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# THE PROBLEM OF LAW AND MORALS IN CONTEMPORARY JURISPRUDENCE<sup>†</sup>

MARK R. MACGUIGAN\*

PERHAPS THE MOST STRIKING characteristic of the common law is the tension between its two conflicting attitudes to legal generalizations: on the one hand, there is the cautious case by case approach, which in tendency limits the generalization to the instant case; and on the other hand, there is the attitude towards precedent expressed in the doctrine of *stare decisis*, the principal of following the decided cases of the past, which in tendency extends the generalization over a wide area of the law. The interplay of these opposing tendencies makes possible a legal system capable of both stability and change. Possibly the common law appears to the nonlegal observer to be as changeless as the laws of the Medes and Persians, and perhaps he feels that the only release from its rigid embrace is to be found in statutory enactment, but anything more than a cursory study will show that the common law of today is far from a carbon copy of the common law of the nineteenth century. The law changes as society changes, in some fields so rapidly that it has been calculated that the life span of a case is about a single generation. We cannot, therefore, assume without enquiry that the law's answer to a particular question will be the same in every century.

## The Relationship of Law And Morals

With regard to the problem of the relationship of law and morals there is a distinctively nineteenth-century view, just as there was a distinctively medieval view—and possibly distinctive seventeenth and eighteenth-century views. The characteristically nineteenth-century attitude was set forth—and indeed to a large extent formed—by the English thinker John Austin. Austin was a strong proponent of the separation

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<sup>†</sup> This article is substantially the text of a talk given to Jesuit seminarians at Regis College, Willowdale, Ontario.

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of law and morals, and expressed himself on the subject as follows:

The existence of law is one thing; its merit or demerit is another. . . . A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth . . . is so simple and glaring that it seems idle to insist upon it. . . . [T]o say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. . . . An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.<sup>1</sup>

These are strong words, which reveal a position emotionally as well as intellectually held. The premise from which Austin derived his conclusions as to law and morals was his belief that law was the command of the sovereign and nothing more; naturally if law is the pure wilfulness of the sovereign, it cannot be subject to any extrinsic standard, and so Austin excluded from the law not only what he called the law of God (by which he meant the realm of natural or intrinsic morality) but also what he called positive morality— notions of decency and fair play, laws of honor, commonly-held beliefs and prejudices, popular views as to the moral standards that should prevail. For the most part I shall use the words “morals” and “morality” (between which I make no distinction) in this broad sense, as including any conceivable extra-legal standard for judging human action.

<sup>1</sup> AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184-85 (Library of Ideas ed. 1954).

### The Holmesian Concept

The twentieth-century attitude to the problem of law and morals, which is our concern, is by no means to be simply identified with that of the nineteenth century, and can be determined only by a careful analysis of the contemporary spirit in jurisprudence. It is my belief that the key figure in contemporary jurisprudence is Mr. Justice Oliver Wendell Holmes, Jr., and so it is to him that I propose to give the lion's share of my attention. Holmes has long been in the Catholic “doghouse” as a charter member of the natural law “3 H Club” of Hobbes, Holmes and Hitler, and I think it is high time to attempt at least a partial rehabilitation of his reputation among Catholics. My intention is to explore the Holmesian legacy in jurisprudence both in itself and in relation to natural law theory.

Holmes' most famous jurisprudential work is a paper called *The Path of the Law*, which he delivered as an address at the dedication of a new law building at Boston University in 1897. His starting point in the paper is an attempt to define the business of the lawyer, and his view is that “the object of [the] study [of law] . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”<sup>2</sup> Now the phrase “the incidence of the public force” sounds like an echo of Austin, and Holmes was indeed a disciple of Austin up to a point. But there are distinctly non-Austinian elements in this preliminary statement about the law, viz., his stress on the work of the courts rather than on that of the legislature and more especially his interest in prediction.

Continuing his initial stress on predic-

<sup>2</sup> HOLMES, *COLLECTED LEGAL PAPERS* 167 (1920).

tion, Holmes goes on to lay down some first principles for more accurate prediction:

The first thing for a business-like understanding of the matter is to understand its [law's] limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law. . . . If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>3</sup>

In this passage we encounter Holmes' famous "bad man" theory of law; the bad man does not care "two straws"<sup>4</sup> for morality, but wants to know merely what the courts are likely in fact to do. Only the bad man sees the law as it is, Holmes feels, because he alone sees it with his native vision, not through the tinted glasses of morality. When the bad man asks the lawyer what the law is, so that he can find out how much he can get away with, he does not want to be told what people will think of his action, or even what the lawyer thinks of it, but only what the law says, merely what his legal rights are. Unfortunately, Holmes thinks, there has been so extensive an intrusion of morals into law, as, for example, in the concepts of rights, duties, malice, intent, and negligence, that it is very difficult for the lawyer to predict accurately for the benefit of the bad man. "The law is full of phraseology drawn from morals," he comments, "and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly

before our minds."<sup>5</sup>

If this were the whole of Holmes, there would be no point in attempting the rehabilitation of his reputation that I spoke of earlier. But after dealing with what he considers the fallacy of confounding morality with law, he proceeds to consider a second fallacy, that of logical form, which is "the notion that the only force at work in the development of the law is logic."<sup>6</sup> Let us listen to what he has to say about this fallacy:

The danger of which I speak is . . . the notion that a given system [of law], ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.<sup>7</sup>

In order to understand the almost revolutionary novelty of these words in 1897 we must advert to the fact that the tradi-

<sup>3</sup> *Id.* at 169-71.

<sup>4</sup> *Id.* at 173.

<sup>5</sup> *Id.* at 171.

<sup>6</sup> *Id.* at 180.

<sup>7</sup> *Id.* at 180-81.

tional theory of the common law, as laid down by such masters as Coke and Blackstone, was that the judge did not make the law but merely found it. In this view there was nothing creative about the judicial role, for the judge has merely to look in the opinions of his predecessors for principles from which to deduce the proper rule for the case at hand. It was recognized that sometimes no precedents directly in point could be found, and in this event the judge was expected to chart new lands, in the sense that he might extend the old principles by analogy. But he was at most a judicial Christopher Columbus, discovering what was already existent, though previously unknown. He was never a Thomas Edison, bringing into being something which had not hitherto been. The judge was, in sum, a logical automaton who needed to know merely how to deduce conclusions from premises.

Holmes was neither the first nor the only jurist to take issue with the old view, but it is worth remarking that it was not until the first decade of the twentieth century that Roscoe Pound entered the fray against the traditionalists, and that Holmes' lecture was delivered two years before François Géný published his *Méthode d'interprétation et sources en droit privé* in 1899 and brought a similar viewpoint to bear on the French civil law. Moreover, along with Pound, Holmes was more responsible than anyone else for the propagation in the common-law world of the new theory that law is not an end in itself but merely a means to social ends. Indeed Holmes had already written in his book, *The Common Law*, published in 1881:

The life of the law has not been logic: it has been experience. The felt necessities of

the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>8</sup>

It was, however, his formulation of the same theme in his 1897 speech which was to have the profoundest effect on later jurists. The judge, he contends, is not a mere calculator adding up sums; the real question about the judge's work is not whether his reasoning is correct but rather where he got his premises. A conclusion follows inevitably from premises, but the premises are chosen, consciously or unconsciously, by the judge, and it is at this crucial stage of the judicial process that the judge has the duty of "weighing considerations of social advantage."<sup>9</sup> The judge can bury his head in the sand like an ostrich and refuse to acknowledge that this is what he does, but he cannot change the fact. "The duty is inevitable," says Holmes, "and the result of the often proclaimed judicial aversion to deal with such considerations [of social advantage] is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."<sup>10</sup>

### Judicial Lawmaking

To see the truth about Holmes' contention as to the inevitability of judicial lawmaking, let us take two examples of the judge's work, one from the area of statutory interpretation, the other from that of common-law interpretation. Problems in the area of statutory interpretation arise not so much where there is some evidence of legislative intention as where there is

<sup>8</sup> HOLMES, *THE COMMON LAW* 1 (1881).

<sup>9</sup> HOLMES, *op. cit. supra* note 2, at 184.

<sup>10</sup> *Ibid.*

no such evidence because the point at issue had never occurred to the legislative body. Suppose, for example, a municipal licensing by-law which requires that all cabs which operate within the municipality be licensed by the municipal authorities, and the by-law defines a cab as "any motor or other vehicle used for hire for the conveyance of persons within the city." In its general range of application such a law would raise no problems, but the question might very well arise for judicial solution whether an ambulance came within the definition of cab as set forth in the law and was thus required to be licensed. Now is the outcome a foregone conclusion or is it rather something about which right-minded men might disagree? The answer may perhaps be suggested by a statement of the fact that the Ontario Court of Appeal recently split 2-1 on just such a question.<sup>11</sup> Is not the judge's decision in a case of this kind based on what he thinks such a licensing statute ought to include?

Now let us take an example from the common law. Suppose a beneficiary under a will murders the testator so that his family can have the benefit of the legacy sooner, and an action is brought by the other beneficiaries to ensure that the murderer and his family should not be allowed to inherit his share of the estate. Here the judge is confronted with a conflict between the principle of the law of wills that a beneficiary under a will is entitled to his legacy after the death of the testator and the principle of equity that no man should profit from his own wrongdoing.<sup>12</sup>

<sup>11</sup> *Re Regina v. Emslie*, [1959] Ont. Weekly N. 279. The view of the majority on this point is expressed only by implication.

<sup>12</sup> This is, of course, the famous case of *Riggs v. Palmer*, 115 N.Y. 506 (1889).

What is the judge to do? The result is in no sense predetermined by the principles of law, and he must make a choice one way or the other. The choice is not, surely, to be made by the tossing of dice; if it is to be judicial, it must be a reasoned and reasonable choice, not an arbitrary one. The judge must, then, decide the issue on the basis of some *ought*.

Holmes himself does not put it quite this way. He speaks of the judge's duty of "weighing considerations of social advantage," and of his judgment "as to the relative worth and importance of competing legislative grounds," but these words are linguistically and logically inseparable from an acknowledgment of recourse to morals. Indeed, if one rejects the slot-machine notion of the judicial function, the only acceptable alternative is a theory of the conjunction of the *is* and the *ought*, of law and morality. Holmes clearly accepts this alternative, but tacitly rather than expressly.

Since in the second part of his paper he thus in effect acknowledges the indissoluble bonds which link morals to law through the necessity of judicial recourse to the realm of the *ought*, his thesis in the first part of the paper becomes impossible to maintain, for if the judge must find his ultimate answers in the moral realm, how can morals be kept out of the law? The "Bad Man" may have no morals of his own, but he can hardly avoid caring about the morals of others, particularly those of the judge and jury who might try him if he is caught in an act which teeters on the borderline of legality. The lawyer whose business it is to predict for the benefit of his "Bad Man" client will have to give his answer in the context of community morals. The "Bad Man" wants to know "the law and nothing else," but this is impossible,

because paradoxically, knowledge of the "law" alone is not real knowledge of the law. If he knows only the "law," he does not know what may happen to him. His anti-moral bias is in effect a pair of blinkers, and until he takes it off, he cannot get a complete view of the world as it is.

### The Legal Realists

This inner conflict in his thought was never explained by Holmes himself, but the key to the solution was subsequently provided by the American Legal Realists. The Realists acknowledged Holmes as their spiritual father and took as their starting point his denunciation of the fallacy of logical form in the second part of his essay. The most famous of the Realists was Karl Llewellyn, who introduced into jurisprudence the notion of the merely temporary divorce of *is* and *ought* for purposes of study. He explained this temporary divorce as follows:

By this I mean that whereas value judgments must always be appealed to in order to set objectives for inquiry, yet during the inquiry itself into what *Is*, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be. More particularly, this involves during the study of what courts are doing the effort to disregard the question what they ought to do. Such divorce of *Is* and *Ought* is, of course, not conceived as permanent. . . . [R]ealists believe that experience shows the intrusion of *Ought*-spectacles *during the investigation of the facts* to make it very difficult to see what is being done.<sup>13</sup>

<sup>13</sup> Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931); Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 808 n.32 (1961) observes that "the

Now this is obviously quite a different kettle of fish from any doctrine of the separation of law and morals. It is not a divorce, but rather a separate vacation to enable the parties to come together again refreshed and clear-sighted. Nor is such a view entirely foreign to the mind of Holmes himself. If we look back again at *The Path of the Law*, we find him saying there:

When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things.<sup>14</sup>

This point of Holmes' gets pushed into the background (apparently even in his own mind) by his subsequent attack on the intrusion of morals into law, and we shall never know if he would have endorsed Llewellyn's view, but at any rate we can see that Holmes can be interpreted benignly and that his Realist disciples have chosen the better part.

However, though recognizing that the separation of law and morals is only temporary and that there is ultimately a conjunction of the two, the Realists have by and large been much more concerned with the task of description of legal rules and processes than with their relation to morals. We do, of course, find statements such as these of Felix Cohen: "the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought*

analytical separation that Llewellyn chiefly wished to preserve was less that between the doctrinal *Is* of analytical jurisprudence and the ethical *Ought* than it was that between the *Is* of law in action (what courts are doing in fact) and the normative *Ought* of the law in the books."

<sup>14</sup> HOLMES, *op. cit. supra* note 2, at 170.

to exist."<sup>15</sup> And again: "The functional approach permits ethics to come out of hiding."<sup>16</sup> However, neither Cohen nor any other Realist in the heyday of Realism followed such words with further analysis and development of the law-morals problem.

But the last two or three years have witnessed a new Realist interest in the problem. In a perceptive study last year Professor Harry Jones of Columbia University expressed the view that "The ethical theory to be drawn from legal realism is . . . that the moral dimension of law is to be sought not in rules and principles, or the higher law appraisal of rules and principles, but in the process of responsible decision. . . ."<sup>17</sup> In his view the best place to see the interplay of law and conscience is in the decisional process, and his reading of Tillich and Buber convinced him that there was theological support for studying justice in the concrete rather than in the abstract. The key words in the Jones analysis are choice, decision, and responsibility: the jurist must have the freedom to choose between alternatives, he must make his decision for the view he believes to be the right one, with courage, integrity, and the assumption of full personal moral responsibility for his decision. Thus the judge is responsible for his judgments and for his exercise of the duty of sentencing, the lawyer is responsible for his acceptance of clients and cases, and the prosecuting attorney is responsible for his decisions as to which cases to lay charges in and what charges to lay. Professor Jones concludes his study with a situating of Legal Realism in relation to natural law theory:

<sup>15</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 841 (1935).

<sup>16</sup> *Id.* at 847.

<sup>17</sup> Jones, *supra* note 13, at 801.

In its approach to the law-morality problem, legal realism is closer, in one important sense, to the natural law position than to the position of conventional analytical jurisprudence. If the realist analysis is right, the day to day work of judges, law officers, and practicing lawyers involves processes far less orderly and far more intricate than the application of positive law generalizations to fact-situations falling more or less neatly within them. . . . The choice between alternatives, the selection of the path to be pursued, can not but be influenced by the decision-maker's *ought to be*. Legal realism, with its emphasis on the inevitability of choice and discretion in the life of the law, casts its vote—though for very different reasons—with the tradition of natural law, and against Austin and the positivists, on the old issue of the complete analytical separateness of the law that *is* from the law that *ought to be*.<sup>18</sup>

But although there is congruence between Legal Realism and the natural law position, the Realist position as here expressed hardly goes far enough to satisfy the natural lawyer, who is concerned not only that there should be "choice, decision, and responsibility," on the part of the judge but also with the substance of his decision. It is all very well if the judge decides in a free, responsible, even courageous manner, but to the natural lawyer it is also of some significance *what* he decides; others will be more affected by what he decides than by how he reached his decision. Judicial sincerity and good intentions are not enough to ensure justice. This Realist answer to the problem of law and morals is just not extensive enough for the natural lawyer. However, since many (if not most) of the Realists are at the same time adherents of the sociological school, of which Roscoe Pound is the chief protagonist, it may still be possible to find a more complete answer

<sup>18</sup> Jones, *supra* note 13, at 808.



within a Realist context.

### The Sociological View

Pound has hammered away again and again at the theme that law is a means, not an end—a means to the achievement of general social goals. His view of society is that it endeavors so to order the activities of men as to enable them to satisfy as many of their interests as possible with the least friction and waste, to bring about a maximum of happiness, satisfying the wants of each so far as this is compatible with satisfying the wants of all. With this in mind he has compiled an inventory of the interests which press for recognition in society, but it is strictly a neutral inventory, with no attempt to arrange the interests presented in a hierarchy of value. Actually what Pound intends is that jurists should accept the hierarchy of values of the society in which they live. A great judge, Mr. Justice Cardozo, who was an adherent of the sociological view, wrote that the judge is under a duty "to conform to the accepted standards of the community, the mores of the times."<sup>19</sup>

But how is the judge to know what the community moral standards are? The view of Lord Denning, the greatest living common-law judge, is that the judge should rely on his own moral sense as indicative of the moral views of his age, but this would not satisfy the sociologists.<sup>20</sup> Logically it would seem that they should endorse the idea of a poll of popular opinion every time it is necessary for an issue to be decided, for only in this way could there be any

scientific basis for decision. But the sociologists are not so blindly devoted to their method as not to recognize the impracticability of a "Gallup-poll" approach to judicial decision, and so in practice their view is that the judge should guess what a poll would reveal as to popular moral attitudes and make this the determining factor in his judicial work. At least this is the view of Judge Hand.<sup>21</sup> Cardozo's view was rather that only the views of the élite should be taken into account: "It is the customary morality of right-minded men and women which he [the judge] is to enforce by his decree."<sup>22</sup> In sum, the sociologists have been unable to carry the science of sociology into the law and have had to settle for a rule of thumb approximation of what they think a scientific social survey would discover. What the sociological school does insist on is that to the extent he can ascertain what the mores of the people are, the judge is bound to follow them. In practice this would admittedly often result in the judge's equation of the community's moral sense with his own, but if the judge did recognize that his own view was not that of society at large, he would be obliged to forego the adoption of his own view and to make into law the generally accepted view.

The basic position of the sociological school, viz., that law is a means to social ends and that the social ends are those which are valued by a society at any particular time, is accepted, I believe, by the Legal Realists almost without exception, and certainly is adopted by their leader, Mr. Justice Holmes. Thus in analyzing the position of the sociological school, we have

<sup>19</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (New ed. 1961).

<sup>20</sup> For a discussion of Lord Denning's views, see DOWRICK, *JUSTICE ACCORDING TO THE ENGLISH COMMON LAWYERS* 92 (1961).

<sup>21</sup> *Johnson v. United States*, 186 F.2d 588, 590 (1951).

<sup>22</sup> CARDOZO, *op. cit. supra* note 19, at 106.

never really left the Realists, and may now return to them with a better understanding of their general position: they accept the conjunction of law and morals, but the morality to which they subject law is that of the community.

### The Natural Law Theory

Now what is to be the attitude of the Catholic jurist, who after all by reason of his faith—and also by reason of his acceptance of Thomistic philosophy, if he does accept it—is committed to an objective view of morals, in face of sociological realism? Well, first of all, I see no incompatibility between his theological and philosophical commitment and realism *qua* realism. There has for too long been an unholy alliance between natural law theory and the old Blackstonian theory of pre-existing rules of law which judges found but did not make. Such an alliance could have even a specious claim to our allegiance only by exaggerating the rational, derived element of human positive law at the expense of the volitional, legislative element, and such an exaggeration is a gross distortion of natural law theory. As I have written elsewhere, “The more basic judge-made rules and many constitutional and equitable norms are . . . deduced, but by far the greater number of explicit legal rules are . . . not logically necessary.”<sup>23</sup> However, misconceptions of natural law by natural lawyers have led to an unwarranted and unjustifiable hostility between Realism and natural law theory which has proved distressing to the more perceptive Realists. Professor Jones writes:

One might have thought, thirty years ago, that jurists of the natural law

<sup>23</sup> MacGuigan, *Positive Law and the Moral Law*, 2 CURRENT LAW AND SOCIAL PROBLEMS 89, 101 (1961).

tradition would not be entirely unsympathetic with the realist thesis that there is more to legal decision-making than the orderly application of positive law generalizations. . . . In legal realism, as in natural law theory, critical intelligence is brought to bear on the positive law; neither approach is content with formal analysis of positive law concepts, and both are concerned more with justice in human affairs than with the inner doctrinal consistency of the positive legal order. What happened, however, is that an uncompromising attack was launched from the natural law camp on the legal realists, and particularly on their hero figure, Justice Holmes.<sup>24</sup>

The past cannot now be undone, but it is not too late for natural lawyers to make amends for their past aversion to Realism. Indeed the process of atonement has already begun. In an article published two years ago Dean O'Meara of Notre Dame Law School argued not only that natural law theory was compatible with Legal Realism but even that the natural law position is unsupportable except on a Realist hypothesis of judicial creativity:

[W]hat role is there for natural law to play? What contribution can it make? Comparatively little, so far as I can see, if law be no more than an aggregation of already existing rules. But law must be regarded as a good deal more than that. It seems to me convenient and useful to think of law as a living process for the just resolution of never-ending human controversies. If law is regarded in this light, as a process of decision . . . the way is cleared for a positive contribution by natural law. . . .

This, of course, presupposes that the judge is not an automaton proceeding mechanically according to predetermined rules. . . .<sup>25</sup>

[T]he sharp distinction, commonly drawn, between the law-that-is and the law-that-

<sup>24</sup> Jones, *supra* note 13, at 801-02.

<sup>25</sup> O'Meara, *Natural Law and Everyday Law*, 5 NATURAL L. F. 83, 84-85 (1960).

ought-to-be is unrealistic, for the simple reason that the so-called law-that-is in important part is a myth. . . .<sup>26</sup>

There can be no separation between the *is* and the *ought* because the *is* is largely a fiction to describe something that is really in flux, or perhaps more accurately, because the *is* is constituted by the *ought*, since the *ought* determines what it will be.

I believe that the future course of natural law theory lies in the direction taken by Dean O'Meara, in company with the Legal Realists, under the banner of the much-reviled Holmes. But is it possible for us to take such a direction without compromising our principles in the face of the concomitant theory of sociology? I think that it is possible for two reasons. First, I see no reason for us to take absolutist, black-and-white positions towards alien movements. I think that both we and the devotees of these movements possess sufficient intellectual subtlety to be able to distinguish the points in which we agree from those in which we disagree. Second, there is such a large area of agreement in the practical order between natural lawyers and sociologists that the likelihood of concrete disagreement in basic matters is small. The rationalist tradition in ethics stemming from Aristotle and the theologically inspired ethics of the Christian churches have so thoroughly dominated both the past and the present of our Western civilization that we find general agreement in our society on moral conclusions even where the philosophical justification of the conclusions is quite different. For instance, Catholics and Protestants disagree on the morality of birth control, but the better Catholic opinion agrees with Protestant opinion that this is not in any case

an appropriate area for legislation by the state. Disagreement on moral issues is still by and large in marginal areas. Of course, this may change; perhaps it is even now changing, but there is no possibility of a major conflict over social ends in the foreseeable future, except from the prudential viewpoint—and I venture to say that there is greater prudential disagreement between the Catholic liberal and the Catholic conservative than between the Catholic liberal and the sociologist.

But to say that the future direction of natural law theory is clear—if it is to have any future—is not to say that the road is already surveyed, graded, paved, and white-marked. Indeed there is a great deal of swampy ground between the contemporary forward-looking natural lawyer and the destination he dimly discerns in the distance. The problem for the natural lawyer is that he must be both legal and philosophical at the same time, that he must do justice to both areas together. Dean O'Meara adopts the approach of the Legal Realists at the expense of philosophical natural law theory. I have in mind his general view of natural law theory as a non-reason theory and particularly his statement, "I do not envisage natural law as the arbiter of legal validity. 'Law is law, whether it be good or bad.'"<sup>27</sup> Now I am willing to concede that the traditional natural law view that civil law is judged and measured by the moral law may have to be re-examined as part of our contribution to "legal ecumenicism," but I am not willing to grant that it can be abandoned in a single sentence (which is all that Dean O'Meara devotes to it) without a lengthy and soul-searching enquiry. And I may add that I do not see how the moral critique of bad

<sup>26</sup> *Id.* at 90.

<sup>27</sup> *Id.* at 84.

law could conceivably be totally abandoned by a natural law theory without an abandonment of the whole natural law philosophy. So much for fidelity to philosophical principles.

On the other hand, of equal importance is fidelity to legal experience, to the genius of the common law. Dean O'Meara is certainly right in chiding that "for the most part, natural law stands aloof from the urgent here-and-now with which lawyer and judge necessarily are preoccupied; it inhabits a world apart."<sup>28</sup> The autonomous and unique claims of the legal order were even more clearly stated by one of the speakers at a conference of Italian Catholic lawyers in 1951:

[W]e are not theologians . . . we are not philosophers. We are lawyers, and this means that we are addicted to a particular science which has an object of its own: the rule of positive law. Is there no way, no method which we can call our own?<sup>29</sup>

Consciously or not, the traditional answer of the natural law thinker to this question has been "No."

Part of the problem has, I think, been the inability of the scholastically-trained thinker to speak to the lawyer in terminology which he can understand. Catholic theological and philosophical natural lawyers have not succeeded in carrying on a dialogue, as opposed to a monologue, with even the Catholic legal profession. But beyond this failing of communication, I believe that there has been even more profound failing on the part of the scholastic

<sup>28</sup> *Id.* at 83.

<sup>29</sup> The speaker was Joseph Delos, O.P., and his remarks are quoted in D'Entrèves, *The Case for Natural Law Re-Examined*, 1 NATURAL L. F. 5, 37-38 (1956).

natural lawyer, viz., a lack of respect for the integrity and autonomy of the legal order, based on a lack of understanding of it. A meaningful discussion of the natural law for any lawyer, Catholic or otherwise, cannot begin with a remote and abstract principle from which a whole series of other principles is deduced until finally the divide between the scientific and the prudential is crossed. It must begin rather with the lawyer's reality, the only reality which qua lawyer he knows, viz., cases and statutes. It is at this level and I believe at this level alone that a natural law theory meaningful for the lawyer as well as for the theologian and philosopher can be worked out. Here is the real field of battle, where the pointed spears of facts and the hard surface of the concrete—if one may still make such a primitive war metaphor in an atomic age—await the ill-equipped and ill-trained. The Scholastic natural lawyer has not yet earned his spurs in this fray and until he demonstrates his command in the field, he cannot expect to have his doctrine accepted.

Here, then, is the natural lawyer's problem. I think that, contrary to the prevailing Catholic opinion, there is no better place for the natural lawyer to begin than with Mr. Justice Holmes. But if Holmes' terminal point did not satisfy the later Legal Realists, still less can it prove satisfactory for the natural lawyer. Indeed no clear destination is in sight for the natural lawyer and the road ahead is merely a rough and meandering cowpath. But perhaps if he drinks deeply enough of the Holmesian Realism, he will acquire the strength to rise and walk for forty days and forty nights into the uncertain future.



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