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## Natural Law and Modern Jurisprudence

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# Natural Law and Modern Jurisprudence

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## I. LAW AND THE FORMATION OF THE CITIZEN

### 1. *The influence of the community*

It is almost with surprise that we remark in the *Ethics*, where Aristotle is preparing his transition to the *Politics*, the important and even critical role he assigns to law in the formation of virtue.<sup>1</sup> It is our habit to think of law as occupied with ends more immediate and pedestrian like monitoring traffic, taxing our cigarettes, and suppressing violence. Only in its more striking manifestations, as when after scrupulous due process, without anger or pity, it solemnly exacts the *poena capitalis*, do we glimpse in its disinterested concern for justice some hint of the "sacred majesty of law." So too for the legal profession itself. Lawyers are best known to us for jousting in civil actions, advising great corporations, and drawing up legal forms foolproof against the resourcefulness of yet other lawyers. None of this suggests a connection between law and virtue.

But these workaday functions involve quite subordinate aspects of law and stand to its primary purposes as a munitions worker to victory in the field. The distinction between lawyers and great lawyers is classical. Once we see the law in its more universal aspects, we can recognize an essential part of political prudence<sup>2</sup> whose end is of all the arts and practical sciences *maxime principalis* and "divine."<sup>3</sup>

Yet here too we must labor to purify a degenerated and laicized notion of the political life. Soldier and surgeon we can easily picture in dedicated role. But before the "politician" can excite our reverence he must find another name with less odious connotations. And even when he is rebaptized as Judge, Senator, or President, — *tanti ponderis est peccatum* — we may see in his great office simply an avenue to prestige and profit, or the instrument of power. That is why the *vita civilis* is the special object of those thirsty for honors,<sup>4</sup>

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1. *Ethics*, Bk X, c. 10, 1179 b. References to the *Ethics* are from the Ross edition of Aristotle's works, Oxford, 1925, vol. ix.

2. In *VI Eth.*, lect. vii, nn. 1197-1201. References are to the Marietti edition of St. Thomas' commentary.

3. In *I Eth.*, lect. ii, nn. 25, 30.

4. "Fere totus civilis vitae finis videtur esse honor, qui redditur bene operantibus in vita civili quasi praemium. Et ideo colentibus civilem vitam probabile videtur felicitas in honore consistere". *Ibid.*, lect. v, n. 63. Cf. also In *II Politicorum*, lect. xiv, n. 315, and also III, lect. v, n. 389. References to the commentary of St. Thomas on the *Politics* cite the Marietti edition.

in itself a sign of its nobility as bearing in a peculiar manner on the final good of man.<sup>1</sup> It is the art of ruling free men, the art of arts in its own order.<sup>2</sup>

Est enim civitas principalissimum eorum quae humana ratione constitui possunt. Nam ad ipsam omnes communitates humanae referuntur. . . . Si igitur principalior scientia est quae est de nobiliori et perfectiori, necesse est politicam inter omnes scientias practicas esse principaliorum et architectonicam omnium aliarum, utpote considerans ultimum et perfectum bonum in rebus humanis.<sup>3</sup>

For unhappy historical reasons it is common nowadays to oppose the interests of man and society, to identify the latter simply with the State or government, and thus (since all power is subject to abuse) to sense in the structures of civil society itself a natural threat to the person. This situation is aggravated by a peculiar feature of modern life in the large American city especially: the diminishing role of "mediating" communities like the family, church, and neighborhood in transmitting cultural values. No other societies effectively intervene between the individual and the State which tends more and more to absorb the resultant vacuum. With this loss of an authentic sense of political community, the State comes to be regarded as a gigantic administrative machine and a wholly artificial device for securing a minimum of public order and efficiency, generally on a purely material and empirical level.<sup>4</sup> A kind of social positivism excludes all human ends qualitatively superior to those which immediately interest the individual himself so that any order imposed for a common good appears to subtract from personality and liberty rather than to complete them. There is lacking here all appreciation of the special unity proper to civil society which far from effacing natural diversity, on the contrary, supposes and nourishes it.<sup>5</sup> The defect of such individualism is in its truncated view of human nature that misses the sense in which an individual, while a substantial whole, is at the same time also naturally a part ordered to the good of another

1. "Oportet quod ultimus finis pertineat ad scientiam principalissimam de fine primo et principalissimo existentem, et maxime architectonicam, tamquam praecipientem aliis quid oporteat facere. Sed civilis scientia videtur esse talis . . . Ergo ad eam pertinet considerare optimum finem." *In I Eth.*, lect. II, n. 25.

2. See *Politics*, Bk I, c. 5 1254 a. References to the *Politics* are from the Ross edition, vol. x.

3. *In Libros Politicorum*, Prooemium, n. 7.

4. See the remarks of Pope Pius XII in his 1955 Christmas Allocution with regard to purely quantitative methods of measuring the function of the State. (*Catholic Mind* for March, 1956, pp. 164-165).

5. "Civitas non solum debet esse ex pluribus hominibus, sed etiam ex differentibus specie, id est ex hominibus diversarum conditionum. Non enim fit civitas ex hominibus qui sunt totaliter similes secundum condiciones." *In II Polit.*, lect. I, n. 180, tertio.

whole.<sup>1</sup> The city is in fact anterior by nature to the individual and family in the same sense that act is said to be prior to potency.<sup>2</sup> It is in civil society that man and the family find their natural human completion,<sup>3</sup> meaning by that not just security from marauding bands and from physical want, but the abundant means for the "happy life" — the life of intellectual and moral virtue.

An abortive notion of man's relation to the body politic according to which there would exist in fact no *community* at all but only an external accidental bond, is not without its repercussions on the philosophy of law. Law as an instrument of the public power is limited by the ends of that power and as we restrict the interests of the one, so of the other.<sup>4</sup> Later on we will examine more closely how this affects the process of formal legislation in a democratic society. For the moment we wish to point out the bearing of the civil community, through its laws, on the moral formation of its members.

Neither vice nor virtue is entirely natural to man<sup>5</sup> and for the latter he needs besides a habit checking the natural drift of concupiscence,<sup>6</sup> the direction of a prudent reason. And that is what laws are for.<sup>7</sup> It is striking that, for the Greeks, the barbarians were those "who were not governed by civil laws"<sup>8</sup> and that the term we ourselves oppose to *barbarian* is *civilized*. Apart from his fellows, Polyphemus is also "without law or justice" — an *affectator belli* all the more fearful in that natural resourcefulness and "virtue" equip him with means to satisfy his untamed appetites.<sup>9</sup> We owe it to the city, the *polis*, that litigation has supplanted the feud<sup>10</sup> and that the good behaviour we take for granted — being civil — is for most people easy and pleasant.<sup>11</sup>

1. "Quia homo naturaliter est animal sociale, utpote qui indiget ad suam vitam multis quae sibi ipse solus praeparare non potest; consequens est, quod homo naturaliter sit pars alicuius multitudinis per quam praestetur sibi auxilium ad bene vivendum." *In I Eth.*, lect.I, n.4.

2. "Illud dicimus esse naturam uniuscuiusque rei, quod convenit ei quando est eius generatio perfecta: sicut natura hominis est quam habet post perfectionem generationis ipsius... naturalis." *In I Polit.*, lect.I, n.32.

3. Cf. *In I Polit.*, lect.I, n.31, tertio; nn.40-41.

4. "Leges de omnibus loquuntur, secundum quod potest convinci, quod pertineat ad aliquid utile communitati. . . . Semper enim in legibus ferendis attenditur id quod est utile et quod est principale in civitate." *In V Eth.*, lect.II, n.902.

5. Cf. *Ia IIæ*, q.95, a.1, c.

6. *In VII Eth.*, lect.xix.

7. Cf. *In X Eth.*, lect.xiv, nn.2148-49; n.2153.

8. *In I Polit.*, lect.I, n.23.

9. *Politics*, Bk I, c.2, 1253 a.

10. Cf. HOLMES, O.W., *The Common Law*, Little, Boston, 1881, p.37.

11. "Homo reducitur ad iustitiam per ordinem civilem; quod patet ex hoc quod eodem nomine apud graecos nominatur ordo civilis communitatis, et iudicium iustitiae, scilicet

Because the community touches so squarely on the conduct of life, a crucial importance attaches to the "consensus" or what Walter Lippman calls "the public philosophy." For expressed or implicit in it are the values which shape the laws. And here we must note with Aristotle that it makes little difference whether these laws be written ones or not.<sup>1</sup> Law determines morality through its power to induce a habit. But just as effective as coactivity, in its obvious and elementary sense of physical force, is the *consuetudo popularis* from which it is hard to depart and against which even formal law itself may prove futile.<sup>2</sup> Morality, it is true, must be personal and deliberately accepted before it is genuine morality. But the community has much to say in deciding the material form this morality is to take "*sicut apud Germanos olim latrocinium non reputabatur iniquum.*"<sup>3</sup> The mere fact that a community ideal comes to an individual from the outside and before he is capable of forming moral judgments favors its acceptance as objectively valid.

Aristotle has shrewdly noted the importance of early training and of a good start in learning to take pleasure in the right sort of things.<sup>4</sup> By and large it is the pleasant thing that we are going to do. A peculiar vividness attaches to our childhood experiences which offer nature her first deployment so that "we favor and persist in them."<sup>5</sup> Thus they fix the direction for the formation of our early habits, and habit in turn tends to reinforce itself as a source of pleasure more basic even than novelty.<sup>6</sup> All delight is founded ultimately on "similitude" or proportion to nature,<sup>7</sup> and habit is itself a second nature. *Consuetudo vertitur in naturam.* Much depends therefore on whether this second nature imposed in childhood is good or bad since nature expresses itself in actions that bear a similitude to it.<sup>8</sup>

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*dike.* Unde manifestum est quod ille qui civitatem instituit, abstulit hominibus quod essent pessimi, et reduxit eos ad hoc quod essent optimi secundum iustitiam et virtutes." *In I Polit.*, lect. I, n. 41.

1. *Ethics*, Bk X, c. 9, 1180 b. The *nomoi*, for which Socrates had such reverence, were old formulations and not contemporary legislative acts. They transcended strict law and entered the domain of social ethics. This is why Aristotle connects education with the spirit of the laws and says they are intended to make the citizens good and just. See Barker's edition of the *Ethics*, pp. lxi et ff.

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

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

4. *Ethics*, Bk II, c. 2.

5. *In VII Polit.*, lect. XII, n. 1256.

6. Cf. *Ia IIae*, q. 32, a. 2, ad 3.

7. *Ibid.*, art. 7; q. 27, a. 3.

8. "Finis propius et proximus (virtutis) est quod similitudo habitus existat in actu." *In III Eth.*, lect. xv, n. 549. Thus the good intended by the courageous man is *ipsa fortitudo*.

We can be deceived here by the fact that our most vehement pleasures are corporeal and accompanied with motion and change which thus appear to be *per se* causes of delight.

These considerations are of special significance for the democratic society. In distinguishing the virtues proper to the *citizen* and those of the good *man*, Aristotle excepted the case of the ruler himself.<sup>1</sup> In this citizen all the virtues and not just the civic ones were required so that his direction of the community be really prudent and that his vision of the final purposes of life be not corrupted by passion, it being understood moreover that one's estimate of the common good must inevitably take its color from what he conceives the end of life itself to be.

Unde secundum quod homines diversimode existimant de fine vitae humanae, secundum hoc diversimode existimant de conversatione civitatis. Qui enim finem humanae vitae ponunt delectationes vel potentiam aut honores, existimant illam civitatem esse optime dispositam in qua homines possunt vivere delitiose vel acquirere multas pecunias, aut consequi magnos honores vel multis dominari. Qui vero finem praesentis vitae ponunt in bono quod est praemium virtutis existimant illam civitatem esse optime dispositam in qua homines maxime pacifice et secundum virtutem vivunt.<sup>2</sup>

Consequently, in the democracy, where all the citizens in some measure participate in rule and where the *vox populi* is especially audible, the operative concept of the common good will be a grass-roots idea and here more than elsewhere the public philosophy will be incorporated in the laws and be reinforced by them in turn. We have only to reflect on how many lines of conduct in areas critical for the status of a society (those, for example, touching marriage and the family) are now currently accepted whereas a century ago, a relatively brief span in the life of a community, they were the frowned upon exceptions. Particularly with modern devices for propaganda and mass-communication media, the modern democracy is always in danger of degenerating to the "*inordinatus status popularis*" with its *venale suffragium*<sup>3</sup> and the tyranny of the "still small voice of the herd." For this reason Pope Pius XII warns of the necessity for a special spiritual maturity in a people living under this regime.<sup>4</sup>

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(Cf. *Ia IIae*, q.31, a.5, c.; *In VII Eth.*, lect.xiv, nn.1533 ff.) But this is accidental to the nature of pleasure which is essentially a *quies in bono adeptio*. Because our material potencies are limited, they are not only impeded by the absence of their objects but also exhausted by excess. (Cf. *Ia IIae*, q.32, a.1, ad 1 ; a.7, ad 3.) Motion and change are pleasurable in so far as they restore equilibrium and thus prevent the "corruption" of habit (q.32, a.2, ad 3).

1. *Politics*, Bk III, c. 4, 1276b-1277a. (St. Thomas, lect.III.)

2. *In II Polit.*, lect.I, n.170.

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

4. 1944 Christmas Allocution, AAS XII (1945), pp. 1-10. (*Catholic Mind* for Feb. 1945).

## 2. The role of jurisprudence

### a) The necessity of jurisprudence

Since laws are among the chief means to the common good — a good specifically human, complex in structure, and one to be progressively realized<sup>1</sup> — it is easy to see the necessity of a sound *jurisprudentia* or science of law. It is a moral science, obviously, since the political order has man for its subject, foundation, and end. Of necessity it must consider principles whose discovery and defence are the proper task of other disciplines but which bear heavily on the legislator's art. The nature of man and his destiny; the origin of rights and authority; the nature of justice: these are but some of those "larger questions of the law" that the great jurists warn us not to dismiss as though having only academic importance with regard to the real down-to-earth issues of the courtroom. *Veram philosophiam non simulatam affectamus*.<sup>2</sup> Law is more than a craft. The term *jurisprudence*, it is true, draws immediate attention to those active moments when it is working close to the complexities of a concrete problem. But prudence needs a fulcrum and supposes more than mere *synderesis*.<sup>3</sup> It is the application of right reason to a singular, and no situation is so fluid and contingent as to escape all control of necessary principles as its point of reference. Law deals with ends and an ultimate end must communicate its motion to the subordinate ones that intervene.

*Sicut nihil constat firmiter secundum rationem speculativam nisi per resolutionem ad prima principia indemonstrabilia, ita firmiter nihil constat per rationem practicam nisi per ordinationem ad ultimum finem qui est bonum commune*.<sup>4</sup>

The legal order must be founded on some judgment as to the nature and end of man. *Lex ab hominis natura est repetenda*. For it is man as such that jurisprudence has for its subject, unlike medicine, to which the political art is often compared<sup>5</sup> and which treats him *in parte inferiori* only.

The effects of this objective difference between law and medicine can be seen when we consider the two agents, doctor and jurist, who exercise these arts. The former may be agnostic or anarchist and his patient may still prosper under his treatment "*quia opera quae fiunt*

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

2. ULPIAN, *De Justitia et Jure*, lib. I. Cited by Suarez in the prooemium of *De Legibus*, Vivès ed., p. ix.

3. *IIa IIae*, q.47, a.15, c.

4. *Ia IIae*, q.90, a.2, ad 3.

5. Cf. *Ethics*, Bk I, c.13, 1102 a.

*ab artibus habent in seipsis quod pertinent ad bene esse artis.*"<sup>1</sup> But the philosophy and value judgments of the jurist pass into the very substance of his *operatum*, the law or judicial sentence, and define it.<sup>2</sup>

The physician imitates nature in taking from her his model of the healthy body and finding in her processes suggestions as to a method for realizing it. And the legislator, too, refers to nature for some measure of the citizen his laws aim to produce. *Homines non facit politica sed eos accipit a natura.*<sup>3</sup> However, the measure nature offers him is a very remote one — *quaedam principia praeparat.*<sup>4</sup> Nature never produces the citizen in the same automatic way it does the healthy body. The city is even more remote from nature than the family and more dependent on practical reason. Man must not only search out the means for effecting it; he must discover for himself what a good city is to be like. The blue-print itself is a work of reason. This obviously involves his philosophy even when he professes none, or where, as sometimes happens, he is determined not to let his philosophy intrude. Such a determination on the part of the jurist in itself implies definite views on the end of the legal order which are by no means as detached or unobtrusive as may at first appear. The point is worth notice because this sort of openmindedness comes in for frequent applause as our protection against the dogmatism of "the natural-law men" reading their prejudices into the law. One speaks, for example, of Mr. Justice Holmes' "impassioned indifference" heroically excluding his own moral conceptions and views on social policy. Humility and reverence for the mystery of the universe kept him to the end a "bettabilitarian" taking no final position on man's meaning in the cosmos.<sup>5</sup> But the "Darwinian strain in his thinking" that saw all life as roar and struggle, and "all societies founded on the deaths of men," comes out in a famous decision permit-

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1. *In VI Eth.*, lect. iv, n. 282.

2. Cf. *IIa IIae*, q. 60, a. 1, c. and ad 1 for connection between the sentence and the *dispositio judicantis*.

"Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing ever in reserve as a court of ultimate appeal. Often the philosophy is ill-co-ordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less the goad is there. If we cannot escape the Furies, we shall do well to understand them." CARDOZO, B., *Nature of the Judicial Process*, Yale, p. 41.

3. *Politics*, Bk I, c. 11, 1258 b.

4. *In Polit.*, prooemium, n. 2.

5. *The Holmes-Pollock Letters*, (2 vols.), Cambridge, 1941, vol. 2, p. 22.

ting the sterilization of a feeble-minded woman on the rather forthright ground that "three generations of imbeciles are enough."

The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecillity, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.<sup>1</sup>

This is not exactly "letting the cosmos alone" or showing "meticulous regard for the strict legal profile of a case." "For all his humanism," comments his editor, "he despised the sentimental outlook. Over and against the invasion of individual liberty he set the decisive social value of preventing the deterioration of the race."<sup>2</sup>

#### b) *The dignity of jurisprudence*

*Divinarum et humanarum rerum scientia.* It is this inherent dignity of jurisprudence that accounts in all probability for the prestige of the great lawyer in all times and for all times, and which makes of the court of law one of the principal channels mediating a nation's culture. This influence, which would be considerable enough where it confined just to lawyers themselves, extends in fact far beyond the limits of the profession. Grotius and Blackstone, long dead, are still with us, and the decisions of Holmes are among the documents of American philosophy. This is especially so in times of upheaval when values and ways of life long taken for granted are suddenly and radically challenged. Among those to whom we look for a justification or, if need be, the necessary reappraisal or adjustment, is the jurist. These are "the great moments of the law" when it has to rise above

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1. *Buck v. Bell*, 274 U.S. 200 (1927). Cited in *The Mind and Faith of Justice Holmes*, Modern Library, N.Y., 1954, p. 356. This is a collection of Holmes' more important decisions and legal writings with commentary by the editor, Max Lerner. It is cited hereafter under the name of Lerner.

2. LERNER, *op. cit.*, p.356.

prejudice and passion, and fix upon eternal reasons to reaffirm a forgotten truth, formulate a new principle, or overturn an established error.

This is not to say that jurisprudence thrives on crises alone. In the daily recurrent tasks of law — in legislation and litigation ; in criminal, constitutional, and international law — there is a steady flow of problems to exercise and vex the jurist, particularly the judge, and force him to frequent meditation on the nature of law, its sources, methods, and its ends. These difficulties arise from the complex nature of the good law seeks to obtain. It is the instrument of government whose primary purpose is to maintain justice as the principal virtue controlling the relations between citizens. Because these relations in a large community are complicated and fluctuating, there arise a corresponding complication in the machinery of law itself. Situations arise where the laws fail to provide, or conflict, or seem to defeat rather than assist the ends of justice. What does a judge do whose office is to apply the law and not create it? Does a murderer's estate have a valid legal claim under his victim's will? One law affirms the binding force of a will in good legal form. Still another forbids the court to add to the prescribed penalties for crimes. However, a New York court refused to make the award, arguing a wider unwritten principle that no one should profit by his crime. Yet in a similar case the Supreme Court of Ohio decided for the criminal on the principle *durum est sed ita lex*.<sup>1</sup>

These problems fall into two general sorts. There are those proper to the subject matter of practical science where we must have final recourse to prudence and experience, and rest content with approximate, tentative, solutions. The others are properly scientific as Aristotle understands it in the *Politics*,<sup>2</sup> or "speculative" in the sense that St. Thomas divides speculative from practical science in the prologue of his commentary. They concern common universal principles which do not depend on reason for their ordering but instead direct it, however remotely, in its operations.

Legal positivism is itself a witness to the decisive bearing of these principles. Whether or not, as a formulated theory of law, it is fighting a losing battle, it continues still by force of numbers and the prestige of its adherents in schools of law and in the highest courts of the land, to dominate American legal thought in one or another of its forms. At first glance these varieties may seem disparate enough but all separate the legal order from its root, through natural law, in the *Lex Aeterna*. Expressed in such cool language it may seem a point about which lawyer-professors and lawyer-philosophers may politely

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1. Cf. Wu, John, *Fountain of Justice*, Sheed and Ward, p. 177. Also CARDOZO, *op. cit.*, p.121.

2. Bk I, c.11, 1258 b.

debate with little or no consequence for the courtroom. Yet in the totalitarian state with its kangaroo trial, its scrapped treaty and genocide programme, Pope Pius XII has identified "the true countenance of juridical positivism."<sup>1</sup> It is for this reason that in his 1949 allocution to the members of the Rota, the Pope urged the combatting of this *droit nouveau* as the still pressing task of jurisprudence. It is in fact these bitter realities of the twentieth century, when the legal profession was never so influential, that have occasioned fresh reflection on the basic postulates of law and a renewed interest in natural-law jurisprudence. To cite a most prominent example, we may recall the profound and continuing embarrassment of some distinguished lawyers in their search for valid legal grounds on which to arraign the Nazi war criminals. For all their personal horror of the gas chamber and slave camp, their own jurisprudence left them with the uneasy feeling that Nuremburg established a dangerous legal precedent and had in fact defined a new sort of crime: that of losing a war.<sup>2</sup>

In the course of this study we will pay some special attention to the positivism of Oliver Wendell Holmes. A quarter of a century after his death at ninety-five he ranks a secure second after John Marshall among the formative influences in American law. Unfortunately, he is equally celebrated as the foe, the debunker even, of natural law, and at least in the popular mind, famed more for his "cynical acid" and "barbaric yawp"<sup>3</sup> than for his legal craftsmanship. Popularly acknowledged as a philosopher of the law, few would propose him as a profound philosopher *simpliciter*. The philosophy indeed is almost too facile for criticism, consisting for the most part in a series of maxims that caught his fancy as a young man in his twenties, and repeated verbatim for the next seventy years. But the merits of his solid contributions to the progress of American law are often attached to his uncomplicated positivism and cited as its vindication. From

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1. In the Allocution of November 1949 to the Italian Jurists. (AAS, XVI, [1949], pp. 597 ff.). He returned to this same point in his Allocution to the Sixth International Congress on Penal Law in October, 1953. These papal pronouncements on questions of law have been collected in *Actes Pontificaux* No. 62 (Le Droit), *Institut Social Populaire*, Montréal.

2. Cf. the preface of Justice Jackson to *International Conference on Military Trials* published by Department of State, 1949.

The same problem was present at the end of World War I. Cf. *The Holmes-Pollock Letters*, vol. I, p. 225. In a letter to Laski Holmes wrote: "I often think of the way our side shrieked during the late war at various things done by the Germans such as the use of gas. We said gentlemen don't do such things — to which the Germans: 'who the hell are you? we do them.' There was no superior tribunal to decide — so logically the Germans stood as well as we did." *The Holmes-Laski Letters* (2 vols., numbered consecutively, vol. 2 beginning with page 822).

3. In a letter to Laski, agreeing on the admissibility of infanticide, he writes: "Of course I agree with you as to morality and have uttered my barbaric yawp on the subject from time to time." *Ibid.*, p. 704.

this point of view it is hard to judge whether the overall influence of Holmes has been for good or bad. But it is certainly there and makes it worth the trouble to point out that his shrewdness and sense for the realities of law as presented in a concrete case, far from depending on his positivism, were sometimes thwarted by it. Holmes, under the spur of Laski's surprising enthusiasm for the Spanish jurists, was ever promising himself to read Suarez. But St. Thomas never came even that close to the honor. "I took Cohen's word for it that I needn't read Thomas Aquinas."<sup>1</sup> Perhaps, in view of the questions that preoccupied him in his legal writings and decisions, he might have found the treatises on Law and on Justice at least suggestive.

## II. LAW, REASON, AND MORALITY

### A. A positivist view of the law

Law, as we are most familiar with it, is described as a rule imposed on human activity for some common good as determined by public authority: "*Quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.*"<sup>2</sup> Probing this notion a bit further, we say that law is a dictate of practical reason since reason alone can thus measure a relation of means to end. *Rationis enim est ordinare ad finem.* This is the sense of the statement, cardinal in this whole matter, that reason is a first principle of human action.<sup>3</sup> Before we can act as men, reason must act.

Actionum quae ab homine aguntur, illae solae proprie dicuntur humanae, quae sunt propriae hominis in quantum est homo. Differt autem homo ab aliis irrationalibus creaturis in hoc quod est suorum actuum dominus. Unde illae solae actiones vocantur proprie humanae, quarum homo est dominus. Est autem homo dominus suorum actuum per rationem et voluntatem . . . Illae ergo actiones proprie humanae dicuntur quae ex voluntate deliberata procedunt.<sup>4</sup>

We are likely to reduce law simply to an act of will because the lawmaker's free will brings it into existence. *Quod placuit principi legis vigorem habet.* Furthermore, law addresses itself to the subject's will, compelling to actions he may be reluctant to take or restraining from those he may be inclined to do.<sup>5</sup> A motorist does not recognize

1. Cf. *The Holmes-Laski Letters*, pp. 689 ; 1183.

2. *Ia IIae*, q. 90, a. 4, c.

3. *Ia IIae*, q. 90, a. 1, c.: "Regula autem et mensura humanorum actuum est ratio, quae est primum principium humanorum actuum . . . Rationis enim est ordinare ad finem, qui est principium primum in agendis." Cf. q. 17, a. 1.

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

5. *Ia IIae*, q. 90, a. 1, c.

a speed limit as law just because he finds it a reasonable means for saving lives, but because it can be enforced. And force we associate with will. *Movere ad agendum proprie pertinet ad voluntatem.*<sup>1</sup>

On the other hand, it is usual also to stigmatize an unjust law precisely as "willful." To the extent it departs from reason in the direction of mere force, it defects from the perfect notion of law — *magis esset iniquitas quam lex.*<sup>2</sup> The implications of this natural testimony are profound for the hint it gives of a final relation between law and truth. But it is important to note that even such unreasonable law remains a "rule of reason" still by the mere fact that it commands or orders.<sup>3</sup> That is why we can still speak of the tyrant's prescriptions as laws: some vestige of reason remains even here.<sup>4</sup> *Regula rationis* does not mean, except as consequence, a rule *for* reason but one emanating from it. And a bad law means that reason has somehow gone awry either because its end is unjust or because the means it prescribes are not apt.

What further helps to obscure the essential part played by reason in the generation of law is our proneness to identify it with the promulgation it receives in the written statute which is only a "sign" of law. Lodged in the statute, the command has acquired a kind of hypostasis giving it the appearance of an impersonal force. Some appear in fact to mean exactly this when they speak of "government of laws and not of men" — a viewpoint which, as we shall see, gets encouragement from the way judges at times interpret the law, adhering to its strict letter and reasoning severely from its terms with more solicitude for the *elegantia juris* than for the original intention of the legislator.

This innocent severance of the idea of law from its origin in deliberate human choice conspires well with legal positivism in its view of law as a neutral fact. This is not to say immediately that law is indifferent to human progress, that it is no index to moral values and "felt needs," or that there is by definition no such thing as law that is unjust. But it does mean that these moral considerations are irrelevant to the essence of law and do not prejudice its being or not being real law with all of law's juridical effects. Indeed, if we understand morality in any absolute sense to mean something other than the current mores prevailing in a given community or the values accepted there, it would not even supply a norm for deciding what is *good* law. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community,

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1. *Ia IIae*, q.90, a.1, objectio 3a.

2. *Ibid.*, ad 3.

3. *Ia IIae*, q.17, a.1, c.

4. *Ia IIae*, q.92, a.1, ad 4.

whether right or wrong.”<sup>1</sup> Law is law because it is there and can be enforced. “I don’t care a damn if twenty professors tell me that a decision is not law if I know the courts will enforce it.”<sup>2</sup>

The scope of state sovereignty is a question of fact. It asserts itself as omnipotent in the sense that it asserts that what it sees fit to order it will make you obey. You may very well argue that it ought not to order certain things and I agree. But if the government does see fit to order them, I conceive that order is as much law as any other — not merely from the point of view of the Court, which will of course obey it — but from any other rational point of view — if as would be the case, the government had the physical power to enforce its command. Law also as well as sovereignty is a fact. If in fact Catholics or atheists are proscribed and the screws put on, it seems to me idle to say it is not law because by a theory that you or I happen to hold (though I think it very disputable) it ought not to be.<sup>3</sup>

In other words, jurisprudence can no longer be defined as the *scientia justi et injusti*. The foundation of law is now force, and the object of jurisprudence is no longer the law that ought to be but the law that is. And to law in this realistic sense are resolved finally all questions of legal rights and duties.<sup>4</sup> Unfortunately, the moral phraseology that lingers in much of our law betrays us into imagining these rights and obligations as realities existing apart from the law and served by it.<sup>5</sup> This is putting the cart before the horse. Rights and duties do not determine law ; they are created by it.

The object of our study [jurisprudence] is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

1. LERNER. *op. cit.*, *The Common Law*, p.57.

2. *The Holmes-Laski Letters*, p.115.

3. *Ibid.*, p.21.

4. “I don’t talk much of rights as I see no meaning in the rights of man except what the crowd will fight for. I heard the original Agassiz say that in some part of Germany there would be revolution if you added a farthing to the cost of beer. If that is true the current price of beer was one of the rights of man at that place.” *Ibid.*, p. 68. “All law means I will kill you if necessary to make you conform to my requirements.” *Ibid.*, p.16.

5. “The law is full of phraseology drawn from morals, 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. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence

... The primary rights and duties with which jurisprudence busies itself are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas is that theory is apt to get the cart before the horse, and to consider the right or duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court — and so of a legal right. ... The prophecies of what the court will do in fact, and nothing more pretentious are what I mean by the law.<sup>1</sup>

All this is tied up logically with Holmes' scepticism, his determinism, and the biological interpretation he gives to human life and history. Obviously if our most compelling certitudes are just "can't helps," and man a predatory animal "no different from the other species, having for his main business to live and propagate, and for his main interest food and sex,"<sup>2</sup> not much room is left for an objective juridical order independent of the positive law. "The *ultima ratio* not only *regum* but of private persons is force."<sup>3</sup> The value of Holmes' voluminous correspondence lies in its having made explicit the direct connection between his anthropology and this Draconian jurisprudence. In the intimacy of these letters he put ideas quite baldly and with a certain relish in their power to shock. But in more austere writings like *The Common Law* and *The Path of Law* which are the most extensive expression of his legal philosophy, the biologism is below the surface, though not far, and the strong conclusions appear to flow from a cool hardheaded analysis of the common law and the conduct of the courts. Since *The Common Law* has been judged alone sufficient to establish him among the creative forces in American law, it is important that we examine the argument.

## B. *An analysis of Holmes' legal positivism*

### I. LAW AND COACTIVITY

What is the general reasoning in the passages we have cited? Simply that because the public power gets its way and this thanks

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of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals... I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced." LERNER, *op. cit.*, *Path of Law*, p.74. This essay originally appeared in *Harvard Law Review*, X (1896), pp. 457-478. It is found also in Holmes, *Collected Legal Papers*, Harcourt, N.Y., 1920.

1. *Ibid.*, p.74.

2. *The Holmes-Laski Letters*, p.1125.

3. LERNER, *op. cit.*, *Common Law*, p.59.

to superior physical force, it is *therefore* indifferent to and makes no profession of a juridical order superior to itself ; that *therefore* again, no such "overlaw" exists and so abstract rights and obligations are mere ghosts seen in the law,<sup>1</sup> "the hypostasis of a prophecy."<sup>2</sup>

Now we have only to observe coactivity as normally exercised through a rational person for the non-consequence to appear.<sup>3</sup> If there be nothing *a priori* unlikely in a legislator making law precisely in recognition of an obligation imposed on him *desuper* to do so, his resort to force, far from implying indifference to moral values, indicates his determination to see them served. That force as final arbiter subdues even an opposition that is justified means only that legislators can be fallible or corrupt. Force attaches to law not because it is an *ultima ratio* but because men have appetites not always docile to reason. Criminal law and much of civil law supposes this disorder present to some degree even in the majority.<sup>4</sup>

The fact that law is thus premised on disordered appetite and designed as a means to curb it, leads Holmes to conclude that "to dispel the confusion between law and morality" and to grasp the fundamental question of what constitutes law and legal duty, we must look upon the law through the bad man's eyes.<sup>5</sup>

We shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law.<sup>6</sup>

Now apart from noting in passing that the legislator and the *good* man also have a point of view which, touching *agibilia*, might be more perceptive, it is doubtful that even the bad man himself is getting his due — at least the ordinary bad man who has not been reading Spencer. What he cares two straws for in the law, and what he judges law to be, need not coincide. At least as regards the

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1. *The Holmes-Laski Letters*, p.389.

2. LERNER, *op. cit.*, *Natural Law*, p.397. This essay appeared originally in *Harvard Law Review*, XXXII (1918), pp.40-44.

3. Holmes never wavered in the confidence that he had cut through the fogs generated by emotional thinking and "church-descended talk of transcendentalist" (*H-L* 1069), to expose the real heart of the law. Yet for all his labor for realism as against the illusions of conceiving law as something apart from what courts decide — "a brooding presence in the sky" — he appears to have accomplished the same sort of thing in his own way. It is possible after all to "hypostatize" decisions, statutes, force, sovereignty, etc., and conceive them too, as well as rights and duties, floating in the air without their anchor lines in human action and deliberation.

4. Cf. *Ia IIae*, q.95, a.1, c.

5. LERNER, *op. cit.*, *Path of Law*, p.74.

6. *Ibid.*, p.75.

criminal law it is improbable that even the subject in need of coercion would consider sanctions as the essence of law or as anything but a punishment for violating what is already law and already binding. He may not quite explain this even to himself. The fact remains that justice is specific to man. It takes time and practice to uproot it so thoroughly as to put him mentally at home in world where justice has no meaning.<sup>1</sup> The view-point recommended by Holmes as "the real test of legal principles" gets no support from any facts of anthropology or human psychology. It gets its only plausibility from the fact that sanctions are attached to law with the bad man's appetites in mind. The legislator, though defining a strict right or duty, cannot afford to merely indicate or command but must speak in language the bad man understands and in terms of what is likely to appeal to him given the peculiar state of his affections.<sup>2</sup> The definition of law as force is based not on any analysis of the generation of law nor of its operation but on Holmes' social Darwinism. Any other definition is excluded in advance where society is conceived not as a natural unit but as a system of forces in conflict.

The tacit assumption of the solidarity of the interests of society is very common but seems to us false. The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with monkeys but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully.

The more powerful interests must be more or less reflected in legislation; which like every other device of man or beast, must tend in the long run to aid the survival of the fittest. . . . The fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else.<sup>3</sup>

## II. THE DOCTRINE OF THE EXTERNAL STANDARD

Darwinism provides the setting also for Holmes' famous doctrine of the External Standard which contains the key to legal history and

1. Cf. *In V Eth.*, lect.xv, n.1074.

2. Cf. *In X Eth.*, lect.xiv, n.3146.

3. LERNER, *op. cit.*, *Masters and Men*, p.50.

shows the law's independence of moral considerations. Consequences, not motives, are the law's affair. That such is the true ethos of law is clear from its progressive tendency to disregard internal subjective factors in determining liability (or any other legal distinctions for that matter). The basic principles of criminal and civil liability are essentially the same<sup>1</sup> as is evident from the many instances where it is uncertain whether an imposed liability is a fine or a tax.<sup>2</sup> Despite a moral terminology that speaks of guilt, malice, negligence and the like, the effort of law's evolution is to fix all liability, criminal and civil, on the basis of a sensible external standard to which the individual must measure up at his peril.

These standards are not only external but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are most dangerous.<sup>3</sup>

Law, aiming at an external good, exacts no more, but no less, than external conformity to the rule. If that is achieved law is satisfied. Some things it permits and encourages even where malice may be the motive; other it punishes even though innocent and justified. As for the hardship imposed on the weak, law is and should be careful of the species only. Despite much "hyperaethereal" talk, "sacredness of human life is a municipal ideal valid only within the jurisdiction."<sup>4</sup> Law uses the individual as a "tool to increase the general welfare at

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1. LERNER, *Path of Law*, p.75; *Common Law*, pp.59, 69.

2. *Ibid.*, p.75. We might note two things here. The cases that are uncertain are borderline; there are many where there is no doubt that the punishment is vindictive. Secondly, as we shall point out later, the legislator is not charged with vindicating the whole moral order. He cannot undertake to stamp out all vice and he may even confer a legal status on acts objectively wrong (*IIa IIæ*, q.77, a.1, ad 1). Many legal determinations of natural law are in themselves objectively indifferent and the sanctions imposed by the state may be simply intended as an effective means for securing the desired good. Thus, to discourage without prohibiting divorce, the law might make the process costly. Or it might ticket repeatedly for overnight parking merely to keep it under control. The problem will arise more often for Holmes than for the jurist who recognizes a natural law. Holmes has no guide except the law's expressed intention or definition of an act as criminal. For the rest, he must judge by the consequences (Lerner, *op. cit.*, p.69). When the state hangs or imprisons, we presume it is a punishment. But when one pays cash and goes free to repeat the act, what then?

3. *Ibid.*, *Common Law*, p.63.

4. *The Holmes-Pollock Letters*, II, p.36. Again *The Holmes-Laski Letters*, p.217.

his own expense," sacrificing him as it sees fit and can.<sup>1</sup> That is why ignorance does not excuse from the law. It also explains punishment for crime (when this is not just a wise indulgence regulating the appetite for revenge).<sup>2</sup> Here there is no question of guilt or "mystic bond between wrong and punishment."<sup>3</sup> An individual for one reason or another, no matter, has failed to meet the standard, and law, careful of the species, reacts.

Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interest on the other side of the scales.<sup>4</sup>

In a letter to Laski we see what this means. Thus Holmes to an unlucky individual who has not measured up :

"I don't doubt that your act was inevitable for you, but to make it more avoidable for others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises."<sup>5</sup>

This is certainly consistent jurisprudence in a Holmesian cosmos and we should be grateful for his having worked the logic out. *Lex ab hominis natura est repentenda*. Much depends on whether or not man differs from the ape. Just now, however, we wish to weigh the thesis that jungle jurisprudence alone makes consistent and intelligible the natural tendency of law to follow an external standard.

#### a) Law and the "struggle for life"

First a general point : in so far as reason and appetite represent two opposed concepts of law, a politique that submits its legal processes to the control of a standard at all, has willy-nilly made an option for reason. Such a discipline cannot be explained in a universe regulated by the laws of biology alone. This should be clear to any Darwinian

1. LERNER, *op. cit.*, p.61.

2. *Ibid.*, p.57 : "If people would gratify the passion of revenge outside the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution." (On the same page, quoting Sir James Stephen : "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.").

3. *Ibid.*, p.58.

4. *Ibid.*, p.62.

5. *The Holmes-Laski Letters*, p.806.

not bent on having his cake and eating it, and provided he set aside all picturesque possibilities of what law might be like and stick with the law as it is and always has been. The good it aims to promote — the *communitas in bene vivendo* — is human and moral both in itself and in the conditions necessary for achieving it.<sup>1</sup> How does it happen, after all, that law should throw its weight *against* robbery, murder, and libel? For the sake of peace and order, yes, but that is a long pull from the jungle where losses are left to lie as they fall. The parallel between law's conscious solicitude for the common good and nature's instinctive care for the species at the expense of individuals, in the sense that the parallel itself is apt, puts law on the side of reason. It takes a reason, even in nature, to plan for the *bonum speciei* since only a concrete material good can be the object of sense apprehension and sense appetite. But the analogy between law and nature-in-the-raw disguises a critical difference. Nature does indeed sacrifice individuals to the species but the individual tiger still looks out for himself. And it is by individuals that laws are enacted and enforced. And — an important point — in these activities their aims are not instinctive but deliberately pursued. What explains this deliberate pursuit of a *common* good? A dominant class may legislate its appetites. Undoubtedly too a judge, though, as regards the parties before him, his interests are seldom immediately involved, may undergo the subtle influence of private preference and class sympathies. So long as the influence remains subtle, few are scandalized, and the law itself realistically provides to keep it to a minimum.<sup>2</sup> But when appetite and passion are plainly evident (as, for example, in the legal artifices aimed at circumventing the Supreme Court ruling on segregation), the indignation it provokes reveals a common conviction that law has been perverted and not merely pushed to the length of its own logic.

This is particularly apparent in the criminal law. What explains the laborious, not to say conscientious, research and reflection necessary to verify the standard, or the pains taken to insure due process? These are the constant accompaniments of law and absorb the greater part of its energies. They are evident in some heroic dissents of Holmes himself.<sup>3</sup> Yet they call for a kind of disinterested asceticism

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1. "Lex praecipit ea quae pertinent ad singulas virtutes. Praecipit enim facere opera fortitudinis, puta cum praecipit quod miles non derelinquat aciem, et quod fugiat, neque proiciat arma. Similiter etiam praecipit ea quae pertinent ad temperantiam, puta cum praecipit quod nullus moechetur, et quod nullus faciat mulieri aliquod convicium in propria persona. Et similiter praecipit ea quae pertinent ad mansuetudinem: sicut cum praecipit quod unus non percutiat alium ex ira, et quod non contendat cum eo opprobria inferendo. Et similiter est de aliis virtutibus quarum actus lex iubet, et de aliis malitiis quarum actus prohibet." *In V Eth.*, lect. II, n. 904.

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

3. Notably in *Frank vs Mangum*, 237 U.S. 309, 345 (1915), where he dissented from the majority of the Supreme Court in holding that the defendant had been denied his right

unlikely in predatory animals. In the first place, these don't associate in communities as the presence of their fellows is more a hindrance than a boon.<sup>1</sup> And law supposes the community. Which means finally that it too supposes in men, at least *secundum communem naturam*, not violence but mildness.<sup>2</sup> The criminal law is not a necessity for the majority of men. Were these naturally inclined to robbery and deterred only by the pressure of law, it scarcely needs showing that law would be helpless to control them. Large and experienced as they are, our law enforcement agencies are kept well occupied even now in matching the astuteness of the comparative few who live *sine justitia et sine lege*. While it must depend on force, law cannot force a whole multitude. "*Mensura debet esse homogenea mensurato.*"<sup>3</sup> The values embodied in effective law are those to which the community as a whole has given its consent.

#### b) *The amoralism of the External Standard*

For Holmes the moral neutrality of law — its indifference to moral right or wrong, to moral guilt or innocence — is most clearly manifest in the purely external standard it uses to determine liability. Of course, the general basis of the standard is moral in the sense that it supposes certain kinds of action lie within a man's power and that he exercises with regard to them a true responsibility. It seeks to prevent harms and inconveniences by warning a man that he does or omits certain specified actions at his peril. The standard is determined by what experience teaches as to the ways in which harms occur and the foresight a prudent man might be reasonably required to exercise in order to prevent them.

When a workman flings down a stone or piece of timber into the street and kills a man ; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the act was done. If it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only ; but if it were in London, or other populous town, where people are continually passing, it is manslaughter,

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to a fair trial and had been " tried by mob." This view received a tragic confirmation. Before the defendant, a Jew, could be executed, he was taken from his Georgia prison by a mob and lynched.

1. Cf. *In I Politic.*, lect. vii, n.103 : " Videmus enim quod quaedam bestiae vivunt congregata in multitudine et quaedam vivunt dispersa et separata secundum quod expedit ad cibum ipsorum ; quaedam enim ipsorum sunt comedentia animalia, quaedam vero comedunt fructus, quaedam vero comedunt indifferenter omnia."

" Unde non distinxit (Philosophus) vitas eorum, sed cibos quos eligunt naturaliter et secundum quod vivunt in desidia vel in pugna : nam ea quae comedunt alia animalia oportet esse pugnativa et quod dispersa vivant, aliter enim non possent cibum invenire ; sed animalia quae comedunt cibum qui de facili potest inveniri vivunt simul."

2. Cf. *In VIII Eth.*, lect.1, nn.1541-42 ; *In III Politic.*, lect.v, n.387.

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

though he gives loud warning ; and murder, if he knows of their passing and gives no warning at all.<sup>1</sup>

The standard must not be set too high. It must be such as indicates blameworthiness in the average citizen in the sense that he at least had the power to meet it, so that failure to do so in his case can be termed negligence or crime. Yet this moral element of choice or blame has a pragmatic reference only. It is introduced simply to make the power of avoiding certain conduct the condition of liability. It still remains true that law is interested in consequences only and that its purpose is purely external. It punishes "wrong" actions "not because they are wrong but because they are harms."<sup>2</sup> "A man may have as bad a heart as he chooses if his conduct is within the rules."<sup>3</sup>

The true explanation of the reference of liability to a moral standard . . . is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it.<sup>4</sup>

In a later chapter we will examine the extent of the legislator's direct interest in the moral education of the community. For the moment it will be enough to indicate the confusions which have led Holmes to conclude from the use of an external standard to the amorality of the legal order.

Law originates in the social nature of man. It regulates him as a part of a civil multitude ordered to the common good.<sup>5</sup> Since this political activity is not the whole of human life, it follows that the areas of law and morality are not coextensive. A great part of the moral order is exempt from the legislator's competence.

For of all the moral virtues only justice directly interests the law since it is proper to justice to perfect man in relation to others and not just with regard to himself. The acts of the other virtues are commanded only to the extent they affect the common good.<sup>6</sup>

The proper matter of justice, however, is external actions. Only by these does man enter into relation with others and advance or hinder the common good. That is why law, though aiming at justice for its own sake, can be content with the mere external performance of an act regardless of the agent's motive in performing it.<sup>7</sup> The mean

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1. LERNER, *op. cit.*, *The Common Law*, p.60.

2. *Ibid.*, p.66.

3. *Ibid.*, p.61.

4. *Ibid.*, 66.

5. *Ia IIae*, q.90, a.2 ; *IIa IIae*, q.58, a.5.

6. Cf. *IIa IIae*, q.57, a.1, c ; *Ia IIae*, q.100, a.2, c.

7. Cf. *IIa IIae*, q.58, a.8, c.

of justice is a *medium rei* established without reference to the subjective disposition of the agent.<sup>1</sup> While a correct interior disposition is necessary for a *virtuous* act of justice,<sup>2</sup> this aspect of things, the *modus virtutis*, is a matter of the agent's own perfection and not the object of law. The law has not the equipment for regulating it. It can legislate only what it can enforce and it can enforce only what it is capable of judging — external acts.<sup>3</sup>

Hence it is true that "a man may have as bad a heart as he chooses" so far as the law is concerned. That does not mean its purpose is not moral but only that its moral purpose is limited. "*Non enim idem est finis praecepti et id de quo praeceptum datur.*"<sup>4</sup> The common good, we have already noted, is a human good. By the mere fact that it disposes man for the ends of civil society, law has a moral purpose. It is ambiguous to say it punishes wrong actions "not because they are wrong but because they are harms." The harms are not morally neutral but are opposed to justice.

### c) *The External Standard and "Natural Selection"*

So long as the external standard of liability has some reference to personal responsibility it can be squared with a pattern of law pledged to the service of justice.<sup>5</sup> How then does it favor the viewpoint of social Darwinism? Not because it is external but because it is universally applied without consideration for subjective internal factors that exclude responsibility in a particular individual. The Standard is naturally selective. Conduct may be blameworthy only in the "prudent" but it is punished in all.

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven, but his slips are no less troublesome to his neighbors than if they sprung from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.<sup>6</sup>

Here one will immediately instance the case of insanity which law does in fact excuse. It is not easy to square practice and theory

1. *Ila IIae*, q.58, a.10, c ; q.57, a.1, c.

2. *Ila IIae*, q.58, a.1, c.

3. Cf. *Ia IIae*, q.96, a.3, ad 3 ; q.100, a.9, c.

4. *Ia IIae*, q.100, a.9, ad 2.

5. Given the purpose of human law, to secure the common good, it follows that punishments may be medicinal as well as vindictive. St. Thomas notes in several places that the gravity of a fault is not the only norm for determining penalties. See especially *Ia IIae*, q.105, a.2, ad 9. Also, *Ia IIae*, q.76, a.4, ad 4 ; and *Ila IIae*, q.108, a.4 : "*Aliquis interdum punitur sine culpa, non tamen sine causa.*"

6. *The Common Law*, *op. cit.*, p.108.

here. Holmes mentions insanity only as an exception illustrating the general rule that "every man is presumed to possess ordinary capacity to avoid harm." He has already noted that since liability is founded on the idea of blame, the community would reject as too severe a law that punished where fault was plainly absent. However, he was speaking there of a law that "punished conduct which would not be blameworthy *in the average member* of the community,"<sup>1</sup> whereas the point here is that the insane are not average members. What accounts for the law's unexpected patience with these obviously unfit members of the species?

The only solution indicated is that law does allow for incapacities that are clearly marked and "specially excepted." It is toward vague, undefined, peculiarities which do not go "beyond a certain point" that the law is merciless. Of its nature law must be general and "any legal standard must in theory be one which would apply to all men, not specially excepted, under the same circumstances."<sup>2</sup>

Clearly, this shifts considerably the basis of the supposed philosophy behind the external standard. It is one thing to say law cares not a hoot for individual responsibility, and another to imply it can't do all it might wish. Presumably the law would make allowances wherever incapacity is clear. As a matter of fact, the criminal law is taking more and more into account the psychological factors that destroy or diminish responsibility. And it still remains manageable law because real incapacity is *eo ipso* exceptional.

From his views elsewhere expressed on the sacredness of human life "outside the jurisdiction," it is doubtful that Holmes admires much the law's hesitation here before its clear duty to the species. One might argue, however, that this is merely a question of general state policy that does not engage the philosophy of liability. The logic of the external standard, he would say, is no more involved in excepting the insane than in the case of harm wrought by wild animals. From its very purpose — to discourage harmful acts — a law of liability can apply only to those it can threaten.

But if that be so, we must reexamine the law's attitude toward those other sub-standard individuals on whom it does fall. Are these "less than ordinary" — the weak and ignorant — responsible or not? Holmes has already said no, and has consequently to rationalize the legal discriminations against them. But then we ask why they are any more liable than the insane? Are they just not clearly irresponsible? In that case the law is proceeding against them not altogether ruthlessly but on the supposition, erroneous perhaps, that they are free. In other words, both the practice and theory of the standard suppose even in individuals a *mens rea*.

1. LERNER, *op. cit.*, *The Common Law*, p.63.

2. *Ibid.*, p.108.

1. *The criminal class and responsibility.* The source of trouble here is Holmes' misconception of the *voluntarium*, a point on which, as Aristotle observes, lawyers in particular ought to be clear precisely in order to determine correctly when actions call for punishment or pardon.<sup>1</sup> For Holmes it appears that only the man of "ordinary intelligence and prudence" is capable of voluntary wrong-doing, and that ignorance and passion such as found in the criminal classes exclude true responsibility. This is the teaching implied in passages where he is justifying the law's wholesale application of the standard :

Theory and fact agree in frequently punishing those who have been guilty of no moral wrong, and who could not be condemned by any standard that did not avowedly disregard the personal peculiarities of the individuals concerned. If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes.<sup>2</sup>

Again, as proof that public policy sacrifices the individual to the common good, he notes that the laws do not excuse ignorance though "there are many cases in which the criminal could not have known that he was breaking the law."<sup>3</sup> And again : the law takes no account of "incapacities" but falls hardest on the weakest :

For it is precisely to those who are most likely to err by temperament, ignorance, or folly that the threats of the law are most dangerous. . . . The individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness.<sup>4</sup>

Now in a sense it is apt to speak of the criminal's incapacities. Common speech in describing him as weak, recognizes him as stripped of an interior power meant for him as a rational creature. Vice may have become so habitual that he appears helpless to desire, let alone effectively will, to be quit of it. In the eighth book of his *Confessions*, St. Augustine has drawn the unforgettable portrait of this interior slavery — the strife within a man's own household where the "two wills" are at war. *Imperat animus sibi et resistitur.*

Yet he is also blamed for failure to martial over this weakness a power he is still judged to possess. His helplessness is confined

1. *Ethics*, Bk III, c.1, 1109 b. Cf. also Bk VII, c.11, 1152 b, on the importance for politics of a proper understanding of *delectatio*. (St. Thom., lect.xi).

2. LERNER, *op. cit.*, p.59.

3. *Ibid.*, p.62.

4. *Ibid.*, pp.63-64.

largely to the interior movements of appetite. While these certainly favor the commission of the external act for which alone the law punishes, yet the will exercises here a despotic control.

Since freedom is rooted in both intellect and will, an act can be involuntary through a defect at either source.<sup>1</sup> If one has acted without the concurrence of appetite, in so far as he can be said to have acted at all, it is through violence. If the freedom of the act has been impaired through some defective presentation of the object to the will, he has acted in ignorance. But while all violence is simply opposed to freedom,<sup>2</sup> not every kind of ignorance makes an act involuntary.<sup>3</sup> The action can still be willed and voluntariness is diminished only to the extent that ignorance is not itself due to the will, or in so far as the will, so to speak, has been deceived by the intellect so that the act can be truly said to have been placed not just *in* ignorance but *propter ignorantiam*. Often enough there has been rather a complicity between the erring judgment and the appetite.<sup>4</sup>

Now the ordinary criminal has not been induced to act through violence.<sup>5</sup> That is just his trouble. He has been following appetite too heartily and acting *per delectationem*.<sup>6</sup> And the more installed in his evil habit, the more voluntary is his slavery from this point of view. *Dulciter premitur*. If his act is involuntary at all, it must be so under the heading of ignorance — some defect in the judgment which tells him his criminal act is good to place.

Every evil act supposes some sort of ignorance<sup>7</sup> but it is an *ignorantia ejus quod oportet* at least as regards the sort of actions the law punishes vindictively. The election has been corrupted by appetite either in a general way or, as is more frequently the case, in a particular instance. This is so because actions have to do with singulars in concrete circumstances and so too do the passions taken in their proper sense of sense appetite.<sup>8</sup> For this triumph of appetite and the consequent darkening of the judgment a man is almost always responsible since the passions lie within his political control.<sup>9</sup> Although he cannot straightway become a just man once the iron chain

1. Cf. *Ia IIae*, q.17, a.1, ad 2 ; *In III Eth.*, lect.1, n.386.

2. *Ia IIae*, q.6, a.5.

3. *Ibid.*, a.8.

4. Cf. *Ia IIae*, q.76, a.3, c. (*apud finem*).

5. "Concupiscentia magis facit voluntarium." *Ia IIae*, q.6, a.7, c.

6. "Omnes qui operantur ex violentia et involuntarii operantur cum tristitia. Unde et in quinto *Metaphysicorum* bene dicitur quod necessitas est contristans, quia contrariatur voluntati. Sed illi qui operantur propter aliquod delectabile adipiscendum, operantur cum delectatione. Non ergo operantur per violentiam et nolentes." *In III Eth.*, lect.11, n.402.

7. *Ibid.*, lect.11, n.410.

8. *In II Eth.*, lect.v, n.292; *Ia IIae*, q.22, a.3 ; Cf. *Ia IIae*, q.9, a.2, ad 2.

9. *In I Eth.*, lect.xx, n.241.

of habit has been formed, he can at least undertake the long patient work of breaking the links, and in any case he could have prevented the habit from being formed.<sup>1</sup> To speak of the *passionum sectator* as a victim sacrificed to the law comes close to ridiculous. Law not only warns him away from the gallows but, fighting appetite with appetite,<sup>2</sup> helps him to become human and fit for community. *Innatus sumus ad habendas virtutes*. Prodding him with its stiffening encouragement, law with its special kind of discipline is restoring reason to its royal control and helping to instill a taste for virtue.<sup>3</sup>

2. *The External Standard and Imputability*. We can see now that the reasons for the law's deafness to pleas of ignorance are not altogether as fierce as Holmes would make them out to be. If the action for which a man incurs liability is one already proscribed by natural law, whether immediately or as determined by custom in the community, ignorance is unlikely to be without fault "*quia naturaliter est menti humanae inditum*."<sup>4</sup> If on the other hand it is an action which is *mala quia prohibita*, here too, granted an adequate promulgation, the state may reasonably suppose or, for that matter, demand a knowledge of the law. *Reus reputabatur propter negligentiam addiscendi*.<sup>5</sup> In the rare cases involving the *difficilia iuris* where ignorance is not negligent, a man may be presumed willing to bear his liability for the common good secured by the law and for the benefits he receives from a community governed by law. He must be patient with the imperfections inherent in the nature of law which has to be generally formulated if it is to be a useful measure of singulars.<sup>6</sup> For cases of unusual hardship there are courts of equity.

This explains how it happens that in actions of purely civil liability there is a more rigid adherence to the external standard than in cases where there is question of crime and of vindictive punishment, and why less allowance is made for ignorance. Imputability of ignorance is usually difficult to determine here and would be practically impossible if allowed as an excuse. Since the action is not as a rule one that is wrong *per se*, there is only the law itself to tell both good men and bad that it is excluded, and that one is liable if he places it. The legislator has banned an action not because it is wrong but to

1. *In III Eth.*, lect.xii, n.513.

2. "Homo pravus, quia appetit delectationem, debet puniri per tristitiam seu dolorem, quemadmodum subiugale, idest sicut asinus ducitur flagellis. Et inde est, quod sicut dicunt, oportet tales tristitias adhibere quae maxime contrariantur amatis delectationibus; puta si aliquis inebriavit se, quod detur ei aqua ad bibendum." *In X Eth.*, lect.xiv, n.2152. Cf. the following passages also.

3. *Ia IIae*, q.94, a.1. c.; *In X Eth.*, lect. xiv, n.2149.

4. *In V Eth.*, lect.xv, n.1072.

5. *Ia IIae*, q.105, a.2, ad 9.

6. *Ia IIae*, q.96, a.1, c. and ad 2.

secure a public good, and for this he depends not on the virtue of the subject but on knowledge of the law. Hence the severity with infractions. When it is generally known that the law is determined to force a result, individuals are inspired to stay informed.

Perhaps the most striking and frequent instance of this sage reasoning behind the external standard is found in the law of contracts. Holmes cites it as a prominent example of how moral phraseology leads to confusion.

Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met ; that is because they have intended different things or because one party has not known of the assent of the other.<sup>1</sup>

Yet the fact is that the courts have bound parties to a contract that *neither* of them intended. One party thinks a promise will be construed to mean a week ; the other, that it will mean when he is ready. The court says it means "within a reasonable time." Whence Holmes concludes :

In my opinion no one will understand the true theory of contract or be able to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having *meant* the same thing but on their having *said* the same thing.<sup>2</sup>

But signs signify. The court is not saying that intentions don't matter in contract. Words normally indicate intent and the court, in a doubtful case, is interpreting them for what they mean or are to mean hereafter. Hence even when it is clear *ex aliunde* in a particular case that intentions do not correspond, or that a party has acted in bad faith, the law, with certain statutory exceptions, will still support a contract in good legal form. This does not argue indifference to justice. Words are as a rule all she has to go by, and the stability of contracts is a social necessity. Instead of assuming the impossible task of ascertaining intent apart from its normal signs, she warns contracting parties to say exactly what they mean.

If the iniquities that result seem to be frequent, that is because contracts are still more frequent. As St. Thomas reminds us in connection with the evils consequent on private property, a system

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1. LERNER, *op. cit.*, p.77.

2. *Ibid.*, p.78.

must be judged not simply by the inconveniences it admits — else we should have to leave the world — but also with an eye to the possibly greater ones it averts.<sup>1</sup> At any rate even moralists who define contract by consent approve the law's procedure here. Indeed the Church follows it in her own jurisprudence despite the fact that her laws, unlike civil statutes, reach directly into the internal forum.<sup>2</sup> And Justice Cardozo (Holmes' successor on the Supreme Court), citing his own experience, shows no aloofness to the moral issue in following the external standard :

Here was a case where advantage had been taken of the strict letter of a contract to avoid an onerous engagement. Not inconceivably a sensitive conscience would have rejected such an outlet of escape. We thought this immaterial. The court subordinated the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life. The end to be attained in the development of the law of contract is the supremacy, not of some hypothetical, imaginary will, apart from external manifestations, but of will outwardly revealed in the spoken or written word. The loss to business would in the long run be greater than the gain if judges were clothed with power to revise as well as interpret.<sup>3</sup>

### III. SOME FURTHER ARGUMENTS OF HOLMES

As drawn from an examination of the external standard, the positivist argument is not without a certain subtlety, especially when, as in *The Common Law*, it is mounted with a great deal of legal erudition. As for some more general arguments and illustrations offered, they are surprisingly fragile. One ventures this censure with circumspection after a reminder in *Natural Law* that "the *a priori* men generally call the dissentients superficial."<sup>4</sup> But careless definition of the point at issue and reckless inference are almost prominent throughout.

In the passage just referred to, Holmes argues the phantom quality of *a priori* rights as follows :

The most fundamental of the supposed pre-existing rights — the right to life — is sacrificed without scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. . . . I remember a very tenderhearted judge being of the opinion that closing a hatch to stop a fire and the destruction of a cargo was justified even if it was known that doing so would stifle a man below. It is idle to illustrate further, because to those who agree with me

1. *In II Polit.*, lect. IV, n. 206.

2. Canon 1513, 2, makes an exception for a will lacking civil form when it is made *in bonum Ecclesiae*.

3. CARDOZO, B., *Growth of the Law*, Yale, 1924, p. 235.

4. LERNER, *op. cit.*, p. 397.

I am uttering commonplaces and to those who disagree I am ignoring the necessary foundations of thought.<sup>1</sup>

To show that the state admits no law above itself and that the individual stands to society as a means to end, he argues :

No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner's protests, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will and his welfare to that of the rest.<sup>2</sup>

In this connection we may recall his decision in *Buck v. Bell* already quoted. There he argued *a fortiori* to the state's right to directly sterilize the unfit from the fact that "the public welfare may call upon the best citizens for their lives," apparently meaning war again. Thus he resolves a grave and delicate issue by a mere *façon de parler*.<sup>3</sup> The United States, for one, has never claimed this direct power over a single life even to guarantee the welfare of a whole nation. It does not call upon a soldier for his *life*. It calls upon him to defend his country, his own *patria*, at the *risk* of life — a substantial distinction even outside the schools.

Again in *The Common Law* he states that force is the *ultima ratio* and (as though this were the same thing) "at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference." And the proof :

If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.<sup>4</sup>

Although in *The Path of Law* Holmes alluded expertly to "the errors of the school," he seems unaware that these *casus* are among the *loci communes* familiar to even passing acquaintance with the manuals of scholastic ethics and moral theology. One might have expected here some recognition, if only to dismiss them, of the formalities of the indirect voluntary and double effect. The assurance and finality with which he proposes these examples as definitive and unassailable evidence of the positivist thesis justify some doubt as to just how searching has been his reflection on the ultimates of the

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1. LERNER, *op. cit.*, p.397.

2. *Ibid.*, p.58.

3. We might note, in passing, the cavalier equation of vaccination with the severance of the Fallopian tubes.

4. LERNER, *op. cit.*, p.59.

law. They certainly indicate a private understanding of what is meant by natural law.

The fact is that positivism has closed his mind to the possibility of any "outside thing" :

What I can't understand is the suggestion that the United States is bound by law even though it does not assent. What I mean by law in this connection is that which is or should be enforced by the courts and I can't understand how anyone should think that an instrument established by the United States to carry out its will and that it can dispose upon a failure to do so, should undertake to enforce something that is *ex hypothesi* against its will. It seems to me like shaking one's fist at the sky when the sky furnishes the energy that enables one to raise the fist. There is a tendency to think of judges as if they were the independent mouthpieces of the infinite, and not simply directors of the force that comes from the source that gives them authority. I think our Court has fallen into the error at times and it is this that I have aimed at when I have said that the common law is not a brooding omnipresence in the sky and that the United States is not subject to some mystic overlaw that it is bound to obey.<sup>1</sup>

For positivism that is indeed an anomaly since the legal order derives all its authority from below and all its strength in the *vis coactiva*. As for the common law and the schools, they say both yes and no to "*princeps legibus solutus est*."

Princeps dicitur esse solutus a lege, quantum ad vim coactivam legis : nullus enim proprie cogitur a seipso ; lex autem non habet vim coactivam nisi ex principis potestate. Sic igitur princeps dicitur esse solutus a lege, quia nullus in ipsum potest iudicium condemnationis ferre, si contra legem agat. . . . Sed quantum ad vim directivam legis, princeps subditur legi propria voluntate ; . . . Unde quantum ad Dei iudicium, princeps non est solutus a lege, quantum ad vim directivam ejus ; sed debet voluntarius, non coactus legem implere. Est etiam princeps supra legem, inquantum, si expediens fuerit, potest legem mutare, et in ea dispensare, pro loco et tempore.<sup>2</sup>

The doctrinaire quality of Holmes' realism would quickly appear from matching it with a typical trial record of an actual American court. It is still a rare judge who would recognize in *The Path of Law* his own thought processes as he pronounces sentence on the criminal. Certainly the common good may be uppermost in his mind, but the law, in principle always and in practice usually, is careful for the individual even where the common good seems to suffer by the law's delay and where, were one to be cynical, the prompt sacrifice of an innocent might offer a handy opportunity *pour encourager les autres*. True, the insistence on due process is itself protective of the common

1. *The Holmes-Laski Letters*, p.822.

2. *Ia IIae*, q.96, a.5, ad 3.

good, but *in exercito* it is for the individual. It would need long proving, for example, to show that during the protracted Rosenberg trial, the justices had present in their deliberations any considerations other than the legal rights of the accused.

On all this American law is explicit. The United States does in fact recognize an overlaw to which she is subject. Her system of judicial review, unique even among common-law nations, that gives the judiciary power to overrule the executive and to declare null the legislation of Congress or the States, is a clear affirmation in practice that law is not force but reason.

This point is worth noting. The impression is sometimes given that Anglo-American jurisprudence functions on a positivist concept of law and admits no absolutes. This seemingly because in contrast to systems of codified law, it proceeds inductively by cases, forming conclusions on the basis of experience, utility, and concrete circumstances instead of finding, or pretending to find them already contained and predetermined in a legal principle. Dynamic, experimental, concrete, "at bottom the juristic philosophy of the common law is the philosophy of pragmatism." Its truth is relative, not absolute.

Such statements can be distinguished. Certainly common law procedure is alien to a type of so called "natural law theory" that is mechanical and rationalistic. Against such understanding of "law as reason" the famous dictum of Holmes: "the life of the law has not been logic, it has been experience" strikes home. It is also true that the administration of the common law both in England and America has been heavily influenced by positivism, and that many common-law judges are steeped in it. Moreover, the common law's concrete method leaves it peculiarly exposed to contamination once the broad natural-law foundation is disregarded. The area of legal experiment then becomes limitless and precedents are established in contravention of natural law.

Later on we will have better chance to judge the accord between the philosophy of the common law and natural-law jurisprudence. For the moment we can be content with a point drawn from the history of the common law and thus of some significance since the common law is its history. It was born and nourished in the ecclesiastical courts; got its name in fact from the *lex communis* of the canonists. It had found itself before positivism was on the scene and had made early room for equity, which is not in the spirit of positivism. Becket, Bracton, and Thomas More were at home with it — men who had firm ideas on how to exegete "*quod placuit principi*."

The king himself ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore, let the king render back to the Law what the Law gives him, namely dominion and power; *for there is no king where will, and not Law, wields dominion*. That as a

vicar of God he ought to be under the Law is clearly shown by the example of Jesus Christ whose place he takes on earth. For although there lay open to God, for the salvation of the human race, many ways and means beyond our telling, His true mercy chose this way especially for destroying the work of the devil : He used not the force of His power but the counsel of His justice. Thus He was willing to be under the Law " that He might redeem those who were under the Law." For He was unwilling to use power, but judgment.

Thus also the blessed Parent of God, the Virgin Mary, Mother of the Lord, who by a unique privilege was above the Law, for the sake of giving an example of humility did not recoil from following lawful ordinances. The king should act likewise, lest his power remain unbridled.<sup>1</sup>

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(To be continued.)



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1. BRACTON, *De Legibus et Consuetudinibus Angliae*, fol. 5b (cited by WU, p.73).