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THE NATURAL LAW, PRECEDENT, AND THURMAN ARNOLD

THIS article is an attempt to indicate an approach to law which will avoid the confusion afforded by some modern approaches to law, to emphasize historic ideas which are an integral part of our system of law, and to make it possible to understand something of the relationship between law and the everyday world, and law and the other social sciences. Nothing will be said in this article that is new. Nor is it the assumption that the approach to law here set forth is the only true¹ approach to law. Some other approaches using different words no doubt say the same thing. The assumption is rather that the approach to law here offered is commonly understood, and is worth retelling because it is useful.

There are, of course, many ways of looking at various aspects of the law. One point of view is that of the natural law. Another point of view is that of precedent. A third way of looking at the law, which might be called the Thurman Arnold way,² is that of concepts or symbols in the law. The natural tendency when one of these approaches to law is adopted is to state all of the problems about law in terms of that one approach. This often results in distortion, although the effect may seem brilliant. It is the contention of this article that these three approaches are not incompatible, that no one of them is in itself complete, and that together they make a unified whole. It is the contention of this article, therefore, that the position ascribed to Thurman Ar-

¹ Whenever the word true appears in this article, the reader may put quotation marks about it.

² What is here called the "Thurman Arnold way" is developed later in the article. Mr. Arnold's views are to be found in his two books: *THE SYMBOLS OF GOVERNMENT* (1935), and *THE FOLKLORE OF CAPITALISM* (1937).

nold is not intelligible if it is not combined with an acceptance in a certain sense of the position of the natural law. In fact it will be claimed herein that Mr. Arnold's views give particular force to the natural law position, and that in this sense Mr. Arnold may be hailed as the great revivor of the natural law. It is to be understood of course that a combination of views such as will be attempted in this article will be irritating to some persons and perhaps completely pleasing to none. The sequence of topics in the article has been arranged with an eye to possible irritations. The discussion of natural law, it is thought, will irritate most persons, many of whom rely on some doctrine of precedent as their legal guide. The discussion of precedent, it is hoped, may deprive such persons for the time being of their legal guide. The discussion of concepts will join the natural law and precedent in a jurisprudential marriage. This is in accordance with Thurman Arnold's idea that jurisprudence reconciles incompatibles; only of course, our thesis is that the natural law and precedent are not incompatible. The order of topics, then, is, first, the natural law; second, the theory of precedent, and, last, the function of concepts or symbols.

1. *The Natural Law*

The natural law is an ancient idea which in Anglo-American jurisprudence stems back to the works of Plato, Aristotle, and Aquinas.³ Aristotle and Aquinas⁴ will be referred to in this article because their position on the natural law is easy to present, and because it seems to avoid the pitfalls into which later writers have sometimes fallen. It must be stated at once that

³ See the brilliant essays of Sir Frederick Pollock on the natural law in POLLOCK, *ESSAYS IN LAW* (1922) 31-80; also in (1901) 1 *COL. L. REV.* 11; (1902) 2 *COL. L. REV.* 131. The point of view taken in this paper does not seem far different than that in COHEN, *REASON AND NATURE* (1931), 401-426; I have not attempted an historical treatment of the natural law; for a starting point there is, of course, GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* (Barker trans. 1934).

⁴ In a sense, of course, Plato's Republic is on the natural law. In the main, Aristotle's position on the natural law is stated in Book V of the *Nicomachean Ethics*, Aquinas' position is somewhat stated in the discussion following question XCIV, the *Treatise on Law*, volume 8 of the Dominican translation of the *Summa Theologica*.

an idea of natural law which assumes that somehow or other men may see clearly natural rights which apply in specific cases is not the idea of natural law which we wish to espouse. The two criticisms usually levelled at the natural law idea are that it is either too specific to be true, or too general to be useful. In the first portion of this article it will be shown that the natural law is not too specific to be true; in the second and third portions of this article the argument will be made that it is because the natural law is general that it is useful.

One reading Thomas Aquinas on the natural law will be struck not with how much the scholar says, but how little. We are told that there are first and second principles of the natural law.⁵ The first principles (or principle) are equally known to all men.⁶ It is, in short, to do good and avoid evil. The command is a command to men. The good which is to be done is the good for men; the evil to be avoided is the evil for men. But what is the good for men? The good for men, we are told, is to seek to know the truth, to live in society, and to harm no one.⁷ These three injunctions, then, form the elaboration of the first principle, and they are the first principles of the natural law. No one can say that they are not extremely general, and no one can say that they pretend to be anything other than general. There is, however, in Aquinas a further elaboration of the natural law. We are told that the good for men has three aspects according to the various sides of man's nature. We are told that man has something in common with all substances, something in common with all animals, and something peculiar to himself. The good for men will be the satisfaction of the desires of these parts of his nature insofar as such satisfaction is possible for men. But these statements have not taken our feet off the ground. We knew them before, and, indeed, that was the boast of Aquinas.

Aquinas states that there are secondary principles of the nat-

⁵ Summa Theologica, Q. 94, A. 2, A. 4, A. 6.

⁶ A. 6 " * * * there belong to the natural law, first, certain most general precepts, that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles. As to those general principles, the natural law in the abstract, can nowise be blotted out from men's hearts."

⁷ This is generally stated in Art. 2, as man's inclination to good, according to the nature of his reason.

ural law which are conclusions from the first principles. Aquinas gives us three examples of secondary principles. They are (1) not to kill; (2) to return goods held in trust, and (3) not to steal.⁸ Yet these secondary principles do not indicate that killing is always wrong, that goods held in trust must always be returned, or that it is always wrong to steal.⁹ There will always be exceptions to the general principles even when the general principles are known to man. Furthermore in many cases the general principles will not be known to man because man's reasoning about the practical world is imperfect.¹⁰ And even if it were possible to know the general principle and how it applies in the particular case, the punishment to be meted out to the murderer, the embezzler, and the thief is a matter of further difficulty which the general principles do not make clear. Finally, most of the laws in a given society are not even secondary principles of the natural law.¹¹ These laws are indifferent to the natural law, except insofar as it might be considered a part of the natural law that the proper agency of the state should enact laws deciding certain matters one way or another, and insofar as these laws must not be contrary to the general principles of the natural law. Lest it be thought that by these laws are meant such commonplaces as on what side of the road cars should drive, it is well to remember, although we may not agree, that Aquinas thought of slavery in that light.¹² It is true, of course, that laws, in this

⁸ Q. 95, A. 2; Q. 94, A. 6, A. 4.

⁹ Q. 94, A. 4. "Thus it is right and true for all to act according to reason: and from this principle it follows as a proper conclusion, that goods entrusted to another should be restored to their owner. Now this is true for the majority of cases: but it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance if they are claimed for the purpose of fighting against one's country."

¹⁰ Q. 94, A. 4. "But as to the practical conclusions of the practical reason, neither is the truth or rectitude the same for all, nor where it is the same, is it equally known to all."

¹¹ Q. 95, A. 4. "But those things which are derived from the law of nature by particular determination, belong to the civil law, according as each state decides on what is best for itself."

¹² Q. 94, A. 6. "A thing is said to belong to the natural law in two ways. First, because nature inclines thereto; *c. g.*, that one should not do harm to another. Secondly, because nature did not bring in the contrary: thus we might see that for man to be naked is of the natural law, because nature did not give him clothes, but art invented them. In this sense, the possession of

sense indifferent to the natural law, in their application to particular cases may be contrary to the general principles of the natural law, and even though our knowledge as to particular cases is incomplete we are compelled to act upon them as we see them.¹³

Aristotle gives a somewhat different picture of the natural law phrased in terms of justice. Justice is equality, or the giving to every man his due. But what is man's due? Aristotle has worked out a formula for us. Justice deals with the distribution of earthly goods. It does not deal with the distribution of wisdom, for example, although it would deal with the distribution of the external facilities which might aid men in becoming wise. The formula for justice indicates the proper distribution of these earthly goods among men. Thus, the formula reads, as one man is to another, so the goods of one man must be to the goods of another. This, of course, is merely another way of stating that justice is to give every man his due. And it should not be thought that Aristotle overlooked the question of how we shall value men and goods, without which valuation the formula is incapable of application to any particular case, for Aristotle states that particular countries will value men, and presumably goods, differently.¹⁴ While we may assume that there is some limit to the way a society may value men or goods, the range is broad. If this is the natural law, it is not the same kind of a law that is made by the precedent of a case or by a learned treatise on agency. But, then, no one ever said it was.

It is true that Aristotle's analysis of justice is a good deal more elaborate than the picture of the natural law which has been presented so far. His analysis includes three terms: corrective justice, distributive justice, and equity. Distributive justice is

all things in common and universal freedom are said to be of natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life."

¹³ Under this analysis, there are first principles, secondary principles which are conclusions from the first principles and which are normally true in any state (Aquinas states that theft, which is expressly contrary to the natural law, was not considered wrong among the Germans,) third principles, which are determinations made by particular states according to the principles of the particular state, and determinations of a lower order such as the particular punishment.

¹⁴ Book V of the Ethics, 1131 a.

the distribution of earthly goods in the state according to some standard set by the state. Corrective justice restores the balance upset by one man's misdeed. Apparently the distribution of earthly goods is a function of the basic constitution of the state and of the legislature. Corrective justice is more properly the function of the court or the impartial wiseman. But we need not ask whether it is ever possible to have a system of law which keeps these types of justice distinct in its institutions, for we are told that with justice, there must be equity to be applied to the particular case which does not fit into the general rule. Once equity has been administered, a new rule has been created, and a new distribution of goods is effected. The judiciary in administering equity has administered distributive justice. The famous case of the highwaymen is an example of distributive justice.¹⁵ There was a partnership arrangement in that case. The goods were withheld by one highwayman from another. Corrective justice would have seen that the injured highwayman was compensated; distributive justice refused to allow compensation. The right of the highwayman to have his profit ceased to be a right because in the mind of the court he was a bad man. The day may come when rich men will be considered as these bad men in the courts and given no redress.¹⁶ It is not at all clear that such a ruling would be contrary to natural law, although it might be contrary to the basic constitution of the state, or thought to be distributive justice of so radical a nature that it would not be permitted to be performed by a court.

Aristotle's analysis of justice includes an analysis of those acts which make for justice or injustice between men. The result of an unjust act is that one man obtains too much of the goods of the earth, and the other party to the transaction obtains too much of what is bad. The act itself may have been done (1) because of ignorance, or because of coercion; or (2) it may have been done with a minimum of thought; or (3) it may be done after deliberation, which might be said to involve moral choice.¹⁷ The distinctions made in this analysis are distinctions made in the An-

¹⁵ *Everet v. Williams* in 9 L. Q. REV. 197 (1893).

¹⁶ See Husserl, *Justice*, 47 INT. JOUR. OF ETHICS 271 (1937).

¹⁷ Book III of the *Ethics* must be read in connection with Book V as to the nature of acts.

glo-American law, and insofar as the distinctions are valid they undoubtedly have some significance in any body of law sufficiently developed to be concerned with the state of mind of the actor. But at most this analysis in practical significance only gives us the basis for a theory of punishment. The analysis raises eternal questions; it does not solve them. Thus the nurse who became so drunk that she mistook a child for a log and tossed the child into the fire does not have her sentence determined for her by this analysis.¹⁸ The analysis distinguishes between those acts done because of ignorance, (not knowing that the instrument is a gun) and those acts done with ignorance, as for example, with ignorance but because of drunkenness. The drunkard is responsible for his acts in the sense that he chose to drink too much liquor. That line of argument is traditional in Anglo-American law. It does not follow that the nurse will be hung or that she will be sent to the Keeley Institute. Similarly Aristotle points out that men with bad habits formed those habits themselves, and he believes that men may be pushed into the formation of good habits by the fear of punishment. Such an assumption, also, underlies the Anglo-American law of crimes. It does not, however, indicate the form of punishment, nor does it say that criminals who grew up in slums (and whose criminal habits were easily acquired) are to be treated the same as those who formed criminal habits under other conditions.

Aristotle completes his analysis of acts done because of coercion by distinguishing between external coercion and a choice by necessity. In the latter case there is a kind of coercion in that no one would voluntarily place himself in the situation where the difficult choice of a selection of a lesser evil is forced upon him. While this latter choice is not a case of real coercion under this analysis, Aristotle nevertheless states that some acts done by reason of this kind of necessity may be pardonable. The example he gives is throwing a man's goods overboard in order to save one's own life on an overburdened ship.¹⁹ Aristotle adds that some acts of this latter sort may not be pardonable. While it is not necessary to view this analysis of acts as any part of the

¹⁸ See 18 *Gent. Mag.* 570 (1748).

¹⁹ Book III of the *Ethics*, 1110 a.

natural law, we may do so if we consider the analysis as indicating the type of act always involved in any just or unjust act. The Anglo-American law has developed to the point where we may attempt to apply this analysis of acts and of the natural law to particular instances.

In *United States v. Holmes*,²⁰ the first mate and some sailors, among them Holmes, were set adrift in an overcrowded life boat with some passengers. The boat because it was overcrowded was in grave, and, possibly, immediate danger of sinking. Acting on what may have been the instructions of the first mate, Holmes and other sailors began tossing the passengers out of the boat. Single men were to go first, married men next, and the women were to be saved until the last. In the struggle between the passengers and the sailors, two women were thrown overboard either accidentally, or because they wished to join their relatives in the sea, or because they had become troublesome. The drastic measures taken by the sailors apparently saved the life boat from sinking. The life boat was eventually picked up by a passing ship. Holmes who had been one of the more active sailors was tried for manslaughter of one of the women in the federal circuit court in Philadelphia before Justice Baldwin of the United States Supreme Court. As Mr. Hicks has said, the case is one on which we may argue until the end of time.²¹

How may the natural law be applied to *United States v. Holmes*? One of the few principles derived from the natural law that we may rely on with some certainty is that some kind of killing must be prohibited. This is one of the secondary principles of the natural law. Yet there are exceptions to the general principles, and the imperfections of human reasoning are such that we may not recognize how the natural law should be applied. The woman was killed because of a choice by necessity. Some acts done because of a choice by necessity are pardonable; others are not. There is no way of applying the natural law to the case at hand with any certainty. Nor were the rules of Anglo-American law clear as to what should be done in this case. It was known that murder was wrong, and that kill-

²⁰ 1 Wall. (Jr.) 1 (U. S. C. C. 3d, 1842).

²¹ HICKS, HUMAN JETTISON (1927).

ing in self-defense was excusable. There was some suggestion that the sailors should have had the passengers draw lots in order to choose the ill-fated ones. Justice Baldwin thought this would have been appropriate as an appeal to God to decide, but it is difficult to know why God, had He so desired, could not have decided the issue without artificial props. There was also the known duty of sailors to passengers, but this would not mean that all the sailors must die first, because some sailors were required to man the boat. There was also the duty of a sailor to obey his superior officer, but of course illegal commands must not be obeyed. In short neither the Natural Law nor the Anglo-American law seem very helpful as to how the case should be decided. Actually Holmes was found guilty and given an extremely light sentence. The newspapers of the time thought that he would be pardoned, but President Tyler did not do so because of the failure of the judge to join in the request for a pardon. At this point it may be added that Justice Baldwin had apparently prejudged the case, was cantankerous, and died two years later. The judge who had been originally slated to hear the case apparently favored Holmes. It is difficult to state what these facts, which often impress the realist, add to our consideration of the case.

The English court, many years later, in a somewhat similar case,²² may have handled the matter somewhat better. In a superior way they scoffed at the idea of drawing lots, and thought it sufficiently important to add as an afterthought to their opinion that if lots were drawn, the final result might be that more men would be killed than would be saved. After copious references to English jurists and Puffendorf, the English court decided the defendants were guilty of murder, but the court's opinion clearly indicated that the case was one in which the crown might well exercise its pardoning power. This the crown did. The picture was then complete by the crown's use of what Aquinas called the power of dispensation. And the perfection of the opinion lies in the fact that henceforth the world and England might know that such conduct was reprehensible for Englishmen, but at the same time the actual result was the Englishmen

²² *Regina v. Dudley and Stephens*, 14 Q. B. 273 (1884).

who committed the crime went free because all other Englishmen would have acted just as they had.

The natural law did not decide these cases. The English solution may be thought to be more in accord with the natural law in that it preserved order in the state and exercised what appears to be justifiable mercy towards the defendants. But this is not at all clear. The natural law does not decide any case. It will not tell us whether an agent who has been illegally forced to pay a claim against his principal may recover from his principal.²³ It does not tell us whether a man who has married a woman believing her chaste and certainly not pregnant, may secure an annulment because the lady is not chaste and is pregnant.²⁴ It does not tell us whether the buyer of fur skins who is turned out of the seller's house when the buyer is ill may recover damages from his host.²⁵ But as it happens, precedent did not tell us what to do in those cases either. And to the extent that these cases were decided on a basis of what appeared to be just, and no one of them can be shown to be clearly unjustly decided, in that sense, and in that sense alone, these cases were decided in accordance with the natural law. In all of these cases there was a striving for justice, an attempt to give every man his due, an attempt on the part of a court not to overstep the boundary between distributive and corrective justice too much. To this extent natural law is a part of all conventional law. Of course it is obvious that we may speak of natural law in other terms, such as life, liberty, and the pursuit of happiness, or a wise and orderly government. The end of the law is the same no matter what we call it. But there is a danger in speaking of natural laws or of natural rights in the plural, because we are apt to believe that these separate doctrines are easier of application than the general concept of justice or the natural law. It is important that we do not assume that our power of reasoning is such that we can draw clear conclusions from the natural law for application to particular cases. This has never been shown to be the case, and it is opposed to the position of Aristotle and

²³ *D'Arcy v. Lyle*, 5 Bin. 441 (Pa. 1813).

²⁴ *Moss v. Moss*, 77 L. T. Reports 220 (1897).

²⁵ *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1 (1907).

Aquinas. The natural law when made specific, as we shall later show, loses all of its utility.

At this point the charge will probably be made that while it has been shown that the natural law is not too specific to be true, it is nevertheless too general to serve any purpose. It is the end of the law and we are worried about the means. But are there any means less general than the natural law?

2. Precedent

The natural law with its extreme generality is at one end of the scale; the decision of a court and the precedent created by the decision are at the other end of the scale. It has been argued in the first portion of this article that natural law is general, but that at the same time, it is not too general a notion to be of service. On the other hand the argument to be made on precedent is that the kind of precedent, upon which most lawyers think they rely, is too particular to be of any use, and in one sense does not exist. If the structure of the law were dependent on what is usually meant by the so-called binding web of precedent, the structure would have collapsed. It may be worthwhile to examine a theory of precedent in order to make this position clear.

The most earnest attempt to locate what is a precedent of a case is to be found in an article by Mr. Goodhart.²⁶ Mr. Goodhart begins by stating what precedent is not. The precedent of a case is not the court's summation of what it considers to be the law in the case, even though Mr. Morgan of Harvard apparently thinks it is.²⁷ Mr. Goodhart points out that the court's summation is often incorrect and cannot be considered to be binding. Thus in *Rex v. Fenton*,²⁸ where "the prisoner caused the death

²⁶ Goodhart, *Determining the Ratio Decidendi of a Case* (1930), 40 *Yale L. J.* 161. Note also Mr. Goodhart's earlier article: *Case Law in England and America* (1923) 36 *HARV. L. REV.* 641; also the acrimonious debate between Mr. Holdsworth and Mr. Goodhart: Goodhart, *Precedent in English and Continental Law* (1934) 50 *L. Q. REV.* 40; Holdsworth, *Case Law* (1934) 50 *L. Q. REV.* 180; Goodhart, *Case Law—A Short Replication* (1934) 50 *L. Q. REV.* 196; cf. the article on François Géný, by B. A. Wortley in *MODERN THEORIES OF LAW* (Oxford, 1933), especially at 149.

²⁷ Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 *YALE L. J.* 161, 165. MORGAN, *THE STUDY OF LAW* (1926) 109.

²⁸ 1 *Lew. c. e.* 179 (1830).

of a man by wantonly throwing a large stone down a mine", Tindal, C. J. thought that the principle of law involved was "if death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter". Mr. Goodhart points out that the statement of the principle was too wide, for in *Regina v. Franklin*,²⁹ where "the prisoner threw a box belonging to a refreshment-stall keeper into the sea, thereby killing a swimmer", Field, J. stated that "We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and therefore, the civil wrong against the refreshment-stall keeper is immaterial in this charge of manslaughter".

Mr. Goodhart also agrees with John Chipman Gray, that "It must be observed that at the Common Law not every opinion expressed by a judge forms a Judicial Precedent."³⁰ Thus the reasoning of the court may be ridiculous and the reasoning itself does not form a precedent. The reasoning in *Priestly v. Fowler*,³¹ which Mr. Goodhart finds to be "palpably incorrect" does not form part of the precedent of that case. Nevertheless the case itself, if one can find the ratio decidendi of that case, remains as law in England.

On the other hand Mr. Goodhart does not agree with Oliphant as representative of "the view of a certain American school of legal thought" that the "predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinion, but which way they decide cases, will be the dominant study of any truly scientific study of law."³² Mr. Goodhart believes that such a view would make all the facts of a particular case, those facts apparent in the judge's decision, those facts apparent on the record, and those facts in the mind of the judge a necessary part of the precedent of a case. Such a rule he believes to be unworkable, because facts are infinitely various. Mr. Goodhart proposes instead his own theory of precedent.

Mr. Goodhart's theory of precedent is that the precedent of

²⁹ 15 Cox c. e. 163 (1883).

³⁰ GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1924) 201.

³¹ 3 M. & W. 1 (1837).

³² Oliphant, *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 159.

a case is formed by the court's findings as to what facts are material or immaterial, and the actual result reached in the case. There are certain rules whereby it may be determined whether the court has found a fact to be material or immaterial. All facts mentioned by the court are material, unless they are facts concerning person, time, place, kind, and amount. The latter facts are immaterial unless the court states otherwise. If the court states a fact to be immaterial, it is immaterial. On the other hand hypothetical cases proposed by the courts do not form any part of the precedent. Mr. Goodhart then goes on to consider the cases of alternative facts and of several opinions. Where there are alternative facts, the court's finding as to each set creates a precedent. When there are several opinions, a majority finding as to each fact determines whether it shall be considered material or immaterial. Mr. Goodhart is forehanded enough to answer two possible criticisms of his analysis. He says, "It may be said that a doctrine which finds the principle of a case in its material facts leaves us with hardly any general legal principles, for facts are infinitely various."³³ To this he responds, "It is true that facts are infinitely various, but the material facts which are usually found in a particular legal relationship are strictly limited. Thus the fact that there must be consideration in a simple contract is a single material fact although the kinds of consideration are unlimited. Again if A builds a reservoir on Blackacre and B builds one on Whiteacre, the owners, builders, reservoirs and fields are different. But the material fact that a person has built a reservoir on his land is in each case the same."³⁴ The other possible criticism of his theory noted by Mr. Goodhart is that it allows courts to make precedent on a basis of facts which the court believes to be present, but which a scrutiny of the record or the world would show to have been actually absent.³⁵ "The answer to this interesting question is that the whole doctrine of precedent is based on the theory that as a general rule judges do not make mistakes either of fact or of law."³⁶

³³ 40 YALE L. J. 181.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

There is no point in trying to prove that Mr. Goodhart's theory of precedent is not a good theory save insofar as the objections that may be made to his theory are applicable to all theories of precedent which do not restrict precedent to an extremely narrow, almost non-existent, position. One way in which the theory advanced by Mr. Goodhart broadens the scope of precedent is by allowing the court to decide for itself what facts are material or immaterial. We can only guess at the meaning of these words, but there are at least two possibilities. Material facts may be either necessary facts, or they may be sufficient facts, and in that distinction lies a great difference. If material facts are necessary facts, then the absence of any material fact will govern succeeding cases automatically to that extent at least. Thus in the *Hynes Case*,³⁷ where the New York Central Railroad was held liable because of a lack of ordinary care to a boy struck by a falling electric wire while diving off a board attached to the railroad's property and over a public waterway, if the fact that the New York Central Railroad had not objected to the use of its property for diving purposes had been a material fact, a case in New York where the railroad had objected would result in a holding of something other than liability. We may guess that Mr. Goodhart meant material facts to be necessary facts, because of his converse reasoning that an immaterial fact is one the absence of which would make no difference in the decision. Thus, conversely, if in the *Hynes Case*, no protest had been made and the court had found this to be immaterial, a succeeding case where there was protest (the absence of "no-protest") would have to be decided in favor of liability. On the other hand if material facts are only sufficient facts, and Mr. Goodhart may mean this to be the case, there is no precedent at all binding on a succeeding case where the material fact is absent.

If material facts, however, are necessary facts, it is difficult to see why hypothetical facts stated by the court do not form part of the precedent. To say that a fact is hypothetical is only another way of stating that a fact is not present in this particular case. But the absence of a fact is just as much a fact as

³⁷ 231 N. Y. 229, 131 N. E. 898 (1921).

the presence of a fact. Thus in any case where the court mentions the absence of certain facts, and it may do this indirectly by comparing the present case with a hypothetical case having certain facts present, it would seem that the court would be making a finding as to the materiality of these absent facts. Thus in the *Hynes Case*, Cardozo says: "The most that the defendant can fairly ask is exemption from liability where the use of the fixture is itself the efficient peril. That would be the situation, for example, if the weight of the boy upon the board had caused it to break and thereby thrown him into the river."³⁸ Cardozo has stated a hypothetical case. He has also stated that the fact that the spring-board did not break in the present case was material. If a non-breaking spring-board is a necessary fact, a breaking spring-board, under the precedent in the *Hynes Case*, without more, would have to result in no liability. It is questionable whether anyone would want a theory of precedent seemingly as far-reaching as that.

Yet the truth of the matter is that even taking Mr. Goodhart's theory in its broadest application, it is still questionable whether his theory means very much. The precedent of a case is made up of the facts in the case together with the actual result. As Mr. Goodhart states, "the facts are infinitely various." It is no answer to state that the facts naturally group themselves so that we will recognize a group of facts as constituting one fact; such as, to use Mr. Goodhart's own illustration, the fact of consideration. We may think that the facts naturally group themselves, but this natural grouping is not the result of precedent. The holding of a case, in Mr. Goodhart's own terms, is composed of the facts together with the result, and the result is not a grouping of facts under the heading of a legal concept. The result is liability, non-liability, specific performance, punishment or variants of these. No court has ever *held* that consideration is necessary for a contract, that a res is necessary for a trust, or that a stranger uninvited on one's property is a trespasser. We may ourselves group the facts that must be present under the general heading of consideration, and we may feel that we are able, pretty generally, to spot facts which come un-

³⁸ 231 N. Y. 229, 235, 131 N. E. 898, 900.

der the heading of consideration. The court may also feel capable in this regard, and as a matter of short hand expression about a group of facts, the court may speak of them not individually but in terms of the consideration concept. But the consideration concept is a generalization made about a group of facts, and the ratio decidendi does not make the generalization for us. Further these concepts carry with them a number of what might be called rules of law indicating a generalization of the normal result in a case where the facts, generalized into a concept, are present. We speak about the necessity of a res for a trust, the requirement of consideration for a contract, the lack of a requirement of ordinary care to trespassers, but these are the results of generalization made by us and by the courts; they are not the holdings of cases.

Of course if it were possible for the exact facts of a case to repeat themselves with no additions, precedent would be applicable. Mr. Goodhart admits that this will not be the case very often. He remarks that it will always be possible to see present slightly different facts which, however, do not materially change the situation. But of course the reason the new facts do not materially change the situation is because we perceive them to be of the same order as the old facts. We do this because we are all capable of seeing similarity and dissimilarity in the world about us. But with education and other facts our ideas of similarity and dissimilarity change, often without our knowing it. On the other hand in many cases we do not know whether to treat the facts as though they were the same or different. We then fall back on an idea which may be called the idea of lateral consistency, which is to say that if in other cases certain facts have been treated as though they were similar, we will treat those facts as though they were the same in every other case, unless some good reason for not doing so appears.³⁹ But of course we may see a good reason for not doing so, and we may not know of the other cases. Thus ordinarily in the law men are treated alike, and we do not, in the usual case, differ-

³⁹ This would mean that the Anglo-American law of precedent is actually not so different from the continental notion of consistency. See ALLEN, *LAW IN THE MAKING* (1927) 107 et seq.

entiate men on the basis of their occupations. The *Holmes Case* involved a sailor, but it is not at all clear that for the sake of lateral consistency we will apply the *Holmes Case* as precedent in a future case involving a passenger. Somehow a sailor and a passenger seem different under the circumstances of the *Holmes Case*. Whether we should distinguish between a sailor and a passenger will never be settled by precedent.⁴⁰ It will not be settled by the natural law either.

All that has been said here about precedent may be summarized briefly. The precedent of a case, consisting of the facts of the case together with the results, can never be binding in a subsequent case unless we think the facts of the subsequent case are the same. Our thoughts on the question of similarity will not be controlled by precedent. The thoughts of the court in this matter do not create a precedent. The first court may believe that the fact before it can be generalized so that a large number of other facts appear to be analogous. The second court may ignore the generalization without disregarding precedent. But the difficulty of this position is that, taken literally, there never is a precedent. The board in the *Hynes Case* was sixteen feet long. Would this be a precedent in a case where the board was sixteen and 1/12 feet long? We may answer this in two ways. We may say that there is no precedent because the cases are different if we wish to see them as different. This would destroy the idea of precedent entirely. On the other hand, it seems better to say that there is a precedent in such a case. There is a precedent because commonly speaking the boards are the same. If we do this, the emphasis should be on the "commonly speaking." Commonly speaking both planks are diving boards. Suppose that in the next case there is no diving board but a giant flag pole. We may say that this makes no difference, the boards of two sizes and the flag pole are all appendages. We are expressing the commonness or similarity that we see by a concept of "appendages." Our theory of precedent has turned into a theory about concepts, because our theory of precedent is

⁴⁰ It will be settled in one sense. If a later case were to treat a passenger as a sailor in facts similar to the *Holmes case*, that common treatment would indicate a precedent. If a third case ignored this common treatment, it would in that sense be overruling precedent.

based upon our seeing commonness which must be expressed in words. This does not mean that the law is therefore uncertain; it does mean that the certainty of the law is based on general opinions as to similarity and difference. And it would also seem to mean, or so this article will attempt to show, that a major task of the observer of the law is to examine the concepts which express similarity and difference. And it is also our intention to show that without a theory of the natural law the concepts are dangerous. Since Mr. Arnold has indicated the dangers and utility of these concepts, we will salute him as the revivifier of the natural law.

3. *Thurman Arnold*

The natural law is an idea of extreme generality; precedent is an idea of such particularity that on close examination the precedent of a case tends to disappear or is preserved only because similarity between facts and dissimilarity are perceived in a general way. Precedent, thus, in order to have any validity is dependent on general opinions and words that express general opinions. The gap between the generality of the natural law and the particularity of precedent is bridged by these words that express general opinions. We may call these words concepts. It should be noted at once that concepts differ in the order of their generality. At the lower levels we have words expressing the idea of a spring-board. The concept "spring-board" is on such a low level of generality that a theory of precedent which assumes identity between a spring-board of fifteen feet and one of fifteen 1/12 feet would be acceptable to us. It becomes necessary to concentrate on the concepts, however, when they become more generalized. The concept "appendage" is more generalized and in our hypothetical case was a way of stating similarity between a flag-pole and a spring-board. Actually most of the important concepts in law are of a higher generality. Words such as "fixtures," "trust," "consideration," "trespass" are exceedingly generalized concepts. We can go higher in the structure of generality and speak about "rights," and the most generalized concept of all is the concept of "the natural law."

It may be worth while to look at the *Hynes Case* again in or-

der to stress the operation of these concepts in the pattern of the law. It will be remembered that in that case a boy was killed by a falling wire of the New York Central Railroad Company while the boy was jumping off a spring-board attached to the company's property but overlooking the public way. The Appellate Division of Supreme Court thought the boy was a trespasser and that the New York Central Railroad owed the boy no duty of due care.⁴¹ The boy was a trespasser because he was uninvited on the property of the New York Central Railroad. Of course the real issue in the case was whether the railroad would have to pay damages to the boy's family. The way that this real issue was approached, however, was to discuss whether the boy was a trespasser, which in turn was somewhat dependent on whether the spring-board was considered the railroad's property. For the solution of these problems, the court looked to prior cases. It found one case in which a defendant had carted away the wood of a tree belonging to the plaintiff when the roots of the tree had extended themselves into soil belonging to the defendant. An action of trespass lay against the defendant.⁴² In another case a young lady was rudely shoved by the defendant when she attempted to grasp cherries growing on her brother's tree but hanging on a branch which extended over the defendant's property. The lady sued the defendant, and in the course of its opinion the court concluded that the lady was not a trespasser because the tree was the property of her brother.⁴³ In a third case, the plaintiff attempted to land his boat at a wharf which the defendant insisted belonged to him, but which the plaintiff said belonged to the public since it was on the public way. The plaintiff sued for the damage suffered by him because of his inability to unload his cargo. The plaintiff failed to recover.⁴⁴ Even though the dock was on the public way, the court felt that so far as the plaintiff was concerned the dock was the property of the defendant. These three cases may seem to have very little to do with the situation in the *Hynes Case*. Nevertheless we may argue that a boy on a spring-

⁴¹ 188 N. Y. Sup. 178 (1919).

⁴² *Masters v. Pollie*, 2 Rolle 14 (1619).

⁴³ *Hoffman v. Armstrong*, 48 N. Y. 201 (1872).

⁴⁴ *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70 (1862).

board is similar to a man unloading cargo on a wharf, or to a defendant pushing a lady away from overhanging cherries, or to a man carting away logs, and that this similarity is indicated by calling them all trespassers. We may say that a spring-board over a public way is the same as a wharf on a public way, or a branch over another's land, and we indicate that similarity by calling all these things the property of the men who own the things out of which these appendages come.

The difficulty with the concepts used in the *Hynes Case* and in all cases is that we do not treat them as though they were merely ways of indicating our belief that, in certain respects, facts are similar. Indeed we treat them as though they somehow decided the case for us, with the result that often we know the facts are not only different but should be treated so, and yet, the force of the concepts is such that we feel our hands are tied. The result is that we find a court saying "Were we to follow the instincts of our hearts, we would be under the strongest impulse to sustain the plaintiff's action;" admitting "We have been unable to find any case precisely like the present," and yet feeling itself bound to reach a result not of its own choosing.⁴⁵ And even when the court realizes its hands are not tied, and proceeds to act upon the differences, as Cardozo did in the *Hynes Case*, the court feels required to justify its actions by the creation of other concepts, or by changing the meanings of the old concepts. Thus Cardozo in the *Hynes Case* created the concept of "efficient peril." The railroad company was not insulated from liability because the trespassing was not the "efficient peril" of the injury.

It is important to note that while a court might coin a word to express similarity or dissimilarity, it will not frequently do so. Most of the concepts drift into the law rather naturally from the common expression of the people. Concepts in common use by the people are always changing. And once in the legal system they continue to change. Thus in *The Meaning of Meaning*⁴⁶ the following passage is quoted: "We do not often have occasion to speak, as of an indivisible whole, of the group of phenomena involved or connected in the transit of a negro over a

⁴⁵ *Henderson v. Dade Coal Co.*, 100 Ga. 568 (1897).

⁴⁶ OGDEN AND RICHARDS, *THE MEANING OF MEANING* (1936).

rail fence with a melon under his arm while the moon is just passing behind a cloud. But if this collection of phenomena were of frequent occurrence, and if we did have occasion to speak of it often, and if its happening were likely to affect the money market, we should have some name as "wousin", to denote it by. People would in time be disputing whether the existence of a wousin involved necessarily a rail fence, and whether the term could be applied when a white man was similarly related to a stone wall.'"⁴⁷ But the truth is we would probably not call this collection of phenomena a "wousin." We would probably wait for some propagandist, possibly a social scientist, to popularize a word which would then naturally slide into legal usage or we would fall back on the word "trespass." Probably at one time the word "trespasser" had no legal significance at all. It was merely a name for a person who got in our way. The name very naturally came into our legal usage as a way of indicating the form of action which could be taken against persons who got into our legal way. It then naturally came to be a word indicating not a legal action alone, but a class of persons against whom such a legal action might lie even though no one was bringing such an action against them. In this form the word carries with it a great many legal rules which lawyers commonly believe apply to trespassers. One of these rules is that ordinary care need not be accorded a trespasser. The impact of social ideas current in the world today, just as they were current in the days of the Lord's prayer, brought about a modification of the concept in the *Hynes Case*. Either Hynes was not a trespasser, in which case the class of persons to which the word at one time seemed to apply has been decreased, or the rule that ordinary care is never necessary to trespassers has been changed. It has been changed naturally and easily because the world, educated to the notion of a right of poor boys to go swimming and the advantageous position of corporations, was ready for the change. The concept will continue to change. If the *Hynes Case* is a "wousin," we do not know whether or not "wousiness" will apply to an old man on a spring-board.

⁴⁷ Quoted from Ingraham, Swain School Lectures (1903). See Duff, *The Personality of an Idol*, (1927) 3 Camb. L. Jour. 42.

We may say that there is a fairly certain structure of the law because judges will not frequently mean to invent concepts or change old ones. If any thing, they mean not to do so. It is for this reason that the law can change while the judges and lawyers insist that it does not. The concepts change with the social order without our knowing it; new concepts come in without our realizing it.⁴⁸ In the main this is as it should be. It gives the law its ability to change and yet remain consistent. It is also the reason why judges should not be particularly bright, or they would change the law consciously too frequently. As Justice Bonyngne has stated in *Reed v. Littleton*, "a certain amount of naivete is an essential adjunct to the judicial office."⁴⁹

But the difficulty with the concepts is that while we need them and cannot do without them, they have a certain magic of their own which increases as the concept arises to a higher order of generality. We forget that they are only ways of seeing similarity or dissimilarity. At best we have faith that the matter has been thought out for us by wise men over countless ages; at worst we feel that to deny that a concept applies, or to indicate that a concept should be changed because our ideas have changed, is an assault upon a religious ideal. The result of this feeling is that we refuse to allow the concept to change or to die with the times. We cling to it like a dog to an old bone. This dilemma of our need for concepts and of their danger to us is very clearly seen by Thurman Arnold. His thesis, as I understand it, is that we may free ourselves to some extent from the domination of these concepts by observing how these concepts operate, by being aware of the cultural ideas of the people so that we can estimate what concepts they will react to, and by then manipulating concepts as much as we can; so that they will serve practical ends. He concludes *The Folklore of Capitalism* with these observations:⁵⁰

"I have no doubt as to the practical desirability of a society

⁴⁸ "* * * the Judge is only enunciating a rule already known to the offender by the experience of every-day life." JENKS, *THE BOOK OF ENGLISH LAW* (1929) 82.

⁴⁹ *Reed v. Littleton*, 159 Misc. 853 (N. Y. 1932).

⁵⁰ ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 393.

where principles and ideals are more important than individuals. It is an observable fact that such a society is more secure spiritually and hence more tolerant. Yet the belief that there is something peculiarly sacred about the logical content of these principles, that organizations must be molded to them, instead of the principles being molded to organizational needs, is often the very thing which prevents the principles from functioning. The greatest destroyer of ideals is he who believes in them so strongly that he cannot fit them to practical needs."

It does not seem necessary to belabor the point that the concepts in the legal field have often become ends in themselves. The types of text-books written in the law are some indication of this. They are books not on practical problems but on the concepts. Insofar as the books provide a technique for molding concepts to meet practical needs, they are entirely justifiable. The real naivete would be to assume that we could do without concepts and therefore write only on practical situations, ignoring the standard concepts. But throughout the law, practical solutions have been impeded by mystical discussions. These mystical discussions again have their place insofar as they keep the law from getting ahead of the common notions of the community. But there is such a thing as getting behind the common notions of the community. Thus the courts of this country have floundered for at least a quarter of a century in an endeavor to discover whether a joint deposit in a bank with an intended right of survivorship, called a poor man's will, is a trust,⁵¹ a contract,⁵² a contract creating a joint tenancy,⁵³ a joint tenancy,⁵⁴ a gift,⁵⁵ a third party beneficiary contract,⁵⁶ an agency,⁵⁷ or a testamentary disposition.⁵⁸ The problem apparently has not been whether according to our notions it is a good thing to al-

⁵¹ Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370 (1898).

⁵² See Appeal of Garland, 126 Me. 84, 136 Atl. 459 (1927).

⁵³ Wisner v. Wisner, 82 W. Va. 9, 95 S. E. 802 (1918).

⁵⁴ Illinois Trust & Savings Bk. v. Van Vlack, 310 Ill. 185, 141 N. E. 546 (1923).

⁵⁵ Negaunee Nat. Bank v. Le Beau, 195 Mich. 502, 161 N. W. 974 (1917).

⁵⁶ Deal's Admr. v. Merchants' & Mechanics' Saving Bank, 120 Va. 297, 91 S. E. 135 (1917).

⁵⁷ Staples v. Berry, 110 Me. 32, 85 Atl. 303 (1912).

⁵⁸ Morristown Trust Co. v. Capstick, 90 N. J. Eq. 22, 106 Atl. 391 (1919).

low a poor man's will in this fashion. It has only been whether the joint deposit will be laid on the altar of one idol or another. And the inability of the courts to realize that the public around them sees a new concept, the concept of joint deposit, which can be molded to do what is thought to be justice is somewhat shocking. When the Ohio court finally decided with the aid of a statute that a joint deposit with a right of survivorship created a "joint interest by contract,"⁵⁹ it then proceeded to hold that one of the depositors might kill the other depositor and then receive the amount on deposit. They did so because the concept "joint interest in a contract" indicated the murderer had a "contract right" of which he might not be deprived. The court said, "We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution."⁶⁰ Discussions today concerning the liability of corporate trustees are conducted in a similar vein. Learned articles deal not with the question of whether or not the corporate trustee should be made to do certain things or be liable, but whether, in the religion of trusts, the corporate trustee is one of the sect.⁶¹ The courts are theological institutions particularly when they deny it.

It is to be expected, of course, that the process of the invention of concepts, the influx of concepts, and the change of concepts will always go on in the law. The concepts at one stage will seem to become ends in themselves; then when the concepts impede social desires too much, agitation will result in a repetition of the process. New concepts, and changed concepts will take their place in the hierarchy. But the difficulty with this view of the law is that it does not tell us why we should desire to change concepts that impede social desires. Mr. Arnold has often been in the position of urging that the concepts be handled to fit practical needs, and yet "practical needs" is itself a concept, and presumably it also should be handled to meet the ends of another concept. It is necessary that somehow or other we

⁵⁹ *Cleveland Trust v. Scobie*, 114 Ohio St. 241, 151 N. E. 373 (1926).

⁶⁰ *Oleff Admr. v. Hodapp*, 129 Ohio St. 423, 195 N. E. 838 (1935).

⁶¹ See McCollom, *The Securities and Exchange Commission and Corporate Trustees* (1936), 36 *COL. L. REV.* 1197.

get out of this treadmill. We can only be objective about concepts, we can only use them, if we know why we want to use them. It is impossible to use concepts as a part of what Mr. Arnold calls political dynamics unless our natural desire for some fixed concept is appeased and at the same time in appeasing it we have not tied ourselves down to another concept. It would be ridiculous to free ourselves from the domination of the concept trust and then use the concept trust only as a slave to the concept of free enterprise or of the collective system. All that we have done is to change masters. We need to see some final end to which we cannot be enslaved. That end is the natural law. The need for this belief in a final end is clearly seen by Mr. Arnold. He says:

“No one writing on social organization can escape the demand that he formulate a social philosophy. Not only does the demand come from others, but the writer himself is so much a part of his own time that he feels uncomfortable if he fails to produce a platform of principles on which he can stand in order to repel attacks.”⁶²

And yet it is obvious that while Mr. Arnold produces a platform of principles, he is uncomfortable about his principles, and the principles which he does state are only predictions of the coming social pattern. He states what he thinks will be the slogans of a new order to which in turn all of us will be bound. He does not state any final end. We will be on a treadmill again.

Therefore it is probable that Mr. Arnold will refuse the title of the revivor of the natural law. And yet, it would seem that the next step to complete a philosophy of political dynamics is a reaffirmance in the natural law. This means that the purpose of the lawman is to do justice. Mr. Arnold in his *Symbols of Government* is happy with the end of the doctor which is to cure people, and he laments the fact that lawyers have allowed themselves to become enslaved to concepts forgetting their practical purpose. The end of the lawyer is to do justice, which of course can be stated in different words. The generality of the concept is our safeguard. If we would be slave to that concept and no

⁶² ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 332.

other, we would have a guarantee of freedom which we do not now have. We would not be deceived into believing that the natural law can be stated in more specific terms, nor that we can dispense with the natural law and rely on precedent. We would be willing to use the slogans of a coming era but always for the purposes of doing justice as we see it. And in a real sense we would be slave to no concept, for the natural law is dependent only on man's nature. Its practical application will change as current notions about society change, but its generality will insulate it from use as a deceptive battle-cry, provided, of course, we preserve this generality.⁶³

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⁶³ The difficulties perceived by the English officer who tried to govern Penang only according to the natural law are worth remembering. "The law of nature is the only law which I can apply to the Criminal and Civil suits brought in judgment before me. But as the law of nature gives me no precepts respecting the right of disposing of property by wills and testaments, the right of succession and inheritance, and the forms and precautions to be observed in granting Probates of Wills and Letters of Administration to intestates' effect, or respecting many things which are the subject of positive law, I have often been much embarrassed in the execution of my duty as Judge in the Court of Justice in which I preside; and many cases there are in which I am utterly unable to exercise jurisdiction." POLLOCK, *ESSAYS ON THE LAW* (1922) 77, n. 1.