WILLIAM OCKHAM AND NATURAL LAW

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ABSTRACT

WILLIAM OCKHAM AND NATURAL LAW

By

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It is the primary purpose of this dissertation to determine the truth of the recently resurrected, traditional dictum of scholarly interpretation that because Ockham was a nominalist in his philosophy, he was also a voluntarist in his legal theory, especially as regards his position on natural law.

In Part I of this study, which comprises Chapters 1-6, a detailed analysis of the legal aspects of the controversy over the poverty of Christ and His apostles is presented. It was reflection on the issues raised in this conflict which not only launched Ockham into his polemical period against the Avignon papacy but also gave him an occasion to first employ natural law arguments. In this analysis in Part I, particular attention is given to natural law arguments used by the antagonists in this conflict.

With this background delineated in Part I, Part II of this work, which comprises Chapters 7-12, presents the

first detailed analysis of all significant natural law arguments employed by Ockham in the context of an investigation of all of his known polemical works.

A number of specific conclusions are reached in Part II: (1) the heretofore, only suspected existence of a relationship between some of Ockham's standard natural law arguments and those of certain of his Franciscan predecessors who were involved in the poverty conflict is shown to be factual; (2) the thesis that Ockham was dependent for his position on natural law on his Franciscan companion, the civil and canon lawyer, Bonagratia of Bergamo, is shown to be very unlikely; and (3) the thesis that Ockham was a voluntarist in his philosophy of law and, specifically, in his position on natural law is shown to be erroneous, since this thesis lacks any textual foundation.

In Part II as well, a detailed analysis and criticism of the arguments proffered by certain, more contemporary Continental and American authors who support this voluntarist thesis are given.

In Part III, which comprises Chapters 13-15, a thorough analysis of the criticisms offered by certain, more contemporary Continental authors against Ockham's position on natural law is presented. In view of a new and original interpretation concerning Ockham's actual intentions and methodology in his use of natural law arguments, offered by the writer of this dissertation, most of the

former criticisms of these Continental authors are shown to be fundamentally unfair to Ockham.

In this part as well, the marked influence of the actual legal doctrine which eventually formed Ockham's position on natural law is traced historically, with particular attention being given to its effect on the theories of natural law of St. Thomas Aquinas and John Duns Scotus. A thorough criticism of Ockham's actual position on natural law is then presented. This criticism indicates that, at best, Ockham's position is of only very limited, continuing interest and value as an analysis of natural law.

Finally, a summary of the conclusions reached in this dissertation is given. Some suggestions concerning matters requiring further study or scholarly exegesis are presented. And the specific and general significance of the conclusions of this study are indicated.

WILLIAM OCKHAM AND NATURAL LAW

By

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LIST OF ABBREVIATIONS

A.F.H.	Archivum Franciscanum Historicum
A.L.K.G.	Archiv für Literatur- und Kirchengeschichte des Mittelalters
An princeps	An princeps pro suo succursu, scilicet guerrae, possit recipere bona ecclesiarum, etiam invito papa
Breviloq.	Breviloquium de principatu tyrannico
Bull. Franc.	Bullarium Franciscanum
Consult. de causa matrim.	Consultatio de causa matrimoniali
Contra Benedict.	Contra Benedictum Tractatus
Contra Ioann.	Contra Ioannem Tractatus
De Imper. et Pontif. Potes.	De imperatorum et pontificum potestate
Dial. I	Dialogus, Part I
Dial. III I	Dialogus, Part III, Tract I
Dial. III II	Dialogus, Part III, Tract II
Epitome	Bullarii Franciscani Epitome
Franz. Stud.	Franziskanische Studien
Octo Quaest.	Octo quaestiones de potestate papae
O.N.D.	Opus Nonaginta Dierum

INTRODUCTION

In the past thirty years, there has been some renewed controversy over the traditional dictum of scholarly interpretation that because Ockham was a nominalist in his philosophy, he was also a voluntarist in his legal theory, especially as regards his position on natural law. This dissertation proposes to try to resolve this controversy.

With this purpose in mind, Part I of this dissertation, which covers Chapters 1-6, will investigate the development of the legal aspects of the conflict over the poverty of Christ and His apostles, with particular attention being given to the use of natural law arguments by the antagonists in this controversy. This will lay a foundation for investigating the hypothesis that Ockham's position on natural law was actually derived from his companion, the civil and canon lawyer, Bonagratia of Bergamo. It will also provide the necessary background for us to determine whether, in fact, Ockham's natural law arguments were anticipated in the work of his Franciscan predecessors in the poverty conflict, a suspected but a heretofore neither corroborated nor discredited thesis.

It was reflection on the issues raised in this poverty controversy which provided the occasion for Ockham to initiate his polemical period against the Avignon popes who reigned during this time. Reflection on these issues also provided him with a sufficient reason to first become concerned with natural law arguments, about which he was silent during this earlier, non-polemical period.

Through this foundation laid in Part I, we will, in Part II of this work, which comprises Chapters 7-12, undertake the first complete analysis of all significant natural law arguments proffered by Ockham in the context of an investigation of all of his known polemical works. Through this analysis, we will be able to determine the truth of the theses, mentioned above. We will also be able to determine the veracity of the traditional dictum of scholarly interpretation, noted above. This is the primary purpose of this study.

Generally speaking, this traditional dictum of scholarly interpretation proposes that, in his theory of natural law, Ockham emphasized the Divine Will as the source of the natural law. According to this interpretation, Ockham also maintained the radical contingency of the basic principles of the natural law because of their complete dependence on Divine fiat, which could change at any time.

This supposed voluntarist interpretation is usually contrasted with a rationalistic interpretation of natural

law. This latter interpretation usually emphasizes that the natural law has its source in Divine Wisdom or Reason and that it is grounded in the immutable Divine Essence. This rationalistic interpretation views the basic principles of the natural law as immutable and evidently knowable or discoverable through the light of natural reason.

In Part II as well, we will analyze the specific proposals of those authors who have championed the traditional voluntarist thesis concerning Ockham's position on natural law. We will also assess the soundness of their arguments.

In Part III of this dissertation, which covers Chapters 13-15, we will analyze a number of specific criticisms concerning Ockham's position on natural law proffered by certain Continental authors. We will also try to determine not only their plausibility but also the fairness of these criticisms to Ockham as a polemicist. Further, we will offer a new and original hypothesis concerning Ockham's actual intentions, as far as his use of natural law arguments was concerned.

Our analysis in Part III will include a brief tracing of the development and influence of the major legal doctrine which eventually formed Ockham's position on natural law. Particular attention will be given to the influence of this doctrine on Ockham's famous, medieval predecessors, St. Thomas Aquinas and John Duns Scotus. We will

then evaluate and criticize Ockham's actual position on natural law, with a view to assessing its continuing interest and value as an analysis of the notion of natural law.

Finally, we will summarize the conclusions reached in this study, suggest what further work might be done relating to the topic, and try to point to the particular and general significance of the results of this dissertation.

PART ONE

NATURAL LAW AND THE LEGAL ASPECTS OF THE POVERTY QUESTION

CHAPTER ONE

POVERTY AS THE RENUNCIATION OF DOMINIUM: THE BIRTH OF A LEGAL CONFLICT

"If we are to understand the Michaelist movement, we should, rather, turn our eyes from the voluminous products of the post-1328 conflict, and look back on the course of Franciscan history before 1323."[1] Whether in fact Lambert's statement is true of the whole Michaelist[2] movement, it is at least clear that it would be difficult for an otherwise qualified reader in the philosophy of law to full grasp what William Ockham is proposing in some of his polemical works,[3] for instance, his Opus Nonaginta Dierum, unless the reader has some understanding of the history of the development of the particular legal issues that were engendered in the controversy over the poverty of Christ and His apostles in the early years of the Franciscan Order.

Thus, what will be given in Part I of this study is an analysis of the particular legal issues that arose in the context of this controversy. Moreover, special attention will be given to any use of natural law arguments by the protagonists in this conflict. It is hoped that this will

more fully disclose the historical framework in which Ockham developed at least part of his natural law position.

However, it should not be assumed that the other central question which preoccupied Ockham in his polemical works, the nature and limits of papal power, especially as it relates to imperial prerogatives, was somehow a necessarily less fruitful ground for Ockham in the development of his position on natural law.

Nevertheless, it is apparent that the development of the conflict between the popes and the emperors has had so extensive a history as to preclude a detailed analysis of its legal aspects in the context of this brief introduction. Further, this controversy has been much more thoroughly studied, as far as its legal and political aspects are concerned, than the much more historically-circumscribed controversy over the poverty of Christ and His apostles.[4]

Finally, although the conflicts between the popes and the emperors engendered some not very clear legal notions, nevertheless, a number of the legal concepts which were utilized in the context of the controversy over the poverty of Christ and His apostles, for instance, simplex usus facti, could be even more puzzling to the reader of Ockham's polemical works, unless he has a more adequate understanding of the historical genesis of such notions than an otherwise competent reader normally possesses.

Even before his death, St. Francis of Assisi found

his ideal of absolute poverty being gradually relaxed; and, eventually, the acceptance of privileges from Rome that he so dreaded became a more and more commonplace practice.

Although we do not possess the original Rule of St. Francis, it is customary to accept the Rule of 1221 as the earliest known rendering. Chiefly under the influence of Cardinal Ugolino, the cardinal-protector[5] of the Order and the future Pope Gregory IX, a redaction of this rule, the Regula Bullata of 1223, was produced. Moorman has commented that when this redaction is compared with the earlier Rule, one can already note changes that are indicative of a movement away from St. Francis' original intentions.[6] Nevertheless, the Regula Bullata, which is still the official Rule of the Friars Minor,[7] contains an explicit prohibition against the Friars Minor appropriating houses, settlements or any other thing.[8]

It is not until four years after St. Francis' death that Ugolino, now Gregory IX, declares in his bull Quo elongati[9] (September 28, 1230) that St. Francis' final appeal in his Testament is not binding since it was not sanctioned by a chapter-general[10] of the Order. It is in his Testament that St. Francis expressed his dying wish that the Friars Minor not accept any buildings or seek any privileges from the Holy See under any pretext whatsoever.[11] As Douie has noted,[12] Quo elongati marked the starting point in a long series of papal bulls which gradually

constructed a superstructure over St. Francis' original Rule.

Quo elongati also expanded the functions of the amicus spiritualis, who had been introduced in the amended Rule of 1223, in order that the Friars Minor, who were forbidden by their earlier Rule to receive money, might have someone to buy clothing and provide for the necessities of the sick.[13] By papal decree the amicus spiritualis was to also buy any "imminent necessities" the Friars Minor might require.

Quo elongati also provided for another official, the nuntius, who was to be the agent of the benefactors of the Friars Minor or of those who gave alms to them. The nuntius was not supposed to be a Franciscan agent. He was instructed not to retain any alms given to him by the benefactors of the Friars Minor; but he was to hand over anything left over from meeting the necessities of the Franciscans to the amicus spiritualis.[14]

Finally, in answer to the legally complex question, who had dominion over the movable goods of the Order if the Order was not supposed to have any corporate possessions, as the Rule of 1223 had specified, Gregory IX replied that neither in common nor as individuals ought the Friars Minor to have proprietas, that is, the legal right to hold property in common or individually; but of the utensils, books and movable goods that it is permitted for them to have, they

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have only the use. Also, the Friars Minor, according as the minister-general[15] or the provincials[16] specify, might use these things, relinquishing the dominion of their settlements and houses to those to whom it is understood to pertain.[17]

Gregory IX continued that in order to sell or exchange any movable goods outside the Order or to alienate them in any way the Friars Minor had to obtain the permission of the Cardinal-Protector of the Order.[18] As Lambert has argued,[19] this might imply that the cardinal-protector was the owner of the Franciscans' movable goods; but, as yet, the matter was still not very clear.

Thus, although the legal issue of common property, that is, the dominium or proprietas of the Friars Minor, did not arise as a significant point of contention during St. Francis' lifetime,[20] it formed a significant precedent that the Holy See directly intervened to attempt to settle this problem when it did arise.

It will become important later that the reader also notice that Gregory IX assumed in his bull Quo elongati that it was correct to make a distinction between the dominion and use of the goods held by the Friars Minor and that St. Francis had intended the Franciscans to be stripped of all forms of dominium.[21]

Some eleven years after its publication, Quo elongati elicited a legal reply from the Franciscan province of France.

In their Expositio Quatuor Magistrorum super Regulam Fratrum Minorum,[22] the authors were concerned that papal intervention would not result in relaxation of the Rule.[23] And, in a prophetic anticipation of the subsequent action of Innocent IV, they questioned the advisability of making the nuntius a procurator[24] for the Order.[25]

In fact, Gregory IX actually created as many legal problems as he solved through Quo elongati. Further clarification became more and more pressing an issue. Innocent IV attempted to give this clarification in his bull Ordinem vestrum[26] (November 14, 1245).

However, the net effect of Ordinem vestrum was not a clarification of Quo elongati; rather, it was actually a relaxation of the latter's provisions. Innocent IV greatly expanded the resources of Franciscan superiors by stipulating that they might appeal to their agents not only for necessities, but also for that which was "commodus," that is, suitable or proper. This had the effect of giving the superiors the right to utilize their agents to receive alms whenever the superiors saw fit.

Innocent IV also omitted the essential clause of Quo elongati that had insured that the nuntius would turn over all unused alms to the amicus spiritualis. Thus, he effectively scuttled the restriction that the nuntius only be an agent for the almsgiver and not of the Friars Minor.[27] This entailed that the nuntius became a redundancy, since all his

functions were already being performed by the amicus spiritualis.

Even more importantly, in order to clear up the practical legal difficulties that had been occasioned by Gregory IX's system in which the rights of dominion were retained by the benefactors of the Friars Minor, Innocent IV decreed that all goods of the Friars Minor were received into the domain of St. Peter,[28] that is, they became the legal property of the Holy See.

As will be seen later, this was a move that was to engender much legal controversy. The extremely nebulous legal character of the property rights in fact obtained by the Holy See under this arrangement occasioned legal difficulties for some seventy years until this system was overturned by Pope John XXII.

Finally, in his bull Quanto studiosius[29] (August, 1247), Innocent IV granted the right of appointing procurators to the Friars Minor, a move that the authors of the Expositio had strongly advised against. Although they were supposed to oversee the goods of the Friars Minor for the Holy See, these procurators were in fact agents of the Franciscan superiors. They could sell, exchange or alienate any gifts given to the Friars Minor and with the money obtained buy both necessities and that which was "commodus" for them.[30]

Thus, what has transpired up to this point is a gradual reinterpretation of the notion of poverty. From the

original emphasis of St. Francis on the simple renunciation of all material goods, there has been a movement toward considering poverty in a legal sense as the abjuration of dominium, the divesting of the Friars Minor of any legal right to common property. Before this reinterpretation is fully matured, it will become more and more legally complex and, as we will see in the next chapter, academic and even more theoretical in nature.

FOOTNOTES TO CHAPTER ONE

[1]M. D. Lambert, Franciscan Poverty (London, 1961), p. 243.

[2]The term "Michaelists" refers to certain Franciscans who broke away from the main body of the Order, then known as "Conventuals." This break, which occurred in 1328 and was led by Michael of Cesena, was in protest against the dogmatic decree of Pope John XXII on the question of the poverty of Christ and His apostles. Among the more noted Michaelists were the civil and canon lawyer, Bonagratia of Bergamo; the theologian, Francis of Ascoli; and our author, William Ockham.

[3]Ockham's works are divided into two groups: polemical and non-polemical. His non-polemical works include his earlier treatises on logic, philosophical and theological issues. These predate his polemical works, which include his voluminous political tracts, written after his embracing of the Michaelist cause.

[4]Among the works which could be recommended to the reader on the legal aspects of the conflict between the popes and the emperors, two works by Walter Ullman are particularly valuable: Medieval Papalism (London, 1949) and The Growth of Papal Government in the Middle Ages (London, 1955).

[5]As the name implies, a cardinal-protector of a religious order, like the Franciscans, was a prelate designated to look after the interests of the order, for instance, as regards its position with the Holy See.

[6]John Moorman, A History of the Franciscan Order from its Origins to the Year 1517 (Oxford, 1968), p. 58.

[7]Ibid., p. 57. At this time, the terms "Friars Minor" and "Franciscans" are synonymous.

[8]Regula, chap. VI; cf. Livarius Oliger, "Regula S. Francisci anni 1223 fontibus locisque parallelis illustra," Storia e Letteratura Raccolta di Studi e Testi, 30 (Rome, 1950), p. 183, in Appendix.

[9]C. Eubel, ed., Bullarii Franciscani Epitome (Apud Claras Aquas, 1908), no. iv, pp. 229a-231a. The small, lower case "a's" or "b's" which frequently occur as part of the page numbers in the footnotes of this study indicate whether the passage being cited can be found in the first column, "a," or in the second column, "b," on the page of the work being cited.

[10]A chapter-general is a duly-constituted general meeting or assembly of the members or of the elected representatives of the members of a religious order.

[11]Moorman, op. cit., p. 78.

[12]Decima L. Douie, The Nature and Effect of the Heresy of the Fraticelli (Manchester, 1932), p. 2.

[13]Regula, chap. IV; cf. Oliger, op. cit., p. 181.

[14]Epitome, pp. 229b-230a.

[15]A minister-general is the general superior of all the members of a religious order. He is elected by the chapter-general; see supra, n. 10.

[16]A provincial is the superior of the members of an order in a given geographical location, ex., the provincial of England.

[17]Epitome, p. 230a. It was understood that the benefactor was to retain legal dominion or ownership over the things given to the Friars Minor under Gregory IX's system.

[18]Ibid.

[19]Lambert, op. cit., p. 86.

[20]Ibid., p. 51.

[21]Ibid., p. 86.

[22]Livarius Oliger, Expositio quatuor magistrorum super regulam fratrum minorum, Storia e Letteratura Raccolta di Studi e Testi, 30 (Rome, 1950), pp. 123-168.

[23]Expositio, chap. II; cf. ibid., pp. 129-130.

[24]In this context, a procurator would be someone, in all likelihood a layman, who was the official agent of a particular religious order, like the Franciscans.

[25]*Expositio*, chap. IV; cf. Oliger, *Expositio*, *op. cit.*, p. 145.

[26]*Epitome*, no. xi, pp. 238a-239b.

[27]*Ibid.*, p. 238b.

[28]*Ibid.*, p. 239a.

[29]J. H. Sbaralea, ed., *Bullarium Franciscanum*, I (Rome, 1759), no. CCXXXV, pp. 487-488.

[30]Lambert, *op. cit.*, p. 100.

CHAPTER TWO

THE SECULARS v. THE MENDICANTS: THE THEORIZATION OF A LEGAL CONFLICT

The next phase of the historical development of the legal issues involved in the conflict over the poverty of Christ and His apostles finds its beginning in the dispute that raged between the seculars and the mendicants at the University of Paris in the latter half of the 13th century.

The opening broadside of what was to become a pamphlet war between the seculars and the mendicants was delivered by the secular master William of St. Amour in his Tractatus brevis de periculis novissimorum temporum.[1] William cut to the heart of the matter by focussing on the theological position that had underlaid the legal stance of the Friars Minor. He simply denied that there was any Scriptural basis for the theory of evangelical poverty. Positively, he asserted that Christ and His apostles had possessed property in common and maintained that the possession of property in common in no way diminished the perfection of the religious life.[2]

Although De periculis evidences a certain amount of confusion, it is, nonetheless, significant. It served as a

source both for argument development and for critical counter-argument throughout the rest of this controversy.[3] In analyzing the development of these arguments, central emphasis will again be given to legal issues and, especially, to the use of natural law arguments. The other aspects of this controversy, for instance, the theological and Scriptural points of conflict that arose, will not be able to be investigated here.

In their answers to the De periculis, St. Bonaventure in his Quaestio disputata de evangelica paupertate[4] and St. Thomas Aquinas in his Contra impugnantes Dei cultum et religionem[5] concentrate on theological and Scriptural counter-arguments. However, in dealing with the question whether religious ought to work with their hands, St. Thomas asserts that not only religious but all men are enjoined by a precept of natural law to work with their hands.

However, St. Thomas continues that even though this precept has as its goals the combatting of idleness and the controlling of sensuality, nevertheless, since it does not specify the particular means which have to be used to achieve these ends, the latter are left to individual discretion. Although the precept obliges all men to help one another according to their abilities, it does not, in fact, require that every individual must work with his hands.[6]

However, the Manus quae contra Omnipotentem tenditur,[7] which was most probably the work of the Franciscan

Thomas of York,[8] was more important to the mendicants' cause than these two pamphlets by St. Bonaventure and St. Thomas Aquinas. Next to the De periculis, the Manus was the most important source for further polemical works in this controversy.[9]

Again, although the Manus is concerned mainly with theological and Scriptural issues, it does contain one very significant reference to natural law. In order to counter certain arguments offered by the seculars in support of the French bishops' endeavors to curb the activities of the mendicants as preachers and confessors in their dioceses, its author appeals to the plenitudo potestatis of the pope. The Manus maintains that this plenitudo potestatis gives the pope the authority to grant to the friars the right to preach and hear confessions even in dioceses where permission had not been obtained from the bishop.[10]

More specifically, the author of the Manus claims that the pope, as the supreme legislator of the Church, could reinterpret or alter any of the laws or canons cited by the seculars, as long as these reinterpretations were not at variance with Scripture, Tradition or the natural law.[11]

Actually, the argument is even more interesting than this. It specifically states that anyone who contradicts Scripture in effect contradicts natural law. Especially when one considers that this move is made in the context of a discussion of papal plenitudo potestatis, it very clearly

suggests that the author was influenced by a tradition in the interpretation of natural law embraced by the papal canonists, that is, natural law is taken to be divine law: "Jus naturale, id est, jus divinum."[12]

Indeed, it was an appreciation for this supposed plenitudo potestatis which afforded a legal justification for the intervention of Alexander IV in 1256. The pope condemned the De periculis and banished its author, William of St. Amour, to Burgundy, because of his obdurate refusal to recant what he had said in this work.[13] Thus, there was a temporary victory for the mendicants' position.

However, this triumph was quite short-lived. In 1267, a renewed conflict arose when Clement IV regranted the privileges to the friars to preach and hear confessions in dioceses without first obtaining the permission of the local bishop. In the summer of 1269, Gerard of Abbeville, the archdeacon of Abbeville and Ponthieu, took up the cause of the seculars and published a reply to the Manus, the Contra Adversarium Perfectionis Christianae.

Gerard of Abbeville presents two very significant legal counter-arguments to the mendicants' position in his Contra Adversarium. First, he maintains that it is simply ridiculous to claim that there is a legal distinction between the dominion or ownership of, and the use of, consumable goods which are consumed in use.[15] Second, he proposes that it is just unbelievable that, of the things given to the Friars

Minor for their use, the Holy See has a dominion which is of profit to the Friars Minor but in no way profitable to the reputed owners, the Holy See.[16]

Among the replies which were composed by the mendicants to the Contra Adversarium were St. Thomas Aquinas' De perfectione vitae spiritualis,[17] St. Bonaventure's Apologia pauperum[18] and John Peckham's (Pecham) Tractatus pauperis.[19] Of these, St. Bonaventure's Apologia is of the greatest interest. St. Thomas' De perfectione vitae spiritualis is primarily concerned with theological matters. As Lambert notes,[20] although it is quite similar to St. Bonaventure's Apologia in the arguments it contains, Peckham's Tractatus pauperis lacks the critical acumen found in the former work. The Apologia is not only a more fruitful source on which to concentrate, but it also had a much more lasting and pervasive influence than Peckham's work.

In the Apologia St. Bonaventure attempts to counter the two major legal criticisms which Gerard of Abbeville had proposed in his Contra Adversarium. First, to the objection that use could not be separated from dominion in things consumed in use, St. Bonaventure denies that this principle is always true under law. He cites the case of the relationship of a son to the peculium. Although he has no right of dominion over the peculium, nevertheless, the son is held to have use of the peculium; and the peculium would encompass things consumed in use.[21]

St. Bonaventure is appleaing here to a principle of Roman Law, the peculium.[22] This principle had been used by Justinian in his Digest[23] to typify the legal status of a son as regards the retention, recovery or acquisition of any possession included in the peculium. St. Bonaventure cites Justinian's rule, although not in its entirety.[24]

Second, to the objection that the papacy actually gains no temporal benefit from its dominion over the possessions of the Friars Minor, St. Bonaventure argues that civil law is being employed here out of its proper sphere of application. He claims that the Holy See's ownership of the Franciscan goods is not unfruitful since its possession is of spiritual benefit.[25] This is not a very adequate counter-argument from a legal point of view. It fails to address itself to the legal criticism being posed and instead circumvents the legal question by an appeal to extralegal considerations.

Also, St. Bonaventure claims that what he has proposed is further sanctioned by a precept of natural law that is plainly expounded through civil law. He argues that the law provides, among other things, that a benefit is not able to be conferred on one who is unwilling to accept it.[26] Thus, since the Friars Minor do not have the intention of acquiring dominion over their goods, but indeed a contrary wish, they are in fact not able to acquire dominion or ownership or to be spoken of as owners of the goods they use.

Without the intention of acquisition one is unable to acquire property, dominion or possessions under law.[27]

Whatever limited legal merit this argument has in itself, what is disconcerting is that it is unclear precisely what precept of natural law it is to which St. Bonaventure is appealing that he feels is so "evidently explicated" through the civil law.

In the Apologia, St. Bonaventure also claims that Christ's sanctioning of the principle of use without possession of temporal goods being of spiritual value is corroborated by natural, civil, canonical and divine law.[28] But this reference is even less illuminating.

However, it must not be assumed that so significant a medieval philosopher as St. Bonaventure did not have any specific position on natural law. He gives a much clearer exposition of his understanding of natural law in his Commentary on the Sentences of Peter Lombard.[29] However, since this chapter of our historical analysis is primarily concerned with the controversy between the mendicants and the seculars, an analysis of this work, which was not part of the conflict being considered, would range beyond the purpose of this chapter. We are still primarily concerned with tracing the development of the legal aspects of the question of the poverty of Christ and His apostles, since considering this issue was to so profoundly affect William Ockham.

In general then, St. Bonaventure's Apologia is actually weakest in its counter-arguments to Gerard of Abbeville's Contra Adversarium precisely in that aspect in which we are most interested, that is, in its reply to the legal criticisms of absolute poverty. Not only does St. Bonaventure become confused by assuming that in the Quo elongati rather than in the Ordinem vestrum the Holy See took over dominion of the goods of the Friars Minor; but throughout the Apologia he never precisely defines or distinguishes most of the terms he uses when he is speaking about the rights of ownership.[30]

Although there were a number of polemical works of some significance added to this pamphlet war after St. Bonaventure's Apologia, among them, St. Thomas Aquinas' Contra pestiferam doctrinam retrahentium homines a religionis ingressu,[31] John Peckham's Quaestio utrum perfectio evangelica consistat in renuntiando vel carendo divitiis propriis et communibus,[32] commonly referred to as the De paupertate, and his De pueris oblatis in Ordine Minorum,[33] and Nicholas of Lisieux's De ordine praeceptorum ad consilia,[34] these did not add any new impetus to the development of the legal conflict over the poverty of Christ and His apostles.

It was St. Bonaventure's Apologia then that was to have the greatest influence on the continued development of the legal conflict in question. It was to serve as the model for the next papal intervention in the interpretation

of the Franciscan Rule. We will consider this intervention in the next chapter.

FOOTNOTES TO CHAPTER TWO

[1]Guillaume de Saint-Amour, Opera Omnia (Coutances, 1632), pp. 17-72. By a secular master is meant a teacher or professor who, although he was a cleric, was not a member of a religious order, i.e., a member of the regular clergy, like the Friars Minor or the Dominicans, which were also mendicant orders. The two other major mendicant orders were the Carmelites and the Augustinian Hermits.

[2]De periculis, chap. 12; cf. Max Bierbaum, "Bettelorden und Weltgeistlichkeit an der Universität Paris," Franz. Stud., 7 (1920), 35-36. The theory of evangelical poverty proposed that Christ and His apostles had possessed nothing in common or as individuals.

[3]Decima L. Douie, The Conflict between the Seculars and the Mendicants at the University of Paris in the Thirteenth Century (London, 1954), pp. 8-9.

[4]S. Bonaventura, Opera Omnia, V (Ad Claras Aquas, 1891), pp. 125-165.

[5]S. Thoma Aquinatis, Opera Omnia, XV (New York, 1950), pp. 1-75.

[6]Ibid., pp. 26-27.

[7]Bierbaum, op. cit., 37-168.

[8]Franz Pelster, "Thomas of York, O.F.M., als Verfasser des Traktates 'Manus quae contra Omnipotentum tenditur,'" A.F.H., 15 (1922), 3-22.

[9]Douie, op. cit., p. 14.

[10]Ibid., p. 15. By plenitudo potestatis is usually meant the papal theory of plenitudo ecclesiasticae potestatis. This theory proposes that the pope is the source of all ecclesiastical power and in him all ecclesiastical power is comprised since he was invested with this fullness of power by God.

[11]Manus, chap. XIV; cf. Bierbaum, op. cit., 140.

[12]Guido de Baysio [the 'Archdeacon'], Rosarium seu super Sexto decretalium commentaria (Venice, 1577), in Comm. on Dist. I.

[13]Douie, op. cit., p. 16.

[14]Sophronius Clasen, "Tractatus Gerardi de Abbatisvilla 'Contra Adversarium Perfectionis Christianae,'" A.F.H., 31 (1938), 276-329 & 32 (1939), 89-200. At this time an archdeacon was, because of the scope of his ecclesiastical duties within a bishopric, considered to be next in importance after the diocesan bishop.

[15]Contra Adversarium, Bk. II, pt. IV; cf. Clasen, ibid., 32 (1939), 133.

[16]Ibid.; cf. Clasen, ibid., 135.

[17]S. Thoma Aquinatis, ed. cit., pp. 76-102.

[18]S. Bonaventura, Opera Omnia, VIII (Ad Claras Aquas, 1898), pp. 233-330.

[19]As yet, the Tractatus pauperis has not been published as a whole; however, the Prologue and chaps. I-VI have been published by A. van den Wyngaert in his Tractatus pauperis a fratre Johanne de Peckham, O.F.M., Archiepiscopo Cantuariensi, conscriptus, et cum apparatu critico (Paris, 1925). F. M. Delorme has published chaps. VII-IX in his "Trois chapitres de Jean Peckham pour la défense des Ordres mendicants," Studi Franciscani, 29 (1932), 54-62 & 164-193, and chaps. XI-XIV in "Quatre Chapitres inédites de Jean de Pecham, O.F.M.," Collectanea Franciscana, 14 (1944), 84-120, and chap. XV in his Fratris Richardi de Mediavilla, quaestio disputata de privilegio Martini papae IV nunc primum edita (Ad Claras Aquas, 1925), pp. 79-88. Chaps. X and XVI have been published by A.G. Little in his Fratris Johannis Peckham quondam Archiepiscopi Cantuariensis tractatus tres de paupertate (Aberdeen, 1910), pp. 21-90.

[20]Douie, op. cit., pp. 19-20.

[21]Apologia, ed. cit., xi, 7, p. 312.

[22]"Peculium. Lat. In Roman law. Such private property as might be held by a slave, wife, or son who was under patria potestas, separate from the property of the father or master, and in the personal disposal of the owner." Black, Law Dictionary 1287 (4th ed. 1968).

[23]Justinian, Digest, Bk. L, tit. 17, de Regulis iuris, regula 94.

[24]For some reason, St. Bonaventure leaves "neque adipisci" out of his rendering of the relevant rule; cf. Apologia, ed. cit., xi, 7, p. 312.

[25]Ibid.

[26]Ibid., xi, 9, p. 313.

[27]Ibid.

[28]Ibid., xi, 11, p. 314.

[29]If the reader is interested in investigating further St. Bonaventure's position on natural law, he might consult the following texts: In IV Sent. dist. 33, art. 1, qu. 1, 2, and 3, in S. Bonaventura, Opera Omnia, IV (Ad Claras Aquas, 1889), pp. 748-752. Here he distinguishes three notions of natural law: one in which, as in the case of some papal canonists, natural law is taken to be divine law in the Scripture; one in which he equates natural law with a law common to all nations, a ius gentium; and one in which he identifies natural law with a law instilled in all animals, which for the medievals was often equated with what was supposed to be the Roman notion of natural law. Here St. Bonaventure expresses his preference for the supposed Roman concept of natural law as the most proper notion of natural law. And in In II Sent. dist. 39, art. 2, qu. 1 [ed. cit., II (Ad Claras Aquas, 1885), p. 911], he distinguishes two senses of "natural law." In the first sense, the term stands for a habit of the soul which includes intellect and affect. In the second sense, it stands for a collection of the precepts of the natural law. The reader should also consult these works: A. H. Chroust, "The Philosophy of Law from St. Augustine to St. Thomas Aquinas," New Scholasticism, 20 (1946), 58-62, and Ludwig Baur, "Die Lehre vom Naturrecht bei Bonaventura," Studien zur Geschichte der Philosophie. Festgabe zum 60. Geburtstag Clemens Baeumker. Beitrage zur Geschichte der Philosophie des Mittelalters. Supplementband (Münster, 1913), pp. 217-239.

[30]M. D. Lambert, Franciscan Poverty (London, 1961), p. 139.

[31]S. Thoma Aquinatis, ed. cit., pp. 103-125.

[32]Livarius Oliger, "Die theologische Question des Johannes Pecham über die vollkommene Armut," Franz. Stud., 4 (1917), 139-176.

[33]Livarius Oliger, "De Pueris Oblatis in Ordine Minorum (cum textu hucusque inedito Fr. Iohannis Pecham)," A.F.H., 8 (1915), 414-439.

[34]Bierbaum, op. cit., pp. 220-234.

CHAPTER THREE

EXIIT TO EXIVI:

AN ATTEMPT TO CLARIFY A LEGAL CONFLICT

Again, chiefly through the initiative of Nicholas III, a former Cardinal-Protector of the Order, the Holy See found it opportune to make another clarification of the Franciscan Rule in perhaps the most famous papal intervention, the bull Exiit qui seminat[1] (August 14, 1279).

In this bull Nicholas III makes a pronouncement that is to be repeated for decades as a papal vindication of the position of the Friars Minor. Because of its importance it will be translated here in full:

> . . . we say that the renouncement of such ownership of all things both individually and in common for God is meritorious and holy and how much Christ taught disclosing the way of perfection in word and strengthened by His example, and how much the first founders of the Church Militant, according as they drank from this spring, in choosing to live perfectly, diverted through the channels of their doctrine and lives.[2]

It is interesting to note the marked doctrinal similarity which is evident both here and in a number of other passages between Nicholas III's assertions and those of St. Bonaventure in his Apologia.[3] This similarity is so pronounced that the bull appears to be a papal underwriting of

St. Bonaventure's approach and hence a corroboration of the then-current Franciscan position on the doctrine of absolute poverty.[4]

Immediately subsequent to making this famous pronouncement, Nicholas III, in considering the possibility of the Friars Minor coming to the point of extreme necessity, maintains that the natural law does not forbid doing what is necessary to sustain life. He appeals to the principle that extreme necessity excepts one from all law.[5]

As the reader will note, this appeal to the idea of natural law sanctioning the doing of whatever is necessary to sustain life when one is at the point where his continued existence is in extreme peril will be appealed to in one form or another again and again by subsequent authors in this controversy, especially by those championing the Franciscan cause.

Further, Nicholas III proposes that the renunciation of dominion over their goods by the Friars Minor in no way entails that they have also renounced the use of these things.[6] In further specifying his meaning, Nicholas III considers five legal concepts: "proprietas,"[7] "possessio,"[8] "usus fructus,"[9] "ius utendi,"[10] and "simplex usus facti."[11] These appear to be a further precising of St. Bonaventure's terms: "proprietas," "possessio," "usus fructus," and "simplex usus."[12] These terms were employed by him in the only passage in which he really tries to come to grips with the terminological complexities of the legal aspects of the

poverty problem in his Apologia.[13]

Nicholas III proclaims that even though the Friars Minor do not have dominion over their goods, they, nonetheless, have simplex usus facti of them. He says that they have a use which should be tempered by a moderation that is in accordance with the maintaining of their lives and also with the carrying out of their functions.[14]

To the objection, raised by Gerard of Abbeville in his Contra Adversarium, that the dominion of the Holy See over the goods of the Friars Minor is unprofitable, Nicholas III gives essentially the same unresponsive answer that St. Bonaventure had offered. The pope maintains that such dominium is fruitful because of its spiritual benefits for eternity.[15]

The bull gives no reply to the other legal objection, which was also raised by Gerard of Abbeville, that use cannot be separated from dominium in goods consumed in use. The commission that provided the material on which the bull was based had expert legal counsel. And, since, in another context, the commission employed the two legal examples St. Bonaventure had given to try to counter this objection, it is clear that the members of the commission were not ignorant of this objection or St. Bonaventure's attempted defense of the Franciscan position.[16] Possibly, the commission considered this objection too damning.

Finally, at the end of the bull, Nicholas III ordered

that there was to be no concordat, contrary, diverse or adverse opinions or expositions of the bull, unless they dealt with purely verbal or grammatical matters that in no way impaired the bull's being interpreted literally; and he enjoined all these prohibitions under the pain of excommunication and privation of both ecclesiastical position and benefice.[17]

For some time, this injunction was effective in stifling open conflict over the specific issues defined in the bull. The scene shifted to another arena, the Spiritual-Conventual conflict.[18] This was essentially a further precising of the absolute poverty question rather than a new controversy. The Spiritual-Conventual conflict was concerned with a number of issues which are not in themselves of central importance to our legal analysis, such as the actual practice of poverty in the Order, the conflict over the doctrine of usus pauper[19] and other doctrinal disputes between the two factions.

However, in the context of this controversy, the question of an oversight in Exiit's not specifying a procedure for the use of the papal procurator granted to the Friars Minor in Quanto studiosius was raised. In order to remedy this defect, Martin IV issued a bull, Exultantes in Domino[20] (January 18, 1283).

Martin IV granted to the Friars Minor the right to appoint procurators without first consulting the bishop or the Holy See, to utilize the procurators as they saw fit,

and to deprive them of their office at their own discretion.[21] Thus, although the procurators were nominally supposed to be the representatives of the papacy as far as the dominion of the Holy See over the goods of the Friars Minor was concerned, functionally they became the go-betweens of the Franciscans.

Nevertheless, the internal struggle in the Order over the doctrine of usus pauper raged on. This struggle was more fired by Exultantes than stifled by it. The chief protagonist of the Spiritual party, Petrus Johannes Olivi, pressed all the more forcefully for the acceptance of his doctrine of usus pauper against the Conventual position that Franciscan poverty consisted, in essence, in the abjuration of dominion rather than with a concern that the use of goods be strictly limited to necessities.

Exultantes had, in effect, provided a carte blanche from the Conventuals' point of view to use the goods of the Order in any way the superiors saw fit. Some superiors took full advantage of this privileged legal position in spite of the chagrined outcries from the Spiritual party.

Again, however, it is not our purpose to recount this whole controversy but to try to point out any legally relevant aspects it might exhibit. The next major protagonist for the Spirituals, Ubertino da Casale, seems to have influenced Clement V to issue his bull Dudum ad apostolatus[22] (April 14, 1310). This bull was essentially favorable to the Spirituals'

position. Ubertino also had some legally relevant things to say in his work, Super Tribus Sceleribus.[23]

Ubertino insisted on the acceptance of the usus pauper and maintained that it was heretical for the Conventuals to hold that the usus pauper was not included in the Franciscan vow of poverty.[24] In the Super Tribus Sceleribus in a discussion of usus pauper, he proposed that as far as the temperance and virtue of an act are concerned, it is a law of natural reason and divine precept that one obtain that which is necessary for one's time, state and place.[25]

Again, this is an appeal to a version of the notion of natural law's underwriting the obtaining of that which is necessary for one's existence. This kind of move is characteristic of those who are arguing against the papalist position among the Franciscans. However, here we see the further sophistication of a Spiritual using such an appeal against the Conventuals. By this time, the Conventuals had more thoroughly accepted the legal mentality in the papal interpretations of the Franciscan Rule than had the Spirituals.

In accord with their view that poverty essentially consists in the renunciation of dominion, the Conventuals appealed to St. Bonaventure's arguments in the Apologia; and they utilized technical legal arguments to support their case.[26] In the Circa materiam,[27] their declaration concerning the usus pauper, the Conventuals proposed that a vow must be certain and determinate. Since the usus pauper

admits of no certain and determinate specification, it cannot be included under the vow of poverty.[28]

In another work sympathetic to the Conventuals' position, the Tractatus de Paupertate Fratrum Minorum,[29] Richard of Conington gives another argument against the usus pauper. The substance of the vow of evangelical poverty is, he maintains, the abjuration of dominion, since the renunciation of dominion is not able to be dispensed even by the pope, whereas use can be so dispensed.[30]

Here we see an implicit denial of the principle of plena ecclesiasticae potestatis. As we noted above, this was supposed to characterize the pope's power in spiritual matters. Above, the spokesman for the Friars Minor used this principle in his arguments against the secular masters at Paris. Here we see another Franciscan, a Conventual, denying this principle in order to weaken the case of the Spiritual party. He maintains that even the pope does not have the power to dispense one from some consideration, in this case the renunciation of dominion, that is presumably intrinsically bound up with the Franciscan vow of poverty.[31] We will see that Richard of Conington was a little precipitous in his assessment of what the pope could or could not do.

This continuing controversy between the Spirituals and the Conventuals was raising more and more theological issues that had to be resolved. Therefore, a commission was appointed at the Council of Vienna (October 16, 1311-May 6,

1312) to look into the whole poverty conflict within the Franciscan Order. Although the commission seemed to support Ubertino da Casale's condemnations of laxity in the Order, even to the point of mirroring Ubertino's list of infractions,[32] it did little to resolve the central question of the observance of the Rule which was at issue.

Again, the Holy See seems to have felt constrained to step in to try to finally resolve the significant doctrinal issues in question. Clement V issued two bulls: Exivi de Paradiso[33] and Fidei catholicae fundamento[34] (both, May 6, 1312). Of these two bulls the latter, Fidei, is of less interest since its purpose was to resolve the more circumscribed issue of certain doctrinal errors supposedly contained in the works of the Spiritual Petrus Johannes Olivi.

However, Exivi sought to clear up the doubts engendered by the controversy between the Spirituals and the Conventuals concerning the interpretation of the Rule. Again, the bull listed the infractions of the Rule in the same order as in Ubertino's Rotulus iste,[35] in much the same way as the commission of the Council of Vienna had done.[36] Yet, the bull actually accepted neither the Spiritual nor the Conventual position on the observance of poverty. Instead, Clement V concocted a compromise solution under which the Friars Minor were especially obliged to those narrow or "poor" uses of goods in the way in which these

uses were specified in the Rule.[37]

But again papal intervention in interpreting the Franciscan Rule proved to be inefficacious in actually resolving the specific points at issue, in this case those between the Spirituals and Conventuals. In fact, it opened the door to more conflict and this time not only on a verbal, but also on the physical level.

It was Clement V's successor, John XXII, who inherited an even more serious problem than his predecessor had originally faced. And as we will see in the next chapter, John XXII dealt with the problem in his typical single-minded manner.

FOOTNOTES TO CHAPTER THREE

[1]C. Eubel, ed., Bullarii Franciscani Epitome (Apud Claras Aquas, 1908), no. XLVI, pp. 290b-300b.

[2]Ibid. As Lambert has noted [Franciscan Poverty (London, 1961), p. 143], Eubel has made an error in the Epitome since he prints "vitam perfectionis" where the original reads "viam perfectionis"; cf. J. H. Sbaralea, ed., Bullarium Franciscanum, III (Rome, 1765), p. 407b.

[3]Venantius Maggiani in his "De relatione scriptorum quorumdam S. Bonaventurae ad Bullam 'Exiit' Nicholai III (1279)," A.F.H., 5 (1912), 3-21, offers the reader a series of texts demonstrating the doctrinal relationship not only between Exiit and the Apologia but also between Exiit and a number of other works by St. Bonaventure, e.g., the Legendae duae, the Expositio super regulam Fratrum minorum, and the Quaestio de paupertate. For specifics, see 12-21 of this article.

[4]Lambert, op. cit., p. 143.

[5]Epitome, p. 293a.

[6]Ibid., p. 293.

[7]Proprietas. In this context, this would mean ownership. It is roughly equivalent to dominium.

[8]Possessio. This would entail the ability to exercise power or control over some thing but would not entail dominium over the thing or the acquisition of dominium through usucapio, concerning which, see Black, Law Dictionary 1712 (4th ed. 1968).

[9]Usus fructus or Ususfructus. This would be defined as the right to enjoy something, although another possesses dominium, and to derive any fruits from the use which does not substantially alter the thing being so enjoyed.

[10]Ius utendi. This is the specific right to use an object. It legitimizes the use of that object, whether or not the user does possess dominium over the object.

[11]Simplex usus facti. In the present context, this entails the license to use certain goods. This license is revocable at the will of the grantor at any time.

[12]Simplex usus. This is equivalent to simplex usus facti in this context; see supra, n. 11.

[13]For the specific text involved, Apologia xi, 5, p. 312, see Maggiani, op. cit., 17.

[14]Epitome, p. 293b.

[15]Ibid.; see Maggiani, op. cit., 17, for the parallel argument, i.e., Apologia xi, 7, p. 312.

[16]Lambert, op. cit., pp. 144-145.

[17]Epitome, pp. 299b-300a. A benefice was usually some Church property, ex., a monastery, that was endowed or invested on a cleric with the ecclesiastical office or position that went with it in order to provide for his living through its revenues.

[18]Spiritual-Conventual. These two terms refer to two factions within the Franciscan Order in the 13th and 14th centuries. The Spirituals endeavored to impose a rigorous interpretation of the Rule on the Order, whereas the Conventuals, who were the majority party, followed the Rule as it had been interpreted by the Holy See. The Conventuals are also called the "Community."

[19]Usus pauper. In this context, this refers to an interpretation by the Spirituals that the Rule, through the vow of poverty, enjoined that the Friars Minor limit their use of goods to only those which were absolutely necessary. This term seems to have been conceived by the Spiritual Petrus Johannes Olivi.

[20]Epitome, no. XLIX, p. 301.

[21]Ibid., p. 301b.

[22]C. Eubel, ed., Bullarium Franciscanum, V (Rome, 1898), no. 158, pp. 65b-68a.

[23]A. Heysse, "Ubertini de Casali opusculum 'Super Tribus Sceleribus,'" A.F.H., 10 (1917), 103-174.

[24]Lambert, op. cit., p. 193.

[25]Super Tribus Sceleribus, Reply to the Fourth Objection; cf. Heysse, op. cit., 171.

[26]Lambert, op. cit., pp. 193-194.

[27]Heysse, op. cit., 116-122.

[28]Circa Materiam; cf. Heysse, ibid., 118.

[29]A. Heysse, "Fr. Richardi de Conington, O.F.M. Tractatus de Paupertate Fratrum Minorum et Abbreviatura inde a Communitate extracta," A.F.H., 23 (1930), 70-105 & 340-360.

[30]De paupertate, III, XI, in responsio; cf. Heysse, ibid., 105.

[31]It is somewhat ironic that it is quite possible that Richard of Conington may have derived the basis for his position on the limits of the pope's power in this case from Olivi, the Spiritual. Although Olivi was a firm supporter of papal authority, he did not believe that the pope could dispense from the vow of poverty. He maintained that the pope's power had been given to him not for debasement but for edification. Thus, the pope could not entice a man to forsake a life of perfection; cf. Douie, op. cit., p. 98.

[32]Geroldus Fussenegger, "Relatio commissionis in concilio Viennensi institutae ad decretalem 'Exivi de paradiso' praeparandum," A.F.H., 50 (1957), 152.

[33]Bull. Franc. V, no. 195, pp. 80a-86a.

[34]Ibid., no. 196, p. 86.

[35]Franz Ehrle, "Die von Ubertino Casale gegen die Communität aufgestellten Anklageartikel und Raymunds von Fronsac Widerlegung derselben," A.L.K.G., 3 (1887), 93-137.

[36]For reference to specific points of similarity between the Rotulus and Exivi, see Lambert, op. cit., p. 199, n. 4.

[37]Bull. Franc. V, p. 85a.

CHAPTER FOUR

SIMPLEX USUS FACTI:
THE ULTIMATE FORMULATION OF A LEGAL CONFLICT

Of the number of possible options open to resolve the serious internal strife within the Order, John XXII chose what was perhaps the most direct, if not the most perspicuous, solution. He determined to support the Conventuals in crushing the Spirituals.

To this end, John XXII promulgated Quorumdam exigit[1] (October 7, 1317). In Quorumdam exigit he ordered that all the Friars Minor were to submit to the decisions of their superiors--their Conventual superiors--on two central points of observance of the Rule to the Spirituals. The Spirituals had adopted the use of a shorter habit than that worn by the Conventuals.[2] They were ordered to submit to the will of their Conventual superiors and wear the habit that was in general use by the Conventuals. Also, on the issue of the Rule's forbidding the Friars Minor to have cellars and granaries for the storing of food and wine, an observance on which the Spirituals were insistent, John XXII ordered all Friars Minor to submit to the decisions of their Conventual superiors.[3]

John XXII ended his Quorumdam exigit with a lecture on obedience. One sentence of this is especially significant; he says, "Great indeed is poverty but unity is greater; obedience is the greatest good if it is keep intact."[4] This insistence on obedience is characteristic not only of his dealings with the Friars Minor but also of many other aspects of his resolving the problems of his pontificate.

It is certainly one of the ironies of history that a future excommunicate, Michael of Cesena, the Minister-General of the Order, was at this time more than eager to help John XXII in crushing the Spirituals. He cleverly devised a set of questions[5] to be posed to certain seized Spirituals which put them in the position of either submitting to their Conventual superiors or being suspected of heresy. Four recalcitrants were finally burned by the Inquisitor of Provence.[6]

In two subsequent bulls, Sancta Romana[7] (December 30, 1317) and Gloriosam ecclesiam[8] (January 23, 1318), John XXII continued the suppression of the Spirituals and their lay supporters. However, his attention was eventually directed back to the root of the whole Spiritual-Conventual conflict, the question of the poverty of Christ and His apostles.

In order to open up the whole question for theological discussion again, John XXII rescinded the penalties incurred by anyone who dared to comment on the substance of Nicholas III's Exiit in his bull Quia nonnumquam[9] (March 26,

1322). If it was not distressing enough to the Order that their most cherished doctrine was now open for theological investigation once more, John XXII further asserted that he had the right to change any specific canons issued either by himself or his predecessors, if he thought them to be more of a hindrance than useful.[10] This seriously weakened the Franciscan position, since their doctrinal stance on poverty depended on Nicholas III's Exiit. If John XXII could alter or abrogate any part of his predecessors' decrees, he could rescind the doctrinal basis of the Franciscan position in Exiit.

At this time also, John XXII directed Cardinal Napoleon Orsini, a perennial supporter of the Spirituals, to obtain the views of his friend Ubertino da Casale on the matter of his suspension of certain parts of Exiit.[11] Ubertino's reply is interesting since he claims that Christ and His apostles had temporal things by right of necessity and by a common right of fraternal charity and that this having of temporal goods for necessary sustenance was sanctioned by natural law. Ubertino notes that the natural law, the ius naturale, is also known as "ius poli."[12]

This is again another appeal by a Franciscan, this time by one of the leaders of the Spirituals, to a notion of natural law's grounding the obtaining of that which is necessary for the preservation of life as an absolute right.

In reply to John XXII's Quia nonnumquam, the Order

issued two encyclicals to all the faithful from their Chapter-General meeting in Perugia at Pentecost of this same year (1322). In the first of these, the so-called "short version," the Friars Minor merely restated their position. They asserted that Exiit could not be rescinded, since not only had it been accepted by the whole Church but even John XXII himself had lauded Exiit in his bull Quorumdam exigit. As far as the Order was concerned, the question of the poverty of Christ and His apostles had already been settled in Exiit.[13]

In another version of the encyclical, the so-called "long version," the Friars Minor gave a more detailed defense of their position.[14] In this defense they tried to add further strength to their doctrinal position by claiming that Christ and His apostles in fact had simplex usus facti of their goods.[15] In this same context, the encyclical claimed that the Franciscans have a right based on natural and divine law to be provided with those things congruent with simplex usus facti that were necessities.[16]

Again, this is another version of the natural law argument that is grounded in the idea that one cannot be denied those things that are necessary for one's existence. But here it is being pressed into service to help to undergird the simplex usus facti doctrine, which is so essential for holding together the Franciscans' legal case.

Further, the Chapter-General appointed Bonagratia

of Bergamo, a doctor of both civil and canon law (doctor utriusque iuris), their procurator to set forth their legal case. He did this in his Tractatus de Christi et apostolorum paupertate.[17] It is ironic that Bonagratia, who had been so acerbic in his criticism of the Spirituals that Clement V had him imprisoned,[18] now found himself defending the Conventuals against the encroachments of the papacy.

In addition to trying to meet the objection that it was heretical to assert that Christ and His apostles did not have anything in common, Bonagratia tried to demonstrate that the Friars Minor had no dominion but only simplex usus facti of the goods that they used. And, in this attempted demonstration, he relied heavily on appeals to natural law.

Bonagratia maintained that simplex usus facti of those things necessary for natural sustenance was required by natural law. He said that this natural law originates from the promptings of reason and a natural instinct that is common to all men and everywhere in force.[19]

Bonagratia asserted that neither through law nor through renunciation, abdication nor in any other way are natural laws that are followed by all and constituted by Divine Providence to be always firm and immutable able to be abrogated or altered.[20]

He proposed that property and possession or ownership of things are due to human law, and usufruct (usus-fructus) and right of use (ius utendi) are due to civil law.

It is certain, he argues, that all private law which is due to human institution is able to be renounced.[21]

In another argument he claims that no one is able to renounce the obligation of natural law to preserve one's nature through those things that are necessary for this preservation. No one is able to renounce this obligation, he asserts.[22]

Further, he argues that it is clear that what is natural is not able to be served unless one has usus facti of those things that are necessary for the preservation of human life, such as food and clothing, which, with other things, are consumed or worn out in their use.[23]

Finally, he concludes that property or dominion of things or food which is lawful is, nonetheless, not natural, since only usus facti is natural. Thus, dominion can always and everywhere be renunciated but not use.[24]

This is again just a further tooling of the natural law argument, we have noted above, was based on the notion of one's being required to obtain those things necessary to preserve one's existence. Again, the argument is being used to justify the simplex usus facti position.

In a further argument Bonagratia makes an appeal to another central natural law argument. He maintains that the use of things and food which falls under the precept of natural law is clear from Genesis, chap. 2, vs. 17. There it is read that from the promptings of reason of a creature

in a state of innocence, God gave two commands to man: "From every tree in paradise you may eat, but of the tree of the knowledge of good and evil you may not eat."[25]

He proposes that this shows that the use of food which is consumed in this use is according to natural law and falls under a divine precept. Bonagratia asserts that in a realm in which natural law is fully in force no one is able to say, "this is mine" and "this is yours."[26]

And he concludes that the use of those things that are consumed in use does not of necessity have to be connected with the notions of mine or yours. Consequently, it is clear, he feels, that the use of things that are consumed in use is able to exist without there being property or dominion.[27]

The underlying principle of the natural law being appealed to here by Bonagratia is the notion that in the state of original innocence, the state of Adam and Eve in paradise before the Fall, there was no such thing as property or possessions. Property rights resulted from the necessity of dealing with man's debased nature after the Fall.

This principle was well accepted even before the Middle Ages. For instance, Bonagratia appeals to what he believes to be Clement of Alexandria's statement that the terms "mine" and "thine" were introduced because of the iniquity and cupidity of nations through human institution.[28] This notion that there was no property or right of

possession in man's state of original innocence will be appealed to again and again by the Franciscans as a principle of justification in their arguments based on natural law during this controversy over poverty.

In another argument designed to meet a possible objection to this state-of-innocence hypothesis, Bonagratia argues that if one were to maintain that this state of innocence did not last long enough to show that use could be permanently separated from ownership or dominion, another could reply that the first man might not have sinned. If this were so, then the use of all things would have always and everywhere been separated from ownership or dominion.[29] This argument involves a theoretically-interesting contrary-to-fact conditional, but it is not a very convincing legal counter-argument.

Further, Bonagratia maintains that under both civil and canon law, in times of extreme necessity all goods perceived as necessary for sustaining life are held in common by all men of the world so that no one is able to say that this is his property.[30]

Finally, Bonagratia denies that either the principle of _ususfructus_ or _quasi ususfructus_[31] relate legally to _simplex usus facti_, since, in essence, the latter entails neither any kind of dominion or ownership nor any _ius utendi_, which is implied by the former.[32]

Thus, in his hastily written[33] _Tractatus de Christi_

et apostolorum paupertate, Bonagratia of Bergamo used many of the natural law arguments that were to be frequently employed in the Franciscan cause to support their position on the poverty of Christ and His apostles.

John XXII, angered by the presumptuousness of the Chapter-General's issuing an encyclical to all the faithful designed to impinge on his papal prerogatives, issued an even stronger statement of his competence in the bull Ad conditorem canonum[34] (December 8, 1322).

In Ad conditorem John XXII tried to undermine another central tenet of the Franciscan position by suspending the parts of Exiit in which Nicholas III had renewed the Holy See's taking over legal dominium of the goods used by the Friars Minor.

The Franciscans had claimed that because of this arrangement, they had no dominion over the goods they used but merely nudus usus facti,[35] the pope stated. He retorted that it was the actual dominion of the Holy See that was nudus, not the use by the Friars Minor.[36] Also, the Franciscans were able to sell, exchange or give away those things that were supposed to be under the dominion of the Holy See in certain instances. John XXII claimed that this was more indicative of dominion than it was of one's being a nudus usuarius.[37]

Further, John XXII argued that there could not be nudus usus in things that were consumed in use and that use

sanctioned by law (usus iuris) and factual use (usus facti) could not be separated from dominion. To assert that they could was contrary to both law and reason.[38] John XXII continued that it could not have been Nicholas III's intention to reserve such goods under the dominium of the Holy See since no sane person would believe that Nicholas III intended the papacy to have dominion over "one egg or one bean or one crust of bread" that was frequently given to the Friars Minor.[39]

John XXII maintained that the Holy See's dominion over the Franciscans' goods was "naked, verbal and mathematical." The ones who were deriving the advantages of such a setup were the Friars Minor and not the papacy; nor could the Holy See expect to obtain some benefit from this dominion in the future since this arrangement was originally supposed to have been for the profit of the Franciscans.[40]

Further, John XXII asserted that the dominion over the Franciscan goods had been the occasion of such evils as boasting, internal conflicts and harm to the spiritual life of the Order. These would continue as long as the Holy See retained ownership of the possessions of the Friars Minor.[41]

Finally, the pope proposed that the Franciscans' use of their procurators, supposedly acting in the name of the papacy, had proved to be a source of agitation, vexation and perturbation as well as an occasion for copious injury to the good name of the Holy See.[42]

Thus, in bringing into question the plausibility of the notion of a total renunciation of dominium in Ad conditorem, John XXII had seriously weakened the Franciscan doctrine of the poverty of Christ and His apostles. The Friars Minor claimed that Christ and His apostles had observed a total renunciation of dominion, that is, that they had lived a life of absolute poverty. If it was true that such an abjuration of dominion was not actually possible or was devoid of spiritual value, if possible, then the Order's position would be undermined and so would be their claim to be the Order that uniquely imitated the poverty of Christ and His apostles.[43]

However, what is quite interesting to note is that the Holy See's renunciation of dominium over the Franciscan goods had little or no practical effect on the flow of everyday life in the Order; business went on pretty much as usual. This is perhaps the best evidence to indicate how speculative in nature were many of the basic issues preeminent in the poverty controversy by this time.

This is then the point that had been reached in the renewed controversy over the poverty of Christ and His apostles by the end of 1322. Although he was seriously threatening the Franciscans' doctrinal position, John XXII had not yet had the final word. The new year brought yet another formal response from the Order concerning their embattled doctrine.

FOOTNOTES TO CHAPTER FOUR

[1]C. Eubel, ed., Bullarium Franciscanum, V (Rome, 1898), no. 289, pp. 128a-130b.

[2]Ibid., p. 128b.

[3]Ibid., p. 130a.

[4]Ibid., p. 130b.

[5]Chap. xxiii; see Franz Ehrle, "Des Ordenprocurators Raymond von Fronsac (de Fronciacho) Actensammlung zur Geschichte der Spiritualen," A.L.K.G., 3 (1887), 30.

[6]Bull. Franc. V, no. 293, pp. 132b-133b.

[7]Ibid., no. 297, pp. 134b-135b.

[8]Ibid., no. 302, pp. 137b-142b.

[9]Ibid., no. 464, pp. 224b-225b.

[10]Ibid., pp. 224b-225a.

[11]Decima L. Douie, The Nature and Effect of the Heresy of the Fraticelli (Manchester, 1932), p. 155.

[12]Bull. Franc. V, p. 234a (footnote).

[13]Littera Capituli Generalis celebrati in civitate Perusii de Paupertate Christi in the Chronicon de Gestis contra Fraticellos Authore Joanne Minorita, which is contained in E. Baluze, Miscellanea, III, J.D. Mansi, ed. (Lucca, 1762), p. 208. This is actually the Chronicon of Nicholas the Minorite and not "John the Minorite." It would appear that Baluze called Nicholas the Minorite "John the Minorite" because of an error in a 15th century manuscript, where the copyist transcribed a "J" instead of an "N"; cf. Douie, op. cit., p. 154, n. 1. This work will usually be referred to as "Baluze-Mansi, Miscellanea" hereafter.

[14]Baluze-Mansi, Miscellanea, pp. 208b-211b.

[15]Ibid., p. 210a.

[16]*Ibid.*, p. 210b.

[17]Livarius Oliger, "Fr. Bonagratia de Bergamo et ejus 'Tractatus de Christi et apostolorum paupertate,'" *A.F.H.*, 22 (1929), 292-335 & 487-511. Here "procurator" is being used in another of its senses. Above, we saw it used as a term to describe an official agent of the Friars Minor; see *supra*, Pt. I. chap. 1, n. 24, p. 15. In this context, it is being used to describe Bonagratia's position as an attorney or agent for the Friars Minor whose function was to present their legal case. As a matter of fact, Bonagratia was also the official legal agent or Procurator of the Friars Minor at Avignon.

[18]Bonagratia was ordered to be imprisoned in a convent named "Monte Caprario"; however, by some oversight, he was actually imprisoned at Valcabrère, near Cominges, in the province of Aquitaine. After a year's imprisonment, he was able to extricate himself on the legal technicality that he had been incarcerated in a place not specified in the papal bull ordering his confinement; cf. Douie, *op. cit.*, pp. 15, 16-17 & 131.

[19]Oliger, *op. cit.*, 503.

[20]*Ibid.*

[21]*Ibid.*

[22]*Ibid.*

[23]*Ibid.*

[24]*Ibid.*, 504.

[25]*Ibid.*

[26]*Ibid.*

[27]*Ibid.*

[28]*Ibid.*

[29]*Ibid.*

[30]*Ibid.*

[31]*Quasi usufructus*. This is a legal principle which had been developed from the concept of *usufructus*; see *supra*, Pt. I, chap. 3, n. 9, p. 38. It replaced the requirement in *usufructus* that the substance of the thing

being used be returned intact to the owner with one requiring that something equivalent to this thing be returned to the owner at the termination of the period of use.

[32]Oliger, op. cit., 508-510.

[33]John Moorman, A History of the Franciscan Order from its Origins to the Year 1517 (Oxford, 1968), p. 316.

[34]Bull. Franc. V, pp. 233b-237a (footnote). The first version of this bull is found in a footnote on the pages cited. The second version of the bull, which we will consider in the next chapter, is printed in the text above this extended footnote. In writing this bull, John XXII seems to have also been motivated by a desire to extricate the Holy See from the constant lawsuits that were being brought by both secular and regular clergy against the Friars Minor. Since the Holy See was the legal owner of the goods used by the Friars Minor, it was responsible for defending these things in any legal actions brought against the Franciscans; cf. Douie, op. cit., p. 160.

[35]Nudus usus facti. In this context, this phrase should be taken as equivalent to simplex usus facti; see supra, Pt. I, chap. 3, n. 11, p. 39.

[36]Bull. Franc. V, p. 236a (footnote).

[37]Ibid. A nudus usuarius would be one who had the bare or mere use of something belonging to someone else in order that the former, the usuary, might be able to meet his daily needs.

[38]Ibid.

[39]Ibid.

[40]Ibid., p. 236b (footnote).

[41]Ibid.

[42]Ibid. "Procurator" is being used here in the sense in which it stands for an official agent [see supra, Pt. I, chap. 1, n. 24, p. 15] not in the sense in which it stands for a legal advocate; see supra, Pt. I, chap. 4, n. 17, p. 53.

[43]M. D. Lambert, Franciscan Poverty (London, 1961), p. 233.

CHAPTER FIVE

CUM INTER NONNULLOS:
THE DOGMATIC RESOLUTION OF A LEGAL CONFLICT

On January 14, 1323, the Order responded to Ad conditorem through Bonagratia of Bergamo's Forma Appellationis per Procuratorem ordinis interpositae.[1] Bonagratia appealed in his Appellatio to much the same kind of natural law arguments that he employed in his Tractatus de Christi et apostolorum paupertate.

He proposed that to assert that usus facti of things consumed in use could be separated from ownership or dominion was by no means contrary to law or reason but was congruent with both divine, natural, canonical and civil law, as well as with reason.[2] Further, he maintained that both as far as use of those things which were either consumed or not consumed in use was concerned, there was no necessity that one have dominion or ownership according to both natural and divine law.[3] Again, he based this claim on the notion of the original commonality of all things, that property or ownership arose from the wickedness and cupidity of nations through human institution, not from natural or divine law.[4]

Bonagratia also appealed to both civil and canon law in order to try to demonstrate that in those things that were consumed in use, use was able to be separated from dominion or ownership. In this attempted demonstration, he appealed to the standard examples employed by St. Bonaventure in his Apologia[5]: the servant, the filius familias and the monk. Presumably, all of these have neither dominion nor ownership over those things which are consumed in their use; and, nonetheless, they have simplex usus facti.[6]

Bonagratia's Appellatio had a contrary effect on John XXII than the Order must have hoped for, since it even further intensified his resolve. John XXII's response was to reissue an amended form of Ad conditorem, which was given the same date as that on which the first version of this bull had been promulgated (December 8, 1322).

Although John XXII mollified his personal criticisms of the Friars Minor in this revised version and altered the original version of the bull by still retaining dominion over churches, oratories, convents, and certain movable goods of some value used by the Franciscans,[7] nevertheless, he reaffirmed and further extended his criticisms of the legal position of the Friars Minor.

John XXII proceeded to examine the civil law definitions of usufruct, ius utendi and simplex usus facti to try to show that it was not congruent with their legal natures to be held in things that were consumed in use.

He asserted that as far as usufruct was concerned, it was necessary that whatever was involved in the usufruct provide some sort of fruit or utility for the one granted the usufruct without the essential substance of whatever was involved being altered; and this, he claimed, was simply not the case in goods consumed in use.[8]

Further, John XXII maintained that ius utendi, since it was merely a personal right which properly required that from the thing involved in the ius utendi some utility be able to be provided in some way through its use and that in the use no substantial alteration can be affected in the thing involved, ius utendi could not be had in things consumed in use.[9]

Finally, John XXII argued that since it was neither a form of personal servitude[10] nor comparable to ius utendi, simplex usus facti was not able to be held in things consumed in use. He continued that some fruit or utility, in whole or in part, was not able to be derived without substantial alteration of the things from such use.[11]

John XXII also proposed that for there to be legitimate use of an object it was required that the user have ius utendi of that object, whether or not he had dominion over it.[12] Yet ius utendi as such could not be held in those things that were consumed in use unless there was also ownership or dominion over those things.[13] Thus, there could be no simplex usus facti in things consumed in use separated from

ownership or dominion without ius utendi[14]; and thus, the Friars Minor had no legal ground in civil law for their position.

Finally, John XXII added that not only had simplex usus facti of an object without ius utendi of that object no basis in civil law but to act on such a baseless assumption would be to act unjustly.[15]

About the same time as the promulgation of Quia nonnumquam, in March of 1322, John XXII had commissioned all the prelates and masters of theology at the papal curia in Avignon to submit a written opinion on the issue of the poverty of Christ and His apostles.[16] And thus, during the ensuing controversy, a number of opinions were delivered to the pope. Some of these are of interest not only because they provided the pope with the material on which he drew in making his final dogmatic pronouncement on the poverty question in Cum inter nonnullos,[17] which we will consider shortly, but also because of their use of natural law arguments.

Among the replies John XXII received was one from a bishop whose opinion was identified as "Episcopi Ulisbonnensis." The bishop felt that it was not heretical to assert that Christ and His apostles had property in common, since the commonality of property was according to natural law, which was not affected by a consideration of ownership as individuals or in common.[18]

Further, the bishop proposed that to assert that

Christ and His apostles had nothing in common was true according to positive law. And to have everything in common is true according to natural law. But he left it to the Holy See to determine whether the proposed position was heretical.[19]

To suspend judgment on the question involved was not an imperspicuous thing for the bishop to do, since, of the answers received by the pope, save for the replies sent by the five Franciscans queried, the other cardinals, bishops, and theologians who replied were convinced almost to a man that the Franciscan position was heretical.[20]

Nevertheless, in the replies from the Franciscans, there was some significant use of natural law arguments. In his response to an objection that use cannot be separated from dominion as far as simplex usus facti was concerned, Cardinal Vital du Four asserts that use could be separated from dominion in things consumed in use as long as natural law was fully efficacious so that no one was able to say about anything that "this is mine" and "this is yours."[21]

Further, Cardinal Vital du Four proposes that in much the same way as the things that were used by Adam during the time before the Fall, when natural law was fully efficacious, were God's goods and not some other's, so Christ, wishing to bring the Apostolic College as much as possible to the state of a natural institution, gave the apostles the use of those things that were necessary for their maintenance without

granting to them possession or ownership over these goods.[22]

Cardinal Bertrand de Turre, another Franciscan employing appeals to natural law in his reply to the pope, also gave a defense of the Minorite position. He reasoned that the life of Christ and His apostles restored the world, as much as was possible, to a state of innocence and natural law. Moreover, under natural law all things were the common property of all, so that men had use of all things from natural law. And no one had property or dominion. Nor was anyone able to say "this is mine," "this is yours," since, he maintained, this was due to ius gentium and human custom and contrary to natural equity. But, as far as dominion or ownership is concerned, all things are God's possessions, as in the words of the Psalmist: "The earth is the Lord's and the fullness thereof."[23]

Indeed, Ad conditorem had provoked such widespread indignation among the Friars Minor that even some English Franciscans, who had otherwise not been greatly involved in the poverty controversy on the Continent, set out to respond to it, even though they had not been asked by the pope. Among the responses, the Responsiones fratris Richardi de Conygtona ad Rationes papales[24] is significant.

In the Responsiones Richard of Conington limits himself to a rational defense of the usus facti, as it had been defined in Exiit by Nicholas III. He proposes that if before God had given to man dominion over the things of the earth

and conceded their use to him the necessity of eating had cropped up, then man could have justly eaten, since such an act would be underwritten by the natural law.[25]

Richard of Conington also speaks of what he terms an "improper and most bountiful sense of natural law." This, he says, not only stands for that through which all things were common in the state of innocence but also for whatever is supported by "a principle of natural reason."[26]

Finally, he attributes the division of the goods of the earth after the Fall to ius gentium and proposes that natural law still sanctions the commonality of all goods, as far as their "necessary rational uses" are concerned.[27]

Richard of Conington, like Bonagratia of Bergamo, denied that there could be any connection between usufruct and simplex usus facti, since the significance of the latter lay in its denial of any legal claim on the part of the user.[28] His position on natural law is quite similar to Bonagratia's, as is that of François de Meyronnes, the Franciscan theologian and pupil of John Duns Scotus.[29] François de Meyronnes' chief merit is his rationalistic systematization of the customary Franciscan position mirrored in Bonagratia's works; he accomplished this systematization in his work, de Dominio Apostolorum.[30]

However, John XXII was not impressed. Bolstered by an all but unanimous number of positive replies to his query of March, 1322, from his non-Franciscan curial cardinals,

bishops and theologians, indicating that the position proposed by the Friars Minor was heretical, and wishing to effect a final reply to Bonagratia and the other Franciscans, he issued his bull Cum inter nonnullos[31] (November 12, 1323).

In this short bull, John XXII made two dogmatic pronouncements. First, he decreed that the proposition that Christ and His apostles did not have anything either privately or in common was erroneous and heretical. He maintained that it expressly contradicted Holy Scripture, which, in a great number of places, asserted that they did have some things. Further, he proposed that such an assertion openly supposed that Holy Scripture itself, through which certainly the articles of orthodox faith are proved, contained the leaven for falsehoods and consequently by rendering it wholly lacking in credibility, as much as this was possible, made the Catholic faith doubtful and uncertain.[32]

Second, John XXII decreed that the assertion that Christ and His apostles in no way had a right to use those things which Holy Scripture declares that they had; or that they had no right to sell, give, or exchange these things, even though Holy Scripture testifies that they did this or expressly assumes that they were able to do so, this assertion, John XXII decreed, was erroneous and heretical. The pope maintained that this assertion evidently typifies the use of these things by Christ and His apostles as unjust and is thus characterizable as involving an impiety, contrary to

Sacred Scripture and inimical to Catholic doctrine. And, the pope proposed, this assertion brings into question certain words and actions of Christ and His apostles.[33]

Of these two dogmatic pronouncements, the first did not really address itself to the fully developed position then being proposed by the Franciscans. Only the second pronouncement adequately zeroed in on the Franciscans' fully developed position.

The bull first condemned an early, not-too-well-differentiated thesis that Christ and His apostles had nothing, individually or in common. However, more to the point, it condemned the doctrine of *simplex usus facti*, as this was contained in the long version of the encyclical issued by the Chapter-General of the Order at Perugia, in its second dogmatic pronouncement.

The net effect of the bull, then, was to condemn only the most advanced formulation of the Franciscan doctrine of absolute poverty. It is quite possible that John XXII's bull could still have been reconciled with the 13th century doctrine of poverty proposed by Nicholas III in *Exiit*.[34]

There was an immediate reply from the Franciscans, the *Responsiones ad oppositiones*,[35] most probably the work of Alvarus Pelagius.[36] In this work the author again makes an appeal to natural law. He maintains that nothing is necessary for the conservation of human life save the use of things. And since the use of food is necessary for the

conservation of nature, to which conservation one is at all times indispensably obliged by a precept of natural and divine law, one is not able to renounce the use of these things. But ownership, since it is not necessary for the preservation of nature, is able to be renounced.[37]

However, the great majority of the members of the Order submitted to John XXII's decree, since to refuse to do so and to preach about the condemned doctrine on the absolute poverty of Christ and His apostles was to put oneself in jeopardy of being arrested and imprisoned.

Nevertheless, there were some Franciscans who did not submit to John XXII. As Lambert has noted,[38] the ultimate sequel to John XXII's Cum inter nonnullos was the revolt of the Michaelists. And, as we will see in the next chapter, one of the more important figures in this revolt was William Ockham.

FOOTNOTES TO CHAPTER FIVE

[1]É. Baluze, Miscellanea, III, J. D. Mansi, ed. (Lucca, 1762), pp. 213a-221a.

[2]Ibid., p. 216a.

[3]Ibid., p. 217a.

[4]Ibid.

[5]For the specific comparisons, see S. Bonaventura, Opera Omnia, VIII (Ad Claras Aquas, 1898), xi, 7, p. 312, and 8, p. 313. The "filius familias" example, appealed to here, involves the unemancipated son in a family, who was referred to in civil law as the "filius familias." It is the filius familias who is used by St. Bonaventure in his counter-argument involving the peculium; see supra, Pt. I, chap. 2, n. 22, p. 27.

[6]Baluze-Mansi, Miscellanea, p. 217b.

[7]Decima L. Douie, The Nature and Effect of the Heresy of the Fraticelli (Manchester, 1932), p. 162. An oratory in this case would be a small chapel. In all likelihood it would be in or attached to a Franciscan convent.

[8]C. Eubel, ed., Bullarium Franciscanum, V (Rome, 1898), no. 486, p. 239a.

[9]Ibid., p. 239.

[10]The reference here is to personal servitudes (servitudes personarum), which is one of the four rights over another's property (jura in re aliena) customarily recognized under Roman Law governing things. "Personal servitudes. These were servitudes belonging to a man personally, not as owner of anything else, applying to movables as well as land, limited in duration, few in number (usufruct and two or three others derived from it), and giving indefinite rights, including physical possession of the property subject to them." W. W. Buckland, A Textbook of Roman Law from Augustus to Justinian (Cambridge, 1950), p. 268.

[11]*Bull Franc.* V, p. 239b.

[12]*Ibid.*, p. 240b.

[13]*Ibid.*, p. 241a.

[14]*Ibid.*, p. 241.

[15]*Ibid.*, p. 242. John XXII's interest in countering the legal position of the Friars Minor is not really surprising, which one realizes that he was a doctor of both civil and canon law (*doctor utriusque iuris*), like Bonagratia of Bergamo. As a matter of fact, he had been a professor of civil and canon law at the universities of Toulouse and Cahors before he became a bishop.

[16]John Moorman, *A History of the Franciscan Order from its Origins to the Year 1517* (Oxford, 1968), p. 314.

[17]J. G. Sikes, "Hervaeus Natalis: De Paupertate Christi et Apostolorum," *Archives d'Histoire Doctrinale et Littéraire du Moyen Âge*, 11-12 (1937-1938), 217.

[18]Felice Tocco, *La quistione della povertà nel secolo XIV secondo nuovi documenti* (Naples, 1910), p. 58.

[19]*Ibid.*, p. 59.

[20]Sikes, *op. cit.*, 209.

[21]Tocco, *op. cit.*, p. 82.

[22]*Ibid.*, p. 83. The reference her to "Apostolic College" is merely another way of identifying Christ's apostles.

[23]Patrick Gauchat, *Cardinal Bertrand de Turre*, *ORD. MIN.* (Rome, 1930), p. 81, n. 1.

[24]Decima L. Douie, "Three Treatises on Evangelical Poverty by Fr. Richard Conyngton, Fr. Walter Chatton and an Anonymous from Ms. V III 18 in Bishop Cosin's Library, Durham," *A.F.H.*, 24 (1931), 355-369.

[25]*Ibid.*, 361.

[26]*Ibid.*, 362.

[27]*Ibid.*, 365.

[28]*Ibid.*, 344.

[29]Although it does not appear that John Duns Scotus became directly involved in the conflict over the property of Christ and His apostles, he certainly had some views on natural law. If the reader is interested in Scotus' position on natural law, he might want to consult Günter Stratenwerth, Die Naturrechtslehre des Johannes Duns Scotus (Göttingen, 1951), especially, pp. 73-116.

[30]Jacqueline de Lagarde, "La participation de François de Meyronnes à la querelle de la pauvreté (1322-1324)," Positions des thèses des élèves de l'École Nationale des Chartes (Paris, 1953), p. 53.

[31]Bull. Franc. V, no. 518, pp. 256a-259a.

[32]Ibid., pp. 256a-257b.

[33]Ibid., pp. 257b-259a.

[34]M. D. Lambert, Franciscan Poverty (London, 1961), p. 239. In this instance, Lambert seems to have considered Wadding's argument at least probable; cf. Luke Wadding, ed., Annales Minorum, VII, 2nd ed. (Rome, 1733), pp. 3-6. Wadding had argued that Exiit never said that Christ had not held any dominium at all (nequaquam), but only that Christ had renounced this dominium in order to point the way to perfection. Wadding maintained that the bull clearly implied that Christ and His apostles had, at one time, held common dominium over their goods. Thus, Wadding felt that, at least as far as its wording was concerned, John XXII's Cum inter nonnullos had not condemned the traditional Franciscan doctrine of the absolute renunciation of dominium, derived from Nicholas III's Exiit.

[35]Bull. Franc. V, pp. 256a-259b (footnote).

[36]Moorman, op. cit., p. 318, n. 1.

[37]Bull. Franc. V, p. 258b (footnote).

[38]Lambert, op. cit., p. 242.

CHAPTER SIX

MICHAEL OF CESENA AND WILLIAM OCKHAM: THE HERETICAL RENEWAL OF A LEGAL CONFLICT

Up to this time, that is, 1323, William Ockham[1] had not been involved at all in the controversy over the poverty of Christ and His apostles. Actually, he will not become actively involved in this conflict for some five years. Ockham had primarily been engaged in academic, non-polemical pursuits.[2]

Although there is some question concerning the date of his birth, Ockham seems to have been born between 1280 and 1290.[3] He became a Franciscan and studied theology at Oxford from about 1310 to 1315. Here he lectured on the Sentences of Peter Lombard from 1315 to 1317 and on the Bible from 1317 to 1319.[4] He was probably a baccalaureus formatus Oxonie from around 1319 to 1323.[5]

However, it seems that he never became a magister actu regens,[6] although he appears to have completed all the formal education required to exercise this function. In all likelihood, he was not advanced to the rank of magister actu regens because he was accused of being a heretic by the Thomist John Lutterell, a former Chancellor of Oxford, when

Lutterell was in Avignon in 1323.[7]

Ockham was commanded by John XXII to come to Avignon; and he arrived there in 1324. John XXII created a commission to take charge of Ockham's case. This commission included the Dominicans, Raymundus Bequini, patriarch of Jerusalem; Dominicus Grima, bishop-elect of Pamiers; and Durandus of St. Pourçain, bishop of Meaux; two Hermits of St. Augustine, Gregory, bishop of Belluno-Feltre; and John Paynhota, a master of theology; and Lutterell himself, who was a master of theology.

Ockham's case was drawn out over a two year period, and the commission seems to have returned two pronouncements on at least some of the 56 suspect articles drawn up by Lutterell from Ockham's Commentary on the Sentences. The commission actually utilized the list of 51 articles prepared by the Dominican archbishop of Aix-en-Provence, James Concoz. This list included only 29 of Lutterell's original articles.[8] Of the two acts of the commission, the first was definitely milder than the second. In the first, none of the articles with which the commission finds fault is classified as "hereticum"; all of these are characterized in some less serious manner, as "falsum," "erroneum," "ridiculosum," and the like. However, the commission's second report explicitly pronounces that 14 of the essentially same articles which were examined in the first act of the commission[9] are "hereticum" or "heresis."

Yet, even after these two processes, the commission was unable to reach any definite settlement on Ockham's case. A number of possible explanations have been offered for this deadlock.

First, it seems that Ockham was allowed to defend himself; and it also seems that he was permitted to make corrections in his own text and that these corrections were incorporated by the commission into their pronouncements.[10] It is possible that his defense was sufficiently convincing that the commission could not finally agree to condemn him.

Second, there is the hypothesis, proffered by Koch,[11] that the commission may have not been able to come to a unanimous judgment concerning Ockham's case because of the mitigating influence of Durandus of St. Pourçain. Durandus was a nominalist whose position on the question of universals was not unlike Ockham's.

Finally, there is the thesis that the commission may have failed to condemn Ockham because, before it had concluded the process against him, he fled Avignon with the other Michaelists.[12] Thus, the commission lost its examinee and its purpose for continuing the investigation.

In any case, at least one thing is certain; it is during this time, when Ockham was required to remain in Avignon,[13] that he first became involved in the controversy over the poverty of Christ and His apostles.

At this time, he seems to have been in contact with

Bonagratia of Bergamo. Bonagratia had again been imprisoned,[14] this time for a short period by John XXII, essentially because of his Appellatio against the first version of Ad conditorem. However, Bonagratia's influence seems to have been insufficient in getting Ockham involved in the poverty controversy.

At this time as well, the Emperor Lewis of Bavaria decided to enter into the controversy over the poverty question. The Emperor had been previously excommunicated by John XXII for continuing to exercise the functions of emperor in spite of the papacy's claim that it was its prerogative to fill the vacancy that the Holy See felt had been created by the contested imperial election of 1314.[15]

Lewis of Bavaria maintained that John XXII's pronouncements on the poverty question were clearly heretical and that John XXII's enacting these heresies cut him off from the body of the Church. As a consequence, he was deprived of any standing as a prelate.[16]

John XXII answered Lewis' challenge in his bull Quia quorumdam[17] (November 10, 1324). He declared that anyone who would preach the "damnable heresies" condemned in Cum inter nonnullos or knowingly defend these heresies verbally or in writing or presume to approve of them was a heretic. And anyone who knowingly approves or defends anything against those things defined, ordained and enacted in Ad conditorem was an "insolent rebel."[18]

Lewis of Bavaria's reply was to undertake a papally prohibited Italian expedition in 1327-1329. To say the least, this operation was not in the best interests of the Holy See's position in its Italian campaigns to regain effective control over the Papal States.

About the same time John XXII became suspicious that Michael of Cesena, the Minister-General of the Friars Minor, who was then in Italy, was going to throw in his lot with Lewis of Bavaria and that Michael, in fact, aspired to be pope.[19] So on June 8, 1327, John XXII ordered Michael to come to Avignon on the pretext of needing him in order to discuss the affairs of the Order. Michael arrived in Avignon on December 1, 1327; and, although he was courteously received by the pope, he was told not to leave the city without John XXII's permission.[20]

It was at this time that William Ockham came into contact with Michael of Cesena; and it is through Michael that he became involved in the controversy over the poverty of Christ and His apostles.

Ockham tells us later in his Epistola ad Fratres Minores apud Assisium Congregatos[21] that he had resided in Avignon for almost four years before he recognized that the superior there, that is, the pope, had fallen into "heretical perversity." He asserts that because he did not wish to believe with equanimity that a person placed in so great an office would determine that heresies were to be held, he

had neither read nor tried to acquire John XXII's "heretical constitutions."[22]

Ockham goes on to tell us that, later, he had been afforded an occasion to read and diligently study John XXII's three constitutions, namely, Ad conditorem, Cum inter and Quia quorundam, because he was ordered to do so by his superior,[23] who was at this time Michael of Cesena. Therefore, it was through Michael of Cesena that Ockham became involved in the controversy which was to so profoundly affect the course of his life.

When Michael requested authorization from John XXII to go to Bologna in order to preside over the Chapter-General of the Order that was to take place there at the next Pentecost, the pope, in the first instance of his abandoning his former, apparently benevolent, attitude toward Michael, categorically refused his request with the caustic comment that he knew Michael wanted to be "pope in Lombardy."[24]

On April 9, 1328, John XXII ordered that Michael appear before him. In the stormy audience that followed, the pope berated Michael on a number of points, especially the position on the poverty of Christ and His apostles that had been advocated by the Order's Chapter-General at Perugia. John XXII declared that the Chapter-General's position was heretical. But Michael boldly maintained that it was sound, Catholic doctrine, as had been determined by John XXII's predecessor, Nicholas III.[25]

John XXII, not very pleased, accused Michael of being "foolish, reckless, headstrong, tyrannical, a supporter of heresies and a viper nourished in the bosom of the Church."[26] Further, he absolutely forbade Michael to leave Avignon under pain of excommunication, deposition from his office, and forfeiture of his ecclesiastical status and benefice.[27]

In spite of his troubles at Avignon, Michael was re-elected Minister-General by the Chapter-General of the Order meeting in Bologna at Pentecost. On April 13, 1329, Michael secretly sent a letter to the Chapter-General,[28] noting all that the pope had effected against him. This letter was witnessed by Francis of Ascoli, a Franciscan doctor of theology and lecturer in the convent of the Friars Minor at Avignon; William Ockham; Bonagratia of Bergamo; and two notaries.

Finally, on the night of May 26, 1328, Michael, William, Bonagratia and Francis of Ascoli fled the city and went to Argues-Mortes, where Peter of Arrablay, cardinal of Porto, tried to dissuade them from their course.[29] However, they were resolved in their action and embarked and left for Genoa. From Genoa they went to Pisa and arrived there on June 9, 1328,[30] where they were met by some of the Emperor's officials. The Emperor arrived at Pisa in September, and he and the Michaelists remained there for about eight months.

Even before the Michaelists had arrived at Pisa, John XXII, in his bull Dudum ad nostri[31] (June 6, 1328),

excommunicated Bonagratia and Ockham and excommunicated, deposed from office, and stripped of all honors, dignities, rank and ecclesiastical status their leader, Michael of Cesena. The pope also deprived them of any ecclesiastical benefices they might have formerly held and imposed like penalties on their supporters and on those who adhered to their heresies.[32]

While at Pisa, Michael composed an excusatory letter[33] which was addressed to all the members of the Order. The letter, dated July 9, 1328, delineated his reasons for leaving Avignon and maintained that since John XXII had fallen into heresy, he was no longer pope and thus lacked any competence to decree what the Order was to do. Finally, he ended the letter with an announcement that he would soon disclose an Appellatio that had been composed at Avignon.

On September 18, 1328, the promised Appellatio Generalis Ministri in Majori Forma[34] appeared. This quite lengthy work attempts to specify and refute all the individual heresies that Michael believed the pope was succoring. Among the issues dealt with were the origin of property, the commonality of goods and its diverse forms, poverty and its relation to religious perfection, the separation of simplex usus facti from property, the fallibility of the pope and the consequences that result when the pope falls into heresy.[35]

However, of particular interest are the arguments that Michael offers which involve natural law. He makes the standard points that property and dominion over anything are

not from natural law but were introduced through human law[36] and that it is through iniquity that anyone would say "this is my property" and "this is yours," since the introduction of property is contrary to the state of innocence or the state of natural law.[37]

Michael, like a number of his Franciscan predecessors, maintains that property rights are not derived from natural law but from positive law. He also expresses his agreement with the idea that natural law differs from both custom and human legal enactments, since under natural law all things are held in common.[38]

Michael proposes that the Friars Minor are not able to have ownership or dominion over either those things which are consumed in use or not consumed in use. Nonetheless, they are able to licitly exercise usus facti of these things that is separated from ownership or dominion.[39]

Michael asserts that it is certain that under natural law there existed a common simplex usus facti of all the things that were necessary for the sustaining of human life and that there was no ius utendi, since this only arose later through its introduction by positive legislation. Thus, he proposes, from divine law which is called "natural law," it is manifestly evident that simplex usus facti is able to be justly maintained apart from ius utendi. As a consequence, to say that simplex usus facti is not able to be maintained apart from ius utendi is at odds with and repugnant to both

divine law and Apostolic perfection.[40]

What is particularly interesting here is the close relationship that Michael draws between divine law and natural law. One gets the impression that natural law differs from divine law only because the latter is sometimes called "natural law," whereas there is no essential difference between them. This is again another instance of the approach of some of the medieval canonists to take the natural law to be divine law.

Pushing to the limit the notion of extreme necessity underwriting the doing of whatever is necessary to maintain one's life, Michael argues that, in one sense, the commonality of temporal things is grounded in a right of natural necessity. From this right it follows that concerning those temporal things suitable for sustaining one's life, one who needs something because of extreme necessity is able to use it to sustain his life, even though this use is contrary to the will or without the permission of him who owns the thing in question. Michael maintains that one is even able to licitly carry things away violently from him to whom they belong in such circumstances.[41]

Michael uses appeals to natural law in a number of other places in his Appellatio; however, these other arguments do not differ substantially in content from those already noted.

On December 12, 1328, Michael's Appellatio and a new

redaction of Lewis of Bavaria's Gloriosus Deus[42] (April 18, 1328) were posted on the porch of the Cathedral of Pisa.[43] In his bull the Emperor had solemnly deposed the pope because of his supposed attack on the rights of the empire and his reputed falling into public heresy.

Finally, on April 11, 1329, the Emperor left Pisa, taking with him Michael of Cesena and his companions. In February of 1330, they reached Germany; and the Michaelists were lodged in the Franciscan convent in Munich, the town in which the Emperor had his imperial court.[44] There Ockham was to remain for the rest of his life.

It is with Ockham's arrival at Munich that the first part of this analysis will be concluded, since it is during his stay at Munich that Ockham writes his polemical works with which we will be concerned in the next part of this study.

In the second part of this work, a more detailed examination of his position on natural law, involving a study of all of his known polemical works, will be given, a heretofore, unattempted task.

In this more detailed analysis, it will be interesting to see to what degree Ockham carries on the Franciscan tradition in the use of natural law arguments which we have seen so clearly developing during the course of the poverty controversy. With this heretofore undisclosed tradition to refer back to in Part I, we can, in Part II,

determine whether Ockham adds anything of an original nature to this tradition, when he takes up the issues involved in the poverty conflict in his polemical works.

FOOTNOTES TO CHAPTER SIX

[1]In this work, we will follow the practice of such authors as Boehner, Kölmel, Junghans and Miethke by referring to Ockham as "William Ockham." However, we feel that the customary tradition of referring to him as "William of Ockham" is also acceptable. On this point, see P.T. Boehner's "Introduction" to his Tractatus de Successivis attributed to William Ockham (St. Bonaventure, N.Y., 1944), pp. 4-5.

[2]For a list of those authentic works composed by Ockham during his non-polemical period, see Léon Baudry, Guillaume d'Occam, Sa vie, ses oeuvres, ses idées sociales et politiques, I: L'Homme et les Oeuvres (Paris, 1949), pp. 273-285.

[3]For some of the various opinions which have been offered concerning Ockham's birthdate, see Helmar Junghans, Ockham im Lichte der neueren Forschung (Berlin, 1968), pp. 25-26.

[4]A baccalaureus formatus Oxonie would have had to have lectured on the Sentences of Peter Lombard for two years and then given cursory lectures on the Bible for one or two more years; during the first period one would be a baccalaureus Sententiarum, whereas in the latter period one would be a cursor biblicus; cf. James A. Weisheipl, "Ockham and some Mertonians," Medieval Studies, 30 (1968), 167-168.

[5]For an alternative analysis of the dating of Ockham's early career, see C. K. Brampton, "The probable date of William of Ockham's noviciate," Franz. Stud., 51 (1969), 78-85.

[6]A magister actu regens was one who had been a baccalaureus Theologiae for four, or almost four, years; received his license to teach; was admitted to the so-called "Principium," the public lecture(s) or disputation(s) through which one entered into his official duties and the ceremonies which accompanied this formal reception; and, thereby, became a master; cf. Boehner, op. cit., pp. 1-2.

[7]Lutterell was chancellor of Oxford from 1317 to 1322. He had wished to go to Avignon in 1322 to proceed with his case against Ockham and Oxford University but had been

stopped from departing by King Edward II, who enjoined him to submit the matter to his council at York for examination. However, in 1323, the King permitted Lutterell to go and present his appeal to the Roman curia at Avignon; cf. Auguste Pelzer, "Les 51 articles de Guillaume Occam censurés, en Avignon, en 1326," Revue d'Histoire ecclesiastique, 18 (1922), 246.

[8]C. K. Brampton, "Personalities at the Process against Ockham at Avignon, 1324-26," Franciscan Studies, 26 (1966), 8-9. For a valuable article by article correlation between the commission's second act [first printed in Pelzer, op. cit., in 1922] and the commission's first act [first printed in J. Koch, "Neue Aktenstücke zu dem gegen Wilhelm Ockham in Avignon geführten Prozess," Recherches de Théologie ancienne et médiévale, 8 (1936), 81-93 & 168-194], see Koch, ibid.

[9]The list of articles reviewed in the first act of the commission contains 51 articles, whereas the list of articles reviewed in the commission's second act does not contain any article 32 or 33. Yet, as Koch notes [ibid., 8 (1936), 184, n. 1], there does not seem to be anything of substance omitted from the second act which was considered in the first.

[10]Ibid., 8 (1936), 195-197.

[11]Ibid., 7 (1935), 369-370.

[12]Boehner, op. cit., p. 6. More recently, Brampton has claimed that even though the two processes against Ockham resulted in no "positive indictment," nevertheless, no third process was initiated by John XXII, apparently because of his reluctance to pursue the matter any further for reasons of judicial discretion. And, since, according to Brampton, the pope lacked the "requisite evidence," Ockham was never officially condemned; cf. Brampton, "Personalities," op. cit., 23 & 25.

[13]It does not seem that Ockham was imprisoned during this time. He seems to have been obliged to remain in Avignon, but he was free to move about and stayed at the Franciscan convent there. It also seems that he was allowed to continue to write; cf. Boehner, ibid.

[14]A. Mercati, "Fratre Francesco Bartoli d'Assisi, Michelista, e la sua ritrattazione," A.F.H., 20 (1927), 272.

[15]Due to a division in the imperial electors, two candidates were chosen in 1314, Frederick of Austria and Lewis of Bavaria. Lewis settled the matter from a practical point of view by defeating and capturing Frederick at the battle of

Muhldorf on September 28, 1322. However, the Holy See felt that Lewis' exercising imperial sovereignty was legally invalid, since he had not sought papal approval for his assuming the title of "Emperor," and that, in fact, the imperial office was vacant. John XXII pushed the papacy's claim, which was based on the notion of the dependence of the empire on the papacy, as far as the conferring of sovereign power was concerned.

Actually, the pope had threatened excommunication on the grounds of three offenses supposedly committed by Lewis: (1) that, though his election as emperor had been in discordia, he had dared to assume the imperial title without papal approval; (2) that he was performing acts of sovereignty in the realm and the empire, even though the empire was without an emperor and its administration, consequently, pertained to the pope; and (3) that Lewis had shown favor to the Visconti of Milan, who had been condemned for heresy, as well as to other rebels from the Church; cf. H. S. Offler, "Empire and Papacy: the Last Struggle," Transactions of the Royal Historical Society, 5th Series, Vol. 6 (1956), 23-24. When Lewis ignored the papacy's claims, John XXII excommunicated him on March 23, 1324.

[16]Appellatio Ludovici Imperatoris in É. Baluze, Miscellanea, III, J. D. Mansi, ed. (Lucca, 1762), p. 229a.

[17]Ibid., pp. 233b-237a.

[18]Ibid., pp. 236b-237a.

[19]Baudry, op. cit., p. 111.

[20]Baluze-Mansi, Miscellanea, p. 237a. It seems that John XXII became even more suspicious of Michael, first, because of an alleged sickness which delayed his arrival at Avignon for about six months and, second, because, in the interim, he had received letters from Perugia indicating that Michael was known to have been intriguing with Lewis of Bavaria, who was then in Italy, and that Michael, indeed, had hopes of being made an antipope; cf. Decima L. Douie, The Nature and Effect of the Heresy of the Fraticelli (Manchester, 1932), pp. 166-167.

[21]This work was first published by Léon Baudry in his "La Lettre de Guillaume d'Occam au Chapitre d'Assise (1334)," Revue d'histoire franciscaine, 3 (1926), 185-215. Later, C. Kenneth Brampton published his Gulielmi de Ockham Epistola ad Fratres Minores (Oxford, 1927), which contains some interesting notes on the text, see pp. 19-55. Finally, H. S. Offler published a critical edition of the Epistola ad Fratres Minores in R. F. Bennett and H. S. Offler, Guillelmi de Ockham Opera Politica, III (Manchester, 1956), pp. 1-17.

[22]Bennett and Offler, ibid., p. 6.

[23]Ibid.

[24]Baudry, Guillaume d'Occam, op. cit., p. 113.

[25]Baluze-Mansi, Miscellanea, p. 237.

[26]Ibid., p. 237b.

[27]Ibid., p. 238b.

[28]Ibid., pp. 238b-240a.

[29]Baudry, Guillaume d'Occam, op. cit., p. 116.

[30]Baluze-Mansi, Miscellanea, p. 243b.

[31]Ibid., pp. 243b-244b.

[32]Ibid., p. 244b.

[33]Ibid., pp. 244b-246a.

[34]Ibid., pp. 246b-286b.

[35]Baudry, Guillaume d'Occam, op. cit., p. 117.

[36]Baluze-Mansi, Miscellanea, p. 248a.

[37]Ibid., pp. 249b-250a.

[38]Ibid., p. 256b.

[39]Ibid., p. 250a.

[40]Ibid., pp. 256b-257a.

[41]Ibid., p. 278a.

[42]Ibid., pp. 240b-243a.

[43]Baudry, Guillaume d'Occam, op. cit., p. 118.

[44]Ibid., p. 123.

PART TWO

WILLIAM OCKHAM AND NATURAL LAW

CHAPTER SEVEN

THE OPUS NONAGINTA DIERUM

"I am doubtful about the extent of the legal 'voluntarism' and 'irrationalism' which Lagarde attributes to Ockham."[1] Certainly, Gewirth's doubts seem to be quite well-founded. Nevertheless, such authors as Lagarde,[2] Oakley,[3] and Gierke[4] seem to be quite convinced that Ockham was a legal voluntarist.

A number of specific reasons will be offered in each case to account for these authors' insistence on Ockham's being a legal voluntarist and for the disagreement that has been evident concerning the nature of Ockham's basic position on natural law.[5]

And yet, there does seem to be a more general consideration that could count as at least a possible partial explanation for such marked disagreement even on the nature of Ockham's basic position on natural law. Ockham never sat down to write a tract on natural law as did, for instance, St. Thomas Aquinas.[6] Ockham's comments on natural law are scattered throughout his voluminous polemical works and seem much more directed to explicating or justifying the particular point with which he is concerned at the

moment rather than with presenting a systematic position on natural law. Thus, deriving a systematic interpretation of Ockham's basic position on natural law is no easy matter. In great measure, one has to try to piece this position together from his widely scattered applications or uses of the notion of natural law.

In view of this, the seemingly most plausible methodology to adopt in accomplishing the task stated at the end of Part I of both disclosing Ockham's position on natural law and distinguishing those parts of it that are unique to him and those aspects that seem to be more the work of his Franciscan predecessors is to systematically investigate all of Ockham's polemical works in the order in which they were composed. In this way, we can ascertain whether his position on natural law underwent development while he was composing his polemical works.[7]

In Part I we concluded our examination of Ockham's life with his arrival in Munich in February of 1330. It is in this same year that Ockham's first, commonly recognized polemical work, the Allegationes virorum religiosorum,[8] was signed,[9] although, in fact, much or the work on it was probably accomplished before Ockham's arrival at Munich. Actually, this work is the common product of the efforts of Henry of Talheim, Francis of Ascoli, Bonagratia of Bergamo, and William Ockham. It not only gives a short rendering of these authors' views on papal power and its limits, but also

offers nine agruments in an attempt to prove that John XXII's deposition of their leader, Michael of Cesena, and his replacement with the election of Guiral Ot (Ott) was legally void.[10]

Nonetheless, the Allegationes offers nothing concerning natural law. This topic is only initially dealt with in Ockham's second polemical work, the massive Opus Nonaginta Dierum,[11] which appeared in 1333.[12] This work is a line by line refutation of John XXII's bull Quia vir reprobus[13] (December 16, 1329) and a defense of the views, contrary to those expressed in the bull, that were held by the Michaelists.

As is characteristic of some of Ockham's polemical works, it is written in an "impersonal" style, avowedly indicative of a mere reporting of the contrary views of John XXII and the Michaelists with his own positions being reserved for the writing of a later work.[14] This acknowledgment has occasioned an understandable degree of apprehension concerning precisely what one should accept as Ochham's actual personal positions and what are merely reported group positions not necessarily indicative of Ockham's own views.

This is no less an acute problem as regards the issue of his use of natural law arguments and concepts in this work. However, because of the analysis of the relevant history of the use of natural law arguments and concepts by

Ockham's predecessors given in Part I, we are in a somewhat better position to weigh H. S. Offler's thesis that Ockham's use of civil law concepts was both "borrowed and shallow learning," his reading in canon law "casual rather than professional," and that he and other Michaelists relied "a good deal" for their standard canonical arguments on Bonagratia of Bergamo.[15]

Certainly, one is immediately impressed with the great degree of correspondence between the arguments which we noted were indicative of the pre-ockhamist Franciscan position on natural law and the actual arguments Ockham employs in this work. He reiterates that property and dominium can be separated from ius utendi in things consumed in use and says that this separation is underwritten by divine, natural and human law.[16] Further, he restates that at a time of extreme necessity anyone has the ius utendi of any goods, even those consumed in use, which are necessary for sustaining his life and that no property or dominium is acquired from such use.[17]

Throughout the Opus Nonaginta Dierum Ockham tries to counter John XXII's thesis that ius utendi cannot justly be held in things consumed in use unless the user also possesses dominium or ownership of the thing being used. Of course, this again amounts to an overriding interest in justifying the Franciscan doctrine of simplex usus facti. As we saw in Part I, this had also concerned Ockham's immediate

Franciscan predecessors. Ockham characterizes the simplex usus facti doctrine as equivalent to the claim that he wishes to present. He wants to show that one has the usus (use) of anything that is necessary for sustaining his life.[18]

As did his Franciscan predecessors, Ockham sees Nicholas III's Exiit as the authoritative source on the poverty question. He attempts to disclose those particular aspects of Exiit that undermine John XXII's pronouncements on Franciscan poverty and, especially, his arguments based on the notion of ius utendi.

However, in a seemingly new countermove, Ockham effects a bifurcation in the civil law notion of ius utendi by distinguishing it into ius utendi positivum and ius utendi naturale. He seems to intend this division to be an interpretative explication of Nicholas III's statement that the Friars Minor could not be denied those things that are necessary for the sustaining of their lives, since this would violate the natural law.[19] What Ockham claims Nicholas III meant was that the Friars Minor could not be denied ius utendi naturale. But they could be denied ius utendi positivum, which here seems to correspond to the normal civil law notion of ius utendi, that is, the specific right to use an object granted under human positive law.[20]

Ockham goes on to characterize this new notion of ius utendi naturale as a right of use common to all men naturally and not possessed because of any human ordinance

supervening. He maintains that it is had by all men at all times but is not exercisable at all times as regards the individually or commonly held goods of others. It only permits ius utendi of the goods of others in times of extreme necessity. At these times, in virtue of the natural law, one is able to licitly use another's goods if one's life cannot be preserved without such use.[21]

Further, Ockham claims that the Friars Minor have a licentia utendi (license to use) things as an ongoing power; and yet they possess full ius utendi only during an actual time of extreme necessity. Thus, licentia utendi and ius utendi are not the same thing. Ockham uses this distinction in an attempt to explicate Nicholas III's assertion that the Friars Minor are able to renounce all property and dominium but not every ius of all things. Ockham maintains that just because one is permitted to renounce property and the power of appropriating does not entail that one can renounce ius utendi naturale. He says that whatever power one has through ius utendi naturale, one does not have ius at all times, but only in times of extreme necessity.[22]

What Ockham seems to be driving at here is that one possesses a license to use things belonging to another as a conditional and circumscribed power. But only at an actual time of extreme necessity does this power become a ius, in this case, a valid power to use another's goods based on natural law.

It is in Chapter 65 that Ockham gives his most extended and most significant treatment of topics utilizing the concept of natural law in the Opus Nonaginta Dierum. Here Ockham initially considers the word "ius" and notes that it can be used for either the ius poli[23] or the ius fori (positive law). He claims that ius fori is called "just," because it is a law that is explicitly established either by agreement or enactment by God or men. He says that is can also be called "ius consuetudinis" (customary law), if one employs the word "custom" in a broad sense.[24]

In a quite significant move Ockham claims that ius poli is called "aequitas naturalis" (natural equity). He asserts that natural equity is in conformity with recta ratio[25] (right reason) without any human or purely divine positive ordinance being involved. He says that this conformity with right reason is a conformity with either pure natural right reason or with right reason taken from those things that are divinely revealed to us.[26] Further, Ockham continues that ius naturale belongs to ius poli; and he proposes that ius poli can also be called "ius divinum," because there are many things in conformity with right reason taken from those things that are divinely revealed to us which are not in conformity with pure natural reason.

Thus, what Ockham does here is to take ius poli (natural law) to be natural equity. He characterizes natural law as a law in conformity with right reason, that is,

prudence in acting and habit. He also effects a bifurcation in the standard Scholastic notion of recta ratio into pure natural right reason and right reason taken from those things which are divinely revealed to us. In all likelihood, he effects this division in recta ratio to establish a category for those particular instances of prudence in acting or in habit which, presumably, have been revealed by God, for instance, in Holy Scripture. Thus, they can rightly be called "ius divinum" (divine law).

Thus, Ockham has constructed a two-fold justification for the simplex usus facti doctrine. From pure natural right reason, he feels that it is obvious that no one can be denied the use of those things that are necessary to sustain one's life, when one is in imminent peril at a time of extreme emergency. From right reason divinely revealed, he asserts[27] that it is clear that those who dedicate themselves to a life of absolute poverty to preach the Gospel and thus lack the means for obtaining the necessities of life can rightly use those temporal goods given to them by those to whom they preach, in order that they might be able to sustain themselves in their evangelical mission. Of course, for Ockham the Friars Minor would not only qualify for inclusion in the former category, since ius utendi naturale pertains to all men, but in the latter category as well, because they would be seen to fulfill, perhaps uniquely, all the particulars presumably indicated by

right reason divinely revealed.

The most important thing to notice about all this is the fact that it is natural reason and not God's will that is being given the central place in Ockham's consideration of ius poli as natural equity.

In a further attempt in Chapter 65 to explicate Nicholas III's meaning in Exiit, Ockham maintains that by denying ius utendi to the Friars Minor Nicholas III intended only to deny that ius which was based on ius fori and in fact expressly conceded that ius underwritten by ius poli.[28] Thus, Ockham here associates ius utendi positivum with ius fori and ius utendi naturale with ius poli.

Further, Ockham distinguishes[29] various ways in which one might have temporal goods. One might have them through ius fori, in which case one would have them either through leges humanas positivas (human positive laws) or through leges divinas positivas (divine positive laws). Or one might have them through ius poli, in which case one would have the use of temporal goods only at a time of extreme necessity; or in good conscience. Or one might have temporal goods through no ius and not in good conscience, as in all cases involving the unjust possession of temporal goods.

As regards the use of temporal goods under ius naturale, Ockham maintains that this ius cannot be renounced; and yet it is able to be limited in many cases and in a certain sense is able to be abridged or is able to be impeded,

as far as its being carried over into action is concerned.[30] What Ockham seems to have in mind here is that although the natural law can and has been limited after the Fall in the scope of its immediate efficacy, nevertheless, this circumscription does not extend to ius utendi naturale, that aspect of natural law that cannot be renounced. He then asserts that this is still the case even though Isidore of Seville had maintained that under natural law all things are held in common and everyone is free.

It should not be assumed that Ockham is in any way attacking the common medieval position, noted in Part I, concerning man's original state of innocence and of the uninhibited sway of natural law in this original human condition. On the contrary, Ockham accepts this thesis. He views original sin as the cause of the loss of this preternatural state with the resulting weakening of the original efficacy of the natural law over men's lives. He says there is a necessity for the enactment of human positive law, in order to avoid a condition of homo homini lupus, in part, through the establishment of private property.[31]

What Ockham seems to want to maintain here is that the legal efficacy of the natural law can never be totally nugatory in men's lives. In spite of his fallen, tainted state, man still retains something of his original natural condition. It is this vestige of his original, natural excellence that grounds man's capacity to use goods rightly when

this disposition is realized through the ius utendi naturale at a time of actual extreme necessity. As far as the particular individual in peril is concerned, in these instances he is legally restored to the original condition in which there was no individual dominium or property rights and all men were free.

However, Ockham does not feel that these instances of the actualization of ius utendi naturale are in any way equivalent to the dominion exercised by man in his original state. He criticizes John XXII for making this assumption, since the occasions on which ius utendi naturale legally restores man to his original condition yet lack the "perfect power of ruling and disposing of temporal goods" of our "first parents."[32]

Thus, it is clear that Ockham is not in any way disparaging the pervasive medieval position concerning the commonality of all things and universal human freedom as man's original condition under natural law. He is merely trying to make clear that because of original sin and the resulting necessity, due to man's fallen state, for both divine and human positive laws being enacted, a certain limitation in the former pervasive efficacy of natural law has been effected. However, natural law can be restored to its original unrestricted dominance on those occasions on which the existence of extreme emergencies imperilling human life calls for the temporary suspension of positive laws, as

clearly dictated by right reason. Thus, following this same line of thought, Ockham states that not using that temporal thing without which one would not be able to preserve one's life could never be obligatory under any law whatsoever or warranted by any factual consideration.[33]

Again in Chapter 65, Ockham makes an interesting move.[34] He effects a bifurcation of "ius" by dividing the term into ius divinum and ius humanum, but he includes ius naturale et poli and ius positivum et fori under ius humanum. Thus, in this instance, he abandons the common Scholastic move of including ius naturale under ius divinum, where the latter is meant to stand for the eternal law of God. What he may have had in mind here was the association of ius divinum not with the eternal law of God but with divine positive law. But, as we have already seen in the case of right reason divinely revealed and as we will see more clearly as we investigate Ockham's subsequent polemical works, this might be a risky assumption to make at this point. He actually draws a rather close parallel between natural law and certain aspects of Holy Scripture, which is, of course, a supposed source of divine positive law.

Further, Ockham gives specific definitions for both "ius poli" and "ius fori." The former he typifies as "a power in conformity with right reason without any compact," whereas the latter he characterizes as "a power in conformity with a covenant, at some times conformed to right

reason and at other times not conformed to right reason."[35] He proposes that to possess anything rightly is to possess it according to right reason. He distinguishes two ways in which something can be possessed: by ius fori or by ius poli. He asserts[36] that all that is possessed by ius poli is possessed rightly, whereas not everything that is possessed by ius fori is possessed rightly. For example, something can be possessed by ius fori and yet possessed avariciously and thus not possessed rightly, whereas this cannot be the case under ius poli.

Ockham also maintains[37] that licit usus could not be separated from ius utendi when ius poli was the justification for the right of use. However, licit usus could be separated from ius utendi when ius fori was involved, since the latter could degenerate into legalizing illicit use.

Later in the Opus Nonaginta Dierum, to contradict John XXII's assertion that the division of temporal goods, since it is accomplished through human law, is iniquitous and contrary to the equity of natural law, Ockham distinguishes two senses of "aequitas naturalis."[38] John XXII had specifically maintained that property is wicked, because it was generated through custom of the law of nations and was thus contrary to natural equity.

Ockham asserts that such a custom would be contrary to aequitas naturalis as it was in the state of innocence before the Fall. Moreover, he feels that it is contrary to

that aequitas naturalis that ought to characterize man's following of reason at all times, that is, ideally speaking, men ought to perfectly conform their acts and habits to reason at all times. This ideal state is what is being intimated here. However, this custom is not contrary to that aequitas naturalis which exists among men prone to dissension and to doing evil, man's natural condition after the Fall. Thus, Ockham asserts[39] that this contrareity is according to genus naturae (genus of nature), which is now a state of human corruption, and not according to genus moris (genus of morals), since such a custom of establishing property rights is not iniquitous or evil.

Certainly then, there are a number of reasons for agreeing with parts of H. S. Offler's thesis, noted at the beginning of this chapter. There do seem to be certain similarities between Ockham's work and that of his Franciscan predecessors. Offler's supposition that Ockham may have relied heavily on Bonagratia of Bergamo for his standard canonical arguments is not implausible, when one compares some of Ockham's arguments with those examined in Part I, which were employed by Bonagratia.

Further, Offler's judgment that Ockham's reading in canon law was "casual rather than professional" seems irrefutable if by "professional" he means that Ockham was not a professional canon lawyer, like Bonagratia. But then all non-canon lawyers' reading in canon law could be typified as

"casual"; and it is difficult to see what significant claim is being made. Nevertheless, as Lagarde has pointed out,[40] it is certainly true that just as John XXII tried to master theology without advanced training in that area, so Ockham tried to do the same things with canon law.

However, as Offler indicates,[41] Ockham displayed an easy facility in "finding his way" within canon law even in his earlier non-polemical work the De sacramento altaris.[42] Further, as he also indicates,[43] Ockham did not pull his punches about the low esteem in which he regarded canon lawyers who tried to be theologians. Further, Ockham maintained flat-out in the Opus Nonaginta Dierum that "theology is superior to all legal science."[44] Thus, it seems implausible that Ockham would have simply acquiesced to Bonagratia's pronouncements on law and, more specifically, on natural law, when the issue in question involved theology. And basically, as we have indicated in Part I, although it was expressed in legal terminology, the poverty question was a theological controversy as well.

Further, as Brampton has pointed out,[45] Ockham and Bonagratia disagreed on the nature and origin of spiritual and temporal power. And, even though Ockham's debt to Bonagratia for counsel on legal issues may have been great, nonetheless, this did not cause him to subordinate his individual opinions to those of Bonagratia. As Brampton put it, Bonagratia was a lawyer and as such dealt in cases where the

defense was best served through practical and self-evident arguments. Ockham was a theologian and philosopher who was convinced that only theologians were competent to solve problems of a less mundane nature, as, for instance, those involving questions of natural law.

Also, as Bayley has noted,[46] Ockham felt that the lawyers were adequately acquainted with the law and its procedural formalities. However, he maintained that only the theologian was competent to disclose the true meaning of the law and the actual intent of its enactors. Bayley asserts that since, in Ockham's estimation, only the theologian was competent to operate not only in the more mundane lawyers' world of ius (law) but also in the aethereal realm of iustitia (justice), the theologian alone was able to staff the perennially higher tribunal which judged the ius positivum humanum (human positive law) and its practitioners.

In its central concerns, the poverty question, the defense of the doctrine of simplex usus facti and the presentation of other Michaelist positions, the Opus Nonaginta Dierum does in fact exhibit a number of stock natural law arguments, quite possibly borrowed from Bonagratia.[47] Nevertheless, there are some apparently new twists, for instance, the ius utendi positivum-ius utendi naturale distinction. Because of the essential violence resulting through the introduction of natural law under ius utendi naturale as a division within the otherwise standard civil law concept of

ius utendi, this distinction seems to be more the work of a non-professional canonist, like Ockham, rather than that of a professional civil and canon lawyer, like Bonagratia.

Further, in Chapter 65, there was the concentration on ius naturale as aequitas naturalis with its implicit emphasis on natural reason. This emphasis was not as apparent in Ockham's Franciscan predecessors' natural law arguments. Also, some of the natural law arguments here and elsewhere in the Opus Nonaginta Dierum evidence an acuity of intellect not that apparent in Bonagratia's work. This may afford at least indirect evidence for their origination by Ockham.

And yet of course, all this does not entail that these natural law arguments may not have been group-conceived positions[48] that Ockham was merely expressing in a more profound manner. His insistence that he was only presenting the opposing views in the controversy between John XXII and the Michaelists, even though this was undoubtedly said with tongue in cheek, still makes it difficult at this point to characterize those arguments that he presents which do not seem to have been prefigured in the preceding Franciscan tradition in the use of natural law arguments as necessarily indicative of his own position on natural law. This is in view of his specific avowal that he was going to save his own views for presentation in a subsequent work. Only in the context of a full investigation of all of his polemical works can we have a firmer ground for making a reasonably

plausible characterization of Ockham's own position on natural law.

FOOTNOTES TO CHAPTER SEVEN

[1]Alan Gewirth, "Philosophy and Political Thought in the Fourteenth Century," The Forward Movement of the Fourteenth Century, F. L. Utley, ed. (Columbus, 1961), p. 158, n. 22.

[2]Georges de Lagarde, La naissance de l'esprit laïque au déclin du moyen âge, VI: La Morale et le Droit (Paris, 1946), pp. 140-163.

[3]Francis Oakley, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition," Natural Law Forum, 6 (1961), 65-83.

[4]Otto von Gierke, Political Theories of the Middle Ages, Frederick William Maitland, trans. (Boston, 1958), p. 173, n. 256.

[5]Another consideration is one mentioned by Gewirth, i.e., that "the view that Ockham was a political 'individualist' and a legal 'voluntarist' because he was a philosophical 'nominalist' is, of course, an old tradition of scholarly interpretation"; cf. op. cit., p. 157, n. 18. Gewirth then cites Gierke's position referred to immediately above; see supra, n. 4.

[6]St. Thomas' whole tract on law in Summa Theologiae I-II is being alluded to here but, most particularly, S.T. I-II, qu. 94.

[7]In this presentation we will follow the list of Ockham's authentic polemical works proffered by Léon Baudry, Guillaume d'Occam, Sa vie, ses oeuvres, ses idées sociales et politiques I: L'Homme et les Oeuvres (Paris, 1949), pp. 288-294. Hereafter, this work will be referred to as "Baudry, Guillaume d'Occam, I." Our methodology is in part reinforced by Lagarde's statement [op. cit., IV: Guillaume d'Ockham, Défense de l'Empire (Paris, 1962), p. 67] that one should never try to study a work of Ockham in isolation, but one should always compare it with other works by Ockham where he has treated the same question.

[8]Baluze-Mansi, Miscellanea, pp. 315a-323b.

[9]Lagarde, op. cit., IV, p. 22. For a brief biography on Henry of Talheim, one of the signers and a prominent Michaelist, see Clément Schmitt, Un Pape réformateur et un défenseur de l'unité de l'Église, Benoit XII et l'Ordre des Frères Mineurs (1334-1342) (Florence, 1959), p. 199 and p. 199, n. 2.

[10]Baudry, op. cit., p. 122.

[11]This work is now available in the critical editions by J. G. Sikes, Guillelmi de Ockham Opera Politica, I (Manchester, 1940), pp. 287-374, covering chaps. 1-6, and R. F. Bennett and H. S. Offler, Guillelmi de Ockham Opera Politica, II (Manchester, 1963), pp. 375-858, covering chaps. 7-124. Hereafter, the first of these works will be referred to as "Sikes, Opera Politica, I" and the latter will be referred to as "Bennett and Offler, Opera Politica, II." All references in the notes to the Opus Nonaginta Dierum will hereafter be made with the abbreviation "O.N.D.," and all volume and page references will be to these critical editions by Sikes or Bennett and Offler.

[12]Baudry, op. cit., p. 153.

[13]Baluze-Mansi, Miscellanea, pp. 323b-341a.

[14]O.N.D., II, chap. 124, pp. 857-858. We will use such phrases as "Ockham asserts," "Ockham claims," "Ockham maintains," "Ockham proposes," et al. in our analysis of those works of Ockham's polemical period which were written in his "impersonal" style, as well as in those works in which he directly presents his own views to use. But the reader should understand that such introductions do not necessarily indicate in the case of Ockham's polemical works written in "impersonal" style that what follows such phrases is Ockham's own view. Such phrases are used in order to avoid the stylistic straitjacket of always having to say "Ockham reports the opinion," "Ockham notes the opinion," etc., when analyzing what Ockham says in these works.

[15]Bennett and Offler, op. cit., II, p. xvi, in "Introduction" by Offler.

[16]O.N.D., I, chap. 3, p. 323. Ockham gives a quite specific definition of what "ius utendi" means in this work. He asserts that it is "a valid power of using some exterior thing, of which one ought not be willing to be deprived except because of his own fault or without reasonable cause; and if one is so deprived, he be able to have legal recourse"; cf. O.N.D., I, chap. 2, p. 304. For an anticipation of the argument being referred to in this note in the work of Michael of Cesena, see supra, Pt. I, chap. 6, p. 76.

[17]Ibid., p. 325. For the foreshadowing of this argument in Bonagratia of Bergamo, see supra, Pt. I, chap. 4, p. 48.

[18]Ibid., II, chap. 58, p. 550. For an anticipation of this argument in Nicholas III's Exiit, see supra, Pt. I, chap. 3, p. 30; in the work of Ubertino da Casale, see supra, Pt. I, chap. 4, p. 43; in the "long version" of the encyclical from the Chapter-General at Perugia in 1322, see supra, Pt. I, chap. 4, p. 44; in the work of Bonagratia of Bergamo, see supra, Pt. I, chap. 4, p. 45; and in the work of Michael of Cesena, see supra, Pt. I, chap. 6, p. 76.

[19]Ibid., chap. 60, p. 556 and chap. 61, p. 561. For an explication of Nicholas III's original statement, see supra, Pt. I, chap. 3, p. 30.

[20]Ibid.

[21]Ibid., chap. 61, p. 559.

[22]Ibid., pp. 561-562.

[23]We have noted above the meaning of this term; see supra, Pt. I, chap. 4, p. 43. Lagarde's claim [op. cit., VI, p. 159, n. 39] that Ockham derived the term "jus poli" from Scotus' Op. Oxon. IV, dist. 15, qu. 2, is possibly correct; however, Ockham cites St. Augustine's De Vita Clericorum xvii, qu. iv, c. ultimo, as his source for the use of both the terms "ius poli" and "ius fori"; cf. O.N.D., II, chap. 65, p. 573.

[24]O.N.D., II, chap. 65, pp. 573-574.

[25]Fortunately, Ockham gives us some idea of what he usually means by the classical and standard Scholastic term "recta ratio." He does not do so here but in his non-polemical work Super quatuor libros sententiarum subtilissime quaestiones earumdemque decisiones (Lyons, 1495), III, qu. 11 X, where he states that "right reason, moreover, is prudence in acting or in habit." For a prefigure of Ockham's relating natural law to a principle of natural reason among his Franciscan predecessors, see supra, the comments on this subject by Richard of Conington, Pt. I, chap. 5, p. 61.

[26]O.N.D., II, chap. 65, pp. 574-575. For a criticism of Lagarde's considering this definition "curieuse," see Wilhelm Kölmel, "Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 42, n. 17.

[27]Ibid. If Morrall is correct ["Some Notes on a Recent Interpretation of William of Ockham's Political

Philosophy," Franciscan Studies, 9 (1949), 346, n. 39], and we think he is, that Ockham here intended to identify his notion of right reason divinely revealed with Gratian's identification of natural law with that which is contained in the Mosaic Law and the Gospel, then it would be another example of some canonists' position of effecting such an association that we noticed occurred in the pre-occamist Franciscan tradition in the use of natural law concepts in Part I and would, thus, associate Ockham with this tradition in canonical interpretation. For a specific foreshadowing of this association in the work of Michael of Cesena, see supra, Pt. I, chap. 6, pp. 76-77.

[28] Ibid., p. 575.

[29] Ibid., pp. 576-577.

[30] Ibid., p. 577. For an anticipation of Ockham's statement that the right of use to temporal things under ius naturale cannot be renounced, see supra, Bonagratia of Bergamo's assertions in Pt. I, chap. 4, pp. 45-46, and Alvarus Pelagius' argument in Pt. I, chap. 5, pp. 63-64. Isidore of Seville, mentioned here by Ockham, is one of the Fathers of the Western Church. He became archbishop of Seville at the beginning of the seventh century and is responsible for the Etymologiarum sive originum libri XX (the Etymologies), a vast, early medieval encyclopedia. His influence on early medieval canon law, the so-called "classical period" of canon law, was profound. For an account of his transmission of both Greek and Roman legal concepts to the early Middle Ages, see Dom Odo Lottin, Le Droit Naturel chez Saint Thomas d'Aquin et ses prédécesseurs, 2nd ed. (Bruges, 1931), pp. 9-11.

[31] Ibid., chap. 88, p. 657.

[32] Ibid., chap. 14, p. 432. Ockham actually distinguishes three epochs, as far as dominium is concerned, in the O.N.D.: (a) that dominium before sin in which the power of rationally ruling and governing temporal things without the "impetuous resistence" of these things was granted to man's "first parents" [ibid.]; (b) that dominium after sin but before the establishment of divine or human positive law in which the "first parents" did not, properly speaking, have common dominium over all things but only the "power of appropriating and acquiring common dominium in itself" [ibid., p. 435]; and (c) that dominium established through divine or human positive law, which as "dominium" most properly so-called, resulted in the emergence of proprietas (property); cf. ibid. What Ockham is accusing John XXII of making is the mistake of identifying an instance of the realization of ius utendi naturale with (a). Further, as far as (b) is

concerned, Ockham, in fact, later specifies that the original "division" of things, after the Fall but before the establishment of divine or human positive law, was restricted only to their use with a universal commonality being retained; cf. ibid., chap. 88, p. 656. This commonality of goods should not be confused with the common dominium, mentioned above in (b), since common ownership of temporal goods was only a later realization of the power of appropriating and acquiring such dominium characteristic of (b).

[33]Ibid., chap. 65, p. 578.

[34]Ibid. Kölmel also seems to be interested in the significance of this atypical division; see op. cit., 42, 47 and 47, n. 39. However, this division is not unprecedented, see the Summa Coloniensis in Bamberg Staatl. Bibl. Can. 39 (D. II. 17). The relevant text can also be found in Lottin, op. cit., p. 105. For an alternative analysis of Ockham's division, see Jürgen Miethke, Ockhams Weg zur Sozialphilosophie (Berlin, 1969), p. 482, n. 191. Although Miethke specifically states [ibid., p. 477] that he does not intend to give a systematic elaboration of Ockham's position on natural law, he does offer an interesting analysis of "ius poli" and "ius fori" in the context of the O.N.D.; see ibid., pp. 477-502.

[35]Ibid., p. 579. As Kölmel has pointed out in criticism of Lagarde [op. cit., 48, n. 44], Lagarde's interpreting this definition of "ius fori" [op. cit., VI, p. 190] as establishing that Ockham posited an area of freedom for man from natural law where a large part of positive law is totally indifferent morally, so that a "justice légale" can be created in a manner independent and totally distinct from "justice naturelle," this interpretation, as Kölmel proposes, stretches the definition of ius fori far beyond its intended meaning. Ockham never intended or proposed that any part of human positive law was morally indifferent or not subject to natural law as a final test of its justice. For Ockham's presentation of various possible senses of the term "iustitia" in the O.N.D., see O.N.D., II, chap. 60, p. 557.

[36]Ibid., pp. 579-580. For a discussion of the inadequacy of the full argument Ockham offers here and its inadequacy implying a proof for a discontinuity between Ockham's philosophical and political thought, see Morrall, op. cit., 349.

[37]Ibid., p. 580.

[38]Ibid., chap. 92, p. 669.

[39]Ibid. As Kolmel has pointed out in criticizing Lagarde [op. cit., 48, n. 43], Lagarde is in error [op. cit., VI, p. 150, n. 26] when he tries to derive from Ockham's remark that between the common dominium of the original state and property there is a contrareity according to "genus naturae" and not according to "genus moris" that therefore there exists a matter of indifference with regard to the moral law or the "rational categorical imperative." The problem is that this move assumes that Ockham considered property to be iniquitous or evil; this is an error. For further analysis of this point, see Miethke, op. cit., p. 486, n. 202. The reference above to "rational categorical imperative" will become clearer later when we consider Lagarde's original theory more closely. For an anticipation of the idea of a state of natural equity as characteristic of man's original condition among Ockham's Franciscan predecessors, see supra, the comments on this subject by Cardinal Bertrand de Turre, Pt. I, chap. 5, p. 60.

[40]Lagarde, op. cit., IV, p. 55.

[41]Bennett and Offler, op. cit., p. xvi, in "Introduction" by Offler.

[42]For Latin text and English translation, see T. B. Birch, The De sacramento altaris of William of Ockham (Burlington, Iowa, 1930).

[43]Same as n. 41 supra.

[44]O.N.D., II, chap. 49, p. 536.

[45]C. K. Brampton, "Ockham, Bonagratia and the Emperor Lewis IV," Medium Aevum, xxxi, no. 2 (1962), 86.

[46]C. C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," Journal of the History of Ideas, 10 (1949), 199-200.

[47]As Lagarde has noted [op. cit., IV, p. 48], there is an incontestable influence of Bonagratia's style and arguments on Ockham in the O.N.D.

[48]H. S. Offler claims [Bennett and Offler, op. cit., p. 26, in "Introduction" by Offler] that "the polemic of Michael's followers against John XXII was a collective effort, in which the participants freely shared their ideas and their materials. Consequently, there is a family resemblance in their works."

CHAPTER EIGHT

OTHER POLEMICAL WORKS AGAINST JOHN XXII

Ockham's next polemical work seems to have been the first part of his voluminous Dialogus.[1] It was begun around the end of 1333 or the beginning of 1334 and completed before the end of this latter year.[2] This first part of the Dialogus is the only section of this massive work that we have in its entirety. The very significant third part, which we will consider in detail later, was never finished. What is now the second part was substituted for this unfinished third part.[3] The "original" second part of the Dialogus, if indeed there ever was one, has disappeared.[4]

The Dialogus involves a dialogue between a master and his pupil. And unfortunately, it is written in the "impersonal" style of some of Ockham's polemical works. This greatly complicates the task of distinguishing what is Ockham's actual position from the number of alternatives he usually presents on some particular point.

In the Prologue of the Dialogus, the pupil asks his master not to mention the proper names of the persons whose positions might come up in the discussion and not to limit

himself to only the presentation of one position but to give several without revealing to the pupil which is his own position. The pupil asks the master to do this for two reasons. First, the student has so much confidence in his master's views that if he knew which position was actually espoused by his master, he would lose his impartiality toward the individual positions being advanced. Second, the student feels that the practice of not giving the names of those who propose the individual positions covered will foster an unprejudiced assessment of the views under dispute.[5]

The seven books of the first part of the Dialogus are dedicated to investigating various questions about heresy. These books concern themselves with such issues as who should define what is heretical, theologians or canonists; in what does heresy consist; under what conditions does a man become a heretic; how should heretics be punished; what about the fautors of heresy and the like.

We are, of course, not as much interested in the various possible positions Ockham cites on these issues as we are in the arguments he gives for them that involve appeals to natural law.

Although, as we just mentioned, the student had exacted an agreement from his master not to directly identify his own views in his responsiones (responses) to the student's quaestiones (questions)--the method of exposition employed throughout the Dialogus--the standard rationes

(reasons) that the master gives for this or that opinion prove from the very beginning of the Dialogus to be unsatisfactory to the pupil; and he asks the master to also give a responsio (response) for each of the reasons given. The master does this reluctantly, protesting that initially they had agreed that he would only state the various opinions. Although giving such responsiones would normally result in the master's becoming involved in the discussion to the point of disclosing his own views, he is so cautious and tentative in his responsiones, which usually involve long sequences of replies and counter-replies, that his own views still tend to be far from clearly stated.[6]

Thus, although Ockham's employment of the "impersonal" method in the Dialogus does not necessitate abandoning the search for his own views in this treatise, as has been proposed, nonetheless, his use of this method certainly does weaken, to a degree, the thesis that his own personal views are to be found in the master's replies.[7] This is no less true of his position on natural law in this work. However, the prognosis for disclosing Ockham's position on natural law is, we feel, by no means hopeless, when what he had proposed in the Dialogus is put in the context of a full investigation of all of his polemical works.

In Part I of the Dialogus Ockham initially claims that all customs which are "true" under Holy Scripture and natural law are found not only in the Law (the Mosaic law)

and the Gospel but also in "true moral philosophy."[8] Although Ockham does not tell us here what he means by "true moral philosophy," an analysis of his statements on related matters from his earlier non-polemical works would tend to make one suspect that by this phrase he would mean that moral philosophy which was at least a complete scientia moralis (moral science). For him this science would not only take into consideration those things which are good or evil because they are enjoined or forbidden by divine or human positive law but also would account for those things which are known to be good or evil through self-evident moral principles or moral principles known through experience.[9]

It seems clear from what he says here that he is implying that at least one source of natural law principles is the Mosaic law and the Gospel. He does not imply that "true moral philosophy" is the sole source for the precepts of the natural law, which, presumably, along with others found in Holy Scripture, ground the "veracity" of certain customs. Thus, we again seem to have another instance of his associating at least some of the dictates of the natural law with the precepts of the Mosaic law and the Gospel.

Ockham claims that ignorance of the natural law is not excusable.[10] However, he also claims that not all the precepts which belong to the natural law are necessarily naturally known, since there are many things which are

conclusions from the natural law that are not naturally known.[11] Thus, it would seem possible that ignorance of these specific conclusions may in some cases be excusable, whereas ignorance of the supposedly naturally known principles would not be.

Ockham maintains that no decree of the pope contrary to natural law should be obeyed,[12] that the laws that can be imposed by the pope are necessarily restricted by natural law,[13] and that if the pope becomes a notorious heretic or criminal or a scandal to the Church and yet does not correct himself, then it is evident from both ius naturale and evident natural reason, as well as from Holy Scripture, that he must be cast out.[14]

Ockham proposes that it is evident from divine law, natural reason in divine law, and propositions naturally known that a heretic in no way is able to be preeminent over orthodox catholics[15] and that it is not contrary to natural law, at least according to one opinion,[16] that criminals undergo accusation and have to testify. And yet, Ockham notes that there are contradictory opinions concerning whether natural law or merely human law excludes an heretical pope from being called to testify in any legal action.[17] In any case, Ockham's actual legal resolution of the problem of an heretical pope did not involve there being a trial to establish the pope's guilt.[18]

Ockham also offers and interesting second-order rule

for the difficulty of equivocal words or words with multiple meanings occurring in first-order legal rules. He proposes that when the words of a law are equivocal or have multiple meanings, none of which is repugnant to natural law, in this case the interpreter of the law should look to the maker of the law or a superior who would be able to establish a similar law to clear up the difficulty.[19] This meta-rule combines nicely with Ockham's assertion that superiors are not to be obeyed in all things, for instance, if what is ordered is contrary to natural law.[20]

Ockham intimates that positive laws are to be evaluated in light of the understanding of the natural law which is current in a given epoch.[21] The individuals in a given epoch are to employ those dictates of natural reason in this evaluation that are fitting according to natural law. Nevertheless, he envisions ignorance at least in part resulting in the enactment of positive laws inimical to natural law; and he asserts that any positive law that is contrary to natural law is unjust.[22]

Ockham notes the example given by Isidore of Seville that one ought to return that thing that another has put in one's safekeeping.[23] Nevertheless, if that other should want the return of a sword placed in one's safekeeping in order to injure himself or some innocent person unjustly, the sword ought not to be returned to him. Ockham continues that such restitution would be in violation of the

natural law.[24] Clearly then, he is implying that such an act would violate the natural law because it would be antithetic to natural reason by being a violation of natural equity.

Further, Ockham proposes that many things which are not mentioned in Holy Scripture must still be done when the necessity arises, if they pertain to natural law. The example he gives is that Holy Scripture does not mention the case in which the pope becomes a heretic; nevertheless, he feels that when the pope falls into "heretical depravity," the clergy ought to restrain him, even if they are disinclined to do so, since their action is enjoined by natural law.[25]

It seems clear that Ockham is again implying that the core of natural law is to be found in Holy Scripture. He seems to be trying to account here for something that he feels falls under natural law, the necessity of the clergy's restraining an heretical pope, which is, nevertheless, not expressly covered in Holy Scripture.

Finally, Ockham again notes the distinction concerning natural law that he had drawn in the Opus Nonaginta Dierum by stating that there was one natural law for the time when human nature was instituted and another for the time after man had fallen into sin.[26] He reiterates that under the natural law pertaining to the time before the Fall, all men were equal in the sense that no one had any power over another.[27]

Around the same time that the first part of the Dialogus was being written, Ockham composed his Epistola ad Fratres Minores apud Assisium Congregatos,[28] mentioned above,[29] for Pentecost Sunday (May 15, 1334). The Epistola consists essentially of three lists of errors supposedly committed by John XXII: (a) a list of statements from Ad conditorem, Cum inter nonnullos, and Quia quorundam,[30] supposedly proving John XXII's heresy; (b) a list of supposed errors in the bull Quia vir reprobus[31]; and (c) a list of supposed heresies that John XXII had presented in a series of sermons preached by him between December 1329 and February 1332.[32]

The Epistola is actually a short, personal justification of Ockham's activities since 1328 to the members of the Franciscan Order gathered at Assisi for their General-Chapter at Pentecost in 1334. As such, it contains only one reference of interest for our purposes. This is just a reassertion of the now standard Franciscan argument that it is repugnant to Holy Scripture, natural reason and certain experience that usus facti in things consumed in use is not able to be separated from property or dominium.[33]

Whether in fact the Epistola preceded or followed the De dogmatibus Johannis XXII,[34] the tract that appears as the second part of the Dialogus,[35] does not seem to be able to be determined historically.[36] In any case, there is no significant reference to natural law in the De dogmatibus to

help us to ascertain Ockham's position on natural law.

Ockham's final polemical work in the period of the Michaelist quarrel with John XXII is his Tractatus contra Ioannem.[37] It seems most likely that this work was both begun and finished during 1335.[38]

The first part of this work, Chapters 1-21, attempts to demonstrate that John XXII's confession of faith[39] concerning the souls of the blessed and the Beatific Vision, read to the cardinals present while he was on his deathbed, did not absolve him of having been a heretic. In the last part of the work, Chapters 22-42, Ockham tries to demonstrate that John XXII's conditional disavowal of any other errors that he might have professed did not free him from still dying in heresy.[40]

As we just noted, one of the things that Ockham tried to show in the Contra Ioannem was that John XXII's final confession of faith in what was to subsequently become defined doctrine still did not save him from dying in heresy. However, we are again more interested in Ockham's use of natural law arguments and concepts in this work than we are in recounting his proof that John XXII was a heretic.

Ockham's references to natural law in this work are very infrequent; nevertheless, he does make some significant statements. He states flatly that ius naturale is in merit more noble and more efficacious than ius humanum.[41] As might be remembered, he had noted something similar in the

first part of the Dialogus when he stated that any positive law that is contrary to natural law is unjust.[42]

Further, Ockham continues a line of reasoning employed in the first part of the Dialogus. There he had stated that under the natural law instituted from the foundation of human nature and before the Fall, all men were equal in the sense that no one had any authority over another.[43] In the Contra Ioannem he claims that under ius naturale no one has any special privileges.[44]

Thus, it seems that at least two significant conclusions can be gleaned from these other polemical works against John XXII. First, there is definitely a continued emphasis in all of these works with significant appeals to natural law on interpreting natural law as natrual equity. Thus, there is a continued emphasis on natural reason rather than on God's will as the source for natural law. Second, there is a continued emphasis on viewing Holy Scripture as a prime depository for those principles of right reason that are divinely revealed.

Throughout these works as well, there is a repeated insistence that natural law is superior to any human positive law. Thus, if there is any conflict with natural law engendered through the enactment of some human positive law, it is the positive law which must give way or an unjust law will have been created.

FOOTNOTES TO CHAPTER EIGHT

[1]Unfortunately, the Dialogus is unavailable in a critical edition. Thus, one is still dependent on Melchior Goldast's Monarchia Sancti Romani Imperii, II (Frankfort, 1614), pp. 398-957, for a complete edition of the Dialogus. At times, Goldast's work is not only defective because it contains substantive errors but also because of its somewhat chaotic pagination, which makes references to pages rather risky. Nonetheless, the customary practice of citing texts by both chapter and page will be followed in this work. The first part of the Dialogus, which covers folio pages 398-739 in Goldast's text, will be referred to in the notes as "Dial. I." And, for instance, "Dial. I VI, chap. 66, p. 572," would be referring the reader to page 572 in the 66th chapter of Book Six of the First Part of the Dialogus.

[2]E. F. Jacob, "Ockham as a Political Thinker," Essays in the Conciliar Epoch (Manchester, 1963), p. 92.

[3]Ibid.

[4]Léon Baudry, Guillaume d'Occam, I (Paris, 1949), p. 159.

[5]Dial. Prologus, p. 398.

[6]Jacob, op. cit., p. 92.

[7]J. B. Morrall proposes ["Some Notes on a Recent Interpretation of William of Ockham's Political Philosophy," Franciscan Studies, 9 (1949), 350-351] an abandonment of the "baffling" Dialogus and the establishment of a provisional statement of Ockham's personal views without using this work. Certainly, within the purposes and goals of Morrall's article, this may have been the most perspicuous thing for him to have done. However, we cannot abandon the Dialogus in our search for Ockham's position on natural law not only because of the significant slice of Ockham's total polemical work it comprises but, more importantly, because of the extensive use that two previous interpreters of Ockham's position on natural law, Georges de Lagarde and Wilhelm Kölmel have made of the Dialogus, especially of Part III of this work, which will be considered shortly. For a discussion of the various opinions of both those who propose that Ockham's

opinions can be found in the master's assertions and those who, for one reason or another, reject this view, see G. de Lagarde, La naissance de l'esprit laïque au déclin du moyen âge, VI: La Morale et le Droit (Paris, 1946), pp. 96-97.

[8]Dial. I I, chap. 9, p. 405.

[9]Ockham recognized two senses in which the term "morale" (moral) could be used: (a) broadly, for all human acts that were the subject of willing considered absolutely; and (b) strictly, for habits or subjective acts in the power of the will in accordance with natural reason's dictates and other circumstances; cf. Quodlibeta septem (Strasbourg [Argentorati], 1491), II, qu. 14. Further, Ockham recognized two kinds of moral science: (1) positive moral science, which contained human and divine laws that enjoined pursuing or fleeing those things that were neither good nor evil unless they were prohibited or commanded on the whole; and (2) nonpositive moral science, that moral science which without any precept of a superior directed human actions just as do principia per se nota (self-evident principles) or principles known through experience, cf. ibid. Ockham claims that among the many per se nota principles in moral philosophy are ones like "the will ought to conform to recta ratio (right reason)" and "all evil must be shunned and fled"; cf. ibid. He considers (1) to be a nondemonstrative science, whereas (2) is for him a demonstrative science. We hypothesize that for him a full moral science would, in all probability, recognize at least (1) and (2). We feel that this hypothesis is at least in part supported by David W. Clark's apparent thesis ["Voluntarism and Rationalism in the Ethics of Ockham," Franciscan Studies, 31 (1971), 85] that any adequate presentation of Ockham's moral theory must account for both "the positive and nonpositive parts of his ethics..." Also see Clark [ibid., 83] for "two factors" that should be mentioned concerning Quodl. II, qu. 14.

[10]Dial. I IV, chap. 10, p. 451, and ibid., VII, chap. 25, p. 670.

[11]Ibid., VI, chap. 47, pp. 550-551.

[12]Ibid.

[13]Ibid., chap. 61, p. 566.

[14]Ibid., chap. 62, p. 568. Ockham was faced with an interesting legal problem. He accepted Huguccio of Pisa's position that a pope could only be accused of heresy when he publicly proclaimed his willful adherence to a known heresy and declined to abandon his heretical position after due

admonition. Further, he accepted Gratian's dictum that an inferior could not condemn a superior; thus, there was no court competent to try a pope. However, Gratian had also maintained, and Ockham concurred, that no formal condemnation was necessary in the case of one who accepted an already condemned heresy, since then this person was regarded as having willfully included himself in the previous condemnation. According to Huguccio's argument, which Ockham accepted, if a pope accepted an already condemned heresy, then he would ipso facto (by the act itself) be deposed and, thus, subject to the judgment of any Catholic. Thus, for Ockham no formal charge or trial was necessary, since the pope had ipso facto deposed himself from office the moment that he willfully espoused a previously condemned heresy. This supposed, previously condemned heresy was his pronouncements on the question of evangelical poverty, which Ockham claimed were heretical because they contradicted the previously defined orthodox position on this question that was supposed to have been given by Nicholas III in Exiit. Thus, Ockham was able to extricate himself from his legal problem by cleverly combining Huguccio of Pisa's thesis with certain aspects of Gratian's legal theory; cf. Brian Tierney, "Ockham, the Conciliar Theory and the Canonists," Journal of the History of Ideas, 15 (1954), 40-70.

Incidentally, it is most probable that Ockham was in error concerning his claim that Nicholas III had made a previous doctrinal pronouncement on evangelical poverty in Exiit which was being contradicted by John XXII's doctrinal assertions on this question. It seems unlikely that Nicholas III intended to make his statements on the poverty question a matter of Church doctrine. If Ockham was in fact in error, it seems to have been an honest, albeit a convenient, mistake.

[15] Ibid., chap. 75, p. 587.

[16] Ibid., chap. 79, p. 596.

[17] Ibid., chap. 81, p. 600. This exclusion may be related to the canonical dictum that in no public business, such as a trial, is the testimony of an heretical pope to be believed; see ibid., chap. 80, p. 599.

[18] See supra, Pt. II, chap. 8, n. 14, pp. 120-121.

[19] Dial. I VI, chap. 100, p. 628, and ibid., VII, chap. 6, p. 639.

[20] Ibid., VII, chap. 10, p. 648.

[21] Ibid., VI, chap. 100, p. 629.

[22]Ibid.

[23]Ultimately, of course, this example is taken from the dialogue between Socrates and Cephalus in Book I of Plato's Republic; cf. Republic I, 331, in B. Jowett, The Dialogues of Plato, I (New York, 1937), p. 595.

[24]Dial. I VI, chap. 100, p. 629.

[25]Ibid.

[26]Ibid., VII, chap. 67, p. 729. For this distinction in the O.N.D., see supra, Pt. II, chap. 7, pp. 97-98.

[27]Ibid.

[28]For the references concerning where this work has been published, see supra, Pt. I, chap. 6, n. 21, p. 82. All references to the Epistola will be from H. S. Offler's critical edition of this work cited in the note just mentioned.

[29]See supra, Pt. I, chap. 6, pp. 72-73.

[30]For a discussion of these bulls, see supra, Pt. I, chap. 4, pp. 49-50 and chap. 5, pp. 56-58, for Ad conditorem; Pt. I, chap. 5, pp. 62-63, for Cum inter nonnullos; and Pt. I, chap. 6, p. 71, for Quia quorundam.

[31]See supra, Pt. II, chap. 7, p. 87, for this work.

[32]According to Ockham John XXII had committed a number of heretical errors in these sermons. Among the supposed heresies that he found in the sermons, the one that caused most concern was John XXII's opinion that the souls of those who die in a state of grace still do not see God face to fact immediately. Their final beatitude has to wait until the Last Judgment and the reunion of body and soul. As might be remembered from Part I [see supra, Pt. I, chap. 5, n. 15, p. 66], John XXII was not a professional theologian but a doctor of both civil and canon law (doctor utriusque iuris). Brampton claims ["Personalities at the Process against Ockham at Avignon, 1324-26," Franciscan Studies, 25 (1965), 18] that John XXII's knowledge of theology was, in great part, gleaned from conversations at the Papal Curia. However, John XXII thought himself to be something of a theologian, much to the delight of his professional theologian-antagonists, like Ockham. What John XXII had done was to propose a traditional theological position on an as yet undefined issue that was out of touch with contemporary theological developments. The view that John XXII had espoused was opposed not only by most of the eminent

theologians at Avignon but also by the theologically prestigious University of Paris. He came under such pressure that on his deathbed he was supposed to have had read to the cardinals present a confession of his faith about the issue in question that was much more in line with contemporary theological thought. In any case, the Michaelists entertained doubts about the authenticity of this confession. These doubts were, even if contrived, understandable, since, in fact, this theological faux pas gave them new fuel for their battle to prove John XXII a heretic. Ockham seems to have known about John XXII's sermons from the beginning of 1332, and knowledge of the pope's opinions is apparent even in the O.N.D.; see O.N.D., II, chap. 120, p. 813, and ibid., chap. 124, p. 839. Further, the task of proving that, even if authentic, this final confession did not remove the supposed taint of heresy from John XXII was given to Ockham; and to prove this point, he composed his Tractatus contra Ioannem, which we will consider later in the chapter. For a detailed consideration of this controversy over John XXII's sermons, see R. F. Bennett and H. S. Offler, Guillelmi de Ockham Opera Politica, III (Manchester, 1956), pp. 20-24, in the "Introduction" by Offler. Hereafter, this work will be referred to as "Bennett and Offler, Opera Politica, III."

[33]Epistola, p. 8.

[34]Goldast, op. cit., pp. 740-770.

[35]It is commonly held now that this work could not have formed any part of the original Dialogus; see Baudry, op. cit., pp. 172-176.

[36]Bennett and Offler, op. cit., III, p. 24, in the "Introduction" by Offler.

[37]Ibid., pp. 29-156. The work actually has no title; it begins with the words "Non invenit locum poenitentiae Ioannes XXII." Richard Scholz, who first published it in 1911, called it "Tractatus contra Ioannem"; cf. R. Scholz, Unbekannte kirchenpolitische Streitschriften aus der Zeit Ludwigs des Bayern (1327-1354), I: Analyzen (Rome, 1911), pp. 149-152. All references to this work will be from the critical edition by Bennett and Offler, and the abbreviation "Contra Ioann." will be used in the notes. This work is also sometimes referred to as the "Non invenit."

[38]Same as n. 36 supra.

[39]See supra, Pt. II, chap. 8, n. 32, pp. 122-123.

[40]Same as n. 36 supra.

[41]*Contra Ioann.*, chap. 21, p. 84.

[42]See *supra*, Pt. II, chap. 8, p. 114.

[43]See *supra*, Pt. II, chap. 8, p. 115.

[44]*Contra Ioann.*, chap. 20, p. 82.

CHAPTER NINE

THE CONTRA BENEDICTUM, AN PRINCEPS AND DIALOGUS III I

The election of Cardinal Jacques Fournier, a conciliatory Cistercian reformer, on December 20, 1334, gave the Church a new pope, Benedict XII. The new pope's apparent desire to heal the divisions with the Church initially resulted in a number of attempts to reconcile the excommunicated Emperor Lewis of Bavaria with the Church. Various overtures went on for around two years until the French court, fearful of the political ramifications of the reunion of the Emperor with the Church, finally convinced Benedict XII to drop the matter. However, during this time, that is, between 1335-1337, the Michaelists discontinued their polemical writings against the papacy, presumably in the interests of Lewis' possible desire to see if a workable accommodation could be hammered out with the new pope.[1]

With the renewal of hostilities Ockham composed another polemical work, the Tractatus contra Benedictum.[2] This work seems to have been written between the autumn of 1337 and the spring of 1338.[3] Basically, what Ockham had in mind was to demonstrate, first, that Benedict XII was a

fautor of heresies since he failed to condemn John XXII's bulls concerning evangelical poverty, John XXII's supposed heretical errors in his sermons,[4] and the supposed heretical errors in the works of Guiral Ot (Ott), whose election as Minister-General of the Friars Minor John XXII had engineered after his deposition of Michael of Cesena.

Second, Ockham attempted to show that Benedict XII had engendered some heresies of his own through the publication of his bull Redemptor noster[5] (November 28, 1336) and through his not rescinding John XXII's enactments against Lewis of Bavaria. Ockham felt that his reaffirming these same, supposed heretical errors made Benedict XII a heretic. It is in prosecuting this latter charge against Benedict XII in Book VI of the Contra Benedictum that Ockham first involves himself in the actual political confrontation between the papacy and the empire in his polemical works.[6]

A continued and ever increasing involvement with the question of the limits of papal authority and a defense of the prerogatives of the empire was to gradually supplant Ockham's sole concern over the question of evangelical poverty. This latter question had consumed his attention in his earlier polemical works.[7]

As a matter of fact, it is precisely in presenting his position on the limits of papal authority in the Contra Benedictum that Ockham uses some natural law arguments. He claims that the pope's plenitudo potestatis[8] (fullness of

power) is not only limited since he cannot enjoin that which is contrary to Sacred Scripture or natural law but also because he cannot require some things that are not contrary to divine law or natural law.[9]

For instance, Ockham claims that to abandon married life and to be perpetually separated and to vow perpetual chastity or to remain a virgin or not to accuse an heretical pope of heresy or to prescribe that those in minor orders or lay people remain forever chaste are not contrary to either divine or natural law; and yet the pope does not have the power to command any of the things mentioned. Thus, Ockham asserts,[10] he does not have plenitudo potestatis in spiritual matters.[11]

Ockham also offers an interesting meta-rule on legal processes and sentencing. He claims that one of the reasons that renders a legal process or sentence unjust through a deficiency in the order that is necessarily required in legal processes or sentencing is an intolerable error against the natural law.[12] This is again another example in which the positive law can become unjust through its noncompliance with the dictates of natural law, in this case in the matter of positive legal processes and sentencing.

Further, as a specific application of this rule, Ockham claims that a sentence of excommunication is void and is neither to be feared or observed if the ecclesiastical authority pronouncing the sentence omits anything of the

prescribed procedure as, for instance, when he tries to pass judgment on that over which he has no power. And this is always the case when an intolerable error in sentencing is articulated contrary to the natural law.[13]

Although Ockham's polemical works were tending more and more toward the issue of the limitation of papal authority and the defense of imperial prerogatives, nevertheless, he did not totally abandon his polemics against John XXII. His next work, the Compendium errorum papae,[14] although it does not contain anything of interest concerning natural law, evidences some of the most scathing language to be found in Ockham's polemical works.[15] Its eight chapters again catalog a number of the heretical errors that Ockham considered had been committed by John XXII in his constitutions on evangelical poverty, in his Quia vir reprobus, and in his sermons relative to the souls of the blessed and the Beatific Vision. Ockham also gives a response to those who had criticized him concerning his polemics against John XXII.

The Compendium,[16] as well as Ockham's next commonly recognized polemical work, the Allegationes de potestate imperiali,[17] were written in 1338. The Allegationes, which is not incontestably attributed to Ockham,[18] seems at least to have been the common effort of certain theologians and lawyers residing in Munich at the time. In this effort, Ockham seems to have had a part. This work attempted to show that nothing in either divine or human law justified the attribution

of plenitudo potestatis to the pope. In any case, since the Allegationes contains nothing of interest on our topic, its authenticity is not crucial for our purposes.

Ockham's next polemical work, the An princeps pro suo succursu, scilicet guerrae, possit recipere bona ecclesiarum, etiam invito papa,[19] as its title indicates, deals with the question of whether a king--Edward III of England--is able to appropriate ecclesiastical goods as an aid in his carrying on a war--against the French--even though such appropriation of Church possessions is forbidden by the pope. Ockham gives an affirmative answer to this question.

This work seems to have been composed in 1339.[20] It also seems to have been at least partially inspired both by the alliance that then existed between Lewis of Bavaria and Edward III and by Benedict XII's threat to excommunicate Edward III if he did not raise the seige of Cambrai and renounce the title of "imperial vicar" conferred on him by his excommunicated ally, Lewis of Bavaria. One of the things that Ockham wanted to prove in the An princeps[21] is that such an excommunication of Edward III should be neither feared nor observed. At least as far as Ockham was concerned, all Edward III was doing in attacking France was pursuing his just claim to the French throne.[22]

In what exists of this tract, Ockham initially distinguishes in what sense one can say that the pope possesses plenitudo potestatis. And, after an analysis of the clergy's

right to have temporal goods, he attempts to prove that they have an obligation to help Edward III by giving him their temporal goods. Ockham claims that even the pope would not be able to free them from their obligation to aid the king in pursuing his supposedly rightful claim to the French throne through the presumably just war he is waging on the Continent.

Finally, Ockham tries to prove that the threatened papal excommunication of Edward III would be inefficacious since the king is supposedly merely pursuing the proper execution of his rights. However, the attempted proof just ends in the middle of a line in Chapter 13.[23]

Fortunately, in what we possess of this tract, there are some significant references to natural law. Again, in dealing with the issue of the pope's plenitudo potestatis, Ockham makes reference to divine and natural law. However, he here introduces the notion of a ius naturale immutabile et indispensabile[24] (immutable and indispensable natural law). Thus, he implies that this may be a possible division within natural law which might have as a complementary category a ius naturale that is mutable and dispensable.

Ockham claims that no power possessed by an emperor, king or anyone else is able to extend itself to be served in contrareity to this ius naturale indispensabile or divine law,[25] and he again reiterates that the pope is not able to do all things permitted by divine and natural law.[26]

In a quite significant passage, Ockham asserts that it is absurd to propose that the pope is able to enjoin an action contrary to ius naturale or lex divina (divine law), such as the killing of innocent people, which the faithful would have to carry out, even though God was able to decree --although not against equity--that Abraham kill his own innocent son.[27]

It is important to notice that what Ockham is actually proposing here is that, although, in an individual instance, God can occasionally decree that which is contrary to some part of natural or divine law, nonetheless, He is not able to decree something that is contrary to equity. Thus, God can decree individual exceptions to natural and divine law which do not entail his enjoining something opposed to equity.

Finally, Ockham claims that the power implied in Christ's statement, "Whatever you bind on earth shall be considered bound in heaven; whatever you loose on earth shall be considered loosed in heaven,"[28] the so-called "Power of the Keys," conferred on St. Peter by Christ, ought not to include exceptions to lex divina or ius naturale (natural law) or those things that are notably or greatly to the detriment of the liberties of laymen or clerics or entail an infringement on the temporal laws of emperors, kings, or rulers, if these things are congruent with ius naturale, ius gentium (law of nations) or ius civile (civil law),

either before or after the institution of the law of the Gospel.[29]

Thus, Ockham seems here to be greatly limiting the scope of the papal canonists' appeal to the "Power of the Keys." This concept was used by some advocates of papal plenitudo potestatis as a justification for attributing virtually unlimited spiritual and temporal power to the pope.[30] Note that for Ockham the "Power of the Keys" should not be employed to underwrite exceptions to natural and divine law. It should also be considered as powerless to interfere with any laws based on ius naturale, ius gentium or ius civile that govern either laymen or clerics and are obviously for their benefit or increase the exercise of their liberties. Further, this limitation of the "Power of the Keys" is not to just pertain to laws enacted before the promulgation of the law of the Gospel but is also to apply to those laws established after the institution of the law of Christ. As a matter of fact, Ockham so limits the scope of the canonists' notion of the "Power of the Keys" that it is possible that for him it might be efficacious only in such limited spheres of application as matters involving the forgiveness of sin in the sacrament of penance. In this particular case, Ockham said he found a proper object for the exercise of the "Power of the Keys."

The last work to be considered in this chapter is the first tract of the third part of the voluminous Dialogus,

the De potestate papae et cleri.[31] Because of the emphasis that has been placed on the second tract of the third part of the Dialogus by Lagarde and Kölmel,[32] the entire next chapter will be devoted to this tract.

The third part of the Dialogus seems to have appeared at some time between 1339 and 1341.[33] The four books of this first tract deal with questions concerning the power of the pope, pontifical sovereignty, the sources of the faith, and apostolic primacy.

Ockham again has some interesting things to say concerning natural law in the De potestate papae et cleri. He gives us another more specific definition of what he means by someone's possessing plenitudo potestatis. He asserts that this kind of power entails that one is able to do or to enjoin all things except those contrary to divine or natural law. And he states that no one is able to free himself from one having this fullness of power concerning anything in any way that is not in itself illicit.[34]

Further, Ockham maintains that the pope does not possess plenitudo potestatis over temporal and spiritual matters regulariter but only causaliter,[35] not simpliciter but only in casu.[36] Ockham claimed that the pope does not possess regulariter the power of administering temporal affairs from either divine law or any power granted by Christ, since such power normally pertains to kings and rulers.[37]

Similarly, Ockham proposes that the pope does not possess plenitudo potestatis in spiritual matters regulariter and simpliciter but only in casu, since there are many things that he cannot enjoin that the laity must do without himself sinning, unless he has sufficient cause. Among the things that Ockham feels the pope does not regulariter have plenitudo potestatis to enjoin that the laity must do are not to contract marriage or to vow perpetual virginity or chastity, although these things are not in themselves contrary to either divine or natural law. Nonetheless, in casu or with sufficient reason or for some great necessity or utility, when from such a precept no one would be put in peril, the pope is able to enjoin in spiritual matters that which is not contrary to divine or natural law,[38] such as those things mentioned above.

Although this is not the first time that Ockham has made such pronouncements on the limits of papal plenitudo potestatis, it is interesting to note that he tries to indicate more specifically what he is driving at by utilizing the regulariter-causaliter and simpliciter-in casu distinctions, customarily employed when speaking about the exercise of legal jurisdiction.

Further, it is also interesting to note that his use of the simpliciter-in casu distinction affords him a device for further clarifying what he had said in the Contra Benedictum.[39] There he had maintained that the pope did not

possess the plenitudo potestatis in spiritual matters to enjoin that anyone make a vow of perpetual chastity. Here, in the first tract of the third part of the Dialogus, it would appear that the pope possesses such power in casu to require such a vow from a layman, as long as the person involved would not thus be put in peril. This seems to us to be more a further clarification of his position than an instance of textual contradiction between the Contra Benedictum and the De potestate papae et cleri, in spite of the fact that, since the latter tract is part of the Dialogus, one could possibly reject the statements in question contained therein as not indicative of Ockham's own position.

In considering various kinds of political sovereignty in this tract of the Dialogus, Ockham notes the case of one who rules in accordance with his own will and not according to law, one who reigns in the interest of the common good but without being restricted by any purely positive human laws or customs. Ockham maintains that even though this ruler is above all such laws, nevertheless, he is bound by the natural law. He must enact laws and encourage customs which foster the common utility through their mirroring the natural law.[40]

Ockham also considers an ideal case. He proposes that one of the ways in which a ruler can be chosen is by iustum naturale in particulari (the application of natural justice to the individual case). In this type of natural

choice there is some clear, natural difference between the ruler and the ruled. This difference, he feels, naturally results in a just choice of a sovereign in the particular case in question. As examples of this, he gives the supposed natural sovereignty of a man over his wife, a father over his sons, and a master over his servants. However, in the case of a perfect community in which there are many who are similar or equal in virtue, iustum naturale's enjoining that the best should rule does not in itself indicate in fact who should rule. Nevertheless, even though it is also not in accordance with iustum naturale that a greater number should be ruling at any one time than is necessary, it can still be just and natural that someone or some group should rule over his or their equals in this perfect community. A selection can still be made through a determination based on iustum positivum[41] (positive justice). However, this selection through iustum positivum still has to remain consistent with iustum naturale in the sense that, although iustum naturale does not indicate in this case which particular one or ones are to be selected, nevertheless, it still enjoins that one or some of the best must be chosen.[42]

In a quite significant passage Ockham maintains that not only as regards human positive laws but, moreover, as regards divine positive laws, it ought to be understood that a real necessity is not subject to divine positive laws, unless the opposite is ordered in these same divine laws.

But this is not the case as regards lex naturalis (natural law) or lex Dei naturalis (divine natural law), that is, natural law divinely revealed, since a real necessity is subject to these laws nor does any real necessity excuse from them.[43]

Again, we have here another example of the proposed preeminence of natural law, whether pure natural law or natural law divinely revealed, over both human positive law and divine positive law, unless, in some particular instance, the latter specifically prohibits an exception, in the case of a real necessity excepting one from the law. For all of human positive law and, presumably, most of divine positive law, a real necessity is a valid excuse for the non-observance of a law, that is, for the existence of an exception to a law, but never in the case of natural law.

Ockham reemphasizes that the principles of the natural law ought in no case to admit of an exception because of any necessity or utility whatsoever, unless God specifically and expressly states something else. Ockham again uses the example, we noted above,[44] he employed in the An princeps; but here he gives another expression of what he wants us to understand is entailed in this exception. He proposes that the exception intended was just like the one God made in the case of His commanding Abraham to sacrifice his own son, a special exception not in contradiction with the precept of the pure natural law not to knowingly kill innocents.[45]

Here Ockham seems to be saying that when he had maintained in the An princeps that God could not command any exceptions that were contrary to equity what he was proposing was that God could not command any exceptions that were in contradiction to the precepts of the pure natural law.

Thus, even though this first tract of the third part of the Dialogus still evidences the difficulties concerning ascertaining Ockham's own positions apparent throughout the Dialogus because of Ockham's use of his "impersonal" style of presentation, nevertheless, when this tract is examined in light of the other works considered in this chapter, all these works point to the continued development of the positions on natural law that we noted at the end of the last chapter.

There is a continued emphasis on interpreting the natural law as natural equity with an even clearer presentation of this association than may have been apparent in Ockham's polemical works against John XXII. There is thus a continued emphasis on natural reason rather than on the Divine will as the basis of natural law. Further, there is a continued insistence on the natural law's preeminence over both human and divine positive laws. Any violation of the natural law, whether it is an infringement of pure natural right reason or right reason divinely revealed, by any positive law results in the injustice of the violating

law, unless God has specifically made an exception in some particular case through divine law. And even here an exception cannot be commanded by God to the dictates of equity grounded in pure natural right reason.

FOOTNOTES TO CHAPTER NINE

[1]For an account of Benedict XII and his dealings with the Michaelists and Lewis of Bavaria, see Clément Schmitt, Un Pape réformateur et un défenseur de l'unité de l'Église, Benoit XII et l'Ordre des Frères Mineurs (1334-1342) (Florence, 1959), pp. 197-249.

[2]As in the case of the Tractatus contra Iohannem, the original manuscript containing this work had no title. It began with the words "Ambulavit et ambulat incessanter." The name "Tractatus contra Benedictum" was, as with the Contra Iohannem, given to this work by Richard Scholz; see R. Scholz, Unbekannte kirchenpolitische Streitschriften aus der Zeit Ludwigs des Bayern (1327-1354), I: Analyzen (Rome, 1911), pp. 152-161. All references to this work will be from the critical edition by Bennett and Offler, Opera Politica, III, pp. 165-322; and the abbreviation for this work, "Contra Benedict.," will be used in the notes.

[3]Bennett and Offler, op. cit., III, p. 162, in the "Introduction" by Offler.

[4]Even though Benedict XII in his bull Benedictus Deus (January 29, 1336) [see Magnum bullarium romanum, I (Lyon, 1673), pp. 240-241 for the text; for an historical commentary on the bull, see X. Le Bachelet, "Benoit XII," Dictionnaire de théologie catholique, II (Paris, 1905), col. 657-696] had made a dogmatic pronouncement, i.e., that the purged souls of the blessed see God face to face immediately after their deaths rather than having to wait until after the Last Judgment, which was a corroboration of Ockham's opinion and a condemnation of John XXII's supposed final position; nevertheless, Ockham still considered Benedict XII to be a fautor of heresy because he did not treat the former pope, John XXII, as a heretic.

[5]In this bull Benedict XII had decreed that once any matter of doubt or question that had arisen concerning some matter of faith had been taken under investigation by the Holy See no one was to be so presumptuous as to favor any position on the question until a papal pronouncement had been made on the issue in doubt. Ockham considered this decree to entail the heresy of supposing that any matter of faith, even those things revealed in the Scriptures, would

finally end up being dependent for its veracity on the will of the pope if, because of any doubt or question that had arisen concerning it, it was brought before the Holy See for investigation. For text of bull, see Bull. Franc. VI, p. 32.

[6]Schmitt, op. cit., p. 215.

[7]Boehner's assertion ["Ockham's Political Ideas," Collected Articles on Ockham (St. Bonaventure, N. Y., 1958), p. 444] that the question of the limits of papal authority became Ockham's main focus of interest from about 1335 is certainly plausible enough if for no other reason than there are no known polemical works between his last, known work in 1335, the Contra Ioannem, and the beginning of the composition of the Contra Benedictum in 1337 that could conclusively disprove Boehner's assertion.

[8]Here the term "plenitudo potestatis" should not necessarily be understood only in the sense of plenitudo ecclesiasticae potestatis, explained above; see supra, Pt. I, chap. 2, n. 10, p. 26. In his later polemical works Ockham is particularly interested in disproving not only that the pope lacks plenitudo potestatis in spiritual matters but that he lacks this fullness of power in temporal matters as well.

[9]Contra Benedict. IV, chap. 12, p. 262.

[10]Ibid., VI, chap. 3, p. 274.

[11]Here Ockham is specifically denying that the pope has plenitudo ecclesiasticae potestatis [see supra, n. 8] over the things mentioned. For an anticipation of this denial of the pope's plenitudo ecclesiasticae potestatis in the work of Ockham's Franciscan predecessors, see supra, the comments of Richard of Conington, Pt. I, chap. 3, p. 35.

[12]Contra Benedict. VI, chap. 11, p. 293.

[13]Ibid., p. 294.

[14]Melchior Goldast, Monarchia Sancti Romani Imperii, II (Frankfort, 1614), pp. 957-976.

[15]Ibid., pp. 957-958.

[16]Léon Baudry, Guillaume d'Occam, I, p. 192.

[17]R. Scholz, op. cit., II: Texte (Rome, 1914), pp. 417-431.

[18]Baudry lists [op. cit., p. 291] this work as a work of Ockham's polemical period; nonetheless, he offers some interesting discussion concerning its actual attribution to Ockham; see ibid., pp. 199-203. There seems to be some ongoing discussion concerning its attribution to Ockham; see Wilhelm Kölmel, Wilhelm Ockham und seine kirchenpolitischen Schriften (Essen, 1962), pp. 162-163.

[19]J. G. Sikes, Opera Politica, I, pp. 230-271. All references to this work will be from the critical edition by Sikes, and the abbreviation "An princeps" will be used in the notes. This work is also sometimes referred to as the "An rex Angliae."

[20]Baudry, op. cit., p. 209.

[21]In fact, of the four main points that according to Ockham were supposed to be presented in the An princeps, only the first, i.e., the one concerning Edward III's right to appropriate Church possessions in the given circumstances, is fully accomplished in what exists of the tract. Whether in fact the rest of the work was completed and has been lost or, as is the case with some of Ockham's polemical works, was begun and then abandoned has not been determined; cf. J. G. Sikes, op. cit., I, p. 224 and p. 224, n. 3

[22]Sikes, op. cit., I. p. 230. Edward III's claim to the French throne was based on the following set of circumstances. Edward III's mother, Isabella, was Philip IV's sister. In 1328, with the death of Charles IV, Philip IV's son who left no male heir, the crown passed from the direct Capetian line to the collateral line, the House of Valois and Philip VI. In 1337 Edward III challenged Philip VI's right to the throne, repudiated his act of homage to Philip for his French fiefs and declared himself King of France, reaffirming his previously made claim (1328) to the crown in right of his mother, Isabella. This was, of course, a groundless claim in view of the exclusion of females from the French throne.

[23]See An princeps, chap. 13, p. 271.

[24]Ibid., chap. 1, p. 231.

[25]Ibid., chap. 2, p. 235.

[26]Ibid.

[27]Ibid., chap. 5, p. 245. The problem of the apparent dispensation effected in natural law through God's commanding Abraham to sacrifice his son Isaac was much discussed

by both medieval canonists and theologians. So many figures considered this problem that it is not feasible to note them all here; however, for some of the more interesting solutions; see St. Bernard of Clairvaux's Liber de praecepto et dispensione, chaps. 2-3 in Abbé Minge's Patrologiae cursus completus, Series Latina, 182, col. 836-865; the extracts from William of Auxerre's Summa aurea in quattuor libros sententiarum a subtilissimo doctore Magistro Guillermo Altissiodorensi edita (Paris, 1500), printed in Dom Odo Lottin's Le Droit Naturel chez Saint Thomas d'Aquin et ses prédécesseurs, 2nd ed., (Bruges, 1931), p. 38, n. 2; Albert the Great's Summa de bono in Bruxelles B.R. 603 (1655), also printed in Lottin, ibid., p. 119; and St. Bonaventure's In I Sent., dis. 47, qu. 4, in S. Bonaventurae Opera Omnia, I (Ad Claras Aquas, 1882), p. 846.

[28]Matthew 16: 19-20. (Jerusalem Bible).

[29]An princeps, chap. 5, p. 246.

[30]As Ullman notes [Medieval Papalism (London, 1949), p. 154], the canonists considered the pope to be the "vicarius Dei." Since the pope was the successor of St. Peter and the vicar of Christ on earth, he possessed the fullness of power in their eyes. The canonists chose the juristic conception of pope Nicholas II, i.e., since Christ had bestowed the "Power of the Keys" on St. Peter, the pope, as his successor, also possessed fullness of power over the laws of both heaven and earth.

[31]Goldast, op. cit., pp. 772-870. The abbreviation "Dial. III I" will be employed for this section of the Dialogus in the notes.

[32]Both Lagarde and Kölmel, two previous interpreters of Ockham's position on natural law, give much attention to this tract. However, Lagarde gives this tract a much more central place in his interepretation than does Kölmel; cf. Georges de Lagarde, La naissance de l'esprit laïque au déclin du moyen âge, VI: La Morale et le Droit (Paris, 1946), pp. 143-156, and Wilhelm Kölmel "Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 50-64.

[33]Baudry, op. cit., p. 215.

[34]Dial. III I I, chap. 12, pp. 783-784.

[35]The regulariter-causaliter distinction was normally used to express the kind of legal jurisdiction one possessed over some matter. He who possessed jurisdiction regulariter exercised such jurisdiction most of the time. This type of jurisdiction would, for instance, normally be consequent on the possession of some office, ex., the

emperor regulariter possessed jurisdiction over the temporal affairs within the empire. He who possessed jurisdiction causaliter only exercised such jurisdiction in particular cases and usually for a specified period of time, ex., the pope could exercise jurisdiction causaliter over the temporal affairs in the empire if and for as long as, for instance, the emperor failed to correct some temporal evil that was a serious and immediate threat to the common good of his subjects. For a discussion of the use of the regulariter-causaliter distinction in Ockham's political philosophy, see Charles C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," Journal of the History of Ideas, 10 (1949), 199-218.

[36]The simpliciter-in casu distinction used here merely reemphasizes that the one who possesses jurisdiction simpliciter exercises such jurisdiction most of the time and ordinarily, whereas one who acquires jurisdiction in casu exercises such jurisdiction only in specified instances and extraordinarily.

[37]Dial. III I I, chap. 16, pp. 785-786.

[38]Ibid., p. 786.

[39]See supra, Pt. II, chap. 9, p. 127.

[40]Dial. III I II, chap. 6, p. 794.

[41]Ibid., chap. 17, p. 802.

[42]Ibid., p. 803. For a further explanation of Ockham's position on this issue, see Kölmel, "Das Naturrecht," op. cit., 51-52 and 51, n. 52 and n. 53. For a criticism of Lagarde's claim [op. cit., VI, p. 190] that Ockham's assertions here provide a proof that he created a "justice légale" independent and totally distinct from "justice naturelle," also see Kölmel, ibid., 51, n. 54.

[43]Ibid., chap. 20, p. 808. The distinction used here by Ockham between lex naturalis and lex Dei naturalis has already been anticipated by Ockham's division of recta ratio into pure natural right reason and right reason derived from those things divinely revealed in his comments on ius poli's being called "aequitas naturalis" in the O.N.D.; see supra Pt. II, chap. 7, p. 91.

[44]See supra, Pt. II, chap. 9, p. 131.

[45]Dial. III I II, chap. 24, p. 812.

CHAPTER TEN

DIALOGUS III II

The one tract in Ockham's polemical work that has received the most attention in the last thirty years as regards his position on natural law is the second tract of the third book of the Dialogus, the De potestate et juribus romanii imperii.[1] This is not surprising when one takes into consideration frequency of citations concerning natural law. Even in the context of the massive proportions of Ockham's polemical works, we have estimated that a full one fourth of his total comments on natural law occur in this tract which covers only some 86 folio pages in Goldast.[2]

Certainly, one should not assume that this unequalled concentration of comments on natural law in this one tract in itself has been the only reason that has attracted interpreters to this work. Here Ockham also offers the reader a discussion of a tripartite division in the possible senses of ius naturale which has proven so irresistible to Lagarde[3] that he has been willing to embrace not only this division but the chapter in which it occurs as the central expression of Ockham's position on natural law, in spite of the obvious textual difficulties of

identifying Ockham's own positions in the Dialogus.

For a number of reasons that will soon be made clear, we agree with Kölmel[4] whose methodology at least indicates an implicit agreement with our position that a broader base must be drawn in order to gain an adequate understanding of Ockham's position on natural law. Although Kölmel does not attempt to give a complete analysis of Ockham's position on natural law in the context of all of Ockham's polemical works,[5] nevertheless, Kölmel seems to us to be on the right track.

Quite early in this tract, Ockham gives a twofold division in natural principles. He proposes that these principles may be characterized as either absolute, those without any condition, modification or stipulation, or as not absolute, those which involve some condition, modification, specification or exposition. Of the former principles, the absolute ones, Ockham gives the examples: "Do not worship another God" and "Do not commit adultery," whereas of the latter, the non-absolute principles, he gives the example: "If you have been put in extreme necessity, cut off one of your members in order to conserve the health of the body."[6]

From this division in natural principles Ockham derives a twofold division in ius naturale: an absolute ius naturale and a ius naturale that admits of some modification or specification. He claims that it is spoken of as contrary to ius naturale dictum primo modo (natural law spoken of in

the first sense), that is, to ius naturale absolutum, that there be one ruler who commands all men. He feels that in no case is any ruler able to rule over all men under ius naturale absolutum. He states that it is also possible for it to be contrary to ius naturale dictum secundo modo (natural law spoken of in the second sense), that is, to ius naturale that admits of some modification or specification, that one ruler presides over all men, since ratio naturalis (natural reason) dictates that there ought not be one ruler who is master over all men when this kind of dominion is detrimental and injurious to the state or the common good. For, he claims, this kind of dominion is just regulariter but in casu is able to be iniquitous and contrary to ius naturale dictum secundo modo.[7]

Further, Ockham notes the opinion that one leader over all men is contrary to the ius gentium (law of nations), which, he says, is ius naturale; and thus such a situation is never expedient or licit. Ockham maintains that this opinion can be refuted. He argues that the ius naturale involved in ius gentium is a ius naturale that is conditional or admits of some modification or some other specification or determination and not ius naturale absolutum. He claims that under ius gentium in casu (extraordinarily) it is possible for one to dominate over all men or for wars to occur or for captives to be taken or for altercations between various elements to occur and for these occurrences to be just; but

this cannot be the case under ius naturale absolutum, which admits of no such variation.[8]

What Ockham seems to be saying here is that there is one set of principles of the ius naturale that admit of no exceptions, the principles of the ius naturale absolutum. There is also another set of principles of the ius naturale that are conditional since they render certain actions unjust. Certain actions are unjust because of the effect that these actions would have in some particular circumstance, for example, when one individual's ruling over all men would be detrimental or injurious to the common good. Countenancing such dominion would violate natural reason.

Ockham also seems to envision epistemological differences in our apprehension of ius naturale. He makes a further twofold division in ius naturale as regards our knowledge. He claims that there are certain iura naturalia (natural laws) that follow from or assume principia per se nota (self-evident principles) or principia immobilia per se nota (unchangeable self-evident principles). He says that no one is able to err or be in doubt about these principles except that one may be ignorant of these, since it is possible that one never thought of them. However, he asserts, such ignorance excuses no one, since, whenever they are thought of, they are immediately understood; and ignorance of them proceeds from damnable negligence or contempt and is thus not excusable.[9]

As another part of his first division of iura naturalia, Ockham speaks of iura naturalia ex primis principiis iuris (natural laws from the first principles of law). These are supposed to be elicited clearly and without great deliberation or consideration, just as in that known with certainty certain conclusions are inferred clearly and without great deliberation from first principles by even the minimally schooled. Ignorance of these, he asserts, is of a serious nature and thus not excusable.[10]

As the second part of his division of iura naturalia, Ockham speaks of iura naturalia which are apparent only to a few experts and after great deliberation and study, derived through a number of steps from prima iura naturalia (primary natural laws), and concerning which experts have contrary opinions, some thinking the matter in question to be just and others viewing it as unjust. He feels that ignorance of these iura naturalia is excusable, especially as regards omitting to do that which is enjoined by them, which would, nonetheless, be done if one were not ignorant, unless one's ignorance is crass and studied.[11]

What is interesting to note here is not only Ockham's acceptance of the standard Scholastic idea of natural reason's immediate access to certain and unchangeable principles of ius naturale, which immediate access works much in the same way as our supposed knowledge of other immediately known first principles, but also his insistence that those

principles that are direct inferential consequences of these first principles of ius naturale are also objects of moral knowledge concerning which ignorance is no excuse. Only in the case where a great deal of rational cognition is required before one can see some particular principle as implied by the first principles of the ius naturale and where the difficulty of this task has occasioned disagreement concerning the validity of the particular derivation in question among authorities on ius naturale is it possible for one to be found blameless for his ignorance of this principle, as long as this ignorance is not the result of gross stupidity or deliberately contrived.

Incidentally, Ockham not only reemphasizes his denial that the pope has plenitudo potestatis to do all those things not contrary to divine and natural law[12] in this tract of the Dialogus, but he also quite clearly states that the emperor, through his imperial authority, is not able to do all those things which are permissable under divine and natural law, but only those things which are for the common good.[13]

Further, Ockham claims that the emperor does not have plenitudo potestatis to do anything contrary to ius divinum (divine law), ius naturale absolutum, or ius gentium (law of nations). Thus, Ockham proposes, it is permissible to resist an imperial decree which, although it is not contrary to ius divinum or ius naturale, is, nonetheless,

contrary to ius humanum (human law), not because it is contrary to ius civile (civil law) but because it is contrary to ius gentium.[14]

Earlier, Ockham had asserted that the ius gentium is the same among all nations, as is ius naturale, which no custom or group of people or ius positivum (positive law) is of sufficient power to diminish in any way and that, in general, it is in opposition and repugnant to the ius gentium that all of mankind be subject to one ruler or emperor.[15] Also, he had claimed that the ius gentium is a conditional ius naturale which involves some modification, specification or determination.[16] Thus, his placing ius gentium over positive imperial decrees is quite congruent with what has been said previously in this tract.

Further, in this tract, the master, whose views some have assumed express Ockham's own positions, is asked two questions by the disciple: why is the ius divinum able to be extended to encompass all of the ius naturale and why is the ius naturale able to be called "ius divinum." In order to answer these questions and support the previously expressed opinion that the Roman people have the right to choose the supreme pontiff through an extending of the ius divinum to take in all ius naturale, the master launches into a discussion of three senses of ius naturale. Lagarde considers the chapter in which this discussion occurs, chapter six of Book III of Tract II of Part III of the Dialogus,

to be the most significant chapter in Ockham's polemical work, as far as the latter's position on natural law is concerned.[17]

The first sense Ockham speaks of as ius naturale conforme rationi naturali (natural law conformed to natural reason). Taken in this sense, ius naturale is supposed to fail in no case. As one example of this first sense of ius naturale, Ockham gives the same example he gave for an absolute natural principle, that is, "Do not commit adultery."[18] As another example, he gives "Do not lie."

The second sense Ockham speaks of as ius naturale that is heeded by all who see sola aequitate naturali absque omni consuetudine vel constitutione humana (from natural equity alone without any human custom or constitution) what is natural, since this is not contrary to statum naturae institutae[19] (the natural state established). If all men had lived according to ratio naturalis (natural reason) or lex divina (divine law), all things would have been held in common in accordance with ius naturale in the second sense, not in the first, since in the statu naturae institutae all things had been held in common. If after the Fall all men had lived according to reason, all things ought to have been held in common, not individually, for, Ockham states, property was introduced because of sin.[20]

What Ockham seems to be saying here is that in the state of nature originally instituted under ius naturale in

the first sense all things were held in common. However, after the Fall, which resulted in the loss of man's originally established state, natural equity alone without any human custom or legal enactment dictated the necessity for the establishment of common property. Yet men's wills did not perfectly conform any longer with natural reason; and, thus, the dictates of natural equity could possibly not and were not followed concerning the holding of all things in common. Thus, from sin's driving a wedge between natural reason and the will, private property was established.

Ockham continues that if it is true that under ius naturale in the first sense all things were held in common and all men were free, then no one is able to licitly appropriate anything for himself either through the ius gentium (law of nations) or ius civile (civil law) nor is anyone able to be made a slave, since ius naturale in the first sense is immutable, invariable and indispensable.[21] Yet, Ockham maintains, it is well known that some are licitly slaves under the ius gentium. All are free under ius naturale in the first sense; and, nevertheless, there are slaves under the ius gentium. From this it is concluded that ius naturale in the second sense is not immutable; rather it is right to permit the establishment of something contra (against) in order that a contrarium (opposite) to the law may be effected.[22]

In order to resolve this apparent contradiction

between ius naturale in the first sense's immutability and the presumed licit existence of such things as individual property and slavery, which are diametrically opposed to its dictates and yet seem to be justifiable under the ius gentium, Ockham speaks of a third sense of ius naturale, a ius naturale that is gleaned from the ius gentium or from some human act done with evident reason, unless a contrarium is established with the consent of those who have an interest therein.[23] Ockham calls this third sense of ius naturale, ius naturale ex suppositione[24] (suppositional natural law).

Ockham sees this third sense of ius naturale as underwriting the possibility of such things as the restitution of borrowed money and the forceful repulsion of violence. He considers that these things could have existed neither under ius naturale in the first sense nor under ius naturale in the second sense. They would not have existed in statu naturae institutae, that is, in the originally instituted natural state of man, which would have been man under ius naturale in the first sense. They would also not have existed among those who, living according to reason, would have been content with aequitas naturalis (natural equity) alone without human custom or legislation, since among these nothing would have been deposited or lent nor would anyone interfere forcefully with another. Thus, Ockham concludes these things must be iura naturalia ex suppositione

(suppositional natural laws). He feels that one makes the supposition that things and money are appropriate under the ius gentium or under some human law gleaned from evident reason, which thing deposited or money lent ought to be restored, unless ex causa (for some reason) a contrarium is agreed on by those who have an interest therein. Similarly, he reasons, one makes the supposition that anyone inflicting violence on another that is de facto injurious is not acting in accordance with ius naturale but contrary to that ius naturale gleaned from evident reason which permits one to repel such violence through force.[25]

Clearly then, ius naturale ex suppositione is intended to cover those supposed licit cases that seem to fit under ius naturale, that is, the restitution of a deposited thing and borrowed money and the forceful repulsion of injurious violence, which, nevertheless, could not occur under ius naturale in either of the two other senses specified. Under ius naturale in the first sense such actions as lending money or forcefully repelling another threatening injury would not occur, since such actions would be totally incongruous with the perfection of the original status naturae institutae. Further, these actions would also be incongruous with those living according to natural reason, that is, with those living in the ideal state in which natural equity without any human custom or constitution would hold full sway, with those living under ius naturale in the second sense.

Finally, the master concludes that in virtue of these three senses of ius naturale it can be said that the Roman people have the power of choosing the supreme pontiff through an extension of ius divinum to include all ius naturale, inasmuch as if the ius divinum is extended to comprehend only the first sense of ius naturale spoken of, then the Roman people do not have the right of choosing the supreme pontiff from ius divinum alone.[26]

However, the student makes two objections. His first objection amounts to the claim that the tripartite distinction drawn by the master permits contraria (opposites) under ius naturale in the second sense which are an impediment to the universal efficacy of the ius naturale, thus violating Isidore of Seville's assertion that the ius naturale is common to all nations.[27] The student's second objection amounts to the charge that injustices can be derived from the grounds of both ius naturale in the second and third senses indicated, thus violating Isidore of Seville's statement that anything like ius naturale is never unjust but is held to be natural and equitable.[28]

The master replies that when Isidore of Seville maintained the ius naturale is common to all nations, he was referring to ius naturale in the second sense which is common to all nations, by which all nations are bound, unless a contrarium is enjoined for some reason, and thus from the status naturae, that is ratio naturalis (natural

reason), before any human consent is ascribed. Ius naturale in the third sense is spoken of as common to all nations ex suppositione (suppositionally), as if all nations had naturally established or enacted it. Ius spoken of in this sense is gleaned from evident reason and is, therefore, not had in the status naturae, that is ratio naturalis. It is on the basis of this supposition that this sense of ius naturale is to be understood according to the master.[29]

Second, the master replies that by the second statement noted Isidore of Seville should be understood as referring to ius naturale in the second sense as "natural" and "equitable" because it is followed, unless a contrarium is established through some human law for a valid reason. Moreover, ius naturale spoken of in the third sense is never unjust, but always natural and equitable, as is maintained in the supposition: that which is gleaned from evident reason is never unjust but is always natural and equitable because in this instance it is accepted by him or them in whose interest it is to enact a contrarium.[30]

Thus, the master's answer is that certain words in the statements made by Isidore of Seville obviously pertain more to one sense of ius naturale than to the others; and, thus, it is only in the specific sense appropriate that the pupil should interpret the words in question.

The student then questions the master about his statement that all of ius naturale can be called "ius

divinum." The master replies that all law that is from God, who is the creator of nature, is able to be called "ius divinum"; and, moreover, all ius naturale is from God; thus, all ius naturale can be called "ius divinum." Then, since all law that is explicitly contained in Holy Scripture is able to be called "ius divinum," because, the master states, ius divinum is contained in the Holy Scriptures, all ius naturale is contained either explicitly or implicitly in the Holy Scriptures. The master claims that in the Holy Scriptures there are certain regulae generales (general rules) from which alone or in concert with other rules one is able to glean that all ius naturale spoken of in either the first, second or third senses, even though not found explicitly in Holy Scripture, is ius divinum.[31]

Again, Ockham seems to be making an association here that we noted in Part I was characteristic not only of some medieval canonists[32] but also of some of Ockham's Franciscan predecessors,[33] subsuming the contents of ius naturale under ius divinum. Ockham clearly indicates that his reason for asserting that ius naturale can be called "ius divinum" is in virtue of the supposed fact that the Holy Scriptures contain certain regulae generales from which one is able to derive all the principles of natural law either directly or in concert with other rules.

To answer the student's original query, the master claims that the Roman people have the right of choosing a

bishop. He feels that from ius naturale in the third sense, that is, from the supposition that they ought to have a bishop, they have a right to choose one, unless the Roman people themselves or someone superior to them who has the requisite power establishes or ordains a contrarium. Thus, since St. Peter chose his seat at Rome, it follows, according to the master, that the Romans have the right to choose St. Peter's successor, who has authority over them in spiritual matters. Thus, the Romans have the right to choose the supreme pontiff from ius divinum's being extended to comprise all that is ius naturale.[34]

Finally, concerning the question whether the Romans have the right of choosing the pope from either ius divinum or ius humanum, the master maintains that the opinion worthy of consideration is that of those who propose that neither from ius divinum alone nor from ius humanum alone but from both at the same time the Romans have the right to choose the pope through the extending of ius humanum to embrace ius gentium, not just ius civile or ius canonicum.[35]

Thus, in answering the query of the pupil in this chapter of the Dialogus, the master presents a tripartite distinction in the senses of ius naturale. A careful analysis of this distinction demonstrates that it is not indicative of any shift away from the direction which we have seen characterizing Ockham's position on natural law thus far. The master's tripartite distinction still has ratio naturalis

(natural reason) as its central grounding, not God's will.

In the first sense noted, it is claimed that ius naturale is in complete conformity with ratio naturalis. In the second sense explained, aequitas naturalis (natural equity) is the sole source for the dictates of ius naturale. This emphasis on aequitas naturalis is quite congruent with the rationalistic movement of Ockham's position on natural law, which we have noted thus far. Finally, in the third sense described, ius naturale ex suppositione, it is reasoned assumption or supposition which undergirds ius naturale. This third sense of ius naturale is generated to account for the naturalness which is supposed to be inherent in certain social phenomena that are considered to be just under ius gentium and yet apparently incongruous with ius naturale in the first sense or inexplicable under the first two senses of ius naturale noted in Dialogus III II III, chapter six.

Indeed, throughout the entire second tract of the third part of the Dialogus, there is no evidence of any variation away from the rationality theme which we have seen in Ockham's works up to this point characterizing his position on natural law. Certainly, there is a danger, which we well recognize, in trying to designate some particular opinion that is noted by Ockham in the Dialogus as his own position. But our approach does not require us to embrace some particular chapter or distinction in one of Ockham's polemical works, especially in one of those written

in his "impersonal" style, as his own theory of natural law. As a matter of policy, our methodology strictly prohibits our making this extremely risky move because of its emphasis on trying to discover Ockham's position on natural law only in the context of an investigation of all of his polemical works rather than from one chapter in one of his quite problematic, "impersonal" polemical works.

Nevertheless, when this important chapter and this tract for that matter are considered either by themselves or put in the context of his other polemical works which we have examined thus far, in this instance, both approaches yield the same result, an emphasis on natural reason and not on the Divine will as far as a grounding for natural law is concerned.

FOOTNOTES TO CHAPTER TEN

[1]Melchior Goldast, Monarchia Sancti Romani Imperii, II (Frankfort, 1614), pp. 871-957. For the text of Dialogus III II III, chap. 23, discovered by Scholz, see Richard Scholz, Unbekannte kirchenpolitische Streitschriften aus der Zeit Ludwigs des Bayern (1327-1354), II: Texte (Rome, 1914), pp. 392-395. All references to this tract in the notes will refer to it as "Dial. III II."

[2]See supra, n. 1.

[3]See Georges de Lagarde, La naissance de l'esprit laïque au déclin du moyen âge, VI: La Morale et le Droit (Paris, 1946), pp. 140-156.

[4]See Wilhelm Kölmel, "Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 39-85.

[5]Kölmel concentrates his attention on only some of Ockham's polemical works, the Opus Nonaginta Dierum, the Dialogus, the Breviloquium and the Octo Quaestiones, both in his journal article [see supra, n. 4] and in those passages in his subsequent book, Wilhelm Ockham und seine kirchenpolitischen Schriften (Essen, 1962), where he deals with Ockham's position on natural law. Although his methodology seems to us to be superior to Lagarde's approach, nonetheless, we feel that the long-neglected exposition of Ockham's position on natural law in the context of an investigation of all of his polemical works needs to be done in order to gain a more fully adequate understanding not only of this position but also of any development which it may have undergone during his polemical period.

[6]Dial. III II I, chap. 10, p. 878.

[7]Ibid.

[8]Ibid., chap. 11, p. 879.

[9]Ibid., chap. 15, p. 884.

[10]Ibid., p. 885.

[11]Ibid.

[12]Ibid., chap. 23, p. 891.

[13]Ibid., III II II, chap. 27, p. 924.

[14]Ibid., chap. 28, p. 924.

[15]Ibid., III II I, chap. 2, p. 874.

[16]See supra, Pt. II, chap. 10, p. 147.

[17]Lagarde [op. cit., VI, p. 105] considers this chapter uniquely contains Ockham's own theory of natural law. However, Kölmel ["Das Naturrecht," op. cit., 55-56], with whom we agree, considers the tripartite division Ockham presents in this chapter of limited significance in the context of Ockham's entire polemical work. For a reference where one can find a discussion of the theory that Ockham's views are those of the master in the Dialogus, see supra, Pt. II, chap. 8, n. 7, pp. 119-120.

[18]Dial. III II III, chap. 6, p. 932. For the use of this example within the context of a consideration of absolute natural principles, see supra, Pt. II, chap. 10, p. 146.

[19]In Goldast [op. cit., Dial. III II III, chap. 6, p. 932] this reads "statum naturae institutae"; however, Lagarde [op. cit., VI, p. 150, n. 25] found a variant reading, "statutum naturae institutae," in three manuscripts in the Bibliothèque Nationale in Paris and accepted this reading rather than Goldast's. Lagarde claims that even though the second occurrence in the text in question is definitely "statu naturae institutae," Ockham meant to say "statutum naturae institutae" earlier in the passage in order to set up a kind of opposition between "statutum naturae institutae" and "statum naturae institutae." We are unable to find the confirmation for this opposition thesis in the two texts noted by Lagarde, O.N.D., chap. 92, and Breviloquium, pp. 85-88 (Baudry edition). Further, in the case of the first citation given, O.N.D., chap. 92, Kölmel has shown that Lagarde derives a mistaken interpretation of part of Ockham's position expressed in this chapter [see supra, Pt. II, chap. 7, n. 39, p. 108]; and Lagarde employs this misconception in explaining Ockham's supposed intention in using "statutum" rather than "statum" in the first instance of the phrase in the text in question; see Lagarde, ibid., VI, p. 150. We are also unable to find any similar opposition set up in Ockham's polemical works using these phrases.

[20]Dial. III II III, chap. 6, p. 932.

[21]Ibid., pp. 932-933. In addition to the three characteristics of ius naturale in the first sense noted by

Ockham, immutability, invariability and indispensability, Lagarde gives a number of other characteristics among which is "irrationnel"; cf. op. cit., VI, p. 144. It is clear from what he says that he means this adjective to characterize the notion that in the case of ius naturale in the first sense the reason must accept its own postulates as indemonstrable in a sense analogous to the supposed indemonstrable postulates of science. It seems to us erroneous to assume that because a postulate is indemonstrable that this means that it is also "irrationnel." Further, the two citations which Lagarde gives to justify his claim concerning ius naturale in the first sense's being "irrationnel" [see ibid., VI, p. 144, n. 11] fail, as Kölmel has pointed out ["Das Naturrecht," op. cit., 54, n. 67], to substantiate Lagarde's interpretation which is clearly vitiated in the context of the third part of the Dialogus. Also, at least part of Kölmel's criticism can be extended to Oakley's use of these same two citations in his attempt to show that Ockham did not link natural law with evident natural reason. In these two passages--actually both citations amount to no more than two short sentences taken out of context--Oakley claims, Ockham maintained that "certain moral precepts cannot be defended by reason"; cf. Francis Oakley, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition," Natural Law Forum, 6 (1961), 68-69 and 68, n. 19. As Kölmel notes [ibid.], such an interpretation is vitiated in the context of what the third part of the Dialogus clearly proposes; and, in any case, as Lagarde also clearly indicates in another context [ibid., VI, p. 112], Ockham is here referring to indemonstrable postulates taken as moral first principles; and, thus, Ockham is not really claiming that these postulates "cannot be defended by reason" but that as the primary principles of moral reasoning, their certainty does not have to be demonstrated by reason. The fact that reason could not accomplish such a demonstration is not the point, since their certainty is not based on any rational process of demonstration. Thus, Gewirth's doubts [see supra, Pt. II, chap. 7, p. 85] about the "irrationality" that Lagarde attributes to Ockham seem to be quite well founded.

[22]Dial. III II III, chap. 6, p. 933.

[23]Ibid.

[24]As Kölmel notes ["Das Naturrecht," op. cit., 70], Ockham borrows the term "suppositio" from his logic; but it does not function here as it did as a term in his logic. As Moody asserts [Truth and Consequences in Medieval Logic (Amsterdam, 1953), p. 20], "in medieval logic, the property of 'being interpretable for something' was called the property of supposition. It was understood as the capacity of a term

to be interpreted for one or more objects in a proposition." However, as Ockham is employing the term here, it is much closer in meaning to our use of the word "supposition" when we want to indicate that something is being assumed to be true on the basis of other considerations already held to be true.

Francis Oakley, in his translation of Dial. III II III, chap. 6, for Lerner and Mahdi's sourcebook [Ralph Lerner and Muhsin Mahdi, Medieval Political Philosphy: A Sourcebook (Ithaca, N.Y., 1972), pp. 499-505], renders "ius naturale ex suppositione" as "'conditional natural law'"; cf. ibid, p. 501. However, we feel that our rendering of it as "(suppositional natural law)" more adequately captures the intended meaning of this sense of ius naturale. And Shepard seems to agree with us, since he translates this phrase as ". . . natural law by supposition," cf. Max Shepard, "William of Occam and the Higher Law," American Political Science Review, 26 (1932), 1012. In this sourcebook, Oakley also translates Dial. III II II, chaps. 26, 27 and 28; see pp. 494-499 in the Lerner and Mahdi work.

[25]Dial. III II III, chap. 6, p. 933.

[26]Ibid.

[27]Ibid.

[28]Ibid.

[29]Ibid

[30]Ibid.

[31]Ibid., pp. 933-934.

[32]See supra, Pt. I, chap. 2, pp. 19-20.

[33]See supra, Pt. I, chap. 6, pp. 76-77.

[34]Dial. III II III, chap. 6, p. 934. For a criticism of the master's drawing this conclusion from the preceding tripartite distinction, see Lagarde, op. cit., V: Guillaume d'Ockham, Critique des Structures Ecclésiales (Paris, 1963), pp. 286-287.

[35]Ibid., p. 935.

CHAPTER ELEVEN

THE BREVILOQUIUM, OCTO QUAESTIONES, CONSULTATIO AND DE IMPERATORUM ET PONTIFICUM POTESTATE

Certainly, Scholz's finding of Ockham's Breviloquium de principatu tyrannico in 1926[1] was an important discovery, since this work can aid us in our attempt to uncover Ockham's position on natural law.

Although the Breviloquium is another of Ockham's works of which we possess only a portion,[2] nonetheless, it is a work in which he abandons his "impersonal" style and tells us that he is going to directly render his own conclusions on the issues in question.[3] Since, in all probability, this work was composed sometime during the course of the year 1341[4] and is thus in the cycle of Ockham's final polemical works, it may be of interest in ascertaining his later, personal views on natural law.

Although the first two books of the Breviloquium deal with disclosing Ockham's opinions that the one most competent to judge the question of the pope's plenitudo potestatis would be the theologian consulting Holy Scripture and that this investigation discloses that the pope does not possess plenitudo potestatis in either spiritual or temporal

matters, the greater part of the Breviloquium, Books 3-6, deals with the question of the origin of imperial and civil power. In these books Ockham tries to prove that such an attribution of plenitudo potestatis to the pope implies errors about both the civil and spiritual orders and involves the erroneous assumption that the pope possesses more power over the empire than he would have over any state. He also tries to disprove those supposedly erroneous arguments designed to show that the empire derives its source of power from the papacy. Ockham feels that these arguments are based on misguided appeals to Scripture and canon law.

Ockham again employs ius naturale in his arguments against papal plenitudo potestatis in the Breviloquium. He reaffirms the position that since the pope does not possess the power of enacting laws concerning any matter permissible under divine and natural law, he does not possess plenitudo potestatis in temporal and spiritual matters.[5] He asserts that if the pope through a precept or enactment of Christ had plenitudo potestatis over all things in spiritual and temporal matters without any exception so that he was able to legally enact anything not obviating divine or natural law, then the law of Christ would be the most horrendous form of servitude and incomparably more onerous than the Old Law.[6]

Again making reference to the example of God's commanding Abraham to kill his innocent son,[7] Ockham claims that it is an "heretical absurdity" to propose that the

pope can licitly and legally kill innocents and do all things without exception that are not contrary to divine and natural law in which God is able to effect a dispensation. Ockham states that if the pope were able to do all things without exception, then the pope would be able to licitly prescribe anyone to kill innocents, since God could licitly enjoin Abraham to kill his own innocent son.[8]

Ockham also makes an assertion about ius naturale that seems to point to the association of ius naturale with ius divinum in Holy Scripture which we noticed in the last chapter[9] was characteristic of some medieval canonists and some of Ockham's Franciscan predecessors. He proposes that if a question arises whether some particular power is contrary to natural law, one ought to principally turn to an examination of it in light of Holy Scripture.[10]

However, Ockham's most significant comments on natural law in the Breviloquium seem to occur in his consideration of the term "equitas naturalis" (natural equity). Ockham maintains that this term stands for that conforme rationi recte (conformed to right reason), which cannot possibly be false or unjust. The pope, he asserts, is not able to do anything contrary to equitas naturalis in this first sense licitly. If he does enact anything contrary to equitas naturalis in this first sense, which, Ockham says, is ius naturale, it has no legal force, but is no law at all.[11]

Ockham also distinguishes a second sense of equitas

naturalis in which the term stands for that which ought regulariter to be followed by those using reason, unless a special consideration exists on account of which it cannot be followed. As an example of such a reason, Ockham asserts that one ought not to use another's possessions when forbidden to do so. Nevertheless, one is permitted to use these possessions at a time of extreme necessity, even though forbidden to use them by their owner. Ockham continues that the pope can do things contrary to equitas naturalis in this second sense but so, for that matter, can the emperor or anyone else in extraordinary circumstances. Thus, Ockham concludes that it is not possible to maintain that the pope has plenitudo potestatis since he can do things contrary to equitas naturalis in this second sense.[12]

What Ockham seems to have done here is to distinguish a sense of equitas naturalis in which it is equivalent to ius naturale, equitas naturalis in the first sense, and another sense in which equitas naturalis is equivalent to a rational dictate of natural equity which is to be regularly followed unless acting in accordance with it would violate, for instance, one's supposed ius utendi naturale, based on ius naturale, to use those things necessary to preserve one's own life in an extreme emergency, even though one may have been forbidden to do so by the owner of the lifesaving entities.

Ockham again emphasizes a point that is analogous to one that he has made before.[13] He claims that just as

infidels are enjoined by divine precept and ius naturale to honor their fathers and mothers and to work to provide for those things that are necessary for their immediate families, so they are required in casu (extraordinarily) to make any necessary appropriations and set over themselves any necessary powers in secular affairs. He feels that these things pertain to an affirmative precept that always obliges, but not at all times. Infidels, just as the faithful, are obliged to these things, not at all times, but only at a time of extreme necessity.[14]

What Ockham is referring to here is the analogous obligation under natural law that one has to do all that is necessary to maintain one's own life when his life is put in peril in an extreme emergency.

Ockham claims that temporal jurisdiction can be taken as the power of ruling or coercing others as if they were subjects and that such power can be introduced either through divine and natural law or through human law. As examples of a power derived from divine and natural law, he cites the power of a man over his wife or the power of a father over his progeny.[15] As may be remembered, he employed this example before in the Dialogus.[16] Ockham proposes that judicial power in a city, kingdom or region to which others than wives and children are subject is not in every case from divine or natural law but is sometimes from human law. He continues that it is permissible that the power of instituting

justice and rectitude be given by divine and natural law to men who themselves have the power of coercing subjects. Nevertheless, he says, that anyone has such power over others is not always from divine law; whence few have had such power from divine ordination alone.[17]

Thus, Ockham seems to be claiming that judicial power can be grounded in divine and natural law or in human law. Except for those few instances in which one obtains judicial power through divine law, it is far more common that one possesses judicial power through human law, because one exercises temporal jurisdiction. Only occasionally is one given judicial power through direct divine precept or ordination.

Although, in fact, he tends to constantly associate the divine and natural laws in his polemical works, nevertheless, Ockham still tries to mirror accepted distinctions. He quite clearly states in the Breviloquium that one should call all that is not ius divinum or ius naturale "ius civile," which, he says, covers all ius humanum et civile.[18]

Thus, it is fortunate that Ockham clearly presents his own positions on the issues taken up in the Breviloquium, since this affords us an opportunity to compare these assertions with those expressed in his former, "impersonal" polemical works. Further, his expressing his views clearly helps us, at least partially, to distinguish his own positions in his next polemical work, the Octo quaestiones de

potestate papae.[19] In this work Ockham reverts back to his "impersonal" style of presentation.

We feel that Haller's view[20] that Ockham's own positions are to be found in the responsiones at the end of each of the quaestiones in the Octo quaestiones has not been fully corroborated, as Morrall maintained,[21] through Scholz's discovery of the Breviloquium[22] and certain other treatises in which the "impersonal" method was not used.[23] However, Scholz's "discoveries" did much to provide a new impetus for trying to solve the problem of which opinions in the Octo quaestiones were Ockham's own views. Riezler had declared that this problem was incapable of solution[24]; and Meyer characterized Haller's solution for this problem as too optimistic.[25]

Nevertheless, as Lagarde notes,[26] neither Haller's idea nor Boehner's thesis[27] is entirely satisfactory, in all cases, as an inerrant guide to Ockham's actual position.[28] Boehner's thesis is that the opinion which was disproportionately more developed and proved in comparison with the other opinions on some particular question was to be accepted as Ockham's own view.

As its title indicates, this work, which seems to have been composed sometime between early in 1340 and 1342 at the latest,[29] deals with eight separate questions. Among these are such standard issues as whether anyone could have supreme power in both spiritual and temporal matters; whether

supreme secular authority is derived immediately from God; whether the pope and the Church can entrust temporal jurisdiction to the emperor or other secular princes when they themselves do not have the exercise of such jurisdiction; and whether the election of anyone to be emperor in itself confers full jurisdiction because one's power is then immediately from God.

However, there are also a number of more historically circumscribed issues discussed in the Octo quaestiones, for instance, whether a succeeding hereditary monarch receives any power over temporal affairs because he is anointed, consecrated or crowned by an ecclesiastic or merely that grace which follows as a spiritual benefit from such an ecclesiastical act; whether a succeeding hereditary monarch might be made subject to another through his own coronation; whether because a monarch is crowned by another archbishop than the one designated by ancient custom, he loses his title and sovereign power[30]; and whether canonical election by the German princes, since in itself it entails one's legitimate succession as succeeding hereditary monarch, also results in one's election as emperor.

Ockham again makes one of his standard criticisms of papal plenitudo potestatis in the Octo quaestiones. He asserts that to say that the pope has such power in both temporal and spiritual matters universally and without exception to do anything that is not contrary to ius divinum,

which here Ockham specifically identifies as that which is enjoined as necessary for salvation, or that is not contrary to ius naturale indispensabile et immutabile (indispensable and immutable natural law) is repugnant to Holy Scripture, human law, canon law, civil law and evident reason.[31]

In dealing with the question of the bishops' possible failure to pass judgment on an heretical pope resulting in the primary responsibility for such condemnation falling on the emperor, Ockham claims that even though canon laws, which he typifies as inferior to divine and natural law, may enjoin that the pope is unable to be summoned personally before secular authorities by a cleric or bishop in this event, nevertheless, these canons must be interpreted in the light of epikeia. Ockham defines epikeia as "a certain virtue and aequitas (equity) by which it is discerned in what cases laws should be strictly followed and in which cases not." Further, Ockham asserts that it seems equally in accordance with aequitas naturalis (natural equity), supported by reason and Sacred Scripture, that it by no means ought to be understood that, concerning an heretical pope, he ever continued to weaken ecclesiastical power through clerical impotence, malice or damnable negligence.[32]

We here see Ockham making an appeal to one of the central considerations in his general political philosophy, an Aristotelian notion of epieikeia.[33] Ockham's definition of epikeia evidences certain similarities to Aristotle's

discussion in the Nicomachean Ethics[34] concerning epieikeia's being a rectification of law where the law is defective because of its generality. Further, Ockham also reemphasizes here what is for him a standard given, that is, the superior legal force that divine and natural law have over Church canon laws. Because Ockham puts canon laws under ius humanum, he feels that they can be overturned if they violate divine or natural law.

Finally, Ockham makes an interesting comment on temporal sovereignty. He asserts that regulariter the king is superior over his whole realm but that, nevertheless, in casu he is inferior to the realm because the latter is able to depose its own king and detail him in custody. It has this prerogative from ius naturale in the same sense in which anyone is permitted by ius naturale to repel force with force.[35]

As might be remembered, the forceful repulsion of violence was one of the actions justified under ius naturale ex suppositione, the third sense of ius naturale distinguished by Ockham in the sixth chapter of Dialogus III II III.[36] It might thus be possible to conclude that a people's ability in casu to depose their sovereign would be another example of ius naturale ex suppositione. This power does not seem to fit easily under the first two senses of ius naturale distinguished in Dialogus III II III, chapter 6. It is unlikely that an occasioning circumstance would arise under

either ius naturale in the first sense since there would be no differentiation into sovereign and subjects in the original natural state of man, presumably instituted by God, or under ius naturale in the second sense since in an ideal community in which each person thoroughly conformed his actions to natural reason, it is unlikely that the necessity for deposing a sovereign would arise.

This should not, of course, be taken as an espousal on our part of the necessity of accepting Ockham's comments on ius naturale at Dialogus III II III, chapter 6, as certainly his own views. Conversely, however, we have not, as yet, discovered any inconsistency between the comments he makes there and the basically rationalistic position on natural law we have seen developing since his initial comments on this subject in the Opus Nonaginta Dierum that we would have to conclude that the tripartite distinction presented there is inconsistent with the rationalistic position on natural law apparent in the context of our investigation of his other polemical works, examined up to this point.

Further, there seems to be no reason to suspect that Ockham veered away from his rationalistic position on natural law in his final polemical works. His next tract, the Consultatio de causa matrimoniali,[37] certainly would afford no justification for any such assumption.

The Consultatio, which seems to have been completed at least before February 10, 1342,[38] was written by Ockham

to prove that the emperor can remove the canonical obstacles to the marriage of his son, Louis, margrave of Brandenburg, to Margaret, countess of Tirol and duchess of Carinthia, even though Louis and Margaret were related by affinity in the third degree,[39] a canonical impediment to the marriage.

As Sikes noted,[40] Ockham's arguments in this work were based on two assumptions: first, that the original marriage between Margaret and John Henry,[41] since it was a matrimonium non consummatum (a non-consummated marriage),[42] was never a true marriage; and second, that the canon laws concerning degrees of affinity were not founded on divine law.

As Bayley noted,[43] Ockham argues his case here by using all three of the basic devices of his political philosophy. First, he appeals to the doctrine of epieikeia, which, as we noted above,[44] he also employed in the Octo quaestiones, to try to prove that both secular and ecclesiastical laws ought to be interpreted in light of aequitas (equity), not only that those subject to these laws might not suffer injury but also that their welfare might be insured. Second, Ockham argues that if one were to insist on a literal observance of canon law in this instance, this strict adherence to the letter of the law would be harmful to the commonweal. And, finally, Ockham argues that because this is a case in which there is an urgent necessity and evident utility involved, the emperor can exercise jurisdiction causaliter in view of the extraordinary circumstances of this case.

Even though this short work does afford a fine example of Ockham's use of the standard devices of his political philosophy, nevertheless, it does not contain anything of additional interest concerning natural law. Historically, however, it does stand as Ockham's final polemical work in the pontificate of Benedict XII.[45]

Eleven days after the death of Benedict XII, the cardinals elected the luxurious Benedictine archbishop of Rouen, Pierre Roger, to be pope; and he took the name Clement VI.

During Benedict XII's pontificate Lewis of Bavaria had strengthened his position through political alliances; and, due to a sense of independence fostered by the German movement toward national resistance to papal claims, he was not greatly concerned with effecting a reconciliation with the Holy See while Benedict XII was pope.[46]

As a matter of fact, the early negotiations between the new pope and Lewis were characterized by a similar disinclination on the latter's part to work to reach a settlement with the Holy See. Eventually, Clement VI's patience ran out when his renewal of the papacy's order that Lewis desist from administering the kingdom of Germany and the empire was ignored by Lewis beyond the three month period Clement VI had given him to comply with this injunction. On July 19, 1342, and again on August 4, 1342, Clement VI renewed John XXII's excommunication of Lewis.[47]

Even though Lewis did renew more serious negotiations

with Clement VI by the autumn of 1343, chiefly because of rumors that the pope intended to foster the election of an anti-king to oppose Lewis in Germany,[48] nevertheless, Lewis was unable to forestall the action of the German princes who, finally becoming weary of the continuing struggle between the papacy and the empire,[49] on July 11, 1346, elected Charles of Moravia, a Luxemburger, to be their new king and emperor, Charles IV.

By this time also Ockham found himself almost alone as a representative of the Michaelist cause. Both Michael of Cesena and Bonagratia of Bergamo had died; and Francis of Ascoli and Henry of Talheim had submitted to the Holy See and recanted their Michaelist heresies.[50]

In spite of the growing isolation Ockham composed another polemical work, the De imperatorum et pontificum potestate.[51] In this essentially two part work, which in all likelihood was composed some time between the summer of 1346 and the fall of 1347,[52] Ockham first inveighed against the supposed unwarranted interference of the Holy See in the temporal domain and in the administration of the empire. Second, he gave another list of the supposed errors contained in the constitutions of John XXII concerning the poverty question and in Benedict XII's bull Redemptor noster.

Ockham seems to have intended this work to be a justification which would demonstrate why he had not submitted to the papacy. Actually, this short work is a passionately

written polemic with the asperity of tone which characterizes Ockham's final writings.

In it Ockham again employs the notion of natural law to undermine the idea of a papal plenitudo potestatis. Ockham claims that no temporal lord has more legal power over his servants than he would be able to impose on anything which was not contrary to lex divina (divine law) or lex naturae (natural law). If Christ had given to St. Peter such plenitudo potestatis over all the faithful, all would have been made his slaves. Ockham feels that this obviously annuls the liberty of the law of the Gospel.[53]

Further, Ockham maintains, St. Peter had plenitudo potestatis neither in temporal nor in spiritual matters which would permit him to do all things not prohibited by lex divina or lex naturae. Ockham feels that one must realize that there were limits beyond which St. Peter was not allowed to transgress and only under which was he permitted to exercise the power given to him by Christ.[54] Obviously then, Ockham's point is that if Christ had not granted plenitudo potestatis to St. Peter to do all those things not contrary to divine and natural law, this power could not have been handed down by St. Peter to his successors, the popes.

Finally, Ockham claims that no sentence, even of a true pope, is to be feared if it is contrary to ius divinum or ius naturale, since there are no laws more noble, more worthy and more indispensable than these laws. He feels

that they are much less able to be loosed than other laws and canons and that the pope has even less power to licitly enjoin anything contrary to the ius divinum and ius naturale than have inferior prelates to contravene canon laws.[55]

As might be remembered, Ockham had previously stated in both the first part of the Dialogus and in the Contra Benedictum[56] that any sentence that contravened the natural law lacked any legal force and did not have to be feared or obeyed. His statement here is again another instance of Ockham's making a ius positivum humanum (human positive law), in this case a papal sentence, which for him would fall under this kind of law, subject to ius naturale. If the former contradicts the latter, the former has no legal force but ceases to be law for Ockham.

With the death of Lewis of Bavaria on October 11, 1347, Ockham's position became not only more solitary but somewhat precarious, as did that of Lewis' partisans. In vain they offered the imperial crown in succession to King Edward III of England, the margrave of Meissen and Thuringia, and finally to Gunther of Schwarzenberg.[57] However, no one could be found who would oppose the consolidating position of Charles IV in Germany.

This situation was viewed by Clement VI as one favorable to an initiative on his part. Thus, he granted to a number of prelates, among them the archbishop of Prague and the bishops of Bamberg and Constance,[58] the power to absolve

those, whether clerics or laymen, who confessed their supposed errors and humbly sought pardon from all of their incurred censures. The pope also drew up a formula for those who wished to submit; it contained such conditions as avowing that the emperor had no authority to depose the pope or to elect or create another pope, swearing an oath of fidelity to Charles IV, and refraining from promoting any person to be emperor who had not first been approved by the Holy See.[59]

It was in the storm of controversy over this formula of submission that Ockham composed his final polemical work, the De electione Caroli quarti,[60] some time in 1347.[61] Although this work contains no significant references to natural law, it does include Ockham's refutation of the assumptions underlying the major conditions of the pope's formula of submission. Among its main points were a restatement of Ockham's position on the replacement of an heretical or immoral pope, including a list of Clement VI's supposed profligate and immoral practices, and Ockham's exposition of the steps that he thought would be necessary before Charles IV could validly become emperor. In any case, Ockham felt that this was precluded since, by his supposed support of the "heretics in Avignon," Charles IV was a heretic himself and thus unfit to be emperor.

And yet, it would appear that the increasing strength of Charles IV's cause in Germany with the concomitant dissolution of the influence of Lewis of Bavaria's partisans

finally moved Ockham to sue for peace with the Holy See. He returned the Seal of the Order, entrusted to him with the office of vicar general of the Order by Michael of Cesena, to William Farinerius, who was then minister-general of the Friars Minor; and he sought to be reconciled with the other Franciscans and to obtain the pope's pardon. These events most probably occurred in April of 1348.[62]

However, the pope seemed in no hurry to reply. It was not until June 8, 1349,[63] that he finally authorized Farinerius to absolve Ockham and his remaining companions, provided that they would submit within a year by signing the formula of submission that accompanied his letter of authorization. This formula contained essentially the same conditions as those found in Clement VI's formula of submission of 1347, save for the omission of the oath of fidelity to the emperor, Charles IV.[64]

What has become a point of dispute, however, is whether in fact Ockham ever signed this act of submission. A few authors, among them Wadding,[65] Eubel,[66] and Morrall,[67] believe that Ockham signed the act of submission. However, a number of other authors, among them Müller,[68] Preger,[69] Scholz,[70] Hofer,[71] Abbagnano,[72] Baudry,[73] Vascoli,[74] and Schmitt,[75] do not believe that Ockham ever signed the act. Some authors, like Rinaldi,[76] refrain from attempting to make any definitive determination on this issue.

Although it seems that a majority of the authors

who have expressed an opinion on this question favor the thesis of Ockham's final non-submission to the Holy See, we are unable to either corroborate or disprove this thesis nor are we able to resolve the conflict over the actual date of Ockham's death.[77] Nevertheless, we do feel that, concerning the latter issue, the proposal that Ockham died sometime during 1349 or 1350, in all probability, of the Black Death[78] is the most probable thesis.

In summation then, there seems to us to be no textual evidence to suppose that Ockham varied from the rationalistic position on natural law in his later works that we have seen develop throughout his earlier polemical works. A thorough analysis of all of his significant references to natural law in the context of a consideration of all of his polemical works leads to the unavoidable conclusion that the thesis that Ockham was a legal voluntarist just lacks textual support.

FOOTNOTES TO CHAPTER ELEVEN

[1]Richard Scholz, Wilhelm von Ockham als politischer Denker und sein Breviloquium de principatu tyrannico (Leipzig, 1944), p. 29. We will use Scholz's edition of the Breviloquium [ibid., pp. 39-207] rather than the earlier edition of this work by Léon Baudry; see Baudry, Gulielmus de Ockham, O.F.M. Breviloquium de potestate Papae (Paris, 1937). The abbreviation "Breviloq." will be employed for this work in the notes.

[2]This work ends abruptly in the middle of a sentence in chapter 5 of Book 6; see Scholz, ibid., p. 207. Baudry [ibid., p. v] hypothesizes that the copyist merely lacked the time to finish fully accomplishing his task of transcribing the original model he was employing, now lost.

[3]Breviloq. Prologus, p. 40.

[4]Baudry, Guillaume d'Occam, I, p. 218. Baudry's earlier statement [Breviloquium, op. cit., p. vii] that this work was written sometime during the course of the years 1339-1340 can be rejected. It is based on the erroneous assumption that Benedict XII died on April 25, 1341. He actually died on April 25, 1342. Baudry seems to have corrected this mistake. For, some eleven years later, he made the estimation concerning the time of composition with which we agree.

[5]Breviloq. II, chap. 6, p. 64.

[6]Ibid., chap. 3, p. 57.

[7]See supra, Pt. II, chap. 9, p. 131, for the use of this argument in the An princeps, and Pt. II, chap. 9, p. 137, for the use of this argument in Dialogus III I.

[8]Breviloq. II, chap. 14, p. 82.

[9]See supra, Pt. II, chap. 10, p. 158.

[10]Breviloq. I, chap. 10, p. 51.

[11]Ibid., II, chap. 24, p. 106.

[12]Ibid. As Kölmel notes ["Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 76, n. 148], Lagarde is in error when he supposes [La naissance de l'esprit laïque au déclin du moyen âge, VI: La Morale et le Droit (Paris, 1946), p. 145, n. 16] that equitas naturalis in the first sense relates exclusively to ius naturale in the first sense specified by Ockham in Dial. III II III, chap. 6; see supra, Pt. II, chap. 10, p. 152. For an anticipation of Ockham's argument concerning one's supposed right to use another's possessions in a time of extreme necessity, even though one has been forbidden to do so by their owner, see supra, Pt. I, chap. 6, p. 77. the even stronger expression of this idea in the work of Michael of Cesena.

[13]See supra, Pt. II, chap. 7, p. 89-90.

[14]Breviloq. III, chap. 8, p. 128.

[15]Ibid., chap. 11, p. 131.

[16]See supra, Pt. II, chap. 9, pp. 135-136.

[17]Breviloq. III, chap. 11, pp. 131-132.

[18]Ibid., chap. 15, p. 138.

[19]Sikes, Opera Politica, I, pp. 13-221. In the notes, the abbreviation "Octo Quaest." will be used; and all references will be to this critical edition by Sikes.

[20]J. Haller, Papsttum und Kirchenreform (Berlin, 1903), p. 77, n. 2.

[21]J. B. Morrall, "Some Notes on a Recent Interpretation of William of Ockham's Political Philosophy," Franciscan Studies, 9 (1949), 351.

[22]R. Scholz, "Zwei neue Handschriften des Defensor Pacis von Marsilius von Padua und ein unbekannter kirchenpolitischer Traktat Wilhelms von Occam," Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde, 47 (1928), 559-566.

[23]We presume that Morrall is here referring, at least, to the Contra Iohannem, Contra Benedictum, and the De imperatorum et pontificum potestate; cf. R. Scholz, Unbekannte kirchenpolitische Streitschriften aus der Zeit Ludwig des Bayern (1327-1354), I: Analyzen (Rome, 1911), pp. 149-161 & 176-189. However, these works were not first discovered by Scholz, see Andrew G. Little, The Grey Friars in Oxford (Oxford, 1892), pp. 232-233.

[24]S. Riezler, Die literarischen Widersacher der Päpste zur Zeit Ludwigs des Baiers (Leipzig, 1874), p. 250.

[25]H. Meyer, Lupold von Bebenberg (Freiburg im Breisgau, 1909), p. 136.

[26]Lagarde, op. cit., IV: Guillaume d'Ockham, Défense de l'Empire (Paris, 1962), p. 66.

[27]P. T. Boehner, "Ockham's Political Ideas," Collected Articles on Ockham (St. Bonaventure, N.Y., 1958), p. 447.

[28]For Lagarde's counter-analysis of those particular parts of the eight questions that should be accepted or rejected as Ockham's own positions, see Lagarde, op. cit., IV, p. 66, n. 36. In great measure, Kölmel's views on this matter mirror Lagarde's; see Wilhelm Kölmel, Wilhelm Ockham und seine kirchenpolitischen Schriften (Essen, 1962), pp. 125-148.

[29]Baudry, Guillaume d'Occam, I, pp. 220-221. More recently, Offler has argued that this work was composed between the summer of 1340 and the late summer of 1341; cf. H. S. Offler, "The Origin of Ockham's 'Octo Quaestiones,'" English Historical Review, 82 (1967), 323.

[30]This question may have been occasioned by the historical circumstances of Lewis of Bavaria's imperial coronation. Because of a division that existed among the German princes, both Lewis of Bavaria and Frederick of Austria were elected in 1314; see supra, Pt. I, chap. 6, n. 15, pp. 81-82. Lewis was crowned in the correct place, Aachen, the location dictated by custom, but by the wrong archbishop, the archbishop of Mainz. Frederick was crowned by the archbishop designated by custom, the archbishop of Cologne, but in the wrong place, Bonn. A legal question arose concerning the validity of Lewis' coronation, because he was crowned by the wrong archbishop. For Offler's counter-analysis that this question arose in the historical context of the coronation of Charles IV, see Offler, op. cit., 329-330.

[31]Octo Quaest. I, chap. 6, p. 28.

[32]Ibid., chap. 17, pp. 61-62. Epikeia or epieikeia is a standard canonical principle of interpretation which exempts one, in a given instance, from a particular canon law when, for example, the strict application of the canon would create a great hardship or it can be prudently conjectured that the enactor of the canon would not want the law to be strictly applied in the particular case at hand; cf. T. Lincoln Bouscaren and Adam C. Ellis, Canon Law: A Text and

Commentary (Milwaukee, 1948), pp. 33-34. For a short presentation of the historical genesis of the notion of canonical equity and how it differs from the various theories of natural equity which exerted an influence on its genesis, see Charles Lefebvre, "Natural Equity and Canonical Equity," Natural Law Forum, 8 (1963), 122-136. Ockham seems to show an appreciation for the distinction between natural and canonical equity in this passage.

[33]Charles C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," Journal of the History of Ideas, 10 (1949), 200.

[34]Aristotle, Nicomachean Ethics, The Loeb Classical Library, n. 73 (Cambridge, Mass., 1962), V, 10, 1-8, pp. 312-317.

[35]Octo Quaest. II, chap. 8, p. 86.

[36]See supra, Pt. II, chap. 10, pp. 154-155.

[37]J. G. Sikes, op. cit., I, pp. 278-286. The abbreviation "Consult. de causa matrim." will be employed in the notes for any references to this work that may occur. Any references to this work will be referring the reader to the critical edition by Sikes. This work is also sometimes called the "Tractatus de jurisdictione imperatoris in causis matrimonialis."

[38]Baudry, Guillaume d'Occam, I, p. 224. Baudry accepts this date, that of the marriage of Lewis of Bavaria's son, Louis, margrave of Brandenberg, to Margaret, countess of Tirol and duchess of Carinthia, as the latest possible time for the appearance of this work because the Consultatio refers to the marriage as an as yet unaccomplished fact.

[39]Margaret's grandmother, Elizabeth, wife of Meinhard II of Tirol, had been a sister of Louis the Harsh of Bavaria who was Louis' grandfather; cf. Sikes, op. cit., I, p. 275.

[40]Ibid.

[41]John Henry was the second son of John, King of Bohemia. He and Margaret had had a childless marriage, and the nobles of Tirol grew restless under John Henry's rule. The emperor saw this situation as an opportunity to lessen the influence of the Luxemburgers--John Henry was a Luxemburger--since they were one of his significant dynastic rivals in Germany. Thus, the emperor cooperated in a plan to separate John Henry and Margaret and marry Margaret to Louis,

Lewis' eldest son. The emperor encouraged the nobles' expulsion of John Henry from Tirol and finally saw his son married to Margaret. For a much fuller account of these historical circumstances, see Kenneth John Thomson, "A Comparison of the Consultations of Marsilius of Padua and William of Ockham relating to the Tyrolese Marriage of 1341-1342," A.F.H., 63 (1970), 5-10. Although he does not directly deal with Ockham's position on natural law and, on the whole, limits his consideration to the Consultatio, Thomson gives an interesting rendering of Ockham's position on the relationship of divine law to canon law in this limited context; see ibid., 15-20 & 25-43. His emphasis on the essentially non-positivistic nature of Ockham's approach to law, in part, corroborates our own findings concerning Ockham's position on natural law; see ibid., 29.

[42]As Sikes notes [op. cit., p. 275, n. 1], since, in 1349, John Henry was able to obtain a dissolution of his marriage to Margaret from the Holy See on the canonical grounds of impotentia coeundi relativa (impotence preventing intercourse with a certain person but not necessarily with any other person, which would be impotentia absoluta), it is possible that Ockham's claim that this was a matrimonium non consummatum was correct.

[43]Bayley, op. cit., 204.

[44]See supra, Pt. II, chap. 11, pp. 174-175.

[45]Baudry, Guillaume d'Occam, I, p. 226.

[46]H. S. Offler, "A political 'collatio' of Pope Clement VI, O.S.B.," Revue Bénédictine, 65 (1955), 127.

[47]Baudry, Guillaume d'Occam, I, p. 227.

[48]Offler, "collatio," op. cit., 128.

[49]Boehner, "The Life of Ockham," The Tractatus de Successivis attributed to William Ockham (St. Bonaventure, N.Y., 1944), p. 14.

[50]Baudry, Guillaume d'Occam, I, p. 230.

[51]The first twenty-six chapters and the initial part of Chapter 27 of this tract can be found in either R. Scholz, Unbekannte, op. cit., II: Texte (Rome, 1914), pp. 453-480, or C. Kenneth Brampton, The De Imperatorum et Pontificum Potestate of William of Ockham (Oxford, 1927). The remaining part of Chapter 27 can be found in W. Mulder, "Gulielmi Ockham Tractatus de Imperatorum et Pontificum Potestate," A.F.H.,

17 (1924), 72-97. All references in the notes will be to Brampton's edition of this work; and the abbreviation "De Imper. et Pontif. Potest." will be used in these citations.

[52]Baudry, Guillaume d'Occam, I, p. 232.

[53]De Imper. et Pontif. Potes., chap. 1, pp. 5-6.

[54]Ibid., chap. 2, p. 6.

[55]Ibid., chap. 14, p. 28.

[56]See supra, Pt. II, chap. 8, p. 114, for the statement in Dialogus I, and Pt. II, chap. 9, p. 127, for the assertion in the Contra Benedictum.

[57]Baudry, Guillaume d'Occam, I, p. 236.

[58]Ibid.

[59]For an English translation of the formula of submission supposedly drawn up for Ockham and his remaining companions, see Boehner, "The Life of Ockham," op. cit., p. 15.

[60]Unfortunately, we have only that part of this work reproduced for the purpose of criticism by Conrad of Megenberg in his Tractatus contra Wilhelmum Ockham. For what exists of the text of the De electione Caroli quarti, see R. Scholz, Unbekannte, op. cit., II, pp. 347-363. For Brampton's arguments for his claim that this is not a genuine work of Ockham, see C. K. Brampton, "Ockham and his alleged authorship of the tract 'Quia saepe iuris,'" A.F.H., 53 (1960), 30-38.

[61]Baudry, Guillaume d'Occam, I, p. 239.

[62]Ibid., p. 241.

[63]Ibid.

[64]Ibid. Also, see supra, n. 59. For the original text, see Bull. Franc. VI, n. 508a, p. 230.

[65]L. Wadding, ed., Annales Minorum, VIII, 2nd ed. (Rome, 1733), a. 1347, n. 20, p. 11.

[66]Bull. Franc. VI, p. 231, n. 1.

[67]J. B. Morrall, op. cit., 367-368.

[68]K. Müller, Der Kampf Ludwigs des Bayern mit der römischen Kurie, II (Tübingen, 1880), pp. 252-253.

[69]W. Preger, "Der kirchenpolitische Kampf unter Ludwig den Bayern und sein Einfluss auf die öffentliche Meinung in Deutschland, "Abhandlungen der historischen Klasse der Königlichen Bayerischen Akademie der Wissenschaften, XIV (Munich, 1879), p. 37.

[70]R. Scholz, Unbekannte, op. cit., I, p. 181, and Breviloquium, op. cit., pp. 6 & 15.

[71]J. Hofer, "Biographische Studien über Wilhelm von Ockham, O.F.M.," A.F.H., 6 (1913), 661.

[72]N. Abbagnano, Guglielmo di Ockham (Lanciano, 1931), pp. 20-22.

[73]Baudry, Guillaume d'Occam, I, pp. 241-242.

[74]C. Vascoli, Guglielmo d'Occam (Florence, 1953), p. 54.

[75]C. Schmitt, Un Pape réformateur et un défenseur de l'unité de l'Église, Benoit XII et l'Ordre des Frères Mineurs (1334-1342) (Florence, 1959), p. 249.

[76]O. Rinaldi, Annales ecclesiastici, XXV (Bar-le-Duc, 1872), a. 1349, n. 17, p. 468.

[77]See C. K. Brampton, "Traditions relating to the death of William of Ockham," A.F.H., 53 (1960), 442-449. Although we do not agree with Brampton's conclusion that Ockham did not survive the night of 9/10 April 1347, since we favor Baudry's opinion on this matter, nonetheless, this article does give an interesting analysis of what seem to be the two major theories concerning Ockham's death: (1) that he died in 1347 shortly after completing the De imperatorum et pontificum potestate; or (2) that he survived at least for another two years and wrote the De electione Caroli quarti. If Brampton's thesis were correct, then all of the controversy over whether Ockham signed Clement VI's act of submission would, of course, have been in vain since Ockham would have already been dead when the act was drawn up. Also see Helmar Junghans, Ockham im Lichte der neueren Forschung (Berlin, 1968), pp. 36-41. Junghans asserts that Ockham died on April 9, 1350, without signing the act of submission of June 8, 1349; cf. ibid., p. 41. In an article appearing in the same year, Miethke concludes that one can say with some degree of certainty only that Ockham died sometime between the end of 1346 and the end of 1349, although Miethke himself considers that it is rather probable

that he died in 1348; cf. Jürgen Miethke, "Zu Wilhelm Ockhams Tod," A.F.H., 61 (1968), 98.

[78]Baudry, Guillaume d'Occam, I, p. 244. Of continuing interest is the scholarly article by Höhn. He also concludes that Ockham died of the Black Death, in all probability, in 1349, either reconciled or, at least, ready to be reconciled with the Church; cf. Rudolf Höhn, "Wilhelm Ockham in München," Franz. Stud., 32 (1950), 152.

CHAPTER TWELVE

COUNTER-INTERPRETATIONS CRITICIZED AND SUMMARY OF OCKHAM'S POSITION

What our examination of Ockham's position on natural law has disclosed then is that Gewirth's doubts[1] about the "voluntarism" and "irrationalism" that Lagarde attributes to Ockham's legal theory are well founded. But before we deal individually with the interpretations of Gierke, Oakley, and Lagarde of Ockham's position on natural law, it might be helpful to examine an explanation, also offered by Gewirth,[2] of the more general controversy concerning the relationship between Ockham's non-polemical and polemical works.

As Gewirth proposes,[3] there has been a scholarly debate going on for a number of years concerning the relationship between Ockham's philosophy and his politics. The chief proponents of the theory that there is a close logical relation between Ockham's positions on logic, epistemology, physics, metaphysics and theology and his politics in our day are Lagarde[4] and Baudry.[5] The counter-thesis is championed by such authors as Shepard,[6] Boehner,[7] Scholz,[8] Morrall,[9] and, we would add, Junghans.[10]

Gewirth's central insights were not only to see that the question at issue was basically logical rather than psychological or sociological but also to see that, in light of this clarification, there is not actually as much disagreement between the two sides as might initially appear. The actual question involved in the debate is whether there is some sort of intrinsic or logically inevitable connection between Ockham's philosophical and political ideas.[11]

The actual differences between the two groups, as Gewirth maintains,[12] seem to involve, first, that they are each considering different phases or aspects of Ockham's political ideas and, second, they each start from opposite ends of the actual question involved.

Gewirth identifies[13] two phases or aspects of Ockham's political ideas: first, a practical aspect involving specific recommendations on matters of policy and, second, a theoretical aspect involving the elucidation of certain basic social and political concepts and general doctrines about the nature of social and political relationships with the conceptual methodology employed or referred to in dealing with these considerations.

Although it can be easily missed by the reader, Gewirth then asserts[14] that Baudry and Lagarde concentrate their attention on Ockham's general political definitions and theoretical doctrines "to try to show" how these can be

explained in terms of his philosophical ideas, whereas Boehner and Morrall center their attention on Ockham's practical political proposals, and they "have no difficulty in showing" how these are not logically dependent on Ockham's logic or metaphysics.

Gewirth's choice of words here seems to us to point to an especially important realization when one considers Ockham's position on natural law, developed in his polemical works. As we will try to prove shortly, those authors who, like Lagarde, attempt to show that there is a necessary logical relationship between Ockham's metaphysical ideas and his position on natural law are involved in a hopeless endeavor. One can clearly demonstrate textually that there is no logical dependence of Ockham's position concerning natural law on his metaphysics.

Further, as Gewirth proposes[15] concerning the second major difference between these two groups, Lagarde and Baudry begin with Ockham's general philosophical doctrines and ask one of two questions: first, how do Ockham's political positions follow from his philosophical doctrines or, second, how are Ockham's political positions elucidated by his philosophy. Boehner and Morrall start with Ockham's practical political proposals and ask whether these imply Ockham's general philosophical doctrines.

As Gewirth correctly notes,[16] Boehner and Morrall are easily able to show that there is no necessary logical

connection between Ockham's practical political proposals and his philosophy since the former are compatible with any number of different, even opposed, philosophical positions. And yet, of course, since Ockham was a systematic thinker who would be inclined to employ his general philosophical concepts, doctrines and methodology in elucidating his political positions, Lagarde and Baudry are able to point to a connection between Ockham's philosophy and his politics, as far as the former being used to elucidate the latter is concerned.

However, as Gewirth immediately points out,[17] these two positions do not entail any logical contradiction since one who proposes that "p implies q" is not contradicting another who asserts that "q does not imply p" nor is one contradicting the other when the first says that "the terms of q, and even q itself, are contained in or explained by p" and the second proposes that "q could nonetheless be understood and asserted without p."

It would seem then that Gewirth's insights can help one to see that even though Lagarde and Baudry are able to show that Ockham's philosophical ideas can be employed to clarify the theoretical aspects of his political ideas, nevertheless, they have been unable to demonstrate that Ockham's practical political proposals are uniquely the result of his particular philosophical position or that Ockham's practical political proposals are logically

dependent on his metaphysics.

Thus, with Gewirth's valuable clarifications in mind, let us investigate the attempts of Gierke, Oakley, and Lagarde to establish a logical relationship between Ockham's philosophy and his position on natural law.

First, as Oakley himself admits,[18] Gierke offers no textual justification from Ockham's work to support his assertion that concerning the natural law Ockham viewed this law as "proceeding from pure Nominalism . . . a mere divine command that was right and binding merely because God was the law-giver."[19] As Gewirth suggests,[20] what Gierke is doing here can be seen to be merely stating an old tradition of scholarly interpretation. The fact that Gierke does not offer any textual justification for this claim may in itself be significant. Throughout the extensive footnote section of the work in question,[21] Gierke goes to great lengths to try to support his individual assertions with references to the works of the authors involved. Further, within the lengthy footnote in which he makes the claim in question,[22] he gives a number of textual references to support most of the other individual assertions he makes about natural law. Could it be then that such a thorough scholar as Gierke, realizing that such a claim could not be textually justified, is merely presenting a statement of this old tradition of scholarly interpretation?

In any case, it falls on Oakley to try to justify this tradition; and, unfortunately, the sole textual evidence he offers for this interpretation from Ockham's polemical, political works is, as we have shown above,[23] easily controverted. Further, Oakley goes on to attempt to prove that since one can glean a voluntaristic interpretation of Ockham's moral theory from his non-polemical, philosophical works, this theory, when associated with Ockham's distinction between the absolute and ordained power of the Divine Will,[24] a conception employed in both his polemical and non-polemical works, somehow leads to the conclusion that Ockham is a "legal voluntarist."[25]

Certainly, as Gewirth has noted,[26] it would be reasonable to expect that a systematic thinker, like Ockham, would employ certain aspects of his philosophical theory, for instance, his distinction between the absolute and ordained power of God's Will, in explicating his political ideas; and, moreover, in some specific instances he does this. However, what is most distressing about Oakley's proposal is that there is no textual evidence to support the claim that, as far as his position on natural law was concerned, Ockham employed this philosophical distinction between God's potentia absoluta (absolute power of Divine Will) and potentia ordinata (ordained power of Divine Will) to explicate his position on natural law. Further, there is no textual evidence to support the stronger claims that

in fact Ockham's theory of natural law was voluntaristic, or that it was the result of his voluntaristic moral theory, combined with certain aspects of his philosophical doctrine, like the distinction in question.

Ideally, of course, it would possibly have made things much more systematic if Ockham had derived his position on natural law from his philosophical nominalism; however, even Lagarde now admits that Ockham never sought to develop his natural law theory a principiis.[27] Nevertheless, Oakley takes his unsubstantiated posit that Ockham developed a theory of natural law differing essentially from that theory of natural law presented by St. Thomas Aquinas and concludes therefrom that this clearly necessitates that Ockham must have developed a different theory of law in general. But he laments that he is "unable to cite relevant texts from Ockham himself, . . ."[28] This is, of course, not surprising since it was never Ockham's intention to present a systematic theory of law in general. Thus, that texts disclosing some alternative theory of law in general to St. Thomas' theory of law do not exist is not surprising. There is no textual evidence that Ockham derived either an alternative theory of law in general or theory of natural law in particular from his nominalistic philosophy or ever intended to do so.

Finally, what is perhaps most distressing about Oakley's whole article is his initial step. For at the very

beginning of this publication, he states that throughout this work his remarks will be limited not only to Ockham's best known text on natural law--he cites Dialogus III II III, chapter 6--but to only the first sense of natural law distinguished there. Oakley typifies this first sense as Ockham's "primary and fundamental sense" of natural law. He also claims that his remarks on Ockham's theory will reflect a "somewhat simplified version of his [Ockham's] position."[29]

First, the reader is not warned concerning the difficulties in distinguishing Ockham's actual positions in the Dialogus, an "impersonal" polemical work. Thus, the reader is led to believe uncritically that this text can simply be accepted as a direct expression of Ockham's own views. Further, Oakley's restricting his whole consideration of Ockham's position on natural law to ius naturale in the first sense distinguished at Dialogus III II III, chapter 6, on the basis of the assumption that this is Ockham's "primary and fundamental sense" of natural law seems wholly gratuitous. No proof is offered for this supposition. That this is so is certainly not obvious. Finally, this initial move does not so much result in one's presenting a "simplified version" of Ockham's position on natural law as much as it amounts to presenting a distorted version of Ockham's views on this matter.

The most ambitious presentation of Ockham's position

on natural law, up to this time, is, in all probability, Lagarde's interpretation of 1946.[30] Essentially, what Lagarde attempted to demonstrate in this interpretation was that Ockham's position on natural law was a logical derivative of his supposed, proto-Kantian, voluntaristic moral theory. In this presentation central emphasis was given to trying to show that the three senses of ius naturale distinguished by Ockham at Dialogus III II III, chapter 6, actually involved various species of imperatives or commands. Thus, in this chapter of the Dialogus, which Lagarde typified as containing Ockham's own theory of natural law,[31] Ockham is supposed to be presenting a command theory of law, a voluntaristic alternative to St. Thomas Aquinas' rationalistic natural law theory.[32]

Before we investigate this thesis, it is essential for the reader to realize that, more recently, Lagarde has made a number of significant comments on his original theory; and, thus, it is necessary that we examine these amendments and embellishments as well.

First, Lagarde seems to have had a change of heart concerning the elegance of Ockham's supposed voluntaristic natural law theory. As a result of a more general change in his interpretation of Ockham's political theory, Lagarde has more recently said that, in his opinion, Ockham's theory of natural law is so singularly deficient that it is possible that in his former presentation of Ockham's theory in

1946, he may have been unduly favorable to Ockham in interpreting these deficiencies in his natural law theory as justified by a legal positivism which gave the theory a greater degree of coherence and more of a freshness in tone and prophetic quality than was actually inherent therein.[33]

Because it is not our intention to criticize Ockham's position on natural law at this point, since this task will be undertaken in Part III of this work, we will not comment on Lagarde's criticism. However, we wish to point out two things here. First, it would seem that, to a certain degree, Lagarde is not as thoroughly convinced concerning his espousing of legal positivism as an interpretation of Ockham's position on natural law as he was in 1946. Second, more recently, his attitude concerning Ockham's supposed theory of natural law has changed from viewing it as a prophetic anticipation of legal positivism to much more seeing it as a theory singularly fraught with difficulties.

However, we feel that it would be precipitous to assume that Lagarde has abandoned the interpretation that he espoused in 1946 entirely. A number of the counter-criticisms that Lagarde has offered in his more recent works to Kölmel's article,[34] which so thoroughly criticized his original thesis, indicate that Lagarde has not abandoned the central presupposition of his original interpretation. He still says that it is imperatives or commands which are

the key to understanding Ockham's theory of natural law.[35] In 1946 he specifically stated that one would not comprehend anything of Ockham's theory of natural law without first understanding its essential givens: the Kantian categorical imperative and a moral theory consisting in a priori principles of reason grounded in Ockham's metaphysics.[36] However, what Lagarde's more recent admission that Ockham's natural law theory is not derived a principiis[37] does to create an impasse between these supposed a priori principles constitutive of Ockham's moral theory and his position on natural law is, we think, worthy of some consideration. Lagarde's original theory seems to only work if one can establish this derivative relationship between Ockham's supposed, proto-Kantian moral theory and his supposed, voluntaristic theory of natural law.

Another difficulty with Lagarde's interpretation is that it embodies the following thesis: since Ockham's moral theory is voluntaristic and his metaphysics is nominalistic and since his theory of natural law is logically derived from these, it too will be voluntaristic and nominalistic. One difficulty with this thesis is that it assumes that one can construct a voluntaristic moral theory from Ockham's non-polemical works which will adequately account for all his comments on moral theory in these works. However, even Oakley admits that one finds textual evidence which seems to justify either a rationalist or voluntarist

interpretation of Ockham's moral theory. This seems to preclude not only the possibility of deriving a coherent interpretation concerning the nature of morality but a clear doctrine on natural law as well.[38]

Further, in his original presentation of his position in 1946, Lagarde translated the much used phrase by Ockham "dictamen rationis naturalis" (dictate of natural reason), occurring in the definition of ius naturale in the first sense distinguished in Dialogus III II III, chapter 6, as "l'impératif catégorique de la raison" (categorical imperative of the reason).[39] Although this then permitted Lagarde to speak about Kantian categorical imperatives when explaining his interpretation of Ockham's first sense of natural law, it by no means seems a customary or even fair rendering of the classical phrase "dictamen rationis naturalis."

Also, Lagarde emphasized the distinction between the absolute and ordained power of God's Will, which we noted above[40] was also employed by Oakley in his attempt to prove that Ockham's natural law theory was voluntaristic. Actually, Lagarde used this distinction not only in his attempt to prove that Ockham's position on natural law was voluntaristic but also to try to prove that Ockham's moral theory was voluntaristic.

Certainly, if it is true that God can sweep away everything that He has established through the potentia

ordinata (ordained power) of His Will by exercising the prerogatives of His Will's potentia absoluta (absolute power), then it would seem that natural law would be put on a rather insecure footing. Yet, even if we were to admit that Ockham ever intended this philosophical distinction to be applied to his position on natural law--a posit that wholly lacks textual foundation--nevertheless, more recently, Lagarde himself has admitted its inconsequential nature. In considering Ockham's supposed theory of God's imposing a natum on man, Lagarde concedes that although God could annihilate this natum through his potentia absoluta, nevertheless, in the framework of God's potentia ordinata, this natum imposes itself on us so that one is permitted to reason in natural science as if nature were actually given a rigorous stability. Lagarde continues that this permits one to liken to revealed law the fundamental prescriptions of a law inscribed in a nature actually given, as far as moral theory is concerned.[41]

Thus, even Lagarde himself admits the essentially inconsequential nature of the threat supposedly posed by God's potentia absoluta to the stability of the moral order and, in consequence, to the natural law as well, in the context of his presentation of Ockham's supposed theory of natural law.

Actually, Lagarde seems, more recently, quite disenchanted with the three senses of ius naturale distinguished

in Dialogus III II III, chapter 6. This chapter had figured prominently in his original theory. He criticizes Ockham for imagining that this tripartite distinction could really be employed to justify a universal empire or the right of the Romans to elect the pope. And he maintains that this distinction would not have explicated anything if it had not been dominated by "the contradictory principles for defining law" that Ockham had supposedly posed in his philosophical works.[42]

Again, it is not our purpose at this point to either try to corroborate or reject Lagarde's criticism of Ockham. But we are trying to indicate that, in spite of Lagarde's apparent continued insistence on the accuracy of his original interpretation of Ockham's position on natural law, nevertheless, in his more recent works, he offers a number of comments which seem to us to sap much of the force and novelty of the original theory that he attributed to Ockham. For instance, he now characterizes Ockham's supposed theory of natural law in Dialogus III II III, chapter 6, the central feature of Lagarde's original interpretation, as questionable.[43]

We feel that the validity of Lagarde's original interpretation of Ockham's supposed natural law theory was seriously brought into question by Kölmel's article.[44] Further, Lagarde's more recent comments on his original interpretation seem to do more to further bring this explication

into question than they do to effectively counter Kölmel's original criticisms. Thus, we feel that Lagarde's interpretation of 1946 has been very seriously discredited.

Well then, what about Ockham's position on natural law? Has it ever been adequately characterized? We think that it has.

Lagarde saw quite clearly in 1946 that Ockham's position on natural law was founded on the first distinctions in the Decretum Gratiani.[45] However, Lagarde failed to follow up this insight. Instead, he attempted to prove that Ockham's position on natural law was a logical derivative of his supposed proto-Kantian, voluntaristic moral theory.

However, Kölmel quite clearly perceived that Ockham's position on natural law was derived from the Decretum Gratiani. Kölmel also pointed to a number of specific instances of Ockham's dependence on this work, as far as the latter's position on natural law was concerned.[46]

Certainly, there are a number of striking similarities between the Decretum Gratiani and Ockham's position. First, Gratian's definition of "natural law" at the very beginning of the Decretum as "Ius naturale est, quod in lege et Evangelio continetur"[47] (natural law is what is contained in the law--the Law of Moses, primarily the Ten Commandments--and the Gospel) evidences a number of significant textual parallels to Ockham's own statements on natural law.

In the Opus Nonaginta Dierum Ockham quotes Gratian's

definition of natural law and adds that it is not all that is contained in the Law and the Gospel that comprises natural law but only those particular parts that pertain to natural law.[48] Fortunately, of course, he supplements this essentially non-informative comment on Gratian's definition of ius naturale with a number of substantive statements demonstrating his fundamental dependence on Gratian's formulation, as can be seen through investigating Ockham's remarks on natural law explicated above.[49]

Further, as Kölmel correctly points out,[50] there is a substantial dependence on Gratian as far as what Kölmel considers to be Ockham's basic stand on natural law, that is, a position that takes the natural law to be aequitas naturalis[51] (natural equity). Certainly, throughout Ockham's polemical works there is ample textual corroboration for this thesis.[52]

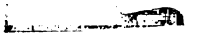
Even if one would accept Lagarde's thesis that Ockham's theory of natural law is contained in Dialogus III II III, chapter 6, essentially in the tripartite senses of natural law distinguished there, it has been clearly shown that these three senses of ius naturale pertain to natural reason.[53] Further, this tripartite distinction is also clearly anticipated in the senses of aequitas naturalis that Ockham distinguishes in chapter 92 of the Opus Nonaginta Dierum.[54] If indeed this were Ockham's theory of natural law, as Lagarde maintained, then his theory of

natural law would be a theory of natural equity.

Further, Kölmel's general characterization of Ockham's position on natural law as not greatly different from Scholastic natural law theory rather than some kind of precursor of a new departure in natural law theory[55] seems to us to be a fair assessment of Ockham's position. More recently, even Lagarde has thought enough of this assessment to point to what further steps would have to be taken for this description to be fully demonstrated, a task which Lagarde admits Kölmel already recognizes, at least in part.[56]

Finally, concerning the question whether Ockham's position on natural law underwent development during his polemical period, it would seem that, although he never actually wavered on the central points of his basic position from his earliest comments on natural law, his expression of these pivotal concepts seems to have been further refined in his subsequent works. For instance, this is evidenced by his use of the simpliciter-in casu distinction in Dialogus III I to further explicate an idea expressed in the Contra Benedictum.[57]

At this point in our analysis then, we feel that Ockham's position on natural law can and has been fairly characterized as essentially a borderline Scholastic law theory displaying a quite marked dependence on the Decretum Gratiani's position on natural law with a concomitant emphasis on interpreting ius naturale as based on natural reason



expressing itself as aequitas naturalis.

We will reserve criticism of Ockham's position on natural law for Part III of this work. In this section we will also evaluate certain more contemporary criticisms of Ockham's position which have been proffered by two authors on the Continent.

FOOTNOTES TO CHAPTER TWELVE

[1]See supra, Pt. II, chap. 7, p. 85. However, we had independently determined the inaccuracy of Lagarde's claims through our own research before we came upon Gewirth's comment.

[2]Alan Gewirth, "Philosophy and Political Thought in the Fourteenth Century," The Forward Movement of the Fourteenth Century, F. L. Utley, ed. (Columbus, 1961), pp. 130-132.

[3]Ibid., p. 130.

[4]See Volumes IV-VI of Georges de Lagarde's La naissance de l'esprit laïque au déclin du moyen âge, IV: Guillaume d'Ockham, Défense de l'Empire (Paris, 1962); V: Guillaume d'Ockham, Critique des Structures Ecclésiales (Paris, 1963); and VI: La Morale et le Droit (Paris, 1946) and his other works, "L'idée de représentation dans les oeuvres de Guillaume d'Ockham," Bulletin of the International Committee of Historical Sciences, 9 (1937), 425-451, and "Comment Ockham comprend le pouvoir séculier," Scritti di sociologica e politica in onore di Luigi Sturzo, I (Bologna, 1953), pp. 593-612.

[5]See Léon Baudry's Guillaume d'Occam, I (Paris, 1949) and his "Le philosophie et le politique dans Guillaume d'Ockham," Archives d'Histoire Doctrinale et Littéraire de Moyen Âge, 12 (1939), 209-230.

[6]See M. A. Shepard, "William of Occam and the Higher Law," American Political Science Review, 26 (1932), 1005-1023 and 27 (1933), 24-38.

[7]See Philotheus T. Boehner, "Ockham's Political Ideas," Collected Articles on Ockham (St. Bonaventure, N.Y., 1958), pp. 442-468.

[8]See Richard Scholz, Wilhelm von Ockham als politischer Denker und sein Breviloquium de principatu tyrannico (Stuttgart, 1944), pp. 18-28.

[9]See J. B. Morrall, "Some Notes on a Recent Interpretation of William of Ockham's Political Philosophy," Franciscan Studies, 9 (1949), 335-369.

[10]See Helmar Junghans, Ockham im Lichte der neueren Forschung (Berlin, 1968), pp. 274-275. Also see Junghans [ibid., pp. 262-274] for an analysis of the following additional authors' works in which positions on this issue are taken: Alois Dempf, Sacrum Imperium (Berlin, 1929); M. A. Schmidt, "Kirche und Staat bei Wilhelm von Ockham," Theologische Zeitschrift, 7 (1951), 265-284; and Wilhelm Kölmel, Wilhelm Ockham und seine kirchenpolitischen Schriften (Essen, 1962).

[11]Gewirth, op. cit., p. 130.

[12]Ibid., p. 131.

[13]Ibid.

[14]Ibid.

[15]Ibid., pp. 131-132.

[16]Ibid., p. 132.

[17]Ibid.

[18]Francis Oakley, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition," Natural Law Forum, 6 (1961), 66-67. In another article that appeared in the same year as the one just noted ["Christian Theology and the Newtonian Science: The Rise of the Concept of the Laws of Nature," Church History, 30 (1961), 433-457], Oakley gives the reader a clear and succinct statement of his interpretation of Ockham's position on natural law [ibid., 439]; but he refers the reader to the first article, noted above, if the reader wishes to have "a more complete analysis of Ockham's position"; cf. ibid., 453, n. 44.

[19]Otto von Gierke, Political Theories of the Middle Age, Frederick William Maitland, trans. (Boston, 1958), p. 173, n. 256.

[20]See supra, Pt. II, chap. 7, n. 5, p. 103.

[21]Gierke, op. cit., pp. 101-197.

[22]Ibid., pp. 172-174.

[23]See supra, Pt. II, chap. 10, n. 21, p. 164.

[24]Ockham drew a distinction between the potentia ordinata (ordained power) and the potentia absoluta (absolute

power) of God's Will. This distinction is specifically mentioned by Gewirth [op. cit., p. 131] as one of the philosophical devices that Baudry and Lagarde use to try to prove that Ockham's general political definitions and theoretical doctrines are to be explicated in terms of his logic and metaphysics. Both Lagarde and Oakley employ this essentially philosophical concept to try to prove that Ockham's position on natural law would have to be essentially voluntaristic in character. However, what is lacking is textual corroboration of this thesis involving Ockham's actual employment of this distinction in his explication of his position on natural law.

As Weisheipl notes [Friar Thomas d'Aquino (New York, 1974), pp. 339-340], this distinction between the potentia Dei absoluta and the potentia ordinata arose, in part, as a reaction to the condemnation of some 219 propositions "prejudicial to the faith" by Stephen Tempier, bishop of Paris, on March 7, 1277; cf. ibid., p. 334. In order to circumvent some of the philosophical and theological pitfalls occasioned by this condemnation, late 13th and 14th century theologians, like Ockham, readily accepted, indeed, "were obsessed" with this distinction. The "main thrust" of the condemnation of 1277 had been "to preserve the omnipotence of God," His potentia absoluta. By concentrating on this distinction, 14th century theologians, like Ockham, were able to skirt many of the articles of the condemnation of 1277.

For an English translation of the 219 propositions condemned in 1277, see Ernest L. Fortin and Peter D. O'Neill's article, "Condemnation of 219 Propositions," in Ralph Lerner and Muhsin Mahdi's Medieval Political Philosophy (Ithaca, N.Y., 1972), pp. 337-354.

[25]Oakley, "Medieval Theories," op. cit., 70.

[26]See supra, Pt. II, chap. 12, pp. 195-196.

[27]Lagarde, op. cit., V, p. 286.

[28]Oakley, "Medieval Theories," op. cit., 74.

[29]Ibid., 66.

[30]Lagarde, op. cit., VI, pp. 140-163.

[31]Ibid., p. 105.

[32]Ibid., p. 162.

[33]Lagarde, op. cit., IV, p. 233.

[34]Wilhelm Kölmel, "Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 39-85.

[35]Lagarde, op. cit., V, p. 187. It is interesting to note that Lagarde also attempted to impose a "morale du précepte" interpretation on Scotus' moral theory. As Günter Stratenwerth has pointed out very forcefully [Die Naturrechtslehre des Johannes Duns Scotus (Göttingen, 1951), p. 86, n. 362], Lagarde's attempt miscarries, since what he claims essentially puts the cart before the horse as far as Scotus' moral theory is concerned. As Stratenwerth notes [ibid.], the only plausible interpretation of Scotus is one that would mirror his avowed position that recta ratio (right reason) already forbids those acts that God has besides forbidden in the Decalogue. Lagarde's interpretation of Scotus' moral theory overlooks the fact that sins for Scotus are sins not just because the acts they involve are contrary to the Ten Commandments, i.e., mala quia prohibitum (evil because prohibited), but because these acts formally involve violations of the lex naturae; they are already mala in se (evil in themselves).

[36]Ibid., VI, p. 92, n. 85.

[37]See supra, Pt. II, chap. 12, p. 199.

[38]Oakley, "Medieval Theories," op. cit., 69-70. For a brief analysis of the 1934 article by Anita Garvens ["Die Grundlagen der Ethik Wilhelms von Ockham," Franz. Stud., 21 (1934), 234-273 and 360-408] and the 1944 article by Elzearius Bonke ["Doctrina nominalistica de fundamento ordinis moralis apud Gulielmum de Ockham et Gabrielem Biel," Collectanea Franciscana, 14 (1944), 57-83] in which positions on Ockham's moral theory were taken, see Junghans, op. cit., pp. 243-245. More recently, in an article ["Voluntarism and Rationalism in the Ethics of Ockham," Franciscan Studies, 31 (1971), 72-87] which seems to have originally been part of his doctoral dissertation [cf. ibid., 72], David W. Clark has clearly shown that Ockham's ethics is amenable to both a "voluntaristic" and a "rationalistic" interpretation. However, as Clark maintains, trying to force Ockham's ethical theory into one or the other of these categories does violence to his text. Thus, he suggests abandoning these terms since, he feels, they present an artificial dilemma for the theorist to solve. Instead, he proposes that these terms be replaced by "dogmatic" and "formal," the former to cover the positive aspects of Ockham's moral theory and the latter to provide for its non-positive aspects. This seems to us a reasonable suggestion. Of course, his proposals do not affect our conclusions concerning Ockham's position on natural law since these

conclusions are not only based solely on Ockham's text but are also not dependent on Ockham's proposing some particular moral theory, "voluntaristic," "rationalistic," or whatever. It is our position that Ockham's position on natural law is neither logically derived from nor dependent on his moral theory, as far as its genesis is concerned.

[39]Lagarde, op. cit., VI, p. 143 and p. 143, n. 8.

[40]See supra, Pt. II, chap. 12, p. 198.

[41]Lagarde, op. cit., V, p. 287.

[42]Ibid., pp. 286-287.

[43]Ibid., p. 112.

[44]See supra, Pt. II, chap. 12, n. 34, p. 214.

[45]Lagarde, op. cit., VI, p. 109. The work being referred to here, the Decretum Gratiani, is the result of the effort of the 12th century Camaldolese monk Gratian to effect a harmony among the discordant canons of Church law, as its real name implies, Concordia discordantium canonum; see Stephen Kuttner, Harmony from Dissonance: An Interpretation of Medieval Canon Law (Latrobe, Pa., 1960). The Decretum Gratiani served for centuries as the source for many glosses on canon law. Even Lagarde characterizes Ockham, at least as far as his position on natural law is concerned, as being a "glossateur du Decret"; cf. Lagarde, ibid.

[46]Kölmel, "Das Naturrecht," op. cit., 62-65, 67, and 83. As Junghans notes [op. cit., p. 248, n. 370], in 1932 Shepard had already pointed to the connection between certain aspects of Ockham's position on natural law and the work of the glossarist on the Decretum, Rufinus; cf. Shepard, op. cit., 26 (1932), 1016-1017.

[47]Decreti Prima Pars, Dist. 1; cf. A. Friedberg, ed., Corpus iuris canonici, I: Decretum Magistri Gratiani (Leipzig, 1879), p. 1.

[48]O.N.D., II, chap. 88, p. 661. Actually, Gratian himself made certain qualifications on this statement as well; see Gabriel le Bras, ed., Histoire du Droit et des Institutions de l'Église en Occident, VII: L'Âge Classique 1140-1378, Sources et Théorie du Droit (Paris, 1965), p. 368.

[50]Kölmel, "Das Naturrecht," op. cit., 67.

[51]Ibid., 42. As Miethke points out [Ockhams Weg zur Sozialphilosophie (Berlin, 1969), p. 480], the canonical glossarists on the Decretum Gratiani united the identification of "ius poli" (natural law) and "aequitas naturalis" (natural equity), accepted by Gratian, with the central conceptions of their school. For an account of the development of the notion of natural equity by the medieval canonists, especially through the efforts of Huguccio of Pisa, whose influence on Ockham has already been shown above [see supra, Pt. II, chap. 8, n. 14, pp. 120-121], and most especially through the work of Hostiensis, and the transmission of this notion of natural equity to the 14th century, see le Bras, op. cit., pp. 352-366. Further, as Junghans notes [op. cit., p. 248, n. 370], Kölmel's demonstration of the connection between Ockham's position on natural law and natural reason was clearly anticipated, and indeed emphasized, by Shepard in 1932; cf. op. cit., 26 (1932), 1009. However, as Junghans mentions [ibid.], there seems to be no evidence that Kölmel knew about Shepard's work when he wrote his article in 1953.

[52]See supra, Pt. II, chap. 7, p. 91; chap. 7, p. 97; chap. 8, pp. 114-115; chap. 9, p. 131; chap. 10, pp. 152-153; chap. 11, pp. 168-169; and chap. 11, p. 174.

[53]See supra, Pt. II, chap. 10, p. 160.

[54]See supra, Pt. II, chap. 7, pp. 97-98. This point was also noted by Miethke; see Miethke, op. cit., p. 485, n. 202.

[55]Kölmel, "Das Naturrecht," op. cit., 81.

[56]Lagarde, op. cit., IV, p. 233.

[57]See supra, Pt. II, chap. 9, pp. 134-135.

PART THREE

CRITICISM AND CONCLUSION

CHAPTER THIRTEEN

FORMER CRITICISMS ANALYZED

"In seiner Theorie treffen sich vielerlei Elemente. Sie sind nicht zu einem ausgeglichenen System zusammengewachsen."[1] Although not only this criticism but also a number of Kölmel's other criticisms concerning the lack of philosophical systematization in Ockham's position on natural law[2] are quite plausible, nonetheless, they are also somewhat unfair to Ockham.

As Kölmel himself notes,[3] Ockham did not intend to originate a theory of natural law but, instead, used natural law arguments to aid him in his conflict with the Holy See. Since Kölmel admits that it was obviously not Ockham's intention to develop a theory of natural law but only to use natural law arguments to aid him in his conflict with the papacy, it does seem somewhat unfair for Kölmel to criticize Ockham for not accomplishing what he never intended to realize.

However, we feel that Kölmel's comment that Ockham worked with the word "ius naturale" as a given, with references to Isidore of Seville and Gratian sufficing,[4] much more accurately captures what Ockham seems to have actually done.

Although it would not fully excuse Ockham's uncritical acceptance of ius naturale as a given, nevertheless, we do feel that a possible explanation can be offered for his apparent lack of philosophical sophistication, as far as his position on natural law is concerned. Before this explanation is proffered, a number of specific points must be understood initially.

As Morrall,[5] Tierney,[6] and Lagarde[7] have all noted, Ockham's principal theoretical antagonists were the canonists who supported the temporal claims of the papacy. Further, as might be remembered,[8] Ockham firmly believed that the theologian rather than the canonist was the one most qualified, through his particular training, to interpret the more profound questions or issues in canon law, such as those involving natural law. Lagarde correctly notes that given this firm conviction, it is not surprising that Ockham dedicated the first Book of Part I of the Dialogus to affirming the preeminence of theologians over canonists, especially in matters concerning ascertaining the more profound aspects of canon law.[9]

Yet, as Tierney has pointed out, given the exhaustive annotation which characterized canonistic scholarship by the 14th century, it would not have been possible for Ockham to have suggested some radically new canonical interpretation of texts which had already been so thoroughly glossed.[10] As Lagarde has noted,[11] Ockham's principal

originality, as far as canonistic sources were concerned, was not so much the novelty of the sources which he utilized, but the very personal way in which he grouped and interpreted these sources.

Indeed, what has characterized some of Ockham's more insightful interpreters, among them Brampton,[12] van Leeuwen,[13] Hamman,[14] and Tierney,[15] has been their insistence on the importance of the canonistic texts which were so frequently used by Ockham in his polemical works. And yet, as Tierney has pointed out, part of the difficulty with Ockham's frequent use of canonical texts has been his employment of canonical doctrines without his giving any reference to his source.[16]

However, we do feel that there is also a possible explanation for this lack of reference to canonical source problem. Hamman has correctly pointed out that Ockham's major sources for his patristic quotes were the Decretum and the Decretals.[17] And van Leeuwen has rightly noted that Ockham attributed much greater value to the Decretals than to the Decretum and often used the latter as a simple collection of patristic texts.[18] Further, as Ullman has proposed, as far as documentary evidence was concerned, the value of an appeal to an authority in the Middle Ages increased proportionally with its age; that is, the older the authority, the greater its evidential weight.[19]

Obviously, referring to canonical texts not as the

work of later canonists but, instead, citing the patristic text which they contained would add greater force to the impact of a quote. When this realization is combined with Lagarde's correct observation that Ockham collated all the diverse canonical glosses in an attempt to try to directly approach a canonical text without having to concern himself with the canonical glosses on that text,[20] it is not difficult to see why Ockham may have been reluctant to always cite his canonical source. It was far more effective for him to use the canonical glossarist's patristic source as his textual justification, since quotes from the Fathers would have greater evidential weight.

However, it must not be understood that Ockham did not have great use for certain decretals in his polemics against the Avignon popes. As Brampton has noted,[21] Ockham often utilized the decretals of former popes as evidential authority to try to show that the Avignon popes were in error. Ockham felt that they had abandoned the original spirit and intention of their predecessors.

Further, the actual glossaries which Ockham does quote turn out to be quite significant for our purposes, even though his direct references to them, when they are taken together, tend to be somewhat infrequent. Both Tierney[22] and Lagarde[23] have accurately noted that Ockham makes direct references to Joannes Teutonicus' Glossa ordinaria on the Decretum. The Glossa ordinaria seems to be the only

canonical gloss which he quotes faithfully and frequently. Interestingly, the Glossa ordinaria specifies as one of the main meanings for "ius naturale," the sum of natural precepts contained in the Decalogue.[24] And, as Lottin claims,[25] the Glossa ordinaria directly transmitted this decretist understanding of natural law to those theologians who, after 1215, systematically treated of natural law in the Middle Ages.

Also, Lagarde correctly asserts that the other two canonists whom Ockham cited were Huguccio of Pisa and Hostiensis.[26] As Oakley has pointed out,[27] they served as sources for arguments on several of the doctrines on ecclesiastical authority that were repeated by Ockham. More interestingly, however, Huguccio of Pisa and Hostiensis were the two most important canonists in the development and transmission to the 14th century of the concept of natural law as the precepts of natural equity contained in the Law and the Gospel.[28] Further, as Ullman has proposed,[29] Huguccio of Pisa, whose influence on Ockham has already been noted,[30] was perhaps the clearest expositor of the notion of the identification of the natural law with the divine law. And Tierney has correctly noted[31] that, in general, Ockham reproduced Huguccio's arguments more accurately than most of the professional canonists on matters of concern to Ockham.

Indeed, as Tierney has proposed,[32] Ockham, as many

other 14th century authors interested in canonical scholarship, turned to many of the glossarists whose opinions had been half-forgotten since the days of pope Innocent III. And, as Tierney also notes, the closest anticipation to Ockham's own proposals, as far as canonical scholarship is concerned, is found in the work of Huguccio of Pisa.[33]

This series of points concerning Ockham's approach to canonical scholarship is designed to corroborate a quite simple hypothesis. Our thesis is that Ockham accepted a canonical interpretation of natural law for polemical purposes. We feel that Ockham embraced much of their science precisely to use it as a means to undo his canonical antagonists.

Since, as Tierney points out,[34] Ockham could not realistically be expected to invent some new canonical interpretation for texts which had already been subjected to so many centuries of glosses, instead, Ockham, as part of his general acceptance of canonical theory, took the developed canonical doctrine on natural law as his own position.

That Ockham does not appear to have felt the need to deal critically with this canonical doctrine on natural law in some thoroughgoing, philosophical manner, we feel should not come as a surprise, as it appears to have been for Kölmel.[35]

Ockham felt that, as a theologian, he was in the

best position to clear up any inadequacies in the received canonical doctrines. As Tierney notes,[36] methodologically, Ockham only resorted to his standard political devices of an appeal to equity, necessity or the intention of the legislator when the canonical text that he wanted to employ unambiguously repudiated the point of view which he wished to maintain. When a canonical text afforded the slightest possibility of an interpretation that was favorable to the point which he wished to make, Ockham merely resorted to his customary methodology of verbal analysis.

Since the received canonical doctrine on natural law was, in general, unproblematic for Ockham's purposes and was, instead, perceived by him as, in all probability, a useful tool in his polemics against the Holy See, it is by no means surprising that he did not feel compelled to thoroughly criticize its inadequacies philosophically. As Morrall has proposed,[37] Ockham's repeated insistence in his non-polemical works that there is a radical and total difference between philosophy and theology should, we feel, in this particular instance, be taken quite seriously.

Ockham, as a theologian supremely confident in the superiority of his discipline, did not evidence the slightest hesitation in accepting some of the positions of the canonists. We feel that one such position was the canonists' approach to natural law. Ockham seems to have felt that as a theologian, he would easily be able to outwit his

canonical antagonists at their own game through disclosing the more profound aspects of their science. Indeed, that John XXII was himself a civil and canon lawyer, in all probability, added further savor to this approach.

Thus, we feel that much of the criticism concerning Ockham's supposed natural law theory has suffered from a lack of insight into the subtlety of his methodology in this instance. Ockham accepted some of the canonists' positions in order to strangle his principal antagonists with what he considered to be the inadequacies inherent in their positions. And he employed other canonical positions, those which were amenable with his own views, in their accepted form. We feel that unless one sees this, then one's criticisms of the apparent philosophical naiveté of Ockham's approach to natural law may misrepresent Ockham's actual intentions.

Indeed, Lagarde correctly states that Ockham intended to wage war with his canonical antagonists, preferably with their own weapons,[38] that is, by first accepting their canonical doctrines and then turning these same doctrines against them. Thus, Lagarde has perceived what we feel is essential to understanding Ockham's apparent, uncritical acceptance of certain canonical doctrines, such as, we feel, the canonical approach to natural law.

Further, as we have pointed out above, Lagarde not only perceived Ockham's dependence on the Decretum[39] but

also referred to Ockham as a "glossateur du Décret,"[40] as far as his position on natural law was concerned. Nevertheless, even in his more recent works, Lagarde tends to make criticisms of Ockham's position on natural law not clearly indicative of an understanding of the implications, as far as fair criticism is concerned, of what appear to be a number of insights which he has grasped concerning Ockham's actual methodology.

Lagarde complains that Ockham is constantly confusing the natural law and the divine law but that this confounding of these two kinds of law is in "la logique de son système."[41] As his source for the claim that this confounding is in "the logic of his system," Lagarde quotes Alois Dempf's statement to the effect that Ockham's position on natural law amounts to nothing more than the abstract contents of the Decalogue and the Bible expressed as rules.[42]

In a certain sense, at least, the reason given for this criticism by Lagarde is possibly correct, even though the criticism itself may not be quite fair to Ockham. If, as is indicated by the justificatory quote which he employs, Lagarde means to imply that it is characteristic of the canonical position on natural law to take the natural law to be divine law, then, at least, the reason given for this criticism would be correct. However, if this is indeed Lagarde's understanding of this matter, then his criticizing Ockham for confounding or confusing these two kinds of

law would be somewhat unfair to Ockham, since the received canonical position already takes natural law to be divine law. It seems to us unfair to accuse Ockham of always confusing or confounding what the accepted position already takes to be one law.

Further, Lagarde's following criticism, which we have already referred to above,[43] to the effect that Ockham erroneously imagines that his tripartite distinction in the senses of natural law distinguished in Dialogus III II III, chapter 6, could actually be used to justify a universal empire or the right of the Roman people to choose the pope, since this distinction would not have explained anything if it had not been dominated by "the contradictory principles for defining law" which Ockham had posed in his philosophical non-polemical works, we feel that this criticism by Lagarde is also problematic.

It would seem that here we have the converse of the problem which we faced in Lagarde's criticism that we just analyzed. Here it is quite possible that Ockham's tripartite distinction in the senses of ius naturale does indeed have to bear a greater load than it can in his attempt to justify the idea of a universal empire or the right of the Romans to elect the pope in Dialogus III II III, chapter 6. Nevertheless, if this distinction does indeed fail to justify these notions, it does not fail because of the reason indicated. Ockham's position on natural law was not

dominated by any "principles for defining law," contradictory or otherwise, supposedly posed by him in his philosophical non-polemical works.

It is somewhat disconcerting that Lagarde does not specify what actually are these supposed contradictory principles for defining law contained in Ockham's philosophical non-polemical works. In any case, since Ockham did not really derive his position on natural law from his philosophical non-polemical works--a point which Lagarde has already conceded, as we noted above[44]--whether certain "contradictory principles for defining law" in fact exist in Ockham's philosophical non-polemical works would seem to be beside the point, as far as his position on natural law is concerned.

It is a simple matter to see that Lagarde cannot have it both ways. If, as he has already admitted, Ockham's position on natural law is not derived a principiis, then it would make no difference even if Ockham had posited certain "contradictory principles for defining law" in his philosophical non-polemical works. These principles would not in fact be involved in his actually defining law, at least in the sense that his position on natural law was, admittedly, not derived a principiis.

Further, it is not possible that these presumed "contradictory principles" in fact dominated Ockham's actual defining of law in his polemical works. As a matter of

fact, one of the major, albeit possibly unfair, criticisms of Ockham's legal philosophy is that he never adequately defined or clarified what he meant by "law," as we noted above.[45]

Lagarde also proposes that Ockham presents a new form of his supposed theory of natural law when he distinguishes absolute from modifiable natural law in the Dialogus.[46] He then criticizes Ockham for the responses which he gives in explicating these two senses of ius naturale in the Dialogus and proposes that these responses afford a new proof of the vacillations in his theory, when Ockham seeks to define natural law.[47]

There are a number of problems with this criticism of Ockham. First, throughout this criticism Lagarde seems to assume that Ockham is speaking about two kinds of natural law when Ockham is actually distinguishing two senses of "ius naturale." Thus, Lagarde initially commits an error which tends to undermine not only his criticism of Ockham but his explication of Ockham's actual position as well.

Further, his specific criticism of Ockham to the effect that Ockham's vacillation at this point becomes apparent as soon as he attempts to define natural law misses the point that Ockham is not here trying to define "ius naturale." As we have noted above,[48] Kölmel demonstrated that one of the central things which Ockham actually failed to do was to define or clarify "ius naturale." In fact, Ockham is

merely distinguishing two senses of "ius naturale" here. Thus, if Ockham's responses are inadequate to show that the empire is universal, which is the presumed goal that he had in mind in the passages in question,[49] then this cannot be due to his miscarried attempt to define the term "natural law," as Lagarde maintains.

Finally, in his criticism of Ockham which formed part of his later concession that in his 1946 interpretation of Ockham's position on natural law he may have been too easy on Ockham by interpreting the shortcomings in his theory as due to his being a legal positivist,[50] Lagarde claimed that Ockham's theory of natural law is singularly deficient.

Certainly, as we have been attempting to indicate throughout this chapter, there is a sense in which some of Lagarde's and, for that matter, a number of Kölmel's criticisms of Ockham are quite plausible philosophically. It is true that if one interprets Ockham as having intended to offer a systematic, philosophical explication of natural law in his polemical works, then what he has actually accomplished of this supposed goal would appear to be singularly deficient, as regards his actually formulating a theory of natural law.

Indeed, the very ease with which one can heap criticism after criticism on Ockham's supposed theory of natural law, we feel, should in itself have given some cause

for reflection to both Lagarde and Kölmel. We feel that these criticisms prove to be so easy to make and Ockham appears to be so naive because of a fundamental misunderstanding of what Ockham intended to accomplish with his position on natural law. In effect then, Ockham has been unfairly criticized, since it was not his intention to originate or develop a theory of natural law.

However, we do not think that this realization in itself insulates Ockham from being effectively criticizable or that from a philosophical point of view a number of the criticisms which were made by Kölmel and a few of the criticisms which were made by Lagarde are not plausible.

We feel that since Ockham did, in fact, accept this canonical position on natural law and employed it in his polemical works, it would not be unfair to attempt to point to some of the philosophical shortcomings in his use of this position. We will try to do this in the next chapter.

We feel that this approach to criticism of Ockham's position on natural law does not vitiate our analysis of the shortcomings in Lagarde's and Kölmel's arguments. Both of these authors seem to us to have gone astray through not sufficiently realizing what Ockham intended to do with the received canonical position on natural law. They both seem to have assumed that Ockham intended to present some kind of philosophical clarification or systematic explication of the notion of natural law; and both of these authors

plausibly criticize Ockham for not adequately carrying out what they believed to be his intended purpose.

Even though, in fairness to Ockham, we think that when one understands his real intentions, this type of criticism is precluded, nevertheless, since, we feel, Ockham did accept this developed canonical position on natural law as his own position, one can still fairly criticize Ockham's uncritical use of this received position. However, one must continue to keep his actual intentions in mind for originally accepting this approach and refrain from attacking him on the grounds that he did not accomplish some critical, philosophical clarification or systematic explication of the notion of natural law or that he failed to develop a philosophically adequate theory of natural law.

FOOTNOTES TO CHAPTER THIRTEEN

[1]Wilhelm Kölmel, "Das Naturrecht bei Wilhelm Ockham," Franz. Stud., 35 (1953), 81.

[2]In his 1953 journal article Kölmel made the following criticims of Ockham's position on natural law which seem to involve accusing Ockham of failing to systematize his approach to this subject: (1) in his theory of modifiable natural laws, Ockham proceeds from the multiplicity of determinations, i.e., the individual situations; thereby, he broadly conceives of natural law as merely presenting itself as unassailable against established laws of popular making; (2) absolute and modifiable natural laws are characterized through their absolute or modifiable import; they appear to be only superficially obligatory through natural reason; thereby, they remain merely expressions which clearly point to a unity and which proceed from a fixed principle; (3) although there is clearly one universal norm involved in the various senses of ius naturale, as is proven through Ockham's relating ius naturale to ius divinum, all this is not systematically or abstractly developed from first principles; (4) it may be that the regulae generales transform the ius naturale into a lex naturalis; but Ockham does not give a clear definition of either ius naturale or lex naturalis; and in his use of these terms he fails to clearly distinguish ius naturale from lex naturalis; (5) as regards these regulae generales, Ockham fails to give a unified conceptual summary of these rules in the lex naturalis; (6) Ockham fails to give a clear, material stipulation of these rules; (7) he fails to give an explicit summary of the senses of ius naturale by using a definition of the regulae generales in which there is a "ius naturale" that unambiguously explicates the inner unity of the three senses of ius naturale in principia per se nota et immobilia; cf. ibid., 81-82. Kölmel also accuses Ockham of offering no essential clarification of the notion of natural law, as, for instance, was proffered by St. Thomas Aquinas and John Duns Scotus, critizes Ockham for using "ius naturale" as a mere nominal label for an otherwise autonomous domain of regulations [cf. ibid., 64-65], and censures Ockham for not giving a rigorous specification of his regulae generales; cf. ibid., 78.

Further, in a subsequent journal article, which appeared in 1964 ["Wilhelm Ockham--der Mensch zwischen

Ordnung und Freiheit," Miscellanea Medievalia, 3: Beiträge zum Berufsbewusstsein des mittalterlichen Menschen, Paul Wilpert, ed. (Berlin, 1964), pp. 204-224], Kölmel makes a number of criticisms of Ockham which imply a lack of systemization on the latter's part, as far as his position on natural law is concerned: (1) he condemns Ockham for splitting up the unity of ius naturale, acknowledged by St. Thomas Aquinas, through his three senses of natural law; cf. ibid., p. 211; (2) he accuses Ockham of not adequately explicating the unity of the natural law, clearly shown by St. Thomas Aquinas in the eternal law; cf. ibid., p. 213; (3) he blames Ockham for not really attempting to ground natural law on first principles or regulae generales; cf. ibid; and (4) he accuses Ockham of an oversight in not tracing back the changeability in natural law to the unity of the regulae generales in order that this unity might serve as a valuable explanation for the apparent alteration in natural law occasioned through the restrictions effected in it in different historical contexts; cf. ibid., p. 214.

[3]"Das Naturrecht," op. cit., 41.

[4]Ibid., 64.

[5]John B. Morrall, "William of Ockham as a Political Thinker," The Cambridge Journal, 5 (1951-52), 750-751.

[6]Brian Tierney, "Ockham, the Conciliar Theory, and the Canonists," Journal of the History of Ideas, 15 (1954), 43.

[7]Georges de Lagarde, La naissance de l'esprit laïque au déclin du moyen âge, IV: Guillaume d'Ockham, Défense de l'Empire (Paris, 1962), p. 54.

[8]See supra, Pt. II, chap. 7, p. 99.

[9]Same as n. 7, supra.

[10]Tierney, op. cit., 45. The term "glossed" refers to a text of canon law in which marginal or interlinear notes have been written by some canonist. These notes are referred to as a "gloss," and the canonist who made them is called a "glossarist" or a "glossator."

[11]Lagarde, op. cit., IV, p. 56.

[12]C. Kenneth Brampton, The De Imperatorum et Pontificum Potestate of William of Ockham (Oxford, 1927), p. xxx, in the "Introduction" by Brampton.

[13]A. van Leeuwen, "L'Église, règle de foi, dans les écrits Guillaume d'Occam, I: Remarques sur l'oeuvre littéraire de Guillaume d'Occam," Ephemerides Theologicae Lovanienses, 11 (1934), 258 and 258-259, n. 25.

[14]A. Hamman, La doctrine de l'Église et de l'État chez Occam (Paris, 1942), p. 29.

[15]Tierney, op. cit., 41.

[16]Ibid.

[17]Same as n. 14, supra. We have already made clear that "Decretum" refers to Gratian's Concordia discordantium canonum, the "Decretum Gratiani." The term "Decretals" refers to collections of papal decrees, for instance, the Decretals of pope Gregory IX, which were issued by the popes to clarify some point in Church law. The term "decretist" refers to a canonist who commented on or explicated the Decretum, whereas "decretalist" would refer to one who explained or commented on a papal decree or set of decretals. The term "patristic" refers to citations from the Fathers of the Church. In Ockham's case, these citations were primarily from St. Augustine, St. John Chrysostom, St. Ambrose of Milan, and the popes, St. Leo the Great and St. Gregory the Great, and from those Fathers of the Church who were most frequently used as sources for the Decretum; cf. Lagarde, op. cit., IV, p. 53.

[18]Van Leeuwen, op. cit., 258-259, n. 25.

[19]Walter Ullman, The Growth of Papal Government in the Middle Ages (London, 1955), pp. 359-360.

[20]Lagarde, op. cit., IV, p. 55.

[21]See supra, Pt. III, chap. 13, n. 12, p. 234.

[22]Tierney, op. cit., 52.

[23]Same as n. 20, supra.

[24]See Dom Odo Lottin, Le Droit Naturel chez Saint Thomas d'Aquin et ses prédécesseurs, 2nd ed. (Bruges, 1931), p. 23, n. 2, for the text involved.

[25]Ibid., p. 23. Crowe also emphasized this point; cf. M. B. Crowe, "The Natural Law before St. Thomas," Irish Ecclesiastical Record, 76 (1951), 199.

[26]Same as n. 20, supra.

[27]Francis Oakley, The Political Thought of Pierre d'Ailly: The Voluntarist Tradition (New Haven, 1964), p. 207. Interestingly, in this more recent book, Oakley repeats an admission which he had originally made in one of his earlier articles; cf. "Christian Theology and the Newtonian Science: The Rise of the Concept of the Laws of Nature," Church History, 30 (1961), 439. He states that God through His potentia ordinata chooses to work within the already established framework of the moral law, which has right reason as an infallible guide. However, in his more recent book, Oakley also concedes that the natural law can be regarded as absolute, immutable and indispensable in the context of the endurance of Ockham's moral order; cf. ibid., p. 171. Nevertheless, in both his earlier journal article and his subsequent book, Oakley immediately warns the reader that God could, through His potentia absoluta, "abrogate that order entirely" [cf. ibid., 439] or "suspend the working of that order"; cf. ibid., p. 171.

As textual justification for this warning in both his earlier journal article [cf. ibid., 453, n. 43] and his subsequent book [cf. ibid., p. 171, n. 29], Oakley refers the reader to O.N.D., chap. 95. When one actually checks the chapter noted, one finds that Ockham does indeed speak of a theological distinction between God's potentia absoluta and his potentia ordinata. However, in order to counter one of John XXII's assertions, Ockham insists, on behalf of the Michaelists, that this distinction does not actually refer to two, separate powers in God, a potentia absoluta and a potentia ordinata. Ockham emphasizes that there is no real distinction involved here but only different ways of speaking about or referring to God's power, which, Ockham insists, is not diverse in itself; cf. O.N.D., II, chap. 95, p. 725. At best then, what this theological distinction is intended to point to, according to Ockham, is a mere verbal distinction, based on the various ways in which individuals speak about God's power. It would seem then that, in this instance, Oakley has attempted to unjustifiably extend the scope of what is for Ockham a mere verbal distinction.

Further, in his non-polemical works, Ockham also emphasized that the potentia Dei ordinata and the potentia Dei absoluta were not two, distinct powers or faculties in God. As Suk has pointed out [Othmar Suk, "The Connection of Virtues according to Ockham," Franciscan Studies, 10 (1950), 29], for Ockham, "in God there is only one power ad extra, which in every respect is God Himself." Suk also indicates that it is erroneous to interpret Ockham's use of the doctrine of a potentia Dei absoluta in God's will as an admission of some kind of moral positivism [cf. ibid.] and insists that for Ockham this absolute power of God's will is "merely a hypothetical power"; cf. ibid., 28.

Indeed, as Fiasconaro has pointed out [Michele Fiasconaro, "La dottrina morale di Guglielmo di Ockham" (Doct. dissertatio, Milan, 1958), p. 69], this distinction should not be understood to signify that for Ockham there are two powers in God's will which are really distinct or that God is able to do some things through His absolute power which He is not able to do through his ordained power. Fiasconaro continues that "de potentia Dei ordinata" was understood solely by Ockham to mean that God manifests His will in accordance with the course of the laws which He Himself established. "De potentia Dei absoluta" was understood by Ockham to mean that God is able to do anything which does not involve a contradiction, whether or not He ordains to bring some particular thing about. For, as Fiasconaro notes, there are many things which God is able to do that He does not want to do. For textual corroboration of these assertions from Ockham's non-polemical work, see Quodl. VI, qu. 1, or Fiasconaro's rendering of this passage from the Quodlibeta septem, ibid., p. 72, n. 7.

[28]See Gabriel le Bras, ed., Histoire du Droit et des Institutions de l'Église en Occident, VII: L'Âge Classique 1140-1378, Sources et Théorie du Droit (Paris, 1965), pp. 357-361 and 380-382. For a brief biography of both Huguccio of Pisa and Hostiensis, whose actual name was Henry of Segusio, see Brian Tierney, Foundations of the Conciliar Theory. The Contributions of the Medieval Canonists from Gratian to the Great Schism (Cambridge, 1955), p. 259.

[29]Walter Ullman, Medieval Papalism (London, 1949), p. 41.

[30]See supra, Pt. II, chap. 8, n. 14, pp. 120-121.

[31]Tierney, "Ockham," op. cit., 60.

[32]Ibid., 43.

[33]Ibid., 49.

[34]See supra, Pt. III, chap. 13, p. 219.

[35]After giving an initial summary of certain criticisms of Ockham's position on natural law in his 1953 journal article, Kölmel proposes that it is remarkable that Ockham did not perceive the obstacles which arose with his acceptance and utilization of "ius naturale" as a mere given, without his clarifying the actual content of this term; cf. Kölmel, "Das Naturrect," op. cit., 64.

[36]Tierney, "Ockham," op. cit., 46.

[37]Morrall, op. cit., 743-744.

[38]Lagarde, op. cit., IV, p. 54.

[39]See supra, Pt. II, chap. 12, p. 207.

[40]See supra, Pt. II, chap. 12, n. 45, p. 215.

[41]Lagarde, op. cit., V: Guillaume d'Ockham, Critique des Structures Ecclésiales (Paris, 1963), p. 286.

[42]See Alois Dempf, Sacrum Imperium, 2nd ed. (Darmstadt, 1954), p. 509.

[43]See supra, Pt. II, chap. 12, pp. 205-206.

[44]See supra, Pt. II, chap. 12, p. 203.

[45]See supra, Pt. II, chap. 12, p. 199.

[46]Lagarde, op. cit., IV, pp. 118-120 and pp. 118-119, n. 17.

[47]Ibid., p. 119.

[48]See supra, Pt. III, chap. 13, n. 2, pp. 233-234.

[49]See Lagarde, op. cit., IV, pp. 118-121.

[50]See supra, Pt. II, chap. 12, pp. 201-202.

CHAPTER FOURTEEN

CRITICISM OF OCKHAM'S POSITION

Perhaps the most striking aspect of Ockham's position on natural law is his adoption of a canonical position inspired by Gratian's interpreting the natural law to be divine law.[1] However, such a move was not as uncommon in the Middle Ages as it might at first seem. Such decretist glosses as the Summa Parisiensis[2] and the Summa Monacensis[3] took the natural law to be the divine law. Such decretists as Rufinus,[4] Stephen of Tournai,[5] and Huguccio of Pisa[6] and such decretist glosses as the Summa Coloniensis[7] and the Summa Lipsiensis[8] interpreted the natural law to be the divine law in the sense of that contained in the Law and the Gospel. Chiefly through the late decretist Johannes Teutonicus' Glossa ordinaria,[9] this understanding of natural law was transmitted, in a slightly altered form, to later theologians. These theologians took the precepts of the natural law to be the precepts of the Decalogue.

Indeed, although such decretalists as Hostiensis[10] still approached Gratian's definition as associating the natural law with the contents of the Law and the Gospel, the theologians who wrote on natural law in the Middle Ages

after 1215 tended to perceive Gratian's position as entailing that the precepts of the natural law were the precepts of the Decalogue.

Not only did such Franciscan masters as Alexander of Hales,[11] John of la Rochelle,[12] and Odo Rigaud[13] interpret Gratian's position as actually involving the taking of the precepts of the natural law to be those of the Decalogue but so also did the Dominican master Albert the Great.[14] This was also Peter Lombard's understanding of Gratian's definition of natural law.[15]

Indeed, either accepting this association of the precepts of the natural law and the Decalogue as a central sense of "natural law" or trying to use this interpretation in their natural law theorizing became so widespread among theologians after 1215 that William of Auxerre stands out because of his opposition to this understanding of natural law.[16] However, his opposing this interpretation was not effective enough to undermine this approach among later theologians.

In fact, even St. Thomas Aquinas, who actually seems to have tried to present a critical, philosophical examination of the notion of natural law in the context of his investigation of law in his later work, the Summa theologiae,[17] still seems to have been greatly influenced by the canonical position which took the precepts of the natural law to be those of the Decalogue.

In his earlier work, the Scriptum super libros Sententiarum, St. Thomas interpreted the primary precepts of the natural law to be the precepts of the Decalogue. He claimed that all other precepts of the natural law are reducible in some way to the Ten Commandments.[18] And, in another, earlier work, the Summa contra Gentiles, he accepted Gratian's definition as one possible sense of "natural law."[19]

Certainly, in his later treatise on law in the Summa theologiae, St. Thomas tries to be more critical and philosophical in his approach to natural law. He considers Gratian's definition and attempts to specify the proper sense in which it should be understood.[20] He also draws a tripartite distinction among moral principles. St. Thomas quite plausibly places the precepts of the Decalogue in a category with secondary precepts of the natural law, which are not self-evident to natural reason, as, supposedly, are the first general principles of the natural law. These secondary precepts are derived from these principles, according to St. Thomas, after only slight reflection. He also distinguishes a third category of precepts of the natural law which are recognizable as precepts only after careful reflection by wise men shows them to be in accord with reason.[21]

St. Thomas' pointing out that the precepts of the Decalogue are not self-evident principles of the natural

law is certainly an advance over his earlier taking the first principles of the natural law to be the precepts of the Decalogue in his Scriptum super libros Sententiarum. The precepts of the Decalogue are not primary principles of the natural law, like St. Thomas' "Good is to be done and pursued, and evil is to be avoided."[22]

Nonetheless, in spite of this apparent advance, St. Thomas tends to greatly weaken the philosophical critical nature of the emendation which he had made in the Summa theologiae by introducing in this same work a new category of self-evident principles, those principles which are self-evident through reason or faith.[23] St. Thomas claims that just as the first principles of the natural law are self-evident to anyone possessing natural reason, so believing in God is a first and self-evident principle to anyone possessing faith.[24] Indeed, St. Thomas seems to consider the two great commandments given by Christ in the Gospel as the main supports for the Law and the Prophets, love of God and love of neighbor,[25] as first general principles of the natural law, self-evident through reason or faith.[26]

Further, St. Thomas insists that not only the remote conclusions of the principles of the natural law, which, he felt, were only able to be ascertained by the wise, but also the first general principles of the natural law themselves are contained in the precepts of the Decalogue. He continues that the former are contained as conclusions

from the Decalogue precepts, whereas the latter, the self-evident principles, are contained in them as principles in their proximate conclusions.[27]

Finally, St. Thomas claims that concerning Christ's precepts of love of God and one's neighbor, these two commandments are most certain and self-evident and require no promulgation. He maintains that they are, as it were, the ends of the commandments of the Decalogue; and no one, he feels, can have an erroneous judgment concerning them. Yet, he continues, not only these self-evident principles but also the corollaries of the Decalogue precepts, the remote conclusions from the principles of the natural law, are still reducible to the precepts of the Decalogue.[28]

Thus, although it is true that St. Thomas did attempt to give a more systematic, philosophical analysis of the natural law in the Summa theologiae, nevertheless, he still seems to have been unable to extricate himself from a marked dependence on the canonical position which took the precepts of the natural law to be the precepts of the Decalogue. And this was in spite of whatever misgivings he may have had about a certain possible interpretation of Gratian's original definition.[29]

In this regard, we feel that, in a very recent work, Weisheipl has offered an interesting insight; he says:

> Unfortunately many modern commentators have wrenched Thomas's teaching on natural law out of context and have distorted it . . . The discussion of law in general and of the natural law in

> particular does not constitute Thomas's full teaching on the foundations of natural law. In I-II, these are only preliminary questions for his principal interest, which is the Old Law and the New Law of the covenant which God made with His people.[30]

As has been implied above,[31] St. Thomas had a number of things to say about natural law in his Scriptum super libros Sententiarum and in his Summa contra Gentiles. Actually, he also considered the subject of natural law in his De veritate and in his Sententia libri Ethicorum.[32] In view of this, Weisheipl's implicit warning concerning the danger of concentrating one's attention solely on those parts of the De lege tract in the Summa theologiae which deal with natural law in an attempt to understand St. Thomas' full teaching on natural law seems to us to be well justified.

Thus, with Weisheipl's insight in mind, it should not actually be so surprising that St. Thomas would so greatly undermine the philosophical, critical nature of his correctly classifying the precepts of the Decalogue as secondary precepts of the natural law in the Summa theologiae's tract on law by introducing in this same tract a new category of self-evident principles, those self-evident through reason or faith.

It is possible that he introduced this new category in order to have a division of first principles of the natural law in which to put Christ's two great commandments of

the New Law. With these two precepts as self-evident first principles, he could then draw a closer connection between these precepts and the precepts of the Decalogue than he would have been able to do with a self-evident principle to reason through nature, such as his "Good is to be done and pursued, and evil is to be avoided." As Weisheipl implies, it was the Decalogue precepts and the commandments of the New Law which were St. Thomas' actual concern. The natural law served as an introduction to them, not the other way around.

Indeed, we feel that similar comments would be appropriate concerning Ockham's Franciscan predecessor, John Duns Scotus, and his theory of natural law. Scotus also seems to have been greatly influenced by the idea that the precepts of the natural law are the precepts of the Decalogue. However, as far as his theory of natural law is concerned, Scotus' main interest seems to have been the first great commandment of Christ, love of God above all things.

Scotus states flatly that to love God above all things is an act conformed to natural right reason; and he proposes that its rectitude is known per se (evidently), just as the rectitude of first practical principles.[33] However, Scotus, unlike St. Thomas Aquinas, denies that the second great commandment of Christ, love your neighbor as yourself, is either a first practical principle of the natural law or follows from such a principle.[34]

Scotus reasoned that the first commandment of the New Law was known per se to be true because natural right reason dictates that the greatest must be loved the most; and, since God was the greatest, He had to be loved the most.[35] However, he felt that since it was possible for one to love God and still not will or wish not to kill or not to commit adultery, neither love of neighbor nor the precepts of the Decalogue which involved love of neighbor, the so-called "precepts of the second table of the Decalogue," were strictly enjoined by natural law.[36]

Nevertheless, Scotus still maintained that the precepts of the second table, although they were not, strictly speaking, derived from the first principles of the natural law, were, nonetheless, "of the natural law." He proposed that they were consonant with these first principles, which were, he felt, necessarily known.[37] In order to give a systematic basis to this claim, Scotus distinguished a number of ways in which something could be "of the natural law": (1) as true, practical principles, known simpliciter (simply) by the light of natural reason, of which there were two classes: (a) practical principles known from their terms, and (b) conclusions demonstrated from these principles; and (2) as that which is consonant regulariter (regularly) with (1). Scotus maintained that even God could not dispense one from the principles of (1), whereas the precepts of (2) could be dispensed.[38]

Thus, since the precepts of the second table of the Decalogue are of the natural law for Scotus because they are consonant with the first principles of the natural law, these precepts are dispensable, according to Scotus. However, the precepts of the first table which are strictly of the natural law, for Scotus the first two commandments of the Old Law, are indispensable.[39]

Scotus felt that the third commandment of the Old Law was only doubtfully of the natural law.[40] In all probability, he maintained this because he claimed that the determination of the sabbath day, insofar as it was a determination respecting time, was not, strictly speaking, of the natural law.[41]

Scotus asserted that in the original state of innocence and before any written law, not only the precepts of the first table but those of the second table of the Decalogue as well were obligatory. He proposed that they were either written in men's hearts or clearly given to man by God through some other external doctrine.[42] However, after man's Fall into sin, all those precepts of the natural law which were only consonant regulariter with the first principles of the natural law, for instance, the precepts of the second table of the Decalogue, were no longer manifest to men; and, Scotus asserted, it was expedient that the necessity for following these precepts be shown to man through divine positive law.[43]

Thus, even though Scotus would not admit that the second precept of the New Law was a primary principle of the natural law, as had St. Thomas Aquinas, and offered arguments against interpreting it as such, nevertheless, he was still greatly influenced by the canonical position which took the precepts of the natural law to be the precepts of the Decalogue.

It seems plausible to conjecture that when he found himself unable to connect the precepts of the second table of the Decalogue with the natural law through the second great commandment of the New Law, Scotus conceived of a theoretical classification through which he would still be able to have these precepts be part of the natural law.

Further, Scotus was unable to finally exclude the third commandment of the Old Law from the precepts of the natural law, even though he had offered arguments against its inclusion among these precepts. Presumably, Scotus had argued against its inclusion among the precepts of the natural law because of its temporal determination.[44]

Thus, in the final analysis, even though he had offered rational arguments to the contrary in a number of individual cases, Scotus included or, perhaps better, did not positively exclude, any of the precepts of the Decalogue from being precepts of the natural law.

Thus, as Kölmel claims,[45] in great part, although both St. Thomas and Scotus attempted to give a philosophical

elucidation of the notion of natural law, whereas Ockham merely accepted "ius naturale" as a given, nonetheless, neither St. Thomas nor Scotus actually liberated themselves from the pervasive influence of the canonical position on natural law, which Ockham, for polemical reasons, appears to have embraced uncritically.

Indeed, the profound influence of this canonical position on natural law in the Middle Ages has been well characterized by Lefebvre. He states flatly that "the affirmation of the identity of the divine law and the natural law constitutes a principle the import of which was incalculable, since it gave direction to the law and its future evolution."[46] Thus, we feel that Ockham's embracing this canonical position should not be viewed as somehow unusual or perhaps forced upon him by the exigencies of his methodology.

Further, when Ockham appears to be unconcerned about the profound difficulties for medieval theologians occasioned by the apparent exceptions, permitted or actually enjoined by God in the Old Testament, to some Decalogue precepts,[47] which were presumed to be precepts of the natural law in the context of the canonical doctrine, exceptions which had so concerned other medieval theologians in their theorizing about natural law,[48] and when he merely cites "Thou shalt not commit adultery," one of the commandments which seemed to have problematic exceptions, as an

example of an absolute principle which admits of no condition, modification or stipulation,[49] or when he uses this same commandment and "Thou shalt not lie" as examples of ius naturale in the first sense distinguished by him in Dialogus III II III, chapter 6, a sense of ius naturale which is supposed to fail in no case,[50] one must realize that Ockham was not primarily concerned with offering a theoretical, systematic presentation of ius naturale in his polemical works. He probably felt that it was not in his own best interests as a polemicist to attempt to account for the apparent Old Testament exceptions to certain commandments of the Old Law, exceptions which had so vexed other Catholic medieval theologians theorizing about natural law. However, even though he was not trying to offer a systematic theory of natural law, nevertheless, since he mirrored the received canonical position by considering the precepts of the Decalogue as unproblematic, absolute and unerring principles of the natural law, he was guilty of an uncritical acceptance and use of a faulty position.

When Ockham embraced this developed canonical position on natural law, he adopted its shortcomings as well. As Lefebvre implies,[51] since St. Thomas' philosophical approach to natural law had little or no effect on later canonists, the latter's denial of the status of primary, self-evident principles to the precepts of the Decalogue did not carry over into the later canonical position.

The later canonists retained the general principles which were proposed by Gratian, with the latter's emphasis on interpreting the principles of the natural law as embraced by the precepts of the Law and the Gospel.[52] Supplementing these precepts for the later canonists was Hostiensis' concept of a rational natural law, with the latter's emphasis on interpreting natural law as natural equity.[53] Hostiensis had developed this position from Huguccio of Pisa's interpretation of natural law as natural equity, a position which the latter had found implicit in Gratian's notion of the equity of natural law.[54] It was Hostiensis who exulted, "If the pagan puts such stock in the equity of the rational natural law, how much more stock ought the Christian put in the equity of the natural law which is contained in the Law and the Gospel."[55]

It was, we feel, this developed canonical position on natural law which Ockham accepted as his own position. In accepting this position, Ockham also adopted Hostiensis' basic presupposition inherent therein, that the rational natural law is above all the divine law.[56]

Ockham clearly indicates in his non-polemical works that he understands what a first, self-evident principle would be.[57] Nevertheless, when he gives examples of the absolute and unerring principles of the natural law, he follows the developed canonical position and takes the primary principles of the natural law to be the precepts of

the Decalogue.[58] Thus, following the canonical position, Ockham essentially ignores the advance made by St. Thomas in the latter's pointing out that the precepts of the Decalogue are not primary, self-evident principles of the natural law.[59]

Further, it is clear that Ockham fully understood what practical per se nota moral principles are, as is evident in his non-polemical works.[60] However, he ignored this philosophical insight in his polemical works. Instead, Ockham gave the status of absolute and unerring principles to the precepts of the Decalogue. We feel that this indicates that Ockham allowed shaky arguments to play a role in his polemical works. Again, this points to the significant difference between Ockham as a philosopher in his non-polemical works and Ockham as a polemicist, between Ockham's philosophy and his polemical work.

Also, to the degree that Ockham's accepted canonical position on natural law took the general principles of the natural law to be the precepts of the divine law, to this degree it collapsed a seemingly useful theological distinction. This distinction involves the supposed difference between the realm of nature and the realm of grace. As we mentioned above,[61] the canonical position's impacting of this distinction was one of the main problems which St. Thomas had with this approach.

However, even more serious, we feel, is the basis

of the actual justification for Ockham's position and the developed canonical position as well. As is evident, not only Ockham[62] but all medieval Catholic theologians accepted the patristic, essentially scripturally-based presuppositions concerning man's state of original innocence and his Fall into sin. Chiefly through the influence of the School of Anselm of Laon,[63] many medieval Catholic theologians accepted the necessity for the promulgation of the divine law in order to reinforce through specific precepts the general principles of the natural law. These latter principles were supposedly obscured, with the clarity of man's reason, by man's Fall and his loss of his state of original innocence.

We feel that there is a basic difficulty with this approach. It first requires faith on the part of the reasoner before he can fully concur with the supposed necessity for there being a supplementing of the natural reason through divine law. Much in the way in which St. Thomas' second category of self-evident principles, those self-evident through reason or faith, first requires the reasoner to have faith before he can, at times, know that what he knows is certain knowledge grounded in self-evidence, so the reasoner must first have faith before he can know with certainty that natural reason must be supplemented through the promulgation of the precepts of the divine law because of man's Fall.

Obviously, if, in fact, there was no historical event of man's Fall, through which he lost his previous state of original innocence in which natural law had full sway, then there would be no need for natural reason, now presumed to be obscured through this Fall, to be supplemented by the precepts of the divine law because of this Fall.

Of course, this does not deny that, in some primordial state, man might have possessed such immediate clarity of vision about even the most remote conclusions from the principles of the natural law and later somehow lost this power of insight. But, accepting this as a hypothetical possibility and conceiving a position on natural law which assumes as its necessary presupposition that there was such an initial historical period that was terminated through the specific historical event of man's Fall into original sin and which then implicitly employs this presupposition as the basis of justification for the necessity of the position's very generation in the first place is another matter. This canonical approach employs this presupposition as a justificatory basis for the necessity of a position specifically designed to overcome the supposed deleterious effects on natural reason of the termination of man's original state of natural innocence through his Fall into sin.

And yet, the only way in which one can have certainty

about the supposed historical occurrence in question is through faith in the Scripture. Thus, in the way in which one must first have faith before he can see through reason that he knows the self-evident nature of some of the precepts in St. Thomas' second category of self-evident principles, one must first have faith in the certainty of the Scripture before one can clearly understand the necessity for the promulgation of the precepts of the divine law. This supplementing of man's understanding is necessary because, according to the position in question, natural reason has been weakened by man's Fall into sin.

Certainly, there are some aspects of one or another medieval natural law theory which seem to have continuing relevance. For instance, St. Thomas' specifying as a primary, self-evident principle of the natural law, "Good is to be done and pursued, and evil is to be avoided," seems a perennially valuable first principle with which one might try to begin to construct a viable theory of natural law.

Nevertheless, we still feel that the greatest difficulty with the developed canonical position on natural law is the way in which one must first have faith before the necessity for positing this position itself can be fully understood. The invention of a new category of natural equity principles, supposedly revealed through divine law, seems necessary only to the degree that one has first already accepted through faith that natural reason is and

has been so weakened through original sin that the general rational principles of natural equity must be supplemented by the specific precepts implicit or explicit in the promulgated, revealed divine law.

That natural reason must be so supplemented before a fuller, more complete understanding of the natural law is possible seems far from evident. Further, since the realization of the necessity for this supplementing of natural reason is so dependent on one's first possessing a particular kind of faith, which also certifies the inerrancy of the source from which these supplementary precepts of the natural law are supposed to be gleaned, these considerations seem to seriously bring into question the adequacy of this developed canonical position on natural law as a viable formulation of continuing general interest and value.

FOOTNOTES TO CHAPTER FOURTEEN

[1]In fact, Gratian's actual position was that natural law was "comprehensum" (comprised) in the Law and the Gospel, not that everything in the Law and the Gospel pertained to natural law; cf. Gabriel le Bras, ed., Histoire du Droit et des Institutions de l'Église en Occident, VII: L'Âge Classique 1140-1378, Sources et Théorie du Droit (Paris, 1965), p. 370, n. 3, in the section of this work written by Charles Lefebvre, Parts II, III, and the Tables, covering pages 133-557 and 569-584. However, many of the canonists in the decretist tradition were satisfied to merely repeat Gratain's dictum that "the natural law is what is contained in the Law and the Gospel."

A number of hypotheses have been proffered to account for Gratian's definition of "natural law." Among these, Crowe claims that one of Gratian's problems was to reconcile Isidore of Seville's division of law into divine law and human law with the established division of law into natural law, ius gentium and civil law. In order to solve this problem, Crowe proposes, Gratian identified natural law with the divine law revealed in the Scriptures; cf. M. B. Crowe, "The Natural Law before St. Thomas," Irish Ecclesiastical Record, 76 (1951), 198. However, Farrell claims that Gratian was influenced to identify natural law with that contained in the Law and the Gospel by Lactantius' interpretation of Cicero's understanding of natural law, since Lactantius presented Cicero's position as the identification of natural law with divine positive law; cf. P. M. Farrell, "Sources of St. Thomas' Concept of Natural Law," Thomist, 20 (1957), 276.

[2]Much of the textual material on the positions of both canonists and theologians up to St. Thomas Aquinas concerning natural law can be found printed in Dom Odo Lottin's Le Droit Naturel chez Saint Thomas d'Aquin et ses prédécesseurs, 2nd ed. (Bruges, 1931). Thus, in most cases, we will refer the reader to Dom Odo's critical text citations rather than to the uncritical manuscript texts involved. For textual justification concerning this position in the Summa Parisiensis, see Lottin, ibid., p. 18.

[3]Ibid., p. 19.

[4]Walter Ullman, Medieval Papalism (London, 1949), p. 40, n. 5.

[5]Lottin, op. cit., p. 16.

[6]J. Gaudemet, "La doctrine des sources du droit dans le Décret de Gratien," Revue de droit canonique, 1 (1951), 30.

[7]See supra, n. 5.

[8]Lottin, op. cit., p. 20.

[9]See supra, Pt. III, chap. 13, pp. 221-222.

[10]Le Bras, op. cit., p. 381.

[11]Lottin, op. cit., p. 55.

[12]Ibid., p. 49.

[13]Ibid.

[14]Ibid., p. 43.

[15]M. B. Crowe, "St. Thomas and Natural Law," Irish Ecclesiastical Record, 76 (1951), 296.

[16]Lottin, op. cit., p. 35. William of Auxerre objected that this interpretation confuses the supposed fact that the precepts of the Decalogue help us to attain our supernatural end and thus ought to be accomplished in a spirit of charity, whereas the precepts of the natural law are uniquely designed to aid us in acquiring the moral and political virtues, which serve as preliminaries to the theological or supernatural virtues, required for attaining our supposed final supernatural end. To a certain degree, this objection foreshadows one which will be made by St. Thomas Aquinas to this interpretation; see infra, n. 20.

[17]St. Thomas' tract on law in the Summa theologiae I-II, qu. 90-108, the De Lege, is being alluded to here. Hereafter, the Summa theologiae will be cited as "S.T."

[18]Same as n. 15, supra.

[19]Crowe, "St. Thomas and Natural Law," op. cit., 298.

[20]S.T. I-II, qu. 94, art. 4, ad 1. St. Thomas claims that it is not all that belongs to the Law and the Gospel that Gratian actually intended to specify as comprising the natural law but only that whatever belonged to the natural law was fully contained in the Law and the Gospel. St. Thomas continues that this can be seen from Gratian's

example, i.e., a law "by which everyone is commanded to do to others as he would be done by."

As Chroust has pointed out [Anton-Hermann Chroust, "The Philosophy of Law from St. Augustine to St. Thomas," New Scholasticism, 20 (1946), 36], although Gratian employs St. Augustine's example here, he departs from the latter's approach by failing to distinguish divine law, which, for St. Augustine, is the lex aeterna (eternal law), from the natural law.

Lottin has noted [Lottin, op. cit., p. 27] that this principle, "Do not that unto others which you would not have others do unto you," was recovered from the School of Anselm of Laon by Gratian and the decretists. Actually, of course, this principle, the so-called "Golden Rule," is taken from Christ's typification of the meaning of the Law and the Prophets in the New Testament; cf. Matthew 7: 12 (Jerusalem).

As Farrell has implied [Farrell, op. cit., 280-281 and 281, n. 182], St. Thomas actually felt that a certain, uncritical understanding of Gratian's definition was inadequate because this interpretation would not be congruent with the former's position on the New Law and grace; i.e., St. Thomas was not sympathetic with an interpretation of Gratian's definition which would take the New Law to be equivalent to the precepts of the natural law, since this would subvert St. Thomas' position by leaving no proper place for grace in his notion of grace building on nature.

Finally, the "art. 4" in the citation at the beginning of this footnote refers to article 4 in the question noted, whereas the "ad 1" refers to St. Thomas' reply to the first objection in the question and article cited.

[21] Ibid., qu. 100, art. 3. It is interesting to note that this tripartite distinction employed here by St. Thomas actually seems to have originally been the invention of his teacher, Albert the Great, as Kuttner also discovered; cf. Stephan Kuttner, "The Natural Law and Canon Law," University of Notre Dame Natural Law Institute Proceedings, III, Edward F. Barrett, ed. (Notre Dame, Ind., 1950), p. 104, n. 20. For the appropriate textual justification from Albert the Great's Summa de bono, see Lottin, op. cit., p. 118. And, for that matter, St. Thomas' two methods of deriving human positive law from natural law, i.e., by deduction and by determination. The latter drew this same distinction; cf. Lottin, op. cit., p. 46, with S.T. I-II, qu. 95, art. 2.

[22] Ibid., qu. 94, art. 2. For an interesting analysis of this first principle of the natural law, see Germain G. Grisez, "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2," Natural Law Forum, 10 (1965), 168-201.

[23]Ibid., qu. 100, art. 3, ad 1.

[24]Ibid., art 5, ad 1.

[25]Matthew 22: 37-39 (Jerusalem).

[26]Same as n. 23, supra.

[27]S.T. I-II, qu. 100, art. 3.

[28]Ibid., art. 11.

[29]See supra, Pt. III, chap. 14, n. 20, pp. 258-259.

[30]James A. Weisheipl. Friar Thomas d'Aquino (New York, 1974), p. 260. In this regard, Armstrong criticized St. Thomas; cf. R. A. Armstrong, Primary and Secondary Precepts in Thomistic Natural Law Teaching (The Hague, 1966), p. 114 and 114, n. 1. Armstrong claimed that since St. Thomas nowhere proves that the precepts of the Decalogue are any more easily evident to reason than some other secondary precepts of the natural law which do not belong to the Decalogue, his treating the precepts of the Decalogue as in some manner different from the other precepts which were also not self-evident is unjustified. We feel that this criticism tends to overlook the profound influence which the canonical doctrine on natural law exerted on St. Thomas. That St. Thomas afforded apparently unjustified, special consideration to the precepts of the Decalogue is not actually as surprising as it would have been if he had not given these precepts some kind of privileged, even though in this instance unproven, status, considering the marked influence which the canonical doctrine had on most medieval theologians who dealt with natural law.

[31]see supra, Pt. III, chap. 14, p. 241.

[32]For an analysis of some aspects of St. Thomas' position on natural law in these works, see Armstrong, op. cit., pp. 30-33, for the De veritate, and pp. 83-85, for the Sententia libri Ethicorum.

[33]Opus Oxoniense III, dist. 27, qu. unica, n. 2; p. 42, n. 173. This and the following citations to Scotus' Opus Oxoniense, up to the semi-colon, are referring the reader to Scotus' Opera Omnia, Luke Wadding, ed. (Lyons, 1639), the so-called "Wadding edition" of his work. The page numbers with their subsequent note number, following the semi-colon, are referring the reader to Günter Stratenwerth's Die Naturrechtslehre des Johannes Duns Scotus (Göttingen, 1951), where one can find a rendering of the

relevant text printed in a more contemporary work than the Wadding edition. Hereafter, this work by Scotus will be abbreviated as "Opus Oxon."

It is interesting to note the similarity between some of Scotus' statements concerning natural law and those of St. Bonaventure on this same subject. For instance, St. Bonaventure claims that the proposition "God ought to be loved" is "simply innate," i.e., it is innate without restriction, as far as being an understood first principle is concerned; cf. In II Sent. dist. 39, art. 1, qu. 2, in S. Bonaventura, Opera Omnia, II (Ad Claras Aquas, 1885), p. 904.

Also, for an analysis of the position on natural law of St. Bonaventure's pupil and subsequent minister-general of the Friars Minor, Cardinal Matthew of Aquasparta, and of his similarity to St. Thomas Aquinas in his approach to natural law theorizing, see Martin Grabmann, "Das Naturrecht der Scholastik von Gratian bis Thomas von Aquin," Archiv für Rechts-und Sozialphilosophie, 16 (1922-23), 29-31.

[34]Ibid., dist. 37, qu. unica, n. 12; p. 83, n. 354.

[35]See supra, Pt. III, chap. 14, n. 33, p. 260.

[36]Opus Oxon. III, dist. 37, qu. unica, n. 11; p. 82, n. 351. Following a Christian tradition begun by St. Augustine, it was customary to view the precepts of the Decalogue as divided into two tables, the first containing the first three commandments, which concerned our relation to God, and the second containing the other seven commandments, which concerned our relation to our neighbor. Scotus accepted this traditional view in his natural law theorizing; cf. Gratianus Budzik, De Conceptu Legis ad Mentem Joannis Duns Scoti (Burlington, Wisc., 1954), p. 43.

[37]Ibid., n. 8; p. 84, n. 356.

[38]Ibid., IV, dist. 33, qu. 1, n. 7; p. 92, n. 388.

[39]Ibid., III, dist. 37, qu. unica, n. 6; p. 91, n. 386. Again, interestingly, St. Bonaventure maintained that the precepts of the first table of the Decalogue, which pertained to God, were indispensable, whereas the precepts of the second table, those pertaining to one's neighbor, were dispensable; cf. In I Sent. dist. 47, qu. 4, in ed. cit., I (Ad Claras Aquas, 1882), p. 846.

[40]Ibid., n. 8; p. 85, n. 359.

[41]Ibid., n. 7; p. 75, n. 327.

[42]Ibid., n. 14; p. 111, n. 471.

[43]Ibid., IV, dist. 26, qu. unica, n. 9; p. 111, n. 474.

[44]As a matter of fact, even though he admitted that, as far as its temporal determination was concerned, the third commandment was only a ceremonial precept, nevertheless, St. Thomas argued that in one respect it was still a moral precept, since it commanded man to give some time to the things of God; cf. S.T. I-II, qu. 100, art. 3, ad 2. Since it was, in one respect, a moral precept, St. Thomas was able to argue for its inclusion with the other precepts of the Decalogue as secondary precepts of the natural law.

[45]See supra, Pt. III, chap. 13, n. 2, pp. 233-234.

[46]Le Bras, op. cit., pp. 378-379.

[47]In addition to the standard example, which Ockham sometimes mentioned in his polemical works, God's commanding Abraham to sacrifice his son Isaac [Genesis 22: 1-2 (Jerusalem)], an apparent violation of the fifth commandment of the Decalogue, there are also a number of other examples of exceptions to Decalogue precepts, which medieval Catholic theologians dealing with natural law attempted to explain: the Israelites being commanded by God to extirpate the Canaanites [Deuteronomy 7: 20 (Jerusalem)], another apparent violation of the fifth commandment; Hosea's taking for himself a wife of fornications, an adulterous woman, because God commanded him to do so [Hosea 3: 1 (Jerusalem)] and God's permission being given to the Israelites to have a plurality of wives [Deuteronomy 21: 15 (Jerusalem)], both apparent violations of the sixth commandment; and the Israelites being commanded by God to plunder the Egyptians [Exodus 12: 35-36 (Jerusalem)], an apparent violation of the seventh commandment.

[48]We have already listed a number of places where more interesting solutions by certain medieval Catholic theologians can be found for the problem of Abraham's being enjoined by God to sacrifice Isaac; see supra, Pt. II, chap. 9, n. 27, pp. 142-143.

[49]See supra, Pt. II, chap. 10, p. 146.

[50]See supra, Pt. II, chap. 10, p. 152.

[51]Le Bras, op. cit., p. 383. Although Shepard was correct in his original, 1932 assessment that no essential difference exists between Ockham and St. Thomas Aquinas in the sense that the former developed a natural law theory

from his nominalism, whereas the latter developed his natural law theory from his realism [Max A. Shepard, "William of Occam and the Higher Law," American Political Science Review, 26 (1932), 1009], nevertheless, Shepard was not entirely accurate when he maintained that Ockham must thank St. Thomas "for many of his underlying ideas about and classifications of law"; cf. ibid., 1009, n. 18; and he was in error when he contineud that "Aquinas furnished the general lines within which Occam, and indeed all his successors, moved"; cf. ibid. Since Ockham accepted the developed canonical doctrine on natural law, his position was not actually that dependent on St. Thomas' work, although, of course, some external similarities may exist between an individual formulation or division concerning natural law employed by both St. Thomas and Ockham.

Further, Bayley's thesis [Charles C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," Journal of the History of Ideas, 10 (1949), 200] is somewhat problematic. Bayley's thesis that Ockham is indebted to St. Thomas for his notion of the general principles of equity fails to point to the actual, main influence on Ockham's concept of equity, i.e., the developed canonical position on this question. This position interpreted the general principles of equity to be the precepts of a divinely revealed natural equity contained in the Law and the Gospel. Thus, Bayley's idea that Ockham's general principles of equity were derived from St. Thomas through the latter's blending of St. Augustine's idea of iustitia with Aristotle's epieikeia is questionable.

[52]Ibid.

[53]Ibid.

[54]Ibid., p. 359.

[55]For the text from Hostiensis' Lectura in quinque decretalium Gregorianarum libros, which we have translated here, see Lectura, in X, I, 43, De arbitris, col. 9, Per tuas, n. 5, reprinted in le Bras, ibid., p. 360, n. 6.

[56]Le Bras, op. cit., p. 381.

[57]See supra, Pt. II, chap. 8, n. 9, p. 120.

[58]See supra, Pt. III, chap. 14, n. 49 and 50, p. 262.

[59]See supra, Pt. III, chap. 14, p. 241.

[60]See supra, Pt. II, chap. 8, n. 9, p. 120.

[61]See supra, Pt. III, chap. 14, n. 20, pp. 258-259.

[62]See supra, Pt. II, chap. 7, pp. 93-94.

CHAPTER FIFTEEN

SUMMARY, SUGGESTIONS AND SIGNIFICANCE

Through the foundation laid in Part I of this study by our analysis of the legal aspects of the controversy over the question of the poverty of Christ and His apostles, we have been able to come to several conclusions concerning the questions posed in the Introduction in Part II of this work.

First, although it has been shown that, in a number of individual instances, there were specific anticipations of particular natural law arguments which were employed by Ockham in his polemical works in the writings of certain of his Franciscan predecessors who took part in the poverty controversy, nevertheless, we have shown that it is very unlikely that Ockham merely mirrored the work of his Franciscan companion, the civil and canon lawyer, Bonagratia of Bergamo, when it came to the former's position on natural law.

Second, through the first comprehensive analysis of all of Ockham's significant natural law arguments in the context of an investigation of all of his known polemical works, we have also been able to show in Part II of this study that there is no textual evidence to substantiate the

claim that Ockham proposed either a voluntarist theory of law or of natural law or ever intended to do so.

Third, through counter-arguments we have been able to show in Part II that those who propose that Ockham did, in fact, originate or develop a voluntarist theory of natural law are, for one reason or another, in error.

In Part III of this work, we have shown that the various, former criticisms concerning a lack of philosophical systemization evident in Ockham's position on natural law, even though some of these criticisms are plausible, are, nonetheless, unfair to Ockham, since these criticisms are based on a mistaken notion concerning what Ockham actually intended to accomplish through his use of natural law arguments in his polemical works.

We indicated in Part III that Ockham adopted a developed canonical position on natural law for polemical reasons having to do with his intention to employ canonical positions in an attempt to undo his canonical antagonists with their own formulations. Indeed, we also noted the marked influence which this canonical position had on Ockham's famous medieval predecessors, St. Thomas Aquinas and John Duns Scotus.

Thus, although we concluded that, in view of his actual intentions, it was unfair that Ockham should have been criticized for not developing a theory of natural law, nevertheless, we indicated that, since Ockham did accept

this developed canonical position on natural law as his own position, it would not be unfair to attempt to point to some of the shortcomings in this position and his uncritical employment of it.

Indeed, these shortcomings proved to be so serious and the received canonical position involved such insular presuppositions, we had to conclude that its value as an analysis of the notion of natural law of continuing, general interest was seriously doubtful. Unfortunately, this same judgment had to be extended to Ockham's position on natural law, because of his uncritical acceptance and use of this position.

As far as suggestions for further work in this area are concerned, we feel that a definite aid to future analysis and criticism would be the creation of a critical edition of the Dialogus. A critical edition of this voluminous work would be helpful, since one could then be liberated from the usual dependence on either Goldast's quite problematic edition of the Dialogus, which has recently been reproduced in Turin as Guilielmus ab Occam, Dialogus de potestate papae et imperatoris, Monumenta politica rariora, ex optimis editionibus phototypice expressa, curante Luigi Firpo, ser. I, nr. I, (Torino, 1959), or the incomplete 1494-1495 edition of the Dialogus by Treschel at Lyon, reproduced in Guillelmus de Occam, Opera Plurima, I (London: Gregg), 1962.

Another important impetus, realistically speaking,

for the encouragement of further work on Ockham's general legal philosophy by legal philosophers in this country would be the rendering of a translation of his polemical works into English. Save for the few chapters from the Dialogus which have been translated into English by Oakley for Lerner and Mahdi's sourcebook, practically no work has been done on making Ockham's polemical works available in English.

Indeed, given the critical editions of a number of Ockham's polemical works made available through the dedicated efforts of Sikes, Bennett and Offler at Manchester University and the former work of Brampton, Baudry, Scholz and Mulder, the availability of most of Ockham's polemical works in a critical edition may, at this point in time, be greater than the availability of critical editions of his non-polemical works, even though these works have received so much more attention by philosophers in this country. In spite of the dedicated efforts of the Franciscan Institute of St. Bonaventure's University, a critical edition of Ockham's Commentary on the Sentences is not yet completed; the Quodlibeta septem still has to be read in one of its 15th century editions or in manuscript; and the Quaestiones in libros physicorum and the Expositio super octo libros physicorum are still unedited.

It is somewhat unfortunate, although perhaps understandable, that so much time and effort have been dedicated

to Ockham's logic and metaphysics by professional philosophers in this country, both in Catholic and non-Catholic academic circles, while Ockham's moral, political and legal philosophy have been almost completely ignored by professional philosophers here, save for the few Ph.D. dissertations which have touched on some aspect of Ockham's moral theory. And again, these studies have tended to concentrate on his non-polemical works, where his moral theory is principally contained.

This has not been true on the Continent where not only law professors, historians and theologians but also professional philosophers have taken an interest in these aspects of Ockham's thought. Some work, including translation, has already been done in this country on Ockham's non-polemical work by professional philosophers, even though the texts involved, when they are taken as a whole, are more problematic, as far as the existence of critical editions is concerned. There seems to be no apparent reason why more work could not be done on Ockham's legal and political philosophy by professional philosophers in this country.

Apart from the obvious significance of this study's finally laying to rest a wholly erroneous thesis concerning such an important figure as Ockham, that is, the more recently resurrected tradition that Ockham was a voluntarist in his supposed natural law theory, the more general

significance of this dissertation has been to point to the marked influence of the canonical doctrine on natural law not only on Ockham but also on such important figures as St. Thomas Aquinas and John Duns Scotus and, indeed, on much of the natural law theorizing which went on in the Middle Ages.

Although this important point has not been missed by some Continental scholars, like Lefebvre, nevertheless, other scholars on the Continent, like Lagarde, seem to have lost sight of this essential insight about legal theorizing concerning natural law in the Middle Ages. Indeed, that the erroneous views of a Continental scholar, like Lagarde, could have had such a clear influence on an American scholar, like Oakley, demonstrates the potential danger of the transmission of some unanalyzed dicta of scholarly interpretation not only through time but within a given age. It also points to the obvious necessity of presenting a more balanced and accurate appraisal of Ockham's actual position for American philosophers, who, because of an apparent lack of interest in Ockham's polemical work, are perhaps much more prone to accept an erroneous appraisal of the views he maintained during his polemical period than their Continental counterparts, who are, in general, more well acquainted with the work which Ockham produced during this latter period of his life.

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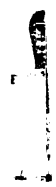

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