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The Architecture of Law: Building Law on a Solid Foundation The Eternal and Natural Laws

Brian M McCall, *University of Oklahoma*



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THE ARCHITECTURE OF LAW: BUILDING LAW ON A SOLID FOUNDATION—THE ETERNAL AND NATURAL LAWS

Brian M. McCall

*“Summum ius, summa iniuria.”*¹ “The greater the law the higher the injury.”

With these words the great Roman orator Cicero warned against the exaltation of human law. His words take on a new poignancy in light of much contemporary jurisprudence. Not only have human positive laws grown exponentially in their number and scope but the dominant theory of Legal Positivism has exalted the place of human positive law by building an entire system of law on it alone. Human made law has become viewed as self-justifying and essentially self-restrained. Classical Natural Law theory placed human law within a grand hierarchical system of laws. This structure is held together by a foundation and a frame erected by its Creator and Artificer.

With the goal of reducing the greatness of human made law, this article examines part of the structure of law that should surround human made laws. It draws heavily on the jurisprudential writings of St. Thomas Aquinas and Gratian. Part I sets the stage for the discussion by describing how any legal jurisprudence not erected within this design of law reduces human law to a pure volitional act rooted in contests for power. Part II commences an examination of the blueprints for this legal edifice by examining the definition of law in general. Part III turns to the foundation of the structure, the Eternal Law. Part IV turns to the frame built up out of the foundation with the tool of man's rationality, the Natural Law. Part V draws some conclusions from the examination of these first two building blocks of law.

Various themes will weave through these first two levels of the artifice of the legal mansion. The hierarchical frame of Natural Law will be shown to be anchored to its foundation, the Eternal Law, by

¹ Cicero, *De officiis* 1.10.33

two pillars, reason and volition. Outside this structure, law balances precariously on the sole pillar of volition. The second theme centers on the interdependence of each level of the structure. Natural Law cannot survive if severed from its source and foundation, the Eternal Law. Otherwise it becomes a non-obligatory element floating by itself. The article concludes that it is futile to advocate a restoration of the Natural Law without restoring the foundation of Eternal Law and the hierarchical structure of Natural Law. By examining these themes, the article will bind together an overall schematic for the erection of the complete legal edifice which will encase and thereby reduce the greatness of human-made law.

PART I

The Power of Law: What Pleases the Prince Has the Force of Law

Much of the current attitude towards law making can be summarized in the ancient legal aphorism: "what pleases the prince has the force of law"² and "the prince is not bound by the law."³ In the non-regal American political context, the principle has been abstracted to the more generalized "the intention of the lawgiver is the law."⁴ The aphorism has become politically ambivalent. Whatever political system happens to be the reigning system for making law (a monarchy, an oligarchy, republic, democracy, totalitarian regime, *etc.*) is irrelevant. All that matters is that whatever the designated law giver decrees to be the law is the law without any other justification. All that matters is that the law givers comply with the reigning

² "*Quod principi placuit vigorem legis habet.*" Justinian, *Dig.* 1.4.1. To be fair to the ancient Roman legal theorists, this phrase was qualified by many other legal concepts, not least of which was the natural law. Thus, "what pleases the prince" was not always law but only what legitimately pleased the prince. Legal Positivism rejects all of these qualifications and accepts this principle as an absolute.

³ "*Princeps legibus solutus est.*" Justinian, *Dig.* 1.3.31.

⁴ Abraham Lincoln, "The Sacredness of Judicial Decisions," Speech of June 12, 1857, *Great Debates in American History*, Marion Mills Miller, ed., Vol. IV, 395-96, 398-99 (New York: Current Literature Publishing Company, 1913).

procedures for making and promulgating law. No higher criteria or foundation exists to make or judge or criticize human-made laws. In fact, this very procedure for making law itself is merely a creature of positive law. Law makers only have to comply with the "rule of law," meaning they comply with the way laws are made, until that rule of law itself is changed. In the words of the English poet Alexander Pope "[o]ne truth is clear, 'Whatever IS, is RIGHT'"⁵

To the original Legal Positivists such as John Austin, the act of the will and the threat of sanctions are what make a legal system. The established legislator decides what is to be law by no criteria other than its will and then uses the monopoly on violence which the State has claimed since the 16th century to make the law obeyed. In Austin's words: "every law properly so called is set by a superior to an inferior or inferiors: it is set by a party armed with might, to a party or parties to whom that might can reach."⁶ Jeremy Bentham, a disciple of Austin defined law as "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state. . . ."⁷ Bentham's formulation indicates that politics has been transformed into the game of "capturing" the will of the sovereign (the levers of power). The sovereign need not even "conceive" of the new law or in fact desire it. If the sovereign can be made to "adopt" it, the new idea becomes law. Law making is the art of persuading the sovereign to adopt one's particular desire. Thomas Hobbes expands this notion of human control over law to the very idea of justice. Hobbes argues that justice and injustice can be demonstrated *a priori* because: "We ourselves make the principles—that is, the causes of justice (namely, laws and covenants)."⁸

Although later Positivists such as Hart and Raz, attempt to tone down the raw power element of this system by explaining how the sovereign (the dispute resolver) is bound by rules as to the way

⁵ Alexander Pope, *An Essay on Man*, l. 1.294.

⁶ John Austin, *The Province of Jurisprudence Determined* 350 (Prometheus Books 2000),

⁷ Jeremy Bentham, *Of Laws in General*, 1 (ed. H.L.A. Hart 1970)

⁸ Thomas Hobbes, *De Homine* X.5.

disputes are settled,⁹ they never offer a criteria for establishing, evaluating and changing these primary or system rules which ultimate rest on the will of the sovereign.¹⁰ The offspring of these theories is law as power politics. Pope Benedict XVI recently summarized the contemporary effect of the raw conception of power at the heart of modern law making:

Today, a positivist conception of law seems to dominate many thinkers. They claim that humanity or society or indeed the majority of citizens is becoming the ultimate source of civil law. The problem that arises is not, therefore, the search for good but the search for power, or rather, how to balance powers.¹¹

Politicians should really not be surprised at the lack of “bipartisanship” or “cooperation” in our political system. Under the tyranny of Positivism, politics is merely the combat to see who can control the “intention of the legislator.” Law making and politics are about power not justification. The Democrats or Republicans, as the case may be, can pass whatever laws they want because they have a “mandate” to do so by conquering the will of the legislature by winning an election. This is no different from the victorious prince claiming the right to revise the laws of the vanquished territory according to “his” will. The principles of Legal Positivism apply equally to the “rule of law,” the procedural system for controlling the will of the legislator. Thus, when a desired result is not obtained, the power seekers need only change the rules of the game or the existing “rule of law.” Thus, when the proposed

⁹ See e.g., H.L.A. Hart, *The Concept of Law* (1961) and J. Raz, *Practical Reason and Norms* (1975).

¹⁰ For a discussion of how modern Positivism still retains an aspect of “might makes right,” see Roger Berkowitz, *The Gift of Science: Leibnitz and the Modern Legal Tradition*, 5 (2007) (associating legal positivism with the view that law is “nothing but a willful decision” and with the idea that “might makes right”).

¹¹ Benedict XVI, *Address to Members of the International Theological Commission*, October 5, 2007.

European Union constitution was voted down in several countries “the will of the people” is rejected as the rule of law. The will of the elected governments of the member states is substituted. The same constitution is redrafted as a treaty and the people who previously rejected these laws are told they have no right to vote anymore (with the exception of Ireland which did vote and reject the latest attempt). As Pope Benedict XVI has remarked: “It is necessary to go back to the natural moral norm as the basis of the juridic norm; otherwise the latter constantly remains at the mercy of a fragile and provisional consensus.”¹²

This paradigm of law as power is not the only available paradigm. Other structures have and can be utilized. To elucidate the form of these structures it is necessary to begin with the most basic building material. It is necessary to begin with a thorough definition of law.

PART II

Surveying the Blueprint: What Is Being Built?

St. Thomas Aquinas provides the essential elements of a definition of law. First he defines law by its two functions; it is a rule (*regula*) and measure (*mensura*).¹³ These two terms indicate that to be a law a thing must both direct an action and serve as a basis for evaluating an action. A rule directs or restricts action by binding or requiring actions to conform to a standard. St. Thomas in the same passage notes that one Latin word for law *lex, legis* is derived from *ligare* (meaning to bind). Law governs actions by directing them to an end. As a rule, a law has a dual function of proscribing and prescribing action furthering or hindering that end. As a measure, law serves as a way of evaluating or measuring acts to see to what extent they conform to the rule. The measure is not simply a binary

¹² Benedict XVI, *Message for the Celebration of the World Day of Peace*, January 1, 2008.

¹³ St. Thomas Aquinas, *Summa Theologica* I-II q. 90 art. 1.

evaluation (it complies or not) but determines how far along the line formed by the directing rule an action lies.

St. Thomas goes on to define the essential elements of such a rule and measure: "*quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.*"¹⁴ First, he begins by noting that anything which does not possess the following qualities is not a law—"nothing is [law] other than that which." There are definitional criteria, outside of the volition of the law giver, necessary to make something a law. These elements establish criteria for evaluating whether or not a command of the will qualifies as a law. It must be ordered of reason (*ordinatio rationis*). Law then is a product of reason. The primary criteria for something to be a law is that it must be "of reason" or reasonable. Gratian notes this requirement of law when he says that law *ratione consistat*,¹⁵ which can be translated "consists in reason" or "stands with or agrees with reason." In the same section he points out that reason designates (with a connotation of entrusting) the law (*legem ratio commendat*) and that if law consists in reason then it will be all that may have already stood (or agreed) by reason (*si ratione lex constat lex erit omne, iam quod ratione constiterit*). The use of the perfect subjunctive in this last phrase is interesting. It expresses the temporal potentiality of law. Law arises after truths may have been constituted in reason. The tense of the phrase acknowledged the uncertainty of success in this first step—*may* have stood by reason. There is no certainty of complete success. This relationship between law and reason is a dramatic difference from Positivism which accepts as law anything which meets the currently reigning procedural requirements for making a law. For the Natural Law system, such is not sufficient; to be a law, the rule and measure must agree with or stand in the faculty of reason, not the will.

Next, law as a rule cannot be directed to any end but "toward the common good" (*ad bonum commune*). The concept of the common

¹⁴ *Summa Theologica*, I-II q. 90 art. 4.

¹⁵ Gratian, *Decretum* D.1, C.5.

good is an entire topic within itself. For purposes of this article, it is sufficient to establish that for something to be the common good it must be both *good* (i.e. objectively oriented to a good) and *common*. The concept of “good” will be developed *infra* when the contents of the Natural Law are discussed. Further, it must be a good that is not unique to one individual or group of individuals but it must be a good which is *common* to all in the relevant community.

Law may not be made by just anyone but only “by him who has care of the community” (*ab eo qui curam communitatis habet*). It is not someone merely in authority or in possession of power. The rule maker must have *care* of the community. Note that this formulation is not regime-type specific. It does not require the law be made by a king, or a legislative body or the people at large. The test of legitimacy (that which binds) is that the lawgiver has *care* of the relevant community. There must be a relationship of entrustment and responsibility between the community and the legitimate law giver.

The order of reason must not just exist in the mind of the law giver but must be externalized; it must become word; it must be publicly spoken or “promulgated” (*promulgata*). Although born of reason, law becomes an act of the will not just a product of speculation. Reason gives rise to the act of promulgation.

Having defined law, Aquinas considers the effects of law. Since the second prong of the definition of law is that it is directed towards the common good, the effect of law must be the common good of those subject to the law. Now the common good of man is his “proper virtue” or “that which makes its subject [Man] good.”¹⁶ In order to make Men good, law fixes punishment with respect to three kinds of human acts, those which are intrinsically good (*ex genere* having connotations of birth or generation), intrinsically evil (*ex genere*) or intrinsically indifferent (again *ex genere*). As to the first type of acts, the law orders or commands (*praecipere vel imperare*) these acts be done. With respect to the second the law prohibits (*prohibere*) them. As to those acts neither good nor evil in themselves, the law leaves

¹⁶ *Summa Theologica* I-II Q. 92. Art. 1.

them alone (*permittere*) neither requiring nor forbidding them with the fear of punishment.

Placing together the elements of the definition and effects of law produces an understanding of law as a rule and measure of human acts ordained of reason towards the common good which is promulgated by one who has care of the community and which makes use of punishment to make men good by commanding good, forbidding evil and permitting neutral acts. This definition needs to be applied to the various stories of the house of law to see to what extent they conform. Before looking at individual levels, however, it is necessary to survey the design of the overall structure. How do the pieces fit together?

Gratian begins his *Treatise on Laws* with the following division of the types of law comprising the structure: "*Humanum genus duobus regitur, naturali uidelicet iure et moribus.*"¹⁷ Gratian sheds light on this two part division of law in the first *causa* of this first *distinction* when he quotes Isidore as saying:

Omnes leges aut diuinae sunt, aut humanae. Diuinae natura, humanae moribus constant, ideoque he discrepant, quoniam aliae aliis gentibus placent. 1. Fas lex diuina est: ius lex humana. Transire per agrum alienum, fas est, ius non est.

The passage begins with a differently worded two-part division. Whereas the first division was Natural Law and Custom, the second is divine law and human law. The terms divine or human can be reconciled to the earlier division, Natural Law and Custom. The second phraseology refers to their origin where as the first refers to a representative type of each genus produced by divine or human agency. Huguccio in his commentary on Gratian confirms the divine origin of Natural Law and verbally links this opening to the passage

¹⁷ Gratian, *Decretum* D. 1 ("The human race is ruled by two things: namely natural law and long standing custom").

by Isidore.¹⁸ He also explains that custom (*mos*) is human law (*jus humanum*) which is invented by Man.¹⁹ Isidore says that Divine Laws stand in or are based on (*constant*) nature whereas human law is based on custom. Hence Natural Law has its origin in God and custom is the creation of human law. The Ordinary Gloss on this opening passage explains “natural” law as “divine” and “custom” as “customary law or written or unwritten human law.”²⁰ Isidore further notes since human laws are rooted in customs of nations they can vary from nation to nation and are therefore not universal. The implication is that that Divine Law, rooted in nature, does not so vary. The Divine Law is immutable as it has its source in nature which is universal.

The text then introduces yet another pair of words to identify each of these two categories. First it calls laws of divine origin (that which stands in the nature of things) “*fas*.” This indeclinable Latin word means that which is right or fitting or proper according to the will or command of God.²¹ Huguccio describes *fas* as whatever is

¹⁸ Huguccio, Pisanus, *Summa Decretorum* contained in *Monumenta Juris Canonici Series A Corpus Glassatorium* Vol. 6, page 13 (Biblioteca Apostolica Vaticano 2006) (glossing naturali videlicet jure as “id est divino”); see also Huguccio, *Derivationes*, quoted in Stephan Kuttner, *The History of Ideas and Doctrines in the Middle Ages*, V, 99 (Variorum Reprints 1980) (drawing a similar parallel between positive justice and natural justice, which he calls *fas*, Huguccio claims that *iustitia positiva* has been made by Man whereas *iustitia naturalis* is extended from the effects of nature).

¹⁹ Ibid. at 10 (“*Quo nomine committitur ius humanu, Ibid est ab homine inuentum*”).

²⁰ Ordinary Gloss to *Decretum* D.1 (emphasis added).

²¹ See Charlton T. Lewis, Charles Short, *A Latin Dictionary* (defining *fas* as “belonging to the religious language, the dictates of religion, divine law; opposed to *jus*, or human law”). The following are examples of the use of the word in the Holy Bible: “*audiebant autem eum usque ad hoc verbum et levaverunt vocem suam dicentes tolle de terra eiusmodi non enim fas est eum vivere*” “And they heard him until this word, and then lifted up their voice, saying: Away with such an one from the earth; for it is not fit that he should live” (Acts 22:22). “*contigit autem et septem fratres cum matre adprehensos compelli a rege contra fas ad carnes porcinas flagris et taureis cruciatos*” “It came to pass also, that seven brethren, together with their mother, were apprehended, and compelled by the king to eat swine’s flesh against the law, for which end they were tormented with whips and scourges” (2 Machabees 7:1). “*hii vero qui intus erant confidentes in stabilitate murorum et adparatu alimoniarum remissius agebant maledictis lacescentes ludam ac blasphemantes et loquentes quae fas non est*” “But they that were within it, trusting in the strength of the

“permitted,” “said to be appropriate and good” and “ought to be said to be pleasing.”²² The text then calls all human laws “*jus*.” This is a general Latin term often translated as “law,” but as Kenneth Pennington has argued conveys a rich penumbra of meanings beyond mere legal enactments.²³ It encompasses the sense of that which is right or just in light of human judgment.²⁴ Justinian’s *Digest* contains a general definition of “*jus*” as that which is “always equitable and good (*semper aequum ac bonum*).”²⁵ Cicero in his Letter to Atticus uses the same construction of *fas* and *jus* to refer to all that is right according to divine and human reckoning.²⁶ Natural law (*jus naturale*) and long standing custom (*mos*) thus stand in the opening lines of the *Decretum* as representatives of these two overarching groupings of everything that is right and good from both the perspective of God (*fas*, rooted in the nature of things or Natural Law) and man (*jus*, rooted in human determinations of what is always right or custom). Both sides of this coin of what is right and good must be examined to determine a rule and measure for conduct. Man is ruled by both Natural Law and Custom, *fas* and *jus*. As the text observes, the human law (*lex humanae*) might prohibit something that could be permissible by divine law (*lex divinae*). Passing through another’s field may not be authorized in light of human customs (a country may prohibit it by custom or statute) but may be authorized by Divine Law, *fas*.

walls, and the provision of victuals, behaved in a more negligent manner, and provoked Judas with railing and blaspheming, and uttering such words as were not to be spoken” (2 Machabees 12:14).

²² Huguccio, *supra* note 18, at 20.

²³ See Kenneth Pennington, “Lex Naturalis and Ius Naturale” 68 *The Jurist* 569, 571-573 (2008).

²⁴ See *A Latin Dictionary*, *supra* note 21 (“that which is binding or obligatory; that which is binding by its nature, right, justice, duty”).

²⁵ Justinian, *Dig.*, 1.1.11.

²⁶ Cicero, *Letter to Atticus*, 1, 16, 6. (Explaining how devastating it is to Rome when corrupt men rendered a wrong verdict he says: “*triginta homines populi Romani levissimos ac nequissimos nummulis acceptis ius ac fas omne delere*.” The phrase sums up a complete obliteration of all rightness - “*ius ac fas*.”).

Thus, for a complete understanding of the rule and measure of human action, both groupings of law must be consulted. In this vein, Justinian's *Digest* defines Jurisprudence (the wisdom of law) thus: "*Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*" ("Jurisprudence is the knowledge of divine and human things, and the science of justice and injustice").²⁷ Natural Law is a component of a dual system. To understand Natural Law, one must know it in this context.

As Gratian comments, this two part division of law is itself subdivided into further species.²⁸ This first category of Gratian contains the three types of law which Aquinas calls Eternal Law (*Lex Aeterna*), Natural Law (*Lex Naturalis*) and Divine Law (*Lex Divina*). Before considering the details of Natural Law, the species which stands as a ground work within this genus must be surveyed first.

PART III

Eternal Law – The Foundation

A. The Eternal Law as a Real Law

The Eternal Law (*Lex Aeterna*) is the foundation of all other forms of law. Aquinas defines it as "the plan (*ratio*) of Divine Wisdom directing all actions and movements" to their "due end."²⁹ Eternal Law maintains the entire rational plan (*rationem*) of law. Notice the use of *ratio* by Aquinas. The definition of law requires law to be ordained of reason. The Eternal Law stands in the eternal Reason of God himself. Yet, the Eternal Law is more than pure rationality; it is really a law meeting the definition established by Aquinas. It is a rule as it is "moving all things to their due end."³⁰

²⁷ Justinian, *Dig.* 1.1.10.2

²⁸ Gratian, *Decretum* D.1 C2.

²⁹ *Summa Theologica*, I-II Q. 93 Art. 1.

³⁰ *Summa Theologica*, I-II, Q. 93, Art. 1.

It serves as the “measure of things.”³¹ Since the Eternal Law flows from the Divine Reason of God it is connected with the great mystery of the mind of God. It is thus difficult for our human intellect to express with precision its reality. Aquinas needs several words and images, drawn from the discipline of art, to capture the rich nature of this *ratio divinae sapientiae*.

Just as in every artificer there pre-exists a type of the things that are made by his art, so too in every governor there must pre-exist the type of the order of those things that are to be done by those who are subject to his government. And just as the type of the things yet to be made by an art is called the art or exemplar of the products of that art, so too the type in him who governs the acts of his subjects bears the character of a law, provided the other conditions be present which we have mentioned above (Article 90). Now God, by His wisdom, is the Creator of all things in relation to which He stands as the artificer to the products of his art, as stated in the I, 14, 8. Moreover He governs all the acts and movements that are to be found in each single creature, as was also stated in the I, 103, 5. Wherefore as the type of the Divine Wisdom, inasmuch as by It all things are created, has the character of art, exemplar or idea; so the type of Divine Wisdom, as moving all things to their due end, bears the character of law. Accordingly the eternal law is nothing else than the type of Divine Wisdom, as directing all actions and movements.³²

Eternal Law has the system (*rationem*) of art (*artis*) or exemplar (*exemplaris*) or eternal prototype (*ideae* with its allusions to the Platonic concept). Significantly, all these terms contain the concept of origin, direction and perfection. Each word contains the idea of defining and directing both the end of, and manner in which, a future act or movement is to be done. The analogy to art is strong in this

³¹ *Summa Theologica*, I-II, Q. 93 Art.2 Reply to Obj. 3.

³² *Summa Theologica*, I-II, Q. 93, Art. 1.

passage; Aquinas several times refers to God as an artificer or artist. Before an artist begins to construct his product, he needs an idea (a general nature of what he is to create). The idea identifies what is to be done. The artist then applies an *exemplar*, or style,³³ to guide the nature of the specific representation of the chosen idea. Finally the artist employs a set of skills (art) to execute the idea in the style chosen. It is in this sense that the Eternal Law permeates the universe and all creation. The Eternal Law is the idea of the universe in all its particulars flowing from the mind of God. It contains the end to which all things are directed. It also contains the exemplar or the pattern for the universe, the style each is to use in pursuing that end. Finally it contains the skill or art needed to achieve the particular idea.

It is important to understand in what sense the universe is ruled by the Eternal Law. The Eternal Law, although it is the art, exemplar and eternal prototype of all that exists, provides for the participation of man in causing the particular determinations of each individual act or operation.³⁴ Again the analogy to art is illuminating. Two artists might have the same idea for a painting (of a Madonna and Child). They might even follow the same style or exemplar (that of the school of Raphael) and both have attained the same level of artistic skill. Yet, the individual paintings of each artist flowing from these common determinants will nonetheless be unique. The product, the painting, is caused both by the idea, exemplar and style which govern the product as well as the individual cooperation of the artist with this style, or we might say, the artist's participation in this style. Thus, the individual elements of the created world will exhibit variety and difference but are united by the *ratio* of the

³³ Although Aquinas does not use the word "style," Pauline Westerman has convincingly argued that it is a suitable English word to capture the essence of Aquinas's comparison to art. See Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis*, 26-30 (Brill 1998).

³⁴ See John Rziha, *Perfecting Human Action St. Thomas Aquinas on Human Participation in Eternal Law*, 66-78 (Catholic University of America Press 2009) (Explaining how Aquinas understands that human acts are determined by the Eternal Law as primary cause but human choice as instrumental cause and showing how the Eternal Law really does determine all things but allows for variety in human action).

Eternal Law which directs their due end. "The *exemplar* God has in mind directs the way the world is *and* should be. In short, the world is created in such a way that it is best fitted to these ends. It is because of the directive power of the *exemplar* that it [Eternal Law] can properly be called "law."³⁵

Eternal Law is not just analogically like law; it is truly law. It is a rule and measure of all that is. It prescribes the end of each thing and thereby prescribes that not directed to such end. It contains an ordered system, an *exemplar*, which measures the proportions of all things with respect to their due end. The Eternal Law is ordained of reason, the Divine Wisdom. The Eternal Law is directed to the most common good, the due end of the created universe. It has its origin in He who has care of the community of the universe, God the Creator and Sustainer of all things. Finally, it has been promulgated through the act of creation, that moment when the idea of each thing passed from the *ratio Divinae Sapientiae* where it existed *in potentia* to created reality where it existed *in actualitate*. I believe Aquinas here gives a hint to resolving the apparent paradox that the Eternal Law is really eternal yet has been promulgated through the act of creation. Promulgation, it will be recalled, requires a public utterance of the law.³⁶ Aquinas explains that through Eternal Law "all things have been created" (*per eam cuncta sunt creata*). This phrase echoes Scripture's reference to the role of the Word (*Verbum*), Christ in creation. St. Paul says "*omnia per ipsum et in ipso creata sunt*."³⁷ St. John's Gospel says of the Word "*omnia per ipsum facta sunt*"³⁸ Thus the Eternal Law is really promulgated through the utterance of the Word, by which all things were made.

³⁵ Westerman, *supra* note 33, at 29. Westerman, despite being a legal positivist who ultimately rejects the usefulness of natural law, offers one of the best explanations of Aquinas' understanding of the Eternal Law which she calls the "divine style." She argues that later natural law scholars who did not fully incorporate this idea of the eternal law in their theory erected a natural law theory on an edifice without a foundation.

³⁶ *Summa Theologica* I-II, Q. 90 Art. 4.

³⁷ Col. 1:16.

³⁸ John 1:3.

Having made a reference to the way creation occurs through the Word, Aquinas makes explicit that the Eternal Law is promulgated through the Word (*etiam ipsa lex aeterna verbo ipso exprimitur*).³⁹ Just as all things created by God are expressed (created through the Word (*Dei opera exprimuntur hoc verbo*), so too the Eternal Law is really promulgated through the Word.⁴⁰ Since this Word is a personal name of God (who is eternal), this Word's expression or promulgation of the rational plan of God (Eternal Law) is also eternal. Eternal Law is really a law and is really eternal.

Such an understanding provides an answer to later Natural Law scholars who struggled to understand how the Eternal Law could be a "real" law, *i.e.*, fulfilled the requirement of promulgation in the definition of a law. For example, Suarez concludes that if a law is eternal, it cannot be promulgated⁴¹ since there would be no time before its promulgation. He reasoned that Eternal Law thus could not really be a law. Suarez only sees the later posited Divine Law, which for St. Thomas is a distinct category, as real law; the Eternal Law is not properly speaking a law.⁴² If Suarez had understood the promulgation of the Eternal Law as part of the theological understanding of the Word, this may have resolved his difficulty with the Eternal Law. The promulgation of the Eternal Law occurs through the Word in the same way that the Word is eternally begotten.

Those theories of law which fail to fully accept the Eternal Law as law seem to result in a minimization of Natural Law if not its ultimate rejection. Grotius is famous for the impious hypothesis—that Natural Law could exist even if God himself did not exist or did not order the universe.⁴³ Although Grotius personally may have

³⁹ *Summa Theologica* I-II, q. 93, art. 1, Reply to Objection 2.

⁴⁰ *Ibid.*

⁴¹ Francisco Suarez, "Tractatus de Legibus ac Deo Legislatore," *Selections from Three Works of Francisco Suarez*, II. I., 11 (ed. James Brown Scott and trans. G. L. Williams et. al. Oxford 1944).

⁴² See *Ibid.* at II.IV, 7.

⁴³ Grotius, *De Jure Belli ac Pacis Libri Tres*, Prolog. 11 (1625) ("What we have been saying

accepted the existence of God, his theory either eliminates any Eternal Law or at most minimizes its importance solely to the desire for self preservation and may limit it only to the realm of human beings and not all of creation.⁴⁴ Three centuries later, John Finnis has little place for Eternal Law. He dismisses God's existence as unnecessary to the study of Natural Law early on in his *Natural Law and Natural Rights*.⁴⁵ Finnis does include a brief discussion of the Eternal Law, but it is literally an appendage to his theory. Not only is it placed at the very end of the work, but Finnis concludes that if God and Eternal Law exist they are superfluous to Natural Law and his seven incommensurable goods: "[W]hat can be established by argumentation from the existence and general features of this world, concerning the uncaused cause of the world, does not directly assist us in answering those practical questions."⁴⁶ Finnis also undermines the status of Eternal Law as a real law by eliminating a personal law giver (one who has care of the community). He does not discuss God as a personal being but rather a "state of affairs" which can be conveniently labeled "D."⁴⁷ Without a personal law giver, Eternal Law cannot be a real law. Ultimately, Finnis dismisses any consideration of Eternal Law as irrelevant to understanding the Natural Law: "it [Eternal Law] must not be treated as a theory which could guide investigation and verification of suggested norms in any of the four orders; rather it is a speculation about why those norms whose holding has been appropriately verified or established do hold. . . . [and] the speculation that the norms intelligible to us in any of the four orders are expressions or indications of D's⁴⁸ creative

[about natural law] would have a degree of validity even if we should concede . . . that there is no God or that the affairs of men are of no concern to him").

⁴⁴ Westerman, *supra* note 33, at 136-139.

⁴⁵ John Finnis, *Natural Law and Natural Rights* 49 (Clarendon Press 1980). To be fair, Finnis does not dismiss all consideration of God's existence as irrelevant in itself (*per se*) but as irrelevant to the study and application of Natural Law.

⁴⁶ Finnis, *supra* note 45, at 404.

⁴⁷ Finnis, *supra* note 45, at 387.

⁴⁸ Although Finnis occasionally, and I would add with hesitation, uses the word God, "D" is his general term for referring to God.

plan in no way warrants the further speculation that D's creative plan is understood by us."⁴⁹

Unlike Grotius and Finnis, Aquinas places Eternal Law as a real law at the very heart of his explanation of Natural Law. It encompasses the entire ordering of the universe by determining what makes each thing what it is (by measuring all things) and by fixing each thing's end (setting its rule). It is the source of obligation for as we have seen the Eternal Law fixes the end and the style for achieving that end. As will be discussed, *infra*, Natural Law is about discovering those ends and types. The source of their obligatory nature is located in this foundation of Eternal Law. As St. Thomas says: "Accordingly all that is in things created by God, whether it be contingent or necessary, is subject to the eternal law."⁵⁰ The source of the obligation to conform to the Eternal Law, a question that plagues those who think about law after David Hume, is contained in this nature of Eternal Law as designating the ends of all things. Men have no choice. Men cannot stop being rational or corporeal. They can choose actions which are disoriented; not oriented to the end incorporated in their nature, but they cannot change the imprint of the Eternal Law on them which defines their due end, their style and their art. Just as a builder can build a house either well or poorly, his action is necessarily directed by the personal law giver which lays down the idea and style of building, the architect.

Yet, Eternal Law involves variety within its uniformity. It acts differently upon different aspects of creation. Eternal Law has imprinted on all of nature the principles of action,⁵¹ but different things in nature are imprinted in different ways, depending on whether they are rational or irrational.⁵² To understand this statement, one needs to understand how Eternal Law is imprinted on things. Eternal Law contains direction to the end of each thing in the sense of the idea

⁴⁹ Finnis, *supra* note 45, at 390.

⁵⁰ *Summa Theologica*, I-II, Q. 93 Art. 4.

⁵¹ *Summa Theologica* I-II, Q. 93 Art. 5.

⁵² *Summa Theologica* I-II, Q. 93 Art. 5, Reply to Obj. 2.

of the end, the exemplar guiding the route to that end and the skill to achieve it. Thus, Eternal Law determines the essence of things by determining the end of each thing and the means at its disposal to reach that end. In this sense Aquinas says that although Men can make laws about what Men do, human made laws cannot decide and imprint what makes a Man a Man. “[B]ut what pertains to the nature of man is not subject to human government; for instance, that he should have a soul, hands or feet.”⁵³ The Eternal Law determines the “respective inclinations to their [each creature’s] respective proper actions and ends.”⁵⁴ It fixes what makes a dog a dog and a man a man and by so doing it determines the function and end of each thing. This order is ruled by Eternal Law by imprinting the style on each class of created beings. How is each type of creature imprinted with this style; how does it participate in the Eternal Law? Each will do so differently, depending on its nature. Rational creatures are subject to the Eternal Law in all aspects of their nature, including their rationality. Irrational creatures, by definition lacking rationality, are not imprinted with the Eternal Law in a rational way. Thus, irrational creatures are imprinted with the Eternal Law in that they are moved or propelled by it through instinct. Whereas, human beings are imprinted partly in this way but as they possess an additional attribute, reason, the Eternal Law also imprints through reason or understanding of the Eternal Law. “Consequently, irrational creatures are subject to the eternal law through being moved by Divine Providence; but not as rational creatures are, through understanding the Divine commandment.”⁵⁵ Thus, the way the Eternal Law works in Men is that it “imprints on their minds a rule which is a principle of action.”⁵⁶ This “rule” is imprinted in the nature of Man and Man cannot but be subject to it. However, the rule serves as a principle for choosing action and since

⁵³ *Summa Theologica* I-II, Q. 93, Art. 4.

⁵⁴ *Summa Theologica* I-II Q. 91 Art. 2.

⁵⁵ *Summa Theologica* I-II q. 93, Art. 5.

⁵⁶ *Summa Theologica* I-II q. 93, Art. 5.

human action is a product of the Will of Man, actions are a matter of choice. Thus, rational creatures, unlike irrational creatures, can choose actions that either accord with the rule imprinted on the mind or that do not. A builder's product may or may not measure up to the designs just as Man's actions may or may not measure up to the idea and exemplar set by Eternal Law.

B. The Relationship between Eternal Law and Justice

Before examining further the role of these natural inclinations imprinted by Eternal Law, it is necessary to pause for a moment to reflect again on Aquinas' general definition of law. It differs from a common conception of law. When one hears the word law, the image of a list or system of detailed rules likely comes to mind. Aquinas has not defined Eternal Law in the same way. Eternal Law is a system but not a system of detailed precepts (as in Divine Law). It is a system explaining things as they are. As Brian Tierney has demonstrated in his discussion of Villey's theory of Aquinas on Natural Law, St. Thomas maintains a distinction between law as describing things the way they are and ought to be and law as a set of precepts.⁵⁷ The second sense of the term law seems to dominate later Natural Law thinkers' understanding of all kinds of law to the exclusion of the first. Suarez focuses on law "as binding precepts promulgated to rational creatures only who are directed to a morally good life."⁵⁸ As the centuries have gone by this second concept of law, law as precepts, and not the former, law as that which is and ought to be has come to dominate. The two meanings are related for St. Thomas. Law, in the first sense of the state of affairs that exists and that should exist, produces precepts. The former is necessary to produce the latter. It is in this sense that human laws (as precepts) are derived from the Natural Law principles which in turn are derived from the due ends

⁵⁷ Brian Tierney, *Natural Law and Natural Rights* 23-24 (William B. Eerdsman's Publishing Company 1997).

⁵⁸ Westerman, *supra* note 33, at 82.

contained in the exemplar, idea and type of all laws, the Eternal Law. In this sense, law can be understood both as an objective reality (it exists) and a subjective reaction to that reality (how, in particular, people respond to it). An examination of St. Thomas' definition of *jus* (which as discussed *supra* is that which is just according to the laws of Man as opposed to *fas*) in the *Summa* will assist in understanding this process more fully. St. Thomas considers in depth the meaning of *jus* where he discusses the virtue of Justice. Interestingly many authors who present interpretations of St. Thomas's Treatise on Laws in the *Summa* fail to connect their reading with this later text. The very term *jus*, as we shall see, inextricably connects the idea of detailed laws and the idea of justice.

In Question 57 of the Second Part of the Second Part of the *Summa*, St. Thomas asks whether *jus* is the object of justice. Early in considering this question he dismisses perceptive law (for which he uses the word *lex* which can have the connotation of specific legal enactments) as the object of justice. He says that "law [*lex*] is the object not of justice but of prudence."⁵⁹ *Lex* is thus related to the intellectual virtue of prudence whereas, justice is a virtue of the will. Aquinas highlights the distinction when he concludes that, law is not the same thing as *jus* (*lex non est ipsum ius*).⁶⁰ By this distinction we can see that *jus*, although often translated as "law" is something greater than particular legal enactments and related to the volitional virtue of justice. St. Thomas indicates that the term *jus* has several different, but related, meanings. It is "the just thing itself" (*ipsam rem iustam*)⁶¹ or as Isidore says in a passage quoted by Aquinas "*jus* is so called because it is just [*justum*]."⁶² What is meant by the "just thing itself" or that which is by its very nature just? It is that which is right or correct, *rectitudino*.⁶³ Beyond rightness or correctness,

⁵⁹ *Summa Theologica* II-II Q. 57 Art. 1, Obj. 2.

⁶⁰ *Summa Theologica* II-II Q. 57 Art. 1, Reply to Obj. 2.

⁶¹ *Summa Theologica* II-II Q. 57 Art. 1, Reply to Obj. 1.

⁶² Isidore, Etymologies. v, 2 quoted by Aquinas in *Summa Theologica* II-II Q. 57 Art. 1 *Sed Contra*.

⁶³ *Summa Theologica* II-II Q. 57 Art. 1 ("Sic igitur iustum dicitur aliquibid, quasi habens

“justice implies equality.”⁶⁴ Drawing on his definition of justice in the next question, Thomas understands the object of the virtue of justice to be rendering “to each one his right or due (*jus suum*).”⁶⁵ As is also pointed out in this next article, justice is always in relation to another. Thus, it is not just the way things ought rightly to be in themselves, but right actions in relation to another. *Jus*, as the object of justice, is that which is correct, due and equitable or as John Finnis summarizes “acts, objects and states of affairs, considered as subject matters of relationships of justice.”⁶⁶

Drawing on the *Digest*, Aquinas notes that the original meaning of *jus*, as that which is good and equitable, has expanded to encompass a second sense of *jus* as “the art of goodness and equity.”⁶⁷ Aquinas qualifies this second meaning given in the *Digest* by recasting it as the “art whereby it is known what is just.”⁶⁸ Since, that which itself is just (*jus*) is the object of justice,⁶⁹ we can see the relationship between this art of knowing what is just itself and the definition of justice as “the habit which makes men capable of doing just actions.”⁷⁰ And justice itself is defined in the next article as “a habit whereby a man renders to each one his due (*jus suum*) by a constant and perpetual will”⁷¹ The term *jus* bridges, in a sense, the intellectual and volitional elements necessary to the habit of justice. To have the constant and perpetual will to render to one his *jus*, a person must possess the art of knowing what is correct, and equitable.

The third meaning of *jus* given in the *Digest* is with respect to particular instances of the exercise of this habit of knowing and willing that which is correct and equitable. *Jus* “refers to the place

rectitudinem iustitiae, ad quod terminatur actio iustitiae” “A thing is said to be just, as having the rightness of justice, when it is the end of an act of justice”).

⁶⁴ *Summa Theologica* II-II Q. 57 Art. 2 Reply to Obj. 3.

⁶⁵ *Summa Theologica* II-II Q. 58 Art. 1.

⁶⁶ Finnis, *supra* note 45, at 206.

⁶⁷ Justinian, Dig. 1.1. quoted by Aquinas in *Summa Theologica* II-II Q. 57 Art. 1 Obj. 1.

⁶⁸ *Summa Theologica* II-II Q. 57 Art. 2 Reply to Obj. 1.

⁶⁹ *Summa Theologica* II-II Q. 57 Art. 1.

⁷⁰ *Summa Theologica* II-II Q. 57 Art. 1 *Sed Contra*.

⁷¹ *Summa Theologica* II-II Q. 58 Art. 1.

where justice is administered” and “a man, who has the office of exercising justice, administers the *jus*.”⁷² This most particular meaning of *jus* highlights the connection between *jus* and *lex*. Particular laws (*leges*), which are related to the knowledge of justice through prudence, are “an expression of right [*jus*]”⁷³ *Jus* is the good and right which the virtue of justice compels one to will towards others. The term *jus* signifies both the justice that is to be known through particular *leges* as well as the justice which the will should continually and perpetually desire to render to others.

To understand this relationship between that which is *jus*, and its particular expression, in a *lex*, Aquinas draws on the analogy, used so extensively in the discussion of Eternal Law, a craftsman or artist. “Just as there pre-exists in the mind of the craftsman an expression of the things to be made externally by his craft, which expression is called the rule of his craft, so too there pre-exists in the mind an expression of the particular just work which the reason determines, and which is a kind of rule of prudence. If this rule be expressed in writing it is called a ‘law.’”⁷⁴

In a very subtle way Aquinas has worked out the relationship among Eternal Law, justice and particular law as well as the connection between knowing and willing good, equitable and right actions. *Jus* is the idea, exemplar and art of Justice, just as the Eternal Law acts in such a way for the other forms of law. The Eternal Law fixes the ends (or good) of all created things. *Jus*, as that which is right and equitable in the actions or states of affairs among people, is the idea or end of justice. The virtue of justice is the habit of choosing that which is *jus*, as a consequence of the *jus* having become known through the expression of the *jus* in *lex*. Justice is the imprint of the style or exemplar of the *jus* in *lex*. This virtue is expressed in particular acts of justice, or we could say, particular acts of law. *Jus* can also be said to contain the style for

⁷² *Summa Theologica* II-II Q. 57 Art. 1 Reply to Obj. 1.

⁷³ *Summa Theologica* II-II Q. 57 Art. 1 Reply to Obj. 2.

⁷⁴ *Summa Theologica* II-II Q. 57 Art. 2 Reply to Obj. 2.

achieving the object of justice, by defining *jus* as the art of knowing what to do in relationships with other people—that which is correct and equitable and then forming the habit of doing them. All laws that follow the exemplar of *jus* are particular expressions of the idea of *jus*, and thus when rendered in a particular place are said to be given *in jure*.⁷⁵ This entire discussion is filled with expressions resonating with the language of the earlier discussion of Eternal Law (which used the metaphor of art and God as artificer).

Thus, as St. Thomas argues in Question 57, *jus* and justice are connected; *jus* is the object of justice. The jurist Bulgarus observed that God is the author of justice (*justitia*) whereas Man is the author of human expressions of justice in law (*jus*).⁷⁶ Even though Man is the author of *jus* through law, since *jus* is the object of justice (whose author is God), God is the ultimate authority of *jus*. The *jus* may have its direct authority from Man, but it “has its beginning and continued existence through God.”⁷⁷ That which is good, right and equitable is patterned on or rests upon the Eternal Law of God. As the Eternal Law determines the natures of all things, God determines through the Eternal Law the nature of justice. Justice determines the nature of the *jus*. Laws (*leges*) made by Man have their beginning and existence through God mediated by their particular exemplar or type, *jus*, the object of justice. *Jus* is the exemplar of laws (*leges*) as Eternal Law is the exemplar of all things. The tiny word *jus* thus summarizes and contains an elaborate system of relationships among existence, authority and objects and among God, the Eternal Law, justice, and human law. Further, *jus* establishes a connection between knowing the just (*justitia*) and doing the just thing in a particular case (*suum jus*). By developing his explanation of Eternal Law, Aquinas is able to add a new explanation to the already rich penumbra of meanings surrounding the legal term *jus*.⁷⁸ He

⁷⁵ *Summa Theologica* II-II Q. 57 Art. 2 Reply to Obj. 2.

⁷⁶ Bulgarus, *Materia Institutionum*, quoted in Kuttner, *supra* note 18, at V, 78 (“[S]icut dixi auctor iusticie Deus est, iuris auctor homo est.”).

⁷⁷ Huguccio, *supra* note 18, at 19.

⁷⁸ See Pennington, *supra* note 23.

connects the purpose and meaning of a legal system of precepts to the concepts of justice, equity, goodness, rightness and the Divine plan of order (*ratio Divinae Sapientiae*) in the universe known as Eternal Law. This elusive concept of the *jus* is made clearer by the earlier explanation of Eternal Law serving as idea and exemplar. *Jus* is the particular idea and exemplar for laws which is itself contained within the Eternal Law's idea and exemplar of justice.

Having laid this foundation for law and justice, the analysis can ascend to consider the manner in which what might be called the Eternal *jus* is expressed in particular precepts or rules. This process of particularization of *jus* is the Natural Law (*Jus Naturale*).

PART IV

Natural Law

A. Man's Participation in the Eternal Law

Before turning to the understanding of *jus*, the discussion of Eternal Law ended by establishing that rational and irrational creatures participate in the Eternal Law in different ways and that rational creatures participate by being imprinted with a rule that serves as a principle for choosing action. An examination of the relationship between Eternal Law and Natural Law can build on this consideration. As Aquinas says, Natural Law is nothing other than "the participation (*participatio*) of the eternal law in rational creatures."⁷⁹ Participation, meaning to take part in (*partem capere*), indicates a process whereby one receives and makes his own something belonging to another.⁸⁰ Thus, by his ability to participate in the Eternal Law, a rational creature is both ruled and governed by

⁷⁹ *Summa Theologica* I-II Q 91, Art. 2.

⁸⁰ See Rziha, *supra* note 34, at 9 (discussing one of Cornelio Fabro's insights with respect to participation and using the analogy of water participating in heat when tepid water is heated).

the Eternal Law from above but also takes part in the Eternal Law by the use of reason.

The nature of this participation may be understood by use of the story of Plato's Cave.⁸¹ A group of prisoners are chained in a cave. They watch shadows on the cave wall in front of them cast by people carrying objects behind them. They pass their time speculating about the shadows they see on the wall. One person is unchained and turns around to see the source of the shadows—the light of a fire and the sun illuminating the artifacts being carried. Although the prisoners made use of their reason to speculate about the images they saw on the cave wall, they could not see (until one was turned around) the source of those images. Socrates explains that the light which was causing the shadows represents “the idea of the good” and “the cause for all things of all that is right and beautiful, giving birth in the visible world to light, and the author of light and itself in the intelligible world being the authentic source of truth and reason.”⁸² Even though they are initially unaware of the nature of the source of the light, the prisoners' speculation is directed and guided (ruled) by that source. In this sense they participate in that source. It directs the form of their speculation.

Eternal Law has its source outside of the cave of Man's rational thought but it penetrates into and casts shadows on the cave. Eternal Law rules and measures the use of Man's reason but allows for the participation of that reason in reaching conclusions. If anyone has seen children make shadow figures, one immediately realizes that there is scope for “seeing” different images in the shadow but that scope is not unlimited. Its limits are ruled by the form of the shadow cast.

The use of the power of rationality to consider the shadows cast by the Eternal Law is the participation of Natural Law thought. These shadows illuminate the end of Man which Man is capable of understanding through his reason. Such an insight adds a dimension

⁸¹ Plato, *Republic*. VII.514a-517b (contained in *Collected Dialogues of Plato*, Princeton University Press 1961).

⁸² *Ibid.* at VIII 517b-c.

to the statement that Man is the image and likeness of God.⁸³ As John Finnis rightly points out, Man is not an image of God in the sense of a static photograph⁸⁴ but rather in the sense that the original of the image serves as an exemplar or rule or idea of Man. As Aquinas explains a created thing “approaches that likeness of God more perfectly than if it were only good in itself if it is not only good but also is able to act for the good of others.”⁸⁵ Note, to attain perfection in this rule or measure involves individual action (the ability to do good to others). A few lines later Aquinas comments that although all creation is good singly in its individual nature, “but all creation taken together they are exceedingly (*valde*) good, according to the order of the universe, which is the final and noblest perfection of creation.”⁸⁶ The Eternal Law, the order of the universe, provides the exemplar of Man, the image of God. This image progresses in perfection towards that likeness through actions (ability to do good to others). Natural Law, then, is the ability of humans, as rational creatures, to understand this order of the universe reflecting on and in them, to have a share in the Eternal Reason that promulgated this Eternal Law, and to understand and thus choose actions in accordance with that order.⁸⁷

Aquinas has defined the Natural Law as the participation of the Eternal Law in Man, the rational creature. The Eternal Law sets and illuminates the end of Man and Natural Law involves Man’s participation in achieving this end. The nature of this participation

⁸³ Genesis 1: 26-27; Acts 17:28; Colossians 3: 10; cf. Romans 8: 29.

⁸⁴ John Finnis, “Reason, Revelation, Universality and Particularity in Ethics,” 53 *Am. Jour. Juris.*, 23, 28 (2008).

⁸⁵ Aquinas, *Summa contra gentiles* II, c. 45, n. 4 (“*Perfectius igitur accedit res creata ad Dei similitudinem si non solum bona est sed etiam ad bonitatem aliorum agere potest, quam si solum in se bona esset*”).

⁸⁶ Aquinas, *Summa contra gentiles* II, c. 45, n. 10 (“*Quia singula quidem sunt in suis naturis bona: simul autem omnia valde bona, propter ordinem universi, quae est ultima et nobilissima perfectio in rebus*”).

⁸⁷ Huguccio also links Natural Law with the divine plan for rationality, inclination and the order of nature. Huguccio, *supra* note 18, at 18 (*divine: id est a Deo tradite sine ministro, ut lex naturalis que dicitur ratio et que dicitur instinctus et ordo nature. . . .*”).

is by contemplating the inclinations present in the form of Man as a rational animal.⁸⁸ Natural law consists in the “natural inclinations to proper [in the sense of obligatory] acts and ends” (*inclinationem ad debitum actum et finem*).⁸⁹ Gratian likewise locates the origin of Natural Law not in some detailed enactment but in natural inclinations present in all peoples.⁹⁰ These inclinations, imprinted in the form of Man through which Man can come to know the Natural Law, have their origin in the Eternal Law.⁹¹

The way in which Man has an inclination to proper acts and ends differs from the natural instinct of animals. Although not present in Aquinas's writing this discussion will use the term inclination to refer to the operation of the unique faculty in Man (not present in animals) but instinct to the faculty that operates in other animals. Inclination has a connotation of bending towards something but not necessarily doing so by automatic reflex. For example Cicero uses the term to describe the changing attitude of the Republic when he says “a certain inclination towards a better hope has been seen to come about.”⁹² Earlier in the *Summa* Aquinas distinguished man as rational from irrational animals which are moved only by instinct.⁹³ Animals do not know and choose their ends or their actions. Man on the other hand possesses both natural inclinations (about which he does not have an unrestricted freedom as they just exist in him) and a free will with respect to the pursuit of those ends determined by natural inclinations. He says:

We have free-will with respect to what we will not of necessity, nor by natural instinct. For our will to be happy

⁸⁸ See, *Summa Theologica* I, q. 80, art. 1 (observing that “some inclination follows every form”).

⁸⁹ *Summa Theologica* I-II, q. 91 art. 2 (emphasis added).

⁹⁰ Gratian, *Decretum*, D.1 C.7.

⁹¹ See *Summa Theologica*, I, q. 91, art. 2.

⁹² Cicero, *Orationes: Cum Senatui gratias egit, Cum populo gratias egit, De domo sua, De haruspicum responso, Pro Sestio, In Vatinius, De provinciis consularibus, Pro Balbo* (ed. Albert Clark) XXXI, 67. (“*fieri quaedam ad meliorem spem inclinatio visa est*”).

⁹³ *Summa Theologica* I q. 18 art. 3.

does not appertain to free-will, but to natural instinct. Hence other animals, that are moved to act by natural instinct, are not said to be moved by free-will.⁹⁴

Man in his nature possesses an innate inclination to be happy but his acceptance of this end as an object of action and the choice of means to it are not pre-ordained as the ends of animals are. Now Man possesses two faculties that animals do not. These faculties interact with this natural inclination, the power to know and the power to choose. In explaining the distinction between the operation of instinct in animals and inclination in Man, Aquinas says:

Hence such animals as move themselves in respect to an end they themselves propose [Men] are superior to these [animals]. This can only be done by reason and intellect; *whose province it is to know* the proportion between the end and the means to that end, and duly *coordinate* them.⁹⁵

The operation of the rational nature involves an ability to know what particular actions to undertake and to will (coordinate) those actions. Notice, he does not say Man determines his own ends; these exist by natural inclination. What distinguishes Man from animals is the ability to know that end indicated by natural inclination.

The fact that Man has the ability to know (discern and understand) the natural inclinations implies that he has the ability not to know them. Since he has the mere potentiality to know them, he can fail in actualizing it. The natural inclinations can be confused with other feelings or desires. This is because, in addition to natural inclination, Man also has instincts (in the sense of the sole faculty operative in other animals and inclinations acquired by habit⁹⁶). Irrational animals

⁹⁴ *Summa Theologica* I q. 19 art. 10.

⁹⁵ *Summa Theologica* I q. 18 art. 3. (emphasis added).

⁹⁶ See J. Budziszewski, *The Line through the Heart* 61-77 (ISI Books 2009) (discussing how unnatural inclinations can be acquired and become co-natural).

cannot be confused about the instincts they have; rational Man can confuse instinctive feelings with natural inclinations. If Man were like irrational animals in this respect, there would be no work in the participation in the Eternal Law. Man would just know the ends and automatically do what appears to be a means to that end. Beyond instincts, Man can also develop habits of vice (*i.e.*, ways of acting which are contrary to the natural ends of Man) which can corrupt natural inclinations.⁹⁷ The rational participation in the Eternal Law involves the discernment (knowledge) of the uncorrupted natural inclinations as opposed to the instincts and corrupted inclinations. The work of Natural Law, and a trap for the poor practitioners of it, is to properly separate instinctive feelings (which the reason and will can redirect and control) from the proper natural inclinations of Man. The statement "natural law involves doing what is natural to Man" is laden with potentially dangerous ambiguity. Natural Law is not about merely following innate instinctive feelings but rather orienting them in light of the natural inclination. J Budziszewski coherently distinguishes these two different senses of what is "natural" with the terminology higher and lower nature. He explains:

According to what might be called the lower meaning, the natural is the spontaneous, the haphazard, the unimproved: think of our first parents in the jungle, or for that matter think of the jungle itself. From this point of view a human being is at his most natural when he is driven by raw desires [what I called instinct], "doing what comes naturally," as we say. But according to what might be called the higher meaning, the natural is what perfects us, what unfolds the inbuilt purposes of our design, what unlocks our directed potentialities. This time think of our first parents not in the jungle but in the Garden, or for that matter think of the Garden itself. From this point of view, a human being is most genuinely "doing what

⁹⁷ *Summa Theologica* I-II, q. 85, art. 2 (arguing that the natural inclinations, or the "good of nature," cannot be completely destroyed by vice but can be "diminished").

comes naturally” when he is at his best and bravest and truest—when he fulfills his creational design, “when he comes into his own.”⁹⁸

We might even add to the end of his last sentence “even when doing so requires controlling what instinct causes him to desire.” Failing to recognize these different senses of “natural” and to recognize that the work of participation in the Natural Law is to distinguish and redirect the lower sense has been a great failing of Natural Law critics and some supporters alike. Budziszewski goes so far as to describe this tension between the natural instincts and the natural inclination as the great “scandal” of Natural Law—a scandal that often frightens people away from the fact of Natural Law. He says:

The natural law scandalizes us because our actual inclinations are at war with our natural inclinations, because our hearts are riddled with desires that oppose their deepest longings, because we demand to have happiness on terms that make happiness impossible.⁹⁹

St. Paul seems to be alluding to this very tension when he says: “For the flesh lusteth against the spirit: and the spirit against the flesh; for these are contrary one to another: so that you do not the things that you would.”¹⁰⁰ This war, this scandal within the process of participating in the Eternal Law (this conflict between the natural inclinations and the actual desires or instincts we may feel) is itself not “natural” but a consequence of the Fall,¹⁰¹ as St. Thomas explains:

⁹⁸ Budziszewski, *supra* note 96, at 62-63.

⁹⁹ Budziszewski, *supra* note 96, at 5.

¹⁰⁰ Gal. 5:17.

¹⁰¹ The effects of the Fall provide further proof of the Eternal Law’s status as law. To be law, punishment must follow failure to follow law. When Man acted contrary to the plan of his nature in Eternal Law, the law of the *fomes* became a law of punishment for him. See *Summa Theologica*, I-II, Q. 91, Art. 6.

As a result of original justice, the reason had perfect hold over the lower parts of the soul, while reason itself was perfected by God, and was subject to Him. Now this same original justice was forfeited through the sin of our first parent, as already stated (81, 2); so that all the powers of the soul are left, as it were, destitute of their proper order, whereby they are naturally directed to virtue; which destitution is called a wounding of nature.¹⁰²

As a result of this wounding of nature “the inclination to the good of virtue [the natural inclination] is diminished in each individual on account of actual sin.”¹⁰³ Thus, Men cannot always trust their felt inclinations; are they the natural inclinations, the lower instincts or corrupted inclinations? Men need to use their reason to work to distinguish the natural inclinations placed in them according to the plan of God, the Eternal Law, from other impulses lacking proper orientation. The call of the natural inclination within Man is weaker than it ought to be (it is diminished) as a consequence of actual sin. This conclusion implies that the more one sins the greater the diminishment, which fact accounts for the differing struggles of people in making this critical distinction. This insight answers a challenge to Natural Law. If it exists why do so many people get it wrong; why have Men tolerated evils such as slavery, abortion, genocide if the Natural Law directs otherwise? The answer: Men have been participating in the Eternal Law with a great handicap caused by the effect of sin. There is a shadow obscuring the light cast from the Eternal Law on the mind of Man.

Returning to how Aquinas’s understands this process of distinguishing the natural inclinations from mere instincts, he argues that it involves two faculties. First, there is the act of the intellect; we “discern what is good and what is evil” by “the light of natural

¹⁰² *Summa Theologica* I-II, Q. 85, Art. 3.

¹⁰³ *Ibid.*

reason . . . which is the function of the natural law”¹⁰⁴ Later when Aquinas announces the first precept of the Natural Law, he explains the relation between this knowledge of what is to be done and the second faculty, action: “whatever the practical reason naturally apprehends as man’s good (or evil) belongs to the precepts of the natural law as something to be done or avoided.”¹⁰⁵ We now see the connection between the Eternal and Natural Law; the Eternal Law or order of the Universe fixes Man’s end and illuminates that end through the natural inclinations; the function of the Natural Law is to enable Man to know this end and once known to obligate him to choose actions in accordance with it.

How does Aquinas make the leap from the ability to know what is good to being obligated to do it? The obligation arises from the definition of the “good” spoken of by this first principle of the Natural Law as an end. The “good” is none other than the end of Man, fixed by Eternal Law. Aquinas considers “end” and “good” to be related: “every agent acts on account of an end, and to be an end carries the meaning of to be good.”¹⁰⁶ Good and end are also related to a third concept, being. The end of Man is the correspondence of Man to what he is designed to be by the Eternal Law. Aquinas explains: “the good and evil of an action, as of other things, depends on its fullness of being or its lack of its fullness.”¹⁰⁷ To make the logic explicit, the end of something is defined as the “good” of that thing and something is judged as good to the extent it achieves the fullness of being. Thus, by substitution, the end of something is to achieve the fullness of being which is “good.”¹⁰⁸

But how is this end (this fullness of being, the good) known? Aquinas says: “Consequently the first principle of the practical reason is one founded on the notion of good, viz. that good is that

¹⁰⁴ *Summa Theologica* I-II q. 91 art. 2.

¹⁰⁵ *Summa Theologica* I-II q. 94 art. 2.

¹⁰⁶ *Summa Theologica* I-II Q. 94 Art. 2.

¹⁰⁷ *Summa Theologica* I-II Q. 18 Art. 2.

¹⁰⁸ See Rziha, *supra* note 34, at 36 (“Thomas argues that although humans make a distinction between goodness and being in their knowledge, they are the same in reality”).

which all things seek after.”¹⁰⁹ All things by virtue of the imprint of the Eternal Law seek after their natural type, exemplar or idea. The definition of what Man is contains the definition of Man’s end. As Professor Maria T. Carl states:

St. Thomas holds that good and being are really the same, although they differ in their concept of notion (*secundum rationem*) or in thought in that they are not predicated of a thing in the same way. Being signifies that something is, either absolutely (*per se*) as a substance is, or relatively (*per aliud*) as an accident is. Goodness expresses actuality and perfection, and ultimately goodness expresses the complete actuality of a being.¹¹⁰

Man is obligated to do good in the sense that Man is obligated to be himself. Goodness is the perfection (fullness) of Man’s very existence. Recently, Pope Benedict XVI echoed this connection between Natural Law and “being” when he defined Natural Law as “the ethical message contained in being.”¹¹¹ Hence, the relationship between the properly discerned natural inclinations and goodness lies in the fact that Man is inclined to be what he is. Men thus desire, or are inclined towards, the good, the complete or perfect actualization of their being (which is not equivalent to their instincts). In this sense, Man cannot help but be obligated to do good because he cannot help but be what he is. How he knows this fact about himself, is another matter, but the sense of obligation has been located in existence as established by Eternal Law.

¹⁰⁹ *Summa Theologica* I-II q. 94 art. 2.

¹¹⁰ Maria T. Carl, *The First Principles of Natural Law A Study of the Moral Theories of Aristotle and Saint Thomas Aquinas*, 149-150 (Doctoral Dissertation Marquette University December 1989), available at <http://epublications.marquette.edu/dissertations/AAI9014051/>.

¹¹¹ Pope Benedict XVI, *Address to the International Congress on Natural Moral Law*, February 12, 2007, available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben_xvi_spe_20070212_pul_en.html.

Aquinas has defined the object of this natural inclination of Man as “the will to be happy.”¹¹² Professor Carl explains:

St. Thomas distinguishes two senses of happiness, perfect or supernatural and imperfect or natural. His notion of imperfect happiness, the happiness which can be attained in this life, is a complex concept which explicitly accords with Thomas’ understanding of Aristotle’s definition of happiness. . . . Final and perfect happiness consists in the direct and immediate contemplation of God, which is attainable only through grace in the afterlife. . . . St. Thomas is clear that the natural law is ordered to man’s natural end and is thus inadequate to direct man to his supernatural end. . . .¹¹³

Although Professor Carl is correct that the Natural Law is directly operative in relation to the imperfect or natural end of Man, her conclusion may fail to recognize a connection between these two ends. Although the Natural Law is inadequate to attain the supernatural end of Man, it is still necessary to attain that end. One might say the Natural Law is directly oriented to the imperfect happiness but proximately oriented to the perfect. Although the relationship between the Natural and Divine Law requires further elaboration, for now it is sufficient to note that there is a relationship between the natural and the supernatural. The two ends of Man are not disjointed ends of separate roads; the supernatural end subsumes the natural end and thus the Natural end is related, as a part to the whole, to the supernatural end. Similarly, Gratian when defining Human Law explains that it consists in laws established by men “for divine or human reasons.”¹¹⁴ Likewise, Gratian explains that human-made laws “will be all that reason [which term we have seen is an aspect of the Natural Law] has already confirmed – all at

¹¹² *Summa Theologica* I q. 19 art. 10.

¹¹³ Carl, *supra* note 110, at 153-155.

¹¹⁴ Gratian, *Decretum*, D.1 C.8.

least that is congruent with religion, consistent with discipline and helpful to salvation.”¹¹⁵ Thus, the natural end of Man, recognized even by Aristotle, is not disconnected from the supernatural end but is a necessary component of it. Although Natural Law is directly related to the natural aspect of the end of Man it is indirectly related to the supernatural.

Aquinas’ understanding of this first principle of the Natural Law, good ought to be done, can be restated as what is consistent with what Man is on a natural and then supernatural level ought to be done. This understanding is consistent with the way both Gratian and earlier Roman Law scholars understood the basic precept of Natural Law. In the opening of the *Decretum*, Gratian sums up Natural Law as the Golden Rule: Do to others what you want done to yourself and do not do to others what you do not want done to yourself.¹¹⁶ Since what everyone wants (in the sense of is naturally inclined to) is the good, the perfection of his nature, the Golden rule commands “do” what the Natural Law says we ought want to be done, the good; avoid the opposite. What Man wants done to him, is associated with what Man is. This connotation is stressed by the common gloss on the text which says “interpret wants as ought to want.”¹¹⁷ This gloss emphasizes the objective nature of inclinations and hence the Golden Rule. It is not do unto others what one subjectively may feel he wants done but what he ought to want done which is *jus suum*. The Digest contains a text from Ulpian stating this same first principle of the Natural Law when he defines the basic principles of *jus* as “to live honestly, to not injure other people, and to render everyone their due (*jus*)”.¹¹⁸ Again, the ideas all tie to back to doing good, consistent with the exemplar of human nature as established by Eternal Law. The *Digest* includes in the notion of *jus* that which is always “good and equitable” which is

¹¹⁵ Gratian, *Decretum*, D. 1 C. 5.

¹¹⁶ Gratian, *Decretum*, D.1

¹¹⁷ Ordinary Gloss to *Decretum* D.1.

¹¹⁸ Justinian, *Dig.*, 1.1.10.1

thus *jus naturale*.¹¹⁹ Aquinas, Gratian and the Digest's definitions of Natural Law thus accord with one another in their substance.

Since the obligation to do good and avoid evil (Thomas's first precept of the Natural Law) is obligatory because it is a function of being, the next level of precepts necessarily must serve as a definition of "good" based on the being of Man. As Ana Maria Gonzales has said "the reference to good, at the principle level, involves a reference to a not yet specified content."¹²⁰ Since the "good" is a function of the nature of things; it is what all things seek after or are inclined towards by their nature, the content can be specified by considering what all things seek after. Put another way, the content summarized by "good" can be found by considering the essence or being of Man as Man, in all his hierarchy of capacities. The good must be broken down into more precise statements relating to the various aspects of Man's existence. Gratian and St. Thomas contain two very similar lists of the next level of detail of the Natural Law (beyond do good and avoid evil.) Gratian includes the following list composed by Isidore:

The union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things that are taken from the heavens, earth or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force.¹²¹

This list of things according to Isidore are held to be "natural and equitable (*naturale equumque*").¹²² This last phrase has resonances of one of the definition of the term *jus* from the *Digest*. Its substitution of the word "natural" for "good" is consistent with St. Thomas's

¹¹⁹ Justinian, *Dig.*, I.1.11

¹²⁰ Ana Maria Gonzales, "Natural Law as a Limiting Concept: A Reading of Thomas Aquinas," *Contemporary Perspectives on Natural Law* 24 (Ashgate 2008).

¹²¹ Gratian, *Decretum*, D.1 C.7.

¹²² *Ibid.*

relation of natural being to the good. That which exists by nature (*naturle*) is what is good (*bonum*).

Aquinas' list of the second tier of general principles of the Natural Law although substantially similar, contains some important differences:

Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, "which nature has taught to all animals" [Pandect. Just. I, tit. i], such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination."¹²³

Many of the specific precepts included by Aquinas are identical to those in Isidore. St. Thomas, however, adds two important aspects. First, St. Thomas gives an indication of how these principles are proven to be part of the Natural Law. Second he introduces an ordering or hierarchy.

¹²³ *Summa Theologica* I-II Q. 94. Art. 2.

St. Thomas explains that Man is actually a composite of different natural aspects. The good can be defined as a composite construction of the various principles derived from these individual aspects. The inclinations to which each aspect gives rise can be identified. First, St. Thomas identifies that Man, like all other living substances is alive and is inclined to remain alive. Thus the first principle of this second tier of Natural Law is: do “whatever is a means of preserving human life” and avoid “its obstacles.” In addition to being a living substance, Man is an animal. All animals are inclined to undertake acts which lead to the pro-creation of more like themselves and to the extent consistent with their particular form care for their young. As man is a rational animal, capable of being educated, this inclination includes for man the “education” of children. Next, Man is distinguished from animals by the presence of a rational soul, one that can know and choose. This dual aspect of Man’s soul leads to two more objects of good, knowledge of truth and willed action consistent with man’s social nature. The attribute of an intellect makes man capable of, and therefore suited to, knowledge of the truth. Secondly, Man’s ability to think about and then choose actions makes Man, in the words of Aristotle “a social and political animal.”¹²⁴ Irrational animals can live in groups but their interaction is governed by instinct, irrational desire. Man is capable of, and therefore suited to, comprehending the implications of his interactions and capable of choosing among a range of possible interactions. This aspect of Man’s nature, unique among animals, makes man both social (coming from *societas*, a chosen association or community of people) and political (again an association which is willed). Finally, Aquinas adds to these natural aspects of Man’s nature, the supernatural ability to know not only the truth about the material world but to “know the truth about God.”

This last aspect of this definition of the “good” serves as the bridge between the natural and supernatural ends of Man.¹²⁵ Much

¹²⁴ Aristotle *Politics* I.

¹²⁵ Budziszewski uses the image of the mezzanine level of a house to describe this

has been discussed over the centuries about Aquinas' conception of the relationship between and separation of the natural and supernatural spheres. I do not intend to engage in that question directly but only wish to note that at least with respect to Natural Law Aquinas clearly sees a relation between Man's natural end and his supernatural end, *beatitudo*, knowledge of God. Thus, although Aquinas understands that complete knowledge of God requires supernatural virtues and grace (which are beyond the reach of Natural Law), some knowledge of God is suitable to human nature. Thus, he presents five proofs for the existence of God in the *Summa* which are based completely on the use of natural reason (not on any supernatural revelation). Although many aspects of the nature of God are unknowable by unaided human reason (i.e. the Trinitarian nature of God), God's existence, his role as uncaused cause of the material world, etc. are accessible by the use of natural reason and obligatory under the precepts of Natural Law. In fact, Man has an inclination to know about these ultimate questions of origin. The connection between natural knowledge of God and supernatural knowledge is analogous to the relationship between Eternal and Natural Law. Man does not know the Eternal Law directly in its entirety. As we have seen, the Eternal Law is the Divine Reason itself, thus beyond Man's natural reason. But Natural Law has been defined as the "participation" of Man in the Eternal Law. Thus, Natural Law, as its very name suggests, functions on the level of the natural world (in Man's natural rational capabilities) but it touches the supernatural in that it is a participation in the Eternal Law.

The second addition by St. Thomas to the list of precepts is an imbedded notion that they exist in a hierarchy. The list is not a random list of elements of the aspects constituting the good. It is an ordered hierarchical structure of definitions. Unfortunately, John Finnis feels compelled to depart from Aquinas's understanding of the good as corresponding to the hierarchical nature of Man's essence. For Finnis, the definitions of the good (which he calls

the basic goods) are comprised of unrelated elements as they are incommensurable.¹²⁶ Although Finnis cannot deny that Aquinas lists the elements of the good in a threefold hierarchy, as with Eternal Law, he dismisses the ordering as irrelevant, a “questionable example” which “plays no part in his [Aquinas’s] practical (ethical) elaboration of the significance and consequences of the primary precept of natural law.”¹²⁷

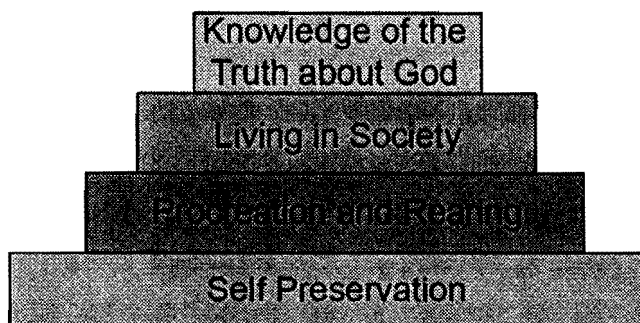
Possibly, Finnis’ hostility to the hierarchical definition of the elements defining the “good” results from a particular visualization of hierarchy. The image of hierarchy Finnis may have in mind might be a product of the Positivist notion of legal hierarchy, such as the Supremacy Clause of the U.S. Constitution. Hierarchy, from this perspective, is a method for determining whose will wins. The top of the hierarchy gets to obliterate or supersede the will of the lower level. “The will of the Prince has the force of law” and it nullifies the will of a lower level. In the American system, a federal statute is supreme over that of a state or municipality. Hierarchy in this sense implies power and victory of the higher level over the lower.

An alternative understanding of hierarchy, which St. Thomas likely had in mind, is necessary to understand the way Aquinas speaks of the hierarchy of the precepts of the Natural Law. Hierarchy can involve not the victory of one thing over another but the enlargement of the lower levels within the higher. Each higher level does not take priority over the lower but rather contains the lower levels within itself plus something additional. Architecturally, one may picture a hierarchy as a pyramid which implies a narrowing as the hierarchy is ascended. Alternatively, the image of an inverted pyramid more accurately portrays this second type of hierarchy. Thus the narrowing and enlarging notions of hierarchy can be constructed thus:

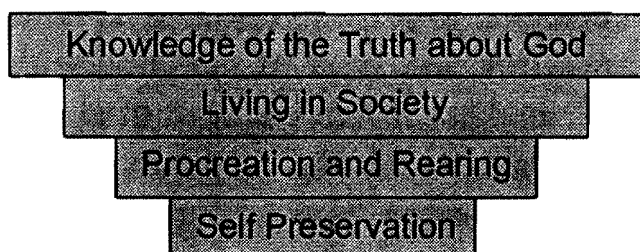
¹²⁶ See Finnis, *supra* note 45, at 92-95.

¹²⁷ Finnis, *supra* note 45, at 94.

Hierarchy as Narrowing



Hierarchy as Incorporating Lower Levels



An understanding of the nature of Man as Aquinas sees it clarifies the relationship among the elements of the hierarchy of the good required to be done by the Natural Law. For Aquinas, Man is on a higher level of being than other animals (occupies a higher position in the hierarchy). Yet, Man is not in opposition to animal but rather animal is contained within the definition of Man.¹²⁸ Man is a *rational animal*. The higher order, Man, in addition to his unique rationality, contains the lower attributes of irrational animals, which include inclinations to pro-creation and care of offspring. For Finnis, admitting a hierarchy of elements of the good may necessitate choices among them.¹²⁹ It would entail a moral system where one resolved conflicts by choosing between conflicting goods, choosing knowledge in opposition to preserving life. Although Finnis concedes that people can and should subjectively order their commitment to one or more of the basic

¹²⁸ *Summa Theologica* I-II, Q. 94, Art. 2 and I, Q. 2, Art. 1.

¹²⁹ See Finnis, *supra* note 45, at 92-95.

goods,¹³⁰ he maintains that “there is no objective hierarchy amongst them;”¹³¹ they are incommensurable.¹³² He may be concerned that a hierarchy necessitates moral rules which choose one element in opposition to the other or where one element can become merely instrumental to the higher ranked element.¹³³ Such a moral system would result in choosing to pursue knowledge and destroy life since knowledge is higher than life in the hierarchy. This may be what Finnis means when he suggests that a hierarchical commensuration of the elements of the good results in fanaticism.¹³⁴

Yet, hierarchy understood as the inverted pyramid where each higher level contains the lower, can never involve an imperative to do something furthering an aspect of the good which necessitates the destruction of another lower element of the hierarchy since the higher good contains within its very own definition the lower. Remembering that for Aquinas “end” and “good” are self referential, he explains this relation among the hierarchical ends of man in his commentary on Aristotle’s *Ethics* thus:

There are also, it seems, many degrees of ends. Some of these we choose purely for the sake of something else, riches, for instance, which are sought for their utility in human living. . . . All such instruments are ends sought merely because of their usefulness. It is obvious that such ends are imperfect [incomplete]. The best end namely the ultimate end, must be perfect [complete]. Therefore if there is only one such end, it must be the ultimate end we are looking for. If, however there are many perfect ends, the most perfect [complete] of these should be the best and the ultimate.¹³⁵

¹³⁰ See, *Ibid.* at 93.

¹³¹ See, *Ibid.* at 92.

¹³² *Ibid.* at 93.

¹³³ See *Ibid.*

¹³⁴ See *Ibid.* at 110.

¹³⁵ Aquinas, *Commentary on the Nichomachean Ethics*, I Lecture IX, 110 (Dumb Ox Books 1964). I have placed the word “complete” after perfect as a reminder that for Aquinas

Thus a command to do the highest ranked good must be a complete end which contains within it the incomplete ends. Aristotle expresses the concept thus: “we reach the conclusion that the good of man is an activity of the soul in conformity with excellence or virtue, and if there are several virtues, in conformity with the best and *most complete*.”¹³⁶ The best end necessarily contains within itself all of the other elements of the hierarchy of the definition of that end since to be the best it must be the most complete. In this way one could never say that the injunction to do the good identified as procreation could require one to choose to kill (violate the good of the lower good of preservation of life) because contained within pro-creation is the element of life preservation which is a lower order (less complete good). For example, complying with the highest element of the hierarchy to know the truth about God can never involve a requirement to violate the precept to preserve life. Thus, if one concluded that one will know the truth about God only after this life and thus concluded he should commit suicide so as to further this inclination, this conclusion would be checked by the fact that the element of the good called knowledge of the truth about God contains within it the preservation of human life thus it would be a violation of the very element of knowing the truth about God to take one’s life (since not taking life is part of the element of knowing the Truth about God).

This proper understanding of the hierarchy of the second tier specifications of the good not only conveys the idea that each higher level contains the lower orders but also indicates a directional movement, or rule. Recall that Aquinas has defined the “good” commanded by the first principle of the Natural Law both as the “end” of Man (his fullness of being) as well as “that which all things seek after.” The cognitive and volitional elements have been combined. The good involves knowing the end and seeking after it or moving towards it. Aquinas combined these two elements in a passage in *De Veritate* when he said:

perfection means completeness or fullness of being.

¹³⁶ Aristotle, *Nicomachean Ethics* I, 1098a7-18 (emphasis added).

Since the essence of good consists in this, that something perfects another as an end, whatever is found to have the character of an end also has that of good. [The first element of good is that we know it by that which equates to its perfection or its end.] Now two things are essential to an end: it must be sought or desired by things which have not attained the end and it must be loved by things which share the end, and be as it were enjoyable to them. [the inclination shared by Men or that which all things seek after.]¹³⁷

As Aquinas argued in the *Commentary on the Nichomachean Ethics* quoted *supra*,¹³⁸ when faced with a hierarchy of ends we should be ruled by the most complete of those ends, the end which contains all the lower order of ends. Thus, the inclination of Man directs him ultimately upward in the fullness of being towards a higher end. A higher good is to be chosen over a lower good not in the sense of in opposition to but in that by so choosing the higher we choose both the higher and the lower. Thus, the first principle of the Natural Law also contains a rule of direction in decision making oriented towards higher and eventually the ultimate and complete good.¹³⁹

Some conclusions about the content of the principles of the Natural Law can be drawn from this hierarchy of goods or ends. The first principle of the Natural Law contains the precept to “do good.” Good is defined as an end directing action. Based on these premises, Aquinas concludes that the Natural Law commands all virtuous acts, acts that are directed towards the hierarchic ends of Man. As he says:

Thus all virtuous acts belong to the natural law. For it has been stated that to the natural law belongs everything to

¹³⁷ St. Thomas Aquinas, *De Veritate* 21, 2 (Rome 1970).

¹³⁸ See text accompanying note 135, *supra*.

¹³⁹ For a good discussion of this understanding, see Westerman, *supra* note 33, at 47.

which man is inclined according to his nature. Now each thing is inclined naturally to an operation that is suitable to it according to its form: thus fire is inclined to give heat. Wherefore, since the rational soul is the proper form of man, there is in every man a natural inclination to act according to reason and thus is to act according to virtue. Consequently considered thus, all acts of virtue are prescribed by the natural law: since each one's reason naturally dictates to him to act virtuously.

Again the interconnection of being (form), inclination to an end and reason are evident. Since Natural Law obligates Man to act always in accordance with his end or that which is good in light of his nature, all acts of virtue are prescribed by the obligation to do good.

The other half of the first precept is the mirror image of the first—"avoid evil." Thus the command to do always what is good contains the opposite command to avoid that which is contrary to the hierarchy of the ends of Man. Thus both Aquinas' and Gratian's primary definition of the Natural Law contains a command and prohibition—Do good and avoid evil¹⁴⁰ and do unto others as you would have done to yourself and avoid doing to others what you would not want done to yourself.¹⁴¹ Gratian's use of the Golden Rule form of this precept emphasizes its connection to nature and natural inclination. Man is inclined as Aquinas would say to what is good for Man, in accordance with his form and proper ends. Thus what Man is properly inclined toward is what he ought to want done unto himself and what he ought to do to others.

¹⁴⁰ *Summa Theologica* I-II Q. 94 Art. 2

¹⁴¹ Gratian, *Decretum* D.1.

PART V

Conclusions

Stepping back from the specifications of the edifice of laws, what can be said about the relationship between the foundation, Eternal Law, and the frame built on it, Natural Law? First, Eternal Law and Natural Law really are law; they are not, as John Finnis claims, "only analogically law."¹⁴² It is not in the form of Title 3, Chapter 12 sub paragraph 4 etc. But the form of verbosely written laws with which moderns have become all too familiar is not essential to the definition of law. Positivism has limited the nature of law to sets of arbitrary, detailed precepts promulgated by one with power to do so. For classical Natural Law thinkers like St. Thomas, law (in the sense of *jus*) is a much richer, broader concept. Beyond precepts it includes the idea or the exemplar of that which is always good, right and equitable. The idea of law is the exemplar of the just thing itself. It is in this way that law is understood as a rule and measure. The Eternal Law, in which rational creatures participate through the Natural Law, is a real law. It is "the act of God's practical reason commanding all creation to act for its divinely appointed end."¹⁴³

With this understanding of *jus* in mind, *jus naturale* is really a rule and measure of willed action determined by the Eternal Law. It is a rule because its principles are the exemplar of the proper end of action. It acts as a directing rule because its principles identify and elucidate the hierarchy of ends of Man's nature flowing out of the Eternal Law. In light of these ends Men can measure to what extent

¹⁴² Finnis, *supra* note 45, at 280. In this quotation Finnis is only speaking of Natural Law, not Eternal Law. Given his dismissal of Eternal Law at the end of the book I doubt he would disagree with applying this phrase to it as well. Also, in certain contexts, Finnis might consider some principles of Natural Law as real law but I believe in the context of the discussion where he uses this phrase (the relationship between Natural Law and positive law) he clearly does not consider Natural Law to function as a real law in conjunction with positive law.

¹⁴³ Rziha, *supra* note 33, at 34.

proposed courses of action are oriented towards or in opposition to one or more of those ends. As a rule a principle such as preserve human life, exists to guide decision making by providing a goal or end. It serves to measure the advisability of a proposed course of action in light of the good embodied in it. Thus, if it is proposed that elderly people should be euthanized to save money for the healthcare system, this does not measure up to the end of preservation of life as a rule.

Eternal and Natural Law have also been promulgated by one having care for the common good of the community. As a universal law the community affected is all of Mankind. He who promulgated the Eternal and the Natural Law participation in it is the One with ultimate care for this community, its Creator. Natural Law is concerned with the common good of that community as its principles address the common ends (or good) of all members of that community, Men. The Natural Law has really been promulgated by God through the Eternal Law which itself has been promulgated through the mystery of the Word. Natural Law participates in the recognition of the imprinted natural inclinations by the rational faculty of Man. The Eternal Law which fixes the ends (or good) of Mankind is made temporal and concrete in the rational mind of Man to the extent it participates in this order by recognizing the imprint of Eternal Law.

This participation is not without difficulty. Due to the Fall, Man labors under the difficulty of seeing natural inclinations through the shadows of other instincts and affections. This discernment resides in the intellect, for it is here that the Eternal Law has made its imprint. This intellectual act of discerning the natural inclinations and their resulting hierarchy of ends gives rise to an act of the will, the choice of action.

Understanding the relation between intellect and will in this theory of Natural Law returns an important balance to the process of thinking about the making of human laws. After centuries of Legal Positivism, law making is generally associated with an act of

the will. A law is a law because it has been willed by the applicable legislator. The alternative vision places a striking emphasis on the intellectual capacity of the soul. The participation of Natural Law requires the intellectual act of discerning amidst the shadows of inclinations the natural inclinations, identifying the ends to which they tend, and drawing correct conclusions from them. Clearly Natural Law involves volition; its first precept is that "good must be done." Yet, complying with "do good" presupposes an intellectual activity of discerning what is good or what is an end. Natural inclinations do not point to any end but "towards a proper act and end" (*ad debitum actum et finem*).¹⁴⁴ The process is analogous to the act of building a house, which presupposes knowledge about what properly constitutes a house. Loss of attention to the intellectual prerequisite to the process of law making has resulted in a philosophy and a legal system rooted in power manipulation and coalition forming. Modern law is all about exercising power. A law can be shown to be rational because it is internally consistent; it is actually directed to whatever end the will of the legislator, or the will of those he represents, has chosen. Natural Law involves demonstrating not only internal consistency but also that the end of the law is inclined to a due end contained in the idea and exemplar of the blueprints of the Eternal Law.

Yet constructing Natural Law on this foundation of the Eternal Law raises a fundamental question. Natural Law theory embodied in Gratian and St. Thomas is an entire metaphysical system of law. It is a grand design of law. Natural Law rests on the foundation of the Eternal Law. The natural inclinations towards the good (or ends of Men) bind Men to rule and measure decisions in light of them because those natural inclinations have been fixed and promulgated through the Eternal Law. The obligatory nature of Natural Law is connected to the process of the rational participation in the Eternal Law, the attempt to conform the order of Man's mind to the order of its reality. Men cannot help but participate in the Eternal Law

¹⁴⁴ *Summa Theologica* I-II, q. 91 art. 2.

as it is imprinted in their very being. Men can participate well or poorly but their rational nature makes Men inextricably bounded by the Natural Law which itself is ruled by the style of the Eternal Law. This great question therefore can be phrased: "Is the Natural Law of any practical relevance to one who does not acknowledge God's existence?" Put more parochially, can an atheist talk about and accept Natural Law? Are arguments of Natural Lawyers of no use in an atheistic age?

The answer to this question is qualified. In one sense the answer is no. The Natural Law is utterly dependent upon the entire grand design of an edifice of law of which it is a part.¹⁴⁵ One cannot ultimately explain the obligatory nature of Natural Law without eventually some reference to the foundation on which it rests. "If they [laws] be just, they have the power of binding in conscience from the eternal law, whence they are derived."¹⁴⁶ Thus, the obligatory nature of all law is rooted in the foundation of the Eternal Law. To the extent a law is derived correctly through the process of participation in the Eternal Law, it is obligatory. If the Eternal Law is struck out from the system, Natural Law is a loose frame, floating in space. The foundation of its obligation has been severed. When thinkers like John Finnis dismiss God's Will (expressed through the Eternal Law) as the ultimate source of obligation,¹⁴⁷ all that remains is a justification of obligation which bears an air of utilitarianism. Law is obligatory because we need it to be. The ultimate source of obligation for Finnis lies in the following principles: "that the common good is to be advanced, that authoritative determination of co-ordination problems is for the common good, and that legal regulation is (presumptively) *a good method of authoritative determination*."¹⁴⁸ Law is obligatory because it is a good (useful)

¹⁴⁵ *Summa Theologica*, I-II, q. 19, art. 4 ("It is from Eternal Law . . . that human reason [*i.e.*, Natural Law] is the rule of the human will").

¹⁴⁶ *Summa Theologica* I-II, Q. 96, Art. 4.

¹⁴⁷ John Finnis, *supra* note 45, at 342-343 (dismissing the notion of obligation in God's Will as "conceptually misdirected").

¹⁴⁸ *Ibid.*, at 335 (emphasis added).

method for solving co-ordination problems.¹⁴⁹ Even Finnis acknowledges that this need based justification for law's obligatory force leaves questions unanswered.¹⁵⁰ When Natural Law theory is rooted in the Eternal Law, principles of Natural Law are recognized by the use of reason but are obligatory because they are contained within the Eternal Law.

Yet, the understanding of legal obligation rooted in the foundation of Eternal Law does not lead to legal obligation becoming mere "mechanics"¹⁵¹ as it may in extreme voluntarist theories of legal obligations. As this Article has shown, the Will of God expressed in the Eternal Law is "the plan of Divine *Wisdom*."¹⁵² Thus, a theory of Natural Law rooted in the Eternal Law is inextricably connected to both reason (Eternal Law is the plan of the Divine Wisdom) and an act of the will (in the promulgation of the Eternal Law).¹⁵³ Natural Law is obligatory because it is the participation in a higher law, a law of reason promulgated by the command of an ultimate lawgiver. Severed from Eternal Law, explanations of the obligatory aspect of Natural Law ultimately end at an unsatisfactory and incomplete utilitarian argument of some sort. Thus, it would seem that it is impossible to discuss Natural Law without reference to at least some understanding of the rational Divine lawgiver.

¹⁴⁹ Certainly Finnis' understanding of the common good is much more nuanced and encompassing than utilitarian notions of utility and preference. Finnis' argument is not therefore strictly speaking utilitarian; yet its source of ultimate justification bears similarity to utilitarian logic. Law is obligatory because it works, not because it conforms to the way the Divine artificer intended it.

¹⁵⁰ *Ibid.*, at 343.

¹⁵¹ *Ibid.*, at 342.

¹⁵² *Summa Theologica*, I-II, Q. 90, Art. 3 (emphasis added).

¹⁵³ For Aquinas, the act of commanding (promulgating a law) is an act of reason; yet this act of reason itself involves an act of the will. See *Summa Theologica* I-II, Q. 17, Art. 1. ("Command is an act of the reason presupposing, however, an act of the will."). When considering whether law is an act of the reason or the will, St. Thomas concludes it is an act of the reason yet references this earlier discussion as a reminder that this act of the reason in commanding presupposes an act of the will as well. See *Ibid.* at I-II, Q. 90, Art. 1., Reply to Obj. 3.

Yet, the rational nature of Man means that he cannot, in a certain sense, help but participate in the Eternal Law (by being rational). Whether he is aware of it or not, the “natural guide of reason impels towards that which is contained in the law of God.”¹⁵⁴ Thus, even one not acknowledging God (and hence the Eternal Law) if following the natural guide of reason¹⁵⁵ is participating in the Eternal Law. The denial of God’s existence may affect one’s ability to observe and consider the natural inclinations, but it does not obliterate them. Even if he does not turn around and see the source of the shadows cast by the Eternal Law in the cave of rationality, a Man is still able to consider what the shadows, as shadows, mean. He may not know the source of light causing them; yet he sees them nonetheless. As St. Thomas says:

[S]ince all things . . . are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends.¹⁵⁶

By making use of reason to discern the ends illuminated by the natural inclinations one is participating in the Eternal Law. As the example of Aristotle shows, even without revelation or a clear articulated understanding of Eternal Law, human rationality can arrive at certain principles and conclusions of the Natural Law. As Scripture affirms the Natural Law is available to all (even those who have not heard the specific revelation of the Artificer of the Eternal Law. “For when the Gentiles, who have not the law, do by nature those things that are of the law; these having not the law are a law to themselves: Who shew the work of the law written in their

¹⁵⁴ Huguccio, *supra* note 18, at 19 (“*quia ad ea que in divino iure continentur naturalis ductus rationis . . . impellit*”).

¹⁵⁵ “*Naturalis ductus rationis*” is a phrase used by Huguccio to describe the natural law. See e.g., Huguccio, *supra* note 18, at 19.

¹⁵⁶ *Summa Theologica* I-II, Q. 91, Art. 2.

hearts, their conscience bearing witness to them. . . .”¹⁵⁷ The law written on the heart, the natural inclinations, is the starting point of all reasoning. This is because all rationality begins with what is known naturally. As St. Thomas explains early in his *Treatise on Laws*:

Every act of reason and will in us is based on that which is according to nature . . . for every act of reason is based on principles that are known naturally. . . . Accordingly the first direction of our acts to their end must needs be in virtue of the natural law.¹⁵⁸

Men begin reasoning by examining what is known naturally. They hence begin to participate in the Eternal Law without realizing they are doing so.¹⁵⁹ When they do so, they are making use of the Eternal and Natural Law even if not calling it such. In a sense, one can engage all Men in discussion of the Natural Law particularly at the level of its most basic principles which are directly derived from the natural inclinations. Yet, as St. Thomas emphasizes, this step is only the “first direction” on which the use of reason is “based.” Ultimately contemplating the framework of what is known naturally will lead to questions of origin. Some knowledge of God is accessible to the mind even without the supernatural aid of grace (as demonstrated by St. Thomas’ proofs for God’s existence). Participating in a reasonable inquiry based on what is known naturally will, naturally, lead to the Eternal Law since it is none other than a participation in it. Thus, discussions of Natural Law may commence without explicit incorporation of Truths about God and the Eternal Law, but it is unnatural to think the entire exercise can proceed without

¹⁵⁷ Rom. 2: 14-15.

¹⁵⁸ *Summa Theologica*, I-II, Q. 91, Art. 2, Reply to Obj. 2.

¹⁵⁹ See Clifford Kossel, “Natural Law and Human Law,” *Ethics of Aquinas*, 171-93 (Georgetown University Press 2002) (explaining that although in the order of causation the Eternal Law precedes the Natural Law yet in the order of knowledge, we come to know the Natural Law first and then come to know its cause, the Eternal Law).

reaching eventually that in which one is participating. The time for integration of the framework with the foundation may vary but the Eternal Law is not as Finnis suggests irrelevant for Natural Law just as the foundation of a house is not irrelevant to the frame, even though one may not initially see the foundation covered over by the frame.

Not seeing the foundation at first is one thing; removing the frame from it is quite another. Such an exercise is doomed to ultimate failure. Doing so leaves the Natural Law drifting without a mooring where it cannot stand. Natural Law itself will eventually crumble leaving only human positive law subject to no other rule or measure than that which it makes for itself. Natural Law without God although capable of stumbling upon individual successes along the way ultimately is building a house on bear ground. As J. Budziszewski remarks:

That was the Enlightenment's project. Little by little, natural law thinkers scrubbed from their little cups of theory whatever grime of influence might have remained from the centuries of faith, whatever benefit they might have gained from the teacher's help. . . . In the end they found that they had scoured away the ground that they were standing on.¹⁶⁰

To avoid such a collapse Natural Law theory needs to be firmly rooted within the context of the entire edifice of which it is a part. This does not mean that every argument regarding a particular contingent matter needs to explicitly reference the Eternal Law. Yet, to avoid ultimate collapse at the theoretical level, defense and exposition of Natural Law must rest explicitly on an understanding of the foundational role of Eternal Law. Since the very concept of justice itself is caught up in the idea of Eternal Law even justice itself cannot stand without the foundation.

¹⁶⁰ Budziszewski, *supra* note 96, at 59.

In 1993, John Paul II clearly rejected building Natural Law on pure rationality not rooted in a recognition of the Eternal Law:

Some people, disregarding the dependence of human reason on Divine Wisdom and the need, given the present state of fallen nature, for Divine Revelation as an effective means for knowing moral truths, even those of the natural order, have actually posited a "complete sovereignty of reason" in the domain of moral norms regarding the right orderings of life in this world. . . . In no way could God be considered the Author of this law These trends of thought have led to a denial, in opposition to Sacred Scripture (Mt. 15:3-6) and the Church's constant teaching, of the fact that the natural moral law has God as its author, and that man, by the use of reason, participates in the eternal law, which it is not for him to establish. . . .¹⁶¹

Ultimately, a complete understanding of Natural Law avoids the error of natural lawyers merely trying to beat the positivists at their own game and thus in practice becoming positivists themselves. If one merely seizes the will of the prince and changes the law by force of conquering the system (by relying on disembodied rational argument) a natural lawyer will have won a battle but lost the war. What needs to change even more desperately than individual unjust human laws (of which there is a plethora today) is the entire philosophical and jurisprudential foundation of the system. For when the system rests on the will of the prince or the will of the Supreme Court or the will of the people, it is easily changed with a change of power or judge or public opinion. The war will only be won when the entire understanding of the system of law is changed.

Positivism has swelled the greatness of Human Law by exalting it as the only law, casting aside the Eternal and with it the Natural Law. It has thus cast aside the heart of Natural Law, the unique role of Man as rational. Law has become its own justification severed

¹⁶¹ John Paul II, *Veritatis Splendor* No. 36.

from the rational participation of a rational creature Man in the Eternal plan of the universe. By denying the fact that making law involves this rational participation of Man in the Eternal Law we have become "an empire of laws, and *not of men*."¹⁶² Only men can attain rational participation in the Eternal Law for only men (and not laws) have rational faculties. A government not of men is therefore not one of rational participation in the exemplar or idea of the way things ought to be. Such an empire of laws and not of Men is therefore an empire with no foundation, nor rules and nor measures. Its laws are therefore not rational. Since law must stand with reason, ironically a government merely of laws is lawless. By cutting away the foundation, positive law is all that remains, making it supreme. The result is exactly what Cicero predicted, the greater the law, the greater the injuries. The world has seen inflicted more injuries than Cicero could have imagined under, through and in the name of the rule of laws. It is time that Natural Law put human law back where it belongs within the architectural structure of law. It is time to construct a government of Men and not of mere laws built on the foundation of the Eternal Law and framed by the principles derived from natural inclinations discerned by the use of reason.

¹⁶² John Adams, *Thoughts on Government*, Ch. 4, Document 5, Papers 4:86-93 (April 1776) (emphasis added).