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# WHAT DOES NATURAL LAW JURISPRUDENCE OFFER?

*by*

GEORGE W. CONSTABLE\*

## *I. Statement of the Problem*

In a world of conflict and struggle, this much would seem to be agreed upon:—The price that must be paid for peace is the subjecting of the conflicting claims of society to some common principle of order. Since it is now “one world” economically and physically, some universally applicable plan of conduct is a necessity.

But there the agreement ends. For what normative absolute can be agreed upon? Some have thought that the absolute of force alone could create order; but the fruit has of course been disorder. Others have held the corrosive relativist view that absolutes and universals are intrinsically impossible; and this, too, has fostered chaos, albeit unintentionally and with the excuse of modesty and tolerance. Less cynical or despairing are those extremists who attempt to pull the great mass of temperate, middle-of-the-road people over to some one-sided ideology. Thus, the individualist makes an absolute of equalized freedom and the socialist makes an absolute of equalized wealth. But here again disorder rather than order has resulted; and on a global scale at that, as may be readily observed in the struggle between the so-called Right and Left.

This unhappy situation has led to a renaissance of a point of view which claims to offer the basis of a peaceful social order.<sup>1</sup> This is, of course, the so-called “natural law” approach—a school of thought that has incidentally, far and away the longest and most honorable jural pedigree. The views of this school of thought are elusive and somewhat variable. The position is more easily defined by what it repudiates than by what it endorses. Thus on the whole it repudiates both excessive socialism and excessive liberty. It rejects the primacy of force or of any mere human authority. At the same time it denies that absolute, universal law or laws are impossible. Furthermore it is critical of the disassociation of legal philosophy from the related fields of political theory, psychology, sociology, metaphysics and theology. There thus emerges a system which upholds liberty against the socialists, general welfare against the individualists, transcendental law against human power, universality

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<sup>1</sup> See FRIEDMAN, *LEGAL THEORY* (1947), ch. 10 (revival of Natural Law Theories).

and immutability against relativism,<sup>2</sup> and integrative thinking against disjunctive thinking. In more positive terms, natural law may be described as those rules of conduct determinable from man's nature and position, which are willed by the Creator and which lead to goodness.

It is thought that at the present stage of the average lawyer's knowledge of the subject, it might be helpful to attempt to put forth in a concise, synoptical, positive form the alleged merits of the natural law theory; and in the process, to explain what the natural law is and whence it comes—all in a context that states, and attempts to reply to, the chief objections to its jurisprudence.

The writer believes that lawyers might be interested in the form of presentation perfected by a thinker who is more read about than read—namely Thomas Aquinas. The method<sup>3</sup> of Aquinas was a "legal method" ideally designed to discuss a point in the light of conflicting authorities. This was to argue the point, almost in short-hand style, in the following sequence—(1) to state in the title the precise question; (2) to enumerate compactly the leading and noteworthy objections to the position he is going to take; (3) to cite leading authority on his side; (4) to give his own fresh analysis of the matter; and finally (5) in the light of his analysis, to reply to the original objections. This has many advantages including a clear holding to the question, a survey of all pertinent points of view and an indication of the writer's judgment of the correct point of view.

What the natural law has to offer at this critical historical juncture may best be understood by putting the question in its most general form; and this is how we will begin:—

## IS THE NATURAL LAW SYSTEM OF JURISPRUDENCE A GOOD ONE?

### *II. The Basic Objections*

OBJECTION 1. (*It is useless.*) It would seem that natural law jurisprudence is bad in that its alleged rules have no good uses and many bad ones. The absence of good uses is evident from the fact that these rules give to the citizens in general, and to legislators, judges and lawyers in particular, no perceptible help in solving the innumerable concrete practical problems daily confronting them.<sup>4</sup> In fact most of these persons

<sup>2</sup> Thoughtful persons will recognize in the recent debate, in the American Bar Journal and elsewhere, concerning Holmes much more than an issue of personal reputation. It is not a case of defending an Olympian from pigmies or of exposing a false God, but of deciding the possibility of any universal standards of right and wrong valid as against the pretensions of either dictators or the masses. It is time to eliminate the personal issue and to continue the discussion purely on the philosophical level.

<sup>3</sup> Used in his greatest work, the SUMMA THEOLOGICA.

<sup>4</sup> Typical are the statements of CAIRNS, in LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949), p. 183-184; Gardner, *Ancient Vision and Modern Yardstick*, 39 Am. Bar. J. 83 (1953); Parker, *Natural Law and Kelsenism*, 13 Ohio St. L. J. 160 (1952), (see section entitled "Not a Useful Lie").

have not even heard of natural law. As to bad uses, it has often supplied misleading rationalizations to decisions and enactments reached on the basis of practical considerations.<sup>5</sup> Thus, it has been used to invest each person with a transcendental and mystical claim to inalienable rights, thereby justifying excessive individualism and the sanctity of vested property interests and impeding the imposition of controls for the general welfare and peace of society.<sup>6</sup> Conversely, it has been used to further the authoritarian programs of dictators, dynasties, races, classes and churches, contrary to the democratic principles of freedom and equality.<sup>7</sup>

OBJECTION 2. (*It is a Myth.*) Further, natural law is bad because its rules are not really rules at all; in fact they are essentially spurious; they do not exist.<sup>8</sup> For what are alleged to be universal and immutable rules have no actual universal acceptance but vary as the consciences and understandings and customs and normal behavior of its exponents vary.<sup>9</sup> Or in large areas and over long periods many of its alleged rules have been unenforced and ineffective and hence are not to be validly called rules at all.<sup>10</sup> Or what purport to be absolute and universal rules are vague and equivocal abstractions like "do good", "act honestly", "give each his due", obey "nature" or "reason", all of which are devoid of specific practical content in concrete cases.<sup>11</sup> They are either empty formulas which beg the question until specification is supplied extraneously; or if they are given definition, the exponents do not show how any subsidiary rules necessarily flow from them. Thus where "good" is defined, as by the scholastics, in terms of the being which satisfies a natural tendency, there is a failure to show how the prime "natural law" of seeking goodness necessarily involves the satisfaction of particular natural inclinations like preserving life, procreating, knowing truth, liv-

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<sup>5</sup> See some instances collected in HALL, *READING IN JURISPRUDENCE* (1938), ch. 8. See also Parker, *Natural Law and Kelsenism*, 13 Ohio St. L. J. 160 (1952); and PATTERSON, *JURISPRUDENCE* (Foundation Press 1953), p. 375.

<sup>6</sup> See T. T. VEBLEN, *THE THEORY OF BUSINESS ENTERPRISES* (1927); KORKINOV, *GENERAL THEORY OF LAW*, (HALL, *supra* note 5, at 209); DEWEY, *NATURE AND REASON* (1931), p. 166-172; Bentham thought natural law let loose lawless revolutionary actions, *THEORY OF LEGISLATION*, (quoted in HALL, *supra* note 5, at 166).

<sup>7</sup> Aristotle justified slavery; Hobbes, monarchical absolutism; according to some natural law is thought to encourage Roman Catholic authoritarianism; Gerhart, *The Doctrine of Natural Law*, 26 N. Y. U. L. R. 76 (1951). As to these contrary pulls of natural law, see 11 Ency. Soc. Sc., *Natural Law* 284, 285.

<sup>8</sup> For example see KOCOUREK, *MY PHILOSOPHY OF LAW* (1941), p. 175; M. R. COHEN, *JUS NATURALE REDIVIVUM*; JOHN DEWEY, *FREEDOM, ITS MEANING* (1940), p. 479; BENTHAM, *THE THEORY OF LEGISLATION*, (HALL, *supra* note 5, at 166).

<sup>9</sup> See HALL, *supra* note 5, ch. 8 note 12; F. K. Beutel, *Relationship of Natural Law to Experimental Jurisprudence*, 13 Ohio St. L. J. 167, 170-171 (1952); Patterson, *supra* note 5, Sec. 4.16, p. 362-366.

<sup>10</sup> See Parker, *Natural Law and Kelsenism*, 13 Ohio St. L. J. 160, 164 (1952).

<sup>11</sup> FRIEDMAN, *LEGAL THEORY* (1947), ch. 8, note comments on Hume; BENTHAM, *THEORY OF LEGISLATION*, (quoted in HALL, *supra* note 5, at 166); Kelsen, (see HALL, *supra* note 5, at 163); STAMMLER, *THEORY OF JUSTICE* (1925), ch. 3, p. 72-93.

ing in society, etc., when it is admitted<sup>12</sup> that only an Absolute Good like God would suffice. Moreover, there is a total absence of a showing how this allegedly primary inclination to do good and avoid evil in general implies any legal order or plan for society by which the innumerable conflicting claims of these diverse particular human inclinations are to be adjusted and coordinated.<sup>13</sup> There is only a resort to a sterile concept of a hierarchy in the faculties of man or to a negative plan that everyone should respect the equal right of everyone else to preserve life, etc. This latter contribution does not depend on natural law jurisprudence.

OBJECTION 3. (*It has no lawgiver.*) Further, the natural law rules have no true rulemaker to whom they can be traced and by whom they are promulgated. The Divine Will or Reason, if there is such a thing, is revealed to no man, and it is arbitrary to designate as spokesmen for God some priestly hierarchy or the elite of some despot, or whatever philosophical school can persuade people that it has correctly interpreted "nature" or God's "will" or "reason". Traced to its source, the Will of God always turns out to be merely some deep-seated human desire or sentiment which seems of universal import because it represents the familiar, the normal, the customary, the ancient or the ideal.<sup>14</sup> There is no proof that the existence of such human inclinations gives rise to an absolute obligation to satisfy them. Ten thousand Is's do not make one Ought.

### III. The General Line of Favorable Authority

ON THE CONTRARY, there stands the authority of Plato,<sup>15</sup> Aristotle,<sup>16</sup> Cicero,<sup>17</sup> Augustine,<sup>18</sup> Aquinas, Bracton,<sup>19</sup> Coke,<sup>20</sup> Grotius,<sup>21</sup> Blackstone,<sup>22</sup>

<sup>12</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 2, A. 8.

<sup>13</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 94, A. 2.

<sup>14</sup> To give only a few examples of this reasoning; Holmes, *Natural Law*, 32 Harv. L. Rev. 40 (1918); K. Olivecrona, *Realism and Idealism*, 26 N. Y. U. L. R. 120, 129 (1951); PARETO, THE MIND AND SOCIETY, (quoted in part in HALL, *supra* note 5, at 265); KELSEN, (See HALL, *supra* note 5, at 158); KORNIKOV, GENERAL THEORY OF LAW, (quoted in HALL, *supra* note 5, at 262); STAMMLER, THE THEORY OF JUSTICE (1925), p. 89, 90; POUND, INTRODUCTION TO PHILOSOPHY OF LAW (1925), p. 96.

<sup>15</sup> PLATO, LAWS. See CAIRNS, *supra* note 4, ch. 3, particularly p. 37.

<sup>16</sup> ARISTOTLE, RHETORICA I, 13; NICOMACHEAN ETHICS; CAIRNS, *supra* note 4, ch. 3.

<sup>17</sup> See chapter on Cicero in CAIRNS, *supra* note 4, p. 127-162; also passage quoted in HALL, *supra* note 5, p. 67-68.

<sup>18</sup> Chroust, *St. Augustine's Philosophical Theory of Law*, 25 Notre Dame Lawyer 255 (1950).

<sup>19</sup> DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, III, 9, 2, fol. 1076; Y De Legibus 39, 23.

<sup>20</sup> See *Calvins Case*, 77 English Reprints 379.

<sup>21</sup> GROTIUS, DE JURE BELLE ET PACIS, Prologue.

<sup>22</sup> COMMENTARIES, I, 38-43.

most of our Founding Fathers,<sup>23</sup> and many others.<sup>24</sup> Substantially representative of this line of authorities is Aquinas who maintains that *the proper effect of law is to make those to whom it is given, good . . .*,<sup>25</sup> and further, *that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided;*<sup>26</sup> and again, *that the natural law is nothing else than the rational creature's participation in the eternal law, fixed by God.*<sup>27</sup>

#### IV. Analysis of the Question

I ANSWER THAT, to understand the goodness of natural law we must first recollect that all law is a means to guide human conduct according to some controlling intention.<sup>28</sup> Law is an agency which directs that this ought or ought not to be done; that such and such shall or shall not, may or may not be done. Consequently, its goodness must be judged according to its suitability to accomplish the controlling intention. However, before this judgment can be formed, it is necessary to know the content of this controlling intention, i.e., what is intended. And this in turn requires a prior determination of whose intentions, if anyone's, are controlling upon society; whether the intentions of the whole people, or of a majority, a special class, a single ruler, a church, the Creator or some other source or no source at all.

##### (a) *The Controlling Intention: The Source and End of Natural Law*

Now it is evident from legal history that there will never be universal agreement upon the source of valid law. We must therefore decide whether there is *no* controlling intention universally applicable

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<sup>23</sup> See Manion, *The Natural Law Philosophy of Founding Fathers*, 1 Natural Law Institute Proceedings 16 (1947). Included are Hamilton, Wilson, Adams, Dickinson, Otis, and of course Jefferson. See also WASHINGTON'S FAREWELL ADDRESS. Incidentally, Burke was a strong espouser of natural law as is brought out by P. J. Stanlis in *Edmund Burke and the Law of Nations*, 47 Am. J. Int'l L. 397, see note 7 (1953).

<sup>24</sup> Generally, see HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS*; W. H. Rose, *The Law of Nature: An Introduction to American Legal Philosophy*, 13 Ohio St. L. J. 121 (1952); FRIEDMAN, *supra* note 1; Pound, *Fifty Years of Jurisprudence*, 51 Harv. L. Rev. 463-472 (1938).

<sup>25</sup> SUMMA THEOLOGICA, I-II, Q. 91, A. 2.

<sup>26</sup> SUMMA THEOLOGICA, I-II, Q. 94, A. 2.

<sup>27</sup> SUMMA THEOLOGICA, I-II, Q. 91, A. 8.

<sup>28</sup> I.e., the end in view, the applicable purpose. Let no one think that the writer is a "voluntarist" favoring "will" over "intellect". In the writer's opinion this is a false dichotomy in legal philosophy. Law is an instrument of intention which embraces both an intellectual content and volitional tension. The definition of Aquinas that law is a promulgated "ordinance of reason for the common good" indicates the presence of both elements, i.e., in the words "ordinance . . . for". The law is the rational means to a rational end. The manifestation of the divine goodness, which is the end of the universe, is certainly a rational end. For a background to this will vs. reason debate, see GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Maitland Transl. 1913), p. 172, note 256; DAVITT, *THE NATURE OF LAW* (1951); ROMMEN, *THE NATURAL LAW* (1947), ch. IX, pp. 175-182, 195-199.

to all humanity or, in the alternative, whether there *is* such a controlling intention even though people do not recognize or admit it. There are three general possibilities to be considered:<sup>29</sup>—either (1) each will is impelled in some specific, definable psychological, biological or physical<sup>30</sup> direction; or (2) each will is completely autonomous (absolutely self-determining); or (3) each will is impelled in some general direction, but is free as to particular specifications of this general direction. The first is fallacious, as every person, in his own conscious choices, has power to choose between acting or not acting, and if acting, then between various courses of action, notwithstanding the interior pressure of any definable psychological, biological or physical urges. Objectively, this is proven by the unpredictability of human behaviour; subjectively, it is confirmed by our consciousness of a power of arbitrary personal intervention in any choice. The second is also fallacious because no one has power to choose what he judges an unsuitable means to carry out the inclination moving him. Whatever he chooses, he chooses as “good” for the purpose at hand; even evil is done under the guise that it is good for the doer’s purpose, the mind suppressing or minimizing the evil involved in the good chosen.<sup>31</sup> For a “good” is something seen in a certain relation, viz., it is that “being” (i.e., that rational entity,<sup>32</sup> that of which unity can be mentally predicated, including a thing, an action or an abstraction) which corresponds to the given inclination (principal of unity, tendency, nature). Food, eating, indulgence are good to the man who wants to get fat but bad to the ascetic who desires to fast. Good is that which fulfills, perfects, completes, a tendency.

This manifests the truth of the third possibility, viz., that every human will is impelled irresistibly only toward what the mind judges (perhaps erroneously) good—i.e., that which appears to partake of goodness—and within that ambit, it is free to select and particularize.<sup>33</sup> In other words, human nature discloses that the will moves towards good universally. But such a universal motion must proceed from a Universal Mover, for as Aquinas says: *a particular cause does not give a universal inclination.*<sup>34</sup> Or to put it otherwise, a mover cannot escape from the the motion of finite causes unless it (the mover) can escape *into* the

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<sup>29</sup> The line of reasoning that follows is developed more fully in Constable, *Natural Law Jurisprudence and the Cleavage of Our Times*, 39 Geo. L. J. 365 (1950).

<sup>30</sup> Be it noted that physical determinism is the basis of the law of those who say that might makes right, that the law is what is effectively commanded, that sovereign force is the final justification. These are saying that the only lawgiver that has authority to control the human will is the lawgiver who actually controls it.

<sup>31</sup> Note AQUINAS’ explanation of malice, SUMMA THEOLOGICA, I-II, Q. 78, A. 1.

<sup>32</sup> See AQUINAS, SUMMA THEOLOGICA, I-II, Q. 8, A. 1.

<sup>33</sup> See SUMMA THEOLOGICA, I-II, Q. 10, A. 2, I-II, Q. 8, A. 1, also I-II.

<sup>34</sup> SUMMA THEOLOGICA, I-II, Q. 9, A. 6. A second reason assigned is “because the will is a power of the rational soul, which is caused by God alone, by creation, as was stated in the First Part (Q. 90, A. 2).”

motion of an Infinite Cause. Or again, a power of selection among particular types of being implies a ground of operations (and of vision) equal to all the alternatives; and this means a ground equal to being as such; which is to say a Cause equal to the effect of being; hence not man but a Creator.

Wherefore we conclude that the will is moved by God to goodness in general but man is free to choose this or that which is a true or apparent good.<sup>35</sup> For this reason it is said the Creator is our lawgiver<sup>36</sup> in that he infixes in our nature a general directive, a prime "ought", to which all actions must be conformed and upon which many actions will depend—namely, to do good and avoid evil and to be free within this range.<sup>37</sup> In other words, according to the natural law, the controlling intention is God's; and the content or objective of this intention is goodness itself. Furthermore the attainment of this goodness signals a complete repose of the will, which is to say, happiness. Therefore the objective of the will is also said to be happiness.<sup>38</sup>

Now a good is simply that being which has the power of suiting an inclination; hence goodness itself is suitable being as such; so that goodness itself can have no real existence (other than as an abstraction) unless there is a being which is by its very nature purely and simply suited to the inclination to being as such, i.e., unless there is a simple self-supplying being, a pure diffusion. But such a being is none other than God as indicated by His name—*He Who is*, which equates His existence to His nature.<sup>39</sup> Therefore, the intendment of the will toward goodness itself (or happiness) is in reality to be satisfied only by the reality of God Himself under His aspect of pure Diffusion, or Absolute Good. And this is a doctrine of the scholastic school of natural law.<sup>40</sup>

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<sup>35</sup> Aquinas says in the same Question: "*God moves man's will, as the Universal Mover, to the universal object of the will, which is good. And without this universal motion, man cannot will anything. But man determines himself by his reason to will this or that, which is true or apparent good.*" For a fuller discussion of how moral freedom and culpability are reconcilable with this divine motion, see Constable, *supra* note 29, p. 398-404, and citations therein. Note particularly Aquinas' statement, SUMMA THEOLOGICA, I-II, Q. 79, A. 2: "*Accordingly, God is the cause of the act of sin and yet He is not the cause of the sin, because He does not cause the act to have a defect.*" See also Garrigou—La Grange, *Predestination* (particular article in appendix); MARITAIN, *EXISTENCE & THE EXISTENT, SCHOLASTICISM AND POLITICS*.

<sup>36</sup> See ROMMEN, *supra* note 28, p. 197, note 11.

<sup>37</sup> AQUINAS, SUMMA THEOLOGICA, I-II, Q. 94, A. 2.

<sup>38</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, G 1, G 5, Arts. 3, 4 & 8. See—Authorities collected in *Natural Law and the Right to Pursue Happiness*, by J. C. Ford, IV Natural Law Institute Proceedings 103-144, at 137 (1950).

<sup>39</sup> That God is goodness, See AQUINAS, SUMMA GENTILES (Burns, Oates, and Washbourne 1924), chs. 37 and 38; BONAVENTURE, BREVILOQUIM (Herder 1946), p. 36; *Itinerarium Mentis In Deum*, ch. 7 ("... the highest good is therefore supremely diffusive of itself...").

<sup>40</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 2, A. 8; St. Augustine, as shown by Chroust, *St. Augustine's Philosophical Theory of Law*, 25 Notre Dame Lawyer 285 (1950); MARITAIN, *POLITICS AND SCHOLASTICISM* (1940).



It thus appears that the natural law not only issues *from* the Creator as its source but it directs humanity *to* the Creator as its end—it is from God as Absolute Cause (the Cause of Existence)<sup>41</sup> to God as Absolute Good.

(b) *The Content of Natural Law: The Legal Means*

From this we may understand the more detailed principles of natural law; that is the suitable ways and means which will lead to the fulfillment of this general intendment toward Goodness, God. If the human will were an absolutely self-determining power, there would be a clear call for a regime to bring about equalized<sup>42</sup> freedom (i.e., the negative side of the Golden Rule). Conversely, if the will were determined, there would be a clear call for a regime of authoritarian social planning to bring about the satisfaction of the type of volitional specification involved. But if as is maintained, the will is impelled towards goodness as such, with liberty as to particular goods, there is a call for a regime to assure equalized freedom within authoritarian planning to realize that Absolute Goodness called God. The specifications of such a regime appear from the following considerations.

The Absolute Good is by nature an invisible cause. Therefore, it can be realized among visible things, if at all, only indirectly, that is to say, as a cause is realized and made present through the effects which are representative of its essential nature.<sup>43</sup> In other words, a man must direct his attention to the production of those visible effects which manifest the likeness of the cause to which he would be united. Moreover, insofar as he *acts*, he must consciously act to embody or express that cause, since his attention is necessarily directed to the cause that his actions embody. He who consciously kills necessarily directs his attention to himself as killer; he that nourishes necessarily focuses his mind on himself as producer. His actions are his own evidence of the causality to which he cleaves.<sup>44</sup>

But the Absolute Good is the principle or cause of existence itself. Hence its representative effect is existence itself—namely, that Being

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<sup>41</sup> This is not to say that the basis of law is the Divine Will as against the Divine Reason; but that the basis of the binding authority of natural law is the irresistibility of the principal of existence in the general intention of man: We cannot help willing good, although we can mistake an apparent for a true good.

<sup>42</sup> That the essence of right, and the object of justice, is the "universalization" or "equalization" in the relations between people is implicit or explicit in almost all theories. See ROMMEN, *supra* note 28, p. 194; AQUINAS, SUMMA THEOLOGICA, I-II, G 57, Art. 1, G 58, Art. 2; I-II, G 90, Art. 2 (the end of law is universal happiness or the common good).

<sup>43</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 12, A. 12.

<sup>44</sup> An interesting statement of this principal is by Christ; "There is no one who shall work a miracle in my name and forthwith be able to speak ill of me." MARK 9:38-39. Again, "for everyone that does evil, hates the light and does not come to the light that his deeds may not be exposed. But he who does the truth, comes to the light that his deeds may be manifest for they have been performed in God." JOHN 3:20-21.

which is so pure as not to be conceivable as not existing; so boundless in its mastery as to be instantaneously always, everywhere, all-capable, constituting a unique plentitude of being. It is impossible for finite things to express such an infinite effect except negatively—that is, by actions which tend to cancel limits of existential power. In other words, the infinite act is to be expressed among finite agents precisely by a negation of their finitude; by a motion of transcending boundaries of mastery of being; by dissolving of their margins in order to bespeak a greater fullness. That is to say, in the realm of non-God, God is to be imaged by “flight” away from nothingness as “aspiring” towards existence.

Hence to attain the likeness of this Creator among visible effects, a man must give himself over in thought and deed to the process of transition to an ever-fuller type of existence. Now participation in such a process is none other than an act of service or goodness;— a limited being yields suitably to the mastery and incursion of a less limited being, becoming integrated in a unity imposed by a more inclusive unity than its own. The less inclusive “feeds” the more inclusive principle; becomes assimilated to it; causing it to live and grow and prosper.<sup>45</sup> We water flowers, we nourish babies, we serve or “do good” to some principle of unity whether it is constructing a cathedral, forming an industry or composing a piece of music. In other words the visible effects which represent the Creator are actions that promote *growth, expansion, success*— what people call productive actions, *kind actions*, or more loosely, “*creative*” actions. In such actions the Creator acts, in concurrence with his finite agents, after his own nature, i.e., creatively, as the cause of being;— He causes being to flow into a given thing in accordance with that mode of acting which promotes its type of unity.

Now each act of service or goodness reflects in some degree the infinite being since it consists of the opening up or sacrifice of a less inclusive to a more inclusive principle of being. But an escape from nothingness, a negation of finitude of existential power, is a continuous sequence of service, a chain of goodness that must begin in nothingness and end in direct dedication to the Creator whose being serves his own nature to-be. And, according to scholastic natural law teaching, the universe clearly discloses the outlines of such a progression, suggesting a pattern of transcendence in which the various classes of creatures fall into definite roles in an overall sequence.<sup>46</sup> Thus nothingness in a sense yields to matter which has at least the mastery of its own bit of existence; particles of matter serve the wider mastery possessed by vegetative

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<sup>45</sup> AQUINAS, SUMMA THEOLOGICA, I, Q. 118, A. 2; took due note of the fact that the production of one thing spells the destruction of another .

<sup>46</sup> AQUINAS, SUMMA THEOLOGICA, I-II, Q. 94, A. 2; Augustine, as shown in Chroust, *supra* note 18; and see generally MARITAIN, SCHOLASTICISM AND POLITICS (MacMillian 1940).

life; matter and vegetation serve the still more inclusive mastery possessed by sensory life; matter, vegetation, and animals serve the even more inclusive mastery possessed by rational life (man); and all four serve the will of the Creator who, since He constitutes the mastery of being itself, serves His own nature to-be.

The whole sequence reflects its Creator with increasing fidelity as it nears direct dedication to Him. Just as whiteness is expressed among things not pure white by an arrangement whereby the darker are tapered into the lighter inwardly around a common center so that a radiant sun finally emerges from the graduated negation of shadows, so the Absolute Good is to be expressed among limited goods by ordering the less good in a graduated sequence culminating in the dedication of the minds of men, with the eye of rational faith, to that Creative Presence which corresponds to the Being whose nature it is to-exist.

The focal point and climax of the whole process of embodying the Absolute Good is the negation in the minds of men, of all particularity of acting in favor of the universal existential (or creative) action of the Creator. Man by reason of his rational powers of prescinding from the particular being to being itself is clearly the link between the finite and the infinite; he is the agent of a goodness which finds its creaturely climax in his own agency; he is, in a true sense, the high priest through whom the created universe is focused back by way of service to meet the Absolute Good from whom it proceeds. And the Creative Presence which is elicited from this final negation, is as it were, the form and shape and likeness of the Absolute Good insofar as attainable in the realm of finite effects; it is that effect, proceeding from within yet above us, in which we may know the likeness of the Divine Cause moving us; it is the medium whereby the mind yields to, and, so to speak, "touches" and unites itself with the Absolute Good, and the Absolute Good communicates itself to the mind, without compromising either that Good's unique plenitude or the individual's distinct personality. Furthermore it is the manner in which a multiplicity of individuals can share in a common unity or social whole.<sup>47</sup>

It follows that if a man is to attain goodness itself through effects which represent its causality, he must give himself over to a participation in some phase of this universe-wide process of aspiration. Whatever he does must tend to carry out the grand design of ascending service. This is to say, he must be the servant of service itself; and in this function will lie his mastery and dignity. For all things are designed to yield

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<sup>47</sup> For a searching historical study of the ideas of unity in diversity and of the possible bases of an organic community—but with a false idea of the reality of group-personality, see GIERKE, *supra* note 28, and NATURAL LAW AND THE THEORY OF SOCIETY (Barker's Transl. 1950).

to his intelligent direction in serving one another according to the ascending scale culminating in the Creative Presence which communicates itself to, and becomes resident of, his own mind. Therefore, properly understood, the universe of immensely diverse creatures is his potential garden of which he can be the lordly cultivator to the glory of God.<sup>48</sup>

The relations between men—which is the primary field of law proper—are determined from this context. Men's rights and duties with respect to each other grow out of their common function of organizing all things to the theme of ascending, deepening, widening productivity. They are so to speak, co-developers of the universe-garden. Hence with respect to social relations, two rules are naturally appropriate—first, positively, to direct each man to his proper promotion of other men's service; and second, negatively, to prevent interference with his promotion of such service. This is a more specific formulation of the two prime rules of natural law: to do good and to avoid evil,<sup>49</sup> since it indicates that man's special good lies precisely in the process of doing good, or service.

*Positively*, the natural law will systematically direct men to contribute according to their respective capacities to each others dedication to service. It aims to make each man rich in the wherewithal and opportunities of service. The particular applications will depend on circumstances. What is necessary to the end in view?<sup>50</sup> The natural law itself *specifies* the applications only insofar as its primary directives logically require secondary directives. Beyond that it merely *influences* the application as a primary directive influences a particular decision.<sup>51</sup> Thus, one way or the other, under present circumstances it would seem to call for each to contribute, according to his means, to the provision of adequate means of transportation and communication; to the establishment of markets and monetary and exchange systems; to the provision of employment and placement agencies; to the dissemination of useful techniques and knowledge and the teaching of wisdom including the truths of natural (but not revealed) religion; to the opening up of frontiers

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<sup>48</sup> Reminiscent of GENESIS 2:15 "and the Lord God took man, and put him into paradise of pleasure, to dress it and keep it (*ut operaretur terram et custodirat . . .*)" Also GENESIS 1:20 "Let us make man to our image and likeness . . . and let him have dominion over the fishes . . . and fowls . . . and beasts and the whole earth and every creeping creature . . .", 1:28 "increase and multiply and fill the earth and subdue it and rule over . . . all living creatures . . ."

<sup>49</sup> It would be beyond the scope of this paper to annotate the subsequently alleged derivations of the content of the natural and to point out the variations and similarities with the views of other expositors of natural law. ROMMEN in his THE NATURAL LAW (1947), gives an excellent historical review together with a chapter specifically on the content.

<sup>50</sup> See ROMMEN, *supra* note 28, p. 180-181 (notes 7 and 8); p. 197 (note 11).

<sup>51</sup> AQUINAS, SUMMA THEOLOGICA, I-II, G 95, Art. 2 (all human laws are derived from natural law in one of these two ways). ROMMEN, *supra* note 28, p. 180-181, note 8, and ch. XIII (emphasizing limits of deduction and need of observation and experience).

and development of natural resources; to the encouragement of productive agencies by such means, where appropriate, as by the financing of promising research, the helping of potentially efficient producers and the construction of certain basic enabling facilities beyond private reach such as great irrigation, metallurgical and power projects; to the perpetuation of soil productivity, the introduction of useful plants and animals and the development of better breeds; to the maintenance of needed health and recreational facilities such as hospitals and parks; to the encouragement of charitable institutions; and to many other things: all to the end of promoting the power of service. Similarly natural law calls for the rendering to servants the considerations and the safeguards adequate to make the desired service feasible; thus it imposes a duty to support one's family, to pay a living wage, to pay a fair price, and to provide safe working conditions. Implicit in this whole program of facilitating men's serving of service itself, is the underlying call for them to organize themselves for that purpose. Thus there arises a certain natural duty for people to form into suitable groups such as families, communities, labor unions, and professional associations, institutions, nations and federations. Not to be overlooked is the fact that the law itself and its instrumentalities are subject to its own purpose of systematically eliciting man's service and hence it must be suitable to do so, i.e., swift, certain, efficient and available to all.

*Negatively*, this natural law outlaws a person's interference in the services of others; to this end calling into existence specific codes, with appropriate policing apparatus, to prevent crimes, torts, fraudulent sales; breach of the intentions of contractors, grantors and testators; the spread of disease and pests; and the denial of basic freedoms of life, vocation, speech, religion, property, enterprise, assembly; and the like; protecting all freedom of intention to the extent it is exercised within the ambit of service or goodness. Thus the natural law marks out and protects an area of freedom for the subjects of the law, i.e., that large range of choice within the general bounds of goodness where, as far as goodness is concerned, it is a matter of indifference what course is selected. Within this area, the equalized right of self-determination—in government, in religion, in expression, in vocation, in contract, in use of property, and elsewhere—is absolute and inalienable and beyond legal encroachment by dictators, parliaments, popes, judges or any human authority.<sup>52</sup> The

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<sup>52</sup> Thus the doctrine of inalienable rights derives from Natural Law. The literature on this aspect of Natural Law is immense. Suffice it here to cite the article on "Natural Rights" in 11 Encyc. Soc. Sciences; GIERKE, *supra* note 28, p. 81-82, and *supra* note 47, p. 113-114; and IV Natural Law Institute Proceedings (1950). See also Corwin, *The Natural Law and Constitutional Law*, III Natural Law Institute Proceedings 47 (1949); MANION, *supra* note 23, p. 3; ROMMEN, *supra* note 28, p. 231 et seq., p. 243 note 50; MARITAIN, *THE RIGHT OF MAN AND HUMAN RIGHTS* (1951), p. 65-66.

goodness of natural law here is negative and protective. It does not extend to prescribing what shall or shall not be done within these boundaries but leaves this to the so-called positive and human law—so long as freedom is preserved within the framework of goodness.

But to the *individualist* it says, your regime of equalized freedom, logically derived as it is from the concept of the absolute autonomy of the human will, necessarily involves, along with those good laws against disservices (in which it agrees with natural law), the multiple evils of selfishness which require, for correction, a return to the primacy of the natural law principle of goodness. Your principle of equal freedom is not so broad as to justify selfish neglect of clear calls to service, whether in the case of parents neglecting their children; able-bodied men refusing to defend their country; the prosperous abandoning the unemployed, the disabled or the aged; the monopolist<sup>53</sup> exploiting or refusing to meet the needs of the community; the patent-owner suppressing a useful invention; the rich man hoarding his money or exacting usury; the laborer extorting from the employer through feather-bedding, stretch-outs and other forms of parasitism; the employer denying work to a willing and capable worker merely because of color or creed; the capitalist squandering natural resources, the large competitor driving smaller but more efficient producers out of business, the conspirator to restrain trade; majorities in a democracy deciding an issue solely on the basis of popularity rather than on intrinsic merit, and the like.

And to the *collectivist*, it says, your regimes of social planning logically derived as they are from some sort of volitional determinism, inevitably involve along with many good provisions for coordinated effort (in which it agrees with natural law) a one-sided organization of society which spells disservice, (i.e., tyranny) to that side of human nature or of society which is not favored. Your economic determinism leads to a proletarian despotism; your biological determinism leads to dynastic or racial dictatorships like fascism and Nazism; your physical determinism (law considered as what is effectively commanded) lends to the despotism of sheer self-justifying power. The primacy of the principle of goodness must be invoked to correct the first principle of your collectivist plan. Your plans can never justify governmental inhibitions on the freedom and opportunity of each citizen to his capabilities. This prohibition embraces all the governmental and legal disservices committed in the interests of the plan, including disseminating fraudulent or slanderous propaganda, holding rigged trials, enforcing party-line orthodoxy by threats and engaging in similar "police-state" methods;

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<sup>53</sup> See II Nat. Law Institute Proceedings 122-123 (1948). Molina's views.

smothering free productive forces through excessive taxes and red-tape; encouraging unproductivity at the expense of the efficient producer, as by tariffs in favor of inefficient industries, price floors in favor of inefficient farmers when the efficient could supply our needs, programs of enforced scarcity to hold up prices, and relief grants to those able but unwilling to work.

Similarly, *among the nations*, this natural law discloses that national sovereignty has both its scope and its bounds. It provides that a nation has a right to be able freely to contribute to the world what nature has given it in the way of talents and resources, without violation of its intent as expressed in international pacts. It says that no nation has a right to act in a self-centered way with respect to those resources and talents. And it justifies international intervention to the extent necessary to promote the one and repress the other. Thus it invokes the provision of channels and machinery for free international commerce. It condemns both the interventionism of Imperialism<sup>54</sup> and the isolationism of Iron Curtains. It exposes the fallacy of an international league that makes its power depend on the consent of the nations affected rather than on the equal right and duty of each to live and produce according to its capacities, and the converse fallacy of a mere super-government based on majority rule.

Standing off and looking at the *whole of human society*—local, national and international—we discern, in outline, a marvellously intricate brotherly cooperation in the organization of the powers of the universe to the theme of productivity. Men are integrated by a rule that calls for something more than non-offense to one another and something less than a paternal care of one another. There is the organic cohesion of diverse capacities all moving functionally according to one Principle.

### (c) *The Usefulness of Natural Law*

In the light of the foregoing we may assess the goodness of the natural law system. Insofar as it has been developed along the foregoing lines, it is good because then it is a manifestly suitable means to help bring to fruition the controlling intention imposed by God upon humanity:—

*First*, because it correctly identifies for its subjects the controlling intention, i.e., the lawgiver who is to be obeyed, namely God. This on the one hand secures natural rights from the jural usurpations of human will; and on the other hand it exposes natural duties to the jural pressure of the Divine Will.

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<sup>54</sup> For example, Vittoria. See discussion in *Natural Law Institute Proceedings* (1948), Vol. II, pp. 105, 11, 119-121.

*Second*, because it states accurately for the subjects the overall content or objective of this controlling intention, i.e., goodness itself, or happiness, (which turns out to be none other than God Himself under His aspect of Creativity). This supplies both an inducement to obedience and a rationale for the understanding and development of the legal means.

*Third*, because it prescribes systematically for its subjects the actual path that should be chosen to reach this Divine Diffusiveness, i.e., the ways of freedom within a pattern of systematized productivity, service, kindness. For the fruit of this way is to draw the immense diversity of creation together in a plan of harmonious cooperation under the stewardship of man wherein, as in a living image, God Himself takes up His residence. Natural law is the wisdom whereby man orders all things to fruition in peace; it is the sceptre by which he rules; the formula by which he causes nature to invest him with her powers. The exercise of this power, the wielding of this sceptre, the use of this wisdom is the good life, the creaturely mirroring of that Living Goodness which alone will bring repose and joy to man.

In plain words, the natural law makes us children of God, brothers of one another, and co-heirs of the powers of the universe. As the guide to the life of freedom within the walls of goodness, it establishes the City of God in which each man is ennobled and liberated—ennobled by his part in the divine activity of imaging this goodness, liberated within the scope of this part. Subjective experience discloses that in the voluntary works of good-will, man has his perfection, his peace, his joy; in deliberately bad works, he contradicts his basic intention, promotes his own frustration and becomes the author of his own misery. One does not say this of *free* works or of *prosperous* works but of *free good* works alone. And natural law, as properly developed, is the systematic ordering of these free good works, aiming to promote simultaneous free goodness in all which is the common good<sup>55</sup> and which is our joint finite participation in the Absolute Good.

Wherefore the natural law system of jurisprudence, inasmuch as it is in essence precisely a means to, and the way of, goodness in human conduct, is itself good.

However, its goodness does not extend to prescribing what shall not be done within that large range of choice where, as far as goodness

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<sup>55</sup> In the triple sense of (a) the good of society as a unit (b) the good of each member, and (c) the good held in common by every member. For the different meanings of "common good" see GILBY, *BETWEEN COMMUNITY AND SOCIETY* (1953), pp. 89-90, 195-6, 211-12; MARITAIN, *THE PERSON AND THE COMMON GOOD* (1947), p. 5-20 in particular; ROMMEN, *supra* note 28, p. 241 note 46; AQUINAS, *SUMMA THEOLOGICA*, I-II, G 90, Art. 2, Reply Obj. 2 (stating that the common good which is the end of law is not a common genus or species but a common final cause or common end).



is concerned, it is a matter of indifference what courses of action are selected. For example, so long as safety of life is promoted, the natural law is indifferent to whether traffic stop-lights shall be red or some other color or whether there shall be any traffic lights. Nevertheless natural law has a two-fold beneficial influence even upon this range of free choice which is the area of the so-called positive or human law:— it fixes the end which is to be freely implemented and it insists on the preservation of man's freedom to select among the implements.<sup>56</sup>

#### V. Replies to the Basic Objections

The foregoing analysis supplies the direct answers to the three basic objections to natural law, offering in outline the proof that there is a Divine Will knowable by the intelligence, that ordered goodness is the specific content of a true natural law, and that such a natural law is useful in leading society, by a middle path, to goodness and happiness. There remains to indicate through what and whose errors the objections arose. For this purpose the objections will be considered in order.

REPLY TO OBJECTION 1. As to the alleged uselessness of natural law—the fact that a tool is not used, or not properly used, does not establish its uselessness. It is necessary to perceive the suitability of natural law to the execution of our basic intention. Three classes of persons dealing with law miss the usefulness of natural law because of a defective perception of this. *First*, there are those who are wedded to a system whose controlling intention is something else than goodness, for example, the communist aiming at satisfying the material self-interest of laborers by taking the instruments of production away from the exploiting owners and vesting them in the hands of the workers;<sup>57</sup> or the individualist aiming at satisfying the impulse to autonomous freedom. These could, but will not, profit from the natural law. *Second*, there are those who live in a society like ours essentially based on natural law and who, because this foundation is unchallenged, are only concerned with the applications of particular laws. For example, in a limited constitutional democracy like our own, lawyers can spend their lives enforcing criminal, tort and contract laws, settling points about the manner of fair trials or procedures, applying the various laws to the facts, and in general administering justice, without ever being obliged consciously to invoke the natural law simply because it is a foundation upon which all operate by tacit agreement. Nevertheless it is useful even to these to understand and maintain it as a foundation lest inadvertently it might be undermined from within. The *Third* class are those skeptics and

<sup>56</sup> See Note 50, *supra*.

<sup>57</sup> VISHINSKI, *THE LAW OF THE SOVIET STATE* (1948), p. 41.

relativists who, because they do not understand what the natural law is, cannot see that at one and the same time and without inconsistency it can be useful in steering society by a peaceful middle path which, by making us good, will make us both prosperous and free—at once preventing the abuses of individualism and of collectivist dictatorships without falling into the abuse opposed to the one it purports to cure. The very contrariety of the protests against the natural law's sanction of inalienable rights and its sanction of authoritarian controls proves its usefulness to one or the other side.<sup>58</sup> The heart's inarticulate feeling for the middle solution of natural law leads to many Court decisions which, in the name of equity or reason or natural justice and decency, use the natural law not falsely to rationalize but correctly to justify. And of course many mistakes are made in its name, thereby bringing discredit upon it, whereas it could have been useful in preventing these mistakes if it had been thoroughly studied.<sup>59</sup>

REPLY TO OBJECTION 2. As to the allegedly mythical character of natural law norms—the variations in consciences and in understandings in different people with respect to what the natural law is, proves only that consciences and intellects can err and that those who derive their natural law from a supposed *uniformity* of conscience or reason are mistaken in doing so. Further, variation in social custom or normal behavior proves merely that natural law cannot be a description of custom or normality. Right according to the natural law doctrine of these pages, does not consist in that which is uniformly thought or felt or done by everyone. Again the fact that many natural law norms have been at times inoperative does not prove the invalidity of these norms. Otherwise mass murders as under Communism or ethnic persecutions as under Nazism would not be crimes because the criminals were not deterred or punished.

The charge that natural law norms are vague and equivocal and devoid of specific practical content stems from a failure to see first, that the prime norm is the irresistible ordering of the will to goodness as such with freedom in choosing particular goods; and second, that this norm yields specific sub-norms for concrete problems. This failure lies

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<sup>58</sup> Note Maine's recognition of usefulness of natural law theory, in the cause of individual freedom, international law and in other fields. MAINE, *ANCIENT LAW* (1861), pp. 74, 76, 77, 92-96. KOHLER also recognized its usefulness at certain times, *PHILOSOPHY OF LAW* (1914), p. 6, 10. So likewise did GIERKE, as seen in Appendix II of Barker's *Transl. of NATURAL LAW AND THEORY OF SOCIETY* (1950), p. 224.

<sup>59</sup> There is need to develop the idea of the gradual *discovery* of natural law through historical experience, just as there is a gradual discovery of, say, the principles of psychology. A fuller understanding of the difference between discovery on the one hand and evolution or creation on the other, would allay many doubts growing out of the historical variation in conceptions of natural law. D'ENTREVES, in his *NATURAL LAW* makes a good beginning in showing the connection between the historical and philosophical approach to the subject. See ROMMEN, *supra* note 28, ch. XIII, p. 218-219 on the deepening grasp of natural law.

partly at the door of some of the expositors of natural law (a) for failing to make clear that "nature", "reason", "right", even the "Will of God" or the "Divine Reason", etc., refer to "goodness" as their ultimate content—giving term and that goodness itself is an aspect of "being";<sup>60</sup> (b) for failing to describe convincingly in terms of modern psychology the irresistibility of "goodness as such" and the resistibility of particular goods; (c) for failing to show logically by what consequent "natural" legal plan and order the diverse inclinations to particular goods are to be adjusted and allowed; and (d) thereby opening the door for expositors to put forth their own preferences.

It does not suffice merely to describe so-called "natural" inclinations (like the will to live, to satisfy the sexual urge, to live in society, to know truth,<sup>61</sup> to live in peace,<sup>62</sup> and to act freely<sup>63</sup>) and to say the law is simply the system necessary to foster and protect these inclinations. Since a man is not irresistibly inclined towards the satisfaction of these particular tendencies (many people desire oblivion, celibacy, isolation, fighting), it is necessary to explain why satisfaction of these tendencies has a clear relation to satisfying the general tendency to goodness, it being apparent that only an absolute good (God) can satisfy the latter.<sup>64</sup> It is also necessary to explain how, i.e., by what consequent hierarchical order, all the crucial conflicts among these diverse inclinations are to be resolved. Apart from the negative proposition that no one can satisfy his inclinations except subject to an equal regard for the right of others—which the individualists as well as natural law jurists hold in common—

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<sup>60</sup>This will be a hard saying to many trained in the schools that organize their treatises in terms of "reason" and "nature". To clarify the point, it is well to distinguish two kinds of legal generalization: (1) the directive that is general because it is *inclusive* (like "win the war", "seek goodness") and (2) the directive that is general because it is *equivocal* (like "render each his due", "be reasonable", "fulfill your nature"). The former is general but definite in content. The latter is general but indefinite in content. It might be objected that "good" is as equivocal as "reason" or "nature". But reflection will show that in human action reason merely implies logical coherence of means to ends (and hence is equivocal as respects the basic content of the means and ends in human conduct) whereas good implies being under its aspect of desirability or suitability (and hence is definite, though inclusive, in its content). Similarly "nature" as a principle of action necessarily takes its definition from the direction toward which it faces, i.e. the good or end to which it moves. It might be countered that this good which is the end of the nature involved is in turn defined by reference back to the essence of the particular being of which it is the fulfilling reality. This is true. However, in the case of man, the essence of the being of which his good is the fulfilling reality is not man himself or "rational animal" but rather that essence which supplies reality simply, i.e. which diffuses existence; which is to say the hypostasis of Goodness. Man's nature for its perfection, looks to that good which is ultimately defined as Subsisting Goodness or as the Essence whose nature is to-be, and not as reason or nature, or rational animal.

<sup>61</sup>These four inclinations are particularly enumerated by St. Thomas Aquinas.

<sup>62</sup>Hobbes deduces his natural law from the desire for peace. LEVIATHAN (Waller ed. 1904).

<sup>63</sup>Locke deduced his natural law from man's natural freedom but he made no clear showing of the limits of freedom. OF CIVIL GOVERNMENT.

<sup>64</sup>Since all ends are willed for the last end. AQUINAS, SUMMA THEOLOGICA, I-II, Q. 1, A. 6.

all the important legal questions are left unsolved.

Thus natural law seemed to leave the Courtroom precisely when help was most needed—when the case began. And it was unnecessary. For as explained above, the order of *coordination* among particular inclinations (between all creatures; between men; and within each man) is suggested by the order of *subordination* of all inclinations to a single theme of creativity. The universe discloses a line of ascending representation of creativity from a pure taking to the pure giving of the Creator grasped in men's minds, thereby yielding a pattern of inter-relation among creatures generally and between men in particular. In other words, just as notes of music are correlated on the basis of relation to a common theme, so each creature finds its place in relation to its neighbors by virtue of a relation to a common God. In order to see this basis of coordination among human claims to particular goods (like life, truth, friends, sex), the moral eye must project its vision beyond the target of promoting these things to the ultimate target of promoting the presence of the Substantive Good. By the measure of its dedication to the presence of that which gives being, each creature is justified in its "taking". Duty to God precedes rights from creatures.<sup>65</sup>

On the part of the opponents of natural law, there has been a failure to discern in human nature a fixed intention of goodness as distinct from either (a) the arbitrary intention of an autonomous human will or (b) the fixed intention of definable or psychological appetites. Consequently they can understand only systems dedicated to human freedom (the programs of which are only negative, i.e., non-interference) or systems dedicated to particular human satisfactions such as racial fulfillment, economic prosperity, effective power, intellectual coherence of norms and the like (the programs of which, while positive, suppress freedom). Lacking the idea of "servant of goodness", they aim to give man either a god-like liberty or an animal like satisfaction which frustrates one side or the other of human nature. In either case, the end is a human "taking"; duties have therefore grown out of rights; and the logical basis for a binding co-ordination among essentially equal claimants is lost.

REPLY TO OBJECTION 3. As to the alleged lack of a knowable law-giver—a person does not determine the Divine Will (as many critics assume) by virtue of his status as philosopher, priest,<sup>66</sup> king, elite or

<sup>65</sup> See ROMMEN, *supra* note 28, p. 243 note 50, also p. 204.

<sup>66</sup> Some have thought that the Roman Catholic Church takes to itself the right to decide what is true or false natural law. See Gerhart, *The Doctrine of Natural Law*, 26 N. Y. U. L. R. 76 (1951). It is true that the Church teaches that the secondary object of infallibility is extended to all and only those truths which are necessary that the data of revelation be faithfully guarded. TANGUERAY, *SYNOPSIS THEOLOGIAE DOGMATICAE FUNDAMENTALIS*, Vol. 1, p. 618 et. seq. (1937 ed.). But this is merely to say that natural law as arrived at by reason cannot conflict with revealed truth entrusted by scripture and tradition to the Church. This does not mean that the Church can infallibly describe (let alone

otherwise, but by virtue of the intrinsic cogency of his deduction of an invisible Creative purpose behind the visible nature of man and his further deduction that particular lines of action fall within or without the direct scope of that purpose. As heretofore noted, the observable activity of all men manifests a fixed general intendment only to goodness as such, with a freedom over particulars (and the possibility of error). This argues a Creative Mover who alone could account for such a generalized motion. It further argues that certain lines of conduct will fulfill this operative principle and certain lines of conduct will frustrate it. This is to say, whatever leads to goodness is within the purview of the Divine Will; and whatever leads away from it is not within its purview (except insofar as the Creator wills to permit the aberration and to cause the consequences). Here again, some proponents of natural law have misled many people by positing as the common human inclination at the source of natural law something less than the inclination to goodness as such. Thus Grotius posited the inclination toward the preservation of society; Hobbes posited the inclination toward peace and away from the "war of everybody upon everybody"; Pufendorf posited the sense of weakness; others have posited personal happiness, self interest, the desire for a long and happy life, common tastes, harmony, reason<sup>87</sup> and so forth. But none of these are universal, immutable and necessary inclinations of the human will. Other exponents like Locke and Kant have so much concentrated their attention upon the apparent equal independence of everyone (as between each other) and the consequent inalienable individual rights, that they have neglected the universal divine purpose and the consequent inalienable duties and opened the way to an excessive libertarianism.

That some persons or groups of persons, by reason of training, natural gifts, special organization for the purpose or strategic position, may gain a clearer insight into the nature of goodness and the actions which will lead to it or away from it, does not make it arbitrary or arrogant to designate them as guides of society. If there were no superiority of one person or group over another in determining rights and wrongs,

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originate) the positive content of natural law; rather that rational truth and revealed truth must harmonize and that revealed truth may help understand rational truth. Nor does it mean that the Pope or hierarchy are able to disobey the natural law—the teaching is quite the contrary. See GIERKE, *supra* note 28, p. 75, notes 257 and 132. Nor again does it mean that where revelation is silent, the human reasoning of Church theologians and philosophers cannot be as wrong as Aristotle or Jefferson or any other exponent of natural law. (Sic, the controversies among Catholic exponents of natural law). It is necessary not to confuse the *negative* authority claimed by the Church under title of scripture and tradition with the *positive* authority belonging to all reasonable men under the title of their status as rational creatures. Both claims are authoritative rather than democratic—qualitative rather than quantitative.

<sup>87</sup> Thus Friedman seems to think that natural law depends upon "reason" as its ultimate source and hence accepts Hume's criticisms of natural law as fatal. LEGAL THEORY (1947), ch. 8, (Twilight of Natural Law Ideology).

why have law schools and bar examinations? Why talk of a judge's qualifications? Why have courts and deliberative councils and expert staffs? Why not every man be his own judge and legislator? Obviously there is as much a place for fitness in ascertaining good and bad acts as there is in prescribing good and bad medicine.

Be it noted that the qualified person or persons are not necessarily government officials. There is a potential plurality<sup>68</sup> of authorities depending on the subject of governance; for example, parents or guardians are usually best to govern their children; charitable institutions are usually best to govern the incompetent; trained soldiers to handle defense, medical authorities to protect public health, courts to determine contested judicial facts; one's self to determine one's own vocation. Fitness of the agent is a question of fact. And the agent that determines the fact of fitness must be fit to do it. Methods of ascertaining the fit will vary, freedom to select those that will govern us must be exercised within the range of the qualified.

This should not cause alarm. Everyone, if he wants, can recognize health when he sees it; yet few could accurately define it (for it is an intangible, relational thing) and not all can say what causes it. Hence, at times, in order to avoid or overcome illness, it is necessary to turn to a doctor. In like manner, everyone can, if he will, recognize goodness (i.e., suitability) when he sees it; but few can describe what it consists in and not everyone can prescribe the way to attain or keep it. It is necessary on occasion to consult one among those who are specially equipped, organized and situated in the field of systematized goodness, which is to say, in the field of law. Just as, ultimately, by the fruitfulness of their remedies in eliciting health, the true doctors commend themselves to us, so, in the last resort, by the goodness of their laws in eliciting goodness in men, we may know the true interpreters of the Will of God.

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<sup>68</sup> That scholastic natural law supports pluralism, see ROMMEN, *supra* note 28, p. 244.