

OF COURSE HUMAN LAW DEVELOPS: CAN NATURAL AND DIVINE LAW DEVELOP?

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Abstract: *According to Thomas Aquinas, human law can develop over time in several ways. It might seem that although our understanding of natural and divine law can become better or worse, natural and divine law themselves can never change in any way. This turns out not to be the case. St. Thomas's account of the matter gives no comfort to relativists, for God's eternal wisdom cannot improve, nor can human nature change in essence, and the Ten Commandments cannot be revised or repealed. Yet in surprising ways, St. Thomas maintains that change and development are realities in both natural and divine law.*

Introduction

By the development of law, I mean any sort of change in law that is cumulative and directional.

I am not speaking of development in the *theory* of law, although that is an important topic too. Cumulative and directional change in law may take place either when the law or the way it is applied is systematically getting either better or worse, or when it is systematically responding to *something else* which is getting either better or worse. Sometimes we confine the term 'development' to getting better.¹

According to Thomas Aquinas, human law can develop over time in several ways. Probably this does not surprise us, since in the sense of getting better, we have come to expect human law to develop. In fact, in our day the utopian tendency has become very strong, which is alarming. The shortest route to dystopia is through a would-be utopia.

However, that is not my present topic. Certainly St. Thomas believes that human law can change for the better, and I will say a few words

¹ For instance, this is how the term is used in theology when speaking of the development of doctrine.

about how. But that will merely get us started. My real question is not whether human law can develop, but whether natural and divine law can develop.

For at least three reasons, it might seem that the answer is a sharp ‘No’ – that natural and divine law could not possibly develop. In the first place, Divine Wisdom is perfect; it can no more improve than decay. In the second place, although human nature, a creation of Divine Wisdom, can change in condition, it cannot change in essence. In the third place, the supernatural destiny of man is fixed; whether or not we get there, God made us for beatitude.

And all this is true. And yet in certain other surprising ways, St. Thomas maintains not only that change and development are possible in both natural and divine law, but that they have actually taken place. Are these changes and developments of such a nature as to give comfort to those who deny the reality and stability of moral basics? No, but they are real. My object is to explain how so. I am going to begin with a quick review of development in human law,

For Comparison: Development in Human Law

St. Thomas makes a variety of distinctions, each of which is necessary for understanding the topic, but which are a little bewildering when taken all at once: Old Law and New Law, conclusion and determination, prelapsarian and lapsarian law, additions to law and subtractions from it, interpretation and dispensation, and so on. The most convenient way to work through all this is first to consider how human law develops, and then turn to divine and natural law to investigate the similarities and differences. First, then, let us consider simply *change* in human law, and then go on to see how such change can be cumulative and directional so that it is properly called development.

Change in Human Law Itself

St. Thomas is cautious about change in human law, stressing that because the mere fact of change is itself prejudicial to the common good, no change should be made unless the improvement in the law is great enough to offset the harm of change as such.² But he does insist

² *Summa theologiae* (hereafter ST), I-II, Q. 97, Art. 2.

that this can happen.

There are two modes of change in human law. One is change *per se*, when the laws themselves change. St. Thomas says that change in the laws themselves can happen in two ways.

First, they may change because of a change in the condition of the people.³ It would seem that a change in their condition might be simply a change in the circumstances in which they live. If people who used to travel on horseback begin to use automobiles, then the traffic regulations which worked in the old days may no longer be ideal. But the kind of change in their condition which St. Thomas actually mentions – presumably because he considers it much more important – is a change in their *moral* condition. Borrowing an example from St. Augustine, he asks us to suppose that up to now, the people have been able to choose their own magistrates – something of which St. Thomas approves, by the way, because free human beings should not be ruled as slaves, but if possible, with their consent.⁴ But suppose that over time the people have become so corrupt that they are willing to sell their votes. In such a case it may be better that they lose the privilege of choosing their rulers.⁵

Second, the laws may change because even if the condition of the people has not changed, the legislators have reconsidered and attained a better understanding of what should be done.⁶ We might draw an example from the civil law concerning dissolution of marriage. Some years ago the marriage laws in U.S. jurisdictions were changed so that a wife or husband seeking a divorce would no longer have to show fault

³ ST, I-II, Q. 97, Art. 1.

⁴ Ideally, St. Thomas thinks, the authorities who act for the people act with their consent. As he says in I-II, Q. 105, Art. 1, the best form of government is ‘partly democracy, i.e. government by the people, insofar as the rulers can be chosen from the people, and the people have the right to choose their rulers.’ A little later, in I-II, Q. 105, Art. 2., he speaks with approval of Marcus Tullius Cicero’s definition of the commonwealth, ‘a nation is a body of men united together by consent to the law and by community of welfare.’ To put it another way, the best state of affairs is that in which the people have both the moral capacity and legal right to make their own laws – and also to choose their own rulers, since every community requires a source and focus of unity, as he explains in *On Kingship, To the King of Cyprus*, Book 1, Chapter 3.

⁵ The example is drawn from St. Augustine of Hippo, *On Freedom of the Will*, Book 1, Chapter 6.

⁶ ST, I-II, Q. 97, Art. 1.

on the part of the other spouse, such as cruelty, adultery, or abandonment.

Since then, evidence has accumulated that no-fault divorce has a number of grave disadvantages. In the first place, it significantly weakens the motivation to save a troubled marriage; indeed, most divorces now occur in low-conflict marriages. In the second place, on average divorce reduces the well-being of both the former spouses and their children much more than had previously been thought.⁷ Many therefore argue that the experiment of no-fault divorce has failed, and that something more like the older system should be reinstated. If this were to be done, it would be an example of change because of an improvement in the understanding of the legislators.

Changes in the understanding of the legislators and in the condition of the people are related. For if legislators do change their mind about no-fault divorce, it will be largely because the advent of that system changed the preexisting condition of the people for the worse. But if they ignore the evidence, it may be because, having been chosen by the same people, their own condition has also changed for the worse.

In these two related ways, then, the laws may change *per se*. However, St. Thomas also speaks of change in law when the change is not in the laws themselves, but in the way in which they are applied.⁸

Change in Application of Human Law

Like change in laws *per se*, change in their application can also happen in several ways. First, the application of the laws may change because of *dispensation* – that is, because public authority declares an exception.

The authorities *might* authorize dispensations for all sorts of bad reasons, for example to benefit their cronies. However, it is *right* for them to authorize dispensations only when circumstances arise in which even though the law is good and just, following it to the letter would be contrary to the common good. Normally, private citizens

⁷ See for example W. Bradford Wilcox, ‘The Evolution of Divorce’ in (Winter, 2019) 38 *National Affairs*. The article is available at <https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce>.

⁸ His primary discussion of dispensation is the fourth part of his investigation of change in laws: ST, I-II, Q. 97, Art. 4.

should follow good and just laws except when the authorities themselves have declared that an exception is to be made. St. Thomas says that occasionally, however, an emergency may arise in which there is no time to consult authority. In this case, the citizens may make the decision. Even here they must honour the intention of the law, but not necessarily its letter. For an example, we are asked to imagine a walled city or fortress. The law decrees that for protection from enemies, the gates of the city must be closed at sundown. It is sundown now, and the gatekeeper is about to close the gates. In the distance, however, he sees the city's defenders racing back to the city, pursued by the enemy. If he shuts the gates now, they will be cut to shreds. If he leaves the gates open just long enough for them to get in, they will survive to fight again the next day. Since there is no time to consult authority, there is no need to do so. The gatekeeper keeps the gates open.⁹

Second, the application of the law may change because of *interpretation* – that is, because public authority has made a new decision that in such and such circumstances, the law is to be applied in such and such a way. One would think that only the rulers of the people would be able to do this. Interestingly, St. Thomas accepts an old maxim of Roman law that the custom of the people themselves has the force of law, abolishes law, and is the interpreter of law.¹⁰ Why is this so? To understand we must remember what St. Thomas thinks law is in itself. Law is an ordinance of reason, for the common good, made by competent public authority, and promulgated or made known: Four conditions.¹¹ But in what St. Thomas calls a free community,¹² the people themselves have the authority to employ their reason about what the common good requires. We tend to think of them doing this in public assemblies and then promulgating their enactments by words, but they may just as well do it in day to day life, promulgating their enactments by repeated deeds. From this point of view, a good and reasonable custom *is* a kind of law, so of course it can interpret law.

⁹ ST, I-II, Q. 96, Art. 6.

¹⁰ ST, I-II, Q. 97, Art. 3.

¹¹ ST, I-II, Q. 90, Art. 4.

¹² 'The people among whom a custom is introduced may be of two conditions. For if they are free, and able to make their own laws, the consent of the whole people expressed by a custom counts far more in favour of a particular observance, that does the authority of the sovereign.' ST, I-II, Q. 97, Art. 3.

Suppose, for instance, that the law requires juries to convict only on good evidence, but juries consistently refuse to convict on the basis of evidence from persons of notoriously bad character. In effect, they have changed the law by giving an interpretation of what shall count as good evidence.

We have considered four ways in which human law can change: Change in law *per se* because of change in the condition of the people, change in law *per se* because of change in the understanding of the legislators, change in the application of law because of dispensation, and change in the application of law because of interpretation. Any of these four kinds of change can become cumulative and directional so that it constitutes what we call development – whether for better or for worse.

For in the first place, change in human law can be cumulative if it results from change in the condition of the people, just because change in their condition can be cumulative. The people may continue to become more or less virtuous, more or less knowledgeable, or more or less experienced in public affairs. In the second place, change in human law can be cumulative if it results from change in the understanding of the legislators, just because change in their understanding can be cumulative. As time goes on the legislators may come to grasp the nature of marriage and the conditions for its flourishing better and better (or, alas, worse and worse). And in the third and fourth places, cumulative change in the condition of the people and in the understanding of the legislators also drive the ways in which the *application* of law changes by dispensation and interpretation.

Development of Divine and Natural Law in Comparison with Development of Human Law

What about divine and natural law? Changes can certainly take place in the condition of the people, but are they relevant here? One might think ‘No.’ Changes *cannot* take place in the understanding of the divine creator and legislator. But is that the end of the story? One might think ‘Yes.’ The answers are surprising.

St. Thomas makes very clear that neither natural nor divine law can

change in its fundamentals or basics – the sorts of moral duties that the Decalogue includes. But there is much more to the picture than that. First let us review what he says, and then let us sift its implications.

We begin with the same distinction we made before – on one hand, the law itself can change, and on the other, its application can change. St. Thomas states that in its secondary and more detailed aspects, natural law can certainly experience change in itself, either by what he calls addition or by what he calls subtraction.¹³ The phraseology of additions to natural law and subtractions from it is extremely odd to our ears. However, the idea is straightforward. Let us take these two modes of change one at a time, beginning with addition.

Change in Natural Law by Addition

The first way in which something can be added to natural law is *determination*, which is not strict inference of conclusions from premises, but rather the pinning down of details which natural law leaves open and which might be arranged in more than one way. Curiously, although God is the author of the basics of moral duty, humans, relying on these basics, can add something to the details. For example, although natural law does not require driving on a particular side of the road – in the U.K., on the left – it does require taking care for the safety of the people. If, to ensure their safety, human authority does require keeping to left, the moral situation changes. Prior to the legislative decision, there was no moral duty to keep to the left. Now, it would be morally wrong not to keep to the left. A genuinely new moral duty has been generated. In this sense there has been an addition to the natural law (in that country), conditioned on an act of public volition.

It is not hard to see how such change can be cumulative and directional. For example, if the legislature pools risks through a social insurance plan, then entire new areas of moral duties open up. If the legislature in turn decides that it has made a mistake, then these new moral duties dissolve or take new shapes.

We might also note the interesting point that apparently, additions to the natural law can also be conditioned on acts of *private* volition. For

¹³ ST, I-II, Q. 94, Art. 5.

example, although natural law does not require Samuel and Edith to exchange marital vows, it does require the keeping of vows. So if Samuel and Edith do exchange vows, then here, too, genuinely new moral duties are generated: Samuel must forsake all others except Edith, Edith must forsake all others except Samuel, and they must faithfully love each other. In this sense there have been additions to the natural law. We might say that natural law prepared the *status* of matrimony, but that it was up to Samuel and Edith whether to *enter* that status. If they did enter it, then a new moral situation was actualized, which previously was only potential.

But to return to what legislatures do, we have seen that there can be additions to the secondary precepts of natural law because *the very process of determining natural law by enacting human law* adds to them. I think it is safe to say that the situation regarding divine law is largely parallel. Just as the enactment of human law by determination adds to the secondary precepts of natural law, so the enactment of canon law by determination adds to the secondary precepts of divine law. However, canon law is broader in principle, and for four reasons. One reason is that it determines generalities of *both* divine and natural law, not just of natural law. A second is that it is framed in the light of both temporal and eternal well-being, not just temporal well-being. A third is that divine law authoritatively makes some things about natural law more clear so that poor reasoners are less likely to make mistakes. Finally, although mistakes in disciplinary matters are still possible, the Church is the beneficiary of divine assistance in a way that ordinary human governments are not; the gates of hell may prevail against secular governments, but never against the Church.

Change in Natural Law by Subtraction

What about *subtractions* from the natural law? Again, when St. Thomas says that these are possible, he does not mean that anything can be subtracted from the general principles. The prohibition of adultery will not be repealed because contraceptives have been invented. It will not become licit to steal because the government has made a routine of it. Treating one's parents with contempt will not become allowable because the oldsters have not kept up with social changes. The subtractions – like the additions – lie in secondary and more detailed matters.

The Angelic Doctor refers to the circumstances which produce subtractions from natural law as *obstacles*. How do these work? Let us bear in mind that in his view, the general principles of natural right are always right and always known (as he puts it, they are ‘the same for all, both as to rectitude and as to knowledge’).¹⁴ For example, it is always wrong to steal, and we all know this. And no, he does *not* say that the Germans were ignorant of the wrong of stealing, as it is so often claimed; what he says in this passage is that they were ignorant of the wrong of *banditry*. Even here he does not mean banditry in general, for he is aware that they punished banditry severely. Apparently they failed to recognize that *their kind* of banditry – raiding other tribes – fell under the wrong of banditry.¹⁵

But with the secondary and more detailed principles, matters stand differently. Circumstances can arise in which such a principle is *not* right to follow. For example, a secondary precept drawn from the wrong of stealing is that if someone has left his property in my keeping, I should return it when he asks. *But this does not always hold true*. For example, what if what he left with me was his auto keys, and at the moment of asking for their return he is falling-down drunk? In such a case, the secondary precept in question drops out of the natural law. Although it ordinarily expresses a genuine moral duty, *in this case it doesn't*. St. Thomas says that in this case it has been subtracted from the natural law.

Change in the Application of Natural Law by Interpretation

So much for changes in natural law *per se*. But as in the case of human

¹⁴ ST, I-II, Q. 94, Art. 4.

¹⁵ The term commonly mistranslated ‘theft’ is neither *furtum*, meaning theft in general, which St. Thomas defines as the taking of property by stealth, or *rapina*, meaning robbery in general, which he defines as the taking of property by force or violence, but *latrocinium*, meaning banditry, which is a specific kind of robbery. We know from the source to which St. Thomas refers, Julius Caesar’s *Commentaries on the Gallic Wars*, that the Germans knew the wrong of banditry. Indeed, Julius remarks that the Germans considered such crimes as *furtum* and *latrocinium* so detestable that on those occasions when they burned victims to propitiate their gods, they preferred to burn perpetrators of these crimes. However, they cut an exception for *latrocinia* beyond the boundaries of each state. These they considered useful for the discipline of youth. Apparently they viewed them not as robbery, but as war. See *Gallic Wars*, Book 6, Chapters 16 and 23. I have discussed this in more detail in *Commentary on Thomas Aquinas’s Treatise on Law and Companion to the Commentary* (both Cambridge University Press, 2014).

law, so in the case of natural, we may also speak of changes in *application*.

St. Thomas does not say much about changes in the application of natural or divine law by way of *interpretation*, although, of course, he does mention the matter. For example, he says that allowing soldiers to fight on the Sabbath to protect the nation is not a dispensation, but an interpretation, ‘for a man is not taken to break the Sabbath, if he does something necessary for human welfare,’ as Christ confirms in Matthew 12.¹⁶ To understand cumulative and directional changes in the interpretation of natural and divine law, I suggest that the best approach would be to adapt St. John Henry Newman’s criteria for ‘development of doctrine.’ Newman, we recall, said that in a true development, which means a healthy, organic development, the underlying idea ‘retains one and the same type, the same principles, the same organization; ... its beginnings anticipate its subsequent phases, and its later phenomena protect and subserve its earlier; [and] it has a power of assimilation and revival, and a vigorous action from first to last.’¹⁷ To be sure, these are not easy criteria to apply, but I suspect – though I cannot prove – that St. Thomas would accept them.

Change in the Application of Natural Law by Dispensation

But although St. Thomas does not say much about changes in the application of natural or divine law by way of interpretation, he does say quite a bit about changes in the application of natural and divine law by way of dispensation. There seem to be two different cases: Dispensation from the rule itself, and dispensation from some portion of the penalty for its violation.

Consider for example the permission of divorce in Old Testament divine law, which St. Thomas calls the Old Law. According to Christ, divorce was never pleasing to God. Though Moses was acting with divine authority, he permitted men to divorce their wives only “because of the hardness of their hearts.” Here, a dispensation was granted to an entire nation at once, because even though men who divorced their

¹⁶ ST, I-II, Q. 100, Art. 8, ad 4.

¹⁷ John Henry Newman, *Essay on the Development of Christian Doctrine*, Chapter 5, ‘Genuine Developments Contrasted with Corruptions,’ available online at <http://www.newmanreader.org/works/development/chapter5.html> .

wives were at fault, tearing asunder what God has joined together, a dispensation was necessary to avoid a worse fault. What worse fault? According to an early commentary on the gospel of Matthew, what Christ meant by the hardness of the people's hearts was that if these men had not been permitted to divorce their wives, they would have murdered them.¹⁸ St. Thomas considers two possible opinions about what to make of this. According to the opinion he considers more probable, although this dispensation freed men from 'eternal punishment' – that is, from the guilt of breaking up their marriages and the spiritual consequence of separation from God – it did not free them from 'temporal punishment,' from the need for purgation. No doubt they suffered these direly. Apparently, then, the dispensation from the indissolubility of marriage was not a dispensation from the rule, but only from the eternal portion of the penalty. Christ, then, instituted a development of divine law by putting an end to dispensation, a dispensation which had never been more than a suspension of a portion of the punishment for violation.¹⁹

Toleration of polygamy among the Patriarchs is a different case. Here, there was an actual suspension of the rule, not a mere suspension of the penalty for violation. St. Thomas does not suggest, as he does in the case of those who divorce, that the Patriarchs were at fault. Polygamy was tolerated not because of the hardness of their hearts, but because for the time, polygamy was actually fitting. In those days, says St. Thomas, God deemed it necessary to permit polygamy in order to increase the population of His people. This consideration does not apply after the coming of Christ, for today the worship of God is propagated in a spiritual way, among all nations. At that time, however, it was propagated in a bodily way, by raising a nation of descendants from a common ancestor. 'Now the law prescribing the one wife was framed not by man but by God,' says St. Thomas, 'nor was it ever given by word or in writing, but was imprinted on the heart, like other things belonging in any way to the natural law. Consequently, a dispensation

¹⁸ ST, Supp., Q. 67, Art. 4, ad 4. This view is expressed in the *Opus Imperfectum*, an incomplete fifth-century commentary on Matthew believed in St. Thomas's day to have been composed by Chrysostom.

¹⁹ The Old Law on divorce: Deuteronomy 24:1-4. The New Law on divorce: Matthew 5:31-32, 19:3-12. St. Thomas on the danger of wife-murder: ST, Supp., Q. 67, Art. 6; *Summa Contra Gentiles*, III, Chapter 123.

in this matter could be granted by God alone, through an inward inspiration, vouchsafed originally to the holy patriarchs, and by their example continued to others, at a time when it behooved the aforesaid precept not to be observed, in order to ensure the multiplication of the offspring to be brought up in the worship of God.²⁰

How it was even possible to suspend the rule of monogamy requires further explanation. St. Thomas holds that just as with human law, the purpose of dispensing from divine and natural law is to release persons from observing it when observing it would frustrate the very intention of the legislator – in the case of divine and natural law, the divine legislator. St. Thomas writes that because such circumstances are ‘not easy to determine,’ only God can dispense persons from divine and natural law. This is important: Not even He can dispense from the general moral precepts, which are parts of the natural law²¹ and are summarized and made explicit by the moral precepts of the Ten Commandments,²² because to do this would contradict His very intention. However, He can dispense from observation of the secondary precepts, which regulate the details of how His intention is to be honoured.²³ Now the general precepts concerning marriage have to do with the principal end of marriage, which is having and rearing children. By contrast, the secondary precepts concerning marriage have to do with its secondary end, which is the community of works between the husband and wife. This explains why the prohibition of unfaithfulness is among the general precepts. What puts it there is not that it damages the community of works, although that is very grave, but that it destroys the integrity of the family as a place to raise children. With polygamy, though, matters stand differently. Provided that the man is faithful to his several wives, St. Thomas argues that the procreation of children is not harmed. True, polygamy gravely hinders the union of the husband and wife, because ‘there cannot easily be peace in a family where several wives are joined to one husband, since one husband cannot suffice to satisfy the requisitions of several wives,

²⁰ ST, Supp., Q. 65, Art. 2; see also Art. 1.

²¹ ST, I-II, Q. 100, Art. 1.

²² There *can* be alteration in the ceremonial aspects of the Decalogue. Times should be set aside for the worship of God, and this is not subject to change. But the provision that one such time is the Sabbath (i.e. Saturday) is subject to change.

²³ ST, I-II, Q. 100, Art. 8; see also I-II, Q. 97, Art. 4, ad 3.

and again because the sharing of several in one occupation is a cause of strife.²⁴ But he says that although polygamy interferes with the unitive end, it ‘does not wholly destroy’ it, and the procreative end is more important. Therefore, in view of the need to build the Chosen Nation, the harm to the unitive end was ‘overlooked.’ Surely the Patriarchs were not as well off under polygamy as they would have been under monogamy. But not all disadvantage is punishment, and there is no suggestion here that the Patriarchs suffered literal punishment either eternal *or* temporal.

One might wish that St. Thomas had investigated this example a little further, for it seems that by attenuating the relationship between the father and the children of his several wives, polygamy damages not only the unitive good, but also the procreative. In fact, it seems to damage the procreative good *by* damaging the unitive good, since children are not as well reared if the home is plagued by jealousy among the wives and among their respective children. If this view is true, then it would seem that polygamy among the Patriarchs was not approved by God, but only tolerated by Him, since although it weakened both natural goods of marriage, it did not utterly destroy either of them. In this case, toleration of polygamy would have represented a dispensation not from the rule itself, but only from a part of the penalty for violating it — something like the case of divorce.

‘Constitutional’ Change in Divine and Natural Law

Finally, let us consider now what might be called *constitutional* development in law – passing all at once from one framework of the law to another. I am not speaking of a revolution, in which even the basics change, but a development in which the change in the details is comprehensive. We know that there are constitutional changes in human law. In my country, for example, we were first governed according to the Articles of Confederation, and subsequently these were replaced by the Constitution of the United States. The basics of a republic were preserved, but there was a thoroughgoing change in the kind of republic that we had.

Like any change in law, constitutional change can take place because of a change in the condition of the people. In the case of human law, the

²⁴ ST, Supp., Q. 65, Art. 1.

main change of condition which comes to mind is that the citizens of a jurisdiction advance or decline in the virtues. But when we think of natural and divine law, the main changes of condition which come to mind are the Fall and the Atonement. In neither change do human beings lose their nature. In both, however, the condition of their nature changes greatly.

Unlike some of the other kinds of changes that we have discussed, the Fall and the Atonement have no close parallel in the development of human law. Ordinary changes in the moral character of a nation may happen at any time, and may go in either direction. At any given point in the history of a people, they may be getting worse or getting better. By contrast, both the Fall and the Atonement happen only once, and each goes in only one direction. By the primordial treason of our first parents, we lost our original integrity, and we were helpless to get it back. By the sacrifice of Christ, the penalty was paid, our helplessness was ended, and the door to restoration was opened. We might (though carefully) call these *constitutional* changes in natural and divine law, because each ushers in a new order of things. To be sure, in each case the new order bears an organic relation with the old one – yet the old one no longer prevails.

To human law, the Fall and the Atonement are invisible — or perhaps we should say that they are not essentially but only accidentally visible. For human law has never experienced prelapsarian man, and it must deal with all sorts of persons both inside and outside of grace. How do the Fall and Atonement play out in natural and divine law?

Constitutional Change in the Medicinal Aspects of Law

At first, much of the change has to do with penalty and correction; later, it has to do with redemption. St. Thomas explains that any sort of tendency or order which a law imparts to us can also be called a law – a law ‘by participation.’ But law may impart a tendency to us in either of two ways, one way direct, the other indirect. The direct way is that the law disposes us to act in a certain way: ‘Do this.’ The indirect way is that the law imparts a penalty to us: ‘Pay this.’ Just because we *did not* act in the requisite way, we are deprived of some honor, capacity, or status, so that we are no longer on the same footing. We come, so to speak, under a different law. This is how St. Thomas explains the

passage in the seventh chapter of St. Paul's letter to the Romans in which the Apostle complains that a 'law of sin' works in us, opposing the law of God. It is not a law in the sense that it commands us, 'Go and sin.' Rather it is a law in the extended sense – it is a penalty we suffer for having turned against God in the first place, like the pain and bleeding I suffer if I slash my arm. The penalty is that although we possess the same nature as before the Fall, we now possess it in a disordered condition. We have lost our original integrity. Not only are our minds clouded, but our passions and appetites rebel against what our minds perceive as really good. The result is a tendency to sin.²⁵

The so-called law of sin is a penalty – an evil that we suffer – in two different senses. In the first place, we suffer it because we deserve it. St. Thomas calls this sort of thing 'punishment simply.' But we also suffer it for our own good. St. Thomas calls this sort of thing 'medicinal punishment,' for 'a medical man prescribes bitter potions to his patients, that he may restore them to health.'²⁶ In what way was it medicinal to suffer the disorder of our nature? Because it was a remedy for pride in both knowledge and power. As to the former, St. Thomas writes that man

was proud of his knowledge, as though his natural reason could suffice him for salvation: and accordingly, in order that his pride might be overcome in this matter, man was left to the guidance of his reason without the help of a written law: and man was able to learn from experience that his reason was deficient, since about the time of Abraham man had fallen headlong into idolatry and the most shameful vices²⁷

An analogy may make this more clear. The prince of a certain rough country allows only honest and law-abiding persons to reside in the homeland. Incorrigibles lose this privilege, and are exiled to the colonies. As they are being loaded onto the colony boat, the prince says to them, 'Since you will not obey my law, the best I can do for you is leave you to yourselves. You think you know what you desire. I will teach it to you even better, for you shall have it. Henceforth you shall live by the law of your own contumacy. After five years, we will see

²⁵ ST, I-II, Q. 91, Art. 6.

²⁶ ST, I-II, Q. 87, Art. 7.

²⁷ ST, I-II, Q. 98, Art. 6.

how well you have learned.’

Once man had endured the medicinal penalty for his pride in his knowledge, which was discovering that he was really ignorant, it became possible to remedy his ignorance by giving a certain nation real knowledge: ‘After those times, it was necessary for a written law to be given as a remedy for human ignorance: because “by the Law is the knowledge of sin”.’²⁸ But once man had been cured of his pride in knowledge, it became possible to remedy the second element in his pride, his pride in power: For ‘after man had been instructed by the Law, his pride was convinced of his weakness, through his being unable to fulfil what he knew.’²⁹

So far we have been speaking of ‘men who are hard-hearted and proud, whom the [Old Testament] law restrains and tames.’ However, ‘it is also imposed on good men, who, through being instructed by the law, are helped to fulfil what they desire to do.’ St. Thomas says such help ‘was most needed by the people, at the time when the natural law began to be obscured on account of the exuberance of sin ... wherefore it was becoming that the Old Law should be given between the law of nature and the law of grace.’³⁰

This is why St. Thomas is so fond of St. Paul’s comparison of the Old Law to the kind of servant called in Greek a *paidagogos*, which does not refer to a pedagogue in our sense, but means, literally, a ‘child-leader’.³¹

Now before faith came, we were confined under the law, kept under restraint until faith should be revealed. So that the law was our custodian until Christ came, that we might be justified by faith. But now that faith has come, we are no longer under a custodian; for in Christ Jesus you are all sons of God, through faith³²

St. Paul maintains that in the same way that the *paidagogos* escorted the children to school and kept watch over them on the way so that they

²⁸ *Ibid.* The internal quotation is from Romans 3:20.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ He refers to this comparison in various places including ST, I-II, Q. 91, Art. 5; Q. 98, Art. 2 and ad 1, ad 2; Q. 99, Art. 6; Q. 104, Art. 3; Q. 106, Art. 3; Q. 107, Art. 1; and II-II, Q. 1, Art. 7, ad 2.

³² Galatians 3:23-26 (RSV-CE).

got there safely, the Old Law escorted or predisposed the people to the grace of Christ who was to come. Though in and of itself it could not impart the power to possess true justice or righteousness, it showed them what it means and how much they needed it.

Constitutional Change in the Redemptive Aspects of Law

Just now we saw St. Thomas speak of a ‘law of grace.’ In Protestantism, which views law and grace as antitheses, such an expression seems inconsistent, like an ‘even odd,’ a ‘non-touching tangent,’ or an ‘innocent sin.’

To understand why St. Thomas speaks as he does, we might consider a charming parable in John Bunyan’s allegory *The Pilgrim’s Progress*.³³ A man attempts to sweep a parlour, but his efforts merely drive the dust into the air, and the room is as dirty as before. After a maid has sprinkled the dust with water, the man is able to sweep the dust into a pile and get rid of it. Law is like the broom; grace is like the sprinkling of water. Bunyan himself, committed to an un-Thomistic contradiction between law and grace, intended the parable to convey the point that the broom is useless. But the parable is better than Bunyan knew. St. Thomas would say that although the broom is useful and necessary, the sprinkling is also necessary so that the broom can achieve its end.

The significance of the law of grace, which St. Thomas also calls the New Law, is not so much that it gives us a new set of divine instructions, but that it gives us the power to fulfill them. This is why St. Thomas writes that ‘the New Law is chiefly the grace itself of the Holy Ghost, which is given to those who believe in Christ.’ But it includes instructions too:

Nevertheless the New Law contains certain things that dispose us to receive the grace of the Holy Ghost, and pertaining to the use of that grace: such things are of secondary importance, so to speak, in the New Law; and the faithful need to be instructed concerning them, both by word and writing, both as to what they should believe and as to what they should do. Consequently we must say that the New Law is in the first place a law that is inscribed on our

³³ John Bunyan, *The Pilgrim’s Progress from This World to That Which Is to Come, in the Similitude of a Dream* (1678), Part 1, Section 2. The work is available online in many places, for example at <http://www.ccel.org> and <http://www.bartleby.com>

hearts, but that secondarily it is a written law³⁴

We may illustrate constitutional change in natural and divine law by considering matrimony, which according to St. Thomas has a number of distinct ‘institutions’ or origins.

- Natural law *as such* originates matrimony in matters concerned with having and raising children and the procreative unity of the husband and wife. There would have been marriage even if there had been no Fall.
- But then we did fall, and natural law responded; it is not that we acquired a different nature and so came under entirely new laws, but that because of the disordered condition of our nature, a stricter discipline became necessary. Thus, natural law *after the Fall* gives further direction to matrimony so that its natural purposes are not unraveled by the wound of sin, which tempts us to employ our sexual powers in ways that forestall the formation of families or undermine their good order. These aspects of discipline, the need for which is recognizable even apart from revelation if we are thinking straight, are *determinations* of the natural law under the circumstance of the Fall.
- The Old Testament divine law, which St. Thomas calls the Old Law, remedies the blurring of the natural law under the circumstances of the Fall. It puts many of the most general moral precepts of the natural law *in writing*, including such basics as marital faithfulness.
- Civil law in general – including both the Old Testament law and human civil law – shapes the institution with respect to ‘other advantages resulting from matrimony, such as the friendship and mutual service which husband and wife render one another.’ Examples of such regulations might be those concerned with inheritance and spousal support. In connection with divine law, St. Thomas also mentions those concerned with who can be married and who is ineligible.
- The law of grace, or New Testament divine law, which St. Thomas also calls the New Law, shapes matrimony so that the union of husband and wife can represent and make present the mystery of

³⁴ ST, I-II, Q. 106, Art. 1.

Christ's union with the Church. Now, faith working in love opens the door to the Holy Spirit, who not only heals the wounds of sin, but uplifts matrimony so that the husband and wife can be joined by the same love that unites Christ with the Church: Supernatural power is poured into vessels of flesh.

St. Thomas says that each of these – natural law in itself, natural law after the Fall, the 'Old' divine law of the Old Testament, the 'New' divine law of the New Testament, and in certain details, the civil law – 'institutes' or originates marriage in some sense.³⁵ Although these 'institutions' or origins 'are not of the same thing in the same respect,'³⁶ they are all linked. Thus, for civil law to treat marriage as something contrary to what it is by nature is profoundly wrong; any such so-called civil marriage is not marriage at all.

Notice that the advent of sacramental marriage does not change the basic rules of marriage. In that sense, neither natural nor divine law changes. But in three other senses, they change profoundly. First, the sacrament provides the *power to fulfill* these rules. Second, it transforms the *inner life* of matrimony so that love can reign supreme. Third, it changes the *signification* of marriage by adding another meaning. By nature, marriage has only two meanings, procreative and unitive; by grace, marriage acquires an additional meaning, for now it contains the sacrament. Just because of the indivisible union of the husband and wife, matrimony can represent and make present the indivisible union of Christ and His spouse, the Church. And just as the union of their bodies makes the spouses biologically fruitful, so their union with Christ makes them spiritually fruitful as they pass on their faith not only to their children but to the world.

It might be thought that since the Old Law has been fulfilled and passed away, there is nothing further to learn from it. This is far from being true, even in the case of the ceremonial observances. Consider the prohibition of consuming blood. The prohibition is no longer binding, but the purposes for which it was once made binding are far from obsolete. St. Thomas lists them as keeping the people from idolatry, because pagan rites involved consuming blood and fat; to introduce a

³⁵ ST, Supp., Q. 42, Art. 2.

³⁶ *Ibid.*, ad 3.

horror of shedding innocent blood; to inculcate reverence for the Divine gift of life, and to foreshadow the sacrifice of Christ. Shouldn't we still detest idolatry, abhor bloodshed, and revere the sanctity of life? Alongside the ancient idolatries such as the worship of the Baals, we may list the perennial ones such as the worship of the Self, once covert, but now done openly, once condemned, but now taken for common sense. To the ancient forms of bloodshed such as killing with the sword, we have added novel ones such as killing with poison gas. The ancients held life so cheap they thought little of killing prisoners, we hold it so cheap that we abolish the laws which protected the aged and the sick, and compliment ourselves for killing them. Neopaganism not only recapitulates paganism, but exceeds it. Even the ancient practice of infanticide no longer stirs us as it did. As to the fourth purpose, it is true that we no longer need look forward to the sacrifice of Christ. All the more reason to pray for the grace to be conformed to Him through being united with what He did on the Cross.

Conclusion

Relativists and antinomians want natural and divine law to be dynamic and changeable so that they can bend and break the rules. From a Thomistic perspective, this quest is destined to end in futility. God's intentions for us never change, and his most basic moral requirements – the sorts of things we find in the Ten Commandments – are fixed points of moral aspiration.

And yet the ordinances of natural and divine law are far from being frozen and static. Indeed, not only can they change in some of the ways that human law can, by addition and subtraction, by determination, dispensation, and interpretation, they also present different faces in each of the three stages of salvation history, Creation, Fall, and Redemption. For we must speak of two editions of natural law – as we experienced it in our original integrity and as we experienced it afterward. Moreover we must speak of two editions of divine law – the preparation for the Gospel and its fulfillment.

'Behold,' God declares through Isaiah, 'I am doing a new thing; now it springs forth, do you not perceive it? I will make a way in the wilderness and rivers in the desert.'³⁷ And it is true. Although the

³⁷ Isaiah 43:19 (RSV-CE).

natural and divine laws do not bend and do not break, they grow and ramify. They adapt themselves to the most diverse circumstances, even to our obstinacy. They do what is necessary to crush our pride and remedy our ignorance. By grace, they lead us to beatitude.