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# Consulting the Architect when Problems Arise – The Divine Law

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# Consulting the Architect When Problems Arise—The Divine Law

BRIAN M. MCCALL\*

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## INTRODUCTION

In *The Architecture of Law: Building Law on a Solid Foundation—The Eternal and Natural Laws*,<sup>1</sup> I began laying the foundation for a particular form of legal architecture. Taking inspiration from St. Thomas Aquinas' description of God as the artificer or architect, I argued that the Law is a multi-storied edifice comprised of different types of law. I explored the nature of the foundational law—the Eternal Law—and its relationship to justice. I considered how the frame of Natural Law is erected upon or participates in the foundation of Eternal Law. Finally, I discussed some of the most basic precepts of the

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1. Brian M. McCall, *The Architecture of Law: Building Law on a Solid Foundation—The Eternal and Natural Laws*, 10 VERA LEX 47 (2009).

Natural Law and argued that they are accessible to all men who simply consider the nature of man as a rational animal and derive principles of action based upon the ends associated with the various aspects of man's nature.

Yet, as any experienced builder knows, even with a solid foundation and a sturdy frame, things can go wrong during construction. Problems arise. In the work of rationally participating in the Eternal Law, men make mistakes. That all human societies, even the best, have made unjust laws should be a statement that evokes no controversy. Just like the best plans for building a house, experience demonstrates that we get law and justice wrong at least sometimes.

So what can be done to correct man's serious errors in legal reasoning despite the perfect foundation of the Eternal and Natural Law? This Article presents several aids to Natural Law reasoning but concludes that recourse to the Architect is indispensable. God, the artificer and author of Natural Law, has provided additional specifications for the implementation of the Natural Law in the form of the Divine Law. This Article explores the role of Divine Law in Natural Law jurisprudence. Pope Leo XIII observed that the fates of Natural and Divine Law are intertwined when he lamented the "spreading wish to supplant natural and divine law by human law."<sup>2</sup> To sustain an effective frame for human law, the Natural Law needs to be accessed in conjunction with the Divine Law.

Part I of this Article analyzes some of the problems faced by man in making use of the Natural Law. After diagnosing the pitfalls, Part II presents some non-legal remedies to assist human reasoning about the Natural Law: taking good counsel, Equity, habit, and advice of the wise. Yet, even these remedies are insufficient for proper use of the Natural Law. Part III argues that since the Natural Law within us has been destroyed, we need a new law to assist reason. This additional law is the Divine Law. Part IV concludes the examination of the Divine Law by summarizing the reasons for its necessity and arguing that a Natural Law project that ignores the necessity of Divine Law is doomed to failure. Just as it would be folly to work through a building crisis without recourse to the original architect, the Natural Law cannot be used properly without some recourse to the Divine Law.

#### I. THE PROBLEMS IN APPLYING NATURAL LAW—THE NEED FOR OTHER FORMS OF LAW

It should be unnecessary to prove that, over the thousands of years of history, human beings have not always deduced correct principles of Natural Law nor always determined good actions pursuant to correct principles. The sources of all the errors and misapplications are essentially twofold: (1) errors in arriving at proper conclusions about the precepts of the Natural Law and (2) errors in

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2. Pope Leo XIII, Encyclical Letter *Arcanum Divinae Sapientiae* ¶ 27 (Feb. 10, 1880), [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_lxiii\\_enc\\_10021880\\_arcanum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_lxiii_enc_10021880_arcanum_en.html).

judgment in applying correct principles to reach good determinations.<sup>3</sup> An example of the first problem would be a conclusion that the Natural Law requires all of a certain type of person to be enslaved to others. An example of the second would be a recognition of enforced slavery as contrary to the Natural Law but a failure to prohibit the slave trade from Africa in the seventeenth century as contrary to the Natural Law.

#### A. *Failure to Know the Natural Law*

Since the principles of the Natural Law are derived from the being or essence of man, knowledge of them is within the capabilities of all. The degree of difficulty or ease in actually arriving at knowledge of the precepts of the Natural Law depends on the level of principles at issue. The more general and basic the proposition, the more accessible it is to human knowledge. The more remote and particular, the more opportunity exists for errors. Thus, Aquinas explains:

It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all. As to the proper conclusions of the speculative reason, the truth is the same for all, but is not equally known to all: thus it is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all. But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all.<sup>4</sup>

Natural Law reasoning involves both speculative and practical reason.<sup>5</sup> Speculative reason is necessary to understand the basic truths on which the existence and obligatory nature of Natural Law rest—the essence and end of man. Practical reason is necessary to reach conclusions oriented to actions based on these truths.<sup>6</sup> Thus, the first principle of the Natural Law, which rests on speculative knowledge about the being, end, and good of man, is not only universally true, it is universally accessible by the reason of all men. Aquinas refers to this basic knowledge of Natural Law as things that are *per se nota*, or known through the thing itself. By this phrase, Aquinas means the conclusion “do good and avoid evil” is not known through the operation of a syllogism, a

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3. See PAULINE C. WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS* 67–70 (1998), for a discussion of the difference between a deduction and a determination.

4. 8 THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 94, art. 4, at 47–48 (Fathers of the English Dominican Province trans., Burns Oats & Washbourne Ltd. 2d rev. ed. 1912–1927) (1265–1274).

5. See Patrick Brennan, *The Place of “Higher Law” in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL’Y 437, 456 (2009) (describing speculative reason as how we know what is and practical reason as how we know what we ought to do).

6. See JOHN RZIHA, *PERFECTING HUMAN ACTIONS: ST. THOMAS AQUINAS ON HUMAN PARTICIPATION IN ETERNAL LAW* 216 (2009) (explaining how speculative knowledge can become practical knowledge by extension by using the example that the speculative premise that men are rational becomes the practical premise that men should act rationally).

conclusion drawn by inference from premises. It is instead known by itself or through the definitions contained therein.<sup>7</sup> To help understand this form of knowledge, Aquinas compares it to the way angels know things, delineating where man's faculty of knowledge is similar and where it differs:

[T]he human soul, according to that which is highest in it, attains to that which is proper to angelic nature, so that it knows some things at once and without investigation, although it is lower than angels in this, that it can know the truth in these things only by receiving something from sense.<sup>8</sup>

Here Aquinas describes the process of knowing something known through itself. Once seen, it is simply known without syllogistic demonstration. Yet, in man this process can only occur when a particular man is exposed to the elements of the thing that is known through itself. Two examples used by Aquinas make the point clearly. It is *per se nota* that a whole is greater than its parts; yet one only apprehends this truth after he knows what is a "whole" and what are "parts."<sup>9</sup> Likewise, the proposition that man is an animal is *per se nota* once one knows that the nature of man contains within it the nature of an animal.<sup>10</sup> Although the knowledge of all things that are *per se nota* is equally accessible to all, in that once observed they are immediately knowable by any man, not all men actually know them. Since human knowledge of even *per se nota* propositions is contingent on sense experience, some people may not be acquainted with the sense impressions necessary to know the *per se nota* proposition. Thus, Aquinas explains:

[C]ertain axioms or propositions are universally [*per se nota*] to all; and such are those propositions whose terms are known to all . . . . But some proposition are [*per se nota*] only to the wise, who understand the meaning of the terms of such propositions; thus to one who understands that an angel is not a body it is [*per se nota*] that an angel is not circumscriptively in a place: but this is not evident to the unlearned for they cannot grasp it.<sup>11</sup>

Although all men have the rational ability to know all things that are *per se nota*, the degree of universal actual knowledge of these principles varies with

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7. Aquinas uses the term "synderesis" to describe this process of knowing indemonstrable first principles. See AQUINAS, *supra* note 4, q.79, art.12; *id.* pt. II-II q. 47 art. 6, reply to obj. 1 at 12; Thomas Aquinas, *Questiones Disputatae de Veritate*, q.16, art. 1, in TRUTH 300–13 (Robert W. Mulligan et. al. trans., Henry Regnery Co. 1952) (1256–59) [hereinafter Aquinas, *Questiones Disputatae de Veritate*]; *id.* q. 17 art. 2, at 322–23.

8. Aquinas, *Questiones Disputatae de Veritate*, *supra* note 7, at 304.

9. AQUINAS, *supra* note 4, art. 2, at 43; 7 *id.* q. 66, art 5, reply to obj. 4, at 198.

10. 8 *id.* q. 94, art. 2, at 43; 1 *id.* pt. I, q. 2, art. 1, at 20–21.

11. 8 *id.* pt. I-II, q. 94, art. 2, at 43 (I have substituted the original Latin *per se nota* for the phrase in the translation of "self-evident" because I believe this English phrase carries the connotation of universally known and as the current discussion makes clear not all things *per se nota* are actually known by all).

the universality of sense experience necessary to know the principles. The more common the knowledge of the definitions, the more common is the knowledge of the principle known through them. Thus, the first principle of the Natural Law is more universally comprehended, but that does not mean it is actually known by all. Once one knows the definition of “good,”—that which is suitable to the form of Man or that which is consistent with the hierarchy of ends of Man<sup>12</sup>—the conclusion to do “good” is known without inference. As Aquinas explains, once being is apprehended by speculative reason, practical reason is busied with orienting that knowledge towards action. Thus, speculative reason apprehends being and practical reason knows to do what is consistent with being. In this sense, we cannot help but be what we are. We are ordered to be what our nature makes us. Yet, not all are aware of even this most general principle, which is known through itself.

Once one moves to the next level of the principles of Natural Law, the hierarchy of goods (preservation of life, procreation and rearing of children, acquisition of knowledge and living in society),<sup>13</sup> knowledge of these ends is less commonly known and thus, the conclusions drawn from them are not always known to the same extent as the first principle. As Aquinas says “the more we descend into detail” the more uncertainty exists as to conclusions.<sup>14</sup> Thus, the general principles of Natural Law are universally valid for all men, but depending on the level of detail not universally known by all men.<sup>15</sup>

### *B. Failures in Applying Principles of Natural Law to Actual Cases*

In addition to formulating principles of decision making (i.e., preserve human life) the practical reason, oriented by its nature to operations, needs to apply those principles to particular and varied factual situations that Aquinas calls “contingent matters.”<sup>16</sup> Again, we see that certainty of reaching correct conclusions of the practical reason is not assured due to two problems: (1) the infinite nature of varying circumstances and (2) a wounding of human nature affecting reason.

#### 1. The Problem of Too Many Contingencies

First, the principles may not actually resolve a particular case at hand. As Aquinas notes, the principles are true for the majority of cases.<sup>17</sup> Yet as with the rule regarding the return of property held in trust, while the general rule is that it is to be returned, such property should not be returned if it is a weapon to be

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12. That which is suitable to the form of Man or that which is consistent with the hierarchy of ends of Man. See McCall, *supra* note 1, at 78–81.

13. See *id.* at 84.

14. AQUINAS, *supra* note 4, at 47.

15. *Id.* at 47–48.

16. See AQUINAS, *supra* note 4, at 47.

17. *Id.* at 48.

used to fight against one's country.<sup>18</sup> That a principle of the Natural Law does not always lead to the same conclusion is understandable given the hierarchy of goods and ends that give rise to the precepts of Natural Law. The principle of returning property is a precept of Natural Law deduced from man's social nature, but the principle should not be followed when it would lead to a result that comes into conflict with another good subsumed in the hierarchy (as when a madman seeks the return of a deposited weapon to harm others).<sup>19</sup> Here the result of applying the precept to return entrusted property would conflict with the precept to protect human life. Thus, even if a man were able to know all of the principles of the Natural Law with complete precision, an unrealistic assumption as we have just seen, he may still err in determining the correct course of action in a particular contingent situation.<sup>20</sup> Due to the complexity of human affairs, the application of the principles may lead to unresolved conflicts.

The virtue of prudence enables one to judge which principle should be used to resolve this conflict. Aquinas says that prudence is "to apply right reason to action."<sup>21</sup> As in the case of the madman seeking his sword, prudence enables one to know that return of the sword should be delayed so as to fulfill the end of preserving life. To apply Natural Law principles correctly, one must take account of all the individual circumstances of the action. Yet, the human mind is incapable of contemplating the infinite number of singular facts and must reduce them to a finite number of factors to be considered.<sup>22</sup> Due to the finite mind of Man being incapable of considering the infinite number of singular facts, Aquinas quotes the Book of Wisdom as concluding that "our counsels are uncertain,"<sup>23</sup> by which I believe he means our decisions in light of Natural Law are not certain to be correct in all circumstances. Thus, even though the principles of the Natural Law are capable of being known by all men, knowledge of the principles will not always lead to correct decisions because Man's reason is finite.

## 2. Problems Caused by a Fallen Human Nature

Beyond the difficulty of applying general principles to many contingent situations, another explanation for the failure of reason to lead to correct action in all cases is that man is not a creature of perfect reason. Our determinations can be affected by our emotions and sensible appetites. We may desire a particular course of action out of our concupiscence, and this desire can cloud

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18. *Id.*

19. 10 *id.* pt. II-II, q. 57, art. 2, reply to obj. 1, at 107–08.

20. See *id.* q. 52, art. 1, reply to obj. 1, at 62–63 ("Prudence or *euboulia* [(deliberating well)], whether acquired or infused, directs man in the research of counsel according to principles that the reason can grasp . . . . Since, however, human reason is unable to grasp the singular and contingent things which may occur, the result is that 'the thoughts of mortal men are fearful, and our counsels uncertain,'" *Id.* (quoting WISDOM 9:14).

21. *Id.* q. 47, art. 4, at 8.

22. *Id.* art. 3, reply to obj. 2, at 6.

23. *Id.* (quoting WISDOM 9:14).

our judgment in making determinations.

Aquinas summarizes all of these difficulties in using the Natural Law (or making use of practical reason) both at the level of demonstrating principles and determining action, thus:

[I]n some few cases it may fail, both as to rectitude [i.e., the principle does not apply to what appears to be a similar case], by reason of certain obstacles [(*impedimenta*)] (just as natures subject to generation and corruption fail in some few cases on account of some obstacle) and as to knowledge [(*ad notitiam*)] [i.e., the principle leads to a correct conclusion but this conclusion is unknown], since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature; thus formerly, theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans as Julius Ceasar relates.<sup>24</sup>

Thus, we see that our reason may fail in identifying the correct precept of the Natural Law to resolve a particular contingent matter, as the principle that seems to be applicable is, in fact, inapplicable due to other complicating factors. This is a failure of prudence to take counsel of all relevant singular facts. Aquinas says the unaccounted-for fact creates an impediment to the correct decision just like impediments can thwart natural generation. As a rule, the mating of a male and female produce a normal offspring. Yet, due to an intervening contingency—an infection, for example—the offspring may fail to be as expected.

Beyond failures of prudence, Aquinas identifies a second reason men reach false conclusions from the precepts of Natural Law: our passions may pose impediments to our reason in knowing and applying the principles properly. Aquinas explains that this failure of practical reasoning is a result of the Fall:

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 . . . 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.<sup>25</sup>

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.”<sup>26</sup> Beyond the limitations of a finite mind to exercise prudence fully, man engages in practical reasoning after the Fall with a birth defect: the passions are not properly ordered to the conclusions of reason. St. Thomas explains:

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24. 8 *id.* pt. I-II, q. 94, art. 4, at 48.

25. 7 *id.* q. 85, art. 3, at 447.

26. *Id.*



The body was made subject in all things to the soul or to reason. But later the devil led man through suggestion from the observation of the divine precept. Then the body was made disobedient to reason. Although it was right for man to desire the good according to reason, nonetheless he became inclined to the contrary due to concupiscence.<sup>27</sup>

Man exacerbates this original wound by engaging in vicious actions. Evil habits are developed, enlarging this original wound.<sup>28</sup> Thus, even though the precepts of the Natural Law necessarily flow from premises originating in the first precept of the Natural Law, sometimes our reason cannot see the clarity of the syllogism through the fog created by the wounding of our nature. St. Thomas gives the example of the Gauls who were mistaken in thinking that theft was good even though properly functioning reason necessarily concludes theft to be contrary to the good of living socially.<sup>29</sup> The problem compounds itself since errors in living according to the Natural Law lead to a deepening of this wound. Thus, the more vice one engages in, the greater the diminishment of the original state of the intellect. Dr. John Rziha summarizes the causes of the inevitable weaknesses in properly engaging in Natural Law stating, “Natural reason is subject to error and ignorance both on account of its fallenness (vice and susceptibility to be blinded by the passions) and on account of its natural weakness.”<sup>30</sup> In the *Summa Theologica*, Aquinas argues that it is impossible for people to attain perfect natural goodness embodied in the natural end of the Natural Law as a result of this wounding of nature after the Fall.<sup>31</sup>

In *De Duobus Praeceptis Caritatis*, Aquinas is even more pessimistic about man’s ability to correctly reason using principles of Natural Law. He explains that originally man was given the Natural Law as a light to guide him in his actions. He then describes the wounding of nature as another form of law operating in contradiction to the Natural Law.<sup>32</sup> He explains, “The devil nevertheless has planted in man another law, namely of concupiscence.”<sup>33</sup> This other

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27. THOMAS AQUINAS, *DE DUOBUS PRAECEPTIS CARITATIS*, Prooemium [Prologue], available at <http://www.corpusthomicum.org/cac.html> (author’s translation of “caro fuit subdita in omnibus animae vel rationi. Sed postquam Diabolus per suggestionem retraxit hominem ab observantia divinorum praeceptorum, ita etiam caro fuit inobediens rationi. Et inde accidit quod licet homo velit bonum secundum rationem, tamen ex concupiscentia ad contrarium inclinatur.”).

28. See RZIHA, *supra* note 6, at 118 (arguing that in the wicked the natural inclinations have been weakened by vicious habits).

29. See AQUINAS, *supra* note 4, at 48.

30. See RZIHA, *supra* note 6, at 271.

31. See AQUINAS, *supra* note 4, q. 109, art. 2, at 327 (“But in the state of corrupt nature, man falls short of what he could do by his nature, so that he is unable to fulfil it by his own natural powers.”); see also RZIHA, *supra* note 6, at 230 (“Reason is subject to ignorance and obscured especially in practical matters.”).

32. AQUINAS, *supra* note 27 (author’s paraphrasing of “quia ergo lex naturae per legem concupiscentiae destructa erat”).

33. *Id.* (author’s translation of “diabolus tamen in homine superseminavit aliam legem, scilicet concupiscentiae”).

law has actually destroyed the Natural Law in us.<sup>34</sup> Yet, this destruction of the Natural Law by the law of concupiscence does not relieve man of responsibility. His ignorance of Natural Law due to this wound of nature does not excuse man from obeying the Natural Law.<sup>35</sup> Man would appear to have an intractable problem: he is obligated to the Natural Law and ignorance of it is not an excuse, yet he seems hopelessly incapable of overcoming ignorance of general and detailed principles of the Natural Law.

## II. NON-LEGAL SOLUTIONS TO THE PROBLEMS

Given these great potentials for error, how can Man proceed in the use of his practical reason to make correct decisions (*secundum rectitudinem*)? Is it hopelessly futile? How can he avoid the pitfalls in determining courses of action due to the influence of his passions? Aquinas' answer is that Man requires four aids: (1) Counsel, (2) Equity, (3) the nurturing of good habits, and (4) the advice and example of a good man. These things can aid in overcoming the complexity of details and the wound of the law of concupiscence.

### A. Counsel and Equity

Despite the ability to reason, men err in making proper determinations of action—i.e. fail to identify the “good” obligated by the Natural Law—due to the complexity of the factual scenarios in which the principles must be applied. Man's reason appears incapable of taking proper account of so many details. Yet, two other attributes, when combined with the use of reason, can correct for this difficulty: prudence aided by taking complete counsel and moderating decisions by applying the principle of Equity.

We have seen that the virtue of prudence enables man to judge which principle should be used to resolve the recurring conflicts among principles of the Natural Law.<sup>36</sup> Which particular decision is necessitated by the ends of man is a matter of prudence. Yet, for prudence to resolve these conflicts, it must take account of all the relevant circumstances and all applicable principles. This process involves taking counsel, which Aquinas describes as an “*inquisitio*,” or investigation.<sup>37</sup> Commenting on Aristotle, Aquinas describes taking counsel as a “deliberative inquiry” to determine the means to a given end.<sup>38</sup> Part of the virtue

34. *Id.* (author's paraphrasing of “quia ergo lex naturae per legem concupiscentiae destructa erat”).

35. *Id.* (“God gave to man this light and this law [Natural Law] in creation. But many believe that they are to be excused if through ignorance they do not observe this law. But against this, the Prophet says in Psalm 4:6 ‘many say who shows us the good, as if they are ignorant of what is to be done.’” This is author's translation of: “Hoc lumen et hanc legem dedit Deus homini in creatione. Sed multi credunt excusari per ignorantiam, si hanc legem non observant. Sed contra eos dicit propheta in Psal. IV, 6: multi dicunt: quis ostendit nobis bona? quasi ignorent quid sit operandum.”).

36. See *supra* Part I.B.1.

37. 10 AQUINAS, *supra* note 4, q. 52, art. 1, at 61–63.

38. 1 THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS bk. III, Lecture VIII, § 473, at 207–08 (C.I. Litzinger trans., Henry Regnery Co. 1964) (1593–1616).

of prudence is taking counsel.<sup>39</sup> The virtue of counsel enables the intellect to organize the detailed facts so that prudence can choose the appropriate resolution of principles. Yet, the varying circumstances, with respect to which the counsels of man must be taken, are infinite. The integration of infinite details requires an infinite intellect and thus the perfect source of assistance in this matter is God. Only through the divine gift of counsel can man truly “deliberate well.”<sup>40</sup> As Aquinas explains:

Hence in the research of counsel, man requires to be directed by God who comprehends all things: and this is done through the gift of counsel, whereby man is directed as though counseled by God, just as, in human affairs, those who are unable to take counsel for themselves, seek counsel from those who are wiser.<sup>41</sup>

The analogy to the human level is proof of our need for God’s involvement if we wish to succeed in reasoning according to Natural Law principles. Just as we recognize that we often need to take counsel with a wise person in making a decision, we realize that our finite intellect is incapable of taking account of all the singular factors that make up complex moral decisions. We thus recognize a need for God in the process of exercising prudence. He fills this need through the gift of Counsel, which perfects the process of exercising the virtue of prudence.

Beyond the gift of Counsel, another aid exists to remedy the difficulty of applying Natural Law principles to an infinity of contingent matters. This aid is Equity. Equity is shown by St. Thomas to be a part of justice, which is the purpose or end of Natural Law.<sup>42</sup> Equity is that virtue which reviews and, in some cases, modifies the direct conclusions of the principles of Natural Law. Aquinas is clear that there is no defect in Natural Law itself but rather in our ability to formulate the principles of the Natural Law. Since our ability to completely and accurately give form to the hierarchy of principles is imperfect, Equity is the virtue that provides, when necessary, a corrective. Aquinas explains:

Since particulars are infinite, our mind cannot embrace them to make a law that applies to every individual case. Therefore a law must be framed in a universal way, for example, whoever commits murder will be put to death.

It is evident that our intellect can predicate something universally true about some things, in the case of what is necessary [i.e., in matters of speculative reason only] where no defect can occur. But about other things it

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39. RZIHA, *supra* note 6, at 42.

40. 10 AQUINAS, *supra* note 4, q. 52, art. 1, reply to obj. 1 at 62–63.

41. *Id.*

42. See McCall, *supra* note 1, at 65–70.

is not possible that something true be predicated universally, in the case of what is contingent [i.e., the realm of practical reason]. Here even though something is true in most instances, nevertheless it errs as we know in a few instances. And of such a nature are human acts about which laws are framed . . . .

[T]he previously mentioned defect does not destroy the rectitude of law or of legal justice . . . . [A]lthough a fault may be committed in some cases by the observance of the law, nevertheless the law is good because that fault is not on the part of the law (since it was made according to reason) nor on the part of the legislator (who legislated according to the condition of the material), but the fault arises from the nature of the thing. Such is the nature of human actions that they are not done always in the same way but are done otherwise in certain infrequent instances.<sup>43</sup>

We might be tempted to respond to this problem by claiming we merely need to formulate the principles of Natural Law in more detail and listing within them the exceptions. This is not a satisfactory solution. Since human actions and circumstances are infinite, our finite reason cannot form principles for infinite possibilities. Moreover, the more we delve into detail, the greater the likelihood that an error occurs. If we were to formulate the principles of Natural Law in more detail (i.e., return a deposit unless the person is a madman, *etc.*), there would be more opportunities for the principle to fail.<sup>44</sup>

The corrective to this failing of human reason to formulate a principle applicable in all eventualities is the virtue of Equity. But what is Equity? Aquinas says it is “a just thing;”<sup>45</sup> elsewhere, he defines it as “the equality of justice” and “the dictates of justice and the common good.”<sup>46</sup> Yet, these are the same definition of *jus*, the just thing itself.<sup>47</sup> The end of *jus*, and hence the end of law, including Natural Law, is that which is just, equitable and for that good common to man (the hierarchy of ends). In this sense, Equity is “the directive of the law [(including Natural Law)] where the law is deficient for some particular case.”<sup>48</sup> The role of Equity seems absent or minimized in a Natural Law system according to thinkers like Suarez who focus exclusively, or nearly so, on formulating exact precepts.<sup>49</sup> For Aquinas, such work is part of the use of practical reason. Yet, this process must be directed or ruled by another method: the review of those principles in particular cases in light of the ends of the entire exercise. The end of *jus* and justice itself must be present in the operation of

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43. AQUINAS, *supra* note 38, bk. V, Lecture XVI, § 1083-1085, at 467–68. Note that where the word “law” is used, we should think of it in terms of a precept of the Natural Law and “legislator” should be understood as the one formulating in words a principle of the natural law. *See also* 12 AQUINAS, *supra* note 4, q. 120, art. 1, at 168–170.

44. *See* AQUINAS, *supra* note 4, at 47–48.

45. AQUINAS, *supra* note 38, bk. V, Lecture XVI, § 1086, at 465.

46. 12 AQUINAS, *supra* note 4, q. 120, art. 1, at 168–70.

47. *See* McCall, *supra* note 1, at 65–66.

48. AQUINAS, *supra* note 38, bk. V, Lecture XVI, § 1086, at 465.

49. *See* McCall, *supra* note 1, at 65.

Natural Law so that it can direct the outcome in particularly difficult cases in light of the good or end of justice.

### *B. The Role of Habit*

Even when the principle of Equity moderates prudential decisions and proper counsel is taken, the virtue of justice involves constantly choosing the right (*jus*) over time. Aquinas defines justice as the “perpetual and constant will to render to each one his right (*jus*).<sup>50</sup> It is not surprising that developing this perpetual and constant will involves the cultivation of good habits. Developing good habits of action thus becomes a means of overcoming the difficulties in using the Natural Law as a guide of action. Aquinas describes habit as

the mode or determination of the subject, in regard to the nature of the thing, belongs to the first species of quality, which is habit and disposition: for the Philosopher says . . . , when speaking of habits of the soul and of the body, that they are ‘dispositions of the perfect to the best; and by perfect I mean that which is disposed in accordance with its nature.’<sup>51</sup>

A good habit is a disposition towards that which is perfect, and the end of one’s nature. In this sense, Aquinas claims that “human virtues are habits.”<sup>52</sup> Recall that the definition of justice is the constant and perpetual will to do what is just.<sup>53</sup> In the Reply to Objection 1 in the article containing this definition, Aquinas shows the relationship between will and habit. An act of will is an act produced by the power of habit.<sup>54</sup> With a causal relationship established between habit and will, Aquinas can reconcile the definition of justice given by Aristotle as “that habit by which men are disposed to just works, and by which they actually perform and will just deeds.”<sup>55</sup> Thus, one way to aid our use of Natural Law is to develop a habit of acting in particular cases according to its principles. This habituates the intellect and the will to the *jus*, and thus makes it easier for us to apprehend and comprehend it. Commenting on Aristotle’s discussion of the necessity of knowledge of particulars (or we might say experience), Aquinas says, “Hence it is that certain people not possessing the knowledge of universals are more effective about some particulars than those who have universal knowledge from the fact that they are expert in [i.e., experienced in] other particulars.”<sup>56</sup>

Adapting the example of Aristotle and Aquinas slightly, we can conclude that

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50. 10 AQUINAS, *supra* note 4, q. 58, art. 1, at 113–16.

51. 7 *id.* pt. I-II, q. 49, art. 2, at 6.

52. *Id.* q. 55, art. 1, at 64.

53. 10 *id.* pt. II-II, q. 58, art. 1, at 113–16.

54. *Id.* at 115.

55. ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 1, § 1129a5, at 116 (Terence Irwin trans., Hackett Publishing Company 1985).

56. 2 AQUINAS, *supra* note 38, bk. VI, Lecture VI, § 1194, at 571.

a man might know that uncooked chicken can result in sickness and death by one of two ways. He may know about the existence and nature of Salmonella, and how cooking kills the bacteria, or he may simply observe that those who cook their chicken do not contract the disease. Thus, one way to proceed in making practical decisions in accordance with Natural Law is by being familiar with particular cases or instances and the right results. One may be able to reason by analogy and reach good results, rather than making deductions from the general principles of Natural Law. By doing so, one would build a habit of familiarity with Natural Law through particulars rather than through the general principles. In a sense, this process has characterized common law legal reasoning of analogizing from past precedents. As with the common law, Aquinas does not present reasoning by analogy as an exclusive alternative to deductive reasoning.

This process of analogizing is not necessarily a sufficient method, as it may fail from insufficient breadth of particulars, a risk of all inductive reasoning, or from using erroneous results to form the habit, resulting in “corrupt habits.”<sup>57</sup> Thus, habit cannot be completely controlling; there must be a possibility of overturning *stare decisis* when the results clearly contradict the general principles derived through deduction.

Gratian includes authorities that maintain this principle with respect to custom, which can be considered a sort of collective habit. Customs are cultivated patterns of living of a community, whereas habits are cultivated patterns of living by individuals. Gratian demonstrates great respect for custom, beginning his *Treatise on Laws* by elevating custom to the level of Natural Law by claiming that humans are ruled by two things: Natural Law and long-standing custom.<sup>58</sup> Notwithstanding his respect for custom, Gratian includes the admonition of Pope Nicholas that evil custom must be “torn up by its roots.”<sup>59</sup>

The cure for bad custom is to submit it to the test of reason. Customs must be set aside if they conflict with truth or reason.<sup>60</sup> Since the Natural Law is the rational participation in the Eternal Law, the reference to reason can be read as a reference to Natural Law. Such a reading adds a new connotation to the opening line of the *Decretum*. The two pillars of law ruling the human race, Natural Law and custom, are not independent laws. They are symbiotically related. Natural Law reasoning must respect custom, but custom must also yield to the dictates of reason. Notwithstanding its benefits, custom, if not harmonized with reason, can perpetrate errors:

An evil custom is no more to be tolerated than a dangerous infection because, unless the custom is quickly torn up by its roots, it will be adopted

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57. 8 AQUINAS, *supra* note 4, art. 6, at 51–52.

58. GRATIAN, *THE TREATISE ON LAWS WITH THE ORDINARY GLOSS*, Distinction 1, pt. 1, at 3 (Augustine Thompson trans., Catholic University Press 1993).

59. *Id.* Distinction 8, pt. 2, C. 3, at 26.

60. *See id.* C. 4–6 at 26–27.

by wicked men as entitling them to a privilege. And then, unchecked deviations and various infractions will soon be revered as lawful and honored as immemorial privileges.<sup>61</sup>

What is said of custom applies to habit on the level of the individual as well. Habit is necessary to complement Natural Law reasoning, but reason is necessary to keep a check on habit. Both methods, deduction and habitual reasoning from analogy, are necessary, as each one supplements or corrects the other.

### C. *The Advice of a Good Man*

Habit can aid in deducing the principles of Natural Law, but still it is insufficient to ensure universal success. If unchecked by reason, a bad habit, like a bad custom, can spread error like a disease. Therefore, an additional aid must be brought to bear. The source of reason must expand from the interior mind of the individual. The reason of a good man has a role to play. As Vernon Bourke explains, this concept is drawn from Aristotle's ethical system.

At times [Aristotle] suggests that we have to depend on observing what the "good man," the pillar of society (*spoudaios*) approves and tends to, in order to discover what is morally good . . . . Certainly [Aristotle's theory] is not a [purely] deductive system, which starts from a certain definition of man and reasons to definite rules governing human activity.<sup>62</sup>

Although Aquinas believes that perfect knowledge comes from understanding and knowing the causes of conclusions, he admits that some people can learn a principle by "accept[ing] it as a probable opinion because wise men or most men teach it."<sup>63</sup> In discussing the principles of the Natural Law contained in the Ten Commandments, Aquinas acknowledges that one way people learn the principles is through "being taught by wise men."<sup>64</sup> As we have seen already, even truths that are *per se nota* are not always known to all, but only to the learned. Aquinas explains "there are some precepts [of Natural Law] the reason of which is not so evident to everyone, but only the wise."<sup>65</sup> The instruction of a wise man may be necessary if one is dealing with a more particular principle of Natural Law. Aquinas explains:

[T]here are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: e.g. "Honor thy father and thy mother," and "Thou shalt not kill, Thou shalt not steal": and these belong to the law of nature absolutely. And there are certain things which,

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61. *Id.* C.3, at 26.

62. 1 VERNON BOURKE, *HISTORY OF ETHICS* 38–39 (1968).

63. 1 AQUINAS, *supra* note 4, pt. I, q. 12, art. 7, at 135.

64. 8 *id.* pt. I-II, q. 100, art. 3, at 118–19.

65. *Id.* art. 11, at 143.



after a more careful consideration, wise men deem obligatory. *Such belong to the law of nature, yet so that they need to be inculcated, the wiser teaching the less wise.*<sup>66</sup>

Thus, although it is a more complete knowledge to know for one's self the general and particular principles of Natural Law (and how one is derived from the other), Aquinas, nonetheless, recognizes that this goal is not attainable by all. Some must be aided by the wise who will teach the unwise. As with habit, this is not an infallible solution. Even the wise can err because they labor under the same difficulties identified in Part I of this Article. Yet, combined together, the wise provide methods that can buttress the use of individual reason in arriving at conclusions and determinations. Such recognition of the corrective of wise opinion may explain the importance of jurists' opinions and "custom" (*mos*) in the legal systems of Rome and the philosophies of St. Thomas and Gratian.<sup>67</sup> The custom of collecting and referring to the opinions of those jurists whose comments have stood the test of time is a method of accessing the advice of the wise.

### III. THE LEGAL SOLUTION: THE ADVICE OF THE ARCHITECT—DIVINE LAW

The effects of original sin, exacerbated by individual sin, result in our attempting to reason using Natural Law under a handicap. Since reason is impaired and passions are disordered, we can buttress the use of deductive reason by forming good habits in light of the advice and opinion of the wise.

Yet, even the wise labor under the same impediments to reason. Thus, the advice of the wise is only as good as the extent to which they have overcome these impediments. Recognizing our plight after the destruction of the Natural Law in us, Aquinas argues that God saw the need for a legal solution, a different law to counterbalance the law of concupiscence. Immediately after making his startling statement that the law of nature has been destroyed in us, Aquinas continues: "It was necessary for man to be redirected to the works of virtue and turned away from vice, that the law of the Scriptures was necessary."<sup>68</sup>

As will be discussed below, the law of the scriptures (*lex scripturae*) is the first part of a two part division of the Divine Law. Aquinas emphasizes that the Divine Law is obligatory and necessary for knowing what is good, what the Natural Law obligates us to do. He uses the word "*oportebat*" to indicate that it

66. *Id.* art. 1, at 115 (emphasis added).

67. See, e.g., 1 THE DIGEST OF JUSTINIAN (Alan Watson trans., Univ. of Pa. Press, Revised English-language ed. 1998) (collection of jurists' expert opinions considered part of Roman law); GRATIAN, *supra* note 58, at 4; *id.* Distinction 2, pt. 1, C. 5 at 9; 8 AQUINAS, *supra* note 4, q. 97, art. 3, at 79–81; David Johnston, *The Jurists*, in THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT 616 (Christopher Rowe & Malcolm Schofield eds., Cambridge Univ. Press 2005) (describing the opinion of jurists as "pivotal" in the Roman law system).

68. AQUINAS, *supra* note 27 (author's translation of "*oportebat quod homo reduceretur ad opera virtutis, et retraheretur a vitiis: ad quae necessaria erat lex Scripturae*").



was necessary for the law of the scriptures to be promulgated for men to attain virtue.<sup>69</sup> Divine Law is not optional or gratuitous, but necessary for the rational participation in the Eternal Law, or the Natural Law. “Because we recognize the weakness of the human intellect, it is necessary to judge the precepts of our reason by the divine law.”<sup>70</sup> Aquinas drives this point home when he argues that

it is obvious that all people are not able to persevere in knowledge and therefore a brief summary of the law was given by Christ so that it might be able to be known by all and nobody would be able to be excused of the observation of it [the law] through ignorance.”<sup>71</sup>

Aquinas’ emphasis of the necessity of the Divine Law, briefly given by Christ for all people is striking. He is emphasizing that we cannot persevere<sup>72</sup> in knowing what is right without this additional law. Later, he repeats that human action cannot be “good or right” (the essence of the *jus*<sup>73</sup>) unless it is harmonized with delight in the Divine rules.<sup>74</sup> He repeats that the Divine “Law ought to be a rule of all human actions.”<sup>75</sup> Both of these passages invoke the very definition of law itself as a rule of human action.<sup>76</sup> This reference to the definition of law indicates that he is speaking of Divine Law as a real law, not just metaphorically.

Aquinas maintains that the precepts of Divine Law encompass all that the Natural Law obligates us to do, the whole law. “He who observes the Divine command and law, fulfils the whole law.”<sup>77</sup> The phrase, “the whole law,” (*totem legem*) appears to be a reference to the Eternal Law. Since the Eternal Law is the entire rule and measure of the universe,<sup>78</sup> it represents the whole of the law, including Natural Law, which is nothing but a participation in it.<sup>79</sup> Yet, the “Divine Law participates in the eternal law more perfectly” than the Natural Law since the Divine Law is not mediated through weakened human reason.<sup>80</sup> To persevere in this participation in the whole law it is necessary to consult the

69. *Id.*

70. RZIHA, *supra* note 6, at 271.

71. AQUINAS, *supra* note 27 (author’s translation of “*Sed manifestum est quod non omnes possunt scientiae insudare; et propterea a Christo data est lex brevis, ut ab omnibus posset sciri, et nullus propter ignorantiam possit ab eius observantia excusari.*”).

72. The use of the verb *insudare* to express this notion demonstrates the arduous nature of persevering in knowledge of what is right. The verb means to sweat or perspire in doing something.

73. See McCall, *supra* note 1, at 66–67.

74. AQUINAS, *supra* note 27 (author’s translation of “*Ad hoc autem quod actus humani boni reddantur, oportet quod regulae divinae dilectionis concordat.*”).

75. *Id.* (author’s translation of “*Sed sciendum, quod haec lex debet esse regula omnium actuum humanorum.*”).

76. AQUINAS, *supra* note 4, q. 90, art. 1, at 1.

77. AQUINAS, *supra* note 27 (author’s translation of “*Sed considerandum, quod qui mandatum et legem divinae dilectionis servat, totam legem implet.*”).

78. See McCall, *supra* note 1, at 57.

79. See *id.* at 70–71.

80. RZIHA, *supra* note 6, at 271 (citing AQUINAS, *supra* note 4, q. 99, art. 2, reply to obj. 2, at 102).

instructions of the architect of the whole law, the Divine Wisdom. This verbal allusion to the discussion of Eternal Law in the *Summa Theologica* is emphasized by an invocation of an image that runs throughout the discussion of Eternal Law—art.<sup>81</sup> Aquinas explains that “as we see in the arts, an object is said to be good and right if it is equalized by rules; so too any human work is good and virtuous when it is harmonized with love of Divine rules.”<sup>82</sup> A love of the rules of the original artificer of the Eternal Law is necessary for the work of participating in that law to be good and right or *jus*.

What then is this other type of law, made necessary by the law of concupiscence to practice the *jus*? The Divine Law is the revelation of God contained in the Old Testament—the law of the scriptures (*lex Scriptura*), also called the Law of Moses (*lex Moisi*) or the law out of fear (*Lex ex timore*)<sup>83</sup>—and the Gospel (*lex Evangelica*), also called the law of Christ (*lex Christi*), or the law of love (*lex amoris*).<sup>84</sup> Divine Law is different from Eternal Law in that it consists of particular principles, conclusions, and determinations originating in the Eternal Law of creation but given or revealed at particular points in history. Whereas the Eternal Law is eternally promulgated,<sup>85</sup> the Divine Law is promulgated at particular moments in history. Many of these principles were originally promulgated through the Natural Law but illuminated directly by the revealed word of God.

Divine Law serves several discrete purposes. Aquinas lists four reasons for a Divine Law, the second of which is directly relevant to the problems identified in Part I of this Article. First, he explains because Natural Law is the participation of man’s nature in the Eternal Law, it deals primarily with the natural ends of man—preservation, procreation and rearing of children, and knowledge. Yet man has an end beyond these—a supernatural end, which is not attainable by mere natural means alone. As St. Thomas explains:

[M]an’s perfect Happiness . . . consists in the vision of the Divine Essence. Now the vision of God’s Essence surpasses the nature not only of man, but also of every creature . . . Consequently neither man, nor any creature, can attain final Happiness by his natural powers.”<sup>86</sup>

Because Natural Law operates on the level of man’s natural abilities (reason), it is insufficient to attain the highest and most complete end—the Beatific Vision—because this end is above nature. Although man can come to the

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81. *See id.* at 58–60.

82. AQUINAS, *supra* note 27 (author’s translation of “Sicut enim videmus in artificialibus quod unumquodque opus tunc bonum et rectum dicitur quando regulae coaequatur; sic etiam quodlibet humanum opus rectum est et virtuosum quando regulae divinae dilectionis concordat . . .”).

83. *See id.*

84. *See id.*; *see also* GRATIAN, *supra* note 58, at 3; AQUINAS, *supra* note 4, q. 91, art. 5, at 17–19.

85. *See* McCall, *supra* note 1, at 60–61.

86. 6 AQUINAS, *supra* note 4, q. 5, art. 5, at 78.

knowledge that God exists by use of natural reason, he cannot know all that he needs to know about God to attain this end from reason alone.<sup>87</sup> Divine Law fills this gap in natural ability or rather elevates natural ability to a higher plane. Thus, the first purpose of Divine Law thus transcends Natural Law rather than assisting it.

The second reason given by St. Thomas directly addresses the problem considered in Part II of this Article. For the variety of reasons identified in Part I of this Article, men have reached and continue to reach differing conclusions on the content of the Natural Law and its applications in particular contexts. For the Natural Law to be a useful element of human decision making, man needs a level of certainty both as to the conclusions reached about the general precepts of the Natural Law based on the ends of man and on their application to particular contingent circumstances. Divine Law provides this assistance. As St. Thomas explains:

[B]ecause, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.<sup>88</sup>

Divine Law is of particular assistance to man in working out his participation in the Eternal Law. Conclusions, and particularly determinations about contingent matters, can be uncertain. As Aristotle turned to the good man, Aquinas expands this solution to include the ultimate good and wise man—God himself, the artificer of the Eternal Law. The Divine Law serves as the detailed specifications of the architect to assist man in constructing rules and measures in accordance with the exemplar of Eternal Law. Thus, although man is capable of knowing the Natural Law, natural lawyers must admit they will not have a perfect knowledge of the Law on their own. Yet, by accepting the Divine Law, man has a supernatural tool available to aid in the natural use of his reason.

The third and fourth functions of Divine Law relate to filling insufficiencies in human law's ability to work complete justice.<sup>89</sup> Essentially, human law is limited in its ability to achieve perfect justice. The first reason for this is that some acts of virtue and vice are dependent upon the intention of the one performing them. Men can only know the intentions of other men indirectly, through circumstantial evidence, but not perfectly and directly. Thus, by necessity, some acts of injustice cannot be corrected by human law due to this imperfect knowledge. Further, in other cases human law might be able to

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87. See 1 *id.* q. 12, art. 12, at 145–46.

88. 8 *id.* q. 91, art. 4, at 15.

89. See *id.* at 15–16. To be properly understood, the role of complete justice must be discussed in a more detailed examination of human law.

correct injustice yet, for other reasons, it must choose to leave the injustice unpunished when to do so is for the greater good. In these cases, justice would not be done. The Divine Law fills this gap so “that no evil might remain unforbidden and unpunished.”<sup>90</sup>

Returning to the second function of the Divine Law, we can see how it completes the work of Natural Law. As we saw in the discussion of justice, its definition incorporated the concept of a habit. The virtue of justice therefore is a habit that requires time to develop. Aquinas uses the term “instruction” or “training” (*disciplina*), which appears to be related to the idea of building a habit as used in the definition of justice. He says,

[M]an has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training [(disciplinam)] . . . Now it is difficult to see how man could suffice for himself in the matter of this training: since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is inclined, and especially the young, who are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue.<sup>91</sup>

Thus, although man has the ability to know the Natural Law through the use of reason, he cannot do so perfectly alone. He needs to acquire the habit through instruction. Divine Law provides the instruction. Understanding this critical function of Divine Law is essential to answering one of the fallacious criticisms leveled against Natural Law advocates. A critic could point to periods of human cruelty and vice (such as genocide or slavery) and say if Natural Law exists and is naturally accessible to man, how does it lead to such results? The answer is that these vices can arise when man rejects the necessary aid to Natural Law provided by God, the Divine Law. When Divine Law is rejected *per se* (as in contemporary America public discourse) or accepted in theory but ignored in practice (as in certain Christian societies that advocated enforced slavery) then the human determinations of Natural Law will not be aided by the Divine Law and will be more likely to err.

Beyond its division by function, Aquinas also divides the Divine Law by type of precept: moral, ceremonial, and judicial. The ceremonial precepts relate solely to the supernatural end of man, and are thus not directly relevant to a consideration of Natural Law. Thus, we will ignore their place in this discussion.

The moral precepts are those which most directly relate to consideration of Natural Law and the second function of Divine Law. As St. Thomas says, “The Old Law is distinct from the natural law, not as being altogether different from

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90. *Id.* at 16.

91. *Id.* q. 95, art. 1, at 54.

it, but as something added thereto. For just as grace presupposes nature, so must the Divine law presuppose the natural law.”<sup>92</sup>

The most obvious examples are the precepts of the Decalogue. The Decalogue contains principles that can be known by human reason alone, namely, Natural Law. God’s revelation of the Decalogue in Divine Law is not gratuitous, however. Aquinas explains the purpose such moral precepts serve:

It was fitting that the Divine law should come to man’s assistance not only in those things for which reason is insufficient, but also in those things in which human reason may happen to be impeded. Now human reason could not go astray in the abstract, as to the universal principles of the natural law; but through being habituated to sin, it became obscured in the point of things to be done in detail. But with regard to the other moral precepts, which are like conclusions drawn from the universal principles of the natural law, the reason of many men went astray, to the extent of judging to be lawful, things that are evil in themselves. Hence there was need for the authority of the Divine law to rescue man from both these defects. Thus among the articles of faith not only are those things set forth to which reason cannot reach, such as the Trinity of the Godhead; but also those to which right reason can attain, such as the Unity of the Godhead; in order to remove the manifold errors to which reason is liable.<sup>93</sup>

Thus man may need assistance in three areas. First, he may err in formulating the most general principles of the Natural Law. These principles are based directly upon the ends of man, such as men should be sociable in doing to others as they would have done to them. Errors in this area are less frequent. Secondly, he may err in formulating conclusions based on these principles, such as the fact that deposits should be returned. Finally, man may err in particular determinations. This includes specific context such as a situation where a deposit should not be returned for another intervening reason. These problems feed on each other. The more corrupted man becomes (the more “habituated to sin”), the more his reason becomes impaired and the more errors he can make. Thus, unaided, man can fall into a downward spiral of error as he calls evil good, acts accordingly, and thus becomes more habituated. Habituation (or discipline) is related to the attainment of virtue. The moral precepts of the Divine Law assist man with the first two areas of difficulty. They call man back from this downward spiral by formulating in words the general principles of the Natural Law, such as “Do unto others”, and more particular conclusions like “Thou shalt not steal.”

All that is contained within the term Natural Law is accessible to reason in theory because by its very definition Natural Law is the rational participation of man in the Eternal Law. As St. Thomas says, “Every judgment of practical

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92. AQUINAS, *supra* note 4, q. 99, art. 2, at 102.

93. *Id.*

reason [the work of Natural Law] proceeds from principles known naturally.”<sup>94</sup> Although in theory anyone having the use of reason can know the general and more detailed principles of the Natural Law by only the use of reason, in practice most people can recognize only the basic principles which are *per se nota*. Only the wise (those not habituated to sin) will actually reach the proper conclusion of practical reason.<sup>95</sup> Whereas Aristotle believes our only means of knowing the Natural Law for certain is through the intervention of wise men, St. Thomas understands that the moral precepts of the Divine Law fulfill this role more effectively and authoritatively as the Divine Law is more certain than relying on the presence of wise men in every society. It is equivalent to enlisting the assistance of an outside consultant or the original architect when interpreting an architectural drawing.

St. Thomas breaks down the contents of the moral precepts of the Divine Law into three categories depending on the relation of the level of detail to the practical ability of most men to reach the correct conclusions.

[T]he moral precepts derive their efficacy from the very dictate of natural reason, even if they were never included in the Law. Now of these there are three grades: for some are most certain, and so evident as to need no promulgation; such as the commandments of the love of God and our neighbour, and others like these . . . which are, as it were, the ends of the commandments; wherefore no man can have an erroneous judgment about them. Some precepts are more detailed, the reason of which even an uneducated man can easily grasp; and yet they need to be promulgated, because human judgment, in a few instances, happens to be led astray concerning them: these are the precepts of the decalogue. Again, there are some precepts the reason of which is not so evident to everyone, but only the wise; these are moral precepts added to the decalogue, and given to the people by God through Moses and Aaron.<sup>96</sup>

Such a relationship between Divine and Natural Law appears to undergird Gratian’s opening of the *Decretum* where he claims that the Natural Law is contained in the Law and the Gospels, collectively the Divine Law.<sup>97</sup> The Divine Law, or more precisely the moral precepts of it, is in a sense unneces-

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94. AQUINAS, *supra* note 4, q. 100, art. 1, at 114.

95. *Id.* at 114–15 (“For some matters connected with human actions are so evident, that after very little consideration one is able at once to approve or disapprove of them by means of these general first principles: while some matters cannot be the subject of judgment without much consideration of the various circumstances, which all are not competent to do carefully, but only those who are wise: just as it is not possible for all to consider the particular conclusions of sciences, but only for those who are versed in philosophy.”).

96. AQUINAS, *supra* note 4, q. 100, art. 11, at 143.

97. GRATIAN, *supra* note 58, at 3.

sary. All of the moral precepts, from the most general to the most particular,<sup>98</sup> are accessible to Man. Yet, as a conclusion becomes more particular, it becomes less accessible to the minds of men. Hence, as a corrective aid, the general principles and detailed conclusions of the Natural Law have been promulgated through, or are contained in, the moral precepts of the Divine Law.

This understanding of the second role of Divine Law explains why St. Thomas considered a love of the Divine commands and rules as absolutely necessary for knowing the goodness of human actions. No matter how proficient or wise one might be in knowing the Natural Law, perfection is impossible due to the law of concupiscence. Although habituation and consultation with the opinions of the wise can improve knowledge of the Natural Law, complete certainty of knowledge is not possible. The only source of certainty in interpreting and knowing the precepts of the Natural Law exists in the mind that promulgated the Eternal Law. God, as the artificer of the Eternal Law, makes it known to rational creatures through the Natural Law. Yet, the obstructions to this light shining in the cave of man's reason must be illuminated by another source. As the nature of the shadows in Plato's cave were only made known by turning to their source, the light,<sup>99</sup> complete knowledge of Natural Law can only be attained by turning to its source as manifest in the moral precepts of the Divine Law. Man's rationality needs these rules. Without them, knowledge of good actions and human works cannot be good and right. Our Natural Law reasoning, like art, needs to be harmonized with the Divine Law.

The function of the Divine Law within Aquinas' system of law reconciles the volitional and intellectual aspects of the Divine Law, both of which must be maintained for Divine Law to be a real species of law. First, it is rational and knowable by the rational mind. Since the moral precepts of the Divine Law are contained within the Natural Law, which is itself a participation in the Divine Rationality, they are a product of reason. In one sense, all men could know the contents of the moral precepts of the Divine Law without the Divine Law just as in a certain sense all men can know all *per se nota* truths. Yet, experience demonstrates that all men do not actually know all *per se nota* truths. Some truths must be "inculcated, the wiser teaching the less wise."<sup>100</sup> Inculcation involves an act of the will that translates knowledge into action. The Divine Law is more than a useful memory aid; it is a real law promulgated by one who has care of the community.<sup>101</sup> The Divine Law is obligatory both because it conforms to the rational nature of man, in that through the Divine Law, man can rationally participate in the Eternal Law, and because these precepts of reason have become law by being promulgated as such within the Divine Law.

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98. St. Thomas lists many examples of the more detailed principles of the Natural Law, that stand below the Decalogue in the hierarchy of generality. See AQUINAS, *supra* note 4, q. 100, art. 11, at 143–45.

99. See McCall, *supra* note 1, at 70–71.

100. See AQUINAS, *supra* note 4, at 115.

101. See McCall, *supra* note 1, at 53 (discussing the general definition of Law).



Although unlikely that Joseph Vining had in mind Aquinas' understanding of the Divine Law, his comparison of the presuppositions of law and religion provide an apt expression of the intertwined relationship between intellect and will within the Divine Law. The Divine Law is binding as a dictate of reason and a promulgated expression of that dictate from the mind of a person. Vining writes:

That which evokes no sense of obligation is not law. It is only an appearance of law, the legalistic, the authoritarian, not sovereign but an enemy. Principal among the presuppositions of legal work are that a person speaks through the texts; that there is mind; that mind is caring mind. These are the links between the experience of law and religious experience.<sup>102</sup>

An understanding of the moral principles of the Divine Law sheds an interesting light on the Ten Commandments controversies in our courtrooms.<sup>103</sup> Placing the Decalogue in a courtroom can be seen as a real act of humility for a judge. It reminds him to be conscious of his wisdom. He may err in applying natural principles of justice. The presence of the Decalogue is there to help remind him of what he should, but does not always, know. Its presence alludes to all the pitfalls in using only our reason to apply the law; it reminds us that, as St. Thomas said, another law is necessary and obligatory. Despite the Supreme Court's purported reconciliation of the 2005 companion cases on the grounds that one instance involved the religious message of the Ten Commandments, the historic role of the Ten Commandments in law making is inseparable from their theological message. They are the auxiliary instructions of the artificer of the law, God.

The most difficult problem involved in Natural Law reasoning is the determination of particular actions based upon the principles of the Natural Law. Due to the variety of so many contingent situations, these answers are not easily universalized. God has provided assistance in making these determinations but in different ways under the Old and the New Law. Both have the same end—the proper ordering of man's relationship to God—but they achieve this end in different methods.<sup>104</sup>

Prior to the coming of Christ, man was in greater need of assistance due to

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102. JOSEPH VINING, *FROM NEWTON'S SLEEP* 34 (1995).

103. *See, e.g.,* Van Orden v. Perry, 545 U.S. 677, 690–92 (2005) (plurality) (holding that the Establishment Clause was not violated by a Ten Commandments monument with the plurality reasoning that the display was typical of unbroken history of official acknowledgements of religion's role in American life and while Ten Commandments were undoubtedly religious, they also had undeniable historical meaning); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 869, 881 (2005) (holding a Kentucky courthouse display unconstitutional as the county's purpose was to emphasize the religious message of the Ten Commandments).

104. *See* AQUINAS, *supra* note 4, q. 107, art. 1, at 291.



the lack of grace.<sup>105</sup> As St. Thomas says, “the Old Law is like a pedagogue of children.”<sup>106</sup> Because men were in need of more habituation to correct determinations, the Old Law contained judicial precepts. The judicial precepts made particular determinations as a matter of divine promulgation. The particular conclusions were not binding by force of reason (as are the general principles of Natural Law), but were binding as determinations made by the ultimate law-giver, God himself.

The judicial precepts contained in the Old Law were “determinations of general principles” that are “derived from reason.”<sup>107</sup> To lead to actual decisions about what to do, the universal principles of the Natural Law, as confirmed in the moral precepts of the Divine Law, need to be “determined by Divine or human law.”<sup>108</sup>

Prior to the coming of Christ, due to the absence of grace, man needed more assistance in these determinations. Again, St. Thomas’s prior discussion of the relationship between habituation or training and the ability to reach correct conclusions or determinations is necessary to understand this distinction. In the time of the Old Law, men were not yet “possessed of a virtuous habit” and thus needed direct divine determination of judicial precepts.<sup>109</sup>

After the advent of grace, which St. Thomas calls “an interior habit bestowed on us and inclining us to act aright”,<sup>110</sup> men could be “endowed with virtuous habits” and thus were no longer in such need of divine determinations such as the judicial precepts.<sup>111</sup> Previously, God chose to give certain judicial precepts, which were particular determinations of the Natural Law. These included particular rules about forgiveness of debts, treatment of laborers, and care for the poor, for example. Later, when the human mind was aided by the availability of grace, the New Divine Law, or law of love, became a “law of liberty,”<sup>112</sup> and the particular determinations of Natural Law contained in the judicial precepts ceased to bind directly, leaving such matters to human determination.<sup>113</sup> With the availability of grace to help discipline men in virtue, the moral precepts of the Divine Law remained in force, as “they are essential to virtue,” being synonymous with the general principles of the Natural Law.<sup>114</sup> However, the particular determinations of the judicial precepts were “left to the decision

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105. See *id.* reply to obj. 2, at 294 (“[T]he Old Law . . . was given to men who were imperfect, that is, who had not yet received spiritual grace . . . .” The New Law, after the coming of Christ is appropriate for those who have “spiritual grace instilled into our hearts.”).

106. *Id.* art. 1, at 291.

107. *Id.* art. 4, reply to obj. 2, at 106–07.

108. *Id.* art. 4, at 105.

109. *Id.* reply to obj. 2, at 106–07.

110. *Id.* q. 108, art. 1, reply to obj. 2, at 306.

111. *Id.* q. 99, art. 4, reply to obj. 2, at 106–07.

112. *Id.* q. 108, art. 1, at 304.

113. See *id.* q. 104, art. 3, at 243–44; *id.* q. 108, art. 3, reply to obj. 3, at 314–15.

114. *Id.* q. 108, art. 1, reply to obj. 3, at 314–15.

of men.”<sup>115</sup>

Some human determinations are left to individuals to decide for themselves,<sup>116</sup> while others are determined for individuals by their personal superiors such as the case of parents for children.<sup>117</sup> Those determinations that “affect the common good”<sup>118</sup> were left “to the discretion of those who were to have spiritual or temporal charge of others.”<sup>119</sup> Thus, with the coming of the assistance of grace, which made the perfection of reason possible, God allowed more freedom in determination of particular acts, withdrew the specific judicial precepts of the Old Law, and entrusted the formulation of determinations to Human rather than Divine Law. Yet, the moral precepts of the Divine Law were not removed but briefly given again by Christ. Thus, the withdrawal of direct Divine determinations presupposed the continuation of the moral precepts of the Divine Law.

The abolition of the binding force of the judicial precepts did not occur because they are inherently contrary to the moral precepts of Natural Law and reason, but rather due to the changed circumstances of human existence.<sup>120</sup> Unlike the ceremonial precepts, which are completely abolished by the New Law, the judicial precepts have merely been revoked as binding in and of themselves, but a human sovereign would not err by adopting any of them as particular determinations of Natural Law.<sup>121</sup> Unlike the ceremonial precepts, the judicial precepts were repealed because man was more capable of making determinations for himself, but they remain as valid possible determinations of the Natural Law. St. Thomas does note that a sovereign would err if he prescribed the judicial precepts because they were binding in and of themselves as part of the binding Natural Law. Yet he distinguishes this error from simply adopting a particular determination that happens to coincide with the older judicial precepts, which would not be an error.<sup>122</sup>

Divine Law fulfills many functions for man—natural and supernatural. With respect to Natural Law, it serves as a clear measure to check errors of natural reason. The moral precepts of the Divine Law are like life rafts that can pull our rationality back from a drowning sea of errors. As we reach conclusions about principles of the Natural Law and particular determinations, we can compare them to the moral precepts of the Divine Law as a litmus test of their propriety. At a prior time in history, the Divine Law also provided direct aid in formulating particular determinations. More freedom in this regard is now granted to temporal and spiritual authority. Yet, this freedom expects those authorities to

115. *Id.* art. 2, at 307.

116. AQUINAS, *supra* note 4, q. 108, art. 1, at 304.

117. *See id.* art. 1, at 304; *id.* art. 2, at 307.

118. *Id.* art. 2, at 307.

119. *Id.* reply to obj. 4, at 311.

120. *Id.* q. 104, art. 3 at 243; *id.* art. 3, reply to obj. 1, at 245.

121. *Id.* art. 3 at 243.

122. *Id.*

access the instructions of the artificer in the moral precepts of the Divine Law.

#### CONCLUSION

The perspective from which this Article has considered Natural Law might be called optimistically pessimistic or idealistically realistic. The process of knowing and acting according to the details of the Natural Law is fraught with perils, congenital as well as self-inflicted. Over time some remedies—taking wider counsel, equity, habit and advice of the wise—have been partially successful. Man can become an artisan of the Natural Law, building more or less sound edifices of Natural Law principles. Yet, as even the most proficient artisan can err by straying unguided from the overall architectural plan, so too these perfecting skills can only take our work so far. An artisan might build a soundly constructed barn only to find it resting on top of the septic field unable to support its weight. Even the artisan needs the guidance of the designing mind of the architect to guide his artistry. Aquinas evokes this very image of the dependence of the artisan on the architect in his discussion of law in the *Summa Contra Gentiles*.

[S]ince law is nothing but a rational plan of operation, and since the rational plan of any kind of work is derived from the end, anyone capable of receiving the law receives it from him who shows the way to the end. Thus does the lower artisan depend on the architect, and the soldier on the leader of the army. But the rational creature obtains his ultimate end in God, and from God . . . . Therefore it is appropriate for law to be given men by God.<sup>123</sup>

In this light, the Divine Law is not merely an exercise of divine will, but rather an assistance offered to man to illuminate the way to the end. Divine Law is not opposed to Natural Law. Its contents, though not completely co-extensive, are completely consistent. Yet, the Divine Law is not redundant, but a necessary corrective. It does not correct the Natural Law, which needs no correction, but rather it corrects man's understanding of the Natural Law. Although speaking about the relationship between reason and faith generally, Pope Pius IX's comments equally apply to the relationship between Divine and Natural Law as well as the relation of both of them to Eternal Law.

[A]lthough faith is above reason, no real disagreement or opposition can ever be found between them; this is because both of them come from the same greatest source of unchanging and eternal truth, God. They give such reciprocal help to each other that true reason shows, maintains and protects the truth

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123. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* III, ch. 114, ¶ 5, at 123–124 (Vernon J. Bourke trans., Image Books 1956) (1258–1264).

of faith, while faith frees reason from all errors and wondrously enlightens, strengthens and perfects reason with the knowledge of divine matters.<sup>124</sup>

Only in understanding the dead end of pure Natural Law reasoning, without the enlightenment, strength and perfection brought by Divine Law can one understand the obligatory nature of the Divine Law. It obligates not as an act of the will but as a necessary legal guide to human reason through the error prone task of discovering and applying the Natural Law. Divine Law thus perfects the participation in the Eternal Law. To ignore it is akin to an artisan, a plumber, performing his work without consulting the overall architectural plan. The kitchen sink might end up in the living room. From this perspective, some of the dissatisfaction with Natural Law theorizing over the past few centuries is an inevitable consequence of removing access to the mind of the architect by the lower artisans of the law.

This conclusion adds a further dimension to one of the arguments I advanced in *The Architecture of Law*.<sup>125</sup> I concluded that removing God and the Eternal Law from Natural Law “leaves the Natural Law drifting without a mooring where it cannot stand.”<sup>126</sup> An examination of the necessity of Divine Law has demonstrated another reason for the futility of pursuing a Natural Law jurisprudence that excludes God and the Divine Law. Such an approach holds out the hope of establishing a legal regime rooted in practical reason but where “ethical positions and their political applications are matter for open public debate, to be proposed and defended as defensible and acceptable without appeal to the authority of revelation or its author.”<sup>127</sup> This approach not only removes the foundation, wherein lies the obligatory nature of all law, but also the necessary corrective instructions of the Divine Law. As Part I argued, Natural Law reasoning on its own is doomed to incomplete success in attaining justice. Legislating Natural Law without the “authority of revelation [Divine Law] or its author” is a recipe for an ultimate rejection of Natural Law. It is akin to hiring an artisan to build a structure without engaging an architect. Some level of success will eventually lead to collapse, calling into question the skill of the artisan.

Since Grotius speculated over three centuries ago on Natural Law without God,<sup>128</sup> the cleavage between Natural Law jurisprudence and God has widened. Although insistence on the need for the super-natural in Natural Law jurisprudence is likely to alienate some from the concept altogether, the retention of parts of the audience by omitting, or reducing to an obscure minimum as does

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124. POPE PIUS IX, *QUI PLURIBUS: ON FAITH AND RELIGION* ¶ 6 (Padraig M. O’Cleirigh ed., Angelus Press 1996) (1846).

125. McCall, *supra* note 1, at 99.

126. *Id.*

127. John Finnis, *Revelation, Universality and Particularity in Ethics*, 53 *AM. J. JURIS.* 23, 38 (2008).

128. See McCall, *supra* note 1, at 61.

John Finnis,<sup>129</sup> the role of Eternal and Divine Law may prove short lived. When the inevitable shortcomings of the artistry of Natural Law reasoning are manifest, the whole project may be abandoned as intractably flawed. Only by restoring the buttress of the instructions of the original architect may Natural Law jurisprudence remain standing.

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129. *See id.* at 62.