

## Laval théologique et philosophique



# Natural Law and the Judicial Function

Joseph V. Dolan

Volume 16, numéro 1, 1960

URI : <https://id.erudit.org/iderudit/1019988ar>

DOI : <https://doi.org/10.7202/1019988ar>

[Aller au sommaire du numéro](#)

### Éditeur(s)

Laval théologique et philosophique, Université Laval

### ISSN

0023-9054 (imprimé)

1703-8804 (numérique)

[Découvrir la revue](#)

### Citer cet article

Dolan, J. V. (1960). Natural Law and the Judicial Function. *Laval théologique et philosophique*, 16(1), 94–141. <https://doi.org/10.7202/1019988ar>

## Natural Law and the Judicial Function \*

So far we have been dealing with the general concept of law and with the general thesis of legal positivism. Against the doctrine which divorces the legal and moral orders by defining law simply as physical force in disguise, we have shown it to be a rational rule and a measure of human acts based on an objective moral order.

This treatment has been for the most part "common" and therefore engaging the legal positivist in the area of broad fundamental principles where he is not on his strongest ground, and where his analysis has not been most searching. Now, however, we must turn to a critique of natural-law jurisprudence which is more formidable since it is more specific to the jurist, originating as it does in considerations where he is expert. The indictment no longer proceeds, at least not consciously, on *a priori* grounds or as the result of philosophical commitments already made. Undoubtedly, there have been legal positivists who were positivists to begin with and whose rejection of the natural law was an offshoot of their positivism. But now we must reckon with those whom legal history itself has led to a mistrust of moral absolutes. Legal experience has brought them to the judgment that "the idea of classical natural law itself is unnatural and wholly man-made," and shown, besides, "the very real dangers to human freedom and progress of attempting to determine absolutely and forever rules for the guidance of the human race upon the basis of dogmatic beliefs derived from the 'natural law'." <sup>1</sup>

Their criticisms are directed primarily against certain mechanical methods of applying the positive law in individual cases and against the attempts to construct the legal order on a purely logical plan. But the attack has been widened to include the existence of natural law itself because it so happens that this mechanical or "conceptual" jurisprudence is closely linked to a so-called "natural law" theory long enough in vogue to go nowadays by the name of *classical*.

It is true that not all legal realists go the full length of relativism. Many accept a natural law in the wide sense that man must act conformably with reason. What they do reject, however, is the idea of a corpus of natural law consisting of fixed principles discoverable by reason and binding always and everywhere in virtue of the constitution of human nature itself. Man's responsibility, they argue, is not to search out an ideal pattern of conduct valid once and for all

---

\* For the first part of this study, see *Natural Law and Modern Jurisprudence in Laval théologique et philosophique*, Vol. XV, 1959, n.1, pp.32-63.

1. G. GOBLE, « Nature, man and law, » *American Bar Association Journal*, vol. 41 (May, 1955), p.403.

and containing the "slightest regulations of natural ethics."<sup>1</sup> He should "rise indeterminately over nature" and create his own moral order :

Man is not like the robin, the same now as always, the same here as elsewhere, one individual like every other individual. It is contrary to his nature to have uniformity in aptitude, in preference, in feeling, in taste, in attitude toward fellows. By nature his thought does not conform to any given standard. Is it not then in accordance with the *law of nature* that men, differing in background, tradition, experience, taste and aptitude, should also differ in ideals and faiths? It is not as much the law of nature for men to be thus diversified as it is for robins to be uniform in their pattern of existence? This attribute sets man off from other animals. Why should it be contended, as it is by some, that this attribute is contrary to the law of God, and that unless man fits his thought and faith into a specified pattern he has committed an offense against the law of nature? The non-acceptance by some men of this characteristic of diversification in man as part of the law of nature has caused many of the world's most oppressive tyrannies and bloodiest wars. Are we even now aware of man's true nature?<sup>2</sup>

This paragraph, penned in defense of Holmes' criticism of moral absolutes, could not be accepted or rejected *sine addito*. But that it should be written to alert against the menace of a revival of natural-law thinking in law and politics shows the need for clearing the air. With this purpose we propose to examine the relation of natural-law ethics to the two complementary functions of political prudence — the judicial and the legislative.

#### I. LAW AS THE INSTRUMENT OF POLITICS

The political art has for its object the ordering of a civil multitude for the security of justice.<sup>3</sup> And the instruments it uses for this end are laws since it is by means of laws that the *politicus* determines which actions are just and which are not. And just as laws are instruments of politics, so the judge may be called an instrument of law. For "once the law is enacted, a judicial sentence is needed to apply the law's general prescription to the case at hand."<sup>4</sup>

1. We cite an expression of Maritain in *Man and the state*, where it has its proper meaning though it may betray the unwary. The paragraph reads as follows: "With regard to the basic *ontological* element it implies, natural law is coextensive with the whole field of natural moral regulations, the whole field of natural morality. Not only the primary and fundamental regulations but the slightest regulations of natural ethics mean conformity to natural lawsay, natural obligations or rights of which we perhaps have now no idea, and of which men will become aware in a distant future." J. MARITAIN, *Man and the State*, Chicago Univ., 1951.

2. GOBLE, *op. cit.*, p.475.

3. ARISTOTLE, *Politics*, Bk I, c.2, 1253 a (St. Thomas, lect.I, n.41).

4. *In V Eth.*, lect. xvi, nn. 1086-1087. Cf. ARISTOTLE, *Ethics*, Bk V, c. 10, 1137 b.

To understand this function of the judge we must consider certain properties of the positive law.

### 1. *The functions of human law*

#### a) *To determine the "justum legale"*

Positive legislation is necessary not just to sanction and compel to just actions but also to define the just action itself. Since natural law leaves many things objectively undetermined,<sup>1</sup> human reason must intervene with laws of its own making to establish a just relation where nature has fallen short. This is a complicated and difficult work since the suitability of these "artificial" determinations for the ends of natural justice (which they must of course serve) depends on a bewildering number of factors that can be assimilated only by experience<sup>2</sup> and with the aid of intellectual virtues and qualities of imagination that alone make such experience avail.<sup>3</sup> Since laws are made for the common good, the *justum legale* to be fixed by law cannot be reckoned in terms of a single equation. "*Oportet quod lex ad multa respicit et secundum personas, et secundum negotia, et secundum tempora.*"<sup>4</sup> As between John Doe, worker, and his employer, it might seem just that the former have a right to strike. But not if he happens to be a member of the police force.

The law's effort then is to impose some rational pattern on an otherwise chaotic element, getting as close to the manifold of human action as it possibly can without getting so close as to defeat the very purpose of law which is to *measure* and direct. To remain a convenient measure, law must retain a certain universality and remain at some distance from the contingent singulars. It cannot become so completely configured to any individual action as to destroy its usefulness as a measure for the others. And it must also renounce the attempt to cover the whole ground and leave no situation unregulated. Otherwise the result would be a plethora of statutes as unwieldy as the mass

1. *Ia IIae*, q. 91, a.3, ad 1 ; q.95, a.2, c ; *In V Eth.*, lect. XII, n. 1023.

2. *Ia IIae*, q.95, a.2, ad 4.

3. This is especially so for the judges and other *executores legum* who are more occupied with singulars than the « architectonic » legislator. The « sentence » is the application of the universal law to the particular *operabile*. Cf. *In VI Eth.*, lect. VII, nn. 1197-1198.

Cf. also *Ia IIae*, qq.40-51 on the parts of prudence and the connected virtues. Also q.70, a.2, c. and ad 2. We are confining ourselves here to the question of interpretation of law, but we should point out the relevance of these articles for another important task of the judge : the weighing and admission of evidence. The deficiencies of the average man in these prudential virtues and in "fact-discretion", as it is called, provide the basis for the criticisms of the jury system as presently administered. Cf. J. FRANK, *Courts on Trial*, Princeton, 1949, cc. VIII-IX.

4. *Ia IIae*, q.96, a.1, c. Cf. q.97, a.1, ad 3.



they were supposed to reduce to order.<sup>1</sup> Hence positive law is compared by Aristotle to the rule used by the Lesbian masons. It is the best instrument the *politicus* has at hand for getting some workable mastery over materials which are unstable, intractable, and multiform.<sup>2</sup> St. Thomas in his own commentary develops this point :

De quibusdam non est possibile quod dicatur aliquid verum in universalis, sicut de contingentibus ; de quibus etsi aliquid sit verum ut in pluribus, ut in paucioribus tamen deficit. Et talia sunt humana facta : de quibus dantur leges.

Quia igitur in talibus necesse est quod legislator universaliter loquatur propter impossibilitatem comprehendendi particularia, nec tamen est possibile quod in omnibus recte se habeat quod dicitur propter hoc quod deficit in paucioribus, legislator accipit id quod est ut in pluribus, et tamen non ignorat quod in paucioribus contingit esse peccatum.<sup>3</sup>

As a measure of human actions, therefore, positive law is of necessity imperfect in so far as it fails to apply to exceptional cases even were it possible for the legislator to foresee them.<sup>4</sup> *Lex deficit in particularibus.*<sup>5</sup> The genius of *eunomia* is to keep the margin of defect to the minimum compatible with the universal language of law. "Law does all that it should when it does all that it can." Thus Aristotle :

All law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct ; for the error is not in the law nor in the legislator, but in the nature of the thing, since the matter of practical affairs is of this kind from the start.<sup>6</sup>

#### b) *To induce habit*

A peculiar importance attaches to the element of time as regards the purposes of law. For time is needed to generate habit which has a notable part to play in consolidating the *justum* once it has been legally determined. This is especially so with regard to the *justum legale* since it is wholly determined by law.<sup>7</sup> Through habitual and

1. " Illud quod est directivum oportet esse plurium directivum. . . . Si enim essent tot regulae vel mensurae quot sunt mensurata vel regulata, cessaret utique utilitas regulae vel mensurae, quae est ut ex uno multa possunt cognosci." *Ia IIae*, q.96, a.1, ad 2.

2. Cf. *Ethics*, Bk V, c.10, 1137 b (St. Thomas, lect. xvi, nn. 1087-1088).

3. *In V Eth.*, lect.xvi, n.1084.

4. *Ia IIae*, q.96, a.6, ad 3.

5. *In V Eth.*, lect.xvi, n. 1084.

6. *Ethics*, Bk V, c.10, 1137 b.

7. *Ethics*, Bk V, c.12, 1134 b (St. Thomas, lect.xii).

common practice, knowledge of the law is facilitated and observance becomes routine. Not only that, but custom, in which the letter of the laws is so to speak incarnated, reveals better than the literal formula itself a law's true meaning.<sup>1</sup> *Consuetudo est optima legum interpres*. Not just any improvement gained by modifying established law would compensate for loss of these advantages.

This is the reasoning behind the at first surprising advice that it is usually wiser to persevere with a poor law rather than change it as soon as we hit upon a better.<sup>2</sup> Change of itself is already one great disadvantage in that it disrupts custom and thus contributes to weakening the constrictive and habituating force of law.<sup>3</sup> To be really compensating, the advantage brought by the new law must be not only sure but proportionally greater. This is one point where the difference between speculative and practical science is of importance and where some doctrinaire political theories of the eighteenth century went awry in attempting to cut new "reasonable" legal systems out of whole cloth. True, in the case of the sciences, when we find a better definition or a more accurate formula, we cast the old aside and run off new editions. Likewise in the arts : as soon as we discover a more efficient process, our factories are reconverted overnight. All this has spelled progress in science and industry. But laws are not entirely comparable to artefacts. Whereas the success of art depends primarily on the good judgment and skill of the artist, the efficiency of law in producing good behaviour in the subjects depends chiefly on custom. Law has to work upon matter which is refractory and not readily responsive to the touch. It attains its purpose by accustoming, and custom by definition requires time.<sup>4</sup>

This is one of the arguments for the common-law policy of *stare decisis* according to which the decisions, — the *sententiae* — of the

---

1. « Unde etiam et per actus, maxime multiplicatos, qui consuetudinem efficiunt, mutari potest lex, et exponi, et etiam aliquid causari quod legis virtutem obtineat." *Ia IIae*, q.97, a.3, c.

2. " Consuescere autem ad dissolvendum leges est valde pravum. Unde manifestum est quod sustinendi sunt quidam modici defectus et errores qui contingunt principibus et sapientibus in legis ferendis ; quia ille qui vult mutare propter aliquid melius, non tantum proficiet mutando quantum nocebit, dum consuescunt cives ad non observandum statuta praecepta principum." *In II Polit.*, lect.xii, n.294.

3. " Habet autem ipsa legis mutatio, quantum in se est detrimentum quoddam communis salutis. Quia ad observantiam legum plurimum valet consuetudo, intantum quod ea quae contra communem consuetudinem fiunt, etiam si sint leviora de se, graviora videntur. Unde quando mutatur lex, diminuitur vis constrictiva legis in quantum tollitur consuetudo." *Ia IIae*, q.97, a.2, c.

4. " Illud exemplum, quod sumebatur de artibus in quibus profuit multa mutasse, inducit nos ad mendacium, quod non est simile de mutatione artis et legis : quia ea quae sunt habent efficaciam ex ratione ; sed lex nullum habet robur ad hoc quod persuadeatur subditis, quod sit bona, nisi per consuetudinem ; quae quidem non fit nisi per multum tempus." *In II Polit.*, lect.xii, n.295.

courts acquire the status of law and serve as precedent and norm for all subsequent similar cases. It has been denounced as "the government of the living by the dead" and has at times been carried to excess as it was by the nineteenth century historical school which defended it on Hegelian grounds. A ruling that was apt in the past can become burdensome when circumstances have changed, and critics of *stare decisis* have no trouble supplying irritating instances where judges have felt compelled to resort to elaborate fictions in order to satisfy both justice and precedent. Law must be stable but it cannot stand still. It must allow for development *ex parte rationis et ex parte hominum*.<sup>1</sup> It is the genius of the common-law system to allow for adaptations that codified systems admit only with a good deal of wrenching. Nevertheless, certitude and stability are good things also in the law and worth the trouble of many an incidental hardship.<sup>2</sup> Prudence must judge when the proportion has become altered to a point where departure from precedent and the encouragement of new custom are just and necessary. Justice Holmes is famous for the impatient remark that it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. In this case he had real anachronisms in mind. Still, that a present rule should date from the time of Henry IV is in itself one good reason in its favor, which must of course be measured against possible indications contra.<sup>3</sup> It lets parties know where they stand and how a question is likely to be decided by a court. Indeed it keeps many questions from coming before the court in the first place. There are few better ways of knowing what the law is than by knowing what the courts are in the habit of deciding. This guarantee is all the more necessary when there is question of the legally just, the *justum legale positivum*.<sup>4</sup>

---

1. *Ia IIae*, q.97, a.2, ad 2.

2. "In these days there is a good deal of discussion whether the rule of adherence ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent ought to be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have ten judges of whom only seven sit at a time. It happens again and again that where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in the rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before whether we relish them or not." CARDOZO, *The Nature of the Judicial Process*, *op. cit.*, p.149.

3. Cf. *Ia IIae*, q.97, a.2, ad 2.

4. "Until the judgment in *Strangborough v. Warner* . . . there had been in English law the most fragmentary and imperfect development of contract by mere consent. Before

For such laws as a rule cannot be inferred. Although reasonable, they have their reason in their usefulness as determined by experience. This is the sense in which St. Thomas explains Justinian's reminder : " *non omnium quae a maioribus lege statuta sunt, ratio reddi potest* : "

Verbum illud Jurisperiti intelligendum est in his quae introducta sunt a maioribus circa particulares determinationes legis naturalis ; ad quas quidem determinationes se habet expertorum et prudentum iudicium sicut ad quaedam principia ; in quantum scilicet statim vident quid congruentius sit particulariter determinari. Unde Philosophus dicit in VI *Ethic.*, quod in talibus " oportet attendere expertorum et seniorum vel prudentum indemonstrabilibus enuntiationibus et opinionibus, non minus quam demonstrationibus." <sup>1</sup>

As with the original law itself, so too with the court's interpretation. It represents a prudential judgment. Cases come up for adjudication because of some obscurity as to the law's meaning and application. The court's decision, whatever its intrinsic merits, at least authoritatively removes the doubt as to what the law now means.

It is sometimes said that this adherence to precedent is slavish ; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may be fairly said to have no law ; for law is a fixed and established rule, not depending in the slightest degree on the caprice of those who may happen to administer it. I take it that the adjudications of this Court, when they are free from absurdity, not mischievous in practice, and consistent with one another, are the law of the land. It is this law which we are bound to execute, and not any " higher law," manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary. The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others, we ought to

---

the rendition of that judgment we cannot say with justice that there was a preexisting principle or rule which the judges were extending or applying. They formulated the principle or rule themselves and gave it potency thereafter by a process of creation. Suppose some court today should refuse to accept the judgment in *Strangborough's* case, and hold the contract void. . . . With this possibility before us, with the power residing in the court to nullify all our predictions, why do we, none the less, declare with assurance that this case is still to be accepted as a statement of the law ? We do so because the observation of recorded instances almost without number induces a belief which as the certainty of conviction that the rule will be acted on as law by the agencies of government. As in the processes of nature, we give the name of law to uniformity of succession." CARDOZO, *The Growth of Law*, Yale, 1924, p. 39.

1. *Ia IIae*, q.95, a.2, ad 4.

be a law unto ourselves. If we are not, we are without a standard altogether. The uncertainty of the law — an uncertainty inseparable from the nature of the science — is a great evil at best and we would aggravate it terribly if we could be blown about by every wind of doctrine, holding for true today what we repudiate as false tomorrow.<sup>1</sup>

c) *To declare the natural law*

In addition to defining or "instituting" and confirming the *justum legale*, statutes will also be necessary to formulate the prescriptions of natural law (*jus naturale*).<sup>2</sup>

There are several reasons why such declaration of natural law is needed. Many of its more specific precepts are not absolutely certain either in themselves or as regards the mind's grasp on them (*secundum rectitudinem et secundum notitiam*). True, they are objectively predetermined in the structure of man's nature. But as generally formulated, they suppose this nature situated in circumstances which are only commonly and not universally verified. Hence such precepts imply a tacit exception.<sup>3</sup> St. Thomas in a lengthy article probes this unequal stability in the conclusions of practical science, which deals with contingent human actions, as contrasted

---

1. *McDowell v. Oyer* cited in R. POUND, *Readings on History and System of the Common Law*, Boston, 1921, p.231. The philosophy of the rule of precedent is implicit in the full expression *stare decisis et non quieta movere*. This is worth noting because the natural-law jurist is sometimes misunderstood in his approval of it. It is generally taken as part of his ingrained conservatism and incurable awe of authority, or even his attachment to the "beauty and symmetry of the law." Or else he is thought to defend it on grounds similar to those of the rationalist and the historical idealist, for whom the legal order develops by the working out of an "idea."

2. "Fit autem aliquid justum dupliciter : uno modo ex ipsa natura rei, quod dicitur jus naturale ; alio modo, ex quodam condicto inter homines quod dicitur jus positivum. . . . Leges autem scribuntur ad utriusque juris declarationem, aliter tamen et aliter. Nam legis scriptura jus quidem naturale continet, sed non instituit : non enim habet robur ex lege, sed ex natura. Jus autem positivum scriptura legis et continet et instituit, dans ei auctoritatis robur." *IIa IIae*, q.60, a.5.

3. Natural law being *ipsa recta ratio* (*Ia IIae*, q. 71, a. 6, c.), we must distinguish the real content of the precept from its formulation. The formula stands in the same need of interpretation as the positive law. The precept touching the restoration of property, for example, is not adequately translated by *deposita sunt reddenda*.

"Nam quaedam praecepta versantur in materia quae non recipit mutationem vel limitationem, ut est, vel generale principium, *Non sunt facienda mala*, vel interdum particulare praeceptum ut *non est mentiendum* : alia vero sunt quae ex parte materiae mutationes recipere possunt, et ideo limitationem, vel quasi exceptionem admittunt : unde saepe loquimur de his praeceptis ac si essent proposita per absoluta verba, sub quibus patiuntur exceptionem, quia non satis declarant ipsum praeceptum naturale prout in se est. Sic enim praeceptum in se spectatum nullam exceptionem patitur, quia ratio naturalis dicitur hoc debere fieri tali vel tali modo, et non aliter, vel concurrentibus talibus circumstantiis, et non absque illis." SUAREZ, *II De Legibus*, c.14, n.7 ; also c. 16, treating of *epicheia* and the natural law.



with those of the speculative sciences which treat of necessary and "immovable" objects.

Quia enim ratio speculativa praecipue negotiatur circa necessaria, quae impossibile est aliter se habere, absque aliquo defectu invenitur veritas in conclusionibus propriis, sicut in principiis communibus. Sed ratio practica negotiatur circa contingentia, in quibus sunt operationes humanae : et ideo, etsi in communibus sit aliqua necessitas, quanto magis ad propria descenditur, tanto magis invenitur defectus.<sup>1</sup>

With regard to such principles which defect on occasion (*ut in paucioribus*), the legislator's task will be to formulate them more narrowly with an eye to the more frequent exceptions. We have examples of this in laws which restrict the uses of private property ; in those which prohibit certain kinds of contract ; and in those which define the limits of professional secrecy. When the law demands, for example, that a physician report a gunshot wound, this clarifies the natural law with respect to the professional secret.

The defective certitude inherent in the principle is not the only source of difficulty. Even when we have a natural-law principle which is indefectible in itself — let us say the precept against abortion — it may not be evident from the mere terms alone and may sometimes required a quite arduous reasoning process. As with the speculative sciences themselves, the farther we travel from the "common conceptions" the less evident and sure is our knowledge.

Sic igitur patet quod, quantum ad communia principia rationis sive speculativae sive practicae, est eadem veritas sive rectitudo apud omnes, et aequaliter nota. Quantum vero ad proprias conclusiones rationis speculativae, est eadem veritas apud omnes, non tamen aequaliter nota omnibus : apud omnes enim verum est quod triangulus habet tres angulos aequales duobus rectis, quamvis hoc non sit omnibus notum . . . Sed quantum ad proprias conclusiones rationis practicae, nec etiam apud quos est eadem, est aequaliter nota.

Sic igitur dicendum est quod lex naturae, quantum ad prima principia communia, est eadem apud omnes et secundum rectitudinem et secundum notitiam. Sed quantum ad quaedam propria, quae sunt quasi conclusiones principiorum communium, est eadem apud omnes ut in pluribus et secundum rectitudinem et secundum notitiam : sed ut in paucioribus potest deficere et quantum ad rectitudinem, propter aliqua particularia impedimenta (sicut etiam naturae generabiles et corruptibiles deficient ut in paucioribus propter impedimenta), et etiam quantum ad notitiam ; . . .<sup>2</sup>

Subjective factors as well as the objective complexity of a situation can impeded our perception of the natural law, The more closely we

1. *Ia IIae*, q.94, a.4, c.

2. *Ibid.*

become involved in the concrete and particular, the more circumstances we must take into consideration and the more occasions there are for the intrusion of passion, sympathy, and partisan interest. Different principles appear to conflict; it becomes increasingly difficult to align the circumstances properly and to judge their true bearing on the principles involved. The chapters on probabilism and "double effect" in any moral textbook will show that these possibilities are not academic.<sup>1</sup> Nor is it just the ordinary citizen who is unequal to these involved situations. Often the solutions may require such dispassionate outlook and such special skill in moral science that even judges of average competence could not be expected to arrive at them independently, at least not frequently or always. That is why we have courts of appeal as St. Thomas explains in connection with the provisions of the Old Law :

Judices ad hoc inter homines constituuntur ut determinant quod ambiguum inter homines circa justitiam esse potest. Dupliciter autem aliquid potest esse ambiguum : uno modo apud simplices ; . . . Alio modo contingit aliquid esse dubium etiam apud peritos ; ideo ad hoc dubium tollendum constituit lex ut omnes recurrerent ad locum principalem a Deo electum, in quo et summus sacerdos esset, qui determinaret dubia circa caeremonias divini cultus, et summus judex populi, qui determinaret quae pertinent ad judicia hominum ; sicut etiam nunc per appellationem, vel per consultationem causae ab inferioribus iudicibus ad superiores deferuntur.<sup>2</sup>

So much for the general reasons why natural law must also be the object of positive legislation. In a later section we will examine the extent to which the state may feasibly undertake this task of implementing the natural law "*in remedium humanae ignorantiae.*"<sup>3</sup>

*d) To guarantee the rule of reason*

This brings us to another quality of law : its general superiority in the line of practical wisdom vis-à-vis the judgment of individuals, magistrates themselves included. "*Neminem oportet esse sapientiozem legibus.*" Since cases ought to be decided on their individual merits, it would seem wise at first sight that laws, instead of attempting to regulate them as it were *a longe*, should propose general directives only and leave the rest to the prudence of the judge. He after all is supposed to be an "animated justice" able to appreciate the merits

1. "Quaedam enim sunt in humanis actibus adeo explicita ut statim, cum modica consideratione, possunt approbari vel reprobari per illa communia et prima principia. Quaedam vero sunt ad quorum iudicium requiritur multa consideratio diversarum circumstantiarum quas considerare diligenter non est cuiuslibet, sed sapientum, sicut considerare particulares conclusiones scientiarum non pertinet ad omnes sed ad solos philosophos." *Ia IIae*, q.100, a.1, c.

2. *Ia IIae*, q.105, a.2, ad 7.

3. Cf. *Ia IIae*, q.94, a.5, ad 1 ; q.98, a.6, c.



of the individual case before him. Such a theory gained ground for a time in France under "*les bons juges*" who rendered decision according to their individual sense of justice, substituting the *arbitrium boni viri* for the objective norm of statute.<sup>1</sup>

On the contrary, without becoming over-ambitious, the law should leave as little as possible to personal judicial discretion. Animated justice is a necessity but it should be made as unnecessary as possible. Since the "animation" happens also to be human, it is rarely found unalloyed, and the wider the area open to its flexibility, the greater the risk of missing the mark. Laws on the other hand are a depository of practical wisdom representing the mature judgment of an élite qualified to weigh pros and cons. For they can reflect calmly on a wide experience of similar cases. The experience is past and generalized, while legislation is for the future. And both past and future are relatively free from the influence of passion and surprise which are likely to color a situation suddenly presented to the judge whose "animation" some morning may, for all we know, be due to indigestion or unconscious antipathy to one of the parties before him. St. Thomas, summarizing Aristotle, thus gathers the reasons for making laws as specific as can be :

Primo quidem, quia facilius est invenire paucos sapientes, qui sufficiunt ad rectas leges ponendas, quam multos, qui requirentur ad recte iudicandum de singulis. Secundo, quia illi qui leges ponunt, ex multo tempore considerant quid lege ferendum sit : sed judicia de singularibus factis fiunt ex casibus subito exortis. Facilius autem ex multis consideratis potest homo videre quid rectum sit, quam solum ex aliquo uno facto. Tertio, quia legislatores iudicant in universali et de futuris : sed homines iudicii praesidentes iudicant de praesentibus, ad quae afficiuntur amore vel odio, aut aliqua cupiditate ; et sic eorum depravatur iudicium.

Quia igitur iustitia animata iudicis non in multis invenitur, et quia flexibilis est ; ideo necessarium fuit in quibuscumque est possibile, legem determinare quid iudicandum sit, et paucissima arbitrio hominibus committere.<sup>2</sup>

Some such thought as this is behind the policy of "legislative tolerance" with which the name of Holmes is associated. From the numerous occasions it formed the theme of his dissenting opinions, he appears to have had a uncommon appreciation of the relation between law-maker and judge. Under the American system of government, the higher courts have not only to review the decisions of lower tribunals but also to pass judgment on the constitutionality of the law itself. Holmes was at frequent odds with his colleagues on the bench in setting early limits to the scope of such judicial review. He was

1. Cf. B. CARDOZO, *The Nature of the Judicial Process*, Yale, 1932, p.139.

2. *Ia IIae*, q.95, a.1, ad 2.

often able to expose in the majority opinion overturning a contested statute, a subtle usurpation of the legislative function itself since the judges, instead of confining themselves to the strict issue of constitutionality, were actually imposing their own ideas in economics and sociology. Holmes, to be sure, was not admitting in others a higher competence in general wisdom. But he knew that courts were not constituted to substitute their own convictions for law and even when his own ideas ran counter, he was generously prepared to suppose, where there was question of the reasonability of a law, that the Congress and State legislatures were better judges than himself of the urgency of some public good and of the best practical means to achieve it. His cutting reminder to the Court, in his *Lochner* dissent, that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*" has since become a quotation. During a quarter of a century he struggled for a more tolerant interpretation of the due-process clause of the fourteenth amendment which the Court was reading in the light of *laissez-faire* economics so as to outlaw all attempts at social legislation on the part of the government as unreasonable interference with liberty. We may see his mentality at work in his dissent in *Adkins vs Children's Hospital* where the Court voided as unconstitutional a minimum wage law for women :

The question in this case is the broad one. Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all. To me . . . the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality, and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men.<sup>1</sup>

When a majority of the Court ruled a tax law unconstitutional on grounds that it drew an arbitrary classification in exempting mortgages due to mature within five years, Holmes in dissent enunciated his famous doctrine of the "pragmatic line :"

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems

---

1. 261 U.S. 525, 567 (1923). Citations not otherwise qualified are from *United States Supreme Court Reports* (Lawyers' edition).

arbitrary. It might as well or might nearly as well be a little more to the one side or the other. But when it is seen that a line or point there must be, and there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

There is a plain distinction between large loans secured by negotiable bonds and mortgages that easily escape taxation, and small ones to needy borrowers for which they give their personal note for a short term mortgage on their house. I hardly think it would be denied that the large transactions of the money market reasonably may be subjected to a tax from which small ones for private need are exempted. The Legislature of Kentucky after careful consideration has decided that the distinction is clearly marked when the loan is for so long a term as five years. Whatever doubt I may feel, I certainly cannot say that it is wrong. If it is right as to the run of cases a possible exception here and there would not make the law bad. All taxes have to be laid by general rules.<sup>1</sup>

The significance of this viewpoint, which may strike us as evidencing only good common sense, may appear more clearly when we examine later on the legal philosophy to which it is opposed.

## 2. *The function of the judge*

### a) *The judge as "minister legis"*

Laws are "measures" instituted by the public authority to regulate human actions. For the most part they accomplish this quietly and effectively. If laws are sound and well formulated, the citizens can in large part apply the measure for themselves. We can speak then of a hidden operation of human law. There are no records of how many individual motorists are firmly regulated by traffic laws.

But legislation would be incomplete without provision for some public, official, means of applying laws to particulars. In the first place, laws depend on sanctions. Hence in addition to the authoritative command, there must be another public power to make particular applications of the law in the form of penalties for violations. Punishment is one of the acts of law<sup>2</sup> and someone must decide it.<sup>3</sup>

There is another reason why the legislator has to be supplemented. Laws must be universally proposed. And since they have for their object human acts which are not perfectly uniform, occasions must arise when there is doubt of a law's application in a particular set of

1. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928).

2. *Ia IIae*, q.92, a.2, c.

3. "Id autem per quod inducit lex ad hoc quod sibi obediatur, est timor poenae : et quantum ad hoc, ponitur legis effectus punire." *Ibid.*

"Punire non pertinet nisi ad ministrum legis, cujus auctoritate poena infertur." *Ibid.*, ad 3.

circumstances. Hence the need for some authoritative voice to interpret the law, deciding if and how it applies in the particular case.

Quia enim lex deficit in particularibus, ista est causa quare non omnia possunt determinari secundum legem, quia de quibusdam quae raro accidunt, impossibile est quod lex ponatur, eo quod non possunt omnia talia ab homine provideri. Et propter hoc necessaria est post legem latam sententia iudicum per quam universale dictum legis applicatur ad particulare negotium. Quia enim materia humanorum operabilium est indeterminata, inde est quod eorum regula, quae est lex, oportet quod sit indeterminata, quasi non semper eodem modo se habens.<sup>1</sup>

The judge's office therefore originates as the natural complement of law just as the manual labourer complements the architect.<sup>2</sup> Besides the law we need the "sentence," or particular judgment, and an "executive prudence" to give the law its proper effect. St. Thomas thus comments on the sense of Aristotle's division of political prudence into active and architectonic :

Una pars est quasi prudentia architectonica, quae dicitur legis positiva. Dicitur enim pars architectonica quae determinat aliis quid sit agendum. Unde principes imponentes legem suis subditis, ita se habent in civilibus sicut architectores in artificialibus. Et propter hoc ipsa lex positiva, idest ratio recta secundum quam principes leges rectas ponunt, dicitur architectonica prudentia.

Alia autem pars politicae communi nomine vocatur politica, quae scilicet consistit circa singula operabilia. Leges enim comparantur ad opera humana, sicut universalis ad particularia. . . . Et sicut legis positiva est praeceptiva, ita et politica est activa et conservativa eorum quae lege ponuntur.

Et hoc patet quod ad ejusmodi politicam executivam pertinet sententia : quae nihil aliud est quam applicatio rationis universalis ad particulare operabile. Non enim dicitur sententia nisi de aliquo operabili.<sup>3</sup>

As the very name of his office suggests, the judge's task is justice. *Judex dicitur quasi jus dicens.* Indeed, the term "judgment" which we use for the mind's affirmation with regard to any object, in its original sense meant a determination of the *just*.

Judex autem dicitur quasi "jus dicens." Jus autem est objectum justitiae . . . Ed ideo iudicium importat, secundum primam nominis impositionem, definitionem vel determinationem *justi* sive *juris*.<sup>4</sup>

Prudence and justice must therefore be his characteristic virtues : prudence, because he must judge with regard to the singular and

1. *In V Eth.*, lect. XIV, n. 1087.  
 2. Cf. *Ethics*. Bk VI, c.8, 1141 b.  
 3. *In VI Eth.*, lect. VII, n. 1197-1198.  
 4. *IIa IIae*, q.60, a.1, c.

contingent *operabilia* "de quibus contingit consiliari;"<sup>1</sup> justice, obviously, because of the general purpose of his office :

Quod autem aliquis bene definiat aliquid in operibus virtuosis proprie procedit ex habitu virtutis : sicut castus recte determinat ea quae pertinent ad castitatem.<sup>2</sup>

Ad rectum iudicium duo requiruntur. Quorum unum est ipsa virtus proferens iudicium. Et sic iudicium est actus rationis : dicere enim vel definire aliquid rationis est. Aliud est autem dispositio iudicantis, ex qua habet idoneitatem ad recte iudicandum. Et sic in his quae ad iustitiam pertinent iudicium procedit ex iustitia : sicut in his quae ad fortitudinem pertinent ex fortitudine. Sic ergo iudicium est quidam actus iustitiae sicut inclinantis ad recte iudicandum ; prudentiae autem sicut iudicium proferentis. Unde et synesis, ad prudentiam pertinens, dicitur "bene iudicativa" . . .<sup>3</sup>

b) *The judge as "persona publica"*

However, the justice which is the object of judicial sentence and research is not absolute justice but justice according to law or *secundum quid*.<sup>4</sup> The judge is the *minister legis* <sup>5</sup> before he is the minister of justice. Or, more exactly, he serves justice precisely by applying the law. He is a public person whose whole authority is from the law and its public purpose of determining the *justum politicum*.

Cum iudicium sit ferendum secundum leges scriptas . . . ille, qui iudicium fert legis dictum quodammodo interpretatur, applicando ipsum ad particulare negotium. Cum autem ejusdem auctoritatis sit legem interpretari et legem condere, sicut lex condi non potest nisi publica auctoritate, ita nec iudicium ferri potest nisi publica auctoritate, quae quidem se extendit ad eos qui communitati subduntur.<sup>6</sup>

That is why the judge has the right to "place his hand on each party" and why his decision is more than a merely prudent declaration which the parties are free to accept or not. *Judicium importat impulsionem*.<sup>7</sup> The sentence is the effect of law and can by analogy be itself law.

Dicuntur etiam quaedam legalia, non quia sint leges, sed propter applicationem legum communium ad aliqua particularia facta ; sicut sunt sententiae, quae pro jure habentur.<sup>8</sup>

1. Cf. *Ethics*, Bk VI, c.8, 1141 b.

2. *IIa IIae*, q.60, a.1, c.

3. *Ibid.*, ad 1.

4. Cf. *In I Polit.*, lect. IV, n.19. This point will be discussed in a later section.

5. *In V Eth.*, lect. VI, n.951.

6. *IIa IIae*, q.60, a.6. c.

7. *Ibid.*, ad 1 ; cf. also q.67, a.1, ad 2.

8. *Ia IIae*, q.96, a.1, ad 1.

Sententia iudicis est quasi quaedam particularis lex in aliquo particulari facto. Et ideo sicut lex generalis debet habere vim coactivam, . . . ita etiam et sententia iudicis debet habere vim coactivam, per quam constringatur utraque pars ad serviendum sententiam iudicis : alioquin iudicium non esset efficax. Potestatem autem coactivam non habet licite in rebus humanis nisi ille qui fungitur publica potestate.<sup>1</sup>

Because of this public status the judge, albeit an "animated justice," must to some extent divest himself of his own personality. Not only must he judge according to the written law, but he must do so on the basis of public knowledge and the *legitima documenta* introduced in court even when he has private knowledge that their witness is objectively defective. Thus Cajetan :

Persona publica potestate publica, scientia publica, et voluntate publica uti debet in iudiciis, sine ignorantia, imprudentia et negligentia propria, quidquid inde veniat.<sup>2</sup>

For the same reason, however laudable in another, the judge is not at liberty to show mercy where the law has stipulated the penalty. *Ipse non fert iudicii sententiam quasi ex propria, sed quasi ex publica potestate.*<sup>3</sup>

Misericordia iudicis habet locum in his quae arbitrio iudicis relinquuntur, in quibus "boni viri est ut diminutivus poenarum," . . . In his autem quae sunt determinata secundum legem divinam vel humanam, non est suum misericordiam facere.<sup>4</sup>

---

1. *Ila IIae*, q.67, a.1, c.

2. CAJETAN, in *Ilam IIae*, q.67, a.2. We do not know how urgent in practice may have been the case "per accidens rarissimum eveniens" (treated earlier by St. Thomas in q.64, a.6, ad 3 and postponed by Cajetan to his present treatment) where the judge pronounces the death sentence on a party he privately knows to be innocent. The case is aggravated here, it seems to us, because it is not a question merely of sentencing one already found guilty say by a jury whose responsibility it is to weigh the evidence, but a question of the judge himself judging the guilt on the basis of the public record.

In such a situation it seems to us that the judge has the right and perhaps the duty, barring some *grave incommodum*, to declare his scruple or at least disqualify himself (a frequent practice today in cases where for any reason the judge would be embarrassed or feel himself an interested party). Homicide is a proportionately grave evil and judicial anarchy would hardly result from such a unique case. In fact it would seem the judge had some obligation, *ceteris paribus*, to become a witness instead : his statement of innocence, even if not capable of public proof, can be publicly made and weighed with the other evidence.

Father Spicq in his commentary points out that modern jurisprudence has tempered the rigor of this formal procedure on which mediaeval jurists apparently had some reason to be more insistent. (Cf. *Édition des Jeunes, La Justice III*, note 7 and Appendix II). In any case, a jury is supposed to decide according to its convictions and its members do not have to explain or defend their votes.

3. *Ila IIae*, q.67, a.4, c.

4. *Ibid.*, ad 1.



This doctrine scandalizes. It appears to confuse ends with means — in short to make the written law an absolute instead of the instrument for justice. Similarly, it seems to forget that the depositions of witnesses are means for arriving at the truth. When the judge knows the truth to be to the contrary, his natural-law obligation would seem to demand that he pronounce accordingly.<sup>1</sup>

We should note first of all that the supposition here is that the law itself is not unjust. Were the case otherwise, the judge would indeed be cooperating with injustice. But that is another problem to be solved by other norms.

However, when the legislator has made a reasonable disposition, and where reasonably effective rules of procedure exist for the admission and sifting of evidence, the judge must follow them. It is natural law, after all, which demands a legal order with all its intrinsic limitations,<sup>2</sup> and which therefore demands that it be observed. That is just how the judge follows his conscience.

In his quae ad propriam personam pertinent, debet informare conscientiam suam ex propria scientia. Sed in his quae pertinent ad publicam potestatem, debet informare conscientiam suam secundum ea quae in publico iudicio sciri possunt, etc.<sup>3</sup>

Justice is the concern of public authority. The means for its administration must also be public and according to law, or what is called "due process."

Finis iutitiae publicae humanae non est veritas facti absolute, sed veritas facti publica homini . . .

Finis institutiae publicae humanae est reddere unicuique ius suum non simpliciter, sed quantum potestas et scientia publica se extendere possunt : neque enim plus exigendum ab homine est.<sup>4</sup>

We have already seen the dangers of leaving more than is necessary to the individual discretion of the judge. The same disarray would result here. There would be little confidence in the courts were judges at liberty to bypass the publicly determined means for establishing facts and base their decisions on private knowledge. As Portia replied to Bassanio's urging that she wrest once the law to her authority and, to do a great good, do a little wrong :

'Twill be recorded for a precedent,  
And many an error, by the same example,  
Will rush into the state : it cannot be.<sup>5</sup>

1. Cf. CAJETAN, *in idem*.

2. Cf. *Ia IIae*, q.91, a.3, c. and ad 3.

3. *IIa IIae*, q.67, a.2, ad 4.

4. CAJETAN, *in idem*.

5. *The Merchant of Venice*, Act IV, sc. i.



c) *The judge as "interpres legis"*

The general principle that the judge decides according to law is easily laid down but in practice can be difficult. It is true that the legal picture is often well enough defined so that the "application" consists merely in giving the law its official, juridical, effect as when sentence is pronounced on the guilty. But at other times the situation poses a *case* where the judge must resolve some obscurity as to the law's meaning and application in particular circumstances. It is not always easy to mark the point at which he exceeds his mandate of applying the law and begins to legislate on his own. The fact is, as we saw, that the two offices of legislator and judge, while distinct, are not so much separate as continuous. The judge is there to prolong the law where its reach falls short because of its generality, giving it fingers as it were to clutch particular objects. And the difference between declaring law and creating it can become very narrow and at times too imperceptible to "change the color of legal litmus paper." For the American courts, the distinction becomes especially nice. On the one hand, the judiciary both on national and state levels are the appointed watchdogs of their respective federal and state constitutions and are supposed to act as checks on the legislatures. They must consequently to some extent judge the law-maker. On the other hand, because of the doctrine of "separation of powers", there is a special sensitivity to any seeming forays of the courts into the legislators' province.

There are some highly artificial ways of viewing the judicial function — as though it consisted in mere automatic, impersonal syllogizing from the terms of a statute. The source of trouble here is in a rationalistic notion of law. The legal order is regarded as a mathematically coherent system whose laws, like geometrical principles, are not made but found. The jurist is then supposed to fill in the details by successive logical steps. Thus, as with Pufendorf, we have a juridical system, deductively constructed, reaching to such minute details as laws governing debts, inheritance, conveyance, and modes of acquiring property.<sup>1</sup>

Legal cases are then regarded as so many jig-saw puzzles or mathematical problems whose solutions are predetermined in the elements themselves whatever the ingenuity required to piece them together. And so scandals result when decisions are handed down otherwise than as predicted on the basis of statutes and precedents — the premises of the legal syllogism — or when judges dissent on the same case "as though one or the other side were not doing their sums right and, if they would take more trouble, agreement would inevitably come."<sup>2</sup>

1. Cf. H. ROMMEN, *Natural Law, op. cit.*, pp. 94 ff.

2. O. HOLMES, "The Path of Law," Lerner, *op. cit.*, p. 79.

We can understand the current lack of enthusiasm for natural-law jurisprudence when we recall that such uninviting views of the judge's vocation are associated in legal memory with the "law-of-nature school."

It was believed that the jurist, by a mere effort of reason, might frame a perfect code which could be administered as ultimate legal wisdom. Under the influence of this idea men were scornful of history and of traditional legal materials. All that was needed might be done by unaided reason as if there had never been a legal past. The one thing needful was to draft into service the most powerful reason in the state, obtain a perfect code through the exercise of reason, and hold down inferior reasons to its text. . . . Hence in the code of Frederick the Great there was to be no judicial power of interpretation. The judges were to consult a royal commission as to any doubtful points and to be bound absolutely by its answer.<sup>1</sup>

The legal realists, as they are called, made a contribution in reacting against such exaggerations and in calling attention to the part played by background, sympathy, and "the inarticulate major premise" in shaping supposedly aloof judicial decisions. The "Great Judge interpretation" of legal history has its partial validity not only as regards the common law which is, after all, essentially judge-made,<sup>2</sup> but also for codified systems whose fixed structure would appear to leave narrow room for judicial discretion.

But realism went to doctrinaire lengths itself in holding that judges alone made law, that in practice there are no laws except the decisions of individual courts, and that a statute for all practical purposes is not real law until construed by the court. Even an individual decision, it is held, is law only for the litigants involved since another court, nay the same court on another occasion, may reverse it. "Law never is but is always about to be."

Such criticisms appear themselves to originate in a mathematical concept of law and a failure to appreciate the difformity of its matter. The realist is offended at the unpredictability of law-suits, at the possibilities for surprise and legal escape from the terms of a contract, and at the subtle ways in which extralegal considerations can deflect the judgment of the court. It is understandable that all this should make a lively impression on lawyers whose legal activities center on litigation. Litigation after all supposes some doubt of the standing

1. R. POUND, *Interpretations of Legal History*, op. cit., p.3.

2. "The outstanding characteristic of the common law is that it is a system of law built up by the judges from case to case, especially in the field of civil law. It thus presents a marked contrast to the legal systems of the Continental countries, which have each a civil code for judges to apply in their decisions. The first question the common law judges asks himself when confronted with a case is, Are there any previous decisions to serve as precedent or at least as an analogue for the instant case? There are of course statutes in the common law countries; but even the statutes are looked at in the context of judicial interpretation and tradition." J. WU, *Fountain of Justice*, op. cit., p. 56.

of the parties so that a decision either way is not wholly improbable. But there are forests as well as trees, and not all law is litigation. A more balanced view should include the wide areas where conduct and contracts are securely controlled and where litigation is neither probable nor possible. It would be unfair to deny the name of law to such an array of statutes, customs, and precedents just because they regulate so effectively as to give no opportunity for putting their certitude to the test.

Both these opposed positions — realism and rationalism — proceed from the same misconception of the nature of practical reason, which leads to the expectation of a like necessity in both the general practical principles and their conclusions. Because the common principles are necessary, and because laws are formulated in concepts technically precise, they are likely to be regarded as so many mathematical propositions. This leads the analytical jurist to postulate the same precision in the applications and conclusions drawn from them. The realist, on the other hand, impressed by the variety in the applications made by the courts, is led by the same illusion to deny the existence, or at least the importance, of the general principles of law. We find this train of thought indicated in an objection cited by St. Thomas against the derivation of positive law from the natural law. It is argued that were such the case, positive laws would be everywhere alike. St. Thomas answers :

Dicendum quod principia communia legis naturae non eodem modo applicari possunt omnibus propter multam varietatem rerum humanarum. Et ex hoc provenit diversitas legis positivae apud diversos.<sup>1</sup>

The question then is not whether there are laws controlling the judge or whether judges make law. It is rather a question of determining how the judge is to accomplish the office of *subordinate* legislator — the difference here being that while the legislator is relatively free to select an end and the means to achieve it, the law, once established, is one of the objective limitations on the judge. He legislates “interstitially” where “gaps” occur in the law.

Judex enim non consiliatur qualiter debeat sententiare in his quae sunt lege statuta, sed forte in casibus in quibus non est aliquid lege determinatum.<sup>2</sup>

We are faced here with the nature of interpretation, the most difficult of judicial tasks.<sup>3</sup> As on the question of the nature of law

1. *Ia IIae*, q.95, a.2, ad 3. Cf. q.96, a.2, ad 3 ; q.97, a.1, ad 1.

2. *In III Eth.*, lect. VII, n.471.

3. We understand *interpretation* in its current sense of the application of law to the particular case. In the treatises *de jure et justitia* it meant principally the methods for determining the meaning of the law when for one or another reason it was doubtful. Cf. SUAREZ, *VI De Legibus*, c. II, n.1.

itself, with which it is obviously connected, schools of jurisprudence, as they divide here, are classified into the analytical, the historical, and the sociological schools.<sup>1</sup>

The analytical and historical schools enjoyed a long ascendancy in English and especially in American jurisprudence. This has been attributed to different causes: the natural conservatism of jurists, inclining them to favor stability over change; the emphasis in their training on deductive processes and on the kind of accuracy that "sharpens the mind by narrowing it;"<sup>2</sup> and finally, as factors peculiar to the united States, a Puritan tradition<sup>3</sup> plus the doctrine of separate powers that waved the courts away from all that might appear as independent excursions along novel paths. All this has encouraged the artificial rationalizations designed to make judicial decisions appear as strictly following from the terms of the law.

In whatever way their influence lingers, as formal juristic methods both schools are now discredited and it would be idle to reduce them once more to absurdity. But as their repudiation has been taken to imply the repudiation of natural law and of absolute moral principles as the basis of the juridical order, it is worth the trouble to note the great divergences between them and the scholastic natural-law tradition.

## II. ANALYTICAL JURISPRUDENCE

### 1. General description

Analytical and historical jurisprudence have much in common and their tendencies are often found in combination. Both make jurisprudence an independent science limited to a critique of law itself

---

1. We are following Pound's classification. The same divisions, with more specific regard to methods of interpretation, are sometimes designated respectively as philosophical, evolutionary, and ethical. (Thus Cardozo in *Nature of the Judicial Process*, *op. cit.*) There is also a biological, an economic, and a political theory but they are interpretations of the origin and growth of law and not theories of judicial methods. In so far as they explain law in terms of the same forces accounting for society, they fall under the general classification of *sociological theories*.

2. Cf. HOLMES, *The Path of Law*, Lerner, *op. cit.*, p.80. In this connection, cf. *In II Metaphys.*, lect. v, n. 334, for the influence of intellectual habits *in inquirenda veritate*. Add to this the fact that these habits are harder to remove and their presence harder to detect than in the case of moral habits. This is so because the intellect is more dependent on the imagination and senses than is the will on the sense appetites. The phantasm is a *principium permanens*; it is at the origin and term of the intellect's action. (Cf. *De Trin.*, q.6, a.2, ad 5). "*Appetitus sensitivus se habet ad voluntatem sicut motus ab ea. . . . Virtutes autem apprehensivae magis se habent ut moventes respectu intellectus.*" *Ia IIae*, q.56, a.5, ad 1.

3. "All discretion ran counter to Puritan religious ideas, no matter what the social or economic position of the particular Puritan. Men were to be with one another, not over one another. There was to be a government of laws, not of men. The individual con-

through sheer analysis of its content without reference to the ends of law or the conditions of its matter. For both, the concepts in which laws are formulated come to be handled as independent objects instead of a signs more or less adequately expressive of the realities they are meant to signify. These conceptions, themselves the product of history and closely bound to the circumstances of their origin, are henceforth endowed with permanent objective reality and finally harden into the principles of a legal system no longer patient of adjustment to the demands of change.

Two distinct but related abuses are especially associated with the analytical school: (a) the attempt to derive solutions to legal problems from the mere analysis of general formulas, and these taken absolutely; (b) the striving for artificial certitude and logical precision in the application of laws.

The first tendency we find somewhat grossly illustrated in the case of *Oleff v. Holdapp*. Tego Mirovanis had engineered the murder of his uncle to gain complete possession of their joint bank account which, according to agreement, was to belong *in toto* to the surviving partner. When the victim's heirs claimed an interest in the account, the Supreme Court of Ohio ruled against them as follows:

We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. Property cannot be taken from an individual who is legally entitled to it because he violates public policy. Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account; but that is the law and we must so find.<sup>1</sup>

This is a good example of "judicial pessimism" where law and morality are separated and the judge's office reduced to "the very cipher of a function."

The second abuse — what has been called by Justice Cardozo "the tyranny of concepts" — may also be illustrated by instances from the court record. The interrupted act of picking an empty pocket was considered no attempt at larceny since, had the action continued, no theft would have occurred.<sup>2</sup> A woman could recover

---

science was to be guided and persuaded by good laws, made in advance, giving light to the individual at the crisis of action, not coerced by administrative tribunals acting according to the notions of those who sat therein as to what equity and good conscience might require in a particular situation." POUND, *Interpretations, op. cit.*, p.103, and note 2.

1. Cited by WU, *op. cit.*, p.179. In a similar case (*Riggs v. Palmer*) the N. Y. Court of Appeals ruled out a murderer's claim on grounds of equity. Yet even here there was a dissenting opinion arguing: "The matter does not lie within the domain of conscience. We are bound by the rigid rules of law which have been established by the legislature and within the limits of which the determination of this question is confined." Cf. B. CARDOZO, *Nature of the Judicial Process, op. cit.*, p. 40.

2. O. HOLMES, *The Common Law*, Little, Boston, p.68.



for an injury done herself, but not for the resultant maiming of her unborn child since the child had no legal personality at the time of injury and when personality was acquired, no new injury was done.<sup>1</sup> According to the concept of liability as arising from parties to a sale, the buyer could recover for injuries caused by negligent manufacture of an auto, but not his brother, unless it had been made clear to the manufacturer that the car was to be given him.<sup>2</sup>

Again, supposing that in such a case as *Dulieu v. White*, two women were in the room, one of whom owned the house while the other was her guest. According to some decisions, proceeding in the purely mechanical fashion of the jurisprudence of conceptions, the one could have recovered damages for the miscarriage produced by the negligently caused fright, since she might have claimed them as an item of damages for the trespass upon her land, while the other could not recover. . . . Or, if in blasting operations, carried on with due care, stones were unexpectedly cast on another's land and hit both the owner of the land and another person casually but rightfully there, we were told that the one might recover as an additional item of damage for the trespass, but the other might not recover at all. For if one were allowed to cast stones on another's land, even though without negligence, without liability, he might acquire a servitude of so doing, whereas there could be no acquisition of a servitude of casting stones on a human being.<sup>3</sup>

These are what have become known in lawyers' parlance as "strong decisions" — decisions thoroughly repugnant to justice and common sense but propounded as the conclusions of faultless legal logic applied to given legal premises. It was a logic completely divorced from the law's realities. The purposes of legislation, approximation, and the "secret exception" to be understood in all human formulations — none of these were permitted to weight in the balance against the integrity of the law's killing letter.

## 2. *The nature of the error*

Such dictionary jurisprudence misconceives the real function of written law as a tool of practical reason. We have already touched on this point in connection with the certitude of natural-law precepts, but as the confusion of speculative and practical science is the root error here, it will pay to go into more detail.

### a) *The differences of speculative and practical reason*

As their names imply, speculative and practical reason differ according to their ends. In speculative science the end is truth sought

1. Cf. POUND, *Interpretations, op. cit.*, p.121.

2. *Ibid.*, p.122.

3. *Ibid.*, p.121.

for its own sake ; in practical science truth is sought as a means to operation :

Theoricus sive speculativus intellectus in hoc proprie ab operativo sive practico distinguitur, quod speculativus habet pro fine veritatem quam considerat, practicus vero veritatem consideratam ordinat in operationem tamquam finem.<sup>1</sup>

We should note that this difference is not merely in the *finis scientis*. The difference in end involves a difference also according to both *object* and *mode*. For science to be in any sense practical, its object must first of all be operable, that is to say measured by and dependent upon the human intellect.<sup>2</sup> And for science to be *simpliciter* practical, it must in addition to ordering its knowledge to action, study its object precisely *as operable* — considering a house, for example, not according to its definition and properties but “*scrutans quomodo res fiat.*”<sup>3</sup>

Cum . . . oporteat materiam fini esse proportionatam, oportet practicarum scientiarum materiam esse res illas quae a nostro opere fieri possunt, ut sic earum cognitio in operationem quasi in finem ordinari possit. Speculativarum scientiarum materiam oportet esse res quae a nostro opere non fiunt. Unde earum consideratio in operationem ordinari non potest sicut in finem, et secundum harum rerum distinctionem oportet scientias speculativas distingui.<sup>4</sup>

Unde Philosophus cum distinguit practicum et speculativum ex fine, non loquitur de fine solum ex parte intelligentis et operantis actualiter, sed ex fine intento ex vi ipsorum principiorum et regularum quibus utitur ista scientia. Si enim sunt principia solum manifestantia veritatem et quasi illuminantia et fugantia ignorantiam, speculative procedunt. Si autem non solum manifestant veritatem, sed dirigunt ad hoc, ut fiat et constituatur in esse, sunt practica et ordinant praxim, intelligendo nomine praxis generaliter objectum practicae cognitionis.<sup>5</sup>

Because the speculative intellect seeks merely to contemplate the truth of things known, while practical intellect aims at knowing in what way and by what means things operable can be made to exist, the speculative sciences are said to proceed *modo resolutivo* and the practical sciences, *modo compositivo*. When our action is limited to

1. *De Trinitate*, q.5, a.1, resp.

2. “Res aliter comparatur ad intellectum practicum, aliter ad intellectum speculativum. Intellectus enim practicus causat res, unde est mensuratio rerum quae per ipsum fiunt : sed intellectus speculativus, quia accipit a rebus, est quodammodo motus ab ipsis rebus et ita res mensurat ipsum.” *De Verit.*, q.1, a.2, resp. “Scientia igitur quae est speculativa ratione ipsius rei scitae, est speculativa tantum.” *Ia*, q.14, a.16.

3. CAJETAN, *in Iam*, q.14, a.16, nn.II-III.

4. *De Trin.*, q.5, a.1, resp.

5. JOHN OF ST. THOMAS, *Curs. Phil.*, Logica, II P., q.1, a.IV. [Vol. I, 269 b].



understanding an object, we take it mentally apart, "analyze" or resolve it into its intelligible components.<sup>1</sup> Our confused knowledge of *man* becomes more distinct, for example, when we "divide" him into *animal* and *rational*. But practical science does not want its object thus in parts. It wants the whole thing put together or *composed* — a whole house, a perfect man.<sup>2</sup> Knowledge of the parts is of interest only in so far as it is necessary for knowing how to compose the desired good. Thus ethics makes use of certain speculative knowledge of the soul, but only "*quantum sufficit ad ea quae principaliter quaerimus.*"<sup>3</sup>

Unde principia speculativa dicuntur resolutiva quia solum respiciunt veritatem, ut resolvitur cognoscibiliter in sua principia ; principia autem practica dicuntur compositiva, quia respiciunt veritatem seu entitatem ut ponendam in esse.<sup>4</sup>

Practicum autem et speculativum exigunt diversa principia in ipsa formali ratione cognoscendi ; siquidem principia speculativa procedunt modo resolutorio et solum tendunt ad manifestandam veritatem secundum connexionem et dependentiam a principibus formalibus talis veritatis, principia autem practica neque resolvunt neque illuminant veritatem quantum ad sua formalia principia, et quidditatem quasi abstrahendo ab existentia, sed applicant et ordinant illam ad ponendum in esse, et ita procedunt modo compositivo. Unde speculativum respicit causas veritatis abstracte et in se ; practica autem concrete et in opere, non abstrahendo ab existentia.<sup>5</sup>

John of St. Thomas points out here that as a result of this different procedure, there is a more radical difference between a speculative and practical science than among the several speculative sciences themselves.<sup>6</sup>

#### b) *Consequences of this difference*

A first consequence of this difference is the unequal certitude of speculative and practical science. Speculative science, since it is ordered simply to the interior possession of its object, will seek it precisely as suited to intellect i.e. as necessary, abstract, and universal.

Speculabili . . . aliquid competit ex parte intellectivae potentiae et aliquid ex parte habitus scientiae quo intellectus perficitur. Ex parte

1. "Dum intellectus noster procedit de potentia in actum, primo occurit sibi confusum quam distinctum ; sed tunc est scientia completa in actu, quando pervenitur per resolutionem ad distinctam cognitionem principiorum et elementorum." *In I Phys.*, lect. I, n.19.

2. "Operabile enim est aliquid per applicationem formae ad materiam, non per resolutionem compositi in principia universalis formalia." *Ia*, q.14, a.15, c.

3. *In I Eth.*, lect. XIX, n.228.

4. JOHN OF ST. THOMAS, *loc. cit.*

5. *Ibid.*, 270 b.

6. *Ibid.*, 271 a.

siquidem intellectus competit ei quod sit immateriale, quia et ipse intellectus immaterialis est ; ex parte vero scientiae competit ei quod sit necessarium quia scientia de necessariis est . . . Omne autem necessarium in quantum huiusmodi est immobile.<sup>1</sup>

But practical science, since it is ordered to action, cannot afford to abstract from matter and motion. It is more perfect, as *practical* knowledge, the more closely it considers the singulars *in quibus est actus*.

Et rationem huius assignat [Philosophus] ; quia in sermonibus qui sunt circa operationes, universales sunt magis inanes, et particulares sunt magis veri. Et huius rationem assignat, eo quod operationes sunt circa singularia. Et ita opportunum est quod sermones qui sunt de operationibus concordent cum particularibus.

Si ergo dicantur sermones operationum solum in universali, erunt in vanum, tum quia non consequuntur finem suum qui est directio particularium operationum, tum etiam quia non possunt universales sermones in talibus sumi, qui non deficient in aliquo particularium, propter varietatem materiae, . . . Sed particulares sermones sunt efficaciores utpote apti ad dirigendum operationes ; et sunt etiam veriores, quia accipiuntur secundum id in quo universales sermones verificantur.<sup>2</sup>

Now the certitude of speculative science comes precisely from the abstract character of its object, purified as it is of matter and motion.<sup>3</sup> That is why we have the same certitude in the principles and conclusions. Any conclusion in geometry, however remote from the definition of a triangle, will have the same necessity as the definition itself.<sup>4</sup> Practical science, on the other hand, having for its object the contingent and fluctuating singulars, will carry the mark of this contingency in its conclusions. Conclusions cannot exceed the stability of the principles, and the principles in this case are only "for the most part so."

Ratio practica negotiatur circa contingentia, in quibus sunt operationes humanae : et ideo, etsi in communibus sit aliqua necessitas, quanto magis ad propria descenditur, tanto magis invenitur defectus. Sic igitur in speculativis est eadem veritas apud omnes tam in principiis quam in conclusionibus licet veritas non apud omnes cognoscatur in conclusionibus, sed solum in principiis quae dicuntur "communes conceptiones." In operativis

1. *De Trin.*, q.5, a.1, resp. "Forma rei intellectae est in intellectu universaliter, et immaterialiter, et immobiliter : quod ex ipsa operatione intellectus apparet, qui intellegit universaliter et per modum necessitatis cuiusdam." *Ia*, q.84, a.1, c.

2. *In II Eth.*, lect. VIII, nn. 333-334.

3. *De Trin.*, q.6, a.1, ad 2am quaest. [the first portion of the article comparing the certitude of mathematics with that of natural philosophy].

4. "Quia enim ratio speculativa praecipue negotiatur circa necessaria quae impossibile est aliter se habere, absque aliquo defectu invenitur veritas in conclusionibus propriis, sicut et in principiis communibus." *Ia IIae*, q.94, a.4, c.

autem non est eadem veritas vel rectitudo practica apud omnes quantum ad propria sed tantum quantum ad communia.<sup>1</sup>

Quanto aliqua scientia magis appropinquat ad singularia, sicut scientiae operativae, ut medicina, alchemia et moralis, minus possunt habere de certudine propter multitudinem eorum quae consideranda sunt in talibus scientiis quorum quodlibet si omittatur, sequetur error, et propter eorum variabilitatem.<sup>2</sup>

Another important consequence of the different orientations of speculative and practical science is the major role of experience in the acquisition of the latter. A speculative science like mathematics (to take a perfect type) disengages its object from matter and motion, "*quidditatem quasi abstrahendo ab existentia.*"<sup>3</sup> It can demonstrate its conclusions from this quiddity alone, that is from formal causes.<sup>4</sup> So far as its principles are concerned, mathematics has no need either of time or experience.<sup>5</sup>

That is why mathematics is a science which proceeds *maxime disciplinariter*. Generating perfect certitude, it is the ideal type of science for the human mind.<sup>6</sup> Its objects are based on experience but they are uniform and purified of all the material elements responsible for diversity and change. It has just enough matter to assist without confusing the imagination.<sup>7</sup>

But in a practical science, principles purified of matter and motion are, as we saw, comparatively useless. And the sort of detailed knowledge that practical reason wants — its proper knowledge — cannot be deduced from general principles. Even when we have perfectly resolved and understand the proposition "divorce is forbidden," it give us no clue to the means for preserving individual marriages.

1. *Ia IIae*, q.94, a.4, c.

2. *De Trin.*, q.6, a.1, ad 2am quaest., c.

3. See above, p.118.

4. "In scientiis enim mathematicis proceditur per ea tantum, quae sunt de essentia rei, cum demonstrant solum per causam formalem; et ideo non demonstratur in eis aliquid de una re per aliam rem, sed per propriam definitionem illius rei." *De Trin.*, q.6, a.1, ad 1am quaest.

5. "Mathematicalia cognoscuntur per abstractionem a sensibilibus quorum est experientia; et ideo ad cognoscendum talia non requiritur temporis multitudo. Sed principia naturalia quae non sunt abstracta a sensibilibus, per experientiam considerantur ad quam requiritur temporis multitudo." *In VI Eth.*, lect. VII, n.1209.

6. "Solum autem mathematicum inquisitionis firmam stabilemque fidem intendentibus dabit, velut utique demonstrationes per indubitabiles vias factas." *De Trin.*, q.6, a.1, ad 2am quaest., c.

7. "Naturalia quamvis sensui subiacent, et tamen propter sui fluxabilitatem non habent magnam certitudinem, cum extra sensum fiunt, sicut habent mathematica, quae sunt absque motu, tamen sunt in materia sensibili secundum esse, et sic sub sensu et imaginatione cadunt." *De Trin.*, q.6, a.1, ad 2am quaest., ad 2. Cf. also the entire article for the comparison with natural philosophy and metaphysics.

Est quidem verum, sed non est sufficienter manifestum prout requiritur ad usum rationis rectae. Est enim quod dictum est quoddam commune . . . Sed ille qui hoc solum commune habet, non propter hoc sciet amplius procedere ad operandum. Puta si quaerenti qualia oportet dare ad sanandum corpus, aliquis responderet quod illa debent dari quae praecipit ars medicinae et ille qui habet hanc artem, scilicet medicus ; non propter hoc interrogans sciret quid deberet dare infirmo. Sic autem se habet ratio recta prudentiae in moralibus, sicut recta ratio artis in artificialibus : unde patet quod non sufficit id quod dictum est.<sup>1</sup>

In practical science the ends we seek are the first principles. We reason not from essence to properties as in mathematics, but from ends to means. This is an extrinsic relation — “*probat<sup>ur</sup> aliquid de una re per aliam rem omnino extrinsecam.*”<sup>2</sup> Such a connection must be grasped through experience or accepted on authority of another. We have a good instance in this in the way St. Thomas argues for the aptness of the judicial precepts of the Old Law, at times suggesting alternative reasons.<sup>3</sup>

Sometimes, it is true, the connection between means and ends may be so determined and manifest as to seem to offer a demonstration *more geometrico* — “*quando id quod est ad finem adaequat, ut ita dicam, finem.*”<sup>4</sup> Still, we do not see *non est fornicandum* in the concept of temperance as we see *equiangular* in the concept of equilateral triangle. We know fornication is wrong because we know it opposes the end of the generative faculty. Similarly, although both polyandry and polygamy are equally opposed to the *concept* of marriage as a union of two persons, they are not equally excluded by the natural law. And the reason given is that polyandry totally obstructs the education of children whereas a multiple female presence merely makes an unquiet house, “*sicut figuli conrixantur ad invicem.*”<sup>5</sup> These effects we know only through experience and it is in their light that we interpret the other generally experienced fact that among both animals and men, the male is the more implacable foe of any catholic sympathies in the other partner.<sup>6</sup>

We can see, then, why moral is the most uncertain and difficult of all the arts and practical sciences. In some of these is a definite object realized through definite means and fairly determined procedure. The sculptor has less need of counsel than the physician whose material is more elusive. But moral science has for its object not only material natures but *human* nature, which involves another

1. *In VI Eth.*, lect.1, n.1111.

2. *De Trin.*, q.6, a.1, ad 1am quaest., c. (tertio).

3. *Ia IIae*, q.105, a.2, c. and ad 11.

4. *Ia*, q.47, a.1, ad 3.

5. *Suppl.*, q.65, a.1, c. and ad 7.

6. *Ibid.*, ad 8.

unpredictable factor — the human will.<sup>1</sup> This not only makes the conclusions less stable, but it affects the perceptions of the moralist himself. Since he is dealing with *agibilia*, his own appetites are engaged. A judgment with respect to virtue requires a certain con-naturality with the virtue itself, and deficiencies here can obscure even those truths of moral science which are in themselves “immobile.” Thus in addition to experience, necessary in all practical science, moral requires a control over passion.<sup>2</sup>

c) *Jurisprudence as a practical science*

It is in connection with the definition of *jus* that St. Thomas notes our tendency to twist words from their original meaning.<sup>3</sup> A glance at the dictionary will show that *jurisprudence* has not been spared.

The components of the term, *juris* and *prudencia*, themselves suggest that originally the *jurisprudens* was one of the *civiliter conversantes*<sup>4</sup> — a person practiced either in the actual framing of statutes or in whatever pertained to their application in particular circumstances such as delivering judgments or offering legal advice.<sup>5</sup> This much we gather from the connotation of *prudens*.<sup>6</sup>

But with a growing complexity in human society, a purely empirical knowledge of law becomes inadequate. Necessity alone would force the search for principles reducing these isolated legal phenomena to order and coherence. Inevitably, too, would come those larger questions touching the nature, source, and ultimate authority of law. Thus the classical definition of the *Digest* :

Jurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.<sup>7</sup>

This legal science — a science of legal principles which exist independently of any local institutions — was the accomplishment of the Romans. And as there was no technical term this time to borrow from the Greek to signify this new branch of knowledge, a term which

1. *In I Eth.*, lect. III, n.35 ; *In I Metaph.*, lect. II, n.47.

2. Cf. *In VI Eth.*, lect. VII, n.1211 and also lect. III of bk I.

3. *IIa IIae*, q.57, a.1, ad 1.

4. Cf. *In VI Eth.*, lect. VII, n.1198.

5. Cf. Cicero's description (*De Oratore*, 1, 48) of the *juris-consulti* (also called *jure periti*, and *prudentes in jure civili* : those skilled in the laws and the usages current among private citizens, and in guiding their clients aright). Cf. I. HOLLAND, *Elements of Jurisprudence*, Oxford, 12th ed., p.2.

6. “ Quia igitur prudentia est ratio activa, oportet quod prudens habeat utramque notitiam, scilicet et universalium et particularium : vel si alteram contingat ipsum habere, magis debet habere hanc, scilicet notitiam particularium, quae sunt propinquiora operationi.” *In VI Eth.*, lect. VI, n.1194.

7. *Digest*, 1, 1.

meant only a general working knowledge of the law came to designate legal science.<sup>1</sup>

As regards its object, jurisprudence is a practical science since the legal order is an *operabile*. However, a science which is practical *ex objecto* may also be speculative *secundum quid*.<sup>2</sup> We have already seen the critical importance for a sound legal science of many truths which must be borrowed and supposed from other speculative disciplines. *Lex ab hominis natura est repetenda*. But jurisprudence must also have some speculative knowledge of its own object in so far as such understanding contributes to the end of the science. Such a speculative treatment we find in St. Thomas' treatise on law where he investigates the universal predicates of law, *definiendo et dividendo*, — as when, for example, he resolves the diversity of human laws in the "*varietas rerum humanarum*;"<sup>3</sup> or when he resolves the limited aspirations of law in its purpose, utility, and the limited potential of its matter, the *multitudo hominum*.<sup>4</sup>

One can, of course, engage in such study simply for the joy of knowing. But the jurist and the judge, as such, want to know how to construct a legal system and how to apply its laws to particular cases. Once determined, for example, that divorce is against the natural law, how shall we adjust the legal order to this truth? By proscribing divorce? By tolerating it? Under what circumstances? Here, evidently, we are seeking principles for *composing* the good of legal justice. Our science is now practical also *quantum ad modum* just as the architect must not simply *resolve* a house but consider how houses are actually made — what sort of materials to use in a particular climate; at what angle to capture the most light, etc.

Jurisprudence is concerned not so much with the purpose which Law subverses, as with means by which it subserves them. The purposes of Law is its remote object. The means by which it effects those purposes are its immediate object.<sup>5</sup>

#### d) *The method of analytical jurisprudence*

The specific error of the analytical jurist is his neglect of this practical mode of legal science both in the analysis he offers of the legal order and in the way he conceives its development taking place.

Representing to himself the whole body of legal precepts as something made at one stroke on a logical plan to which it conforms in every detail,

1. HOLLAND, *op. cit.*, p.3.

2. *Ia*, q.14, a.16, c.

3. *Ia IIae*, q.95, a.2, ad. 3.

4. *Ia IIae*, q.96, a.2. "Hoc siquidem est operabilia modo speculativo considerare, et non secundum quod operabilia sunt; operabile enim est aliquid per applicationem formae ad materiam, non per resolutionem compositi in principia universalialia formalia." (*Ia*, q.14, a.16, c.).

5. HOLLAND, *op. cit.*, p.81.



he conceives that he can discover this plan by analysis and he sets up a plan which explains as much as possible of the actual phenomena of the administration of justice and criticizes the unexplained remainder for logical inconsistency therewith.<sup>1</sup>

Laws, however, do not issue in this way from general reason as though all were determined in some ideal pattern or in the necessary natures of things. They originate in concrete, historical, and therefore shifting conditions and they represent a prudential choice among several undetermined means for attaining likewise undetermined and logically independent goals.

Special temptations await the judge to lure him into the ways of analytical jurisprudence. The legislator himself has the ends of law chiefly in mind; it is the end which moves him to act and which governs his choice of means. But the judge does not deliberate about the ends of the law. The law is for him a first principle. True, he cannot do justice to the law itself without taking into account the intention of the legislator "*quae potior est.*"<sup>2</sup> But the fact is that judges do lose sight of the instrumental function of the law and of the inherent deficiencies of legal formulas. These they proceed to analyse to grammatical extremes as though they were as absolute as the ends of law themselves, and as precise as the propositions of mathematics. And since laws are principles which stand to individual cases as universals to particulars,<sup>3</sup> the result is to consider them as applying with the same uniformity as does a universal concept to its logical inferiors. For the same reason, when it comes to a problem of interpreting the law, the tendency is to consider that the conclusions implicit in it can be drawn out by the same logical analysis we use in mathematics. Legislator and judge are then moving in different worlds.

Almost always, a statute has only a single point of view. All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has been finally aroused. When the legislator interposes, it is to put an end to such and such facts, very clearly determined, which have provoked his decision. And if, to reach his goal, he thinks it proper to proceed along the path of general ideas and abstract formulas, the principles that he announces have value, in his thought, only in the measure in which they are applicable to the evils which it was his effort to destroy and to similar conditions which would tend to spring from them. As for other logical consequences to be deduced from these principles, the legislator has not suspected them; some, perhaps many, if he had foreseen, he would repudiate. In consecrat-

1. POUND, *Interpretations, op. cit.*, p.33.

2. *IIa IIae*, q.120, a.2, ad 1.

3. *Leges enim comparantur ad opera humana sicut universalialia ad particularia. In VI Eth.*, lect. vii, n.1197.



ing them, no one can claim either to be following his will or to be bowing to his judgment. All that one does thereby is to develop a principle, henceforth isolated and independent of the will which created it, to transform it into a new entity, which in turn develops of itself, and to give it an independent life, regardless of the will of the legislator and most often in despite of it.<sup>1</sup>

We have a good illustration of this abuse of formula in the concept of possession which has figured in so much litigation. The Roman jurists had analyzed it into two elements : first, some actual physical power over the object and, secondly, the intention of acquiring it for oneself. These elements they designated respectively as *corpus* and *animus*.<sup>2</sup> It was a convenient way of designating the reduction to exclusive ownership of goods hitherto unoccupied or common.

Now it should be clear that with different objects and in different surroundings, *corpus* must be differently understood. When does a man acquire such physical power over treasure buried on his land? When does he so control a wild animal he has wounded, that others may not seize it? When does probable possession amount to real possession? If fish are all but completely encircled in a net, may another row up and help himself?

In this last case (*Young v. Hichens*) the Queen's Bench, reversing a prior decision for the plaintiff, admitted that his possession was "almost certain" and would have been accomplished except for the action of the defendant. Still it could not see its way to grant him title "unless we were prepared to hold that all but reducing to possession is the same as reducing to possession."<sup>3</sup> The Court here failed to grasp the purpose of the formula *corpus-animus* or to recognize the certitude proper to a practical science. In mathematics what is almost a triangle is not triangle at all, but in law, certain and almost certain ownership must at times be considered equivalent.

### 3. Justice Holmes and the analytical school

The stature of Holmes in American law is due in large part to his effective opposition to the methods of analytical jurisprudence. In the opening passage of *The Common Law* we read :

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed beside logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic : it has been

1. F. GENY, *Méthode d'Interprétation et Source en droit privé positif*, 2 vols, Paris, 1919, préface, xvi. Cited by CARDOZO, *Nature of the Judicial Process*, *op. cit.*, p.144.

2. HOLLAND, *op. cit.*, p.195.

3. Cited by WU, *Fountain of Justice*, p.20.

experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.<sup>1</sup>

So much for Holmes, the historian of the common law. In Holmes the judge, we find the same realism. Throughout his decisions we hear recurrent protest against the idea that the general principles of constitutional law contain in themselves the solution to particular cases. ("It will take more than the Nineteenth Amendment to convince me that there are no differences between men and women.") A constitutional guarantee of liberty, for example, intends a general freedom to pursue one's vocation. It cannot be taken absolutely since all law implies restriction.

When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>2</sup>

The famous Fourteenth Amendment cases gave him ample occasion to make his point clear. We have already noted how this provision with its clause forbidding the states "to deprive any person of life, liberty, or property without due process of law" or of "equal protection of the laws" was being pressed in a way that hampered many legislative experiments by the states. We cite two of his opinions to show the different legal methods here.

To prevent the spread of disease through use of unsterilized shoddy, the State of Pennsylvania had banned the use of all shoddy whatever in the manufacture of mattresses. The Supreme Court held the act to be a violation of due process, arguing it was not necessary to ban all shoddy but only the unsterilized. Moreover, it judged the act discriminatory in striking only at shoddy when disease was spread by other materials as well. In a brief, impatient dissent, Holmes pointed out the reasonable grounds for the supposedly illogical action viz, the widespread use of filthy shoddy, the difficulty of detection, inspection, tagging, etc., and then concluded :

It is said that there was unjustifiable discrimination. A classification is not to be pronounced arbitrary because it goes on practical grounds and

---

1. *The Common Law*, *op. cit.*, p.1.

2. *Missouri v. Holland*, 252 U.S. 416, 433, (1920).

attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." . . . In this case, as in *Schlesinger v. Wisconsin*, I think we are pressing the Fourteenth Amendment too far.<sup>1</sup>

A second instance. After the 1907 panic an Oklahoma statute levied an assessment of all banks to create a fund guaranteeing deposits against insolvency. The Nobel Bank claimed a violation of due process on grounds that it was itself solvent and could not be forced to contribute to the private good of another bank in the event of insolvency. Holmes' reply :

We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the Court to overthrow could be shown easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the State is limited by the Constitution of the United States, judges would be slow to read into the latter a *nolumus mutare* as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. . . . There is no denying that by this law a portion of its property may be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. . . . And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for a correlative burden that it is compelled to assume.

It is asked whether the State could require all corporations of all grocers to help to guarantee each others solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise.<sup>2</sup>

#### 4. *Scholasticism and analytical jurisprudence*

It is unfortunate that the obvious soundness of such views should have lent authority to Holmes' scorn for natural law and for all

---

1. *Weaver v. Palmer Bros*, 270 U.S. 402, 514 (1926).

2. *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

absolute moral principles in law, and also to his characterization of mathematical jurisprudence as "the natural error of the schools"<sup>1</sup>— a product of the natural-law jurist's naive penchant for the "superlative" of absolute certitude.<sup>2</sup> This hardly does justice to the spirit of scholastic jurisprudence. Of course, in St. Thomas we do not find the same detailed treatment of problems of interpretation as in Suarez.<sup>3</sup> These problems are comparatively modern and such intervening events as nominalism, the Reformation, the emerge of nationalism and the pluralist state, have given new urgency to the treatise *de jure et justitia*.<sup>4</sup> But he has said enough on the general subject of law to make evident that the logomachy of analytical jurisprudence has no roots in his thought.

This is clear from the recognized diversity of valid positive laws despite their dependence as conclusions from, or determinations of, the same natural-law principles.

Principia communia legis naturae non possunt eodem modo applicari omnibus, propter multam varietatem rerum humanarum. Et exinde provenit diversitas legis positivae apud diversos.<sup>5</sup>

So too with the norms to be followed in the shaping of good laws : not logical symmetry nor even simply the exigencies of natural law itself,<sup>6</sup> but utility, the *consuetudo patriae*, and possibility with regard to time and place.<sup>7</sup> As we saw, for some laws there is no apparent reason other than the fact that they have stood the test of experience.<sup>8</sup>

As regards the judge, while there is in St. Thomas no minute examination of interpretative methods, we know that the judicial office is not conceived mechanically. For it is above all by his *prudence* that the judge applies the common precept of law to the singular cases. It is he who must fit the Lesbian rule to its multiform objects.

Nulla esset utilitas legis, si non se extenderet nisi ad unum singularem actum. Ad singulares enim actus dirigendos dantur singularia praecepta prudentium : sed lex est "praeceptum commune."<sup>9</sup>

1. LERNER, *Path of Law*, *op. cit.*, p.79 : "The danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from one general axiom of conduct. This is the natural error of the schools . . ."

2. *Ibid.*, p.394.

3. Cf. VI *De Legibus*.

4. Cf. H. ROMMEN, "Natural Law in the Renaissance Period," *Natural Law Institute Proceedings*, vol. I, Notre-Dame Univ., 1949.

5. *Ia IIae*, q.95, a.2, ad 3. Cf. also q.91, a.4, c. (secundo).

6. *Ia IIae*, q.96, a.2.

7. *Ia IIae*, q.95, a.3.

8. *Ia IIae*, q.95, a.2, ad 4.

9. *Ia IIae*, q.96, a.1, ad 2.

Judicium est quidam actus justitiae sicut inclinantis ad recte judicandum : prudentiae autem sicut judicium proferentis. Unde et synesis, ad prudentiam pertinens, dicitur " bene judicativa." <sup>1</sup>

Moreover, it is precisely the supreme authority of moral absolutes as expressed in the natural law, that guarantees the judicial office from the " pessimism " of analytical jurisprudence which would limit it to an automatic, impersonal application of the written law. Hence the basis on which St. Thomas, following Aristotle, argues the need for *epicheia*, or non-legal justice : to correct the written law. For limited human foresight and the necessity of avoiding confusion demand that laws be formulated economically and in general terms.

Nullius hominis sapientia tanta est ut possit omnes singulares casus excogitare : et ideo non potest sufficienter per verba sua exprimere ea quae conveniunt ad finem intentum. Et si posset legislator omnes casus considerare, non oportet ut omnes exprimeret propter confusionem vitandum ; sed legem ferre deberet secundum ea quae in pluribus accidunt.<sup>2</sup>

The judge who is guided only by the letter of the law not only shirks his office <sup>3</sup>, but his *durior interpretatio* delivered in ostensible obedience to the law, actually contravenes it. " *In talibus etiam legislator aliter judicaret, et si considerasset, lege determinasset.*" <sup>4</sup>

Finally, we should note that the treatise on law in the *Summa* is itself a *locus classicus* for texts which highlight the different procedures of speculative and practical reason. Immovable moral principles have a necessary and critical role in jurisprudence as in all human activity <sup>5</sup> just as the first principles of demonstration are

1. *IIa IIae*, q.60, a.1, ad 1.

2. *Ia IIae*, q.96, a.6, ad 3.

3. " Cum lex proponit aliquid in universali, et in aliquo casu non sit utile illud observari, ratio recta se habet quod aliquis dirigat illud quod deficit legi, ubi scilicet legislator relinquit casum particularem in quo lex deficit, non determinatum et peccavit." *In V Eth.*, lect. XVI, n.1086.

4. *IIa IIae*, q.60, a.5, ad 2. It is worth noting here a point to which we will return later : that a principal factor in the rise of mechanical jurisprudence was the abandonment of natural law or " the ideal element of law " as the final justification and norm for positive law. " We must recognize today that the rigid setting off of what was called law from the ideal of law has proved a disservice in blinding us for two generations to factors of the first moment in the actual working of the legal order. It has led to a merely superficial certainty. It has brought about a belief in a mechanical logical application of fixed legal precepts which expresses only a part of the truth. . . . On the breakdown of the natural-law philosophy at the end of the eighteenth century, the ideal philosophical pattern was replaced in general use by an ideal analytical pattern or a historical pattern or a combination of the two." R. POUND, *The Formative Era of American Law*, Smith, N. Y., 1950, p.101.

5. " Sicut nihil constat firmiter secundum rationem speculativam nisi per resolutionem ad prima principia indemonstrabilia, ita firmiter nihil constat per rationem practicam nisi

virtually efficient in the most remote conclusions. Yet these natural law precepts merely orientate ; they give a "*prima directio in finem.*"<sup>1</sup> They were never understood to dispense with the need of human industry, research, prudence, and experiment in their application. With their authority admitted, the proper task of jurisprudence has only begun.

### III. HISTORICAL JURISPRUDENCE

#### 1. *General Description*

"Historical jurisprudence" is not a revealing term. In its inception, the historical school had the merit of recognizing the influence of social forces on the development of law. It began for that matter as a reaction against the extreme rationalism of the eighteenth century law-of-nature school with its legislative codes reasoned out in fine detail from abstract principle of right.<sup>2</sup> Unfortunately, when the moment came for supplying the philosophical basis for this realist theory of law, it was taken in tow by Hegelian metaphysics and ceased to be a historical school at all.<sup>3</sup> Instead, evolution in law was explained in term of an "idea" — specifically the idea of right and liberty — progressively unfolding in history according to a logical process, and realizing itself in legal rules and institutions. Thus historical jurisprudence came to exclude progress in any real sense through belief "that it had discovered finally the immutable lines of growth or had calculated once for all the fixed orbit of progress outside of which no movement could possibly take place."<sup>4</sup>

Roscoe Pound gives us some idea of how this Hegelian conception of the legal order affected the practice of the courts and perverted the original genius of the common law :

In the hands of common-law lawyers, this became a conviction that an idealized form of the common law was the legal order of nature and led

---

per ordinationem ad ultimum finem qui est bonum commune. Quod autem hoc modo ratione constat, legis rationem habet." *Ia IIae*, q.90, a.2, ad 3.

"Omnis operatio rationis et voluntatis derivatur in nobis ab eo quod est secundum naturam. . . . Nam omnis ratiocinatio derivatur a principiis naturaliter notis, et omnis appetitus eorum quae sunt ad finem, derivatur a naturali appetitu ultimi finis. Et sic etiam oportet quod prima directio actuum nostrorum ad finem, fiat per legem naturalem." *Ia IIae*, q.91, a.2, ad 3.

1. *Ibid.*

2. Thomas Jefferson, for example, reasoning from the necessity of the consent of the governed, argued that this consent must be renewed with each generation in order for laws to retain their obliging power. Cf. POUND, *Interpretations, op. cit.*, p.13.

3. See *The Common Law, op. cit.*, chapter VI, for the development of the concept of possession.

4. POUND, *Interpretations, op. cit.*, p.12.



to an excessive development of strictly construing statutes in derogation of the common law and to strained interpretations in the direction of holding new legislation to be merely declaratory of traditional rules. . . . The American state courts kept back the full legal emancipation of women for fifty years by holding the statutes rigidly to the precisely detailed changes which they made in express terms rigidly construed. They kept American legal procedure in a backward state for half a century by reading into codes of procedure an idealized system of actions on a historico-analytical basis. They even began to undo the work of uniform commercial laws by treating them in each state as declaratory of the local course of judicial decision prior to the statutes and so as perpetuating the condition which they were meant to relieve. Secondly, it rejected all criticism of legal institutions and rules and doctrines other than a historico-analytical criticism of the law in terms of itself.<sup>1</sup>

Thus although by a slightly different route, the historical theory, no less than the analytical, issued in judicial pessimism and a jurisprudence of conceptions. Positive law was only declaratory of a legal order eternal and fixed. Law was to be found, not made. And the same artifices were to be employed in order to give the appearance of mere discovery and of continuity with existing law. Concepts were not to be interpreted in the light of the case ; the case was to be fitted to the concept. For example, a concept of the "right to physical integrity," valid for practical purposes in the past, prevented recovery of damages for *mental* injury. *Property, incapacity, restraint of trade* could all be applied to a modern case as though no new contexts had emerged to change their meaning. On this basis a statute requiring corporations to pay wages in cash was declared illegal :

The court said this was unconstitutional as putting the labourer under guardianship and imposing an incapacity by an "arbitrary fiat." Equity had seen the *de facto* inequality between fiduciary and beneficiary and between lender and borrower because of the advantageous position of the former in each case. . . . In such cases and many more like them the law had regulated the contracts which parties might make in these relations in order to insure that no advantage should be taken of the actual inequality and that the contracts made should be fair. But the legislature could not recognize the *de facto* advantage of employer over employee where the employer was a mining corporation because that advantage had not yet taken form in the legal conception. It was but *de facto*. To recognize it was "arbitrary." Legal conceptions were like Lewis Carroll's watch. Facts had no more effect upon the one than time upon the other.<sup>2</sup>

## 2. *St. Thomas and the evolution of law*

There have been isolated instances where Holmes the historian of the common law prevailed over Holmes the judge, notably in the

1. POUND, *Interpretations, op. cit.*, p.65.

2. *Ibid.*, p.123.

surprising Northern Securities dissent where he would have allowed an obsolete concept of "restraint of trade" to obstruct government efforts at checking twentieth-century monopolies.<sup>1</sup> Yet few have done as much in legal writing and in trenchant commentary from the bench to hasten the death of the historical method. His rejection was not only explicit, but it was implied too in his whole method of legislative tolerance which recognized the true source of law in public needs rather than in any organic link with preexisting law. "Legislation may begin where an evil begins."

What is the relationship of natural-law jurisprudence to the historical school? For Holmes and many of his disciples they are one and the same in the spirit of dogmatism and obscurantist hostility to revision and progress in the law. This appears from many a stray sentence in his legal writing and correspondence, and it is with such a picture in mind that he penned "*currente calamo*"<sup>2</sup> his celebrated essay *Natural Law*.

It is not enough for the knight of romance that you agree that his lady is a very nice girl — if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative. . . . It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.

The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.<sup>3</sup>

And in a recent apologia for Holmes written by a law professor of reputation, we read :

Holmes, unlike the natural-law man, did not believe that because he firmly held certain views, they were necessarily universal or infallible truths, or that the acceptance of them by others was essential to the preservation of civilization or the republic. His "can't help" theory was always subject to revision in the light of new conditions or new experience. The classical natural law on the other hand, by definition, must forever remain unchanged. While experience had required its devotees to recede from this position from time to time, by hypothesis the system is immutable. No amount of experience or new light may be used as the basis for altering or revising it. It seems to me therefore, that the Holmes' view makes possible the continuous advance of the standards of human conduct, whereas the natural law view, having in theory already attained perfection, retards it.

1. *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904).

2. *The Holmes-Pollock Letters*, *op. cit.*, vol. I, p.271.

3. *Natural Law*, LERNER, *op. cit.*, p.395.

It is my belief that the views of Holmes have been fortified by the developments in the natural sciences in the last half century. If scientific principles are not absolute, if they must be regarded as tentative and always subject to re-examination and revision, if a Newton must revise a Kepler, and an Einstein revise a Newton, there would seem to be all the more reason why the principles of law should be subjected to the same treatment. In law, we have found that a Blackstone must revise a Bracton, and a Kent revise a Blackstone. In contract law a Williston must revise a Pollock, and a Corbin revise a Williston.<sup>1</sup>

Compare the picture of natural law jurisprudence suggested here with the frank relativism of the following passages from St. Thomas' treatise on law :

*Lex humana est quoddam dictamen rationis quo diriguntur humani actus. Et secundum hoc duplex causa potest esse quod lex humana juste mutetur : una quidem ex parte rationis ; alia vero ex parte hominum quorum actus lege regulantur. Ex parte quidem rationis quia humanae rationi naturale esse videtur ut gradatim ab imperfecto ad perfectum perveniat. Unde videmus in scientiis speculativis quod qui primo philosophati sunt, quaedam imperfecta tradiderunt, quae postmodum per posteriores sunt tradita magis perfecte. Ita etiam et in operabilibus. Nam primi qui intenderunt invenire aliquid utile communitati hominum, non valentes omnia ex seipsis considerare, instituerunt quaedam imperfecta in multis deficientia ; quae posteriores mutaverunt, instituentes aliqua quae in paucioribus deficere possunt a communi utilitate. Ex parte vero hominum, quorum actus lege regulantur, lex mutari potest propter mutationem conditionum hominum quibus secundum diversas eorum conditiones diversa expediunt.<sup>2</sup>*

Not only is it agreed that "experience and new light" may help correct our perception of the objective moral order, but allowance is also made for the "continuous advance of standards of human conduct." For it is recognized that the moral level of a society makes it fitting to demand accordingly more or less of the men who form it.

*Lex ponitur ut quaedam regula vel mensura humanorum actuum. "Mensura autem debet esse homogenea mensurato." . . . Unde oportet quod etiam leges imponantur hominibus secundum eorum conditionem, quia, ut Isidorus dicit, lex debet esse "possibilis et secundum naturam, et secundum consuetudinem patriae." Potestas autem sive facultas operandi ex interiori seu dispositione procedit : non enim idem est possibile ei qui non habet habitum virtutis, et virtuoso ; sicut non est idem possibile puero et viro perfecto. Et propter hoc non ponitur eadem lex pueris quae ponitur adultis : multa enim pueris permittuntur quae in adultis lege puniuntur vel etiam vituperantur. Et similiter multa sunt permittenda hominibus non perfectis virtute, quae non essent toleranda in hominibus*

1. G. GOBLE, "Nature, man, and law," *op. cit.*, p.474.

2. *Ia IIae*, q.97, a.1, c.

virtuosis. Lex autem humana ponitur multitudini hominum in qua major pars est hominum non perfectorum virtute. Et ideo lege humana non prohibentur omnia vitia a quibus virtuosi abstinent sed solum graviora a quibus possibile est majorem partem multitudinis abstinere.<sup>1</sup>

Lex humana intendit homines inducere ad virtutem non subito sed gradatim. Et ideo non statim multitudini imperfectorum imponit ea quae sunt iam virtuosorum, ut scilicet ab omnibus malis abstineant.<sup>2</sup>

Human laws are inherently subject to change and Thomas explicitly rejects various reasoning that would make them absolute.<sup>3</sup> Although the judicial precepts of the Old Law were of divine institution, and justice itself "perpetual and immortal," nevertheless in time they are supplanted :

Justitia quidem perpetuo est observanda. Sed determinatio eorum quae sunt justa secundum institutionem humanam vel divinam, oportet quod varietur secundum diversum hominum statum.<sup>4</sup>

The same distinction (and a qualification of terms) is made with regard to arguments based on the immutability of the natural law from which human laws derive :

Dicendum quod lex naturalis est participatio quaedam legis aeternae. . . et ideo immobilis perseveret ; quod habet ex immobilitate et perfectione divinae rationis instituentis naturam. Sed ratio humana mutabilis est et imperfecta. Et ideo eius lex mutabilis est. Et praeterea lex naturalis continet quaedam universalia praecepta quae semper manent ; lex vero posita ab homine continet praecepta quaedam particularia secundum diversos casus qui emergunt.<sup>5</sup>

As for the alleged "hypothesis" that the natural law system is immutable, "having in theory already attained perfection," there is perhaps an equivocation involved. At any rate it should be noticed that one important reason for the provisional character of positive laws is that the natural law on which they depend is itself subject to change both objectively<sup>6</sup> and because man can improve or deteriorate in his perception of it once we are beyond the very common principles.

Sic igitur dicendum est quod lex naturae, quantum ad prima principia communia, est eadem apud omnes et secundum rectitudinem et secundum

1. *Ia IIae*, q.96, a.2, c.

2. *Ibid.*, ad 2.

3. Cf. *Ia IIae*, q.97, a.1, resp. ad objecta.

4. *Ia IIae*, q.104, a.3, ad 1. Cf. *De Malo*, q.3, a.4, ad 13.

5. *Ia IIae*, q.97, a.1, ad 1.

6. Such changes are limited to the secondary precepts and so from the viewpoint of the primary principles of natural law, are only changes in the applications because of some new circumstance, etc. Cf. *Ia IIae*, q.94, a.5.

notitiam. Sed quantum ad quaedam propria quae sunt quasi conclusiones principiorum communium est eadem apud omnes ut in pluribus et secundum rectitudinem et secundum notitiam : sed ut in paucioribus potest deficere et quantum ad rectitudinem, propter aliqua particularia impedimenta . . . et etiam quantum ad notitiam ; et hoc propter hoc quod aliqui habent depravatam rationem ex passione, seu ex mala consuetudine, seu ex mala habitudine naturae sicut apud Germanos olim latrocinium non reputabatur iniquum cum tamen sit expresse contra legem naturae.<sup>1</sup>

This awareness of the human condition, with its possibilities for progress and relapse, as a limit upon law is evident throughout the treatise. It is from this point of view that St. Thomas exposes the psychology of the Old Law with its elaborate ceremonial, its bizarre judicial precepts, and its incomplete prescriptions in what touches the moral law itself.<sup>2</sup> It was imperfect, *cohibens manum non animum*, and yet perfect *secundum tempus* is so far as designed for taming a people naturally cruel and prone to vice.<sup>3</sup> Hence the concessions *propter duritiam cordis* and the emphasis on temporal punishments and rewards

ut ex illis eum movere incipiat quae sunt in eius affectu sicut pueri provocantur ad aliquid faciendum aliquibus puerilibus munusculis.<sup>4</sup>

With the fullness of times comes a New Law repudiating much of the Old, and easier to observe although adding obligations which are in themselves more weighty :

Et quantum ad hoc praecepta novae legis sunt graviora praeceptis veteris legis quia in nova lege prohibentur interiores motus animi qui expresse in veteri lege non prohibebantur in omnibus etsi in aliquibus prohiberentur ; in quibus tamen prohibendis poena non apponebatur.<sup>5</sup>

It seems a minor tragedy that Holmes, who valued his independence of judgment so highly, should have been so easily dissuaded from reading St. Thomas.<sup>6</sup> We have grounds for speculating on the possible reactions when we recall that Rudolph Jhering who won his own reputation as the first thorough critic of mechanical jurisprudence, confessed his astonishment and admiration when he himself came to a belated reading of the *Summa*, and generously acknowledged that

1. *Ia IIae*, q.94, a.4, c. Cf. also aa. 5 and 6.

2. *Ia IIae*, q.101, a.3 ; q.105, a.2, ad 12.

3. *Ia IIae*, q.98, a.1, c. ; a.2, ad 1. The same principles explain the delay of the Incarnation. Cf. *IIIa*, q.1, a.5, c. and ad 1.

4. *Ia IIae*, q.99, a.6, c. Cf. also q.107, a.1, ad 2.

5. *Ia IIae*, q.107, a.4, c.

6. "I took Cohen's word for it that I needn't read Thomas Aquinas." *Holmes-Laski Letters, op. cit.*, p.689 ; 1183.



he might not have bothered writing his own *Der Zweck im Recht* had he known it earlier.<sup>1</sup> *Habemus confitentem reum*. This is the testimony of a Kantian jurist, admired by Holmes as a man of genius,<sup>2</sup> who himself coined the term "jurisprudence of conceptions" (*Begriffs-jurisprudenz*) and who may be presumed to have had some understanding of its spirit. His words ought to caution those who still ride somewhat recklessly to the attack on natural law to distinguish more carefully the colors of different horses.

### 3. *Historical jurisprudence and the disgrace of natural law*

#### a) *The influence of positivism*

There are several reasons why the repudiation of nineteenth century historical jurisprudence has resulted in the disgrace of natural law. Its special defect was the exclusion of genuine legal progress through limiting the function of the jurist to a kind of historical research and to predictions deducible from the existing law. This strangling of a genuine historical method, almost at its birth, through the abuse of rationalism and Hegelian philosophy had much to do with the spread of legal positivism for many of the historical school converted to it as the only system capable of nourishing its original inspiration. As it so happens today, with positivism in almost complete possession of the field, natural law jurisprudence is distinguished above all by its metaphysical basis — that is, for recognizing universal, immutable, principles and for acknowledging reason's power to discover, judge, and vindicate them independently of any "pragmatic" test. In this moderate realism today's legal positivism sees only the image of its old enemy, rationalism.

There is a certain ironic injustice in this revenge of positivism. The post-reformation versions of natural law (taking Grotius and Pufendorf as samples) were cut off from all roots in the eternal law and were completely anthropocentric and positivist in their basic method.<sup>3</sup> And the analytical and historical schools for all their

---

1. "This great mind correctly understood the realistic-practical and the social actors of moral life, as well as the historical. . . . In amazement I ask myself how it is possible that such truths, once they were uttered, could be forgotten so completely by our Protestant savants? What false roads would have been avoided had they taken them to heart! For my part, I should probably not have written my book, had I known them; for the basic ideas I occupied myself with are to be found in that gigantic thinker in perfect clearness and in most pregnant formulation." R. JHERING, *Der Zweck im Recht*, 2<sup>nd</sup> ed., II, p.161. (Cited in M. GRABMAN, *Thomas Aquinas*, Longmans, 1928, [tr. Virgil Michel, O.S.B.] p.161.)

2. *The Common Law*, *op. cit.*, p.208.

3. "Grotius n'est pas un philosophe, c'est un juriste; il recherche le fondement du droit à propos d'études de droit positif et ne s'occupe ni de métaphysique, ni de morale. Pour lui, le droit se fonde sur la morale courante qu'il considère comme universellement



dogmatism and confidence in logical analysis, were positivist in inspiration. The elaborate codification striving for exactitude and restricting the judiciary to rigid literal interpretations, were partially due to an unwillingness to recognize any such thing as a deposit of "natural" unwritten principles binding independently of statute whereby statutes were themselves to be judged. The State — a physical power — was the exclusive source of law and the only real laws were therefore positive. Hence the exclusion of equity or "non-legal" justice which had early found its way into a truly metaphysical system like the common law.

If thou shalt take all the words of the law giveth thee thou shalt sometime do against the law. And for the plainer declaration of what equity is, thou shalt understand that with the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of law but that it shall fail in some case : and therefore makers of the law take heed to such things as may often come, and not to every particular case, for they could not although they would. And therefore to follow the words of the law were in some case both against justice and the commonwealth.

Wherefore in some cases it is necessary to leave the words of the law and to follow what reason and justice required, and to that intent equity is ordained ; that is to say to temper and mitigate the rigour of the law. And it is called also by some men *epieckeia* ; the which is no other thing but an exception of the law of God, or the law of reason, from the general rules of the law of men when they by reason of their generality would in any particular case judge against the law of God or the law of reason : the which exception is secretly understood in every general rule of positive law. . . . Wherefore it appeareth that if any laws were made by man without any such exception expressed or implied, it were manifestly unreasonable, and were not to be suffered : for such causes might come, that he that would observe the law should break both the law of God and the law of reason.<sup>1</sup>

Positivism, we might note, is the real source of Holmes' opposition to natural law. Even had he known it in its genuine form, he would have been its enemy still. His agnosticism, not his judicial method, excluded it along with the possibility of any solidly grounded juridical order. His friend Pollock, the great historian of English law, saw

---

admise, et il juge donc inutile d'étudier la morale *ex professo* ou de préciser à quel système de morale il adhère. Cette négligence ou cette faiblesse, ses élèves vont en faire une doctrine." J. LECLERCQ, *Le fondement du droit et de la Société*, Namur, 1933, vol. 1, p.21.

The same general criticism applies to modern neo-protestant presentations as found in the "theology of crisis." They recognize immutable moral laws but they are divine *positive* laws. Rejection of the "diabolical" doctrine of analogy, and of natural theology also, makes knowledge of any other natural law impossible.

1. Quoted from Christopher St. Germain in WU, *op. cit.*, p.82.

this gap and pointed it out to Holmes in his private criticism of the essay *Natural Law* :

If you deny that any principles of conduct at all are common to and admitted by all men who try to behave reasonably — well, I don't see how you can have any ethics or any ethical background for law. Apparently the ex-German emperor will have to be tried by a wholly new jurisdiction, if at all, and by some standard which all medieval and not a few modern doctors would refer to natural law.<sup>1</sup>

b) *The courts and "natural law"*

There is another fact of special importance for understanding the antipathy in the United States to the natural-law idea. There was a fundamental if indeliberate dishonesty in the apparently austere methods of conceptual jurisprudence. The methods were purely formal. The real determinants of judicial decision were social policies, in this case the policies of economic liberalism. The American courts were using abstract legal concepts and filling them with arbitrary content to suppress legislation they found displeasing. Far from being altogether impartially applied, legal principles had a suspiciously consistent way of giving birth to decisions in favor of capital and industry as against labor and government. Instead of shielding the judge against the intrusions of private preference and prejudice, the concepts were only serving to mask their presence more effectively. It can be noticed, for example, in most of the cases we have cited that the courts were showing a disproportionately greater zeal for property interests as against specifically human rights — as in the *Oleff* decision<sup>2</sup> where the judge in one astounding paragraph refused to entertain argument on the "theological" issue of justice on the ground that property rights were too "sacred" to be exposed to danger of that nature.

So too "liberty of contract" was taken as an absolute natural right and invoked without qualification by the Supreme Court to defend industry against regulation of child labor, against minimum wages laws, and against the union shop.<sup>3</sup> It did not appear to interest

1. *Holmes-Pollock Letters, op. cit.*, I, p.274.

2. See above, p.115.

3. Holmes dissent in the *Adkins* case (involving a minimum wage law for women) is famous for its brief analysis of "liberty of contract" as a concept-creation of the Court. "In the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

"The earlier decisions upon the same words of the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma Liberty of Contract. Contract is not specifically mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word

the Court that as between employer and the individual laborer unprotected by special legislation, "liberty of contract" remained a very abstract right indeed. Laws enacted to restrain business combinations aimed at dominating the market were voided as interference with free commerce at the same time that workingmen's combinations to secure higher wages and to make their own liberty of contract a reality were judged to be "in restraint of trade" and aimed at "leveling the inequalities of fortune."<sup>1</sup>

The Justices of the Supreme Court during the greater part of the nineteenth century and a good part of the twentieth were well schooled in the spirit of Manchester economics and were applying its doctrines as part of natural law.<sup>2</sup> The Court's record during this period of "concept creation" offers rich documentation for those interested in showing "the relation between a mystical absolutism of natural rights and the practice of laissez-faire."<sup>3</sup> It is an admitted scandal that the judicial support of progressive legislation of the type recommended in the papal encyclicals on a natural-law basis, came from the legal positivists against the stubborn opposition of the "natural-law" jurists including the Catholic membership of the bench.

c) *Concluding remarks*

As the term implies, we know the natural law, in its most proper sense, *naturaliter* :

. . . ut scilicet omnia illa facienda vel vitanda pertineant ad praecepta legis naturae quae ratio practica naturaliter apprehendit esse bona humana.<sup>4</sup>

Lex ergo naturalis nihil aliud est quam conceptio homini naturaliter indita qua dirigitur ad convenienter agendum in actionibus propriis.<sup>5</sup>

liberty. But pretty much all law consists in forbidding men to do some things they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld, I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us." He then gives examples of laws against usury, Sunday laws, etc., which have always been accepted as valid legal restrictions. 261, U.S. 525, 568 (1923).

1. Justice Pitney in *Coppage v. Kansas*, 236, U.S. 1, 17-18 (1915). A reading of this opinion (especially nn. 15-19) is recommended as a startling example of the identification of natural law with the principles of Manchester economics. The reasoning of Justice Pitney on the subject of property rights and particularly on liberty of contract is precisely that which is vigorously repudiated by Leo XIII in *Rerum Novarum*.

2. Cf. W. KENEALY, "Whose Natural Law?", *Catholic Lawyer*, Oct. 1955, pp.259 ff. Also *ABAJ*, *op. cit.*, 403 ff.

3. LERNER, *op. cit.*, p.163.

4. *Ia IIae*, q.94, a.2, c.

5. *Suppl.*, q.65, a.1, c.

The occasions for deception here are evident. *Consuetudo vertitur in naturam*. A prejudice can become so habitual and ingrained as to be taken for a "*conceptio naturaliter indita*" and the judgments made in accord with it are placed like the first principles beyond the range of argument. We can see this psychology at work in a decision of the Supreme Court of Tennessee voiding a marriage between a white man and a colored woman. To the argument that the marriage had been validly performed in another state, the Court replied :

Extend the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister in lawful wedlock, because they formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Chancellor Kent says the marriage contract is a stable and sound contract, of natural as well as municipal law. This is neither.<sup>1</sup>

Inclinations greatly influence our moral perceptions and they are not all purely and simply natural. They can be acquired in all sorts of unnatural ways.<sup>2</sup> Moreover there are not only individually acquired ones, but what we call group inclinations also. We must be on guard against straightway canonizing these inclinations *telles quelles* as authentic echoes of nature and indications of natural moral law.<sup>3</sup> The inclination to honor one's parents ; to marry one wife at a time ;<sup>4</sup> to assign negroes to the rear seats, may all be natural in mode but are not equally *de jure naturali*.

All this evidences the necessity of sound moral science and the importance of a proper method in the transition from principles to conclusions. Natural law as naturally and infallibly known, extends to a very few general principles which, taken alone, are comparatively sterile. They cannot be expected to bring forth a kind of parthenogenesis perfectly formed solutions to concrete problems. The more certain they are *quoad nos*, the more useless they are from this point of view. The danger here is in the tendency to apply them in too immediate fashion to particular situations. We all know, for example, that modesty is a virtue but that does not mean that all can recognize

1. *State v. Bell*, cited in WU, *op. cit.*, p.193.

2. Cf. *In VII Eth.*, lect.v.

3. "Quantum vero ad alia praecepta secundaria, potest lex naturalis deleri de cordibus hominum, vel propter malas persuasiones, eo modo quo etiam in speculativis errores contingunt circa conclusiones necessarias ; vel etiam propter pravas consuetudines et habitus corruptos ; sicut apud quosdam non reputabantur atrocina peccata, vel etiam vitia contra naturam . . ." *Ia IIae*, q.94, a.6, c.

4. *Suppl.*, q.65, a.2.

the *mode*. Great care must be had in establishing the minor premise of the practical syllogism. The crucial things here are the *facts* which must be patiently gathered and prudently weighed with due regard for time and place. This may mean the occasional revision or rejection of a cherished formula, but it may mean also a clearer knowledge of true natural law.

JOSEPH V. DOLAN, S.J.

(*To be continued.*)

