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THE "HIGHER LAW" DOCTRINE IN BRACTON AND ST. THOMAS

CHARLES M. WHELAN, S.J.*

THE DUE PROCESS clauses of the fifth and fourteenth amendments reflect the higher law tradition on which the American nation was founded. The Declaration of Independence speaks of the laws of nature, and of nature's God; the Constitution speaks of due process. In both documents we find written into the American tradition the concept of an order normative for purely positive laws, an order not dependent for its existence or justification on the will of any human legislator. This concept of a higher law has an ancient history, reaching not only to Greece and Rome, but to Egypt, Israel, Assyria, and Babylonia. In the course of its history, the basic norm of this higher law has been variously identified: for Hammurabi and Moses, it was divine revelation; for Cicero and Locke it was nature and right reason; for Mr. Justice Cardozo, it was "the scheme of ordered liberty" fundamental in Anglo-American legal tradition.

This doctrine of the higher law has been the subject of intense discussion and scholarly research in American legal circles. It has importance for our constitutional law, our history, and our theories of jurisprudence. It seems appropriate, therefore, to investigate this doctrine as it appears in one of the first and greatest monuments in the Anglo-American legal tradition, Henry of Bracton's *De legibus et consuetudinibus Angliae*. Because the higher law doctrine is often identified with the natural law doctrine, it also seems appropriate to compare Bracton with one of the great natural law theorists, St. Thomas Aquinas. The comparison seems all the more appropriate since they were contemporaries. Bracton, however, was a judge; and Thomas a theologian. The point of the comparison, therefore, will be simply their agreements and disagreements, not their relative merits.

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One word of caution is necessary. In studying higher law doctrines, we must distinguish between those which are elaborated without regard to the possibility of enforcement by human institutions, and those which are intimately connected with such enforcement, such as the American doctrine of judicial review. Haines, for example, in discussing the significance of ideas of a fundamental law in early English law, cites Plucknett as an author who insists that "there is no substantial evidence in the medieval period to support the doctrine of a supreme fundamental law in England."¹ But Plucknett has subsequently made it clear that his position is limited to the denial of the power of English courts to enforce a higher law against parliamentary enactments. He says:

Of course, there is no doubt that the mediaeval mind would never think of postulating the absolute sovereignty of Parliament or State. The whole scheme of things in the middle ages was based upon the assumption that municipal law derived its force from divine law; but we do not find in mediaeval English cases any decisions which clearly hold that a statute is void because it contravenes some fundamental principle.²

Doctrines like judicial review, the right of rebellion, or papal power to absolve from allegiance, are not essential to an intelligible theory of higher law. Indeed, it would seem in at least one respect that insistence on human institutions capable of enforcing the higher law is contrary to the heart of the doctrine itself. Juvenal's mordant question, "Who will guard the guard-

ians?" pinpoints the problem precisely. Legislatures can tyrannize as well as kings, and courts as well as legislatures. The true value of a higher law doctrine is to remind men that all human acts are subject to moral judgment, not to enable men to substitute new guardians for old.

In Bracton and St. Thomas, therefore, our attention will be devoted to the bases of their higher law doctrines rather than the methods or institutions by which they may have hoped to see it enforced on earth. As we shall see, they were not unconcerned with the problem of enforcement; neither did they make it the central issue in their higher law doctrines.

Bracton: Life and Works

Much of Bracton's life is unknown to us. His very name is the subject of some dispute; there are more than sixty variants in the manuscripts.³ The place and date of his birth are uncertain. Kantorowicz argues persuasively for a year close to 1200, and for Devon as the place.⁴ We do know that Bracton was an ecclesiastic, for he was rector of Combe in Teignhead in 1259, of Bideford in 1261, and archdeacon of Barnstaple in 1264. When he died in 1268, he had prebends at Exeter and Bosham, and was chancellor of Exeter Cathedral. His ecclesiastical status did not, of course, interfere with a judicial career. In 1245 he was a justice in Eyre. The following year his circuit included Yorkshire, Northumberland, Westmoreland, Cumberland, and Lancaster. From 1248 to 1268, he was judge of assize for the southwestern

¹ HAINES, *AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 32 (2d ed. 1932).

² PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 336 (5th ed. 1956).

³ 1 BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* 101, n.1 (ed. Woodbine 1915) [hereinafter cited as *WOODBINE*].

⁴ KANTOROWICZ, *BRACONIAN PROBLEMS* 14-15 (1941).

counties, and from 1248 to 1257 he heard pleas before the king himself. It was during this period that he came into possession of the plea rolls of Raleigh and Pateshull, from which he compiled the *Note Book*.⁵

The *Note Book* is the first English case-book. Some 2000 cases from the first twenty-four years of Henry III's reign were carefully selected by Bracton from the rolls of the common bench, of pleas before the king himself, and from certain Eyre rolls. In numerous instances, Bracton annotated the cases. The original manuscript of the *Note Book* does not identify Bracton as the compiler and annotator, but the careful research and argumentation of F. W. Maitland has established the attribution.⁶

With the help of the *Note Book*, Bracton set about writing the first systematic manual of English law. Glanvill's *De Legibus et Consuetudinibus Regni Angliae* had appeared about 1187, but it was concerned solely with procedure in the royal courts and the common law had developed immensely since its appearance.⁷ That Brac-

ton had Glanvill's treatise before him while he composed his own *De Legibus* is evident not only from the similarity of the titles, but from the close correspondence of their opening sentence. Both insist that two things are necessary for the king: *arma et leges*. The same idea, of course, is also found in Azo, on whom Bracton relied so heavily;⁸ but the choice of this idea as the first in the treatise seems more readily explicable in terms of a reliance on Glanvill.⁹

In addition to the *Note Book*, Glanvill, and Azo's two Summae, Bracton also had at his disposal the plea rolls of Raleigh and Pateshull, the *Leges Edwardi*, the *Decretum* and a collection of *Decretals*, a Bible, some works of Ovid, the institutes, at least the first nine books of the Code and two sections of the Digest. He may also have had a version of the Anglo-Saxon laws, Tancred's *Summa de Matrimonio*, Barnard of Pavia's *Summa Decretalium*, and a work of Raymond de Penafort.¹⁰

⁵ These details of Bracton's life are taken from 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 232-33 (4th ed. 1936).

⁶ Maitland's edition appeared in 1887 in three volumes, entitled *BRACTON'S NOTE BOOK (A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third, Annotated by a Lawyer of That Time, Seemingly by Henry of Bratton)*. The credit for discovering the manuscript belongs to Vinogradoff; see JENKS, *SHORT HISTORY OF ENGLISH LAW* 25 (6th ed. 1949).

⁷ There is an edition by Woodbine (1932). The authorship of the work has been the subject of great dispute. PLUCKNETT, *HISTORY OF ENGLISH LAW* 256 (5th ed. 1956), says flatly: "There is no reason to believe that Ranulph de Glanvill wrote this book, although he may have inspired Hubert Walter to compose it; the manuscripts merely say that it was composed in the time of Glanvill." STENTON, *ENGLISH SO-*

CIETY IN THE EARLY MIDDLE AGES (1066-1307) 40 (2d ed. 1952), suggests that "Glanvill" could have been written only with Henry II's "consent and goodwill, if not at his direct command."

⁸ MAITLAND, *BRACTON AND AZO* (8 Selden Society 1894).

⁹ Glanvill, of course, had modelled his introduction on the preface to Justinian's *Institutes* (ed. Krueger 1911), and in some ways Bracton is more faithful to the new Roman model than Glanvill. The very first words of each preface, however, betray the original thinking of each author. The *Institutes* have *Imperatoriam maiestatem* ("the imperial majesty"); for this, Glanvill has substituted *Regiam potestatem* ("royal authority"); and Bracton writes: *In rege qui recte regit* ("In a king who rules rightly").

¹⁰ MAITLAND, *BRACTON AND AZO XXIV-XXV* (1895); PLUCKNETT, *HISTORY OF ENGLISH LAW* 262 (5th ed. 1956). KANTOROWICZ, *BRACTONIAN PROBLEMS* 27-33 (1941), vigorously rejects any dependence of Bracton on Drogheda.

Bracton borrowed the tripartite plan of his work from Justinian's Institutes: persons, things, actions and obligations. This use of a Roman model was a deliberate attempt on Bracton's part to give a rational structure to English law, which had hitherto been accumulating haphazardly, as laws and customs generally do in rapidly developing legal systems. The choice of a Roman model and the use of Roman authorities to fill the gaps in the laws and customs of his times brought Bracton under sharp criticism from Maine. The great historian, indeed, asserted that Bracton had attempted to fob off Romanism as genuine English Law.¹¹ Maitland forcefully dissented, but rescued Bracton only by making him a "poor, an uninstructed Romanist."¹² Kantorowicz attempted to rehabilitate Bracton as a civilian, without impugning his fidelity to English Law.¹³ Plucknett agrees with Holdsworth that not "all Bracton's law is English in substance . . ." and that it is "because his treatise has given to English law at least one authority upon many matters which were outside the routine of the practising lawyer of the thirteenth century that his influence upon the history of English law has been so great."¹⁴ As we shall see later,

Bracton's Romanism colored not only his treatment of bailments (which was destined to have such importance centuries later in *Coggs v. Bernard*) but his concept of the higher law as well.

Bracton died in 1268 without completing his great treatise. Unfinished as it was, it yet won instant favor; of the forty-six surviving manuscripts, all date from before 1400.¹⁵ Owing to the great length of the treatise, it was rapidly summarized by Gilbert de Thornton late in the thirteenth century and in the works known as Britton and Fleta during the reign of Edward I.

The immediate influence of Bracton's treatise was profound but short-lived. Maitland doubts "whether any book written by a medieval Englishman that was as bulky as Bracton's and was not a book of devotion or of theology was more popular or more often transcribed."¹⁶ Nevertheless, his popularity suffered an eclipse beginning about 1350. He was resurrected in the sixteenth century, through the printing press, in "a stately volume, perhaps the best printed law book we have ever had."¹⁷ Without doubt, the most impressive moment in Bracton's history came on Sunday morning, November 10, 1608. Standing before all the judges of England and the Barons of the Exchequer, Coke intrepidly quoted the most famous line in

¹¹ MAINE, *ANCIENT LAW* ch. iv (1st ed. 1861).

¹² MAITLAND, *BRACON AND AZO* xviii (1895).

¹³ KANTOROWICZ, *BRACONIAN PROBLEMS* 58-127 (1941).

¹⁴ 2 *HOLDSWORTH, HISTORY OF ENGLISH LAW* 286; *PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW* 262 (5th ed. 1956). Holdsworth's final verdict on the influence of canon and civil law on English law seems to be contained in this sentence, which can be found in at least two different places in his works: "It supplied a method of reasoning upon matters legal, and a power to create a technical language and techni-

cal forms, which enabled precise yet general rules to be evolved from a mass of vague customs and particular cases." *HOLDSWORTH, ESSAYS IN LAW AND HISTORY* 77 (1946) (the essay was originally written in 1924); *SOME MAKERS OF ENGLISH LAW* 15 (1938) (speaking of the influence of Roman law on Glanvill).

¹⁵ 1 *WOODBINE* 1-3 (1915).

¹⁶ MAITLAND, *BRACON AND AZO* xxxii (1895).

¹⁷ *PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW* 263 (5th ed. 1956).

Bracton to James I, face to face: "Quod Rex non debet esse sub homine, sed sub Deo et lege."¹⁸

Bracton seems to have had little direct influence on the formation of the higher law theories in the American colonies prior to the Revolution. We do know that in 1775 a Mr. Stone argued before the Court of Common Council that Parliament was inferior to law, and quoted instances from Bracton, Fortescue, Coke, and Blackstone to support his opinion.¹⁹ More importantly, the great controversialist James Otis cited Bracton in his address to Governor Bernard in the Council Chamber late in December, 1765.²⁰ Other instances would doubtless be adduced, but it was to the fully developed theories of men like Locke that the colonial theorists turned for their chief support, not to Bracton.

Historical Background

Before passing to the text of Bracton itself, it may be well to recall a few of the major developments and events in English history from the Norman Conquest to the death of Bracton, a span of almost exactly two centuries. During this period, the royal household evolved from the simple and almost familial forms we see in the Bayeux tapestry into the threefold division of Chapel, Hall, and Chamber, and finally into the still more specialized institutions of the Exchequer, the Chancery, and the

Wardrobe. The King in Council was the ruler of the land; only the beginnings of Parliament were visible.²¹ Of the many important political events with which Bracton must have been familiar, two, it might be thought, must surely have influenced greatly his concept of the king and the law: the martyrdom of Becket in 1170 and the grant of Magna Carta in 1215.

Henry II's difficulties with Becket began in 1163 over a question of taxation.²² Later in the same year they quarreled over the punishment of criminal clerks. In January, 1164, the king called together at Clarendon the whole body of the bishops and barons, and commanded Becket to abide by the customs in use under Henry I. Becket refused, and the Constitutions of Clarendon were thereupon drafted, purportedly as a statement of the usages of Henry I on the disputed points. These involved, among others, questions of advowson and presentation, the trial of laymen for spiritual offenses, the license of the clergy to go abroad, ecclesiastical appeals, the baronial duties of prelates, and election to bishoprics and abbacies. Becket reluctantly and indecisively accepted the Constitutions, but then immediately sought the forgiveness of the pope for having betrayed the interests of the Church.

Deeply offended, the king summoned Becket by a common writ to a council at Northampton in October, 1164, and demanded that Becket produce the accounts of the chancery. (The twelfth century, it

¹⁸ Cf. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 38-39 (1955) (reprinted from 42 HARV. L. REV. 149-185, 365-409 (1928-1929)).

¹⁹ HINKHOUSE, THE PRELIMINARIES OF THE AMERICAN REVOLUTION AS SEEN IN THE ENGLISH PRESS (1763-1775) 84 (1926).

²⁰ MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION (1760-1776) 84 (1933).

²¹ For a lively account, see STENTON, ENGLISH SOCIETY IN THE EARLY MIDDLE AGES (1066-1307) 11-56 (2d ed. 1952).

²² For this account of the first great Church-State struggle in England, I am indebted to I STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 499-513 (6th ed. 1897).

seems, was already adept at using the internal revenue laws to trap political enemies.) The archbishop fled to France, where he stayed in exile for six years. During this period, king and archbishop engaged in endless intrigues against each other. But in 1170, after the coronation during Henry II's own lifetime of his son, Henry III, by Roger of York, the king found himself driven to the wall.

Becket claimed that Roger's intrusion violated the rights of Canterbury, of the English Church, and of Christianity itself. Louis VI, indignant at the fact that his daughter, Henry III's wife, had not been crowned with her husband, urged the pope to put England under interdict. This opposition proved too strong. Henry II hastened to France, made peace with Becket, and authorized his return. When Becket did return in December, he excommunicated the opposing bishops, thus provoking the king to his fatal wish. Becket was murdered in his cathedral on the 29th of December, 1170.²³

The bloody death of Becket was widely believed to be the hest of the king. In a land where the Faith was still centuries from its eradication, Henry II had no choice. He submitted to the papal representatives in 1172, denying under oath any complicity in the death of Becket, and renouncing the Constitutions of Clarendon.

With so impressive a precedent in his mind, it is somewhat surprising to find Bracton making so sharp a distinction between *regnum* and *sacerdotium* that conflict between the two seems impossible.

Speaking of the necessity of jurisdiction over a controversy, he says simply:

There are spiritual cases in which a temporal judge has authority neither to decide nor to command execution of the judgment, since he does not have authority to enforce his decision. For in these cases the right to decide belongs to ecclesiastical judges, who govern and protect the spiritual order [*sacerdotium*]. There are also temporal cases, in which the right to decide belongs to the kings and to the leaders who defend the temporal order [*regnum*] and in which ecclesiastical judges should not intervene (since their rights or spheres of jurisdiction are limited and separate) unless the case be such that one sword should help the other. For there is a great difference between the spiritual and the temporal orders. But since the government of the spiritual order in no way pertains to this treatise, I shall now consider matters pertaining to the temporal order, and, first of all, to whom it belongs, first and foremost, in terms of duty and authority, to pass judgment.²⁴

Except for the comment that ecclesiastical judges should stay clear of cases in the jurisdiction of the temporal judges, Bracton does not suggest the enormous complexity of the relationships between the spiritual and the temporal courts. Still more curiously, the one exception he makes to the rule of non-intervention is the situation in which the spiritual sword should come to the aid of the temporal. It is perhaps worth remarking that Bracton uses the imagery of the swords, which derives from a Gospel incident, not the two "powers" of Pope Gelasius.²⁵ Apparently, either

²³ Stubbs has a somewhat different point of view: Becket "expiated his imprudent and unchristian violence by a cruel death." 1 CONSTITUTIONAL HISTORY OF ENGLAND 512 (6th ed. 1897).

²⁴ Folio [hereinafter cited as f.] 107, 2 WOODBINE 304 (1922). The translation is my own.

²⁵ Gelasius I, *Duo quippe sunt* (494), CHURCH AND STATE THROUGH THE CENTURIES 11 (ed. Ehler and Morrall 1954).

the spiritual and temporal courts were meshing smoothly at the time Bracton wrote his treatise, or he feared that entrance into a discussion of their interrelationships would distract him from the mighty and still unfinished task of setting forth the laws and customs enforced in the temporal royal courts.²⁶

The story of Magna Carta is too familiar to need repetition here.²⁷ Owing, however, to the tremendous importance which this document was to acquire in the constitutional controversies of the seventeenth and eighteenth centuries, it is important to keep Magna Carta in mind while reading Bracton. To judge from what little he has to say of it, the charter was certainly not regarded by him as a document of fundamental constitutional importance. So far from being the cornerstone of his doctrine that the king is subject to law, it seems to be opposed to another equally fundamental doctrine of Bracton's that the king is not subject to any man.

Some commentators have detected an echo in Bracton of the famous provisions of chapter 61 of Magna Carta.²⁸ Under this chapter, the barons were to choose twenty-five from among their number to

act as a committee of vigilantes for the observance of the charter. If any four of the barons were notified of a transgression by the king or one of his officers, they were to petition the king for redress. If he did not repair the injury within forty days, the four barons were to refer the matter to the whole committee of twenty-five, and then the committee, "together with the community of the whole land," should distress and distrain the king in all possible ways, only saving harmless the persons of the king, his queen, and their children.

The passage in Bracton which some have supposed to reflect this concept in Magna Carta occurs in a section where Bracton is developing the rule that the king's justices cannot interpret or annul royal charters. To the objection that this may leave one of the litigants without any remedy against injury by the king save the judgment of the living God, the text replies:

The king has a superior, namely God. Also the law, through which he was made king. Also, his council, namely the earls and barons, since the earls are so called because they are companions of the king, and he that has a companion has a teacher. If, therefore, the king is unbridled, that is, lawless, they ought to put a bridle on him, unless they themselves are unbridled like the king. In that case, the subjects will cry out and say: "Lord Jesus, constrain their jaws with rein and bridle." And the Lord will reply to them: "I shall call out against them a distant nation, strong and unknown, whose language they shall not understand; and this people will destroy them and tear them up by the roots from the land; and they shall be judged by this people, because they were unwilling to judge their own subjects justly." And finally, the Lord will send them, bound hand and foot, into the fiery furnace and

²⁶ Bracton does touch briefly on the distinction between *sacerdotium* and *regnum* at several other places in his treatise; see, for example, f. 5b, 2 WOODBINE 32 (1922); f. 8, *id.* at 40-41. Moreover, he carefully distinguishes between the rights of patrons and bishops where appointments to churches are concerned; see f. 53a, 2 WOODBINE 159-60.

²⁷ The best one-volume account is MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914).

²⁸ For example, CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 29 (1955). For the text and translation of chapter 61, see MCKECHNIE, *op. cit. supra* n.27 at 465-67.

exterior darkness, where there shall be weeping and gnashing of teeth.²⁹ The most serious objection against understanding this passage in the sense of a Bractonian subordination of the king to his council is that it is far from certain that Bracton wrote it. Of all the *addiciones* in the text, this is the most famous and controversial.³⁰ Whether, however, it is from the hand of Bracton or not, the sense of the passage seems far removed from that of chapter 61 of Magna Carta. It seems likely that there is a deliberate play on three words: *comites*, *socii*, and *magister*. If *socius* is taken in the sense of "partner," the earls share in kingship with the king and are collectively his master. If *socius* is taken in the sense of "companion," the earls derive their name from their accompaniment (*comitatus*) of the king and are collectively or individually his teacher. The double meaning of *magister*, teacher or master, can be resolved only by an election between the two meanings of *socius*, partner or companion.³¹ The only part of the passage

²⁹ F. 34a-b, 2 WOODBINE 110 (1922). The translation is mine. The scriptural references at the end of the passage seem to be dependent on *Psalms* 31:9; *Jeremiah* 5:15 ff.; *Ezekiel* 17:9; *Matthew* 13:40 & 22:13; but none of the citations is exact.

³⁰ KANTOROWICZ, BRACONIAN PROBLEMS 50-52 (1941), not only accepts the genuineness of this *addicio*, but comments: "No passage more genuinely Bractonian stands in the whole treatise than these prophetic words, which, if rightly read and understood, contain the clue to centuries of English constitutional life, legal, moral, and political." The weight of scholarly authority, however, still lies with Maitland's original judgment of spuriousness; see PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 234 n. 5 (5th ed. 1956); MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 69 (rev. ed. 1947).

³¹ If the passage is from Bracton, it seems clear from f. 5b, 2 WOODBINE 32 (1922), that

which is manifestly in conflict with the rest of Bracton is the clear statement that the *curia* is superior to the king. This is enough, however, to instill permanent doubt of its authenticity, despite the thoroughly Bractonian imagery of the bridle and of the appeal to divine justice as the last resort against the king and nobles.

Bracton and the Natural Law

At the outset of his treatise, Bracton is concerned with the justification of the title *leges* as applied to unwritten English laws. He contrasts the situation in England with what he believes to be the otherwise universal practice of reducing *ius et leges* to writing. But, he says, it will not be absurd to call English laws *leges*, even though they are not written, because everything has the force of law (*lex*) which has been justly determined and approved through the counsel and consent of the nobles (*magnates*), the common engagement of society (*res publica*), and the prior authority of the king or emperor. He then contrasts *lex* with *consuetudo*; the essential difference is that a *lex* derives its authority from the joint action of king, nobles, and society, whereas a *consuetudo* derives its authority from the practice in a particular place. It is implied, but not stated, that *leges* bind everywhere alike; it is stated explicitly that *consuetudines* bind only in the places where they arise.

After these fundamental distinctions, Bracton explains his purpose in writing the treatise. He then returns to the nature of English laws and customs.³² Those which have been approved by the consent of the users and confirmed by the oath of the king cannot be changed or destroyed without

the proper sense of *socius* is "companion" and of *magister* "teacher."

³² F. 1b, 2 WOODBINE 21 (1922).

the common consent of all those by whose counsel and consent they were promulgated. They can, however, be changed to the advantage of the subjects without their consent, because improvement is not destruction. At this point Bracton digresses on the qualifications of good judges and the punishment of evil ones. When he returns to the nature of laws and customs, he seems to begin his subject afresh.³³ He takes Papinian's set of definitions of *lex* from the *Digest*, but does not interpret them in the light of English government.³⁴ In this section he is borrowing heavily from Azo,³⁵ and is far less coherent than at the beginning of the treatise.

Bracton continues with a discussion of *iustitia*, *ius*, *iuris prudentia*, *aequitas*, *iuris praecepta*, and the distinction between *ius publicum* and *ius privatum*. This brings him to the *ius naturale*, for *ius privatum* is composed of three classes of rules: *ex naturalibus praeceptis aut gentium aut civilibus*.³⁶ We would expect a list of the "natural precepts" to follow; but Bracton surprises the reader by developing the concept of *ius naturale* in the following way:³⁷

"Natural law" is understood in many senses: (1) a certain instinctive motion coming from the nature of an animal, by which motion every animal is impelled to do some certain thing. This is one of the senses of the maxim: "Ius naturale est quod natura, id est ipse deus, docuit omnia ani-

malia." Understood in the sense mentioned, *quod* in the maxim is in the accusative case and *natura* in the nominative.³⁸ In the second sense of the maxim, *quod* is taken in the nominative case, so that the maxim means: Natural law is that law which has instructed all animals through their nature, that is, through the instinct of their nature. In this sense of the maxim, *natura* is read in the ablative case. And this is why it is said that the first movements [of our appetites] are not in our power, but the second are. If, therefore, we take only pleasure and delight in an object, but nothing more, we commit a venial sin. But if we go further and decide to put our base thoughts into practice, then this decision is called the third movement, and we commit a mortal sin. It should also be noted that these movements are called "natural law" with respect to all creatures, rational and irrational, for the same reason that the will is called "justice" with respect only to rational creatures. There are some, indeed, who say that neither the will nor these movements can properly be termed natural law or the law of nations, because they are simply matters of fact. I answer³⁹ that the will and these movements are instruments by which natural law and justice disclose and reveal their effect. For it is in the soul that virtues and rights reside.

Bracton concludes his discussion of the natural law by giving two other definitions, which, however, he does not develop and to which he apparently attributes little importance.⁴⁰ Since the passage translated represents the whole substance of Brac-

³³ F. 2a, 2 WOODBINE 22 (1922).

³⁴ D. 1. 3. 1 (ed. Krueger and Mommsen 1911).

³⁵ MAITLAND, BRACTON AND AZO 18-33 (1895).

³⁶ F. 3b, 2 WOODBINE 26 (1922).

³⁷ F. 36-4, 2 WOODBINE 26-27 (1922). The translation is mine. Throughout I have rendered *ius naturale* as natural law. On the difference between *ius* and *lex* and the problems this distinction raised for Bracton, see MAITLAND, BRACTON AND AZO 29-33 (1895).

³⁸ The maxim then means: Natural law is what nature, that is, God Himself, has taught all animals.

³⁹ I have departed from Woodbine's punctuation at this point.

⁴⁰ "Et illud forte apertius dicitur, *ius naturale esse debitum quoddam quod natura cuilibet praesentat. Item dicitur *ius naturale ius aequissimum, cum dicitur lapsos minores secundum aequitatem restitui*"; f. 4, 2 WOODBINE 27 (1922).*

ton's exposition of the natural law (he does not return to it again except in brief and scattered comments), it is necessary to pay particularly close attention to what he has said and to the way in which he has utilized his sources.

One has only to glance at Maitland's parallel columns to see how closely and yet how selectively Bracton has followed Azo's explanation of the *ius naturale*.⁴¹ Almost every word in Bracton is in Azo, but far from everything in Azo is in Bracton. The second definition given by Bracton follows immediately in both Bracton and Azo upon the passage translated above; but between the second and third definition the following passage occurs in Azo but has deliberately been omitted by Bracton:

Natural law is also predicated sometimes of the law common to all which has been established by human efforts, and so the law of nations may be styled the natural law. Again, as we read in the Decretum, the natural law is the contents of the Mosaic Law or the Gospel.⁴²

Azo continues with still another definition, concerned with the equitable restoration of minors to their rights, which Bracton selects as his third definition and tacks on immediately to the second. It is obvious that Bracton has deliberately excluded the law of nations⁴³ and the content of revelation from his concept of natural law.

⁴¹ MAITLAND, BRACON AND AZO 32-39 (1895).

⁴² *Id.* at 36.

⁴³ Bracton reinforces the exclusion by following Azo again in distinguishing the natural law (common to all animals) from the law of nations (common to all men); f. 4, 2 WOODBINE 27 (1922). *But see* f. 8b, 2 Woodbine 42, where Bracton identifies *ius naturale* with the *ius gentium*, and begins his discussion of the acquisition of things with this "older" law, "which nature brought forth together with the human

It is difficult, therefore, to agree with Maitland's statement that Bracton has copied "his account of *ius naturale* from Azo . . . without adding anything or omitting much."⁴⁴ The omission may be small in terms of length, but it is cardinal in terms of significance. Bracton was too good a lawyer to call human laws "natural" without qualification; too good a theologian to identify nature and revelation.

One puzzle which seems impossible of resolution is why Bracton did accept both the second and third definitions of natural law. They give the term thoroughly equivocal meanings: the second conceives it in terms of duty, and the third in terms of a rule of law. Perhaps Bracton simply wished to inform his readers, most of them presumably students,⁴⁵ that the term did have equivocal meanings in legal usage. This explanation, however, fails to account for the deliberate omission of other meanings equally represented in Bracton's model. Perhaps the second and third definitions would not have survived if Bracton had completed revision of his text.

What is certain is that Bracton seized on the definition of *ius naturale* in terms of the spontaneous, instinctive movements of animal appetites as his favored concept of the natural law. Why he did so is not certain. Perhaps it was in order to teach his readers some moral theology: the distinction between *primus*, *secundus*, and *tertius motus* is as fundamental today as it was in the thirteenth century. Stated briefly, the doctrine is as follows. The spontane-

race." This discrepancy with his earlier sharp distinction between *ius naturale* and *ius gentium* is one of the more startling inconsistencies in Bracton's treatise.

⁴⁴ MAITLAND, BRACON AND AZO 39 (1895).

⁴⁵ F. 1b, 2 WOODBINE 20 (1922).

ous, involuntary movements of appetite and the pleasure or pain which accompanies them are never sinful. They flow from the God-given nature of animals, including men, and are therefore naturally good. In the case of men, they are also morally indifferent. These movements are the *primus motus* of Bracton, the *motus primoprimum* of the later Scholastics. When, however, these movements persist on the level of consciousness, some deliberate response by men will be made. This response may be limited to deliberate complacency in the appetite (*secundus motus*), or it may proceed to a decision to satisfy the appetite (*tertius motus*). If the appetite is "base" because its satisfaction is forbidden, Bracton, following Azo, holds that deliberate complacency is only a venial sin, but that decision to satisfy is a mortal sin. Stated as baldly as that, Bracton's doctrine is not in harmony with the mainstream of medieval moral theology, but it must be remembered that he was not attempting to explain the point fully. Bracton surely knew that there were venially, as well as mortally, forbidden satisfactions. What he may not have known, however, is that there are some mortally forbidden deliberate complacencies: it would be centuries, for example, before all theologians would agree that deliberate complacency in any sexual appetite whose satisfaction was forbidden would be a mortal sin.

Bracton's explanation of the natural law may leave some questions in our minds, but it surely answers one in unequivocal fashion. If there is a higher law doctrine in Bracton, it is not in terms of the natural law. This is all the more remarkable because the books at his disposal, especially the *Institutes*, put ready to his hand the raw materials of the Stoic concept of the

natural law. By virtually limiting the meaning of *ius naturale* to the spontaneous motions of animal appetite, Bracton deliberately refused to identify the law to which the king should be subject with the natural law of Greece and Rome.

God, the King and the Law

But the king is subject to the law, and to God. At the very outset of his treatise, Bracton is at pains to show the relationship between the coercive power of the king and law:

For a king to rule rightly, two things are necessary: arms and laws. These two things make it possible to govern rightly both during war and during peace. For each of these things needs the help of the other, so that military affairs can be handled securely and the laws can be preserved with the help of arms.⁴⁶

Nothing could demonstrate more conclusively the legal realism of Bracton. A legal system without sufficient coercive power to compel obedience is as repugnant to his thought as the lawless use of military power.

Bracton delays development of his concept of the king until he has disposed of the general concepts of jurisprudence. Even when he begins his discussion of persons, the first great division of his treatise, he does not start with the king but with the distinction between freedom and slavery. After touching briefly on certain other distinctions between men, he lists the classes of those who are subject to the king and thus comes to the king himself. The transition is forceful: "Under the king, therefore, we find free men and slaves and subjects to his authority: indeed, everyone is subject to him and he to no one save God alone."⁴⁷

⁴⁶ F. 1, 2 WOODBINE 19 (1922).

⁴⁷ F. 5b, 2 WOODBINE 33 (1922).

Bracton continues with this explanation of the king's superiority to all human authority:

The king has no peer in his kingdom; otherwise he would lose the power to command, since peer has no power over peer. Much less, then, is anyone above or more powerful than the king; for thus he would be inferior to his subjects, and inferiors cannot be peers of the more powerful. The king himself ought not to be subject to any man but rather to God and the law, because the law makes the king. The king, therefore, should attribute to the law what the law attributes to him, domination and power. For there is no king where will rules and not law.⁴⁸

This passage is pure Bracton; he is not copying or even imitating Azo or Glanvill. The king's superiority to all is founded on his right to command all; the king's subjection to law is based on the concept that he was made king by law in order to rule, not to tyrannize. But what of the king's subjection to God? Bracton continues immediately with a beautiful and thoroughly Christian passage:

That the king should be subject to the law, since he is the vicar of God, becomes manifest from the example of Christ, whose vicar he is on earth. The faithful mercy of God, although innumerable ways were open to it for the recovery of the human race, chose a method in preference to all others which accomplished the destruction of the devil's work not by sheer force but through justice. He chose to subject Himself to the law in order to redeem those who were subject to the law. He chose not to use strength, but judgment.⁴⁹ So, too, the

⁴⁸ *Ibid.*

⁴⁹ "Noluit enim uti viribus sed iudicio." Maitland's paraphrase hits the point exactly: "Christ, when he desired to 'recover' the human race, preferred 'due process of law' to a lawless self-help: . . . Even Satan was not to be disseised sine iudicio." BRACTON AND AZO 65 (1895).

blessed Mother of God, the Virgin Mary, our Lord's mother, was by singular privilege above the law, but, in order to give an example of humility, subjected herself to the rules of the law.

In imitation of Christ and His mother, Mary, the king ought to be greater than anyone else in the kingdom in displaying justice,⁵⁰ and he ought to act like the least of his subjects when he has recourse himself to his courts. Bracton then faces the critical question: What if the king refuses to remedy a grievance against himself? He answers: "Since no writ runs against the king, the proper way to seek redress is by petitioning him to correct and amend what he has done. If he does not do so, it is sufficient for a penalty that he will someday meet God the avenger."⁵¹

The idea of divine vengeance is extremely strong in Bracton. He applies it equally to the king and to his judges.⁵² The vengeance

⁵⁰ So intimate is the connection between justice and the king that Bracton does not hesitate to say later, f. 55b, 2 WOODBINE 167 (1922): "Those things which concern jurisdiction and peace, and those which belong to justice and peace, belong to no man but only to the crown and the royal office; they cannot be separated from the crown, because they make the crown itself. For the crown is the doing of justice and judgment, and the keeping of the peace, without which the crown cannot exist or survive." See also f. 107b, 2 WOODBINE 305: The king is created and elected precisely to do justice to all.

⁵¹ F. 5b-6, 2 WOODBINE 33 (1922). Bracton returns to the same question at f. 56b, 2 WOODBINE 169, and insists again that a request to the king to correct a deed "magis voluntarium quam iustum" is the only remedy in this life. On the general problem of proceedings against the Crown in the time of Bracton, see Ehrlich, *Proceedings Against The Crown* (1216-1377), in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1921).

⁵² The most notable example is at f. 2a, 2 WOODBINE 21-22 (1922), a "fervid sermon" in Maitland's phrase, BRACTON AND AZO 17 (1895)

will be all the more terrible because of the intimate relationship between the king and God. The royal throne is, as it were, God's throne.⁵³ The royal subjects are the people of God.⁵⁴ The king stands in the place of Christ; he is the vicar and servant of God.⁵⁵

It is, therefore, in the New Testament doctrine⁵⁶ of the divine origin of political authority that Bracton finds both the dignity of the king and the one sure recourse against abuse of his power. To the modern mind, this is an unsatisfactory solution to the constitutional problem. To the Christian mind, it is only an incomplete solution. Seven centuries of political experience have made us more ingenious than Bracton, but not wise or virtuous enough to prevent the excesses of Hitler and Stalin.

Thomas Aquinas and the Natural Law

As we have seen, Bracton's most characteristic concept of the natural law is that of the appetites which God Himself has implanted in the natures of all animals. It is not to this "law" that the king should be subject, but to the laws of his own kingdom. Infidelity to these laws is a breach of that justice for whose administration on this earth he has been elected God's vicar. Abuse of the divine office will inevitably entail divine vengeance. It is to the justice of God that a subject must look for a remedy against the injustice of a king.

⁵³ F. 1b (twice), 2 WOODBINE 20, 21 (1922).

⁵⁴ F. 5b, 2 WOODBINE 32; f. 108, 2 WOODBINE 307.

⁵⁵ F. 1b, 5b, 55b, 107ab, 2 WOODBINE 20, 33, 166, 305 (thrice).

⁵⁶ *Matthew* 22:21 (and its parallels, *Mark* 12:17, *Luke* 20:25); *Matthew* 23:1-3; *John* 18:36, 19:11; *Romans* 13:1-7; 1 *Timothy* 2:1-2; *Titus* 3:1; 1 *Peter* 2:13-17.

When we turn to the works of Thomas Aquinas, we find a different concern and a different spirit. Thomas is no royal judge, seeking to introduce reason and order into a mass of civil laws; he is a theologian, attempting to understand the nature of law in all its ramifications. Where Bracton sought unity for the laws of a kingdom, Thomas sought unity for the laws of a universe.

Thomas found this unity in the concept of reason as the essence of law. Laws direct human activities toward certain goals. Direction of anything towards an end is a function of reason; for it is reason that perceives the connection between the means and the end. It is impossible, therefore, to have a law without reason.⁵⁷

The ultimate end to which all laws are directed must be the ultimate end of man himself, which is bliss or happiness. Man, however, does not exist in isolation, but in the community of mankind. The proper object of law, therefore, is the common good.⁵⁸ Since the right to direct anything to an end belongs to him to whom the end itself belongs, and since the end of law, the common good, belongs to all, it follows that the making of law belongs either to the whole people or to someone who has

⁵⁷ *SUMMA THEOLOGICA* I-II, q. 90, art. 1. The full scope of St. Thomas' doctrine on natural law can be gathered only from an examination of all his writings. I have limited myself here to a presentation of his most formal treatment in the *SUMMA THEOLOGICA*, because this is more than sufficient to illustrate the difference between his point of view and Bracton's. For a more comprehensive understanding of St. Thomas' legal thought, the following works by d'Entreves are particularly helpful: *THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT* (1939); *ACQUINAS: SELECTED POLITICAL WRITINGS* (1947); *NATURAL LAW* (1951).

⁵⁸ *SUMMA THEOLOGICA*, I-II, q. 90, art. 2.

charge of them.⁵⁹ For a law to be effective, it is obvious that its intended subjects must know of its existence; promulgation is necessary for a law to obtain its force. The definition of law is, therefore, "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."⁶⁰

With this foundation firmly laid, Thomas proceeds to consider the various kinds of law: eternal, natural, human, and divine. The eternal law is the very idea of the government of things in God, the ruler of the universe.⁶¹ In order for this idea to be effective, God has imprinted it in the natures of His creatures by giving them inclinations towards their proper acts and ends. In the case of man, this imprint is of special excellence: man not only has an inclination towards his true end, but he enjoys the light of natural reason, by which he discerns good and evil.⁶²

This discernment operates on the basis of certain general and indemonstrable principles which God has implanted in human reason. Just as the speculative reason, ordered to truth, has its indemonstrable principles, so the practical reason, ordered to the good, has its innate and unprovable laws. These general principles of the practical intellect do not give man a knowledge of the proper solutions of individual cases, but they serve as guides for the acquisition of such knowledge. When men, in the light of these principles, agree on the determination of a particular rule of conduct, they can erect the rule into a law, providing they have legislative authority and the rule is

reasonable, ordained to the common good, and promulgated. Such laws, made by men in the light of the natural law, constitute the body of human laws.⁶³

For St. Thomas, then, unlike Bracton, the natural law in the case of rational creatures is not the spontaneous impulse of appetite, but the light of practical reason. God has not left this reason formless, but has given it a participation in His own idea of the government of the world through the medium of certain general and indemonstrable principles of right and wrong. These principles must govern the determinations men make in their particular political societies; but they only govern these determinations, they do not substitute for them.

Thomas Aquinas and the Higher Law

It is obvious, therefore, that for Aquinas the higher law and the natural law are one and the same. If a law made by men violates the fundamental principles of the natural law, it has no binding force. What, however, is to be done when human governments disregard the natural law?

St. Thomas' most detailed answer to this question is to be found in his unfinished treatise on kingship.⁶⁴ His first point is that if the tyranny of the ruler is not excessive, it is "more expedient to tolerate the milder tyranny for a while than, by acting against the tyrant, to become involved in many perils more grievous than the tyranny itself."⁶⁵ The greatest peril, says St. Thomas, in the suppression of a tyranny is that the victorious party may prove still

⁵⁹ *Id.*, I-II, q. 90, art. 3.

⁶⁰ *Id.*, I-II, q. 90, art. 4.

⁶¹ *Id.*, I-II, q. 91, art. 1.

⁶² *Id.*, I-II, q. 91, art. 2.

⁶³ *Id.*, I-II, q. 91, art. 3.

⁶⁴ ACQUINAS, ON KINGSHIP: TO THE KING OF CYPRUS (ed. Eschmann, transl. Phelan 1949) [hereinafter cited as Eschmann-Phelan].

⁶⁵ Eschmann-Phelan 24 (1949).

more tyrannical in order to maintain its power. One thinks today of Hungary and Cuba.

St. Thomas then considers the morality of tryannicide. He mentions the example of Aioth in the Old Testament, who slew Eglon, King of Moab.⁶⁶ Against this example, however, he sets the teaching of St. Peter that obedience is due not only to good and gentle masters, but also to the froward.⁶⁷ Thomas also cites the example of the Christian martyrs, especially of the Theban legion, which did not resist, armed though it was.⁶⁸

In any event, tyrannicide is not an action to be undertaken by private authority. Only the public authority which has established the tyrant king may depose him. The deposition of a tyrant is not a lawless breach of the loyalty which a people owes to its king, because the tyrant, by definition, has already broken the covenant with his people by not acting faithfully in his office as king.⁶⁹

Suppose, however, that the ruler is not elected by the people, but appointed by a higher authority. The proper remedy for the wickedness of such a ruler is appeal to the higher authority. Thomas cites the example of the Jews' complaint against Archelaus to the Roman Emperor.⁷⁰

Finally, if the situation has so degenerated that no human aid whatsoever is available against the tyrant, "recourse must be had to God, the King of all, Who is a helper in due time in tribulation." God may turn the cruel heart of the tyrant to mildness, as He did in the case of Assuerus

and of Nabuchodonosor. If God does not choose to convert the heart of the tyrant, He can overturn his power, as He did with Pharaoh. To deserve this deliverance by God, however, the people must desist from sin. The rule of wicked men is a divine punishment for human sinfulness.⁷¹

For St. Thomas, then, recourse to God is the ultimate, but not the only, remedy against governmental lawlessness. Since government depends, in part, on a pact between king and people, breach of the covenant by the king gives a right to the people to terminate his authority. This right must be prudently exercised, for the suppression of one tyrant by no means prevents the succession of another. Moreover, the right must be exercised by the *people*, not by private individuals. Thomas does not furnish an institutional scheme by which the people may act as a people against their government; he is thinking of rebellion, not a separation of powers.

The ultimate reliance on divine power, it should be noted, is not a reliance simply on the divine vengeance. God may change the heart of the ruler; God may take away his power even in this world. The people must, however, remember that it is not the sinfulness only of the tyrant which displeases God; their own sinfulness may have brought the tyranny upon them.

Conclusion

In Bracton and in St. Thomas the doctrine of a higher law to which all political authority is subject is a fundamental principle of political philosophy. For Bracton, this higher law is not the natural law, but

⁶⁶ *Judges* 3:14 ff.

⁶⁷ *1 Peter* 2:18-19.

⁶⁸ Eschman-Phelan 26 (1949).

⁶⁹ *Id.* at 27.

⁷⁰ *Id.* at 28.

⁷¹ Eschmann-Phelan 28-29 (1949).

(Continued on page 245)