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# Ancient Legal Maxims and Modern Human Rights

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## ANCIENT LEGAL MAXIMS AND MODERN HUMAN RIGHTS†

### INTRODUCTION—THE RISE AND FALL OF THE LEGAL MAXIM

One of the most striking differences between a modern English law book and one from an earlier period lies in the place given to maxims. Until the middle of the nineteenth century books were still being published<sup>1</sup> which appeared to regard the ancient maxims as central pillars of the law. The teaching of the law was organised round them. They were cited reverentially in court. Since that time the maxims have steadily declined in importance. From guiding principles they became interesting illustrations and have now all but disappeared from legal literature. Commentaries on the maxims remain in law libraries but they are largely historical curiosities. If they are referred to at all, it is for their entertainment value, not as legal authorities.

They are indeed entertaining and their pithy wisdom still meets with the approval of the modern reader but I wish neither to bury them nor to praise them but to restore them to whatever place in the law that they merit. I believe that the time is ripe for such a restoration for a number of reasons but especially because of a resurgence of interest among lawyers in morals in general and human rights in particular. The essence of the maxims is a very lofty and humane ethic: and the current revived interest in human and environmental values might be considered a rebirth of the spirit of the maxims. Dinosaurs though generally extinct are said to survive in one form, namely birds. It may be thought, then, that the maxims are still alive and well at least in the form of human rights and environmental principles.

I propose to follow this theme in a little more detail; to compare the two forms of legal principle, the ancient and the modern; to see whether we can be satisfied with contemporary human rights theories and let the dead rest in peace, or whether we need to take at least some of the old maxims and reintroduce them to improve our stock of jurisprudential ideas.

### THE TRADITIONAL MAXIMS—AND WHY THEY WERE CONSIDERED IMPORTANT

We tend to think of legal maxims as epigrams, little nuggets of legal wisdom—which they are. They are salty sayings in Latin, Norman-French and even English, culled from all sorts of sources and incorporated into legal opinions and texts. But they did not function as mere

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† [Editorial note] The slightly amended text of a public lecture delivered by Professor McQuade in the Queen's University of Belfast, 11 December 1986.

1 Herbert Broom's, *Selection of Legal Maxims* was first published in 1845. The fifth edition was published in 1870.

epigrams. They were not illustrative nor decorative sayings nor “clinchers” added at the end of a legal argument. They were the guiding principles of legal argument. They were referred to collectively as “regula”.<sup>2</sup> The word is singular and means not rules but indeed a ruler, a measuring device, a blueprint, a gold standard, to which more particular things could be compared to see if they passed muster.

The mention of an exemplar, suggesting an ideal form, should alert us to the possibility that Greek idealist philosophy is lurking somewhere in the background and it is. The term maxim is the Latin equivalent of *axioma*<sup>3</sup> meaning a first principle, for example, of geometry. Axioms were, of course, self-evident principles. All the lesser propositions could be deduced from them but they themselves were underived. They stood on their own authority. They were either obviously true or else could not be denied without self-contradiction. A legal maxim, then, would be a self-evident first principle of legal theory from which more particular propositions could be derived.

It may seem odd to us that lawyers could ever have looked on law as a species of geometry, but they did. Indeed it would have been surprising if they did not. Until relatively recent times all science was regarded thus and since academically inclined lawyers have always insisted that the study of law was a science, it had to be treated in this way. They were wont to describe a system of law as “ratio”. The term “ratio”, like our word reason, has many meanings. It can refer to the faculty of reason or the reasoning process or it can refer to the product of reasoning, a rationally structured body of knowledge. Geometry considered as a system of interrelated propositions could thus be described as “ratio”. The term reason was also applied to the first principles of such a system, and such principles were said to be supremely or optimally rational since they justified the whole. All propositions of law could be derived from such general first principles and these could properly be called maxims.

The clearest example of this way of thinking is Sir John Fortescue’s *Dialogue in Praise of the Common Law*, first issued in Latin in 1537, in which he endeavours to persuade his pupil, the young prince in exile, that knowledge of the law is as necessary to a king as skill at arms. Answering his pupil’s objection that such knowledge would take too long to acquire, the Chancellor states that a sufficient knowledge of the principles, all that the king would require, could be managed in a year. He says—

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2 Pope Boniface VIII and Francis Bacon both entitled their collection of maxims “Regula”.

3 The Greek “*axiomata*” is usually translated into Latin as “*dignitates*”. Nevertheless, the connection between mathematical first principles and legal “*principia*” or “*maximi*” is quite clear, e.g., in Fortescue.

as for the *principia*, which the Commentator calls the efficient causes, these are no other than certain *universalia*, which the learned in the law, as well as mathematics, call maxims.<sup>4</sup>

Unfortunately, Fortescue does not give any examples of a legal maxim and we cannot be sure whether he used the term to refer to our “little sayings” or to more general first principles of law or ethics. It is odd, and unsatisfactory, that he does not. He has used the word maxim, a common term for a legal epigram. He ought then to comment on the ordinary usage, and distinguish it from his own if that is his intent. But Fortescue may have been wise in his vagueness. Granted that the rules of law derive from and depend on general maxims, it is quite another and a more difficult thing to determine precisely what the maxims are as opposed to what they say. There are in fact a number of difficult questions, of a philosophical nature, concerning the nature of maxims, their function in legal logic and their justification, which need to be considered. These questions will be taken up later after reviewing modern human rights jurisprudence.

#### HUMAN RIGHTS THEORIES OF LAW

The disappearance of maxim jurisprudence, if it be a crime, has been laid at the door of John Austin<sup>5</sup> and his mentor, Jeremy Bentham. Certainly the decline of maxims coincides with the rise of so-called “legal positivism”. But rather than blaming the appearance of a new species for the disappearance of the maxims we ought probably to attribute the catastrophe (if catastrophe it was) to a change in the climate of thought. The world of medieval philosophy generally was being swept away in England; and new empirical ideas, thought to be more consonant with a scientific attitude to things, were being developed. As scholars generally, and scientists in particular, were emphasising facts rather than concepts, it would be only natural for legal scholars to look at particular propositions in legal texts and opinions rather than general principles. Fortunately we do not need, for present purposes, to answer such difficult historical questions, for we are not trying to decide why the maxims disappeared but whether they are really gone. They did not, in fact, ever disappear completely and the values that they embodied continued to feature in legal argument. Strict legal positivist theory, in the sense of rules without guiding principles, is a very difficult thing to apply in practice. It is not surprising then, that the notion of justice and a variety of moral principles continued to be used to interpret both case-law and statutes. In the United States of course such discussion was built into the

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4 Sir John Fortescue, *Commentation of the Laws of England* (Trans Francis Grigor, 1917), at p 14: “. . . you may be deemed a lawyer in some competent degree, when, as a learner, you shall become acquainted with the principles, causes and elements of the law . . . [T]hough a knowledge and practice of twenty years is but barely sufficient to qualify as a judge, you will acquire a knowledge sufficient for one of your high quality within the compass of one year.”

5 That Austin can properly be called a legal positivist is contested, e.g., by Robert Moles. See “John Austin Reconsidered” (1985) 36 *NILQ* 193ff.

law (some would say fossilised) in the form of constitutional enactments. So one way or another moral values continued to have a place in the law.

In recent decades, debates (and heated ones at that) concerning the concept of justice and the place of moral principles in the law have been a feature of jurisprudential writing. Everyone, it seems, wants to be known as a human rights advocate. Professor Fuller and Professor Dworkin have in turn attacked what they term "legal positivism" as epitomised in the writings of Professor H. L. A. Hart, and insisted that moral principles are an integral part of the law, not merely marks on an external yardstick which determines whether positive law is good or bad. Professor Hart, and those who have supported him, have in turn been concerned to make it clear that their views do not compromise moral principles, especially human rights. Even moral sceptics, as we shall see, tend nowadays to be vociferous advocates of humane causes.

All this interest in, and support of, human rights can, as was said earlier, be considered as a continuation of, and a resurgence of, the emphasis on general moral values and humane principles that was a feature of the maxim approach to law. But in certain respects these writers are not the heirs of Fortescue, Noy, Bacon and Coke. They may be the revived but they are not the authorised version. The classical maxims were developed in the context of natural law theory which in turn was seen against a larger background of philosophical and theological ideas. Contemporary human rights theorists, in contrast, are nervous about such basic theories and generally try to function without them. Lacking any clear philosophical foundation their views have a floating and insubstantial quality. Like clouds they are often beautiful and appealing from a distance but somehow vague, shifting and confusing when you get into them.

I have difficulty with the detailed vocabulary of modern "rights" authors, for example, as to the worthwhileness of Professor Dworkin's distinction between a principle and a policy.<sup>6</sup> But my greatest difficulty is in deciding what each writer considers a human right to be and how one would answer critics who deny that rights are anything other than our own wishes and desires dressed up in a fancy vocabulary. It is common for modern "rights" authors explicitly to dissociate themselves from traditional natural law doctrines. But they do not as a rule go on to say what they are substituting for natural law theory or how they would modify it to make it acceptable. So moral principles and human rights are left floating, not at sea which would at least be understandable, but like Mohammed's coffin, between heaven and earth, which is miraculous.

The most recent entrants on the stage of human rights discussion are radical critics of the law somewhat loosely lumped under the title of the "critical studies movement". A number of such writers are quite explicit that there is no rational basis for moral statements yet these same writers

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6 See Dworkin, *Taking Rights Seriously* (1978), 22.

attempt to persist in moral utterance, especially moral criticism of the law. Legal theory is seen by them, correctly in my opinion, as based on underlying conceptual assumptions about value. But they make use of theories about documentary interpretation (hermeneutics) to suggest that all such value judgments represent only the basic beliefs of the interpreting community, that is, the church, social class, professional group or whatever. Such beliefs, radical critics tell us, cannot be justified in any other way than by saying that they are the creed of the interpreting community. "We believe" then means just that and nothing more.

This is all very reminiscent of theological controversies which raged a quarter of a century ago associated with the writings of Rudolf Bultmann. The interpretation of scripture, and indeed the scriptures themselves, were described by the radical theological critics of that era as representing the faith of the church. Few churchmen, if any, would deny that proposition but it was further asserted, also with help from hermeneutic theory, that nothing more could be said about the faith of the church by way of rational support, than to reiterate that the church believed it. This I would deem an unacceptable account of the relationship between faith and reason, but at least its adherents were able to explain belief as a miracle of grace. What miracle and whose grace can Professor Leff<sup>7</sup> use to affirm (after he has dismantled and discarded the "faith" of the law), that—

It looks as if we all we have . . . [E]verything is up for grabs. Nevertheless: Napalming babies is bad. Starving the poor is wicked. Buying and selling each other is depraved. Those who stood up to and died resisting Hilter, Stalin, Amin and Pol Pot . . . and General Custer too . . . have earned salvation. Those who acquiesced deserve to be damned. There is in the world such a thing as evil (all together now:) Sez who? God help us.

This humanitarian credo may have a heroic ring about it, but it has a desperate sound to it as well, like a last defiance in a lost cause. Perhaps non-rational humanitarianism is better than none at all but it is not much better. It takes more than an emotional outburst to stand up to the calculated cruelty which has been a feature of our times, cruelty which has often been supported by political logic and appeal to the public welfare.

Before we settle for attitudinist morals of this sort, we should be sure that the cause really is lost and that no justification, other than personal or group preference, can be given for moral values and humanitarian principles. I shall be suggesting later that something can be said in support of belief in humane values but in the meantime I cannot but feel that strong (substantive) epistemological scepticism is unlikely to be a lasting stance in law. Weak (procedural) scepticism, the habit of questioning established and accepted positions (at least once in a while), is, of course, a posture of permanent importance in legal studies as it is

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7 Leff, "Unspeakable Ethics, Unnatural Law" (1979) *Duke L J* 1229, at p 1249. Levinson, "Law as Literature" (1982) 60 *Texas L Rev*, at p 403.

elsewhere. But thoroughgoing scepticism of the strong or substantive kind has proved hard to sustain even as a theoretical pose and impossible to maintain in practice.<sup>8</sup> It is also very difficult to tilt at basic legal assumptions about value without challenging basic scientific presuppositions as well. Scientific doctrines can be just as political as legal or moral theories in the sense that they can be bent to the purposes of party and sect.<sup>9</sup> And if we are to attack the underlying premises of the law on hermeneutic grounds, it seems only consistent to add that the notions of truth and order, not to mention a number of ethical postulates, which underlie scientific enquiry, also rest on the say-so (or believe-so) of the scientific community.

One might gather from the foregoing that all is not well, in my opinion, with contemporary human rights thinking as it affects the law. Three basic things need to be done in order to clarify human rights proposals and render them credible and usable.

1. It should be said plainly or as plainly as possible, what a “human right” is.

2. It should be stated, as clearly as possible, how and how far such principles can be justified.

3. We should be shown how “rights” notions function in relation to the legal system. Do they merely measure it? Or are they part of it? Or do they supersede it if there is conflict between law and “justice”?

It is my suggestion that a modernised body of legal maxims, set into and made part of a contemporary version of the medieval “*ratio*”, would be most helpful in clarifying and filling out and justifying human rights theory and also in making it more usable in the context of our system of rules and regulations. Rights and rules should, as far as possible, be seen as pulling together rather than against one another. In order to make good this claim it will be necessary to take a closer look at the maxims. In particular we need to answer the same questions that we asked in connection with human rights, to say what they are; to locate them in legal logic, to say how they function; and finally to justify them; to show, if possible, that they rest on valid moral ideas, not wishful thinking.

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8 See *Hume's Enquiries* (3rd ed 1975), at p 55: “It is more conformable to the ordinary wisdom of nature to secure so necessary an act of the mind, by some instant or mechanical tendency, which may be infallible in its operations, may discover itself a the first appearance of life and thought, and may be independent of all the laboured deductions of the understanding”. And again: “Especially I am sensible that I must at least be contented to sit down with the same answer which might have satisfied me at the beginning”; *Dialogues Concerning Natural Religion* (2nd ed, ed Kemp-Smith, 1917), 163.

9 An article in the Chinese Journal of Medicine in the late 60's referred to “western imperialist antibiotics”.

MIXED MAXIMS—OLD, NEW, BORROWED AND BLUE<sup>10</sup>

The maxims of the law are a strange collection of general propositions drawn from all kinds of sources. They are taken from formal logic, medieval philosophy, the Bible and even from common experience. They cover virtually every aspect of the law;<sup>11</sup> law in general, the judicial office, the relation of law to equity, the interpretation of documents, and the rights of kings and subjects; every department of the law has a cluster of maxims associated with it professing to express its basic principles. In fact they are not all principles. As will appear later, some of them function as rules, many of them can be viewed as both rule and principle, and some fit into neither category. But in all this variety one or two common features can be discerned.

First, all of them, no matter what their source, have been given a legal “twist”, they have been translated and adapted for use in the law. The maxim “*omne maius continet in se minus*”<sup>12</sup> seems on the face of it to be a basic proposition in Aristotelian logic, in effect that “all” implies “some”. In its legal meaning, however, it is not an expression of abstract logic. It was used in Roman and common law to cover cases where more money than was due was paid over to satisfy a debt or where someone who had only a term of years made a grant in fee simple. A strict legalist might argue that the payment and the grant were void—but in vain for the larger payment and the larger grant, according to this maxim, each includes in itself the lesser and is valid. Similarly, the maxim “*circuitus est evitandus*”<sup>13</sup> which on its face counsels us to avoid arguing in circles is applied in law to cases where the claims of both parties are approximately equal and so it would be a waste of everybody’s time to allow them to sue one another.

Secondly, most maxims are either explicitly moral or imply moral principles. Even when the main thrust of an epigram appears to be aimed at some ethically indifferent matter, a significant value proposition usually lurks in the background. The well known maxim “*res iudicata pro veritate accipitur*”<sup>14</sup> seems on the face of it to be mainly concerned with the inconvenience and futility of litigating anything more than once. A companion maxim brings out its humane side however saying “*nemo*

10 The maxim “*dies dominicus non est iudicatus*” invalidates legal acts performed on Sunday and so is effectively a “blue law”.

11 See *Broom’s Maxims* (5th ed, 1885) which treats over 500 maxims. There is also a long appendix to Lofft’s Reports (ed 1790) which contains a copious collection of maxims. Other collections are *Halkerston’s Maxims* (ed 1823). The 9th edition of Noy’s “*Maxims*” was published in 1821. A collection of over one thousand maxims was appended to *Latin for Lawyers* published by Sweet & Maxwell, London, in 1937. It is to be feared, however, that these maxims, which have no applications, were intended to teach Latin rather than law.

12 See also “*Frustra petis quod statim alteri reddere cogis*” and “*Dolo facit qui petit quod redditurus est*”. Both cited by Broom, *op cit*, 346.

13 Broom, *op cit*, 343.

14 Broom, *op cit*, 328, 333, 945.



*debet bis vexari pro uno et eadem causa*".<sup>15</sup> This maxim recognises that law is a vexatious business as far as the parties are concerned and so, as a matter of consideration, once is enough for any suit or for any issue.

How do the maxims, since they are moral in tone, relate to general moral principles. It is most convenient to consider this question by comparing them to the "fixed", most general principles of natural law. Even a casual glance and a brief consideration of their history and development shows that, in terms of natural law theory, they are secondary rules. General moral themes have been transposed into legal terms for legal purposes. Consequently they are rarely, if ever, fixed first principles but change, at least in their application, with the times. It is rare indeed to find a maxim abandoned altogether but they can be greatly diminished in their scope. "*Caveat emptor*"<sup>16</sup> has all but disappeared from contract law and the old maxim of property law that "*whoever owns the land owns it up to heaven and down to hell*"<sup>17</sup> has had to be considerably restricted in its scope to apply it to modern conditions, especially the advent of the aeroplane.

If maxims can be dropped out or truncated, there seems to be no good reason why maxims should not also be added. Sir Edward Coke has been credited, or discredited, with inventing a maxim or two of his own. But if Coke's new pieces of dog Latin encapsulate good principles of law expressed in a memorable way, his pretence of antiquity, so far as legal science is concerned, is immaterial. New times not only require new customs (*alia tempora alii mores*)<sup>18</sup> but new maxims.

It should not be concluded that the updating of our pool of maxims is a simple matter. Value principles are part of the law, functioning in its logical apparatus. A change in one part, substituting a new term or a new use for an old term, can raise all kinds of issues all over the system. Changing the law is like changing the design of an engine; to alter one part you have to look at the whole design. Medieval lawyers were suspicious of change and expressed their misgivings in the maxim that "*every innovation creates more trouble by its novelty than benefits by its utility*".<sup>19</sup> If we limit the application of this maxim to ill-considered tinkering, the warning is still salutary.

This brings us naturally to consider the place and function of maxims in the logical structure of a legal system.

15 Broom, *op cit*, 327 ff and 348 ff.

16 The complete maxim reads "*Caveat emptor; qui ignorare non debuit quod jus alienum emit*". Hobart's Reports, p 99. Discussed in Broom, *op cit*, 147 ff.

17 Broom, *op cit*, 395, 396, 397.

18 "*Alia tempora alii mores*" is not, of course, a legal maxim but it is a possible rendering, indeed the best rendering, of "*ratio enim anima legis, mutatione ratione, mutat et lex*" which can be roughly translated that the law must change with the times.

19 "*Omnis innovatio plus novitate perturbat quam utilitate prodest*". Broom, *op cit*, 147.

## THE FUNCTION OF MAXIMS IN LEGAL LOGIC

To the medieval lawyer, such of them at any rate as had pretensions to learning, jurisprudence was a science and law, its subject matter, had a formal structure. This form, as was mentioned earlier, was seen as a deductive system, termed "*ratio*", where particular propositions were deducible from first principles. The maxims of the law either were such first principles or were themselves derived from them. This view of the law was conformable to Aristotelian theories of knowledge current throughout the later medieval period and also drew on the neo-Platonist doctrines of the Roman jurists who "saw the principles in the cases and the cases in the principles and moved easily from the one to the other".<sup>20</sup>

I have suggested elsewhere an alternative logical format for this "rational" theory of law which is, in effect, a translation of it into contemporary language/logic terms based on Wittgenstein's notions that language is essentially mathematical calculus and that in any applications of such calculus meaning depends on purpose.<sup>21</sup> I do not think that detailed discussion of the logical format of the law is necessary here but a brief explanation is in order.

The central feature of this scheme is a logical apparatus of technical terms or concepts such as "nuisance" or "bargain". Many of these are arranged in sets where each can be internally or verbally defined by reference to the others. So a "contract" is defined in terms of "offer", "acceptance", "bargain" and (in some jurisdictions) "consideration". Certain key terms, such as "valid contract", each carry a number of rules with them which come into effect once it is shown that the term properly applies to a case.

Examples or instances are normally provided to show how the terms should be applied to cases and the Aristotelian technique of the "central instance" and "marginal instances" is the traditional approach to this question. This ability to be applied to cases by the technique of "central instances" is one of the best distinguishing marks which differentiates a rule from a principle. General principles, or maxims in Fortescue's terminology, function in two ways or at two points in such logical systems. First, they justify the system of rules and concepts which in that sense are derived from them. Secondly, they act as goals guiding the application of the concepts to actual cases. So the question as to whether a marginal instance should be treated as a "contract" or a "nuisance" or neither is ultimately decided by considering which alternative best realises the ends and purposes of the law.

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20 F. C. von Savigny, *On the Vocation of our Age for Legislation and Jurisprudence*, 47.

21 See especially Wittgenstein's utterances in conversations with his friends when his remarks are most illuminating, e.g., "... where lies the difference between chess and the syntax of language? I reply . . . solely in their application". See "*Ludwig Wittgenstein und der Wiener Kreis*", Shorthand notes of a conversation on formalism taken by Freidrich Waissman (ed McGuinness, 1967).

Examined from the viewpoint of such a system some of the traditional maxims are general principles and some are rules but many function in both ways. "*Respondeat superior*" for instance usually functions as a rule attached to the terms "employer", "scope of employment" and "fault". If you are characterised as an employer and the acts of your employee are negligent and within the scope of his employment, you pay the appropriate damages. But the maxim "*respondeat superior*" is also a moral principle about the responsibility of those who have ultimate control of an enterprise.

Many maxims also which appear to be, and indeed are, principles also act as concept/rule complexes of a very general nature applying at many points all over the legal calculus. Thus "*ex dolo malo non oritur actio*" is a principle but the concept of fraud or bad faith is a concept which applies in many legal transactions bringing various rules and presumptions into play that are adverse to the wrongdoers. The body of traditional maxims is indeed a wonderful place to try out any schema of legal form. In general, however, I will, for the remainder of the discussion in this paper, use the term maxim to refer to general principles, since that is the aspect that we are mainly discussing here. It must be kept in mind, of course, that a great many of them may function, either primarily or concurrently, as concepts and rules also.

This version of legal logic brings out the fact that moral principles function within the law as a necessary and integral part of the legal calculus, as Dworkin insists, but is more explicit as to how they function. The treatment of rules is also slightly different in that the notion of technical concepts is added and the manner in which concepts may be applied to cases is made a little more explicit. Otherwise I find Dworkin's distinguishing characteristics (that we weigh principles but that rules are either on or off like a light switch) helpful.<sup>22</sup>

#### THE SELECTION AND JUSTIFICATION OF MAXIMS

How do we select values for our legal system? To Savigny there was no real difficulty about the matter; we need only aim at the values which are in fact operative in society. The morals, and so the maxims, of the law can then be arrived at by observation; no moral philosophy is required.<sup>23</sup>

Most lawyers would heave a sigh of relief if only this were true but a little reflection shows that it is too simple. Savigny clearly did not wish the law to identify the values of society with what everybody wants. He is talking about the things that people consider good and worthwhile, ethical values. The values and wants of society are often in conflict, like the flesh and the spirit, and it is the business of the law to support so far as that is feasible.

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22 Dworkin, *Taking Rights Seriously* (1978), 26 ff.

23 Savigny, *op cit*, 27 ff and 46 ff.

We will no doubt use the values that people actually have but commonly held values are frequently vague, dogmatic and conflicting. Before they can be of use in the law we have to clarify them and even justify them as far as possible.

According to Plato moral beliefs are like the statues of Daedalus.<sup>24</sup> They fly away unless they are nailed down by good reasons. Moral principles and humanitarian impulses are vague and weak unless they are supported by well-considered theory. They will vanish in the hard realities of life and under the stony stare of cynical politics unless they are given the authority of truth.

We are doomed then, as always, to reflect and think on what we are doing, which in the present context means clarifying and giving reasons for our values. The choice of values and the defence of values are closely related questions and so will be treated together in the next section.

#### THE QUALIFICATIONS OF A GOOD LEGAL VALUE THEORY

We must begin by admitting that there is no consensus among philosophers as to how (or even whether) values can be justified. I think that a better case can be made for some moral theories than for others but there is no outright winner. Moral controversy tends to be like the caucus race in *Alice in Wonderland*, where everybody ran everywhere, everyone was a winner and everybody got a prize. If we are to benefit from moral theory in the law, we need to get some rules in order to evaluate the "runners" a little better. We must stop going in circles and develop a few criteria in order to see how the various theories of morality perform and whether they can be of use to us.

Fortunately, the justification of legal maxims is not quite the same thing as philosophical "proof". A pure philosophical justification of anything, since it has the claim of truth, must be developed very rigorously so as to satisfy the strictly critical enquirer that it is well-founded and that all objections have been answered. The lawyer may have to be content with much less. Ideally, of course, legal and philosophical justification should be the same, for legal claims too must stand up to scrutiny and attack. But law, unlike science, has needs which must be attended to immediately and cannot wait half a century till the truth emerges. An approximate solution must be developed to keep things going.

This sort of compromise with the ideal is a familiar thing in other aspects of the law. Ideally the accused should really be proved guilty before sentencing, facts should be perfectly known before liability is incurred, we should all act with meticulous carefulness so as not to harm one another and decisions in law should be perfectly just, realising all values and satisfying all parties. But we have to settle for a degree of

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24 *Meno* f.97.

certainty, a reasonable standard of behaviour and approximate justice. Legal justification can in some ways be more demanding than philosophical but is in this one respect less so. For legal purposes we are not trying to convince all philosophers that a theory is unexceptionable, we are only trying to persuade the populace in general, and lawyers in particular, that certain values are sufficiently well-founded for use in the law. Truth value is an important aspect of the argument but it is not the truth value of the philosopher, where every objection must be answered and every alternative weighed and considered. In law a value can be elected with much less qualification than this. And there are other considerations besides truth value which make a theory useful and attractive to lawyers. We may list them as follows:

1. The more truth value the better. In practical terms this means that a theory should at least be considered viable by a large number of qualified persons, and preferably by most of them.
2. Theory must be persuasive to lay people, or capable of being made so.
3. Theory must be able to deal with questions of legal interest. Lawyers, for example, are interested in the question of justice, above all other values, and in the question "why obey the law?" rather than "why be good?" Some moral theories are more apt for legal use than others in this respect.
4. All values of the law, not justice only, should be supported. Justice is not the only legal value. All kinds of "goods" and "bads" are encouraged and discouraged by the law even when they are not demanded. The common law did not reduce justice to fairness. The growth of moral scepticism and the theoretical difficulties involved in justifying specific value judgments have made it tempting (and popular) to adopt the attitude that law should not get into the business of substantive "goods" but concentrate on procedural fairness. I hope to show that there are serious disadvantages to such a proposal particularly in the area of human rights. A legal moral theory should therefore discuss, and hopefully justify, family values, educational, cultural and scientific aims, environmental attitudes and so forth.
5. Theory should, if possible, encourage social virtue. Law is not possible, or not easily possible, in a society where public duty and community service are unknown. Fit officers of the law would never be found in such a situation. Legal morality should therefore include and encourage civic virtues, service to society and a good public spirit generally.

Keeping these criteria in mind we can proceed to evaluate available theories that may be of use in establishing legal values.

#### AVAILABLE VARIETIES OF VALUE THEORY

All sorts of ethical theory have been propounded at one time or another. Values have been based on almost every faculty we have. They

have been said to be known by a strange sort of seeing (intuitionism), a special kind of feeling (moral sense), the propensity for self-preservation (Hobbes and more recently H. L. A. Hart), the desire to avoid pain and seek pleasure (hedonism) and, of course, by reason.

To discuss all of these adequately (or even inadequately) would require volumes and certainly be beyond the scope of this paper. It is only proposed here to outline a few basic types of moral theory and evaluate them as possible foundations for legal values.

Nothing need be said about intuitional or moral sense theories since they do not command much support in the academic community (criterion 1 above). This is not to say that such theories are wrong but only that they are unlikely to be persuasive (criterion 2). So we will proceed to consider other more likely candidates.

### A. Prudential Theories

These are theories that base moral behaviour on prudence, which is usually defined as enlightened self-interest.<sup>25</sup> This is not the classical virtue of *prudentia* which is practical wisdom but rather "mere prudence". So Hobbes and H. L. A. Hart assuming, no doubt correctly, that most people want to go on living, endeavour to show that obedience to law is necessary to ensure our survival. The adequacy of prudence as a foundation for morals will be questioned later but first a little more must be said about two forms of prudential theory, utilitarianism and social contract theory, because they are very much in the academic air at present and are both being strongly argued as suitable foundations for legal values.

#### UTILITARIANISM (INCLUDING ECONOMIC VALUE THEORY)

Utilitarian theory in one form or another assumes, and why not, that most of us prefer pleasure to pain, eating to starving, wealth to poverty, health to sickness and so on. Law, in so far as it promotes these things, ought then to be obeyed.

There are numerous theoretical difficulties about utilitarian theory which need not concern us here. The main objection, from the human rights point of view, is that minority welfare is not obviously guaranteed in utilitarian theories. It is argued, of course, in reply that the unhappiness of a minority may affect the well-being of the majority. This may be true, especially if the minority is sizeable or a powerful one, but it does not provide a big incentive to remember small or weak minorities and for that reason utilitarianism has seemed an unsatisfactory theory to liberal human rights advocates (such as John Rawls).<sup>26</sup>

25 John Rawls, *A Theory of Justice* (1972), 11. Note 4 on p 11 contains a useful set of references to works in the social contract tradition.

26 See, eg, Rawls, *op cit*, 25 ff. See also Dworkin, *A Matter of Principle* (1985), at p 100.

Equally serious is the objection that utilitarianism does not support educational and cultural values (the “city of pigs” objection). Mill’s famous reply is that the pleasures of the mind are always preferable to baser pleasures, since they are more long lasting and have no pain attached. This may be questioned by many who have had to “toil upwards in the night while their companions slept”. But there is a more serious objection. Mill argues that anyone who has tried both kinds of pleasure will prefer the “higher” kind. If this is a statement of fact, he should be able to name former rakes, now reformed, pounding the piano and the books. He should also show that he was unable to find a single happy rake who had formerly been an intellectual. He makes no attempt to do either of these things. Clearly this cultural bias is a natural law notion (of Greek origin) sneaking in by the back door.

Utilitarianism is weak, then, on cultural values and, as will be argued later, deficient in the area of civic virtue also.

Similar arguments weigh against economic justifications of legal values. Economic efficiency boils down to a single value, monetary wealth. Wealth is, indeed, an important value but it is not the only one and the other legal values, including justice, do not translate easily, if at all, into economic terms. The concept of economic efficiency has little to do with cultural values and it seems a poor incentive to civic virtue to inform people that good public service will increase the wealth of the community.

#### SOCIAL CONTRACT THEORY

Social contract theory, long considered dead, has made a considerable comeback in recent years largely due to the work of John Rawls. Rawls replaced the “noble savage”, an exploded myth, with the model of the unborn spirits, poised and ready to be incarnated into bodies and places unknown. These hovering wraiths about to enter society hammer out and agree upon some basic social rules which, they anticipate, will give each of them the best shake that they could reasonably hope for, given the demands of their fellows. This “best shake” Rawls calls fairness and he identifies it with justice.<sup>27</sup>

This is not a theory about the general good, like utilitarianism. It is a theory about justice which is designed to protect the rights of minorities and even of individuals. If a single person looking at the social set-up can show that his or her lot is not the best that he or she could get, and still satisfy the others, the system is unfair to that person and so unjust.

This model is developed not only to protect the underprivileged but even to provide a bias in their favour (positive action).<sup>28</sup> Good environmental policies are also promoted since a ruined environment is an

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<sup>27</sup> Rawls, *op cit*, see esp p 27 and p 30.

<sup>28</sup> Rawls, *op cit*, 78 ff in his discussion of the difference principle.

injustice to future generations.<sup>29</sup> Clearly Rawls's theory is intended to support human and even environmental rights and has been popular with advocates of liberal causes. It has the merits of currency and wide appeal and also relates easily to legal concerns especially the concept of justice. All these are important advantages. Nevertheless there are a number of significant objections.

The most damaging of these is that there seems to be a contrast between the hard bargaining by the spirits at the beginning of the contractual discussions and the humane conclusions at the end. We seem to have moved somehow from rational self-interest to something very like compassion for the downtrodden and concern even for future generations. One is led to suspect that a subtle translation of the word "fairness" has taken place and that the initial non-moral, calculating definition of justice has shifted into fairness based on value statements about the worth of human beings and possibly even of nature. If such a shift has not taken place, it is difficult to see how Rawls has answered the question "why obey the law?" especially when nobody is looking. It is easy to see why I might agree to an arrangement before I was born because it gave me the best prospect I could hope for at that stage of the proceedings. But once I know that I am not in some disadvantaged class why should I not break the arrangement by stealth or force if I can?

Rawls's theory is thus shaky as a foundation for justice, and it is even more unsatisfactory with regard to the other values of the law. This is not due to an oversight on Rawls's part. He appears to feel that sufficient agreement could not be reached on the subject of values; they must be treated as matters of taste, preferences only. The law cannot distinguish between them and must confine itself to the issue of fairness.<sup>30</sup> Rawls likewise provides no rationale for civic virtue. Contract theory shares this shortcoming with other prudential theories. It is very difficult for theories which begin with prudence to arrive at the notion of duty and impossible to get to sacrifice for the common good. "*Dulce et decorum est . . .*"<sup>31</sup> is not a prudential maxim.

It is possible, of course, that moral values, duty and civic virtue have no rationale and that we cannot recommend them by any good arguments. But we should first make sure that this is the case, and if it is, we

29 Rawls, *op cit*, 284 ff. Rawls does not exactly discuss environmental issues but they are implied in his notion of time preference, *e.g.*, "Each [generation] passes on to the next a fair equivalent in real capital as defined by the just savings principle . . . [and] . . . Capital is not only factories and machines and so on but . . . knowledge and culture . . ."

30 Rawls, *op cit*, 432. Rawls remarks that if someone considers the greatest good to be counting the blades of grass in his garden, we may marvel but cannot question his idea of the good.

31 Horace Odes. III.3: *Dulce et decorum est pro patria mori*.



should announce the valueless world openly and consistently—but that, of course, would imply a value judgment.

There remain the rationalist theories, and two types have currency and appeal, natural law and divine law theories. They have often been coupled together and I will suggest later that there is a good reason for this association.

### *B. Natural Law Theories*

The natural law approach to legal principles may be summarised by saying that, according to this view, there are certain fixed moral principles which we can know by human reason without revelation. This notion was the dominant justifying theory of law from the time of the Roman jurists until well into the nineteenth century. A shift of the intellectual climate in an anti-metaphysical direction, which became marked in the latter half of the nineteenth century, made natural law theory (along with the maxims) an endangered species; but it never became quite extinct and is currently making a considerable comeback. A very thorough modern discussion of the subject in philosophical (and generally favourable) terms was published in 1980<sup>32</sup> and it has again become quite fashionable to talk of natural law theory, or some version of it, as the only hope of preserving human rights.

Natural law theory, then, is current, and is considered a viable, or potentially viable, theory of rights. It can be stated in simple terms and is also clearly capable of giving an account of justice and saying why people should obey law. These are points in its favour so far as legal theorists are concerned.

There are however two critical questions that natural law doctrine must face. First, how are the first principles of natural law to be established? And, second, how are the more detailed rules (the changeable ones) to be derived from the immutable first axioms?

Classical natural law theory uses the method of contradiction to establish its first axioms<sup>33</sup> but it is not fashionable to argue in this way now and there is not much help for the moralist here even if the method were as sound as it seems. Some negative propositions are self-contradictory and so necessarily false but how do you go on to say what is true? Thus the famous refutation of scepticism (it must be false to say that nothing is true) even if it shows that scepticism is self-contradictory does not tell you what you can reasonably believe. So even if there is some sort of contradiction in denying that every man ought to do what is right (every man ought to do what is wrong does sound odd), we are not told what is right and it is hard to deduce particular moral rules from this first

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32 John Finnis, *Natural Law and Natural Rights* (1980).

33 *Summa Theologiae*. II, 1, Q 94 2nd article: "The first indemonstrable principle is that the same thing cannot be affirmed and denied at the same time". This is used immediately to derive the first principle of natural law.

axiom. It is possible, of course, (with David Hume)<sup>34</sup> to take the contradiction as being a conflict with our own nature. The first principles of natural law can then be established by asking ourselves if we can really doubt that we ought to do right, or care for our family or be good neighbours, preserve life and seek the truth.<sup>35</sup> For most people denying these things would be an impossibility. We regard anyone who can deny these things as sick or deficient in some way and call them psychopaths or moral lepers.

But is this a logical or a psychological fact? It is perhaps both, for although our moral coercion by our own nature is a fact, it is not a brute fact for it seems somehow reasonable to us to act morally; and when we affirm our moral judgments and our moral nature it seems somehow to be reasonable to do so. It is a reasonable choice. Hume makes a similar observation about our beliefs in the existence of things external to our mind and causation. After acknowledging that he has little choice but to believe these things, he goes on to remark that the choice is nonetheless rational because to believe otherwise, with things and events happening at random, would make reasoning impossible. To go along with order, as nature dictates, instead of fairyland, is therefore in some sense rational. A similar argument is implied as to the choice between a valueless world and the moral world which our nature dictates to us anyway.<sup>36</sup>

It is possible then, as Finnis maintains, that the basic axioms of natural law may be regarded in some sense as self-evident but we are still left with the problem of deriving from them rules which will be particular enough to be useful. St. Thomas Aquinas makes it quite clear that although there can be no debate about the axioms of natural law, the derivative rules both are mutable and allow for difference of opinion. Unfortunately they seem to leave rather a lot of room for argument; so much so that it may be questioned whether they are any use at all when we come down to cases.

I do not entirely agree with this criticism. The stars are very useful in providing a sense of direction even if they cannot tell you the way to Ahoghill. Nevertheless, it must be admitted that general moral values, like the heavenly bodies, need a little assistance, a signpost or two, to give direction in particular problems.

In former times particulars were derived from the first principles by long chains of deductive reasoning. There is little confidence in such

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34 "These (sceptical) principles may flourish . . . in the schools, when it is indeed difficult if not impossible to refute them. But as soon as they leave the shade and . . . are put in opposition to the most powerful principles of our nature, they vanish like smoke and leave the most determined sceptic in the same condition as other mortals". See *Humes Enquiries* (3rd ed, 1975), 159.

35 Finnis, *op cit*, 64 ff. See also Finnis, *Scepticism, Self-Refutation and the Good of Truth in Law, Morality and Society. Essays in honour of H. L. A. Hart* (ed P. M. S. Hacker and J. Raz, 1987).

36 Hume, *A Treatise on Human Nature* (ed Selby-Bigge, 1928 printing), 268.

proceedings today, and on close examination of such arguments it appears that many additional premises (usually empirical generalisations) are brought in at critical points.

In actual moral arguments, then, general notions of the natural law type are supplemented, filled out so to speak, by all sorts of factual propositions. And they have been particularly dependent on concepts derived from religious sources. These are usually models, ideal pictures or blueprints, of entities like man, marriage, the community or even the universe. Such religious sources have been particularly important in the development of the common law which derived ideal models from two distinct theologies, Greek idealism and biblical monotheism.

It is no accident then (or rather it is a fortunate accident) that natural law theory has developed in close association with theological sources, which supplemented its rather bare general propositions with paradigms of ideal behaviour and ideal entities.

Natural law theory, in sum, has much to commend it to the legal theorist. It is defensible, readily made popular, well adapted to the particular problems of the law, supportive of common values (including cultural ones), and capable of achieving the notion of duty and service going beyond mere self-interest. Nevertheless, its bare forms need to be given substance from other sources of which the most important have been theological ones. This seems an appropriate point to consider the divine law approach of legal values.

### *C. Theological or Ontological Theories*

If it is uncomfortable for lawyers to get into moral philosophy, it must be more so to be drawn into theology, but the theological dimension here, as elsewhere, is hard to escape. Scratch below the surface of any discipline and you find a philosophical problem. Dig a little deeper and, like it or not, you are into theology. But legal theory, when it borrows theological ideas from other sources, adapts what it borrows. Juristic thinkers have always followed the example of Procrustes, truncating and stretching concepts to make them suitable for use in the law.

Ancient codes often claim divine authority<sup>37</sup> without drawing much on the religious beliefs of their time. We may speculate as to the reasons for this but such pretensions are not of much use to jurists although they may encourage people to obey the law. Two characteristics seem important so far as legal theory is concerned. The first is rationality. One of the things that distinguishes the rule of law from the edicts of despots is the appeal to reason. Dogmatic beliefs will not then be much use to legal theorists unless everyone in the community accepts them blindly, which is seldom the case. But a reasoned, reflective approach to dogma is

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37 See the prologue to the Code of Hammurabi. Driver and Mills, *The Babylonian Laws* (1955), 6-14.

another matter and jurists have made good use of such theological materials.

The second, and major, requirement of these theological sources was that they should be able to provide vivid pictures or models of the universe and its functions, in short ontologies or accounts of "the way that things are". Ontological religions begin by showing how things are and then go on to draw ethical and practical conclusions from them. Philosophers tell us that you cannot legitimately derive "ought" from "is", and as a purely logical matter that is true. But we all know that "is" is vitally important to "ought". It is precisely because their ontologies are different that hindu and stoic and Judaeo-Christian ethics are different. Furthermore there is nothing illogical about it. The transition is legitimate because the factual matter is inserted into the ethical premises filling them out and making them more concrete. It is indeed at this point that natural law and the theological ontologies complement one another. The rather bare and general duties to do right, support the family, seek truth and so on are fleshed out and put in touch with real problems by ideal pictures or models of man and his universe taken from theological sources.

So the stoics gave to the law their picture of the world as the expression of a mind, or the development of a thought. Man was seen as a microscopic version of this intellectual cosmos, a little particle of the universal mind and temporarily separated out from it. The ethical implications of such a view are obvious. It is man's duty to live in accordance with the divine nature and all earthly things are to be made to resemble as closely as possible their divine exemplars. Mind, thought, and intellectual things generally, are deemed all-important. Human beings also, since they share in the divine intellect, are to be respected. Education and science are man's duty and mankind's hope. Slavery is, of course, wrong.

There is a good deal in the pantheistic religion of the stoa that is not compatible with law. Its virtual denial of the reality of evil indeed makes the efforts of the law to punish evil-doers seem paradoxical. But the Roman jurisconsults ignored what they did not like and took and used what they thought would suit them for their own purposes. They developed legal science along stoic lines, endeavouring to approximate human law to divine justice, arranging it in a rational form and generally steering law in a humane direction. Many of the maxims of the common law were taken from their works.

The Common and Canon lawyers adopted this Roman jurisprudence with enthusiasm but blended vivid Biblical images into the Greek original. In this way they were doing the same thing that educated men in other fields were attempting throughout the middle ages. They harmonised Greek idealism with the Biblical doctrines of a personal God, the creator of a beautiful and wonderful world, of man made in God's image, of sin and forgiveness and so forth, all expressed in the powerful

symbols of the garden, the serpent, the tower of Babel, Adam's rib and the rainbow. The Biblical doctrines were largely inimical to the Greek point of view but they were fitted together by the medieval lawyers and generally got along very well. The Biblical emphasis on person as opposed to mere intellect, on the reality and worth of the material universe, on sin, repentance and forgiveness as opposed to re-education, filled out and corrected the excessive intellectualism of the stoa without seriously detracting from its emphasis on science and education.

It is from these two theological sources azeotropically<sup>38</sup> blended together in a remarkable way that the common law developed its most powerful ideals. These pictorial and symbolic ideas lie behind the maxims of the law, providing them with their justification and their ultimate meaning. If the first principles of the law are its maxims, the law can neither be understood nor justified unless we can establish the views of the world, the ontologies, which underlie them. The only satisfactory reason for treating someone fairly is seeing in them something of value. The only adequate argument for environmental protection is reverence for the universe as a marvel of creation. Otherwise both are only expendable resources.

John Finnis has argued, and I think persuasively, that natural law is explained and supported by a theological context.<sup>39</sup> He develops (and argues for) a set of rather general ideas about the creator (the un-caused first cause) and designer of the universe. What is being suggested here is that theological notions are not a desirable optional extra but a necessary part of a complete view of the law; that they are not vague philosophical doctrines but decidedly particular and vivid concepts which fill out the bare forms of the notion of duty; that they are already built into the law, and finally that it will not function well, if at all, without them.

If this thesis is correct, then we are obliged as legal theorists to become familiar not only with moral notions but with theological notions as well.

I do not propose here to discuss at length the justification of theological propositions and views. It is a fascinating subject and by no means an impossible project. Theological statements are not, as Wittgenstein's earlier writings suggested, either unverifiable or meaningless. They are rather vivid symbolic pictures or models applied to interpret our universe so that we may know how to live in it. In short, theology can be described in Wittgensteinian terms as applied calculus.

As to the justification of such interpretations the same considerations hold as do with moral views. They need only be justified so far as is

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38 An azeotrope is a mixture of two different substances where there is no chemical reaction but nevertheless the two thereafter seem to act as a single substance with different properties from either of its constituents.

39 Finnis, *op cit*, 371 ff.

needed for the purpose in hand, which in our case is the law. We may even regard them as built in categories of the mind, a natural theology supplementing the natural law. Finally, they are susceptible of some kind of rational justification. The picture fits or fits sufficiently well for the purpose of the enterprise and if you should turn out to be wrong what the heck! You have lost nothing.

#### CONCLUSION—ADAPTING THE MAXIMS FOR MODERN USE

We have arrived at a description of legal theory where the central logical apparatus, sets of technical words with associated rules, are ultimately derived from and controlled in their application by concepts of a moral nature expressed in a body of legal maxims. These maxims even when they are principles rather than rules are capable of ready application to particular situations to direct and justify decisions. Such maxims are themselves derived from general notions of morality which in turn are both explained and filled out by theological or ontological ideas, blueprints of the universe and its contents, especially man.

If we conclude that such a formula is a good one and that the establishment of a body of maxims is an important aspect of providing a more adequate form for the law, we need to go further and decide how we are going to set about this task. Simple restoration of the traditional corpus of maxims is unlikely to be helpful. That it was thus in the past does not mean that it should still be so in the present. If it were otherwise we should still work on the principle that the earth is flat. The maxims are first principles of law but they are not the unchangeable principles of natural law and so must keep up with the times. We live in a different world from our forefathers and our maxims must reflect that fact. The legal community in carrying out its responsibility to develop and update the law must provide a body of first principles, maxims if you like, which are proper to our own times and circumstances.

We can either start afresh and build a new set of twentieth century saws and sayings or else radically refurbish the old ones. The latter, I would submit, is the clear choice. It is always easier to improve on what you have than to start all over again. Besides, despite their age and the long time they have spent on the shelf, most of them are in good condition. With a few additions and subtractions and a great deal in the way of new applications they would, I am sure, serve us well.

This enterprise, if it is to be rational, must be conducted in the context of moral theory and will require the reconstruction of legal "theology" or ontology. Here again there are choices and again I would opt for working up the old resources of the common law, the Biblical and Greek ontologies. They are rich sources of vivid and compelling images with wide if not universal appeal. They are apt for popular presentation and well capable of justification sufficient for legal purposes. On top of all this they are already incorporated into the very fabric of the law, adapted and ready for use.

This use of religious materials, especially when they are taken from particular religions, might appear to infringe the rights and coerce the conscience of individuals of other religious traditions or of none; but this, I would suggest, is not really the case.

Legal "theology", the modicum of ontological images needed to support law, is an extract from certain religious resources for legal purposes and in general is not only inoffensive but appealing to people of all religious persuasions and compatible with their own views. Even those who do not subscribe to any religious tradition have no cause for serious complaint. One of the most vital tenets of both the Greek and Hebrew traditions (however misperceived and ignored at times by their adherents) is respect for persons and for their opinions.<sup>40</sup> And the propositions in question are also such that those who cannot believe them might well wish they could do so or at least that others believed them. If the choice lies between law based on well established (and appealing) ideals which promote humane values as against law based on prudence only, it is surely no hardship and no loss to go along with such ideals and such values on practical grounds even if you consider that they have no foundation in reason.<sup>41</sup>

How are we to recover the lost ground, restore the maxims and make lawyers competent to handle such principles and concepts? The first step is to redirect legal science. We should stop poring over the opinions of judges, John Austin fashion, inductively looking for legal logic and rather start supplying the courts with a better legal calculus for deciding cases. This involves a number of things but especially supplying the legal apparatus with an adequate body of principles and, if possible, expressing those principles in memorable form. Such a task requires the cooperation of all legal scholars and teachers, not merely those in the jurisprudence department. Jurisprudence is not something separate from the other subjects; its unique business is providing the philosophical resources for them. In terms of teaching, the jurisprudence courses should provide the students with the conceptual tools that they will need to understand what the criminal law and property teachers are doing. The end product we are all aiming at is an apparatus rich in terms, certain in application over a wide range of commonly recurring instances, well grounded in appealing and defensible moral and ontological concepts—and a profession capable of appreciating and using such a vehicle.

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40 The Hebrew tradition does not agree with the Socratic view that evil is lack of knowledge and insists that there is culpable ignorance, *i.e.*, due to perversity. Nevertheless the reasoned argument is always present, *e.g.*, in the prophetic message. The notion of the holiness of God *i.e.* that God is above our understanding and so should not be represented by images, also makes for tolerance since our knowledge is limited. The second commandment, forbidding graven images, has thus been interpreted as a declaration of academic humility.

41 "This transcendental stuff is nonsense, but we must never let ordinary people find that out". Speech from the floor during a Law and Religion section discussion of the American Association of Law Schools Meeting in Atlanta, Jan 1979.

The project is perfectly feasible once we make up our minds to do it. We could see maxims once more prominent in the legal texts and opinions; maxims and applications taught again in all the classrooms of the law schools; and maximology (including legal ethics and ontology) an important part of the jurisprudence course (required). We might even see modern maxim books published—and people lining up to buy them. Waxing more fervid still once can envisage the maxim page (eagerly read) in every legal periodical. Not merely fervid but now fevered one can foresee teams of judges, solicitors, barristers, law students and even law teachers pitted against one another in a popular TV panel game “Spot the Maxim”. In a final prophetic ecstasy I see the great moment of all annual law association meetings, the Maxim of the Year award. For this great day I have my maxim ready—in Old English it reads—

*Selde grendeth well the lothe  
Selde pledeth well the wrothe*<sup>42</sup>.

In its original form it means that the lazy lawyer does not prepare well and the angry lawyer does not perform well. My modern application, which I submit for a prize, is to comment that proper preparation, fine grinding if you like, involves familiarity with the law down to its roots, and that the opposite of wrath is not coolness but compassion.

STANLEY McQUADE\*

#### AXIOMS CONCERNING THE JUDICIAL OFFICE

*De fide et de officio judicis non recipitur quaestio sed de scientia sive de errore juris sive facta.*  
The good faith and office of a judge cannot be questioned, only his knowledge of the law or the facts.

*Judicium a non suo iudice datum nullius est momento.*  
Anything in a judgement which goes beyond what is relevant to the occasion carries no weight.

*Boni iudicis est ampliare jurisdictionem.*  
A good judge should enlarge his jurisdiction.

*Aucupia verborum sunt iudice indigne.*  
Quibbling about words is unseemly in a judge.

*Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.*  
Judges do not decide matters of fact, jurors do not decide on questions of law.

*Nemo debet esse iudex in sua propria causa*  
No one should be a judge in his own cause.

*Audi alteram partem.*  
Hear both sides.

*In omnibus poenalibus iudiciis et aetati et imprudentiae succurritur.*  
In penal judgments consideration should be given to age and inexperience.

*Tutius semper est errare in acquietando quam in puniendo ex parte misericordiae quam ex parte justitiae.*  
It is safer to err in acquitting rather than in punishing, on the side of mercy rather than justice.

42 Cited W. C. Bollard, *The Year Books* (1921), at p 77. Quoted by Serjeant Matford to opposing counsel who had lost his temper.

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*Discretio est discernere per Legem quid sit justum.*

Discretion is discerning what is just by means of the Law.

*In favorem libertatis et innocenti omnia praesumuntur.*

All things are presumed in favour of liberty and innocence.

*In judicio non creditur nisi juratis.*

The only things that count in a judgment are those that have been weighed.

#### AXIOMS RELATING TO PROPERTY LAW

*Aedificare in tuo proprio solo non licet quod alteri nocet.*

Build on your property but not so as to harm that of another.

*Alienatio rei praefertur juri accrescendi.*

The law favours alienation of property rather than accumulation.

*Aliud est possidere, aliud esse in possessione.*

It is one thing to possess—another to be in possession.

*Bonae fidei possessor in id tantum quod ad se pervenerit tenetur.*

A bona fide possessor, so far as is appropriate, keeps.

*Dona clandestina sunt semper suspiciosa.*

Clandestine gifts are always suspicious.

*Quando plus fit quam fieri debet videtur etiam illud fieri quod faciendum est.*

When you do more than you need you are deemed to have done what you ought.

*Quod ab initio vitiosum est non potest tractu temporis convalescere.*

What was bad from the beginning doesn't get any better with time.

*Partus sequitur ventrem.*

The offspring goes with the mother.

*Non dat qui non habet.*

You can't give what you haven't got.

*Transit terra cum onere.*

The incumbrances go with the land.

*Res sua nemini servat.*

You can't transact a mortgage with yourself.

#### CONSTITUTIONAL PRINCIPLES

*Domus sua est tutissimum refugium.*

A man's home is his castle.

*Nemo patriam in qua natus est exuere possit.*

No one is allowed to forswear allegiance to their native land.

*Protectio trahit subjectionem et subjectio protectionem.*

Protection implies subjection and subjection protection.

*Salus populi suprema lex.*

The welfare of the people is the supreme law.

*Perpetua lex est nulla lex.*

A perpetual law is invalid.

*Qui lege communi derogant, stricte interpretantur.*

Any things which abrogate common law are to be strictly interpreted.

*Nova constitutio, futuris formam imponere debet non praeteritis.*

A new statute should govern the future not the past.

## CONTRACTS

*Incaute factum pro non facto habetur.*  
Negligently done is deemed not done.

*Novatio non praesumitur.*  
Renewal is not presumed.

*Pactis privatis juri publico non derogatur.*  
Private contracts do not derogate from public law.

*Quando abest provisio partis adest provisio Legis.*  
What the parties fail to provide, the law adds.

*Pacta quae contra Leges vel contra bonos mores fiunt non sunt observanda.*  
Contracts contrary to law and good morals are not to be carried out.

*In contractis tacite insunt quae sunt moris et consuetudinis.*  
Usual and customary provisions will be read into contracts.

*Nihil perfectum dum aliquid restat agendum.*  
Nothing is done till it is completed.

*Delegatus debitor est odiosus in lege.*  
A delegate debtor is hateful in law.

*Simplex commendatio non obligat.*  
To "puff" is not to warrant.

*Scientia utrinque per pares contrahentes facit.*  
Equal knowledge makes the contractors equal.

*Vicarius non habet vicarium.*  
A delegate can't delegate.

*Aliud est celare, aliud est tacere.*  
It is one thing to be silent, another to conceal.

*Clausulae inconsuetae semper inducunt suspicionem.*  
Unusual clauses always excite suspicion.

## CRIMINAL LAW

*Spoliatus debet ante omnia restitui.*  
Restitution before all else.

*Nemo tenetur seipsum accusare.*  
No one is required to accuse himself.

## EVIDENCE

*Quod non apparet non est.*  
What isn't seen doesn't exist.

*Stabat praesumptio donec probetur in contrarium.*  
Presumptions stand till the contrary is proved.

*Vox emissa volat—litera scripta manet.*  
The spoken word flies—the written is permanent.

*Acta exteriora indicant interiora secreta.*  
External acts reveal the inner secrets.

*Affirmante non negante incumbit probatio.*  
He who affirms, not he who denies, has the burden of proof.

*Allegans contraria non est audiendus.*  
A witness who contradicts himself is not to be heard.

*Allegare non debuit quod probatum non relevant.*  
You ought not to allege what, even if proved, would not be relevant.

*Index animi sermo.*

Intention is manifested by words.

*Lex non requirit verificare quod apparet curiae.*

The law does not require proof of the obvious.

*Allegans suam turpitudinem non est audiendus.*

A witness alleging his wickedness shall not be heard.

#### INHERITANCE AND WILLS

*Haeres legitimus est quem nuptiae demonstrant.*

The legitimate heir is the one shown to be so by marriage.

*Qui in testamentis ita sunt scripta ut intelligi non possint ac si scripta non essent.*

Anything in a will which is unintelligible is as if it wasn't written.

*Nemo praesumitur alienam posteritatem suae praetulisse.*

No one is presumed to prefer another's posterity to his own.

*Ambulatoria est voluntas defuncti usque ad supremam vitae exitum.*

The testator can change his will right up till his last breath.

*Haereditas numquam ascendit.*

Heredity never ascends.

*Linea recta semper praefertur transversali.*

Straight lines are always preferred to transverse.

#### INTERPRETATION

*Qui haeret in litera haeret in cortice.*

Literal interpretation never gets below the skin.

*Noscitur a sociis.*

A word is known by the company it keeps.

*Qui non valeant singula conjuncta juvant.*

Things which are meaningless on their own, cry out the meaning when put together.

*Maledicta expositio quae corrumpit textum.*

It is a bad interpretation that twists the text.

*Semper in dubiis benigniora praeferenda.*

In doubt the kindlier interpretation is to be preferred.

*Generalia specialia derogant.*

Particular clauses derogate from general ones.

*Certum est quod certum reddi potest.*

What can be rendered certain is certain.

*Divinatio non interpretatio est quae omnino recedit a littera.*

To depart altogether from the literal meaning is second sight not interpretation.

*Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit.*

No one can rightly understand any part who has not read through the whole again and again.

*Benignae sunt interpretationes propter simplicitatem laicorum ut res magis valeat quam pereat.*

Interpretations should be kindly, in view of the inexperience of layfolk, so that their transactions should stand and not fall.

#### OF LAW IN GENERAL

*Ratio enim anima legis, cessante ratione cessat et lex.*

Reason is the life's breath of the law, when the reason changes so does the law.

*Lex non cogit ad impossibilia.*

The law does not require the impossible.

*Ignorantia facti excusat, ignorantia legis non excusat.*

Ignorance of fact excuses, ignorance of law does not.

*Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Every innovation (in the law) causes more trouble by its novelty than benefit from its utility.

*Misera est servitus ubi jus est vagum et incertum.*

The service of the law is wretched when the law is vague and uncertain.

*Qui rationem in omnibus quaerunt rationem subvertunt.*

One who seeks reasons for everything undermines reason.

*Lex plus laudetur quando ratione probatur.*

The law is most esteemed when it is supported by reason.

*Nihil quod inconueniens est licitum.*

Nothing which is unseemly is permitted.

*Nimia subtilitas in jure reprobatur et talia certitudo certitudinem confundit.*

Excessive subtlety in law is to be avoided, too much certainty confounds certainty.

*Apices juris non sunt jura.*

Very fine points of law are not the law.

*Summum jus summa injuria.*

To go all the way in law is a sure path to harm.

*Non in tabulis est jus.*

The whole of the law is not contained in the books.

*Qui peccat ebrius luat sobrius.*

Sin drunk, pay sober.

*Via trita via tuta.*

The well trodden path is the safe one.

*Qui non habet in aere luat in corpore.*

If you have no money, you pay with your body.

#### MARRIAGE AND FAMILY

*Uxor non est sui juris sed sub potestate viri.*

A wife is under the authority of her husband.

*Matrimonia debent esse libera.*

Marriage should be of one's own free will.

*Consensus non concubitus facit matrimonium.*

Consent not cohabitation makes a marriage.

*Consentire matrimonio non possunt infra annos nobiles.*

Parties below marriagable age can't consent to marriage.

*Omnia quae sunt uxoris sunt ipsius viri.*

A wife's property belongs to her husband.

*Pater est quem nuptiae demonstrant.*

Your father is the husband of your mother.

*Whoso bolleth myn kyn. The calf is myn.*

My cow, my calf (applied to presumption of legitimacy).

#### RELIGION

*Summa ratio est quae pro religione facit.*

To promote religion is the supreme legal principle.

*Ecclesia meliorari non deteriorari potest.*

The church is to be bettered not diminished.

*Dies dominicus non est juridicus.*

The Lord's Day is not a day for legal business.

## INSANITY

*Furiosi nulla voluntas est.*

The insane do not have free will.

*Furiosus solo furore punitur.*

A madman is punished only by his madness.

*Furiosus absentis loco est.*

The insane are not present (i.e. can't be witnesses).

## PROCEDURE

*Ordine placitande servato servatur et jus.*

When proper procedure is observed, the law is served.

*Interest reipublicae ut finis sit litium.*

It is in the public interest that litigation should not go on and on.

*Qui sentit commodum sentire debet et onus.*

He who reaps the benefit should carry the burden.

*Abusus non tollit usum.*

Abuse doesn't argue against (proper) use.

*Ad ea quae frequentius accidunt jura adaptantur.*

The laws are adapted to things which happen frequently.

*Qui non prohibet quod prohibere potest assentire videtur.*

If you don't put a stop to something, when you could, you are deemed to concur with it.

*Malitia supplet aetatem.*

Malice causes minors to be deemed of age.

*Lex citius tolerare vult privatum damnum quam publicum malum.*

The law is more disposed to tolerate a private loss than a public evil.

*Consensus tollit errorem.*

Consent takes away error.

*In casu extremae necessitatis omnia sunt communia.*

In cases of extreme necessity, everything is in common.

*Lex spectat naturae ordinem.*

The law has regard to the order of nature.

*Angliae jura in omni casu libertate dant favorem.*

The laws of England in all cases of liberty are favourable.

*Cogitationis poenam nemo patitur.*

The thoughts and intents of men are not punishable.

*Ubi damna dantur, victus victori in expensis condemnari debet.*

When damages are given, the loser ought to be condemned to pay the costs of the victor.

## TORTS

*Actio non datur non damnificando.*

No action without damage.

*Actus Dei nemini nocet.*

You can't complain about "Act of God".

*Injuria non excusat injuriam.*

One injury does not excuse another.

*Lex non favet votis delicatorem.*

The law does not encourage the whims of the fastidious.

*Qui jure suo utitur neminem idedat.*

You are entitled to exercise your rights.

*Qui facit per alium facit per se.*

To act through another is as if you acted yourself.

*Remoto impedimento emergit actio.*

When the lights turn green you should go.

*Corporalis injuria non recipit aestimationem de futuro.*

You are not allowed to speculate on future bodily harm.

*Non decipitur qui scit se decipi.*

You cannot be knowingly deceived.

*Alterius circumventio alii non praebet actio.*

One person getting the better of another is no ground for an action.

*Injuria non praesumitur.*

Injury must be proved.

*Qui vult decipi decipiatur.*

If you ask for it (to be fooled) you'll get it.

*Fraus est celare fraudem.*

It is fraud to conceal fraud.

*Nemo tenetur divinare.*

No one is expected to have a crystal ball.

*Qui tacet consentire videtur.*

Silence implies consent.

*Intentia caeca mala.*

Blind intention (recklessness) is wicked.