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JOHN K. RUCKELSHAUS*

IN DECEMBER 1923, Judge Benjamin N. Cardozo delivered a series of lectures at the Law School of Yale University, later published under the title *The Nature of the Judicial Process.* During the course of his second lecture in this series, entitled *The Need of a Philosophy of Law,* Judge Cardozo stated:

> You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith that you are on the highway to the goal. Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools.[1]

Nevertheless, in the years that followed, the American lawyer paid little attention to Judge Cardozo's admonition as to the importance of legal philosophy. One explanation may be that the law became such a vast enterprise that no time remained to devote to the "luxury" aspects of the field. Or perhaps legal philosophers used a specialized vocabulary largely unintelligible to any but members of their exclusive group. Again, the widely accepted doctrine of positivism, which asserts the philosophy that there is no philosophy, probably persuaded many that the philosophical discipline recommended by Judge Cardozo was unimportant to the practicing lawyer. This article represents an effort to support the thesis of Cardozo that philosophy is indeed of great consequence, and to do so we propose a comparison of the ideas of two men called Thomas: Thomas Aquinas and Thomas Hobbes. Neither was a lawyer, yet the ideas expounded by these two very different individuals illustrate how impossible it is for even the most practical lawyer to hold to the modern dogma that philosophy is of no concern to the law.

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* Member of the Indiana Bar.

[1] CARDOZO, SELECTED WRITINGS 145 (1941).

Thomas Aquinas

The period of approximately one thousand years from the fall of Rome to the beginning of the modern era has been erroneously called "the Dark Ages." Fortunately, the assumption that this period was entirely dark has been recently re-examined. During the latter part of the medieval period, particularly the thirteenth century, much of great consequence transpired. For example, it is difficult to escape the conclusion that a century that produced St. Thomas Aquinas and his monumental theological and philosophical writings contained something more than darkness.

Unfortunately, St. Thomas had no Boswell. A constant companion, Brother Reginald, who might have been his biographer, did not choose to undertake the task, and so our knowledge of his life is sketchy. We do know that Thomas was born near Naples, in what is now Italy, in 1225. He came of distinguished forebears. His father was the Count of Aquino, his uncle the Emperor Frederick Barbarossa, and his godfather Pope Honorius III. At that time one of the celebrated places of learning in his country was the Monte Cassino Abbey, founded by St. Benedict in 529, and it was here that Thomas remained for seven years while he received his early education. Later he went to Naples and applied for admission to the Dominican order. Although his family objected vigorously because so humble an order was decidedly beneath their dignity, when he persisted despite imprisonment by his parents, they capitulated. Thomas became a Dominican.

He began his higher education at Paris and later journied to Cologne where he studied under one of the foremost teachers of his time – St. Albert the Great. Thomas was a large young man, apparently not at all appreciated by the fellow students who nicknamed him "the dumb ox." Albert, who saw the great intellectual potentialities of his young student, observed "You call this man a dumb ox. I tell you that the time will come when the bellowing of his doctrine will be so loud that it will be heard to the ends of the earth."

In 1250 Thomas was ordained a priest, and about 1252 he started a brilliant teaching career at the University of Paris. Here he found himself in the center of a two-pronged controversy. The traditional philosophy of the Christian world was Augustinian. *The Confessions, The City of God* and the other writings of Saint Augustine were said to have provided an intellectual bridge which permitted passage from the Roman era to the Middle Ages. St. Augustine's philosophy was based primarily on the writings of Plato. St. Thomas was forced to defend himself against the charge levelled by the followers of the Augustinian tradition that many of his Aristotelian ideas were not consistent with Christianity.

Another philosophical current of major proportions stemmed from the writings of the brilliant Arabian philosopher, Averroes, who was born at Cordova about a century before the time of Aquinas. For Averroes, the truth and the philosophy of Aristotle were one. But though St. Thomas was an ardent admirer of Aristotle, he fought vigorously against the errors which he felt Averroes had introduced to the European Universities of the period.

St. Thomas brought about a genuine philosophical revolution in the Christian World. Taking the texts of Aristotle from the Arab scholars, he analyzed them and proceeded to build a rational system of thought to supplement the truth which Christians accepted on the basis of their faith. It is asserted that

St. Thomas was the first to draw a sharp distinction between theology based on revelation and philosophy based on reason. He insisted that there was but one truth emanating from God; theology and philosophy if accurately pursued would lead to such truth. A philosophical and a theological truth, according to Saint Thomas, must be one and the same, but that did not mean that philosophy or reason could verify *all* truth which was learned from theology. The Trinity, for example, could be known only through revelation or theology, never by reason or philosophy.

St. Thomas died in his 49th year, but in his relatively brief span of life he produced a vast number of books. His two best known and most ambitious works were the "Summa Theologica," a monumental summary of theological and philosophical knowledge, and "Summa Contra Gentiles," which was an extensive work written for use as an apologetic in the Spanish-Arab world which accepted the Mohammedan tradition. In addition, he translated many of the works of Aristotle, and added his own commentaries on the ideas of this Greek who for him was "the philosopher." One of his objectives in these commentaries was to remove from Aristotle's works the gratuitous errors which were introduced by the Arab scholars who had translated them.

The philosophical revolution of St. Thomas was not an easy victory. Shortly after his death, the Bishop of Paris condemned some of his writings. At Oxford, well known professors were expelled for defending certain of his doctrines. For a time the Franciscans forbade his books to be read in their seminaries. But Thomas had his defenders too, foremost among them St. Albert the Great, and these were to triumph. In 1323 Thomas was canonized.

For the student of legal principles, this medieval monk has provided a superb treatise on the basic concept of law.[2] While he presents the subject from the natural law point of view, it can be asserted that no student of jurisprudence, no matter what his philosophical conviction, could fail to profit from a reading of this profound and lucid analysis.

Thomas Hobbes

Born prematurely on the eve of the defeat of the Spanish Armada in 1588, Thomas Hobbes was fond of saying that his mother had given birth to twins – Thomas and fear. He was sent by his family to Oxford University, where he formed a very low estimate of scholastic philosophy as it was taught at that time in English Universities. Like many scholarly Englishmen he became associated with a prominent family in the role of tutor. He pursued this occupation, which permitted ample leisure for extensive study, for eighteen years. After leaving the family for a brief interval he returned to their household where he remained the rest of his life. On one of his trips to the continent he made the acquaintance of Galileo. With the eminent Frenchman, Descartes, he carried on extensive correspondence. In 1640 Hobbes fled to France during a time of political unrest, and on this occasion he tutored the future English king, Charles II. In 1679 he died at the age of 91.

Hobbes most famous work, *The Leviathan,* was published in 1652, which together with two other treatises, *On the Body,* and *On Man* constituted his celebrated trilogy.

For Hobbes, philosophy was threefold;

[2] AQUINAS, SUMMA THEOLOGICA, I-II, q. 90-105; II-II, q. 57.

it dealt with body, man and the state. Hobbes shared the conviction of his age that a new era based on science was being born. What Copernicus had done for astronomy and Galileo for mechanics, Thomas Hobbes hoped to do for man himself. This philosophy was likened to Noah's dove which established vital commerce between man and the outside world. Philosophy concerned itself only with bodily nature capable of generation, through motion. Because he held that man's reason could know nothing of a spiritual nature, Hobbes was firmly committed not only to mechanism but to materialism.

Based on these basic principles, *The Leviathan* developed Hobbes' theory of the state. Man has one basic right which even transcends his all-powerful sovereign state; "the absolute liberty to use his natural power for self-preservation." But man without the restraining civil power of the state is by nature in a "perpetual war of all against all." The commonwealth is created by a contract wherein the people necessarily delegate to the sovereign state all power. There is thus created the mortal ruler who is subject to no law because he is the source of all law.

Hobbes has been called an atheist. Yet the third part of *The Leviathan* is entitled "Of a Christian Commonwealth." Plainly he was steeped in the Bible which he cited repeatedly as authority for his conclusions. His writings indicate not only a faith in God but also in the Christ of the New Testament. However, it is his firm conviction that not only is the sovereign state supreme in determining civil questions but also in deciding ecclesiastical or religious matters. Thus the state is the final judge not only as to the civil but also the moral law. There is no law above the state, and there can be none.

We can see why Hobbes had fierce critics. In 1688 some of the bishops made a motion that the good old gentleman be burnt for "a heretix." But although Oxford once burned *The Leviathan,* the university now assigns it to its students. Hobbes remained essentially a bookish man, having little practical experience with the politics he endeavored to analyze.

Modern Legal Significance of Their Ideas

There is little agreement in the ideas of these two men. The importance of defining with the utmost care the terms used in any philosophical writing was respected faithfully by both. Furthermore, the importance of examining first principles before accepting a conclusion was recognized by each Thomas. But what are first principles? Frequently one Thomas sharply differed with the other. We propose to confine our attention to one disagreement – the existence of a natural or moral law.

What is the "natural law"? For Saint Thomas there was first the eternal law of God. This law not only applied to the physical and animal world but also to man. The natural law was man's rational discovery of certain essential features of the eternal law. The natural law governed not only the citizen, but also the state. The later Thomas rejected absolutely the existence of any such natural law which purported to be higher than the state. For Hobbes, as we have seen, the state alone was supreme.

For many centuries the natural law was traditionally accepted in Western political thought. The Greeks, including Plato and Aristotle, held to this theory. The Stoics in the Roman period, as eloquently illustrated by Cicero, adhered to this idea. In St. Augustine's *City of God* at the beginning of the

medieval period, just as in the *Summa* of St. Thomas near its close, this principle was proclaimed. Finally there was the historic exchange between King James I and the English jurist Sir Edward Coke. Risking royal displeasure which could have meant imprisonment or execution, Sir Edward nevertheless insisted that the King was under "God and the law."

Our early American history repeatedly illustrates that political philosophy based on natural law had wide acceptance. The Declaration of Independence contains one of its finest expressions. An excellent authority, John Quincy Adams, contended that the Federal Constitution is the practical expression of this natural law idea as enunciated by the Declaration of Independence. Unquestionably this fundamental doctrine was predominant in our country down through the Civil War period.

About 1875 we largely abandoned this traditional concept. The position of Hobbes, as opposed to Aquinas, on this proposition largely won acceptance. More recently, such a brilliant thinker as Justice Oliver Wendell Holmes insisted that the natural law idea was only of historical significance and is no longer acceptable to educated men. Shortly after the beginning of World War II a book entitled *My Philosophy of Law,* containing chapters written by sixteen of our most noted American jurists, had only one writer who accepted entirely the natural law philosophy.

The Brown Case

We can apply this discussion to a current concrete problem. A case which recently has shaken our country is *Brown v. Board of Educ.*,[3] a decision of the Supreme Court of the United States. Was the Fourteenth Amendment to the federal constitution which provided "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws" violated by banning a colored child from a white school? Since 1896 *Plessy v. Ferguson*[4] (a case involving transportation) had been the law, holding that public facilities, separate but equal, satisfied this constitutional requirement. Now the "separate but equal" doctrine has been overruled. Separate schools for Negroes under the *Brown* case meant unequal facilities and therefore were illegal.

Certain critics of the decision insist that the issue is national versus state sovereignty, and hold that the states should triumph. Webster's dictionary defines the word "sovereign" as "supreme in position or power; independent of or not limited by any other." St. Thomas was not concerned with this particular word because it was not yet in usage. But quite likely he would have held neither the state nor nation to be sovereign. For under the natural law theory even the people are subject to the moral law and to God — alone the Sovereign. A somewhat similar answer was indicated by Thomas Jefferson in the Declaration of Independence when he wrote "governments derive their *just* powers from the consent of the governed." Note that even the people may only delegate *"just"* powers to the government. Thus this issue of state or national sovereignty repeatedly emphasized in this Arkansas controversy, *on our traditional American theory,* would not be decisive necessarily of the *Brown* case.

However, accept Hobbes' theory of the absolute state – then either the national or state government necessarily is sovereign.

[3] 347 U.S. 483 (1954).

[4] 163 U. S. 537 (1896).

Hobbes, no doubt, would hold for absolute power in the nation. It is difficult to examine the Federal Constitution which in its preamble reads "We the people of the United States" not "We the States" and follow fully this line of reasoning. Only if we reject pertinent provisions of the Federal Constitution and endorse the political philosophy of Thomas Hobbes, does this argument as to sovereignty in either the nation or the state make sense. Disagreement over the meaning of this word has added immeasurably to the confusion in the public mind as to the character of this distressing controversy.

What would our two men have said of the wisdom of the *Brown* decision? Aquinas apparently never condemned slavery. He warned masters not to order a slave to violate the moral law, and slaves to refuse to obey an immoral command. But the application of his conviction that all men, whether slave or free, were children of God with an immortal soul pointed inevitably toward the abolition of slavery. That idea would have prompted him certainly to join with Chief Justice Warren in ruling out segregation. Just how the other Thomas would have cast his vote were he a justice deciding the *Brown* case is hard to predict. But once this case was decided the Hobbes answer would be easy. Whatever the state decided would constitute necessarily a final determination of both the civil and moral law applicable to the issue.

Conclusion

Not only legal writings in the United States but national constitutions of foreign countries adopted following the termination of our last World War offer significant evidence on this subject. The French document approved in 1946 speaks of "inalienable and sacred rights." In the Italian constitutional convention of 1948, one of the subjects of debate was the creation of a court with the power to declare a law unconstitutional. The proposal was adopted after bitter debate. The Christian Democrats argued for such judicial authority on natural law considerations. The Communists opposed, denying the existence of such a law. Germany in 1949 adopted a basic law recognizing traditional natural law philosophy. Specially significant is a statement in the preamble to the Japanese Constitution of 1946:

> We hold that no people is responsible to itself alone but that laws of political morality are universal and that obedience to such laws is incumbent upon all peoples who would sustain their own sovereignty and justify their sovereign relationship with other peoples.

Does not our best hope for a convincing international position lie in freedom based on the traditional natural law philosophy approved by so many eminent early Americans and in the splendid history of Western civilization by such great thinkers as St. Thomas Aquinas?