

The Medieval Development of Roman Law and Canon Law on Natural Law Foundations

Preface

This paper represents the joint efforts of Darrell Stremmler and myself. I contributed the material from the 'Introduction' to the section entitled 'Natural Law in Gratian'(pp. 1-42); Darrell wrote the remaining sections which conclude with a lengthy discussion on 'Natural Law in Thomas Aquinas'. Our primary interest in this paper is to familiarize the reader with the major medieval constitutional developments of Roman law and canon law and with the significant trends and themes in the history of medieval natural law theory. Though we have tried to be judicious in our inclusion of detail in the text, the intricate character of our subject has forced us to include, for the sake of completion, discussion which may, at first glance, seem tedious. We beg the reader's indulgence. For it is our contention that without an adequate understanding of the intricate details the reader will not be able to decide properly whether or not the generalizations we do make are indeed valid.

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A General Introduction to the Middle Ages

No longer is the medieval era depicted as a millenium of darkness in the textbooks of twentieth century historians, nor as an interim age, flanked on one side by a moribund Graeco-Roman culture and on the other by a vital sixteenth century Graeco-Roman Renaissance. Twentieth century scholars have come to respect the Middle Ages, and have come to portray it as a brilliant, dynamic epoch without whose developments the sixteenth century Renaissance could never have occurred as it did.¹

This is not to say that these historians have denied the intricate character of medieval history, however. For the history of the Middle Ages is, in large part, a complex history of the reconciliation, the fusion, and, finally, the metamorphosis of three once-opposed cultural ideals: the Graeco-Roman, the Germanic, and the Christian.² The initial socio-political struggle between the Early Christian Church and the Roman Empire, and their reconciliation after Emperor Constantine's conversion to Christianity in A.D. 313, is well known.³ Less familiar is the reconciliation of the once opposed Roman and Germanic cultures. In the first two centuries of the Roman Empire (until the death of Marcus Aurelius in 180), Rome jealously guarded her customs, institutions, and citizen rights. The Germanic tribes she encountered were firmly averted from her borders. Rome's rapid social, economic, and military deterioration in the third century, however, drove her to relax her resistance to these non-Roman peoples. Under Emperor Caracalla (in 212), Germanic tribes could freely cross

Rome's borders; virtually every person in the Empire gained citizen status; military, political, and bureaucratic positions, once the exclusive domain of a small body of Roman citizens, now were open to all who pledged allegiance to Caesar.⁴ In such a way the Roman and Germanic cultures were reconciled and slowly fused. Christianity and Germanism remained at odds till the fifth century. With its inbuilt pietism and struggle for orthodoxy, the Christian Church viewed the Germans as a defiant, vulgar people, prone to superstition and myth, or, at best, heresy. With the final collapse of the Western Empire in 476 A.D., however, the Christian Church, and more particularly the papacy, was forced to come to terms with the Germanic tribes in Europe. Driven by a growing monastic movement, the Christian Church of the fifth and sixth centuries thus converted many German tribes to Christianity through extensive mission work.⁵ German and Christian cultures were still further reconciled when Pope Gregory the Great (590-604) ended the political strife in Italy between the Germanic Lombards and the Romans in the famous Lombard settlement.⁶ The growing fusion of Germanism and Christianity in the following decades led eventually to the Carolingian Renaissance under Pepin and Charlemagne.

The social and cultural mosaic of German, Graeco-Roman, and Christian elements in the early Middle Ages, however, was cut through by a dichotomy of theoretical conceptions of government and law. On the one hand, there was the Germanic conception, which may be termed the ascending thesis; on the other, there was the Roman, and later the Christian, descending thesis.⁷ The main feature of the ascending thesis was that

the power of a ruler, be he tribal chief or otherwise, is derived from an original power located in the people, and that the ruler is thus responsible to the people. Conversely, proponents of the descending thesis held that a ruler's power is derived from a supreme being.⁸ For the first four Christian centuries, the Romans alone promoted such a descending theory of kingship. With the Christianization of the Empire, they found a strong ally in Christianity. The patristic synthesists saw an analogy between the Roman view of kingship and the scriptural teaching of kingship. And thus St. Augustine (354-430), e.g., readily equates the supreme being, who the Romans said bestows political power on the king, with the Yahweh of the Old Testament. As Walter Ullmann puts it: "The fusion of Roman Law with Christian doctrine and notably the permeation of the Bible with Roman Law [in the Vulgate] was one of the presuppositions of the monarchical theme by both Christian apologists and Roman constitutional jurists."⁹

These two theses of government stood perennially opposed throughout the Middle Ages. Although the Germanic tribes partly foresook their ascending thesis upon their conversion to Christianity, it was the residual Germanic thesis, among other factors, that spawned the episcopatism of the ninth and tenth centuries, and the conciliarism of the fourteenth. The descending thesis claimed a larger audience in the Middle Ages, however, and it dominated political theory till the end of the medieval epoch.

But proponents of the descending thesis were themselves divided over the question of who should be sovereign in the

land: the emperor or the pope. Before the conversion of Constantine, the pope and the emperor had held sovereign authority in the Church and in the empire respectively. The Christian Constantine, however, upon making Christianity the state religion, assumed sovereign authority over this new religion, as was the customary procedure of the emperor. Such a caesaropapism clashed irrevocably with papalist theory. For the Christian Church held that the pope had inherited the power of the keys, the power to bind and to loose anything and everything on earth, a power which Christ had bestowed on his disciple Peter (Matt. 16:18ff). This power was now being challenged by the rise of caesaropapism. To the Roman emperor, the Roman Empire remained his domain; a conversion from one religion to another, which happened to be Christianity, did not change his position or his power. He was still sovereign in the land in all matters, including religion. To the pope, the same body of people was his Church, which happened to be the Roman Empire.¹⁰ He was the final authority in all matters of faith. Theorists on both sides of the question searched diligently through the Roman law and the Scriptures for proof-texts for their position, but Scripture and Roman law furnished ample proof for both monarchists and papalists.

By the fifth century, theorists began to discriminate legally between the spiritual and secular realms of human life, the former ruled by the pope, the latter by the emperor. St. Ambrose of Milan (333-397), e.g., states that the pope is fully competent, by virtue of the Divine law, to judge all ecclesiastical matters, while the emperor is equally competent

to judge all secular matters.¹¹ In a letter to Emperor Anastasius in 494, Pope Gelasius I (492-496) lays out this duality of medieval society more clearly.¹² In this famous doctrine of two sovereign powers, (duae auctoritates) Gelasius politely but firmly bans the emperor from all interference in ecclesiastical matters and the pope from all judgement of secular matters. This Gelasian doctrine, though the medievalists may have exaggerated Gelasius' claim, was to serve as the ideal norm for pope-emperor relations throughout the entire Middle Ages.

It is not our intention to account for the entire history of the papacy vs. empire controversy. It is apparent, though, that this conflict stems from a more basic issue, viz., the totalitarian tendency of both the Church and the Empire (after the twelfth century called the state) to monopolize and control every facet and institution of medieval society. Because of these opposed claims to power, the history of the Middle Ages becomes, in part, a series of oscillations from Church control to State control, from papal supremacy to imperial supremacy. And the most fruitful, no, the only possible, inquiry into the nature and development of this controversy is that inquiry which exposes the law developments of the canonists who supported the Church and the papacy, and the civil jurists who backed the empire and the emperor. For, as Ullmann says, "the issue of empire vs. papacy was a legal contest: the whole quarrel was fought in the arena of law.... Empire vs. papacy was a constitutional quarrel: the canonists forged the weapons for the papacy, the legists or civilians for the empire. To

expose the fundamental ideas underlying this contest was the business of the canonists and the legists, and our understanding of medieval history should benefit from an inquiry into these sources."¹³

Our plan of investigation of medieval law is three-fold: first, to trace the development of Roman law and Roman legal scholarship through the thirteenth century; second, to outline the origin and growth of the medieval canon law and its scholarship through the Council of Trent, where the Corpus Iuris Canonici reached the form it would retain till 1917; third, to study the natural law theory of the Middle Ages upon which both Roman law and Canon law were built. Such an inquiry, we believe, will illustrate concretely both the aforementioned metamorphosis of Christian, Roman, and Germanic ideals, and the root struggle between the Christian Church and the Holy Roman Empire (and later, state) to seize ultimate control of medieval society.

Roman Law in the Middle Ages

In the Eastern Empire

When the emperor Justinian I came to power in A.D. 527, he encountered a thoroughly disorganized mass of Roman law. The Empire was ruled by an admixture of an old law, composed of all statutes (leges) of the Republic and the Early Empire,¹⁴ and a new law, consisting of the ordinances of past emperors and, to a limited extent, of the writings of the jurists whom the emperor had given the right of declaring law (imperium). Many of the laws were obsolete or too enburdened with prolix

and pompous language to be useful; other laws contradicted previous ones. Furthermore, the laws were so numerous that one region of the Empire was ruled by one set of Roman laws, while another was governed by a wholly different set. No complete and organized constitution of laws was available. The Gregorian and Hermogenian Codes of the third century and the Codex Theodosianus (438) of Theodosius II, which were to serve as such constitutions, had failed to unify Roman law.

Within ten short years Justinian effected such an unification of Roman law. His famous constitution Haec quae necessario (Feb. 13, 528) ordered a commission, headed by former quaestor, John, and including Tribonian and Theophilus, to reduce all the existing laws of the Empire to a systematic order, arranged by subject. This Code was promulgated on April 7, 529 as the formal law code of the Empire. New legislation after 529, and omissions in the first Code made necessary a second edition of the Code. A commission of four lawyers, headed by Tribonian, produced the revised Code on Nov. 17, 534, which was to remain the basic law of the Empire for many centuries.¹⁵

Not only did Justinian systematize the law code of the Empire, he also compiled and organized the many volumes of writings of the jurists in the Digest (or Pandects) of Dec. 16, 533, the product of another commission headed by Tribonian. The Digest is divided into 50 books which contain excerpts of certain jurists on a number of subjects, such as views of law and justice, marriage, contracts, etc.¹⁶ The commission made every attempt to eliminate contradictions among the jurists,

and they freely interpolated where the extant writings were found deficient, or they turned to reworked classical texts, without regard to the authenticity of these reworked texts. It was largely via the Digest that a "uniform" Roman jurisprudence found entrance to the Middle Ages.¹⁷ It also served as a sourcebook of natural law theory for medieval lawyers, as we shall see in the third section of this paper.

The need for a shorter, more elementary text, composed of both active statutes and extra-legal juridical writings, to be used for pedagogical purposes, prompted Tribonian and two others to publish the Justinian Institutes on Nov. 21, 533. Its authors modelled the work on the Institutes of Gaius, a second century work, and they drew freely from the writings of classical jurists as well as the compilations of their writings in the Digest.¹⁸ Although conceived as a manual intended for students of law, the Institutes were also made part of the Byzantine constitution.¹⁹

Thus by the end of 533, Justinian's jurists had thoroughly organized and revitalized the very foundation of Roman civil life which had for so long been neglected: the Roman law. And to guarantee the preservation of the work of his jurists, Justinian, both in 529 and 533, gave strict orders that no contraventions beyond the confines of the text were allowed.²⁰

Justinian himself, however, was not content to live with a static Roman law. Important questions of succession, marriage, divorce, and, especially, of orthodox Christianity, and of the emperor's place in the Church incited him to legislate further. The new laws which he promulgated were appropriately called

Novellae. Although the official compilation of these Novellae, entitled Constitutiones Novellae (c. 540), is no longer extant, many of the individual Novellae have been transmitted to us through private compilations.²¹ The later Byzantine emperors followed Justinian's practice of appending Novellae to the existing compilations of Justinian. The Ecloga of Leo the Isaurian (717-741) is the first known official compilation of such Novellae.²² In this and other extant Novellae collections, the Byzantine emperors reveal that they wielded great power in both civil and ecclesiastical affairs.

In the Western Empire

Until Karl von Savigny's brilliant work Geschichte des römischen Rechts im Mittelalter (1st ed., 6 vols., 1815-1831), historians had largely assumed that the final collapse of the Western Empire in 476 also spelled the end of the utility of Roman law in the West. For a few generations, the conquered Roman peoples maintained certain fragmentary law codes, but these quickly fell into desuetude. Germanic customary law, it was assumed, had, by the sixth century, superseded the Roman law, and the latter remained in the penumbra of primitive Germanic law for the next five centuries.

Extensive research has completely destroyed this thesis. It is apparent that the Visigoth and Burgundian conquerors of Gaul and Spain operated by the personality principle of law whereby they regarded their tribal customary laws as applicable only to themselves and Roman law as applicable to their Roman subjects.²³ When the Franks assumed control of Northern Gaul in the fifth century in place of the Burgundians, they maintained

the same principle of personality. Within a few years, however, the simple tribal laws of the Franks, Visigoths, and Burgundians no longer could cover the new intricacies the conquerors encountered in the mixed societies of Gaul and Spain. As a result, in the late fifth and early sixth centuries, the Germanic kings issued a number of new law codes, known collectively as Leges Romanae Barbarorum. These included the two greatly influential codes, the Lex Romanae Visigothorum (506) of Alaric II (also called the Breviary of Alaric) and the Lex Romanae Burgundiorum (c. 517) of Gundobad. These barbarian codes were largely compilations of imperial constitutions such as the Codex Theodosianus and important juristic writings of the Roman jurists mixed with customary tribal laws and couched in barbaric terminology.²⁴ Simultaneously, the conquered Romans began to shed many of the obsolete laws, and even to adopt certain statutes from the barbarians. This deliberate simplification of Roman law H. Brunner called 'vulgar law', by analogy with 'vulgar Latin'.²⁵ For a great part of the sixth century, as a result, one finds the Leges Romanae and the Leges Barbarorum in juxtaposition. Only in 654 were these juxtaposed law codes fused when Recesvind promulgated the Lex Visigothorum Recesvindiana, a law code binding upon Roman and Visigoth alike.

The fusion of Roman law with that of the Ostrogoths, who had conquered Italy, was far more rapid. The Ostrogoths operated with a territorial principle of law, whereby a single law code was binding upon all people. The Codex Theodoricus issued for the kingdom of Theodoric (c. 493-507) clearly attests to this territorial principle.²⁶

This rapidly formed mosaic of Roman and Ostrogoth law of Italy was shattered in 553 when the generals of Justinian I conquered the Ostrogoth Kingdom and placed Italy under the auspices of the Byzantine Empire. Within a year Justinian declared that his aforementioned codification was to be the law for all Italy. Certain Romans, who had resisted accommodation to Ostrogoth culture, acquiesced happily to Justinian's order; others defied it. Yet, within fourteen years, the Lombards routed the Byzantines, and left only the exarchate of Ravenna and parts of South Italy as Byzantine strongholds. Unlike the Ostrogoths and Byzantines, the Lombards established the personality principle of law. Hence, till the eleventh century, Italy saw the simultaneous rule of Roman, Ostrogoth, and Byzantine law, or some mixture of the three. Fusions between the laws were common, but likewise confusion abounded. As Bishop Agobard of Lyons (c. 850) tells us: "It happened constantly that of five people meeting in a room, each followed a law of his own."²⁷

The seventh century edicts of the Lombard kings, though promulgations for the Lombards alone and at heart still Germanic, imported whole chapters of Roman law to fill in gaps in the Lombard codes. Particularly with the rise of economic intercourse in Italy, the Lombards found their law codes hopelessly deficient. The detailed laws on economic relations in the Roman codes, both Western and Byzantine, proved to be convenient interpolations. The Edict of Rothari (643), eg., contains some 388 chapters of laws on succession, obligations, procedure, contracts etc. more than half of which are adapted

Roman laws. The supplementary laws of Liutprand (712-744) reveal the same dependence on Roman law.²⁸ It was via such law codes that Roman law, albeit in rudimentary form, was kept alive in Italy and other parts of South-Central Europe.

The dimmed light of Roman law was for a few decades, fanned into flame north of the Alps in the Carolingian Empire. Charlemagne's vigorous policies did much to effect an eighth century renaissance in Gaul, and, amidst a more refined people, Roman law found a favourable reception. Especially Charlemagne's attempts to integrate the divergent ethnic peoples of Western Europe and to submerge the dialects of Germanic languages under dialects of Latin made Roman law accessible to some who had never had access to it before. Still further, Charlemagne's insistence on reducing all extant laws to writing, and on maintaining the personality principle of law, produced a variety of written law codes, including Roman Law, by which various peoples of the Carolingian Empire could be judged.²⁹

The Carolingian Empire was the last civil administration which consciously and deliberately sought to promote Roman law in the first millenium of the Christian era. It fell to the church to carry on this task thereafter. Now the Catholic Church had, throughout its history, and particularly in its canon law development, sanctioned the study of Roman Law and made frequent use of it. An indirect boon of the cultural revival under Charlemagne, for the Church, was the amelioration of education. Charles' court was itself an 'academia', and many schools suddenly flourished in this cultural milieu. Because of this prominence of education, canon law became a

burgeoning science and with it Roman law study.³⁰ Many of the clerics who studied Roman law became notaries, i.e., people who interpreted Roman law and applied it to both secular and ecclesiastical matters.³¹ By these and other means, the church kept alive the Roman law tradition till the twelfth century.

We have thus far seen how resistant to decay the Roman law proved to be throughout the early Middle Ages. Hardy seedlings of the once mighty tree of Roman law, though sometimes neglected or grafted with foreign branches, nevertheless thrived among the tribes of Italy and Gaul. It should come as no surprise, then, that it was precisely in Italy and France that Roman law became the subject of growing attention after the eleventh century.

The revolutionary changes engendered in medieval scholarship by Charles Haskins' The Renaissance of the Twelfth Century³² can have dangerous implications for medieval legal studies. If taken in the literal sense, the renaissance of Roman law in the West means, in Vinogradoff's words, "a second life of Roman law after the demise of the body in which it first saw the light."³³ If one were to admit to such a renaissance of Roman law, he would quickly unmake our entire discussion of 'Roman law in the Middle Ages'. The twelfth century saw, rather, an initial revamping of the method of Roman law study. The scholastic dialectic method, perfected by Anselm (1033-1109) in theology, found many disciples among the jurists. Like Anselm, the jurists saw the importance of a systematic alignment of contradictory texts, but unlike the

theologian, they later sought to reconcile them. As a result, of this new method of study, medieval jurists, both ecclesiastical and secular, saw many positive applications of Roman law to twelfth-century civil and ecclesiastical problems.³⁴

Scholars have pointed to a number of reasons for the heightened interest in Roman law in such twelfth-century Italian centers as Lombard, Ravenna, and Bologna and in the French center at Provence. Some see the heightened interest in Roman law as the product of the increased prosperity of the cities. The rise of powerful corporations of merchants and artisans and the organization of political life in the commune made exigent a more sophisticated law.³⁵ Others point to the systematized feudal society, whose intricate relations demanded the more detailed laws of social intercourse provided in the Roman law.³⁶ A number of scholars, in discussing the Italian cities, have stressed the universality of the religious sentiment and the glorification of classical traditions, especially of Roman traditions. Apart from the unifying ideal of the Holy Roman Empire, there arose in these Italian cities a consciousness of their Roman origins. With this veneration of the past, came an accompanying respect for Rome's greatest achievement: its law.³⁷ Perhaps the greatest impetus for the study of Roman law was the Investiture conflict of the late eleventh century.³⁸ Pope Gregory VII's incessant desire to reform the church and to free it from monarchic control led him to ban lay investiture and to proclaim supreme political and legal authority over the entire clergy of Western Christendom. In addition, he asserted complete

political and legal independence of the church. Such revolutionary declarations caused forty-five years of warfare between the papal and Germanic imperial parties—the Wars of Investiture—and in England it took the martyrdom of Thomas Becket before the papal claims, in modified form, were established.³⁹ To parry the attack of the church, the imperialists turned to Roman law. Papalists followed in kind and lifted Roman law texts to their own support. Fueled by this controversy Roman law study in the universities grew quickly. As Walter Ullmann puts it: "The growth of universities was directly conditioned by the Investiture conflict and specifically by the need to study Roman law professionally in depth."⁴⁰

Ravenna had throughout the early Middle Ages maintained a school of Justinian law and had available to it copies of Justinian's codifications. (Whether or not they had all Justinian's writings available to them and, if not, how this law school and others came to possess these works is unknown.⁴¹) The Ravenna jurists took an active part in the Investiture Conflict, throwing full support behind Emperor Henry IV in his struggle with Gregory VII. Peter Crassus, for example, launched a pro-imperialist pamphlet against Gregory VII, filled with quotations from Justinian's Digest and Novellae. In a lost work (c. 1061-1073), Peter Damiani, Gregory's Cardinal, is said to have issued a bitter invective against "the iniquitous lawyers of Ravenna, who, in aiding the Florentines, have gathered in congregation their books and their Justinian against the Pope."⁴²

The law school of Pavia in Lombardy also rose to battle against the papalists. The names of Bonifilius, Lanfranc,

the later Archbishop of Canterbury (1070-1092), Walcausus, the famous jurist, and Guilelmus appear regularly in later medieval documents as strong supporters of the German emperors.⁴³

The law school at Bologna, however, was by far the most important and influential. The first teacher of Roman law in Bologna was an insignificant jurist named Pepo who seems to have quoted extensively from Justinian's Digest. By far the most influential jurist was his successor Irnerius (or Guarnerius-1055-1130). Though full details are not available, it seems likely that Irnerius' initial work was supervised closely by Countess Mathilda, an avid papalist instrumental in Bologna's rise to prominence. Mathilda's quest to form a strong papalist school to counter-balance the law school at Ravenna compelled Irnerius to substantiate papal claims to power using Roman law.⁴⁴ Later, however, Irnerius' allegiance shifted, for we find him as counsellor to Henry V (1106-1124) and supporter of the monarchic position. Likewise Irnerius' four prominent pupils Bulgarus, Martinis, Jacobus, and Ugo maintained strong monarchic stances.⁴⁵

The jurists of the eleventh and twelfth centuries were as a group called glossators, because of their work of adding notes or glosses to the texts of Roman law available to them. Prior to the glossators, jurists had been content merely to collect the laws of the ancients. The glossators made careful study of these collections, constantly looking for the logical structure of the laws and the meanings of various words. In analyzing the law codes, they made small interlinear notes in the text or, if more space was needed, in the margins

of the texts. Soon the quaestio became common, whereby the glossator would deal with a particular problem of a text at length on a separate page. Various standard collections of these glosses soon appeared under special names: the regulae (also called the generalialia or brocarda), summaries of judicial rules on a given subject; the distinctiones, systematizations of sub-parts of a general subject term; the notabilia, abstracts of a number of glossators on particular points; the dissensiones, conflicting opinions of glossators on a particular textual point; quaestiones, disputes on particular problems outside the text, etc.⁴⁶ The two most famous glossators of the thirteenth century were Azo (d.1230) and Accursius (d.1263), and only the complete works of these two glossators are still extant. In his mammoth work Glossa Ordinaria (c. 1250), Accursius compiled, organized, and reconciled every existing important gloss on every law in Justinian's Corpus Iuris Civilis. This work remains a standard textbook of glosses still today.

A further account of the history of Roman law and its dissemination throughout Europe through the nineteenth century would move us beyond the interests of our thesis.⁴⁷ Suffice it to say, that the enormous growth of Roman legal scholarship laid volumes of evidence before the monarchs of the high and late Middle Ages that Roman law fully ratified their rise to power. Simultaneously, it made it eminently clear to the Church that she would have to find legal support for papalism in her own law.

Canon Law in the Middle Ages

With ever increasing momentum, the canon law of the medieval church grew from a loose set of liturgical directives for the clerics to a vast collection of moral prescriptions which sought to direct every step of the Christian's path, both in his individual and corporate capacity. Such a development is quickly seen in the etymological evolution of the term 'canon'. This word comes from the Greek term κανών meaning straight rod or bar or measure. In early Christian parlance, ΚΑΝΟΝ came to denote the inspired books of the Holy Scriptures (as in the phrase 'canon of Scripture') as well as liturgical and disciplinary rules for the clergy. The Latin word 'canon' at first bore the same meanings.⁴⁸ Quickly, however, the Church began to emphasize the meaning of 'canon' in Galations 2:16, i.e., the norm for true Christian living (norma recta vivendi).⁴⁹ The Holy Word of God, revealed through Scripture, was seen as the primary source of norms for the Christian's life, and thus the primary canon. Secondary human canonical enactments, whose authority is derived from God, include the extra-scriptural teaching of the apostles, the patristic writings, the legislation of the ecumenical councils, and, most importantly, the various papal promulgations.⁵⁰ In the historical sketch of medieval canon that follows, we shall see how the church's dependence on a growing number of sources of law furnished it with an ever wider claim on the peoples and institutions of Christendom.

From the very beginning of its organization, the Christian Church found it necessary to draw up rules of government and

to define in unambiguous terms the obligations and responsibilities of her members.⁵¹ Since the earliest Christian Church still recognized its Jewish heritage, it looked to the regulations of the Torah for its constitution.⁵² When the Christian Church began to realize its distinctive differences from Judaism, it quickly turned to the teaching of Christ for the basis of its constitution. Yet, Christ's words bore no such legal character. Hence the church elevated the teachings and customs promulgated by the early apostles. In the customs of the Church, it was felt, the Christian people could retain a point of integrality, for such customary practices were delivered to the Church with the unanimous endorsement of Christ's apostles. (I Clement 42.4; 44.1). From such a mind-set sprang the early Church's accentuation of formal liturgy and ritual. Yet, by the second century, it became clear that no such unanimity of apostolic teaching regarding custom was recognized, for different localities held to different customs. Still, every church claimed the weight of a unanimous apostolic tradition. And thus just as the number of allegedly genuine relics multiplied rapidly in the early Christian Church, so did the number of customs claiming apostolic authority. This led to a marked revision of the theory of apostolic unanimity. The complete agreement of the apostles was now to extend only to doctrine and vitally important rules of practice; in other regards, each apostle was now thought to extend within his own territory a customary practice of his own. And each of these customs was deemed legitimate. So Alexandria appealed to St. Mark, Jerusalem to St. James, Ephesus to St. John and so

on.⁵³ This shift in the understanding of apostolic authority led to a number of different written constitutions based on apostolic precedent.

The earliest such constitution was the Didaché, also known as The Lord's Instructions to the Gentiles Through the Twelve Disciples.⁵⁴ The work consists of two major parts spread over sixteen chapters.⁵⁵ The first ten chapters, constituting the first part, are liturgical rules dealing primarily with instructions for teaching catechumens (chapters 1-6) and for the sacraments of baptism and of the eucharist (chapters 7-10). The last six chapters deal with disciplinary and penitential regulations. High regard and reverence was accorded the Didaché in Christian antiquity, for many regarded it as the apostles' own writing and thus viewed it as part of the canon of Scripture. It is more likely, however, that the Didaché is a concise summary of the apostles' teachings by one who was not himself an apostle.⁵⁶

Later apostolic constitutions built on the Didaché, expanding the liturgical and disciplinary rules. The second major extant work is the Didascalia Apostolorum, a work probably of Syrian origin, written c. A.D. 250.⁵⁷ Like the Didaché, it deals with the bishops, the Church, the sacraments, and disciplinary actions in its 26 chapters. But the Didascalia also includes legislation that touches upon matters beyond the clerical concerns of the Church. Special exhortations to married persons are included (chapters 2,3); other laws seek to regulate suits among Christians (chapters 10-11), the care of the poor (17-18), and the education of the children (22).

Clearly, this canon law code reveals the pervasiveness of church law and the formal hold of the church on the affairs of its members. A.G. Cicognani, the former nuncio in Washington, describes the Didascalia as follows: "It is a fairly complete compendium of ecclesiastical law, perhaps the first attempt to compile a Corpus Iuris Canonici...it treats of everything that then went to make up or affect the life of the Church: discipline, liturgy, the hierarchy, works of charity, heresies, persecution."⁵⁸

The importance of the Didascalia is evident in that later constitutions either embody it literally, or follow its pattern very closely. The Apostolic Constitutions, known also as the Ordinances of the Holy Apostles through Clement, draws heavily upon a number of older constitutions, including the Didascalia. Although the title suggests that the canons were drawn up by the Apostles and transmitted to the church by Clement I of Rome, in reality the Apostolic Constitutions is the work of a late fourth century Arian, who seems to be identical with the interpolator of the Epistles of St. Ignatius.⁵⁹ The first six of its eight books are a slightly adapted version of the Didascalia. The first thirty-two chapters of Book 7 are merely a paraphrase of the Didaché. Chapters 33-49 of this book contain a series of Jewish prayers (33-38), an outline of the rites of baptism and confirmation (39-45) and, finally, a variety of liturgical rules (46-49). In Book 8 we encounter new material. Chapters 1-2 build on a lost work of Hippolytus of Rome entitled Concerning Spiritual Gifts. Chapters 3-22 are a greatly expanded version of the same Hippolytus' Apostolic Tradition, formerly called the Egyptian Church

Order.⁶⁰ These chapters provide detailed laws for the organization of the clergy. Chapters 23-46 contain liturgical laws based upon the former Antiochene and Clementine liturgies, interspersed with descriptions of the duties of the members of the Christian body in marriage, education, and the like. Book 8, chapter 47 comprises the so-called 85 Apostolic Canons, derived, in part, from the Canons of the Councils of Antioch (341) and Laodicea (363). These canons treat in a general manner sacred ordination; participation in the Divine liturgy, and crimes that may result from this participation. The Eastern Christian Church accepted these 85 Canons as a whole at the Second Frullan Council (691) but dismissed the rest of the Apostolic Constitutions as inauthentic. In the West, only the first fifty Apostolic Canons found a place in the later canonical writings.⁶¹ The first of these was the so-called Dionysiana discussed below.

By the fifth century, the Church Orders--except for the Apostolic Constitutions, which was in many ways their summary--practically disappeared from the Western Church.⁶² They had served a vital function in the Church. On the one hand, they furnished the early church with a common point of unity, despite the widely divergent cultic and liturgical practices that many of the churches had adopted. Such an unity was fundamental to the existence of the church in the hostile environment of the pre-Christian Roman Empire. For, at an early stage she was forced either to assert her own independence through legislating and thus face persecution or acquiesce to the Empire's unchristian demands. Adolf Von Harnack lays out this

tension in the early Church well: "The church saw herself confronted by an highly cultivated state, to whose law, however, she was unable to take up a consistent attitude from the beginning. Had she refused to recognize the stateⁱⁿ every relation, she would soon have been shattered by it. Had she been able simply to acquiesce in civil government, there would have been no question of forming a legislative system of her own except to a very modest extent. Just because her relation to the state was complicated, just because she both submitted to it (Romans 13) and opposed it (Apocalypse of John etc.), just because she unconsciously took it as a model and yet refused to recognize it, she found herself at last possessed of a permanent legislative system...."⁶³ On the other hand, the constitutions outlined in considerable detail what the norma recta vivendi was to be for both clergy and laity. And to guarantee compliance to the demands of the constitutions, the earliest canonists founded the laws on the highest authority of the church besides Christ: the apostles.

Concomitant with, and perhaps the very reason for, the demise of the apostolic legislation was the emergence of legislative activity in the ecumenical synods and the juridical promulgations of the popes through their decretals.⁶⁴ The early ecumenical councils were convoked largely to decide upon doctrinal and liturgical and clerical standards in the church. The Council of Ephesus (431), e.g., issued a strong injunction against the Nestorian heretics, and the followers of Pelagius; the Council of Chalcedon (451) further rejected the heretical teachings of the Monophysites.⁶⁵ The Council

of Nicaea (325), the very first ecumenical council, already dictated certain liturgical and clerical standards in its twenty canons. In these canons, the Council, e.g., bans the cohabitation of women and clerics (canon 3), outlines a certain formulary for the consecration of the bishops (canon 4), demands bishops to remain in the churches where they have been enrolled (canon 15), and, finally, decrees that on Sundays prayers are to be said while standing.⁶⁶ Such doctrinal, liturgical, and clerical standards were continually adapted and appended by later ecumenical and provincial Councils, according to the exigencies of the time. Because of this, the canon law of the fourth and fifth centuries remained highly dynamic and flexible.⁶⁷

The importance of the canonical decrees of the Councils in the fourth century is evident in the earliest collections of non-apostolic constitutions. Although few of these collections are extant, the Vetus Romanae (c. 337-417), used extensively in the fifth century, is dominated by the canons of the Councils of Nicaea and of Sardis. An early fifth century code attributed to Dionysius, a Syrian monk, is a compilation of all canons contained in the Vetus, as well as a variety of decrees by provincial councils at Ancyra and Neo-Caesarea in the early fourth century, and at Antioch (341) and Laodicea (345).⁶⁸

A second and more important source of canon law was the papal decretal. What the imperial rescript was to the Roman Empire, the papal decretal was to the Christian Church. In the early Church, the decretal was usually in the form of

a letter addressed either to individuals (such as bishops or princes) or to certain groups. It was the final papal pronouncement on a controversial point in doctrine, liturgy, discipline, or conduct. As such, the decretal was a judicial verdict binding on all. (Hence the name 'decretal'-an adaptation of decretus, --a, --um, a participle of the verb decerno, --are--to judge, to decide.)⁶⁹

Papal decretal output, throughout the Middle Ages, was seemingly proportional to the status of the pope in both the Church and the Empire. Since the early Church was at first too poorly organized and after the fourth century under the ecclesiastical authority of the emperor, few decretals of their pontificates remain. Only under the powerful pontificates of Gelasius I (492-496) and his successors until Hormisdas (514-523) was the papacy prominent enough to promulgate consistently fruitful and original decretals. Under these popes, too, canonists organized the promulgations of the ecumenical councils and the papal decretals into a single body of canon law, wholly under the authority of the Roman pontiff. The premier collations of this period are those of the aforementioned Dionysius Exiguus, the so-called Dionysiana (1st. ed., c. 497-500) and the Collectio Decretalium (c. 497-514). Both these collections embody decretals from Siricius (384-399) to Anastasius II (496-498),⁷⁰ as well as statutes canonized by the Councils of Nicaea (325) and Chalcedon (451). These collections, of the early sixth century served as the backbone of the canon law till the twelfth century.

With the infirmity of the papacy in the next two centuries

the Christian Church succumbed to an anarchy and decadence hitherto unknown to it.⁷¹ The production and power of the papal decretal, consequently, reached its nadir. The one famous seventh century decretal collection called the Collectio Hispana Chronologica (the so-called Isidoriana, falsely attributed to St. Isidore of Seville, d. 636) depends very heavily upon the Collectio Dionysiana.⁷² The few original canons in this collection are, for the most part, mere adaptations and extensions of the Dionysian canons. Furthermore, in this and other minor collections of the seventh and eight centuries, it is apparent that the local laws of the newly converted Germanic tribes contributed increasingly to the formation of canon law. This is no more eminently displayed than in the Carolingian Renaissance, where canon law was infused with local Frankish law.⁷³

Under the Carolingian rulers, the Church and its canon law fell under the influence of strangely juxtaposed Roman and Germanic ideals of government and of social organization. We have already had opportunity to see how the Carolingian Renaissance revitalized the eroded educational system of Europe, and how, in this milieu, canon law, too, was rejuvenated. We must state further at this point that this rejuvenation of canon law was under the strict supervision of the monarch Charlemagne. For in the Carolingian Empire, a pure descending theme of Roman monarchialism was in vogue; emperor Charles, with his imperial law, knew no equal in his realm. The pope, with his canon law, was his subject and subordinate. Thus when in 774 Pope Adrian I delivered to Charlemagne an appended

version of the Di^oysiana Collectio, it was Charlemagne himself who saw to its implementation and reform in the Carolingian Empire, after its acceptance and approval by the Council of Aix-La-Chapelle in 802. Under Charlemagne, new canons were passed which sought to reform the decadent penitential system, to put an end to sexual vice and fornication of the clergy, and to spark an awareness among the clerics of the solemnity of their sacerdotal duty.⁷⁴ Curiously, an ascending Germanic influence also impinged itself on the Church in the Carolingian Empire, in the form of episcopatism. Since the days of Charles Martel (d. 741), two generations before Charlemagne, the emperor quite freely parcelled out church lands to lay lords as fiefs. These non-clerical lords were entitled to build churches on their fieflands, and to appoint clerics to the church who would remain under the lords' supervision. Because of this practice, the bishops often feigned the strict liturgical duties (and theological doctrines) issued by the pontiff. This policy is known as episcopatism. Now Charlemagne passed canon laws in the form of Capitula to make de iure what had long been this de facto custom of episcopatism. This made centrifugal what had always been a thoroughly centripetal canon law, a law emanating from and revolving about the papacy. As Ullmann explains the root meaning of Carolingian episcopatism for the Church: "The hallmark of episcopatism was an aversion from a centralized monarchic papacy, the accentuation of territorial lordship personified in the diocesan bishop, and the harmonious cooperation between episcopate and secular rulers."⁷⁵

The Carolingians, then, despite their attempt to restore to canon law the venerability it originally possessed, jeopardized its future still further by belittling the very source of canon law, viz., the pope. Not only did the popes now have to wrestle free from the strong grip of the Holy Roman Emperor, he had somehow to cajole, to threaten, or to force his wayward episcopal bishops into submission.

In the mid-ninth century, the canonists came to the aid of the feeble popes with the passage of the Isidorian Forgeries or False Decretals (847-857). This collection is nothing but the Collectio Hispana skillfully falsified. It originated in either the city of Rheims or of Lemnas.⁷⁶ The author seems to have had three purposes in mind when he wrote the Decretals: to guarantee ecclesiastical property, to free clerics from secular duties, and to free the clergy, especially the pope, from secular power.⁷⁷ In his writing, the author retains enough genuine legislation to give his work an authentic tone, but because the original documents lacked the crushing weight necessary to shore up papal power, others were added to give this effect.⁷⁸

The Decretals are broadly arranged into three parts, containing some 254 paragraphs. The first part opens with the 50 Apostolic Canons found already in the eighth book of the Apostolic Constitutions. Sixty spurious Canons follow, purporting to come from Roman pontiffs beginning with Clement (c. 88-97), up to Melchiades (early fourth century), and supporting papal supremacy in all spiritual affairs. At the end of the first part, the author includes the spurious Donation of Constantine. According to this famous Donation, Constantine is said to have bestowed on Pope Silvester (314-335) a supreme

and unimpeachable sacred power in repayment for Silverster's miraculous curing of Constantine's mortal illness. The second part of the Decretals contains canons promulgated by councils from Nicaea (325) to Second Seville (690). Here, too, the genuine and false canons are skillfully mixed, and all are supportive of papal supremacy in sacred affairs. The third part gives 120 decretals from Silvester I to Gregory the Great (590-604), 104 of which are forged. Although some doubted the authenticity of the False Decretals from the beginning, many received the collection as truly genuine. Under the authority of Riculf of Mainz (who is said to have received the collection from certain monks in Spain and brought it from there into Gaul), the Decretals gradually make their way into Germany, England, and Italy.⁷⁹ So adroit was this forgery, that, till the fifteenth century, the Church upheld it as authentic.

The False Decretals opened the door to a floodtide of papalist collections bearing the same loose interpolations. Each of these documents built on previous genuine and forged collections of canons, and in its own way, tried to show that the assertion of papal supremacy had been a position held throughout the history of the Christian Church. The most famous of these collections in Italy was the Collectio Anselmo Dictata, a late ninth century work dedicated to Anselm II, Bishop of Milan (883-897). This collection draws heavily from the Dionysiana, the Hispana, and the False Decretals. Most new canons found in this collection appear to be forged. In Germany, the first famous collection was the Collectio Regionis Prumeinsus, or Libri duo de Synodalibus Causis, et de Disciplinis Ecclesiasticis

(c. 895). Although Regino, its author, relied on the Dionysiana, the Hispana, and the False Decretals, he was more dependent upon Roman and Germanic statutes. He made extensive use of the Codex Theodosianus (438), the Lex Romanae Burgundiorum, and various Frankish laws. Through Regino's compilations, Roman law, canon law, and Germanic law all found a place in the famous Decretum or Brocardicus of Burchard, Bishop of Worms (1000-1025). Not only did Burchard rely on the sources utilized by Regino, he also gleaned canons from the Apostolic Constitutions, from Gallican, German, and Spanish provincial councils, and from the writings of the patristics Jerome, Augustine, Basil, Ambrose, and Isidore, thus dramatically broadening the accepted sources of canon law. In Gaul, Bishop Ivo of Chartres (c. 1092-1117), a canonist of an eminence equal to Burchard's, published his collections. Ivo's Tripartita, Decretum, and Panormia are three vast collections drawing from sources similar to those used by Burchard. Like the works of Regino and Burchard, the works of Ivo are essentially a mosaic of widely divergent spurious and genuine canon laws, interspersed with Roman and Germanic statutes. All the above collections of canons, in some way, served as apologies for papalism and as silent judgments against the monarchialism exposed so starkly in the Carolingian Empire.

Backed by the growing number of collections adducing laws supporting a papalism, the popes of the eleventh century wrestled into increasingly powerful positions in the Church and in the Empire. Gregory VII, e.g., as we have seen already, demonstrated this enhanced power when he banned lay investiture of the bishops with these strong words: "...we decree that no one of the clergy

shall receive the investiture with a bishopric or abbey or church from the hand of an emperor or king or of any lay person, male or female. But if he shall presume to do so he shall clearly know that such investiture is bereft of apostolic authority, and that he himself shall lie under excommunication until fitting satisfaction shall have been rendered."⁸⁰ In his famous Dictatus Papae of 27 items, Gregory further announced unequivocally his sovereignty over all spiritual affairs (Items 3-6, 10, 14-21, 23-27) and that even the emperor, who is a member of the church, is subject to him, the pope (Items 8, 9, 12).⁸¹

As a result of this enhanced papal power, papal decretal output rose quickly. Especially after Gregory VII's open defiance of the monarch, the decretal, for centuries of perfunctory significance, grew more authoritative. And Gregory and his successors used this rediscovered instrument of control liberally. Yet, when the popes attempted to legislate in harmony with extant legislation of the councils and popes, they encountered many canon law collections already laced with contradictions and inconsistencies. Their own decretals only added to the confusion. Hence by the twelfth century, the Church was aware that, if the decretals and previous canons were to be all-embracing, understandable principles of order in the Church, and not an haphazard collection of laws, a thorough revision was necessary.⁸²

Such a revision of canon law was undertaken in c. 1140 by a Camaldolese monk at Bologna, Gratian, to whom posterity has assigned the title 'Father of Canon Law' after the publication of his famous Concordia Disconcordantium Canonum or

Decretum.⁸³ Gratian found in the method of dialectic, a method used so successfully by Peter Abelard in theology (Sic et Non, 1115-1117) and by the late eleventh and early twelfth century Roman lawyers in Italy, a useful means of revising and systematizing the canon law collections available to him. Gratian, however, was not content with his predecessors' use of the dialectic method in theology and Roman law. The alignment of one theological teaching with its opposite, as in Abelard's work, or the placing side by side of contradictory interpretations of a Roman law text, as in the notabilia and dissensiones of glosses on Roman law, Gratian found only partly exemplary for canon law. Not only did Gratian align all contradictory canons, he also tried to harmonize, or give concordance to, these disconcordant canons. In that, Gratian performed an enormous service to the medieval Church.

The Decretum Gratiani contains 3945 canons arranged in three parts. Part I is comprised of 101 Distictiones, each divided into separate canons. Part II embodies 36 Causae, each divided into quaestiones, containing canons. Part III is a mixture of various canons, arranged less systematically than the first two parts. The first twenty distinctiones of Part I are a treatise on the sources, origins, and divisions of canon law, much in the spirit of the natural law teaching of St. Isidore of Seville. We shall discuss the natural law teaching of both Isidore and Gratian in the third section of this paper. The remaining 81 distinctiones of the first Part deal with clerics, the hierarchy of clerical functions in the Church, and the hierarchy of ecclesiastical judges and

courts. Part II deals with judgements in these courts as well as causes for criminal acts and their punishment. In this part, Gratian outlines in detail what constitutes a criminal act for both clerics and laymen. The canons of Part III treat some of the sacraments (viz., baptism, confirmation, and penance), the sacramentals, and certain church rituals.⁸⁴

In all three parts of the Decretum, Gratian reveals that the function of canon law is essentially moralistic. The canon law is a guide or regulation for the Christian life. Canon law prescribes what has to be done, forbids that which is evil, and encourages that which is licit.⁸⁵ To obey this canon law is to be moral; to disobey it is to be immoral. Clearly, Gratian ignores the clear boundary between jural and moral functionality and allows the two functions to flow into each other.

Gratian's Decretum builds squarely on the foundations of canonical collections available to the twelfth century scholar, notably the Collectio Anselmo Dictata, and the writings of Burchard and Ivo. In addition to the sources which these compilers used, Gratian drew from the works of such ecclesiastical writers as Bl. Rhabamus Maurus and of St. Venerable Bede as well as the Ordo Romanus, the Liber Diurnis, and Peter Lombard's Book of Sentences. He also imported many Roman laws from the Codex Theodosianus, from the four parts of the Justinian Corpus, as well as certain civil laws from the Lex Romanae Visigothorum of Alaric II and from the capitularies of Frankish kings.⁸⁶ In such a way, Gratian retained the eclectic bent of the canonists--a custom already begun in the ninth century.

In addition, Gratian also provided an avenue for the further importation of spurious canons into the canon law code of the medieval Church.

"As the synthesis of the patristic, conciliar, and papal teaching on the organization of the Church (the hierarchy, clerical discipline, excommunication), on the social structure of the Christianity (matrimony, usury, relations of spiritual and secular authority), and on the sacraments, worship, and liturgy, the Decretum provided canonists with a mine of solid information and provided the churches with sure bases on which to build an ordered array of institutions."⁸⁷ The Decretum especially affected the schools. The twelfth century schools of Roman law opened their doors to canon law study. Bologna was the first such school, beginning canon law teaching c. 1140. At first, only ecclesiastics devoted their time to canon law study. But, by c. 1250, certain Bolognese lawyers (e.g., Aegidius Fuscararius, Dynus de Mugellano) trained in Roman law and not even members of the Catholic Church were studying canon law exclusively. In other parts of twelfth and thirteenth century Italy, France, and England, new schools devoted exclusively to canon law teaching sprung up in abundance.⁸⁸

The earliest scholarship of canon law after Gratian was centered on the Decretum itself. Canonists made notes or glosses on the text of Gratian and hence were called decretists. Most notable among these were Paucapalea (Gratian's student), Roland Bandinelli (later Pope Alexander III), Stephen Tournai, Rufinus, and Huggocio. We shall discuss the contributions these men made to natural law theory in the third part of this paper.

Scholars did not remain bound by the confines of the Decretum for long, however. For Gratian's attempts to harmonize contradictory canons were at times hesitant, vague, and confusing. Hence the decretists began to make suggestions as to how to improve the text. In order to validate their suggestions, the decretists turned to the pope, who, as Gratian had clearly asserted, was the undisputed guardian and source of canon law.

Because papal pronouncements on the decretists' suggestions were so fundamental to the maintenance and development of canon law, the popes after 1140 were all forced to be conspicuously fine jurists. Popes Alexander III (1159-1180), Innocent III (1198-1215), Gregory IX (1227-1240), Boniface VIII (1294-1302), and Clement V (1305-1315) were all astoundingly brilliant jurists.⁸⁹ The popes gave their authority to alterations in the Decretum in the by now familiar decretals. Between 1159-1216 the popes issued literally thousands of decretals treating questions of interpretation of the Decretum alone. With such power over the greatly influential canon law, papal power reached its apogee in the two centuries after Gratian.

The enhanced papal activity in canonist scholarship made necessary new collections of papal decretals, along with collections of patristic and conciliar material overlooked by or unknown to Gratian.⁹⁰ This resurgence of compilation work ushered in the second phase of canon law scholarship known as the decretalist phase. Collections made in this phase were called Decretales Extravagantes, decretals treating subjects beyond the scope of the Decretum. Many of the early extravagantes were private collections, and too loosely arranged to

be accepted.⁹¹ The first systematic collection recognized universally by the Church was the Collectio Parisiensis II (c. 1177-1179) of Bernard of Pavia, a collection of decretals from Honorius II (1127-1130) to Alexander III. After 1180, one finds an enormous number of comparable collections throughout Spain, Portugal, France, Italy, and England.⁹² The most important of these collections were those ordered and supervised by the popes themselves. The first such collection came from the pen of Raymond of Pennafort (c. 1180-1275) in 1234, under the authority of Gregory IX. It was first known as the Decretales Extravagantium, later as the Decretales Gregorii IX. In five lengthy books, Raymond collated all papal decretals from Innocent II (1130-1142) to Gregory IX that deal with persons enjoying authority, with the exercise of that authority, with the clergy, with marriage, and with criminal and civil offenses (not included in the Decretum) and their punishments.⁹³ In 1298, Boniface VIII canonized a sixth book for this collection, appropriately called the Liber Sextus, a product of three Italian jurists: de Mandagot, Fredoli, and Petroni. The sixth book gives supplementary laws to each of the topics dealt with in Raymond's five books. More than half of these canons are Boniface's own promulgations; all but 88 of the remaining laws are conciliar and papal canons issued since the pontificate of Gregory IX. The last 88 canons of Liber Sextus are civil laws on criminal acts borrowed directly from Book 50, 17 of Justinian's Digest.⁹⁴ A seventh supplementary book, Liber Septimus (or Constitutiones Clementiae) was prepared at the order of Clement V, the first Avignon pope. The collection was officially

canonized by Pope John XXII (1316-1334) in 1317. The Liber Septimus consists largely of Clement's decretals concerning civil and criminal laws.

Gratian's Decretum and these three collections of decretals formed the backbone of canon law till 1917. In his constitution cum pro munere of July 1, 1580, Pope Gregory XIII assigned the comprehensive title 'Corpus Juris Canonici' to these four works.⁹⁵ Until 1917, every canon law in these four works remained binding in the Catholic Church and could be supplemented only as need arose.

Natural Law Among the Church Fathers

In an unconcealed spirit of accommodation, the Church Fathers of the first six Christian centuries structured a theory of natural law on two religiously opposed foundations. The first of these foundations was the Holy Word of God as it reads in Romans 2:12-15:

All who sin apart from the law will also perish apart from the law, and all who sin under the law will be judged by the law. For it is not those who hear the law who are righteous in God's sight, but it is those who obey the law who will be declared righteous. Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now confusing, now even deluding them. (RSV)

The second foundation was the thoroughly pagan theory of an universal rational law of nature, emanating from a perfect embodiment of Reason named God, and apprehended by man, whose being participates in the Divine Being and who is thus rationally aware of the natural law.⁹⁶ Such a full natural law theory was in the making

already a millenium before the Church Fathers. In seminal form, the earliest Greek poets Homer, Hesiod, and Pindar had already given theoretical form to this idea of natural law. This early formulation was in turn shaped and reshaped by the philosophers Anaximander, Plato, Aristotle, and by those of the post-Sokratic Cynic and Stoic schools.⁹⁷ In the first century B.C., this Greek natural law idea reached its apogee in the summations of the Roman advocate Marcus Tullius Cicero. Writes Cicero:

There is in fact a true law, right reason in accordance with nature; it applies to all men and is eternal. It summons men to the performance of their duties: it restrains them from doing wrong.... to invalidate this law is never morally right, nor is it permissable ever to restrict its operation, and to annul it wholly is impossible.⁹⁸

Cicero's general rational law of nature was further refined by the great third century A.D. Roman jurist Ulpianus. At one point, Ulpian reduces the gist of natural law to his famous maxim: "Honeste vivere, alterum non lardere, suum cuique tribuere."⁹⁹ At another point, he summarizes natural law in a strikingly different way:

Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures.... From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.¹⁰⁰

The Church Fathers were not averse to ignore the opposed religious sources of this medley of natural law concepts and to integrate various natural law teachings as they saw fit.¹⁰¹ The most important of these Patristic synthesists were St. Augustine of Hippo (354-430) and St. Isidore of Seville (d. 636).

St. Augustine's natural law theory is an eclectic blend of neo-Platonic, Stoic, and Christian ideas of law.¹⁰² He transmuted the Stoic Divine Reason to the Yahweh of Scripture, who rules the world with his Divine Wisdom.¹⁰³ This Divine Reason or Divine Will Augustine equates with an eternal, rational law in the cosmos, and hence he often describes it as the summa ratio.¹⁰⁴ To this Stoic view of God, Augustine appends a thoroughly neo-Platonic view, seeing Plato's world of the innate ideas embodied in the Mind or Intellect of God as "the enduring and unchanging forms of everything that comes to be or could, come to be."¹⁰⁵ The pristine order of the cosmos is thus an emanation from God's immutable mind. Augustine thus speaks of this eternal law as "the Divine Reason or Will of God commanding that the natural order of things be preserved and forbidding that it be disturbed." And he writes further: "With sure touch, Plotinus, the disciple of Plato, treated of providence and showed it to be the intelligible and ineffable beauty of God, from whom it stretched to the very least things on this earth."¹⁰⁶

From this eternal rational law of nature, of all creation, man derives the temporal law; the eternal law serves as the paradigm for his legislation. Says Augustine: "...I would have you see that in temporal law there is nothing just and right that men do not derive for themselves from this eternal law."¹⁰⁷

Although he distinguishes between a temporal and eternal law, Augustine is by no means clear as to the relation between a natural law and an eternal law, and again, between a natural law and a temporal law. Furthermore, the few times Augustine uses the term 'natural law', the definitions he assigns sometimes differ. At one point, Augustine defines natural law as the set of rules of

virtue, "impressed upon the heart," or "transcribed in the soul" of every man, and thus known by all.¹⁰⁸ In several other passages, he reduces the natural law to the Golden Rule stated by Christ in the Gospels: "Do unto others as you would have them do unto you" (Matt. 7:12).¹⁰⁹ Augustine explicitly rejects Ulpian's understanding of a natural law binding upon men and beasts, for the natural law to him must be purely rational. Thus he states: "There is no doubt that in the natural order the soul is to be preferred to the body. In the soul of man there is reason which is not present in animals. Whence, just as the soul is to be preferred to the body, so reason is to be preferred, in natural law, to the other parts of the soul which are common to animals."¹¹⁰

From such conceptions of God, law, and order, I believe we can draw conclusions to Augustine's natural law theory which he himself never drew. Augustine was aware of an universal order in the cosmos, of law-bound functionality in every facet of creaturely existence. Consequently, he speaks of an eternal law in this cosmos to which every creature conforms. As a Christian, Augustine posits Yahweh as the very source of this eternal law. Yet, when Augustine turns to the question of the ontological origin of the pristine order of the cosmos, he shifts to his neo-Platonic concept of ratio, and depicts the mind of God as the supranatural source of the immutable ideas which the present world approximates. Now in this broad view of law as eternal law, I believe Augustine comes near to Ulpian's view of natural law as the guiding principle of man and animal.¹¹¹ What Augustine calls natural law, however, seems to be a sub-set or restricted part of the eternal law. Each time Augustine uses the term 'natural law', its definition restricts it in such a way

that it applies to humans alone. And herein, Augustine's natural law theory becomes openly Stoic. God, the eternal embodiment of Immutable Reason, reveals his rational law to man, who, in acting in accordance with his own reason, which is God's natural law, participates in the Divine Being.¹¹² It is for this reason that Augustine so strongly repudiates Ulpian's definition of an universal natural law, for such a definition is beyond the narrow confines of Augustine's theory. But Augustine does not hesitate to reduce the gist of natural law to pithy epigrams like the Golden Rule, much in the spirit of Ulpian's summary of natural law in the maxim: "Honeste vivere, alterum non lardere, suum cuique tribuere." For by such a definition, Ulpian's natural law stands equivalent to Augustine's.

Granted, Augustine's natural law and eternal law flow into each other, at times, rendering confusion to the Pater's argument. Hence Augustine asserts that man derives his temporal human laws from the eternal law, rather than from the natural law.¹¹³ But such a confusion does not make Augustine's natural law theory less worthy. For his theory has more clarity than Ulpian's. Ulpian saw all law as natural law or positive law; yet some natural laws applied to man alone, others to creatures in general, including man. Augustine refines the terminology of Ulpian (by assigning different terms to the laws particular to humans and to more general natural laws) and couches his Stoic view in neo-Platonic and Christian wording. But, at root, we may argue, Augustine seems to follow Ulpian's idea of natural law more than he is apt to believe.

The impact of St. Augustine on the Christian world in the

Middle Ages is incalculable. How this intellectual of thorough Roman stock saw repeated analogies between the teachings of Scripture and those of the philosophers of the Graeco-Roman world, and thoroughly synthesized the two views, irrespective of their religious foundations, served as a model for the medieval Christian's life. With this admiration for Augustine, medieval Christians absorbed elements of his theory of law as well.

Thus we find in St. Isidore's Etymologies, which served as an encyclopedic summary of seventh century medieval thought, persistent vestiges of an Augustinian natural law tradition. But a tradition with significant advances and alterations. Isidore accepts Ulpian's tripartite division of law into ius naturale, ius gentium, and ius civile.¹¹⁴ Yet Isidore has no patience with Ulpian's natural law common to man and animal. Natural law, he says, "is what is common to all nations and is formulated by natural instinct and not by any positive institution."¹¹⁵ The ius gentium, for Isidore, is the positive law agreed upon by virtually every nation. This law sets guidelines to wars, fighting, treatment of prisoners and slaves, conditions of peace, conduct of public worship, etc.¹¹⁶ Following Gaius, Isidore defines the ius civile as: "What every people establishes as law for itself and is peculiar to the state."¹¹⁷ As given, Isidore's tripartite conception of law seems to be a blend of Stoic ideas found in Ulpian and Gaius.

Building on Augustine, Isidore draws a clear line of demarcation between the human laws and divine laws. Human laws include the ius gentium and the ius civile; divine and natural laws are the same. Although Isidore's understanding of the precise differences between human laws and divine laws is difficult to decipher, his

separation of the two types of law became an essential tenet to the natural law theory of the canonists in the twelfth century Renaissance. The transmission of Roman and Patristic ideas of law to the twelfth century was Isidore's greatest ^{deed} to the natural law tradition.¹¹⁸

Gratian's Natural Law Theory

The twelfth century monk Gratian was a crucial figure in the development of natural law theory in the medieval period. His influence was manifest in two ways. He directly shifted the current of natural law thought with his own peculiar definition of natural law. Indirectly, he also influenced this current by attributing to St. Isidore Ulpian's peculiar definition of a natural law common to men and animals.¹¹⁹ In his Decretum, Gratian quickly draws the following distinctions:

Mankind is ruled in two ways: namely, by natural law and by custom. The law of nature is that contained in the Law and the Gospels, by which each is ordered to do to another as he wishes to be done to himself, and is prohibited from inflicting on another what he does not wish done to himself.¹²⁰

He combines this definition with what appears to be St. Isidore's (and the Roman jurists') definition of the natural law: "Natural law is the law common to all peoples, in that it is everywhere held by the instinct of nature, not by any enactment."¹²¹ Gratian's first distinction is his own peculiar contribution to the medieval definition of natural law. He cites Scripture as the embodiment of natural law, a law which is summarized in the Golden Rule.

The second distinction emphasizes the familiar view of the universality of natural law and the identification of natural law with natural instinct.

That Gratian equated the natural law with the Word of God was not entirely new to the medieval mind. The early Church Father Ambrosiaster (a name assigned by Erasmus to an unknown third century commentator on St. Paul) had already said as much: "Triplex quidem lex est, ita ut prima pars de sacramento divinitas sit Dei: secunda autem quae congruit legi naturali, quae interdicat peccatum: tertio vero factorum, id est, sabbati, neomeniae, circumcisio, etc. Haec est ergo lex naturalis, quae per Moysen reformata, partim auctoritate eius firmata in vitiis cohibendis, cognitum fecit peccatum."¹²² Anselm of Laon (early twelfth century) and the theologians who followed him held to a natural law known as ratio naturalis, a law lying behind the Mosaic law. This law, they thought, is summarized in the Golden Rule of Matt. 7:12. Exerting still greater influence on Gratian was the theologian Hugh of St. Victor.¹²³ He, too, reduces natural law to the Golden Rule. The natural law, thought St. Hugh, was given to man before the Fall, but had to be restated in the Mosaic legislation after the Fall. It was later perfected by its summation in the Golden Rule. The theologians at the school of Anselm and Hugh provided the primitive notions of natural law which Gratian tersely formulated in the first distinction of the Decretum.

In identifying natural law with the Scriptures, Gratian was forced to clarify specifically which parts of Scripture are for him precepts of natural law. Clearly, much of the legislation in the Old Testament, particularly the Pentateuch, could not be maintained as immutable precepts of natural law. To overcome this difficulty,

Gratian makes the following distinction:

The natural law is contained in the law and the gospel; but not all that is to be found in the law and gospel is shown to belong to the natural law. There are certain moral precepts in the law such as: 'Thou shalt not kill' etc., certain mystical precepts, as those concerning sacrifice and others like them. The moral precepts belong to the natural law and so are seen to admit of no change.¹²⁴

The moral precepts or moralia are what Gratian identifies with natural law. The mystical precepts or mystica are those precepts in the Bible which are equivalent to the first ceremonial details which the Israelites were required to observe in the exodus journey and in Canaan. These mystica are not precepts of the natural law, although the underlying principles of the ceremonial legislation are moralia, and thus natural law precepts. Essentially, what Gratian asserts is that the Scriptures are not, in all cases, the literal content of the natural law, but that the Scriptures contain the precepts of natural law.¹²⁵

In citing the two definitions of natural law, Gratian appears to have placed two contradictory conceptions side by side. At least to one studying the development of natural law theory, the incompatibility of Gratian's two definitions is obvious. To Gratian, however, these two definitions probably did not appear contradictory. For the first definition is Gratian's attempt to indicate the divine sanction and source of natural law. In the second definition, one might argue, Gratian is not contradicting himself in citing Isidore. Rather, Gratian is attempting to express the universality of this natural law in the words of the most powerful tradition at his disposal: the Roman law. Hence, to Gratian, the two definitions probably appeared to be complementary rather than contradictory.¹²⁶

For Gratian, as for Isidore, the natural law functions as a norm for positive law. He writes: "By dignity natural law simply prevails over custom and constitution. For whatever things were either received in customs, or comprehended in writing, if they will have been against natural law, they ought to be held null and void."¹²⁷ The logical conclusions of such a statement aided the twelfth century papacy. Natural law, contained in the Scriptures and universal in its application to all men, functions as the guide for positive legislation. This view led to the assertion of the primacy of the Roman popes as the true and correct interpreters of natural law, simply because they were the authoritative interpreters of Scripture.¹²⁸ Moreover, the Church canon law came inevitably to be viewed as holding sway over the civil law, for, due to the loose terminology of the canonists, canon law was called an offshoot of the divine law.¹²⁹ Those who stressed the primacy of the civil law could make no such claim. Thus to reject canon law was willy-nilly to reject the faith.¹³⁰ And to impose civil law on canon law was blasphemy.

With this new understanding of natural law, the papacy found a strong weapon in the struggle between the two totalitarian spheres of church and state.

Natural Law Theory Among the Glossators

Before tracing the development of Gratian's definition of natural law in the work of the decretists, the development of natural law theory among the natural law Glossators should be traced briefly.¹³¹ The glossators' discussions of natural law are philosophically barren. These jurists, typified by those at Bologna, did not pretend

to be expounding the principles of law in a philosophical manner. Instead, they contented themselves, as we have already seen, with a detailed exegetical discussion and criticism of Justinian's statutes. When they did attempt to discuss the foundations of law, their discussions centered around two questions: the definition of natural law as the source of law, and the division of law.¹³² Upon the latter question there was unanimous agreement with Ulpian's tripartite division of law into ius naturale, ius gentium, and ius civile. Likewise, most of the glossators sided with Ulpian's definition of natural law, although some divergence of views did exist upon the question.¹³³ But, though they supported Ulpian's general view of natural law, the glossators repudiated Ulpian's assumption that both men and animals know the natural law by instinct. Such natural instinct is reserved for man alone, they said.

Rogerius, a mid-twelfth century glossator, defines natural law in the Ulpian tradition.¹³⁴ Natural law, he said, binds both men and animals. But, like Augustine, Rogerius claims that this definition of natural law is not exhaustive, for a law of nature limited to men also exists. Unlike Augustine, however, Rogerius identifies this law as part of both the ius gentium and the ius civile, in the sense that both ought to be equitable.¹³⁵ Henry of Baila, a pupil of Martinus in the later twelfth century, borrows a certain understanding of natural law from the canonists in order to make natural law an exclusively human law.¹³⁶ Following Gratian and Rufinus, he claims that Matt. 7:12 summarizes the precepts of the natural law as it applies to human beings.

John Bassianus, a late twelfth century glossator, cites two definitions of natural law.¹³⁷ Again, as the glossators before him.

had done, he first cites Ulpian's definition. In attempting to restrict natural law to humans, Bassianus, somewhat in the spirit of Cicero, identifies natural law with natural reason. The sense of this natural law is to be found in the ius gentium, he says.¹³⁸

In the early thirteenth century, Azo provides the last glossator theory of natural law. In the style of the canonists beginning with Stephen of Tournai, he distinguishes a number of possible definitions of natural law: Ulpian's definition, the ius gentium as described by Bassianus, the ius naturale decalogi of Gratian, or the ius civile in the sense of equity.¹³⁹ Azo reduces these four senses of natural law to two categories. In the first category, Azo includes Ulpian's definition of natural law as cognizable by natural instinct. The second category, embodying the three other definitions, identifies natural law with natural reason.¹⁴⁰

This account of the medieval glossators reveals the similarities of their natural law theories.¹⁴¹ Each jurist seemed compelled to hold to Ulpian's definition of natural law. But, at the same time, each sensed that natural law is a particularly human phenomenon. To distinguish this human sense of natural law from Ulpian's understanding of an animal instinct, the jurists adopted a variety of viewpoints. Natural law qua human phenomenon was defined as equity, natural reason, or as that law contained in the Old and New Testaments.

Natural Law Among the Decretists

In contrast with the medieval glossators, the decretists cannot be said to have held to any uniform definition of natural law. Cer-

tain definitions of natural law dominated decretist natural law theory, but none of these definitions was attractive to all decretists.

Paucapalea was the first decretist. He followed Gratian's two definitions of natural^{law} propounded in the first distinctiones of the Decretum. He emphasized the view of natural law as contained in the Law and the Gospels and as summarized in the Golden Rule.¹⁴² But he also retained Gratian's acceptance of Ulpian's definition and was thus forced to try to synthesize the Scriptural and Roman views. This attempt, however, was little more than an identification with^{out} a justification.¹⁴³

Rufinus was the most significant decretist for the history of natural law theory. His definition of natural law became as influential as Gratian's. Rufinus drew from two sources, other than Gratian, in developing his natural law theory. One was the rationalist tradition flowing out of the thought of the Stoics, particularly of Cicero. The other origin can be found in the thought of the theologians following Hugh of St. Victor. Rufinus also appeared to be influenced in his methodology by the medieval glossators, for he demonstrates an uncanny ability to deal with technical discussion of legal texts.¹⁴⁵

Gratian had claimed that natural law is contained in the Scriptures. He had placed alongside this claim Ulpian's definition of natural law in an attempt to stress the universality of the natural law. But, if strict attention were directed to what these two definitions meant in view of the tradition out of which they arose, their relationship could be, at best, very tenuous. But it

was precisely this relationship that Rufinus tried to clarify. He states in his Summa Decretum (1170): "Therefore, natural law is a certain force implanted in the human creature by nature, for doing good and avoiding the contrary."¹⁴⁶ Rufinus claimed that natural law is applicable only to human beings, but that it arose out of nature, a nature which man has in common with all creatures. Thus, the nature out of which the law of nature arose man shares with all animals, whereas the law itself is peculiarly human. Rufinus describes this law in Ciceronian terms as being "implanted in the human creature by nature."

As the source of all virtue, natural law was given to man before the Fall. After the Fall, this natural law was supplemented by the Mosaic law, which Christ perfected in the Gospels.¹⁴⁷ Rufinus uses the distinction first developed in Hugh of St. Victor's De Sacramentis to explain the immutability and the seeming variability of the natural law:

Moreover, natural law consists of three parts: viz., commands, prohibitions, and indications. It commands what is good, as 'Thou shalt love the Lord thy God'; it prohibits what is harmful, as 'Thou shalt not kill'; it indicates what is expedient, as 'Let all goods be held in common', or 'Let there be one liberty for all', and the like.¹⁴⁸

The commands and prohibitions form the invariable core of the natural law. But because of the Fall, the natural law must include a third part outlining what is expedient for man. This part of the natural law, therefore, may be variable, depending on what is good for man in the condition in which he finds himself. Thus Rufinus defines natural law as that law arising out of nature for man in whom this law is implanted. The natural law, consisting of commands,

prohibitions, and indications, directs man in his moral actions.

The next decretist of importance at Bologna was Stephen of Tournai in the late twelfth century. Stephen took a new approach to the problem of defining the natural law. Instead of giving a simple definition as Rufinus had done, Stephen laid out five senses in which one could correctly speak of a law of nature.¹⁵⁰ Natural law could be defined as, first, a law of nature common to man and animals; second, a law common to all men, i.e., the ius gentium, which comes from nature; third, a divine law for our nature as posited in the Scriptures; fourth, a composite law of nature that embodies the above three senses; fifth, a law of nature peculiar to man which directs him morally. In listing these definitions, Stephen takes an harmonizing approach.¹⁵¹ Although he listed several senses of the term 'natural law', he avoided singling out any one of these definitions as the proper one. Each sense had its own merit in his view. This approach to discussing the law of nature was very influential in the next generation of decretists.

Helping to promote this approach was John Faventius, the last of the early decretists at Bologna. He distinguished six senses of natural law, but he saw the five definitions of Stephen as the most important.¹⁵² R. Weigand has divided the later decretists into five schools.¹⁵³ These schools carry on the discussion of natural law in the format outlined by Stephen and John. They are characteristically eclectic and accommodational to the tradition of natural law. The decretists of these schools often list the various senses of natural law in an hierarchical fashion, almost invariably including in some form the definitions of Ulpian, Gratian, and Rufinus.

Chronologically, the first school was the French school of the 1160's and 1170's. Like the other schools of decretists after Stephen of Tournai, this school had a tendency to list the various senses in which the term 'natural law' could properly be used, without emphasizing any one of these senses. Sicand of Cremona, in his *Summa* (1179-1181), distinguished three senses of natural law: natural law with respect to divine nature, with respect to the common nature of man and animals, and with respect to the nature of man.¹⁵⁴ Clearly, these three senses of natural law correspond with the definitions forwarded by Gratian, Ulpian, and Rufinus respectively. Simon of Bisignano, a contemporary of Sicand, differs from other decretists in his school in his definition of natural law. Following Augustine, Simon identifies the natural law with the ratio superior of the soul, called *synderesis*.¹⁵⁵ To Simon, 'synderesis' is the only proper way natural law can be defined.

What most characterized this French decretist school was its teaching that natural law is implanted in man's heart and that it finds its summary in the Golden Rule.¹⁵⁶ The *Summa Coloniensis* reveals this characteristic well.¹⁵⁷ Sicand of Cremona follows Rufinus in dividing natural law into commands, prohibitions, and indications; but he goes beyond Rufinus in suggesting that this natural law is implanted in the human heart by God, regardless of the form it takes.¹⁵⁸

The next decretist school was the Anglo-Norman school, which saw in the *Summa Lipsiensis* the primary authority of natural law.¹⁵⁹ In this *Summa*, seven meanings of natural law are arranged, but none is taken as superior to another. All the meanings are mere modifications of traditional views of natural law. The chief

decretists of this school, Honorius and Richardus, contributed nothing original to the natural law tradition. Hence this school serves as the best example of the eclectic spirit of the decretists.

The third school of decretists important in the development of natural law theory was the Bolognese school of Huggucio and Alanus in the late twelfth century. This school bears evidence of a similar eclecticism.¹⁶¹ Huggucio of Ferrara distinguished four senses of natural law. He cited the definitions of Ulpian, Gratian, and Rufinus, and also spoke of natural law as the judgment of reason (a distinction found in the Summa Lipsiensis).¹⁶² Huggucio, however, only recognized two of these definitions as proper ones. He saw natural law as properly referring to the law of nature common to man and animals, and as the law of nature identified with man's rationality.¹⁶³ The latter identification appears to reveal some confusion on Huggucio's part. He did not clearly distinguish or clarify the mixed senses of a natural law coming from God and of a natural law arising from man's rationality.

Alanus was another prominent decretist at Bologna in the late twelfth century. He distinguished as proper four definitions of natural law.¹⁶⁴ These included Ulpian's definition, Gratian's definition, the definition of natural law as equity, and the definition of natural law as cosmic justice. The last sense which Alanus mentions appears to come out of Plato's thought in the Timaeus, where Plato refers to cosmic natural justice.

The notion of a cosmic natural law was reasserted by William of Gascoigna.¹⁶⁵ He followed Huggucio's division of natural law, but he also spoke of a cosmic natural law following Alanus. In doing this, William revealed what had become characteristic of many Christian thinkers since the Church Fathers. Even more than his

fellow decretists at Bologna, William attempted to synthesize the teaching of Scripture on natural law and that of the philosophers. When discussing the natural law in the sense of a Platonic natural justice, William identified God with equity and nous with the Word of God or the Wisdom of God.¹⁶⁶ He claimed that this nous is that which the Roman jurists had referred to as nature.

The French school in the early thirteenth century revealed the same tendency to distinguish several meanings of the law of nature, but, unlike their predecessors, they emphasized one distinction over the others. The major product of this school was the Summa Duaceusis, written c. 1200.¹⁶⁷ This work reveals influences of the Anglo-Norman school and of the work of Huggucio and Alanus. The Summa Duaceusis speaks of a cosmic natural justice or law, and quotes directly from Plato's Timaeus to support this view. This cosmic natural justice or law is broken down into three parts. One part of this law refers to all creatures, one part to rational creatures alone, and the final part, contained in Scripture, serves as an appendix to the natural law and again is peculiar to rational creatures.¹⁶⁸ The definitions of Ulpian, Gratian, and Rufinus are thus made subordinate to Plato's notion of a cosmic natural law and justice. But Rufinus's sense of a natural law binding exclusively on human rational creatures was still seen as more important than the other parts of the cosmic natural law. This latter qualification reveals Huggucio's influence upon the writers of the Summa Duaceusis.¹⁶⁹

In addition to the Summa Duaceusis, two others works of this school reveal its tendency to reveal as many senses of natural law as tenable before emphasizing one in particular. The Ecce vicit Leo

distinguishes six possible meanings of natural law, but reduces them to four actual definitions, including those of Ulpian, Gratian, and Rufinus.¹⁷⁰ The Animalia est Substantia (c. 1210) reduces all previous senses of natural law to two definitions: a natural law identified as the natural instinct common to man and animals and a natural law peculiar to man as rational creature. In using the language of the glossator Accursius, this work attempts to squeeze Gratian's notion of God/revealing the law of nature to man as rational creature with man appropriating the law of nature via the Scriptures on the merit of his own rationality.¹⁷¹

The final decretist school important in the history of natural law theory is the Bolognese school in the early thirteenth century. At first glance, the author of the Summa Palatina (1210), Laurentius Hispanus, appears to have listed some different definitions of natural law than those observed in the other decretist schools.¹⁷² But, upon closer inspection, it is clear that he forwards the traditional definitions in a new garb. Similarly, Johannes Teutonicus, the author of the Glossa Ordinaria (1215), follows the traditional natural law definitions.¹⁷³ Teutonicus is particularly important, however, because he gave the last important set of glosses to Gratian's Decretum and thus fixed the form in which discussions of natural law would be passed on to the next generation after the decretist schools. He distinguished four senses of the natural law: a natural of all creation, a natural law common to all creatures, a natural law peculiar to rational creatures, and a natural law whose precepts were contained in the Scriptures.¹⁷⁴ Raymond of Pennafort echoed this list of natural law definitions in his Summa Iuris (1220). To these four definitions, he added a

fifth, viz., natural law as ius gentium.¹⁷⁵

With Raymond of Pennafort, the decretists ended their contributions to the history of natural law theory. The decretists, we have seen, demonstrated more philosophical competence in examining the concept of the law of nature than their glossator contemporaries. The glossators had restricted their discussion of law by relying largely on Justinian's Corpus for the source of natural law concepts. The decretists, on the other hand, though drawing upon the Corpus as well, also looked to the concepts of Plato, Gratian, and Rufinus. As a result, the decretists had a fuller and more mature natural law theory than the glossators. The decretists' greatest service to the future of canon law and natural law lay in their summarization of the many possible definitions of natural law and in their discussion of the merits and demerits of each definition.

Natural Law Among Early Scholastic Theologians

The arena in which natural law underwent its development shifted in the thirteenth century from the domain of canon law to the domain of theology. The canonists began to assume the methodological characteristics of the glossators as canon law expanded into a complex, comprehensive legal system. Discussions among canonists became dominated by technical questions concerning the application of canon law to particular cases which the church had previously never faced. Especially as the medieval church sought to regulate in ever greater detail the daily lives of medieval Christians a strict legal science of canon law became exigent. As a result, theology, which had formerly been combined with the jurisprudence of canon law, gradually began to separate itself from canon law.

The theologians began their discussions of natural law much in the spirit of the decretists down to John Teutonicus. Hence the early scholastic theologians were inclined first to distinguish various senses of natural law and then to harmonize them. But, unlike the decretists, these theologians in general maintained an uniform understanding of natural law. Throughout most of early scholastic theology, one can point to a common highlighting of natural law as natural human reason. Such an emphasis would become increasingly important for medieval natural law theory.

The early scholastic discussions of natural law find their origins in the thought of Peter Abelard and Peter Lombard. Along with Anselm of Laon and Hugh of St. Victor, Abelard viewed natural law as a derivative of human reason, but, at the same time, he identified it as a divine law.¹⁷⁶ In his Commentary on Romans, Abelard states that natural law came prior to Mosaic law. This natural law, he says, is equivalent to human reason. In his Book of Sentences (1152), Peter Lombard seems to hold a familiar view of natural law when he writes: "Truth wrote in the heart of man that he should not do to others what he would not have done to himself, and this precept of natural law, because of man's neglect, had to^{be} reiterated in the Decalogue."¹⁷⁸ His conception of natural law is not much different from that of Abelard and of the canonists who were his contemporaries, particularly, Gratian and Rufinus.

The first theologian to develop fully a theory of natural law was William of Auxerre in his Summa Aurea (1220).¹⁷⁹ In this work, he outlines three senses of natural law.¹⁸⁰ He recognizes natural law as the all-encompassing law giving harmony to creation; as a slightly restricted natural law common to man and animals; and

an even more restricted natural law embodied in the intuitive natural reason of man. This last sense of natural law is, for William, the most important and most proper sense, because of his emphasis on reason as the preservative and error-free force within man.¹⁸¹ Such an emphasis, however, did not prevent William from incorporating Ulpian's definition of natural law into his own theory. One commentator on William views this inclusion of Ulpian's definition as representative of the characteristic, shared by other scholastic theologians, of a richer and fuller account of man's place within the universe.¹⁸²

Three other views of William of Auxerre should be mentioned because of their influence on the theologians who followed him. William saw in natural law the basis and guide for all human virtue.¹⁸³ Though this teaching did not originate with William, his emphasis of it gave it a special importance among scholastic theologians. More important were two other teachings of William, viz., that the natural law is innate, divinely implanted in the human mind,¹⁸⁴ and that a parallel exists between speculative and practical reason.¹⁸⁵ The latter distinction would be present in most later discussions of synderesis, natural law, and conscience.

Like the early scholastic theologians, Philip the Chancellor (of the University of Paris), Guerric of St. Quentin, and Roland of Cremona (all of whom were dominant in the 1330's) emphasized the identification of natural law with human rationality.¹⁸⁶ Roland was important for two further reasons. First, he added to William of Auxerre's natural law theory the notion that all creatures tend towards the realization of the good. This, he said, is a maxim of natural law.¹⁸⁷ Such a tenet of natural law theory is a mere

adaptation of Aristotelian teleology. Second, Roland was the first theologian to distinguish clearly between primary and secondary precepts of the natural law.¹⁸⁸ The former precepts, he said, are invariable; the latter may vary.

The last important theologians before the great natural law synthesis theologian Thomas Aquinas were the two prominent members of the Franciscan school, Alexander of Hales and St. Bonaventure, as well as St. Albert the Great, the teacher of Aquinas. In his Summa Fratris Alexandri, Alexander carries on the tradition of his predecessors, although he does couch his views in slightly different terms. In his important book The Natural Law, Heinrich Rommen states of Alexander's work: "Alexander of Hales, falling back upon St. Augustine's teaching, hit upon a beautiful figure; the eternal law is the seal, and the natural moral law is its impression in the rational nature of man, which in turn is the image of God."¹⁸⁹ Several forms of this natural law, derived from eternal law, are distinguished in Alexander's Summa.¹⁹⁰ A natural law exists with respect to rational beings, with respect to the common nature shared by man and animals, and with respect to all creation. In this, Alexander appears to follow the distinctions of natural law laid out by John Teutonicus.¹⁹¹ Alexander also insists upon the parallel of the speculative and practical reason when discussing the self-evident primary principles.¹⁹² The first principles are immutable, but the conclusions drawn from these primary principles may well be variable. He cites examples of Old Testament instances of Yahweh's commanding his People to disregard the laws such as 'Thou shalt not kill'. One such instance is God's command to Abraham to sacrifice Isaac. At first, Alexander attempts to

explain such commanded abrogations of the natural law by using the Stoic-Christian distinction between a law in the innocent state of nature (before the Fall) and the changing of this natural law after the originally perfect state of nature disappeared. For instance previously common property was a precept of natural law, but, since the Fall, private property has become the norm.¹⁹³ Perhaps because he sensed the tenuousness of this argument, Alexander later insisted upon the primacy of God's will above all law.

The other great Franciscan theologian, St. Bonaventure, did not make a large contribution to natural law theory. But he stands somewhat apart from other thirteenth century theologians in resurrecting Augustine's teaching that cosmic order is a fundamental description and order of the natural law.¹⁹⁴ This belief leads him to the conclusion that Ulpian's definition of natural law is actually the most proper, though he sees Gratian's definition as equally valid. Such a conclusion, we have seen, Augustine himself did not dare to draw.

No matter what his views on natural law, St. Albert the Great would have been important in the natural law tradition simply because he was the teacher of Thomas Aquinas. But Albert was also important to this tradition on the merit of his own contributions. In his Summa de Creaturis, Albert rejects the distinctions made by the decretists, for they had condoned Ulpian's view of natural law common to man and animals. "To him, est ius naturale nihil aliud quam ius rationis."¹⁹⁵ Man's rational nature sets him apart from other creatures. Thus, even the rearing of children and the preservation of life takes on a new meaning for man because of his inherent rationality. Ulpian's definition of natural law, and all other definitions that fail to emphasize man's rationality,

Albert flatly rejects.

In his Commentary on the Nicomachean Ethics, Albert claims that Aristotle's view of natural law, as the equivalent of natural justice, refers essentially to man's rational character, although Aristotle does recognize that man and animals participate in nature together. But only man participates in nature rationally.¹⁹⁶ Albert identifies three categories of human acts: instinctive acts (the rearing of children and the preservation of life), acts of moral virtue (anchored in reason and the good in nature), and acts based on a deduction from a primary principle of the natural law.¹⁹⁷ The law of nature is present in all three categories of human acts, because man's rationality is present in all his action.

With this brief discussion of St. Albert's view of natural law, we have arrived at a crucial point in the history of natural law theory. Like their decretist predecessors, the scholastic theologians forwarded a characteristic hierarchy of natural law definitions. These theologians, however, were not averse to emphasize natural law as the equivalent of natural reason. This conception of natural law is most emphatically promoted by St. Albert. With Albert, no sense of the natural law that fails to include man's rationality can properly be called natural law.

We have now seen the diversity of the natural law tradition in the pre-thirteenth century medieval era and have come to realize that the title 'medieval natural law' is but a catch-all category for a disconcertant range of natural law theories. By the end of the thirteenth century, however, the term 'natural law' was no longer a misleading anachronism. For, in the thirteenth century, Thomas of Aquino (1225-1274) synthesized many of the diverse tenets

of the natural law tradition, ancient and modern, into an homogeneous natural law theory. In Thomas Aquinas, we reach a watershed in the history of natural law theory, for this theory was to dominate the natural law theory of the next three centuries.

Our account of the history of natural law theory before Thomas furnishes us with a working knowledge of many basic assertions which Thomas integrated into his natural law theory. One concept, however, Thomas utilized far more extensively than had earlier proponents of natural law, viz., the concept of synderesis. It would, therefore, be expedient to trace briefly the historical use and meaning of the term 'synderesis' before we analyze Thomas' natural law theory itself.

The word 'synteresis' originates in St. Jerome's Commentary on Ezekiel.¹⁹⁸ In this work, Jerome uses the term to indicate a fourth or higher part of the soul above the Platonic trichotomy of reason, spirit, and appetite. Different arguments put forth by scholars have caused doubt as to whether Jerome even used the term 'synteresis' (or 'synderesis').¹⁹⁹ It is likely that Jerome used the word the term 'syndeidesis' rather than 'synderesis', but in the Glossa Ordinaria on Jerome's Commentary, 'synderesis' certainly does appear. Perhaps the glossator on the Commentary substituted Jerome's 'syndeidesis' with 'synderesis'.²⁰⁰

Regardless of whether Jerome actually used the word 'synderesis', it was attributed to him. The term was not used again until some early scholastic theologians--Stephen Langton, Godfrey of Poitiers, and Alexander Neckham--began to connect this term with the ratio superior of which Augustine had spoken.²⁰¹ Augustine had distinguished between a ratio superior and a ratio inferior in man. Crowe nicely

summarizes the distinction between these two parts of man's reason:

The parts are not quantitative in any sense, but represent two operations of the reason, one concerned with the life of contemplation, the other with the active life. The superior ought to direct the lower reason--otherwise the latter may become absorbed in material things. Only in the higher reason is there truly the image of God.²⁰²

The early scholastics also referred to synderesis as the scintilla rationis, or germ of rationality. Peter Lombard and William of Auxerre both followed this view of synderesis as the ratio superior or the scintilla rationis.²⁰³ Roland of Cremona also held to the equivalency of synderesis and ratio superior, but he went even further in claiming that synderesis is infallible.²⁰⁴

William of Auvergne made a distinction between the ratio superior per se and the functions it performs. He claimed that synderesis is the function of the ratio superior by which the natural law is known.²⁰⁵ The definitive writer on synderesis before Aquinas was Philip the Chancellor. Philip's importance lay mainly in the questions which he raised, rather than in the answers which he gave to those questions. Two questions stand out for him: first, is synderesis a facultas or an habitus? and, second, how is the ratio superior related to synderesis?²⁰⁶ Philip further distinguished conscience from synderesis by suggesting that conscience is the application of synderesis to an actual situation or to a moral decision.

The views of both Bonaventure and Albert the Great were crucial to the view of synderesis later held by Aquinas. Both theologians reflect an appetite for Aristotelian conceptions. Bonaventure adopts Aristotle's division of the speculative and practical reason, identifying synderesis with an habitus in practical reason.²⁰⁷

Moreover, following Aristotelian epistemology, Bonaventure states that this habitus is innate, but that the terms necessary for grasping a knowledge of the primary principles of the natural law must be known from prior experience.²⁰⁸ In answer to Philip's first question, Bonaventure teaches that synderesis is a faculty by which reason gains an awareness of the first principles of the natural law.

Albert the Great posits a similar understanding of synderesis. The principles of the natural law are innate, but they still must be learned. These principles allow men to make moral judgements in general terms. The generality of the first principles is made applicable to specific moral decisions by the practical syllogism which Albert borrowed from Aristotle. "The practical syllogism uses a major premise, provided by synderesis, and a minor premise, the work of reason (which brings the particular under the general rule laid down in the major premise), and conscience draws the conclusion."²⁰⁹ This view of Albert came to be the understanding of synderesis adopted by Aquinas.

Natural Law in Thomas Aquinas

We shall deal with Aquinas' natural law theory in two parts. First, we shall present an outline of his early thought on natural law; second, we shall outline the more mature natural law theory found in the Summa Theologica. But, in attempting to outline his early thought, we must first illustrate how Thomas dealt with the natural law tradition which faced him.

Two examples serve to show in general how Thomas dealt with the heritage of natural law. The first is Thomas' attitude towards

Ulpian's definition of natural law. In his early Commentary on the Sentences, Thomas attempts to include Ulpian's definition in his own definition of natural law.²¹⁰ He speaks of natural law as the force directing all man's actions, both in the nature which he shares with all animals and in the rational nature peculiar to him as man. Moreover, when discussing polygamy, Thomas cites three possible senses of the term 'natural law'. These three senses correspond surprisingly well to the definitions given by Cicero, Ulpian, and Gratian, although Thomas shapes them so as not to contradict his basic understanding of natural law as human reason.²¹¹ As Crowe explains it: "The difficulties surrounding St. Thomas' welcome for Ulpian seem more serious than his adoption of Gratian and Cicero . He is concerned, as always, to find a tolerable meaning for a definition which came to him with a weight of authority behind it. He cannot reject it entirely; but in accepting it he must somehow change its sense. For a natural^{law} genuinely common to man and animals is patently unreal--as many before him, and notably St. Albert the Great, had seen. By making it consist, instead, in the dictates of natural reason concerning that which man and animals have in common; viz., sensitive nature, St. Thomas gives the definition as acceptable a definition as is, perhaps, possible."²¹² Therefore, in his early works, Thomas yields to the power of the tradition of natural law theory, although he does take some steps to alter that tradition and to make it acceptable to his own early view of natural law.

In the Summa Theologica, one does not notice such an open accommodation to the teaching of past natural law theorists. Here,

Thomas states unequivocally that the possession of natural law is exclusive to rational man. Says Thomas:

Irrational creatures, however, do not partake thereof in a rational manner in the eternal law, wherefore there is no participation of the eternal law in them except by way of similtude.²¹³

One would be inclined to say that Thomas has obviously done away with all remnants of Ulpian's understanding of natural law, for such an understanding is incompatible with the definition of natural law he formulates in the Summa passage just cited. But later in the Summa,²¹⁴ and in a subsequent work, Commentary on the Ethics, Aquinas again makes passing references to Ulpian's definition. In the latter work, he even attempts to incorporate Ulpian's definition into his own natural law theory by expanding Ulpian's definition.²¹⁵ Yet, we shall see, Thomas' definition should preclude all use of such an anomalous natural law definition. But Thomas is unable to reject completely the tradition of natural law theory that he faces.

St. Thomas' use of synderesis provides us with another example of how he embodied certain tenets of the natural law tradition. In his early works, Thomas adheres to the definition of synderesis given by his teacher Albert, who referred to synderesis as the habitus of the practical reason by which the first principles of the natural law are known.²¹⁶ The primary principle known through synderesis is the major premise of the practical syllogism. This syllogism is completed by the act of moral decision in a particular case. The moral decision is an act of conscience. But in the Summa Theologica, the term 'synderesis' is hardly mentioned. When discussing whether or not natural law

is a habit, Thomas says:

Synderesis is said to be the law of our mind, because it is an habit containing the precepts of the natural law which are the first principles of human actions.²¹⁷

But the prominent role which this term played in his early works is no longer evident in the Summa. Weigand and Crowe thus suggest that Thomas discontinued the use of the term, but that the function of synderesis is still present in the Summa.²¹⁸ Thomas could have been anxious to dissociate himself from the term 'synderesis' because of the Platonic connotation of innate ideas that scholastic theologians had attributed to the term. R.A. Armstrong also supports this interpretation that, despite the rare occurrences of the word in the Summa, the function of 'synderesis' remained an integral part of Thomas' natural law theory.²¹⁹ Thomas, therefore, in his use of 'synderesis' maintains the traditional meaning of the word in his natural law theory.

In general, these two examples of Thomas' use of the tradition of natural law (i.e., in his use of Ulpian's definition and in his use of synderesis) show the independence of his thought despite some accommodation to traditional teachings. Like his teacher, Albert, he rejected traditional definitions and connotations which were not in agreement with his own conception of natural law. But, on the other hand, even in his later works, Thomas appears to have felt the need, especially in his mention of Ulpian's definition of natural law, to accommodate in some way those powerful elements of the natural law tradition with which he was in disagreement.

Although Thomas's natural law theory is stated most fully in his 'Treatise on Law' (Questions 90-97 of the Summa Theologica), we must first outline the discussions of natural law in his earlier works, as background to the full development of his legal theory. In the Commentary on the Sentences, two views of natural law are presented which are not synthesized.²²⁰ One view is that inherited from the Stoic tradition, including Cicero, Ulpian, and Roland of Cremona, viz., the teleological view of natural law as a divinely implanted natural inclination towards the good. The other view is inherited from the Augustinian tradition, including Anselm of Laon, William of Auxerre, Alexander of Hales, and St. Albert the Great. These theorists emphasized natural law as a series of rational principles known through the habitus of practical reason.²²¹ Although elements of both views are present in Thomas' later writings, his discussion in the Commentary on the Sentences reveals which view he tends to favour. As mentioned above, Thomas adopts virtually intact Albert's discussion of the practical syllogism, synderesis, and conscience. He emphasizes the infallibility of synderesis in providing the major premise of the practical syllogism. The error in the practical syllogism can come at two points. Reason can err in the application of the general principle to the particular situation in the minor premise, or conscience can err in the actual application of the minor premise.²²² This discussion of the practical syllogism gives one the impression that the natural law as the rational decisions or principles of the practical reason known through the habitus of synderesis is the view that Thomas favours.²²³

Thomas' discussion in his De Veritate reinforces the impression one gains from the Commentary that Thomas favours Albert's view of natural law over the teleological view of natural law. In De Veritate, Thomas does not present any striking innovations, but seeks instead to clarify his discussion in the Commentary on the practical syllogism.²²⁴ The primary principles, because of their general character, cannot give direct and specific guidance in particular moral decisions with^{out} the use of reason in the practical syllogism. Thomas distinguishes between^{the} application of the primary principles to questions of fact and to questions of right or wrong. The second type of application involves two further distinctions between whether an ethical judgement involves a future (ought it to be done) or a past (was it right or wrong) action.²²⁵ Again, the natural law appears to be defined in the tradition of Augustine.

Thomas' discussion of natural law in the Summa Contra Gentiles takes place in the context of his discussion of providence. In this Summa, Thomas appears to hint at the synthesis he later makes in the Summa Theologica between the teleological view of natural law and the view of natural law as a series of natural rational principles known by practical reason. In the Summa Contra Gentiles, Thomas states that rational beings participate actively in providence via their rationality, whereas irrational creatures participate blindly in providence through their instincts and natural inclinations.²²⁶ Having been given freedom, rational creatures participate in providence by directing their own moral actions. They are given direction in this participation by the rational principles composing the natural law. Therefore, the teleological

account of natural law as the force guiding man to 'the good' is intertwined with the notion that natural law is a series of rational principles which man is capable of following by virtue of his reason and freedom.

With this background in Thomas' early writings, we now turn to the full explication of his natural law theory in the Summa Theologica. St. Thomas begins in Question 90 of the Summa with a discussion of the fundamental idea of law. He defines law thus: "It is nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated."²²⁷ Corresponding to this definition of law, Thomas distinguishes four types of law, corresponding to the four types of reason.²²⁸ Our main interest lies with the first two types of law, viz., the eternal law and the natural law.

Eternal^{law} is, for Thomas, God's rule of the universe through Divine Reason. This law is the foundation for all other laws: "All laws in so far as they partake of right reason, are derived from eternal law."²²⁹ Etienne Gilson, the prominent neo-Thomist scholar, draws the analogy that the relationship between eternal law and other forms of law is like the relationship between Being and being for Thomas.²³⁰ All creatures in this universe are perforce subject to this law. (God himself, however, is not subject to this law; in fact, the law is identical with Him.) But rational creatures participate differently from irrational creatures in this law.²³¹ In accordance with his teaching in the Summa Contra Gentiles, Thomas remarks that rational creatures qua rational creatures, because they have freedom to make moral decisions, participate in a special way in the eternal law. As he puts it:

Now among all others, the rational creature is subject

to Divine Providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law.²³²

In contrast to other creatures, man has received part of the Divine Light of God which makes him capable of participating in a special way in the eternal law. This points to the dignity of man, the Rational creature.²³³ Thomas cites Psalm 4:6 as proof of his theory. Says the Psalmist: "This 'light' allows men to see what is morally good, i.e., to discern the natural law which is the participation of the rational creature in the eternal law of God."

Thomas postpones the full force of his argument for natural law till Question 94. Here, he begins by inquiring whether natural law is a habit or a faculty of reason. In answering this question, he makes a subtle distinction in order both to honour and to break with the natural law tradition. First, he says that habitus properly refers to an action done out of necessity. Gilson states in this regard: "Habit, as Thomas thinks of it, is a quality, i.e., not the substance of man but a disposition added to his substance and modifying it."²³⁴ But, in this sense, natural law is not a habitus. Instead, natural law refers to those rational principles which ought to guide our moral actions. These principles are perceived through the habitus of synderesis. But the principles should not be confused with the process whereby they are perceived. Purporting to remain in agreement with his natural law predecessors, however, Thomas says that natural law can be vaguely referred to in some cases as a habitus, because after perceiving directly these principles through synderesis, man retains a memory of the

principles. This vague retention of principles can become a habit in that we need not always perceive directly the primary principles when confronted with a moral decision. This discussion of natural law as a habit, therefore, reveals two characteristics of Thomas's more mature view of natural law: first, Thomas confirms his earlier view of natural law as a series of rational principles; second, his account of habitus reveals at once the independence of his thinking and the eclectic character of his natural law theory.

In the second article of Question 94 Thomas deals with the actual content of the natural law. He begins by comparing the practical reason to the speculative reason. The distinction between the two sides of reason is, for Thomas, a distinction of action. Crowe identifies this distinction clearly: "The basis, then, of the distinction between the speculative and the practical intellect is the presence or absence of an accidental relation to action in the intelligible object.... The speculative intellect has as its object truth absolutely speaking, whereas the object of the practical intellect is truth as ordained or related to action."²³⁵ Thomas states that both of these, the speculative reason and the practical reason, have a foundational first principle. With the speculative reason the first principle is the principle of contradiction: that being and non-being cannot truthfully exist at the same time. The first principle of the practical reason, and therefore of the natural law, is "good is to be done and ensued, and evil is to be avoided."²³⁶ The question which immediately arises is: what is 'the good'? From his answer to this question, we gain some understanding of the composition of the primary principles of the natural law.

Thomas' answer to the question what constitutes 'the good' is worth stating in full. We read:

Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, and naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education in offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law: for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.²³⁷

Thomas' answer might be summarized this way: man perceives as good that to which he is naturally inclined as a being, as an animal, and as a rational animal.

Crowe makes three crucial comments about the above passage.²³⁸ First, the primary precepts are not deduced from the first principle of the natural law, but, rather, can be spoken of as containing that first principle. The first principle is a foundational principle, not a principle from which all other principles are deduced directly. Second, the three natural inclinations do not entail three natures within man. Like Albert, Thomas states that man remains in essence a rational creature in all his actions. Third, the division of

primary and secondary precepts of natural law applies to each of these three types of natural inclinations.

In the same article of Question 94, Thomas addresses the issue of the self-evidence of these principles. We have already mentioned that the primary principles of the natural law are not innate but known by virtue of synderesis. Synderesis itself, however, is in a sense innate, appearing almost as a natural disposition.²³⁹ Moreover, man's knowledge of the general principles is infallible. Thomas summarizes this range of questions thus:

Now a thing is said to be self-evident in two ways, first, in itself; secondly, in relation to us.... Hence it is that as Boethius says, certain axioms or propositions are universally self-evident to all; and such are those propositions whose terms are known to all, as Every whole is greater than its part, and Things equal to one and the same are equal to one another. But some propositions are self-evident only to the wise, who understand the meaning of the terms of such propositions.²⁴⁰

Thomas, then, states that the primary precepts of the natural law are self-evident. They are self-evident either in-and-of-themselves, or to all people. Because the terms comprising the natural law may not be known to all people, such a distinction is necessary. If the terms of the primary principles are not known by all people, the principle is said to be self-evident in-and-of-itself, i.e., once a knowledge of the terms is acquired, the principle is self-evident. R.A. Armstrong lists a number of Thomas' principles that are self-evident in-and-of-themselves. These include:

'The commandments of God must be obeyed', 'God must be obeyed', 'One ought to live according to Reason', 'Thou shalt love the Lord thy God', 'Thou shalt love thy neighbour'.²⁴¹

We should make two further comments about those principles which are self-evident in themselves. As mentioned above, the foundational

principle is not the source from which the natural law principles are deduced. In Thomas' theological view of natural law, each natural law principle contains the foundational principle, viz., to do good and to avoid evil. Second, these principles are self-evident because they fulfill man's natural inclinations. Man was created to obey God, i.e., he has been given the natural instinct to obey God. Thus, that man should obey God presents itself as self-evident in the natural man even without the enlightenment of revelation, and of faith. In Thomas' Grace/Nature theology, faith belongs to the realm of Grace, but a natural man, i.e., a man without faith, can still perceive that there is a God whom he must obey. The rational principles of the natural law which all men perceive once they understand the terms involved, therefore, receive further claim to self-evidence because every man is inclined to follow them. Both the rationality and the natural inclinations present in all men support Thomas' claim that the natural law principles are universally self-evident, provided their terms are understood.

The distinction between primary and secondary principles of the natural law is most important for Thomas. Throughout the history of natural law theory, scholars had attempted to make this distinction explicit. The Roman Stoic Seneca had distinguished between the ideal natural law and the actual natural law. Most of the Church Fathers, canonists such as Rufinus, and theologians, such as William of Auxerre and Roland of Cremona, had all tried to distinguish between two types of natural law principles. Thomas makes the distinction clearly. In the Commentary on the Sentences Thomas takes two approaches in distinguishing between primary and secondary precepts of natural law.²⁴³ The first approach bases the distinction

upon primary and secondary ends. For example, the primary end of eating is to stay in good health, but a secondary end of eating could be any end which has good health as a prerequisite. Such a basis, however, is rather vague. The second approach bases the distinction on the notion that the secondary principles are always derived from primary principles.

By the time of the writing of the Summa Contra Gentiles, Thomas had abandoned the first approach and seen in the second approach the only proper method of distinguishing between primary and secondary principles of natural law.²⁴⁴ In Thomas' view, the method of deriving secondary precepts from primary precepts is analogous to the method by which speculative reason arrives at certain conclusions from primary, self-evident givens.

In the Summa Theologica, Thomas makes a similar distinction. "The process of reason," says Thomas, "is from the common to the proper."²⁴⁵ In the same sense, the practical reason moves from self-evident general principles to less evident secondary principles. These communia principia, known by synderesis, are the source from which the conclusiones, or moral precepts, which are not self-evident are derived.²⁴⁶ But in what sense are they derived? Thomas states: "In answer that, as stated above there belong to the natural law, first, certain most general precepts, that are known to all; and, secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles."²⁴⁷ Armstrong points out that the word originally used by Thomas, translated above as "following closely from," is 'propinquus'.²⁴⁸ Literally, this word means "proximate" or "adjacent to." Therefore, one could say that

since the foundational principle is found in all the primary precepts of the natural law, a secondary precept is a precept derived from the primary precept insofar as the primary precept is contained within the secondary precept. The derivation refers not to a strictly logical deduction, but to a sense of "following closely from" a primary precept, in a contingent matter.²⁴⁹

Two further distinctions are important for Thomas' natural law theory. The first is the distinction between demonstratio and determinatio.²⁵⁰ A demonstratio is what has alone been described as a secondary precept of the natural law. A determinatio does not belong to the natural law, but is not incompatible with it. It follows reasonably, but not directly, from a secondary principle of the natural law. A further distinction is made within the demonstrationes.²⁵¹ Modica considerationes are secondary precepts of the natural law which are quickly grasped; multa considerationes are secondary precepts requiring much reflection. The distinction does not, however, reflect upon the validity of the multa considerationes; both the multa considerationes and the modica considerationes are secondary precepts of the natural law. The distinction only reflects the amount of contemplation needed for grasping these precepts. It appears to be a distinction of common sense and self-evidency.²⁵²

Natural law, therefore, contains primary precepts and secondary precepts or demonstrationes. The former are known by the synderesis of the practical reason; the latter are known through reflection (of varying intensity) of the practical reason. One important aspect of Thomas' theory warrants our attention: the variability of the natural law. Thomas states that the natural law may be

changed in two ways: by addition or deletion.²⁵³ Nothing can block the natural law from being changed by addition, as with, e.g., God's intervention into the human law. But deletions from the natural law are only of a particular type. Says Thomas:

The natural law is altogether unchangeable in its first principles: but in its secondary principles, which as we have said, are certain detailed proximate conclusions drawn from the first principles, the natural law is not changed so that what it prescribes be not right in most cases. But it may be changed in some particular cases of rare occurrence, through some special cases hindering the observance of such precepts, as stated above.²⁵⁴

But this account of the variability of natural law does not fully explain why natural law has not retained an invariable form in history, at least in its primary precepts. A French commentator S. Deploige²⁵⁵ lists three explanations Thomas gives, throughout his writings, for this variability. Says Deploige: "First, the influence of the passions; second, the unequal development of reason, of insight, and of civilization; third, the diversity of conditions, of situations, and of circumstances."²⁵⁶ Clearly, human passions can blind man to the rational principles of the natural law. Second, it is also clear that human reason can err. Moreover, human reason is always coming to new insights.²⁵⁶ This is both an individual and collective progress of reason. Jacques Maritain, in illustration of this progress, shows how the conception of slavery has changed with the progress of the rational mind. Previously, slavery was condoned by natural law; today, it is condemned by the same principle.²⁵⁸ Third, the natural law may vary as it is applied to different situations and conditions. This contingency may lead one to cite as valid natural law principles those principles which are merely determinations.

Conclusions

Our survey of medieval natural law theory is now complete. Thomas' synthetic natural law theory serves as the capstone to a series of eclectic theories of natural law which had already begun with the union of Stoic and Christian ideas of law among the Church Fathers. Through an adroit selection of the most tenable teachings of the natural law tradition, Thomas developed a powerful natural law teaching, which, in largely unaltered form, still dominates contemporary Catholic jurisprudence.

Footnotes

¹W.C. Bark, Origins of the Medieval World (Stanford: 1958), p. 77.

²This is the thesis of the chapter 'The Medieval Metamorphosis' in Ibid., pp. 67-100. Cf. also J.H. Randall, The Making of the Modern Mind, 2d. ed. (New York: 1976), pp. 11 ff. and C. Dawson, Religion and the Rise of Western Culture (New York: 1950), pp. 23 ff.

³Cf. H. Mattingly, Christianity in the Roman Empire (New York: 1967) for a fine account of the relations of the Church and Empire up to 476.

⁴D.B. Nagle, The Classical World (Englewood Cliffs, N.J.: 1979), pp. 363 ff.

⁵Dawson, op. cit., pp. 29-33.

⁶M. Deansley, A History of the Medieval Church, 2d. ed. (London: 1928), pp. 15-16.

⁷W. Ullmann, A History of Political Thought: The Middle Ages (Middlesex: 1965), pp. 12-13; W. Ullmann, Law and Politics in the Middle Ages (Ithaca: 1975), pp. 28-34; W. Ullmann, Medieval Papalism: The Political Theories of the Medieval Canonists (London: 1949), pp. 7-8.

⁸Ullmann, A History of Political Thought, p. 13.

⁹Ullmann, Law and Politics in the Middle Ages, p. 34. For a thorough treatment of the influence of the Vulgate on medieval political theory see his "The Bible and Principles of Government in the Middle Ages," Settimane di Studio del Centro Italiano di Studi sull'alto Medioevo, 10 (Spoleto: 1963), pp. 181-227.

¹⁰Ullmann, A History of Political Thought, p. 38.

¹¹Ambrose states: "Palaces belong to the emperor, churches to the priesthood....Where notions of faith are concerned, it is the custom for bishops to judge christian emperors, not for emperors to judge bishops." Cited by B. Tierney, The Crisis of Church and State 1050-1300 (Englewood Cliffs, N.J.: 19), p. 9. Cf. also A.J. Carlyle and R.W. Carlyle, A History of Medieval Political Theory in the West (New York: 1903), Vol. I, pp. 179 ff.

¹²Pope Gelasius' letter reads thus: "Two there are, august emperor, by which this world is ruled, the sacred authority [auctoritas] of the priesthood and the royal power [potestas]. Of these the responsibility of the priests is more weightly insofar as they will answer for the kings of men themselves at the divine judgement. You know, most clement son, that, although you take precedence over all mankind in dignity, nevertheless, you piously bow your neck to those who have charge of divine affairs and seek from them the means of your salvation, and hence you realize that, in the order of religion, in matters

concerning the reception of right administration of the heavenly sacraments, you ought to submit yourself rather than rule...." Cited by Tierney, op. cit., pp. 13-14. For the Latin text, cf. Carlyle and Carlyle, op. cit., Vol. I, p. 190. Recently, scholars have begun to question whether Gelasius was suggesting something more than the doctrine of duae auctoritates by using two different words for power: 'auctoritas' and 'potestas'. Erich Casper, in his Geschichte des Papsttums (Tubingen: 1933), Vol. II, pp. 65-71, 753-755, argues that the word 'potestas' has a meaning of real sovereign power backed by coercion and that 'auctoritas' denotes moral authority alone. Ullmann, in his The Growth of Papal Government (London: 1955), pp. 14-28, suggests that in the language of Roman law, well-known to Gelasius, 'auctoritas' can mean an inherent right to rule and 'potestas' only a delegated executive power to carry out instructions. A.K. Ziegler, in his "Pope Gelasius and his Teaching on the Relation of Church and State," Catholic Historical Review 27 (1942), 412-37, says 'potestas' and 'auctoritas' are merely synonyms denoting a similar power. Thus Casper questions whether Gelasius was a true papalist; Ullmann states that he certainly was a papalist; and Ziegler asserts that Gelasius was decidedly neutral. Cf. Tierney, op. cit., pp. 10-11.

¹³Ullmann, Medieval Papalism, p. 8.

¹⁴The old law became hopelessly confused because the Romans recognized so many legitimate sources of law. These sources include: 1) certain ancient customs (mores maiorum), 2) statutes (leges) passed by the many assemblies, 3) the plebiscita of the plebians, 4) the magistratum edicta of the praetors, 5) the senatus consulta of the Roman Senate, 6) the principia placita of the early emperors, 7) the responsa prudentia of the pontiffs and jurists. All these were equally valid sources of law.

¹⁵J. Gaudemet, "Roman Law, History of," The New Catholic Encyclopædia (New York: 1967), Vol. 12, p. 592.

¹⁶"The contributions taken by the compilers from the various juriconsults were uneven. Most heavily drawn upon were the jurists of the period of the Severi [192-235], since they were the closest in time as well as the most prolix. Ulpian supplied almost a third of the texts, and his own work was itself largely a compilation from his predecessors. Paul and Papinian were quoted also, but not as frequently as Ulpian. More than two-thirds of the texts are taken from the five jurists of the Law of Citations, Gaius, Pompius, Paul, Ulpian, and Modestinus (6137 extracts out of 9142). Scaevola, Pompius, Julian, Marcianus, Javolenus, Africanus, and Marcellus furnished more than one-fourth of the texts (2470) while 27 other jurists supplied only 535." Ibid., p. 593. For a complete English translation of the Corpus Iuris Civilis, cf. The Civil Code, ed. S.P. Scott (Cincinnati, OH: 1932), Vols. 1-7.

¹⁷H.J. Wolff, Roman Law (Norman, Okl.: 1951), p. 180.

¹⁸Encyclopedia Britannica, 1970 ed., Vol. 15, p. 1056.

¹⁹Gaudemet, op. cit., p. 594.

²⁰Wolff, op. cit., pp. 162-183.

²¹The Novellae were summarized and abridged in c. 555 in a collection of some 124 Novellae entitled the Epitome Juliani, attributed to a professor at Constantinople called Julian. A second collection of 134 Novellae, of unknown origin and date, was discovered in the twelfth century. Since the collection seemed to contain indisputably authentic laws, medieval scholars gave it the title Authenticum. The best collection is that of 168 Novellae, completed in c. 578. Cf. Ullmann, Law and Politics in the Middle Ages, pp. 68 ff. for more detail.

²²Cf. B.F. Deutsch, "Byzantine Law," The New Catholic Encyclopedia (New York: 1967), Vol. 12, pp. 596-600 for an exhaustive list of these Novellae.

²³P. Stein, "Roman Law: Eclipse in the West," The New Catholic Encyclopedia (New York: 1967), Vol. 12, p. 600.

²⁴H. Thieme, "Leges Romanae Barbarum," The New Catholic Encyclopedia (New York: 1967), Vol. 8, p. 615.

²⁵Cited by Stein, op. cit., p. 600.

²⁶Paul Vinogradoff, Roman Law in Medieval Europe, 3d. ed. (Oxford: 1961), pp. 11-20.

²⁷Ibid., pp. 26-27.

²⁸Stein, op. cit., p. 601.

²⁹Ullmann, Law and Politics in the Middle Ages, p. 72.

³⁰Deansley, op. cit., pp. 61-63

³¹Ullmann, Law and Politics in the Middle Ages, p. 73.

³²Charles H. Haskins, The Renaissance of the Twelfth Century (New York: 1927).

³³Vinogradoff, cited by R. Feenstra, "Roman Law--Revival in the West," The New Catholic Encyclopedia (New York: 1967), Vol. 12, p. 602.

³⁴loc. cit.

³⁵loc. cit.

³⁶Vinogradoff, op. cit., p. 43.

³⁷Feenstra, op. cit., p. 603.

³⁸The Investiture Conflict arose as a by-product of a controversy between Peter Damiani and Humbert, two cardinals of Popes Nicholas II, Alexander II, and Gregory VII. The issue between them was whether or

not a bishop found guilty of simony could still, ^{retain} the ecclesiastical authority to ordain priests in his diocese. Damiani said he could; Humbert said he could not. It was plain to both cardinals, however, that any disciplining of the guilty bishop in question had to meet the approval of the feudal lord who had appointed the bishop to the diocese in the first place. This practice of lay investiture had been in vogue in the Catholic Church since the ninth century. The weak papacy had, at that time, little say over the growing episcopal tendencies of the Church. With the episcopal movement, all new churches became the fiefs of the lords on whose lands the churches were built. The lord appointed the bishop, and the bishop was answerable to him first of all. Now, the Damiani-Humbert controversy within the Church itself led quickly to an anti-lay investiture conflict, which we shall discuss in the text. Cf. Tierney, op.cit., pp. 33-43 for a number of primary texts outlining this controversy.

³⁹H.J. Berman, The Interaction of Law and Religion (Nashville: 1974), p. 57.

⁴⁰Ullmann, Law and Politics in the Middle Ages, pp. 78-79.

⁴¹A traditional story concerning the rediscovery of Justinian's writings fails chronologically. The story reads that the German emperor Lothaire II, while carrying on a war in Southern Italy with Amalfi near Naples, discovered in the booty of fallen Amalfi a manuscript of the Digest. He gave this manuscript to the people at Pisa, his allies, who treasured it and studied it extensively. This manuscript, then called the Pisana, was in 1406 transferred to Florence and thus called the Florentina. But this tale accounts neither for the availability of the Justinian Code, Institutes, and Novellae used so extensively by the Italian jurists, nor does it explain how the jurists of Lombardy, Ravenna, and Bologna were citing freely from all parts of the Justinian Corpus already in the early eleventh century, a full one hundred years before the Pisana. Cf. J. Hadley, Introduction to Roman Law (New Haven: 1931), pp. 32 ff.

⁴²Vinogradoff, op. cit., pp. 54-55.

⁴³That a later archbishop of Canterbury should be an anti-papalist may seem rather surprising. Lanfranc, apparently, had already left Pavia in 1043 to join William of Normandy, himself by no means a papalist. His toleration of a strong secular government was instrumental in William's accepting him for the archbishop of Canterbury.

⁴⁴Vinogradoff, op. cit., p. 55.

⁴⁵Ullmann, Law and Politics in the Middle Ages, pp. 93 ff. The continuous support for the emperors was warmly rewarded by Emperor Frederick Barbarossa. In the Authentica Habita (1158), the Emperor gave special privileges to the students of Roman Law: safe conduct throughout the empire, exemption from taxes and reprisals, and special jurisdiction.

⁴⁶For an exhaustive list of these collections, cf. Ibid., pp. 85. Vinogradoff, op. cit., pp. 56 ff.; Feenstra, op. cit., p. 603.

⁴⁷For a very fine account of the many law schools that arose after the twelfth century, cf. H. Rashdall, The Universities of Europe in the Middle Ages (Oxford: 1941), Vol I.

⁴⁸"Canon," The Oxford Dictionary of the Christian Church, ed. F.L. Cross (London: 1958), p. 227.

⁴⁹Beyer, "Kanon in the Christian Church," Theological Dictionary of the New Testament, ed. G. Kittel (Grand Rapids: 1965), Vol. 3, p. 600.

⁵⁰J.A. Abbo and J.D. Hannon, The Sacred Canons, 2d. ed. (London: 1961), Vol I, pp. xi-xiii.

⁵¹G. Lebras, "Canon Law," The Legacy of the Middle Ages, ed. G.C. Crump and E.F. Jacob (Oxford: 1926), p. 322.

⁵²A. von Harnack, The Constitution and Law of the Church of the First Two Centuries, trans. F.L. Pgsen, ed. H.J.A. Major (New York: 1910), p. 20; B.S. Easton, "Introduction," The Apostolic Tradition of Hippolytus (Cambridge: 1934), pp. 3-5.

⁵³Easton, op. cit., p. 8.

⁵⁴The time of composition of this important document cannot be firmly established. A.G. Cicognani writes: "Some writers such as Harnack and Bryennius assign a period between 120 and 160 A.D.; while others (as Minasi) hold for the second half of the first century for the following reasons: a) the document mentions very ancient rites, e.g., the communication of the gifts of the Holy Spirit to all the faithful, which was less frequent at the time when the first epistle of St. Paul to the Corinthians was written, sc. 57 A.D.; the ministry of prophecy, as in the old Law, denoting the first century; the simplicity of the rite of baptism, seemingly without previous exorcisms....; the presidency of an Apostle over the presbytery; the enumeration of first fruits to be given to prophets and teachers, Bishops and deacons, and other Jewish observances. b) the similarity of the Didache to the Epistle of Barnabas, probably composed at the time of the emperor Nerva (96-98)...." Canon Law, 2d. ed. trans. J.M. o'Hara and F. Brennan (Philedalphia: 1935), pp. 183-4. J. Quaesten, the contemporary authority on the Didache states that the Didache was written in parts, or as a whole, between 100-150. Quaesten, Patrology (Utrecht: 1950), Vol. I, p. 37.

⁵⁵The great British church historian P. Schaff has translated the entire Didache in The Teaching of the Twelve Apostles (Edingburgh: 1885).

⁵⁶Quaesten, op. cit., p. 37.

⁵⁷J. Quaesten, "Apostolic Constitutions," The New Catholic Encyclopedia (New York: 1967), Vol. I, pp. 689-690. Cf. Translation by R. H. Connolly, Didisgalia Apostolorum, rev. ed. (Oxford: 1929).

⁵⁸Cicognani, op. cit., p. 185.

⁵⁹J. Quaesten, "Constitutions, Apostolic," Encyclopedia Britannica, 1970 ed., Vol. 6, p. 407. I have skipped over a late third century work entitled The Ecclesiastical Canons of the Holy Apostles, other-

wise known as the Apostolic Church Order, a work of Egyptian origin. This constitution consists of thirty canons and, in size and arrangement, very nearly resembles the Didache. I have elected to omit discussion of this work in the text since it merely continues the tradition promulgations of the Didache without making appreciable additions to it.

⁶⁰For a translation of this text and an outline of its importance, cf. Easton, op. cit., G. Dix, The Treatise on the Apostolic Tradition, rev. ed. (London: 1968).

⁶¹Easton, op. cit., p. 13. There are later apostolic writings which warrant mention but not exhaustive analysis: 1) the Epitome, a series of excerpts from the eighth book of the Apostolic Constitutions. It is comprised of five parts. Part A embodies excerpts from Book 8, Chaps. 1-2. Part C from Chap. 32, Part D from Chaps. 33-34, Part E from Chaps 42-45. Part B includes excerpts from Chaps. 3, 16, 18-21, 23-28, 30-31, but is largely an adaption of Hippolytus' Apostolic Tradition. As late as the nineteenth century, scholars held that the Epitome was the source for the eighth book of the Apostolic Constitutions, but archivists have shown that it was actually written some fifty years after the latter work. 2) The Testament of our Lord, a two-part work written some time after 360 A.D., drawing heavily from the Apostolic Tradition. 3) The Canons of the Apostles, ascribed to the Synod of Antioch (341). 4) The Canon Law of the Holy Apostles. 5) The Penalties of the Holy Apostles. 6) The Matrimonial Impediments of the Apostles.

⁶²Dix, op. cit., p. xlix.

⁶³Harnack, op. cit., p. 143.

⁶⁴For a full account of virtually every disciplinary canon passed by the ecumenical councils, cf. R. Schroeder, Disciplinary Decrees of the General Councils (New York: 1937); Cicognani, op. cit., pp. 149-191. For early papal decretals, cf. Cicognani, op. cit., pp. 135-148.

⁶⁵The Nestorian/Monophysite debate raged strongly in the fourth and fifth centuries. The Nestorians claimed that Christ's humanity, i.e., that he could have infancy and birth, should be emphasized. The Monophysites stated that Christ has but one nature (mono physis), and it is divine. The Council of Chalcedon decreed that Christ has two equally significant natures: an human and a divine nature. For more detail, cf. Deansley, op. cit., chap. 1.

⁶⁶Cf. Cicognani, op. cit., p. 154.

⁶⁷Walter Ullmann writes: "Canon law was the one written system of law that was created for contemporaries, grew out of the exigencies of society and was a living dynamic law--in this it differed from its model, the Roman law, which by the time of its codification was in many respects outdated." Law and Politics in the Middle Ages, pp. 124-5.

⁶⁸R.C. Mortimer, Western Canon Law (Berkley: 1953), pp. 10-13.

⁶⁹F. Schulz, History of Roman Legal Science (Oxford: 1946), pp. 16 ff., 152. Ullmann, Law and Politics in the Middle Ages, p. 121.

⁷⁰Dionysius' two works together are called the Dionysia Collectio. Collections of the same period include the Quesnellia Collectio of France (c. 495-500), the Freising Collection (after 495), the Vaticana (c. 514-523), the Sanblasiani (after 523), the Teatina or Collectio Ingilrami (after 523). Cf. C. Vogel, "Canon Law, History of--Early Church," The New Catholic Encyclopedia (New York: 1967), Vol. 4, pp. 35-36.

⁷¹Dawson, op. cit., p. 44.

⁷²The Hispana was drawn up by the Council of Toledo in 633.

⁷³The influence of Frankish law on the Christian canon law development is, of course, but one, though the best, example of the importation of Germanic law into Christian canon law. Many Germanic law codes had their effect: the Lex Salica (c. 500), the Lex Ripuarica (sixth to eighth centuries), the Lex Francorum Chamavorum (c. 802), the Lex Barbara Burgundiorum (end of fifth century), the Lex Alamanorum (beginning of seventh century), the Lex Baiwarorum (c. 750), the Lex Frisonum (eighth to ninth centuries), the Lex Saxorum (beginning of the ninth century), the Lex Anglorum (beginning of the ninth century), etc. Cf. discussion by Vogel, op. cit., pp. 36-37; Mortimer, op. cit., pp. 19-23.

⁷⁴Mortimer, op. cit., pp. 26-33.

⁷⁵Ullmann, Law and Politics in the Middle Ages, p. 127. H.E.A. Feine in Kirckliche Rechtsgeschichte, 4th ed. (Cologne: 1964), Vol. I calls the Carolingian Period a "Germanically cast canon law" in which one sees the "irruption of Germanism into canon law."

⁷⁶Cicognani, op. cit., pp. 239, 244.

⁷⁷Mortimer, op. cit., pp. 38-39.

⁷⁸Ullmann, Law and Politics in the Middle Ages, p. 130.

⁷⁹Cicognani, op. cit., pp. 240-241.

⁸⁰Gregory VII, cited by Tierney, op. cit., p. 51.

⁸¹"The Dictatus Papae," trans. S.Z. Ehler and J.B. Morrell, Church and State Throughout the Centuries (London: 1954), pp. 43-44.

⁸²S. Kuttner, Harmony from Dissonance: An Interpretation of Medieval Canon Law (Latrobe, PA: 1960), p. 6.

⁸³Ibid., p. 9.

⁸⁴Cicognani, op. cit., pp. 276-277.

⁸⁵C. Gallagher, Canon Law and the Christian Community (Rome: 1978), p. 55.

⁸⁶Cicognani, op. cit., p. 280.

⁸⁷L.E. Boyle, "Canon Law, History of--Classical Period," The New Catholic Encyclopedia, Vol. 4, p. 42.

88 Cf. Rashdall, op. cit., Vol. I.

89 Ullmann, Law and Politics in the Middle Ages, p. 140.

90 Boyle, op. cit., p. 42.

91 For an exhaustive list of these collections, cf. Boyle, op. cit., pp. 42 ff.; Cicognani, op. cit., pp. 289 ff.

92 Abbo and Hannon, op. cit., p. xv state that preceding the pontificate of Gregory IX (1227), more than twenty collections were published.

93 Although Raymond depends largely on the post-Gratian decretals, he freely draws from the writings of the fathers Jerome, Augustine, Isidore, and Bede, from conciliar canons, from decretals of popes before Innocent III, and from the many collections of scholars before Gratian.

94 Cicognani, op. cit., pp. 309-310.

95 Abbo and Hannon, op. cit., p. xvii.

96 Sir Ernst Barker writes: "The origin of the idea of natural law may be described to an old and indefeasible movement of the human mind (we may trace it already in the Antigone of Sophocles) which impels it towards the notion of an eternal and immutable law.... This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe--from the Being of God and the reason of man. It follows that law--in the sense of the law of the last resort--is somehow above law-making. Barker, cited by A.P. d'Entreves, Natural Law (New York: 1951), p. 8.

97 There are many accurate histories of the idea of natural law available. We have integrated many of these writings in two earlier papers entitled 'Greek Law and Legal Philosophy' and 'Roman Law and Legal Theory'.

98 Cicero, Republic, tr. C.W. Keyes (Cambridge: Loeb Classical Library, 1929), III, 20-24.

99 "To live honorably, to injure no one, and to give to everyone his due." Digest I, 1.10.1.

100 Ibid., I, 1.3.

101 The early Apostolic Fathers, however, were hesitant to look beyond the will of God as the source of law. Ignatius of Antioch, Clement of Rome, Polycarp of Smyrna, and Barnabas did not utilize pagan natural law theory in their view of morality. Rather, they put great emphasis on the words of Christ, and, more importantly, on the teachings of the apostles. Hence, one can see quite quickly that the early Christian Church's statement that to obey the teachings of the Apostles is to be moral had a partial source in the Apostolic Fathers' repudiation of natural law theory.

¹⁰²Cf. A. Schubert, Augustinus Lex-aeterna-Lehre nach Inhalt und Quellen (Munster: 1924), pp. 3 ff. who argues that Augustine organizes his three views on order, law, and eternal Reason on Cicero, Plotinus, and St. Paul.

¹⁰³Augustine, De Div. Quaes. 73.1.

¹⁰⁴De Lib. Arb. I, 6,15; Enarr. in Ps. 36, Pat. Lat., Vol. 40, p. 90.

¹⁰⁵Augustine, cited by M.B. Crowe, The Changing Profile of the Natural Law (The Hague: 1977), p. 64. Cf. Augustine, De Civ. Dei, X, 14. Cf. E. Osborn, Ethical Patterns in Early Christian Thought (Cambridge: 1976), p. 147.

¹⁰⁶De Civ. Dei, X, 14, cited by F.H. Eterovich, Approaches to Natural Law: From Plato to Kant (New York: 1972), p. 48.

¹⁰⁷De Lib. Arb. I, 6.

¹⁰⁸De Trin. 14. 15, 21.; De Quaes Div. 83, q. 43.2. In the latter source he states: "Natura jus est quod non opinio genuit, sed quaedam innata vis inseruit, ut religionem, pietatem, gratiam, vindicationem, observantium, veritatem."

¹⁰⁹Enarr. in Ps. 118, 25.4, Pat. Lat. 37. 1574; Ep. 158. 3, 16.

¹¹⁰Contra Faust. XXII, 27, Pat. Lat. 33. 681. Augustine's talk of other parts of the soul may, at first glance, be somewhat confusing to the reader. It seems to me that the point of the phrase "the other parts of the soul which are common to men and animals" Augustine has abandoned his definition of the soul as simply the higher faculty of man as opposed to the body. Instead, he has imported an adapted version of the Aristotelian concept of the soul during the latter's hypercathartic phase. Aristotle had identified the souls of the beings he encountered as the principles of individuation. Hence Aristotle spoke of a vegetative soul in plants, a sensitive soul in animals, and a rational soul in man. Augustine seems to be saying in our quotation that 'the sensitive' and 'the rational' are two parts' of the soul. Man's soul has both the rational part and the sensitive part; the animal soul only the sensitive part.

¹¹¹Cf. footnote 100. The difficulty with such an interpretation, of course, is that Augustine clearly speaks of the eternal law as a thoroughly rational law--the summa ratio. The question is, how do beings, excepting rational men, become aware of and operate in accordance with the rational eternal law, when they themselves have no rational functionality. Perhaps the best answer to this query lies in our being aware that Augustine cloaks Yahweh in Stoic garb, i.e., he makes God seem fully rational. Hence when we cognize an eternal law in the cosmos, which emanates from God, we, as rational creature view it as logically-attuned or rational. It does not necessarily follow that such a rational law requires rational functionality to be apprehended.

¹¹²R.A. Markus writes: "The deliverance of conscience or reason as manifested in moral judgement is thus no less and no more than

the human mind's illumination by the eternal law, or its participation in it; Augustine describes conscience as 'an interior law written in the heart itself'.... He refers to this law inscribed in man's heart or known to him by reason as 'natural'. He can thus speak of law (eternal or natural), reason, and order interchangeably when discussing the ordering of human action to bring about its virtuous disposition. "St. Augustine," Encyclopedia of Philosophy, ed. P. Edwards (New York: 1967), Vol. 1, p. 203.

¹¹³Cf. Footnote 107 above.

¹¹⁴Ulpian: "Jus autem naturale est aut civile aut gentium." Digest I, l. 2.

¹¹⁵Isidore, Etymologies, V. 4, cited by Carlyle and Carlyle, op. cit., Vol. I, p. 108.

¹¹⁶Ibid., V. 6.

¹¹⁷Ibid., V. 5. Cf. Gaius, Institutes, I. 1. Cf. Carlyle and Carlyle, op. cit., p. 109, f.n. 4.

¹¹⁸Crowe, op. cit., pp. 68-71. Crowe states that a number of twelfth century jurists falsely attributed to Isidore Ulpian's definition of natural law as that universally recognized by men and animals.

¹¹⁹Ibid., p. 74.

¹²⁰Decretum, Dist. I, 1, cited by E. Lewis, Medieval Political Ideas (London: 1954), Volume I, p. 32.

¹²¹Decretum, Dist. I, 7.

¹²²Comm. in Ep. ad Rom. 3, 20, cited by Carlyle and Carlyle, op. cit., 104, f.n. 4.

¹²³Crowe, op. cit., p. 81.

¹²⁴Decretum, Dist. VI, 3.

¹²⁵D. Composta, "Il diritto naturale in Graziano," Studia Gratiani, Vol. 2, p. 188. Cf. R. Weigand, Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus (Munich: 1967), p. 134; B. Tierney, "Natur id est Deus: A Case Study of Juristic Pantheism," Journal of the History of Ideas, 24 (1963), p. 311.

¹²⁶Crowe, op. cit., p. 85. Crowe cites this in response to Ullmann's claim that Gratian's two definitions arose out of an identification of the Christian God with the Stoic God, viz. 'natura id est Deus'. Cf. Ullmann, Medieval Papalism, p. 40

¹²⁶Decretum, Dist. 8, cited by S. Chodorou, Christian Political Theory and Church Politics in the Mid-Twelfth Century (Los Angeles: 1972), p. 107.

¹²⁸W.H. Reade, "Political Theory to c. 1300," Cambridge Medieval History, ed. J.B. Bury (Cambridge: 1936), p. 619.

¹²⁹Ullmann, Medieval Papalism, p. 42.

¹³⁰Carlyle and Carlyle, op. cit., Vol. II, p. 196.

¹³¹I am heavily dependent upon Crowe, op. cit., for the next sections of the glossators and the decretists. Crowe, in turn, is heavily dependent on R. Weigand, op. cit., for his analysis.

¹³²Crowe, op. cit., p. 87.

¹³³loc. cit.

¹³⁴Ibid., p. 90.

¹³⁵loc. cit.; Weigand, op. cit., p. 33.

¹³⁶Crowe, op. cit., p. 91.

¹³⁷loc. cit.

¹³⁸loc. cit.

¹³⁹Carlyle and Carlyle, op. cit., Vol. II, p. 30.

¹⁴⁰loc. cit.

¹⁴¹Carlyle and Carlyle claim that the glossators shared no common view of natural law as opposed to the canonists who did hold to a common understanding of natural law. cf. Ibid., p. 31. Crowe contends that in actuality the glossators were in agreement and the canonists in disagreement over the understanding of natural law.

¹⁴²Ibid., p. 178.

¹⁴³Crowe, op. cit., p. 95.

¹⁴⁴Ibid., p. 96.

¹⁴⁵Ibid., p. 97.

¹⁴⁶Lewis, op. cit., p. 38.

¹⁴⁷Ibid., p. 39.

¹⁴⁸De Sacramentis, I, 2.

¹⁴⁹Lewis, op. cit., p. 38.

¹⁵⁰Carlyle and Carlyle, op. cit., Vol. II, p. 104.

¹⁵¹Crowe, op. cit., p. 98.

¹⁵²loc. cit.

- 153 Ibid., p. 99 ff.
- 154 Ibid., p. 100.
- 155 Ibid., p. 99.
- 156 Ibid., p. 100.
- 157 Weigand, op. cit., pp. 159-60.
- 158 Crowe, op. cit., p. 101.
- 159 loc. cit.
- 160 Ibid., p. 102.
- 161 Ibid., p. 104.
- 162 loc. cit.
- 163 Ibid., p. 105.
- 164 Ibid., p. 106.
- 165 loc. cit.
- 166 Ibid., p. 107.
- 167 loc. cit.
- 168 loc. cit.
- 169 loc. cit.
- 170 loc. cit.
- 171 Ibid., p. 108.
- 172 loc. cit.
- 173 Ibid., p. 109
- 174 loc. cit.
- 175 loc. cit.
- 176 Ibid., pp. 113-114.
- 177 Ibid., p. 114.
- 178 Petrus Lombardus, Liber Sententiarum, iii, D. 37.
- 179 Crowe, op. cit., p. 116
- 180 G.H. Gerould, "Medieval Conceptions of Natural Law," University of Notre Dame Natural Law Institute Proceedings, ed. A.L. Scanlon (Notre Dame: 1949), Vol. II, p. 79.

181 O. Lottin, Le Droit Naturel chez Saint Thomas, 2d. ed. (Paris: 1931), pp. 3-35.

182 Lewis, op. cit., pp. 9-10.

183 Crowe, op. cit., p. 116.

184 Gerald, op. cit., p. 80.

185 Lewis, op. cit., p. 9.

186 Crowe, op. cit., p. 116.

187 loc. cit.

188 loc. cit.

189 Heinrich Rommen, The Natural Law: A Study in Legal and Social History and Philosophy, trans. P. Havley (London: 1947), p. 43.

190 Crowe, op. cit., p. 118.

191 loc. cit.

192 Rommen, op. cit., p. 43.

193 Carlyle and Carlyle, op. cit., Vol. 5, p. 14.

194 Crowe, op. cit., p. 119.

195 Gerould, op. cit., p. 80.

196 Crowe, op. cit., p. 122.

197 Gerould, op. cit., pp. 80-81.

198 Again, I acknowledge my debt to Crowe, op. cit., pp. 123-135 for this section. The commentaries and primary texts are not available to me at this time.

199 Ibid., pp. 125-126.

200 loc. cit.

201 Ibid., p. 127.

202 loc. cit.

203 Ibid., p. 129.

204 loc. cit.

205 Ibid., p. 130

206 Ibid., p. 131.

207 Ibid., p. 133.

208 loc. cit.

- 209 Ibid., p. 131.
- 210 Ibid., p. 142.
- 211 Ibid., p. 144.
- 212 loc. cit.
- 213 Summa Theologica 91, art. 2.
- 214 Ibid., 95, art. 4.
- 215 Crowe, op. cit., p. 153.
- 216 R.A. Armstrong, Primary and Secondary Precepts in Thomistic Natural Law Teaching (The Hague: 1966), p. 33. Cf. O'Connor, Aquinas and Natural Law (New York: 1968), p. 42.
- 217 Summa Theologica, 94, art. 1.
- 218 Crowe, op. cit., pp. 140-1.
- 219 Armstrong, op. cit., pp. 33, 97.
- 220 Crowe, op. cit., p. 157.
- 221 loc. cit.
- 222 Ibid., p. 154. Cf. S. Kuttner, "The Natural Law and Canon Law," University of Notre Dame Natural Law Institute Proceedings, ed. E.F. Barrett (Notre Dame: 1950), Vol. 3, p. 104.
- 223 Crowe, op. cit., p. 160.
- 224 Ibid., pp. 160-161.
- 225 loc. cit.
- 226 Ibid., p. 163.
- 227 Summa Theologica, 91, art. 4.
- 228 I shall discuss eternal law and natural law thoroughly and only touch upon human law. Human law and Divine law, though important points of Thomas' general legal theory, do not lend appreciably to our discussion of Thomas' natural law theory.
- 229 Summa Theologica, 93, art. 3.
- 230 E. Gilson, The Christian Philosophy of St. Thomas Aquinas (New York: 1956), p. 335.
- 231 This is not the all-encompassing Platonic law discussed in the early Scholastics. This notion is unique to Aquinas. Cf. Crowe, op. cit., pp. 171-173.
- 232 Summa Theologica, 91, art. 2.
- 233 D'Entrevés, op. cit., p. 40.

- 234 Gilson, op. cit., p. 256.
- 235 Crowe, op. cit., pp. 168-169.
- 236 Summa Theologica, 94, art. 2.
- 237 loc. cit.
- 238 Crowe, op. cit., pp. 177-179.
- 240 Summa Theologica, 94, art. 2.
- 239 Gilson, op. cit., p. 258.
- 241 Armstrong, op. cit., pp. 40-41.
- 242 Crowe, op. cit., pp. 181-182.
- 243 Armstrong, op. cit., pp. 68-69.
- 244 loc. cit. Cf. O'Connor, op. cit., pp. 76-77.
- 245 Summa Theologica, 94, art. 4.
- 246 Armstrong, op. cit., p. 90.
- 247 Summa Theologica, 94, art. 6.
- 248 Armstrong, op. cit., p. 92.
- 249 loc. cit.
- 250 Ibid., p. 95.
- 251 O'Connor, op. cit., p. 76.
- 252 Armstrong, op. cit., 102.
- 253 Summa Theologica, 94, art. 5.
- 254 loc. cit.
- 255 S. Deploige, Le confit de la morale et de la sociologie,
cited by Crowe, op. cit., p. 186.
- 256 loc. cit.
- 257 H. Cairns, Legal Philosophy from Plato to Hegel (Baltimore:
1949), p. 193.
- 258 J. Maritain, On the Philosophy of History, pp. 82-83.