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Counseling the Client: An Administrator's View

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Abstract

This Article examines what natural law is and how it should be used as an approach for lawyers. The article first describes that the theory of natural law and positive law is to attain the goal of effecting the common good. Daniel Degnan considers cases from his experience as a law school dean and how the counselors in those cases made good use of a natural law approach. Although the lawyers in all these cases were practitioners advising clients, elements of the common good seems to have been implicit in their handling of every one of the cases. He explains that the law's basic purpose is to be an order of reason for the common good of the community. He concludes that a lawyer, like everyone, begins with the naturally known principles of natural law. But from this, the virtue of prudence has to be sought after and developed over time. True prudence cannot be present without the virtue of justice, which regards the good of another person. When a lawyer acquires this prudence, then she will be capable of knowing and advancing the common good.

KEYWORDS: Counseling clients, natural law, positive law, common good

COUNSELING THE CLIENT: AN ADMINISTRATOR'S VIEW

Daniel A. Degnan, S.J.*

INTRODUCTION

It is unusual to talk or write of a natural law approach to counseling the client. There is a good reason for this. Natural law, according to Thomas Aquinas, is of primary importance, not to lawyers, but to legislators. According to Aquinas, the legislator draws on natural law when making positive law. For the citizens governed by law and the lawyers who advise them, however, the role of natural law is not so clear. Before we talk about a natural law approach for lawyers, therefore, we need to look at what natural law is, and why it concerns the legislator more than the practicing lawyer.

A. Natural Law in Thomas Aquinas's Theory

Aquinas's basic model of natural law has two essential premises. First, every human being naturally knows a few *general principles* of natural law. Some examples include the principle that one should not offend those with whom one ought to live in harmony; that no harm should be done to another; and that justice ought to be observed among humans.¹ Second, every human naturally knows a few *specific precepts* of natural law. For example, one should not murder, commit adultery, or steal. These *precepts* are so "close" to the natural law *principles* that they follow naturally from the principles. The specific precepts, however, are not known as immediately or universally as the general principles.²

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1. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, q.94 a.2, p. 1009-10, q.95 a.2, p. 1014-15, q.99 a.4, p. 1034, q.100 a.3, p. 1038-39 (The Fathers of the English Dominican Province, trans., Benziger Brothers 1947) (1273) [hereinafter *SUMMA THEOLOGICA*]. For Latin texts with English translations, ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE, LATIN TEXT AND ENGLISH TRANSLATION, INTRODUCTIONS, NOTES, APPENDICES, AND GLOSSARIES* (Blackfriars, McGraw-Hill 1964) (1273); and ST. THOMAS AQUINAS, *THE TREATISE ON LAW*, St. Thomas Aquinas, Richard J. Regan, *Treatise on Law* (Hackett Pub. Co. 2000).

2. *SUMMA THEOLOGICA*, *supra* note 1, at q.94 a.4-6, p. 1010-13, q.95 a.2, p. 1014-15, q.100 a.3-5, p. 1038-43. The natural law precepts are not always known, Aquinas says, because of sin, passions, bad habits, and customs. However, the general or common principles of natural law cannot be blotted out from men's hearts, although their

B. Human Positive Law and Natural Law in Aquinas's Theory

Aquinas holds that all human law is "derived" from the natural law. Human law is derived in two ways. In the first way, the criminal law adopts laws against murder, theft, assault, and fraud—laws similar to the natural law precepts. Most other laws, however, are not directly related to natural law precepts. The second way human law flows from natural law is through "determination" (or specification) of the general principles of natural law, especially the principle of justice. Aquinas uses the metaphor of an architect planning a house.³ An architect starts with the general idea of a house in mind. Through art and skill, the architect then determines the particular house to be built. Similarly, the natural law principles and precepts express the general form of justice, but the lawmaker decides what positive laws will achieve justice in human institutions and relationships.⁴

In his theory of natural law and positive law, Aquinas intends the legislator enacting human laws to build on principles of natural law. Much of Aquinas's study of law, moreover, is about effecting the common good, what he sees as the goal of law. In Aquinas's definition, the first work in achieving the common good belongs to the lawmaker.

What then does counseling clients have to do with the natural law? I offer my answer in two parts. In Part I, I consider cases from my experience as an administrator that required good legal help and reveal the qualities of a good lawyer. In Part II, I discuss how the counselors in those cases made use of a natural law approach.

I. CASES WHERE GOOD LEGAL ADVICE WAS NEEDED AND THE QUALITIES OF THE COUNSELING

A. Experience as a Law School Dean

1. Case A: Practicing Law from the Law School

(i) A United States District Court made an informal complaint about a fee-generating lawsuit conducted by the law school's

application may be utterly distorted, as ignorance or corruption of the precepts demonstrates. *Id.* at q.94 a.4-6, p. 1010-13. The effort in this paper is to present Aquinas's theory, not prove it. For a contemporary argument for moral principles and rules, see generally JAMES Q. WILSON, *THE MORAL SENSE* (1993).

3. *SUMMA THEOLOGICA*, *supra* note 1, at q.95 a.2, p. 1014-15.

4. *Id.* See Daniel A. Degnan, S.J., *Two Models of Positive Law in Aquinas: A Study of the Relationship of Positive Law and Natural Law*, 46 *THE THOMIST* 1, 1-32 (1982).

clinical faculty. I confirmed the situation and sought the opinions of several other law school deans, who advised that the case in question was not pro bono litigation that may be conducted from a law school. I requested and ordered that the litigation not be conducted. An extended, damaging dispute followed. At one point, the university's president and its legal counsel suggested legal action against the faculty members involved; this suggestion was rejected. Ultimately, the dispute dissipated; the faculty members and I pulled back from the edge.

(ii) Qualities: This was a failure to seek legal counsel. Good legal advice, at the beginning, would have strengthened my hand and helped in avoiding unnecessary confrontations. The consulted deans identified the academic problem, but offered no guidance in how to deal with it.

2. *Case B: Faculty Union*

(i) The law school had an independent faculty union. Twice during my term as dean, the faculty union secured a contract through collective bargaining with the university. I perceived that my role as dean was to try and keep the bargaining confined to salary and benefits (avoiding academic policy and practices); and to quietly support a considerable but feasible upgrade in faculty pay. I fulfilled my role in both instances, but not without some blood on the floor. In the first negotiation, for example, the union threatened to boycott the law school's commencement; the threat was later withdrawn. The faculty's bargaining, through their own committee, was personal, emotional and unduly sensitive. The university's representative seemed to provoke anger and mistrust. The university brought in labor counsel, and my advice was sometimes sought or tacitly consented to. In both negotiations, the involvement and advice of the university's labor counsel was essential to the successful outcomes.

(ii) Qualities: Labor counsel understood the university and the law school, the persons and issues on each side, and the university's financial capacity. Counsel separated emotional reactions from good decision-making, understood collective bargaining, and offered practical wisdom, good will and patience. Counsel's concern for the good of both university and law school engendered trust and increased counsel's effectiveness.

3. *Case C: Denial of Tenure Results in Legal Action*

(i) A lawsuit was filed against the university and the law school based on the law school's refusal to grant tenure to a professor. The complainant in good faith alleged discrimination and arbitrary dismissal. The case was tried in superior court without a jury, resulting in judgment for the university and law school.

(ii) Qualities: Counsel for the defense offered a vigorous, carefully prepared, fair defense. Counsel demonstrated an understanding of the standards and procedures involved in the award of tenure. Counsel also displayed respect for the dignity of the plaintiff; this was proper in its own right and it added to the effectiveness of the defense.

4. *Case D: A Charge of Bias*

(i) After disagreement between myself and several faculty over the promotion of a faculty member, several faculty members addressed a letter to the entire faculty charging me with general bias against minorities and women, and calling for a hearing of the charge at the next faculty meeting.⁵ On advice of personal counsel, I brought a court stenographer to the faculty meeting, challenged the jurisdiction of the faculty to hear the complaint, and threatened an action for defamation if the statements continued. The faculty decided that it lacked jurisdiction in the matter.

(ii) Qualities: Counsel gave superb legal advice. Counsel also showed concern for personal reputations and the reputation and operations of the law school. The plan of action confronted the issue and calmed it, effectively ending the dispute.

B. Experience as a College President

1. *Case A: The College's Grievance Procedure*

(i) When I began my term as president, there was a recommendation from the college grievance committee on my desk. After a hearing on a staff member's complaint, the committee judged that I should reprimand and suspend a senior professor. The professor had written and circulated a parody, purportedly from the complainant, of an actual letter from the aggrieved staff member about student rudeness to a speaker.

The grievance procedure provided that any member of the college community who felt aggrieved could bring complaints against

5. At that time, the law school ranked first in the number of minority and women faculty recently hired.

anyone in the college. The grievance procedure did not contain standards for issuing, hearing, or judging complaints. College counsel did a thorough analysis of the procedure and concluded that it lacked due process. The recommendation that the senior professor be suspended was rejected on the ground that he had not received due process through the procedure. A new grievance procedure was adopted.

(ii) Qualities: Counsel exhibited professionalism, a quick response, thorough research, and awareness of the potential dangers the arbitrary grievance procedures posed for the college and community.

2. *Case B: Buying the Jesuit Residence*

(i) The college, a Jesuit institution, proposed to buy the priests' residence, comprised of fifty bedrooms, a dining room and a chapel, for the college's first student residence hall, proposing that the Jesuits build a smaller residence for themselves on campus. For the Jesuits, the negotiations were emotional and the sale was a practical decision. For the college, the purchase was a necessary step in creating a residential campus. Negotiations between the Jesuit rector and I broke down over a perceived slight by myself. The Jesuit community's lawyer undertook to negotiate for the community. The purchase went through.

(ii) Qualities: In a delicate situation, the purchase was made possible by diplomacy and the skill of the Jesuit community's attorney. While fully representing his client, he understood the needs of both the community and the college.

3. *Case C: Building a New Residence Hall*

(i) The college proposed to plan and build a new residence hall, in about fourteen months, to open at the start of the school year. Conditional zoning required approval by the city planning board; a height variance was also needed. Under severe time constraints, college counsel negotiated with the city planner and made the case for the college at a hearing before the board, using a top expert and other witnesses. Counsel had met with neighbors and local politicians, reducing opposition to the dorm.

(ii) Qualities: This was not necessarily innovative counseling, but the quality of legal work, including developing a relationship of trust with the city planners and politicians was essential to building the dormitory quickly, thus allowing it to open on time.

4. *Case D: Restricting Speech and Conduct on Campus*

(i) The college's students were 25% Hispanic, 11% African-American, and 9% Asian or Middle Eastern. Despite a remarkably inclusive campus, the faculty proposed a speech policy on matters including race, ethnicity and gender. The policy prohibited speech, writing or action by anyone in the college that denigrated, demeaned, or discriminated against any person or group.

In response, I asked counsel for cases in United States district courts that had struck down similar rules implemented by Wisconsin and Michigan universities for violating free speech and procedural due process. I then wrote a letter rejecting the proposed speech code, based in part on the court's reasoning in the Michigan case, *Doe v. University of Michigan*.⁶

(ii) Qualities: In administration, it can sometimes help to be a lawyer.

II. HOW NATURAL LAW WAS PRESENT IN THIS LEGAL COUNSELING

A. Aquinas's Reasoning about Law and the Practice of Law

How does natural law figure in the lawyer's role of assisting his clients? We can get an idea of this by looking at Aquinas's reasoning about the civil laws governing the Jews of biblical times.⁷ These laws, Aquinas argues, are "determinations" of the natural law principle that justice that ought to be observed among men.⁸ When Aquinas explains the rationale of these laws, however, he never once mentions natural law. In his reasoning, the question is whether the law institutes just relationships and the common good.⁹

Take two examples from the political community: government and bailments. The Jewish constitution, Aquinas says, was based

6. *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

7. SUMMA THEOLOGICA, *supra* note 1, *Of the Precepts of the Old Law*, q.99-105, p. 1031-1103. For Latin text with English translation, St. Thomas Aquinas, SUMMA THEOLOGIAE. LATIN TEXT AND ENGLISH TRANSLATION, INTRODUCTIONS, NOTES, APPENDICES, AND GLOSSARIES (Blackfriars; New York, McGraw-Hill 1964); and St. Thomas Aquinas, THE TREATISE ON LAW, St. Thomas Aquinas, Richard J. Regan, Treatise on Law (Indianapolis: Hackett Pub. Co. 2000). For English texts, St. Thomas Aquinas, 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS, 906-948, (Anton C. Pegis ed., Random House 1945), and St. Thomas Aquinas, SUMMA THEOLOGICA FIRST COMPLETE AMERICAN EDITION (1st Complete American ed., New York: Benziger Bros. 1947).

8. SUMMA THEOLOGICA, *supra* note 1, at q.99 a.4, p. 1034.

9. *Id.* at q.105, p. 1091.

on two principles of just government: all should have part in the government since all will love and guard such a government, and the form of government should be designed so that the ruler should rule according to virtue.¹⁰ In the best type of government, one ruler governs according to virtue, aided by a senate of "elders in virtue."¹¹ The rule belongs to everyone, in that the ruler is chosen by all, from among all the people.¹² Israel had such a rule, Aquinas claims, although God chose the ruler.¹³

Concerning the loan (or bailment) of an animal, Aquinas discusses the liability of the borrower when the animal has sickened and died while in the borrower's hands. Jewish law reasonably provided that if the animal died from the neglect of the borrower, the borrower should compensate the lender for his loss; otherwise the owner should bear the loss.¹⁴

Aquinas seems to be thinking more like a lawyer than a lawmaker. The constitution and the law that Aquinas examines were laid down or written centuries before. Nevertheless, Aquinas purports to discern in these texts the purpose and intent of ancient Israel's form of government and its law of bailments. The reasons he gives for these laws, their purposes, and the means chosen, are practical. The appeal is to what is just, reasonable, and for the common good.¹⁵

B. Counseling the Client and Natural Law

1. *The Common Good*

Take the cases of counseling described above.¹⁶ The cases all involve elements of the common good: for the college, academic freedom, and due process; for the law school, collective bargaining, tenure standards, and standards of legal ethics. Two of the cases in the law school involved claims of discrimination; in the college, the faculty proposed a sweeping policy of restraint on speech.

In these cases, the lawyers had to be more than scholars looking at the law. They were practitioners, advising clients. Like Aquinas, however, counsel had to understand each law's end, and the means the law prescribed to achieve that end. In Aquinas's natural

10. *Id.*

11. *Id.* at 1092.

12. *Id.*

13. *Id.*

14. *Id.* at q.105 a.2, p. 1093, 1096.

15. *Id.* at q.105, p. 1091-1103 *passim*.

16. *See supra* section (B)(1).

law theory, these ends must be designed to create or ensure the common good: just relationships among the people. It is hardly likely that counsel in these cases were contemplating this grand vision. Yet it seems to have been implicit in their handling of every one of the cases.

2. *The Clients: Institutions and Persons*

In reviewing these cases, I was struck by how important it was that the lawyers understood the institutions and persons they represented and dealt with. In the collective bargaining agreements, they needed to appreciate the financial limits of the university and the law school, and the outlook of a law school faculty. In the discrimination case, they had to understand academic standards for tenure. In the charge of bias, it was not only due process, but governance and the health of the institution that was at stake.

For the college, few people understand the legal, political, and psychological differences between a Catholic college and the religious community it serves. Our lawyers did. Would the grievance procedure that invited any and all complaints, against anyone connected with the college, have been as quickly and effectively handled, if counsel did not understand the institution and its needs? In the zoning and planning negotiations, the college's contributions to the community, especially through its current students and its alumni, were a trump card. The college's attorneys played it well.

The point is that in all of this legal counseling, the lawyers were actively involved in realizing elements of the common good.

3. *The View of Law Involved in This Counseling*

A law school dean I know once said to a student: "The difference between you and me, Marcia, is that you think of law as a martial art, and I think of it as a means of reconciliation." In our cases, the lawyers' actions agreed with the dean's position. There is nothing sentimental about this position; it fits with the most vigorous advocacy. The law's basic purpose is at stake: that it be an ordering of reason for the common good of the community.

4. *Are Justice and the Common Good Always Served as the Result of Good Legal Counseling?*

Any practicing lawyer knows the answer to this is no. The law itself may be excessive or unjust. A law's application, by a single judge or jury, or by the courts in general, *may* be misguided and unfair. Administrative regulations may exacerbate the problem.

Faced with situations like this, good legal counseling, exercising the virtue of prudence and sound judgment is necessary. If a proceeding or litigation is involved, the lawyer may be able to appeal to standards of justice and the common good, at least implicitly. It may be, however, that the only course is vigorous, wise representation of one's client, whatever the odds against justice in the matter.

5. *The Personal Virtues Needed: "Prudence" and Justice*

The lawyer, like everyone, begins with the naturally known principles of natural law. From this, the virtue of prudence, the wise and right judgment about action, has to be sought after and developed over time. Unlike others, the lawyer has her experience of the legal system to school her in knowing what is just and what is unjust. If she acquires the prudence needed by lawyers, which Aquinas calls "political prudence," the lawyer will be capable of knowing and advancing the common good.¹⁷

A true prudence, however, cannot be present without the virtue of justice, a constant will and disposition to render to others what is their due. Justice, Aquinas states, is first among the virtues, since it regards the good of another person. Legal justice in turn is the highest form of justice, since in legal justice law orders human relationships and human affairs for the common good. It follows that justice in the lawmaker, and, by extension, in the lawyer, according to this paper, is the highest form of justice, when it serves the common good.¹⁸

17. SUMMA THEOLOGICA II-II, *supra* note 1, at q.47, p. 1389-99, q.50 a.2, p. 1407; SUMMA THEOLOGICA, *supra* note 1, at q.57 a.4, a-5, p. 830-32. Even with prudence, right reasoning about action, practical reason is not certain. Practical reason is about actions, which are singular and contingent. The more it descends to particular matters, the less certain it is. *Id.* at q.91 a.3, p. 997-98. objection 3 and reply 3; q.94 a.4, p. 1010-11.

18. SUMMA THEOLOGICA II-II, *supra* note 1, at q.58 a.1-3, a.11, a.12, p. 1434-1443.

