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A NEW LOOK AT THE NATURAL LAW OF ST. THOMAS AQUINAS

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Controversy continues among legal scholars as to which philosophy should guide the development of law. The three philosophies perhaps most commonly advanced are those based on natural law, on legal positivism, and on realism. Some commentators have taken the view that these philosophies are incompatible.[1] An effort will be made in this discussion to demonstrate that this may not necessarily be so. It is the author's specific objective to comment on some new ideas relating Thomistic natural law to legal positivism and legal realism, and to explore the natural law theory as the basis of a world legal order. In so doing it will be useful to review the contribution made to legal philosophy by St. Thomas, to analyze his legal theories, and to see what meaning they have today. This is a convenient point of departure because St. Thomas took the theories of the Greek and Stoic philosophers and moulded them into concise principles that have formed the basis of most legal philosophic writing since his time.

THE ENVIRONMENT OF THOMISTIC NATURAL LAW

St. Thomas lived from 1224 to 1274 A.D., a period which saw Europe emerging from the so-called dark ages. Thomas, far from being a cloistered monk, was acutely aware of the political and social changes taking place around him. The student of his work cannot help but be amazed at the brilliance and range of his thinking and by his enormous output. Fortunately Thomas was permitted to remain an essentially independent scholar and therefore had the full opportunity of developing his philosophical ideas. First, last, and always, however, St. Thomas was a theologian. All of his writing was directed toward that end and his words on other matters were subordinate to it. It is somewhat anomalous that his theory of natural law, which forms a relatively small part of his monumental *Summa Theologica,* should have had such an impact on legal philosophy. Just as the *Summa* was unfinished, his theory of natural law was not completely developed, a fact that has caused much difficulty for his commentators.

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[1] See, *e.g.*, MARITAIN, ST. THOMAS AQUINAS 54 (1958).

THE NATURAL LAW OF ST. THOMAS

St. Thomas defines law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[2] Note that for Thomas there is no direct tie between law and theology. His definition appears to be technically correct and

[2] AQUINAS, SUMMA THEOLOGICA, pt. I of pt. II, Q. 90, art. 4 (Eng. Dominion Province transl. 1947) [hereinafter cited as S.T., *e.g.*: I-II S.T. 90, 4]. The development of this definition can be followed through the articles of Question 90: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting . . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts . . . . " I-II S.T. 90, 1. The latter statement is of great significance; it demonstrates the importance that Thomas attaches to the function of human reason. I-II S.T. 90, 2:

> [T]he law must needs regard principally the relationship to happiness. . . . Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.

I-II S.T. 90, 4:

> A law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.

does not suffer from an apparent error as befell Austin's definition of law based on the command theory.

Thomas classifies law[3] into *eternal law*—the dictates of divine reason governing the whole community of the universe; *divine law*—rules derived from eternal law and made known by revelation; *natural law*—the participation of the eternal law in rational creatures; and *human law*—particular determinations for the guidance of human activity, devised by human reason, proceeding from the precepts of natural law, and which may be derived from eternal law if based on right reason.[4] It is thus seen that, according to St. Thomas, divine law, natural law, and much of human law are based on the eternal law, but that natural law is distinguished from divine law, the former constituting intrinsic eternal law and the latter extrinsic eternal law.

St. Thomas develops his first principles of natural law in true Aristotelian manner. Recognizing that in demonstrating the truth of any principle it is necessary to rely on prior demonstrable truths until finally the first truth is reached which is incapable of being demonstrated, he states a fundamental proposition which he claims is self-evident because its predicate is contained in the notion of its subject.[5] He says:

> Now as *being* is the first thing that falls under the apprehension simply, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle in the practical reason is the one founded on the notion of good, viz., that

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[3] *Id.* Q. 91.

[4] *Id.* Q. 93, 3.

[5] St. Thomas cites as an example of an undemonstrable truth in the speculative order that the same thing cannot be affirmed and denied at the same time. A. E. Taylor gives Aristotle's explanation of first principles in these words: "[S]uccessive repetitions of the same sense perceptions give rise to a single experience and it is by reflection on experience that we become aware of the most ultimate truths." TAYLOR, ARISTOTLE 53 (1943). A combination of intellectual and intuitive induction from sense perception seems to take place. Gilson puts it this way:

> The human intellect possesses therefore a light just sufficient in order to acquire the knowledge of the intelligibles to which it can raise itself by means of sensible things. . . . In a certain sense, indeed, we possess in us the germ of all knowledge . . . . These pre-formed seeds, of which we have natural knowledge, are first principles . . . . [T]hey are the first conceptions which our intellect forms when we enter into contact with the sensible. . . . The actual intellection of principles is no more innate in us than are the conclusions of our deductive reasoning. . . . But while we discover the former spontaneously, we have to acquire the latter at the price of our research.

GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS 215-16 (1956). This approach to first principles in the practical order appears to have remained relatively free from criticism.

> *good is that which all things seek after.* Hence this is the first precept of law, that *good is to be done and pursued and evil is to be avoided.*[6]

This is the foundation on which the natural law theory of St. Thomas Aquinas is based and means simply that it is man's essential nature to follow reason and to do good and avoid evil.

In this same context, St. Thomas lists several examples of things "apprehended as good to which man has a natural inclination" including (1) conservation of life; (2) procreation and education of offspring; (3) knowledge of truth (avoidance of ignorance); (4) social existence in the sense of respecting the basic rights of others; and (5) things of like nature.[7] Is this what Thomas meant by the natural law? Did he mean more than this or less than this? These questions have caused controversy since the day St. Thomas died. It seems safe to say that the primary principles and the natural inclinations specified above are, indeed, unchanging and common to all humanity, immutable and universal, and thus meet the two tests that the natural law must pass.[8] If it is assumed that Thomas states the natural law by saying only that man should follow reason and do good and avoid evil, then the substance of the law becomes so vague that it has very little meaning or value. On the other hand, if it is assumed that he intended that the natural law include more detailed precepts such as the prohibition against taking human life, then his theory of natural law must fail because the more detailed precepts patently cannot pass the tests for natural law principles that he himself has established—a necessarily fatal defect. Extension of fundamental natural law to cover precepts against the taking of human life and other specific forms of conduct is exactly the mistake that many so-called natural law philosophers and commentators on St. Thomas have made, and in so doing they have performed a great disservice to him.[9] That this should have happened is readily understandable because, as has been said previously, Thomas did not fully develop his legal theories and his exposition of some of them is therefore not entirely clear. His terminology is inexact, and furthermore Thomas frequently digresses from his exposition on law into theological and sociological matters with dubious results if his treatise is to be thought of as a legal philosophy for the ages.[10]

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[6] I-II S.T. 94, 2.

[7] *Ibid.*

[8] *Id.* Q. 94, 4-5.

[9] The list is long and varied. It ranges all the way from Grotius and Locke to Maritain and Rommen and on to lesser scholars.

[10] Three instances of statements necessarily limited to short run sociology are his comments on slavery, monarchy, and the role of the judiciary.

By employing selectively the terminology of Adler,[11] and by adopting the well developed arguments of a more recent analyst of Thomistic natural law,[12] it is possible to develop some order out of the chaos and perhaps to apply the theories of the good saint to useful purpose. Let us designate as *principles* those primary and un-

[11] See Adler, *A Question about Law*, in ESSAYS ON THOMISM 205 (Brennan ed. 1942).
[12] MacGuigan, *St. Thomas and Legal Obligation*, 35 NEW SCHOLASTICISM 281 (1961); MacGuigan, *Positive Law and the Moral Law*, 2 CURRENT LAW AND SOCIAL PROBLEMS 89 (Macdonald ed. 1961).

demonstrable truths previously referred to, namely, that it is man's essential nature to follow reason and do good and avoid evil, as well as the concomitant things to which man has a natural inclination —preservation of life, procreation, knowledge, and congenial social existence. Thus we have specified the substantive content of the natural law itself in terms of principles, which are considered to be immutable, universal, immediately known, and rooted in human nature itself. Necessary conclusions from these principles we will call *precepts.* Included in this category would be essential conclusions deduced from natural law, such as the prohibitions against murder, theft, and lying. Contingent general determinations from the precepts, such as other less general parts of human positive law, are designated as *rules* and might be illustrated by negligence laws and minor penal statutes. Singular applications of these rules, for example judicial decisions in particular cases, we will specify as *decisions.*

Principles, then, are truths that are arrived at intuitively by an operation of the intellect; they are not deduced through the process of reasoning. Precepts, on the other hand, are the necessary conclusions deduced by reason from the principles. Rules and decisions are the general and particular determinations reached by a deductive or inductive process from the precepts. According to this method of terminology, precepts, rules, and decisions may have their ultimate source in the natural law but are not technically part of it. Although the terms used by St. Thomas himself in his explanation of natural law and human law are somewhat indefinite, it does seem entirely possible to interpret his words in the manner described above without doing violence to his fundamental ideas.[13] This approach provides a concept of natural law reduced to principles which, though arrived at by metaphysical techniques, is not tied to theology and is sufficiently detailed to form the basis of a working body of precepts.

THE ROLE OF HUMAN POSITIVE LAW

St. Thomas recognized that the principles of natural law, while they are universal and knowable by all, are still rather indefinite for practical purposes. Therefore, in his discussion of law, he gives a great deal of attention to human positive law as a means of laying

[13] See I-II S.T. 94, 97. Several commentators on the natural law have suggested or adopted this approach. Among them: Dabin in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN (1950); Adler, *supra* note 11; D'Entreves, *The Case for Natural Law Re-examined,* 1 NATURAL L.F. 5 (1956); Davitt, *Law as Means to an End — Thomas Aquinas,* 14 VAND. L. REV. 65 (1960); MacGuigan, *supra* note 12.

down the specific provisions necessary for adequate governance of society.[14] It is clear that Thomas regarded human law as a necessary implementation of natural law. In his development of human law concepts, he brings out the following points: (1) Human law which is based on natural precepts forms an explicit part of the eternal law; it derives an obligatory character as the result of this relationship. (2) Not all human law is derived from the principles of natural law; some human law pertains to things outside the purview of natural law. (3) Human law is directed toward regulations of the social relationships of man and incorporates sanctions which compel obedience. In this way, the precepts relating to natural law are enforced by something more tangible than the mere sense of obligation. (4) Human law should attempt to regulate only overt human acts and does not endeavor to control or prescribe all human acts. (5) Human law, insofar as it is based on natural law precepts, must proceed from the will of man in accordance with reason.

THE MORAL LAW

At this point it becomes necessary to introduce another element into the concept of law. Moral law is defined as precepts derived from the natural law which are based on right reason and which govern overt and covert human acts. The idea of moral law is introduced to facilitate the establishment of norms against which human law can be measured and to provide for the development of a resistance theory of law.

It will at once be apparent that human positive law and the moral law which governs social conduct, coincide where human law is based on natural law precepts;[15] it is equally apparent that the moral law intersects with positive divine law at a number of points. Moral law is thus flexible enough to apply to covert acts of man which are incapable of being judged or regulated by human positive law. Furthermore, it can operate as a norm for judging human law.[16] The notion of obligation to perform or refrain from performing certain acts is introduced by the moral law just as a similar coercive effect is introduced by the sanction attached to human law. It is in moral law that the common good and the individual good meet.[17] The moral law concept also permits the application of norms to rules and decisions since many of these are derived from precepts, and in

[14] I-II S.T. 95-96.
[15] Adler refers to this part of moral law as *ius gentium*.
[16] The terms "human positive law" and "human law" are considered to be exactly synonymous in this paper.
[17] This discussion of moral law is based on the illuminating development of the whole subject by MacGuigan, *Positive Law and the Moral Law*, 2 CURRENT LAW AND SOCIAL PROBLEMS 89, 100 (Macdonald ed. 1961).

so doing, the moral law comes to recognize new customs and regulations.

In the area of precepts, it is apparent that the moral law and human law are co-extensive except for the distinction that the moral law "exists" by the mere process of deductive reasoning from a principle whereas the positive law does not come into being until it is "willed" or enacted by the designated law-making authority. Once the human law is enacted, however, then the two types merge and the moral law applies a "static" norm to the positive law in the sense that if the human law departs from this norm, it is malum in se (intrinsically bad, according to St. Thomas) and thus invalid.[18] In other words, moral law has a substantive effect on human law that is based on natural law precepts and thus we have developed a theory of resistance in positive law.

In the area of rules and decisions, the moral law applies "dynamic" norms[19] which have primarily an adjective effect and operate on the procedural aspects of such rules and decisions. Therefore, if a discrepancy exists between the moral law and the rule or decision, the rule or decision is malum prohibitum (contrary to human welfare in the words of St. Thomas) and ought not to be obeyed unless there are extenuating circumstances such as avoidance of scandal or preservation of public order.

Now the question is: how should this resistance theory operate? Obviously, its critical region is with respect to positive law that is held to be malum in se, because in such a case there would arise a binding obligation not to obey the law. Actually, the magnitude of this problem has been much exaggerated. In the first place positive law ordinarily touches on the area of natural law precepts in rela-

[18] Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TUL. L. REV. 491 (1957). Professor Brown's interpretation of Thomistic natural law is open to question; his terminology is, however, useful.

[19] *Ibid.*

tively few places. Suppose a law-making body enacted a statute prohibiting divine worship. Such a law would be malum in se according to St. Thomas and would also be in conflict with the divine law. The technical objections to a statute of this kind are that it invades the area of individual moral law, is not a proper subject of positive law, and would be virtually impossible to enforce. It would seem very desirable to have a reliable standard for determining whether or not a statute qualifies as valid law. In the second place, most of the precepts of the natural law operate negatively; the only exception that comes to mind is the positive injunction to provide for the common good. Take, for example, the precept reflected by the moral law prohibiting theft. To violate this prohibition the positive law would have to compel those persons bound by it to commit theft—a rather preposterous idea.[20] Thirdly, it seems obvious that the resistance theory should apply only to those charged with enforcement of the law. It cannot reasonably be the privilege of every citizen to decide whether he will obey the law or not. Ordinarily, the initial responsibility for enforcing the law will fall on the courts. For the three reasons cited above, it should be apparent that the resistance theory in the substantive sense has very limited application.

In the region of rules and decisions, the operation of the resistance theory is generally in the sense of requiring natural justice or what we usually refer to as due process of law. It is not necessary for the resistance to be applied here as strictly as in the case of laws that are mala in se, for practical considerations require us to recognize that justice is not always perfect and that there may sometimes be other factors that have to be taken into account. Nevertheless, any moral pressure aimed at improving the administration of justice would appear well directed.

In the more civilized countries, there seem to be only two areas in which the resistance theory becomes a serious problem: the areas of divorce as it affects the existence of the family relationship, and of the power over human life in being as it is reflected in capital punishment, euthanasia, and abortion. Divorce laws present a problem because they are widespread and because we don't yet know with certainty whether the common good is best served by permitting the dissolution of the family relationship under certain circumstances. Although many theologians say all divorce is morally wrong, a final determination may have to depend on sociological

[20] It must be conceded that failure to have a law prohibiting theft might violate the positive moral injunction to provide for the common good.

evidence yet to be acquired.[21] Practically the problem has been sidestepped either by having judges who disapprove of divorce from a moral standpoint disqualify themselves or by viewing the divorce action as not an intrinsically evil act.

As to the power over human life, it may be that if there are any "absolutes" related to natural law principles and precepts, they apply here. This area has not given a great deal of difficulty yet, but it may in the years to come. Abortion and euthanasia are already legally practiced in many culturally advanced nations, and capital punishment is permitted in many of the United States. Power over human life is clearly a moral issue of the highest order and the greatest care must be taken in resolving it. Perhaps the most appropriate thing to say is that the development of man's wisdom may not as yet have progressed to a level sufficient to warrant entrusting power over human life to the vicissitudes of human positive law. We know, for example, that most statutes under which capital punishment can be imposed are so overlaid with procedural safeguards that a final decision in a capital case is often not rendered until years after the initial trial. This can only be regarded as a sign of lack of confidence in our ability to impose this extreme penalty without the possibility of error. In any event, the experience in Nazi Germany is surely the most compelling argument for the perpetuation of a resistance theory against the possibility that governmental morality may completely break down.

By using the concept of moral law as a parameter, an effort has been made to demonstrate that there is a body of universal principles arrived at by metaphysical techniques and applicable to all mankind that can form the basis of precepts which are expressible as human positive law. The positive law formulated from these precepts is separate from but guided and measured by the norm of the moral law which in turn is founded on human reason. We have seen that in some places where precepts are involved, human law and moral law coincide, but this would not seem to create a fatal ontological defect in natural law theory. It is further arguable that positive law of this kind in one political entity should be compatible with similar law in other political entities of similar cultural achievement. Here, then, is the start of a common system of positive substantive law that might be used as the foundation of a world legal order. The system has the advantage that it is not tied to any particular theology or arbitrary requirement, although it is entirely possible that it is compatible with certain theological objectives. By

[21] If the definitions given earlier in this paper are correct, divorce is not governed by natural law *principles*.

refining these principles and precepts, it is likely that their appeal could be widened. Dabin has made a good start in this direction, and his ideas on justice are particularly interesting and capable of further development.[22] It is to be hoped that someone will be able to carry on where he, now in the twilight of his career, has paused.

NATURAL LAW AND THE ANALYTICAL POSITIVISTS

It has long been considered by many commentators that natural law theories and the theories of the analytical positivists are fundamentally irreconcilable principally because of the problem of separating the law that is from the law that ought to be. It is here submitted that as a practical matter these two theories are not really in conflict. It has already been shown that human positive law[23] and moral law act as a norm of positive law in many places, and where positive law deals with precepts of the natural law, the two coincide. It has further been demonstrated that the resistance theory of natural law is very limited in its scope of operation.

[22] Dabin, *op. cit. supra* note 13. A more detailed stipulation of prohibitions would be another approach.

[23] It should at once be recognized by any positivist that the mere enactment of a law has a moral connotation in the sense that the enactment itself involves a choice between two or more possible courses of action.

John Austin's theory of positive law[24] has been severely criticized in many particulars. Probably the most criticized of all his statements is his injunction to adhere strictly to the positive law exactly as it is, as distinguished from what the interpreter thinks it ought to be. However, it is not to be expected that Austin's writing was entirely free from the possibility of error in terms of modern application, any more than was the writing of St. Thomas Aquinas. It is essential to remember what Austin was trying to do: he was endeavoring to develop a technique for the analysis of positive law with the end in view of erecting a concise body of legal statements that could be clearly understood as law.[25] He was concerned mainly with law *after* it came into existence (when the moral decision has already been made) and felt that if the legal terminology problem could be solved, the legal statements could be made precise enough so that very little "interpretation" of them would be required. Later writers have improved considerably on Austin's basic theories. Probably the most eloquent spokesman on analytical positivism today is Professor H. L. A. Hart,[26] who seems to have some reservations regarding the extent to which Austin's major objective can be achieved in light of present day experience. Hart's elucidation of what he terms the "penumbral effect" is at least one attempt at framing an alternative approach.[27]

It seems accurate to say that the analytical positivists continue to concentrate on legal certainty in written law through the introduction of exact terminology, an eminent objective indeed. Nor is it apparent that there is any more fundamental conflict between analytical positivism and natural law than Bodenheimer finds between positivism and legal realism.[28] After suggesting that the positivists ought not to try to make the printed law too rigid, thus foreclosing to the judge the possibility of injecting any *ad hoc* historical or sociological elements into his decision, Bodenheimer says the real problem is: "failure . . . to provide the judiciary with a well considered theory of the non-formal (i.e., non-positive) sources of the law."[29] Hart appears also to realize this, and the question now is

[24] AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).
[25] This argument is persuasively advanced by Bodenheimer in an excellent commentary on analytical positivism entitled *Analytical Positivism, Legal Realism, and the Future of Legal Method*, 44 VA. L. REV. 365 (1958).
[26] See for example HART, THE CONCEPT OF LAW (1961). Some of Hart's ideas seem a little obscure, but he has plenty of time ahead of him for fuller development of his theory. His work has unquestionably made analytical positivism a much more workable theory and Hart has been able to answer adequately many of Austin's severest critics.
[27] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).
[28] Bodenheimer, *supra* note 25, at 370.
[29] *Id.* at 375.

asked: Might not the principles and precepts of the natural law fill the gap?[30]

NATURAL LAW AND LEGAL REALISM

Probably the most significant recent contribution to jurisprudence is that made by the legal realists, including Holmes, Cardozo, and Llewellyn.[31] The self styled natural law writers have been crying "wolf" apparently on the ground that man is in danger of being dehumanized by realist techniques. But what can possibly be wrong with the application of modern scientific techniques to the making of positive law and the rendering of judicial decisions? This appears to do nothing more than follow the advice of St. Thomas to examine with a critical eye precepts, rules, and decisions in order to insure that they are in accord with the dictates of reason.[32] It should be recalled that every bit of natural law and derivation from it that has been discussed in this paper is rooted either in the natural inclinations of man or based on human reason—and this includes even our parametric moral law. We have, indeed, stacked our chips on human nature and reason. There appears to be no real barrier between natural law theory as formulated here and the legal realists when Professor Jones can write:

> The ethical theory to be drawn from legal realism is, I suggest, that the moral dimension of law is to be sought not in rules and principles, but in the process of responsible decision, which pervades the whole law in life.[33]

Both the natural law advocate and the positivist may wish to caution the realist against excessive tailoring of the law to individual situations at the expense of legal predictability, simplicity, and social order, but neither can gainsay the desire of the realist to get at objective facts and to make the law respond to human needs insofar as is reasonably possible. Cardozo, one of the greatest legal philosophers of this century and a legal realist of the first water, may somewhat misconceive the role of our natural law theory when he quotes Berolzheimer as saying:

> The modern philosophy of law comes in contact with the natural law philosophy in that the one as well as the other

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[30] It should be mentioned that Austin's predecessor, Bentham, worked out a legal theory on the basis of utility, pain, and pleasure with a calculus of legal values which incorporates substantive law aspects. Bentham's approach does not seem best adapted to meet the problem that Bodenheimer outlines.

[31] Whether Pound can be considered a true realist is debatable. His sociological objectives of law are certainly compatible with those of the realists even if his methodology is not.

[32] I-II S.T. 94, 4-5.

[33] H. W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 801 (1961).

> seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law—out of what it is and of what is becoming.[34]

If the formulation of natural law theory contained in this paper has any value, the gap between "natural law philosophy" and "the new philosophy of law" does not seem to be as great as is expressed by the words of the quotation.[35]

CONCLUSION

To summarize briefly, the objective of this paper has been to reduce natural theory to a set of practical concepts which are essentially consistent with the expressed legal doctrines of St. Thomas Aquinas and which can fill an urgent requirement of the present day —that of providing the basis of a world legal order. Natural law principles might be recognized as the foundation from which to derive precepts expressed as positive law pertaining to some subjects and implied as an unwritten moral law pertaining to other matters. A further effort has been made to show that the natural law theory thus formulated is compatible with the two most significant legal theories of our day, analytical positivism and legal realism. In developing this formulation of natural law theory, great care has been taken in the definition and use of technical terms in the hope of eliminating confusion and of communicating ideas efficiently.

There is only one real reason for taking this approach to natural law theory: it is infinitely preferable to have a workable and acceptable body of law with which to meet a pressing jurisprudential need than to see a fine source of substantive law relegated to the category of legal history. In striving for this objective, as in the resolution of most complex problems, some compromises have had to be made. It has been necessary virtually to separate natural law theory from theology—certainly from any particular theology.[36] Natural law principles have been tied to the natural inclinations of man as arrived at by metaphysical methods, and natural law precepts and

[34] 2 BEROLZHEIMER, SYSTEM DER RECHTS UND WIRTH — SCHAFTPHILOSOPHIE 27, Quoted by CARDOZO, NATURE OF THE JUDICIAL PROCESS 132 (1921).

[35] It is well to remember that the quoted words were written shortly after the turn of the century and that consequently Berolzheimer's — and even Cardozo's — view of natural law theory may have been quite different from that outlined in this paper.

[36] It does not appear that the approach taken makes natural theory inconsistent with any particular theology.

the moral law have been, for better or for worse, firmly linked to the dictates of human reason. Simplification has been necessary. A good many commentators will argue that by taking these steps the natural law has been deprived of its character of absoluteness and made too relativistic,[37] in addition to being oversimplified beyond recognition. There may be some substance to these charges, but, though the risk is great, it is at least arguable that some acceptable natural law is preferable to none at all. With careful development, this flexible natural law theory may prove useful beyond the wildest expectations of its advocates.

Really original and useful ideas in any field are rare and, in the area of philosophy, almost impossible to produce. The best that can be hoped for here is that some clarity has been added to existing ideas and current thinking related to natural law so that a better understanding of these theories will result.

[37] Davitt seems to include just such a caveat at the conclusion of his article on the natural law of St. Thomas, *supra* note 12, at 80, when he makes reference to what the communists did to some of Hegel's best ideas.

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