The Scholastic Analysis of Usury

JOHN T. NOONAN, JR.

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CHAPTER I

THE ROOTS OF THE THEORY

1. *The Teaching of the Church*

It will be well to know where the scholastics start and what guides them in their rational discussion of usury. There can be no question but that here the initiating force and illuminating rule for them were the positive teaching authority of the Church. Usury analysis would not have begun if the Church had not prohibited usury, and no other intellectual or economic force exerted so strong a pressure on the formation of the early theory. It is the Christian tradition as transmitted, taught, and interpreted by the living ecclesiastical institution which is at the origin of the scholastic discussion of usury.

If we take A.D. 750 as the beginning of the specifically medieval developments on usury and ask what particular sources of Christian doctrine determined medieval thought upon it, we shall not find any single source dominant. It is sometimes asserted that the Bible by itself was the chief influence.[1] But in the early development of the teaching on usury, only one Old Testament text was cited with any frequency, and it was only about 1050 that a specific New Testament text was decisively used. The Bible helped to form opinion against usury but its influence was not predominant. Of as much initial influence on the Middle Ages as the Bible were the writings of the Fathers against usury and the numerous condemnations of clerical usurers by earlier Councils. Taken together, the Bible, the patristic writings, and the Councils witnessed that the Christian tradition itself condemned usury, and it was the combined weight of these authorities, and no single authority by itself, that was responsible for the medieval position.

Moreover, the force of these sources lay not in their character of literary documents of a past age, as some historians tend often to regard them. Their force lay in the living teaching of the Church. What texts and documents the contemporary Church selected, and how ecclesiastical authority interpreted them were what was important for the medieval mind. Only in the context of the Christian tradition, to which these documents testified, but

[1] E.g., Wilhelm Endemann, *Studien in der romanisch-kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des siebenzehnten Jahrhunderts* (Berlin, 1874–1883), II, 359.

which they did not constitute, did the texts acquire full power. The Church stated what the tradition was and authoritatively declared what the documents meant. In particular, as far as the scholastic writers are concerned, since they began their analyses 400 years after the first medieval developments on usury, it is abundantly clear that what mattered for them was the biblical, patristic, and early conciliar texts which had been taken as decisive by medieval pontiffs and councils. Their concern was solely with these texts as understood and taught by ecclesiastical authority.

Appreciating the dominance of the theological teaching on usury, we may at once reject three hypotheses sometimes put forward to account for the medieval stand on usury. One gross hypothesis sees it founded on the doctrine of Aristotle.[2] But the medieval position was well established long before Aristotle was known in Western Europe. The Aristotelian teaching on money, when it belatedly came to the attention of the scholastics, was a simple auxiliary instrument of the usury prohibition.[3]

A more reasonable, but still erroneous, hypothesis suggests a direct causal connection between the scholastic usury theory and the economic conditions of the time.[4] The fact that later, in the sixteenth century, economic pressure to modify the usury theory clearly triumphed over logic and past opinion suggests that at every point the usury theory was equally responsive to economic needs, and that when we find the usury rule generally accepted, this acceptance must be understood as testimony to the economic wisdom of the law. But it is dangerous to generalize about one historical epoch on the basis of another, and it seems clear that what might be true of a period of Renaissance culture would not necessarily be true of a more religious period. The sixteenth century was a commercial, humanistic age, in which economic rationalism was already of importance. The early Middle Ages, on the contrary, were neither commercial nor humanistic; people were inclined to accept a bare theological rule simply because it was a theological rule and to apply that rule in all its bleakness. That the usury prohibition was accepted by the secular power and ratified by civil legislation is therefore no evidence that the mundane interests of medieval Europe led to the adoption of the prohibition. The hope of living by an ideal standard may much more

[2] Ernst Troeltsch, *The Social Teachings of the Christian Churches*, trans. Olive Wyon (New York, 1931), I, 320. Edmund Schreiber also at least overemphasizes Aristotle's place: *Die volkswirtschaftlichen Anschauungen der Scholastik seit Thomas v. Aquin* (Jena, 1913), p. 93.

[3] This point is well developed by G. Lefèvre in his introduction to *Le traité "De usura" de Robert de Courçon* (Lille, 1902), pp. iii–viii.

[4] F. X. Funk, *Zins und Wucher* (Tübingen, 1869), p. 48.

readily have brought about acceptance of the rule. Undeniably, the condition of the European economy in the ninth century was strikingly similar to that of the Judaic economy, in which the Mosaic law on usury was first applied,[5] and certainly the facts that the economy was almost completely agrarian and that borrowing was nearly always for consumption[6] were largely responsible for the emphasis upon the doctrine in the ninth century. The sudden zeal with which usury legislation is welcomed in this period may be partially understood as a last effort to save the small free farmers from absorption by the landholders who were the usual lenders. But it was in the twelfth century in Italy, as trade revived,[7] that the papal efforts to suppress usury became most strenuous; and it was in the thirteenth century, when the Italian city-states were already in an early capitalistic stage,[8] that the scholastic analysis of usury began. Even at this point of economic development there was probably a real need to prevent a choking of commerce by too high demands from the few possessors of liquid funds; and the bulk of the European economy remained agrarian. Conditions were still receptive to a usury rule. It is safe to say that there would not have been a rule in the shape it took, with the dominance it achieved, if economic conditions were not such as partially to justify it. But at the level of conscious motivation the theological decisions were more important to most scholastic authorities than the economic facts; and when one speaks of the origin of "the scholastic analysis," it is fair to say that the chief source was the prior ecclesiastical teaching.

We may more readily dismiss the suggestion that the usury prohibition was related to the Church's own interests.[9] It is true that one reason for papal concern over twelfth-century usury was the need to protect noble borrowers going on the Crusades.[10] Also, the papacy, like most governments, frequently resorted to deficit financing, while individual bishops and monasteries often had to seek credit from the cameral banking firms.[11] It is pos-

[5] Franz Schaub, *Der Kampf gegen den Zinswucher, ungerechten Preis und unlautern Handel in Mittelalter: Von Karl dem Grossen bis papst Alexander III* (Freiburg in Br., 1905), p. 66.

[6] Henri Pirenne, *Medieval Cities*, trans. F. D. Halsey (Princeton, 1925), pp. 46, 76; cf. Schaub, pp. 41 and 73–74.

[7] Pirenne, p. 113; Schaub, p. 147.

[8] Fedor Schneider, *Das kirchliche Zinsverbot und die kuriale Praxis im 13 Jahrhunderts*, in *Festgabe enthaltend vornehalich vorreformationsgeschichtliche Forschungen Heinrich Finke* (Munster, 1904), p. 146; cf. Henri Sée, *Modern Capitalism*, trans. Homer B. Vanderbleu, Georges Doriot (New York, 1928), pp. 7, 25.

[9] James Westfall Thompson, *Economic and Social History of Europe of the Middle Ages* (New York, 1931), p. 410.

[10] Robert of Courçon, *De usura*, p. 77.

[11] Edouard Jordan, *De mercatoribus apostolicae camerae in XIII saeculo* (Paris, 1909), pp. 117, 53. See also *infra*, Chapter VIII, section 2.

sible that the usury prohibition played a part in keeping the charges made by these firms moderate and the cost of papal finance low. At the same time, many churches and monasteries were heavily endowed and under a constant pressure to find suitable investments for their funds. The monasteries were, indeed, the chief lenders to the nobles departing on the Crusades.[12] The purchase of annuities by churches and pious institutions was on a very large scale.[13] The higher clergy, too, were generally men of wealth with money to invest or loan.[14] The papacy itself often had large idle sums on deposit in banks. Moreover, the cameral banking firms were so closely associated with the Holy See that their welfare was almost identical with the papacy's.[15] There was, throughout the Middle Ages, therefore, ample temptation to change the usury prohibition for a rule more favorable to investors, bankers, and creditors. But instead of yielding to this temptation, the Church insisted on a law which convicted of sin its most trusted emissaries and many of its highest dignitaries. At the beginning of the Middle Ages the evidence that the usury prohibition ran counter to ecclesiastical economic interests is even stronger: the usury law was first applied and told most heavily against the monasteries.[16]

No biblical or ancient Christian text by itself, nor Aristotle, nor economic conditions or interests, but the vital present authority of the teaching Church stands at the head of all later developments on usury.

2. *Development of the Positive Prohibition*

As a condition for understanding the scholastic analysis, we must now survey briefly the process by which the positive Christian law on usury was clarified and made explicit in the early Middle Ages. We shall be concerned to note the past and present authorities the medieval men found definitive on usury; the increasingly clearer notion of the essence of usury; the immensely important shift from treating usury as a sin of uncharitableness or avarice to treating it as a sin of injustice; and the extension of the usury prohibition so that it applied unmistakably not only to clerics, but to all

[12] Thompson, p. 394.

[13] On the Church's interest in the *census* contract, see the evidence offered by medieval contemporaries such as Henry of Hesse, *Tractatus de contractibus*, IV, Dub. 10ff., in John Gerson, *Opera omnia* (Cologne, 1484–1485), Vol. IV; and St. Antoninus, *Summa sacrae theologiae* (Venice, 1581–1582), Part 2, Title 1, c.8.

[14] William of Auxerre, *Summa aurea* (Paris, 1500), III:21:13, f.225v:a; also Matthew of Paris, *Chronica majora*, ed. H. R. Luard (London, 1874), V, 245.

[15] Jordan, pp. 119–127.

[16] R. Génestal, *Le rôle des monastères comme établissements de credit étudié en Normandie du 11^e^ à la fin de 13^e^ siècle* (Paris, 1901), p. 85; Schaub, p. 154; see also Schneider, p. 132.

men. We shall cite only the documents which bear significantly on these matters. Although there is never any real discontinuity in history, and any starting-point is to some degree arbitrary, we may begin with the commencement of Charlemagne's empire, for this period forms the immediate background of the medieval treatment of usury.[17]

The First Period, 750–1050

The *Hadriana*, a collection of canons, was to be the most influential body of ecclesiastical legislation for Charlemagne's empire. In it is contained the single most important document of the early Church on usury: the epistle *Nec hoc quoque* of Pope Leo the Great, a papal decree that categorically forbids clerics to take usury and declares that laymen who take it are guilty of seeking *turpe lucrum* (shameful gain). It is the most formal general prohibition of usury enunciated by supreme ecclesiastical authority before 1179. It forms the cornerstone of later usury legislation.

A number of early conciliar prohibitions of usury are also contained in the *Hadriana*, but all of them apply only to clerics. One, however, is of exceptional importance. It is a canon passed by the first general council, Nicea, and although it is aimed specifically at clerics, it includes a reference to Psalm 14 wherein the unrestricted and absolute rejection of usury is implied. The Psalm asks, "Lord, who shall dwell in thy tabernacle?" and answering by an enumeration of the crimes the just man avoids, it says, "He that hath not put out his money to usury." Both because it admits no exceptions and because of its use by the first ecumenical council, Psalm 14 becomes the favorite early medieval biblical text against usury.

At the same time that the *Hadriana* appeared, the Christian teaching found expression, for the first time in history, in the secular legislation of the State. Citing Nicea, *Nec hoc quoque*, the "Apostolic Canons," and the "law of the folk," the capitularies of Charlemagne forbade usury to everyone. That the State should ban usury, and ban it for laity as well as clergy, is an important event. Here in the formative age of medieval civilization, the usury rule is acknowledged by the secular power as obligatory on all Christians.

From this time on, State and Church both press the fight against usury. The Empire several times renews the basic prohibition; and the Nynweger capitulary of 806 gives the first medieval definition of usury. Usury, it declares, is "where more is asked than is given." The Church continues the

[17] For this summary of early legislation, Schaub has been closely followed: see especially pp. 19, 26, 28, 29, 30, 37–39, 58, 59, 61, 66, 121–122, 178.

battle by means of episcopal capitularies and by local and national synods, although the synods devote their attention chiefly to clerical usurers. The Paris synod of 829 shows a wider use of biblical authorities, citing, in addition to Psalm 14:5, Exodus 22:25, Leviticus 25:35–37, Deuteronomy 15:7–10, Amos 8:4–6, and Ezekiel 18:8, and, obliquely, the New Testament without specific reference.[18] The synod also uses St. Jerome's commentary upon Ezekiel where he declares that usury may occur in commodity loans of goods such as wheat, as well as in money. This commentary is of particular interest in that it rejects the natural commercial argument that the loan is the source of gain to the borrower, in which the lender is entitled to share. The contention is dismissed simply on the ground that usury is against God's command.

The Synod of Pavia in 850 excommunicates lay usurers and prescribes full restitution to their victims if living, or, if they are dead, at least half the usury taken to their heirs. The obligation of restitution is apparently intended as a penalty, rather than considered as a requisite of commutative justice which demands the restoration of stolen goods. The censures of this synod are the sharpest measures yet taken against lay usury. In 889 an episcopal capitulary contains the first legislation referring to usury taken by means of a contract. The tenth century, in which European economy and culture both reach their nadir, shows no development and less interest in the usury prohibition than the eighth or ninth.

To sum up, the first period, from 750 to 1050, sees the enactment of the usury prohibition into the law of the land in the Holy Roman Empire and much local legislation by bishops against usury, the collection of some biblical texts against usury, the rejection of the defense that the usurer is entitled to a reward for helping the borrower productively, and the recognition, in one influential collection of canons, of a papal condemnation of usury which is applicable to laymen. Nonetheless, the period's thought on usury is primitive. Strong sanctions are laid only against clerical usurers. The papacy sponsors no general legislation on the subject. Usury itself is barely defined, and

[18] The relevant texts, besides Psalm 14:5, read as follows:

"If thou lend money to any of my people that is poor, that dwelleth with thee, thou shalt not be hard upon them as an extortioner, nor oppress them with usuries." Exodus 22:25.

"If thy brother be impoverished and weak of hand, and thou receive him as a stranger and sojourner, and he live with thee: Take not usury of him, nor more than thou gavest. Fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury: nor exact of him any increase of fruits." Leviticus 25:35–37.

"And if a man be just and do judgment . . . [and] Hath not lent upon usury, nor taken any increase . . . he is just, he shall surely live, saith the Lord God." Ezekiel 18:5–9.

Amos 8:4–6 and Deuteronomy 15:7–10 have nothing specifically on usury, but urge the rich not to exploit the poor.

although it presumably occurs in loans, no attempt is made to define what a loan is. At no time is it said that usury is a sin against justice, nor is restitution of usuries prescribed as an obligation of justice. The generic category of usury remains *turpe lucrum*; and while the taking of usury is treated as a serious sin, it is denounced as a form of avarice or uncharitableness.

The Second Period, 1050–1175

The Christian teaching upon the subject enters a second stage of development around 1050. Its growth may be ascribed in part to a general development in learning, entailing a more detailed knowledge of the Fathers and a clearer realization of the nature of usury, and in part to the revival of trade. As commerce grew, it soon became clear that usury on business loans through which borrower-merchants made themselves profits could not very easily be condemned as greed or lack of charity.

St. Anselm of Canterbury (1033–1109), an Italian familiar with the commercial revival, is the first medieval author to suggest the similarity of usury and robbery.[19] This is one of the earliest indications that usury is to be considered a sin against justice. His still undeveloped comparison is then given real force by his disciple Anselm of Lucca, another Italian and the native of a city where the textile industry was just beginning to develop. In his collection of canons, made about 1066, Anselm of Lucca is the first medieval author to treat usury as specifically a sin against the Seventh Commandment, and the first to demand restitution of usuries as stolen goods. Anselm's classification of usury under theft is an influential precedent; it is followed by Hugh of St. Victor (1096–1141),[20] Peter Comestor (d. 1178),[21] and, above all, by Peter Lombard (d. 1160),[22] whose *Sentences* are of such importance in directing later medieval thought. Anselm is also the first to use a quotation from one of the Fathers as a canon upon usury; he cites St. Augustine's condemnation of usury and demand for restitution to reinforce his own position.

[19] St. Anselm of Canterbury, *Homiliae et exhortationes*, in J. P. Migne, *Patrologiae cursus completus, Series latina* (Paris, 1844–1861), CLVIII, col. 659 (hereafter cited as *P.l.*).

[20] Hugh of St. Victor, *Summa sententiarum*, Tract. IV, c.4, in Migne, *P.l.*, CLXXVI, col. 122.

[21] Schaub, p. 148–149.

[22] Peter Lombard, *Sententiarum libri quatuor*, Book III, Dist. 37, c.3, in Migne, *P.l.*, CXCII. Although the *Sentences* are the basis for so many later treatments of usury, there is nothing in them, except this determination that usury is against justice, which concerns the rational analysis of usury.

Even at this date what was to become the standard analysis of usury was not universal. In the work of Bartholomew of Exeter (c. 1150–1170), usury is simply treated as *turpe lucrum* and there is no attempt to define it in relation to a loan; see Bartholomew of Exeter, *Penitential*, ed. A. Morey (Cambridge, 1937), c.92, *De usuris*.

Ivo of Chartres (d. 1097) in his collection of canons, the *Collectio trium partium*, uses quotations from St. Augustine, St. Jerome, and St. Ambrose as canons against usury. One citation from St. Augustine points out that usuries, as stolen goods, may not be given as charity — a restriction which emphasizes the unjust character of their acquisition. Another citation from St. Augustine declares that usury occurs when you "expect to receive something more than you have given." Ivo does not emphasize the possibility of mental sin implicit in the reference to expectation but takes the text in a general sense as simply saying paraphrastically that usury is anything taken beyond the principal. The seeds of legal analysis are also apparent. Ivo's citation from St. Augustine specifically mentions a loan as the contract in which usury occurs, and Ivo distinguishes the loan from the lawful partnership contract, *societas*.[23]

In 1139, the Second Lateran Council prohibits usury to all men and declares that usurers shall be held infamous.[24] This is the first explicit decree of universal prohibition passed by a body of bishops having the absolute authority of an infallible ecumenical council. The Council is also the first general council to declare that usury is reprobated both by the Old and New Testaments. It does not, however, give specific references, nor does it say explicitly that usury is a sin against justice. Nine years later the central authority of the Church supplemented the conciliar decree with action aimed at a favorite practice of the monasteries.[25] Pope Eugene III decreed that mortgages, in which the lender enjoyed the fruits of a pledge without counting them towards the principal, were usurious.[26]

In 1159 the legal form of the usury prohibition received another stiffening and began to approach definitive shape with Gratian. His *Concordia discordantium canonum* is a collection of canons which, however modified and revised, form a part of the law of the Church until the complete revision of canon law in the new Code in 1917. It is an authority directly governing the scholastic writers throughout the medieval period. In it usury is for the first time treated as a special topic — a probable proof of the growing importance of the subject with the growing influence of commerce. St. Augustine, St. Jerome, and St. Ambrose, as well as the Nynweger statute under the erroneous title of the Council of Agde, are all used to prove that usury is "whatever is demanded beyond the principal." *Nec hoc quoque* of Leo the Great is still the most general ecclesiastical condemnation of usury which Gratian can cite, and Psalm 14 is his only biblical reference. The inadmissibility of usuries as charitable offerings is reaffirmed. Gratian particularly insists on the obligation of restitution as in theft.[27]

[23] Schaub, pp. 134, 160.

[24] Second Lateran Council, Canon 13, *Porro detestabilem*, in Karl Joseph von Hefele, *Histoire des conciles*, trans. H. Leclerq (Paris, 1907–1938), V, Part 1, 729. Local councils in the eleventh century had previously forbidden usury to all: for example, the council of Reims in 1049 under Leo IX (Schaub, p. 126), and synods at Gerona in Spain, 1068 and 1078 (Schaub, p. 128).

[25] Schaub, p. 155; cf. Génestal, p. 78.

[26] Eugene III, *Epistolae*, in Migne, *P.L.*, CLXXX, col. 1567.

The climax of the early medieval campaign against usury is reached with the vigorous actions of two twelfth-century popes, Alexander III and Urban III. Alexander (1159–1181) began by closing a loophole as important as the earlier one of mortgages. He declared that credit sales at a price higher than the cash price should be considered usury. Significantly, this is the first extension of the usury prohibition to cases where the explicit form of the transaction is not that of a loan. The Pope asserts that God will judge beyond the form of the contract.[28] Alexander III also determines that the Church cannot dispense from the prohibition against usury, even to raise money for such a worthy cause as the ransoming of Christian captives from the Saracens. His reason is that usury is "a crime detested by the pages of both Testaments."[29] It is thus made clear that usury is not merely a matter of a simple ecclesiastical rule. It is not yet, however, said to be against the natural law.

The Third Council of the Lateran, an ecumenical council presided over by Alexander in 1179, declares usury condemned by both Testaments, excommunicates and denies Christian burial to manifest usurers, and prohibits the reception of offerings made by them.[30] The Council notes that usury is waxing strong "in almost all places, so that many, leaving other businesses, exercise usury as if it were licit." The Pope later supports the Council by declaring that usurers who had taken usury before the decrees of the Council are not exempt from the obligation of restitution enjoined by it, except by reason of poverty.[31]

These strong measures are confirmed by Urban III (1185–1187). In a letter which becomes the decretal *Consuluit*, he cites the words of Christ,

[27] Gratian, *Decretum Gratiani*, Part II, Causa 14, Q.4, in *Corpus juris canonici*, ed. E. Friedberg (Leipzig, 1879–1881); and cf. Part I, Dist. 46, c.9 and 10.

[28] Gregory IX, *Decretales*, V: 19:6, *In civitate*, in *Corpus juris canonici*.

[29] *Decretales*, V:19:4, *Super eo*. It is curious that in his own writings as a canonist before he was elected to the papacy, Alexander III makes no reference to credit sales or to the intrinsically evil character of usury. His commentary on the subject is instead a trite repetition of earlier authorities. See Roland Bandinelli, *Die summa magistri Rolandi, nachmals papstes Alexander III*, ed. Freidrich Thaner (Innsbruck, 1874), C.14, Q.3.

[30] Third Lateran Council, Canon 25, *Quia in omnibus*, in Hefele, V, Part 2, 1105.

[31] *Decretales*, V:19:5, *Quam tu*.

"Lend freely, hoping nothing thereby" (Luke 6:35).[32] The immense importance of this citation can hardly be exaggerated. Here, for the first time in the entire tradition, a specific command of Christ is authoritatively interpreted by a pope as prohibiting usury. Henceforth, effectively unquestioned till Dominic Soto in the sixteenth century, Luke 6:35 will stand as an absolute divine prohibition of gain from a loan. Moreover, not only is the papal reference of the highest interest in itself, but the use made of it by Urban is of equal importance. He has been called on to decide two cases in which it is questioned whether usury is present. In one no contractual stipulation for usury has been made, but the lender would not lend without hope of gain; the other is the old case of sales at a higher price on credit. Urban decides both by the criterion of intention. The lender in each case intends to receive gain from a loan; this is prohibited by Luke 6:35; the lenders are therefore guilty of mortal usury. Again and again, scholastic writers will recur to this biblical text and to the Pope's application of it to show that intention to gain will alone constitute usury.

Conclusion

The development from 1050 is evident. Usury has now become a sharply defined notion. It is treated without hesitation as a sin specifically against justice. It has been localized in the loan contract, but some credit contracts taking usury in some other way than by a simple payment on a loan have been detected as evasions of the law. General papal and conciliar legislation with heavy sanctions has been enacted against the widespread sin. Biblical and patristic authority has been marshaled to condemn it, and "Lend freely, hoping nothing thereby" has been made a central text. By 1187, the date of *Consuluit*, the essential bases of the medieval position on usury have been laid: (1) Usury is whatever is demanded in return in a loan beyond the loaned good itself; (2) the taking of usury is a sin prohibited by the Old and New Testaments; (3) the very hope of a return beyond the good itself is sinful; (4) usuries must be restored in full to their true owner; (5) higher prices for credit sales are implicit usury. These five basic theses, which come not from the Bible alone, nor from Aristotle, nor result simply from economic conditions, nor are scientifically defended on a rational level, must be ascribed to the vital, active authority of the Church herself. They form the foundation of all later scholastic thought upon usury.

[32] *Decretales*, V:19:10, *Consuluit*.

CHAPTER II

THE PHILOSOPHICAL FRAMEWORK

Before examining the scholastic analysis of the injustice of usury in historical detail, we should investigate certain assumptions which are shared by all the scholastics and which are essential to their analyses of usury. These common elements of all the usury treatments concern the nature of law; the rightness of private property; the character of justice; the nature of profit; the place of intention in human acts; and the difference between public and private sinners.

1. *The Nature of Law*

Since the usury prohibition is first of all a matter of law, the scholastic concept of law underlies the scholastic analysis of usury. A firm belief in the rationality, immutability, and universality of law is at the heart of the scholastic approach to all moral problems; it is in this larger context that their discussion of any special moral question must be understood.

As is so frequently the case, the origins of a scholastic theory lie in a combination of Christian tradition, Roman law, and Aristotle. The Christian teaching on law begins with the Bible itself, and it is most succinctly stated in St. Paul's Epistle to the Romans. According to St. Paul's doctrine, there are three major kinds of law: the Law of the Old Testament, a divine revelation to the Jews; the New Law of the Gospel, also a divine revelation, which replaces the Old Law for Christians; and a law which is written in the hearts of all men, Christians, Jews, or pagans, and which binds them, even in the absence of revelation, to certain natural moral duties. The specifically Christian tradition on law is nothing but a commentary on these words of St. Paul.[1]

Even earlier, Aristotle had sharply distinguished between the merely local,

[1] Romans 5:20; 8:2; 2:14, 15. The influential *Glossa ordinaria* on the Bible gives the classic Christian interpretation of the Pauline text when it declares that by the last kind of law, St. Paul means "the natural law, by which man knows and is conscious of what is good and what is evil." Walafrid Strabo (d. 849), *Glossa ordinaria*, in Migne, *P.L.*, CXIV, col. 476.

changeable civil law and the natural law, which depended on no positive institution. The natural law, he said, bound all men, and although not completely immutable, was clearly different from purely conventional agreement.[2] But he did not develop this concept.

The Roman law similarly made a clear distinction between positive and natural law. The natural law, says Ulpian, closely following Aristotle, is "what nature has taught all animals." [3] The *ius gentium*, add the *Institutes*, is specifically human law, but it is the work of natural reason and rules all men; it is assimilated to the natural law in opposition to purely local, positive ordinances.[4] The natural law, the *Digest* notes, is as old as man himself, and there is no dispensation from its precepts.[5]

The Epistle to the Romans and the Roman law, which includes the Aristotelian notions,[6] furnish all the essential elements of the scholastic concept of law. Beginning with Gratian, we find unanimous acceptance of the major teachings of both Christian and pagan antiquity: there is a positive, local, mutable law, and there is an unwritten, universal, unchangeable law, which is rooted in human nature and undistinguishable from it.[7] The natural law may not be dispensed from by any human authority.[8] It binds all men. Its first principles are innate, though experience is necessary for their application or development.[9] Sometimes the natural law is considered in its subjective

[2] Aristotle, *Ethica Nichomachea*, Bk. V:7, in *Works of Aristotle*, trans. and ed. W. D. Ross (Oxford, 1928), Vol. IX.

[3] *Digesta Justiniani Augusti*, *Corpus juris civilis*, ed. T. Mommsen, W. Kroll, P. Krueger, and R. Schoell (Berlin, 1928–1929), I:1:1.

[4] *Justiniani Institutiones*, *Corpus juris civilis*, II:1:11. Cf. Gaius, who identifies the *ius gentium* and the law of reason, *Digesta*, I:1:9.

[5] *Digesta*, IV:5:8; VII:5:2.

[6] There is no evidence that Aristotle influenced the early scholastic writers on law, but it is abundantly clear that the Roman law, containing Aristotelian concepts, was of great influence, so that it seems best to include all initial Aristotelian influence under the Roman law.

[7] Gratian, *Decretum Gratiani*, D.5, D.6, D.13; cf. Rufinus, *Die Summa Decretorum des Magister Rufinus*, ed. Heinrich Singer (Paderborn, 1902), p. 6; William of Auxerre, *Summa aurea*, III:7:1; Alexander of Hales, *Summa theologica* (Quarrachi, 1924–1948), Bk. III, Part 2:2:4:1:1 and 2; St. Bonaventure, *In IV libros sententiarum*, IV:33:1:1, in *Opera omnia* (Quarrachi, 1882–1902), Vol. IV; St. Albert, *Summa theologica*, II:16:99:3:2, in *Opera omnia*, ed. A. Borgnet (Paris, 1890–1899), Vol. XXXIII. See also the opinions of Simon of Bisiamo, Huguccio, John Teutonicus, and William of Auvergne reported in P. Odon Lottin, "Le droit naturel chez S. Thomas et ses predecesseurs," *Ephemerides Theologicae Lovaniensis* (1924), I, 384ff. and II, 32ff. Lottin's series of articles are excellent on this whole subject.

[8] Gratian, D.13; Rufinus, p. 31; Huguccio, in Lottin, I, 385.

[9] The Platonic Augustinians hold that the natural law is known prior to experience and is an intuition of God. So William of Auxerre, III:7:1:4, and Alexander of Hales, III:2:2:1:2. The normally Platonic St. Bonaventure, however, as well as Aristotelians like St. Albert, hold that experience is necessary before the terms of the judgments of the natural law can be known, although the judgments will be self-evident on experience (St. Bonaventure, II:39:1:1; St. Albert, *Summa de creaturis*, unpublished MS. cited in Lottin, II, 47). All would probably agree that the natural law does depend on experience for application and even development.

principles, and then it is identified with reason itself; [10] sometimes it is considered in its objective content and then it is identified with what is taught by reason.[11] More broadly, it is considered by some authors to reside in the intrinsic tendencies of all beings or of all animals.[12] But, fundamentally, as it applies to men, these tendencies are considered natural only as they are governed by reason.[13] The natural law is usually said to teach such acts of animal necessity or common equity as the rightness of the union of the sexes, the procreation and education of children, the return of property held as a deposit, and the wrongness of adultery and theft.[14] Gratian sums up the natural law in the Golden Rule; other authors say it consists essentially in two precepts: Love God; do no evil to your neighbor.[15]

The early canonists generally fail to distinguish clearly between the natural and divine law. Ignoring the teaching of St. Paul, Gratian declares that "the natural law is what is contained in the Law and the Gospel," [16] thus confusing the Old Testament, the New Testament, and natural law. This error, entrenched in the canon law itself, is not corrected by the early canonists.[17] But it is rectified by the theologians. Before Gratian, Hugh of St. Victor had contrasted the law of nature and the law of grace, although without defining them.[18] Later, William of Auxerre, Alexander of Hales, and St. Bonaventure consider the law of reason as the most proper signification of natural law, while the canonists' usage is ignored.[19] St. Albert says decisively that the law of grace is natural only in an improper sense. The natural law is essentially the law which human reason finds that man as man must obey.[20]

What emerges as the common scholastic doctrine after a hundred years'

[10] Rufinus, p. 9; William of Auxerre, III:7, ante c.1. So also Huguccio and Simon of Bisiamo, in Lottin, II, 379–380.

[11] St. Bonaventure, II:39:2:1; Huguccio, in Lottin, I, 383; *Glossa ordinaria* on Gratian, *Corpus juris canonici* (Venice, 1605), D.1, c.7. The *Gloss* on Gratian is by John Teutonicus, completed in 1215 and revised about 1240 by Bartholomew of Brescia.

[12] *Glossa ordinaria*, D.1, c.7; Rufinus, p. 6; Huguccio, in Lottin, I, 383; Simon of Bisiamo, in Lottin, I, 379; William of Auxerre, III:7:1, ante c.1.

[13] *Glossa ordinaria*, D.1, c.7; Huguccio, in Lottin, I, 300; Simon of Bisiamo, in Lottin, I, 379; St. Albert the Great, MS. cited in Lottin, II, p. 45; William of Auxerre, III:7, ante c.1, c.1:1 and 4.

[14] Gratian, D.1; *Glossa ordinaria*, D.1, c.7; William of Auxerre, III:7:1:5; Alexander of Hales, III:2:3:2:1:2:6 and 7; Stephen of Tournai, *Summa des Stephanus Tornacensis über das Decretum Gratiani*, ed. J. F. von Schulte (Giessen, 1891), p. 7.

[15] Gratian, D.1; Huguccio, in Lottin, I, 385; Rufinus, p. 6; William of Auxerre, III:7:1:3.

[16] Gratian, D.1. [17] Cf. Lottin, I, 387.

[18] Hugh of St. Victor, *De sacramentis*, in Migne, *P.L.*, CLXXVI, cols. 343 and 347.

[19] William of Auxerre, III:7, ante c.1; Alexander of Hales, III:2:2:4:1; St. Bonaventure, IV:33:1:1.

[20] St. Albert the Great, MS. cited in Lottin, II, 48.

discussion is best summed up by St. Thomas Aquinas, and his synthesis will be generally accepted throughout the Middle Ages. His opinions will therefore be presented a little more fully. According to St. Thomas, law is a dictate of reason ordering acts to an end, and the most fundamental kind of law is the eternal law, which is identical with God's intelligence directing all beings to their proper ends.[21] All created beings participate in the eternal law by deriving from it their inclination to their proper acts and ends.[22] The good is being, considered as an end, and as every being seeks its end or good, it tends naturally to the maximum of being attainable by its capacities.[23] Thus, every being as being tends to preserve its substance. Every animal being tends to preserve its species by copulation and the rearing of its offspring. Every rational being, because he can know being in general, seeks the good in general.[24]

On this metaphysical foundation of the innate dynamism of all creatures towards the good, St. Thomas finds the natural law is built. Man not only has certain natural innate tendencies: he is conscious of them, and his rational apprehension of what are his natural ends or goods constitutes the natural law in him. Man knows, first of all, that the good is what all seek, and he knows, then, that the first precept of the natural law is, Seek the good.[25] Then he apprehends that as a substance, he must preserve his being; that as an animal, some of his species must have sexual intercourse and rear children; that as a rational being, he must seek the good which can satisfy his spiritual will and consequently that he must seek to know God.[26] Inasmuch as man is essentially rational, the entitative and animal tendencies will be directed to their ends, subordinate to reason.[27]

Further, as the natural tendencies to certain ends are innate to man, so is his awareness of them, and consequently he has in principle and potency an innate knowledge of the primary precepts of the natural law. These precepts consist in certain judgments of the practical reason which like any judgment will not be formed prior to sense experience.[28] But once experience has made known the terms of the propositions to a man, he will apprehend them as naturally and necessarily binding. Like the first principles of the speculative reason, the first principles of the practical reason are self-evident and nondemonstrable.[29] Most strictly considered, they will consist

[21] St. Thomas Aquinas, *Summa theologica*, I–II, Q.93, art. 1, in *Opera omnia*, ed. P. Maré and S. E. Fretté (Paris: Vivès edition, 1871–1880). Hereafter cited as *S.T.*

[22] *S.T.*, I–II:94:2.

[23] *Summa contra gentiles*, III:24; cf. *S.T.*, I:5:1; I:6:1.

[24] *S.T.*, I–II:94:2.

[25] *S.T.*, I–II:94:2.

[26] *S.T.*, I–II:74:2.

[27] *S.T.*, I–II:84:6.

[28] *S.T.*, I–II:24:2.

[29] *S.T.*, I–II:94:2.

in "what nature has taught all animals."[30] But the most fundamental precepts of the natural law are those specifically proper to man: Love God and love your neighbor.[31] These primary principles can never be abolished from the heart of man, although they may be ignored in particular sinful actions.[32]

There are also secondary precepts of the natural law, which are not immediately self-evident but which follow rationally from the primary principles. The union of the sexes, for example, is dictated by a primary natural law, whereas polygamy, which hinders but does not prevent the natural objective of the education of offspring, is dictated by only a secondary natural law.[33] The secondary precepts of the natural law can be erroneously deduced from the primary ones or corrupted by custom, so that whole societies may exist in ignorance of them.[34] Nonetheless, they are as binding on man as the primary precepts if they are known. The natural law is, then, universal in its general principles for all, and obligatory for all as to the conclusions from these principles if the conclusions are known.[35] Similarly, the natural law is unchangeable in its primary principles, though in its secondary principles it may be changed by being ignored or, on the other hand, by being developed.[36]

The *ius gentium* is part of the secondary teaching of the natural law.[37]

[30] *S.T.*, I–II:95:4; *Commentum in IV libros sententiarum*, IV:33:1:1 ad 4, in *Opera omnia*, Vol. X. Hereafter cited as *In IV lib. sent.*

[31] *S.T.*, I–II:100:3. By "God" in this context St. Thomas may not necessarily mean the one true God, but simply the good in general; for he has granted that the knowledge of God's existence is not innate (*S.T.*, I–I:2:1); therefore he can hardly mean to say that one innately loves God. Also he restates the other primary precept as "Do not harm your neighbor" (*S.T.*, I–II:100:5 ad 4 and 95:2) so that neither of the primary laws are as rigorous as they may seem at first glance.

There is a little inconsistency in St. Thomas' language here, since, on the one hand, he makes the fundamental natural laws consist in specifically rational inclinations, while on the other hand, he calls the natural law in the strictest sense the law common to animals and man. I think the latter usage is to be explained by a wish to save the authority of Aristotle and Isidore, who speak in this sense. Cf. Lottin, I, 349–350.

[32] *S.T.*, I–II:94:6.

[33] *In IV lib. sent.*, IV:33:1:2.

[34] *S.T.*, I–II:94:6. It is noteworthy that St. Thomas here asserts that even unnatural sexual vice can be generally practiced in a society as if it were not sinful. This opinion seems to indicate that not even all acts against the animal tendency towards union of the sexes and procreation can be considered against the primary precepts of the natural law; for the primary precepts can never be so generally ignored. This confirms the interpretation given above that for St. Thomas personally the natural law consists primarily in certain specifically human duties.

[35] *S.T.*, I–II:94:4.

[36] *S.T.*, I–II:94:5.

[37] St. Thomas himself never directly identifies the *ius gentium* and the secondary precepts of the natural law; but since the characteristics of the *ius gentium* as conceived by St. Thomas surely fit the description of the secondary natural law, it seems correct to say that it forms part of this law. Moreover, in commenting on Aristotle, he says the *ius gentium* is part of the natural law in Aristotle's sense of the term, *In X libros ethicorum*

As man is naturally made to seek God and develop his rational nature in society, so reason teaches him certain acts necessary to social life, such as the observance of justice in buying and selling, and the institution of government. These rational deductions from a natural premise compose the *ius gentium*.[38] Reason here naturally selects the means essential to attain the ends set by nature, and the observance of these means becomes as obligatory a part of the natural law as the obligation to attain the ends themselves.[39] Indeed, since man is essentially rational, every act in accordance with reason is natural to him and prescribed in a general way by the natural law. To be virtuous for man is to be rational, and the natural law thus prescribes every virtue, as it prescribes in general, "Be rational."[40]

Clearly distinct from natural law and the broad dictates of reason is human positive law. Human positive law is mutable, dispensable, different with different times and places.[41] Human law is not innate or universal. It is made by particular governments, secular or ecclesiastical, or by local customs.[42] It neither forbids all natural vices nor prescribes all natural virtues; for it is made to direct the majority who find virtue difficult.[43] It is essentially, however, only the detailed application of the natural law. So it is naturally just to punish a criminal; the particular punishment is a matter of positive institution. Or human law may prescribe particular acts of virtue which the natural law in a general way indicates are good.[44] Always the natural law is the norm and measure of positive law;[45] and positive laws contrary to it are *ipso facto* unjust, while positive law made by competent authority in accordance with it has the sanction and obligatory force of the natural law itself.[46]

Besides natural and human law, there is also the divine law. The divine law is contained in the revelation made by God directing man to a supernatural end beyond that which he might naturally attain.[47] It was imperfectly set forth in the Old Law of the Jews and is now perfectly set out in the New Law of the Gospel.[48] The New Law is instilled in man by grace,

ad Nichomachum, V:12, in *Opera*, Vol. XXV (hereafter cited as *In X lib. eth.*).

[38] *S.T.*, I–II:95:4.

[39] *S.T.*, II–II:57:3.

[40] *S.T.*, I–II:94:3.

[41] *S.T.*, I–II:91:3; 97:2 and 4.

[42] *S.T.*, I–II:97:1 and 3.

[43] *S.T.*, I–II:96:2.

[44] *S.T.*, I–II:95:2 and 96:3.

[45] *S.T.*, I–II:91:3.

[46] This sanction is either direct, as when human law draws a conclusion from a primary precept of nature, or it is indirect, as when the law is purely a positive determination. In the latter case the natural obligation to seek the common good entails the obligation of following the law of a ruler directing the community to the common good. *S.T.*, I–II:95:2; I–II:96:4.

[47] *S.T.*, I–II:91:4.

[48] *S.T.*, I–II:107:1 ad 2.

and as the natural law is innate in rational man, so the New Law is inscribed in the heart of the Christian, directing him as to what he should do and helping him to do it: indeed as the natural law consists in reason, so the New Law consists chiefly in grace.[49] In its secondary aspect, it consists in precepts concerning the reception of grace by the sacraments.[50] These precepts are positive, divine law, unchangeable by man because authored by God.[51]

The New Law also secondarily consists in moral precepts. But these moral precepts are identical with the Decalogue of the Old Law,[52] and the Decalogue and its corollaries are identical with the precepts of the natural law.[53] In the Decalogue and the New Law God has only made evident by revelation truths that fallible man, because of passion or ignorance, might have mistaken, but truths which any rightly reasoning intellect should be able to discover for itself.[54] The Decalogue contains the essence of natural law, ordering man to the final good, which is God, and regulating man in his relations with other men according to justice.[55] The New Law simply renews the precepts of the Old, and both the Old and New simply renew the law of reason. Thus for all moral matters outside the sacraments, the natural law of reason and the Christian law are identified. Such an identification, it is clear, could work in one of two directions. On the one hand, any act prohibited by the Christian tradition could be treated as if it were evil by nature, not by positive law. On the other hand, any act not naturally demonstrable as evil could be considered as not prohibited by Christian teaching. The early scholastics tend to emphasize the first approach; the postmedieval scholastics — not without exceptions — incline to measure moral demands by what is demonstrably rational.

This difference in emphasis was to have important secondary effects on the evolution of the usury prohibition. From the beginning of its development by the scholastics, however, the whole handling of the prohibition hung on their most general assumptions, derived from the Gospel and the Roman law, and summed up by St. Thomas: the moral law is rational, natural, and founded on the intrinsic rationality and naturalness of certain acts; the moral law is universal, nondispensable, unalterable, and distinct from purely human ordinances.[56] These assumptions supply passion to the scholastics' quest for a

[49] *S.T.*, I–II:106:1.

[50] *S.T.*, I–II:108:2.

[51] *S.T.*, I–II:106:4.

[52] *S.T.*, I–II:107:3 ad 2.

[53] *S.T.*, I–II:100:11.

[54] *S.T.*, I–II:99:2 ad 2.

[55] *S.T.*, I–II:100:8.

[56] A number of scholastics are voluntarists in their views on the origin of natural law; that is, they teach that the will of God has constituted the moral law by determining certain acts to be right or wrong by His

a rationale for the usury rule. Where they faltered, as in the case of John Gerson, the rule itself was in danger. They created conflict when the rule was challenged by positive law and custom. Without them the scholastic analysis would have lacked a broad structure and a fundamental stimulus.

2. *The Right of Private Property*

To know that the scholastics believed in natural law is not, however, to know that they believed private property was naturally inviolable. Yet the usury question is essentially a matter of the natural right of a debtor to be protected from the expropriation of his property by a creditor. If the scholastics had believed private property to be only a human institution, they might have argued that human laws by their own authority could justify the transfer of property from one person to another regardless of existing property rights.

The curious truth is that in the canon law itself Gratian had incorporated a passage from St. Augustine which denied the divine or natural origin of private property and taught that property was a purely human convention. To bolster this assertion Gratian added the teaching of Plato and the Acts of the Apostles.[57] Thus the official code of the Church appeared committed to the naturalness of communism.

The early canonists devoted themselves to minimizing this declaration. Rufinus and Simon of Bisiamo said that the natural law neither proscribed nor prescribed private property, though it indicated that common ownership was good. Huguccio declared that nature approved common ownership, as it did the personal freedom of men, but that as mere *"demonstrationes,"* not precepts, these natural indications were not binding. The real meaning of

arbitrary decree. Thus, acts are good or evil because God willed that they should be so; He did not will them because they were good or evil. So Duns Scotus, *In IV libros sententiarum*, IV:46:4:8, *Reportata Parisiensis*, in *Opera omnia*, ed. nova juxta edit. Waddingi (Paris: Vivès, 1891–1895), Vol. XXIV; and John Gerson, *Liber de vita spirituali animae*, col. 26, in *Opera omnia*, ed. L. E. du Pin (Antwerp, 1748), Vol. III.

Logically, it is clear that the fact that all nature originates in God's will does not alter its naturalness; nor does the fact that the origin of the moral law is the will of God affect its naturalness. Both Scotus and Gerson clearly distinguish (1) natural law — the law which God by His will has instilled in men and by which, consequently, certain acts are intrinsically denominated as good or evil (Scotus, II:22:3; IV:37:5; Gerson, col. 21); (2) positive divine law — the law which God by revelation has added to the law instilled naturally in man; (3) positive human law — local, mutable additions to the natural law.

It cannot be denied that psychologically — although not logically — the notion that God's will is the source of law is a factor sometimes encouraging a narrow and arbitrary interpretation of the law (see the positions of Gerson, *infra*, pp. 70, 158–159).

[57] Gratian, init. D.8. The references are to the *Republic*, III:22, and Acts 4:34.

Gratian's bold phrase, he asserted, was that only in necessity were all things naturally common. This happy explanation was repeated by John Teutonicus in the influential *Glossa ordinaria* on Gratian;[58] and it eventually became the traditional one.

The theologians added to the canonists' explanation a connection between private property and original sin. Before the Fall, says William of Auxerre, nature indicated that property should be held commonly. After the Fall, in the present state of sin, nature permits private ownership. Alexander of Hales subscribes to the same theory, declaring a little more forcefully that nature now dictates private property. St. Albert the Great similarly teaches that private property is natural in the present fallen state. It is not, however, indicated by a first principle of the natural law. But it is prescribed by rational reflection as being for "the convenience and utility of man," just as the election of rulers is also prescribed by rational reflection.[59]

St. Thomas follows in the same tradition. Nature as such is indifferent to private ownership; the rightness of private property is not a primary principle of the natural law, as is the procreation of children.[60] Nonetheless, in this fallen state, rational reflection shows the necessity of private property.[61] Nature does prescribe as a necessary end the preservation of peace, the maintenance of order, the encouragement of human industry; reason shows that the best way of obtaining these ends is the institution of private property.[62] Private property is thus commanded by the *ius gentium* or the secondary principles of natural law.[63] Still, nature itself does not determine who shall own what: the determination of specific property rights is a matter of positive law.[64]

The scholastic defense of private property is a conditional one, expressly championing it only in man's fallen state and as the most rational way of preserving peace. But the individual's right to property in this fallen world is defended absolutely. Every scholastic writer considers theft to be against the natural law.[65] Similarly, then, when the scholastics consider usury, they will find it also against the natural law; like theft, it violates a right to property which natural reason has established as just and necessary in the present order.

[58] Rufinus, p. 6; Simon of Bisiamo, in Lottin, I, 379; Huguccio, in Lottin, I, 385, 386; *Glossa ordinaria*, D.I, c.7.

[59] William of Auxerre, III:7:1; Alexander of Hales, III:2:2:4:3:2; St. Albert, MS. cited in Lottin, II, 49.

[60] St. Thomas, *In IV lib. sent.*, IV:33:2:2:1; *S.T.*, I–II:94:5 ad 3.

[61] *S.T.*, I:98:1 ad 3.

[62] *S.T.*, II–II:66:2.

[63] *S.T.*, II–II:57:3.

[64] *S.T.*, II–II:66:2 ad 1.

[65] *S.T.*, I–II:100:1; and see *supra*, n. 14.

3. *The Idea of Justice*

Classified by the early Middle Ages as the invasion of a property right, usury fell within relations governed by the requirements of justice; usury analysis took form from the generic understanding of the nature of this virtue. The classification had serious consequences; usury was not to be condemned merely as avaricious or uncharitable. The early Middle Ages had made this far-reaching decision to treat usury as a sin not of uncharitableness or avarice, but as a sin against justice. To those unfamiliar with scholastic theology the distinction may seem a quibble: "A sin is, after all, a sin." Nonetheless, there are two important practical differences between a sin of injustice and a sin of uncharitableness. A sin against justice entailed the obligation of reparation of the damage or restitution of the loss, as a condition for absolution; a sin against charity required simply internal sorrow for forgiveness.[66] Thus, as a practical matter, repentance for injustice involved both more hardship and more complication for the penitent, particularly if many financial transactions were concerned, than did penitence for uncharitableness. Secondly, the command to help one's neighbor corporeally, out of charity, was binding, under pain of mortal sin, only in certain cases, that is, when he was in great need and you had the means to help him. But the precept to do justice was binding in every case, however rich or poor the parties involved. There were thus far more occasions offered in business for sins against justice than sins against charity. Clearly then, it was enormously important that after a three hundred years' development it became axiomatic that usury should be considered a sin against justice, rather than against charity.

Similarly, it was highly important that usury was not considered merely *turpe lucrum*, "shameful gain"—gain acquired out of avarice, or by disreputable means. The taking of such gain was not considered to constitute a positive invasion of another's right, and although the common doctrine was that it should be given to the poor, it entailed no obligation of strict restitution.[67]

As to what was meant by justice, the early writers, treating usury under theft, have the general notion set forth in the Roman law that it is wrong to deprive a man of his property, if he is unwilling.[68] Such a seizure of another's good is clearly enough distinguished from a sin of uncharitableness or avarice. The words of the *Institutes* of Justinian are doubtless in the minds of the canonists who begin the first rational analysis of usury: "Justice is the constant and perpetual desire to give to each one that to which he is entitled. . . . The following are the precepts of the law: to live honestly, to injure no one, and to give to each that which belongs to him."[69] The essence of natural justice is here set forth; the scholastics will not improve upon it. The definition of an early theological writer upon usury, William of Auxerre, who may be taken as representative, is entirely similar: "If it is strictly used, justice is the virtue by which to each one is rendered what is his own, because it is his own."[70]

The notion of commutative justice proper, which consists precisely in the equality of objects given in exchange, becomes general only with the revival of Aristotle, and the repetition of his doctrine in the commentaries of St. Albert the Great and St. Thomas. Equality of exchange was a sharp and clear concept applicable especially to contracts, but the Aristotelian criterion really only made explicit what the earlier writers had said more loosely. The earlier writers as well as the later ones had seen that justice was no respecter of persons, and that it was as wrong to steal or to take usury from a rich man as from a poor one; and, since they did not make the status of the parties to a contract a test of justice, it is clear that they, too, had implicitly considered the equality of objects exchanged as the test of honesty. The conception of justice underlying the usury theory is a constant.

4. *The Character of Profit*

The just is not necessarily the unprofitable. The usual definition of usury is "whatever is added to the principal"[71] on a loan, or simply "profit from a loan."[72] The scholastics make no attempt to analyze "profit" as modern economics does, but the term is used in its common-sense meaning of the gain that is normally sought by every businessman as the reward of his industry and investment. For example, if a seller of wool sells wool worth 25 ducats for 30 ducats, the scholastics will commonly call the 5-ducat increase in his capital "profit," although 5 ducats may be only a fair return for his labor

[66] For the common doctrine, see *S.T.*, II–II:62:2.

[67] St. Raymond of Pennaforte, *Summa casuum conscientiae* (Verona, 1744), 2:7:5. See St. Antoninus, *Summa*, Part 2, Title 1, c.16, for a clear and traditional distinction between unjust profit and *turpe lucrum*.

[68] *Justiniani Institutiones*, II:1:1:2; see Peter Lombard, *Sententiarum*, III:37:3; Alexander of Hales, III:2:3:2:1:2:7:1.

[69] *Institutiones*, I:1:3.

[70] William of Auxerre, III:7, *De justitia in generali*, f.176r:b.

[71] Gratian, C.14, Q.4, dictum post c.x.; Hostiensis, *Summa aurea* (Venice, 1579), *De usuris*, n.1.

[72] Bernard of Pavia, *Summa decretalium*, ed. E. Laspeyres (Ratisbon, 1860), V:15:1; Joannes Andreae, *Decretalium libros novella commentaria* (Venice, 1581), VI, *De regulis iuris*, "Peccatum," 7.

and investment. Laurentius de Ridolfis' definition would be accepted by all: "Profit is properly said to be the superabundance or increment which one has from a voluntary exchange beyond those goods which were one's own at the beginning of it." [73]

It must be clearly understood that there is no scholastic opposition to profit as such. It is only profit on a loan that is condemned. Every early writer speaks of profit gained in other contracts by laymen as a perfectly normal acquisition. All authors would subscribe to St. Bernardine's dictum, "All usury is profit, but not all profit is usury." [74] St. Antoninus expresses the unanimous opinion when he says, "Nor is hope of profit prohibited in contracts; rather it is commonly present." [75] It must not be supposed, then, that the scholastics held that businessmen must always act out of principally charitable motives, nor that principal hope of profit in all contracts was considered sinful. Only in a loan and in fictitious disguises of a loan was the seeking of profit considered immoral.

5. *The Criterion of Intention*

It is axiomatic in scholastic theology that the intention to perform a sinful act, even though not executed, is a sin in itself. That mental usury was a sin, and that "hope makes the usurer" were common doctrines taught by everyone.[76] The intention to profit from a loan was as sinful as profiting in fact; no contractual disguise of the loan and no absence of an express contractual provision for the payment of usury freed from guilt the man who desired the usury in his heart. In particular, a special emphasis was placed on intention by the text, "Lend freely, hoping for nothing thereby," and its interpretation given by Urban III in *Consuluit*. There was also reason for supposing that if a man preferred to lend rather than to invest his money in other businesses, he did so because lending gave him more than other businesses would, and it could be inferred from his preference that he sought profit on a loan, or usury. But starting from an axiomatic principle on intention, a Gospel text emphasizing it, and a reasonable presumption, the early scholastics — as later theologians were to recognize — employed the criterion of intention in a far wider sense than the doctrine itself demanded. In the less critical, early period, "intention to gain from a loan" was so

[73] Laurentius de Ridolfis, *De usuris*, in *Tractatus universi juris* (Venice, 1584–1586), VII, c.1:1 (n.4).

[74] St. Bernardine, *De contractibus et usuris*, in *Opera omnia* (Venice, 1745), Vol. II, Sermon 36, art. 1, c.2.

[75] St. Antoninus, *Summa*, 2:1:8 (n.14).

[76] *Glossa*, C.14, Q.3, c.2, at "Expectus." Monaldus, *Summa perutilis atque aurea* (Lyons, 1500), "Usura," f.289. Astesanus, *Summa Astesana* (Rome, 1728), Bk. III:11:5.

used that the only loans recognized as licit were those made from charity or under compulsion. The presence of objectively valid titles to compensation beyond the principal was held not to justify a man taking the compensation if he had loaned principally to get it. The hope of even this lawful compensation was consistently construed as a sinful intention to profit. The intention to gain vitiated the objective titles to interest. In case after case, and author after author down to 1500, we shall find this principle dominant.[77] St. Raymond expresses what is common to all: "One ought to lend to one's needy neighbor only for God and principally from charity." [78]

This emphasis on intention was deepened yet further by two favorite comparisons of the scholastics. As early as 1210 William of Auxerre, saying "that a usurious will makes the usurer," compared the sin of usury to the sin of lust which might be committed by unlawful desire alone. St. Antoninus stated another popular comparison as follows: "Just as the principal hope and intention of temporal benefits leads to spiritual simony . . . so also in a loan the principal intention of profit leads to usury. . . ." [79] These analogies were dangerous in that they compared sins which depended largely on subjective factors with a matter where the determination of lawfulness consisted peculiarly in a consideration of the objective components of an act. Simony, for example, is committed by a man who intends gain from a spiritual office, and the sin is committed whether or not some other objective title to gain exists, if the man seeks gain by virtue of his office. In contrast, the sin of injustice in contracts is committed only by one party effecting an objective inequality in an exchange or intending to effect this inequality. It would not, according to the natural law, be a sin if a man sought profit from a loan, if there was an objective title to the profit other than the loan itself, and if he did not specifically intend to commit an injustice.[80] The early scholastics, however, argued that as it is always sinful to intend to gain from a spiritual office, so also it is always sinful to intend to gain from a loan. The criterion of intention was thus reaffirmed as the great guide for the practical application of the usury prohibition. The definition of usury as "whatever is added to the principal," combined with the use of the criterion of intention, led directly to the doctrine that no loan might ever be made in the same spirit as other business transactions. A loan had to be made with the hope of getting nothing back beyond the sum loaned.

[77] St. Raymond, 2:7:3; Hostiensis, *Summa*, V, *De usuris*, n.1; Giles of Lessines, *De usuris*, c.6, in St. Thomas Aquinas, *Opera* (Parma ed., 1864), Vol. XVII; Henry of Hesse, *De contractibus*, c. 16, f.193. See also *infra*, pp. 105, 108, 115, 124.

[78] St. Raymond, 2:7:2.

[79] William of Auxerre, III:21, f.224r:b; St. Antoninus, 2:1:7.

[80] See *infra*, pp. 257, 259–260.

6. *The Distinction between Personal Responsibility and Social Accountability*

The Third Lateran Council had excommunicated manifest usurers—commonly understood to mean men who had been convicted in a court of taking usury, or who were "notorious by fact" by publicly setting themselves up to lend money at a profit.[81] Since judicial prosecutions, whether ecclesiastical or lay, were almost never directed except at declared moneylenders,[82] the canon had the practical effect of excommunicating only the professional lenders who made usury their business. These professional moneylenders were regularly pawnbrokers who made loans for consumption purposes to the poor at high rates: their usual charge was 43½ per cent per annum.[83] According to the scholastic authorities, they might be tolerated by the State as a necessary evil, but not approved or encouraged.[84] Some states seem to have gone beyond giving simple permission and positively licensed these moneylenders and participated in their profits through heavy license-fees.[85] After the Council of Vienne in 1317, such compensation of the rulers of the State brought excommunication upon them, too; but this penalty does not seem to have been an effective deterrent.[86] In the Low Countries, which may be taken as typical, the public usurers were under the special protection of the prince, and the State directed its chief efforts in this field toward eliminating the competition of unlicensed usurers.[87] Occasionally, in waves of reform, the public usurers might be raided or suppressed, much like licensed gamblers today; but they were always found necessary and they always reappeared.[88]

The men who were public usurers were usually either Jews or lombards.[89]

[81] Innocent IV, *Apparatus super quinque libros decretalium* (Strassburg, 1478), V:19:3; Hostiensis, *Summa*, V, *De usuris*, 10; St. Antoninus, *Summa*, 3:24:49.

[82] George Bigwood, *Le régime juridique et économique du commerce de l'argent*, (Brussels, 1921), I, 568–585.

[83] Bigwood, I, 453; Raymond de Roover, *Money, Banking and Credit in Medieval Bruges* (Cambridge, Mass., 1948), p. 125. Armand Sapori, *Studi di storia economica medievale* (Florence, 1947), p. 108, reports that fourteenth-century Florentine usurers charged 30 per cent. Forty-three-and-a-half per cent is not a remarkably high rate for the small-loan business. Most modern American companies in the 1930's charged between 30 and 42 per cent — see L. N. Robinson and R. Nugent, *Regulation of the Small Loan Business* (New York, 1935), pp. 248–265.

[84] See Joannes Andreae, VI, *De regulis iuris*, "Peccatum," 17; St. Bernadine, 38:3:3; Alexander de Nevo, *Consilia contra Judaeos foenerantes* (Frankfort, 1478), *Consilium* II.

[85] Bigwood, I, 329, 336.

[86] Cf. de Roover, pp. 100–103; Bigwood, I, 256ff. For the decree of Vienne, see Council of Vienne, Canon 15, in Hefele, VI, Part 2, cols. 694–695.

[87] Bigwood, I, 603.

[88] De Roover, p. 156.

[89] Henri Pirenne, *Economic and Social History of Medieval Europe*, trans. I. E. Clegg (New York, 1937), pp. 133–135. The proper noun "Lombard" seems to have become the common noun "lombard," a term designating any public Christian usurer. Originally and generally, the lombards were also Lombards, but not all Lombards were lombards. The distinction in spelling insisted on by de Roover seems proper, and although most writers before him have not made the distinction, I have followed him on it in this study. Cf. de Roover, p. 346; Armand Sapori, *Le marchand italien au moyen age* (Paris, 1952), XIV.

The Jews were, of course, unaffected by excommunication, but according to the Fourth Lateran Council, they were to be boycotted commercially by Christians and were to be held to make up to the Church the taxes on Christian properties which had come into their possession through usury.[90] These provisions do not seem to have been much followed. Yet the traffic of the Jews was never considered permissible, as some modern economic historians seem to think, "because they were damned anyway,"[91] but was universally deplored by the theologians as immoral and unnatural.[92] The Jews, however, not believing themselves bound by the canon law, felt free to enter the business, and did so because few Christians would openly compete with them.[93]

One group of Christians were an exception to the general Christian avoidance of open usury. These were the lombards, men chiefly from the hill towns of northern Italy, such as Asti and Chieri. They spread throughout Europe even more successfully than the Jews, and for some unaccountable reason, showed a strange insensitivity to ecclesiastical and social censure.[94] Both lombards and Jews and other open moneylenders were generally hated by the poor whom they exploited and considered social outcasts by the rest of the community.[95] The social distinction followed the theological one of manifest usurers.

Some historians, imbued with a highly materialistic view, have remarked the absence of external force against many usurious practices and the restriction of the ecclesiastical and social penalties to manifest usurers, and have concluded that the usury prohibition might easily have been evaded.[96] They have pointed out the many contractual disguises by which usury could be cloaked, and one eminent historian has gone so far as to compare the

[90] Fourth Lateran Council, Canon 67, *Quanta amplius*, in Hefele, V, 1386; *Decretales*, V: 19:18.

[91] E.g., Melvin Knight, Harry Elmer Barnes, and Felix Flügel, *Economic History of Europe* (New York, 1928), p. 113; cf. de Roover, p. 157.

[92] See St. Raymond, 2:7:9; St. Thomas Aquinas, *De regimine Judaeorum*, in *Opera*, Vol. XXVII; Alexander de Nevo, *Consilium* I, ad dubium 142.

[93] Schaub (*Der Kampf gegen den Zinswucher*, p. 167) holds that the Jews voluntarily entered the moneylending business in the eleventh and twelfth centuries, well before there was any restriction on them forcing them into this business.

[94] de Roover, pp. 113ff.

[95] de Roover, p. 108.

[96] E.g., Ferdinand Schevill, *History of Florence* (New York, 1936), pp. 294–295; Endemann, *Studien in der romanisch-kanonistichen Wirthschafts*, I, 30; Thompson, *Economic and Social History of Europe*, I, 438.

usury prohibition to the Volstead Act, which was impossible of literal enforcement and simply existed as a threat over the heads of those engaged in the prohibited business.[97] Such a view considers only the legal and social barriers to usury. The usury law was primarily a spiritual matter, and if the Church hoped that society and the State would endeavor to suppress public usury, still she relied on spiritual means for its real control. The theologians knew as well as the economic historians that a thousand disguises for usury existed, yet the Church chose to use the extreme spiritual penalty only against flagrant violation. But all hidden usury was still a mortal sin, and the ultimate punishment of damnation still awaited all hidden usurers. If one considers the genuinely religious attitude of probably the majority of medieval men, it is not then very realistic to say that the usury prohibition was meaningless because it was rarely enforced thoroughly by public authority, and the thousand evasions of it could never be checked. As medieval men knew well, they could sin in this life without the State being able to punish them, but they damned themselves for eternity. The real force of the usury law lay in its hold on men's souls, and there no evasion was possible. The prohibition may have been commonly evaded in business practice, and economic historians, looking only on the economic results, may conclude that it was therefore economically ineffective. But even if the prohibition did not have complete economic effectiveness, one should not infer that it was without practical results. Even when it did not affect commercial practice, it did affect the spiritual state of businessmen, and who will say that there is no meaning to the salvation or damnation of a man? Though businessmen might go on making money by hidden usury, so that the prohibition remained impotent in business, yet these men were guilty of sin if they knew they were engaged in illicit work. Though the number of manifest usurers were few, the number of hidden usurers might be many; it is in terms of the latter that the full extent of the usury prohibition must be measured. The Church taught that intention to gain from a loan was mortal sin; as long as this sinful intention was held in a man's heart, whatever form his contract took, he knew that he was outside the state of grace.[98]

Conclusion

Distinguishing between a revealed divine law, a rational natural law which coincided with the divine law in moral matters, and positive human

[97] Pirenne, *Economic and Social History*, p. 146.

[98] See, for example, Hostiensis, *Summa*, V, *De usuris*, 8; St. Antoninus, *Summa*, 2:1:6.

law, the scholastics set up a structure in which the usury rule might be studied, explained and limited. Their deep desire to harmonize the types of law, their strong belief in orderly, universal rules, encouraged a rationalistic evaluation of the purpose of the prohibition. The natural law guaranteed the right of private property of which the prohibition was at once a specific protection and limitation. The prohibition was a concrete embodiment of the virtue of justice that required that no one take the property of another against his will. True, this requirement of justice did not prohibit a businessman from making a profit in exchanging property; but, for reasons to be explored, it did prohibit profit on loans. Moreover, as intention to do injustice is as sinful as the unjust act, intent to profit on a loan was accounted sinful. The criterion of intention shifted the test from the objective equality of the property exchanged to the state of mind of the lender. It provided an effective spiritual control to which public social controls were only a supplement in notorious cases. The use made of it was not entirely consistent with the basic conception of the nature of justice. Yet, for the first period, 1150 to 1450, these fundamental notions of law, property, justice, and intention furnished the general shape of the scholastic doctrine on usury.