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Natural Law and the Law of Nations: Some Theoretical Considerations

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James V. Schall, S.J.

Abstract

I will argue here that the law of nations, the *jus gentium*, in fact lies at the heart of many crucial modern social and political issues.

NATURAL LAW AND THE LAW OF NATIONS: SOME THEORETICAL CONSIDERATIONS

James V. Schall, S.J.*

Ad jus gentium pertinent ea quae derivantur ex lege naturae sicut conclusiones ex principiis, ut justae emptiones, venditiones, et alia hujusmodi, sine quibus homines ad invicem convivere non possunt; quod est de lege naturae, quia "homo est naturaliter animal sociale," ut probatur in I Pol. [1253a2].¹

INTRODUCTION

In summarizing the concepts found in the Roman *Corpus Juris Civilis*, Alexander Passerin d'Entrèves wrote:

Now of laws there are different sorts. There is the law of the State, which expresses the interest of one particular community (*jus civile*). There is a law of nations (*jus gentium*), which men have devised for their mutual intercourse. But there is also a law which expresses a higher and more permanent standard. It is the law of nature (*jus naturale*), which corresponds to "that which is always good and equitable" (*bonum et aequum*).²

On reading this passage from d'Entrèves, it is not altogether clear what is meant by the *jus gentium* or how it may relate to the *jus civile* and the *jus naturale*. D'Entrèves simply remarked that the law of nations is "devised for mankind's mutual intercourse."

Presumably, by this purpose of assisting "man's mutual intercourse" d'Entrèves meant that there are rules that can and should be devised for dealings among those who do not be-

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1. "For to the law of nations belong those things which are derived from the law of nature as conclusions from principles, e.g., just buyings and sellings, and the like, without which men cannot live together; and this belongs to the law of nature, since man is by nature a social animal, as is proved in *Politics* i. [1253a2]." THOMAS AQUINAS, *SUMMA THEOLOGIAE*, in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS I-II, question 95, art. 4 (Anton C. Pegis ed. & Laurence Shapcote, O.P. trans., Random House 1945).

2. ALEXANDER PASSERIN D'ENTRÈVES, *NATURAL LAW: AN HISTORICAL SURVEY* 19 (1965).

long to the same polities.³ These rules would be fair and agreed upon by reasonable men understanding the particular situation. Even if agreement is not likely—to agree more with Hobbes—it is still possible to be rational—to agree with Aristotle—even outside or beyond the polis. D'Entrèves may also have meant that every polity ought to have at least some basic rules or laws defining how to deal with foreigners, rules or laws that every polity was not free not to make in some suitable fashion. These rules would include norms for basic reasonable dealings with members of other polities or tribes.

Thomas Aquinas had said that the law of nations derived from the natural law as a conclusion from principle.⁴ And he maintained that without this process of conclusion from first principle, men cannot live together. Their very living together, their *convivere*, required rational discourse and agreement about fundamental things. Thomas Aquinas gave buying and selling as the normal matter with which this law of nations was most obviously to be concerned.⁵ One may reconcile Aquinas's remark with d'Entrèves's account by observing that everyone recognizes that if no reasonable and agreed upon rules exist among people of different nations in their buying and selling, then no trade will result. We do not have to live only in our own polity to be reasonable, and we cannot avoid dealing with others. The law of nations became a philosophic reflection on an aspect of human reality that addressed itself to

3. See ALEXANDER PASSERIN D'ENTRÈVES, *AN INTRODUCTION TO LEGAL PHILOSOPHY* 32 (2d ed. 1970). The author noted that

[t]he meaning and function of *ius gentium* has been described many times. It was certainly the most important factor in [the process of the universalization of Roman law]. Under the stress of the growing intercourse with foreign peoples, the Roman jurists found in it the practical means for overcoming the limitations and extending the boundaries of municipal law; until in due time it developed into a theoretical principle expressing the common element in all legislation.

Id.

4. THOMAS AQUINAS, *supra* note 1, I-II, question 95, art. 4. In question 95, article 4, Thomas Aquinas wrote that

[t]he law of nations is indeed, in some way, natural to man, in so far as he is a reasonable being, because it is derived from the natural law by way of a conclusion that is not very remote from its principles. Therefore men easily agreed thereto. Nevertheless, it is distinct from the natural law, especially from that natural law which is common to all animals.

Id.

5. See *supra* note 1.

reason, to what was fair and right and correct even in a world that lacked any sovereign international authority.

But Thomas Aquinas's brief remark in question 95 specifically said that the law of nations was derived as a "conclusion from principle." This addition meant that some reasonable and logical connection needed to be demonstrated to show that everyone was bound by certain practices whether he lived in a polity or not. The citation from Aristotle in the *responsio* to the same question meant that living in a civilized society was itself reasonable and according to human nature and perfection. The reason that law bound anyone at all was related to the argumentation about premises and conclusions. The implication of Aquinas's remark is that the law of nations binds reasonable men even apart from the particular laws of their own polities, because they can understand the argument of reason and fairness if presented to them in logical form, that is, as conclusions from principles.

The law of nations, however, does not succeed or replace the civil laws. But it does present civil laws with an additional claim to the same rationality that is implied in our living together as reasonable citizens in any given polity. The principles of justice are binding not only on our dealings with fellow citizens but in our dealing with anyone. Experience and good sense may be necessary to flesh this criterion out in practice, but the law of nations implicitly upholds the judgment of reason to be relevant to buying and selling, yes, even to war and peace, and to other such things that take place among citizens of whatever origin.

Is the law of nations that men have "devised for themselves" different from the civil law that presumably they have also devised for themselves? Might we be bound to the laws of polities other than our own and if so, why? If a U.S. citizen is in England, why, if not because of the law of nations, is he bound to obey English law in many important areas? And is this *jus gentium* also to be "always good and equitable," and if so, how is it to achieve this status? Is there some hidden but profound meaning to the *jus gentium* that bears renewed reflection?

I will argue here that the law of nations, the *jus gentium*, in fact lies at the heart of many of crucial modern social and polit-

ical issues. The theories of the general will and of legal positivism, both theories that in principle recognize no grounded principle of discourse other than with themselves, are subject to some rational limits through the law of nations. Moreover, the collapse of both Nazism and Communism in this century has given rise to new considerations of natural law and the law of nations, of some recognition that national or ideological standards alone are not sufficient, points that both Walter Lippmann and Alexander Solzhenitsyn have made with graphic force.

Moreover, the recognition of not merely the most abstract of principles but of more concrete ones, not merely of tolerance but of principles of morality, has subjected the tyrannies of this century to great pressure both internally and externally. In this light, a renewed discussion of the law of nations is of utmost importance. The context of this discussion and reflection should be the natural law and law of nations, and not exclusively that of "human rights," which themselves are too often but code expressions of a modernity that itself recognizes no theoretic basis but general will or positivism. I am not entirely opposed to every use of the notion of "rights," but the term is so overloaded with relativism and subjectivism that it is almost impossible to be used unequivocally as a term for the content of natural law or the law of nations.

I. *AQUINAS AND THE CATEGORIES OF LAW*

Thomas Aquinas, in his *Treatise on Law*, sought to define more exactly the precise philosophical nature and origin of the civil law, natural law, and law of nations.⁶ In this endeavor, he had to discuss, in addition to the eternal law and the divine law, both civil or human law and natural law. The eternal law meant the order of things existing outside of God but as they were first known by God.⁷ It implied that the world was not a

6. THOMAS AQUINAS, *supra* note 1, I-II, questions 90-108.

7. In question 93, article 1, St. Thomas wrote that

God, by His wisdom, is the Creator of all things, in relation to which He stands as the artificer to the products of his art, as was stated in the First Part. Moreover, He governs all the acts and movements that are to be found in each single creature, as was also stated in the First Part. Therefore, just as the exemplar of the divine wisdom, in as much as all things are created by it, has the character of an art, a model or an idea, so the exemplar of divine

chaos, but an order with related parts and with a final purpose. Simply because there could be dispute about such things did not mean that nothing could be known. It meant that the dispute itself had to be part of the reflection of reason, of natural law.

The divine law meant essentially revelation, the specific propositional content of the Old and New Testaments. Whether the Koran or Plato fell under this notion of revelation would also have to be at least discussed.⁸ Thomas Aquinas asked why, in addition to natural law, a divine law might be "necessary."⁹ He understood that revelation was unintelligible without some basis in reason by which to judge its possibility. But he also insisted that the philosopher must examine all things addressed to the mind and intelligible in some fashion to it. The coherence of all things prevented men from simply blocking off revelation as if it did not need to be considered, when it did in fact address questions that persistently

wisdom, as moving all things to their due end, bears the character of law. Accordingly, the eternal law is nothing else than the exemplar of divine wisdom, as directing all actions and movements.

Id., I-II, question 93, art. 1.

8. See LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* 7-21 (1973); Thomas Pangle, *Introduction to LEO STRAUSS, STUDIES IN PLATONIC POLITICAL PHILOSOPHY* 1-26 (1983); see also ERIC VOEGELIN, *PLATO AND ARISTOTLE* (1957).

9. In question 91, article 4, he answered that divine law is necessary for the directing of human conduct, in addition to natural law and human law, for four reasons. THOMAS AQUINAS, *supra* note 1, I-II, question 91, art. 4.

First, because it is law that directs man how to perform his proper acts in view of his last end, and because man is ordained to an end of eternal happiness that exceeds his natural ability, divine law is required to supplement natural and human law. *Id.*

Second, as a result of the uncertainty of human judgment, "especially on contingent and particular matters, different people form different judgments on human acts," from which differing and contrary laws result. *Id.* Unerring divine law is needed, therefore, "that man may know without any doubt what he ought to do and what he ought to avoid." *Id.*

Third, although man is competent to make laws in certain matters, such as exterior acts which are observable, he is not competent to judge of "interior movements, that are hidden." *Id.* For the perfection of virtue, however, it is necessary that man be able to conduct himself rightly in both kinds of acts. *Id.* Thus, "human law could not sufficiently curb and direct interior acts, and it was necessary for this purpose that a divine law should supervene." *Id.*

Fourth, the supervision of divine law is needed in order that no evil might remain unforbidden and unpunished, because human law cannot punish or forbid all evil deeds without also doing away with many good things necessary for the common good. *Id.*

arose in philosophy and politics.¹⁰

To Aquinas, natural law was the reflection of the eternal law as it existed in actual things themselves.¹¹ It was their “normalcy of functioning,” as Jacques Maritain put it, what they did when they acted.¹² A thing could only act insofar as it was the kind of thing it was, and no “kind” of thing could act at all unless it existed in the first place. In this sense, natural law accounted for the stability of functioning within the diversity of finite things. Turtles acted in turtle ways; humans acted in human ways.

Civil law or human positive law meant that in addition to reason, which was man’s proper natural law, there needed to be specific acts of reason, commands, that reasonably decided what men living in groups should do to achieve their purposes, both of living well and of living rightly.¹³ These purposes fol-

10. See JOSEF PIEPER, *Philosophy Out of a Christian Existence and The Possible Future of Philosophy*, in JOSEF PIEPER—AN ANTHOLOGY 164-70 (1989). Etienne Gilson stated the matter somewhat differently, but to the same point:

This final orientation of Christian philosophy entails no *a priori* exclusion of any field of philosophical research. What can there be in the whole world that is irrelevant to the knowledge of God and man? Since the invisible of God is known from His creatures, there is no creature—that is to say, no thing—whose knowledge is unrelated to the knowledge of God; and since the world of knowledge is the work of man, it can be said of man that, in the last analysis, all his acquired knowledge is about himself.

ETIENNE GILSON, *A GILSON READER* 188 (1957).

11. THOMAS AQUINAS, *supra* note 1, I-II, question 91, art. 2. In his *responsio* to this question, St. Thomas wrote that

[because] all things subject to divine providence are ruled and measured by the eternal law, as was stated above, it is evident that all things partake in some way in the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others. Therefore 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.

Id.

12. As Jacques Maritain put it,

Any kind of thing existing in nature, a plant, a dog, a horse, has its own natural law, that is, the *normalcy of its functioning*, the proper way in which, by reason of its specific structure and specific ends, it “*should*” achieve fullness of being either in its growth or in its behaviour.

JACQUES MARITAIN, *MAN AND THE STATE* 87 (1951).

13. THOMAS AQUINAS, *supra* note 1, I-II, question 91, art. 3. In answer to three objections calling into question the need, possibility, and reliability of human law, St.

lowed their existence and being so that man was by nature a political animal. That is, his full being required reasonable laws to be formulated and understood.

The *jus gentium* was found somewhere between natural law and positive or civil law. Aquinas held that the first principle of practical reason, to do good and avoid evil, was known by everyone.¹⁴ He meant by this principle that, even if men would verbally deny this principle, they will in practice defend their actions as good and deny that they are evil. That is, they appeal to reason and invite discourse about their actions precisely on the basis of their goodness or wrongness.

The human exercise of reason, however, included the illumination of what things were to be done on the basis of their good and evil. To act reasonably, the natural law for human beings, was not to be merely an abstraction. It was meant to have an ever more particular and understood content. The *jus gentium* was described as a law of reason, but it was not identified with the first principle of practical reason, the reason that was oriented to action to achieve some purpose, end, or good in terms of good and evil.¹⁵

A. *Jus Gentium and the Crisis of Modernity*

The theoretical discussion of the law of nations, of *jus gentium*, is a proper counterbalance to the essentially modern and Rousseauist position that disorders in mankind are due to the

Thomas invoked the authority of St. Augustine, who, in *De Libero Arbitrio*, distinguished two kinds of law, the eternal and the temporal or human. *Id.* St. Thomas concluded that

just as in the speculative reason, from naturally known indemonstrable principles we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is that from the precepts of the natural law, as from common and indemonstrable principles, the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided that the other essential conditions of law be observed as was stated above [question 90].

Id. In question 90, entitled "The Essence of Law," St. Thomas stated that this essence requires that law pertain to reason, that it always be directed to the common good, that it be made either by the whole people or by "a public personage who has care of the whole people," and that it be promulgated to be effective. *Id.* question 90.

14. *Id.* question 94, art. 2.

15. *Id.* I-II, question 95, art. 4.

structures of society, family, or property, so that the restructuring of man depends not on his own moral or personal reform but on the reconstruction of society. The law of nations is also the proper context in which to discuss those institutions and habits in any society that either are unworkable or impede the achievement of any proper human good.¹⁶

The problems of Third World development, for example, are largely problems of *jus gentium*; that is, they are problems of common reason about what institutions and attitudes will and will not work for a common good, even of another society. Similarly, it is the *jus gentium*, and not "human rights," that is the proper context in which to discuss the impediments to religious freedom in those rather too many states that directly impede religious practice and conversion. "Human rights" are, in fact, when not most carefully used, notions that can undermine any state or any morality.¹⁷ It is the *jus gentium* that forms the proper context for discussing the problems of public and private property that have so disordered the socialist states in modern times.

Jus gentium is the philosophic discussion of those things to be learned by reason and experience that are not merely unique to each particular polity. It presupposes the first principle of practical reason that all hold in common, and on this basis it can claim, by right, to engage in the discussion of the common foundations of morality and law. It recognizes that crucial questions of public life and order will need clarity and discussion, but it also recognizes that no polity or individual is

16. I have argued that mankind knows most of the basic ways to create and distribute wealth, but that habits of work or status or religion, along with defective economic and political theories, are what prevents a more reasonable and abundant world. In a broad sense, these too are question of the law of nations. See JAMES V. SCHALL, *RELIGION, WEALTH, AND POVERTY* (1990).

17. As I have argued elsewhere,

[i]n relation to Grotius and the sort of modern natural right which he founded . . . a natural "law" presupposed to full comprehension by human reason became in effect a natural "right" which itself yielded no theoretic reason for being what it was, no "author" of its right. The autonomous reason and factual nature were thus theoretically left open to be radically altered so that the optimum configuration of nature would itself depend on a political will which conceived itself capable of determining *what man is*.

James V. Schall, S.J., *Human Rights as an Ideological Project*, AM. J. JURIS. 32 (1987); see MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* (1973); HENRY VEATCH, *HUMAN RIGHTS: FACT OR FANCY?* (1985); D'ENTRÈVES, *supra* note 2, at 51-64.

outside of the realm of common discourse. It is not, in this sense, an "alienation" to take cognizance of political aberrations wherever they might exist.

This is to say, following the example of St. Thomas, that an accurate knowledge of an evil or an error, either of thought or of practice, is itself a question of integrity and a function of rational discourse. This consideration, at this point, is not a claim to international law jurisdiction in certain cases like crime or genocide or to "interference" in the internal affairs of an erring country. These latter actions may indeed follow if the evidence is established. But here there is a prior intelligible claim that common principles exist and that logical conclusions follow from them. Thus, they cannot be ignored intellectually and politically if human beings are to retain moral and philosophical integrity.

Yves Simon wrote in his book, *The Tradition of Natural Law*,¹⁸ that the law of nations was never fully clarified in the Roman law itself. Roman law looked on man as simply a being, an animal, or a rational agent. Roman lawyers would sometimes use natural law to refer to man as being or as animal, while they would use the "law of nations" to refer to man as a rational being, to his unique distinction as man.¹⁹ However, if natural law includes all three categories in Roman law, what then would "the law of nations" possibly mean? Simon pointed out that in modern times, the "law of nations" has come to mean mainly a law, mostly customary or treaty law, that guided relations among independent nations.

To understand properly the law of nations, it is necessary to have some reference to principles intelligible to and understood by civilized societies that recognize the validity of universal and binding discourse. The common law of civilized societies, the law of nations, came to be identified with international law for this reason. As long as no organized institutional community of nations exists, the only law which can hold is one with which a number of independent communities happen to agree.²⁰ Contrary to certain modern and positivist concep-

18. YVES R. SIMON, *THE TRADITION OF NATURAL LAW: A PHILOSOPHER'S REFLECTIONS* 152 (Vukan Kuic ed., 1965).

19. St. Thomas spoke of this in his *COMMENTARY ON THE ETHICS OF ARISTOTLE*, 1019.

20. SIMON, *supra* note 18, at 152-53. Francisco de Vitoria was the first to define

tions of international law, which root its obligatory character in the consent or recognition of sovereign states,²¹ or various rearticulations of the categorical imperative,²² such agreement has the force of law because it bears the marks of rational argument of principles to conclusions.²³

Yves Simon continued his observation by pointing out the relationship of the natural law to the law of nations. From the point of view of rational analysis, natural law and the law of nations do not differ. Both manifest reason. No society of human beings exists in which first principles are somehow not the same or intelligible. What is the status of reasonable precepts that are argued from recognized first principles but are not immediately "self-evident"? Contingent circumstances

modern international law with his purposeful modification in *De Indiis* of Ulpian's formulation: "*quod naturalis ratio inter omnes gentes constituit.*" For a general discussion of the philosophical and theological origins of the law of nations, see José Manuel de Aguilar, O.P., *The Law of Nations and the Salamanca School of Theology*, 9 *THOMIST* 187, 216 (1946). As Fr. de Aguilar observes, however, we must be careful not to confuse or identify the law of nations with international law. In Vitoria's thinking, the law of nations is anterior and superior to international law because it relates to the common principles and institutions among different peoples, whereas international law only arises among men after the "social fraction" into particular political states. *Id.* at 217. Vitoria's contribution to international law is to have solidly anchored it in the Thomistic framework of *jus gentium*, one that unites national states into a non-contractual but organic community closely informed by natural law.

21. Professor Thomas Franck, for example, grounds his *proceduralist* explanation of the legal character of international law in the literary structure, origin, internal consistency and reasonableness of the rules themselves. See, e.g., Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705, 706-13 (1988) (suggesting that "rule legitimacy" or "right process" in formulation and recognition of international law explains compliance by states in absence of hierarchical world order or coercion).

22. See, e.g., Fernando R. Tesón, *The Kantian Theory of International Law*, 92 *COLUM. L. REV.* 53, 74-93 (1992) (advocating Kantian basis for international human rights and democratic government as alternative to conventional orientation of international law based on primacy of state sovereignty); cf. Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 *YALE J. INT'L L.* 84, 109-18 (1990) (grounding, on basis of modified Rawlsian model, thesis that traditional notion of primacy of state sovereignty in international law must be redefined to accord primacy to respect for persons).

23. Sir Hersch Lauterpacht noted that the most significant and lasting contribution of James Brierly to international law was his opposition to its increasingly positivist and consensual orientation: "[James Brierly] had no hesitation in pointing to the beneficent potentialities of a revived law of nature as one of the main elements of the moral foundation of international law—for, upon final analysis, he saw no other basis for it." Sir Hersch Lauterpacht, *Brierly's Contribution to International Law*, in *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY* at xv (H. Lauterpacht & C.H.M. Waldock eds.)

may well appear in questions arising under the law of nations. Simon maintained that

[i]n fact, the contingent conditions that are commonly realized in developed societies, constitute an entire and complex system. Vague as these terms may be, they help us perceive the normal source of international law. Its rules are deductions from natural law which indeed involve contingent conditions, but these contingent conditions are commonly realized when societies are sufficiently developed.²⁴

The contingent variety in practice and expression does not detract from the fact that the same essential principles and issues presented to reason are at work in every polity. The variety of human practices and laws even on important things does not in principle mean that reason is not at work to deduce the necessity of a law from a self-evident principle.

In 1954, Walter Lippmann wrote a then famous, and still worthy, book entitled *The Public Philosophy*, a book written in large part to analyze the philosophic origins and lessons of World War II.²⁵ Interestingly in retrospect, the first section of this book was entitled, "The Decline of the West." This moody title was immediately drawn from the famous work of Oswald Spengler philosophizing about the end of World War I, a book itself reflective of Gibbon's *Decline and Fall of the Roman Empire*. In turn, one cannot read this famous book without recalling St. Augustine's *City of God*. *The City of God* itself was written against the practical background of accusations that the Christian religion was the cause of Roman decline, as well as against the theoretical background of Plato's *Republic*, a book that considered the location of the best regime. All of these books bear universal philosophic import.

Mr. Lippmann himself argued that some error or choice of a vast and profound nature was at the heart of modern political aberrations. A long tradition of reason, reasoned discourse, and religious virtue had been rejected, to be replaced by a tradition, beginning with Machiavelli, that had overturned that wisdom in which Western civilization had been grounded. The precise understanding of "modernity" in political philosophy became the essential intellectual question for subsequent legal

24. SIMON, *supra* note 18, at 153.

25. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955).

and political theory.²⁶

“As the bitter end has become visible in the countries of the total revolution,” Mr. Lippmann wrote,

we can see how desperate is the predicament of modern men. The terrible events show that the harder they try to make earth into heaven, the more they make it a hell. Yet, the yearning for salvation and for perfection is most surely not evil, and it is, moreover, perennial in the human soul. Are men then doomed by the very nature of things to be denied the highest good if it cannot be materialized in this world and if, as so large a number of modern men assume, it will not be materialized in another world? . . . If there is a way out of the modern predicament, it begins, I believe, where we learn to recognize the difference between the two realms. For the radical error of the modern democratic gospel is that it promises, not the good of this world, but the perfect life of heaven. The root of the error is the confusion of the two realms—that of this world where the human condition is to be born, to live, to work, to struggle and to die, and that of the transcendent world in which men’s souls can be regenerate and at peace. The confusion of these two realms is an ultimate disorder.²⁷

What is of note, in retrospect, in these remarks of Mr. Lippmann is that he associated “ultimate disorder” and “radical error” not so much with totalitarian regimes, which were only consistent conclusions from erroneous philosophy, but primarily with “the modern democratic gospel,” as if the root problem was one of political philosophy and classic theology and not just of law and civic institutions. Plato’s classic teaching, that disorders of polity are themselves reflective of disorder,

26. As Leo Strauss observed,

The crisis of modernity reveals itself in the fact, or consists in the fact, that modern western man no longer knows what he wants— that he no longer believes that he can know what is good and bad, what is right and wrong. Until a few generations ago, it was generally taken for granted that man can know what is right and wrong, what is the just or the good or the best order of society— in a word that political philosophy is possible and necessary. In our time this faith has lost its power. According to the predominant view, political philosophy is impossible: it was a dream, perhaps, a noble dream, but at any rate a dream.

LEO STRAUSS, *The Three Waves of Modernity*, in *POLITICAL PHILOSOPHY: SIX ESSAYS* BY LEO STRAUSS 81 (Hilail Gildin ed., 1975).

27. LIPPMANN, *supra* note 25, at 109-10.

ders of soul, remains an initial starting point in fundamental political philosophy.

Did the "countries of total revolution," in other words, include somehow the other countries of the West besides the totalitarian ones visible in the 1940s? In a related manner and about the same time, Leo Strauss made the same fundamental point about philosophic disorder in his discussion of the "modern project," while Eric Voegelin reemphasized it under his discussion of "gnosticism."²⁸ The controversy over the American Founding itself is involved in the proper understanding of its relation to modernity and to the transcendent origins of law and being.

Probably no one has stated this divergence in Western thought better than Alexander Solzhenitsyn in his famous Harvard address of 1978:

The mistake must be at the root, at the very foundation of thought in modern time. I refer to the prevailing Western view of the world which was born in the Renaissance and has found political expression since the Age of Enlightenment. It became the basis for political and social doctrine and could be called rationalistic humanism or humanistic autonomy: the proclaimed and practical autonomy of man from any higher force above him. . . . The humanistic way of thinking, which has proclaimed itself our guide, did not admit the existence of intrinsic evil in man, nor did it see any task higher than the achievement of happiness on earth.²⁹

In 1991, Mr. Solzhenitsyn added that a society's strength or weakness depends "more on the level of its spiritual life than on its level of industrialization. . . . If a nation's spiritual energies have been exhausted, it will not be saved from collapse by the most perfect government or by any industrial development. . . ."³⁰ Solzhenitsyn and Pope John Paul II have both recognized that the Marxist collapse was more one of spirit

28. See generally LEO STRAUSS, *THE CITY AND MAN* (1964); LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1952); ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS* (1953); ERIC VOEGELIN, *SCIENCE, POLITICS, AND GNOSTICISM* (1968). See JAMES V. SCHALL, *THE POLITICS OF HEAVEN AND HELL: CHRISTIAN THEMES FROM CLASSICAL, MEDIEVAL, AND MODERN POLITICAL PHILOSOPHY* (1984).

29. SOLZHENITSYN AT HARVARD 16 (Ronald Berman ed., 1980).

30. Alexander Solzhenitsyn, *Our Own Democracy*, *NAT'L REV.*, Sept. 1991, at 44.

than of economics or even of polity.³¹

In what sense was America a “best regime”? Did democratic principle obviate moral collapse? What was the relation of these questions to natural, constitutional, and positive law? The American principle, Ellis Sandoz has written, is

that the pursuit of happiness and highest liberty as the goal of human existence primarily will be conducted *privately* under the protection of the Constitution. While that solution to the vexed problems of religion and politics is ambiguous and even paradoxical in a society formed by Christian civilization, it is theoretically acute and pragmatically sound. . . . For Americans, [the] rearticulation of Western civilization in the founding reasserted the classic and Christian experiences—symbols of transcendent reality in a way that runs directly counter to radical modernity by providing an ennobling alternative to it.³²

The question that Walter Lippmann and Alexander Solzhenitsyn pose is not, then, whether the American tradition is in conformity with classical and Christian traditions, but whether in recent times another legal and philosophic theory, which renders limited government and transcendent freedom impossible, has subverted its origins, along with Western civil life itself.

With the demise of the Marxist experiment, whose inspiration itself was surely based on an attempt to establish a kind of Kingdom of God on earth, it is again possible to ask properly questions of natural law and the law of nations. This time these questions can be asked in a less utopian context than that in which they had been posed in modern times. No doubt, we must continue to wonder, as Paul Johnson has pointed out,

31. Encyclical Letter *Centesimus Annus* of John Paul II on the Hundredth Anniversary of *Rerum Novarum*, ¶¶ 22-29 [hereinafter *Centesimus Annus*]. John Paul II writes in *Centesimus Annus* that

the true cause of the new developments [of the year 1989] was the spiritual void brought about by atheism, which deprived the younger generations of a sense of direction and in many cases lead them, in the irrepressible search for personal dignity and for the meaning of life, to rediscover the religious roots of their national cultures, and to rediscover the person of Christ himself as the existentially adequate response to the desire in every human heart for goodness, truth and life.

Id. ¶ 24 (emphasis added).

32. ELLIS SANDOZ, *A GOVERNMENT OF LAWS* 216-17 (1991).

whether the root problem does not remain with us in our souls and minds, and whether its essence has been merely transferred to other and more recent enthusiasms like environmentalism, or feminism, or statism.³³ These enthusiasms have not rejected the root error that postulates that man's freedom consists in "making himself," a making presupposed to no nature or order not dependent on man's own will.

Thus, according to this view, it is still possible to produce "a perfect society," and, by implication, still possible literally to "remake" man. It is just that Marxism was the wrong way to do it. Now, it is said, let us begin another way, perhaps with a more "perfect" Marxism, or other sort of utopianism, one with a more comprehensive "science." We must recall that the original proposal for "a perfect society" was in the greatest philosophical book in our tradition, Plato's *Republic*. In this book we were subtly and charmingly warned of the dangers inherent in this effort. And if we did not catch these warnings in Plato's works, they were more clearly narrated in the books of his pupil, Aristotle.

No doubt, one of the initial problems today, a problem that is increasingly dominant in all of academia, is a cultural relativism that maintains, in effect, that there is really nothing to learn.³⁴ Everything is true or not true, as the case may be, because there is no ontological criterion.³⁵ No test of excellence or rightness can exist, in principle. Cultural and intellectual relativism at bottom suggest that the real enemy is the philosophy that argues that there is some stable human nature, some area of philosophy in which the "relative" itself is tested.

Modern academia and intelligence almost always hear this sort of criticism in purely political terms. Truth is seen to be a threat to freedom, not its end and purpose.³⁶ The result is that the highest things, the things that most matter to men, are excluded from serious discourse. This exclusion is made by states already built on theocracy or ideology. These states do

33. Paul Johnson, *Is Totalitarianism Dead?* CRISIS, Feb. 1989, at 9-17.

34. See HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 134-59 (1986).

35. See generally JOSEF PIEPER, *LIVING THE TRUTH: THE TRUTH OF ALL THINGS* and JOSEF PIEPER, *REALITY AND THE GOOD* (1989).

36. See YVES R. SIMON, *Freedom of the Intellect and Truth and Community*, in *A GENERAL THEORY OF AUTHORITY* 100-32 (1980).

not want to listen to Socrates; that is, they do not want to listen to any truth outside of themselves, because they understand the tenuousness of their own founding. Other more liberal states consider discussions of the highest things to be dangerous to institutions based on democratic relativism, itself essentially a civil or secular religion, as Irving Kristol has recently pointed out.³⁷

II. IS WORLD ORDER POSSIBLE WITHOUT REFERENCE TO COMMON PRINCIPLES?

Many students of modern legal history have heard of the Hague Conventions, the League of Nations, and the United Nations. They are familiar with the names of Gabriel Vázquez, Francisco Suárez, Hugo Grotius, Samuel Pufendorf, and other early modern theorists who wrote of the law of nations or international law at the beginnings of the nation-state in the sixteenth and seventeenth centuries.³⁸ Many jurists are likewise familiar with the international role that the Papacy and the Holy Roman Emperor had played up until the time of the rise of the nation-states, whose construction was based precisely on a denial of any sovereignty higher than that of the modern polity itself.

Indeed, as Harold Berman has pointed out, most of the institutions and procedures used by the modern state were actually first hammered out in the dicasteries of the Papacy concerning canon and civil law.³⁹ Good students will also be familiar with the formation and codification of Roman law, with the Stoics and with the *Corpus Juris Civilis*; they will also know the relationships and differences between Roman law and common law.⁴⁰ Behind this legal background, they will also know about the passage in the Gospel of Matthew in which the Apostles are told to go and teach all nations.⁴¹ They may know that

37. Irving Kristol, *The Future of American Jewery*, COMMENTARY, Aug. 1991, at 92.

38. See generally ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1947).

39. HAROLD S. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

40. See ARTHUR B. HOGUE, *ORIGINS OF THE COMMON LAW* 21-22 (1985); HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 197-98 (1978).

41. *Matthew* 28: 19-20.

the first part of the Hebrew Bible is devoted to "The Law."⁴²

Finally, perhaps, they will know why Aristotle was not especially enthusiastic about Alexander the Great's notion of universal empire and brotherhood. Aristotle thought that it would be impossible to organize vast empires of men into one political whole. In fact, it would be dangerous to do so, for it would end in jeopardizing the possibility of the highest things existing in any place at all.⁴³ The multiplicity of smaller states was in practice more likely to allow at least some reasonably good polities. The randomness of the vast empires almost always insured a kind of tyranny.⁴⁴

In the beginning of modernity, especially in the early seventeenth century, the question was posed: Granted the existence of so many diverse nations, themselves breaking away from the older religions and empires, what remains common? Writers like Spengler, Toynbee, Voegelin, and others spoke rather of civilizations and cultures than of nations as the basis of communality and diversity.⁴⁵ With the advent of the modern age, unity and diversity were located, it seemed, in the culture, not in the individual or the nation.

Thus, the Islamic states were not seen as particularly interesting in themselves, but as slightly differing expressions of a common faith. The debate about the meaning of human existence, nevertheless, had to exist at a level deeper than that of the nation-state. The Chinese seemed to claim that they did not need to debate with anyone, even after they had adopted a

42. See generally HERMANN KLEINKNECHT & W. GUTBROD, *LAW* (1962).

43. The multiplicity of states at least allowed the possibility of some society of relative virtue, whereas an international order was so complex and dangerous that it could in all likelihood result only on tyranny on a vast scale. See LEO STRAUSS, *THE CITY AND MAN*, *supra* note 28, at 13-49. The thesis that Strauss is arguing against is that, among others, of W.W. TARN, *HELLENISTIC CIVILISATION* (1974).

44. As Charles McCoy observed,

[t]he reason why Aristotle did not consider a larger unit than the city-state as politically viable lies in the fact that any larger unit in the fifth century Mediterranean world would not have met the exigencies of a truly "political" life but rather would have favored a kind of random freedom befitting not men but animals and slaves. . . . Was it not Aristotle's opinion that in the milieu of empire men would live at random on the margin of society, contributing little or nothing to the common good, all readily victimized by the common slavery to which the whole of human nature is subject?

CHARLES N.R. MCCOY, *THE STRUCTURE OF POLITICAL THOUGHT* 75-76 (1963).

45. The latest addition to this discussion is probably Francis Fukuyama's *THE END OF HISTORY AND THE LAST MAN* (1991).

Marxist form. Western civilization was also something one could study, define, largely because of the Greeks, Romans, the Bible, the Church, and science.⁴⁶ The Japanese became particularly interesting because they seemed to combine, contrary to all expectations, an ancient culture, a single nation, with modern political institutions, and especially modern science and technology.

The final break-up of the European empires after World War II and the establishment of the United Nations seemed at first sight to be in the name of universal democratic and scientific principles. In a sense, it was a victory for universal civilization, even though this very idea of universal civilization was itself a Western idea.⁴⁷ The recent collapse of the Marxist experiment, itself likewise based largely in Western universalism, in an effort to organize the whole world into a single classless society, in its demise also seems to argue to common principles of free trade, private enterprise, democracy, and popular sovereignty. These latter principles, as we shall see, seemed rather close to the issues that Thomas Aquinas stressed about the law of nations.

And yet, there are increasing signs, of which cultural relativism is the theoretic expression, that what is at stake is the very notion of a common humanity, of common principles of justice and right, of anything that can transcend the power of culture or the nation-state or its sovereign individuals. Nonetheless, even the theory of relativism, of the consequent justification of absolute national power, is rooted in the West's philosophic discussion with itself, a discussion intended to be universally true. Machiavelli himself, the founder of modernity, of

46. See CHARLES NORRIS COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* (1977); CHRISTOPHER DAWSON, *THE MAKING OF EUROPE* (1965).

47. The current problem, popularly known as "politically correct thinking," itself based on a philosophy of deconstructionism, is but the logical consequence of doubt about universal principles. Leo Strauss had it right:

The crisis of the West consists in the West's having become uncertain of its purpose. The West was once certain of its purpose —of a purpose in which all men could be united, and hence it had a clear vision of its future as the future of mankind. We no longer have that certainty and that clarity. . . . A society which was accustomed to understand itself in terms of a universal purpose, cannot lose faith in that purpose without becoming completely bewildered.

STRAUSS, *THE CITY AND MAN*, *supra* note 28, at 3.

a system that rejects classical reason, in dedicating his book to Lorenzo the Magnificent was addressing what he considered to be human nature as such, how it always and everywhere would act.⁴⁸

In this sense, our political and economic institutions require some justification that they cannot provide simply by their own constitution or legislation. Practical matters have their place, no doubt, even their theory, as Aristotle and Burke would have suggested. Nevertheless, to defend even the most practical and common things, as G. K. Chesterton wrote in his book on St. Thomas Aquinas, we must ultimately resort to the first and most philosophical of enterprises.⁴⁹

The term, "the law of nations," as we have indicated, has a long history.⁵⁰ What is perhaps useful here, I think, is to elaborate more clearly the philosophic understanding of this notion. This effort is particularly necessary within the context of the theoretical political and legal relativism that surrounds many of our contemporary discussions about the purpose and shape of our "new world order." This relativism was already noted by Aristotle in his discussion of the Greek understand-

48. As Machiavelli wrote in his dedication:

Since it is my intention to write a useful thing for him who understands, it seemed to me more profitable to go behind the effectual truth of the thing, than the imagination thereof. And many have imagined republics and principates that have never been seen or known to be in truth; because there is such a distance between how one lives and how one should live that he who lets go that which is done for that which ought to be done learns his ruin rather than his preservation—for a man who wishes to profess the good in everything needs must fall among so many who are not good. Hence, it is necessary for a prince, if he wishes to maintain himself, to learn to be able to be not good, and to use it and not to use it according to necessity.

NICCOLÒ MACHIAVELLI, *THE PRINCE* 93 (Leo Paul de Alvarez trans., 1980); see Jacques Maritain, *The End of Machiavellianism*, in *THE SOCIAL AND POLITICAL PHILOSOPHY OF JACQUES MARITAIN* 295-325 (Joseph W. Evans & Leo R. Ward eds., 1976).

49. As G.K. Chesterton put it,

But St. Thomas had the scientific humility in this very vivid and special sense; that he was ready to take the lowest place; for the examination of the lowest things. He did not, like a modern specialist, study the worm as if it were the world; but he was willing to begin to study the reality of the world in the reality of the worm. His Aristotelianism simply meant that the study of the humblest fact will lead to the study of the highest truth.

G. K. CHESTERTON, *St. Thomas Aquinas* in 2 *COLLECTED WORKS OF G. K. CHESTERTON* 470.

50. See A. J. & R. W. CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST* 33-44, 71-80 (1930).

ing of democracy as a regime in which liberty ruled.⁵¹ This “liberty” was one under which, as Socrates recounted about Athens, no one could distinguish between a fool and a wise man because there was no criterion of distinction.

This liberty postulated a doctrine of freedom based on a denial of defensible philosophic roots or first principles intelligible to all men, even if all men might not understand them or, more likely, if they refuse to understand them. In this context, not unlike our own, to speak of “the law of nations” is an effort, not new, to ask what is fundamentally common and what is legitimately different among the nations. More recently, we have taken to use “cultural relativism” and not “national diversity” because it is recognized that the nation-state is not always or even primarily at the bottom of this diversity.

The classical tradition had based itself on the reflection that the primary division among men was not geographical, racial, or biological. In *The Apology*, almost as though he foresaw Hobbes, in a passage that fundamentally defines the nature of Western culture, Socrates stated:

I did not think I ought to do anything servile because of my danger; and now I do not regret that such was the manner of my defense; I much prefer to die after such a defense than to live by the other sort. Neither in court nor in war ought I or anyone else to do anything and everything to contrive an escape from death. In battle it is often clear that a man might escape by throwing away his arms and by begging mercy from his pursuers; and there are many other means in every danger, for escaping death, if a man can bring himself to do and say anything and everything. No, gentlemen, the difficult thing is not to escape death, I think, but to escape wickedness—that is much more difficult, for that runs faster than death.⁵²

51. ARISTOTLE, *POLITICS*, 1317a40-1317b5 in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., Random House 1941). Aristotle explained that

[t]he basis of a democratic state is liberty; which, according to the common opinion of man, can only be enjoyed in such a state:—this they affirm to be the great end of every democracy. One principle of liberty is for all to rule and be ruled in turn, and indeed democratic justice is the application of numerical not proportionate equality; whence it follows that the majority must be supreme, and that whatever the majority approve must be the end and the just.

Id.

52. PLATO, *THE APOLOGY*, 38-39.

And Aristotle remarked that the subject matter of ethics is the things worthy of praise and blame. The most fundamental distinction of men and regimes was based on the distinction between good and evil.

Yet, while the law of nations may or may not argue to a common political or legal authority capable of arbitrating wars and disputes, the need, if not the possibility, of such authority is widely recognized. But any authority is itself rooted in intelligence, in some notion of its own legitimacy.⁵³ And this legitimacy must be somehow based in reason. The law of nations or the *jus gentium*, as we have indicated, was designed to account for the common things that were found in the jurisdiction of all civil societies. Each civil society had positive laws unique to itself, but certain laws dealing with murder, theft, perjury, and such actions, as well as with buyings and sellings, were found wherever there were men in civil society. This common strata was not accidental but a conclusion of general, practical reason about the essential structure or requirements of actual human nature so recognized wherever men lived with one another.

Moreover, the law of nations itself was a necessary derivative from natural law. It was based on the principle that human beings throughout time and space were the same in their essential structure, in that they each possessed reason, and that reason could be formulated, communicated, understood, and debated wherever men sought understanding. The theories and actions of anyone, even rulers, could and should be tested by reason. This testing would result in an agreed upon law if the reasonable solution could be found. It would result in violence, disagreement, and even war if it could not.

But law and war were themselves efforts to guarantee that reason prevailed. The "law of war" was not a contradiction in terms, but an effort to limit and define the issues of reason and unreason at stake in a given controversy. Law and war needed explication, even if it were, as Plato understood, only the theory that "the law of the strongest" rules by right. War was not simply war, but "just war," as Aquinas taught.⁵⁴ It did not escape the scrutiny of reason, even when it was barbarous and the barbarians won. And when the barbarians lost, the winners

53. See SIMON, A GENERAL THEORY OF AUTHORITY, *supra* note 36, at 23-79.

54. THOMAS AQUINAS, *supra* note 1, II-II, question 40.

did not necessarily become barbarians. It depended on what they did. That is, it depended on reason.

St. Thomas, in question 95 of the *prima-secundae* of the *Summa Theologica*, treated the specific question of the meaning of "human law."⁵⁵ By human law, Aquinas meant laws "posited" by a legitimate civil society through its own proper channels, with a proper end and knowledge of what it does. Article 4 of this same question asks about a remark of St. Isidore of Seville, an early collector of philosophic and religious documents.⁵⁶ St. Isidore, evidently, had distinguished *jus gentium* and civil or posited law.⁵⁷ The question arose about whether there was any root difference between *jus gentium* and ordinary constitutional and civil laws. St. Thomas held that there was a difference, one that went back to his earlier discussion in article 2 about whether all humanly posited laws are derived from the natural law.⁵⁸

55. *Id.* I-II, question 95.

56. In this article, St. Thomas observed that

[i]t would seem that Isidore divided human statutes or human law wrongly. For under this law he includes the *law of nations*, so called, because, as he says, *nearly all nations use it*. But, as he says, *natural law is that which is common to all nations*. Therefore the law of nations is not contained under positive human law, but rather under natural law.

Id. question 95, art. 4.

57. In his *Etymologies*, St. Isidore had abandoned Ulpian's classical definition of the natural law, *quod natura omnia animalia docuit*, or, *commune omnium, eo quod utique instinctu naturae, non constitutine habetur aliqua*, and insisted on its origin and universality: "It is common to all nations, since it is given everywhere by natural instinct and not by any establishment." Isidore imprecisely defined the law of nations as *quod eo iure omnes fere gentes utuntur*, or "the law which almost all nations use." These definitions tended to confuse natural law and the law of nations, as distinguished from human or positive law. See de Aguilar, *supra* note 20, at 192-93.

58. In article 4, Aquinas sought to reconcile his view that the law of nations is included within positive law with the authority of Isidore. He referred to his earlier argument in article 2 that every human law is derived from the law of nature, and, according to the two ways that something may be derived from natural law, he divided positive law into civil law and the law of nations. The law of nations is thus included within positive law. St. Thomas resolved the apparent contradiction with Isidore by invoking the Roman concept of *jus naturale* that Isidore had abandoned. See de Aguilar, *supra* note 20, at 192-94. As Fr. de Aguilar observed,

[f]rom Roman Law [Aquinas] took his distinction and at the same time the tendency to link the law of nations more closely with the natural law. The law of nations is common to all men, imposed by the necessities of the same human nature, founded on the natural reason itself and exclusive to the rational nature.

Id. at 195.

Of primary importance here, of course, is whether, as in Roman law, it is sufficient to find out merely whether the law is “posited” by the will of the ruler to be worthy of obedience by rational subjects.⁵⁹ Aquinas held that all law did require some effort to see its justification. We are to obey all laws after the manner any human being ought to do anything, that is, with an understanding of what one does when doing it and why what a person does is legitimate. Without these latter two elements, the observance of the law is not fully “rational” or understood by the doer.

St. Thomas explained that this justification might be difficult at times to see, but that it would take one of two forms. Either it would be merely a deduction from principles that are already quite clear and readily accepted, or it would be decided after the manner of determining something that had to be decided in particular. Thus, in the first case, if we should not harm our neighbor in general, a law that we should not murder him would be clear as a reasonable deduction from the premise that we should not harm him.

We can even ask at an earlier stage why we should not harm him at all. The answer to this would have to do with the kind of being he is, whether he is acting dangerously or threateningly to us or someone else, and with our own limited nature and our realization that we are like unto other human beings in their essential nature. This is an argument made perhaps most famously by Cicero in his *De Officiis* as well as by St. Thomas in the treatise on law of the *Summa*.⁶⁰

59. THOMAS AQUINAS, *supra* note 1, I-II, question 90, art. 1. St. Thomas answered the possible objection that law pertains, not to reason, but to the will. Contrary to the Roman maxim that “[w]hatsoever pleaseth the sovereign has the force of law,” St. Thomas wrote that

[r]eason has its power of moving from the will, as was stated above; for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; or otherwise the sovereign’s will would savor of lawlessness rather than of law.

Id. (citation omitted).

60. As Cicero wrote,

To take something away from someone else—to profit by another’s loss—is more unnatural than death, or destitution, or pain, or any other physical or external blow. To begin with, this strikes at the roots of human society and

Secondly, Aquinas pointed out that we must decide some things because many alternatives are available to us. We must "determine" which one we will use. Thus if we are to build a house, we cannot just build an abstract form of a house, but we must determine that we will build this specific house, not that one—a Georgian Mansion, not a Cape Cod cottage. The other example St. Thomas often used was, significantly, that of determining punishment. It may be reasonable that we punish, but it is a question of choice and prudence how we carry this reason out in our particular legal system.

A. *The Thomistic Account of the Jus Gentium*

What has this discussion of human law to do with *jus gentium*? Aquinas said, in discussing St. Isidore, that there are many things within human law that can be intelligently divided or distinguished.⁶¹ The first thing is that the human law is derived from natural law. In this sense, he continues, positive right, or *jus positivum*, can be divided into civil law (*jus*) and *jus gentium*.

*Unumquodquae potest per se dividi secundum id quod in eius ratione continetur. . . . Sunt autem multa de ratione legis humanae, secundum quorum quodlibet lex humana proprie et per se dividi potest; est enim primo de ratione legis humanae quod sit derivata a lege naturae. . . . Et secundum hoc dividitur jus positivum in jus gentium et jus civile secundum duos modos quibus aliquid derivatur a lege naturae.*⁶²

The difference between civil law and the *jus gentium* lies in how each is derived from natural law. By what processes of intelligence are the law of nations and civil law derived from natural

fellowship. For if we each of us propose to rob or injure one another for our personal gain, then we are clearly going to demolish what is more emphatically nature's creation than anything else in the whole world: namely, the link that unites every human being with every other.

CICERO, *De Officiis*, in *SELECTED WORKS* 166 (Michael Grant ed., 1977).

61. THOMAS AQUINAS, *supra* note 1, I-II, question 95, art. 4.

62. *Id.* ("A thing can be divided essentially in respect of something contained in the notion of that thing. . . . Now, in the notion of human law, many things are contained, in respect of any of which human law can be divided properly and essentially. For, in the first place, it belongs to the notion of human law to be derived from the law of nature. . . . In this respect positive law is divided into the *law of nations* and *civil law*, according to the two ways in which something may be derived from the law of nature.").

law, which itself essentially means, "doing what is reasonable?"

The *jus gentium* is derived after the first manner, that is, after the manner of necessary principles from more clear premises.⁶³ What St. Thomas puts in this category would not merely be that murder is wrong and to be punished, but things like just buying and selling, namely those things "*sine quibus homines ad invicem convivere non possunt.*"⁶⁴ Aquinas adds that human beings cannot live without these things because, citing Aristotle, man is a "social animal." However, those things that derive merely from determinations of a natural principle, like punishments, belong purely to civil law and can vary widely—"*quaelibet civitas aliquid sibi accommode determinat.*"⁶⁵ But each particular civil law of this kind has within it, so to speak, the argumentation of the *jus gentium* about human deeds and punishments and how they are logically related.⁶⁶

If we ask what is the significance of this discussion about the difference in how *jus gentium* and *jus civile* are "derived" from the natural law, it becomes clear that St. Thomas is saying that certain particular reasons are binding beyond our civil boundaries. We are obliged by them even if we are not citizens of the other polity. One can ask the question, for example, "In Los Angeles would it be all right for an Englishman to drive on the left hand side of the road because that is the way they do it in England?" The answer is clearly in the negative not merely because of California civil law, but because that civil law in such a case contains the law of nations principle as it relates to the natural law principle of acting reasonably.

In spite of the fact that the jurisdiction the Englishman is visiting clearly might be a tyranny, he must, by virtue of the law of nations, still obey the laws of the local polity, even if in his own polity driving on the left-hand side of the road is a legitimate habit. Was he free, therefore, because "*lex tyrannica non*

63. *Id.* As noted earlier, St. Thomas stated that "[t]he law of nations is indeed, in some way, natural to man, in so far as he is a reasonable being, because it is derived from the natural law by way of a conclusion that is not very remote from its principles." *Id.* In order to reconcile Isidore's account, which had included the *jus gentium* within human law, St. Thomas then distinguished *jus gentium* and its rational character from that law of nature that man shares with all animals. *Id.*

64. *Id.* ("Things without which men are not able to live together.")

65. *Id.* ("Each city determines what is proper to itself.")

66. *Id.*

est lex?"⁶⁷ It is obvious that he remains bound by the natural law and the law of nations to what is reasonable. While he might be justified in killing the tyrant, he is not free to kill anyone by the way he drives his car, even in a tyranny. Thus, the local laws of driving bind him by virtue of the law of nations.

What binds the Englishman in this case in principle then seems to be *jus gentium*, the notion that reasonable ways of acting are clear to anyone who sets his mind to it. Likewise, in buying and selling, surely the very stuff of international trade, reasonable norms of exchange and value need to be set up to measure justice in these cases. Coinage and weights may be different, but *jus gentium* would suggest that some reasonable equivalence is possible and needs to be deduced from the principle of man's social nature as it exists in particular relationships.

In order to appreciate the far-reaching effects of the natural law/law of nations distinction, I want to turn to the discussion by Charles N. R. McCoy of this topic in his insightful book, *The Structure of Political Thought*.⁶⁸ Fr. McCoy was particularly concerned to show how *jus gentium* had become, by a series of misunderstandings of its essence, a basis of modern totalitarian theory whether it be in the democratic Rousseauist version or in the absolutist Marxist version.

Several historians of political thought, notably George Sabine and the Carlyles, had, following certain Roman law interpretations, understood the first principles of natural law to be those that man had in common with the animals. This meant that things like property and polity were added by the *jus gentium* to natural law. In this sense, politics was not a sign of human perfection, as Aristotle had held, but of its bondage through reason. To be perfect meant not to be civil and political, as Aristotle had held, but to escape from politics, as the Stoics and Epicureans had held. It is from these latter sources that anti-political notions enter into modern political philoso-

67. *Id.* question 92, art. 1.

68. MCCOY, *supra* note 44, at 88-98; see also CHARLES N. R. MCCOY, *The Problem of the Origin of Political Authority*, in *ON THE INTELLIGIBILITY OF POLITICAL PHILOSOPHY: ESSAYS OF CHARLES N. R. MCCOY* 49-60 (James V. Schall & John J. Schrems eds., 1989); James V. Schall, "Man for Himself": *On the Ironic Unities of Political Philosophy*, *POL. SCI. REVIEWER*, Fall 1985, at 67-108.

phy.⁶⁹

Ultimately, this “escapist” position would justify the notion that to be “human” meant to escape from the civilizing institutions of family, state, and property.⁷⁰ To be “natural” did not mean to use one’s reason to apply intelligence to more particular things, which is the natural law of the being whose reality includes this faculty. Rather it came to mean the desire to escape from those institutions that had been added by reason. Thus, perfection would be achieved by escaping from family, polity, and property.

Aquinas, be it noted, had implied just the opposite, that is, that human intelligence, in “adding to reason,” became more reasonable, civilized, and worthy. This addition was the project intelligence gave to the naturally social being. It was to establish a polity worthy of man himself, an establishment that meant a constitution, with particular, but just laws, and a discipline directed to virtue through the example of the law. But this law included the freedom both to understand and act virtuously from resources that are more than legal.

Fr. McCoy’s discussion of this relation of natural law and *jus gentium* is worth much reflection:

Natural law in its first precepts (as distinguished, then, from

69. See McCoy, *supra* note 44, at 73-87; see also James V. Schall, *Post-Aristotelian Philosophy and Political Theory*, 3 CITHARA, Nov. 1963, at 56-79. As I have explained elsewhere,

[w]ith the Epicureans and the Stoics, the idea began to germinate that ethics and politics were superior to the confusions of the speculative order. Peace was attained by a form of moderation and self-control, which had most peculiar theoretical implications. These propositions held that man was not affected by what went on in the cosmos, that there was no passage from the practical to the speculative orders, no unity of the whole. Aristotle had held that ethics and politics were the *proper* life of man, to be sure, but not his *highest* or best life, so that the practical order was preparatory to contemplation. He did not deny value or relative autonomy to the practical order. In the post-Aristotelian philosophers, man himself became the theoretical center. . . . The human order came to be transformable into metaphysics itself. The effect of this reasoning is, again, to make politics into a kind of metaphysics of a very odd sort.

JAMES V. SCHALL, REASON, REVELATION, AND THE FOUNDATIONS OF POLITICAL PHILOSOPHY 64-65 (1987).

70. For a consideration of this same problem from its parallel origin in *Genesis*, see SCHALL, THE POLITICS OF HEAVEN AND HELL, *supra* note 28, ch. 1 (“The Old Testament and Political Theory”); ch. 4 (“The Christian Guardians”); and ch. 7 (“The Limits of Law”) are also pertinent to this discussion.

natural law in its secondary precepts [(94, a. 2)]—*Jus Gentium*) embraces actions that are naturally known as bearing an “absolute natural commensuration” with what nature intends for men: for example, to seek good and avoid evil. The matters belonging to *Jus Gentium*, on the other hand, are said to bear a “relative natural commensuration” with what nature intends for man. These are the civilizing institutions without which the principal ends of human life cannot be attained except with the greatest difficulty.⁷¹

The “inclinations” or principal ends of human nature are to life, to family, to know the truth about God, and to live in society.⁷² What is said here is that these inclinations have the character not solely of deductions but of clearly known principles or statements about what human nature is, as it is given from nature.⁷³

“Man does not make man to be man, but taking him from nature, makes him to be good man,” as Aristotle said.⁷⁴ Aquinas adds in the next sentence in this same article the fact that knowing the truth about God and the manner of living with one another (*convivere*) belongs to this same law of reason, so that we should “avoid ignorance and we ought not to offend others in those things in which we ought to converse and deal with them.”⁷⁵ I cite this passage at some length because Aquinas in principle does not allow us not to use our reason and when we use it, we are to use it rightly.

71. McCoy, *supra* note 44, at 95. In the Thomist tradition, Francisco de Vitoria and Domingo de Soto, among the Salamanca theologians, emphasized the distinct but intimate relation between the natural law and the *jus gentium*, including the importance of the latter for the conservation of the former. See de Aguilar, *supra* note 20, at 199. For Vitoria, the law of nations is not deduced with absolute necessity from the natural law; its deduction is only “almost necessary” (“*pene necessarium*”), whence the need that the law of nations receive the consent of men for its establishment. As Fr. de Aguilar summarizes the relation of the three laws,

The law of nations is fixed in a medial, differential point between the two laws. The natural law is absolutely necessary, an evident principle or a necessary conclusion. The law of nations is hypothetically necessary, a conclusion of the greatest fittingness. Positive law is hypothetical, by circumstantial determination.

Id. at 201.

72. THOMAS AQUINAS, *supra* note 1, I-II, question 94, art. 2.

73. See James V. Schall, *Truth and the Open Society*, in *ORDER, FREEDOM, AND POLITY* 71-90 (George W. Carey ed., 1986).

74. Aristotle, *THE POLITICS*, 1256a21-22.

75. THOMAS AQUINAS, *supra* note 1, I-II, question 94, art. 2.

Charles McCoy pointed out that the *jus gentium* also belongs to reason in the sense that men can figure out and find certain institutions and rules without which these main human ends cannot be easily or rightly achieved. In other words, the state's structure, rules of property, and a unified family life are institutions that for the most part must exist if most people are to achieve a full life of reason and virtue. When these rules do not exist or do not exist as properly ordered, the empirical evidence of the resulting disorder will be evident to careful reason reflecting on the results.

Thus, as Fr. McCoy explained in considering the manner in which unreasonable, though somehow attractive, institutions are to be analyzed,

Possession of all things in common and the nonpolitical condition greatly hinder the attainment of the principal end of life. . . . The introduction, then, of civilizing institutions is indeed natural in the sense that nature inclines thereto; it is the work of man's natural reason. Far from embracing principles of law that are corruptions of an original and "higher law," the *Jus Gentium*, because it has the force of natural law, is itself part of the "higher law," of which all the different systems of civil law are mere particular determinations.⁷⁶

The proper content of civil law thus allows and encourages a wide variety of political forms, constitutions, and legal arrangements.⁷⁷

Civil law then determines how particular things will be done. But in essentials—whether there be a juridical system, whether there be enforcement agencies, whether there be private property and family—civil law remains subject to *jus gentium*. That is, reason sees that such institutions are required for the kind of beings we are if we are to reach our immediate and highest ends. The highest ends of activity are not to be achieved well without these intermediate considerations and institutions. There is a discourse of reason that exists, and must exist, "among the nations." The various cultures and polities are not simply "diverse" and incommensurable. They

76. McCoy, *supra* note 44, at 95.

77. THOMAS AQUINAS, *supra* note 1, I-II, question 95, art. 4.

have common grounds of discourse about the *what is* of human reality.

The import of this position in terms of political philosophy and its relation to law is that civil rule as such is limited, but necessary and good. Civil or positive human law is not the giver of human nature. It does not establish what it is to be a human being, nor is it the provider of the elements of that human being's proper good and activity. All civil law has to defend itself before the bar of reason at every level. The so-called "sovereignty" of law ought not to mean that civil or constitutional law is subject to nothing but itself or the wills of those who constituted them.⁷⁸ Those who constituted them are in turn subject to *what they are*.⁷⁹ This is their freedom and their glory.

This "subjection," however, is itself the basis of any freedom we might have. For the fact that our being is given, and not made by us, means that we can and must appeal to a reason, a reason that we discover but do not make, for our judgments about our actions and politics. The *jus gentium* in its philosophic sense is what connects all political societies with each other and what enables each member of any society to consider rationally the validity of the rules he lives under and the rightness of his own obedience to these laws. This obedience is not based on force or blind convention. Rather, it is "promulgated" to our own reason so that we can understand and test the "precepts," the statements of the law and our own moral conscience which are themselves bound by what we did not make.⁸⁰

78. As Jacques Maritain observed, however, in the political sphere, and with respect to the men or agencies in charge of guiding peoples toward their earthly destinies, there is no valid use of the concept of Sovereignty. Because, in the last analysis, no earthly power is the image of God and deputy for God. God is the very source of the authority with which the people invest those men or agencies, but they are not the vicars of God. They are the vicars of the people; then they cannot be divided from the people by any superior essential property.

MARITAIN, *supra* note 12, at 50.

79. James Brierly pointed to this most basic presupposition of legal reasoning when he concluded, in his inquiry into the nature of the basis of obligation in international law, that ultimately we must fall back on metaphysics. See Lauterpacht, *supra* note 23, at 67.

80. See James V. Schall, *Truth, Liberty, and Law*, in 1989 THE CATHOLIC COMMISSION ON INTELLECTUAL AND CULTURAL AFFAIRS 59-74; SIMON, *supra* note 36, at 143-56.

In a famous sentence in his article on the "power" of law, St. Thomas pointed out that "*lex autem humana ponitur multitudini hominum, in qua maior pars est hominum non perfectorum virtute.*"⁸¹ That is, even though the law is concerned about justice and reason, it can recognize that most people are imperfect. This recognition would mean that we ought to estimate accurately what can and cannot be done, lest something worse come about. If something is too far in advance of possibility, a more perfect norm will only discourage and be neglected. The achievement of virtue or goodness in human affairs includes a certain prudent appreciation of gradualness and of the agonizing confrontation with evil and evil habits. Aquinas did not by this limitation mean to lessen or condone the power of evil among men and institutions, but rather to make it more possible to confront it because of a more accurate estimation of the difficulties in which men are involved in their very condition.

Consequently, in his answer to the second objection in the same article, St. Thomas remarked, "*lex humana intendit homines inducere ad virtutem, non subito, sed gradatim.*"⁸² The law recognizes that virtue must be seen to be a gradual process, not, except rarely, a sudden one. Such principles of prudence and good sense also will be operative in the civil law and the *jus gentium*. But what is of interest here is not so much the gradualness and common sense displayed by Aquinas in dealing with actual men, but his insistence that natural law and reason remain the goals to which we ought to strive and the norms by which we ought to judge what is imperfect and evil.

This is perhaps the moderate and legitimate approach to the "political realism" we associate with St. Augustine, Edmund Burke, and even Aristotle.⁸³ It is a political realism that does not doubt, like the versions of modernity, the dire consequences of bad choices and institutions even when they may be tolerated or, more rarely, legalized under the principle of the lesser evil. When this toleration or legalization exempts itself

81. "Now human law is framed for the multitude of human beings, the majority of whom are not perfect in virtue." THOMAS AQUINAS, *supra* note 1, I-II, question 96, art. 2.

82. "The purpose of human law is to lead men to virtue, not suddenly, but gradually." *Id.*

83. See generally HERBERT DEANE, *POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* (1956).

from the rule of truth and gradualness, then it shades into the principle of modernity, according to which what is legal is also what is moral because it has no other source but the autonomous human will.

III. *DISCOURSE ON LAW CANNOT PRESCIND FROM DISCOURSE ON ENDS*

This analysis means that these distinctions of natural law, *jus gentium*, and civil law account both for common principles of reason by which all men in all societies are bound. These principles subject to this same reason the areas of variety and difference that are found in practice and in culture without reducing them to purely relativist diversities. The argument for the variability of many political and social things ought not to militate against the equally valid argument for reasonable consideration of universal and common things.

The law of nations, as we have seen, is, in its philosophic sense, that argument designed to foster and protect common institutions of reason and judgment against the notion that civil society is at best a necessary evil and at worst a positive danger to mankind. On the other hand, the relation of natural law to the *jus gentium* is designed to guarantee that no civil society can escape from the judgment of itself, both by others and by its own citizens. The law of nations means and demands a constant pressure toward natural law, to that which is reasonable in particular circumstances of polity in time and place.⁸⁴

One final consideration is worth adding to these reflections on the *jus gentium*. This is the fact that political life, to which human law is ordained, while worthy in itself, is not simply related to itself. The life of leisure, the life beyond politics, as it were, the end of politics, as Aristotle knew, requires that we think about these higher things. The medieval writers remarked that the active life of politics was ordained to the contemplative life of truth. This means that the truth of what goes

84. In the words of Fr. de Aguilar,

[t]he constraining force of the law of nations is intimately connected with the natural law. For as necessity was the basis of the latter's compulsive power, so the obligation of the law of nations is based on its relative or hypothetical necessity for the observance of the natural law, from which it arises as a rational deduction.

de Aguilar, *supra* note 20, at 209.

on in political life, including legal affairs, needs to be reflected upon and this in the light of first principles and how they relate to institutions, customs, laws, and activities. This reflection ought to be the classic mission of the universities and law schools, though the intellectual freedom and conditions of these institutions often leave this mission in other hands.

Josef Pieper wrote, in his remarkable little essay, *The Purpose of Politics*,⁸⁵ that our practices need to be considered in the light of our highest purposes and ends. He wrote that “practice does become meaningless the moment it sees itself as an end in itself. For this means converting what is by nature a servant into a master—with the inevitable result that it no longer serves any useful purpose.”⁸⁶ We recognize here, on reflection, Aquinas’s statement that the *jus gentium* is a matter of first principles and necessary connections, of clarity of reason which applies to men wherever they think to live together. Without this connection to rational reflection, politics becomes a kind of “empty deadliness” and law a mere compromise among competing policies and “interests.”

Josef Pieper next recalled the old scholastic dictum from Aristotle: “It is requisite for the good of the human community that there should be persons who devote themselves to the life of contemplation.”⁸⁷ Some at least need to be free to consider the logic even of our institutions and activities, as well as of the truth of being as such. “It is contemplation,” Pieper concluded, “which preserves in the midst of human society the truth which is at one and the same time useless and the yardstick of every possible use; so it is also contemplation which keeps the true end in sight, gives meaning to every practical act of life.”⁸⁸ The upholding of the law itself, in other words, is not merely a question of proper political judgment and action, but also of philosophical understanding and argument.

If we reflect on the meaning of *jus gentium* as it relates to the natural, civil, eternal, and divine laws, we see that present in it is this recurring force of reason. This reason is free of any civil law. It can consider any civil law in its consequences and

85. PIEPER, *The Purpose of Politics*, JOSEF PIEPER—AN ANTHOLOGY, *supra* note 10.

86. *Id.* at 122; see JOSEF PIEPER, *LIVING THE TRUTH: THE TRUTH OF ALL THINGS*, *supra* note 35; see also JOSEF PIEPER, *REALITY AND THE GOOD*, *supra* note 35.

87. *Id.*

88. *Id.* at 123.

in its formulation, not as something merely coming from the autonomous will of legislators or judges empowered to act, but as a reflection of reason, of a clear and courageous statement to the minds of the nations about the meaning of their laws in the context of what human life is. This meaning is understood in the light of that contemplation, which, as Aristotle said in the last book of the *Nicomachean Ethics*, is our proper purpose for being human in the first place.⁸⁹ This purpose is found originally in our being, not in our law. It is a purpose itself rooted in the cause of *what is* in the first place. The noble tradition of the *jus gentium* remains the challenge that anyone who would reflect on civil and international law must ultimately propose to himself.

89. As Aristotle said,

[b]ut we must not follow those who advise us, being men, to think of human things, and, being mortal, of mortal things, but must, so far as we can, make ourselves immortal, and strain every nerve to live in accordance with the best thing in us; for even if it be small in bulk, much more does it in power and worth surpass everything.

ARISTOTLE, *NICOMACHEAN ETHICS*, 1177b31-78a2 (Richard McKeon ed.).