

WHAT THE OLD LAW REVEALS ABOUT THE  
NATURAL LAW ACCORDING TO THOMAS AQUINAS

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## WHAT THE OLD LAW REVEALS ABOUT THE NATURAL LAW ACCORDING TO THOMAS AQUINAS

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WHAT DOES THE OLD LAW have to tell us about the natural law? For some, this question is tantamount to asking, "What does Athens have to do with Jerusalem?"<sup>1</sup> since it seems clear that the natural law is a category drawn from Greek, particularly Stoic, philosophy,<sup>2</sup> while the Old Law refers the Mosaic Law of the Old Testament Hebrew people. If Athens represents the natural law and Jerusalem the Old Law, then what *do* they have to do with one another? For some, the answer would clearly be "nothing."<sup>3</sup> For Thomas Aquinas, however, as I hope to show, they have quite a lot to do with one another. Indeed, the

<sup>1</sup> The quotation is originally Tertullian's ("Quid ergo Athenis et Hierosolymis?"); cf. *De praescriptione haereticorum*, c. 7.

<sup>2</sup> For a good, short introduction to the classical roots of the natural law tradition, see J. Rufus Fears, "Natural Law: The Legacy of Greece and Rome," in *Common Truths: New Perspectives of Natural Law*, ed. E. B. McLean (Wilmington, Del.: ISI Books, 2000), 19-56.

<sup>3</sup> The best-known Christian critic of the natural law tradition from a religious-biblical perspective in the past century was undoubtedly the Protestant theologian Karl Barth. See esp. his *Church Dogmatics*, 2:2 (Edinburgh: T. and T. Clark, 1957). Among contemporary thinkers, the most influential is perhaps Stanley Hauerwas; see esp. his *The Peaceable Kingdom: A Primer in Christian Ethics* (Notre Dame, Ind.: University of Notre Dame Press, 1983), esp. 50-71. There has traditionally been suspicion of the natural law tradition among Jewish rabbinic scholars as well. For testimony to this fact and for a good defense of the natural law tradition from the Jewish perspective, see David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998). And for an excellent defense of the notion that the natural law occurs within the Old Testament itself, see John Barton, *Ethics and the Old Testament* (Harrisburg, Penn.: Trinity Press, 1998), esp. chap. 4, "Divine Commands or Natural Law?" and ch. 5, "Why Should We Be Moral?," 58-97.

goal of this article is to reveal how material in Thomas's discussion of the Old Law can help us to adjudicate and resolve a number of centuries-old debates about the precepts of the natural law.

# I. THE DEBATE CONCERNING THE PRIMARY AND SECONDARY PRECEPTS OF THE NATURAL LAW

The debate over the precepts of the natural law has raged for many centuries, with no signs of abating. Although the precepts of the natural law are supposed to be "naturally known" to all persons, fundamental differences remain between the commentators over such basic matters as whether the natural law consists in a few, basic precepts, or whether it includes a complex series of commandments; whether it is invariable in all cases for all persons, or whether its commands must be tempered by prudence. Indeed, so many and so varied are the positions that we will need an effective way of sorting through them all. To this end, I propose making use of a schema first suggested by R. J. Armstrong in *The Primary and Secondary Precepts in Thomistic Natural Law Teaching*.<sup>4</sup>

Armstrong notes that there are four seminal factors in the debate over the precepts of the natural law: the *generality* or *specificity* of the precepts, and their *variability* or *invariability*. Given these four, we can generate eight possible positions regarding the precepts of the natural law. The natural law might consist of:

1. general, invariable precepts only
2. general, variable precepts only
3. general and specific invariable precepts

<sup>4</sup> R. A. Armstrong, *Primary and Secondary Precepts in Thomistic Natural Law Teaching* (The Hague: Martinus Nijhoff, 1966), esp. 2-5. Martin Rhonheimer says of this work that it is still "the standard work" on the precepts of the natural law, adding: "This very circumspect and comprehensive study has not won the attention it deserves from many scholars of St. Thomas" (Martin Rhonheimer, *Natural Law and Practical Reason: A Thomist View of Moral Autonomy*, trans. Gerald Malsbary [New York: Fordham University Press, 2000], 292 n. 24).

4. general and specific variable precepts
5. general, invariable and specific, variable precepts
6. general, variable and specific, invariable precepts
7. specific, variable precepts only
8. specific, invariable precepts.<sup>5</sup>

These are the positions that are *logically* possible, but only some of them have actually been held by Thomistic scholars. Since all agree that the natural law must contain at least *some* general precepts, positions 7 and 8 can be excluded. And since none of the commentators allows for the possibility of *variability* among the *general* precepts, positions 2, 4, and 6 can likewise be eliminated. By process of elimination, therefore, we need really only consider positions 1, 3, and 5.

There are, then, it seems, three possible positions. The natural law might consist in (1) a few very general, self-evident principles and nothing more; or (2) a few general, self-evident principles along with a certain number of more specific precepts. The specific precepts, then, might be either (a) *invariable*, because they are like the primary precepts from which they are derived, or (b) *variable*, because they deal with more particular and contingent matters. For our purposes, then, we can label these three positions as follows:<sup>6</sup>

- |             |   |
|-------------|---|
| Position 1: | general, invariable precepts only                             |
| Position 2: | general invariable precepts, and specific invariable precepts |
| Position 3: | general invariable precepts, and specific variable precepts   |

By using these categories, we can more easily catalogue the vast array of commentators on the natural law. For example, as examples of those who advocate Position 1 (that the natural law consists of a small number of general, invariable precepts only)

<sup>5</sup> Armstrong, *Primary and Secondary Precepts*, 2.

<sup>6</sup> Cf. *ibid.*, 2-3 (although the reader will note that my numbering at this point differs from Armstrong's).

Armstrong lists scholars such as Viktor Cathrein, Henri Capitant, Edgar Janssens, and Louis Le Fur.<sup>7</sup> There is some disagreement, however, even among these as to what constitute the primary, invariable precepts. Examples range from the famous "Do good and avoid evil" (which many consider to be the sole precept of the natural law) to Cathrein's "You should observe the order which is fitting for you as a rational being, in your relations with God, your fellow men and yourself," to Le Fur's, "one ought to pay compensation for damage unjustly inflicted on another person," to one of Armstrong's own suggestions: "the sexual relationship requires some form of regulation."<sup>8</sup> Numbered among those who hold Position 2 (that the natural law consists of both general and specific precepts, both of which are *invariable*) we find scholars such as Jacques Leclercq, Georges Renard, Paul Van Overbeke, and Jacques Maritain.<sup>9</sup> In the last category (those who claim that the natural law consists of invariable general precepts and specific precepts that may be variable), one finds luminaries such as Antonin Sertillanges, Régis Jolivet, Dom Odon Lottin, and Heinrich Rommen.<sup>10</sup> In each category, we can find a number of

<sup>7</sup> See Viktor Cathrein, *Recht, Naturrecht und Positives Recht* (Freiburg: Herder, 1909); Henri Capitant, *Introduction à l'étude du droit civil* (Paris, 1923); Edgar Janssens, *Cours de morale générale* (Louvain: Bibliothèque de l'Institut supérieur de Philosophie, 1926); C. Martyniak, *Le fondement objectif du droit d'après saint Thomas d'Aquin* (Paris: Recueil Sirey, 1931); Louis Le Fur, *Les grands problèmes du droit* (Paris: Recueil Sirey, 1937).

<sup>8</sup> See Armstrong, *Primary and Secondary Precepts*, 3-4, 7, and 126.

<sup>9</sup> See Jacques Leclercq, *La notion précise du droit naturel* (Brussels: Institut Saint-Louis, 1923); and *Le fondement du droit et la société*, vol. 1 in *Leçons de droit naturel* (Louvain: Namur, 1957); Georges Renard, *Le droit, l'ordre et la raison* (Paris: Recueil Sirey, 1927); Jean Dabin, *La philosophie de l'ordre juridique positif spécialement dans les rapports de droit privé* (Paris: Recueil Sirey, 1929); idem, *Théorie générale du droit* (Bruxelles: Bruylant, 1944); J. Messner, *Social Ethics, Natural Law in the Modern World*, trans. F. F. Doherty (St. Louis: Herder, 1949); Paul Van Overbeke, "La loi naturelle et le droit naturel chez saint Thomas," *Revue Thomiste* 57 (1957): 450-95; Jacques Maritain, *Man and the State* (Chicago: University Of Chicago Press, 1951); idem, *The Rights of Man and Natural Law*, trans. D. C. Anson (New York: Scribners, 1943); and Philippe Delhay, *Permanence du droit naturel* (Louvain: Editions Nauwelaerts, 1960).

<sup>10</sup> See Michael Cronin, *The Science of Ethics*, vol. 1 (Dublin: Longmans, 1909); A. D. Sertillanges, *La philosophie morale de Saint Thomas d'Aquin*, 9th ed. (Paris: Aubier, 1946); Régis Jolivet, *Morale*, vol. 4 in *Traité de philosophie* (Lyon: E. Vitte, 1963-66); Dom Odon Lottin, *Le droit naturel chez saint Thomas et ses prédécesseurs* (Bruges: C. Beyaert, 1931); idem, *Morale fondamentale* (Tournai: Desclee, 1954); and Heinrich Rommen, *The Natural*

the preeminent natural law thinkers in the first half of the twentieth century. And yet, there seems to be no one position that all of them can agree upon.

Nor has time and the progress of scholarship brought about the desired consensus. If we consider more recent scholars of the natural law, we could perhaps divide them once again into three major camps, roughly speaking (here listed chronologically). The first group begins with the basic principle that "good is to be done and evil avoided," and then distinguishes other precepts of the natural law according to the basic human inclinations listed in question 94, article 2 of the *Prima Secundae* of Thomas's *Summa Theologiae*. We could include in this group the eminent historian of medieval philosophy, Etienne Gilson, as well as D. E. Luscombe, author of the article on the natural law in *The Cambridge History of Later Medieval Philosophy*.<sup>11</sup> For example, Gilson claims that, for a man to know what the natural law demands of him, he "has only to observe himself attentively in order to discover it," because "the inclination which draws us toward certain ends is the unmistakable mark of what eternal law demands of us."<sup>12</sup> The first and most universal prescription of this law is the command to "do good and avoid evil." Once we have granted this, says Gilson, it is clear that "the precepts of natural law correspond exactly with our natural inclinations and that their order is the same."<sup>13</sup> Accordingly, Gilson identifies three basic prescriptions of the natural law and describes them as follows:

- (1) To tend to persevere in being is . . . the first precept of natural law to which man is subject.
- (2) [The second is] To reproduce himself, to raise his children, and other similar natural obligations.

*Law* (St. Louis: Herder, 1947).

<sup>11</sup> See Etienne Gilson, *The Christian Philosophy of St. Thomas Aquinas*, trans. L. K. Shook (New York: Random House, 1956); D. E. Luscombe, "Natural Morality and Natural Law," in *The Cambridge History of Later Medieval Philosophy*, ed. N. Kretzmann et al. (Cambridge: Cambridge University Press, 1982), 705-19, esp. 709-12.

<sup>12</sup> Gilson, *Christian Philosophy*, 266.

<sup>13</sup> *Ibid.*, 266.

(3) [The third is] To live in society, to seek truth about the natural sciences and the highest principle, God; not to injure those with whom we live, to avoid ignorance and to do what we can to dissipate it.<sup>14</sup>

Since we can presume that Gilson does not mean to suggest that these very general precepts are always and everywhere binding (for to do so would mean that no martyr could sacrifice his life for the faith—a violation of precept 1—or that no friar, such as Thomas Aquinas, could refuse to “reproduce himself” and “raise children”—a violation of precept 2), it follows that for him (and similarly for Luscombe, whose elucidation of the subject matter is similar), the natural law must contain both a primary precept that is invariable (“do good and avoid evil”) and secondary precepts that are subject to variation. These authors could be numbered, therefore, among those who hold Position 3—that the natural law consists of general, invariable precepts and specific precepts that may be variable.

There is another contemporary group of scholars, however, who have been concerned that a position such as Gilson’s would make Thomas seem to be deriving an “ought” from an “is.” This second group, whose leading advocates are Germain Grisez and John Finnis, would distinguish the precepts of the natural law according to a list of “fundamental human goods” that are known intuitively. To be morally good, each human act must be directed ultimately to one of these fundamental human goods. Now since, on their account, the fundamental human goods are incommensurate, and thus one can never be sacrificed for another (for to justify that, the second good or goods would have to be commensurately superior to the first), both Grisez and Finnis hold that it can never be licit to do an act that is directly opposed to a fundamental human good.<sup>15</sup> For this reason, I suggest regarding

<sup>14</sup> See *ibid.*, 267.

<sup>15</sup> See in particular the first three volumes of Grisez’s multi-volume treatment of the Christian moral life: Germain Grisez, *The Way of the Lord Jesus*, vol. 1, *Christian Moral Principles* (Chicago: Franciscan Herald, 1983); vol. 2, *Living a Christian Life* (Chicago: Franciscan Herald, 1993); vol. 3, *Difficult Moral Questions* (Chicago: Franciscan Herald, 1997); along with the following: Germain Grisez, *Fulfillment in Christ: A Summary of Christian Moral Principles* (Notre Dame, Ind.: University of Notre Dame Press, 1991); and

Grisez and Finnis as advocates of something like Position 2: that the natural law consists of invariable primary precepts (the “fundamental human goods”) and at least some invariable secondary precepts (acts directly opposed to a fundamental good).

More recently, a third group of contemporary scholars has arisen, stressing the priority of prudence in Thomas’s moral philosophy. They wish to minimize what they see as the “legal prescriptivism” of the other groups. Their tendency, accordingly, is to de-emphasize the role of particular norms or rules in natural law ethics and focus rather on the role of prudence in particular situations that call for a moral judgment. Although these thinkers accept as a first principle of practical rationality the statement that “good is to be done and evil avoided,” they do not believe that any particular moral norms can be derived from it. Characteristic in this regard is the following statement in a recent article on the natural law by Ludger Honnefelder:

If one is not to misunderstand the scope of the first practical principle [says Honnefelder], one must consider what it does and does not entail. Arrived at by way of reduction, it turns out to be the formal structure of all concrete practical judgment, not, however, their source. No concrete sentence which guides action is possible without implying this principle, but none can be directly deduced from it either. As regards material content, the principle is tautological and empty.<sup>16</sup>

*idem*, *Contraception and the Natural Law* (Milwaukee: Bruce Publishing, 1964). On Finnis, the reader might consult the following: John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980); *idem*, *Fundamentals of Ethics* (Washington, D.C.: Georgetown University Press, 1983); *idem*, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, D.C.: The Catholic University of America Press, 1991); and *idem*, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998). J. Finnis, J. Boyle, and G. Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon, 1987) contains a selected bibliography of pertinent writings by these three authors at the end. See also Robert George, ed., *Natural Law and Moral Inquiry: Ethics, Metaphysics and Politics in the Work of Germain Grisez* (Washington, D.C.: Georgetown University Press, 1998), which contains relevant discussions and critiques of the Grisez et al. project.

<sup>16</sup> Ludger Honnefelder, “Rationalization and the Natural Law: Max Weber’s and Ernst Troeltsch’s Interpretation of the Medieval Doctrine of Natural Law,” *Review of Metaphysics* 49 (1995): 282-83.

As for the natural inclinations from which Gilson and Luscombe derived the secondary precepts of the natural law, Honnefelder claims that,

no concrete norms can be derived from or read out of them. They have a meta-normative character and form . . . a non-arbitrary, open teleological system . . . from which only the most general prohibitions can be gleaned (which set natural boundaries to the field of action) but not, however, concrete and positive guides to action.<sup>17</sup>

What is required, instead, according to these thinkers, is an act of "complex practical deliberation,"<sup>18</sup> such as is made possible by the virtue of prudence. Thus, as Daniel Mark Nelson suggest in *The Priority of Prudence*:

the naturally known principles from which practical reasoning proceeds . . . do not help us know what to do. The first principles of natural law are too general and abstract to guide action, and the secondary principles are experientially derived to a much greater degree, reflecting the judgments of prudence.<sup>19</sup>

There are important differences between the thinkers in this group—this is more of a "tendency" rather than an actual "school of thought," as could be argued is the case with either the Gilsonian or Finnis-Grisez schools described above—so we would probably have to list these thinkers either as advocates of Position 3 (that the natural law consists of one general, invariable precept, namely, that "good is to be done and evil avoided" and several, more specific, variable precepts) or, in some cases, as advocates of Position 1 (that the natural law consists of one general, invariable precept only and no other generally applicable specific precepts). In this group, we might include such recent authors as Daniel Mark Nelson, Daniel Westberg, and Anthony Lisska.<sup>20</sup>

<sup>17</sup> Ibid., 283.

<sup>18</sup> See *ibid.*

<sup>19</sup> Daniel Mark Nelson, *The Priority of Prudence: Virtue and Natural Law in Thomas Aquinas and the Implications for Modern Ethics* (University Park, Penn.: Penn State University Press, 1992), 114.

<sup>20</sup> See Nelson, *Priority of Prudence*; Daniel Westberg, *Right Practical Reason: Aristotle, Action, and Prudence in Aquinas* (Oxford: Clarendon Press, 1994); and Anthony Lisska, *Aquinas's Theory of Natural Law* (Oxford: Clarendon Press, 1996).

From our brief survey, then, it would appear that, not only are the uneducated (the *rudes*) unclear about the precepts of the natural law, even the majority of the twentieth century's finest and most dedicated natural law scholars can not agree on the precepts of the natural law. One might be forgiven for wondering whether there are any two ethicists anywhere who agree on what the natural law is. Indeed, so hopelessly muddled and confused have we become about what the term "natural law" might mean, in fact, that the late political philosopher Gerhart Niemeyer once advised that, "we would do well to use the concept of natural law reluctantly, if at all."<sup>21</sup>

In short, the dispute over the content of the natural law has raged for generations among scholars with no decisive resolution. Why so much disagreement? Particularly considering the fact that many, if not most, of these scholars all trace their work back to pretty much the same texts in the *Summa Theologiae*?

Perhaps this is part of the problem. Perhaps the problem arises because scholars have so often attempted to articulate the entire content of the natural law from scraps of evidence they find among Thomas's ruminations about the question, "Does the natural law contain one precept or many?" in the *Summa* (*STh* I-II, q. 94, a. 2).<sup>22</sup> (The simple answer to that question is that the

<sup>21</sup> See Gerhardt Niemeyer, "What Price 'Natural Law'?" *The American Journal of Jurisprudence* 27 (1982): 1. In conversations over the years, I have found this to be not an uncommon view, even among those who would otherwise be sympathetic to the natural law. The general consensus seems to be—and this is Neimeyer's thesis as well—that the modern sense of the term "nature" is simply too "thin" (or at least too different from that of our classical and medieval predecessors) for the term "natural law" to become meaningful for any contemporary audience. For a good treatment on the relationship between *nomos* and *physis* in the thought of fifth-century B.C. Greece, see W. K. C. Guthrie, *A History of Greek Philosophy*, vol. 3 (Cambridge: Cambridge University Press, 1969), 55-104. For another view of why the natural law fails among our contemporaries, see Alasdair MacIntyre, "Theories of Natural Law in the Culture of Advanced Modernity," in E. B. McLean, ed., *Common Truths: New Perspectives on Natural Law* (Wilmington, Del.: ISI Books, 2000), 91-115.

<sup>22</sup> The literature on this one article is vast, and it would be impossible to give anything like an adequate bibliography relating to it in any one journal article; there would be room for nothing else. To get a sense of the on-going debate, however, such as it has been carried on even within just the last twenty years, the reader might consult the following useful secondary literature (listed alphabetically by author): K. Flannery, *Acts Amid Precepts: The Aristotelian Logical Structure of Thomas Aquinas's Moral Theory* (Washington, D.C.: The Catholic University of America Press, 2001), esp. 25-83; A. Gómez-Lobo, "Natural Law and

natural law contains many [*plura*] precepts, but all of them have to do with seeking after that which is good, and thus most fulfilling, for the human person.) It may be that this one article cannot bear as much weight as we are accustomed to place on it. If we were to read a mere four questions further on in the *Prima Secundae*, however, we would find a large amount of important information about the natural law in Thomas's discussion of the Old Law,<sup>23</sup> information that will prove useful in resolving many

Naturalism," *Proceedings of the American Catholic Philosophical Association* 59 (1985): 232-49; J. Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), esp. 79-94; G. Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1-2, Question 94, Article 2," *Natural Law Forum* 10 (1965): 168-201; idem, "The Structures of Practical Reason: Some Comments and Clarifications," *The Thomist* 52 (1998): 269-91; R. Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987), esp. 30-48; B. V. Johnstone, "The Structures of Practical Reason: Traditional Theories and Contemporary Questions," *The Thomist* 50 (1986): 417-46; P. Lee, "Is Thomas a Natural Law Theory Naturalist?" *American Catholic Philosophical Quarterly* 71 (1997): 567-87; R. McInerney, "The Principles of Natural Law," *American Journal of Jurisprudence* 25 (1980): 1-15; idem, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (Washington, D.C.: The Catholic University of America Press, 1982); M. Rhonheimer, *Natural Law and Practical Reason: A Thomist View of Moral Autonomy*, trans. G. Malsbary (New York: Fordham University Press, 2000), esp. 58-145; J. Schultz, "Is-Ought: Prescribing and a Present Controversy," *The Thomist* 49 (1985): 1-23; idem, "The Ontological Status of Value Revisited," *Modern Schoolman* 63 (1986): 133-37; idem, "'Ought'-Judgments: A Descriptive Analysis from a Thomistic Perspective," *New Scholasticism* 61 (1987): 400-426; idem, "St. Thomas on Necessary Moral Principles," *New Scholasticism* 62 (1988): 150-78; idem, "Thomistic Metaethics and a Present Controversy," *The Thomist* 52 (1988): 40-62. For what is still the most useful resource on the background to Thomas's treatment of the natural law, see esp. O. Lottin's, *Psychologie et morale aux XIII<sup>e</sup> et XIV<sup>e</sup> siècles*, 6 vols. (Louvain: Abbaye du Mont-César; Gembloux: J. Duculot, 1942-60) and the shorter, and in some ways more useful idem, *Le droit naturel chez saint Thomas d'Aquin et ses prédécesseurs*, 2d ed. (Bruges: Beyart, 1931).

<sup>23</sup> The secondary literature dealing with Thomas's treatment of the Old Law is not anywhere near so vast as that dealing with the discussion in *STh* I-II, q. 94, a. 2 (see n. 20 above). Indeed, one of the only articles that deals explicitly with the material on the Old Law is an excellent historical study by Beryl Smalley, "William of Auvergne, John of La Rochelle, and St. Thomas Aquinas on the Old Law," in *St. Thomas Aquinas, 1274-1974: Commemorative Studies* (Toronto: P.I.M.S., 1974), 2:11-72. Smalley's interest is primarily historical, not philosophical, and she makes nothing of the relationship between the Old Law and the natural law. Scholars are just now beginning to take some account of this material. Noteworthy in this regard is especially Jean Porter's recent *Natural Law and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids, Mich.: Eerdmans, 1999); see esp. chap. 3, "Scripture and the Natural Law," 121-77. One finds passing mention of the moral precepts of the Old Law in two recent works on the natural law—Flannery's *Acts Amid*

of these on-going debates about the number and character of the precepts of the natural law.

In the next part of this article, therefore, I will examine why and in what way the Old Law reveals the natural law to us. In the following section, I will attempt to indicate how these reflections on the Old Law help us to resolve some of these centuries-old disputes about the precepts of the natural law.

## II. THE OLD LAW AS A WRITTEN ARTICULATION OF THE NATURAL LAW

Thomas tells the reader of the *Prima Secundae* that "the Old Law shows forth the precepts of the natural law."<sup>24</sup> In order to understand exactly how this relationship works, however, we must begin by recognizing a key distinction within the Law of the Old Testament.<sup>25</sup>

Thomas distinguishes three basic types of precept that make up the Old Law: moral precepts (*moralia*), ceremonial precepts (*caeremonialia*), and judicial precepts (*judicialia*).<sup>26</sup> It is only the first of these, the moral precepts, that relates directly to the

*Precepts* and Rhonheimer's *Natural Law and Practical Reason*—but neither develops the implications of the relationship, nor do they take seriously using the moral precepts as a guide to the natural law.

<sup>24</sup> *STh* I-II, q. 98, a. 5. English translations are largely my own, though throughout I have been guided by the 1949 English translation of The Fathers of the English Dominican Province, *Summa Theologica* (repr.: Westminster, Md.: Christian Classics, 1981); and by the modification of that translation done by Anton Pegis in his *Basic Writings of Saint Thomas Aquinas* (New York: Random House, 1945). In most cases, where relevant, I have provided the Latin text for the reader's own reference. The Latin text of the *Summa* used was that of Thomas Gilby, et al., trans., *Summa Theologiae*, 60 vols. (New York: McGraw-Hill, 1964-1973).

<sup>25</sup> Matthew Levering has done excellent work on this entire topic. See in particular Matthew Levering, *Biblical Natural Law* (Oxford: Oxford University Press, 2008), chap. 4; idem, *Christ's Fulfillment of Torah and Temple* (Notre Dame, Ind.: University of Notre Dame Press, 2002), chap. 1; idem, "God and Natural Law," *Modern Theology* 22 (2008): 151-77; and idem, *Jewish-Christian Dialogue and the Life of Wisdom* (New York: Continuum, 2010), chap. 4, in which he engages with the work of Jewish author David Novak, especially the latter's fascinating study of the topic from a contemporary Jewish perspective, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998). I am much indebted to Professor Levering for these references.

<sup>26</sup> See *STh* I-II, q. 99, aa. 2-4.

natural law. The latter two, the ceremonial and judicial precepts, are essentially positive law precepts given by God to the Jewish people to deal with their particular needs during the historical circumstances of the Old Testament period. Though related to the natural law, they represent more specific "determinations" of the natural law. These precepts, says Thomas, were explicitly binding only on the Jewish people and only until the coming of Christ.<sup>27</sup>

When it comes to the moral precepts, on the other hand, they are said to be binding on all people at all times because, according to Thomas, they "belong to the law of nature" (*de lege naturae*).<sup>28</sup> Indeed, the identity between the moral precepts of the Old Law and the natural law is expressed in particularly strong terms. In question 99, article 4 of the *Prima Secundae*, for example, Thomas says that the moral precepts refer to the *dictamen* of the natural law (*ad dictamen legis naturae, ad quod referuntur moralia praecepta*). He uses the same term when he distinguishes the moral precepts from the judicial and ceremonial precepts in question 104, article 1. He says there of the moral precepts that they "derive their binding force from the *dictamen* of reason itself" (*habent vim obligandi ex ipso dictamine rationis*).<sup>29</sup>

The term *dictamen* carries strong connotations in Latin which we have trouble capturing with any single English term. Often, the English terms "utterance," "statement," or "dictum" are forced into service.<sup>30</sup> In the Latin Middle Ages, however, the term

<sup>27</sup> See esp. *STh* I-II, q. 99, a. 4: "We must therefore distinguish three kinds of precept in the Old Law, viz., *moral* precepts, which are dictated by [*dictamen* of] the natural law; *ceremonial* precepts, which are determinations of [the general principles of the natural law that apply to] the divine worship; and *judicial* precepts, which are determinations of [the general principles of the natural law that apply to] the justice to be maintained among men." Needless to say, such a distinction among the precepts would make a Jewish scholar such as David Novak relatively unhappy. Novak himself, however, rather than looking to the covenant law on Sinai for the natural law, associates it rather with the Noahide Law. On this, cf. Novak, *Natural Law in Judaism*, esp. 149ff. More specifically on the Noahide Law, see also his earlier essay: "Noahide Law: A Foundation for Jewish Philosophy," in *Tradition in the Public Square: A David Novak Reader*, ed. Randi Rashkover and Martin Kavka (Grand Rapids, Mich.: Eerdmans, 2008), 113-44.

<sup>28</sup> See *STh* I-II, q. 98, a. 5; *STh* I-II, q. 100, a. 1.

<sup>29</sup> *STh* I-II, q. 104, a. 1.

<sup>30</sup> On this, see for example the definitions of *dictamen* given by R. J. Deferrari in his *Latin-English Dictionary of St. Thomas Aquinas* (St. Paul: Daughters of St. Paul, 1960; repr. 1986).

*dictamen* referred primarily to a written dictation, taken down by a scribe, which represented in writing an authoritative statement, usually from a superior to his subordinates.<sup>31</sup> The scribal art of taking dictation was, in fact, called the *ars dictaminis*. In Lewis and Short's Oxford Latin Dictionary, we find under the entry for *dictamen* the following: "late Latin for *dictum*, *praescriptum*," and most tellingly, "*praeceptum*." Why would a *dictamen*, a dictation, come to be understood as a "prescript" or, more to the point, a "precept"? Because a *dictamen*, in addition to being a precise written account of someone's words (their *dicta*, as it were), carries with it a clear authority of command—the authority of the one whose words have been so scrupulously recorded—and thus constitutes for those under his authority a "precept" or a "command." I suggest that we can say of the moral precepts of the Old Law, therefore, that they are a written articulation of what the natural law expresses in an unwritten way, just as a medieval *dictamen* was a written dictation of a command that was expressed originally in an unwritten way.

To state the working premise of this article more precisely, then, let us say that, for Thomas, the moral precepts of the Old Law articulate in a written way what the natural law expresses in

<sup>31</sup> The *ars dictaminis*, the art of letter writing, became a very precise and valued art during the Middle Ages. Scribes trained in the art of letter writing were invaluable at court. The treatises on the "art" of letter writing applied Ciceronian rhetorical principles to the actual mechanics of writing a letter. As a result, a five-part letter format was developed and systematized. The art became so systematized, in fact, that collections of formularies and model letters (*dictamina*) began to circulate for verbatim copying by those unable or unwilling to compose letters of their own. The association of *dictamina* with form letters need not concern us at present, although I believe it strengthens my case that the word *dictamen* was frequently associated with the notion of verbatim copying. The literature on the *ars dictaminis* is vast, but there is a useful introduction to the development of the practice in James J. Murphy, "Ars dictaminis: The Art of Letter-Writing," in idem, *Rhetoric in the Middle Ages: A History of Rhetorical Theory from Saint Augustine to the Renaissance* (Berkeley, Calif.: University of California Press, 1974; repr. 1981). For annotated guides to the bibliography, see Murphy's "Letter Writing: Ars dictaminis," chap. 4 in idem, *Medieval Rhetoric: A Select Bibliography*, 2d ed. (Toronto: University of Toronto Press, 1989), 76-103; and Luke Reinsma, "The Middle Ages," in *Historical Rhetoric: An Annotated Bibliography of Selected Sources in English*, ed. Winifred Bryan Horner (Boston: G. K. Hall, 1980), 43-108. An account of more recent scholarship can be found in Martin Camargo, *Ars dictaminis, ars dictandi* (Turnhout: Brepols, 1991). Camargo has a bibliography of current scholarship, but only those not listed in either Murphy or Reinsma.



an unwritten way. Or to express the same point in another way, we might say that the moral precepts of the Old Law express materially—that is, in a certain *materia*, namely, in the words recorded by the writers of the Old Testament—the essential teaching (the *doctrina*) of the natural law. On Thomas's account, the source of the unity between the natural law and the moral precepts of the Old Law lies in the fact that they are two expressions of God's single will. For it is the one God, who is Author of both the Book of Nature and the Book of Scripture, who has revealed the fundamental precepts of the natural law in a written way in the moral precepts of the Old Law.

### III. MAN'S CORRUPTED NATURE AND THE NEED FOR A REVEALED ARTICULATION OF THE PRECEPTS OF THE NATURAL LAW

Why, however, would there even be a need for a special, revealed articulation of the precepts of the natural law, since the whole point of the natural law is that it can be known "naturally"? Are these not precepts which, as Aristotle says in the *Rhetoric*, "appear to be universally recognized"?<sup>32</sup> Thomas himself says of

<sup>32</sup> Aristotle, *Rhetoric* 1.10.1368b7-10 (Aristotle, *The "Art" of Rhetoric*, trans. John Henry Freese [Cambridge: Harvard University Press, 1975], 107). I am aware, as the reader should be, that to say that the natural can be known "naturally" does not necessarily imply that it is known by everyone equally. There are a number of different alternative logical possibilities. First, one might mean by the "natural law" a law whose precepts derive from nature in general and/or human nature in particular. If there are such precepts, they might or might not be easily or generally accessible to human reason. For example, the so-called "laws of nature" (what we often call the laws of chemistry or physics) are certainly "natural," but they are not known without a great deal of effort and application of scientific study and expertise. But even if we were to admit that the natural law precepts are "naturally known"—or as Aristotle suggests, "universally recognized"—we still wouldn't necessarily have to conclude that such precepts are known easily and by all. For example, when we say that something is "universally recognized," we might be implying merely that something is recognized across national and cultural boundaries, as when we say that it is "universally recognized" that visiting foreign ambassadors are not to be killed, or that noncombatants should not be targeted in warfare. These principles are so broadly recognized by different countries and nationalities that we might indeed claim that they are "universally recognized"; not in the sense that every single citizen of every country understands them, but that every country generally or for the most part recognizes them.

And yet, while these remain *logical* possibilities, we might say two things. First, there is in

the natural law that it pertains to "the light of natural reason" (*lumen rationis naturalis*).<sup>33</sup> He also describes the natural law as "the light of our intellect whereby we know what we ought to do" (*lumen intellectus per quod nota sunt nobis agenda*) and says of it that "God gave this light and law to man in the creation" (*hoc lumen et hanc legem dedit Deus homini in creatione*).<sup>34</sup> If human reason, operating by its own lights, is a sufficient guide to what is good and what is evil, then isn't a revealed written law merely superfluous?

Thomas answers this very objection in question 99, article 2 of the *Prima Secundae*. The article's second objection asserts that man's reason is sufficient for grasping moral precepts, therefore there is no need for the Old Law to contain any moral precepts. Thomas's response is that divine revelation comes to man's assistance not only in matters where his reason is insufficient, such as in matters of faith, but also in those matters where his reason may have been impeded or obscured.<sup>35</sup> In this regard, the moral precepts are like the *praeambula fidei* that Thomas describes at the beginning of the *Summa*: God must reveal them, otherwise the knowledge of these truths upon which man's whole salvation depends "would be known only by a few, and that after a long

the history of the natural law teaching a long tradition claiming that the precepts of the natural law are "universally recognized" not only by different peoples in different nations, but also by most people for the most part. (Whether they must be recognized by *all* people at *all* times—whether, in fact, they cannot *not* be known—remains in question.) Second, however, as we shall see, Thomas himself claims that the natural law can be known by the light of natural reason and that there are certain precepts that cannot fail to be known by all human persons. Given this fact, along with the nearly universal Christian association of the natural law with the verse in Rom 2:14 which speaks of the Gentiles, who "though they do not have the law, do by nature the things required by the law" (and thus are guilty of immorality when they do not obey this law), the question we are treating remains valid: why *reveal* the precepts of the natural law if they can be and are known by reason alone?

<sup>33</sup> *STh* I-II, q. 91, a. 2..

<sup>34</sup> Thomas Aquinas, *The Commandments of God: Sermon Conferences on the Two Precepts of Charity and the Ten Commandments*, trans. Laurence Shapcoate (London: Burns Oates, 1937), section 1; Latin text: *In duo praecepta caritatis et in decem legis praecepta expositio*, in *Opuscula Theologica*, vol. 2 (Turin: Marietti, 1954).

<sup>35</sup> *STh* I-II, q. 99, a. 2, ad 2.

time, and with the admixture of many errors."<sup>36</sup> For human reason, says Thomas, through being habituated to sin, "became darkened as to what ought to be done" and "went astray, to the extent of judging to be lawful things that are evil in themselves."<sup>37</sup>

But how did this happen? How did we become habituated to error and the natural power of our intellects thus darkened to what is good and evil? The answer is that our natural powers have been corrupted by sin, especially original sin. As Thomas often explains, one must consider human nature in two ways. In the first way, we can think of human nature in its full integrity or wholeness (*in sui integritate*), as it was in the first man before he sinned. Secondly, however, we must consider human nature as it exists in us now, corrupted due to original sin (*corrupta in nobis post peccatum primi parentis*).<sup>38</sup> At his creation, before the fall, man was able to act in accord with the natural law. It was at that point, says Thomas, "according to his proper natural condition that [man] should act in accordance with reason"; indeed, "this law was so effective in man's first state, that nothing either outside or against reason could take man unawares." After man turned away from God, however, "he fell under the influence of his sensual impulses," which began to rule him as though they themselves were a kind of law. This law—what Thomas calls in the *Summa* the law of the *fomes*, and what he calls elsewhere, more simply, "the law of concupiscence"—is "a deviation from the law of reason." The more man fell under its sway, the more he "departed from the path of reason"—so much so that Thomas proclaims starkly that, "the law of nature was destroyed by the law of concupiscence."<sup>39</sup>

<sup>36</sup> *STh* I, q. 1, a. 1. Cf. in particular *STh* I, q. 2, a. 2, ad 1. See also Thomas's exposition of Boethius's *De Trinitate*, q. 2, a. 3. For a longer discussion of the relationship between the truths known by faith and the truths known by reason, see *Summa contra Gentiles* I, cc. 3-8, and in particular c. 4: "Beneficially, therefore, did the divine Mercy provide that it should instruct us to hold by faith even those truths that the human reason is able to investigate. In this way, all men would easily be able to have a share in the knowledge of God, and this without uncertainty and error."

<sup>37</sup> *STh* I-II, q. 99, a. 2, ad2.

<sup>38</sup> On this, cf., for example, *STh* I-II, q. 109, a. 2.

<sup>39</sup> *In duo praecepta caritatis*, prol. (*The Commandments of God*, 2).

The result, according to Thomas, is that in his present fallen state, man is largely *not* able—that is, no longer able—to do the good proportioned to his nature.<sup>40</sup>

For Thomas, therefore, as for the medieval Christian tradition of which he is a part, the operations of human nature since the fall of man are not at all the workings of a well-oiled and efficient machine. Human nature has been so corrupted by the effects of sin that what was characteristic of or "natural" for man in that time when his nature was healthy and uncorrupted is no longer so. Man's acts and dispositions are the result of severely weakened capacities. Thus, when we talk about the natural law and, correspondingly, about the capacities of man's "natural" reason to arrive at independent moral judgments, we must remember that, for the actual world of living moral agents, what has become "natural" for us, according to Thomas, are the moral judgments that follow upon a wounded, corrupted nature, not those that depend upon an integral and uncorrupted nature that human beings no longer actually possess.

Thus it precisely *not* the case, as the Jesuit scholar R. J. Henle claims in his commentary on Thomas's *Treatise on Law*, that:

If [man] were left to his natural powers, he could, by these powers alone, achieve some degree of happiness proportionate to his nature. In this case, the Natural Law and Human Law would be adequate to guide him in his human acts.<sup>41</sup>

Quite the contrary: Thomas makes clear that if man were left to his natural powers, he would, by these powers alone, not be very happy at all. We know this because we have a record of the results. According to Thomas, man's chief defect since the fall has been pride, and men are proud of two things: knowledge and power. In order that man's pride might be overcome, says Thomas, "man was left to the guidance of his reason alone without the help of a written law."<sup>42</sup> Indeed, Thomas even calls this

<sup>40</sup> *STh* I-II, q. 109, a. 2.

<sup>41</sup> Thomas Aquinas, *The Treatise on Law*, trans. with commentary by R. J. Henle, S.J. (Notre Dame, Ind.: University of Notre Dame Press, 1993), 166.

<sup>42</sup> *STh* I-II, q. 98, a. 6.

"the age of the natural law."<sup>43</sup> Far from showing, as Henle claims, that "the Natural Law alone would be adequate to guide man in his human acts," the age of the natural law showed man how desperately inadequate his knowledge had become. The result, according to Thomas, was that "man fell headlong into idolatry and the most shameful vices." Knowledge of the natural law was obscured or obliterated so great was the "exuberance of sin." And yet, because of this, says Thomas, "man was able to learn from experience"—indeed, painful experience—"that his reason was deficient."<sup>44</sup> God, then, out of his infinite mercy and love, responded to man in his need by providing him with the Old Law "as a remedy for human ignorance" (*in remedium humanae ignorantiae*),<sup>45</sup> so that he might be instructed in the principles of the natural law, which he should know, were his nature not corrupted by sin.<sup>46</sup> Dom Odon Lottin has accurately described the theology of history lying behind this view:

The school of Anselm of Lâon spread, on the subject of the natural law, a conception which exercised a profound influence. Before the epoch of the Mosaic Law, humanity was subject to the reign of the natural law, which *naturalis ratio* dictated to him. It was condensed into this principle: Do not do to another that which you would not want for him to do to you. [We will see this in Thomas as well.] But this natural reason was soon obfuscated by sin, to the point that few men remained faithful to the true God. The Mosaic Law, thus, became necessary to revive the natural law in the heart of man.<sup>47</sup>

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> *In duo praecepta caritatis*, prol. (*The Commandments of God*, 2).

<sup>47</sup> Lottin, *Le droit naturel*, 27: "L'école d'Anselme de Laon a répandu, au sujet de la loi naturelle, une conception qui a exercé une profonde influence. Avant l'époque de la Loi mosaïque, l'humanité était soumise au règne de la loi naturelle que lui dictait la *ratio naturalis*. Elle se condensait en ce principe: Ne fais pas à autrui ce que tu ne voudrais pas qu'on te fit. Mais cette raison naturelle fut bientôt obnubilée par le péché, au point que peu d'hommes restèrent fidèles au vrai Dieu. La Loi mosaïque devenait ainsi nécessaire pour faire revivre la loi naturelle au cœur de l'homme."

What Thomas saw perhaps more clearly than any of his contemporaries,<sup>48</sup> however, was that if the moral precepts of the Old Law stand as a privileged revelation from God of the *dictamen* of the natural law, given to man as a salutary aid in light of his fallen state, then we should be able to use the moral precepts of the Old Law as an authoritative guide to the content of the natural law. It was for this exact reason, after all, that they were given to us by God.

#### IV. THOMAS'S THREEFOLD HIERARCHY OF PRECEPTS

The hierarchy that obtains among the moral precepts of the Old Law is laid out in question 100, article one of the *Prima Secundae*, and then repeated almost verbatim in two subsequent articles (*STh* I-II, q. 100, aa. 3 and 11). In each article, Thomas identifies three "levels" (*gradus*) among the moral precepts of the Old Law, distinguishing them according to their degree of universality or particularity and thus according to their accessibility to human reason. The whole presentation, in fact, is based upon an ongoing comparison between speculative and practical thinking.

As every judgment of the speculative reason proceeds from the natural knowledge of first principles, likewise every judgment of the practical reason proceeds, says Thomas, "from certain naturally known principles" (*ex quibusdam principiis naturaliter cognitis*).<sup>49</sup> These principles of practical rationality are what Thomas calls the "first and common precepts of the natural law" (*prima et communia praecepta legis naturae*), which are "self-evident" (*per se nota*) to human reason.<sup>50</sup> As *per se nota*, these

<sup>48</sup> Thomas is particularly insistent on the literal meaning of all the precepts of the Old Law, and he goes to great lengths to defend many of the most obscure precepts in the Old Testament books of Numbers, Leviticus, and Deuteronomy. On Thomas's understanding of the literal meaning of the Old Law and the views of some of his predecessors, see Smalley, "William of Auvergne, John of La Rochelle, and St. Thomas Aquinas on the Old Law."

<sup>49</sup> *STh* I-II, q. 100, a. 1.

<sup>50</sup> See, for example, *STh* I-II, q. 100, a. 3, ad 1.

precepts need not (and indeed cannot) be deduced from prior principles.

Although (as mentioned above) there has been much debate among scholars about which precepts are the *primary* precepts of the natural law, the articles in question 100 show that Thomas leaves no doubt as to what he, at least, thinks they are. For example, in article 3 he says of the two great commandments to "love the Lord your God with all your heart, with all your soul, and with all your mind," and to "love your neighbor as yourself," that "these two precepts are the first and common precepts of the natural law, which are self-evident to human reason" (*illa duo praecepta sunt prima et communia praecepta legis naturae, quae sunt per se nota rationi humanae*).<sup>51</sup> As he makes clear elsewhere, there are also several alternative forms of the second commandment to "love your neighbor as yourself": the positive injunction to "do unto others as you would have them do unto you"; the negative injunction "do *not* do to others what would not want them to do to you"; and the most simple form: "do harm to no one."<sup>52</sup> Such commandments constitute for Thomas the primary precepts of the natural law.

The second- and third-level precepts are derived from the first and are related to them "as conclusions to common principles" (*sicut conclusiones ad principia communia*).<sup>53</sup> Thomas distinguishes between the second- and third-level precepts on the basis of the degree of "consideration" necessary to reach the conclusion. Second-level precepts concern matters "so evident" (*adeo explicita*), that "at once, after very little consideration" (*statim, cum modica consideratione*), "anyone" is able to approve or disapprove of them by means of these common first principles.<sup>54</sup> Such precepts involve relatively simple and straightforward moral

<sup>51</sup> Ibid.

<sup>52</sup> One can find examples of this throughout Thomas's discussion in *STh* I-II, q. 100, aa. 1-11.

<sup>53</sup> For a good contemporary discussion of the derivation of the "secondary" precepts from the primary precepts, see Rhonheimer, *Natural Law and Practical Reason*, esp. 275 ff. on "The Extension of the Natural Law: Its Discursive Explication by the *Ratio Naturalis* and 'Secondary Precepts.'"

<sup>54</sup> *STh* I-II, q. 100, a. 1.

judgments, which everyone, insists Thomas, even the uneducated, are capable of making.<sup>55</sup> Unlike the precepts of the first level, however, concerning which no one can be in error, the second-level precepts need to be promulgated in the Law because human judgment can be led astray (*iudicium humanum perverti*) concerning matters even as simple as these. As examples of second-level precepts—those which "the natural reason of every man of its own accord and at once, judges ought to be done or not done" (*quae statim per se ratio naturalis cujuslibet hominis dijudicat esse facienda vel non facienda*)—Thomas lists, "Honor your father and mother," "Thou shalt not kill," and "Thou shalt not steal."<sup>56</sup>

Third-level precepts, finally, are those that require more complex moral reasoning. They require not a "slight consideration" (*modica consideratione*) as do the precepts of the second level, but "much consideration" (*multa consideratio*) of the various circumstances. Not all are able to do this carefully, says Thomas, "but only those who are wise; just as it is not possible for all to know the particular conclusions of the sciences, but only for those who are philosophers."<sup>57</sup> Precepts of this third level—those "which are judged by the wise to be done after a more subtle consideration of reason" (*quae subtiliori consideratione rationis a sapientibus judicantur esse observanda*)—include relatively simple moral norms, such as "Rise up before the hoary head, and honor the person of the aged man," and "Don't commit acts of prostitution," as well as relatively more sophisticated moral judgments such as "Don't evade the truth by giving in to the

<sup>55</sup> See *STh* I-II, q. 100, a. 11.

<sup>56</sup> *STh* I-II, q. 100, a. 1. With regard to the first and second levels of moral precept mentioned above, Jean Porter says, "Nearly every canonist and theologian I have examined cites the Golden Rule as one of the possible meanings of the natural law, and most of them add the Decalogue as well" (Porter, *Natural and Divine Law*, 180 n. 26). My research over much the same material has yielded the same result. By Thomas's time, it has become a medieval commonplace. In this sense, there really should be no question as to what Thomas would list as the basic precepts of the natural law. Every other medieval theologian would list the same: the Golden Rule (either "Do unto others as you would have them do unto you," or "Love your neighbor as yourself") and the Ten Commandments of the Decalogue. On this, as I have said, there should be no debate.

<sup>57</sup> *STh* I-II, q. 100, a. 1.

judgment of the majority" (cf. Exod 23:2: "Neither shall you yield in judgment to the opinion of the majority, to stray from the truth") and "Don't use false weights on a scale" (cf. Deut 25:13: "You shall not have in your bag differing weights, a large and a small").<sup>58</sup> Thomas insists that even the precepts of this third level "belong to the law of nature" (*de lege naturae*), but they are such that "they need to be taught, the wiser giving instruction to the less wise" (*indigeant disciplina, qua minores a sapientioribus instruuntur*).<sup>59</sup>

The judgment that allows one to move from moral norms of the second level to those of the third is not easy or automatic. We are far from anything like a "practical syllogism" that moves by means of synthetic deduction from premises to a particular act as its conclusion. Rather, what allows one to move from the basic moral principles (such as those on the first and second levels) to the conclusions of those principles (such as those that are revealed by the third-level precepts) is prudence. Indeed, in one of his questions on the virtue of prudence later in the *Summa*, Thomas says specifically that the role of prudence is "applying universal principles to particular conclusions of practical matters."<sup>60</sup> Moving from the simple and very basic moral judgments of the natural law, in other words, such as those that are revealed in the Ten Commandments, to the moral judgments that can be derived from them, such as those that are revealed by the moral precepts of the third level, requires the intellectual and moral virtue of prudence—a virtue that might be infused, but generally requires years of training and experience. Not all are able to do this, says Thomas, but "only those who are wise."<sup>61</sup>

Because of their importance, Thomas reviews the essential elements of his threefold hierarchy in article 11 of question 100, identifying clearly the precepts that correspond to each level of moral consideration.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> *STh* II-II, q. 47, a. 6.

<sup>61</sup> *STh* I-II, q. 100, a. 11.

The moral precepts derive their efficacy from the very dictate of natural reason. . . . Now of these there are three levels.

(1) For some are *most certain*, and so evident as to *need no promulgation* [*adeo manifesta quod editione non indigent*], as for example the commandments dealing with the love of God and neighbor, and others of this type, as was stated above, which are, as it were, the ends of the commandments [*finis praeceptorum*]; hence no one can make an erroneous judgment of reason about them.

(2) Other precepts, then, are *more particular, the reason for which anyone, even an uneducated person, can see immediately* [*magis determinata, quorum rationem statim quilibet, etiam popularis, potest de facili videre*]. Nevertheless precepts of this sort need to be promulgated, because in a few instances it may happen that human judgment can be led astray concerning them. These are the precepts of the decalogue.

(3) Again, there are some precepts *the reason for which is not so evident to everyone, but only to the wise* [*quorum ratio non est adeo cuilibet manifesta, sed solum sapientibus*]; and such are the moral precepts added to the decalogue, and given by God through Moses and Aaron.<sup>62</sup>

#### V. WRITING THE LAW ON HUMAN HEARTS: THE NATURAL LAW AND THE NEW LAW

It is important to note, however, that for Thomas the instruction that comes from the Old Law is merely the first part of a twofold plan of moral reform that corresponds to man's twofold sinful condition. As Thomas says in his introduction to the final section of the *Prima Secundae*, after God "instructs us by means of his Law," it remains for him to "help us by means of his Grace."<sup>63</sup> After the fall, says Thomas, man became proud of two things: his knowledge and power. Because he took pride in his knowledge, "as though his natural reason could suffice to bring him salvation" (*quasi ratio naturalis ei posset sufficere ad salutem*), God left man under the guidance of his own reason "without the support of the written law" (*absque adminiculo legis scriptae*), so that he could learn from experience that he suffered from a defect of reason (*quod patiebatur rationis defectum*). That is why the written law had to be given: to make up for the deficiencies of

<sup>62</sup> Ibid.

<sup>63</sup> Prologue ("de lege") to *STh* I-II, q. 90. An author who is particularly good on this issue is Matthew Levering. See his *Jewish-Christian Dialogue and the Life of Wisdom*, esp. 107-14; and *Biblical Natural Law*, esp. chap. 4: "Natural Law and the Order of Charity," 189ff.

human ignorance (*in remedium humanae ignorantiae*). Along with pride over his (supposed) knowledge, however, man gained pride over his power. And so, says Thomas, "after man had been instructed by the Law, his pride stood convicted of weakness [*convicta est ejus superbia de infirmitate*], since he was still unable to fulfill what he knew."<sup>64</sup> Therefore, "it was right," says Thomas elsewhere, "that man should first be left to himself under the regime of the Old Law, in order that by falling into sin and coming to know his own weakness, he should recognize his need for grace."<sup>65</sup>

As Thomas well understood, following the insights of St. Augustine and St. Paul before him, even after the basic precepts of the moral law are revealed to us—written down for us to see and to know—this revelation of itself does not succeed in enabling us to *do* the good. We still often fail to do the good we have been taught we ought to do. Why? Because, according to Thomas, we have suffered a tragic alienation of the will from the intellect due to the corruption of our integral human nature. No longer does the will obey "naturally" the conclusions regarding what reason has judged to be good. And indeed the intellect, clouded by sin, has itself lost the knowledge it once had of its ultimate good.<sup>66</sup>

<sup>64</sup> *STh* I-II, q. 98, a. 6.

<sup>65</sup> *STh* I-II, q. 106, a. 3.

<sup>66</sup> This topic would require a great deal more discussion, but the problem seems to be that our knowledge of our ultimate good—which is found only in God—is not complete. In other words, we do not know our ultimate good as ultimate. We "know" it (not in the sense of a *scientia*, but rather in the sense of a *cognitio*) as just another particular good among others. And *that* is why it is possible for us to choose other particular goods—say, the good of pleasure, or the good of power—over things that are "purportedly" (that, at least, is what our teachers and elders tell us) more in accord with our ultimate good. As John Henry Newman has suggested in *The Grammar of Assent*, it is one thing to give a "notional assent" to those things about which one has merely a "notional apprehension," and quite another to give a "real assent" to something about which one has a "real apprehension" (Newman, *An Essay in Aid of a Grammar of Assent*, esp. chap. 4, on "Notional and Real Assent.") We can know (have a "cognition") that something is the "right" thing to do in a particular situation—that it is supposed to lead us to our ultimate good and flourishing in the long run. But that is the long run. The good of pleasure or the good of having money, however, is available to us now. The good of the beatific vision, which could be ours ultimately, is known only abstractly, and attaining it may involve difficulty, patience, and discipline. Given the balance of those scales, we sometimes opt for the lesser good, although we don't necessarily judge it to be the "lesser"

That is why we often find we *know* in a certain sense the right thing to do, but are still not able to *do* it, and certainly not able to do it promptly and freely. If we manage to do the good act, we usually do it under duress or because we fear punishment.

The fact is that, even after the moral law has been "written on our minds," it needs to be written on our hearts as well. We should recall in this regard that the natural law was traditionally conceived of specifically as an *unwritten* law, a law "written on our hearts." Indeed, by the Middle Ages, that classic trope about the natural law as an unwritten law was being correlated with Paul's reference in Romans 2:15 to the "law written on men's hearts."<sup>67</sup> And it was understood to be the promise of the prophets such as Ezekiel and Jeremiah that the law—the law which had been obscured due to the blindness and incapacities brought on by sin—would be written anew (a "New Law," as Thomas calls it): written in this new age not on tablets of stone, but on the fleshy tablets of the human heart.<sup>68</sup> So, for example, in his very first article on the New Law, we find Thomas quoting the famous verse in Jeremiah (31:33) where God says he will "put My law within them and on their heart I will write it."<sup>69</sup> Later in the same article, we find Thomas quoting Augustine, who says that, "as the law of works was written on tablets of stone, so the law of faith is written in the hearts of the faithful." Again, quoting from

of the two at the time. We judge the more limited good to be the "greater" because we know that we can have it now. The other good is too far away and abstract and may not ever be attained. What we need, then, is greater wisdom about the good, a more powerful love of it, and an abiding hope that we can attain it, along with greater discipline of the will to keep our attention focused on the true goods that will fulfill us more completely.

<sup>67</sup> See, for example, the marginal gloss on Rom 2:15 in the medieval *Glossa ordinaria*. In the margins beside the phrase *qui ostendunt opus legis scriptum in cordibus suis*, one finds this simple gloss: "*id est lex naturae*." See *Biblia Latina cum glossa ordinaria: Facsimile Reprint of the editio Princeps Adolph Rusch of Strassburg 1480/81*, introduction by Karlfried Froehlich and Margaret T. Gibson (Brepols: Turnhout, 1992).

<sup>68</sup> Along with the text from Jer 31:33 discussed below, see also, for example, Ezek 11:19-20, where God promises through the prophet: "And I will give them one heart, and put a new spirit within them. And I will take the heart of stone out of their flesh and give them a heart of flesh, that they may walk in My statutes and keep My ordinances and do them. Then they will be My people, and I shall be their God."

<sup>69</sup> *STh* I-II, q. 106, a. 1, sc.

Augustine: "What are the laws of God written by God himself in our hearts, if not the very presence of the Holy Spirit?"<sup>70</sup>

Just as the moral precepts of the Old Law are, of themselves, imperfect—incomplete—until and unless they are perfected by the virtues and the grace of the Holy Spirit, so too we can say that any written articulation of the natural law will suffer from the same defect. It is not enough merely for the natural law to command *externally*; it must also move the will *internally*. This is why it is important to remember that the natural law is actually an *unwritten law*. It is supposed to be a "law written on men's hearts." What the corruption of man's nature has done, however, is to make it possible for the law to be written on our minds, but not in our hearts. We can *know* what we ought to do, and still not have the *will*, as it were, to do it. In such circumstances, our tendency is to view the law, not as a gift of wise counsel from a loving and concerned Father, but rather as burden of arbitrary decrees from an uncaring and unremitting Lawgiver. God becomes, not Father, but only Lawgiver and Judge.

It is only by the gift of the New Law, then, which is the gift of God's own Holy Spirit, by which "charity is spread abroad in our hearts," that the natural law can be fulfilled. Indeed, as Thomas makes clear, without the gift of God's grace, we can make the natural law into an occasion of sin, just as the written law of the Old Testament, though good of itself, became an "opportunity" for sin: "this commandment, which was to result in life, proved to result in death for me; for sin, taking an opportunity through the commandment, deceived me and through it killed me." When the natural law is written only on our minds and not on our hearts, then it too can become a burden or a goad to greater sin. The promise of the prophets such as Ezekiel and Jeremiah, on the other hand, is that the law will be written anew on the hearts of the faithful. Thus, as Thomas tells us in the famous prologue to question 90 of the *Prima Secundae*, after God "instructs us by means of his Law," it remains for him to "assist us by means of his grace." The second part of God's plan of moral renewal,

<sup>70</sup> *STh* I-II, q. 106, a. 1.

therefore, involves the work of the Holy Spirit, who will, as the prophets foretold, give us a new heart and a new spirit, so that we may walk in the Lord's commandments and keep them (Ezek 36:26-27). The natural law is revealed in a written way in the moral precepts of the Old Law, but it is only fully realized finally with the gift of the New Law and the development of the virtues, both acquired and infused.

While more needs to be said on this topic, that discussion would involve us in an analysis of the role of the virtues in the moral life as a process of "writing" those moral laws on our hearts. Instead, we must turn to a consideration of how this material on the Old Law helps us to resolve the classic debates about the precepts of the natural law.

#### VI. QUESTIONS ABOUT THE PRIMARY AND SECONDARY PRECEPTS OF THE NATURAL LAW

Analyzing the logically possible positions regarding the precepts of the natural law, we reduced them to the following three:

- Position 1: The natural law contains general, invariable precepts only
- Position 2: The natural law contains certain general, invariable precepts, along with specific precepts that are also invariable
- Position 3: The natural law contains general, invariable precepts, and specific precepts that are variable

A question we did not examine in detail above, however, is why this disagreement arose in the first place. Why three positions instead of one? As we will see, the controversy seems to have arisen because of the small differences in wording that occur in Thomas's description of a key analogy between the principles of speculative reasoning and what he calls "the principles of practical



reasoning," the latter term being one he uses to help describe the role of the precepts of the natural law.

For example, in question 94, article 2 of the *Prima Secundae*, Thomas suggests that "the precepts of the natural law stand in relation to practical reason as the first principles of demonstrations do to the speculative reason: both are self-evident principles" (*principia per se nota*).<sup>71</sup> Earlier (*STh* I-II, q. 91, a. 3), he lays out the analogy in even more detail:

A law is a kind of dictate of the practical reason. Now the processes of the theoretic and practical reasons are similar; for each proceeds from principles to conclusions, as we stated earlier. Accordingly we must say that, just as in speculative reasoning, the conclusions of the various sciences are produced from indemonstrable principles naturally known, the knowledge of which is not imparted to us naturally, but discovered through the industry of human reason, so also from the precepts of the natural law, as from common and indemonstrable principles, human reason needs to proceed to some things more particularly arranged. And such particular arrangements, arrived at according to human reason, are called human laws.<sup>72</sup>

These two texts have suggested to a number of commentators that *all* of the conclusions of the common and indemonstrable principles of the natural law are, by definition, to be considered human law. Indeed, from these two texts alone it would be very easy to conclude that the natural law consists of a few, general, self-evident, and indemonstrable first principles, and nothing more (Position 1). All other precepts derived from the indemonstrable first principles and dealing with "more particular arrangements" would be, by default, precepts of the human law, and not other precepts of the natural law at all.

The problems for this interpretation arise, however, when we get to later articles in the same section (specifically *STh* I-II, q. 94, aa. 4, 5, and 6), articles that deal in turn with whether the natural law is the same for all (a. 4), whether it can be changed (a. 5), and whether it can be "deleted from the human heart" (a. 6). Whereas in previous articles Thomas was interested in using the analogy

<sup>71</sup> *STh* I-II, q. 94, a. 2.

<sup>72</sup> *STh* I-II, q. 91, a. 3.

between the principles of speculative and practical reasoning to help elucidate the role of the precepts of the natural law, in these later articles he emphasizes the important *dis-analogies* that remain between speculative and practical reasoning. That is to say, while the precepts of the natural law act something like the principles of speculative reasoning, the similarity diminishes the more one proceeds from principles to conclusions.

For example, in article 4 we find Thomas affirming that "the natural law, as to the first common principles, is the same for all, both as to rectitude and as to knowledge," yet he also grants that

as to the proper principles, which are something like conclusions of the common principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge, but in some few cases it may fail, both as to rectitude, because of some particular impediments . . . and as to knowledge, because some persons have had their reason perverted by passion, or by evil custom, or by an evil disposition of nature.<sup>73</sup>

When we reach this text, the viability of Position 1 seems to crumble. Although it had seemed before as though the natural law might consist only in self-evident first principles—and all the conclusions derived from these first principles would be considered precepts of human law, not natural law—in this text, Thomas clearly seems to be suggesting that at least some of the precepts derived from the "first common principles" are indeed precepts of the natural law. This implication turns into a very clear statement to that effect in the two subsequent articles.

In article 5, for example, Thomas continues his discussion of the ways in which the natural law may or may not be changeable and begins his analysis with the same analogy between practical and speculative reasoning we have seen before. In commenting on whether something that was once forbidden by the natural law can ever cease to be prohibited, Thomas says this:

As to the first principles of the natural law, the natural law is altogether unchangeable. But as to its secondary precepts [*secunda praecepta*], which, as we have said, are something like certain proper conclusions close to the first

<sup>73</sup> *STh* I-II, q. 94, a. 4.



principles [*quasi proprinquas primis principiis*], the natural law is not changed so that what the natural law holds to be right in most cases is not. Nevertheless it may be changed in some particular and rare cases, because of some special causes hindering the observance of these precepts.<sup>74</sup>

This is the first place Thomas explicitly uses the term "secondary precepts" (*secunda praecepta*) to describe the class of precepts derived from the primary, first and common, self-evident, and indemonstrable principles of the natural law. In this text, these "secondary" precepts appear also to be natural law precepts, and not precepts of human law. In the very next article, Thomas says explicitly that "*there belong to the natural law*, first, certain most common precepts which are known by all; and secondly, certain secondary, more proper precepts, which are something like conclusions following closely from first principles" (emphasis added). These three articles in question 94 have caused some scholars to reject Position 1, that the natural law consists of general, invariable principles *only*, and to opt for Positions 2 or 3 instead. But notice, once the issue has been framed in terms of natural law precepts that are "primary" and others that are "secondary," arguments have arisen quite naturally over the status and character of these "secondary" precepts: whether they are actually part of the natural law properly speaking, and if so, whether they are variable or not. Instead of belaboring the point by showing *how* the various interpretations might follow from the different combinations and permutations of these texts, I will discuss rather what light might be shed on the question by incorporating evidence from Thomas's discussion of the moral precepts of the Old Law.

#### VII. HOW THE OLD LAW RESOLVES THE QUESTIONS ABOUT THE PRIMARY AND SECONDARY PRECEPTS OF THE NATURAL LAW

Given what we have seen, we can now safely eliminate Position 1: the natural law includes more than just a few, very general moral principles and nothing more. It is clear from the material

<sup>74</sup> *STh* I-II, q. 94, a. 5.

in question 100 (which helps us to clarify Thomas's comments in question 94) that there is at least a second class of precepts related to the first "as conclusions to first and common principles." We also know from the questions on the Old Law that the "first and common precepts of the natural law" (*prima et communia praecepta legis naturae*), which are "self-evident" (*per se nota*) to human reason can be expressed by the two great commandments to love God and to love one's neighbor as oneself, while the second-level precepts, those derived as "conclusions to the first and common principles," can be summed up in the Ten Commandments.

In the *sed contra* of question 94, article 2, therefore, when Thomas speaks of the precepts of the natural law "standing in relation to operable matters as first principles do to matters of demonstration," and again in question 91, article 1, when he says that human law is derived from the natural law "as from certain common and indemonstrable principles," he is speaking more broadly than he will in later articles of the *Summa*. It is clear from the articles in question 100 that, in actual fact, only the first-level moral precepts are "first and common" and entirely self-evident principles of the natural law. The second-level precepts, however, which are summed up in the Decalogue, can also serve as principles from which conclusions can be drawn, although they are not "first and common" nor "self-evident." It remains to be seen whether the third-level precepts can similarly serve as principles for further conclusions. I will discuss this possibility in more detail below. What is important to see now, however, is that Thomas becomes *more precise* as he moves into later articles and adds important distinctions that he had not felt it necessary to introduce earlier. These later distinctions do not negate his earlier comments, they merely refine them.

If one is not aware of these later distinctions, it is easy to misread the earlier material. Thomas speaks in a sort of "shorthand" in question 94, article 2, and question 91, article 3, making reference only to the "precepts of the natural law" which serve as indemonstrable first principles without the distinctions

introduced in question 100, which help us to understand more precisely the various ways in which they operate as first principles from which conclusions can be drawn. This "shorthand" has led some commentators to conclude, as mentioned above, that the natural law contains *only* general, invariable precepts and nothing more. All other derivations from these first and common, indemonstrable primary principles are then considered, on this view, to be precepts of *human law*, not natural law. Knowledge of the material in question 100, however, makes Thomas's comments in questions 91 and 94 clearer.

What about the "secondary" precepts? What does the material on the Old Law tell us about them? Our analysis shows that there are in fact two kinds of "secondary" precepts of the natural law: "those that with but slight reflection can be gathered at once from the first common principles," summed up in the Decalogue, and "those things which the wise judge ought to be done after a more careful consideration of reason."<sup>75</sup> In these later questions on the Old Law, Thomas is simply more explicit than he had been earlier in his more general treatment of the different types of law, and he specifies three levels (*gradus*) of precept rather than merely two. And just as the precepts of the Decalogue can be derived from the first and common, self-evident precepts of the first level as "conclusions from principles," so also the precepts of the third level can be derived from those on the second level as "conclusions from principles."<sup>76</sup> Thus, when we come to what commentators generally call the "secondary" precepts of the natural law, we must again realize that Thomas speaks more broadly in question 94 than he does in question 100.

Among the doubts that might still be lingering, however, is whether all three levels of the moral precepts identified in question 100 are, in fact, natural law precepts, or whether only the precepts of the first and second levels are. There are several reasons for claiming that all of the moral precepts on all three levels are natural law precepts and not, for example, human law

or positive law precepts. First, Thomas identifies all three levels as moral precepts (*moralia*), and all the moral precepts are distinguished from the ceremonial and judicial precepts precisely by being *dictamen* of the natural law. Nowhere does Thomas specify a substantial distinction among them and in no place does he suggest that the precepts of the second or third levels operate as positive law precepts—in fact, quite the opposite. Another key distinction between the moral precepts and the ceremonial and judicial precepts is that the moral precepts are binding on all people at all times, while the ceremonial and judicial precepts were binding only on the Jewish people in the historical circumstances of the Old Testament. When we look at the precepts of the second level—don't kill, don't steal, don't commit adultery—as well as those of the third level—honor the aged, don't fornicate, don't engage in sex with a prostitute, don't give in to the opinion of the majority—both appear (at least *prima facie*) to be norms binding on all people at all times. The judicial precepts, on the other hand—such as those that dealt with the relationship between Moses and the Elders, or those that specified how long a foreigner must live among the Jews before he or she could become a citizen<sup>77</sup>—seem to be, on the contrary, precepts that are related to the more particular circumstances of the Jewish people during the time of their wandering in the wilderness. While the judicial and ceremonial precepts are not entirely unrelated to the natural law—they are, in fact, applications of it to particular circumstances—they are not generally applicable norms that cover various times and circumstances in the way that even the moral precepts of the third level do. In other words, although the judicial and ceremonial precepts are positive law precepts, the third-level moral precepts are not. By contrasting the judicial precepts with the third-level moral precepts, Thomas makes clear that all of the moral precepts—including those of the third level—are natural law precepts and not mere positive law.

<sup>75</sup> *STh* I-II, q. 100, a. 11.

<sup>76</sup> See *STh* I-II, q. 100, a. 3.

<sup>77</sup> On the relationship between Moses and other Jewish officials, including priests, elders, and judges, see *STh* I-II, q. 105, a. 1. On how long a foreigner should be required to live among the Jews before becoming a citizen, see *STh* I-II, q. 105, a. 3.

Thus far we have learned that, along with certain general precepts, the natural law also contains a number of more specific precepts—in fact, two classes of more specific precepts: one involving a simple judgment without conditioning circumstances, a judgment of which even the unlearned are capable; and a second class involving a more complex consideration of circumstances of which only the wise are capable. Having come to these conclusions concerning the *generality* and *specificity* of the precepts of the natural law, we must now turn to the other major factor involved in the debate over the natural law, namely, the *variability* and *invariability* of the precepts. This will allow us to adjudicate between Position 2 (that the natural law consists of general invariable precepts and specific precepts that are *invariable*) and Position 3 (that the natural law consists of general invariable precepts and specific precepts that are *variable*).

#### VIII. VARIABILITY AND INVARIABILITY AMONG THE PRECEPTS OF THE NATURAL LAW: DEFECTS OF RECTITUDE VS. DEFECTS OF KNOWLEDGE

If we ask whether the “secondary” precepts (using the term broadly)—those derived from the first and common principles—are variable or invariable, we must be careful to distinguish. Thomas identifies two potential defects that can arise when moving from moral principles to the conclusions derived from those principles: defects of *rectitude* and defects of *knowledge*.<sup>78</sup> When we ask about the variability of the precepts of the natural law, then, we must first clarify whether the rectitude of the precept is variable, so that what was once prohibited by the natural law is no longer prohibited; or whether the knowledge of the precept is variable, so that what is known by one person to be right or wrong might not be known by another. In other words, do the “secondary” precepts (whether of the second or the third levels) enunciate moral norms that are invariably right or wrong

<sup>78</sup> See the discussion in *STh* I-II, q. 94, a. 4.

(that, for example, it is never right to do X), and are they such that they are invariably known to be right or wrong?

Thomas first lays out these basic distinctions in question 94, article 4 of the *Prima Secundae*, where he makes clear that in matters directly related to the first and common principles of moral action rectitude is the same for all and is equally known by all. In practical reason as in speculative reason, says Thomas, “there is necessity in the common principles.”<sup>79</sup> In article 5 of the same question, he asks whether the natural law can be changed. If by “change” we mean that what previously was in accord with the natural law ceases at a later time to be so, Thomas insists unequivocally that “the natural law is altogether unchangeable in its first principles.”<sup>80</sup> And again in article 6, Thomas says of our knowledge of the natural law that, “As to the common principles, the natural law, in its universal meaning, cannot in any way be blotted out from men’s hearts.”<sup>81</sup>

Significantly, Thomas reiterates these same points in the articles of question 100 that deal with the first grade of moral precept. In article 3, for example, he says that with regard to the first and common principles, “they need no further promulgation after being once imprinted on the natural reason to which they are self-evident.”<sup>82</sup> In article 11, he says of the first grade of precept that they are “most certain, and so evident as to need no promulgation,” thus “no one can have an erroneous judgment about them.” These texts indicate clearly that the natural law must be founded upon certain general precepts which are *invariable*, both as to rectitude and as to knowledge.

What, then, about the secondary precepts? As Thomas makes clear in question 94, article 4, the more one moves away from the common principles and descends into proper conclusions, the more one is liable to encounter defects of either rectitude or knowledge. Our question, then, is where among the “secondary” precepts do these defects of rectitude and knowledge enter in? In

<sup>79</sup> *Ibid.*

<sup>80</sup> *STh* I-II, q. 94, a. 5.

<sup>81</sup> *STh* I-II, q. 94, a. 6.

<sup>82</sup> *STh* I-II, q. 100, a. 3.

the same article, after affirming that the "first and common" precepts are the same for all with regard to both rectitude and knowledge (i.e., they are always true, and it is impossible for a person not to know them), Thomas declares that "as for certain proper aspects, which are something like conclusions of the common principles," the secondary precepts are the same for all in the majority of cases (*in pluribus*), with regard to both rectitude and knowledge, but in a small number of cases (*in paucioribus*) it may fail, with regard to both rectitude and knowledge. What does this mean concretely?

As we have seen, Thomas's comments throughout question 94 remain rather broad and do not include specifications he includes only in later discussions. It will help, therefore, if we distinguish, as we did before, between the "secondary" precepts that are derived from the first and common precepts as conclusions from principles "at once after little consideration" (the precepts of the second level in *STh* I-II, q. 100, a. 11) and those that are derived "after much consideration" by the wise (the precepts of the third level). Given the terms of the discussion, the following combinations would be logically possible. The second-level precepts (the precepts of the Decalogue) could be:

- (a) *not* liable to defects of either rectitude or knowledge;
- (b) liable to defects of rectitude but *not* of knowledge;
- (c) *not* liable to defects of rectitude, but liable to defects of knowledge; or
- (d) liable to defects of both rectitude and knowledge.

The same would be true of the third-level precepts (the moral precepts added to the Decalogue).

In order to sort through these possibilities, it will be necessary to consider defects of rectitude and defects of knowledge each in turn. Let us consider first whether the precepts of the second level—those summed up in the Ten Commandments—can fail either in rectitude or in our knowledge of them.

With regard to *rectitude*, Thomas argues in question 100, article 8 that the Ten Commandments "contain the very intention of the lawgiver, Who is God," and thus they "contain the very preservation of the common good," and "the very order of justice and virtue." He concludes that "the precepts of the decalogue admit of no dispensation whatsoever" (*et ideo praecepta decalogi sunt omnino indispensabilia*).<sup>83</sup> We can say, then, that the Ten Commandments are invariable as to rectitude. What about our *knowledge* of them?

It will be helpful to remember what sort of precepts we are dealing with here. Thomas's own examples of the precepts of the second level, those things which "the natural reason of every man, of its own accord and at once, judges to be done or not to be done," are, "Honor your father and mother," "Thou shalt not kill," and "Thou shalt not steal" (cf. Exod 20:12, 13, 15). These three precepts are obviously meant to represent all of the commandments of the Decalogue,<sup>84</sup> but the reference to stealing is particularly noteworthy, because stealing is what is at stake in a famous example of a defect in the knowledge of the natural law, namely, that "theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans."<sup>85</sup> Thomas mentions the possibility of having defects in our knowledge even of precepts such as those in the Decalogue later in question 100 as well. He says explicitly that, even among those precepts "the reason for which anyone, even an uneducated person, can see immediately" (that is, the precepts of the Decalogue), it is possible for there to be failures in knowledge, because "in a few instances it may happen that human judgment can be led astray concerning them."<sup>86</sup>

The conclusion we can draw from the evidence, I would suggest, is that while there can be no defect in the rectitude of the Commandments, in the sense that what was once wrong is so no

<sup>83</sup> *STh* I-II, q. 100, a. 8.

<sup>84</sup> Thomas makes this plain, as we have seen, in *STh* I-II, q. 100, a. 11, where he says explicitly of the second-level precepts that "these are the precepts of the decalogue."

<sup>85</sup> *STh* I-II, q. 94, a. 4; cf. Caesar, *The Gallic Wars* 6.23.

<sup>86</sup> *STh* I-II, q. 100, a. 11.

longer, there may yet be defects in our knowledge even of these very basic moral judgments. For the most part, men understand the fundamental moral principles embodied in the Commandments. It is possible, however, that evil persuasions and evil passions may cause one to lose sight of these moral principles for a short time; and evil customs or a vicious nature might, in some rare or extreme circumstances, blot out the principle almost entirely, as in the case of Caesar's Germans or, closer to our own day, Hitler's Nazis.<sup>87</sup>

Since, as we have seen, there can be no defects of rectitude in either the first or the second levels of the moral precepts, and yet it is clear from what Thomas has said in question 94, article 4 that defects of rectitude enter in somewhere as we move from principles to conclusions, where do defects of rectitude enter in? The logic of Thomas's presentation leads to the conclusion that such defects enter in at the third level, with those precepts that require a judgment based on "much consideration of the various circumstances" (*multa consideratio diversarum circumstantiarum*). Indeed, this interpretation of the evidence is in accord with what Thomas says earlier in question 94, article 4 about defects, namely, that "the principle will be found to fail the more, according as we descend further towards the particular [*quanto magis ad particularia descenditur*] . . . because the greater the number of conditions added [*quanto enim plures conditiones particulares apponuntur*], the greater the number of ways in which the principle may fail [*tanto pluribus modis poterit deficere*]."<sup>88</sup>

<sup>87</sup> Thomas may be putting too much faith in the testimony of an authority. While it may be the case in certain "primitive" societies that theft is tolerated, or even encouraged, when it is perpetrated on strangers or enemies, it would be hard to imagine a society that valued theft even among its own people in any and all circumstances. It may well be that Thomas needed a more sophisticated cultural analysis of the relationship between one's own tribe (those who qualify as full-fledged "people") and foreigners or aliens (those who do not so qualify). Would it vitiate Thomas's thesis concerning the natural law if we allowed the further provision that, at times, certain groups can become insulated in such a way that they come to view other groups as not merely other, but as something subhuman, and that in such cases the usual canons of "do unto others as you would have them do unto you" are thought not to apply?

<sup>88</sup> *STh* I-II, q. 94, a. 4.

To understand what this means concretely, however, we must attend closely to the example Thomas offers in the same place of an act whose rectitude is open to question. The outlines of this case are these. It follows from reason, says Thomas, "as a proper conclusion," that goods entrusted to another should be restored to their owner. It may happen in a particular case, however, that it would be injurious, and therefore unreasonable, to restore the goods of another, as, for example, if they are being claimed for the purpose of injuring one's own country.<sup>89</sup> In other words, although it is *usually* right to restore goods entrusted to one by their owner, it might not *always* be right, depending upon the circumstances. Indeed, the more complex the circumstances, the more often the principle "restore goods entrusted to you by their owner" will not be the right thing to do, as in the case of a drunk and angry man demanding his sword back so that he can kill one with it.

But is the precept "One ought to return goods entrusted to one by their owner" a precept of the second level or of the third level? It is certainly not one of the Ten Commandments, so it must be a precept of the third level. But note the complexity. Many commentators who have in mind *only* the perspective of "primary" and "secondary" precepts will say, with some justification, that failure to return goods entrusted to one by their owner is a violation of the commandment "You should not steal." This is certainly true. To keep goods entrusted to one by another would seem to be a kind of theft. If someone lends me his car, and I refuse to give it back, that is a kind of theft. As Thomas makes clear elsewhere, hiring a worker to do a job for an agreed-upon wage and then refusing to pay can also be a kind of stealing.<sup>90</sup> But the problem arises not at the second level of generality—with the commandment "You shall not steal"—but at the third level of generality. It is always wrong to steal; whether refusing to return goods entrusted to one by their owner is *in these particular*

<sup>89</sup> See *ibid.*

<sup>90</sup> See *STh* I-II, q. 105, a. 2.

*circumstances* a case of stealing can, however, be subject to disagreement. Such decisions require the judgment of the wise.

To come at it from another direction, we consider this: Does failure to return goods entrusted to one amount to stealing? In most cases, yes. If, however, circumstances are such that the goods are being claimed for the purposes of doing harm to others, then returning the sword *in that circumstance* would violate an even more fundamental commandment—one from which the commandment against stealing is itself derived “as a conclusion from a first and common principle”—namely, the commandment not to harm others and to “love one’s neighbor as oneself,” precepts that Thomas calls “the ends” (*fines*) of all the other precepts.<sup>91</sup> And yet, even if one is not bound to return a dangerous sword immediately, or upon request, to its original owner due to certain circumstances (the man is drunk, or it is clear that he intends to do some very obvious evil with it)—indeed, given certain circumstances, one might be bound *not* to return the sword—this does not mean that one can simply keep the weapon for oneself in perpetuity. One is still bound by the fundamental commandment not to steal. Given that fundamental obligation, it may be that one should decide to hold the sword in trust for a certain length of time until the one for whom one is keeping it is no longer drunk or until the evil passions have subsided or until he can be convinced no longer to pursue his evil intentions. If the owner cannot be persuaded within any *reasonable* length of time—and this too would be a judgment requiring the wisdom of prudence—perhaps the sword should be sold and the money dedicated to the common welfare or to the Church.<sup>92</sup> To keep the sword for oneself, however, even if there

<sup>91</sup> See *STh* I-II, q. 100, a. 11.

<sup>92</sup> An interesting historical example may serve to corroborate the point. In a letter often mis-identified as being written to “the Duchess of Brabant” (even by the Leonine editors), Thomas provides an interesting reply to a query from Margaret II, Countess of Flanders, also known as Margaret of Constantinople because she was the daughter of Baldwin I of Constantinople. (On this, see Leonard E. Boyle, “Thomas Aquinas and the Duchess of Brabant,” *Proceedings of the Patristic, Mediaeval and Renaissance Conference* 8 [1983]: 25-35; or idem, *Facing History: A Different Thomas Aquinas* [Louvain: FIDEM, 2000], 105-121. Fr. Torrell accepts Boyle’s attribution in his biography of St. Thomas: see J.-P. Torrell, *Saint*

are good reasons for not returning it to its owner, would be a kind of theft, and therefore prohibited by the commandment against stealing. Such precepts, it should be noted—those that “cannot be the subject of judgment without much consideration of the various circumstances” and “the reason for which is not so evident to everyone, but only to the wise”—correspond to the moral precepts of the *third* level, not the first or second.

We can summarize Thomas’s teaching on the various precepts of the natural law as follows. The natural law is grounded in two general, invariable precepts, which are invariable with respect to both rectitude and knowledge: to love God and to love one’s neighbor as oneself. The natural law also contains a series of more specific precepts derived from these first-level, general, invariable precepts. There is a second level of precepts that are invariable with regard to rectitude, but not invariable with regard to knowledge. And there is a third level of precepts that are variable

*Thomas Aquinas: The Person and His Work* [Washington, D.C.: The Catholic University of America Press, 1996], 355.) The Countess of Flanders, a wealthy and fairly substantial benefactor of the Dominicans, who asked whether it would be permissible for her to seize money from Jewish money-lenders who had obtained it through usury. Recall that for Thomas, usury (if these were, in fact, cases of usury) would have been a violation of the seventh commandment against stealing. Thomas’s very careful answer is that, in some instances, money recovered from Jewish money-lenders who obtained it illegitimately through usurious means *might* be seized, but every effort must be made to find and return the money thus recovered to those from whom it had been “stolen.” If the original owners could not be found, then the money was to be deposited for the “benefit of the common good” or for the Church. It was certainly *not* permissible, however, replies Thomas, given these circumstances, to keep the money for oneself. In other words, taking money away from people who had ostensibly “stolen” it from others would be permissible, but keeping that money for oneself would not, because that would itself be an act of stealing. If we presume that the Countess would have only wanted the money in order to enrich her own coffers and would not, in addition, have been particularly pleased to discover that, should she seize the “stolen” funds, she would then become personally responsible for locating each and every debtor to restore their loss, Thomas’s reply was probably something of a bitter pill. See H. F. Dondaine, ed., *Epistola ad ducissam Brabantiae*, in *Sancti Thomae de Aquino Opera Omnia iussa Leonis XIII P.M. edita* (Rome, 1976) 42:357-78, esp. ll. 55-61 and 105-7. For a fuller discussion of the context and contents of this letter, see the excellent article by Michael B. Lukens, “St. Thomas’ Letter on the Jews,” in *Conflict and Community: New Studies in Thomistic Thought*, ed. Michael B. Lukens (New York: Peter Lang, 1992), 165-201. Lukens’ thesis is that the letter is actually an inducement *not* to seize the money from the Jewish money-lenders, even if gotten usuriously. This article also contains a useful English translation of Thomas’s letter.

with regard to both rectitude and knowledge. This information is summarized in the diagram below.

Types of precepts of the natural law	Corresponding grades of moral precept	Variability as to rectitude and knowledge	Example
Primary: general, invariable precepts	first grade	<i>rectitude:</i> "wholly immutable" <i>knowledge:</i> "first and common" "cannot be blotted out from men's hearts"	"Love your neighbor as yourself"
Secondary (type 1): less general, more specific, invariable precepts	second grade	<i>rectitude:</i> "cannot be dispensed" <i>knowledge:</i> "may suffer defects in knowledge, but not in rectitude"	"You shall not steal"
Secondary (type 2): less general, more specific, variable precepts	third grade	<i>rectitude:</i> "may suffer defects both in knowledge and in rectitude" "depend upon the multitude of diverse circumstances" <i>knowledge:</i> "require the judgment of the wise"	"Return things lent to you"

## IX. QUESTIONS STILL TO BE CONSIDERED

In the present article, I have attempted to do one thing alone: to explain how Thomas's comments on the Old Law can help us to solve long-standing debates about the precepts of the natural law. In doing so, I am aware, as many readers undoubtedly are, of the many elements missing and the many questions left unanswered. I wish to indicate just a few of the more salient issues that still need to be considered.

(1) No discussion of the natural law is complete without an adequate account of the role of the New Law in fulfilling the natural law. If, as Thomas says, the precepts of the natural law can ultimately be reduced to the two first and common precepts, to love God and to love one's neighbor as oneself, then any account of the natural law must take account of the role of charity in fulfilling the law.

(2) Some readers of Thomas, knowledgeable about aspects of the natural law, will want to know about the principle that "good is to be done and evil avoided" (*STh* I-II, q. 94, a. 2). Isn't *this* the first principle of the natural law? The short answer is yes and no. "Do good and avoid evil" is the first principle of practical reasoning in the same sense that the principle "The same thing cannot be affirmed and denied" is the first principle of speculative reasoning. To claim that "Do good and avoid evil" is a first principle in that sense, however, is not necessarily to say that it is the first principle in terms of the substantive *content* of the natural law, any more than the principle "The same thing cannot be affirmed and denied" is the ultimate first principle in terms of content of all the natural sciences. In both cases, we are talking about a principle that grounds the basic "logic" of the system. There is no sense in which all other precepts of the natural law are meant to be derived from the principle "Do good and avoid evil," any more than all the conclusions of biology or geology are meant to be derived from the principle "The same thing cannot be affirmed or denied." Biology and geology have their own, proper first principles, from which all the other principles and conclusions of these particular sciences can be derived. So too with the first principles of the natural law: the "first and common" principles from which actual, substantive moral content can be derived are, as Thomas states very clearly, the precepts to love God and to love one's neighbor as oneself. Staking out this position adequately, however, would entail a closer reading of the text (in particular *STh* I-II, q. 94, a. 2) as well as a more substantial consideration of Thomas's understanding and use of "first principles," both of practical and of speculative reasoning.



(3) Other readers of Thomas acquainted with any of the abundant secondary literature on article 2 of question 94 will undoubtedly want to know what has happened to the three inclinations discussed in the second part of that article. Don't *they* specify, as Gilson claimed, the content of the natural law? In brief, I would argue that the inclinations that are especially relevant to the natural law as it applies to human beings are those on the third level: those that deal with "the knowledge of God" and "living in society." I suggest that there is a rough correlation between the *inclinations* "to know God" and "to live in society" and the *commandments* to "to love God" and "to love one's neighbor as oneself" as the necessary conditions for realizing those inclinations. That correlation, however, would need to be argued for and not merely stated.

(4) Another issue that would require more extensive treatment involves the status of those two self-evident (*per se nota*) principles of the natural law: to love God and to love one's neighbor as oneself. An especially vexing question involves how the precept to love God can be a *per se nota* principle. In this instance in particular, I have simplified Thomas's discussion in an important way. What Thomas goes on to say in question 100, article 11 of the *Prima Secundae* about these two precepts is that they are the "first and common precepts of the natural law, which are *per se nota* to reason, *either through nature or faith*" (emphasis added).<sup>93</sup> Earlier in the same question (*STh* I-II, q. 100, a. 1), after listing the precepts that "the natural reason of every person judges at once ought to be done or not done, such as *Honor your father and mother, Thou shalt not kill, and Thou shalt not steal*"; and the precepts "which are judged by the wise ought to be done after a more careful consideration of reason, such as *Rise up before the hoary head, and honor the person of the aged man* and the like"; Thomas says: "Lastly, there are certain actions to judge of which human reason needs divine instruction [*quaedam vero ad quae judicanda ratio humana indiget instructione divina*], which teaches us about the things of God: for instance, *Thou shalt not make for*

<sup>93</sup> *STh* I-II, q. 100, a. 3, ad1.

*yourself a graven thing, nor the likeness of anything; Thou shalt not take the name of your God in vain.*"<sup>94</sup> Thus, although the precept to love God with all your heart, mind, and spirit is, like the precept to love your neighbor as yourself, said to be *per se nota* to human reason, it is *per se nota* to human reason by faith, not necessarily by nature. The principle is *per se nota*, but it is a *per se nota* principle that requires "divine instruction" in order to be understood fully. Clearly, this is a notion of *per se nota* that defies many people's usual expectations. When we say that something is *per se nota*, we usually mean that it can be known by reason alone, *apart* from revelation or faith. To understand Thomas's position fully, we would need to make this point clear.

(5) Finally, it would undoubtedly be important to say something more about the judgment that moves one from the second-level precepts to those of the third level and the relationship between these "judgments" and the cardinal virtues—especially those of prudence and justice—but also, since these judgments seem to involve the commandment to love God, the relationship between them and the virtues of faith, hope, and love.

My hope here has been, quite simply, to advance the discussion about the precepts of the natural law, or at least to encourage it, by showing the relevance and value of the questions on the moral precepts of the Old Law.

<sup>94</sup> *STh* I-II, q. 100, a. 1.