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Miriam T. Rooney

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The Philosophy of Natural Law of St. Thomas Aquinas

MIRIAM T. ROONEY†

THE UNUSUAL FEATURE of the 3rd annual Natural Law Conference of the Catholic Lawyers Guild of New York was the fact that it had as its main theme the practical application of Thomistic principles in respect to the virtue of Justice rather than merely their general consideration. The following introductory remarks of Dean Miriam Teresa Rooney should serve as a necessary philosophical supplement to such a program which had the solution of current, concrete social problems as its basic object. It was taken for granted by the speakers who dealt with Distributive, Commutative, Legal and Social Justice that St. Thomas provided the most exemplary expression of the traditional wisdom of Western morality. Dean Rooney's excellent summary of his fundamental teachings is therefore a logical preliminary to their approach which was based in the main upon the language and concepts of our time.

Jurists and philosophers who are well read in current literature about legal theory are aware of at least three currents flowing into the main channel. From one side there is the failing strain of a once vigorous positivism; from the other, there is the prevailing current of sociological jurisprudence — said to be an improvement on the narrow lines of positivism — but exaggerating the social aspects of law at the expense of the personal; and toward the center is the new-found stream called natural law, which is hailed from one side by positivists disillusioned by the Nuremberg trials, and from the other by those who would protect human rights from suppression by the sometimes overwhelming pressures of society. Positivism has been long and ably expounded, so that few who have been graduated from our better law schools are free from its claims. Sociological jurisprudence, being newer, is not yet widely understood in

†Dean and Professor of Law, Seton Hall University School of Law.

its fullest implications, but it has given rise to a learned and impressive literature in the last forty years, which has won the adherence of many of the ablest of the younger leaders of Bench and Bar. The revival of natural law—noted by some, advocated by



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others, and challenged by a few outspoken critics—is a more or less unknown—or at least a rather widely misunderstood, but recent—development in contemporary jurisprudence. From those who view it as little more than a recurrent swing of the pendulum away from strict law and toward equity, to those who view it as a sinister attack upon the liberty under law which others believe would not exist but for the doctrine of natural law, there is the widest possible diversity of opinion and an incipient literature. Unfortunately there has been nowhere nearly enough written as yet to inform honest inquirers on any side as to what the natural law can offer toward the solution of contemporary legal problems.

Writers seriously concerned about current developments in legal thinking have noticed this gap in our publications. For

example, W. Friedmann, in reviewing the volume in honor of Roscoe Pound entitled *Interpretations of Legal Philosophy*,¹ comments upon the failure to discuss the neo-scholastic philosophies of law in that symposium. Another English writer, H. L. A. Hart, said:

It is surprising to find how small a contribution to English Jurisprudence in these years has been made by writers in the natural law tradition, for it might have been expected that the extension of state activities into the sphere of the individual would have provoked some vigorous restatement at least of Catholic natural law doctrines.²

And Professor Lon Fuller, of Harvard Law School, in reviewing Reuschlein's *Jurisprudence, Its American Prophets*, asks:

What does the neo-Thomist philosophy say about such questions as the interpretation of statutes, the proper role of the judiciary, or the methods of reconciling freedom and control in our complex modern society?³

It would seem, therefore, that an Institute such as this one on the Natural Law and Justice needs no apology, but rather encouragement in undertaking to meet a deep-felt need.

The project of providing a clear exposition of the relation of natural law to justice, no matter how desirable, presents many complexities, however, and this may account for the scarcity of adequate studies on the subject. The most formidable question is where to start. As far back as the history of law goes, philosophers like Plato and Aristotle have written about natural law. The pages of Sacred Scripture

¹ 64 L. Q. REV. 545-549 (1948).

² 2 AM. J. COMP. L. 355-364, 362 (1953).

³ 12 LA. L. REV. 531-535 (1952).

from Moses to Paul are filled with allusions to it. Not only jurists and philosophers, but conquerors and revolutionaries, have sought justification for their activities in the name of the natural law. Is it fair to assume that all are talking about the same thing? If so, how can the disparities be reconciled and the confusion dispelled? It may well be that many of those who talk about the natural law, like those who call out, "Lord, Lord," will not ultimately be found among the elect. If that is the case, the next question that may be asked is what criterion can be established upon which a selection can be made.

The necessity of setting up one particular standard or criterion to the exclusion of all others is particularly obvious in reading recent challenges to the natural law. For example, in an admirably tempered article in the May issue of the *American Bar Association Journal*, Professor George W. Goble of Illinois University Law School expresses a position about the limits of human reason which is shared by most of us, and then lapses into a *non sequitur* by attributing absolutism to adherents of the natural law school. He thereby beats a straw man of his own creation, instead of a live flesh and blood enemy of liberty under law he apparently aimed to discredit. An even more distressing critique, because based upon hearsay evidence rather than primary documentary sources, (e.g., he relies on the *Encyclopedia Britannica* for his knowledge of what the Papacy stands for, instead of citing official documents — something he would never do in referring to the United States Supreme Court), is the rejection of the natural law position presented by Eugene Gerhart, first in the *New York University Law Quarterly Re-*

view in 1951, and subsequently in a book entitled *American Liberty and Natural Law*, which appeared in 1953.⁴ For Mr. Gerhart, the question is not whether such a thing as natural law exists, but rather, whose interpretation of it is to be given force and effect. He is exceedingly fearful that some authoritarian or absolutist interpretation of the natural law is being advocated which may ultimately set aside the American Constitution and the liberties it guarantees instead of strengthening them. It is a horrible prospect that he visions but one which fortunately is not likely to happen here as long as most of us lawyers who are sworn to support the United States Constitution no less than he, remember that vigilance is the price of liberty. Less temperate than Professor Goble, Mr. Gerhart nevertheless falls into a similar error of flaying a straw man of his own creation instead of winning modern adherents of a natural law philosophy away from their advocacy of the cause.

The fact of the matter is that neither Mr. Goble nor Mr. Gerhart have done a fair job of ascertaining what is currently being proposed by those who recommend a re-study and re-application of natural law principles in confronting present day community problems. Although the lack of information about the natural law position evidenced by both men is quite obvious, especially since they have undertaken to challenge the position seriously in learned and scholarly periodicals, nevertheless they may not be entirely to blame, since busy lawyers can hardly be expected to devote the time and attention necessary to acquire a mastery of medieval sources, some of which are still in the Latin language, and

⁴ Boston, Beacon Press.

all of which are written in a style not easily comprehended by those untrained in scientific medieval terminology. Perhaps a little of the blame for this lack of information must be shared by those of us who have failed to do our part in making what literature there is more readily available, or who have neglected to spell out in simple A B C's what it is that we find acceptable in the natural law school of thought. The corrective would seem to be to pay less attention to the misunderstandings of the critics and more to making our own convictions intelligible. In this way, a fairer hearing may be anticipated from that reasonable man to whom we all necessarily appeal whenever we undertake to discuss the law.

The next question in getting the subject into workable form, concerns the selection of one author whose notions are worth analyzing. Shall it be Plato or Aristotle, Grotius or Locke, Suarez or Holmes? Any of these and many others are worthy of study, but for the purpose of this paper it is proposed to exclude them all in favor of Thomas Aquinas. It may appropriately be asked why, in a common law country, one is urged to look to a medieval philosopher for an exposition of the meaning of natural law. Not one answer but many may be given. First of all, Thomas Aquinas was widely read in all the writers who preceded him, drawing freely upon Plato and Augustine, Aristotle and Justinian, Gratian and St. Paul, as needed. Second, his viewpoint was unusually broad, embracing an extraordinary number of aspects to many kinds of problems which are at present of great importance to us. Third, his method of progressing from the observation of facts to conclusions about them is intel-

ligible to us and the precision with which he uses language is scientific in the best sense. His writings are voluminous and are available for study, many of them in fairly recent English translations. These reasons would be sufficient to justify concentrating on his books were there nothing more to be said. In the case of Thomas Aquinas, however, there is an even more significant reason, for he was teaching and writing at the University of Paris at the very time when Henry de Bracton was sitting on the King's Bench and writing his great book on the laws of England, just across the English Channel. They were both outstanding men in an age of extraordinarily great minds—minds capable of mastering architectural and engineering techniques adequate to build glorious cathedrals in all the leading cities of Christendom, and of providing a university system of education which has not been successfully superseded in the literary capitals of the world in all the centuries since. To be recognized as greater than all his contemporaries, as Thomas Aquinas is, surely justifies that attention be given to what he has to say about law. Furthermore, since what he wrote was contemporaneous with the formulation of the common law system as expounded by Bracton, a reading of his works provides us with a context which cannot be ignored if Bracton's treatise on law is to be fully comprehended.

Were these reasons not enough, there is at least one other that compels our attention. Approximately one hundred years after the Declaration of Independence had been signed in this country, an astute diplomat, experienced teacher, and learned bishop was elected Pope at Rome and took the name of Leo XIII. In his own life time,

Pope Leo had seen the exile and death of Napoleon, the revolutions of 1848 in Europe, the movement for the codification of German law, the beginnings of psychoanalysis, and the spread of industrialization under the expansion of corporate forms of ownership, along with recurrent depressions and famines. Upon becoming Pope, the first thing he did was to advocate renewed study of the writings of Thomas Aquinas, and then throughout the rest of his Pontificate he wrote an extraordinary series of Encyclical Letters in order to demonstrate that the teachings of Christ and the expression of those teachings in the writings of Thomas Aquinas contained much illumination for those confronted by the almost insoluble problems of modern community life. The Popes who have succeeded Leo XIII, notably Pius XI and Pius XII, have reinforced the work.

Furthermore, it is not exactly without significance for the jurists of this day and place that the revival of Thomistic philosophy inaugurated by Pope Leo XIII was paralleled by a fresh study of the writings of Bracton and his fellow jurists, first by Frederick William Maitland in England, and later by George Woodbine at Yale University in this country. Just as seven hundred years ago, the theories of Aquinas could be measured by their application in the legal practice of Bracton, so today the legal practice established by Bracton and his successors may be reappraised by a fresh study of the philosophical principles of Aquinas. Parallel readings of the works of both men in the face of contemporary problems about guaranteeing liberty under law should provide a unique criterion by which progress or retrogression can be more precisely measured. For all these reasons it is proposed here to concentrate

attention, not on natural law theories generally, but on Thomas Aquinas' exclusively, in the expectation of obtaining a succinct summation of the bases of liberty which have prevailed in the common law tradition from before Magna Carta until long after the formulation of the Bill of Rights.

For the purposes of this paper, a summary rather than an extensive study of Thomas Aquinas' philosophy of law is presented.

The scholarship of St. Thomas was evidenced early in his career when he urged the use of original Greek texts of the treatises of Aristotle rather than the traditional abstracts derived from Latin translations. His earliest comprehensive work, the *Summa Contra Gentiles* was a critical examination of the work of Mohammedan philosophers in Spain.

The work for which St. Thomas is most famous was begun as an orderly digest or summation of all his previous writings and studies for the benefit of the students who were seeking his guidance in achieving their own mastery of the sciences, sacred and profane. With his customary intellectual and spiritual humility, he thought of the work as a manual or handbook for students; and he frankly offered it as nothing more nor less than a logically arranged statement of his own reasoning and conclusions about many of the problems of life upon which he had been consulted. At his death he left the book unfinished, without pride of authorship, but with a dying declaration that everything he ever wrote was submitted entirely to the judgment of Holy Mother Church. The title of this last book which he bequeathed to us is the *Summa Theologica*, meaning a rationalized summary of all his thoughts

about the relation of man to the Creator of the universe.

Much of the criticism of St. Thomas Aquinas has come from a lack of familiarity with his great writings and the background in which they were produced. He has been criticized on the one hand for undertaking to write a definitive answer on every possible question that occurred to him, and, on the other hand, for offering such an encyclopedic work as a manual for students.

Criticisms such as "authoritarian," "relies on deductive reasoning," "fails to consider facts," and so on, evidence a lack of understanding of the intent and purpose of St. Thomas, for they identify him with the very obscurities which he undertook to clarify.

He has been singled out by Pope Leo XIII as the ablest of all the scholastics, but it is not so much for his conclusions but his method of reaching them that he has been held up as a model for our time.

In the small treatise, *De Legibus*,⁵ St. Thomas Aquinas mentions five kinds of law: Divine law, eternal law, natural law, human law, and positive law. In addition to indicating 1) that law differs from counsel in that it has coercive power; 2) that it is more than a mere lawgiver's will in that it necessarily concerns the common good; and, 3) that it is directed to human reason, he points out that law includes both general principles and particular rules or applications. It is his discussion of the latter, with particular consideration of human law, that will concern us chiefly here.

Divine law he defines as the very mind and will of the Creator of the universe.⁶ As

law in general is a rule and measure of human acts,⁷ so Divine law is a rule and measure of all things.⁸ As the end is the first principle in all matters of action⁹ and as the end of Divine government is God Himself,¹⁰ so Divine law is not distinct from God's Will or His essence.¹¹ It would appear that St. Thomas uses Divine law and eternal law at times interchangeably,¹² but at other times he speaks of eternal law as the "plan of government in the Chief Governor";¹³ as the type of the Divine government;¹⁴ or as the idea of the government of things in God.¹⁵ However, human knowledge of eternal law cannot be other than imperfect,¹⁶ since each person's knowledge of it is limited according to his own capacity.¹⁷ Furthermore, he can know it, not as it is in itself, but only in its effects.¹⁸ For these reasons, no person can judge of eternal law.¹⁹

Natural law is a participation in human beings of the eternal law, St. Thomas says.²⁰ Not only human beings but all things partake somewhat of the eternal law insofar as it is imprinted upon them²¹ and they are moved to obey it by the natural inclinations²² impressed or imprinted on

⁷ *Id.*, q. 90, art. 1.

⁸ *Id.*, q. 93, art. 1, ad 3.

⁹ *Id.*, q. 90, art. 1.

¹⁰ *Id.*, q. 91, art. 1, ad 3.

¹¹ *Id.*, q. 93, art. 4, ad 1.

¹² *Id.*, qq. 93, art. 4; 93, art. 5; 91, art. 2.

¹³ *Id.*, q. 93, art. 3.

¹⁴ *Id.*, q. 93, art. 4; 93, art. 1; 93, art. 5, ad 3.

¹⁵ *Id.*, q. 91, art. 1.

¹⁶ *Id.*, q. 91, art. 2.

¹⁷ *Id.*, qq. 91, art. 3, ad 2; 93, art. 2, ad 3.

¹⁸ *Id.*, q. 93, art. 2, ad 1.

¹⁹ *Id.*, q. 93, art. 2, ad 3.

²⁰ *Id.*, q. 96, art. 2, ad 3.

²¹ *Id.*, q. 91, art. 2.

²² *Id.*, qq. 91, art. 2, ad 3; 90, art. 1, ad 1; 91, art. 6; 94, art. 2.

⁵ SUMMA THEOLOGICA, I-II, qq. 90-96.

⁶ *Id.*, I-II, q. 93, art. 4, ad 1.

them by the Creator.²³ Irrational creatures are moved to act through being moved by Divine Providence²⁴ without any knowledge or free choice on their part, but solely by reason of their participation in the eternal law. Human beings are moved to act in accordance with eternal law, first of all through being so inclined or disposed as other creatures are, but they are also moved to act by knowledge²⁵ and understanding of the Divine commandment.²⁶ It is the power of rationality which distinguishes man from the rest of creation that he sees about him, and it is the appeal it makes to his reason which distinguishes man's participation in the eternal law from that of other created things.²⁷ Principles of reasoning are known naturally²⁸ by man for no other reason than that he is so created by God. Man thereby participates in eternal law not only by inclinations which move him to act but also by sharing in the eternal Reason²⁹ which enables him to know. This participation of the eternal law in the rational creature is called the natural law and is nothing else than an imprint on us of the Divine light.³⁰ It is in virtue of the natural law therefore that man has his first direction of acts to their proper end.³¹

The first direction of human acts is a very imperfect guide, nevertheless, because the knowledge it gives is limited.³² As St. Thomas explains, the process of reason is

²³ *Id.*, q. 93, art. 5.

²⁴ *Ibid.*

²⁵ *Id.*, q. 93, art. 6.

²⁶ *Id.*, q. 93, art. 5.

²⁷ *Id.*, q. 91, art. 2, ad 3.

²⁸ *Id.*, q. 91, art. 2, ad 2.

²⁹ *Id.*, q. 91, art. 2.

³⁰ *Ibid.*

³¹ *Id.*, q. 91, art. 2, ad 2.

³² *Id.*, qq. 91, art. 3; 91, art. 3, ad 1; 91, art. 3, ad 3.

from the common to the proper.³³ This process differs somewhat in the two aspects of reason, the speculative and the practical.³⁴ In order to understand just how limited our knowledge of natural law really is, it is necessary to follow St. Thomas' thought about the different operations of the speculative and practical reason. That which, before anything else, falls under apprehension is *being*, the notion of which is included in all things that man apprehends.³⁵ It is the speculative reason which is busied chiefly with necessary things — things which cannot be otherwise than they are.³⁶ Because it is concerned with things as they are, its proper conclusions, like universal principles, contain the truth without error.³⁷ However, proper conclusions are not known to all men³⁸ but only the principles which are spoken of as common notions.³⁹ Now if the knowledge of truth in speculative matters is thus difficult for man to attain, it is much more so in practical matters relating to action, for St. Thomas says plainly that:

[I]n matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to general principles; and where there is the same rectitude in matters of detail, it is not equally known to all.⁴⁰

In order to be sure that his meaning is understood, he restates the same notion in a slightly different way, where he says:

As regards the general principles whether of speculative or practical reason, truth or

³³ *Id.*, q. 94, art. 4.

³⁴ *Ibid.*

³⁵ *Id.*, q. 94, art. 2.

³⁶ *Id.*, q. 94, art. 4.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

rectitude is the same for all, and is equally known by all. As to the proper conclusions of the speculative reason, the truth is the same for all but is not equally known to all . . . But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all.⁴¹

It is not only with respect to reaching true conclusions that human reason finds difficulty in knowing what the law is. A rule of action may also be derived from the natural law in another way. To quote St. Thomas again:

It must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details . . . Some things are therefore derived from the general principles of natural law by way of conclusions . . . while some are derived therefrom by way of determination, e.g. the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of law of nature.⁴²

The distinction so made between conclusions and determinations is very important in showing the relationship between natural law and human law. Both modes of derivation are found in the human law⁴³ says St. Thomas, but those which are derived by way of conclusions are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in

the second way have no other force than that of human law.⁴⁴

Efforts of human reason are required whenever conclusions or determinations are reached, since the knowledge needed in both cases is not imparted to us by nature.⁴⁵ As St. Thomas puts it:

Just as, in the speculative reason, from naturally known indemonstrable principles we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by efforts of reason, so too it is from precepts of the natural law, as from general and indemonstrable principles, that human reason needs to proceed to the more particular determinations of certain matters. These particular determinations, devised by human reasons, are called human laws, provided the other essential conditions of law (i.e. ordinance, for the common good, made by him who has the care of the community, and promulgated)⁴⁶ be observed.⁴⁷

The indemonstrable principles referred to in this paragraph are explained elsewhere, where St. Thomas, after observing that being is the first thing that falls under the apprehension,⁴⁸ continues:

Wherefore the first indemonstrable principle is that the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being: on this principle all the others are based . . . Now as being is the first thing that falls under the apprehension simply, so good is the first thing that falls under the apprehension of the practical reason, which is directed to action; since every agent acts for an end under the aspect of good. Consequently the first principle in the practical reason is one founded on the notion of

⁴¹ *Ibid.*

⁴² *Id.*, q. 95, art. 2.

⁴³ *Ibid.*

⁴⁴ *Id.*, q. 91, art. 3.

⁴⁵ *Ibid.*

⁴⁶ *Id.*, q. 90, art. 4.

⁴⁷ *Id.*, q. 91, art. 3.

⁴⁸ *Id.*, q. 94, art. 2.

good, viz., that good is that which all things seek after. Hence, this is the first precept of law, that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done, or avoided.⁴⁹

It is to be noted that these first indemonstrable principles cannot be argued about, since they are by definition indemonstrable. They may be either accepted, as they have been for centuries by most people, or rejected, as they are by a few philosophers like Hegel who substitutes *becoming* for *being*, and replaces the first principle of identity (or contradiction) by the premises of thesis and antithesis, attaining thereby a new synthesis. These premises of his thereby become matter for argumentation as well as subject to acceptance or rejection.

The necessity of the first indemonstrable principle is not at all to be found in giving us desired answers without the efforts of reason, but rather in pointing out the limitations of reason. If one were to paraphrase St. Thomas' first definition of law and take it out of context—by saying merely that law is a rule and measure of acts . . . and . . . the rule and measure of human acts is reason—an undue burden, much heavier than that which it actually has, would be placed upon human reason thereby. St. Thomas himself supplies the corrective when he points out that:

Human reason is not, of itself, the rule of things: but the principles impressed on it by nature, are general rules and measures of all things relating to human conduct.⁵⁰

In this way is to be understood the fur-

ther statement that "the natural reason is the rule and measure of human conduct, although it is not the measure of things that are from nature."⁵¹ Now, since it is the practical reason which is concerned with conduct, and since the practical reason is concerned with the particular and contingent, rather than with the necessary, the human laws which it devises cannot have that inerrancy that belongs to the demonstrated conclusions of the sciences. St. Thomas speaks in several places of "the uncertainty of human judgment, especially on contingent and particular matters."⁵² Indeed he goes so far as to say that:

[I]n contingent matters, such as natural and human things, it is enough for a thing to be certain as being true in the greater number of instances, though at times, and less frequently, it fail.⁵³

There is another way in which the relationship between natural law and human law makes a correct statement of the law difficult to formulate and that is in its application. On this point St. Thomas says that:

The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs; and hence arises the diversity of positive laws among various people.⁵⁴

Elsewhere he refers to differences in persons,⁵⁵ as, for example, between children and adults, where the measure is not the same⁵⁶ and as between the virtuous and the vicious, where, the motivation being different,⁵⁷ the application also may vary.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, q. 91, art. 4.

⁵¹ *Id.*, q. 96, art. 1, ad 3.

⁵² *Id.*, q. 95, art. 2, ad 3.

⁵³ *Id.*, qq. 93, art. 2, ad 2; 91, art. 3, ad 1.

⁵⁴ *Id.*, q. 96, art. 2.

⁵⁵ *Id.*, q. 93, art. 6.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, q. 91, art. 3, ad 2.