force of law, abolishes law, and is the interpreter of law.”<sup>49</sup> Thomas draws an analogy between speech and actions; both are expressions of the interior reason and will of the actor. Like speech, repeated actions can express the reason of the actors, especially where “a thing is done again and again” and thus takes on the appearance of “proceed[ing] from a deliberate judgment of reason.”<sup>50</sup> Where custom arises in opposition to a law, this can be an indication that the law needs to be modified to take account of the changed conditions of the

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<sup>44</sup> See *id.* at 91.3, 97.1 (“[I]t seems natural to human reason to advance gradually from the imperfect to the perfect.”).

<sup>45</sup> See *id.* at 97.1.

<sup>46</sup> *Id.*

<sup>47</sup> ST IaIIae 94.5. Thomas’s treatment of this is somewhat obscure. “Additions” to the natural law are practices that have been discovered to benefit human nature over time. But, these have been “added over and above the natural law both by the Divine Law and by human laws.” *Id.* Presumably, these developments are part of the natural law because they have been shown to conduce to human flourishing, but it is puzzling that Thomas does not treat them as merely derived from the natural law. The only examples he gives are private property and human slavery, which were not part of the law of nature because man’s natural condition includes “the possession of all things in common and universal freedom.” *Id.* at 94.5 ad 3. Yet, according to Thomas, “the distinction of possessions and slavery were not brought in by nature but devised by human reason for the benefit of human life.” *Id.* Thomas avoids characterizing this as a “change” in the natural law by suggesting that nature did not incline toward common property and universal freedom as moral principles; these had to be “added” on the basis of human experience.

<sup>48</sup> See DAVID VANDRUNEN, LAW AND CUSTOM: THE THOUGHT OF THOMAS AQUINAS AND THE FUTURE OF THE COMMON LAW 15-23 (2003).

<sup>49</sup> See ST IaIIae 97.3.

<sup>50</sup> See *id.* at 97.3.

people, and Thomas suggests that the presence of a custom in such an instance obviates the need for express modification of the law by the ruler.<sup>51</sup>

Even given the possibility that accumulated wisdom and experience will reduce the degree of uncertainty in human judgment, Thomas regards legal uncertainty as a more or less intractable condition. Not even the wise will ever attain godlike knowledge—that is to say, certain and infallible knowledge—of what should be done in the myriad conditions of human life.

## 2. Human Fallenness

Up to this point, we have considered the operation of human reason in its “natural” state. Thomas must also face the question of what additional effects “the Fall,” humanity’s rebellion against God, has had on the reliability of human reason and thus, on the human capacity to engage in lawmaking, judging and other moral actions.

In order to understand Thomas’s assessment of the effects of the Fall on human reason, a short detour into his anthropology is required. Thomas holds that human beings were originally created (a) in the image of God, and (b) in a state of righteousness<sup>52</sup> and fellowship with God.<sup>53</sup> God’s image is reflected (albeit incompletely) in the human capacity to reason.<sup>54</sup> The original state of righteousness consisted of the proper ordering of the various aspects of the person: human “reason [was] subject to God, the lower powers [e.g., those human powers common to other living things] to reason, and the body to the soul.”<sup>55</sup> The penalty God assessed on human

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<sup>51</sup> *See id.* at 97.3 ad 2. Thomas hesitates, however, where custom is at odds with the reason underlying a rule in the absence of changed conditions. In that case “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’ . . .” *Id.*

<sup>52</sup> *See id.* at 94.1, 95.1.

<sup>53</sup> *See id.* at 113.2.

<sup>54</sup> *See id.* at 93.6. Thomas also connects the intellect with man’s spiritual, as opposed to his physical nature. *See id.* at 93.7. *See also* Brewbaker, *supra* note 40, at 605-07 (discussing Thomas’s hierarchical account of being); Paul J. Griffiths & Reinhard Hutter, *Introduction*, in, *REASON AND THE REASONS OF FAITH* 1, 7-9 (Paul J. Griffiths and Reinhard Hutter, eds., 2005) (discussing the noetic effects of sin).

<sup>55</sup> *See* ST IaIIae 95.1.

beings as a result of the Fall was forfeiture of the supernatural gift of righteousness<sup>56</sup> as a consequence of which fellowship with God was lost,<sup>57</sup> with the result that the lower powers do not subject themselves to reason as they should;<sup>58</sup> the body fails to subject itself to the soul.<sup>59</sup> Significantly, however, because human reason pertains to the essence of the human being and thus could not be blotted out without human nature's being changed to something else entirely, Thomas holds that human reason is largely unaffected by the Fall.<sup>60</sup> Sin does not affect the human being's reasoning capacity, merely his inclination to use his reason to direct his actions to the good.<sup>61</sup>

In Question 94, Thomas addresses the question whether the natural law "can be abolished from the heart of man."<sup>62</sup> In principle, as we have just seen, the answer must be no, at least as to the basic principles of right and wrong. However, even the general principles of the natural law may be "blotted out in the case of particular action" when reason is overcome by passion.<sup>63</sup> The unregulated desire of passion may distract the ruler from using his reason; it may specifically incline the ruler to act against what his reason is telling him, or it may even affect a person physically in a way that prevents the right use of reason.<sup>64</sup> Again, the problem here is not that the ruler does not know what to do, but rather that he is unable to apply the natural law to the situation at hand because the higher faculties are unable to control the lower ones. In fact, the

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<sup>56</sup> See *id.* at 91.6 ("But since, by the just sentence of God, man is destitute of original justice, and his reason bereft of its vigor, this impulse of sensuality, whereby he is led, in so far as it is a penalty following from the Divine Law depriving man of his proper dignity, has the nature of a law."). See also *id.* at 106.3 ad 3.

<sup>57</sup> See *id.* at 79.3, 87.5 ad 2.

<sup>58</sup> See *id.* at 91.6 ("But when man turned his back on God, he fell under the influence of his sensual impulses: in fact this happens to each one individually, the more he deviates from the path of reason, so that, after a fashion, he is likened to the beasts that are led by the impulse of sensuality . . .") (citing *Psalm* 48:21); see also *id.* at 100.2 ad 2.

<sup>59</sup> See *id.* at 164.1, 85.1.

<sup>60</sup> See Robert Pasnau, *THOMAS AQUINAS ON HUMAN NATURE* 259 (2002) ("Aquinas's view is that God initially gave the human race a special gift, 'original justice,' which accounts for the prodigious knowledge and virtue of Adam and Eve . . . When they sinned this gift was taken away and human beings fell to their natural, mediocre state. By nature we are fallible, weak, and corruptible, and this is how God has decided to leave us.") (citing ST IaIIae 100.1, 85.3; Thomas Aquinas, *Questiones Disputatae de Veritate* 25.7).

<sup>61</sup> See ST IaIIae 85.1; 85.2, 96.4 (contrasting laws "conducive . . . to the common good" with those conducive "to [the authority's] own cupidity or vainglory"). On the common good generally, see *id.* at 90.2, 99.1 ad 1, 91.5, 100.2, 100.8, 100.11. See also MARY MARGARET KEYS, *AQUINAS, ARISTOTLE AND THE PROMISE OF THE COMMON GOOD* (2006).

<sup>62</sup> See ST IaIIae 94.6.

<sup>63</sup> See *id.*; 100.5 ad 1 ("Now there was need for man to receive a precept about loving God and his neighbor because, in this respect the natural law had become obscured on account of sin . . ."). The principles of love for God and neighbor are surprisingly "general."

<sup>64</sup> See *id.* at 77.2. Thomas compares the effect of passion to that of sleep or drunkenness.

virtuous ruler is precisely the one whose habits incline him to be a reliable discerner and implementer of the good. Natural intellectual and moral virtues (good habits) keep the passions in check so that a person can act with prudence. The divinely infused habits (virtues) of faith, hope and love that are the gift of God to the believer perfect human nature.<sup>65</sup>

If the knowledge of the basic principles of natural law can sometimes be blotted out, human beings are even more prone to confusion when it comes to knowing and applying the secondary principles.<sup>66</sup> Here, the problem is not merely one of applying the moral truths one knows, but also of knowing particular moral truths to begin with. Such knowledge can be hindered because of “evil persuasions” or “vicious customs and corrupt habits.”<sup>67</sup> Our moral reasoning does not occur in a vacuum; we can thus go wrong when another person (or even the devil) persuades us wrongly.<sup>68</sup> And, indeed, we may stop thinking clearly, or even at all, when we are part of a whole culture whose thinking has gone wrong about particular matters or when we habitually engage in wrongful conduct. So we should not be surprised to see rulers go astray when they get bad advice about the matter at issue or when doing the right thing would require them to act against common cultural assumptions or their own personal ways of life.<sup>69</sup>

Interestingly, Thomas does not treat the consequences of sin as a once-and-for-all static matter. Instead, his account of human reason as a communal, developing process<sup>70</sup> resurfaces in his treatment of sin’s effects in Question 98. Immediately after Adam’s sin, human reasoning capacities began to dim, but this process was, in Thomas’s view, a gradual one: “as yet the dictate of the natural law was not yet darkened by habitual sinning.”<sup>71</sup> On the other hand, in their rebellion against God, humans were “proud of their knowledge and their power” and were not yet “able to learn from [their] experience that [their] reason was deficient” and that they were in

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<sup>65</sup> See *id.* at 98.6, 93.6. See also F.C. COPLESTON, AQUINAS 214-19 (1955) (and sources cited); RALPH MCINERNEY, ETHICA THOMISTICA 90-102 (rev. ed. 1997). See generally ST IaIIae 63.1, 92.1 ad 2, 92.1 ad 3, 107.1 ad 2.

<sup>66</sup> See *supra* text accompanying notes 31 through 44.

<sup>67</sup> See ST IaIIae 94.6.

<sup>68</sup> See *id.* at 80.1.

<sup>69</sup> See *id.* at 94.6 (Thomas gives the example of a society in which “theft and even unnatural vices . . . [are] not esteemed sinful.”). Elsewhere in Question 94, Thomas adds to his list of reasons for moral blindness an “evil disposition of nature.” *Id.* at 94.4. On evil dispositions, see THOMAS AQUINAS, ON EVIL Q.4 (Oesterle, trans., Univ. Notre Dame 1995).

<sup>70</sup> See *supra* text accompanying notes 45-48.

<sup>71</sup> See ST IaIIae 98.6 ad 1.

need of help from the divine law.<sup>72</sup> Only when they had “fallen headlong into idolatry and the most shameful vices,” was human pride chastened sufficiently for reason to receive the help (i.e., divine revelation) it needed.<sup>73</sup>

### III. THE REST OF THE *TREATISE*: THE USES OF SCRIPTURE IN HUMAN LAW

#### A. Law as Divine Instruction

Having sketched out the main direct and indirect causes of moral uncertainty, we are now prepared to consider Thomas’s treatment of Scripture’s relevance for civil law. As we have seen, one of the reasons for Scripture is to guide decision makers in matters that are otherwise uncertain: the divine law is necessary “because, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result.”<sup>74</sup> The remedy for such uncertainty is “a law given by God, for it is certain that such a law cannot err.”<sup>75</sup> But how does Scripture serve this function? Is it a source of law that can be simply read off into a multitude of cultural contexts? If not, how exactly is it to be used?

Before addressing these questions, the point needs to be made that although Thomas affirms that there are various kinds of law<sup>76</sup>—eternal law, natural law, human law, divine law, Old Law, New Law—“law” is not merely a label that is attached to a group of otherwise unrelated phenomena. That said, neither does “law” carry precisely the same meaning in each usage; the terms are used analogically, which is to say that while the various kinds of laws differ in significant respects, the use of the term “law” for each phenomenon is hardly accidental.<sup>77</sup>

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<sup>72</sup> See *id.* at 98.6.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 91.4. See generally *id.* at 99.2 ad 2.

<sup>75</sup> *Id.* See generally *id.* at 94.5 ad 1.

<sup>76</sup> See *id.* at 91 (prologue).

<sup>77</sup> For a discussion of analogical predication, see ST Ia 13.5; Finnis, *supra* note 23, at 42-47; F.C. COPLESTON, AQUINAS 134-41 (Penguin Books 1991) (1955); Ralph McInerny, AQUINAS AND ANALOGY (1996); RALPH MCINERNY, ST. THOMAS AQUINAS 134-35 (Univ. Notre Dame 1982) (1977). For discussion of its application to law, see YVES R. SIMON, THE TRADITION OF NATURAL LAW 69-71 (Vukan Kuic ed., 1965); Brewbaker, *supra* note 40, at 607-09.

Moreover, each of the various kinds of law is ultimately grounded in the one eternal law—the reasonable will of God that governs the universe.<sup>78</sup>

The starting point for Thomas’s theological treatment of the relationship between divine and human law is thus their shared character as *law*. Thomas’s treatment of law is carefully situated within the *Summa* under the heading of “extrinsic principles of acts.”<sup>79</sup> Thomas believes that human beings have intrinsic natural powers as well as acquired habits (virtues and vices) that influence our actions.<sup>80</sup> We are also subject to two extrinsic influences—the devil, who inclines the human person to evil, and “God, Who both instructs us by means of His Law and assists us by His Grace.”<sup>81</sup> Law, then, is one of the ways God inclines us to do good.

Significantly, although law is extrinsic to human beings, it is not, at least not ideally,<sup>82</sup> merely an external demand that is obeyed merely for the sake of avoiding punishment. Rather, law operates on rational creatures when those subject to it accept it as a reason for action.<sup>83</sup> This is true even for divine law: God “*instructs* us by means of His law;”<sup>84</sup> God moves the will not by force, as it were, but by appeal to the natural inclinations with which He has already supplied it.<sup>85</sup>

Seen in this context, Thomas’s claim that all law is an instrument of instruction in virtue is not surprising. Each of the main kinds of law simultaneously teaches and commands what is required for human flourishing.<sup>86</sup> Natural law is the starting point of human moral reasoning and

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<sup>78</sup> Thus Russell Hittinger argues, on the basis of Thomas’s statement that natural law is a participation of the eternal law, that “[t]here are not four or five kinds of law, but only two. Law that proceeds from the divine mind and law that proceeds from the human mind; as Augustine said, one is eternal and the other is temporal.” RUSSELL HITTINGER, *THE FIRST GRACE* xi (2003) (citing Stephen Louis Brock, *The Legal Character of Natural Law According to St. Thomas Aquinas* ch. 2-C (1988) (unpublished Ph.D. dissertation, Univ. Toronto)). Because human law is, in Thomas’s account, derived from natural law, one might take the insight further and argue that there is, ultimately, only a single law.

<sup>79</sup> See ST IaIIae 49, 90 (prologue).

<sup>80</sup> See *id.* at 49 (prologue).

<sup>81</sup> *Id.* at 90 (prologue).

<sup>82</sup> See *id.* at 92.1 ad 2, 96.5 ad 1.

<sup>83</sup> See *id.* at 93.5

<sup>84</sup> *Id.* at 90 (prologue) (emphasis added).

<sup>85</sup> See ST IaIIae 93.6, 105.4 ad 1, 103.1 ad 3.

<sup>86</sup> Thomas’s ethics might thus be described as both law-based and virtue-based. Cf., G.E.M. Anscombe, *Modern Moral Philosophy*, available at <http://www.philosophy.uncc.edu/mledrid/cmt/mmp.html> (last visited Nov. 28, 2010). See also ANTHONY J. LISSKA, *AQUINAS’S THEORY OF NATURAL LAW* 112-115 (1996); OLIVER O’DONOVAN, *RESURRECTION AND MORAL ORDER* 18 (2d ed. 1994) (“It is arguable . . . that the thought of Thomas Aquinas is best understood as a continuation of the patristic tradition, only secondarily as an Aristotelian revision of it, and very subordinately as a theatre of war between voluntarism and realism.”).

generates the basic precepts of moral life.<sup>87</sup> The source of natural law is the reasonable will of God (eternal law), of which natural law is a human (non-exhaustive) participation.<sup>88</sup> The divine law instructs human beings on how to obtain the good of eternal, as opposed to merely temporal happiness.<sup>89</sup>

Fitting the remaining types of law—human law and the “law” of concupiscence—into Thomas’s schematic requires a little more effort. Thomas avoids the issue with respect to the law of concupiscence by denying that it is really *law*. This “law” (literally, the law in the “fomes” of sin<sup>90</sup>) is Thomas’s term for the human impulse toward sensuality that is left imperfectly controlled by reason after the Fall. Precisely because Thomas holds that law is inseparably connected to reason, he denies that the sinful human inclination toward unbridled sensuality is law. The law of concupiscence is only *law* in the sense that divine law imposes it as a penalty on account of human rebellion.<sup>91</sup>

When it comes to human law, Thomas yields no ground with respect to the claim that such law is intended as instruction tending to lead human beings to virtue. Thomas’s famous definition of law holds that the goal of law is the common good—the flourishing of the community.<sup>92</sup> Humans cannot be virtuous unless they relate properly to the community in which they live; obedience to just laws results in their acting appropriately with respect to that community, which is a form of virtue.<sup>93</sup> Indeed, Thomas will say that “every law aims at establishing friendship, either between man and man, or between man and God.”<sup>94</sup> In addition to the social virtues, human and divine law also promote individual virtues: “every law . . . is imposed on some men who are hard-hearted and proud, whom the law restrains and tames: and it is imposed on good men, who, through being instructed by the law, are helped to fulfill what they desire to do.”<sup>95</sup>

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<sup>87</sup> See ST IaIIae 94.2.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at 91.4

<sup>90</sup> *Fomes* is a Latin word meaning “tinderwood.” See SAINT THOMAS AQUINAS: ON LAW, MORALITY AND POLITICS 121 n.38 (William P. Baumgarth & Richard J. Regan, S.J. eds.1988).

<sup>91</sup> See ST IaIIae 91.6.

<sup>92</sup> See *id.* at 90.2.

<sup>93</sup> See *id.* at 91 (prologue).

<sup>94</sup> See *id.* at 99.1 ad 2. *Cf., id.* at 99.2 (“[J]ust as the principal intention of human law is to create friendship between man and man; so the chief intention of the Divine Law is to establish man in friendship with God.”).

<sup>95</sup> See *id.* at 98.6.

Thomas's suggestion that all law is not only an instrument of instruction in virtue, but an instrument of *divine* instruction is more surprising. To be sure, the suggestion is not hard to sustain with respect to natural law and eternal law, much less with respect to divine law. In the natural and divine laws, God has clearly given human beings instruction as to how they should live: The divine law is given in God's written revelation in Holy Scripture and by it "man is directed how to perform his proper acts in view of his last end."<sup>96</sup> Natural law includes both the God-given human capacity to distinguish between good and evil and the resulting axioms that are the starting point of moral reasoning. Thomas describes the natural law as "nothing less than an imprint on us of the Divine Light."<sup>97</sup> The eternal law, God's plan for the government of the Universe,<sup>98</sup> is an extrinsic source of divine instruction in that it includes, among many other things, God's plan to endow human beings with the capacity and inclination to make moral decisions. The natural law inclines human beings to moral action in accordance with the light of God precisely because God has decreed that it would be so; the divine plan for the world includes human participation<sup>99</sup> in the larger divine reason, the eternal law.<sup>100</sup>

What about human law? How can it be an instrument of *divine* instruction? One of the effects of Thomas's organizational structure in the *Treatise* is that he clears out space for human law as being something distinct from the divinely promulgated natural, divine and eternal laws.<sup>101</sup> But if human law is to some extent distinct, how can it be a source of divine instruction?

The short answer lies in Thomas's contention that human law is derived from natural law, either directly, or (most of the time) indirectly. Where human law is derived directly from natural law, it amounts to divine instruction for precisely the same reasons that apply to natural law. Natural law is "the imprint of the divine light," so it is easy to see how laws instantiating

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<sup>96</sup> See *id.* at 91.4. As we have seen, the Divine Law also serves to correct uncertain human judgments. The Divine Law "curb[s] and direct[s] interior acts" which are beyond human capacity to judge and forbids all evil, so "that no evil might remain unforbidden and unpunished." *Id.* I have already noted the most important feature of the Divine Law for purposes of this article, viz., its capacity to correct uncertain human judgments. See *supra* note 63.

<sup>97</sup> See ST IaIIae 91.2.

<sup>98</sup> See *id.* at 91.1 ("[T]he whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law.").

<sup>99</sup> See *id.* at 90.1 ad 1.

<sup>100</sup> Cf. *id.* at 93.5 ad 2.

<sup>101</sup> See JOHN FINNIS, *The Truth in Legal Positivism*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195, 203-04 (Robert P. George ed., 1996) ("[A] conceptual distinction or disconnection [between law and morality] is effortlessly established by the move made in the *Summa*, of taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified prior to any question about its relation to morality.").

the general principles of law—i.e., laws against theft, murder, etc.—amount to divine instruction in righteousness. However, most human laws are derived from the natural law only indirectly: the ruler uses human reason (including its divinely implanted moral orientation) to develop the specific rules that will further the common good under the circumstances.<sup>102</sup> (As an aside, this may help explain why Thomas, although he clearly recognizes the fact that laws do not cease to have legal effects merely because they are unjust, nevertheless insists that unjust laws are not, in the fullest sense, law.<sup>103</sup> Such laws, whatever else they may be, clearly cannot be categorized as instruments of divine instruction in virtue.)

## B. Scripture as “Higher Law”

If laws in general are divinely given sources of instruction for human action, the divine law found in Scripture has two special functions when it comes to human lawmaking and judging. First, divine law serves as a limiting norm for human law. Human laws that are at odds with the divine law are invalid insofar as they mandate things God has forbidden or forbid things that God requires.<sup>104</sup> Second, the divine law, properly understood, contains authoritative statements about the natural law, which is the central guiding norm for human law in Thomas’s scheme.<sup>105</sup>

### 1. Scripture and the Divine Good

Although most of the discussion of the divine law’s relevance for human law relates to its function in articulating natural law principles, its function as a limitation on human law also merits attention. In a famous passage, Thomas says that unjust laws are not binding on the conscience, and that laws may be unjust either by “being contrary to human good” or “through

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<sup>102</sup> Even so, Thomas holds that “all laws, insofar as they partake of right reason, are derived from the eternal law,” thereby supplying a direct connection with divine instruction. ST IaIIae 93.3.

<sup>103</sup> See *id.* at 93.3 ad 2; see also Brewbaker, *supra* note 40, at 594-99 (discussing Thomas’s account of unjust human laws).

<sup>104</sup> See ST IaIIae 96.4.

<sup>105</sup> See *id.* at 95.2.

being opposed to the Divine good.”<sup>106</sup> The ways in which human laws may be contrary to human good track the features of good law found in Thomas’s definition of law.<sup>107</sup> For example, such laws include those that are not made with a view to the common good, are unduly burdensome and are imposed by those who lack the authority to do so. Although such laws do not bind the conscience, they may nevertheless be obeyed “in order to avoid scandal or disturbance . . . .”<sup>108</sup>

Divine law is especially relevant to Thomas’s second category of unjust laws—those that are contrary to the divine good. The examples he provides are “the laws of tyrants inducing to idolatry” and “anything else contrary to the Divine law.”<sup>109</sup> In order to understand Thomas’s contention, recall that the primary purpose of the divine law is to assist human beings to obtain eternal happiness.<sup>110</sup> Because eternal happiness consists of the vision of God,<sup>111</sup> natural human faculties are inadequate to achieve it. Human beings require divine assistance, and the divine law directs them “how to perform [their] proper acts in view of [their] last end.”<sup>112</sup> Presumably, divine good refers to the good of human beings as they relate to God, so it is no surprise that a law that induces idolatry is the first example of a law that is unjust in respect of the divine good. However, Thomas notes that other laws that are “contrary to the Divine law” may also be unjust in respect of the divine good. He does not provide examples, but presumably a law that forbids the observance of the sacraments or works of charity commanded by God would be deemed unjust because it would be contrary to the divine good.<sup>113</sup> Interestingly, the faithful may not obey laws that are contrary to the divine good; disobedience to such laws is mandatory because they “are contrary to the commandments of God, which is beyond the scope of (human) power.”<sup>114</sup>

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<sup>106</sup> *Id.* at 96.4c.

<sup>107</sup> *See id.* at 90.4c.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> ST IaIIae 90.4c.

<sup>111</sup> *See id.* at 5.5.

<sup>112</sup> *Id.* at 91.4.

<sup>113</sup> *See id.* at 108.2; *see also infra* text accompanying notes 122-127 (explaining the purposes of the New Law).

<sup>114</sup> *See* ST IaIIae 96.4 ad 2; *see also id.* at 96.4 (citing *Acts* 5:29).

## 2. Scripture, Natural Law and the Human Good

As previously noted, the role of the divine law found in Scripture is not limited merely to human laws that implicate religious observances and good works. Thomas also argues that divine law provides a remedy for uncertainty occasioned by human finitude and fallenness<sup>115</sup> and thus is relevant for laws governing ordinary human relations. Does this mean that biblical passages (such as the Hebrew laws found in the Old Testament) are to be treated as timeless legal principles binding on every society? What about laws compelling religious observances? Should the morally demanding standards of the Sermon on the Mount be written into law?

### a. Thomas's Analytical Toolkit

The answers Thomas gives to these questions turn as much on his assumptions about law as they do on his assumptions about Scripture. As already noted, Thomas treats divine law and human law as analogues, not as identical, but he shows no hesitation in using concepts developed primarily on the basis of human laws and applying them to the divine laws found in Scripture.<sup>116</sup> Three critical presuppositions underwrite his account of the way the Bible provides norms for human law: (1) the primacy of law as the most relevant Scriptural genre, (2) the concept of “determinations” and (3) the division of laws into three subcategories—moral, judicial and ceremonial.

Thomas's starting point is that Scripture is normative for human lawmaking primarily insofar as it exhibits the character of law. As we have seen, law is an external measure of human action, typically in the form of a rule or command.<sup>117</sup> Since lawmaking itself is a form of human action, it is a moral enterprise and thus governed by law. Like other moral enterprises related to man's life on earth,<sup>118</sup> the primary law governing human action related to lawmaking and judging is the natural law. By focusing on Scripture's character as law—an external measure of

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<sup>115</sup> See *supra* Part I. A. 2.

<sup>116</sup> See *supra* note 77.

<sup>117</sup> See ST IaIIae 90.4.

<sup>118</sup> Cf., the divine law's regulation of man's pursuit of his eternal end.

human action, usually given as a command of some kind<sup>119</sup>— Thomas has already narrowed the relevant field of the Bible’s direct influence considerably.

The second building block in Thomas’s scheme is his classification of laws according to the things they direct: *moral* precepts direct human decision making about what to do generally, *judicial* precepts direct human beings living in a particular community in their relationships to one another with a view to the common good and *ceremonial* precepts direct human beings in their worship of God. Significantly, this division is relevant to more than just the Old Law or even the divine law. Thomas uses it to shed light on natural law and human law as well.<sup>120</sup>

The third key concept in Thomas’s account of the relationship between the Bible and human law is the idea of *determinations*. As we have already seen,<sup>121</sup> human rulers are not merely inert agents mechanically carrying out ministerial tasks. Although some human law is derived from the natural law merely by reading off primary natural law norms and inserting them into the statute books, most human law has a more indirect relationship to the natural law. In order to be made operational, natural law norms must be made more specific, adding details that may bear no necessary relationship to any natural law precept, but that are nevertheless necessary for the relevant legal system to operate. Crimes must have punishments affixed to them, details of property ownership or contract enforcement must be laid out and procedures for lawmaking and judging must be established. Thomas holds that these laws should be and usually are derived from the natural law, but only in the loose sense that the ruler is obligated to use reason and to act for the common good. Significantly, the idea of determinations is critical not only to Thomas’s understanding of human law, but also, as we shall see, to his understanding of the ceremonial and judicial laws of the Old Testament and, indirectly, to his account of the Old Testament’s moral law.

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<sup>119</sup> The focal case involves precepts, *see id.* at 91.4, 91.5, 98. However, precepts do not exhaust the content of law. *See id.* at 95.

<sup>120</sup> *See infra* Part II. B. 2.c.; *see also* ST IaIIae 103.1, 104.3 obj. 2 (referring to human laws as the “judicial precepts of natural law”).

<sup>121</sup> *See supra* text accompanying notes 44-47.

## b. The Old Law and the New Law

Thomas's primary *modus operandi* in his treatment of the relation between Scripture and human law is to remind the reader of the main point of human law, and then to progressively narrow the range of Scripture that exerts direct control over human law's content. We have seen that Thomas has already limited Scripture's direct relevance to human law to passages that could be styled as precepts (commandments) that guide human action. A fairly obvious further division might be between the rules set forth in the Old Testament and those set forth in the New Testament. Are both sets of rules relevant to the ruler?

According to Thomas, the Old Law (God's commands contained in the Old Testament), and the New Law (which, insofar as it is written, consists of God's commands contained in the New Testament<sup>122</sup>) differ in four main ways: (1) their respective imperfection and perfection, (2) the ends that they seek, (3) the matters they govern and (4) the way they induce human action. Thomas's characterization of the Old Law as imperfect and the New Law as perfect is based on *Galatians* 3:24-25, in which St. Paul describes the Mosaic Law as a "pedagogue."<sup>123</sup> Thomas interprets the idea of law as pedagogue to argue that St. Paul is "compar[ing] the state of man under the Old Law to that of a child . . . but the state under the New Law to that of a full-grown man who is 'no longer under a pedagogue.'"<sup>124</sup> The relative imperfection of the Old Law compared to the New is played out along the other three important dimensions of law mentioned above: (1) its orientation to the common good, (2) its form as a directive to human action and (3) its ability to induce action.<sup>125</sup> Whereas the New Law invites human beings to their heavenly destiny, the Old Law was oriented to ancient Israel's earthly habitation of the Promised Land.<sup>126</sup>

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<sup>122</sup> See ST IaIIae 106.1. The New Law is, in its primary sense, the grace of the Holy Spirit that guides and empowers the believer. However, Thomas adds that it also, secondarily, "contains certain things that [1] dispose us to receive the grace of the Holy Ghost and pertaining to [2] the use of that grace." These latter things are things about which "the faithful needed to be instructed" and therefore are written down. The New Law is thus primarily unwritten but is a written law in a secondary sense. See *id.*

<sup>123</sup> "Wherefore the law was our schoolmaster to bring us unto Christ, that we might be justified by faith. But after that faith is come, we are no longer under a schoolmaster." *Galatians* 3:24-25 (King James).

<sup>124</sup> See ST IaIIae 91.5.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 91.5 The Old Law, according to Thomas, directed humans to a "sensible and earthly good." *Id.* Thomas supports this claim by arguing that "at the very outset of the law, the people were invited to the earthly kingdom of the Canaanites." (*Exodus* 3:8,17). The New Law, by contrast, aims at man's "intelligible and heavenly good." Christ invites us not to Canaan, but to the "kingdom of heaven" at the outset of his ministry. Less obviously

The Old Law regulated external actions, but the New Law regulates internal acts. And, whereas the Old law “induce[d] men to observe its commandments . . . by fear of punishment,” the New Law does so “by love, which is poured into hearts by the grace of Christ bestowed in the New Law but foreshadowed in the Old.”<sup>127</sup>

Once we recall that the main purpose of human law is to regulate *external* action,<sup>128</sup> Thomas’s statement that the New Law regulates internal acts calls into question whether the New Law has any relevance at all as a norm for human law. With respect to external actions, the purpose of the New Law is limited to making “such prescriptions or prohibitions alone as are essential for the reception or right use of grace.”<sup>129</sup> Thus, the New Law commands the observance of the sacraments (through which grace is received) and “works of charity,” which are the “right use of grace.” Only some works of charity are commanded by the New Law, however, namely those that are “essential to virtue.” The New Law adds nothing to the Old Law in this respect. All the works that are “essential to virtue” were previously commanded in the Old Law as well.<sup>130</sup> So, perhaps surprisingly, it is the “imperfect” Old Law that Thomas emphasizes most in his discussion of divine law’s relevance for human law. And, as noted earlier, Thomas divides the Old Law into three critical categories—the moral law, the judicial law and the ceremonial law.

### **c. The Old Law’s Precepts: Ceremonial, Judicial and Moral**

#### **i. Ceremonial**

If the New Law, with its primary focus on internal matters, is unlikely to be helpful to the earthly ruler, the ceremonial precepts of the Old Law are not only unhelpful, they are, in

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to modern readers, the New Law’s superiority is also indicated by its direction of humans to their “intelligible” good, with its association the reasonable with the spiritual and heavenly, which is higher than the earthly and tangible.

<sup>127</sup> See ST IaIIae 91.5, 98.6. *But see also id.* at 107.1 ad 2 & ad 3 (qualifying this conclusion because some people in the Old Testament obeyed the law because of love for God and some in the New Testament were motivated by temporal aims).

<sup>128</sup> See, e.g., *id.* at 98.1.

<sup>129</sup> See *id.* at 108.2.

<sup>130</sup> See *id.* at 108.2, 107.3 ad 2.

Thomas's words, "both dead and deadly."<sup>131</sup> The precepts are unhelpful in that their purpose is to prescribe the "external works, whereby man makes profession of his subjection to God, and it is these works that are said to belong to the Divine worship."<sup>132</sup> Human law regulates external actions, but only insofar as they affect human beings in their relationships with each other.<sup>133</sup> The worldly ruler does not purport to direct the citizens as to how they should worship, so the ceremonial precepts have nothing to offer by way of norms for human law.<sup>134</sup> Even if it were the job of the ruler to direct worship, Thomas says that the ceremonial precepts are mere determinations<sup>135</sup> of the natural law appropriate to (and binding only in) the time and place in which they are instituted,<sup>136</sup> albeit with the critical difference that they are not instituted by human rulers, but are put into effect by God through the divine law.<sup>137</sup> The ceremonial precepts of the Old Law are "dead" in that they were designed for the priesthood of the Old Covenant, which presupposed that Christ had not yet come.<sup>138</sup> They are also "deadly" in that to observe them would amount to a denial of faith in Christ and thus constitute mortal sin.<sup>139</sup>

## ii. Judicial

Perhaps the biggest surprise in Thomas's treatment of the Old Law is his treatment of the judicial precepts. As we have seen, human laws are the determinations of the natural law that earthly rulers institute for the common good of the particular society being governed. The judicial precepts of the Old Law likewise regulated the external actions of the Israelites under

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<sup>131</sup> See *id.* at 104.3.

<sup>132</sup> See *id.* at 99.3. Thomas notes that "the Divine [L]aw 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." See *id.* Part of the divine law's direction to human beings is interior; the ceremonial laws govern that part which is external and relates to how God is to be worshipped. *Id.*

<sup>133</sup> See ST IaIIae 98.1, 99.3 ("human law is instituted chiefly in order to direct men in relation to one another"); *id.* at 100.2 & ad 2. However, human law may incidentally include ceremonial precepts, as where there is a connection between Divine worship and the formation of morals. See *id.* at 99.3.

<sup>134</sup> Note that this statement applies equally to the ceremonial precepts of the New Law, which are far fewer than those contained in the Old Law. See *id.* at 107.4.

<sup>135</sup> See *supra* Part II. B. 2. a.

<sup>136</sup> Like human laws, they derive their binding force "from their institution alone, since before they were instituted it seemed of no consequence whether things were done in this or that way." See ST IaIIae 104.1, 100.11 & ad 2.

<sup>137</sup> See *id.* at 99.3 ad 2, 99.4, 101.1. Cf. *id.* at 99.4 (describing the institution of the judicial law).

<sup>138</sup> See *id.* at 103.4.

<sup>139</sup> See *id.* at 103.4, 104.3 (describing ceremonial precepts of the Old Law as "dead and deadly").

Moses's rule for the common good,<sup>140</sup> so they served a purpose similar to that served by human laws. However, Thomas holds that these particular determinations were given to the Israelites by God Himself.<sup>141</sup> We might thus have expected Thomas to urge earthly rulers to pay particular attention to them.<sup>142</sup>

Thomas does not do this, for reasons that are both theological and philosophical. Just as the coming of Christ annulled the Old Law's ceremonial precepts, it likewise annulled the judicial precepts, which "were . . . instituted . . . that they might shape the state of that people who were directed to Christ. Consequently, when the state of that people changed with the coming of Christ, the judicial precepts lost their binding force . . ." <sup>143</sup> Like the ceremonial precepts, the judicial precepts are "dead," but it turns out that, unlike the ceremonial precepts, observing them is not "deadly." A ruler might well order that the judicial precepts be observed. This would not be a sin, "unless . . . they were observed . . . as though they derived their binding force through being institutions of the Old Law."<sup>144</sup> Observing the Old Law for its own sake would, in effect, amount to a denial of Christ. A sovereign might permissibly borrow these laws because he or she concluded that they would fit the state of the people and work to their common good. In that case, they would be binding not because of their institution in Israel, but because of the borrowing ruler's authority.

One can see at this point the critical role played by Thomas's presuppositions about law. Thomas's theological position on the question of the binding nature of the Old Law's judicial precepts is entirely consistent with his earlier treatment of human law. Judicial precepts, whether

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<sup>140</sup> *See id.* at 99.4, 104.1. The judicial precepts are not merely those that govern controversies among neighbors, although that is part of what they do. *See id.* at 99.4 ad 2 ("Judgment denotes execution of justice, by an application of the reason to individual cases in a determinate way. Hence the judicial precepts have something in common with the moral precepts in that they are derived from reason; and something in common with the ceremonial precepts, in that they are determinations of general precepts."). *See also id.* at 104.1 ad 1 ("Consequently the judicial precepts are not only those which concern actions at law; but also all those that are directed to the ordering of one man in relation to another, which ordering is subject to the direction of the sovereign as supreme judge.").

<sup>141</sup> *See id.* at 104.1 (characterizing judicial precepts as "moral precepts fixed by Divine institution"); *see also id.* at 105.1 s.c., 105.2 s.c., 105.3 s.c., 105.4 s.c. (citing Scripture treating Israel's judicial precepts as God-given law). Thomas no doubt conceives of the judicial precepts as indirectly given, however. *See id.* at 100.11.

<sup>142</sup> *See ST IaIIae* 104.3 obj. 1, where Thomas anticipates precisely this objection.

<sup>143</sup> *See id.* at 104.3. *See also id.* at ad 2 (supporting this argument by citing Aristotle for the proposition that a state's change from a democracy to an oligarchy would require a change in the state of the law); *see id.* at ad 3 (arguing that because "in Christ there was no distinction between Gentile and Jew, as there had been before . . . the judicial precepts needed to be changed.") .

<sup>144</sup> *See id.* at 104.3.

of human law generally or of the Old Law in particular,<sup>145</sup> are always determinations of the natural law that the ruler(s) deem(s) appropriate to the conditions of a given people at a given time. Their binding force comes from having been instituted by those in political authority, and (assuming they are within the bounds of reason)<sup>146</sup> not from their specific content, which may differ according to time, place and the form of the regime. Only the main natural law precepts when incorporated into human law get their force not only from their status as human law, but also from the natural law,<sup>147</sup> and it is only these that we should expect to find always and everywhere in the laws of any given jurisdiction.

If we take seriously the status of the Old Law's judicial precepts as determinations, they would have, at most, only what lawyers call "persuasive authority." As expressions of what seemed wise to a ruler living in another context, they might prove useful. Furthermore, as we have seen, Thomas anticipates that they would not be inappropriate "model laws" for a ruler, at least as long as the ruler was not instituting them for the sake of conscience. Nevertheless, such laws would not bind future rulers because they are determinations appropriate to the time, place and condition of another people. This would be true even though the determinations were given to the people by God himself and presumably reflect the "right answers" for Israel's context.<sup>148</sup>

Another reason Thomas has reservations about the wholesale adoption of the Hebrew judicial laws is that they have a figurative component. As Thomas notes, there is a tradition of both literal and figurative interpretation of the Old Law's judicial precepts.<sup>149</sup> We can easily understand the figurative nature of the ceremonial laws, which represent things that are above human reason, but we would not expect laws that govern earthly human relations to be

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<sup>145</sup> See *id.* at 103.1, 104.3 obj. 2 (characterizing human law as including judicial precepts).

<sup>146</sup> See *id.* at 96.4.

<sup>147</sup> See *id.* at 95.2.

<sup>148</sup> Aquinas's account of the divine authorship of the Old Law's judicial precepts is somewhat complex. These laws were, he says, "given" to the Jews by God, through Moses. Thus we might well understand that their author was Moses, who, as a human being endowed with reason sufficient to govern human action, was capable of making the right determinations himself. Interestingly, however, Thomas says elsewhere that the eternal law contains the correct determinations to legal questions. See ST IaIIae 91.3 ad 1. Thus Thomas may be suggesting that even if Moses gave the answers, they were correct in this latter sense. One would think that on this view of the Old Law, one would be very interested in judicial precepts, even if they were confronting questions raised in vastly different cultural and political circumstances.

<sup>149</sup> See generally John F. Boyle, *St. Thomas Aquinas and Sacred Scripture*, 4 PRO ECCLESIA 92-104 (1995).

understood allegorically.<sup>150</sup> Thomas ultimately concludes that the judicial precepts are primarily moral and the ceremonial precepts are primarily figurative. The judicial precepts were instituted “in order that they might regulate the state of that people [Israel] according to justice and equity.”<sup>151</sup> Nevertheless, because “the entire state of that people, who were directed by these precepts, was figurative,” the judicial precepts inevitably had a figurative dimension.<sup>152</sup>

### iii. Moral

The result of Thomas’s analysis thus far is to leave rulers in search of biblical direction with a single category of Scripture on which to draw—the moral precepts of the Old Law. As we have seen, implicit in Thomas’s reference to the “moral precepts of the Old Law” are two sets of categories that work more or less independently of each other. As Thomas says near the beginning of the *Treatise*, there are several different kinds of law-- eternal law, natural law, human law, divine law, Old Law, New Law and so forth.<sup>153</sup> The precepts within each of the kinds of law may also be categorized, the main categories being moral, judicial and ceremonial, but the categories of precepts may be applied to more than one of the legal kinds. There are, for example, moral precepts in both the natural law and the Old Law, and judicial precepts in both the Old Law and in human law. Some legal kinds consist mostly of one kind of precept. Human law is, not surprisingly, mostly judicial precepts,<sup>154</sup> but even in those cases there are exceptions. Human law also contains incidental ceremonial precepts instituted for the sake of the earthly common good.<sup>155</sup>

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<sup>150</sup> See ST IaIIae 104.2 obj. 1, obj. 3. See also Boyle, *supra* note 149 (discussing “allegorical” purposes of Scripture).

<sup>151</sup> ST IaIIae 104.2.

<sup>152</sup> See *id.* (citing 1 *Corinthians* 10:11); *cf. id.* at ad 2 (noting that that the “wars and deeds” of Israel “are expounded in the mystical sense: but not the wars and deeds of the Assyrians or Romans, although the latter are more famous in the eyes of men.”).

<sup>153</sup> See *id.* at 91.

<sup>154</sup> See *id.* at 103.1, 104.3 obj. 2. Indeed, Thomas sometimes sounds as if human law only includes positive laws that are distinct from the moral precepts of the natural law, see *id.* at 99.3 ad 2, 99.4, 101.1, 102.2 ad 3, *but cf. id.* at 95.2.

<sup>155</sup> See *id.* at 99.3. Although some human law judicial precepts are “contained in human law not as emanating therefrom exclusively, but have some force from the natural law also;” see *id.* at 95.2, there are no “moral” precepts of human law regulating individuals in themselves and not as related to others. See *id.* at 104.1 ad 3. Thomas even has a category for natural law ceremonial precepts, which he calls “fixed ceremonies.” These practices were “not law” because they were not fixed by one in authority, “but according to the will and devotion of those that worship

Thomas argues that the Old Law's moral precepts are tightly connected with the natural law. Unlike judicial and ceremonial precepts, the Old Law's moral precepts are not mere determinations that get their force from having been instituted by rulers and, in the case of Old Law precepts, recorded in Scripture.<sup>156</sup> Instead, they "derive their efficacy from the very dictate of natural reason, even if they were never included in the Law."<sup>157</sup> They are distinguishable from the ceremonial and judicial precepts because of their subject matter—"good morals."<sup>158</sup> Good morals are those which are in accordance with practical reason, and, as Thomas has explained in his earlier treatment of natural law, the judgments of practical reason are made on the basis of the natural law.<sup>159</sup>

Given the tight connection between the Old Law's moral precepts and the natural law, Thomas seems to have his work cut out for him in explaining why the precepts have any continuing value for jurists. The starting point for Thomas's explanation is his account of variation in the application of natural law precepts discussed previously.<sup>160</sup> In his earlier treatment of the topic, he explained why moral truth "is not the same for all as to matters of detail but only as to the general principles."<sup>161</sup> He illustrated these brief and somewhat cryptic statements with the example of the principle (which he takes to be in accordance with reason and thus natural law) that "goods entrusted to another should be restored to their owner."<sup>162</sup> As we saw earlier,<sup>163</sup> the principle is a reliable guide to action most of the time, but not always: "[I]t 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."<sup>164</sup> Thomas notes, "this principle will be found to fail the more according as we descend further into detail . . . because

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God." *See id.* at 103.1. Aquinas then says that "a heavenly instinct" prompted worshipers to worship God in a certain way, so that "there were some ceremonies before the Law, but they were not legal ceremonies because they were not as yet established by legislation." *Id.*

<sup>156</sup> *See id.* at 99.4.

<sup>157</sup> *See* ST IaIIae 100.11.

<sup>158</sup> *See id.* at 100.1.

<sup>159</sup> *See id.* ("principles known naturally").

<sup>160</sup> *See supra* notes 28-47 and accompanying text.

<sup>161</sup> *See* ST IaIIae 94.4.

<sup>162</sup> *See id.*

<sup>163</sup> *See supra* text accompanying notes 35-38.

<sup>164</sup> ST IaIIae 94.4.

the greater the number of conditions added, the greater the number of ways the principle may fail, so that it be not right to restore or not to restore.”<sup>165</sup>

Thomas’s discussion of the Old Law’s moral precepts in the first article of Question 100 adds some additional texture to this account of moral reasoning. Because he is discussing precepts and their application, he is particularly interested in the role of moral principles in practical deliberation. Every moral judgment, says Thomas, starts with the principles of natural law, but the decision maker does not use the principles in the same way for every decision. At the easy end of the spectrum, recourse to “general first principles” solves the problem: I ought not to harm others, therefore, I should not hit my brother.<sup>166</sup> At the other end of the spectrum, however, and as we have just seen from Thomas’s discussion of the complexity of natural law judgments, are “matters [that] cannot be the subject of judgment without much consideration of the various circumstances, which all are not competent to do carefully, but only those who are wise . . . .”<sup>167</sup> Finally, there are “some matters of which man cannot judge unless he be helped by Divine instruction; such as the articles of faith.”<sup>168</sup>

Implicit in the foregoing discussion of moral precepts are three categories of judgments that Thomas will use to square his account of natural law with his account of the moral precepts specific to the Old Law: (1) a few very general conclusions that can be reached on the basis of first principles—e.g., “I ought not to harm others” (2) some slightly more complex judgments that are made on the basis of the obvious conclusions that follow immediately from these first principles—e.g., “I should not hit my brother” and (3) more complex judgments, accessible to the wise but not to everyone else. In addition, there are some judgments that fall under a fourth category-- those dealing with “the things of God.” As to these judgments, natural human reason needs divine instruction.<sup>169</sup>

Thomas manages to find a place for the Old Law’s moral precepts in each of the three main categories of judgments noted above: “[A]ll the [Old Law] moral precepts,” Thomas

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<sup>165</sup> *See id.*

<sup>166</sup> *Cf., id.* at 95.2 (“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’ . . .”).

<sup>167</sup> *See id.* at 100.1.

<sup>168</sup> *See id.* at 100.14.

<sup>169</sup> *See id.* at 100.1 *See infra* text accompanying note 173 (explaining that the reason “sees” these conclusions once faith has been divinely infused).

concludes, “belong to the law of nature; but not all in the same way.”<sup>170</sup> The biblical commandments to love God and neighbor are among the general first principles from which moral action follows; they are “most certain” (i.e., always reliable) and so evident as to need no promulgation.<sup>171</sup> The Ten Commandments follow these first principles as conclusions from premises; they “are more detailed, the reason of which even an uneducated man can easily grasp; and yet they need to be promulgated, because human judgment, in a few instances, happens to be led astray concerning them . . . .”<sup>172</sup> Knowledge of the Ten Commandments is given immediately from God,<sup>173</sup> And the commandments which deal with human relations (i.e., the last seven<sup>174</sup>) fit neatly into the second category described above; they can be gathered from the first general principles of natural law “with but slight reflection.”<sup>175</sup> The other three, which deal with the divine/human relationship “become known to man immediately through divinely infused faith.”<sup>176</sup> The remaining Old Law moral precepts correspond to the third general category of moral precepts. This group of rules is “reducible to the precepts of the Decalogue, as so many corollaries . . . .”<sup>177</sup> Unlike the other moral precepts, these precepts are “not evident to everyone, but only to the wise; these are the moral precepts added to the Decalogue and given to the people by God through Moses and Aaron.”<sup>178</sup>

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<sup>170</sup> See ST IaIIae 100.1.

<sup>171</sup> See *id.* at 100.11.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 100.3. There may be a hint of skepticism as to whether the account of God’s writing the commandments on the tablets should be taken literally or whether it may be merely a metaphor for the direct deliverance of the commandments from God through the natural imprint and operation of reason “with but slight reflection” and by infusion of faith. There is certainly not much emphasis on the story as set forth in *Deuteronomy* or *Exodus*. But see *id.* at 100.5 ad 1 (where Thomas argues that one reason the Ten Commandments do not include commandments with respect to duties to oneself is that the commandments were given directly by God to Israel and thus needed “to be such as the people can understand at once.”). Understanding that one has duties to oneself requires instruction by the wise and cannot be immediately grasped in the way that duties to one’s god and neighbor can be. See *id.* at 100.5 ad 1.

<sup>174</sup> See *id.* at 100.4.

<sup>175</sup> See *id.* at 100.3; *cf.*, *id.* at 100.5, in which Thomas analyzes each of the Ten Commandments in terms of their relationships to natural law principles. Significantly, Thomas also includes the first three commandments, which he says elsewhere are known “by divinely infused faith,” see *id.* at 100.3, in this analysis. The suggestion may be that once divinely infused faith is present, the first three commandments likewise follow on from the first principles of practical reason.

<sup>176</sup> See ST IaIIae 100.3.

<sup>177</sup> See *id.* at 100.11.

<sup>178</sup> See *id.* These precepts are shown by “the careful reflection of wise men . . . to be in accord with reason; since the people receive these principles from God, through being taught by wise men.” *Id.* at 100.3.

Thomas thus finds two avenues of connection between the natural law and the Old Law's moral precepts. The first begins with the shape of natural law and attempts to show a significant degree of formal and substantive fit between the precepts of natural and divine law: Both sets of precepts begin with general (but certain) starting principles; "do no harm," "love your neighbor" and "love God." From these starting points flow a group of accessible and universal, though less abstract, precepts. In natural law parlance, these are the "conclusions from premises;" in divine law, the Decalogue. Finally there are more specific precepts that are accessible only to the wise, but that are nevertheless "dictates" of the natural law in principle which are universally binding. In the Old Law, these are the more specific corollaries of the Ten Commandments; in the natural law, these are reflected in the judgments of the wise about practical reason.

The second avenue of connection emphasizes the divine origin of both the natural law and the precepts of the Old Law. Although the first general principles of natural law do not appear in the Old Law explicitly,<sup>179</sup> God promulgates them directly by "imprint[ing them] on the natural reason to which they are nearly self-evident."<sup>180</sup> The Ten Commandments are given directly by God in a twofold sense. They are written on the tablets Moses receives from God, and, more significantly from the point of Thomas's analysis, they are grasped by God-given reason "with but slight reflection" from the first principles.<sup>181</sup> Finally, God is likewise the giver even of the more detailed moral precepts found in the Old Law: "the people receive these principles from God, through being taught by wise men,"<sup>182</sup> specifically Moses and Aaron.<sup>183</sup>

Much of the second half of the *Treatise* is taken up with Thomas's point-by-point demonstration of the consonance between the natural law and specific Old Law precepts. He shows, for example, how the Ten Commandments can be derived from the general principles by way of analogy with natural political obligations.<sup>184</sup> As political subjects owe duties to the head of the earthly community and to each other, so human beings owe duties to God and neighbor.

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<sup>179</sup> At least not in Thomas's account of natural law in the early parts of the *Treatise*, where they are described in terms of not harming others, living together, etc. See *id.* at 94.4. Later in the *Treatise*, Thomas connects these ideas with the "two great commandments," *Matthew* 22:36-40, love of God and neighbor. Thomas also affirms that the first principles are nevertheless contained in the Decalogue "as principles in their proximate conclusions." See ST IaIIae 100.3.

<sup>180</sup> See ST IaIIae 100.3.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See *id.* at 100.11.

<sup>184</sup> See *id.* at 100.5.

The duties one owes to the head of the community are fidelity, reverence and service, and the three commandments respecting duties to God correspond precisely to these duties. The general natural law principle of behaving well toward one's neighbor, says Thomas, leads to the remaining commandments.<sup>185</sup> Even the order in which the Ten Commandments appear is, for Thomas, demonstrably reasonable. Fidelity is a higher obligation than reverence, reverence than service and obligations to God have priority over obligations to man. The Ten Commandments reflect these priorities in that the commandments respecting human obligations to God appear before those governing obligations to neighbor, and in the ordering of the commandments within the respective groups.<sup>186</sup>

Thomas likewise defends the reasonableness of the Old Law's judicial and ceremonial precepts, albeit as "determinations" rather than as immutable moral truths.<sup>187</sup> As we have seen, the purpose of the Old Law's judicial precepts is to govern relationships among human beings. As determinations of moral precepts, the judicial precepts are based on reason, and Thomas sets out to show the connection between reason and the Old Law's judicial precepts by defending the judicial precepts against possible objections. Thomas organizes the judicial precepts in terms of the different relationships being regulated—ruler/people, relations among private individuals, relations with foreigners and relations within households.<sup>188</sup> Aristotle's influence looms large in this discussion (though it is by no means exclusive), both as a source of the objections lodged against various precepts<sup>189</sup> and as a measure of their reasonableness.<sup>190</sup>

Thomas engages in a similar project to reconcile Scripture and reason in his analysis of the ceremonial precepts, which, as he says in Question 102, have a twofold purpose: "they were ordained to the Divine worship, for that particular time, and to the foreshadowing of Christ."<sup>191</sup> The result is that for any given ceremonial precept, one should be able to find both literal and figurative reasons. The literal reasons relate to the needs of the people of Israel at the time the

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<sup>185</sup> See *id.* Thomas's account seems a little strained at points. *E.g.*, "To his neighbors a man behaves himself well both in particular and in general. In particular, as to those to whom he is indebted, by paying his debts: and in this sense is to be taken the commandment about honoring one's parents." *Id.*

<sup>186</sup> See generally ST IaIIae 100.6; see also *id.* at 122.

<sup>187</sup> See *id.* at 104.1

<sup>188</sup> See *id.* at 104.4.

<sup>189</sup> See, *e.g.*, *id.* at 105.1 obj., 105.2 obj. 2, 105.2, obj. 3, 105.4 obj. 1, 105.4 obj. 4.

<sup>190</sup> See, *e.g.*, *id.* at 105.1, 105.2, 105.2 ad 3, 105.3 ad 2, 105.3 ad 5, 105.4, 105.4 ad 5.

<sup>191</sup> See *id.* at 102.2; see also Boyle, *supra* note 149.

law was given as those needs related to the divine worship; the figurative “and mystical” reasons may have (1) an allegorical sense, when “they relate to Christ Himself and the Church,” (2) a moral sense, when they relate to Christian morality or (3) an “anagogical” sense, “which pertains to the state of future glory inasmuch as we are brought thereto by Christ.”<sup>192</sup> Thus, for example, Thomas argues that the literal reason for the Old Testament sacrifices was to direct the worshiper’s mind to God and to “withdraw” the worshipers from the local habits of offering sacrifices to idols.<sup>193</sup> The figurative cause was to foreshadow Christ’s sacrificial death: “[a]nd for this reason all the other sacrifices of the Old Law were offered up in order to foreshadow this one individual and paramount sacrifice -- the imperfect forecasting the perfect.”<sup>194</sup> Thomas goes on to analyze the literal and figurative reasons for other ceremonial laws relating to the tangible things used in worship:<sup>195</sup> circumcision and other rites of purification,<sup>196</sup> dietary observances<sup>197</sup> and so forth. In each case, he adduces literal reasons for the specific precepts he encounters (e.g., the sense of reverence brought on by having special places, instruments and garments set aside for worship)<sup>198</sup>, as well as figurative ones (e.g., the purple thread in the temple veil symbolized “the sufferings which the saints underwent for God”).<sup>199</sup>

#### IV. GETTING SPECIFIC: THE USE OF THE MORAL PRECEPTS IN LAWMAKING

Even though we have identified the “moral precepts of the Old Law” as the portion of Scripture most relevant to lawmakers and positioned it within Thomas’s analytical scheme, a number of important questions remain.<sup>200</sup> Where, exactly, in the Old Law can we find the “moral precepts?” How do we know them when we see them? And, once we find them, how, precisely, are they to be put to use?

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<sup>192</sup> See ST IaIIae 102.2.

<sup>193</sup> See *id.* at 102.3.

<sup>194</sup> See *id.* at 102.3.

<sup>195</sup> See *id.* at 102.4.

<sup>196</sup> See *id.* at 102.5.

<sup>197</sup> See *id.* at 102.6.

<sup>198</sup> See ST IaIIae 102.4.

<sup>199</sup> See *id.* at 102.4 ad 4. Articles 102.3 through 102.5 are replete with imagery and symbolism alien to modern religious sensibilities and, for that very reason, fascinating. For example, in discussing the figurative reasons for the laws of ceremonial uncleanness, Thomas explains that “the leprosy of a house signified the uncleanness of the assembly of heretics; the leprosy of a linen garment signified an evil life arising from bitterness of mind; the leprosy of a woollen garment denoted the wickedness of flatterers . . . .” *Id.* at 102.5 ad 4.

<sup>200</sup> See *id.* at 100.1

According to Thomas, the moral precepts include both the Ten Commandments and some additional precepts, “the reason of which is not evident to everyone, but only to the wise; these are the moral precepts added to the Decalogue and given to the people by God through Moses and Aaron.”<sup>201</sup> Because they are derived from the basic principles of natural law embodied in the Decalogue, these additional precepts are “reducible to the precepts of the Decalogue, as so many corollaries . . . .”<sup>202</sup> Thus, for example, “[t]o the fourth commandment prescribing the honor due to parents, is added the precept about honoring the aged [*Leviticus* 19:32] . . . and likewise all precepts prescribing the reverence to be observed towards our betters, or kindness towards our equals or inferiors.”<sup>203</sup> Similarly, “[t]o the seventh commandment which forbids theft is added the precept forbidding usury [*Deuteronomy* 23:19] . . . and the prohibition against fraud [*Deuteronomy* 25:13] . . . and universally all prohibitions relating to peculations and larceny.”<sup>204</sup>

How, precisely, are we to identify the moral precepts in the pages of Scripture? Thomas has already identified the moral precepts as having been given to the people by Moses and Aaron, so presumably he would restrict the relevant pages of Scripture to the first five books of the Bible, traditionally regarded as the work of Moses.<sup>205</sup> While this approach limits our search to some degree, it proves to be unhelpful since Thomas occasionally finds both (binding) moral precepts and (nonbinding) judicial precepts in the same chapter of Scripture.<sup>206</sup> How are we to distinguish between the two kinds of precepts when we find them side by side?

One possible way would be to treat Aquinas’s listing of the corollaries in Article 11 of Question 100 as exclusive, in which case we would have a short, manageable list of additional precepts to work with. It is possible to read Thomas as having intended just this. Indeed, he specifically states that no further moral precepts are added with respect to the Ninth and Tenth Commandments.<sup>207</sup> And, in his analysis of the Second, Sixth and Eighth Commandments, he

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<sup>201</sup> See *id.* at 100.11.

<sup>202</sup> See *id.* (“But since the things that are evident are the principles whereby we know those that are not evident, these other moral precepts added to the decalogue are reducible to the precepts of the decalogue, as so many corollaries.”)

<sup>203</sup> See *id.*

<sup>204</sup> See ST IaIIae 100.11.

<sup>205</sup> All the examples he gives in 100.11 are drawn from these five books.

<sup>206</sup> Cf., ST IaIIae 100.1, 105.2 obj. 1 (*Deuteronomy* 23); 100.11; 105.2 obj. 6 (*Leviticus* 19).

<sup>207</sup> See *id.* at 100.11. In Thomas’s account, the Ninth and Tenth Commandments forbid coveting another person’s goods and another person’s wife, respectively. See *id.* at 100.4.

seems quite definite about the corollaries he has in mind.<sup>208</sup> However, the descriptions of the corollaries of the First, Third, Fourth, Fifth and Seventh Commandments are not particularly specific about which texts involve moral, as opposed to judicial precepts.<sup>209</sup>

Another possibility is that we might exclude those commandments that have penalties affixed to them, on the theory that one of the marks of a “determination” more properly seen as a judicial precept is that it fixes a penalty rather than sets a standard.<sup>210</sup> While none of the precepts Thomas specifically identifies as moral is accompanied by a provision affixing a penalty,<sup>211</sup> this does not necessarily separate them from other precepts he marks out as judicial and therefore nonbinding.<sup>212</sup>

While there may be no precise marker separating the relatively more abstract moral precepts from the relatively more detailed (time and culture-bound) judicial precepts, the specific examples Thomas gives are not surprising. As already noted, the moral precepts are usually general prohibitions against particular sorts of activities—e.g., blasphemy, lying, fraud and so forth. The precepts Thomas identifies as judicial are more detailed and would not necessarily be relevant in all times and places.<sup>213</sup> For example, a rule that permits one to eat freely from his neighbor’s vineyard while he is there but not to carry any grapes away in a bag<sup>214</sup> would not appear in the judicial code in a location without vineyards. Nor in a warm climate would it necessarily be imperative for a lender to return a poor borrower’s cloak at the end of each day.<sup>215</sup>

Still, Thomas’s treatment leaves one puzzled about exactly which precepts count as “moral” and therefore binding and which do not. Thomas clearly regards *Leviticus* 18’s

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<sup>208</sup> See *id.* at 100.11. The Second Commandment (perjury) also forbids blasphemy and false doctrine. The Sixth Commandment forbids “whoredom” and “unnatural sins.” The Eighth Commandment (false testimony) forbids “false judgment,” lying and “detraction.” *Id.*

<sup>209</sup> The corollaries of the First Commandment include “precepts forbidding things relating to the worship of idols;” the corollaries of the Third are “all the ceremonial precepts” (presumably, then, no moral precepts are added with respect to the Third Commandment); the corollaries of the Fourth include, among others, “all precepts prescribing the reverence to be observed towards our betters, or kindness towards our equals or inferiors;” the corollaries of the Fifth Commandment include “the prohibition of hatred and any kind of violence inflicted on our neighbor;” those of the Seventh Commandment include, among others, “universally all prohibitions relating to peculations and larceny.” *Id.*

<sup>210</sup> Cf. *id.* at 95.2.

<sup>211</sup> Based on the author’s review.

<sup>212</sup> Cf. ST IaIIae 105.2 (e.g., *Deuteronomy* 23:24, 22:1-4).

<sup>213</sup> A text that seems to make a point of saying that a given commandment is for Israel might also be appropriately interpreted as a judicial precept. See, e.g., *id.* at 105.2 ad 2 (treating *Numbers* 27:8 as a judicial precept).

<sup>214</sup> See *id.* at 105.2 obj. 1 (*Deuteronomy* 23:24).

<sup>215</sup> See ST IaIIae 105.2 (*Deuteronomy* 24:13).

prohibitions on homosexual sex and bestiality as moral precepts with continuing force, but says nothing about the myriad other sexual restrictions in the chapter, including the multiple prohibitions on incest. Perhaps, as suggested above, his list of moral precepts is meant to be illustrative rather than exclusive. In any event, given the significance of the category for political life in Thomas's framework, the lack of clarity is regrettable.

Again, in Thomas's scheme, these moral precepts (including both the Ten Commandments and the additional precepts) are not mere determinations binding only on those under the particular law of that place and that time, but are "dictated by the natural law;"<sup>216</sup> they are extensions of the moral law "derived from reason"<sup>217</sup> and therefore applicable across different contexts. They "derive their efficacy from the very dictate of natural reason, even if they were never included in the Law."<sup>218</sup> Although Thomas treats the Decalogue as secondary precepts of natural law,<sup>219</sup> and secondary principles are ordinarily subject to dispensation because they fail in their application in some concrete circumstances,<sup>220</sup> this is not the case with the Decalogue. Rather, Thomas holds that the Ten Commandments "contain the very intention of the lawgiver, who is God," both as to the human/divine relationship and as to "the order of justice to be observed among men."<sup>221</sup> Thus, they may never be dispensed with; a violation of any of the commandments is always wrong; changes are not possible.<sup>222</sup> Nevertheless, one who has appropriate jurisdiction—sometimes human beings and sometimes God alone—may make (changeable) judgments about what constitutes violation of the commandments (e.g., in what circumstances forfeiture of one's property does or does not amount to theft, or when capital punishment does or does not amount to murder, and so forth).<sup>223</sup>

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<sup>216</sup> ST IaIIae 99.4. *But cf. id.* at 104.1 (dictates of reason (moral precepts) govern human conduct that does not affect others).

<sup>217</sup> *See id.* at 99.4 ad 2.

<sup>218</sup> *See id.* at 100.11.

<sup>219</sup> *See id.* at 100.3.

<sup>220</sup> *See id.* at 96.6; 97.4.

<sup>221</sup> *See id.* at 100.8.

<sup>222</sup> In ST IaIIae 100.8 ad 2, Thomas argues that even God, "since He is justice itself . . . God cannot dispense a man so that it be lawful for him not to direct himself to God, or not to be subject to His justice, even in those matters in which men are directed to one another."

<sup>223</sup> *See id.* at 100.8 ad 3. Again, Thomas is regrettably vague. He seems to want to carve out areas—he mentions marriage—in which human rulers cannot make changes to received understandings, but he is clearly uneasy about this. Even as he affirms human authority by saying that "in such matters as are subject to human jurisdiction . . . men stand in the place of God," he retreats: "and yet not in all respects." *Id.*

Thomas does not specifically say whether the moral precepts that are “corollaries of the Ten Commandments” are subject to dispensation. Presumably they are. Recall that the “corollaries” represent those precepts that are evident only to the wise in that they were given by God to Israel through Moses and Aaron.<sup>224</sup> This analogy with secondary natural law precepts, which Thomas specifically holds are dispensable in Question 97,<sup>225</sup> suggests that the “corollaries” would likewise be dispensable.

On the other hand, the case can be made that even the “corollaries” are not dispensable. Recall that as moral precepts, Thomas does not view them as determinations, but rather as “dictated by the natural law.”<sup>226</sup> This alone would be insufficient to prevent dispensations being made since ordinary secondary natural law precepts are not determinations, yet they are nevertheless subject to dispensation in appropriate cases. However, there is an important distinction between the “corollaries” and most secondary natural law precepts—namely, their status as divine law. Indeed, Thomas says that “in the precepts of the Divine Law, which are from God, none can dispense but God or the man to whom He may give special power for that purpose.”<sup>227</sup> Moreover, even to the extent that the divine law is nothing but a restatement of the natural law, one of its functions is to remedy uncertainty in human judgment: “[i]n order . . . that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.”<sup>228</sup>

One may speculate that there are probably very few circumstances, if any, in which Thomas would find it acceptable for the corollaries to be dispensed with. For Thomas, the Decalogue contains the “very intention of . . . God” with respect to “the order of justice to be observed among men.”<sup>229</sup> Moreover, there is a tight connection between the Ten Commandments and the corollaries. Since the divine law’s function is to limit the uncertainty about moral action caused by human fallenness and finitude, it seems unlikely that any corollary should be dispensed with. This is especially so given the generality of the examples Thomas

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<sup>224</sup> See *supra* notes 197-200 and accompanying text.

<sup>225</sup> See ST IaIIae 97.4; see also *id.* at 96.6.

<sup>226</sup> See *supra* text accompanying note 156.

<sup>227</sup> See ST IaIIae 97.4 ad 3.

<sup>228</sup> See *id.* at 91.4.

<sup>229</sup> See *id.* at 100.8. The quotation refers specifically to the second table of the Decalogue.

gives in his discussion. It is difficult to imagine circumstances under which the human actor might feel permitted to dispense with moral strictures against doing violence to one's neighbor, adultery, usury, fraud, false judgment, etc.<sup>230</sup> Recall that Thomas has already noted that human rulers will nevertheless have to make judgments about what sorts of conduct violate these principles, but these judgments do not amount to a dispensation. Finally, given the apparent generality of the corollaries, Thomas's explanation of the reason for dispensations in connection with the natural law precepts is unlikely to apply.

We can now see the primary means through which Scripture provides norms for the judge or legislator in Thomas's scheme: the moral precepts of the Old Law stand as an authoritative source of moral guidance. These consist of the Ten Commandments and an uncertain number of "corollaries," some of which Thomas identifies specifically. These precepts constitute reliable statements of natural law, and as such, are useful to those charged with earthly political rule. While useful, the precepts underdetermine the decisions the ruler must make. In his discussion of the moral precepts themselves, Thomas specifically acknowledges that there remains a role for rulers in determining what specific sorts of conduct fall foul of the precepts<sup>231</sup> (e.g., what specific conduct constitutes murder or theft). Even starting with the assumption that the ruler is obliged to respect the moral precepts as substantive guides to conduct, human law requires further "determination"—the setting of penalties and other specific provisions that make rules workable in the particular social context. In this latter regard, the ruler may (but need not) consult the Old Law's judicial precepts.<sup>232</sup>

#### CONCLUSION

Thomas's analysis of the relevance of Scripture for civil law leaves only a modest place for the consultation of the Bible along with the other authorities on the jurist's shelf. The jurist is obligated to consult the commandments in the New Testament related to worship and "essential acts of virtue," not for the purpose of giving positive content to the civil laws (it is not the place of the ruler to make prescriptions for worship), but because the ruler is obligated not to make laws that preclude obedience to these higher commandments. Rulers should thus not make laws forbidding the worship of God, professing faith in Christ or doing good deeds such as showing

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<sup>230</sup> See *id.* at 100.11; see also *id.* at 96.6, 97.4.

<sup>231</sup> See *supra* note 219 and accompanying text.

<sup>232</sup> See *supra* Part II. B. 2. c. ii.

mercy to the poor. Even if they made such laws, the faithful would be under an obligation not to obey them.<sup>233</sup>

The moral precepts of the Old Law are “dictated by the natural law” and are thus also binding on the ruler. These precepts shape the positive content of the civil law as opposed to merely marking out a “no trespassing” zone in the fashion of the commandments of the New Law. The lawgiver should consult and heed them (insofar as they can be identified) because they serve as correctives to the ruler’s judgment as to the true content of the natural law. The acts specifically prohibited in the Decalogue—idolatry, taking God’s name in vain, sabbath-breaking, failure to honor parents, murder, adultery, theft, lying, and covetousness—are thus violations of the natural law, as are the other moral precepts closely related to them, such as usury, fraud, larceny, blasphemy, false doctrine, sexual immorality, false judgment, detraction, etc.<sup>234</sup>

Several features of Thomas’s account of human law further attenuate the direct relevance for legal purposes of even these norms. Human law properly deals only with outward conduct rather than inner attitudes, about which human beings are not competent to judge each other. Moreover, even with concrete guidance about what sorts of conduct are immoral and should be discouraged, much is left to the judgment of the ruler. Rulers must specify what sorts of conduct constitute a violation of the precepts and must affix penalties for violations thereof. They must also determine whether, given the state of the people, the vicious conduct should be prohibited through law or dealt with in some other manner.

The judicial precepts of the Old Law—the laws governing the ancient Israelite theocracy—are likewise relevant to the jurist, but only as models of how another jurisdiction has resolved a particular legal question. Just as contemporary lawyers consult and cite decisions from other jurisdictions as evidence of the wisdom of a particular approach to a legal matter, the Thomistic jurist may consult the judicial precepts for divinely-inspired decisions appropriate to the time and circumstances of the Hebrew polity under Moses and Aaron. However, the fact that Thomas takes seriously law’s need to respect the cultural and social conditions of the people to

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<sup>233</sup> Cf., ST IaIIae 96.4 (discussing obligations of obedience to unjust laws, which Thomas says may be obeyed in order to avoid scandal).

<sup>234</sup> See *supra* text accompanying notes 201-11. As noted earlier, however, it is not always apparent which commands count as moral precepts and which do not.

whom it is addressed, and the fact that contemporary society is so far removed from the agrarian theocracy of Israel, would seem to render these rules of relatively little interest to the modern jurist, even one who believes that the rules themselves were given by divine inspiration.

One can only conclude that Scripture is of limited importance as a legal sourcebook in Thomas's scheme. Its main functions are (1) to set limits on civil law to the extent such law would impede the subject's ability to fulfill religious duties and (2) to remind the ruler of natural law norms, which in principle, should already be known. Nevertheless, even if the divine law is not particularly important to the Thomistic jurist as a legal authority to be consulted alongside other law books, for Thomas it is a crucial feature of faithful legislating and judging. Recall that although the New Law has a written element, it is more essentially the grace of the Holy Spirit shed abroad in the heart of the believer through faith in Christ.<sup>235</sup> The infusion of grace leads to a change in the inward motivation of the believer, the subjugation of the passions and the development of the charity that is essential to true friendship and the pursuit of the common good and therefore also to good law. On this view, the divine law's influence on the jurist is more about improving the jurist's motivation for making good decisions than it is about specifying the content of those decisions.<sup>236</sup>

A wise and faithful ruler might not need to consult Scripture very much in the course of performing his or her job. Such a ruler would presumably not be inclined to enact laws that prevented the faithful from fulfilling their religious duties and would also be aware of the requirements of the natural law. Moreover, the repentance that accompanies faith in Christ ought to produce humility, which might in turn motivate judges to consult the Divine Law instead of being "proud of their knowledge and their power."<sup>237</sup> Ironically, Scripture's main functions as a law book are most beneficial when the ruler is inclined to stray from the light of sanctified reason—i.e., when the ruler is least inclined to seek such help.

The New Law may also affect the people to whom the laws are directed. Precisely because Thomas takes seriously the need to fit the law to those it governs, the nature of the

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<sup>235</sup> See ST IaIIae 106.1

<sup>236</sup> Cf. Bartholomew, *supra* note 8, at 15 ("Scripture, in this tradition, provides the motivation for ethics but not the content of ethics—the ought of ethics arises from [reflection on] what is."). This statement is not entirely correct as a representation of Thomas, for whom the primary meaning of the New Law is grace infused by the Holy Spirit, not the written words of Scripture.

<sup>237</sup> See *supra* text accompanying notes 70-73.

community affects the appropriate scope and subject matter of law. To the extent that the people are living in accordance with the New Law, Thomas would expect that human law would be less coercive, but possibly also more demanding.<sup>238</sup> The internal presence of the New Law could also be expected to affect the prevalence of certain institutions present in society, necessitating appropriate legal accommodations.<sup>239</sup>

In the *Summa*, Thomas is writing primarily as a theologian, not a jurist. His main task is to situate the various topics he engages within the larger story of God's revelation in Christ.<sup>240</sup> As a result, Scripture is important for Thomas not only as a source of rules but as an indirect source of the background narrative through which the Thomistic jurist interprets the world. When Thomas speaks of nature, he has in mind the contingent divine creation; when he speaks of human beings, he has in mind bearers of the divine image who are accountable to God and to whom God has given dominion over the rest of the world He has made.<sup>241</sup> Thomas presents these theological starting points as truth and not merely as religious opinion; there is no apparent reason a ruler should ignore them. And, while the starting points will rarely make much difference in legal details, they do lead Thomas to a vision of law that is famously at odds with many modern accounts.

In other words, while the second half of the *Treatise* suggests on its face that the specific rules found in the Bible do not always matter all that much for human laws, Scripture is nevertheless critical to good law in Thomas's system in other ways. Not only does it bear witness to the Gospel, it also helps provide the background account of the human person, the world, justice and political authority that animates Thomas's Christian vision of law.

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<sup>238</sup> See ST IaIIae 95.3; 96.2.

<sup>239</sup> Thus, for example, a society that is filled with organizations dedicated to charitable works might require a different law governing charitable institutions than one in which such organizations are encountered less frequently.

<sup>240</sup> For a luminous explication of this idea, see Jordan, *supra* note 11.

<sup>241</sup> For an example of a "legal" passage in the *Summa* that brings these theological concepts together, see ST IaIIae 66.1 (considering "whether it is natural to possess external things"). Concerning the priority given Scripture in Thomas's ethical writings, see Servais-Theodore Pinckaers, *The Sources of the Ethics of St. Thomas Aquinas, in THE ETHICS OF AQUINAS* 17, 19 (Stephen J. Pope, ed., 2002).