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## Natural Law and Legislation

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## Natural Law and Legislation \*

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Resistance to natural-law jurisprudence in what concerns the court function is largely due to impatience with the hurdles it supposedly places in the way of progress and the evolution of the legal order. But hostility to the natural-law idea as the basis of politics in its general task of directing society through legislation is inspired rather by apprehension. Perhaps the principal ground for this fear is the almost exclusive alliance of natural law with Catholic social philosophy. It has become in the thought of many the philosophical arm of the Church's program for reducing all phases of social life — religious, moral, political, cultural — to an order conformed to her own special blueprint.<sup>1</sup>

There are grounds for this trepidation in a pluralist society like the United States, traditionally and constitutionally jealous of its great civic freedoms — freedom of worship, freedom of teaching, freedom of the press — with relatively little concern for their corresponding responsibilities or awareness of their essential limits. The issue has become critical in recent years as a result of growing Catholic numbers, the heightened sharpness of the polemic against secularism, and the sensational documentation in the writings of Paul Blanchard.<sup>2</sup> These have brought to wide public notice some official pronouncements of the relation of the Church to society, the democratic society in particular, which have come as a frank surprise and embarrassment to Catholics themselves and which theologians are at the moment loyally struggling to exegete in a way that harmonizes with both the magisterium and the First Amendment of the Constitution. The doctrine proposed in these nineteenth-century documents of the magisterium is that the state must profess and promote the Catholic religion, allowing others only such freedom as may be needed to avoid greater evils. And as the necessity for this indulgence exists presumably only because the number of dissidents is at present unmanageable, the earnest Protestant can hardly be chided as querulous for asking what is to happen to his posterity when Catholics are in position at last to call the plays.<sup>3</sup> He knows the

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\* For the first parts of this study, see *Natural Law and Modern Jurisprudence in Laval théologique et philosophique*, Vol. XV, 1959, n.1, pp.32-63; and *Natural Law and the Judicial Function*, *ibid.*, Vol. XVI, 1960, n.1, pp.94-141.

1. Leaving aside the more intemperate and alarmist treatments of this question, see in *Catholicism in America*, Harcourt, 1953, the essays by R. NIEBUHR, ("A Protestant looks at Catholics"), W. HERBERG, ("A Jew looks at Catholics"), and J. COGLEY ("Catholics and American Democracy").

2. To cite a few favorite sources: the encyclicals *Libertas*, *Immortale Dei*, *Longinqui Oceani*, *Testem Benevolentiae*, and of course the *Syllabus Errorum*.

3. "The question arises in the non-Catholic's mind — and it must be recognized as a very disturbing question — whether the liberal, democratic, pluralistic emphasis of

implacable argument for the Catholic position : that the natural law demands that society acknowledge its dependence on God through public profession of the true religion which happens to be only one — and Catholic.<sup>1</sup> Since error has no equal right with truth, the sects have no legitimate claim to free exercise.<sup>2</sup> That a man should be free to embrace and profess the religion his reason tells him is true ; that Church and state should be separated ; that in our times it is no longer apt that the

Catholicism in America is for the Church a matter of basic principle or merely a passing counsel of expediency and necessity, motivated by its present minority status. Suppose Catholics were to become an overwhelming majority of the population and non-Catholics "numerically insignificant" in this country, what then? Ryan and Millar in their treatise *Church and State* tell us in effect that in such a case Catholics would use their power to repeal the First Amendment, establish the Catholic Church as the State church, and outlaw free proselytizing activities on the part of non-Catholics, who would, however, be permitted religious practices "in the family or in such inconspicuous manner as to be an occasion neither of scandal nor of perversion to the faithful!" Is this to be taken as authoritative Catholic doctrine? American Jews who prize the First Amendment as the charter of their freedom as a minority group, are very much concerned to know." HERBERG, *op. cit.*, p.41.

In a revision of the work cited in this passage and entitled *Catholic Principles of Politics*, Macmillan, 1941, Ryan and Boland remark : "While all this is true in logic and theory, the event of its practical realization in any state or country is so remote in time and in probability that no practical man will let it disturb his equanimity or affect his attitude toward those who differ from him in religious faith," p.320. In spite of this attempt at reassurance one may still understand the Protestant minister who persisted : "but it *does* disturb our equanimity." For the rest, it seems a dubious vindication of "Catholic principles of politics" to have to protest the unlikelihood of their ever being reduced to practice.

Monsignor Knox in his *Belief of Catholics*, Harpers, 1927, after a forthright exposition of the strong doctrine, rejects the charge of duplicity levelled against the Church for her readiness to invoke constitutional guarantees of religious freedom when her own liberty of action is involved. "When we demand liberty in the modern state, we are appealing to its own principles, not to ours (p.242)." However, when Communists exploit the Constitution on this same logic they are denounced as at least ungrateful and meanspirited.

1. "Wherefore civil society must acknowledge God as its Founder and Parent, and must obey and reverence His power and authority. Justice therefore forbids and reason itself forbids, the State to be godless ; or to adapt a line of conduct which would end in godlessness — namely to treat the various religions (as they call them) alike, and to bestow upon them promiscuously equal rights and privileges. Since then the profession of one religion is necessary in the State, that religion must be professed which alone is true, and which can be recognized without difficulty, especially in Catholic States, because the marks of truth are, as it were, engraved upon it. This religion, therefore, the rulers of the State must preserve and protect, if they would provide — as they should do — with prudence and usefulness for the welfare of the community." *Human Liberty* (English translation, Paulist Press, N. Y., p.15.) The Latin text cited hereafter is from the Paris edition (Roger et Chernoviz), *Lettres apostoliques de S.S. Léon XIII*, with French translation, tome deuxième. The cited passage appears on p.194.

2. The text has "*Falsum eodem jure esse ac verum rationi repugnat*" (p.206). It would be better to translate "*eodem jure*" as "*having the same standing before the law*" rather than as "*having equal rights*." (English transl. p.24.) Truth and error are not subjects of rights but only persons. And persons in error still have rights.

Catholic religion should be the only religion of the state to the exclusion of all other cults ; that immigrants coming into Catholic regions should be permitted the public exercise of their own religion — these propositions which sound most healthy to democratic ears are all proscribed in the *Syllabus of Errors*.<sup>1</sup>

Organized movements against indecent literature and movies, sometimes with recourse to the courts or to police methods, are another cause of nervousness. Even when there is sympathy with the aims, the technique of pressure in this sensitive area of the arts irritates those who have been taught to look with unlimited confidence to free competition in the market-place as the ultimate test for the validity of an idea. And the outlawing of birth-control clinics has provoked further outrage in its presuming to fix for the whole community a standard of morality that is to all practical purposes Catholic.<sup>2</sup> Ironically, the Catholic hopes his zeal will be understood and indulged once he explains that he is acting in no partisan fashion but in the interests of natural morality. In fact, as might have been expected, he exasperates all the more through this unflattering evaluation of the moral perceptiveness of others.<sup>3</sup>

Undoubtedly there are pitfalls here. Catholic moral teaching is firm and dogmatic and on certain points there are not *buts*, hesitations, or allowances. The principles are certain ; there are no doubts as to their objective truth and salutary import. But when there is question of implementation it must be remembered that principles cannot be

1. "Liberum cuique homini est eam amplecti ac profiteri religionem quam rationis lumine ductus veram putaverit." (prop. 15) ; "Ecclesia a statu statusque ab Ecclesia seiungendus est." (prop. 55) : "Aetate hac nostra non amplius expedit religionem catholicam haberi tanquam unicam status religionem, ceteris quibuscumque cultibus exclusis. Hinc laudabiliter in quibusdam catholici nominis regionibus lege cautum est ut hominibus illuc immigrantibus liceat publicum proprii cuiusque cultus exercitium habere." (props. 77-78.) For the background and interpretation of the *Syllabus*, cf. the articles in *Dictionnaire de théologie catholique* and *Catholic Encyclopaedia*.

2. While these Connecticut and Massachusetts statutes were enacted under Protestant auspices, it is Catholic resistance to their repeal which keeps them on the books.

3. "I feel that Catholicism has a special blame on at least one point of friction between us. This point has to do with the effort to apply the standards of Natural Law to the life of the community. There is something ironic in the fact that the concept of Natural Law is regarded by Catholics as a meeting ground for Catholics and non-Catholics, and for Christians and non-Christians, whereas, as a matter of fact, it is really a source of tension between the Catholics and non-Catholics. Marital and family standards on questions both of divorce and birth-control are the chief points at issue. . . . Those of us who believe that rigid Natural Law concepts represent the intrusion of stoic or Aristotelian rationalism into the most dynamic ethic of Biblical religion are unqualifiedly accused of "moral relativism" or even moral nihilism : our motives in rejecting the thesis that a rigid legalism is the only cure for relativism are impugned ; and we are given no credit for wrestling with the moral problems of such historical creatures as human beings who exhibit both a basic structure and endlessly unique elaborations of that structure. This in our opinion makes a rigid rational formula inapplicable while there is no situation in which the double love commandment is not applicable." R. NIEBUHR, *Catholicism in America*, op. cit., p.30.

uniformly applied to their concrete material. "*Non possunt eodem modo applicari omnibus propter diversitatem rerum humanarum.*"<sup>1</sup> Attempts to monitor the public morality have sometimes gone beyond the limits of prudence and even of justice<sup>2</sup> through failure to note the precise relation of natural law to the political order. Natural law and human law differ *as law*. That is to say they regulate human actions differently.

Natural law is determined, so to speak, by the essence of its objects. It is discovered, not made, and its content is grasped by speculative intellect. Natural-law precepts, unlike human laws, are not the product of human practical reason but are the first principles which direct it.<sup>3</sup> They are thus the measures of human laws which are the instruments for rationalizing society and bringing its activity to accord with the objective moral order. In this sense the natural law, "*ipsa rationalis natura*,"<sup>4</sup> is indeed the norm of positive law. But that does not mean that whatever natural law prescribes can aptly or even justly be commanded by positive law as well. Natural law, for example, forbids lying; the positive law does not and could not. This obvious example is enough for the moment to indicate the point we are trying to make: that human law, being the work of practical reason, must resign itself to limitations. It requires for validity the verification of conditions of which the natural law is independent and natural law itself prescribes that these limitations be respected.

*Multa autem diriguntur lege divina quae dirigi non possunt lege humana. Plura enim subduntur superiori causae quam inferiori. Unde hoc ipsum quod lex humana non intromittat de his quae dirigere non potest, ex ordine legis aeternae provenit.*<sup>5</sup>

We must now consider in detail the two general sources of limitation on human positive law: consent and possibility.

#### I. CONSENT

It was not until the later scholastics like Bellarmine and Suarez, in the period that saw the emergence of state absolutism, that detailed

1. *Ia IIae*, q.95, a.2, ad 3.

2. While there is no such thing as a moral right to do wrong, there can be — depending on circumstances — a right against interference with one's freedom of action by the public power. It is at least highly questionable, for example, that the civil power has any right to prohibit and punish the practice of contraception (as distinct from the sale and manufacture of contraceptive devices). One has only to reflect on the consequences implicit in the granting of such power with its accompanying right of surveillance to realize how oppressive and disruptive of the common good such legislation could be.

3. *Ia IIae* q.94, a.1, ad 2.

4. SUAREZ, II, *De Legibus*, c.XIII, n.2.

5. *Ia IIae*, q.93, a.3, ad 3.

attention was given to the relation between the people and the authority governing them. Scholastic theories on the origin of authority in civil society differ in their shading but there is common agreement that it comes to the state, the organ of coercive power, through the people in whom it is first resident, not as single individuals but as a multitude. Secondly, all recognize as legitimate a form of government in which the multitude reserves to itself a role in that special act of the state called legislation. We need not stop to examine the ways in which this acceptable scholastic doctrine differs from the romantic and positivist forms of liberal democracy originating in the eighteenth and nineteenth centuries except to note that political authority has its immediate source in the nature of civil society itself, not in the free will of individuals pooling their personal rights and transmitting them to the state. Civil authority is in other words *de lege naturae*. There are consequently properties attaching to its essence as regards its end and basic function which in no way depend on human consent.<sup>1</sup>

Not only is the democratic form of government considered legitimate, but in what touches legislation, St. Thomas in several brief important passages of the treatise on law, recognizes the authority of the multitude as an element of all positive law irrespective of the particular kind of regime under which it lives. In two different articles he cites with approval Isidore's description of human law :

Lex est constitutio populi secundum quam majores natu simul cum plebibus aliquid sanxerunt.<sup>2</sup>

In the first of these two articles he is treating explicitly the question as to who has the right to make laws. He argues that no private person may do so because it is within the province of the *multitude* to order activity to the common good :

Lex proprie, primo et principaliter respicit ordinem ad bonum commune. Ordinare autem aliquid in bonum commune est vel totius multitudinis, vel alicujus gerentis vicem totius multitudinis. Et ideo condere legem vel pertinet ad totam multitudinem, vel pertinet ad personam publicam quae totius multitudinis curam habet. Quia et in omnibus aliis ordinare in finem est ejus cujus est proprius ille finis.<sup>3</sup>

Only a public person, the vicar of the people (*gerens vicem totius multitudinis*) can make law because the law requires a coercive power which only the multitude as such possesses.

Potest enim privata persona solum monere, sed si sua monitio non recipiatur, non habet vim coactivam quam debet habere lex ad hoc quod

1. Cf. SUAREZ, *Defensio fidei catholicae et apostolicae adversus anglicanos errores*, lib.III, cii. (Vives, vol.XXIV).

2. *Ia IIae*, q.90, a.3, sed contra.

3. *Ibid.*, resp.



efficaciter inducat ad virtutem. . . . Hanc autem virtutem coactivam habet multitudo vel persona publica ad quam pertinet poenas infligere. . . .<sup>1</sup>

In the second article referred to, treating of the origin of law (*ut instituat a gubernante communitatem*), he speaks of the mixed regime which he considers best of all and which he distinguishes from "democracy" understood as the simple *regimen totius populi*. In this best, and therefore most natural, society the people exercise a part in government (*gubernatio civitatis*) and in the passing of laws.<sup>2</sup> And in a subsequent article we are told that whatever scope be allowed the multitude's authority with respect to the law-making function under non-democratic rule, it remains sovereign in a society composed of a "free multitude" and can even overrule the ruler :

Si enim sit libera multitudo, quae possit sibi legem facere, plus est consensus totius multitudinis ad aliquid observandum quem consuetudo manifestat, quam auctoritas principis, qui non habet potestatem condendi legem, nisi in quantum gerit personam multitudinis. Unde licet singulae personae non possint condere legem, tamen totus populus legem condere potest.<sup>3</sup>

Despite this liberal strain in scholastic political theory, which became even more pronounced with Bellarmine and Suarez, Catholic thought did not make easy friends with the democracy as historically realized. *Testem Benevolentiae* is there to witness that even the American brand was less the object of benevolence than suspicion.<sup>4</sup> The Church is still felt to be opposed to it in principle and it is uncertain to many that in coming to terms with it she is not just bowing before a *fait accompli* and waiting for better times. "Acquiescence" in fact is her own word for it :

Although in the extraordinary condition of these times the Church usually acquiesces in certain modern liberties, not because she prefers them in themselves, but because she judges it expedient to permit them, she would in happier times exercise her own liberty and by persuasion, exhortation, and entreaty, would endeavor, as she is bound, to fulfill the duty assigned to her by God of providing for the salvation of mankind.<sup>5</sup>

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

2. *Ia IIae*, q.95, a.4, c. (tertio).

3. *Ibid.*, q.97, a.3, ad 3. Cf. also q.97, a.1, c. (ex parte vero hominum) which implies a certain appropriateness of a democratic regime where the multitude is *bene moderatus et gravis*.

4. Cf. J. T. ELLIS, *The Life of James Cardinal Gibbons*, Bruce, 1952, 2 vols., ch.XVI ["Americanism"].

5. *Human Liberty*, p.23. [Si vero ob singularia reipublicae tempora usuveniat, ut modernis quibusdam libertatibus Ecclesia acquiescat non quod ipsas per se malit, sed quia permissas esse iudicat expedire, versis in meliora temporibus, adhibitura sane esset libertatem suam et suadendo, hortando, obsecrando studeret uti debet, munus efficere sibi assignatum a Deo, videlicet sempiterna hominum saluti consulere. Text, p.204.]

In his 1944 Christmas allocution, Pius XII remarked with apparent approval that "in times such as ours when the activity of the state has become so immense and critical, the democratic form of government seems to many to be a postulate of nature imposed by reason itself."<sup>1</sup> One must candidly admit that the Holy See has sounded here a fresh note different from that to which our ears have been accustomed in the pronouncements of the embattled nineteenth-century Pontiffs and of even so progressive a pope as Leo XIII.<sup>2</sup> Indeed the corpus of Leonine teaching on the organization and conduct of political society is, next to the *Syllabus* itself, the great source of concern to the liberal.

Historical developments account for this change of key. For the Church of Leo's time with its still fresh memories of a French, a Spanish, and an Italian revolution, the threat came from the "capricious multitude" and the "seditious bands"—undisciplined, propagandized, inflamed. "*Haec turbulenta tempora et rerum novarum libido*" provide the background.<sup>3</sup> Today the danger comes rather from the totalitarian state, an immense well of unchecked power holding the people in slavery, with its way prepared and its grip secured by suppressing the very political liberties the Church herself was not much more than a half-century ago roundly condemning. The shift is only momentarily embarrassing. Second thought will find in the turn of events a vindication of Leo's shrewd analysis of the new forces at work in Europe and a sombre confirmation of his prophecy that the liberalism of that day, given its philosophy and its mood, was clearing a straight path to tyranny—*iter ad tyrannicam dominationem proclive*.<sup>4</sup>

*Denzinger* can be a dangerous weapon with no other companion volume but the dictionary. Nothing can be so easily and innocently abused as a papal or conciliar document read outside its historical context. Encyclicals are not devotional luxuries. They are issued in

1. "Al tempo nostro in cui così vasta e decisiva è l'attività dello Stato, — la forma democratica di governo apparisce a molti come un postulato naturale imposto dalla stessa ragione." *AAS*, XII (1945), p.13.

2. Cf. "Tolérance et intolérance religieuse", *Documentation Catholique* for March 15, 1959, cols. 335-348, a conference delivered originally in Italian by Giacomo Cardinal Lercaro (translated into English in *Catholic Mind* for Jan. 1960).

3. Text, p.174. Cf. also p.189.

4. *Ibid.*, p.188. "So great is the confusion today, that we see commonsense principles, which have been ignored in the past by the worshippers of a false and deceiving liberty, being now used in a false and deceiving manner in order to destroy true liberty. Those maxims — dealing with our obligations toward truth and with the rights of the common good — which were branded as an outrage against human autonomy when the Catholic Church set them forth to condemn theological liberalism, and which, by opposing unbridled, divinely unlimited freedom of expression, were of a nature to save freedom of expression — the Communist State is no trumpeting them and perverting them in order simply to annihilate freedom of expression. A sad Times' revenge. And, for everybody, an opportunity for melancholy reflection." J. MARITAIN, *Man and the State*, Chicago, 1953, p.116.



response to a particular need or to settle some point of doctrine which happens to be of actual moment. This must be kept in mind especially when it is a document dealing not with a point of dogma in its immutable "abstract" character (as, for example, the definition of the Assumption) but with some problem touching the practical order — above all when it is a question of politics. The treatment of problems here is sometimes so closely involved with the contingent historical realities that the principles on which they are resolved must be clearly disengaged before they can be validly applied in a context that is different.<sup>1</sup>

We have a good illustration of this in the celebrated encyclical *Libertas Praestantissimum* of Leo XIII which is an *ex professo* analysis and condemnation, of the "modern liberties." To understand what is being condemned and why and how far in the energetic paragraphs of *Libertas*, we must remember that they are aimed at a particular form of revolt against the traditional Christian concept of political society (which concept, it would also be well to note, had itself taken a particular and by no means ideal form in nineteenth-century Europe). The enemy identified quite early in the opening pages of the encyclical is rationalism. It is with rationalism in mind that the metaphysics of Christian liberty is explored at length, and it is as formal products of rationalist principles that the liberties we think of today as "civil" are repudiated. This is clear from the nexus the Pope makes in descending from his general treatment of liberty to his specific condemnation of the new freedoms :

What the Naturalists or Rationalists aim at in philosophy, that the supporters of Liberalism, carrying out the principles laid down by Naturalism, are attempting in the domain of morality and politics. The fundamental doctrine of Rationalism is the supremacy of human reason, which, refusing due submission to the divine and eternal reason, proclaims its own independence, and constitutes itself the supreme principle and source and judge of truth. Hence these followers of Liberalism deny the existence of any divine authority to which obedience is due, and proclaim that every man is the law to himself ; from which arises that ethical system which they style *independent* morality, and which, under the guise of liberty, exonerates man from any obedience to the commands of God, and substitutes a boundless license. The end of all this is not difficult to foresee, especially when society is in question. For once man is firmly convinced that he is subject to no one, it follows that the efficient cause of the unity of civil society is not to be sought in any principle external to man, or

1. "It would be a mistake to treat the encyclical [*Quadragesimo Anno*] as if it were the Decalogue engraved in stone on Sinai. Like any papal pronouncement on social questions, it is a combination of eternal principles, based on natural law and divine revelation, and of application to contemporary situations. There is a mixture of stern and certain judgment on some points with somewhat hesitant prudential suggestions on others. As historical situations change, some judgments and prudential advice directed to these conditions are bound to be dated." J. CRONIN, S.S., in *Social Order* for January 1956 (reprinted in *Catholic Mind*, Nov. 1956).

superior to him, but simply in the free will of individuals ; that the authority of the state comes from the people only ; and that just as every man's individual reason is his only rule of life, so the collective reason of the community should be the supreme guide in the management of all public affairs. Hence the doctrine of the supremacy of the greater number, and that all right and all duty reside in the majority.<sup>1</sup>

In other words, the right to choose one's own form of worship ; the right of the state to profess no religion and to accord all religions equal standing before the law — these liberties were being coupled with a naturalist anthropology ruling out a supernatural order and declaring man and society *expers legis*. This was the *droit nouveau* — “ *illa nefaria vox ‘non serviam!’* ” It had taken form in the aggressively laicist state (*genus id rei publicae recens*) and in this concrete form Leo assails it.

It would be tiresome to list all the allusions indicating the limited, localized, bearing of *Libertas*. But they must be taken into account if we are to gauge properly the scope of condemnation and approval. The rationalist principle of separation of Church and state is rejected but that does not imply that the manner in which the “ Catholic states ” of the nineteenth century had realized their union represented the ideal arrangement. Nor does it follow that all kinds of “ separation ” fall equally under the ban. To determine this we need other principles besides those developed in the encyclical which is not a treatise on politics or law but a polemical document attacking one definite political heresy. The nature of that heresy made it proper to insist on the absolute aspects of truth ; on man's absolute dependence on a higher truth and a higher power ; on the divine origin of law and authority, and on the link between human and eternal law — on all that the *novum jus* was subjecting to attack.

This immediate and urgently practical objective of Leo XIII — to check the spread of militant nineteenth-century European liberalism — has much to do with shaping the picture of positive law which emerges from the encyclical and which is of some importance as regards the factor of consent. The alliance of throne and altar under the Habsburgs and Bourbons should not mislead us into thinking that the so-called Catholic state of their day embodied in a pure or even very commendable fashion the ideal principles of Catholic political philosophy.<sup>2</sup> It was closer in spirit to the absolutist than to the scholastic

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1. *Human Liberty*, p.12 [Text, p.186].

2. “ Did the Catholic ‘ thesis ’ go out with the Bourbons ? And do we now hover in midair, as it were, clutching our collective principles to our collective bosom, unable to make any application of them (save where there is dictatorship on the Bourbon model, as in Spain), condemned to find our way through the contemporary world into the future (which belongs, I hope, to democracy) touching only on the precarious footing of expediency, what time we look back over our shoulder at the diminishing figure of Isabella II ? What

or medieval notion of the state in its concept of the prince's authority. He was under God, it was true, but this was stressed as much to enhance as to moderate his power. There was not much awareness of or concern for what the people might desire as regards the administration of the body politic. There was no real *libera multitudo*. Legislative authority was not viewed as coming from the bottom up but from the top down.

In a formal treatise on politics or law there would be some examination of the people's role, especially in the democratic and pluralist society. As it is, the Pope is writing in terms of a definite historical situation, the "*singularia reipublicae tempora*," and of the kind of state with which he is currently experienced.<sup>1</sup> His charge consequently is not to a self-determining multitude — its responsibility is always described in terms of obedience — but to the princes and *legumlatores*, the "ministers of God."<sup>2</sup> And they are reminded of their obligation to the only authority above them, the eternal law, and of their principal duty of keeping the multitude in obedience. "*Hoc fere civilis legumlatoris munus est, obediētes facere cives*."<sup>3</sup> It is noteworthy in this connection that in both *Libertas* and *Immortale Dei* the civil rulers are exhorted to exercise their power *paternally*.<sup>4</sup>

Of all the properties to be respected in the structure of human law, the dependence on and conformity to the eternal law is the only one stressed.<sup>5</sup> No consideration is given to the part played by consent

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an extraordinary posture for the universal Church?" J. C. MURRAY, S.J., "The problem of 'the religion of the State.'" *American Ecclesiastical Review* (CXXIV), May 1951, p.348, n.18.

Cf. also the chapter "Church and State" in MARITAIN, *op. cit.*, especially pp.152-162.

1. On this point see the conference of Cardinal Lercaro cited in page 243, note 2. "It is only fair to consider the condemnations of Gregory XVI and Pius IX in the light of the adversaries against whom they were pronounced. They were not concerned with the distinction between dogmatic and civil tolerance which we have been stressing. They did insist on total intransigence on the theoretical plane even to the point of expecting Catholics to deny all spontaneous recognition of religious freedom to dissenters. But in analyzing their statements we must insist on certain principles of historical criticism which demand that any statement be judged in its historical context — in this case, in relation to the anti-Catholicism of the time." *Catholic Mind* translation, p.22.

2. *Human Liberty*, p.17.

3. Text, p.189.

4. "Benigne ac fere cum caritate paterna populo praeesse." *Libertas*, Text, p.194. "Debet igitur imperium justum esse, neque herile, sed quasi paternum." *Immortale*, Text, p.20. Similarly, the people are urged beyond obedience to reverence and love for their rulers.

5. "Of the two general canons of human legislation which the Scholastic tradition elaborated Leo XIII adverts to only one, the moral law or the canon of justice. The other, the canon of consent, (secondary indeed, but essential), is here omitted. . . . It would seem that in Leo XIII the Power has come to occupy the central position that in medieval times has been occupied by the People. And the consent of the people does not assume the same importance as a dynamic of human legislation that it had in earlier

of the people as an element of valid legislation and hardly any analysis (although there is notice) of the limitations placed upon human law in consequence of its restricted power, purpose, and mode of action.

A complete exposition of the legislative function, as distinct from an exposition of the errors of liberalism, would have to take more account of the difference between the content of human law and the *lex aeterna*. The authority of the ruler does not descend in direct vertical line from the eternal law. We should conceive it rather as flowing from the eternal law to the legislator *through the people* whose will for justice and whose coercive power he incarnates — *vicem gerens totius multitudinis*. Cajetan makes this point rather vigorously :

Seclusa namque divina lege, in multitudine generis humani nullus est princeps, sed ipsa multitudo commune bonum primo respicit per seipsam vel committit alteri : alioquin non princeps sed tyrannus esset qui multitudini praeesset.<sup>1</sup>

This is where the distinction between the state and the body politic itself is important. The state — or sometimes the *government* — is society's organ of administration, of law, and of coercion.<sup>2</sup> This means that before we can determine what duties fall upon the state with regard to legislation (let us say as to the public profession of religion), we would first have to determine what obligations lay upon the body politic and which of them could justly or aptly be legislated given the legislator's mandate. Not all of society's objective obligations can be implemented by the state for the simple reason that the means at its disposal are not adequate. Society has an obligation to express its gratitude to God as its Author and Conserver but human law cannot

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times. It would seem in fact that Leo XIII tends to emphasize, not the conscience of the people and the need of their consent to human legislation, but rather the conscience of the legislator and his obligation to consent to the higher law. This was the notion that had come to the fore in the age of absolutism. In that age the conscience of the king came to be regarded as the source whence justice flowed down to the community, instead of the conscience of the community being the source whence justice accrued to the king's legislation. Correlatively, the stress was laid on the duty of the people to consent to the king's legislation, rather than on the duty of the king to obtain the consent of the people to his legislation. It would seem that Leo's polemical bias led him closer to absolutist conceptions than to the more original Christian and medieval ones." J. C. MURRAY, S.J., "Leo XIII on Church and State." *Theological Studies*, March, 1953, p.23.

Perhaps a qualifying note must be added as to the purity of medieval ideas on the nature of the king's authority which was sometimes apparently modelled on the pope's (which comes from above). The idea of the king being a vicar of God rather than of the people was perhaps encouraged by the rite of kingly anointing and his receiving the crown at the hands of the bishop.

1. CAJETAN, *In Ia IIae*, q.90, a.3. In his allocution to the members of the Rota in October of 1945, Pius XII laid stress of the different manner in which authority derives in the Church and in the state. Cf. *AAS*, XII (1945), p.260.

2. Cf. MARITAIN, *Man and the State*, *op. cit.*, pp.265 ff. ; 12 ff.

legislate gratitude. A Catholic legislator knows there is only one true form of worship but the multitude may not, and the body politic cannot know or be morally obliged to acknowledge any other truth than what the people know. And even when a majority does know it, there may still be reason to ask whether it is suitable for law to intervene. Not only justice but utility must regulate the practical steps taken to realize it.

A discussion of tolerance belongs more properly under the heading of possibility than of consent, but we might consider it here because it provides another illustration of how the particular preoccupation of the encyclical gives a particular shading to the principles. The Pope takes up the matter of tolerance of evil after having dealt singly with each of the "false liberties" and their bitter fruits :

Yet with the discernment of a true mother, the Church weighs the great burden of human weakness, and well knows the course down which the minds and actions of men are in this our age being borne. For this reason, while not conceding any right to anything save what is true and honest, she does not forbid public authority to tolerate what is at variance with truth and justice, for the sake of avoiding some greater evil, or of obtaining or preserving some greater good. God Himself in his providence though infinitely good and powerful permits evil to exist in the world, partly that greater good may not be impeded, and partly that greater evil may not ensue. In the government of States it is not forbidden to imitate the Ruler of the world ; and as the authority of man is powerless to prevent every evil, it has (as St. Augustine says) to overlook and leave unpunished many things which are punished, and rightly, by divine Providence. But if in such circumstances for the sake of the common good (and this is the only legitimate reason), human law may or even should tolerate evil, it may not and should not approve or desire evil for its own sake ; for evil of itself, being a privation of good, is opposed to the common welfare which every legislator is bound to desire and defend to the best of his ability.<sup>1</sup>

The Pope then goes on to warn that the more evils the state is forced to tolerate, the further it is from perfection.

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1. *Human Liberty*, p.22. [Nihilominus materno iudicio Ecclesia aestimat grave pondus infirmitatis humanae ; et qualis hic sit, quo nostra vehitur aetas animorum rerumque cursus, non ignorat. His de causis, nihil quidem impertiens juris nisi iis quae vera quaeque honesta sint, non recusat quominus quidpiam a veritate iustitiaeque alienum ferat tamen publica potestas, scilicet majus aliquando vel vitandi causa malum, vel adipiscendi aut conservandi bonum. Ipse providentissimus Deus cum infinitae sit bonitatis, idemque omnia possit, sinit tamen esse in mundo mala, partim ne ampliora impediuntur bona, partim ne majora mala consequantur. In regendis civitatibus rectorem mundi par est imitari : quin etiam cum singula mala prohibere auctoritas hominum non possit, debet multa concedere atque impunita relinquere, quae per divinam tamen providentiam vindicantur, et recte. Verumtamen in ejusmodi rerum adjunctis, si communis boni causa et hac tantum causa, potest vel etiam debet lex hominum ferre toleranter malum, tamen nec potest nec debet id probare aut velle per se, quia malum cum sit boni privatio, repugnat bono communi quod legislator, quoad optime potest, velle ac tueri debet. Text, p.204.]



Now although St. Thomas is cited in the context, there is a significant difference in approach. In his treatise on law Thomas considers toleration of evil as consequent upon the very nature of human law and of political society.<sup>1</sup> Leo does not present the doctrine here in terms quite as universal. He is solving a case of conscience for the harried rulers "in this our age." From *Libertas* alone we might gather the impression that the toleration of evil — in this case the modern liberties — is a sort of dispensation relaxing an existing obligation of the ruler to enforce the prescriptions of the eternal law to the full (*Ecclesia non recusat . . .*) — almost as though a really fervent and conscientious ruler would take arms against the whole sea of evils and by opposing end them. The necessity of tolerance appears as something exceptional due to times exceptionally out of joint (*quo nostra vehitur aetas animorum rerumque cursus*).

We might in fact gather the same impression from St. Thomas himself when he too is dealing with the justification for tolerance of a particular evil, for example, the rites of infidels.<sup>2</sup> But in the treatise on law tolerance is tied in with the nature of human law as a measure for a human multitude. *Tolerance* can prove an ambiguous word. In ordinary language it is taken for the attitude of forbearance and indulgence and so may convey the idea that the law's refusal to stamp out all evils is something accidental to the function of law, and that perfect "ideal" law, law *per se*, would move against them. But by definition, that is, given the reason for its necessity in the first place and its reliance on coercion, "ideal" law must make choices and husband its energies. *Lex datur populo*. It is for the human community and must consequently aim low. That is precisely how the human legislator does obey and enforce the eternal law. Notice how altogether general and doctrinal is St. Thomas' handling of this point of political prudence :

Lex ponitur ut quaedam regula vel mensura humanorum actuum. Mensura autem debet esse homogenea mensurato ut dicitur in X *Metaphys.* : diversa enim diversis mensuris mensurantur. Unde oportet quod etiam leges imponantur hominibus secundum eorum conditionem. . . . Lex autem humana ponitur multitudini hominum in qua major pars est hominum non perfectorum virtute. Et ideo lege humana non prohibentur omnia vitia, a quibus virtuosus abstinere ; sed solum graviora, a quibus possibile est majorem partem multitudinis abstinere ; et præcipue quae sunt in nocumentum aliorum, sine quorum prohibitione societas humana conservari non posset, sicut prohibentur lege humana homicidia et furta et hujusmodi.<sup>3</sup>

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

2. *IIa IIae*, q.10, a.11, c.

3. *Ia IIae*, q.96, a.2, c. Cf. also ad 2.



It might help to compose honest fears were we to insist more on this natural-law philosophy of tolerance and show how alien it is to "the perilous notion of the optimum,"<sup>1</sup> as a legislative norm. To many people natural-law jurisprudence is known only for its rejection of relativism and of the notion that "truth and error have equal rights." Realizing that constitutional freedoms mean in effect the civil, not moral, right to error, they fear that a natural law regime must logically involve the suppression of the liberties themselves. They are confirmed in this fear by the flavor of much Catholic writing where battle is still being waged against secularism, rationalism, and moral relativism with a consequent heavy accent on the absolute, immutable, and transcendent aspects of moral principles and on the evils that flow from their neglect.

Toleration of evil is not a favor or an act of legislative munificence. If it were that, it could not be defended at all. Wherever toleration is reasonable it is also necessary. It becomes a natural-law obligation to the common good. As Pius XII expressed it: "the duty to repress religious and moral deviation cannot . . . be an ultimate norm for action. It must be subordinated to higher and more general norms."<sup>2</sup> It is certainly a reasonable political judgment that the guarantees of civil liberties like freedom of the press and assembly are the necessary protections of human liberty itself and of the common good, and that a power to legislate which would even risk the loss of these guarantees would be too great a price to pay for security against their abuse. For that reason the people may decide to place stringent limits to the state's competence in matters touching their exercise. Where there is danger to the common good from the abuse of these civil rights, statutes tightly drawn and expressing the consensus (presumably not depraved) can deal with particular evils.

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Man's specific perfection and dignity are found in his liberty. *Libertas praestantissimum munus Dei*. This is of course to be understood not of the mere physical power to choose between right and wrong, which is only the foundation of true liberty. We mean rather the power and mission to ratify by his own choice the purposes of divine Wisdom and to contribute consciously to his own perfection. Both on the natural and supernatural levels this remains the human vocation. The most efficacious grace respects this essential human role. "*Noli cogitare te invitum trahi*." To be drawn by the *tractio Patris* one must run with the pull (*quod currit trahitur*).<sup>3</sup>

1. J. C. MURRAY, S.J., "Leo XIII on Church and State," *loc. cit.*, p.25.

2. In an allocution to the Italian jurists in November 1953, AAS (XVI), p.597.

3. ST. AUGUSTINE, *Tract. 26 in Joannem*.

In this perspective it can be seen that law like society itself must be in the final service of freedom. And since every human law implies restraint and may often curtail liberties otherwise justly exercised, it can be justified only because it promotes another and more urgent liberty. A genuine social value, and *a fortiori* an individual value, may be sacrificed by even good law because the state is faced with a choice of a lesser evil or between two incompatible goods. It is a costly restraint on liberty to draft young men into military service when they would ordinarily be following their own chosen careers, but it is a restraint for the sake of liberty. Less obviously but just as tangibly, it is to secure the benefits of freedom that society in taxing his income, limits a man's freedom to spend as he will.

When there is question of material values, the choice of which to sacrifice is not usually difficult since they can be quantitatively appraised. But the spiritual and properly human goods pose a problem. And the problem becomes more thorny in a pluralist society whose members are not agreed on the comparative values in question.

The modern democracy has resolved the problem by choosing for the "modern liberties" as against whatever other values might be realized through their curtailment. This choice reflects a value judgment, of course, but it does not need the premises of moral relativism or liberalism to make it intelligible although that is the rationale sometimes offered. It means only that, given the circumstances of a particular society and its culture, these political freedoms have been judged to be the normal conditions of progress, and that on the basis of experience, historical memories, prudent fears, and its concept of the happy life, a people has preferred the risk of liberties abused to the risk of committing to the public power the authority to decide what it may read and say. It is confident of dealing capably with the one evil through its own resources, including statutes where necessary, whereas the public power is harder to control. We can speak here of a practical relativism, a sort of pragmatic indifference on the part of the state. It is not committed to the view that there is no truth, that one religion is as good as another, or that there is no objective difference between right and wrong. But the people have withdrawn or, more exactly, withheld from it the power to pronounce where the truth lies. Civil rights as such are negative immunities. The Bill of Rights does not affirm the citizen's independence of natural law or his moral right to write or to worship as he pleases. It is even in its language a catalogue of restrictions on the state's coercive power: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Natural law ratifies this public option. It denies a moral right of the individual to depart from objective moral norms through abuse of liberty and yet, given the norms of consent and utility, concedes a civil right not to be restrained by the civil power.

Much is written these days in praise of the genius of the constitutional democracy and of the pluralism on which it is premised and which is supposed also to invigorate it. It should be noted, however, that pluralism is not a virtue when it exists with respect to moral and religious standards on which society ought to be agreed. A body politic should have a spiritual patrimony. The more pluralist in this direction, the less united, the less *one*, is the community on the human level and the less it ministers to the life of virtue. Its role in this area becomes more and more negative and the common good, taken as the object for which the state may directly strive, tends to be interpreted in exclusively material, morally neutral, terms. The evil here is not so much that natural-law principles are not incorporated in law — this in itself may be only symptomatic — but that the community itself is uncommitted to them. With neither law nor custom strong enough to sanction them, they lose ground steadily and no longer act as effective norms for liberty. When they go hand in hand with such indifference in the body politic and become the instruments for promoting it, the modern liberties pose a threat to democratic society which more than any other requires for its preservation a people "*bene moderatus et gravis communisque utilitatis diligentissimus custos.*"<sup>1</sup>

## II. POSSIBILITY

Since it is an instrument of practical reason, the first limitation on the scope of legislation is imposed by its end. "*Ratio eorum quae sunt ad finem sumitur a fine.*"<sup>2</sup> This purpose is the common good of the body politic, the good of civil society as common to all.<sup>3</sup> It is for this that society originates and it is to secure and promote this good, the *bonum totius et omnium*, that the state legislates. There is no other justification for the public act or law, for its compulsion of free individuals and its claim on their obedience.<sup>4</sup>

That is why it can be said that the purpose of law is to make men good. It does so because it adjusts the parts to the whole and effects a smooth functioning of parts within it.<sup>5</sup> "*Turpis est omnis pars*

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

2. *Ia IIae*, q.102, a.1, c.

3. Cf. *De Regimine Principum*, I, 14.

4. *Ia IIae*, q.96, a.4, c.

5. *Ia IIae*, q.92, a.1, c.

*quae suo toti non congruit.*"<sup>1</sup> It is the proper excellence of a part to serve the good of the whole and the members of a community are its parts. Otherwise we would have not a community but a mere crowd. We have already seen how we are to understand this statement which to our modern viewpoint with its modern concerns may have a totalitarian ring. The reason why a human person may be subjected to the common good of society is that society has a moral, human, purpose — the *communicatio in bene vivendo*, — and because it is in and through political society that the individual finds his own proper fulfilment.<sup>2</sup>

It follows from this that the juridical and moral orders, while intimately related, are not coextensive. Human laws aim at one part of the moral order, the good of justice, whereby is furthered the good of political society. It is through man's social nature that law connects with the moral order, regulating him with respect to other individuals and the common good.<sup>3</sup> His individual moral integrity is of no immediate interest to the law except as it touches on justice. The law will not bother him, be he ever so concupiscent, until he upsets the common life. The legislator does not seek an individual's moral virtue as the good of that individual in the way a parent seeks the moral good of his child. If the law aims to make Socrates temperate and brave, it is not with a view to his own everlasting crown. It is so that he will not become publicly drunk or panic in battle. All the virtues admit some connection with legal justice and the law wants them not as goods for Socrates, which they are, but for the common good in which Socrates shares.<sup>4</sup>

It would be wrong then to give to human law the same scope of interest as the natural law, as it would be equally wrong to deny the moral purpose of law because of its restricted field of operation. *Abstractio non est negatio.* It is true that there is no virtue whose act the state may not at some time require, though not *as virtuous*.<sup>5</sup> And it is likewise true that an individual's moral qualities affect his stature as citizen. In fact, these may have more repercussion on the common good than on the particular good of another individual citizen.<sup>6</sup> (His

1. *Ia IIae*, q.92, a.1, ad 3.

2. "Omnes qui sub communitate aliqua continentur comparantur ad communitatem sicut partes ad totum. Pars autem id quod est totius est ; unde et quodlibet bonum partis est ordinabile in bonum totius." *IIa IIae*, q.58, a.5, c. Cf. also a.9, ad 3.

3. *IIa IIae*, q.58, a.5, c.

4. "Bonum cujuslibet virtutis, sive ordinantis hominem ad seipsum sive ordinantis ipsum ad aliquas personas singulares, est referibile ad bonum commune ad quod ordinat justitia. Et secundum hoc actus omnium virtutum possunt ad justitiam pertinere, secundum quod ordinat hominem ad bonum commune." *Ibid.* Cf. also *Ia IIae*, q.96, a.3.

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

6. "Bonum commune est finis singularium personarum in communitate existentium, sicut bonum totius finis est cujuslibet partium. Bonum autem unius personae singularis

laziness or cowardice, for example, are of no direct harm to the neighbor individually considered and yet may fail the common good as we shall see.) But the connection of every violation of moral law, even external, with the common good is not so proximate or definable as to place it within the province of human law. That is why besides human legislation, there is need of a divine positive law to integrate the individual with respect to himself<sup>1</sup> and why, as we shall explain later, it must rest finally with the religious forces of the community to insure the genuine common good.

Since it is by external actions that man contributes to the good or ill of a natural society (as distinguished from the supernatural *corpus mysticum*), human law can have for its object only such actions. It does not follow, however, that it is indifferent to the interior, specifically moral, status of the society as a good in its own right or that the peace and prosperity of the community are calculated in exclusively material terms. The common good, while of the temporal order, involves spiritual values. The state, for example, bans a movie for children simply for the moral damage it does whether or not it may provoke additional juvenile crimes. But on the other hand, the law, while banning the movie itself, cannot ban the producer's intention or willingness to corrupt. The common good, in this case the moral integrity of the minor, is for the law's purposes not threatened until the evil designs are put into effect. And even then the law's hands may be tied. It must be left to experience to draw the line in deciding when there has been a legal "attempt" at crime, that is to say such attempt as the law will undertake to sanction. If one is found stooping over saturated rags in the small hours of the night with lighted match in hand, he may be arraigned for arson. But he could not be apprehended in the act of purchasing the kerosene even though his mischievous intention were known. The connection, from the law's limited range of vision, is too remote for the act to be specified as criminal. Too many factors, including a change of mind, may intervene and in any case, the law cannot screen every man who buys kerosene. The Code of Canon law, incidentally, offers a striking example of this economy when it visits with ecclesiastical penalty only the *successful* attempt to procure abortion.<sup>2</sup>

Apart from such actions as lie altogether and as it were *ratione sui* beyond the competence of law, there are others which escape at the law's discretion. The end, commonly considered, imposes the first

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non est finis alterius. Et ideo justitia legalis, quae ordinatur ad bonum commune, magis se potest extendere ad interiores passiones, quibus homo aliquantulum disponitur in seipso, quam justitia particularis, quae ordinatur ad bonum alterius personae singularis." *IIa IIae*, q.58, a.9, ad 3.

1. *Ia IIae*, q.91, a.4 c (tertio) ; q.98, a.1.

2. Canon 2350.



general limitation, but to be apt for its purposes, an instrument must be designed with an eye also to the differences in the matter to which it is to be applied. Handsaws all have the same general structure but finer teeth are needed for oak than for a softer wood. Laws too must be well suited or "homogenous" to the matter they measure, and in this they differ importantly from natural law. The norm for determining natural law is human nature itself taken in all its essential relationships, social included. It is *ipsa recta ratio*. It does not require consent in order to bind. It remains valid law whether or not there be a power able to enforce it, whether or not the moral sense of the community is even aware of it. "Its life is not of today or of yesterday but for all times."

Human law is another affair. It is a device to bring social conduct to accord with what natural law requires of society . . . but *gradatim*. The supposition of much positive law is that society is not yet capable of a full genuine moral response to what the order of justice requires. The law must not simply declare and decree the just action but also bring it effectively to be. It must hammer out the form of justice in human material that needs to be coerced. The legislator must take his matter as he finds it and like the tower-builder in the Gospel, trim his plans accordingly.<sup>1</sup> A goldsmith, however skillful, cannot make bracelets out of clay. The legislator, if he be wise, will not try to make moral paragons of the general run of mankind. Not only will the effort flounder but the impossibility of enforcement results in contempt for authority<sup>2</sup> as "use and liberty run by the hideous law as mice by lions."

We have strict statutes and most biting laws,  
The needful bits and curbs to headstrong weeds,  
Which for this fourteen years we have let slip ;  
Even like an o'ergrown lion in a cave,  
That goes not out to prey. Now as fond fathers,  
Having bound up the threatening twigs of birch,  
Only to stick it in their children's sight

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1. *Ia IIae*, q.96, a.2, c. "Political hypermoralism is not better than political amorality and, in the last analysis, answers the very purpose of political cynicism. Politics is a branch of Ethics, but a branch specifically distinct from the other branches of the same stem. For human life has two ultimate ends, the one subordinate to the other : an ultimate end *in a given order*, which is the terrestrial common good, or the *bonum vitae civilis* ; and an *absolute* ultimate end, which is the transcendent, eternal common good. And individual ethics takes into account the subordinate ultimate end, but *directly aims* at the absolute ultimate one ; whereas political ethics takes into account the absolute ultimate end, but its *direct aim* is the subordinate ultimate end, the good of the rational nature in its temporal achievement. Hence a specific difference of perspective between these two branches of Ethics." MARITAIN, *Man and the State*, *op. cit.*, p.61.

Cf. also J. C. MURRAY, S.J., "Morality and foreign policy," *America*, March 19, 1950, pp.729-732.

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



For terror, not for use, in time the rod  
 Becomes more mock'd than fear'd ; so our decrees,  
 Dead to infliction, to themselves are dead ;  
 And liberty plucks justice by the nose ;  
 The baby beats the nurse, and quite athwart  
 Goes all decorum.<sup>1</sup>

Laws must be such as the majority of men find relatively easy to obey, which means their aim must be modest just as the majority of men are of modest virtue. The state must be satisfied with containing passion and appetite within limits that keep them from accomplishing notable harm to the common good. The justice demanded by law will always fall below natural, not to say Christian, justice. It is justice *secundum quid*.<sup>2</sup> Indeed this pessimism with regard to the possibility of legal control over human passion goes even to the point of recommending some outlet as a quasi-licit means for preventing more violent eruptions and threats to public peace. Thus St. Thomas cites with approval St. Augustine's caution against attempting the suppression of prostitution.<sup>3</sup>

A law prescribing a standard of morality above the average level of virtue in the community would tax the energy and ingenuity of those charged with implementing it. While all law implies the need for coercion, it cannot coerce a whole community without provoking disaffection. For the success of law depends on the general moral standards, on what the people judge to be a threat to the community, and on the sanctions, statutory or social, it is prepared to place on violations. Divorce may be outlawed in Quebec whereas its prohibition would be futile in the United States. Legislation must reflect the public morality which it means to guarantee against the comparative few who would otherwise not conform.

When it is said that the purpose of law is to make men good we must qualify it with *suo modo*. It would be a mistake to conclude

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1. *Measure for Measure* I, iii. The action of the play, incidentally, originates in an inexperienced and overzealous ruler's determination to awake these "drowsy and neglected acts" — in this case the death penalty for *fornicatio privata*, a classical example of something the law should not undertake to punish. "Non potest lex civilis prohibere omnia vitia contra omnes virtutes, ut simplicem fornicationem non scandalosam, nec aliter nocivam communitati." SUAREZ, *III De Legibus*, c.xii, n.12. The reason as given in the preceding paragraph: "Ad finem legis humane non sunt necessarii omnes actus virtutum omnium; mensura autem potestatis ex fine illius sumenda est." Cf. also *Ia IIae*, q.96, a.2, c. and ad 2.

2. "Dicitur enim justum simpliciter quod est justum secundum suam naturam: justum autem secundum quid quod refertur ad commoditatem humanam, quam lex intendit, quia propter utilitatem hominum omnes leges positae sunt. . . . Et ideo hoc justum dicitur esse secundum quid, ut possibile fuit lege poni; non tamen est justum simpliciter." *In I Polit.*, lect.iv, n.79.

3. *IIa IIae*, q.10, a.11. Cf. also *Suppl.*, q. 67, a.3 on the granting of a bill of divorce to check uxoricide.

that one is a good citizen who merely satisfies the law. The common good, the object of legal justice (the *justitia generalis* of St. Thomas),<sup>1</sup> requires many acts that the law cannot demand — not because it lacks the right but because it could not usefully do so.<sup>2</sup> The fact alone that law operates by coercion with the mediocre citizen in mind should suggest the difference between the *debitum morale* and the *debitum legale*.<sup>3</sup> Other obligations exist which must be left to the conscience and civic sense of the élite for their realization. The “friendship” to which political society is ordered cannot be coerced.<sup>4</sup>

Thus while not all its precepts can be translated into positive law, it is nevertheless in the light of natural justice or natural law, *ipsa recta ratio*, that we must seek the norms of legal justice. To consider the common good in terms of what the positive law alone demands is to overlook the dependence of human law on natural law.<sup>5</sup> It would imply that what the positive law forbids is simply *malum quia prohibitum* and that so long as one hewed his conduct to the letter of the law, the question of injustice or of wrong to the common good could not be raised. It must be remembered that laws are valid for what they contain of natural justice and represent the best human effort to approach it, all things considered — including the retarding force of imperfect virtue.

The legalistic mentality is largely responsible for the arrested conscience in matters of social justice. When obligations are reckoned solely on the basis of existing law, the result is the canonization of the status quo. For if positive law is taken as the equivalent of justice, there can be no reason for undertaking its improvement. Yet society as well as individuals is meant to move forward. Social progress indeed is the normal condition for personal growth and law in its own patient way should supply the impulse. It should help raise the customary standards and not just those of the laggards.<sup>6</sup> These latter need to be coerced but the greater part of the community is prepared to obey the law *ex virtute* who yet may need its spur. When we say law must adjust to the level of average virtue we mean it must adjust to the possibilities of that average. To reduce these possibilities to act the initiative must sometimes come from the legislator endowed with *prudentia regnativa*. The “public morality” taken as a standard of law should include this potential element. It is the morality of the élite in so far as it can be effectively transmitted to the

1. *IIa IIae*, q.58, a.5, c. (circa finem) ; *In V Eth.*, lect.III, n.924.

2. *Ia IIae*, q.93, a.3, ad 3 ; *IIa IIae*, q.78, a.1, ad 3.

3. *Ia IIae*, q.99, a.5.

4. Cf. *In II Polit.*, lect.III, n.193.

5. Cf. E. GAUDRON, O.F.M., “Éducation morale et civique,” *Culture*, Sept. 1956, pp.47-64.

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

multitude. Public opinion and morality, in other words, are not necessarily the commonplace. Legislation initiated at the top has often called for a boost in the level of community morality itself. The multitude can be urged a little before becoming recalcitrant. To the pressure of a responsible opinion can be added the pressure of law. In this way many actions previously considered as *debita moralia* have become legal duties as well.

Justice called for the living wage and the curtailment of child labor long before they could be legislated. Today they are taken for granted and the law has gone on to demand much more besides. It has thus been the instrument of moral progress. White and colored are becoming slowly habituated to riding in the same seat. As scattered pockets of resistance are wiped out *per vim et metum* and yield before the pressure of a new consensus, the law can move on to other conquests. As men become better and more human under this pedagogy, more can be demanded of them just as more can be demanded of responsible adults than of children.

It must be remembered, however, that this sort of progress for which the law can claim some direct authorship is both external and social, and hence moral in but a partial, limited, sense as man's external social activity is but one part of his total moral life. As regards the external order of justice the law can be fairly ambitious. It is true that attainment of justice, as we will see in a moment, is conditioned on the presence of other moral virtues. Nevertheless its excellence and the mean of justice itself are more easily recognized and agreed upon. Its norm is more objective and men are less attracted to injustice for its own sake than to the "good" proposed to appetite by other vices.<sup>1</sup>

The more distant (or, we should say, the less obvious) its connection with justice and the more demands it makes on sense appetite, the less law can accomplish in the way of direct moral education. The aims here must be minimal especially where there is no consensus on moral principles. Society depends heavily on law as a check to passion but not for much. Its function here is vital but strictly fundamental just as food and drink make an indispensable but still primitive contribution to total human living. If natural-law morality is to make its way in a society, it will be through subordinate agents like the family, school, and church rather than by legislative dictate. The state's chief contribution in this domain is to guarantee the means for these subordinate institutions to carry out their educative mission.

There are other reasons for this besides the sheer impossibility of saddling the community with law it does not want. In the first place,

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1. *Ia IIae*, q.60, a.2 ; q.65, a.1 ; *IIa IIae*, q.58, a.8 ; *In V Eth.*, lect.xv, n.1074.

law must be satisfied with a mere external conformity — the only conformity it can judge.<sup>1</sup> It secures this by force. It cannot command that virtuous acts be virtuously performed.<sup>2</sup> The most law can do along this line is to dispose remotely for interior moral growth by supplying tangible motives for controlling passion and thus help to develop the taste for good conduct. We say "remotely" because the mere material repetition of acts or abstentions from them, especially when constrained, will never produce a virtue in the sense of an interior commitment to a moral value although it may give the ascendancy over the material movement of appetite itself. Pope Pius XII in an allocution to schoolteachers remarked on the poor psychology of certain techniques of religious training which placed too much confidence in mere mechanical habit as a means of moral formation.<sup>3</sup> To educate to real love of justice and to instil real virtue, there is need of the *paternus sermo* — some more amiable master than the biting law.<sup>4</sup> A wise father knows his own child but the law speaks to all indifferently in the same sharp key. *Communitur proponitur*.<sup>5</sup> Its strength is in its lack of distinction. It does not approach through the heart, and shows pity for all by being patient, indulgent, comprehending, with none.

There is another consideration limiting the law's talents as the instrument of moral education and reform. Apart from being unable to reach the interior faculties, it can command or forbid only such external actions as pertain to justice, that is in so far as they perfect man *in ordine ad alium*. This leaves still much soil to be tilled in the garden of virtues. One can be quite intemperate without going to the point of assault and battery. The law cannot lock a man up for avarice, pride, or indolence and he can be unchaste without the law so much as knowing it. Yet these vices gnaw away at the common good either by corrupting the moral judgment of justice or enticing the will to desert it. The disposition of passion and appetite have much to do with deciding what moral principles and values are recog-

1. *Ia IIae*, q.91, a.4.

2. "Actus aliquis dicitur esse virtutis dupliciter. Uno modo, ex eo quod homo operatur virtuosa; sicut actus iustitiae est facere recta et actus fortitudinis facere fortia. Et sic lex praecipit actus aliquos virtutum. Alio modo dicitur actus virtutis quia aliquis operatur virtuosa eo modo quo virtuosus operatur. Et talis actus semper procedit a virtute: nec cadit sub praecepto legis sed est finis ad quem legislator ducere intendit." *Ibid.*, q.96, a.3, ad 2.

3. Allocution of April 20, 1956 ("Risques et bienfaits de l'éducation commune"), *Documentation Catholique* for May 13, 1956, col. 585ff.

4. Cf. *Ethics*, Bk X, c.9, 1180 b (St. Thomas, lect.xv, n.2159). Also *In V Eth.*, lect. III, n.925. Moreover we must take account of the perverse element in human nature which finds in the very prohibition of the law an incitement to violate it. Cf. *Romans* VIII, 5, and *Ia IIae*, q.98, a.1, ad 2.

5. *In X Eth.*, lect.xiv, n. 2154.

nized in society and which can be enforced by law. The possibility of effective legal controls over salacious films and magazines, for example, depends for the most part by far on how well the personal virtues like chastity and reverence are prospering in the community. As they decline, it becomes harder and harder even to settle upon a workable legal definition of the obscene.

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We are now in some position to calculate the threat of natural-law jurisprudence to the democratic society and its institutions.

The first point to insist on is the distinction between natural-law *ethics* and natural-law *politics* or jurisprudence. It does not exhaust the notion of the latter to describe it as a system which subscribes to universal, immutable, moral principles based on a definite concept of man's nature and destiny, and which considers the good of the political order dependent on their acceptance. All this is true as far as it goes. But we must see jurisprudence as part of the philosophy of politics, which is a practical science. And practical reason must take account not only of the abstract, transcendent, truth of moral principles but also of the matter to which they must be applied. And the "matter" in politics is *men*, about the most disparate and refractory matter there is.

The legislating of natural law must be modified as a matter of principle and not mere expediency (or, more exactly, by expediency as a matter of principle), by the moral and physical freedom of the members within the body politic. To the first of these corresponds the canon of *consent* or the right of the people to ratify its law. To the second corresponds the canon of *utility* (or "possibility") which confines the province of law to what it can usefully exact, all things considered (the customary morality especially), in the way of conduct affecting the common good. Put otherwise, this means that the state is bound by the principle of subsidiarity dear to Catholic social thought, and should not attempt to absorb functions which have their specific organs in subordinate societies.<sup>1</sup> Indeed the prosperity

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1. This principle is of special importance with regard to the state's role in education. It must be remembered that the *politicus* as such is not equipped to judge the interior truth of a speculative science or the arts (i.e. *quantum ad determinationem operis*). (Cf. *In I Eth.*, lect. II, n. 27.) Their truth, as distinct from the act of their communication, is not an *operabile*. Politics can judge them only "*quantum ad usum*." Thus if the state bans the teaching of Marxist materialism in its schools, it is in virtue of its power to judge not the speculative error, but the harm to the common good. For this political prudence is competent. Cf. *In VI Eth.*, lect. x, n. 1264. The Church's competence, on the contrary, extends also to judging the doctrinal error.

Touching censorship of the cinema and the like, there should be special caution against confusing art and morality. Art is not the supreme good whatever the individual artist may think to the contrary. There can be just reasons for banning even a good work



of these is of critical importance, as we saw, for the ultimate fortunes of natural-law morality itself.

No apologies are needed for the hope or the wish that natural-law "dogmas" which relate to the common good should someday find their way to being legislated and become the working doctrine of the courts. But if divorce is ever outlawed in some far future, and "Catholic" natural-law norms are legislated for the school, the cinema, the operating room, it will be because the community is ready for them. Such institutions as the school and hospital are parts of political society and public in nature, and a Catholic society will naturally express Catholic values in its law. But there is nothing in the democratic charter forbidding a majority to become Catholic and it would be curious democracy to hamstring tomorrow's majority with the same viewpoints and prepossessions that prevail, however understandably, today. Value judgments will have changed: the same dangers will not be feared; the same minorities no longer anxious. Justice Holmes once remarked that "we do not realize how large a part of our law is open to reconstruction upon a slight change in the habit of the public mind."<sup>1</sup> Such shifts are bound to affect the composition of law which is "the deposit of our moral life." Customary morality will translate itself in law — in fact it is a kind of law<sup>2</sup> — creating it, obstructing it, adapting it.

No historian of constitutional law, for instance, would deny that the prevailing judicial interpretation of the First Amendment with regard to separation of church and state, an interpretation fluctuating even now, has modified in a particular direction the actual understanding of the Founding Fathers who did not even use the term "separation" to begin with. The interpretation has been shaped not by literal or historical analysis of the language of the amendment but by subsequent concerns. We are not now questioning their reasonableness but it should be clear that as they change and disappear, a society may become less touchy on the prospect of closer cooperation between the temporal and spiritual powers. It would mean, of course, an arrangement that took account of the spirit of American institutions as formed by history, tradition, and custom. American Protestantism as a historical phenomenon will always and inevitably be part of the background of American Catholicism.

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of art if for some cause or other (including the disposition of the multitude) its presentation would compromise some other social good. But well intentioned efforts here have often been clumsy — as, for example, insisting that crime should not go unpunished in the script. Murder is evil but it can make good art (as Sacred Scripture itself is good art, whose principal Author is the Holy Spirit). And it is no truth of history or of Christian doctrine that evil is punished in this life.

1. O. HOLMES, "The Path of Law," *The Mind and Faith of Justice Holmes* (ed. Max Lerner), Modern Library, 1954, p.70.

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



Beyond that there is not point in speculating on what posterity is to do in circumstances we can only remotely contemplate.

For the rest, it is only natural-law jurisprudence that recognizes an absolute, not just constitutional, foundation of human rights and alone makes the norm of legal justice independent of majorities and of the positive law. This becomes very striking at times when we come across a court judgment heroic in its adherence to legal principle but resting its whole weight on the fact that so the law requires — with the implied concession that had the law disposed otherwise, decision would have been different.

The non-committed society can work injustice in its own subtle, unconscious, perhaps unavoidable, way. The double tax on parents who wish to fulfil a natural obligation of providing a religious education for their children is one very tangible instance of how, despite its jealousy for minority rights and for equality before the law, a democracy can effectively penalize those who dissent from its own political dogma that religious education is a luxury of no essential relevance to the common good. Minority rights, after all, are factually those which the majority has agreed to recognize, and the law before which all are equal is the majority's law. Even in the liberal democracy dogmas are inescapable.

As for its being Catholic property, the full triumph of natural-law morality in political life would indeed mean a society gone Catholic. Natural law as connaturally known extends to but a few common principles and here there is not much disagreement as to the principles themselves whatever may be said of the grounds on which they are established. But for the less common precepts connatural knowledge no longer suffices, and when we extend the concept of natural law to include the whole range of morality (i.e. where "natural" indicates not the mode of perception but the objective character of the precept), even human industry left to its own resources is not enough.<sup>1</sup> Perhaps there should be more honest emphasis on this ordinary Catholic teaching that we owe to revelation the security of our knowledge of many truths which are not *per se* beyond the range of human reason. — a fact which is more true of our moral than of our speculative knowledge since the obstacles are more numerous and formidable. Our ethics textbooks help at times to give a false impression in their emphasis of the reasonableness of Catholic moral teaching when proofs are presented in syllogistic form giving the appearance of a strict demonstration. The impression may thus be given that all who fail to see their cogency are either lacking in sincerity or duped by passion.<sup>2</sup>

1. *Ia IIae*, q.100, a.1, c ; Suppl., q.65, a.3, ad 1.

2. Of the average college student's penetration of these arguments we might say the same as for his knowledge of metaphysics : "*non attingunt mente licet dicant ore.*"

Actually a good part of our Catholic natural-law teaching is authoritative. On almost any point involving the less common principles — the very ones on which men are wont to differ — the only time Catholic moralists themselves are in perfect unanimity is when they are not left free to differ. And even then there are differences as to the rational basis for the position.<sup>1</sup> The Scholastics themselves were not agreed on the natural-law character of the Decalogue nor on the strict necessity of its precepts.<sup>2</sup> St. Thomas himself wavered on the possibility of a dispensation from even primary precepts of the natural law.<sup>3</sup> And in our own day Catholic moralists aware of new problems have occasionally had to accept correction from the Holy See for a tendency to situation ethics and the *moralité d'une fois*. It is not always easy to judge between the precept which is absolutely immutable and the one which holds *ut in pluribus*.<sup>4</sup> The distinction between primary and secondary precepts came into being to account

(In *VI Eth.*, lect.vii, n.1210.) If he may admittedly be too young and inexperienced to grasp the real nature of liberality, he may for the same reasons be incapable of appreciating the tragic force of the "hard case." St. Augustine, it will be recalled, hesitated as to whether a wife, in order to save her husband's life, might laudably agree to adultery. After reciting the details of the case of Acyndinus, he remarks: "Nihil in aliquam partem disputo; liceat cuique aestimare quod velit; non enim de divinis auctoritatibus deprompta historia est: sed tamen narrato facto, non ita respuit sensus humanus, quod in illa muliere, viro iubente, commissum est, quemadmodum antea, cum sine ullo exemplo res ipsa poneretur horruimus." *De sermone Domini in monte*, lib.I, cap.xvi.

1. Cf. for example the article "Luxure," *DTC*, on the different reasonings for the immorality of incomplete venereal pleasure *in solutis*.

2. Cf. H. ROMMEN, *Natural Law*, Herder, 1947, p.52; C. HARRIS, *Duns Scotus*, Oxford, 1927, pp.327ff. For Scotus the Decalogue was neither self-evident nor indispensable. (*Opus Oxon.*, III, dist.37, n.2.) And only the first three precepts were strictly *de lege naturali* (*ibid.*, n.8). The others were simply *valde consona*. Compare this with *Ia IIae*, q.100, a.1.

3. "Aliquando autem est [ratio dispensandi] tantum in causis superioribus: et tunc potest dispensatio esse divinitus etiam contra prima praecepta legis naturae ratione alicujus mysterii divini significandi vel ostendendi, sicut patet de dispensatione in praecepto Abrahae facto de occisione filii innocentis. Tales autem dispensationes non fiunt communiter ad omnes sed ad aliquas singulares personas sicut etiam de miraculis accidit. Si ergo inseparabilitas matrimonii inter prima praecepta legis naturae contineatur, solum hoc secundo modo sub dispensatione cadet. Si autem sit inter secunda praecepta legis naturae, etiam primo modo [scilicet per causas inferiores] cadere potuit sub dispensatione. Videtur autem magis inter secunda praecepta legis naturae contineri." *IV Sent.*, d.33, q.6, a.2. (*Suppl.*, q.67, a.2.) Compare this with his later teaching in *Ia IIae*, q.100, a.8.

4. The meaning of "primary" and "secondary" is by no means uniform. The general basis for the distinction appears to be the contingency of their matter (*Ia IIae*, q.94, aa.4, 5), and the necessity of their connection with the ends of human nature (*Suppl.*, q.65, a.1). But secondary precepts are also, and perhaps consequently, described as *conclusions* from the first and as less generally known (*Ia IIae*, q.94, a.6, and q.95, a.4). The manuals often distinguish these two sorts of precepts on the basis of their evidence and then go on to add a third category, "tertiary" precepts, which require diligent study. Cf. V. CATHEIN, *Philosophia Moralis*, Herder, 8th ed., p.171.

for the Old Testament "dispensations" from natural law and it is striking that the examples of secondary precepts given in the manuals are usually the scriptural ones — divorce and polygamy.<sup>1</sup>

The Church alone is in complete possession of natural law. She alone is equipped to declare it adequately and, through her sacraments and institutions, to maintain it in vigor. If we consider Christian civilization historically, it is difficult to say which elements belong to it in virtue of natural law and which are specifically Christian.<sup>2</sup> Is it because polygamy and slavery are against natural law that they have disappeared from the west? Natural law has shaped western society not because men were agreed upon the rational evidence of its precepts. It is just when question of their rational grounds is raised that voices become pitched high in quarrel. Natural-law civilization has always been Judaeo-Christian and natural law loses ground as the norm of public morality and legislation in proportion as Judaeo-Christian ideals cease to nourish it. A society can be informed by a natural-law morality only when it is leavened by the supernatural morality of the Gospel and the *lex caritatis*. Or as Chesterton expressed it through the mouth of King Alfred :

... because it is only Christian men  
guard even pagan things.

JOSEPH V. DOLAN, S.J.

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1. Cf. ROMMEN, *op. cit.*, pp.42ff.

2. In this connection it would be well to recall Cajetan's warning in his commentary on *Ia IIae*, q.94, a.1 : "cave ne misceas jus humanum." Apart from their desire to accommodate their natural-law synthesis to the data of revelation, another complication comes from the scholastics' unwillingness to depart from the terminology or even the classical examples of the jurists in their division of natural law from the *jus gentium*. The latter is thus sometimes distinguished as positive law from natural law (*Ia IIae*, q.95, a.4, c.) ; sometimes it is natural law proper to man as distinct from the *jus naturale* common to men and animals (*IIa IIae*, q.57, a.3) ; sometimes it consists of conclusions from the primary precepts which are known *per modum inclinationis* (*Ia IIae*, q.95, a.4, c.).

Cf. S. SCHIFFINI, *Disputationes Philosophiae Moralis*, Taurini, 1891, vol.1, p.381 : "Porro si scriptores et doctores, etiam optimae notae, ea de re consulas, tantam invenies diversitatem sententiarum, et obscuritatem sermonis, ut post diuturnam lectionem haud immerito haerere debeas, nesciens quam in partem tuto te recipias."