

January 1996

## Ancient Legal Maxims and Modern Human Rights

Dr. J. Stanley McQuade  
*Campbell University School of Law*

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Human Rights Law Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Dr. J. Stanley McQuade, *Ancient Legal Maxims and Modern Human Rights*, 18 *Campbell L. Rev.* 75 (1996).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in *Campbell Law Review* by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

# ANCIENT LEGAL MAXIMS AND MODERN HUMAN RIGHTS

DR. J. STANLEY MCQUADE\*

## I. INTRODUCTION — THE RISE AND FALL OF THE LEGAL MAXIM

One of the most striking differences between a modern English law book and one from an earlier period lies in the place given to maxims. Until the middle of the nineteenth century books were still being published which appeared to regard the ancient maxims as central pillars of the law.<sup>1</sup> The teaching of the law was organized round them. They were cited reverentially in court. Since that time the maxims have steadily declined in importance. From guiding principles they became interesting illustrations and have now all but disappeared from legal literature. Commentaries on the maxims remain in law libraries but they are largely historical curiosities. If they are referred to at all, it is for their entertainment value, not as legal authorities. They are indeed entertaining and their pithy wisdom still meets with the approval of the modern reader. I wish neither to bury them nor to praise them but to restore them to whatever place in the law that they merit. I believe that the time is ripe for such a restoration for a number of reasons but especially because of a resurgence of interest among lawyers in morals in general and human rights in particular. The essence of the maxims is a very lofty and humane ethic; the current revived interest in human and environmental values might be considered a rebirth of the spirit of the maxims. Dinosaurs though generally extinct are said to survive in one form at least, namely birds. It may be thought then that the maxims are still alive and well at least in the form of human rights and environmental principles.

I propose to follow this theme in a little more detail; to compare the two forms of legal principle, the ancient and the modern;

---

\* Dr. McQuade is a lawyer, professor, medical doctor, and a minister. He currently teaches jurisprudence, products liability, and law and medicine at Campbell University School of Law. Dr. McQuade regularly publishes in the areas of legal philosophy and law and medicine.

1. Herbert Broom's *SELECTION OF LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED* was first published in 1845. All references to Broom in this article are to the fifth edition, which was published in 1870.

to see whether we can be satisfied with contemporary human rights theories and let the dead rest in peace, or whether we need to take at least some of the old maxims and reintroduce them to improve our stock of jurisprudential wisdom.

## II. THE MAXIMS AND MODERN HUMAN RIGHTS

### A. *The traditional maxims and why they were considered important*

We tend to think of legal maxims as epigrams, little nuggets of legal wisdom, which they are. They are salty sayings in Latin, Norman-French, English, and there are even a few in Anglo-Saxon. They are culled from all sorts of sources and incorporated into legal opinions and texts. But they did not function as mere epigrams. They were not illustrative nor decorative sayings nor “clinchers” added at the end of a legal argument. They were considered to be the guiding principles of legal argument. They were referred to collectively as “regula”.<sup>2</sup> The word is singular and means not rules but indeed a ruler, a measuring device, a blueprint, a gold standard, a pattern, against which individual things may be compared to see if they will pass muster.

The mention of an exemplar, suggesting an ideal form, should alert us to the possibility that Greek idealist philosophy is lurking somewhere in the background and it is. The term maxim is the Latin equivalent of *axioma*<sup>3</sup> meaning a first principle, for example, of geometry. Axioms being first principles were by definition self-evident. All the lesser propositions could be deduced from them but they themselves were underived. They stood on their own authority. They were either obviously true or else could not be denied without self-contradiction. A legal maxim, then, would be a self-evident first principle of legal theory from which more particular propositions could be derived.

It may seem odd to us that lawyers could ever have looked on law as a species of geometry, but they did. Indeed it would have been surprising if it were otherwise. Until relatively recent times all science, and so all knowledge, was viewed as a deductive process and presented in a quasi-geometrical form. So since academi-

---

2. Pope Boniface VIII and Francis Bacon both entitled their collection of maxims *REGULA*.

3. The Greek *axiomata* is usually translated into Latin as *dignitates*. Nevertheless, the connection between mathematical first principles and legal *principia* or *maximi* is quite clear. See *infra* note 5, and accompanying text.

cally inclined lawyers have always insisted that the study of law was a science, it had to be organized in the same way.

Medieval lawyers were wont to describe a system of law as *ratio*. This was a technical term in the middle ages. Generally it is translated as reason but this term had, as it still has, many meanings. It can refer to the *faculty of reason* or the *reasoning process* or it can refer to the *product of reasoning*, an organized body of knowledge. The subject matter of geometry could thus be organized into a system of interrelated propositions which could then be described as ratio (knowledge). The term reason was also applied to the first principles of such a system, and such principles were said to be supremely or optimally rational since they justified the whole. All propositions of law could be derived from such general first principles and these would therefore properly be called maxims, the first principles or axioms of legal science.

The clearest example of this way of thinking is found in Sir John Fortescue's classic book, *De Laudibus Legum Angliae* (Dialogue in Praise of the Common Law), first issued in Latin in 1537. This work takes the form of a dialogue in which he endeavors to persuade his pupil, the young prince in exile, that knowledge of the law is as necessary to a king as skill at arms. Answering his pupil's astute objection that such knowledge would take too long to acquire, the Chancellor states that a sufficient knowledge of the principles, all that the king would require, could be managed in a single year. He says, "[t]he principles, furthermore, which the Commentator<sup>4</sup> said are effective causes, are certain universals which those learned in the laws of England and mathematicians alike call maxims[.]"<sup>5</sup>

Unfortunately, Fortescue does not give any examples of a legal maxim and we cannot be sure whether he used the term to refer to our "little sayings" or to more general first principles of law or ethics. It is odd, and unsatisfactory, that he does not. He has used the word maxim, a common term for a legal epigram; he ought then to have made it clear whether he was using the term in its ordinary meaning, referring to the known body of maxims, or whether he was using it in a special sense to indicate self-evident first principles. But Fortescue may have been wise in his vague-

---

4. i.e. Aristotle

5. "[t]hrough the experience of them necessary for judges is scarcely attainable in the labours of twenty years, you will adequately acquire a knowledge fitting for a prince in one year." SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* Chapter VIII (Chrimes trans., 1942).

ness. Most of the maxims are not evidently first principles and there are a number of other difficulties in characterizing them. In fact there are a number of difficult questions of a philosophical nature concerning the nature of the traditional maxims, their function in legal logic and their justification, which need to be considered. These questions will be taken up later after reviewing modern human rights jurisprudence.

*B. The decline of the maxims and emergence of human rights theories*

The disappearance of maxim jurisprudence has been laid at the door of John Austin<sup>6</sup> and his mentor Jeremy Bentham. Certainly the decline of maxims coincides with the rise of so-called "legal positivism". But rather than blaming the appearance of a new species of legal philosophy for the disappearance of the maxims we ought probably to attribute the catastrophe (if catastrophe it was) to a change in the climate of thought. The world of medieval philosophy generally was being swept away in England; new empirical ideas, thought to be more consonant with a scientific attitude to things, were being developed. Scholars generally, and scientists in particular, were emphasizing facts rather than concepts. Consequently it would be only natural for legal scholars to look at particular propositions in legal texts and opinions, rather than general principles.

Fortunately we do not need, for present purposes, to explain the disappearance of the maxims historically, for we are not trying to decide why the maxims disappeared but whether they are really gone. They did not, in fact, ever disappear completely and the values that they embodied continued to feature in legal argument. Strict legal positivist theory, in the sense of rules without guiding principles, is a very difficult thing to apply in practice. It is not surprising then that the notion of justice and a variety of moral principles continued to be used to interpret both case law and statutes. In the United States, indeed, many of these values are embodied in the constitution and moral discussion proceeds under the guise of constitutional interpretation. So one way or another moral values continued to have a place in the law.

---

6. That John Austin can properly be called a legal positivist is contested. See Robert Moles, *John Austin Reconsidered*, 36 Northern Ireland Legal Quarterly 193 (1985).

In recent decades, debates (and heated ones at that) concerning the concept of justice and the place of moral principles in the law have been a feature of jurisprudential writing. Everyone, it seems, wants to be known as a human rights advocate. Professor Fuller and Professor Dworkin have in turn attacked what they term "legal positivism" as epitomized in the writings of Professor H.L.A. Hart, and insisted that moral principles are an integral part of the law, not merely marks on an external yardstick which determines whether positive law is good or bad. Professor Hart, and those who have supported him, have in turn been concerned to make it clear that their views do not compromise moral principles, especially human rights. Even moral skeptics, as we shall see, tend nowadays to be vociferous advocates of humane causes.

### C. *Difficulties with human rights theories*

All this interest in, and support of human rights can, as was said earlier, be viewed as a continuation (or resurgence) of the emphasis on general moral values and humane principles that were a feature of the maxim approach to law. But in certain respects these writers are not the heirs of Fortescue, Noy, Bacon and Coke. They may be the revived but they are not the authorized version. The classical maxims were developed in the context of natural law theory which in turn was seen against a larger background of philosophical and theological ideas. Contemporary human rights theorists, in contrast, are nervous about such basic theories and generally try to function without them. Lacking any clear philosophical foundation their views have a floating and insubstantial quality. Like clouds they are often beautiful and appealing from a distance but somehow vague, shifting and confusing when you get into them.

I have difficulty with the detailed vocabulary of modern "rights" authors, for example, as to the worthwhileness of Professor Dworkin's distinction between a principle and a policy.<sup>7</sup> But my greatest difficulty is in deciding what each writer considers a human right to be and how one would answer critics who deny that rights are anything other than our own wishes and desires dressed up in a fancy vocabulary. It is common for modern "rights" authors explicitly to dissociate themselves from traditional natural law doctrines. But they do not as a rule go on to say what they are substituting for natural law theory or how they would modify

---

7. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

it to make it acceptable. So moral principles and human rights are left floating miraculously, like Mohammed's coffin, between heaven and earth.

The most recent entrants on the stage of human rights discussion are radical critics of the law somewhat loosely lumped under the title of the "critical studies movement". A number of such writers are quite explicit that there is no rational basis for moral statements, yet these same writers attempt to persist in moral utterance, especially moral criticism of the law. Legal theory is seen by them, correctly in my opinion, as based on underlying conceptual assumptions about value. But one way or another they discount any notion that values might have an objective basis. Some make use of existentialist notions which treat all value propositions as personal statements. Or the argument may employ skeptical theories about documentary interpretation (hermeneutics) to suggest that all such value judgments represent only the basic beliefs of the interpreting community, i.e. the church, social class, professional group or whatever. Such beliefs, radical critics tell us, cannot be justified in any other way than by saying that they are the creed of the interpreting community. "We believe" then means just that and nothing more.

This is all very reminiscent of theological controversies which raged a quarter of a century ago associated with the writings of Rudolf Bultmann. The interpretation of scripture, and indeed the scriptures themselves, were described by the radical theological critics of that era as representing the faith of the church. Few churchmen, if any, would deny that proposition but it was further asserted, also with help from hermeneutic theory, that nothing more could be said about the faith of the church by way of rational support, than to reiterate that the church believed it. This I would deem an unacceptable account of the relationship between faith and reason, but at least its adherents were able to explain belief as a miracle of grace. What miracle and whose grace can Professor Leff use (after he has dismantled and discarded the "faith" of the law) to affirm that:

It looks as if we are all we have . . . everything is up for grabs. Nevertheless: Napalming babies is bad. Starving the poor is wicked. Buying and selling each other is depraved. Those who stood up to and died resisting Hitler, Stalin, Amin and Pol Pot and General Custer too have earned salvation. Those who acquiesced

deserve to be damned. There is in the world such a thing as evil (all together now) Sez who? God help us.<sup>8</sup>

This humanitarian credo may have a heroic ring about it, but it has a desperate sound to it as well, like a last defiance in a lost cause. Perhaps non-rational humanitarianism is better than none at all but it is not much better. It takes more than an emotional outburst to stand up to the calculated cruelty which has been a feature of our times, cruelty which has often been supported by political logic and appeals to the public welfare. Before we settle for attitudinist morals of this sort, we should be sure that the cause really is lost and that no justification, other than personal or group preference, can be given for moral values and humanitarian principles. I shall be suggesting later that something can be said in support of belief in humane values but in the meantime I cannot but feel that strong (substantive) epistemological skepticism is unlikely to be a lasting stance in law. Weak (procedural) skepticism, the habit of questioning established and accepted positions (at least once in a while) is a posture of permanent importance in legal studies as it is elsewhere. But thoroughgoing skepticism of the strong or substantive kind has proved hard to sustain even as a theoretical pose and impossible to maintain (as Leff clearly demonstrates) in practice.<sup>9</sup> It is also very difficult to tilt at basic legal assumptions about value without challenging basic scientific presuppositions as well. Scientific doctrines can be just as political as legal or moral theories in the sense that they can be bent to the purposes of party and sect.<sup>10</sup> And if we are to attack the underlying premises of the law on hermeneutic grounds, it seems only consistent to go further and say that the notions of truth and

---

8. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 403 (1983).

9. "It is more conformable to the ordinary wisdom of nature to secure so necessary an act of the mind, by some instant or mechanical tendency which may be infallible in its operations, may discover itself at the first appearance of life and thought, and may be independent of all the labored deductions of the understanding". DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 68 (Hendel ed., 1955). And again: "especially when I am sensible, that I must at least be contented to sit down with the same answer, which, without farther trouble might have satisfied me from the beginning." DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* Part IV (Kemp-Smith, ed., 1917)(Philo speaking to Cleanthes)

10. An article in the *Chinese Journal of Medicine* in the late 1960's made reference to "western imperialist antibiotics".

order, not to mention a number of ethical postulates which underlie scientific enquiry, must also rest on the say-so (or believe-so) of the scientific community.

One might gather from the foregoing that all is not well, in my opinion, with contemporary human rights thinking as it affects the law. Four basic points need to be clarified in order to render human rights proposals credible and usable.

- (1) It should be said plainly or as plainly as possible, what a "human right" is;
- (2) It should be stated, as clearly as possible, how and how far such principles can be justified;
- (3) We should be shown how "rights" notions function in relation to the legal system. Do they merely measure it or are they part of it?; and
- (4) Do they only permit approval/disapproval of the law or does their authority override law in that law not only should but must conform to them in order to be law and to require our obedience?

It is my suggestion that a modernized body of legal maxims, set into and made part of a contemporary version of the medieval ratio, would be most helpful in clarifying, filling out and justifying human rights theory. It will especially be argued that they should once again be incorporated into legal theory. Rights and rules are often set in opposition, straining against one another. It would be better if they could be seen as pulling together as part of the same team, as allies and co-workers rather than as enemies. In order to make good these claims it will be necessary to take a closer look at the maxims. In particular we need to answer the same kinds of questions that we asked in connection with human rights: to say what they are; to locate them in legal logic and show how they function there; and finally to justify them, showing if possible that they rest on valid moral ideas, not wishful thinking.

#### *D. Maxims old, new, borrowed and blue*<sup>11</sup>

The maxims of the law are a strange collection of general propositions drawn from all kinds of sources. They are taken from formal logic, medieval philosophy, the Bible and even from common experience. They cover virtually every aspect of the law;<sup>12</sup>

---

11. The maxim "Dies dominicus non est juridicus" invalidates legal acts performed on Sunday and so is effectively a "blue law".

12. See the collection of maxims appended to this article. See also BROOM, *supra* note 1, which treats over 500 maxims. There is also a long appendix to LOFFT'S REPORTS (1790 ed.), which contains a copious collection of maxims as

law in general, the judicial office, the relation of law to equity, the interpretation of documents, and the rights of kings and subjects. Every department of the law has a cluster of maxims associated with it. It has been commonly assumed that they represent basic legal principles (legal axioms) but this is by no means the case, as will become apparent later. Some of them are indeed general principles, some look more like particular rules, many of them can be viewed as both rule and principle and some fit into neither category. But in all this variety two common features can be discerned:

- (1) First, all of them, no matter what their source, have been given a legal "twist"; they have been translated and adapted for use in the law. The maxim "omne majus continet in se minus"<sup>13</sup> seems on the face of it to be a basic proposition in Aristotelian logic, in effect that "all" implies "some". In its legal meaning, however, it is not an expression of abstract logic. It was used in Roman and common law to cover cases where more money than was due was paid over to satisfy a debt or where someone who had only a term of years made a grant in fee simple. A strict literalist might argue that the payment and the grant were void — but in vain, for the larger payment and the larger grant, according to this maxim, each includes in itself the lesser and so is valid. Similarly, the maxim "circuitus est evitandus"<sup>14</sup> which seems to merely warn us against arguing in circles, is applied in law to cases where the claims of both parties are approximately equal and so it would be a waste of everybody's time to allow them to sue one another, and
- (2) Secondly, most maxims are either explicitly moral or imply moral principles. Even when the main thrust of an epigram appears to be aimed at some ethically indifferent matter, a significant value proposition usually lurks in the background. The well known maxim "res judicata pro veritate accipitur"<sup>15</sup> seems on its face to be mainly concerned with the inefficiency and futility of litigating anything more than once. However, a companion maxim brings out its humane side saying "nemo debet bis vexari pro uno et eadem causa."<sup>16</sup> This maxim recognizes that law is a vexatious

---

does HALKERSTON'S MAXIMS (1823 ed.) and NOY'S MAXIMS (9th ed. 1821). A collection of over one thousand maxims was appended to *LATIN FOR LAWYERS* published by Sweet and Maxwell, London, in 1937.

13. See also "Frustra petis quod statim alteri reddere cogeris" and "Dolo facit qui petit quod redditurus est". Both are cited by BROOM, *supra* note 1, at 346.

14. BROOM, *supra* note 1, at 343.

15. BROOM, *supra* note 1, at 328, 333, 945.

16. BROOM, *supra* note 1, at 327.

business as far as the parties are concerned and so, as a matter of common consideration, once is enough for any suit or for any issue.

It is important to ask how the maxims, since they are moral in tone, relate to general moral principles. We may conveniently consider this question by comparing them to the most general principles of natural law, which (according to St. Thomas) are fixed and immutable allowing no exceptions.<sup>17</sup> Even a casual glance and a brief consideration of the history and development of the maxims shows that they are secondary and derivative rules only. They represent modifications and transpositions of the principia into legal terms for legal purposes. Consequently they are rarely, if ever, fixed first principles and so (according to Aquinas) would be apt to change with time and circumstance. It is unusual for a maxim to disappear and be abandoned altogether<sup>18</sup> but they can be greatly diminished in their scope. "Caveat emptor"<sup>19</sup> has all but vanished from contract law and the old maxim of property law that "whoever owns land owns it up to heaven and down to hell"<sup>20</sup> has had to be considerably restricted to apply it to modern conditions, especially the advent of the airplane. Yet some vestige of the principle underlying these maxims still remains.

Maxims can wax as well as wane, becoming more prominent at some period of time and acquiring new applications. And there seems to be no good reason why new maxims should not be devised and added to the corpus. Sir Edward Coke has been credited with inventing a maxim or two of his own. This has been viewed by some as a species of petty fraud. But if Coke's new pieces of dog latin encapsulate good principles of law expressed in a memorable way, his pretence of antiquity, so far as legal science is concerned, is immaterial. New times not only require new customs (*alia tempora alia mores*)<sup>21</sup> but new maxims. It is worth not-

---

17. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II q.94, a.5. (McDermott ed., 1989). See also John Finnis' comments on this and cognate passages in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 30 (1980).

18. This has happened, however, in a few cases such as the maxim that a married woman's property belongs to her husband.

19. The complete maxim reads "Caveat emptor, qui ignorare non debuit quod jus alienum emit" HOBART'S REPORTS 99 (1603-1625). The waning maxim is discussed in BROOM, *supra* note 1, at 147.

20. See BROOM, *supra* note 1, at 395-97.

21. "Alia temporalia alii mores" is not, of course, a legal maxim but it is a possible rendering, indeed the best rendering of "ratio enim anima legis, mutatione ratione, mutat et lex" which can be roughly translated that the law must change with the times.

ing, however, at this point that adding a maxim to the value systems of the law is changing the legal apparatus and this is something that must be managed with great care for it is not usually a simple matter. Changing the law is like changing the design of an engine; to alter one part you may have to review the whole design. Medieval lawyers were suspicious of change and expressed their misgivings in the maxim "omnis innovatio plus novitate perturbat quam utilitate prodest" (innovation produces more confusion than benefit). If we limit the application of this maxim to ill-considered tinkering, the warning is still salutary.

This brings us naturally to consider the place and function of maxims in the logical structure of a legal system.

### III. THE LOGICAL NATURE AND FUNCTION OF MAXIMS

#### A. *The word calculus account of legal logic*

A medieval lawyer with any pretensions to learning considered jurisprudence to be a science and in consequence assumed that law, its subject matter, had a formal structure. This form, as was mentioned earlier, was seen as a deductive system, termed *ratio*, where particular propositions were deducible from first principles. The maxims of the law were seen either as these first principles or at least as very general secondary principles derived from them. This view of the law was conformable to Aristotelian theories of knowledge current throughout the later medieval period and also drew on the neo-Platonist doctrines of the Roman juriconsults who "saw the principles in the cases and the cases in the principles and moved easily from the one to the other."<sup>22</sup>

I have suggested elsewhere<sup>23</sup> an alternative logical format for a "rational" theory of law which is, in effect, a translation of it into contemporary language/logic terms. This kind of thinking is based on Wittgenstein's notion that thinking is carried out by symbolic games which can be applied for some purpose. The symbols may be numbers or letters, as in mathematics, but most of our thinking is done with words. Wittgenstein's earlier work<sup>24</sup> developed the dogma that the meaning of a word is its verification, a notion that

---

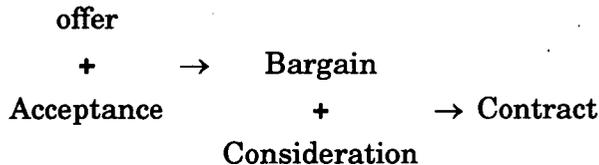
22. F.C. VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 47 (A.Hayward trans. 1831).

23. J. Stanley McQuade, *Medieval "Ratio" and Modern Formal Studies: A Reconsideration of Coke's Dictum That Law is the Perfection of Reason*, 38 AMERICAN JOURNAL OF JURISPRUDENCE 359 (1993).

24. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1921).

restricts the proper use of words to the descriptions of empirical events (things, events or behavior). In his later thinking, however, he abandoned this earlier view and took the position that the meaning of a word depended on its function, what you were trying to do with it. In this version of his thinking language is essentially word calculus and when we come to apply word calculus games, meaning depends on the purposes that we have in mind.<sup>25</sup> This representation of thinking is very helpful in understanding all sorts of things, including physical sciences and even jokes and it has obvious relevance to the study of law. I do not think that detailed discussion of the logical format of the law is necessary here but a brief explanation is in order.

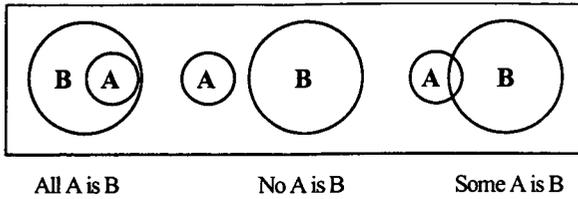
The central feature of this scheme is that law can be represented by a logical apparatus where technical words such as “nuisance” or “bargain” are linked together in some formal arrangement, for example a decisional tree or algorithm. These key words are arranged in sets in such a way that each of the special words in each group can be verbally defined in terms of the others. So a “contract” is defined in terms of “offer”, “acceptance”, “bargain” and (in some jurisdictions) “consideration”. This little piece of legal word logic may be represented as:



These sets of terms are applied to fact situations (cases) by analogy with typical instances (cases). The method is indeed similar to the “circles of Aristotle” used to explain formal logic to beginners. The interrelationships of two circles are used to represent the meanings of the logical terms “all”, “none” and “some”. When circle A is entirely within circle B then “all A is B”: if it is entirely outside B then “no A is B”: but if they intersect then “some A is B” and also “some B is A”.

---

25. Wittgenstein’s utterances in conversations with his friends are most illuminating, for example, “What is it that distinguishes the syntax of a language from the game of chess, I answer: It is its application and nothing else.” FRIEDRICH WAISMANN, *WITTGENSTEIN AND THE VIENNA CIRCLE* 104 (McGuinness, ed., 1979).



The legal application of this logical template is obvious. Smoking a pipe in one's garden, even though it happens to make your neighbor sick, is clearly not a nuisance; running a garbage disposal business in the back yard in a residential area would clearly constitute a nuisance; and having an occasional hookah party where twenty people puffed strong turkish tobacco through a water pipe might be marginal. Legal text books used this technique well into the present century, illustrating every legal term with clear positive and negative examples (where the term clearly applied or clearly did not) and by marginal cases where the disposition of the case was not obvious and had to be determined in court.

The handling of marginal cases, deciding whether they should be placed within or outside a legal term, requires consideration of the likely effects of the decision on the objectives and purposes served by that part of the law. This also follows from language/logic considerations since, according to Wittgenstein, the meaning of words depends on their function so that a set of words cannot be meaningfully applied to anything unless we know the purposes and objectives that we have in mind in applying it. This relationship to ultimate values is implied in every application of legal word logics but is more obviously present in marginal cases. Thus deciding whether hookah parties constitute a nuisance or not requires the balancing of two well established policies; namely that you should be able to enjoy your own property but not to the detriment of your neighbor.<sup>26</sup>

Once a case has been decided (holding a fact situation to be inside or outside a legal category) this becomes a precedent and counsel will argue that similar cases should be treated in the same way. Legal argument in such cases may indeed center around whether the new case resembles (or does not) one already

26. The rights of an owner are listed as "utere, frueret et destruere" (to use, enjoy or destroy) but also limited by the contrary maxim, "Sic utere tuo ut alienum non laedas" (do not use what is yours in such a way that you injure others).

decided and so further precedents may be established. It is likely, indeed, that the simplest form of legal rules (the kind envisaged as Austin's sovereign commands or Oliphant's legal predictions) come into being in this way. But such simple rules, from the point of view of language/logic theory, cannot be regarded as the totality of the law. They are particular applications of it. Behind them and explaining them, implicitly or explicitly, is the entire logical structure of the legal apparatus, the word logic systems and the values and policies which these serve. In short, values are an integral part of the law even when the case is an open and shut one that apparently comes under a clear rule.<sup>27</sup>

*B. The logical meanings and functions of the term "principle"*

Originally the term "principle" meant a chief premiss of the law, i.e. a maxim or axiom. We have already noted some uncertainty about the medieval use of this term and the same can be said for modern writers. In Austin's work the term principle and rule appear to be interchangeable<sup>28</sup> whereas in others they are treated as distinct and totally different entities. Dworkin distinguishes rules, policies and principles<sup>29</sup> while Roscoe Pound has quite a list of general items which he terms principles, policies, doctrines etc.<sup>30</sup> From the language/logic point of view general principles might be seen in one of two ways:

- (1) They may be words which function similarly at several points in a legal calculus or in a number of different legal calculus systems. Thus the term "fraud" appears in many divisions of the law with similar effects and predictable results, and
- (2) Secondly, they act as goals guiding the application of the concepts to actual cases. So one of the policies of the law is that fraudulent behavior is a "bad thing" and so should be punished and discouraged in every possible way.

---

27. This version of legal logic brings out the fact that moral principles function within the law as a necessary and integral part of the legal calculus, as Dworkin insists, but it is more explicit as to how they function. Otherwise I find Dworkin's distinguishing characteristics (that principles are weighed while rules are either off or on like a light switch) to be quite clear and helpful. See DWORKIN, *supra* note 7, at 24.

28. JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 318 (1913).

29. DWORKIN, *supra* note 7, at 22.

30. See Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 *TULANE LAW REVIEW* 475 (1933).

### C. *The place of the traditional maxims in legal logic*

Examined from the language/logic viewpoint, the traditional maxims do not fall clearly into any one category. Some can be considered principles in the first sense defined above. i.e. definitions and descriptions of terms which appear in more than one legal word-calculus system. Others are clearly moral values and policies which are ends and goals of some part or other of the law. Many, and perhaps most, can be viewed as functioning in both ways. Thus "ex dolo malo non oritur actio" can be considered a general moral principle but the concept of fraud or bad faith is also a technical term which applies in many legal transactions bringing various rules and presumptions into play that are adverse to the wrongdoers. "Respondeat superior" likewise usually acts as a term of art attached to other terms such as "employer", "scope of employment" and "fault". But it is also a moral principle about the responsibility of those who have ultimate control of an enterprise.

Sometimes, indeed, maxims appear to be particular rules. For example, the feudal rule (now defunct) that inheritance never ascends means that the father of the deceased cannot be heir to an estate in land. Yet this seeming particularity is deceptive, for here too a principle was involved. Grants of land were most commonly made to younger sons by their fathers and it was felt that the grant should not revert to the father but go to the other children. This principle was expressed in another maxim which stated that the same person cannot be grantor and heir.<sup>31</sup>

The traditional maxims then tend to be legal principles with some degree or other of generality and most, if not all of them, have a moral aspect. Consequently, for the remainder of the discussion in this paper, the focus will be on the use of maxims as guiding moral principles which direct the application of legal word calculus systems in dealing with particular cases.

---

31. This same tendency to embody a principle in a particular example or expression of it is found in ancient codes, for example the Ten Commandments. Modern authors also take provisions of the U.S. Constitution in this way, seeing through a particular "rule", such as the right to bear arms, to the principle behind it which may then be applied to current circumstances and problems.

## IV. EVALUATING THE VALUE THEORY BEHIND THE MAXIMS

A. *The maxims as expressions of natural law*

In medieval thinking learning was divided into two branches, theoretical and practical. Both of these were forms of *reason* organized in the geometrical manner, with particular propositions deriving from more general ones. The major axiom of speculative reason was the notion that truth exists<sup>32</sup> while the equivalent first principle of practical reason would be that "whatever is good ought to be pursued".<sup>33</sup> Other self-evident first principles of practical reason, arranged under the aegis of the first one, included the duty to preserve life, to care for ones family, to promote the good of society and to seek the truth.

The typical stoic axiom, "render to each what is due" is omitted by Aquinas, presumable being subsumed under the others. The basic underlying principle here is respect for people which in turn is based on the philosophical (theological) tenet that each human being has a preeminent degree of reason and should therefore be accorded some measure of the reverence due to the universal wisdom of the universe. This more basic axiom is currently in vogue being viewed by some, for example Dworkin,<sup>34</sup> as the fundamental moral principle of the law.

The leading tenets of natural law were considered to be imprinted into the mind of man by nature and so were called principles (*principia*) of natural law. These leading principles were considered immutable; they did not admit of exceptions. However, the secondary principles derived from them did not apply universally at all times and in all circumstances.

Legal learning, from this viewpoint, would have been classified as a form of practical reason and the maxims may even have been viewed by some as axioms or first principles of practical rea-

---

32. This was, of course, an axiom since the contradictory proposition "there is no truth" would be considered self-contradictory. This would amount to saying "it is true that there is no truth."

33. This too is an axiom. Its contradictory (one ought not to pursue good things) can be translated as "one ought not to seek that which one ought to seek" since the very nature of the good is that it is desirable and should therefore be pursued.

34. See DWORKIN, *supra* note 7, at xii, where he identifies this principle of respect with Rawls' notion of justice as fairness.

son.<sup>35</sup> If called upon to justify the legal maxims, the medieval lawyer would therefore have related them to one or other of the great natural law principles. However, in modern times natural law theory has increasingly come under attack and until recently seemed to most lawyers to be more or less defunct. Two strategies were developed to deal with the vacuum created by its supposed demise. One was the "positivist" approach which was to say that law is simply laid down by the appropriate authorities and that it can be studied without reference to moral values. This is a difficult notion and very unpopular at the moment so we will concentrate here on the second alternative which has been to substitute some other ethical theory for natural law.

### B. *Attempting to use values without value theory*

One possibility is to simply view moral values as given facts within a particular society. This was the alternative which seems to have been adopted by Savigny and a number of modern writers.<sup>36</sup> The business of law is to facilitate custom which enshrines those values which are in fact operative in society. The values which the law should take into account can then be arrived at by observation; no moral philosophy is required.

Most lawyers would heave a sigh of relief to be rid of philosophizing, but a little reflection shows that this view is too simple. To begin with we must be ask what we mean by given values. Are they simply the things that people want or those which they consider morally good and right? If Savigny intends the former, treating values as wishes and wants, he will have some serious moral problems, for example, when majorities wish to disregard the welfare of minorities or even to abuse them. On the other hand if he is speaking about the things that people consider good and worthwhile, ethical values, then almost inevitably he will be driven into moral thinking, for three reasons:

- (1) Commonly held values are frequently vague, dogmatic and conflicting, so that they need to be clarified and organized into a reasonably consistent set of ideas before they can be used;
- (2) The moral values accepted in any society are often in conflict with its material and social preferences (as when the desire for immediate prosperity conflicts with environmental values). Har-

---

35. It is more plausible, however, to consider them as secondary and derivative principles rather than axioms. See II.D *supra*. (maxims old borrowed and blue).

36. SAVIGNY, *supra* note 22, at 27, 46.

monizing these opposing drives can be a difficult theoretical matter as well as a practical one; and

(3) When given values are challenged they must be justified.

This last point is most important. Even if no other person challenges our moral views we are liable to question them ourselves. According to Plato moral beliefs are like the statues of Daedalus.<sup>37</sup> They fly away unless they are nailed down by good reasons. Moral principles and humanitarian impulses are vague and weak unless they are supported by well-considered theory. They will vanish in the hard realities of life and under the stony stare of cynical politics unless they are seen to be valid in some sense and not the mere product of social forces.

We are doomed then, as always, to reflect and think on what we are doing, which in the present context means clarifying and giving reasons for our values. This is a difficult task, but it is an important one and we should not give up without making an attempt. Indeed it may not be as impossible, at least for legal purposes, as moral skeptics suppose.

### C. *The qualifications of a good legal value theory*

We must begin by admitting that there is no consensus among philosophers as to how (or even whether) values can be justified. I think that a better case can be made for some moral theories than for others but there is no outright winner. Moral controversy tends to be like the caucus race in *Alice in Wonderland*, where everybody ran in all directions, everyone was a winner and everybody got a prize. If we are to benefit from moral theory in the law, we need some way to evaluate the "runners" a little better. We must stop going in circles and develop a few criteria in order to see how the various theories of morality perform and whether they can be of use to us.

Fortunately, the justification of legal maxims is not quite the same thing as philosophical "proof." A pure philosophical justification of anything must be developed very rigorously; it must satisfy the strictly critical enquirer that it is well founded and that all objections have been answered. The lawyer may have to be content with much less. Ideally, of course, legal and philosophical justification should be the same, for legal claims too must stand up to scrutiny and attack. But law, unlike science, has needs which must be attended to immediately and cannot wait half a century

---

37. PLATO, PLATO'S DIALOGUES, *Meno*, folio 97.

till the truth emerges. An approximate solution may be deemed acceptable in the meantime to keep things going.

This sort of compromise with the ideal is a familiar thing in legal practice. Ideally the guilt of the accused should be shown beyond all doubt before sentencing, facts should be conclusively established before liability is incurred, we should all be required to act with meticulous carefulness so as not to harm one another and decisions in law should be absolutely and perfectly just, realizing all values and satisfying all parties. Unfortunately these goals are generally unobtainable and so we have to settle for a sufficient degree of certainty, a reasonable standard of behavior and approximate justice. Legal justification of values can thus be less demanding than philosophical enquiry. For legal purposes we are not trying to convince all philosophers that a theory is unexceptionable. We are only trying to persuade the populace in general, and lawyers in particular, that certain values are sufficiently well founded for use in the law. Truth value is an important aspect of the argument but it is not the only one. There are other considerations besides truth value which make a theory useful and attractive to lawyers. We may list the possible criteria for a legal value theory as follows:

- (1) *The more truth value the better the theory.* In practical terms this means that a theory should at least be considered viable by a large number of qualified persons, and preferably by most of them;
- (2) *The theory should be plausible.* A proposed theory should be understandable and believable. In particular it should be persuasive to lay people, or capable of being made so;
- (3) *The theory should be relevant to legal interests.* A proposed theory should be able to deal with questions of legal interest. Lawyers, for example, are interested in the question of justice, above all other values, and in the question "why obey the law?" rather than "why be good?". Some moral theories are more apt for legal use than others in this respect;
- (4) *The theory should support a broad spectrum of values.* All the ends of the law, not justice only, should be validated. Justice is not the only legal value. All kinds of "goods" and "bads" are encouraged and discouraged by the law even when they are not demanded. The common law did not reduce justice to fairness. The growth of moral skepticism and the theoretical difficulties involved in justifying specific value judgments have made it tempting (and popular) to adopt the attitude that law should not get into the business of substantive "goods" but concentrate on procedural fairness. I hope to show that there are serious disadvantages to such a proposal particularly in the area of human

rights. A legal moral theory should therefore discuss, and hopefully justify, family values, educational, cultural and scientific aims, environmental attitudes and so forth; and  
(5) *The theory should promote civic virtue.* A proposed theory should, if possible, encourage social virtue. The establishment of law is hardly possible, if at all, in a society where public duty and community service are unknown. Fit officers of the law would never be found in such a situation. Legal morality should therefore include and encourage civic virtues, service to society and a good public spirit generally.

Keeping these criteria in mind we can proceed to evaluate available theories that may be of use in establishing legal values.

#### D. *Available varieties of value theory*

All sorts of accounts of value judgements have been put forward. They have been based on almost every faculty and propensity possessed by mankind. We are said to know what is good by a strange sort of seeing (intuitionism), by a special kind of feeling (moral sense) and by reason. They have also been justified by such things as the need for self preservation (Hobbes and more recently H.L.A. Hart<sup>38</sup>) and the desire to avoid pain and seek pleasure (hedonism). Moral skeptics have viewed them as individual statements of preference (I like X and I wish you would too) or as group preferences. To discuss all of these adequately (or even inadequately) would require volumes and would certainly be beyond the scope of this paper. It is only proposed here to outline a few basic types of moral theory and evaluate them as possible foundations for legal values. Nothing need be said about intuitional or moral sense theories since they do not currently command much support in the academic community (criterion 1 above). This is not to say that such theories are wrong but only that they are unlikely to be persuasive (criterion ii. above). So we will proceed to consider other more likely candidates.

#### E. *Prudential theories of value*

These are theories that base moral behavior on prudence. This is not the classical virtue of *prudentia* in the sense of practical wisdom, but rather "mere prudence" which is usually defined

---

38. See the discussion of minimal natural law in H.L.A. HART, *THE CONCEPT OF LAW* 193-200 (2d. ed. 1994).

as enlightened self-interest.<sup>39</sup> So Hobbes and H.L.A. Hart base their justification of law on the twin facts that most people want above all things to go on living and that obedience to law is necessary to ensure our survival.<sup>40</sup> The adequacy of prudence as a foundation for morals will be questioned later but first a little more must be said about two forms of prudential theory, *utilitarianism* and *social contract theory*, because they are very much in the academic air at present and are both being put forward as suitable foundations for legal values.

*F. Shortcomings of utilitarianism from the legal viewpoint*

Utilitarianism in one form or another assumes that most of us gravitate toward pleasure and away from pain and therefore prefer eating to starving, wealth to poverty, health to sickness and so on. Law, insofar as it promotes these things, ought then to be obeyed.

This simple approach to legal value theory is plausible, in fact it appeared so obvious to Bentham that he considered it axiomatic. Nevertheless it has provoked a host of criticisms (mathematical, philosophical, etc.) most of which need not concern us here. The main objection from the human rights point of view is that minority welfare is not obviously guaranteed in utilitarian theories. The standard utilitarian response to this criticism is that the pain of a minority will diminish the pleasure of the majority. This may be true, especially if the minority is sizeable or a powerful one, but it does not provide a big incentive to remember small or weak minorities especially if they are not present and visible to us. It is hardly surprising then that utilitarianism has seemed an unsatisfactory theory to liberal human rights advocates (such as John Rawls).<sup>41</sup>

Equally serious is the objection that utilitarianism does not support educational and cultural values (the "city of pigs" objection). Mill's famous reply is that the pleasures of the mind are always preferable to baser pleasures, since they are more long lasting and have no pain attached. This may be questioned by many who have had to "toil upwards in the night while their companions slept." Mill also argues that anyone who has tried both

---

39. JOHN RAWLS, A THEORY OF JUSTICE 11, n. 4 (1972)(containing a useful set of references to works in the social contract tradition).

40. See *supra* note 37.

41. See, e.g., RAWLS, *supra* note 39, at 25. See also RONALD DWORKIN, A MATTER OF PRINCIPLE 100 (1985).

kinds of pleasure, and is thus qualified to give an opinion, will prefer the "higher" kind. If this is a statement of fact, he should be able to name former rakes, now reformed, who prefer the library to the tavern and the classical concert to the dance hall. He should also show that he was unable to find a single happy rake who had formerly been an intellectual.<sup>42</sup> He makes no attempt to do either of these things. Clearly this cultural bias is a natural law notion (of Greek origin) sneaking into utilitarian theory by the back door.

Utilitarianism thus offers little protection to minorities, no support for cultural values and, as will be argued later, is deficient in the area of civic virtue also.

Similar arguments weigh against economic justifications of legal values (a derivative form of utilitarianism) which treat economic efficiency or the maximization of monetary wealth as the sole value. Wealth is undoubtedly an important good thing but it is not the only one, and the other legal values, including justice, do not translate easily if at all into economic terms. The concept of economic efficiency has little to do with cultural values and it seems a poor incentive to civic virtue to inform people that good public service will increase the wealth of the community.

#### G. *Shortcomings of contract theory from the legal viewpoint*

Social contract theory, long considered dead, has made a considerable comeback in recent years largely due to the work of John Rawls. Rawls replaced the "noble savage", an exploded myth, with the model of the unborn spirits, poised and ready to be incarnated into bodies and places unknown. These hovering wraiths, ignorant of their future preferences and circumstances, hammer out and agree upon some basic social rules which will apply once they have been born. These rules, they anticipate, will give each of them the best shake that they could reasonably expect, given the demands of their fellows. This "best shake" Rawls calls fairness and he identifies it with justice.<sup>43</sup>

This is not a theory about the general good, like utilitarianism. It is a theory about justice; and it is designed to protect the rights of minorities and even of individuals. If a single person looking at the social set-up can show that his or her lot is not the best that he or she could expect while still meeting the expecta-

---

42. Omar Khayyam, scholar turned skeptic and wine-bibber ("no longer deep in anything but wine") is an obvious contrary instance. See RUBAIYAT OF OMAR KHAYYAM Stanza XLI (Fitzgerald, trans.).

43. RAWLS, *supra* note 39, at 27, 30.

tions of others, then the system is unfair to that person and so unjust.

This model is developed not only to protect the underprivileged but even to provide a bias in their favor (affirmative action).<sup>44</sup> Good environmental policies are also promoted since a ruined environment is an injustice to future generations.<sup>45</sup> Rawls' theory has therefore been popular with those who favor liberal causes, which most of us do (in principle at least). It thus has the merits of currency and wide appeal. It also relates easily to legal concerns, especially the concept of justice. All these are important advantages. Nevertheless there are a number of significant objections.

The most damaging of these is that there seems to be a contrast between the hard bargaining of the spirits at the beginning of the contractual discussions and the humane conclusions at the end. We seem to have moved somehow from rational self interest to something very like compassion for the downtrodden and concern for future generations. One is led to suspect that a subtle translation of the word "fairness" has taken place and that the initial non-moral, calculating definition of justice has shifted into fairness based on value statements about the worth of human beings and possibly even of nature. If such a shift has not taken place, it is difficult to see how Rawls has answered the question "why obey the law?" especially when nobody is looking. It is easy to see why I might agree to an arrangement before I was born because it gave me the best prospect I could hope for at that stage of the proceedings. But once I know that I am not in some disadvantaged class why should I not break the arrangement by stealth or force if I can? Rawls' theory is thus shaky as a foundation for justice, and it is even more unsatisfactory with regard to the other values of the law. This is not due to an oversight on Rawls's part. He appears to feel that sufficient agreement could not be reached on the subject of values generally and that they must therefore be treated as matters of taste, preferences only. The law cannot distinguish between them and must confine itself to the issue of fair-

---

44. *Id.* at 78 (discussing the difference principle).

45. *Id.* at 284. Rawls does not exactly discuss environmental issues but they are implied in his notion of time preference, for example, "Each [generation] passes on to the next a fair equivalent in real capital as defined by the just savings principle . . . [and] . . . [C]apital is not only factories and machines, and so on, but . . . knowledge and culture . . ." *Id.* at 288.

ness.<sup>46</sup> Rawls likewise provides no rationale for civic virtue. Contract theory shares this shortcoming with other prudential theories. It is very difficult for theories which begin with mere prudence to arrive at the notion of duty and impossible to get to sacrifice for the common good. "Dulce et decorum est pro patria mori" (it is a fitting thing and one to be desired to die for one's country) is not a prudential maxim.<sup>47</sup>

#### H. Rationalist ethics — natural law theory

There remain the rationalist theories, and two types have currency and appeal, natural law and divine law theories. They have often been coupled together and I will suggest later that there is a good reason for this association. The natural law approach to legal principles may be summarized by saying that according to this view there are certain fixed moral principles which we can know by human reason without revelation. This notion was the main ethical and philosophical theory of law from the time of the Roman juriconsults until well into the nineteenth century. A shift of the intellectual climate in an anti-metaphysical direction, which became marked in the latter half of the nineteenth century, made natural law theory (along with the maxims) suspect in intellectual circles; but (like the maxims) natural law theory never became quite extinct and is currently making a considerable comeback. A very thorough modern discussion of the subject in philosophical (and generally favorable) terms was published in 1980.<sup>48</sup> It has indeed become quite fashionable in legal circles to talk of natural law theory, or some version of it, as the only hope of preserving human rights.

Natural law theory, then, is current, and is considered by scholars with good philosophical credentials to be a viable, or potentially viable, theory of rights. It can be stated in simple terms; it has wide appeal to ordinary persons; it accounts not only for justice but for other human values including social and civic virtues; and finally it provides a reason by why people should obey law. These are significant points in its favor so far as legal theorists are concerned.

---

46. RAWLS, *supra* note 39, at 432. Rawls remarks that if someone considers the greatest good to be counting the blades of grass in his garden, we may marvel but cannot question his idea of the good.

47. HORACE; ODES, BOOK III, ODE II, line 13.

48. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

There are two critical questions that natural law doctrine must face:

- (1) How are the first principles of natural law to be established?
- (2) How are the more detailed rules (the changeable ones) to be derived from the immutable first axioms?

*The difficulty of justifying natural law theory*

Classical natural law theory uses the method of contradiction to establish its first axioms<sup>49</sup> but it is no longer fashionable to argue in this way. Furthermore, even if the axiomatic method were sound it is not very informative. Thus the famous refutation of skepticism (it must be false to say that nothing is true) may show that general skepticism is self-contradictory and that there must be truth, but it does not tell us if any other propositions are true and if so which ones. So even if there is some sort of contradiction in denying that every man ought to do what is right (every man ought to do what is wrong does sound odd), we are not told what is right and it is hard to deduce particular moral rules from this first axiom.

Another approach (that of David Hume)<sup>50</sup> is to take the contradiction as being a conflict with our own nature. The first principles of natural law can then be established by asking ourselves whether we can *really* doubt that we ought to do right, or ought to care for our family or be good neighbors, preserve life and seek the truth.<sup>51</sup> For most people, denying the validity of such moral principles would be an impossibility. Indeed, we commonly regard anyone who is indifferent to such things as sick or deficient in some way and call them psychopaths or moral lepers.

But is this a *logical* or a *psychological* necessity? It is perhaps both, for although moral coercion by our own nature is a fact,

---

49. "[T]he first starting-point of thought, accepted without proof, presupposed to everything else, is that [which] you can't simultaneously affirm and deny . . ." ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* II, 1, q.94, a.2. (McDermott ed., 1989). This is used immediately to derive the first principle of natural law.

50. "These (skeptical) principles may flourish . . . in the schools; where it is, indeed, difficult, if not impossible to refute them. But as soon as they leave the shade, and . . . are put in opposition to the most powerful principles of our nature, they vanish like smoke, and leave the most determined sceptic in the same condition as other mortals." DAVID HUME, *AN ENQUIRY INTO HUMAN UNDERSTANDING* 177 (Freeman, ed., 1966).

51. FINNIS, *supra* note 48, at 64. See also JOHN FINNIS, *SCEPTICISM, SELF-REFUTATION AND THE GOOD OF TRUTH IN LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* (P.M.S. Hacker and J. Raz, eds., 1987).

it is not a brute fact. It seems somehow reasonable to us to act morally; and when we affirm our moral judgments and our moral nature it seems to be reasonable to do so. It is a reasonable choice. Hume makes a similar observation about other basic beliefs, for example, in the existence of things external to our mind and the belief that there is such a thing as causation in nature. After admitting that he has little choice but to believe these things, he goes on to remark that the choice is nonetheless rational because to believe otherwise, with things and events happening at random, would make reasoning impossible. To go along with order, as nature dictates, instead of accepting a sort of fairyland where things happen unaccountably, is therefore in some sense rational. A similar argument is implied as to the choice between a valueless world and the moral world which our nature dictates to us anyway.<sup>52</sup>

#### *J. Applying natural law in particular cases*

It is possible then, as Finnis maintains, that the basic axioms of natural law may be regarded in some sense as self-evident, but we are still left with the problem of deriving rules from them which will be particular enough to be useful. St. Thomas makes it quite clear that although there can be no debate about the axioms of natural law, the derivative rules are mutable and allow for differences of opinion in particular circumstances. Unfortunately they seem to leave rather a lot of room for argument; so much so that it may be questioned whether they are any use at all when we come down to cases.

This criticism is not entirely on point. Guiding principles are not useless because they do not direct us as precisely as we would wish. The stars are very useful in providing a general notion as to where we are even if they cannot, without further information, tell you the way to Ahoghill.<sup>53</sup> In the same way the principles of natural law can provide a starting point and a basis for moral discussion which is something, even if some other kinds of information are required in order to proceed to less general principles and particular moral rules.

In former times particulars were derived from the first principles by long chains of deductive reasoning. There is little confidence in such proceedings today, and on close examination of such

---

52. DAVID HUME, A TREATISE ON HUMAN NATURE 268 (Selby-Bigge, ed., 1967).

53. A small town in my native Ireland.

arguments it appears that many additional premises (usually factual) are brought in at critical points. Moral principles then can only function in particular cases when they are supplemented, filled out so to speak, by all sorts of factual propositions. Thus in a debate on the morality of capital punishment it is important to know whether the fear of being caught and put to death *in fact* deters potential murderers and saves lives.

Moral arguments may also be made more particular by concepts derived from religious or philosophical sources. These are usually models, ideal pictures or blueprints of entities like man, marriage, the community or even the universe. These models relate to the more general principles but they are much more detailed. Thus the general notion that family values are important was transposed in the middle ages into the much more concrete ideal of the traditional family.<sup>54</sup> Such religious exemplars have been particularly important in the development of the common law which derived ideal models from two distinct theologies, Greek idealism and biblical monotheism.

It is no accident then (or rather it is a fortunate accident) that natural law theory has developed in close association with theological sources or idealist philosophies which supplemented its rather bare general propositions with more detailed paradigms of ideal behavior and ideal entities.

Natural law theory, in sum, has much to commend it to the legal theorist but it needs to be given support and substance from other sources if it is to be of any real value in the law. This seems an appropriate point to consider more fully the theological (religious) contribution to legal values.

#### *K. Theological or ontological theories of morals*

If it is uncomfortable for lawyers to get into moral philosophy, it must be more so to be drawn into theology, but the theological dimension here, as elsewhere, is hard to escape. Scratch below the surface of any discipline and you find a philosophical problem. Dig a little deeper and, like it or not, you are into theology (broadly defined).

Ancient codes often claim divine authority.<sup>55</sup> In some cases this may be a formal prologue, and therefore of no real impor-

---

54. The story of the creation of woman out of Adam's rib thus becomes a model for marriage where two persons become one flesh. See *Genesis* 2:24.

55. See GODFREY DRIVER AND JOHN MILES, *THE ASSYRIAN LAWS* 6-14 (1975)(discussing the prologue to the Code of Hammurabi).

tance. In others, such as the Mosaic codes, the laws are clearly based on theological presuppositions which not only provide them with authority but also help to explain their content. Even when the law has no obvious religious content it is difficult to prevent prevalent notions with religious origins from finding their way into the legal apparatus. This kind of theological infiltration into a legal system can have several important consequences. They are:

- (1) The religious overtones provide law with additional authority;
- (2) Religious notions often provides a rational basis in the form of theological explanations for the law as a whole or detailed provisions in it; and
- (3) Religious sources (as was mentioned earlier) may provide vivid pictures which act as ideal models to guide the application of the law to cases.

Legal theorists almost inevitably incorporate current theological and ontological ideas into their systems. In this process these imported ideas become transformed (even warped) for juristic thinkers have always followed the example of Procrustes, truncating and stretching concepts to make them suitable for use in the law. The Roman jurisconsults exemplify both of these processes incorporating Stoic notions into their jurisprudence and modifying the Stoa as they did so. The stoics viewed the world as the expression of a mind, or the development of a thought and saw each human being as a microscopic version of this intellectual cosmos, a little particle of the universal mind temporarily separated out from it. The ethical implications of such a theory are obvious. It is man's duty to live in accordance with the divine nature (which is Nature itself) and all earthly things are to be made to resemble as closely as possible their divine exemplars. Mind, thought, and intellectual things generally, are deemed all-important. Human beings also, since they share in the divine intellect, are to be respected. Education and science are man's supreme duty and mankind's hope. Slavery is, of course, wrong. The Roman jurists found these notions inspiring and relevant. They developed legal science along stoic lines, endeavoring to approximate human law to divine justice, arranging it in a rational form and generally steering law in a humane direction. Many of the maxims of the common law were taken from their works. But it was obvious that there is a good deal in the pantheistic religion of the stoa that is not compatible with law. Its virtual denial of the reality of evil, indeed, makes the efforts of the law to punish evil-doers seem paradoxical. But the Roman jurisconsults ignored what they did not

like and took and used what they thought would suit them for their own purposes.

The common law and canon law jurists carried this process a little further. They adopted the Roman jurisprudence with enthusiasm but blended vivid Biblical images into the stoic original. In this way they were doing the same thing that educated men in other fields were attempting throughout the middle ages. They harmonized Greek idealism with the Biblical doctrines of a personal God, the creator of a beautiful and wonderful world, of man made in God's image, of sin and forgiveness and so forth, all expressed in the powerful symbols of the garden, the serpent, the tower of Babel, Adam's rib and the rainbow. The Biblical doctrines were largely inimical to the Greek point of view but they were put together somehow by the medieval lawyers and generally got along very well. They corrected the excessive intellectualism and pantheism of the stoa without seriously detracting from its emphasis on science and education. It is from these two theological sources azeotropically<sup>56</sup> blended together in a remarkable way that the common law developed its most powerful ideals. These pictorial and symbolic ideas lie behind many of the maxims of the law, providing them with their justification and their ultimate meaning. The maxims then can neither be understood nor justified unless we can establish the views of the world, the ontologies, which underlie them. The only satisfactory reason for treating someone fairly is seeing in them something of value e.g. as having intelligence or as a creature carrying the stamp of divinity (*imago dei*). The only adequate argument for environmental protection is reverence for the universe as a marvel of creation. Otherwise both man and environment are only expendable resources.

John Finnis has argued, and I think persuasively, that natural law sits naturally in a theological context which explains and supports it.<sup>57</sup> The concept of natural law indeed implies and argues for some general ideas about the designer and creator (the un-caused first cause) of the universe. This seems reasonable enough but there is more to be said on the subject. The view presented here is that:

---

56. An azeotrope is a mixture of two different substances where there is no chemical reaction but nevertheless the two thereafter seem to act as a single substance with different chemical properties from either of its constituents.

57. FINNIS, *supra* note 48, at 371.

- (1) Theological notions are not a desirable optional extra but a necessary part of any view of the law which gives an important place to values;
- (2) Particular theological (religious) concepts are needed to fill out the bare forms of the notion of duty;
- (3) These theological and religious elements are already built into the law so that it cannot be understood properly without taking them into consideration; and
- (4) If the previous three positions are considered plausible it would seem to follow that a value driven system of law, especially one based on natural law notions, will not function well, if at all, in the absence of religious motivation and religious ideas.

If this thesis is correct then we are obliged as legal theorists to become familiar not only with moral notions but with theological (ontological) notions as well.

#### *L. The justification of ontological moral theories*

I do not propose here to discuss at length the justification of theological propositions and views. It is a fascinating subject and by no means an impossible project. Theological statements are not, as Wittgenstein's earlier writings suggested, either unverifiable or meaningless. They are vivid symbolic pictures or models which can be used to interpret our universe so that we may know how to live in it. In short theology can be described in Wittgenstein's terms as applied calculus.

As to the justification of such interpretations for legal purposes the same considerations hold as do with moral views. These considerations are:

- (1) They need only be justified so far as is needed for the purpose in hand, which in our case is the law;
- (2) We may even regard them as built in categories of the mind, a natural theology supplementing the natural law; and
- (3) Finally, they are susceptible of some kind of rational justification. If the picture fits it is to that extent justified and in the present context that means that the picture need only fit sufficiently well for legal purposes.

### V. INCORPORATING MAXIMS IN A MODERN LEGAL SYSTEM

#### *A. Adapting the maxims for modern use*

We have arrived at a version of legal theory where the central logical apparatus, sets of technical words, are ultimately justified by and controlled in their application by concepts of a moral

nature expressed in a body of legal maxims. This explains how maxims, even though they are general principles rather than particular rules, are apt for use in particular situations. They do not directly supply solutions to the legal questions (who shall be liable and how?) but rather act as aims and objectives which direct and guide courts in the application of legal terms to particular cases. Legal language would indeed be meaningless without some such guiding principles. Words cannot be applied to things or events in the absence of purposes (express or implied). Stripped of any notion of purpose they are just sounds, pure symbols like abstract music or geometrical shapes. If the legal apparatus is to function then we must provide sets of ends and goals for each piece of legal calculus which will allow it to be applied meaningfully in particular cases; and this will be particularly important in adapting the law to meet changing circumstances or to deal with novel cases. Moreover, since the values of the law are derivative lower order values which are subject to change it is likely that, from time to time, we will need to revise and update our stock of values.

Assuming that this kind of activity is necessary or worthwhile we must now go further and consider how we should go about it. There are three possibilities:

- (1) We could simply revive and restore the old corpus of legal maxims and the old ways of using them. This may be the simplest alternative but it is unlikely to be helpful. We live in a different world from our forefathers and our logic and our maxims must reflect that fact. The legal community in carrying out its responsibility to develop and update the law must provide an adequate legal apparatus (word calculus) accompanied by an apt body of principles (maxims); and both of these should be proper and suited to our own times and circumstances;
- (2) We could start afresh and build a new set of twentieth century saws and sayings representing contemporary principles and values. This might seem the logical thing to do but it should be acknowledged that it would be a formidable task; and
- (3) We could revise and update the traditional body of maxims; accepting some, refurbishing others, adding new ones where needed and entirely eliminating those that are totally outdated (for example, those embodying feudal notions of property or ancient views about the status of married women).

There is much to be said for the third alternative, which is a kind of compromise between the first and the second. It is always easier (and certainly the preferred method in law) to improve on what you have than to start all over again. Besides, despite their

age and the long time they have spent on the shelf, most of the maxims are in good condition. With a few additions, modifications and subtractions (and a great deal in the way of new applications to modern conditions) they would, I am sure, serve us well. But however we go about this task there are several basic requirements which will be discussed in the following sections.

*B. The maxims should be made as particular as possible*

Maxims, being derivative value statements, can be found in all degrees of generality, ranging from the most abstract down to propositions which are barely distinguishable from statements of fact. It is intuitively obvious that the level of agreement which a maxim enjoys will be directly proportional to its generality and vice versa. We are all agreed on the value and importance of saving life but may disagree very sharply on the derivative proposition that limiting the availability of guns to the general public would be a good thing. Conversely, the usefulness of a value proposition in deciding particular cases is directly proportional to its particularity. The notion that education is a good thing, being vague, will be less helpful in coming to a decision than the more specific goal of reducing the numbers of drop-outs in high school. It follows then that the maxim project must sail between Scylla and Charybdis; if we move in the direction of generality our maxims achieve consensus at the expense of usefulness, whereas if we make them more particular and so more usable, we increase the likelihood of disagreement as to how they should be interpreted.

There are basically three considerations in navigating this difficult strait and achieving particularity without too much difference of opinion:

- (1) *By careful appraisal of facts.* Different interpretations of general principles are in large measure dictated by different conclusions as to matters of fact. Views on the rightness or wrongness of capital punishment are considerably influenced by opinions as to whether and under what conditions the threat of capital punishment deters someone from taking the life of another person. Reliable facts are not easy to come by but we need to take advantage of them where they are available and to look for them when they are not;
- (2) *By taking advantage of community agreement.* Quite precise applications of basic moral principles may be common in a given society and these can be used as legal goals. And agreement may be sought when it is not initially present. For even where there is sharp difference of opinion on a particular value proposition, some

part of it or some version of it may avoid the disagreement and allow a common view to be developed; and

(3) *By showing how acceptance of a maxim would be beneficial.* If those who are doubtful or opposed to a particular value can be persuaded that adopting it or tolerating it will not violate their conscience and will operate to their benefit.<sup>58</sup>

By using any or all of these methods fairly precise (and therefore usable) values may be obtained while preserving a broad base of community agreement and acceptance.

### C. *Setting the maxims in a proper theoretical context*

It has already been argued that producing a legal system is a moral venture, involving values and ideals. If it is to be rational enterprise it will require both moral theory and a legal theology (ontology). At this point there are further choices. No likely source should be ruled out but again I would opt for reworking the old resources of the common law, the Biblical and Greek ideals and ontologies. They are rich sources of vivid and compelling images with wide if not universal appeal. They are apt for popular presentation and well capable of justification sufficient for legal purposes. On top of all this they are already incorporated into our traditions and into the very fabric of the law, adapted and ready for use.

This use of theological materials, especially when they are taken from particular religions, might appear to infringe the rights and coerce the conscience of individuals of other religious traditions or of none, but this I would suggest is not really the case. Legal "theology", the modicum of ontological images needed to support law, is an extract from certain religious resources for legal purposes and in general is not only inoffensive but appealing to people of all religious persuasions and compatible with their own views. Even those who do not subscribe to any religious tradition have no cause for serious complaint for two reasons:

(1) One of the most vital tenets of both the Greek and Hebrew traditions (however misperceived and ignored at times by their adherents) is respect for persons and for their opinions,<sup>59</sup>

---

58. This is using what I take to be the essential principle in Rawls' notion of justice as fairness. See DWORKIN, *supra* note 7, at xii.

59. The Hebrew tradition does not agree with the Socratic view that evil is lack of knowledge and insists that there is culpable ignorance, i.e., due to perversity. Nevertheless the reasoned argument is always present, e.g., in the prophetic message. The notion that God is above our understanding also makes

(2) The theological propositions proposed are also such that those who cannot believe them might well wish they could do so or at least that others believed them. If the choice lies between law based on well established (and appealing) ideals which promote humane values as against law based on prudence only, it is surely no hardship and no loss to go along with such ideals and such values on practical grounds even if you consider that they have no foundation in reason.<sup>60</sup>

#### *D. Expressing the maxims appropriately*

The ancient legal maxims, whether rendered in Latin or Norman French or old English are, as they should be, tersely and well worded so that they stick in the memory, roll musically off the tongue and capture the attention and respect of the hearers. What could be more succinct and more telling than "sin drunk, pay sober"<sup>61</sup> or "you can't give what you haven't got".<sup>62</sup> We may not always be able to rise to this standard, indeed the traditional maxims often failed to do so, but we can try.

### VI. SUMMARY AND CONCLUDING REMARKS

#### *A. Summary of the preceding arguments*

It has been argued that however much we may differ from the medieval lawyers about legal theory and moral questions, we share with them a common set of objectives which enshrine a set of humane values. It has also been argued that we need to emulate their achievement in providing the values and goals required for the legal enterprise. It has further been suggested that the most likely way to go about these tasks would be to refurbish and adapt the existing legal materials which we have inherited rather than creating starting out from scratch. Assuming these contentions to be sound we must then ask how we should go about adapt-

---

for tolerance since our knowledge is limited. The second commandment, forbidding graven images, can be expounded in these terms (it is impertinence because God is beyond our imagining) and has indeed been interpreted as a declaration of academic humility.

60. To paraphrase a speaker, whose name I do not remember, "This transcendental stuff is nonsense, but we must never let ordinary people find that out." This comment was made during a speech from the floor during a Law and Religion section discussion of the American Association of Law Schools meeting in Atlanta, January, 1979.

61. "Qui peccat ebrius luat sobrius."

62. "Non dat qui non habet."

ing these older tools to improve our own performance. A number of measures spring to mind including the following:

- (1) A first step would be to refashion legal science along the lines of modern logic (as suggested earlier) or in some other way that would allow value judgements to be incorporated into and be part of legal theory;
- (2) The second project would be to supply this new legal apparatus with an adequate body of moral (value) principles;
- (3) These values would have to be much more particular than the immutable first principles of natural law, otherwise they will too easily allow contrary opinions to be derived from them;
- (4) Particularity may be achieved by building on common values already present in the community;
- (5) A broad base of agreement should be sought by identifying common value judgements in people of diverse opinions;
- (6) This base might be further expanded and made more particular by the use of carefully ascertained factual materials;
- (7) Remaining disagreement may be minimized by pointing out that accepting some controversial value judgements could confer considerable benefit without sacrificing personal integrity;
- (8) The moral and value depositum thus obtained should be supported if possible by a theoretical philosophical and preferably a theological foundation. This could be the creed of a particular religious body if in fact that were the overwhelmingly predominant group in the community. In our society this is more likely to work if it is in the form of a "natural theology". Those who are personally opposed to any form of theology might be induced to accept this pragmatically provide that the integrity of their opinions was not compromised;
- (9) This ontology (theology/philosophy) should be embodied in vivid images (the tree, the garden, and generally the pictures painted in the book of Genesis would be good models);
- (10) This body of common values should be expressed (like the best of the old legal maxims) in succinct and memorable form; and
- (11) The ultimate product of all this effort would be a complex but clear logical apparatus; rich in well defined technical terms; with clearly established applications over a wide range of commonly recurring instances; interpreted by a large body of accepted and aptly expressed value judgements; and supported by a vivid and appealing ontology.

It may occur to the reader that the proposals here represent a mixture or a cross breed (perhaps a mongrel) combining a number of viewpoints that are not always deemed compatible. This is so and I think necessarily so. Natural law theory, except in a very homogeneous society, requires some bargaining to be useful and

contract theory without some objective notion of values lacks direction. Both without theology lack foundation.

### *B. Comment on the practicality of the proposal*

On the practical level it is not hard to see that the project just outlined is not a simple nor an easy one. It requires a number of things such as the following:

- (1) Focussing jurisprudential attention on a serious common project instead of wasting all our intellectual energy on controversy. I am not saying that the bloodless battles of the scholars are not valuable; only that some capable people ought to be working, and working together, on reconstructing the logical apparatus of the law;
- (2) We would also need to develop a profession capable of appreciating and applying complex logical apparatus. The cooperation of the whole profession would be required to produce legal apparatus and especially important in fine tuning it and keeping it in step with changes in society, new developments in technology etc.; and
- (3) We urgently need to reintroduce serious foundational jurisprudence into the required curriculum of our law schools. This is an investment for the future, aimed at interesting gifted people in this central enterprise of the law and also probably ensuring the sympathy and support of the profession as a whole. I have suggested elsewhere how we might make a beginning here.<sup>63</sup>

There is no denying that these are not things that will be easily achieved but they are perfectly feasible once we make up our minds to do them. Most of the advantages that we have as a profession can be traced back to imaginative and energetic people who saw something that needed to be done and set out to bring it to pass. The times are right for change, the old house of the law is looking shaky and I think we will see all sorts of changes in the next few years. Much of it will no doubt be superficial and cosmetic only; but hopefully some start will be made on the foundational problems including those discussed here.

### *C. Final maiximological apocalypse*

Vision is all important and so I will assume the mantle of the prophet of hope and foretell the glorious future of the legal maxims and the humane values that they embody. I see, or I would

---

63. J. Stanley McQuade, *Procrustean Jurisprudence: Squeezing Legal Philosophy Into An Already Crowded Curriculum*, 40 THE AMERICAN JOURNAL OF JURISPRUDENCE (forthcoming December 1995).

like to see, maxims once more prominent in legal texts and judicial opinions; maxims and their applications taught again in all the classrooms of the law schools; and maximology (including legal ethics and ontology) an important part of the jurisprudence course (required). We might even see modern maxim books published — and people hastening to buy them. Waxing more fervid still one can envisage the maxim page (eagerly read) in every legal periodical. No longer merely fervid but now perhaps fevered one can foresee teams of judges, lawyers, law students and even law teachers pitted against one another in popular TV panel games featuring maxims, for example, “Let’s Make a Maxim.” In a final prophetic ecstasy I see the great moment of all annual law association meetings, the *Maxim of the Year* award. For this happy day I have my entry ready. In Old English it reads:

Selde grendeth well the lothe  
 Selde pledeth well the wrothe.<sup>64</sup>

In its original form it means that the lazy lawyer does not prepare well and the angry lawyer does not perform well. My modern application, which I submit for the prize, is to comment that proper preparation, fine grinding if you like, involves familiarity with the law down to its roots, and that the opposite of wrath is not coolness but a benign wisdom, knowledge directed toward humane values.

---

64. W.C. BOLLARD, *THE YEAR BOOKS 77* (1921)(Quoted by Serjeant Matford to opposing counsel who had lost his temper).

## APPENDIX I

**Axioms concerning the judicial office**

*De fide et de officio judicis non recipitur questio sed de scientia sive de errore juris sive facta.*

The good faith and office of a judge cannot be questioned, only his knowledge of the law or of the facts.

*Judicium a non suo iudice datum nullius est momento*

Anything in a judgment which goes beyond what is proper to the occasion carries no weight.

*Boni judicis est ampliare jurisdictionem.*

A good judge should enlarge his jurisdiction.

*Ancupias verborum sunt iudice indigne.*

Quibbling about words is unseemly in a judge.

*Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.*

Judges do not decide questions of fact and juries do not decide matter of law.

*Nemo debet esse iudex in sua propria causa.*

No one should be a judge in his own case.

*Audi alteram partem*

Listen to both sides.

*In omnis poenalibus judiciis et aetati et imprudentiae succuritur.*

In deciding on punishments age and inexperience should be taken into consideration.

*Tutius semper est errare in aequietando quam in puniendo ex parte misericordiae quam ex parte justitiae.*

It is safer to err in acquitting than in condemning, to lean towards mercy rather than justice.

*Discretio est discernere per legem quid sit justum.*

Discretion is to see through the law to what is just.

*In favorem libertatis et innocenti omnia praesumuntur.*

All presumptions are in favor of liberty and innocence.

*In iudicio non creditur nisi juratis.*

Nothing will be judicially believed unless it has been judicially considered.

### **Axioms relating to property law**

*Aedificare in tuo proprio solo non licet quod alteri nocet.*

Build on your own property but not so as to harm someone else's.

*Alienatio rei praefertur juri accrescendi.*

The law favors alienation of property rather than accumulation.

*Aliud est possidere, aliud esse in possessione.*

It is one thing to possess, another to be in possession.

*Bonae fidei possessor in id tantum quod ad se pervenerit tenetur.*

A bona fide possessor, so far as is appropriate, keeps.

*Cuius est solum, eius est usque ad coelum et ad inferos.*

Whoever owns land owns it up to heaven and down to hell.

*Dona clandestina sunt semper suspiciosa.*

Clandestine gifts are always suspicious.

*Quando plus fit quam fieri debet videtur etiam illud fieri quod faciendum est.*

When one does more than he needs he is deemed to have fulfilled his obligations.

*Quod ab initio vitiosum est non potest tractu temporis convallescere.*

What was bad from the beginning isn't cured by time.

*Partus sequitur ventrem.*

The offspring goes with the mother.

*Non dat qui non habet.*

You can't give what you haven't got.

*Transit terra cum onere.*

Encumbrances go with the land.

*Res sua nemini servat.*

You can't transact a mortgage with yourself.

*Sic utere tuo ut alienum non laedas.*

Do not use your property in a way that injures your neighbor.

### **Constitutional principles**

*Domus sua est tutissimum refugium.*

A man's home is his castle.

*Nemo patriam in qua natus est excusare possit.*

No one is allowed to forswear allegiance to their native land.

*Semel civis semper civis.*

Once a citizen always a citizen.

*Protectio trahit subjectionem et subjectio protectionem.*  
Protection implies subjection and subjection protection.

*Salus populi suprema lex.*  
The public welfare is the supreme law.

*Perpetua lex est nulla lex.*  
A perpetual law is no law.

*Qui lege communi derogant stricte interpretantur.*  
Derogations of common law are strictly construed.

*Nova constitutio, futuris formam imponere debet non praeteriis.*  
A new statute should govern the future not the past.

### Contracts

*Incaute factum juro non facto habetur.*  
What is negligently done is deemed at law as not done at all.

*Novatio non praesumitur.*  
Renewal is not presumed.

*Pactis privatis juri publico non derogatur.*  
Private agreements do not abrogate public law.

*Quando abest provisio partis adest provisio legis.*  
When the parties fail to make provision the law supplies the want.

*Pacta quae contra leges vel contra bonos mores fiunt non sunt observanda.*  
Contracts contrary to law or good morals are not to be upheld.

*In contractis tacite insunt quae sunt moris et consuetudinis.*  
Usual and customary provisions will be read into contracts.

*Nihil perfectum dum aliquid restat agendum.*  
Nothing is done till it is completed.

*Delegatus debitor est odiosus in lege.*  
A delegate debtor is hateful in law.

*Simplex commendatio non obligat.*  
Puffing is not warranting.

*Scientia utrinque per pares contrahentes facit.*  
Equal knowledge makes the contractors equal.

*Vicarius non habet vicarium.*  
A delegate can't delegate.

*Aliud est celare, aliud est tacere.*

It is one thing to be silent, another to conceal.

*Clausulae inconsuetae semper inducunt suspicionem.*

Unusual clauses always excite suspicion.

### **Criminal Law**

*Spoliatus debet ante omnia restitui.*

Restitution before all else.

*Nemo tenetur seipsum accusare.*

No one is required to accuse himself.

### **Evidence**

*Quod non apparet non est.*

What isn't shown doesn't exist.

*Stabat praesumptio donec probetur in contrarium.*

A presumption stands till the contrary is proved.

*Vox emissa volat — litera scripta manet.*

The spoken word flies away, the written remains.

*Acta exteriora indicant interiora secreta.*

External acts reveal the inner secrets.

*Affirmante non negante incumbit probatio.*

He who affirms, not he who denies, has the burden of proof.

*Allegans contraria non est audiendus.*

A witness who contradicts himself is not to be heard.

*Allegare non debuit quod probatum non relevant.*

One ought not to allege what, even if proved, would not be relevant.

*Index animi sermo.*

Intention is manifested by words.

*Lex non requirit verificare quod apparet curiae.*

The law does not require proof of the obvious.

*Allegens suam turpitudinem non est audiendus.*

A witness alleging his own wrongdoing shall not be heard.

### **Inheritance and wills**

*Haeres legitimus est quem nuptiae demonstrant.*

The legitimate heir is the one shown to be so by marriage.

*Qui in testamentis ita sunt scripta ut intelligi non possint ac si scripta non essent.*

Anything written in a will which is unintelligible is as if it was not written.

*Nemo presumitur alienam posteritatem suae praetulisse.*

No one is presumed to favor another person's descendants over his own.

*Ambulatoria est voluntas defuncti usque ad supremam vitae exitum.*

The testator can change his will right up till his last breath.

*Haereditas numquam ascendit.*

Heredity never ascends.

*Linea recta semper praefertur transversali.*

Vertical lines (of descent) are always preferred to transverse.

### Documentary interpretation

*Qui haeret in litera haeret in cortice.*

Literal interpretation is superficial

*Qui non valeant singula conjuncta juvant.*

Things obscure on their own are clear when taken together.

*Maledicto expositio quae corrumpit textum.*

A bad interpretation twists the text.

*Semper in dubiis benigniora praeferenda.*

In doubt the kindlier interpretation is to be preferred.

*Generalia specialia derogant.*

Particular clauses derogate from general ones.

*Certum est quod certum reddi potest.*

What can be made certain is certain.

*Divinatio non interpretatio est quae omnino recedit a littera.*

To depart altogether from the literal meaning is second sight not interpretation.

*Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit.*

No one can understand any part who has not read through the whole again and again.

*Benignae sunt interpretationes propter simplicitatem laicorum ut res magis valeat quam pereat.*

Interpretation should be kindly, keeping in mind the inexperience of layfolk in order that their transactions should stand and not fall.

## Of law in general

*Ratio enim anima legis, cessante ratione cessat et lex.*

Reason is the life of the law, when the reason changes so does the law .

*Lex non cogit ad impossibilia.*

The law does not require the impossible.

*Ignorantia facti excusat, ignorantia legis non excusat.*

Ignorance of the facts is an excuse in law, ignorance of the law is not.

*Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Every innovation in the law produces more harm by its novelty than benefit from its usefulness.

*Damnum non est injuria.*

Mere harm is not actionable wrong.

*Misera est servitus ubi jus est vagum et incertum.*

The law performs miserably when it is vague and uncertain.

*Qui rationem in omnibus quaerunt rationem subvertunt.*

One who seeks reasons for everything undermines reason.

*Lex plus laudetur quando ratione probatur.*

The law is most esteemed when it is supported by reason.

*Nihil quod inconueniens est licitum.*

Nothing is permitted which is unfitting.

*Nimia subtilitas in jure reprobatur et talia certitudo certitudinem confundit.*

Excessive subtlety in law is to be avoided and too much certainty confounds certainty.

*Apices juris non sunt jura.*

Very fine points of the law are not the law.

*Summum jus summum injuria.*

The limits of the law are the limits of your injuries.

*Non in tabulis est jus.*

The whole of the law is not contained in the law books.

*Qui peccat ebrius luat sobrius.*

Sin drunk pay sober.

*Via trita via tuta.*

The well trodden path is the safe one.

*Qui non habet in aere luat in corpore.*

If you have no money you pay with your body.

### Marriage and family

*Uxor non est sui juris sed sub potestate viri.*

The wife is under the authority of her husband.

*Matrimonia debent esse libera.*

Marriage should be of ones own free will.

*Consensus non concubitus facit matrimonium.*

Consent not cohabitation makes a marriage.

*Consentire matrimonio non possunt infra annos nubiles.*

Parties below marriageable age can't consent to marriage.

*Pater est quem nuptiae demonstrant.*

Your father is the husband of your mother.

*Whoso bolleth myn kyn,.*

*The calf is mine*

My cow, my calf (applied to presumption of legitimacy).

### Religion

*Summa ratio est quae pro religione facit.*

To promote religion is the supreme legal principle.

*Ecclesia melliorari not deteriorari potest.*

The church is to be bettered not diminished.

*Dies dominicus non est juridicus.*

The Lord's day is not a day for legal business.

### Insanity

*Furiosi nulla voluntas est.*

The insane do not have free will.

*Furiosus solo furore punitur.*

A madman is punished only by his madness.

*Furiosus absentis loco est.*

The insane are not present (i.e. cannot be witnesses).

### Procedure

*Ordine placitande servato servatur et jus.*

When proper procedure is observed the law is observed.

*Interest reipublicae ut finis sit litium.*

It is in the public interest that litigation should not go on and on.

*Qui sentit commodum sentire debet et onus.*

He who reaps the benefit should carry the burden.

*Abusus tollit usus.*

Abuse of anything is not an argument against its use.

*Ad ea quae fræquentius accidunt jura adaptur.*

The laws are devised for things which happen frequently.

*Qui non prohibet quod prohibere potest assentire videtur.*

He who is able to prevent something and does not will be deemed to have agreed to it.

*Malitia supplet aetatem.*

Malice causes minors to be deemed of age.

*Lex citius tolerare vult privatum damnum quam publicum malum.*

The law will more easily tolerate a private harm than a public evil.

*Consensus tollit errorem.*

Consent bars error.

*In casu extremæ necessitatis omnia sunt communia.*

In cases of extreme necessity all goods are communal.

*Lex spectat naturæ ordinem.*

The law pays regard to the natural ordering (of things).

*Angliæ jura in omni casu libertate dant favorem.*

The laws of England favor liberty in all cases.

*Cogitationis poenam nemo patitur.*

The thoughts are not punishable.

*Ubi damna dantur, victus victori in expensis condemnari debet.*

When damages are awarded, the loser ought to pay the costs of the winner.

### Torts

*Actio non datur non damnificando.*

No action without damage.

*Actus Dei nemini nocet.*

You can't complain about "Act of God".

*Injuria non excusat injuriam.*

One wrong does not justify another.

*Lex non favet votis delicatorum.*

The law does not encourage the whims of the fastidious.

*Qui jure suo utitur nemini facit injuriam.*

You are entitled to exercise your legal rights.

*Qui facit per aliam facit per se.*

To act through another is as if you acted yourself.

*Remoto impedimento emergit actio.*

When the lights turn green you should go.

*Corporalis injuria non recipit aestimationem de futuro.*

You are not allowed to speculate about future bodily harm.

*Non decipitur qui scit se decipi.*

He who knows he is being lied to is not deceived.

*Alterius circumventio alii non praebet actio.*

One person getting the better of another is not sufficient ground for an action.

*Injuria non praesumitur.*

Injury must be proved.

*Qui vult decipi decipiatur.*

Let him who is willing to be deceived be deceived.

*Fraus est celare fraudem.*

It is fraud to conceal fraud.

*Nemo tenetur divinare.*

No one is deemed to have a crystal ball.

*Qui tacet consentire videtur.*

Silence implies consent.

*Intentia caeca mala.*

Culpable recklessness is intent.