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MEDIEVAL THEORIES OF NATURAL LAW: WILLIAM OF OCKHAM AND THE SIGNIFICANCE OF THE VOLUNTARIST TRADITION

Francis Oakley

THE BELIEF in a natural law superior to mere positive enactment and the practice of appealing to it were common to the vast majority of medieval political thinkers¹—whether civil lawyers or philosophers, canon lawyers or theologians; and, all too often, it has been assumed that when they invoked the natural law, they meant much the same thing by it. It takes, indeed, little more than a superficial glance to discover that the civil or canon lawyers often meant by natural law something rather different than did the philosophers or theologians, but it takes perhaps a closer look to detect that not even the theologians themselves were in full agreement in their theories of natural law.

Now if, for the sake of simplicity, we ignore the canon and civil lawyers, and set aside, therefore, the ambiguities and uncertainties which persisted in their thinking about natural law, and if, having done this, we turn our attention to the theologians of the later Middle Ages, we will find, I believe, that their natural law theorizing was almost wholly trapped within the field of attraction exercised by the two influential poles of the “rationalist” and “voluntarist,” or, if you wish, the “realist” and “nominalist” positions—this latter terminology referring to the respective solutions of the two schools to the basic epistemological problem of the status of universal concepts.

The most prominent of the medieval realists was, of course, Thomas Aquinas, and the most coherent of the later medieval nominalists was William of Ockham, the fourteenth century English philosopher of empiricist leanings who has sometimes been compared with Hume. Neither of these men wrote treatises specifically devoted to law, and their views, therefore, have to be quarried from their general philosophical and polemical writings. This is easy enough in the case of Aquinas, both because he was a systematic thinker and because his views are so well known; but it is less easy when we turn to Ockham, who produced no ordered synthesis comparable with the *Summa*

1. Marsilius of Padua is, of course, an exception to this generalization, though there is some disagreement about the precise nature of his position—see ALAN GEWIRTH, 1 MARSILIUS OF PADUA 134-135 (New York, 1951).

Theologica, and many of whose writings are not yet available in modern editions. He was a most prolific writer. His remarks on law are scattered throughout his writings, and few, indeed, are the scholars who can claim to know them all. Moreover, in his best-known text on natural law,² Ockham actually distinguishes three varieties, the last of which overlaps with the law of nations. The remarks which follow, however, will be restricted to his first variety—natural law in what is for him its primary and fundamental sense—and they will, therefore, reflect a somewhat simplified version of his position.

These qualifications being understood, I propose to do four things: First, to contrast the natural law theories of Aquinas and Ockham; second, to trace the descendants of the Ockhamist theory; third, to ask whether this particular theory of natural law entailed a definition of the nature of law in general, and to inquire whether it is valid to suggest the existence of any link between this theory of natural law and the development of the idea of sovereignty; finally, and more tentatively, to contrast in general terms the philosophical presuppositions relevant to the disparate legal theories of the two men.

I

We may take as our point of departure one of Otto von Gierke's lengthy footnotes in which he contrasts the two basic medieval views on natural law. "The older view," he says,³

which is more especially that of the Realists, explained the *Lex Naturalis* as an intellectual act independent of will—as a mere *lex indicativa*, in which God was not lawgiver but a teacher working by means of Reason—in short, as the dictate of Reason as to what is right, grounded in the Being of God but unalterable even by Him. . . . The opposite proposition, proceeding from pure Nominalism, saw in the Law of Nature a mere divine command, which was right and binding merely because God was the lawgiver. So Ockham, Gerson,⁴ d'Ailly.⁵

Gierke proffered no documentation of his assertion concerning the Nominal-

2. Cf. *Dialogus*, III, II, III, ch. 6; in GOLDAST, 2 *MONARCHIA* 934-935 (Frankfurt, 1668).

3. *POLITICAL THEORIES OF THE MIDDLE AGE* 173, n. 256, transl. Maitland (Cambridge, 1927).

4. Jean le Charlier de Gerson (1363-1429), a sometime Chancellor of the University of Paris, best known for his theological writings. For a brief biographical sketch see *DICTIONNAIRE DE THÉOLOGIE CATHOLIQUE*, s.v. "Gerson, Jean."

5. Cardinal Pierre d'Ailly (1350-1420), master and friend of Gerson, philosopher, theologian, Chancellor of the University of Paris and, finally, Bishop of Cambrai. See *DICTIONNAIRE DE THÉOLOGIE CATH.* s.v. "Ailly, Pierre d'."

ists, but his interpretation of the Realist view can speedily be vindicated if we turn to Aquinas's *Summa Theologica*.⁶

Law, according to Aquinas, is "something pertaining to reason" (*aliquid rationis*).⁷ And as the law is "nothing else than a dictate of practical reason emanating from the ruler who governs a complete community," it follows, if it is granted that the world is ruled by the divine providence, that

the whole community of the universe is governed by the divine reason. And, therefore, the reason directing the government of things, existing in God as ruler of the universe, has itself the nature of law. And because the divine reason conceives no ideas in time . . . it follows that this sort of law must be called eternal.⁸

Or again, God is related to the world of which He is the creator and ruler, as an artist is related to his work. And as in the mind of every artist there pre-exists the idea of the work he produces, so also in every ruler there pre-exists the idea of the order to be followed by those being governed. Hence "the idea of the divine wisdom, moving all things to their due end, has the nature of law," and "the eternal law is nothing other than the idea of the divine wisdom insofar as it directs all acts and movements."⁹ Moreover,

Because all things which are subject to divine Providence are measured and regulated by the Eternal Law, . . . it is manifest that all things, in some manner, participate in the Eternal Law, inasmuch as they derive from it certain inclinations to those actions and aims which are proper to them. Of all creatures, however, rational creatures are subject to divine Providence in a more excellent way, being themselves made participators in Providence itself, in that they control their own actions and the actions of others. They have, therefore, a certain share in the divine reason itself, from which they derive a natural inclination to such actions and ends as are fitting. And this participation in the Eternal Law by rational creatures is called the Natural Law.¹⁰

Aquinas's position, therefore, amounts basically to this: that there is an Eternal Law which orders to their appointed ends all created things, irrational as well as rational. Insofar as it concerns man and is apprehended by his reason this eternal law is called the natural law. And it should be noted that to these two categories he adds two further ones: *divine positive law*, the

6. SUMMA THEOLOGICA, la 2æ, qu. 90-95. (The *Summa* is hereafter cited as S.T.)

7. S.T., la 2æ, qu. 91, art. 1.

8. S.T., la 2æ, qu. 91, art. 1, *Resp.*

9. S.T., la 2æ, qu. 93, art. 1, *Resp.*

10. S.T., la 2æ, qu. 91, art. 2, *Resp.*

decrees of God which supplement the natural law and which are made known to man by revelation rather than reason;¹¹ and *human positive law*, the laws enacted by rulers for their subjects.¹² Finally, he maintains, every human positive law "bears the nature of law only insofar as it is derived from the natural law."¹³

If, however, we now turn to Ockham we will find, according to Gierke, that far from viewing the natural law as grounded in the Being of God, he regarded it merely as a series of divine commands. But Gierke supports his interpretation with no references, and it has not gone unchallenged. In 1932 Max A. Shephard, in an article¹⁴ commended in recent years by Ewart Lewis,¹⁵ took issue with it, and his arguments have led Sabine to conclude that "there is a question how far William actually carried his metaphysics over into his theory of law."¹⁶ Referring to a passage from the first part of Ockham's *Dialogus*,¹⁷ in which he speaks of "natural law or evident natural reason," Shephard contended that such a linking together of the natural law and natural reason "shows us that Occam held to the time-honored ancient and medieval tradition of eternal, immutable principles of nature, discoverable by the use of reason." He concluded, therefore, that

no really essential difference exists between Occam and Aquinas on this point, and that it is on the whole erroneous to extend the nominalistic-realistic schism to embrace their respective theories of natural law.

It is true that such texts, in which Ockham links natural law with evident natural reason, are broadcast throughout the *Dialogus*, and in one of them, indeed, Ockham gives an unquestionable indication of the rational character of natural law, when he speaks of "using the natural dictate of reason, that is, using natural law."¹⁸ Other texts fail, however, to support this position. For in at least two places in the *Dialogus*,¹⁹ Ockham says that certain moral

11. S.T., Ia 2æ, qu. 91, art. 4, *Resp.*

12. S.T., Ia 2æ, qu. 95, art. 1, *Resp.*

13. S.T., Ia 2æ, qu. 95, art. 2, *Resp.*

14. *William of Occam and the Higher Law*, 26 AMERICAN POLITICAL SCIENCE REVIEW 1005-23 (1932); also vol. 27 (1933), pp. 24-38. The quotations below are from p. 1009.

15. 1 MEDIEVAL POLITICAL IDEAS 336, n. 32 (London, 1954).

16. G. H. SABINE, A HISTORY OF POLITICAL THEORY 306 (New York, 1955).

17. The *DIALOGUS*, a rather prolix polemical work, takes the form of a discussion between a master and his pupil, Ockham representing the master whom the pupil questions on his opinions. (This work is hereafter cited as *DIAL.*)

18. *DIAL.* I, VI, ch. 100, p. 629, line 45, "utens naturali dictamine rationis, hoc est utens jure naturali."

19. *DIAL.* I, I, ch. 8, p. 405, line 9, "Quædam vero pure moralia traduntur in eis, quæ nulla possunt ratione muniri, sicut patet in multis capitulis decretorum et decretalium."

DIAL. I, I, ch. 8, p. 405, lines 20-21, "Quantum vero ad moralia, quæ nulla possunt ratione muniri. . . ."

precepts cannot be defended by reason. Indeed, he goes so far as to admit that God is not bound by natural law because He can dispense from its precepts.²⁰ Such statements can only serve to indicate that the natural law, far from possessing any intrinsic rationality or any ontological foundation, is grounded solely in the decisions of a sovereign Divinity. Faced with these contradictions, therefore, it becomes necessary to broaden the basis of our inquiry and to see what Ockham had to say about the question in his *Commentary on the Sentences of Peter Lombard*²¹—an earlier writing and his major philosophical work.

Here Gierke would seem to find support in a long series of texts which enunciate the voluntarist position in terms which admit of no equivocation. In the second book of the *Sentences* we are told that hate of God, adultery, robbery—all such vices—could be stripped of their evil and rendered meritorious “if they were to agree with the divine precept just as now, *de facto*, their opposites agree with the divine precept.”²² The reason for this is that “God is obliged to the causing of no act.”²³ And, indeed, all this is but a necessary deduction from the position already adopted by Ockham when he said that “evil is nothing other than the doing of something opposite to that which one is obliged to do.”²⁴ It should be noted, too, that such an obligation does not affect God, since He is not obliged to do anything.

So far, so good. But in the third book of the *Sentences* we are told that

20. DIAL. III, I, II, ch. 24, p. 812, lines 35-36, “Si autem sint simpliciter præcepta juris naturalis, nullus casus excipi debet, propter quamcunque necessitatem vel utilitatem, nisi Deus specialiter aliquid exciperet.”

21. SUPER QUATUOR LIBROS SENTENTIARUM (Lyons, 1495)—to be cited hereafter as SENT. This is one of the many medieval commentaries on the *Sentences* of Peter Lombard, born c. 1100, died c. 1160: first, Professor of Theology at Paris, later, Bishop of Paris. Lombard's *Sentences* consists of a long series of questions in which the whole body of theological doctrine is covered and united in a systematized whole. Down to the sixteenth century, it was the textbook of the university course and upon it every future doctor had to lecture.

22. SENT. II, qu. 19 O: “. . . dico quod licet odium dei, furari, adulterari habeant malam circumstantiam annexam et similia *de communi lege* quatenus fiunt ab aliquo qui ex præcepto divino obligatur ad contrarium: sed quantum ad esse absolutum in illis actibus possunt fieri a deo sine omni circumstantia mala annexa: et etiam meritorie possunt fieri a viatore si caderent sub præcepto divino sicut nunc de facto eorum opposita cadunt sub præcepto divino.”

23. SENT. II, qu. 19 P: “. . . sed deus ad nullum actum causandum obligatur: ideo quemlibet actum absolutum potest sine omni malo culpæ causare: et ejus oppositum, et ideo sicut potest causare totaliter actum diligendi sine bonitate vel malicia morali: Quia bonitas moralis et malicia connotant quod agens obligatur ad illum actum vel ejus oppositum: ita potest totaliter causare actum odiendi deum sine omni malicia morali propter eandem causam: quia ad nullum actum causandum obligatur.”

24. SENT. II, qu. 5 H: “. . . quia malum nihil aliud est quam facere aliquid ad cuius oppositum faciendum aliquis obligatur: quæ obligatio non cadit in deum: quia ille ad nihil faciendum obligatur, nec præsupponitur malicia in causa: quæ sit causa maliciæ effectus. Sed malicia effectus est causa maliciæ in causa.”

"no act is perfectly virtuous unless the will through that act wishes that which is dictated by right reason because it is dictated by right reason."²⁵ Again, therefore, a coherent position seems to be shattered by the introduction of an alien element incompatible with it. Again, as was the case with his political writings, so also with his more purely philosophical, it seems impossible to extract from them a coherent interpretation of the nature of morality and hence a clear doctrine of natural law. In both we find, in intimate juxtaposition, the rationalist and voluntarist theories, and no peace can be found to grow between these antinomies. For it is clear that there can be no question of a compromise.

It would, nevertheless, be incorrect to accuse Ockham either of incoherence or illogicality. For if we push the analysis another step further, we do not, it is true, find suitable ground for a compromise, for that is out of the question, but we do find that the last word lies with the will. Will, not reason, is found to be at the heart of law. Coming, as it does, after the rationalist texts quoted above, this, no doubt, must seem a rash contention. The fact is, however, that there is, in itself, nothing final about right reason; the ultimate priority lies with the divine will, for it is rather "by the very fact that the divine will wishes it that right reason dictates what is to be willed."²⁶ Again, no act elicited against right reason, we are told, can be virtuous, "Since such an act would be elicited against divine precept and against the divine will commanding that such an act be elicited in conformity with right reason."²⁷ We are now at the very heart of Ockham's position. And there is no dichotomy between the respective criteria of right reason and divine will, which are linked here, and linked significantly and hierarchically.

The case, therefore, for the voluntarist interpretation of morality, and, as a result, of natural law, would now seem to be watertight. But it is still possible to feel a certain dissatisfaction with the logic of Ockham's argumentation. It may be true for him, as we have seen, that right reason is dependent, for the very role it plays in morality, upon the will of God, but he had not only based natural law on right reason — he had also asserted that the

25. SENT. III, qu. 12 CCC: ". . . nullus actus est perfecte virtuosus nisi voluntas per illum actum velit dictatum a recta ratione propter hoc quod est dictatus a recta ratione."

26. SENT. I, dist. xli, qu. 1 K: ". . . omnis voluntas recta est conformis rationi rectæ sed non est semper conformis rationi rectæ præviæ quæ ostendat causam quare voluntas debet hoc velle. Sed eo ipso quod voluntas divina hoc vult, ratio recta dictat quod est volendum."

27. SENT. III, 13 C: "Tunc arguo sic. Impossible est quod aliquis actus voluntatis elicited contra conscientiam et contra dictamen rationis sive rectum sive erroneum sit virtuosus. Patet de conscientia recta: quia talis eliceretur contra præceptum divinum et voluntatem divinam volentem talem actum elicere conformiter rationi rectæ."

natural law is absolute,²⁸ immutable, and admitting of no dispensation.²⁹ And does not natural law, so defined, burst through the voluntarist framework that is clamped, perhaps somewhat arbitrarily, upon it? For it is difficult to conceive of a moral order as absolute, immutable, and without dispensation, when it is completely dependent upon the will of a divine sovereign.

Once again, however, the inconsistencies are but superficial. For Ockham distinguishes between the *ordained* or *ordinary power* of God, by which God has actually established a moral order (within the framework of which established economy the moral law is absolute, immutable, and without dispensation), and the *absolute power* of God, whereby God could order the opposites of the acts which He has, in fact, forbidden.³⁰ This teaching is not as complex as might at first appear to be. Ockham is merely applying to the realm of ethics a distinction which he regards as relevant to all operations of the divine will. What he is in fact assuming is this: that God's absolute power, subject though it can be to no limitation, *normally* expresses itself, nevertheless, in accordance with the supernatural or natural order which has been ordained. Thus, as Christians, we must believe that God guarantees to fulfill the divine promises contained in the Scriptures, and, even as philosophers we can safely assume that the order apparent in nature betrays certain constant rules according to which God will *normally* act. The big reservation assumed in this, and underlined by the use of such qualifications as "by the common law" or "in the present order," is that God, of His absolute freedom and power, could always abrogate the present economy, or transcend it, as He does in the case of miracles.

Experience teaches us, for example, that water dampens, fire burns, and so on; nevertheless, by the absolute power of God, these effects need not necessarily proceed from their causes — think, for example, of the case of Daniel's three companions, Shadrach, Meshach, and Abednego, whom King Nebuchadnezzar threw into the fiery furnace but who emerged unscathed.³¹ Similarly, although we normally assume that it is good to love God and bad to hate Him, nevertheless God could, of His absolute power, make it meritorious to hate Him, since acts are good and just, or bad and unjust, not of

28. DIAL. III, II, I, ch. 10, p. 878, lines 27-31, "Cum jus naturale sit naturale præceptum . . . præceptum autem naturale quoddam est absolutum absque omni conditione, modificatione seu determinatione, sicut 'Non coles deum alienum,' 'non mæchaberis,' et hujusmodi."

29. DIAL. III, II, III, ch. 6, p. 932, line 65, ". . . quia jus naturale est immutabile primo modo et invariabile ac indispensabile."

30. OPUS NONAGINTA DIERUM ch. 95 (no foliation) (Lyons: Jean Trechsel, 1495). See esp. § *Nota de duplici potentia dei*.

31. *Id.* at § *Hereticum est dicere omnia de necessitate evenire*.

their own nature or essence, but simply because God has enjoined or forbidden them.³² Thus when Ockham speaks of a natural law which is absolute, immutable, and admitting of no dispensation, he is thinking within the framework of the ordained or ordinary power of God. Thus it is that he can tell us that "in the present order, no act is perfectly virtuous unless elicited in conformity with right reason,"³³ and can speak of an act of will which is "intrinsically and necessarily virtuous, given the divine order."³⁴ Indeed, his very use of qualifications like *in the present order* and *given the divine order* is significant.

II

Our conclusion, therefore, can only be this: that Gierke, after all, was right to brand Ockham as a legal voluntarist, and that Shephard's criticism fails to do justice either to the profundity of Gierke's scholarship or to the consistency and rigor of Ockham's thinking. Nor was this way of thinking without subsequent adherents. The history of the voluntarist interpretation of natural law has yet to be written, and it forms something of a subterranean stream in late-medieval and modern thought. This much, however, is apparent: that having been formulated with clarity by Ockham, it was propagated by his philosophical descendants, the nominalist philosophers who became so prominent in the later Middle Ages. Notable among these were Gerson and d'Ailly, of whom we have already heard,³⁵ and whose works were widely read in the fifteenth and sixteenth centuries. And to their names may be added those of Gabriel Biel (d. 1495), Jacob Almain (d. 1515), John Major (d. 1540), and Alphonse de Castro (d. 1558) — all of whom were cited in 1612 as proponents of the voluntarist theory by the Jesuit philosopher Suarez, whose own theory, indeed, bore the impress of this point of view.³⁶

Nor was this way of thinking limited to those whom we usually regard as scholastic philosophers. Luther was well acquainted with the writings of several of these men; and through him the voluntarist theory, complete with the characteristic distinction between the absolute and the ordinary

32. Cf. *op. cit. supra* notes 22 and 24.

33. SENT. III, 12 CCC, ". . . stante ordinatione quæ nunc est nullus actus est perfecte virtuosus nisi conformiter eliciatur rationi rectæ actualiter inhærenti.

34. SENT. III, 12 CCC, ". . . aliquis actus voluntatis qui est intrinsece et necessario virtuosus stante ordinatione divina."

35. See notes 4 and 5 *supra*.

36. "De Legibus, ac Deo Legislatore," Bk. 1, ch. 5, 8-9; 1 SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ, S.J. 26 (Oxford, 1944).

powers of God, seems to have made its way into Protestant theology³⁷ — Calvin, for example, being notably unambiguous on this point.³⁸ The persistence into the seventeenth century of this interpretation of natural law is manifest in Suarez's *Treatise on Laws*,³⁹ and Suarez was by no means alone. Earlier in the same century, Grotius (who was later to change his mind) had adopted a similar position in his *Commentary concerning the Law of Booty*⁴⁰ and Locke's early essays on the natural law — published for the first time in 1954 — reveal that he, too, at least in his early years, had voluntarist inclinations.⁴¹ A few years later, Hobbes⁴² and Pufendorf⁴³ were to conceive of natural law in similar terms, but the ultimate fate of the tradition is obscured partly by the growing lack of interest in the divine origin of the natural law, and even more by the characteristic imprecision of eighteenth century thinking on the subject — though, if we were to look, we would find Blackstone, over a century later, speaking of the natural law which governs man as "the will of his maker."⁴⁴

III

We have been speaking, so far, about the *nature* of natural law. At this stage, however, we must face a question of a more practical character. Granted that Ockham, instead of regarding the natural law "as the dictate of reason as to what is right, grounded in the Being of God, but unalterable even by Him," reduced all moral laws to inscrutable divine commands, "right and binding merely because God was the lawgiver" — granted all this, is not the outcome, in practice, the same? Ockham remained, after all, a firm believer in the natural law, and it has been said that, with regard to insistence upon the law and dislike of arbitrary power, the principles of Ockham

37. 43 D. MARTIN LUTHERS WERKE 71 (Weimar, 1912), 'Vorlesungen über 1 Mose,' Kap. 19, 14; cf. also, Kap. 19, 17-20 and Kap. 20, 2.

The voluntarist character of Zwingli's view of natural law has been pointed out by John T. McNeill, *Natural Law in the Teaching of the Reformers*, 26 THE JOURNAL OF RELIGION 177-178 (1946); and Georges de Lagarde sees in the juridical thought of the reformers in general, a reiteration of the nominalist idea of law—RECHERCHES SUR L'ESPRIT POLITIQUE DE LA RÉFORME 166-167 (Douai, 1926).

38. JOHANNIS CALVINI INSTITUTIO CHRISTIANAE RELIGIONIS (Berlin, 1846), p. 486; Lib. IV, ch. 20, § 16.

39. Bk. II, ch. 6, 20-23; 1 SELECTIONS 126-128.

40. DE JURE PRAEADAЕ, COMMENTARIUS, ed. H. G. Hamaker (The Hague, 1868), ch. 2, pp. 7-8. This work was written in the winter of 1604-5, but rediscovered only in 1864 and first published in 1868. In his later and more famous *De Jure Belli et Pacis*, Grotius abandoned this position in favor of an extremely rationalistic interpretation—see the edition of William Whewell (Cambridge, 1853), Bk. I, ch. 1, X, 1-2, pp. 10-11.

41. W. VAN LEYDEN (ed.), JOHN LOCKE: ESSAYS ON THE LAW OF NATURE (Oxford, 1954).

42. LEVIATHAN, Part II, ch. 30-31, ed. Michael Oakshott (Oxford, 1946), pp. 219-235.

43. See his DE JURE NATURAE ET GENTIUM, Lib. II, c. 3, § XX (London, 1672), p. 191.

44. COMMENTARIES ON THE LAWS OF ENGLAND (New York, 1830), p. 26; Sect. II, 40.

do not differ materially from those of Aquinas. Have we, perhaps, made too much of the changes wrought by Ockham?

The answer to this question can only be a firm negative. Jerome Hall has recently suggested that the voluntarist phase of natural law thinking actually encouraged legal positivism in its definition of law as the command of the sovereign, and has claimed that "an examination of certain natural law writing is illuminating as regards the source of some of the basic legal ideas which are usually assumed to be the invention of the positivists."⁴⁵ Hall does not, it is true, fully document his assertions, but there can be little doubt that he is basically correct.

It will be remembered that Aquinas's theory of natural law involved a definition of law in general. Law, for him, was "something pertaining to reason," it was "a rational ordering of things," it was "a rule or measure of action in virtue of which one is led to perform certain actions and restrained from the performance of others." Ockham, however, substituted a different theory of natural law, and it is clear that the change must necessitate also a different definition of law in general. I am, alas, unable to cite relevant texts from Ockham himself, but perhaps the words of Pierre d'Ailly, one of his more faithful philosophical disciples, will suffice. For d'Ailly regards obligation as the distinguishing mark of law and argues, therefore, that a law must take the form of precept or prohibition, of the command to do something or not to do it.⁴⁶ He agrees that custom is said, with the lapse of time, to have the force of law, but insists that it carries no weight, even against human positive law which can abrogate it.⁴⁷ He can conclude, therefore, that it is legitimate to apply to the pope the Roman legal maxim that "the Prince is bound by no law" — not even those laws which he himself has made — so long as it is remembered that this refers to human and not to divine law.⁴⁸ For "just as the divine will," he says, "is the first efficient cause in the genus of efficient causality, so also is it the first obligating rule or law

45. STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 31-32 (New York, 1958).

46. *Utrum Petri Ecclesia*, in J. GERSON, OPERA OMNIA, ed. Ellies du Pin (Antwerp, 1706), I, col. 663: ". . . lex divina sumitur pro lege divinitus inspirata: qualis est lex Moysis, vel Christi. Uno modo, potest sumi pro aliqua una regula data a Deo aliquid præcipiente, vel prohibente. Alio modo, pro aliqua una congregatione plures tales regulas continente: qualiter tota doctrina Christi dicitur lex Christi. . . . Sed sic capiendo, potest sumi stricte, pro aliqua tali congregatione solum continente præcepta et prohibitiones; quia hæc duo solum pertinent ad legem proprie dictam."

47. See *Tractatus de ecclesiastica potestate*, in GERSON, II, col. 933; *Tractatus II adversus Cancellarium Parisiensem*, in GERSON, I, col. 773.

48. *Tractatus de materia concilii generalis*; Paris, *Bibl. Nat.*, Ms. Lat. 1480, fol. 108r: ". . . Et hoc ideo dicit quia princeps legibus solutus est, ut in dicto cap. *Significasti*. . . . Sed quod dicit hic glossa quod princeps est solutus legibus, intelligit hæc opinio de legibus humanis ab ipso editis. De legibus autem divinis . . . non concedit."

in the genus of obligating law,"⁴⁹ and "no edict of a prince, precept of a prelate, political statute or ecclesiastical decree is just or justly obligatory, unless it is in conformity with the divine law."⁵⁰

Perhaps the most interesting thing about this is that these words could almost equally well be attributed to Bodin, the self-styled father of the notion of sovereignty. Nor should this be surprising. For in their legal voluntarism or positivism the nominalist philosophers joined hands with the Roman lawyers⁵¹ — in particular, with the school of the Post-Glossators, the most famous of whom were Bartolus and his pupil Baldus,⁵² and among the descendants of whom Bodin was proud to count himself.⁵³ And this is not merely to say that the nominalists adopted legal views parallel to those of the Post-Glossators, but, further, that they actually exerted an influence upon them.

It is admittedly difficult to establish the probability of such an influence, but it is not impossible. If, for instance, we turn our attention to the England of the early seventeenth century (on the face of it, as the home of the common law, unpromising ground), we find that the issue was being joined between royal claims to absolutism and parliamentary claims to a greater control over the government of the country. One of the crucial areas in this constitutional struggle was, of course, the extent of the king's prerogative powers in matters of taxation, and, in 1606, this led to a famous legal decision in the case known as *Bate's case*. The details of this case do not concern us here, but Holdsworth has described the decision of the Chief Justice (or, rather, the Chief Baron) as the first clear statement of the new royalist theory that the king had "an overriding absolute prerogative to deal with matters of State," or "a general absolute prerogative to act as he pleased, which he could use whenever he saw fit."⁵⁴ The case is clearly an important one, and the wording of the Chief Baron's decision is highly significant. "The King's power," he says,

is double, ordinary and absolute, and they have several laws and ends.

49. *QUESTIONES SUPER I, III ET IV SENTENTIARUM* (Lyons, 1500), I, qu. 14, art. 3, Q, f. 173r: ". . . sicut voluntas divina in genere efficientis est prima efficiens causa, sic ipsa in genere legis obligantis est prima lex seu regula obligatoria."

50. *Princ. in Ium Sent.*, E, f. 21v: "Ex quo sequitur quod nullum principis edictum, praelati preceptum, politice statutum aut Ecclesie decretum est justum vel juste obligatorium, nisi sit divinæ legi consonum."

51. Cf. R. W. and A. J. CARLYLE, 6 *A HISTORY OF MEDIEVAL POLITICAL THEORY* 419 (Edinburgh and London, 1936).

52. Bartolus was born in 1314 and died c. 1357 — see C.N.S. WOOLF, *BARTOLUS OF SASSOFERATO* (Cambridge, 1913). The Post-Glossators were often known as *Bartolists*. For a bibliographical sketch on Baldus (1314-1400), see J. D. WILSON, *Balus de Ubaldis*, 12 *YALE LAW JOURNAL* 8-20 (1902).

53. See H. D. HAZELTINE, Introduction to WALTER ULLMANN, *THE MEDIEVAL IDEA OF LAW* xxv (London, 1946).

54. W. S. HOLDSWORTH, 6 *A HISTORY OF ENGLISH LAW* 21 (London, 1924).

That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of *meum* . . . and by the civilians is nominated *ius privatum* and with us common law; and these laws cannot be changed without parliament. . . . The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is *salus populi*; as the people is the body and the King is the head . . . and as the constitution of this body varieth with the time, so varieth this absolute law according to the wisdom of the King, for the common good.⁵⁵

If this were not an English case, and if we were not, perhaps understandably, a little skeptical about the impact of theological modes of thought upon legal matters, this distinction between the absolute and the ordinary powers of the king might look suspiciously analogous to the nominalist distinction between the absolute and the ordinary powers of God. It is certainly a new distinction in English law, and Holdsworth can only suggest as its origin a somewhat similar distinction used in the fifteenth century to elucidate "the difference between the common law administered in the common law courts and the equity administered in the Chancery."⁵⁶ But what Holdsworth overlooked was this: that in 1605, only a year before Bate's case, Albericus Gentilis, the Italian jurist who taught Civil Law at Oxford and who is usually classed as a Bartolist or Post-Glossator,⁵⁷ had clearly enunciated this same distinction between the absolute and the ordinary powers of the prince, saying that the absolute power (which in England is called the prerogative) is the very plenitude of power, and, unlike the ordinary, is subject to no law.⁵⁸ More significantly, in making this distinction, Albericus had referred back for his authority to the fourteenth century Post-Glossator, Baldus. Now Baldus was a contemporary of Ockham.⁵⁹

Those who are convinced that theology has little influence on anything — even religion — will no doubt be disposed to dismiss as an interesting coincidence the striking analogy which exists between the distinctions employed by these two contemporaries in their respective fields of theology and law. To these, the skeptical, I would suggest three considerations. In the first place, law has not always been as divorced from theology as it is today,

55. T. B. and T. J. HOWELL (ed.), *A COMPLETE COLLECTION OF STATE TRIALS*, II, col. 389 (London, 1816).

56. 2 *A HISTORY OF ENGLISH LAW* 597 (London, 1923). An echo of this usage is to be heard in SIR EDWARD COKE, *THE FOURTHE PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* ch. 8, p. 79 (London, 1797).

57. Hazeltine, *op. cit. supra* note 53, at xxv.

58. *Regales Disputationes Tres*, Disp. Prima, p. 10; the relevant text is cited in CARLYLE, 6 *A HISTORY OF MEDIEVAL POLITICAL THEORY* 452, n. 2.

59. Ockham was born c. 1288 and died c. 1350.

and the Post-Glossators, in particular, are known to have drawn upon scholastic ideas concerning government, law, and justice.⁶⁰ In the second place, if the gulf between theology and law still seems too wide to justify the transference of ideas from one to the other, perhaps the canon law might be regarded as a possible intermediary, and, in fact, it is true that in at least one canonical treatise, this same distinction is known to have been made between the absolute and the ordinary powers — in this case, of course, of the pope.⁶¹ In the third place, and a little closer to home, in 1610 — four years after Bate's case — the analogy was explicitly drawn, and by no less a person than James I himself in a speech delivered to Parliament.⁶² In this speech, James insisted that the king is accountable for his actions to God alone, and argued that "if you will consider the attributes of God you will see how they agree in the person of a king." For just as God has the power to create or destroy, so also kings have the power to make and unmake their subjects, to exalt the low and abase the high, and, in his own memorable phrase, to "make of their subjects like men at the chess." And, having said this, he adds the following comment:

But now in these our times we are to distinguish between the state of kings in their first original and between the state of settled kings and monarchs that do at this time govern in civil kingdoms; for even as God, during the time of the Old Testament, spake by oracles and wrought by miracles, yet how soon it pleased him to settle a Church . . . then there was a cessation of both. He ever afterwards governing His people and Church *within the limits of His revealed will*. So in the first original of kings, whereof some had their beginnings by conquest and some by election of the people, their wills at that time served for law; yet how soon kingdoms began to be settled in civility and policy, *then did kings set down their minds by laws*, which are properly made by the king only, but at the roagation of the people, the king's grant being obtained thereunto.

Historians have usually been impatient of James' frequent theological similes and have tended to regard them as merely the sugar coating designed to render the swallowing of the pill of prerogative a little less distasteful. But may I suggest that in so doing they have been adopting an anachronistic attitude towards statements which were intended in a serious and literal sense, and which are historically valuable as indications of the ultimate theological

60. Cf. Hazeltine, *op. cit. supra* note 53, at xxii.

61. See H. JEDIN, A HISTORY OF THE COUNCIL OF TRENT, trans. E. Graf (St. Louis, 1957), p. 81, where he cites the *Tractatus alter de cardinalibus* (ca. 1448-1451) to this effect.

62. C. H. McILWAIN, THE POLITICAL WORKS OF JAMES I 307-310 (Cambridge, 1918).

origin of some of the modes of thought characteristic, not only of the king himself, or of his prerogative lawyers, but also of that whole juristic school, the most famous representative of which was Bodin?

IV

Those to whom this type of historical approach does not recommend itself may be inclined to dismiss reflections such as these as possibly of interest to the professional archaeologist of ideas but certainly of no wider relevance. To these I would, in conclusion and very tentatively, suggest the possibility of an alternative and perhaps less purely historical approach, an approach moving by way of the philosophical presuppositions which lay behind the legal views of Aquinas and Ockham. And what characterizes this approach is the belief that, as Oakeshott has said, there has probably been

no theory of the nature of the world, of the activity of man, of the destiny of mankind, no theology or cosmology, perhaps even no metaphysics, that has not sought a reflection of itself in the mirror of political philosophy.⁶³

— and therefore, we may add, of legal theory.

R. G. Collingwood has argued that “in the history of European thought there have been three periods of constructive cosmological thinking,” by which he means three periods

when the idea of nature has come into the focus of thought, become the subject of intense and protracted reflection, and consequently acquired new characteristics which in their turn have given a new aspect to the detailed science of nature that has been based upon it.⁶⁴

The three ideas of nature which these periods have produced he calls the Greek, the “Renaissance,”⁶⁵ and the modern. The contrast between these ideas springs, he suggests, from the difference between their analogical approach to nature. The modern idea does not concern us here — suffice it to say that he regards it as based upon the analogy between the processes of the natural world as studied by natural scientists and the vicissitudes of human

63. MICHAEL OAKESHOTT (ed), *THE LEVIATHAN OF THOMAS HOBBS*, Introduction xix (Oxford, 1946).

64. *IDEA OF NATURE* 1 (Oxford, 1945).

65. As Collingwood himself admits (p. 4), “The name is not a good one, because the word ‘Renaissance’ is applied to an earlier phase in the history of thought, beginning in Italy with the humanism of the fourteenth century and continuing, in the same country, with the Platonic and Aristotelian cosmologies of that century and the fifteenth century. The cosmology I have now to describe was in principle a reaction against these and might, perhaps, be more accurately called post-Renaissance.”

affairs as studied by historians. Turning to the two earlier "ideas," he argues that whereas the Greek view of nature as an intelligent organism was based on an analogy between the world of nature and the individual human being, the "Renaissance" view conceived the world analogically as a machine. Instead of being regarded as capable of ordering its own movements in a rational manner and according to its immanent laws, the movements which it exhibits are imposed from without, and "their regularity . . . due to 'laws of nature' likewise imposed from without."⁶⁶ Collingwood concludes, therefore, that this view presupposes both the human experience of designing and constructing machines, and the Christian idea of a creative and omnipotent God. This is, I believe, a good way of characterizing the change in approach which led to the development of the classical or Newtonian physical science. And it is relevant to our problem, as we shall see, because it indicates the role played in this development both by the Christian idea of an omnipotent God and by the concomitant idea of the imposed laws of nature.

But what reflection do these cosmologies find in the "mirror of political philosophy"? The answer to this question, I would suggest, is to be found in the three main patterns which, Oakeshott has claimed, "philosophical reflection about politics has impressed upon the intellectual history of Europe." The first of these patterns or traditions, he tells us,

is distinguished by the master-conceptions of Reason and Nature. It is coeval with our civilization; it has an unbroken history into the modern world; and it has survived by a matchless power of adaptability all the changes of the European consciousness. The master-conceptions of the second are Will and Artifice. It too springs from the soil of Greece, and has drawn inspiration from many sources, not least from Israel and Islam. The third tradition is of later birth, not appearing until the eighteenth century. The cosmology it reflects on its still unsettled surface is the world seen on the analogy of human history.⁶⁷

The coincidence of these traditions of political thought with Collingwood's "ideas of nature" is apparent and striking—the more so, indeed, in that they were formulated, not only independently of these ideas of nature, but also with an eye rather to the history of theories of knowledge than to the history of cosmological assumptions.⁶⁸ And the actual link between these traditions of political thought and the ideas of nature which correspond to them is to be found, I would further suggest, in the ideas of law which they share in common.

66. *Op. cit. supra* note 64, at 6.

67. *Op. cit. supra* note 63, at xii.

68. I owe this information to Professor Oakeshott in a private letter.

A. N. Whitehead, who, before Collingwood, had stressed the relevance of the Semitic concept of God to the development of the natural sciences in the sixteenth and seventeenth centuries,⁶⁹ distinguished between the two salient types of natural law which we have already seen related to Collingwood's Greek and "Renaissance" cosmologies. It is true that Whitehead, too, was concerned with analyzing cosmological assumptions, but the distinction is as valid and relevant in the juridical sphere as it is in the scientific.⁷⁰ It merits, therefore, closer consideration.

The theory of law as immanent, he argued, involves the assumption that things are interdependent in such a way that when we know the nature of things we also know their mutual relations with one another. "Some partial identity of pattern in the various characters of natural things issues in some partial identity of pattern in the mutual relations of these things." The laws of nature are the formulation of these identities of pattern. Thus it could be adduced as a law of nature that animals unite to produce offspring or that stones released in midair strive to reach the ground. This view of the laws of nature involves, he concluded, "some doctrine of Internal Relations," some notion that the characters of things are the outcome of their interconnections, and the interconnections of things the outcome of their characters" — and, we may add, it involves, therefore, a wholehearted subscription to an unambiguously Realist ontology.

The doctrine of imposed law, on the other hand, adopts the alternative metaphysical theory of external relations. Individual existents are regarded as the ultimate constituents of nature; and these ultimate constituents are conceived to possess no inherent connections one with another, but to be comprehensible each in complete isolation from the rest. The relations into which they enter are imposed on them from without, and these imposed behavior patterns are the laws of nature. It follows, therefore, that these laws cannot be discovered by a scrutiny of the characters of the related things, nor, conversely, can the nature of the related things be deduced from the laws governing their relations. It follows also, we may add, that such a view presupposes a nominalist epistemology and entails an empiricist science of nature.

With this distinction in mind it is revealing to glance back to the ideas of natural law and the laws of nature held in the centuries before Ockham. Immanent law is found to be typified by Stoic, perhaps even generally by Greek, views. These conceived of the material world as impregnated with reason, and regarded natural law as universally valid and inherent in the

69. SCIENCE AND THE MODERN WORLD 12-14 (New York, 1948).

70. ADVENTURES OF IDEAS 115-119 (New York, 1955). For an interesting attempt to apply the distinction to the juridical sphere see M. Ginsberg, *The Concept of Juridical and Scientific Law*, 4 POLITICA 1 ff. (1936).

very structure of things — so much so, indeed, that the Stoics could draw arguments for peace from the harmony of the celestial spheres. Imposed law, on the other hand, finds its best illustration in Semitic, and, in particular, in Jewish monotheism. For the God of the Old Testament gave to Moses the Ten Commandments, and “to the sea his law, that the waters should not pass his commandment.”⁷¹

And the Christian view? Whitehead’s comment was that it was a compromise between the immanence of law and imposed law due to the Platonism of Christianity.⁷² In this, as in so many other matters, it reflects an amalgamation of Semitic and Hellenic elements. This somewhat uneasy compromise is evident in Aquinas. His God is, admittedly, a Christian God, omnipotent and transcendent, but his eternal law is undoubtedly immanent in the universe. Thus although God is not thought of as being immanent in the world, it should be noted that the eternal law finds its ultimate foundation in the intellect, and, therefore, in the very being of God, so that Aquinas can at one point say that the eternal law is nothing other than God.⁷³

This quasi-immanentism involved an attempted Christianization of the Platonic doctrine of Eternal Forms or Ideas by means of the location of these Ideas in the divine mind as exemplars according to which God created the world, and it was hedged around with cautious qualifications. These qualifications, however, were clearly not cautious enough, and, in 1277, the bishop of Paris and the archbishop of Canterbury condemned a whole host of philosophical propositions, several of them Thomistic, as contrary to Christian beliefs.⁷⁴ In so acting, they followed in the footsteps of the Arab and Jewish theologians, who, before them had resorted to similar measures, and they reflected a fear, widespread among theologians of all three religions, that the metaphysical necessitarianism of Aristotle endangered the doctrine, common to Jews, Moslems, and Christians, of the freedom and omnipotence of God.

The condemnations marked the beginning of a theological reaction that was to vindicate the freedom and omnipotence of God at the expense of the ultimate intelligibility of the world,⁷⁵ and Ockham — a philosopher so often

71. Proverbs 8:29.

72. ADVENTURES OF IDEAS 139-140.

73. S. T., Ia 2æ, qu. 91, art. 1 *ad tertium*.

74. Etienne Gilson points out that the doctrinal act of 1277 traced the condemned errors to their very root, “namely, the Aristotelian identification of reality, intelligibility and necessity, not only in things, but first and above all in God.” HISTORY OF CHRISTIAN PHILOSOPHY IN THE MIDDLE AGES 407 (New York, 1955). See also pp. 728-729, where he lists some of the condemned propositions. One of them is: “That God necessarily produces what immediately follows from him.”

75. This amounted to an abandonment of any attempt to reconcile the Greek conception of a necessarily existing universe, ruled by strict necessity, with the Biblical notion of a

regarded as comparable with Hume — was the classic product of this reaction. Gilson has spoken of his thought as being a post-1277 theology “in a more than chronological sense,”⁷⁶ and as being dominated “by the first words of the Christian creed: I believe in one God, the Father Almighty.”⁷⁷ It is hardly surprising, therefore, that Ockham should have rejected the doctrine of the divine ideas, not only as introducing a heathen multiplicity into the Christian God, but also as implying a qualification of the divine omnipotence and freedom. Nor is it surprising that he should have viewed the divine liberty as similarly compromised by the realist connection of the natural moral law with the doctrine of the divine ideas, for the moral law, just as the whole of creation, must, he insisted, be utterly contingent upon the unhampered *fiat* of the divine will. And, believing this, he had no choice but to dismiss the traditional doctrine of the divine ideas, and the whole metaphysic of essences upon which it depended, as a pagan interpolation that had no place in any Christian philosophy.

Ockham's universe, therefore, is one in which a free and omnipotent God boldly confronts, without any *necessary* intermediaries, the things which he has created and which are radically contingent upon him. Hence, the dismissal of any necessary connections in nature between distinct things, even between cause and effect.⁷⁸ Hence, too, the belief that if we are to know the order of the world we can only examine what is *de facto*, for being completely dependent on the divine choice, it cannot be deduced by any a priori arguments.⁷⁹ Thus, from Ockham's fundamental insistence on the omnipotence and freedom of God follow, not only his nominalism, not only his ethical or legal voluntarism, but also his empiricism.

Now the lesson to be drawn from all this is that in a coherent philosophical system, given any *one* of the following elements, we should expect to find

freely created world, ruled by a free and omnipotent divine will. The Arab theologians had already faced the same problem and had adopted a comparable solution. Al Ash'ari (d. 936) and his followers vindicated the Semitic notion of God by adopting an atomistic view of the world as constituted of disjointed moments of time and points of space, connected together only by the will of God and possessing, therefore, no natural necessity. They held to this position so strictly that they were driven into a thoroughgoing occasionalism. See L. Gardet and M-M Anawati, *Introduction à la théologie musulmane*, 37 ETUDES DE PHIL. MÉD. 52-66 (Paris, 1948). This viewpoint was also adopted by early Jewish thinkers. See ERNEST RENAN, *AVERROËS ET L'AVERRUISME* 106 (Paris, 1861), and ISAAC HUSIK, *A HISTORY OF MEDIEVAL JEWISH PHILOSOPHY* xli (New York, 1958).

76. *Op. cit. supra* note 74, at 410.

77. *Id.* at 498.

78. Thus God can produce in us intuitions of nonexistent objections — QUODLIBETA SEPTEM UNA CUM TRACTATU DE SACRAMENTO ALTARIS (Strasbourg, 1491), Quodl. VI, qu. 6; English translation of this question in RICHARD MCKEON, 2 SELECTIONS FROM MEDIEVAL PHILOSOPHERS 372-375 (New York, 1930).

79. Cf. L. BAUDRY, *LE TRACTATUS DE PRINCIPIIS THEOLOGIAE ATTRIBUÉ À G. D'OCCAM* Introduction 23 (Paris, 1936).

in conjunction with it the rest — a nominalist epistemology; an empiricist approach to natural science; and, if a conception of God is admitted, a voluntarist or imposed version of the natural law (both scientific and juridical) and a Semitic view of God which stresses above all his utter freedom and omnipotence. But, as we have seen, the voluntarist interpretation of the natural law tends to carry over into a positivist interpretation of law in general. In a very tentative way, therefore, I would proffer the general conclusion that the shift to the metaphysical presuppositions necessary for the development of an empirical or quasi-empirical natural science did much to encourage the growth of a full-blown legal positivism. This is very clear in a philosopher like d'Ailly, a man whose thinking embodies all the elements which we have linked together, who propounded a positivist theory of law in general, and, therefore, a voluntarist theory of natural law and of the laws of nature, and who made use of expressions such as "the machine of the universe,"⁸⁰ admitting the relevance to the world of the very clock analogy that was to become a cliché of eighteenth century deist theology.⁸¹ For just as the craftsman constructs a clock, so also, in an analogical way, God — whom he calls, consistently enough, "the supreme architect and artisan" — can be said to fashion the celestial machine.⁸² Admittedly, if we turn to the famous architects of the seventeenth century scientific revolution, men such as Robert Boyle and Sir Isaac Newton, while we do find that they incline to nominalism and empiricism and tend to view the laws of nature as imposed upon a mechanistic world by a God whose most striking attribute is his omnipotence, we also find that they were uninterested in matters juridical. The influence, however, of their type of thinking cannot lightly be dismissed, and there is one seventeenth century figure in whose thinking most of our requisite elements explicitly — and all of them implicitly — play their role. This man is the more important in that he occupies an admitted, indeed, a prominent place in the history of legal positivism. His name is Thomas Hobbes.

80. *Ymago Mundi*, ed. E. Buron, 3 vols. (Paris, 1930), II, p. 494.

81. *Tractatus de Legibus et Sectis*, in J. Gerson, *Opera Omnia*, ed. Ellies du Pin (Antwerp, 1706), I, col. 793: ". . . Et confirmatur ratio: quis si quis faceret horologium materiale, utique efficeret omnes rotas, motusque earum commensurabiles, quantum posset: quanto magis ergo opinandum est de architectore summoque opifice Deo, qui omnia fecisse dicitur numero, pondere et mensura."

82. *Ibid.*