Alejandro Madrazo[*]

4. From Revelation to Creation: The Origins of Text and Doctrine in the Civil Law Tradition

SUMMARY: I. Introduction. II. Revelation: The Advent of Legal Texts. III. Creation: The Ascent of Legal Doctrine. IV. Conclusions. V. Bibliography.

I. Introduction

For common law scholars, one of the most striking features of the civil law tradition is the prominent role played by legal doctrine and legal scholars.[1]

For civil law practitioners, on the other hand, one of the most striking features of the common law is the absence of legal texts at the core of its legal culture. This article aims at exploring the origins of these two prominent features of the civil law tradition: the centrality of text and the authority of doctrine.

These two features of the civil law tradition are the legacy of two distinct conceptual models of legal inquiry, which I call the model of revelation and the model of creation. I argue that each of these models has a distinct origin in separate but related practices of normative inquiry. The model of revelation, concerned for the most part with authoritative texts, emerged from the practice of late medieval jurists known as the glossators. The model of creation, concerned with doctrines, comes from the late Scholastic moral theology of 16th century Spain. These two models lie at the foundation of the civil law tradition.

Exploring medieval jurisprudence can help us understand the origins of the roles of text and doctrine in the civil law tradition. It can also help us understand their relationship to each other. I propose that the differences between these two schools can be understood as a deep transformation in the way the source of legal authority was understood. Underpinning these changes in the understanding of law was a transformation of the metaphysical assumptions brought about by developments in theology. The shift goes from a model in which divine authority is revealed in a fixed text to one in which divine authority is found in creation, i.e. nature. Changes in law mirrored

[*] Professor of Legal History and Comparative Law at the National Autonomous University of Mexico (UNAM). This article reproduces substantive portions of my J.S.D. dissertation completed at Yale University. I would like to thank all of those involved, especially my advisor Paul W. Kahn

[1] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (Stanford University Press, 1985) (2nd ed.), chapters IX and X.

a shift from the preeminence of the notion of revelation (paradigmatically present in the Bible as divine law) to the preeminence of the idea of creation (*i.e.* nature).

Revelation and creation, glossators and Second Scholastics, text and doctrine are three pairs of ideas that underlie the structure of this article. Accordingly, the article is divided into two main sections: revelation and creation. The first section focuses on the work of the glossators and the second section on the Second Scholastics. Throughout the discussion I will illuminate the roles played by text and doctrine in the civil law tradition. I will illustrate the two models by situating the people who used them in specific historical and social contexts, and then analyzing their work in further detail by exploring their methodological and metaphysical underpinnings.

I believe this approach to the origins of the civil law tradition will help understand not only the cult of legal text and the authority of legal doctrine, but other important features of the civil law, such as the tendency towards abstraction, the heavy reliance on definitions and formal concepts and the strongly normative role played by a discipline that thinks of itself as scientific and descriptive (i.e. legal science).

II. Revelation: the advent of legal texts

Ius commune is a vague term that usually refers to the common law of Central and Western Europe from the late Middle Ages on. It was not the law of a particular political entity with a determined jurisdiction. It was rather a common learned legal culture. In the fractured legal universe of late medieval Europe, the *ius commune* served as a meta-legal system that made it possible to resolve conflicts between competing legal systems, establish common solutions for common problems, and provide legal solutions to problems other laws or customs did not address.

The *Ius commune* pivoted on two authoritative collections of legal texts: the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*. Late medieval jurists studied these texts using a common set of assumptions and techniques, thus forming a common school. The *Corpus Iuris Civilis* was a compilation of old Eastern Roman law that was revived in the West in the early centuries of the second millennium. The other authoritative legal collection, the *Corpus Iuris Canonici*, was an amalgamation of sacred texts and old laws of the Christian churches and the "new law" of the recently consolidated Roman Catholic Church.

While each of these two legal collections was studied by a distinct academic discipline, the disciplines were closely related. Civil law studied the *Corpus Iuris Civilis* and canon law studied the *Corpus Iuris Canonici*. The texts studied by canon law (and the doctrines of which it consisted)

were the positive laws of a political and territorial entity under the authority of the Popeas prince.[2] The *Corpus Iuris Civilis*, on the other hand, was not the positive law of any existing polity. It was a learned law shared by lawyers and bureaucrats in different polities throughout Europe. These two disciplines shared methods, principles and assumptions:

> *The canonists shared with the Romanists of their day the same basic theories concerning the nature and functions of law and the same basic methods of analysis and synthesis of opposites — theories and methods which were as much borrowed from them by the Romanists as by them from the Romanists. Indeed, not only theories and methods but also many specific legal concepts and institutions were taken over into contemporary Roman legal science form the new science of canon law.*[3]

This interrelatedness included formal academic training.[4] A surge in academic work on canon law at the turn of the first millennium was paralleled and intertwined with the rise of the academic study of civil law. Both fed an increasingly interrelated class of jurists that populated Church and lay bureaucracies in the centuries to come. To be sure, this cross-fertilization between legal disciplines included sharing some of the same legal texts, but most importantly it involved common terminology, methodology, ideas and concepts.[5]

Noted Mexican legal historian, Guillermo F. Margadant, tells us that the period stretching roughly over the first two centuries of the second millennium was dominated by the ideal of *reductio in unum*: a single Church, under a single authority (the Pope's); a single Empire in which all kings were to be vassals of the Emperor; a single language for culture, Latin; and, to complete this scheme the idea of a single law, the *ius commune*, built by jurists out of the *Corpus Iuris Civilis* and the canon law.[6] Legal and political disputes were not about how to split the pie, but rather about the pecking order; the pie was to remain whole, at least in theory. This idea of *reductio in unum* is important in understanding the universalistic claims of jurists in their work, as will be seen below.

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[2] Canon law was also not only the positive law of a territorial polity under papal jurisdiction, but was also the positive law of the Western Church, which meant it applied to the faithful throughout Europe in matters that fell under Church jurisdiction.

[3] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 204 (Harvard University Press, 1983). In fact, the example of the Scholastic methods of analysis and synthesis as applied by the new legal science used by Berman in his book refers to the monk Gratian who in 1140 wrote a treatise on canon law mentioned below. See also BERMAN at 143-145.

[4] JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 52 (Longman, 1995).

[5] *Id.* at 22.

[6] GUILLERMO F. MARGADANT, LA SEGUNDA VIDA DEL DERECHO ROMANO 85 (Miguel Ángel Porrúa, 1986). E. N. Van Kleffens also mentions the importance of the idea of *reductio ad unum*, E. N. VAN KLEFFENS, HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES 173 (1968).

1. *Emerging Institutions and Authoritative Texts*

Two key processes contributed to the emergence of the *ius commune* in the first centuries of the second millennium: the consolidation of the Church under papal authority with a unified legal system (canon law), and the academic revival of Roman law in the universities. The emergence of a centralized Roman Catholic Church under the Pope's authority was a process that spanned from the 10th to the 12th centuries. The university emerged at the end of the 11th century and would successfully reproduce itself through-out Europe (and later America) effectively dominating academic legal studies well into the 18th century. At the university, the formal study of Church law and Roman law would spawn the twin legal sciences of canon law and civil law.[7]

2. *Canon Law*

In the late Middle Ages, the Western Church emerged as a centralized entity under the direct tutelage of the bishop of Rome. The development of the Catholic Church's legal system, or canon law, with identifiable sources of law and a determinate jurisdiction, is closely linked to this process of reform and centralization, which Harold Berman has called the Papal Revolution (but which is more commonly known as the Gregorian Reform).[8]

Early reformists wanted to advance the Church's independence from secular authorities. Their strategy partly consisted of advancing their claims in legal terms. They pushed for both a substantive revision of the laws governing the Church and an administrative reorganization that would allow the adjudication of Church law in Church tribunals and the persecution of Church criminals.[9]

Previously, authoritative Church documents bearing on law were characterized by multiplicity and inconsistency. These included documents which were very distant in terms of time, authorship and intent.[10] Consequently, proto-canonical lawyers were concerned with reconciling the discrepancies found among the texts. In compiling and interpreting them to better serve their purposes, reformists initiated many of the methodological advances that the glossators would later

[7] One must keep in mind that the distinctions between the legal systems and the disciplines that studied them were blurred. So I will use the terms "canon law" and "Church law" interchangeably, as well as "Roman law" and "civil law".

[8] BERMAN, *supra* note 3 at 145. In the West, secular authorities' control over local churches and the corruption of ecclesiastical conduct had become the norm after the break-up of the Carolingian empire and the rise of "feudalism". See Brundage, *supra* note 4. In the 10th century, reactions against the situation began with the successful withdrawal of a few monastic houses from secular control, notably the Burgundian monastery of Cluny (909). By the mid-eleventh century, reformers had gained the papacy under Leo IX, who gathered around him other reformers who would later also be popes, notably Gregory VII.

[9] See BRUNDAGE, *supra* note 4

[10] They included *conciliar* canons (that is, canons agreed upon at Councils, diverse universal or regional summits of high ranking clergy that had taken place throughout Christian history), Scripture, the writings of the Church Fathers and other documents.

build upon. From the time of Pope Gregory VII (11th century), collections of old conciliar canons[11] became more frequent. More importantly, the Pope claimed the power to create new laws, called *decretals* (which together were known as *jus novum*, or new law as opposed to *jus antiquum* or old law from the conciliar canons that were being compiled around the same time).[12]

By the early 12th century, the Church had amassed a body of law sufficiently abundant that Berman sees it as the prototype of a modern legal system.[13] The Church had produced a large number of legal precepts that governed matters under its jurisdiction.[14] It had also begun developing interpretative techniques which allowed it to reconcile conflicting authoritative texts. Eventually, the authoritative legal texts of the centralized Western Church would be compiled and systematized through these interpretative techniques into a collection known as the *Corpus Iuris Canonici*.

3. *Roman Law*

Together with canon law, the *ius commune* tradition of late medieval Europe grew out of the study of Roman law. During the early Middle Ages, the importance of Roman law had been relatively minor. Academic inquiry was the key vehicle in moving Roman law from the periphery to center stage of the Western European legal world. This academic revival of Roman law was linked to a revision of the proper place of law in the general scheme of knowledge.[15] Peter Stein tells us that the traditional view had been to locate law under the category of ethics insofar as it deals with human behavior. The new perspective, arriving with the emergence of the glossators, was to limit the ethical categorization of law to the *content* of the rules, yet to understand law as a part of logic insofar as it consisted of interpreting words in a text.[16] This allowed for the legitimate use of all the arts of traditional education known as *trivium* (grammar, dialectic and rhetoric) in legal inquiry.

Throughout the 11th century, there was increasing interest in jurisprudence with the emergence of several centers of specifically legal learning in Provençe, France, and in Lombard cities of northern Italy. During this period Justinian's Digest (the part of the *Corpus Iuris Civilis* which compiled Roman legal doctrine) was studied in northern Italy.[17] These new centers

[11] *i.e.* authoritative norms or interpretations agreed upon by the different ecumenical councils, or bishop assemblies.
[12] BERMAN, *supra* note 3 at 202.
[13] *Id.* at chapter 5.
[14] *i.e.* Church finances and property, crime, labor, taxes, marriage, and family relationships, etc.
[15] The question of which social and political reasons stimulated the revival of Roman law is complex and has no clear answer. For accounts of the historical context, see BERMAN, *supra* note 3, STEIN, *infra* note 16 and MARGADANT, *supra* note 6.
[16] PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 46 (Cambridge University Press, 1999).
[17] Its final part, including its final title, was not known at first. STEIN, *infra* note 19 at 127.

of learning gradually evolved into an autonomous corporation that came to be known as the University.[18] Starting in Bologna, the study of law would be mostly devoted to Roman law as presented in the *Corpus Iuris Civilis*. From there, its study and the corresponding methodology would consolidate and, in the following centuries, spread throughout Europe through a growing network of universities. The lawyers who spread from Bologna have come to be known as the school of the glossators.

There are two key elements in understanding the work of the glossators and their importance in the subsequent development of a systematic "science" of law. First, they took the Justinian texts to be consistent, complete and coherent (as Justinian affirmed in the beginning of the compilation it self).[19] Secondly, they built upon the tendency, already reflected in the last title of the Digest,[20] to abstract texts from their context and generalize their applications and implications.[21] The glossators took abstraction to a new level by applying it to the entire compilation and not just to the last title.

The glossators represent a key moment in the secularization of both academic knowledge and legal studies. However, their enterprise can best be understood in relation to the religious context of their origin.[22] Both aspects of the work of the glossators —a) the presupposition of the completeness and consistency of the text; and b) the willingness to abstract and generalize any part of it— were linked to the religious underpinnings of their enterprise: the glossators approached the *Corpus Iuris Civilis* in very much the same way a contemporary theologian would have approached the Bible.

The idea that the authoritative collection of texts was complete was important, especially in the case of civil law. In contrast to Ancient Rome, in late medieval Europe there was no uncontested Imperial authority that could be the source of new Roman law.[23] Civil lawyers had only the *Corpus Iuris Civilis* to work with. In the late medieval revival of Roman law, the Justinian

[18] BERMAN, *supra* note 3 at 124.

[19] "The glossators took it for granted that the different texts could be reconciled, for they accepted without question Justinian's assurance that the Digest contained no contradictions which could not be resolved *subtili animo* (*Const. Tanta*, 15)". PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 131-132 (Edinburgh University Press, 1966).

[20] The Digest was the fourth and last text of the *Corpus Iuris Civilis*. It was a compilation of opinions on specific matters from authoritative Roman jurists prior to Justinian's time. The last title of the Digest consisted of a list of abstract rules (*regulae*), separated from their specific topic, serving as sort of default solution in case a specific matter was not addressed.

[21] The *Corpus Iuris* itself a product of this tendency.

[22] Theodor Viehweg warns against assuming that Scholasticism in theology was imported in its entirety into jurisprudence and cautions against drawing parallels between jurisprudence and theology. THEODOR VIEHWEG, TOPICS AND LAW. A CONTRIBUTION TO BASIC RESEARCH IN LAW 54-55 (W. Cole Durham trans.) (Peter Lang, 1993). In this article, the point I wish make about the theological origins of the basic understanding of law and its treatment of authority is not intended to contradict Viehweg. He is concerned with bringing to light the "widely overlooked" influence of topics in jurisprudence, whereas I am concerned with bringing to light the persistent influence of theology in law, a matter which, at least in Mexican legal history and jurisprudence, has also been widely overlooked.

[23] Holy Roman Emperors claimed such authority at different times, though the claim was never uncontested.

text was assumed to be a complete and authoritative whole, free of contradictions and gaps. The glossators accepted without question Justinian's assurance that the texts contained no contradictions that could not be reconciled by one who tackled them with a subtle mind (*Constitutio Tanta,15*) and took for granted that the compilation as a whole contained everything necessary to answer any conceivable legal problem.[24]

They also treated it as *truth* with *transcendent authority*:

> *It was of critical importance, however, that the jurists who studied these ancient texts believed, as did their contemporaries generally, that that earlier civilization, the Roman Empire, had survived until their time, in the West as well as in the East. It had survived in a special sense —in a new form, as the soul of a person might survive the body. More than that, they believed it had a universal and permanent quality. They took Justinian's law not primarily as the law applicable in Byzantium in 534 A.D., but as the law applicable at all times and in all places. They took it, in other words, as truth— the way they took the Bible as truth and the works of Plato and (later) Aristotle as truth.*[25]

What was in fact a multiplicity of texts with varying functions, different authors and historically diverse sources, compiled centuries before under Imperial orders, was treated as a unified whole valid for the present.[26]

4. *Interpreting Texts*

The legal collections, then, were authoritative in a transcendental sense. Medieval jurists' understanding of authority paralleled the understanding of authority of the other great discipline concerned with authoritative texts: theology. Harold Berman links the emergence of a legal science with the emergence of a science of theology, which sought to analyze evidence of divine revelation systematically.[27] Knowledge and authority were both understood to come from divine revelation. The *Corpora*[28] played, for their respective disciplines, the role that the Bible played for theology.

In fact, the texts of the *Corpus Iuris Civilis* were anything but systematic. They were arranged with "...appalling lack of coherence... The same matters were dealt with in the Institutes,

[24] STEIN, *supra* note 16 at 46.
[25] BERMAN, *supra* note 3 at 122.
[26] *Id.* at127; JOHN P. DAWSON, THE ORACLES OF THE LAW 124 (The University of Michigan, 1968).
[27] BERMAN, *supra* note 3 at 132; DAWSON, *supra* note 26 at 126 goes further than Berman in linking the two sciences and locates law at the receiving end of methodological borrowings.
[28] *i.e.* both the *Corpus Iuris Canonici* and the *Corpus Iuris Civilis*.

Digest and Code, but without any order".[29] The decisions and extracts contained in them were often very narrowly tied to concrete cases that had actually taken place; otherwise, they were, for the most part, either imperial ordinances or else statements of how a magistrate (*praetor*) would act on specific cases.[30] As John P. Dawson points out, the concern of Roman jurists had been to find solutions, in the texts, to specific cases; a task in which "no elaborately reasoned justification was needed, for to persons outside the elite group the jurist's own authority was enough and those inside would understand the reasons well enough".[31]

These assumptions and experiences did not correspond in time or place to the world in which the glossators worked, making the original meaning of the texts simply incomprehensible — or at best, useless— to them.

The glossators drew the tools with which to generate the meaning of the texts from their intellectual environment. It is common to link the school of the glossators to medieval Scholasticism.[32] Scholastic methods presumed that the mass of propositions with which one worked were all true. At stake was their relation to one another, their systematization, not their validity.

> *This [the Scholastic] method, which was first fully developed in the early 1100's, both in law and in theology, presupposes the absolute authority of certain books, which are to be comprehended as containing an integrated and complete body of doctrine; but paradoxically, it also presupposes that there may be both gaps and contradictions within the text: and it sets as its main task the summation of the text, the closing of gaps within it, and the resolution of contradictions. The method is called "dialectical" in the twelfth century sense of that word, meaning that it seeks the reconciliation of opposites.*[33]

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[29] STEIN, *supra* note 16 at 46.

[30] BERMAN, *supra* note 3 at 128. He uses "...an example, 'The praetor says, 'If you or your slaves have forcibly deprived anyone of property which he had at that time, I will grant an action only for a year, but after the year has elapsed I will grant one with reference to what has [subsequently] come into hands of him who dispossessed the complainant by force'. Such propositions are then followed by quotations from opinions of various jurists".

[31] DAWSON, *supra* note 26 at 116.

[32] MICHEL VILLEY, LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE 104-108 (Editions Montchrestiene, 1975). Villey goes as far as considering this period as *la Revolution scolastique*. Scholasticism was the dominant philosophical movement in Western Europe from the 9th AD to the 17th century AD, drawing from a tradition which combined religious dogma with patristic philosophy and later, importantly, Aristotelian philosophy.

[33] BERMAN, *supra* note 3 at 131. The dialectical method for the summation of the Justinian text, Berman explains, had roots in Greek philosophy and Roman jurisprudence, but transformed the methods of both traditions to a considerable extent. Berman traces dialectics from Greek philosophy starting with Plato who equated it with a method to arrive at truth, that is, a science (*the* science in fact). In Plato's thought it consisted, basically, of refuting one's opponents statements by exposing their own contradictions; drawing generalizations from true propositions about particular cases; and defining concepts through distinctions arrived at through analysis of a genus into species and synthesis of species into genus and genera into larger genera. Plato also believed that the truth was obtainable only through deductive logic, not inductive logic. Aristotle, on the other hand, distinguished between *dialectic* reasoning and *apodictic* reasoning. Apodictic reasoning started from propositions known to be true and arrived at certain truths; dialectical reasoning, on the other hand, started from problems or, at best, debatable premises and arrived, again at

Jurists, like theologians, were concerned with making sense out of the texts without questioning the authority of any part of them. All texts were equally authoritative; they simply had different scopes or spoke to different questions. If authoritative texts seemed conflicting or lacking, it was assumed that this was because further understanding was needed, not because the texts needed correction or addition.

In the process of solving contradictions, medieval jurists increasingly abstracted specific rules from their context, a tendency already present in Roman legal texts. At the risk of oversimplifying, the evolution of ancient Roman law can be depicted as one of increasing abstraction.[34] The activity of the interpreter went from elaborating *definitiones*,[35] which were broad descriptive statements of the law dealing with a common set of specific cases; to producing *regulae*,[36] which were normative propositions (initially elaborated by jurists but later incorporated into imperial legislation) designed to deal with several common cases. Medieval jurists carried this tendency towards abstraction even further by using legal maxims in the sense of selfevident, normative, abstract propositions from which legal conclusions could be deduced.

This increased abstraction in the work of the glossators requires an explanation of their use of the closing title of the Digest (title 50.17). Justinian had included a list of 211 abstract ('maxim-like', in the words of Stein) legal rules.[37] According to Stein, these rules, in their original contexts, were often *regulae* of the classical period of Roman jurisprudence (the first two and a half

best, at probabilities. Although both types of reasoning could use either inductive logic or deduc tive logic, dialectic reasoning is better suited to use inductive logic whereas, in apodictic reasoning deductive logic is appropriate depending on the kind of science. The Stoics, from whom Roman jurists would inherit the dialectic method, used dialectics as a method for analyzing arguments and defining concepts by analysis and synthesis, separating dialectics from logic and linking it with rhetoric and grammar. The Roman jurists, for their part, were the first to apply these methods to legal texts (the Greeks didn't consider legal rules as valid starting points for reasoning) and used them basically for classifications and for formulating rules implicit in decisions. Though Berman speaks of a "subtle" distinction in this last use between "definitions", which were more closely linked to the case, and "rules" derived from cases but capable of being considered separately from the case, it seems that this distinction pales in comparison with the extrapolation towards "maxims" that the medieval jurists would undertake. See BERMAN, *supra* note 3 at 132-139

[34] The tendency towards abstraction was coupled by a tendency to increased normativeness. By *normativeness*, I refer to the normative character that legal commentaries of normative rules increasingly took. At first look, we would expect a commentary on an authoritative text to *describe* what that text is saying. The authoritativeness of the text implies that the interpreter will clarify the sense that the text already has. The text is normative, the commentary on the text is not and so we should expect it to limit itself to *describing* a *normative* text. In Western legal science what we see, I argue, is an increasingly *normative* character of the *commentary*, rivaling to some extent the authoritative text itself. Rather than *describing* the normative text, commentaries *dictate* or *norm* what the text should be understood to say. Under the pretense of describing the meaning of a text, commentators actually infuse it with new sense. In short, *normativeness* here is to be understood by opposition to *description*.

[35] STEIN, *supra* note 19 chapter 2.

[36] For a detailed analysis of the emergence of *regulae* in Roman jurisprudence, see STEIN, *supra* note 19, chapters III, IV & V.

[37] The following lines are based on Stein's account of the Justinian compilation found in STEIN, *supra* note 19 at 118-120

centuries A.D.):[38] broad statements which explained a series of concrete juristic decisions in the text preceding it. By removing the texts from the cases, the Digest compilers broadened the scope of application of the formulations. Detached from their context, the broad statements could be applied to an indefinitely growing number of concrete cases. Those new cases might have little to do with the original scope of the rule. An example helps illustrate this:

> *Occasionally the compilers were so keen to obtain a neat maxim of dramatic simplicity, that they left it ambiguous, as in the case of fr. 56, semper in dubiis benigniora praeferenda sunt. To say that in doubtful matters the more benevolent interpretation should be preferred raises the question, more benevolent to whom? It is only when it is seen that the maxim is derived from a discussion of legacies, that it becomes clear that it originally meant "more favorable to the legatee".*[39]

This structure of the *Corpus Iuris* as a mass of specific legal texts sealed by a list of abstract maxims was fundamental to the glossators. The glossators went much further toward abstraction than the Roman jurists had by making generalizations of similar cases: they took the maxim-like *regulae* "as legal 'maxims', that is, as independent principles of universal validity".[40] Furthermore, they used other sections of the Justinian text, not originally stated as *regulae*, and took them out of context so as to make them into maxims as well.[41]

Whenever medieval jurists used *regulae* as maxims, they were fundamentally using solutions resulting from a problematic starting point as maxims from which to deduce necessary conclusions. Aristotle held that *dialectical* reasoning was to be deployed when starting from problematic propositions and could arrive only at probabilities, not certainties; *apodictic* reasoning, on the other hand, was premised on propositions known to be true and could therefore arrive at conclusions that were certain.[42] Medieval jurists claimed apodictic certainty for dialectical arguments.

Today it would be problematic, to say the least, to claim the applicability of apodictic reasoning to legal rules, for we would be pressed to accept legal rules as uncontested statements of truth. But that is what medieval jurists did when extracting *regulae* from their specific contexts of the *Corpus Iuris* and using them as universal maxims. The use of apodictic reasoning in law, however, would not be controversial if legal rules are assumed to be divinely inspired truths, which, I propose, is what enabled medieval jurists to deploy their analytic and synthetic

[38] For details on the periods in which Roman legal history is divided see notes 35 and 36.
[39] STEIN, *supra* note 19 at 119. The text "in doubtful matters the more benevolent interpretations should be preferred" would have dramatically different consequences in a different kind of case, say, in sentencing a criminal.
[40] BERMAN, *supra* note 3 at 139.
[41] STEIN, *supra* note 19 at 131.
[42] See *supra* text accompanying note 33

methods with apodictic authority in these texts. Treating legal rules as authoritative maxims, that is as truths, was a key move in allowing them to think of the *Corpus Iuris* as a complete and consistent whole. It enabled the glossators to elevate particular statements to general statements and from there derive particular conclusions, which in turn allowed them to close gaps. They were also able to reconcile contradictory propositions by distinguishing them according to their level of generality in genus and species. They moved through the mass of cases, rules and doctrine by way of premising deductive logic on the *regulae* as if they were universal maxims. This might have been consistent with their understanding of the Justinian text as truth, parallel to the revealed truth of the Bible, but it posed serious problems in terms of the Aristotelian logic they thought they were emulating. In the words of Berman:

> *Aristotle had denied the apodictic character of dialectical reasoning. It could not achieve certainty because its premises were uncertain. The twelfth-century jurists of Western Europe, on the contrary, used the Aristotelian dialectic for the purpose of demonstrating what is true and what is just. They turned Aristotle on his head by conflating dialectical and apodictic reasoning and applying both to the analysis and synthesis of legal norms. In contrast to the earlier Roman jurists and the earlier Greek philosophers, they supposed that they could prove by reason the universal truth and universal justice of authoritative legal texts... Since Roman legal norms were true and just, they could be reasoned from, apodictically, to discover new truth and justice. But since they contained gaps, ambiguities, and contradictions, they had to be reasoned from dialectically as well; that is, problems had to be put, classifications and definitions made, opposing opinions stated, conflicts synthesized.*
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> *This was the first systematic application of St. Anselm's famous motto, Credo ut intelligam ("I believe in order that I may understand").*[43]

Related to the truth-character that the glossators attributed to the texts they expounded, and equally relevant to their work, was the assimilation of legal *regulae* to scientific laws.[44] In explaining this, I will borrow from Peter Stein's detailed look at the work of some glossators. Stein tells us that, for Bulgarus, a leading second generation glossator, a "*regula* was not primarily a norm but more like a scientific law, such as the law of gravity, i.e. a generalization from a number of regularly occurring instances".[45] This attitude towards the *regulae* explains the ease with

[43] BERMAN, *supra* note 3 at 140-141.
[44] One must keep in mind that, at the time, scientific truth and biblical truth were not considered separate: scientific truth was expected to confirm biblical truth, which was unquestioned.
[45] STEIN, *supra* note 19 at 135.

which they abstracted concrete texts and restated them as maxims that could harmonize with each other. It also helps explain the deduction, through syllogism, of legal consequences from abstract (or, more precisely, abstracted) *regulae* as if they logically followed. According to Stein, Bulgarus presents the rule as being constituted by a series of preexisting situations of fact. "The *regula* converts the single instances into a universal proposition"[46] through the process of induction, so that the legal rule parallels the law of nature. This process was linked to the role the Greek notions of *genus* and *species* played in understanding the *reguale*. A rule that emerges from finding the common element in singly occurring instances was understood as a *genus* and encompassed many *species* (i.e. singularly occurring instances). "The *regula* is thus likened to a *genus* comprehending a number of *species*".[47]

Regulae, however, were not only understood as general descriptive statements of what law is; they became normative statements that made new law. Thus, the descriptive and normative functions of finding *regulae* came to be confused.[48] This expansive understanding of the attributes of the *regulae* of legal texts was coupled with a blurring of the distinction between the *regulae* and the glosses medieval jurists made to those *regulae*. By the late 12th century, civil lawyers had borrowed these glosses or commentaries, called brocards, from canonists to serve as collections of

> *...short general rules, each supported by references to the texts. Often, but not always, one rule is followed by another which seems to contradict it, also backed by texts. The essence of a brocard was coming to be a generale, which could be used as the starting point of a legal argument... There is little difference between a generale (or brocard) and a regula, except that a regula was normally found stated in the authoritative texts, while a generale was manufactured out of materials found in the texts.*[49]

Once the normative character of the *regulae* was considered and the commentaries on the texts formulated in a short and general manner, the three degrees of propositions (particular rule of a decision, universal *regulae* and general brocard) were easily confused. As this happened, the descriptive and normative functions of the practice of medieval jurists were increasingly harder to distinguish. The move of attributing normative qualities to *regulae* had already been taken by canonist glossators before civil glossators reached that point: "Gratian had explained *regula*... as

[46] *Id.* at 135.
[47] *Id.*
[48] *Id.* at 137-142.
[49] *Id.* at 144-145.

deriving from *regere*, rule, or *rectus*, right, and as being a norm of conduct, prescribing what was right or correcting what was wrong".[50]

Whichever way civil or canon lawyers arrived at attributing normative or lawmaking qualities to meta-legal interpretations of legal texts, this movement foreshadows the decoupling of juristic analysis from the authoritative text and the independent normative authority that juristic work would acquire in later times, as we will see when we look at the work of Thomas Aquinas and its effects on the legal doctrines of the Second Scholastic.[51]

In short, medieval legal sciences relied on the use of logical tools, such as induction and deduction, classification in *genus* and *species*. Through them, increasingly abstract legal propositions with increasingly normative roles were developed. In doing so, the distinctions between apodictic and dialectic reasoning became blurred, as well as the distinctions between particular rule, universal rule (*regulae*) and commentary (*generale*). This conflation was enabled by the truth-character they attributed to the authoritative texts expounded. In the background, there was the assumption that legal texts expressed truths of unquestioned authority, in a manner similar to the way in which religious texts expressing divine revelation.

5. *The* Ius Commune: *A Leap of Faith*

Late medieval jurists therefore held the mutually exclusive belief that the texts they were expounding were simultaneously known truths and problematic propositions.The gaps and inconsistencies which required dialectical reasoning resulted from the unsystematic nature of the texts themselves. However, their understanding of it as a system emerged out of a leap of faith that owed much to the assimilation of authoritative legal texts to authoritative religious texts. Their use of particular rules as universal maxims was premised on the idea that "every legal decision or rule is a species of the genus law. This made it possible for them to use every part of the law to build the whole, and at the same time to use the whole to interpret every part".[52]

The Scholasticism of the glossators seems to have been built on a series of contradictions which today seem untenable and betray the Aristotelian foundations on which they were built: confusing particulars and universals, rules and maxims, *obiter dicta* and central statements, analogy and distinction, apodictic and dialectic reasoning, known truths and debatable propositions. This is understandable, however, in a world in which moral precept and statement of truth, reason and revelation, secular and sacred, are confused to the brink of equation. All of this is

[50] *Id.* at 144. Stein mentions the turn to a normative understanding of *regulae* as simultaneous with the confusion between *regulae* found in the text and *regula* as the product of juristic induction: "As the notion of *regula* was being blurred by the discussions of the canonists, so the distinction between *regulae* and brocards was also disappearing", at 144.

[51] See *infra* "III. Creation: The Ascent of Legal Doctrine" at 13.

[52] BERMAN, *supra* note 3 at 140.

incomprehensible if the quasibiblical nature of the *Corpus Iuris Civilis* is not brought to the forefront.

A true, complete and consistent body of law was the premise, not the product, of the endeavor of jurists. This enterprise was made possible by belief; by the collapse of a series of dichotomies: Justice and Truth, biblical authority and imperial authority, certainty and polemic, particular and universal. Quite literally, a leap of faith enabled the display of scientific inquiry.[53]

Whatever the problems with the legal science developed by jurists of late medieval Europe, it lay the foundations on which Western jurisprudence would be built over the coming centuries. A complete, coherent and consistent body of law as the basic assumption; the truth-character attributed to legal propositions and the corresponding study of law by means of working out the logical consequences of those propositions; a marked tendency towards increasing abstraction; and the normative character of juristic commentaries were all elements which, in one way or another, came to determine the development of legal science and positive law in the West. Methodologically, the premises of completeness, truth and normativeness coupled with tools of abstraction would prove long lasting.

At the close of the Middle Ages, in the midst of major historical events like the end of the *Reconquista* in Spain, the Reformation in Central and Northern Europe, the circumnavigation of Africa and the conquest and colonization of America, a great transformation in legal thought would be engendered. This time, however, it would come not from the professional class of jurists, but from a different profession, also grounded in the university: theologians.

III. Creation: The Ascent of Legal Doctrine

In the 16th century, Catholic theologians faced the challenges of the Reformation. In response, they refurbished their doctrines by recasting all mayor fields of knowledge, including law, in what had become Catholic orthodoxy: Thomistic theology. This recasting had a profound impact on law and legal studies resulting in a shift from revelation to creation as the source of knowledge about law.

Professor James Gordley[54] holds that the doctrinal structure of private law is common to all Western legal systems, including both common law systems and civil law systems, and has the same origin:

[53] Thus Berman's reference to St. Anselm's motto see BERMAN, *supra* note 3 at 140-141.
[54] JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (Clarendon Press, 1991).

In the sixteenth and early seventeenth centuries, a fairly small group of theologians and jurists centered in Spain self-consciously attempted to synthe-size the Roman legal texts with the moral theology of Thomas Aquinas. The fundamental concepts and doctrines of private law with which we are familiar are a simplification of the synthesis they achieved.[55]

> *I will follow Professor James Gordley's thesis that Aquinas's contribution to legal doctrine lies in the Aristotelian methodology which he himself applied to the study of marriage and promises. Aquinas set the example that Salamantine theologians and jurists would systematically follow in constructing legal doctrines.*

The fairly small group of theologians that Gordley refers to is the Salamanca School, also known as the Second Scholastic or the Spanish Natural Law School. It was composed of two generations of theologians and jurists and was fathered by Francisco de Vitoria in the early 16th century at the University of Salamanca. Thomistic philosophy had resurged at the start of the 16th century at the University of Paris, headed by the Dominican Pierre Crockaert.[56] His pupil there, Francisco de Vitoria, returned to his native Spain in 1526 to the University of Salamanca where he remained until his death 20 years later.[57] The turn to Thomas Aquinas needs to be under-stood in the context of the Reformation: against the "evils" of philosophical nominalism, religious Protestantism and political absolutism,[58] the Salamantine thinkers opposed a view of the world which supported the notion that truth and faith were accessible to humankind by means of natural reason. Legal inquiry, as deployed by the Second Scholastics, pivots on the idea of creation as the source of legal knowledge. It is in nature that they find the source of authoritative norms.[59] Like the previous model built around revelation, this model too finds the ultimate source of authority in divinity. However, in this case, divinity is manifest through nature and not only revelation, and is grasped through observation and reflection and not only by making sense of authoritative texts. The shift to inquiring into nature rather than text does not mean that creation displaced revelation or doctrine replaced text; rather, the idea was that doctrine and nature could speak where text

[55] *Id.* at 3
[56] *Id.* at 69.
[57] At Salamanca, Vitoria taught a generation of theologians and jurists who constituted what is known as the Second Scholastics. Most prominent among these were the jurist Miguel de Covarrubias (1512-77) and the Dominican theologian Domingo de Soto (1494-1560). Later names associated with the School of Salamanca were the Jesuit theologians and metaphysicians Luis de Molina (1535-1600) and Francisco Suárez (1548-1617). See ANTHONY PAGDEN, *Introduction* to FRANCISCO DE VITORIA, POLITICAL WRITINGS (Anthony Pagden *et al.* eds., Cambridge University Press, 1991).
[58] GORDLEY, *supra* note 54 at 70. According to Villey, the Jesuits especially, in their struggle against Protestant heresies, sought in Thomas ideas that would defend human liberty and human participation through personal merit, in salvation. VILLEY, *supra* note 32 at 345.
[59] Of course, the ultimate source remains God Himself, but for mankind the principal source of knowledge of God's will (or reason) shifted from His revelations to His Creation

and revelation were silent. The more the text was silent, however, the more important doctrine would become. The relationships between revelation and creation and between divine law and natural law in theology and moral theology are mirrored in the relationship between legal text and legal doctrine in legal science.

Going beyond Professor Gordley's concern with the origins of contract doctrine, I argue that the importance of the Salamanca School in the history of legal thought also relates to the *place* they gave legal doctrine in their work: a place of preeminence with regard to legal texts. The metaphysics and epistemology of Thomas Aquinas on which the Salamantine jurists and theologians relied enabled a shift in the *locus* (location) of the source of authority of the law from specific texts to nature. This shift resulted in the increased importance of doctrines since nature had to be interpreted to render normative guidance. Eventually the emphasis on legal doctrines cast a shadow on the texts themselves.

1. *Doctrinal Work of the Second Scholastics*

Most participants in the Salamanca School were trained as theologians, not as jurists. To convey the importance of their work in law, I will illustrate the doctrinal legal work with some examples, relying on Professor Gordley's detailed and illustrative analysis of their work on contract doctrine.

In discussing contracts, the Salamantines were concerned with a myriad of problems which ranged from such broad fundamental issues as the binding force of contracts to issues as detailed as how one can determine the just price of things. The keystone to the development of their doctrines was to explain the binding force of contracts as a function of the Aristotelian-Thomistic virtues of fidelity (promise-keeping), commutative justice (fair exchange) and liberality (gift-giving).[60] They distinguished between different contracts, which they understood as accepted promises (therefore involving the virtue of promise-keeping), by determining whether they constituted an exercise in the virtue of commutative justice or in the virtue of liberality.[61]

They explained that, by virtue of fidelity (promise-keeping), contracts performed in exercise of liberality (and thus not directly resulting in an injustice if the obliged party did not perform) were as binding as those made in exercise of commutative justice. In consequence, "every enforceable contract had to be made for one of two *causae* or reasons: 'liberality' or the receipt of a

[60] For a fuller analysis of the Salamantine work on the binding force of contract, see GORDLEY, *supra* note 54 at 71-82. The following remarks will be basically a rough summary of those pages, tailored to illustrate what seems most interesting to the issues at hand.

[61] This classification in function of Aristotelian virtues, Gordley tells us, was already present in the works of Bartolus de Sassoferrato and Baldus de Ubaldis, but unlike the Salamantines, they did not derive theoretical implications form the distinction, but used it only to explain the Roman texts. GORDLEY, *supra* note 54 at 77-78.

performance in return for one's own". In other words, they had to be made either for *causa gratuita* or *causa onerosa*.[62]

They drew important theoretical implications from the distinction of the reasons or causes for making a contract. Since contracts were promises made in exercise of a virtue it was important that the circumstances (who? what? when?) of the contract be detailed in accordance with such virtues.[63]

The detailed issues they raised and attempted to solve were then fit into this virtue-oriented definition of contracts. Depending on the virtue exercised, the enforceability of a contract began at one point or another (when the offer was accepted or when it was first made).[64] Also, the conditions to be met in terms of the understanding and willingness of the parties would be different.[65] The answers to questions, such as "what types of contracts can be made?", "what is required in making them?", "what is presupposed?", "what is implicit?" and "what is allowed?" in each type of contract, were all related in some way to the virtue in pursuance of which the contract was entered.[66]

The method they used to address their concerns "proceeded by defining an object of study and then extracting consequences from the definition"[67].

A definition is first constructed by looking at the end that is pursued, and then filling in the definition of the concept in accordance with that end. Diverse consequences can, thereby, be derived from the definition. The method is characterized by being *both* teleological and conceptualist. It is based on a method developed by Aristotle and applied by Thomas Aquinas to promises and to the contract of marriage, from which the Spanish jurists borrowed it. In Aristotelian thought, the definition captured the "essence" of a thing, stating it in terms of the *genus* to which it belongs and the *specific difference* that sets it apart from other things in that general class. The *essence* was a mental image corresponding to the *substantial form* —the set characteristics of a thing that make it what it is— of a thing; such characteristics are derived by looking at the causes (material, formal, efficient and final) of a thing, most importantly —for the Second Scholastics— the *final cause*. For Aristotle, the *final cause* refers to the characteristic way in which a thing behaves, not its conscious purpose.[68] As the Second Scholastics used the idea of

[62] For Gordley's discussion of the doctrine of *causa*, see GORDLEY, *supra* note 54 at 77.
[63] "If one promised neither to give 'to the right persons, the right amounts, at the right time' nor to receive an equivalent in return, one was exercising neither virtue. One was lacking in prudence or else dishonest". GORDLEY, *supra* note 54 at 78.
[64] See GORDLEY, *supra* note 54 at 79-82.
[65] See *id.* at 82-93.
[66] *Id.* at 93-111.
[67] *Id.* at 14.
[68] Several details need to be explained at this point. In Aristotelian thought, there was a difference between natural things and man-made things in the manner in which the *substantial form* or *formal cause* related to the *final cause* of a thing. For Aristotle, the *final cause* of naturally occurring things and their *formal cause* (or *substantive form*) were the

final cause or *end* in building legal concepts, the final cause *was* understood as the conscious purpose of the person that engaged in the legal activity. Starting from that purpose (or rather from the purpose they assumed people must have), they defined the legal concept. With a definition at hand, they derived legal consequences that implied the legal rules that were to regulate that activity.

The whole approach was based on the Aristotelian apparatus for under-standing things, which when applied to developing legal concepts provided the basic metaphysical assumptions on which they were built.[69] In the *Physics*, Aristotle held that "we know a thing only when we can say why it is as it is —which in fact means grasping its primary causes—..." which he explains one by one.[70] First, he mentions the *material cause*: "In one sense, what is described as a cause is that material out of which a thing comes into being and which remains present in it. Such, for instance, is bronze in the case of a statute..."[71] Next, the *formal cause* (or *substantial form*): "...the form and pattern are a cause, that is to say the statement of the essence genera to which it belongs...".[72] Here he refers to the characteristics which classify something as belonging to a particular species within a wider genus. Thus, the *formal cause* is expressed in a definition that locates something within a species and a larger genus. Then, there is the *efficient cause* "...the initiating source of change or rest: the person who advises an action, for instance, is the cause of the action; the father is the cause of his child; and in general, what produces is the cause of what is changed".[73] Lastly, he mentions the *final cause*: "There is what is a cause insofar as it is an end (*telos*): this is the purpose of a thing...".[74] Aristotle also states that "All the intermediate things, too, that come into being through the agency of something else for this same end have this as their

same thing; in contrast, for crafted or man-made things, the *final cause* and the *formal cause* were two different things. See Richard Bodéüs, *Aristotle* in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 65 (Richard H. Popkin, ed., 1999): "Unlike products of human art, in which the four causes will be different, in the case of natural things, the form and the end are one and the same...". This is important because the method used by Salamantine jurists in constructing a definition treated contracts or promises, that is, human actions, as naturally occurring things rather than human crafted objects. Intuitively, one would think that the analogy between an action and a craft is closer than an analogy between a human action and a natural object. However, if one thinks of natural objects as creations, concretely God's creations, and thus also involving agency, a closer analogy might be with natural objects; more on this below.

[69] The explanation that follows is taken directly from Aristotle. It might be more help-ful to the reader, however, to look at Gordley's explanation of the underlying Aristotelian metaphysics, GORDLEY, *supra* note 54 at 17-18.

[70] ARISTOTLE, *PHYSICS* II.3 (Robert Hooker trans., 1993) available at http://www.wsu.edu:8080/~dee/GREECE/4CAUSES.HTM.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* It is worth clarifying that, to Aristotle, as Gordley tells us, natural things do not have a "purpose" in the sense of having a conscious purpose, but rather "purpose" refers here to the way in which a thing tends to behave. Man-made things, on the other hand, are made with a conscious purpose. See *supra* note 68.

cause".[75] meaning that all the means that are brought about subsequently for the same end, share this end as a final cause, *e.g.* organs in a body or steps in a recipe.

Aristotle developed the theory of the four causes. With the Aristotelian method in hand, Thomas defined human actions such as the act of marriage. He understood the ends of actions to be the exercise of virtues, such as fidelity. With the example Thomas laid out, the Second Scholastics undertook the enterprise of systematically reformulating legal concepts and Roman law.

The importance of virtues in understanding human actions makes sense in Thomistic philosophy. Fulfilling the principles of natural law, specifically the most fundamental of them —doing good and refraining from doing evil— requires that people act virtuously. People need to draw on such virtues to obey natural law. The four cardinal virtues of Aristotle were key. Out of prudence, fortitude, temperance and justice, this last one was more directly involved in common political life. The virtue of justice, then, was the keystone of many of the laws concerning social interaction. All virtues are required to fulfill the natural law, and the virtue of justice is most relevant concerning the laws of human interaction. Behaving virtuously and fulfilling the law become synonymous.

The reformulation of legal doctrine carried out by the Second Scholastics consisted of systematically subjecting the different legal figures received from Roman law to the Thomistic model so as to build not only definitions of legal concepts, but also theories to go with the concepts. They would define a legal transaction and from that definition derive the obligations which followed for each party. Definitions were constructed by identifying an end for which the transaction served as well as a larger type, *genus*, to which the transaction belonged (*genus* was identified as a function of the virtue which was pursued; for example, whether it was an act of commutative justice or an act of liberality). The obligations derived from the definition were either a) considered included in the concepts used to establish the definition or b) they were necessary means to the end by virtue of which the contract was defined.

Let us explore the example of contracts as presented by Professor Gordley.[76] In trying to answer the question of when (and why) a contract is binding, the Second Scholastics, as we have seen, defined contracts in terms of an *end.* They defined contracts as promises made in pursuit of one of two ends: the virtue of liberality or the virtue of commutative justice. Their legally binding force came from the pursuance of those virtues.[77] When promises were made for a reason that could not be considered an exercise of either virtue (*i.e.* for a good *causa*), they were considered

[75] ARISTOTLE, *supra* note 70.
[76] See GORDLEY, *supra* note 54 at chapter 4. The following paragraphs are a simplification of some of the polemics the Second Scholastics dealt with as described by Gordley in that chapter.
[77] The normative obligation of behaving virtuously came from the most fundamental premise of natural law: do good and shun evil.

unenforceable. Contracts then, could be classified as either a) onerous, that is, made by a *causa onerosa*, if there were matching obligations by the parties involved and thus served the virtue of commutative justice, or b) gratuitous, that is, made for a *causa gratuita*, if the obligations fell only on one party and the other party received only benefits. By the implications of "commutative justice" and "liberality", this classification enriched the tautological affirmation that the person who makes a promise can either get something or nothing in exchange for the promise. The implications of the use of the two virtues for defining and classifying contracts were that it had to either impose *equivalent* obligations and benefits, depending on whether a contract was onerous or gratuitous, or give to the "*right* persons, the *right* amounts, at the *right* time", respectively.

Let us imagine the case of an onerous contract that exercised the virtue of commutative justice such as a sale of a horse. The price paid for the horse had to correspond to its value. It would not further commutative justice to trade a prize horse for 50 dollars. If the horse, on the other hand, is dead and is being sold as meat, 50 dollars might be adequate and 50,000 clearly would not. In any case, the price must correspond to the value of the object sold.

Let us now imagine the case of a gratuitous contract in exercise of the virtue of liberality such as donating money so that others feed the poor. It would be inappropriate to donate 5 dollars to establish a soup kitchen that would provide relief to the poor. It would also be inappropriate to donate blankets to a homeless shelter at the end of winter instead of at the beginning or else to give the money for establishing a soup kitchen to the local loan shark.

This classification had certain consequences when turning to other questions. For example, when considering the question of when a promise becomes binding (whether when made, when expressed or when accepted), Molina was of the opinion that in onerous contracts, and only in onerous contracts, the offer had to be accepted for it to become binding since by establishing mutual obligations, contracts required mutual consent.[78] Examples: it would be incorrect to consider that I would find myself obligated to give you 50 dollars for the horse carcass if you have not yet accepted to sell it to me for 50 dollars. On the other hand, it seems more reasonable for me to have an obligation to donate blankets at the beginning of winter once I have mentioned it to my friends (or the IRS) even if the homeless shelter has not yet found out about my kind offer.

In dealing with consent in contracts, the theories elaborated by the Second Scholastics again derived from the initial definition of a contract in terms of the ends pursued by the contract. Because contracting was purposeful action, the person must both *know* the essential elements of the action to be performed and *choose* to do them. They interpreted duress as affecting the choice element of consent while mistake and fraud concerned the knowledge element.

[78] See GORDLEY, *supra* note 54 at 80.

Here, Aristotelian-Thomistic metaphysics played a further role: the consequences of the action could be distinguished as being either of the *essence* of the action or merely accidental. A promisor needed only to understand and want the essential characteristics of an action in order to be bound, regardless of whether he wished to avoid or actually avoided other consequences. Example: I need to both *understand* that I have to pay 50 dollars in order to get the horse carcass and *want* to do so in order for the contract to be binding. If I thought you were donating it to me at the time I picked it up, it would not be binding for me to pay (but I would have to return your carcass). If you put a gun to my head so that I would agree to buy the horse's carcass, it also would not be binding.

As to the content of a contract, Aristotelian-Thomistic metaphysical assumptions also determined the theories. Here is where the teleological-conceptual character of the methodology becomes more evident and the definitions better rounded.

> *For the late scholastics, as for Thomas, once one had defined a transaction one could move from the definition to a description of the obligations that the transaction entails. One defined a transaction by identifying its end and placing it in some larger type or category of actions to which it belongs. Thus, as we have seen, Thomas classified the contracts familiar from Roman law by identifying them as acts of liberality or commutative justice and by identifying the end that each serves. Some contracts transfer ownership of a thing, as in a sale, some the use of a thing, as in a lease, and some transfer the thing for safe keeping, as in a deposit, or to secure an obligation, as in pledge and suretyship.*[79]

While the classification had been made by Thomas Aquinas, Second Scholastics — such as Conradus and Soto— attempted to "devise a system of classification that would encompass all possible contracts and reduce them to a set number of natural types".[80] The purpose of such classification was to identify types of contracts and the normative consequences that naturally followed from those types. Thus, the terms normally contained in different types of contracts were, in turn, classified according to a distinction developed by an earlier medieval jurist (Baldus), also inspired in Aristotelian philosophy:

> *The "essential" terms were necessary for a contract of a given type to exist and were the "original root" form which the "natural" terms arose. The "natural" terms were*

[79] *Id.* at 102-103
[80] *Id.* at 103. Soto's classification was later used by Grotius in developing his own classification; at 104

> *read into a contract when the parties had made no other express provision. The "accidental" terms were binding only if the parties mentioned them expressly.*[81]

In establishing the different "natural" types of contracts, the Second Scholastics established the "natural" terms that could be read into a contract, even if the parties had not agreed to them. Examples: 1) An *essential term* of a contract: that there is a price paid in exchange for the prize horse.

If I were to offer a beautiful hog in exchange for the prize horse, we would be talking about a different type of contract, not a sale. 2) A *natural term*: if we did not specify which prize horse was to be sold, that the prize horse should be a healthy prize horse with four legs. 3) An *accidental term*: that the price be paid in one dollar bills at the corner of Chapel Street and College Street at three in the morning by a clown dressed in a green ballet outfit. This system of classification of contracts and of terms of contracts still sounds familiar today in modern contract doctrine in the continental tradition.

So far, I have used examples to illustrate how the Salamantine theologians deployed the teleological-conceptual method in defining legal concepts, deriving consequences and developing doctrines. I now want to turn to the manner in which they used Aristotle's four causes, for it will help to better understand the impact of the Second Scholastics on later developments in legal thought. To do so, we must look at how Thomas treated human actions. In some respects, Thomas treated human action as Aristotle would have treated natural objects; in others, he treated human action as Aristotle would treat man-made things. When considering the causes of things, Aristotle held that, in natural things, *formal cause* and *end* (*i.e.* final cause) are one and the same; in the case of products of human art, each *cause* was a different thing.[82] In natural objects, the final cause "is whatever lies at the *end* of the regular series of developmental changes that typical specimens of a given species undergo... the *telos* of a developing tiger is *to be a tiger*".[83] The *formal cause* of a tiger is also to be a tiger: to have the characteristics proper of a tiger. In the case of a chair, the *final cause* is the purpose of the human that made it: to allow someone to sit down or to sell it in order to obtain money. The *formal cause* of a chair is to have the characteristics proper of a chair (the characteristics in the carpenter's mind before being imposed on the *material cause*, i.e. wood): a seat, some sort of support and a back.

[81] *Id.* at 105.
[82] See *supra* note 68.
[83] MARC COHEN, THE FOUR CAUSES, available at http://faculty.washington.edu/sm cohen/320/4causes.htm last visited September 29th, 2004 at 4:30 pm (emphasis is in the original text). Gordley explains a *final cause* in natural things as the way something "tends" to behave. See *supra* quote linked to note 69.

I hold that the way Thomas and the theologians of Salamanca under-stood human actions oscillated between these two kinds of things (natural and man-made). This produced a conflation among end, purpose and essence (*final cause*, *purpose*, and *formal cause*) of legal concepts. For now, let us concentrate on the methods and understandings of the Second Scholastics. On one hand, they treated human actions as man-made things, for they identified the *end* or *final cause* of the action with the *purpose* of the agent.

"According to Thomas, the essence of an action is defined by the end for which it is preformed. In that respect, an action is like a man-made thing such as a couch or a house. Such things are defined by the ends for which they are made".[84] On the other hand, however, the *end* of an action was identified with its essence or *formal cause*: "This concept in the mind that corresponds to the 'substantial form' is the 'essence' of a thing".[85] The identification of *formal* and *final* cause —in Aristotle— corresponds to natural things, not to man-made things. In treating human actions as analogous to crafts or actions in so far as *final cause* and *purpose* are identified; and analogous to natural objects in so far as *final cause* and *formal cause* are identified, the method produced —required— the identification of all three things (*purpose-end/final cause-essence/formal cause*) in dealing with human actions.[86] The result is that human actions —such as exchanging— when translated into legal concepts —such as contracts— become *essentialized* and *objectified*.[87]

They acquired the qualities of naturally occurring things and they become objective, constant and discrete entities which can be fully understood by grasping their essence. The

[84] GORDLEY, *supra* note 54 at 21

[85] *Id.* at 18.

[86] This conflation of *end, form*, and *purpose* is better understood if we consider that the notion of *purpose* is equivocal. "Purpose" can refer to the *intent* of the agent. Understood in this way, it seems proper to treat actions like man-made things and identify *end* and *purpose*. "Purpose", however, can refer to an immediate purpose, an immediately desired effect, regardless of whatever the ultimate goal may be. For example, if I walk three blocks to buy tickets for a concert, "walking" has the intent of providing me with concert tickets but it also has the immediate purpose of displacing me from one spot (my home) to the other (the box office). In the case of understanding "purpose" as immediate purpose, it seems correct to identify *purpose* and *formal cause*. It is a different thing, however if we try to equate *formal cause* with *purpose* if by *purpose* we mean something as mediate as living the virtuous life in adoration of God or some analogous end. When discussing an end as distant as that, one cannot equate *final cause* and *formal cause* without further specifying a sequence of immediate ends that link each one as a means to an ultimate end. However, we must keep in mind that Thomas and the Second Scholastics were concerned with moral law. Any "immediate purpose" needs to be understood in its relation to the ultimate purpose of human- kind when we are concerned with the morality or normative quality of human activity. If I walk to the box office to steal the tickets I am not likely to forward my ultimate purpose as a human being (whether that ultimate purpose is related to my rational potential, as in Aristotle, or my relationship to God, as in Aquinas)

[87] By "essentialized" I mean that actions are considered only in their essence, that is, only the necessary and sufficient conditions that are thought to make something what it is in detriment of the highly contextual and specific "accidents". By "objectified" I mean that actions are treated as discrete, abstract entities, understandable independently of context, with an objective, true essence. These two characteristics make for the consideration of actions as things that are fixed, constant and abstract. This contrasts with an understanding of actions as deeply imbedded within a context outside of which they are not meaningful

difference between their ends and their essence is erased, and thus the end becomes necessarily fixed.

Let us now turn to the normative implications of this understanding of the theory of the four causes. In defining an action and drawing normative consequences from that definition under the Aristotelian-Thomistic methodology, we are engaged in a process that inserts an intermediate step in purely teleological reasoning, rendering a richer ground from which to draw normative implications. We cannot engage in only a two-step process in which one identifies the end of an action and derives proper action to be taken in pursuance of that end. We need to at least a) identify the end or ends, b) develop a definition of a concept that accounts for that end, and c) draw consequences from the concept.[88] What is more, step b), developing a definition, requires accounting for the other causes of something, at least the material and efficient causes. Introducing a definition that must account for causes other than the final cause further complicates teleological-conceptual reasoning and sets it apart from simpler teleological reasoning. Because in Aristotelian-Thomistic methodology one is necessarily involved in teleological inquiry when constructing concepts, the two processes are intertwined. "Conceptual reasoning, by which one moved from a definition to its consequences, was therefore inseparable from teleological reasoning, by which one moved from a desired end to a conclusion about the appropriate means".[89] Concepts and definitions play a central role that goes beyond the means-to-ends reasoning structure of pure teleological thinking. We are before teleological-conceptual reasoning.

Many of the issues that the Second Scholastics dealt with were not new and the solutions they proposed to concrete problems had often been advanced before, either by Thomas or by medieval jurists. What is important in the work of the Salamantine theologians is that they engaged legal questions by developing concepts and theories that allowed them to treat the problems the texts presented in a consistent manner and provide more coherent sets of solutions for the different sets of problems. They dealt with the problems *systematically*, through *concepts* and elaborate *doctrines* that attempted to solve legal questions in an *integrated* manner. They faced legal *problems*, rather than legal *texts*.[90]

We can summarize the methodology of the Second Scholastic as follows:

a) constructing a definition of a concept in reference to the *ends* pursued and its specific differences, and then b) extracting consequences from that definition. Gordley has called this teleological-conceptual thinking. The two basic moves worked by applying Aristotelian

[88] Of course, a) and b) are performed as one and the same step, for identifying the end is simultaneous with constructing a concept by intersecting the other causes. But here we want to distinguish this type of reasoning from teleological reasoning that goes directly from the identification of an end to the identification of the proper means to that end.
[89] GORDLEY, *supra* note 54 at 22.
[90] Although the problems they deal with were found in the texts, it was making sense of the problem rather than making sense of the text that interested the Second Scholastics

metaphysics to a Thomistic world in which, being designed and created by a deity, everything is ordered around final causes; in other words, it is purposeful and accessible to reason. This allowed for the identification of purpose and essence, and resulted in the objectification and essentialization of human actions.

Let us now turn to the theological and epistemological foundations of the methodology.

2. *The Importance of Aristotelian-Thomistic Metaphysics*

The metaphysical assumptions and methodology underlying the Second Scholastic's doctrinal work were directly taken from the 13th century Dominican theologian Thomas Aquinas. The importance of Thomistic philosophy and metaphysics, as understood by the Spanish theologians, lies not only in that it provided the blueprint for developing legal doctrine in very peculiar and elaborate ways, but also in that it *justified* the *need* for such doctrines and underlined their importance.

The Aristotelian-Thomistic world is a place created by God and imprinted with order. Furthermore, it is a world *knowable* to the human mind through reason because God implanted human reason in people to share in His divine reason. It is a world inhabited by substances. These substances, created by God according to His divine reason, are subject to the meta- physical model discussed above. Thus, they belong to a genus and a species, have specific differences, final causes, natures, substantial forms, accidents, material and efficient causes, etc.[91] In such a world, what is good is for each thing created by God is for it to follow its proper order, as ordained by God when He established its nature.[92]

Michel Villey explains why, in such a world, knowing nature, specifically human nature both requires and constitutes a moral philosophy.[93] As all else, humans must follow their nature and they must do so in two ways: instinctively, because they share in the class of animals; and rationally, because rationality is the specific difference which distinguishes humans from other animals. This rationality implies that humans have the liberty to act according to, or contrary to their nature. If, because of their rationality, they can act according to or contrary to nature, it is important that they procure themselves of the rationally ascertainable guidelines that will point them toward the good, towards the realization of the potential that corresponds to their nature. Inquiring into human nature thereby acquires a normative dimension. Moral philosophy, which is to guide human liberty, must be an ordering of human life towards the ends proper to human nature.

[91] See *supra* note 69.
[92] See *supra* note 69 for the technical meaning of "nature" in Aristotelian-Thomistic thought.
[93] VILLEY, *supra* note 32 at 125

Thomas's intricate and sophisticated theory of knowledge[94] explains not only how we know the world but also how we make practical (including moral) deliberations for "[p]*ractical understanding differs from theorizing only in intention*" and "[b]eing good and being true imply one another: we value truth as a good, we perceive goodness as a truth about things".[95] This "general theory of knowledge", as Villey calls it, is the one Aquinas applied to questions of law and justice.[96]

In Aristotelian-Thomistic thought, all knowledge of nature comes through the senses.[97] In contrast, all moral knowledge is known in two ways: a) either directly from God (in Scripture, for instance), or else, b) as does knowledge of nature: through the senses.[98] This, for Villey, has two consequences: first of all, the study of natural law will be based on "reality" (human reality that is); secondly, because the study of natural law is dependent on our actual experience of the world, our knowledge of natural law is perfectible, provisory and revisable.[99]

At the risk of oversimplifying the process, the Thomistic "general theory of knowledge" sounds something like this:[100] we perceive nature through the senses, but we perceive only specific things (say, concrete people), particulars. This, however, does not tell us much about the nature (say, human nature) of things or about moral law.[101] Through the process of abstracting[102] the common elements of specific, concrete things, we go from the concrete things perceived by our senses to genera and species, which allow us to understand nature: "Since we can only understand what is actually understandable (just as we can only sense what is actually there to be sensed), our minds need to make things actually understandable by abstracting their forms from their material conditions".[103] Through abstraction (*i.e.* induction) from experience we can understand: from specific movements we see general inclinations; from concrete desires, we

[94] In the traditional classification of the *Summa Theologiae* this "general theory of knowledge" is set out in Ia, qu. 79, qu. 84-89; in the edition by Timothy McDermott, which I used to consult directly the work of Aquinas, the traditional citation is not used, so I will make reference to both the traditional citation system and McDermott's edition. See *infra* AQUINAS, note 95 at 121-124 and 129-142.

[95] THOMAS AQUINAS, SUMMA THEOLOGIAE 123 (Timothy McDermott ed., 1989). Italics are in McDermott's edition. I refer to "natural law" in my text, but respect McDermott's translation in quoting it.

[96] In Ia IIae, qu. 94 he speaks of natural law, or, in McDermott's translation, "the law we have in us by nature"; in IIa IIae, qu. 57-79, Thomas deals with justice.

[97] VILLEY, *supra* note 32 at 126.

[98] "When authority is silent we can only believe what accords with nature. Now men naturally learn by sense-experience, so those born in a state of innocence would also have acquired their knowledge over a period of time by discovery and instruction, though without the difficulties we have. And, as infants, they would no more have had mature use of their reason than they had of their bodily limbs". Ia, qu. 101; AQUINAS, see *supra* note 95 at 149.

[99] VILLEY, *supra* note 32 at 126.

[100] The account that follows is, largley, a paraphrase of Villey's. VILLEY, *supra* note 32 at 126-127.

[101] According to Thomas, this perception involves only our *receptive mind* which is "*a sort of susceptibility*" of humans by which we become aware of what is. Ia qu. 79 art. 2, see AQUINAS, *supra* note 95 at 121-122.

[102] This process of abstraction is performed by the ability of the mind which Thomas called *agent mind* to distinguish it form the *receptive mind*. Ia, qu. 79, art. 3; see AQUINAS, *supra* note 95 at 122.

[103] Ia, qu. 79, art. 3; see AQUINAS, *supra* note 95 at 122.

understand ends; from ends, natures. Once we understand natures, we can deduct what is good and the distinction between what is good and what is bad is what natural law is. The science of natural law consists of inquiring into the ends and natures of humans through *observation* so as to determine what is good and what is bad. In Thomas's world, natural law is not fixed. Thomas acknowledged the essential mobility of human circumstances, and even seems to acknowledge that human nature itself is capable of change.[104] Thomas says that there is an eternal law, but according to Villey, we should understand this in the sense that from the existence of *a* permanent law (do good and avoid evil), it does not follow that all law is fixed. The law which states that we should do good and avoid evil is purely formal. As soon as we derive laws from that first law, we enter contingent and conditional ground.[105]

So much for the place of natural law in Thomas's "theory of knowledge". Natural law is not positive law, and in the work of Thomas they are not to be confused. It is still necessary to further explain the link between the two in order to understand why this Thomistic science of natural law, based on the observation of nature, is relevant for the "doctrinalization" of positive law. We need, therefore, to understand the links between natural law and human law in Thomistic thought.

Positive law is the product of human law-making, not God's. Like other types of laws, it must fulfill the four elements that define law: "law is an ordinance of reason, for the general good, made by whoever has care of the community, and promulgated".[106] Unlike other types of laws,[107] the reason that ordains it is not God's, but rather human reason, which is what we share of

[104] VILLEY, *supra* note 32 at 129-130.
[105] *Id.* at 130.
[106] AQUINAS, *supra* note 95 at 281. Iallae, qu. 90, art. 4. It should be mentioned that the need for law is part of human nature, for, following Aristotle, Aquinas starts from the assumption that humans are social animals by nature, and to order life in society, we need laws to establish what is rightly allocated to whom. AQUINAS, *supra* note 95 at 281. Iallae, qu. 90, art. 1-2.
[107] Thomas believes that there are *four types of law*: a) eternal law: "The plan by which God, as ruler of the universe, governs all things, is a law in the true sense. And since it is not a plan conceived in time we call it the eternal law". AQUINAS, *supra* note 95 at 281. Iallae, qu. 91, art.; b) natural law: "Everything God plans obeys the standards of his eternal law, and bears the imprint of that law in the form of a natural tendency to pursue whatever behavior and goals are appropriate to it. Reasoning creatures follow God's plan in a more profound way, themselves sharing the planning, making plans both for them- selves and for others; so they share in the eternal reasoning itself that is imprinting them with their natural tendencies to appropriate behavior and goals. This distinctive sharing in the eternal law we call the natural law, the law we have in us by nature". AQUINAS, *supra* note 95 at 281. Iallae, qu. 91, art. 2. c) human law: "Reason when pursuing truth starts form premises which cannot be proved but are known by nature, and draws conclusions that belong to the various different sciences: these we do not know by nature but work out by reason. In the same way [when planning action] man's reason starts from injunctions of law he has by nature as if from general premises that need no proof, and arrives at more particular arrangements which, provided they fulfill the other defining conditions of law previously mentioned, are called human laws". AQUINAS, *supra* note 95 at 281. Iallae, qu. 91, art. 3; and d) divine law: "Since the law of men is not enough to check and guide what goes on within us, we needed a law of God as well". AQUINAS, *supra* note 95 at 282. Iallae, qu. 91, art. 4. God provides this law through revelation, concretely through the Bible in the Old and New Testaments: "The law of God divides into the Old Law and the New Law, less and more fully developed versions of the same thing, like child and grownup". AQUINAS, *supra* note 95 at 282. Iallae, qu. 91, art. 5.

divine reason.[108] Human law is necessary because natural law is indeterminate in its details. Statements of natural law are as broad as first premises and need further determination according to particular circumstance: "The injunctions of the law in us by nature are to reason planning action what the first premises of the sciences are to reason pursuing truth: self-evident starting points".[109] But natural law only gets us so far, for, in deducing from the premises of natural law, natural reason may fail. Even when it does not fail, proper deliberation on how to guide our actions must also take account of the specificities and particular circumstances of a community and thus deal with specific situations in which natural law would be inappropriate or else to which natural law doesn't speak:

What makes man human is his rational soul, so all men tend by nature to act reasonably, which is to act virtuously. That does not mean that the law which is in us by nature prescribes every specific act of every virtue that can be defined; rather it prescribes the acts to which nature immediately inclines us, but not those that only reasoned investigation can show help us live well.[110]

Through reasoned investigation, then, humans must further determine a course of action, which, when involving collective life, takes the form of law. This understanding of natural law as premises from which norms of action must be deduced requires certain clarifications to understand the need for human law. First, there are things to which natural law does not speak specifically "(attaching some particular penalty to a crime, for example)".[111]

Second, even when natural law speaks to a circumstance and thus the silence of natural law is not a problem; there might be need for exceptions.[112]

Finally, because of the possibility of mistakenly deducing a course of action from natural law, the correct consequences of the first premises of natural law should be reinforced and clarified in human law.[113] There is thus a need to determine and adapt the indications of natural law to particular circumstances.[114] So we need human law to keep us from straying from the thrust of natural law, to make exceptions when the particular circumstances of a case require so, and to provide us with specific determinations that do not follow from natural law.

[108] "For the light of natural reason by which we tell good from evil (the law that is in us by nature) is itself an imprint of God's light in us". AQUINAS, *supra* note 95 at 281. IaIIae, qu. 91, art. 2.
[109] *Id.* at 286. IaIIae, qu. 94, art. 2
[110] *Id.* at 287. IaIIae, qu. 94, art. 3
[111] *Id.* at 289. IaIIae, qu. 95, art. 2.
[112] "And secondary injunctions (which can be regarded as close consequences of these first premises thought less general) must remain right in the majority of cases, though exceptionally because of intervening factors they may change in some particular". *Id.* at 288. IaIIae, qu. 94, art. 5
[113] *Id.* at 286. IaIIae, qu. 94, art. 4 and 6.
[114] *Id.* at 287. IaIIae, qu. 94, art. 4.

Villey explains the relationship between positive law and natural law in Thomas Aquinas by stating that legislation of positive law is a continuation of the study of what is naturally just. All human law derives from natural law in two ways: either as a *conclusion* arrived at by reasoning from the first premises of natural law and applying it to the historical circumstances; or else as a *determination* by adding specific precepts from a plurality of possible specific precepts amenable to the vague precepts of natural law and in pursuance of their same ends.[115] In this understanding of positive law, the science of natural law does not speak so much *about* positive law as much as it speaks *to* positive law. The inquiries and products of the science of natural law take a prominent position in understanding, interpreting and reforming positive law. When the work of the jurist is to expound an authoritative text, the person that determines which is an authoritative text has the upper hand. When the *contents* of the authoritative texts are subject to criticism by reference to something authoritative outside *the* texts, experts become the authorities.

Michel Villey suggests that the work of Thomas Aquinas provided for a novel importance in the legislative function. In conceiving natural and divine law as incomplete for the comprehensive ordaining of human societies and in conceiving natural law as being subject to change, Thomas assigned a crucial place in the ordaining of communal life to positive law which must fill in and complete the ordering of natural law.[116] The work of the legislator became more important. At the same time, however, it also became far more susceptible to the criticism of jurists in so far as its authority depended in one way or the other on its conformity to natural law, which specialized jurists studied by looking *outside* the authoritative texts and through their science, interpreting human nature. Doctrine, the product of legal science, became the dominant source of the substantive contents of legislators' enactments. This preponderance of doctrine would last for centuries.[117]

Villey holds that the need to go beyond the authoritative texts to obtain law came about for several reasons. First, under the Augustinian idea that all law should be derived from (fixed) sacred texts, law was too rigid to adequately address the problems of the increasingly complex society of the late medieval period. Secondly, as the Justinian imperial figure receded as the centuries passed and the pagan origins of the texts and rules included in the Justinian compilation became increasingly clear, there was increased need to justify the authoritativeness of the Roman legal texts, which had already been in use for over a century. Finally, the solutions provided by the texts

[115] VILLEY, *supra* note 32 at 132, also AQUINAS, *supra* note 95 at 289-290. IaIIae, qu. 95, art. 2.
[116] *Id.* at 133.
[117] *Id.* at 133. And if we accept Professor Gordley's conclusions, doctrine as a source of legal substance has persisted beyond the French Revolution. See his book, GORDLEY, THE PHILSOPHICAL ORIGINS..., *supra* note 54.

themselves, both sacral and Roman, were insufficient, and thus required a philosophy which would not only justify them, but allow them to be adapted to the needs of the time.[118]

Whatever the causes of this shift from text to doctrine in the development of legal science, the use of a metaphysics to justify and a methodology to enable doctrine had profound repercussions on legal understanding. By philosophically grounding the creative role of doctrine, conferring authority as to what should be the contents of positive law to an expert class seems justified. The authority of such doctrines derives from their resulting from the proper use of method when inquiring into nature: the person expressing the doctrines needs no longer to be an authority herself.[119] Thus, the force of doctrine hinges on the acceptance of natural law[120] (and of its expositors). Independently of whether there are causal links, the consequences of Aquinas's work on legal thought were congenial with the flourishing of legislation that began in the later 13th century and continued into the 14th century.[121] The newfound relevance and abundance of positive law necessarily drew the attention of jurists away from the established texts of the *Corpus Iuris*. The juristic activity that systematically incorporated Thomistic notions to the study of law would follow suit in the late 15th and particularly the 16th centuries, thus reinforcing the compatibility of law and Thomistic theology.

Thomas Aquinas was not primarily concerned with law, and even less so with Roman law. Aquinas frequently turned to Roman and canon law, but mostly to support his arguments. He did not seek to explain law through his methods, but rather explain his methods through law. The move away from the texts was not Thomas's innovation. Legal science had been moving rules out of the text and transforming them into maxims and commentators had already departed from strict textual interpretation before the Second Scholastics reformulated law in Thomistic terms.[122] What Thomas's work represents is a substantive, well rounded philosophical framework which justifies, requires and enables a turn to something other than authoritative texts, while providing the methodological tools to do so. It articulated an understanding of the world that allowed — required— positive legislation while providing the basis for a normative doctrinal critique of that positive legislation.

If medieval jurists abstracted the legal rules of the *Corpus Iuris* or canon law on the premise of their authority, completeness and coherence, the Second Scholastics "doctrinalized" the systems

[118] *Id.* at 121-122.
[119] *Id.* at 166.
[120] *Id.* at 169.
[121] Villey believes Thomas's work had direct implications on the law and politics of the 13th century: "in explaining the need for positive legislation to adapt natural law to the concrete historical needs of a time, Thomas empowered political authorities to produce abundant *new* legislation". See VILLEY, *supra* note 32 at 174-175.
[122] James Gordley, *The Achievement of Baldus de Ubaldis (132?-1400)*, 4 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [Z.E.P.], 820-836 (2000) (F.R.G.).

of legal rules on the foundations of Thomistic metaphysics and methodology.[123] In doing so they assumed, as jurists, a more authoritative role. Arguably, the role of jurists would eventually become more authoritative than the texts themselves in the civil law tradition. The Second Scholastics deeply altered the role of the jurist.

The Second Scholastics also provided future generations with a body of doctrines that carried the methodology and metaphysics on which they were built into later centuries, when these metaphysics and methodology were no longer explicitly acknowledged. Just as some of Thomas'sGod's reason-law can be discerned by observing His creation even though we may not understand it, the methodology and metaphysics that Thomas bequeathed to the Second Scholastics remained imprinted in the doctrines the latter passed down to subsequent generations of jurists. Their creations still point towards their origins.

IV. Conclusions

The two models that underlie contemporary legal science emerged from medieval antecedents inspired by theological understandings of authority. The first of these models, the model of revelation, dates from the development, in the late medieval period, of professional legal studies at the university on canon law and civil law, together known as the *ius commune*. The concerns and methods of the *ius commune* reflect the influence of Scholastic theology: their interest in authoritative texts with quasi-sacred status. Their central work dealt with systematizing, through abstraction and the use of authoritative texts. The second model —the model of creation— dates from the 16th century, no longer part of the Middle Ages. However, it too emerges from a medieval scholastic theological tradition: Thomism. The model of creation is centered not on authoritative texts but rather on nature, as explained in doctrine. It deployed a highly sophisticated method of legal inquiry, which James Gordley labels teleological-conceptual, built on the Aristotelian four causes. Its central concern was with concept-building and drawing normative consequences from the concepts.

Other characteristics still present in the civil law tradition also find their origins in medieval legal thought: a reliance on concepts to work out normative solutions and a drive to abstract to higher and broader general principles are tied to the methodologies used in developing the civil law tradition. These historical roots also help understand the split personality of legal science, which on one hand imagines itself as the descriptive, scientific enterprise concerned with finding out what

[123] VILLEY, *supra* note 32 at 357.

law is, but on the other hand engages in vigorous normative claims of how legislators' errors should be ignored in favor of the true nature of this or that legal institution.

To understand the possibilities of law in the civil law tradition, we need to take a long, hard look and assess how and under what implicit assumptions it actually works. We can begin by understanding how we came to think this way. In today's secular legal world, it might be painful to look at how reliant on theological underpinnings our understanding of law is. It is, however, quite illustrative.

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