The NATURAL LAW

HEINRICH A. ROMMEN

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A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY

Heinrich A. Rommen

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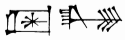

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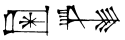

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Introduction

Heinrich Rommen is known in the United States primarily as the author of two widely read books on political philosophy, *The State in Catholic Thought: A Treatise in Political Philosophy* (1945) and *The Natural Law* (1947), and as a professor at Georgetown University (1953–67). Yet, before 1938, when he fled the Third Reich for the United States, Rommen was neither a scholar nor a university professor, but a professional lawyer—trained in civil and canon law—who had devoted considerable energies to Catholic social action during the dissolution of the Weimar Republic and the rise of the Nazi Party. The two books that secured his academic reputation in the United States were written in Germany in the midst of his legal and political work, for which he was imprisoned by the Nazis.[1]

Although *The Natural Law* displays erudition in a number of academic specialties (law, philosophy, history, theology), the reader will appreciate that the book was written by a lawyer in response to a political and legal crisis.[2] As a practicing lawyer, Rommen watched with alarm as the Nazi party deftly used German legislative, administrative, and judicial institutions to impose totalitarian rule. "Our modern dictators," he remarked, "are masters of legality."[3] "Hitler," Rommen concluded, "aimed not a revolution, but at a legal grasp of power according to the formal democratic processes."

1. *Der Staat in der katholischen Gedankenwelt* (1935) and *Die ewige Wiederkehr des Naturrechts* (1936).

2. Despite copious references to the works of great philosophers and jurisprudents, Rommen's original text contained no footnotes. The notes in the present volume were supplied later by his English translator.

3. *The State in Catholic Thought: A Treatise in Political Philosophy* (St. Louis: B. Herder, 1945), p. 212 (hereafter abbreviated *SCT*).

Every generation, it is said, finds a new reason for the study of natural law. For Rommen and many others of his generation, totalitarianism provided that occasion.[4] As he put it in his book on the state, "When one of the relativist theories is made the basis of a totalitarian state, man is stirred to free himself from the pessimistic resignation that characterizes these relativist theories and to return to his principles."[5] Rommen's writings were prompted by the spectacle of German legal professionals, who, while trained in the technicalities of positive law, were at a loss in responding to what he called "*Adolf Légalité.*"[6]

What caused this loss of nerve, if not loss of moral perspective? Rommen points to the illusion that legal institutions are a sufficient bulwark against government by raw power—as though a system of positive law takes care of itself, requiring only the superintendence of certified professionals. "Forgotten is the fact that legal institutions themselves can be made the object of the non-legal power struggle. Who does not know that in a nation the courts or the judges themselves are subject to the power strife, showing itself in the public propaganda of contradictory social ideals?"[7]

The reader will find that Rommen is relentlessly critical of legal positivism. He distinguishes between two different kinds of positivism.[8] The first, he calls world view positivism. A world view positivist holds that human law is but a projection of force—proximately, legal force is the command of a sovereign; ultimately, however, the sovereign's decree replicates the force(s) of nature, history, or class. Whereas the world view positivist makes metaphysical, scientific, or ideological claims about law, the second kind of positivism is methodological, and its adherents are committed to the seemingly more modest project of studying and describing the law just as it is, without recourse to metaphysical or even moral analysis.

4. The original German title of *The Natural Law* is *Die ewige Wiederkehr des Naturrechts* (1936). Literally translated, "The Eternal Return of the Natural Right."

5. *SCT,* p. 48.

6. *SCT,* p. 212. For a recent study of the Nazi legal system, see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich,* trans. D. L. Schneider (Cambridge: Harvard University Press, 1991).

7. *SCT,* p. 718.

8. Infra p. 110.

It is important to note that Rommen is not entirely critical of methodological positivism. He allows that so-called analytical jurisprudence can be subtle and refined.[9] After all, lawyers should study law *as it is*—in the statute books, judicial decrees, and policies of the state. Yet, by consigning the moral predicates of law (good, bad, just, unjust) to a realm of ethics that is separated, rather than merely distinguished, from jurisprudence of the positive laws, the methodic positivists can become world view positivists by default. In Germany, their "tired agnosticism" with respect to the moral bases and ends of positive law left the German legal profession intellectually defenseless in the face of National Socialism.[10]

In *The Natural Law,* Rommen traces the historical and philosophical roots of this "tired agnosticism." He wants to show that the disrepair of constitutional democracy is the result of skepticism and agnosticism, which themselves are the cultural effects of disordered philosophy. The idea that the project of constitutional democracy suffered from philosophical neglect was a lesson drawn not only by Rommen but also by a number of other influential European émigrés to the United States. In 1938, the year that Rommen arrived in the United States, three other important émigrés debarked on these shores: the French political theorist Yves R. Simon, the Austrian legal philosopher Eric Voeglin, and the German philosopher Leo Strauss. The most famous Catholic thinker of the century, Jacques Maritain, arrived in New York in 1940, one year before Hannah Arendt. These émigré intellectuals explained the European problem to Americans and proposed also to explain America to itself.

Beginning in the late 1930s and through the 1950s, there was a renascence of interest in natural law—one that corresponded almost exactly to the American careers of the European intellectuals who had fled the chaos of Europe. The extraordinary talents of these émigrés were almost immediately recognized. Consequently, they were able to introduce Americans to a more classically oriented philosophy and taught a new generation of students in law and political philosophy to

9. Infra p. 136.
10. Infra p. 113.

ask questions and to look for answers in places long forgotten by American schools. Arguably, they rescued the American departments of political science from positivism and behavioralism.

After stints at small Catholic colleges, Heinrich Rommen became a member of the faculty at Georgetown. The rest of the cohort of Europeans tended to cluster at three other universities. Dr. Alvin Johnson, President of the New School for Social Research in New York City, recruited Leo Strauss, Hannah Arendt, and other European-trained social theorists. At the University of Chicago, Robert Hutchins, Mortimer Adler, and John Nef, head of the Committee on Social Thought, also recruited Europeans, many of whom (Simon, who came by way of Notre Dame, Strauss, and Arendt) would eventually hold posts at Chicago. Ninety miles away, in South Bend, Indiana, Notre Dame's president, John F. O'Hara, began building what was called "the Foreign Legion." Most of the émigrés were either Catholic or Jewish, and Father O'Hara took full advantage of the Catholic connection to build the faculty at Notre Dame. Waldemar Gurian and F. A. Hermans came to the University of Notre Dame in 1937. Although compared with Maritain and Strauss they were lesser lights in the constellation of émigré scholars, Gurian and Hermans founded the *Review of Politics,* which led to the foundation of the *Natural Law Forum* (today, the *American Journal of Jurisprudence*).[11] Both journals quickly became important media for both Catholic and Jewish émigrés.

In the brief course of five years, therefore, the New School, the University of Chicago, and Notre Dame became, in a curious way, sister institutions. Political philosophy was pursued in the light of the ancient and medieval traditions, with a multidisciplinary breadth that was distinctively continental. It would be anachronistic to characterize this group of thinkers as "conservative." In their respective European contexts, they rejected the various species of nineteenth-century romanticism that formed the staple of European conservatism in fin-de-siècle Europe. In hindsight we see that the advent of a conservative intellectual

11. While still in Germany, Gurian allegedly threw the fascist legal philosopher Carl Schmitt down some stairs during a philosophical argument.

movement in the United States would have been unthinkable without these Europeans. Among other contributions, for present purposes, they called attention to the perennial debate over natural law.

With respect to the problem of natural law, what did these Europeans find upon their arrival? The answer is that, in the first decades of this century, American thinkers had given relatively little attention to natural law. If natural law was ever mentioned, it was usually in the context of theories of jurisprudence (rather than philosophy or political philosophy) and even then in a derisive or dismissive tone. In his brief but nonetheless influential 1918 essay "Natural Law," Oliver Wendell Holmes declared, "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[12]

It is a historical fact that ideas of natural law and natural rights shaped the Founding of the United States and in the 1860s its refounding. Nonetheless, American academicians and jurisprudents generally regarded natural law as an antique metaphysical ghost—an abstraction drawn from an obsolete philosophical conception of nature and the human mind's place within it. At the turn of the twentieth century, the educated classes thought of "nature" not according to the classical conception of an ordered cosmos of ends, nor even according to the Enlightenment understanding of fixed physical "laws of nature"; rather, nature was conceived according to one or another evolutionary scheme within which the human mind exercises creative, pragmatic adjustments.

At the same time, American legal theorists and jurisprudents resisted the pure positivism entrenched in England and in some legal cultures on the Continent.[13] They recognized that neither laws nor a legal system as a whole could be explained simply on the basis of the will of the

12. Oliver W. Holmes, "The Natural Law" (1918), in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), p. 312.

13. For a comparison of English and American law, emphasizing the American dissatisfaction with formalism, see P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, Clarendon Press, 1987).

sovereign. Nor for that matter were the Americans satisfied with a formalistic treatment of legal rules. Having jettisoned both the classical and modern theories of natural law, the American legal mind was forced to turn elsewhere for an account of the extralegal bases of law. Such advocates of "sociological jurisprudence" as Louis Brandeis urged judges to set aside mechanistic and formalistic logic of "rules," and to interpret law in the light of economic and social facts. While not fully reducing law to social policy, sociological jurisprudence took the first step in that direction. Legal realists, including Karl Llewellyn and Benjamin Cardozo, took the argument further, contending that judges make law (*ius facere*) rather than merely discovering it (*ius dicere*). To them, law is to be made after considering multiple social, economic, and political facts. The tag "legal realism" thus conveyed the notion that a proper account of law is less a matter of explicating legal doctrines than of observing what judges actually do when they interpret and apply law, namely, contribute to the formation of social policy.

Although it might be doubted that these schools of jurisprudence rescued American law from the clutches of positivism, certainly they depicted the law as something more complicated and dynamic than the command of a sovereign; at least temporarily, these schools of jurisprudence satisfied the quest to have positive law rooted in something more than itself. The theories were tailor-made for a people agnostic about metaphysical truths but irrepressibly earnest in pursuing the tasks of progress and social reform.

There were, of course, notable exceptions to this rule. Edward S. Corwin's 1928–29 articles in the *Harvard Law Review,* eventually published as *The "Higher Law" Background of American Constitutional Law* (1955), traced both the theory and practice of American constitutional law to ideas of natural justice implicit in the English common law tradition, and beyond that to the ancient concept of *ius naturale.* It is worth noting, however, that Corwin's work was not widely read until it was assembled into a monograph in 1955, after the natural law renascence was well under way. In the early 1930s, Charles Haines's *The Revival of Natural Law Concepts* (1930) and Benjamin Wright's *American Interpretations of Natural Law* (1931) also investigated the role of natural law in American jurisprudence.

Still, Corwin, Haines, and Wright were not especially interested in the philosophical grounds of natural law. Like the advocates of sociological jurisprudence and the legal realists, they were interested primarily in what judges do. To be sure, until the 1890s there was relatively little reason for judicial review to ignite debates over natural law. For example, in federal cases adjudicated during the early years of the Republic, the theme of natural law arose infrequently and even then only indirectly. Admittedly, the federal courts of the nineteenth century did face problems of natural justice in connection with slavery. Even so, most federal judges enforced the written terms of the fugitive slave clause.[14] The *Dred Scott* case in 1857 was perhaps a premonition of a debate as to whether judges should avail themselves of moral theories in adjudicating constitutional cases, but the problem was settled by Congress after the Civil War. Abolitionist enthusiasm for natural justice found expression in the legislative rather than the judicial arena.

Corwin, Haines, and Wright's interest in natural law was piqued by judicial events that began to transpire three decades after the Civil War. In the 1890s the Supreme Court embarked on a new interpretation of the due process clause of the Fourteenth Amendment. Due process guarantees were invested with "substantive" meanings and purposes, especially with regard to rights of property and contract. Over the next two decades, federal courts struck down hundreds of state laws under the rubric of "substantive due process." Both partisans and critics of this new jurisprudence understood that the courts were using something like natural law reasoning.[15]

In varying degrees, Corwin, Haines, and Wright approved of what seemed to be a fresh "revival" (to cite Haines's term) of natural law, especially in defense of individual liberty against government.[16] But this

14. On the conduct of judges in the antebellum Republic, see Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

15. Even today, "natural law" often means any species of moral theory used by appellate judges when they interpret and apply law. See, for example, John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

16. Corwin wrote, "Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the greatest periods of its history, and juristically the most fruitful one since the days of Justinian." *The "Higher*

attitude was not widely shared, and it certainly did not represent a significant movement in the universities or law schools, not to mention the wider public. This is easily explained. At that time, the judicial discovery of natural rights was perceived not only as antipopulist but as contrary to social reform. By their advocates, these newly discovered rights were deemed to be bulwarks of individual economic liberty, upheld against the policies of social reform enacted by state legislatures in the early part of this century, and then by the New Deal Congress during the Depression. In defending individual property rights from the bench during a time of economic crisis and dislocation, the Court made natural law appear contrary to the common good. Here, of course, we are not passing judgment on that jurisprudence (natural law theory, after all, is typically used to check legislative will, whether of kings or of democratic majorities); rather, we are explaining why a very interesting episode of natural law reasoning in the 1930s fell flat. Not only in America, but even more so in Europe, there prevailed a popular urge to remove whatever was deemed an impediment to strong legislative and executive action in addressing the crises of the decade. In any event, with the retirement in 1938 of Justice George Sutherland this era of judicially enforced natural rights came to a close.[17]

Interestingly, although Heinrich Rommen has relatively little to say about the Anglo-American traditions of natural law jurisprudence, he does mention the institution of judicial review.[18] Indeed, he refers approvingly to the project of juridically applied natural law. On this matter, two points need to be made. First, Rommen was not trying to insinuate himself into a debate over American constitutional law. He shows little or no awareness of the currents and riptides of debate over use of natural law by the Supreme Court. Rommen refers to the institution of judicial review in order to make the philosophical (rather than constitutional) point that the mere fact that a law is posited by the will of a lawmaker is neither the first nor the last word in what

Law" Background of American Constitutional Law (Ithaca: Cornell University Press, 1955), p. 89.

17. See Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994).

18. Infra pp. 36–37, 220–21, 232–33.

constitutes a law. Wherever there is a Bill of Rights, he observes, there is a "strong presupposition" that the law is not out of harmony with natural law.[19] Second, we need to remember that in Europe—in Germany and Italy in particular—the problems of the Great Depression quickly led to centralized state authority that brutally trampled on individual rights in the name of the common good. Thus, for many Europeans like Rommen,[20] the discovery and defense of individual rights by the United States judiciary, especially in the face of a public emergency like the Depression, certainly appeared to be evidence of a tradition lost in Europe.

The renascence of natural law theory in the 1940s and 1950s owed little to this rather specialized issue of judicial review; if anything, it had to overcome an allergic reaction to that subject.[21] In any case, the recently transplanted Europeans were far more interested in philosophical, and in what might be called civilizational, issues. Consider, for example, the first round of publications produced by these thinkers: Rommen's *The Natural Law* was published in English translation in 1947; Leo Strauss's *National Right and History* in 1950; Simon's *Philosophy of Democratic Government,* and Maritain's *Man and the State* in 1951; and Voegelin's *New Science of Politics* in 1952. In these books the problem of the moral foundations of law and politics are treated speculatively, broadly, and, for lack of a better term, classically.

To some extent, the interests of these émigrés overlapped. They agreed, for example, that the origins of modern totalitarianism are to be found in the Enlightenment; they also agreed that the Romantic

19. Infra p. 232.

20. Jacques Maritain, for example, wrote, "I think that the American institution of the Supreme Court is one of the great political achievements of modern times, and one of the most significant tributes ever paid to wisdom and its right of preeminence in human affairs." *Reflections on America* (New York: Charles Scribner's Sons, 1958), p. 171. Maritain, who helped shape the UNESCO and UN statements on universal human rights, believed that the Fourteenth Amendment was a model for checking the mistaken notion of state sovereignty. Like Rommen, Maritain was vaguely aware of the Court's natural law jurisprudence in applying that Amendment; and, like Rommen, he was more interested in the problems drawn from the European experience than in U.S. constitutional law.

21. Of course, the problem of judicial review would reemerge later, but long after the renascence.

reaction worsened rather than corrected the Enlightenment's consequences. The contrast between the philosophy of the ancients and moderns became a trademark of the Straussian school, but virtually all of the émigré thinkers, including Rommen in *The Natural Law,* drew some version of that distinction. Yet it would be a mistake to suppose that their common interests and overlapping research programs amounted to a common doctrine of natural law. Leo Strauss, Eric Voegelin, and Catholics like Rommen, had distinctively different approaches to the subject.

Besides the obvious fact of their religion, the Catholic thinkers had at least three things in common that distinguished them from the other émigrés. First, Rommen, Simon, and Maritain shared a philosophical vocabulary that was rooted in scholastic thought, specifically in the work of Thomas Aquinas. Second, for the Catholic thinkers the philosophy of natural law was a living tradition: that is to say, it was not only a concept to be expounded according to the philosophy of the schools, it was a tradition formed by centuries of application to a wide array of intellectual and institutional problems. Third, the Catholic thinkers were more confident in building and deploying a system of natural law. Not only Heinrich Rommen, but also such well-known Thomists as Jacques Maritain and the American Jesuit John Courtney Murray wanted to rescue the concept of natural rights from what they deemed the dead-ends and errors of modern philosophy—a project that was a contradiction in terms to many, if not most, of the writings and students of Leo Strauss.

At midcentury, then, these Catholic thinkers were confident that the crisis of the Second World War provided an opportune moment for reconsidering democratic institutions in light of traditional natural law theory. Because this Scholastic tradition informs almost every page of Rommen's *The Natural Law,* it will be helpful briefly to examine it.

The word *scholasticism* derives from the dialectical method of the medieval schools, in which the dicta of authorities (*auctoritates*) in matters of theology, law, and philosophy were submitted to a very complex and open-ended form of systematization. Beginning with the

compilation and classification of authoritative dicta, the data were to be interrogated, distinguished, and disputed. The scholastic method was in part the legacy of the legal revolution of the twelfth century, when the Roman Catholic Church, having secured its legal autonomy from the Carolingians, consolidated its independence by systematizing ecclesiastical customs and legal rulings. In about 1140, for example, Gratian, a Camaldolese monk from Bologna, produced the *Concordantia discordantium canonum* (Concordance of Discordant Canons). Comprising some four thousand different texts and authoritative dicta, the so-called *Decretum Gratiani* formed the first part of what eventually became the *Corpis iuris canonici* (the Code of Canon law). Gratian's work was a conduit for legal, philosophical, and theological opinions about natural law as well as for many other legal subjects. His method of reconciling, or harmonizing, diverse opinions became a model for the golden age of scholasticism in the schools of the thirteenth century.

About fifteen years later (circa 1155), Peter Lombard adopted a similar method in treating theological opinions in *Sententiarum libri quatuor,* and as a young student in Paris a generation later, Thomas Aquinas studied and wrote a commentary on the four books of the "Sentences of Lombard." Thomas's unfinished *Summa theologiae,* which he composed off and on for more than a decade in Paris and Italy during the mid-thirteenth century, is widely regarded as the most masterful expression of medieval scholasticism. This is because Thomas set out not only to harmonize nearly a millennium of theological opinions but also to treat the "new" learning of the recently recovered pagan philosophers, especially Aristotle.

Though he was well aware of the emerging legal systems of both civil and canon law, Thomas was not professionally trained in the laws. He was, instead, a Dominican theologian. In all his writings there is but one discussion of law for its own sake; this is found in the *prima-secundae* (I–II) of the *Summa theologiae,* questions 90 through 108. Most of this so-called "Treatise on Law" examines human and divine positive law as well as the *lex nova,* or "New Law," of the Gospel. It is perhaps paradoxical that while Thomas's treatment of natural law is by far the most influential and certainly the most quoted discussion of the subject in the history of philosophy, Thomas himself had relatively little to

say about natural law. Whereas his *Summa theologiae* consists of more than five hundred discrete questions, only one is devoted exclusively to the *lex naturalis.*[22]

In this case, however, quantity is misleading; for in terms of the clarity of its analysis and exposition, the synthesis of materials (legal, theological, philosophical, political), and the deft application of natural law to disputed issues of human conduct (just war, theft, polygamy, etc.), Thomas's work in this area was a significant achievement. It is written serenely and in a manner that a modern reader might regard as understated, but it is all the same a tour de force. It outlived its immediate medieval context and the various "Thomisms" that have evolved in the intervening centuries.

Thomas's natural law theory had its greatest influence long after the Middle Ages. During the period of late scholasticism (roughly, the sixteenth and seventeenth centuries) Dominican and Jesuit theologians resurrected Thomas in order to respond both to the Reformation and to a series of international political crises. These crises were brought about by new and potent expressions of royal absolutism on the part of Protestant and Catholic sovereigns and by moral and political conflicts ignited by their colonial policies in the New World. In a period of civil wars and domestic disturbance, theories of royal absolutism were geared to enhance executive power. It is the recurrent story of natural law theory that it crops up precisely when the political order removes barriers to legislative and executive will.

Such is what happened during the Baroque era, where these issues were debated in the seminaries and in the courts of the Hapsburgs. Two centuries before the American Revolution, and nearly three centuries before the American Civil War, issues of political self-determination and slavery were debated in terms framed by Thomistic natural law theory. For example, the Dominican theologian Francisco Vitoria argued successfully for the natural rights of native peoples in the Indies and developed exacting criteria for the use of war by nations. His lectures, called the *Relectiones* (1527–40), influenced Hugo Grotius and

22. *Summa theologiae* I–II, q. 94 (hereafter abbreviated *S.t.*). At II–II, q. 57.2, there is one article devoted to *ius naturale.*

the emerging modern jurisprudence of international law. Another Spanish Dominican, Bartolomé De Las Casas, whose *Historia de las Indias* (1561) was translated into several languages, worked and wrote tirelessly for the natural rights of Indians to political liberty and property. Consequently, the transition from medieval doctrines of natural law to modern conceptions of natural rights was achieved in no small part by Spanish scholastics.[23]

The best known of the late scholastics was the Spaniard Francisco Suárez (1548–1617), whose *De Legibus ac Deo Legislatore* (1612) was the most ambitious effort in the modern period to construct a Thomistic legal theory. Noteworthy for our purposes is that Rommen's first book, *Die Staatslehre des Franz Suarez* (1927), was on Suárez, and there are repeated references to the Spanish Jesuit in *The Natural Law.* It was Suárez who vigorously defended the legality of natural law, which he applied to problems of political consent, just war, and right of revolution against unjust political authority. His emphasis upon the divine ground of natural law, and his critical application of it against the exaggerated imperial power of temporal sovereigns suggests that Suárez is more deserving of the title "father of modern natural law" than merely to be known as a "late" interpreter of Aquinas. Indeed, Suárezian natural law exerted considerable influence on both Catholic and Protestant legal and political theorists. That during the Second World War the Carnegie Endowment for International Peace published a Latin-English edition of Suárez's *De Legibus* is but one measure of his continuing influence.

More immediately, Rommen and his fellow Catholic thinkers were the products of a new wave of scholasticism that can be traced to Pope Leo XIII's encyclical *Aeterni Patris* (1878). Leo called for a return to the primary sources of scholastic philosophy, especially to Thomas Aquinas. Whereas "late scholasticism" was bred primarily in Roman and Spanish seminaries, the "neo-Thomism" prompted by the Leonine reform was led by lay scholars, many of whom taught in secular universities.

23. This chapter of intellectual history is covered by Brian Tierney, "Aristotle and the American Indians—Again," *Christianesimo Nella Storia* 12 (Spring 1991): 295–322.