

October 2016

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### Recommended Citation

Rev. William F. Cahill (1965) "Morality in Legal Practice," *The Catholic Lawyer*. Vol. 11 : No. 3 , Article 4.  
Available at: <https://scholarship.law.stjohns.edu/tcl/vol11/iss3/4>

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# MORALITY IN LEGAL PRACTICE

REV. WILLIAM F. CAHILL\*

ONE CANNOT SPEAK of a moral way of practicing law without stating, at least summarily, his philosophy of law and relating it to his philosophy of morals. Two concepts are characteristic and basic in natural law jurisprudence: that the legal order is part of the moral order, and that the moral order is subject to modification by the legal order. The same concepts may be expressed in other terms: an unjust law is no law, and a just law creates, alters and discharges moral obligations.

## **Jurisprudence and Justice**

Jurisprudence is a science which serves the virtue of justice. Jurisprudence discovers what is just in human law, and justice impels men to enact, to execute, and to obey laws which are just. The impulse of the virtue of justice is upon man's will—the virtue of justice is the habit of choosing those acts and forbearances which, as reason shows, are means appropriate to realize concretely the abstract principle of justice, that each shall have what belongs to him. Man's duty to realize in his conduct the virtue of justice and his duty to choose conduct appropriate to that end's achievement are moral obligations.

## **Expediency Imposes No Obligations**

Man's only true obligations are those of morality. The precepts of expediency, which advise a man what means are effective to achieve an end or purpose he has chosen or may choose, do not create obligations. These precepts do not bind a man's will to choose the end, and they do not, therefore, oblige him to choose the means which, as reason indicates, are effective to achieve the end. "If you want to please X, tell him all you know about Y," may be an accurate statement of the means

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effective of the end of pleasing X—it may well be that X would like nothing better than to know what you know about Y. But this precept of expediency imposes no obligation. As an accurate statement of how you can please X, it does not assert or imply that you should please X, nor, consequently, that you should tell X about Y. Expediency can, of course, relate pleasing X to a more ulterior end, such as getting a job which is the gift of X. But expediency's precept will be still contingent: "If you want this job, please X, and to please him, tell him about Y."

#### **Obligation Postulates an Absolute**

Obligation arises, and morality is involved, when a man must choose an act or a forbearance. An absolute enters into the precept, so that it can be said "You must get the job," or "You must please X," or "You must tell him about Y." Suppose that precepts of expediency establish that getting this job is the only means by which you can live—you are in a totalitarian society in which useless persons are liquidated, and you can be useful in no other job than this one. Whether the maintenance of life is an absolute which will oblige you to get this job, and thus oblige you to please X, and therefore oblige you to tell him about Y, depends on what you are.

If the entire significance of man's being can be exhausted in a description of the physical conditions upon which his life depends and of the physical capacities which his life imports, then life is not, for him, an absolute. He has no obligation to choose life and no obligation to choose death—there is nothing in the world which the sciences of chemistry, biology, physics and psychology describe which can say to

him, "You must choose to live" or "You must choose to die." These sciences can say what will kill him or keep him alive, and they can describe the physical, emotional and mental processes which will or may accompany or follow upon his act of choosing to live or to die, but they cannot offer an absolute which will make either choice an imperative obligation.

Further, the physical world cannot, without destroying man or his consciousness, control his act of making a choice between life and death. Physical force can intervene to destroy the functioning of his nerves, so that his will's decision cannot be implemented even within his own body, or physical force can inhibit his bodily capacities or their function, so that his will's decision cannot be implemented exteriorly. Force can frustrate the will, and it can influence the will indirectly, by threat of consequences to follow on one choice or other, but force cannot directly control the will.

#### **The Absolute in Human Conduct**

The will of man can be directly controlled only by its proper object. It is the nature of the will to choose the good, as it is the nature of the mind to know the true. As nature impels the mind to inquire after the true and to seize upon it in the act of knowledge, nature impels the will to desire the good and to seize upon it in the act of choice. By nature, there is only one object which can control the will perfectly—one object which the will cannot but choose. That object is the absolute and perfect good.

Every concrete object of the will's choice is presented to the will by the mind, and in presenting each object, the mind shows it to be good in some degree. If the mind could present perfectly to the will an object

absolutely good, the will could not but choose that object. In this life, however, the mind cannot present to the will even the absolute good with such perfect clarity that the will cannot reject the absolute good. In the absence of a perfect mental presentation of the absolute good, the will's choice of a good object is not inevitable. Yet the natural response or inclination of the will is to choose, among several objects presented to its election, that which the mind shows to be the greater good. Thus, the mind's evaluation of the greater or less goodness of the objects it presents to the will is the only natural guide which can directly and intimately influence the will's act of choosing.

The mind's evaluation of the goodness of an object has two premises: that, in the order of being, there is an absolute good, in reference to which all other real things are good; and that, in the order of knowledge, the mind can discover, albeit imperfectly, the real absolute good and its relations. If, in the order of being, man's power of choice has no ultimate object, or if, in the order of knowledge, man can know no absolute good whose embracement by willful choice is the *raison d'être* of man's power to choose, then there is no moral order controlling man's choice, for it cannot be said that man should or must choose any particular good rather than any other.

But if, in the order of being, man is the creature of an intelligent God, and if man's mind, by employing the concepts of cause and effect, can discover that fact, then there is a real order. That order, examined by man through the concepts of end and means, directs man's acts of choice to an ultimate and absolute good. The act by which an intelligent God creates is an in-

telligent act and, as such, must have purpose. The ultimate purpose of the Supreme Being can be only Itself. If that Being creates man with a will capable of choosing good and the Creator Himself is supremely good, then the ultimate purpose of this creative act, and the purpose binding absolutely upon the will created, must be that the created power of choice shall choose, that is, shall love, its Creator.

Thus, the will of man, in its creation, is bound by the obligation to choose God as against any other thing which may be presented to it as an alternative object of choice. This is the root principle of all man's obligations. The ultimate end of man's choosing, as of man's being, is God—that end is the absolute which imposes upon man the obligation to choose with his will no object whose choice turns man, in any degree, from his ultimate end.

#### **Reason Discovers the Order of Being and the Order of Morals**

The detailed design for human conduct which leads man to God as his ultimate natural end is the natural moral order—it is an aspect of the natural order of being which is the detailed design of God's creative act. From time to time in human history, God has communicated to men, by the supernatural act called revelation, some of the principles which describe the order of being and the moral order established by the divine act of creation. Yet the principles of the order of being and the moral order set up in the act of creation are open to discovery by human reason.

These natural orders do not preclude God's establishing, by acts distinct from the act of creation, supernatural orders of being and of morality. God has in fact, without altering essentially man's created

nature, destined man to share in the divine life of God Himself. That destiny gives to man grace—a new principle of activity, distinct from his natural life. This supernatural vital principle puts man in a new order of being—the order of divine sonship—which is distinct from the order of created nature. That man is established in this new order of being implies that there is for his conduct a new moral order. These supernatural orders, of being and of morals, differ from, but do not destroy or essentially alter the natural orders of being and morality. The principles of the supernatural orders cannot be discovered by natural human reason unaided—they can be known by reason when reason is helped by the supernatural aid called faith.

#### **The Principles of the Natural Order of Being**

The mind of man applies to the phenomena of the physical world the intuitive rational principles of causality and sufficient reason, to discover the principles of the natural order of being. Some of the principles clearly validated by this intellectual inquiry are these: that the world is the product of the creative act of the one, supreme, infinite, intelligent and free God; that the ultimate end of man's existence is God—that the union with God to which man is naturally destined is a union of understanding and of free will, choice or love.

The order of being and its principles concern facts and factual relations, susceptible to discovery by the process of "speculative reason" which has for its basic tools the concepts of cause and effect, and for its purpose the discovery of what is true. The relations discovered and described are chiefly necessary ones, which cannot be other than they are in fact. The

conclusions of speculative reason as to the principles of the order of being are, therefore, endowed with a high degree of certainty.

#### **The Principles of the Natural Moral Order**

The nature of man, as described by the principles of the order of being, is examined under the concepts of end and means, in order to discover the principles of the moral order by which man's conduct is guided. Man's nature, as the subject of this examination, is man's entire and integral nature—the inclinations of nature are guides to moral principles of conduct only in so far as they are the inclinations of reason or the inclinations of other parts of human nature ruled by reason.

The purpose of this process is to discover what is good, that is, to perceive the order which relates the objects which man's will may embrace as good, among themselves and to the absolute good. This last is the ultimate object of man's willful choice, it is God, to Whom man unites himself by understanding choice—by the act called love. Some of the basic principles of the moral order are: good—whatever contributes to the union of man's will with God's will—must be done, and evil must be avoided; human life, as a moral value, is superior to any value involving property only; and an evil means, employed to accomplish a good end, is nonetheless evil. The moral evaluation of many particular ends, such as the destruction or preservation of human life and liberty, as good or evil, can be made with a high degree of certainty, since the reasoning process there involved is chiefly deductive. The particular end is viewed with reference to man's ultimate end of union with God, and the causal relation

between the ultimate and the particular is adequately perceived. But the evaluation of many other particular ends, and the evaluation of means for achieving many particular ends in the concrete, involve causal relations too unclear to warrant a conclusion by deduction. Evaluation can be made inductively—this type of conduct has good moral results in this case and in that case, and in the other case—or it has evil moral results in so many other cases. Many of the conclusions available to reason in these matters are, therefore, products of incomplete induction, which cannot yield perfect certainty. Yet if the conclusions are so highly probable as to exclude reasonable doubt, they are said to be morally certain—in matters of human conduct it is often practically impossible to achieve perfect certainty, and human action would be paralyzed if it had to wait upon that achievement. Conclusions which are less probable, having only “the greater weight of probability,” and even those having lesser weight yet being “supported by solid reason,” have significance as guides to human conduct in circumstances where the obligation to act with care or to act only after inquiry is relatively lighter.

Reason’s search for the true principles of the natural moral order is sometimes aided by revelation. God, speaking in a supernatural way, through the Scriptural writers He inspired and through the infallible teaching of His Church, has indicated clearly some natural moral principles whose discovery is difficult and even uncertain when they are sought only in the indications of nature. Revelation helps reason in these matters, not only directly, by stating the true principles explicitly, but even indirectly, by calling to the mind’s

attention some aspects of nature whose moral significance, on first view, was not clear. Thus the conclusions of moralists in respect of duties bearing upon the life of the unborn have been clarified and even revised in the light of Church doctrine which implies that the human rational soul is infused in the first instant of conception.

### **The Legal Order is Part of the Moral Order**

The legal order is one sector of the natural moral order. God, in creating man, has ordained that to accomplish the perfection of his nature man shall live in community with other men. To direct the conduct of men to the purposes which the community, by divine ordination, serves, the community is given a share in God’s power to bind the will of man—to impose upon men true moral obligations.

### **The Legal Order Distinguished Within the Moral Order**

Any man can be said to bind the conscience of any other man when he brings to the attention of the other a precept of the moral order which is applicable to conduct that the other contemplates. Like the moral counsellor, the lawmaker urges his subjects to obey the precepts, such as that against theft, which are conclusively, that is, deductively, imposed by the principles of the moral order. But, unlike the counsellor, the lawmaker can morally bind his subjects also by precepts which impose categorically ends and means which the natural law imposes only alternatively.

If I have wilfully broken through my neighbor’s fence, the natural law obliges me to repair the harm done and to prevent further harm. In a given situation—I being a competent workman and having at hand

the appropriate materials—a moral counsellor might advise me that the best means of fulfilling my moral obligations would be to repair the fence immediately, though he would have to say that I would do no wrong if I chose rather to warn my neighbor of what had happened and to stand ready to make money compensation for his harm. The law, having to adapt itself to the common rather than the special situation, may prescribe money payment and allow me no credit for repairs, even when competently made, unless they had been accepted by the owner of the fence. If that is the law, my neighbor may morally stand upon it, and if he does so, I am morally bound to obey it.

But it is the coercive moral power of the lawmaker which essentially distinguishes him from the moral counsellor. While the counsellor can employ only reasoned instruction and persuasion to bring his client to voluntarily fulfill the moral precept, the lawmaker's distinctive power is to bind his subject morally to a coerced, involuntary, obedience. As was said when force was discussed, the human will's choice cannot be internally coerced. The law's external coercion differs from brute force in this, that the law's coercion, though it involves, directly or indirectly, an exercise of physical force, is legitimated in the moral order by the divine mandate to society. That mandate morally obliges the members of a society to accept the force which society reasonably exercises to coerce obedience of just laws.

It is this attribute of "coercibility"—the legal precept's quality of being able to achieve its objective where the subject's will does not embrace the law's objective, and even where the subject's will positively rejects the law's objective—which distin-

guishes the law from all other precepts in the moral order. It is this coercive quality of the precepts of the legal order which sets apart from the moral order in general that special area thereof which we call the legal or juridical order. The objective of the moral precept against murder—the moral perfection achieved by one who willingly obeys the precept—is not achieved where a man, fully wishing to kill his neighbor, forbears to do so for fear of punishment. But the objectives of the legal precept—the immunity of any individual from unjust death and that external peace which all the neighbors need to accomplish their moral self-perfection—are achieved in such a case.

The lawmaker does not and need not use his moral power to the full limits of its potential, in every case.

When he prescribes conduct required by natural moral precepts, the lawmaker adds nothing to the moral obligation to act or forbear in the subject matter, but he attaches a coercion to conduct violative of the precept. The specific moral obligation thus created—that the subject shall accept the just coercion of the law—is the lawmaker's only contribution to the moral situation.

When the lawmaker prescribes a line of conduct not conclusively imposed by natural law, he always contributes this moral obligation to accept just coercion. He may, and usually does, impose also a moral obligation as to the specific line of conduct he directs—it is immoral to drive to the left on Broadway, and to drive to the right in Piccadilly Circus. But the lawmaker need not impose a moral obligation as to the specific line of conduct he directs—he may choose to oblige his subject "only to the penalty of the law." The intent thus to

limit the exercise of the law's moral potential seems quite clear in the matter of one or two-hour parking limitations. The conduct forbidden is not naturally harmful or dangerous, nor are the rights of property or other rights of commutative justice involved, nor is the common good seriously affected. Thus, the sense of seriously conscientious men appears to support the view that the only moral obligation of the overtime parker is to obey the summons lawfully issued and to pay the fine which the court imposes.

But if the lawmaker intends that his precept shall have no moral obligation whatever, he abdicates his character of lawmaker, and becomes either a mere counsellor or a tyrant. If he urges a line of conduct without being prepared to coerce it in any way, he is a counsellor merely. If he prescribes conduct not mandated by natural law, with intent that his command shall not morally oblige his subjects, but imposing a coercion which reasoned morality does not oblige the subject to accept, he is a complete tyrant. In either case, the enactment is not law.

The lawmaker differs also from the parent, but in a different respect. The parent, like the state, can coerce unwilling obedience, because the parent has responsibility for the child's external welfare, as the state has such responsibility in respect of its citizens. But the parent is also entrusted by nature with the internal perfection of his child. Therefore, the parent's command can bind his child morally even in matters in which obedience cannot be coerced. Thus the parent shares God's power, not shared by the state, to bind the conscience directly, without coercion.

It is a principle of the natural moral order that every human law, if it be just,

binds the subject's conscience, to observe the law or at least to accept its coercion. It is not necessary that the lawmaker actually advert to the fact that his law imposes an obligation of conscience, nor that he believe in or understand the moral order which makes his law effective in the realm of conscience. If he is exercising power legitimated to him by the natural law, every just law, by which he intends to bind his subjects in any way, binds them in conscience.

#### **The Test of the Human Enactment as Just Law**

The divine mandate, embodied in human nature, which empowers the community to regulate its subjects' conduct by imposing upon them moral obligations and morally effective sanctions, is the ultimate criterion by which human law is morally evaluated. A social enactment which goes beyond that mandate is not a just law—indeed, it is not a law in any real sense—it is only the shadow or shell or semblance of a law. Examined by reason, the divine mandate is seen to imply four principles upon which a social enactment can be evaluated as a just law, effective in the moral and juridical order.

*First Principle: A human law is not just if it is contrary to higher law, that is, to the natural law or the divine positive law*

The natural moral order and the natural law are products of God's intelligent and wilful act of creation. It is inconceivable that the supernatural order, which the same Divine Wisdom has established for men, should essentially conflict with the natural moral law. Nor is it conceivable that the law-making power of the human community, if reasonably exercised and so morally effective, should forbid or require conduct which the supernatural order re-



quires or forbids. Human law, therefore, cannot impose or discharge moral obligations in derogation of the divine positive law. Thus, a human law which purported to forbid the use of wine for the Sacrament of the Eucharist would be manifestly unjust and morally ineffective.

Since it is the natural moral order which validates the power of the human community to make true law, the exercise of that power cannot rise above its source, as it would do if it could competently make law contrary to a rule of conduct which follows as a necessary conclusion from the principles of natural law. Thus a law which directs mutilation not required for the subject's own health nor reasonably imposed as punishment for wrongdoing is unjust.

A human law is unjust, not only when its command runs counter to a principle of the higher law, but also when it fails to enact rules of conduct which are necessary conclusions from the higher law, as if, for example, a legal system would in no way forbid murder, or would permit self defense in no circumstances.

The rules of human conduct which are necessary conclusions from natural law and divine positive law are relatively few in number, as compared with the total number of the moral law's precepts and prohibitions. Most concrete moral rules of human conduct are premised upon the judgment that the conduct in question tends toward fulfillment or toward frustration of the principles of natural law. These principles require, among other things, that man in society contribute to the common good—this requirement will be discussed in detail under the Third Principle and thereafter. The judgment of tendency is usually a contingent one, being dependent upon concrete circumstances which

vary from time to time, from place to place, and even from person to person. In this area, the human enactment cannot execute its divine mandate by implementing conclusions of higher law, for the conclusions of higher law in these matters are not open to certain discovery by human wisdom. Reason can show men only a probability that the concrete act tends to fulfill or frustrate a natural law principle. Such probabilities are the bases for human enactments which determine obligations which the principles of natural law do not impose conclusively upon men. Where a person would be unjustly enriched at the expense of another if he were permitted to retain property to which he has title, the natural law obliges him to, somehow, save that other from harm. Our law determines a precise way in which this duty shall be performed—the title owner is subjected to the specific obligations of a “constructive trustee.”

Out of the contingent quality of the judgment that a specific act or line of conduct fulfills or frustrates principles of the higher law, arises a prime requirement in respect of human enactments which foster or inhibit such conduct. This requirement is that the enactment shall be implemented only after mature deliberation. It is this principle which founds our constitutional requirements of orderly legislative process, of freedom of speech, assembly and petition, of executive veto and judicial review. The principle justifies also the concepts that the law should be applied under the supervision of trained judges, by juries subject to challenge, and that judges should explain their findings openly and in terms of “artificial reason.”

*Second Principle: A human law is not just if it is made without competence*

Competence here has a three-fold reference. The law-making authority of a community is legitimated to the person or persons exercising it where the community has somehow consented to its exercise by that person or persons. Jurisdiction is determined, generally, by the physical limits of the community whose legitimated authority makes the enactment. Special consideration must be given here to the competency of the community and of its law-making authority to legislate upon a specific moral subject matter.

It seems difficult, where the enactment simply prohibits or simply forbids, clearly to distinguish the concept of competence in the subject matter of an enactment from the principles requiring that the human enactment shall violate no higher law (First Principle, *supra*), and that the enactment shall be directed to the common good (Third Principle, *infra*). Yet it seems reasonable to suggest that since the natural scope of the civil society's common good is the material conditions which further the development of the human personality, the civil society is not competent, for example, to enact laws which command or forbid purely mental acts. Also, it seems correct to say that commands and prohibitions directly violative of a higher law are not only unjust but incompetent. The higher law has "pre-empted" competence to regulate the subject matter.

The distinction is clearer where the precise moral subject matter which the enactment purports to affect is not a simple command or prohibition, but rather the extinction of an existing moral obligation. For example, the law of the state empowers an infant to rescind a valid contract. When the infant does so, he is discharged from the moral obligation to per-

form, which had arisen out of his act of making the contract. Thus the law, through the power of rescission which it gives to the infant, extinguishes an existing moral obligation. This the civil society is competent to do where the obligation respects property, but the natural law makes the state incompetent to extinguish the moral obligations which arise out of a valid contract of marriage. The common law, in the days when it predicated itself upon the natural law, never purported to void a marriage which had been valid *ab initio*. The limit of the civil society's power in respect of marriage is this: for persons whose marriages are not confided by divine mandate to the competence of some other society, the law of the civil society can, with full moral effect, invalidate *ab initio* marriages truly adverse to the common good of that society—secret marriages, for example, because such marriages create social and moral jeopardy for the parties and for other persons as well.

Another example illustrates the incompetence of human law in the area of property, an area which, generally, is within human legislative competence. A law of prescription or of adverse possession has no moral effect to extinguish an owner's rights or to create ownership in a possessor where the possessor has not good faith. If he takes or holds the thing in violation of a duty, known subjectively to him, not to take it or to hand it over to its owner, the law does not extinguish his moral obligations or the owner's moral rights. The law cannot, morally, put a premium upon conscious wrongdoing, whatever it may be able to do for a man who does wrong ignorantly.

The concept of competence in the moral subject matter is seen most clearly where

a divine positive law has deprived a human society of competence in a moral area which had belonged to it by natural law. The Christian revelation denies to the state any competence to enact laws respecting the validity of marriages contracted by baptized persons. In the supernatural order, such marriages are given a special character which differentiates them from natural contracts of marriage. Thus they are withdrawn from the civil jurisdiction which has competence to legislate, reasonably, upon the validity ab initio of the marriages of unbaptized persons.

*Third Principle: A human law is not just if it is not directed to the common good*

Under natural law, the end or purpose of civic life is to preserve, develop, and perfect the human person, by providing external conditions needed by the citizens as a whole to develop their qualities and to fulfill their duties in every sphere of life—material, intellectual and religious. It follows that the ends of society are no other than the ends of human life. Conduct conducive to the ends of society is an obligation of the society's members, imposed as such by the order of being and the moral order, which require men to live in society in order to have aids necessary to perform their duties to God. The common good of society must include the individual's immunity from interference in those goods he needs to fulfill his moral duties, and it must include also those external conditions which are needed for the full human development of the citizens as a whole.

A law which promotes conditions needful to the citizens as a whole, but which invades even one individual's necessary moral immunity, is an unjust law. Thus,

a tax law which is generally equitable and furthers the economic well being of the whole group of citizens, is unjust to the extent that it directly makes an individual unable to obtain by his labor the bare necessities of life.

Laws, like that on adverse possession of realty, which extinguish moral rights of one individual in favor of another, serve the general needs of society, yet they are not just laws if they do not respect the necessary moral immunity of the individual deprived. When owners leave their lands long unused and unoccupied, society is deprived of benefits which accrue to it from the occupancy and exploitation of the land—these are benefits which are truly significant and even necessary to the general welfare. No one will trouble to maintain or improve lands neglected by their owners if the improver can be turned out at any time by the neglectful owner or even by that owner's remote successors. Yet the law of adverse possession would be unjust if it gave title to a possessor who came upon the land and occupied it without any act reasonably calculated to give notice to the owner that his title was in jeopardy, or if the law gave title to one whose entry and occupation had been licensed by the owner himself.

On the other hand, society has no true good which is not a good in reference to the human development of its citizens. Therefore, a law which, though it did not invade any individual's reserve of necessary moral immunity yet did not foster conditions needful to the whole group of citizens, is not a just law. Thus, in a society where the financial needs of the community could be provided for adequately by an equitable income tax, a capital levy would be unjust to the extent that it would

discourage thrift and enterprise.

Society may reasonably and justly forbid a citizen, even directly, to take alcoholic drink, if the prohibition serves a true need of the societal group. The need appears clearly where the prohibition is particularized, as, for example, in respect of soldiers and policemen on duty or of persons operating vehicles in public. But that any such need is actually served by a general prohibition law, which forbids the act of drinking directly or even indirectly, by barring liquor from commerce, does not clearly appear.

The intelligent application of this principle of the common good requires not only that attention be given to its philosophical implications. Careful attention to the data of the social sciences is also required. With proper reservations made as to their philosophical implications, the explorations of such jurists as Pound and Fuller in the matters of social interests and the practical principles of social order are valuable aids in assessing the justice of a law from the viewpoint of its direction to the common good.

*Fourth Principle: A human law is not just if it inequitably distributes benefits and burdens among the members of the community*

The benefits and burdens which the law distributes are measured not only in physical terms of material things taken and given, and of physical labor required or dispensed with. Even such material items are viewed, by morality and by just law, in the light of human needs, more or less urgent and more or less closely related to the individual's necessary immunity and to the common good. Neither these considerations of human need nor the correla-

tive considerations of human capacity are limited to objects measurable in terms of matter and energy—the needs and the capacities of the extraordinary person, the ordinary person, the immature person, the person handicapped by nature or by circumstances or by the activity of those who are more competent or more powerful, must be assessed also in terms of mental and moral resources. There is not true equity where a man's goods and labor are respected but he is burdened with unreasonable duties of inquiry and foresight which shackle his freedom of action.

Finally this complex human situation is regulated by a device which, though it may appear subtle and overly delicate to the layman, is known to its ministers for the gross and crude instrument that it is. The law itself, being the product of generalization upon immensely diverse situations, and being an attempt to coerce activities whose true objectives are often beyond coercion's reach, cannot distribute with perfect equality even those benefits and burdens whose measure is open to clear and exact determination. Many of the law's crudities are ameliorated when the jurist and the lawmaker view the law from the standpoint of Professor Fuller's thesis on the Principles of Order. And while one deplores the philosophical myopia of the analytical jurists he cannot adequately serve justice if he ignores their scientific contributions as means by which the law can be so shaped as to react sensitively to the subtle demands of true equity.

Despite the complexity of the law's subject matter and the crudeness of the legal instrument, practical reason, instructed by moral philosophy and legal science, can judge that the burdens and benefits of a

given law are equitably or inequitably distributed to such degree that the law is just or unjust, and thus effective or not in the orders of law and of morals.

**All Moral Obligations are Created  
by Some Law**

In the moral order, the concept of duty or obligation is antecedent to the correlative concept of right. There is in one man a moral claim upon another's act or forbearance, only if the other is obliged by the moral order so to act or so to forbear. Because each man has duties to God which he cannot perform without the concurrence of others, each man has moral rights against other men, individually and collectively, for their necessary concurrence. It is because men have duties to God which can be performed only by community living, that the community has from God moral power to impose upon individuals in the community coercive moral obligations, which give rise to correlative rights in the community and in its members. The same duties to God premise the moral power of the human community to defend itself against outsiders who would destroy it or unreasonably impede its proper function.

The just human law can coerce obligations imposed categorically by natural law, and it can impose categorically moral obligations which are not so imposed by the law of nature. These latter obligations, made categorical by the human law, derive from natural law mediately—through the general precept of natural law requiring men to fulfill their moral duties to God. The duties, for example, to conserve one's life and to provide for one's family, are imposed by that general precept, and their performance requires men to live in

community. The duty to live in community is not fulfilled by man's physical presence among others. He lives in community, truly and humanly, when his way of life is directed, by charity, justice and prudence, to the common good of the community. The competent and equitable laws of society, directed to the common good, are effective to impose as categorical obligations of justice, moral obligations which the natural law imposes only alternatively, and also moral obligations whose only natural moral quality is their derivation from the natural duty to live in society and to contribute by one's lawful conduct to the advancement of the common good.

No individual, by his act done in absence of law, can bind himself to another or another to himself, either legally or morally. An individual, hitherto free of a specific obligation or not possessed of a specific right, can voluntarily do an act which has such impact upon the moral order that morality imposes upon him that obligation, or gives him that right. A promise could not bind its maker to its fulfillment if his act of making the promise did not bring his performance of the conduct promised under the moral precept of fidelity. The voluntary acceptance of another's offer to promise contractually could not give the offeree a moral right to demand performance if his act of acceptance did not bring the promisor under the moral precept of commutative justice, by giving to the promisor that act or promise for which he bargained his promise.

The operative precept, under which one is brought by his act or by the act of another, may be one imposed conclusively or alternatively by natural law, whether the precept be coerced or not by human law. It may be one imposed by just human

law which determines or specifies and coerces an obligation that is only alternative in natural law. Or, finally, it may be a precept imposed by a just law which makes obligatory and coerces, for the sake of the common good, conduct not prescribed by natural law, either conclusively or alternatively.

### **Moral Obligations Created and Discharged by Human Law**

Where the just human law creates a moral obligation which would not have come into existence in the absence of such law, there is no difficulty in perceiving that the entire content of the obligation derives immediately from the human law in question. And it is clear that the human law can discharge its subject from the obligations the law itself has imposed.

This sort of moral obligation is exemplified by the great mass of moral duties which arise directly out of the law's exercise of its moral power to coerce. When a just law coerces performance of some obligation by its subject, one can always distinguish the subject's obligation to suffer coercion from any duty of the subject, the performance of which is the objective of the coercive law.

Unless and until the legal machinery of coercion is made to operate in his regard, neither the duty whose performance is the objective of legal coercion, nor the mere existence of the coercive law, imposes any obligation upon the subject to suffer the coercion that the legal machinery is designed to impose. And if the coercive law limits its machinery's function in regard to the subject, his obligation to suffer its operation is thus curtailed.

Thus, for example, the court cannot, legally or morally, apply coercion to a person who has not been made a defendant before it. A person against whom no complaint or accusation has been made—even by a judge in a situation where a judge may accuse on his own motion—has no obligation to suffer any detriment prescribed by a statute, or considered by the court, as appropriate to an act this person has done. And if the law permits a person, made defendant by complaint or accusation, to stop the process of legal coercion by bringing some fact to the attention of the court, the defendant is freed of any moral obligation to suffer coercion premised upon the complaint or accusation.

Even if the law gives the complainant an action and gives no defense to this action, the only moral obligation imposed by the law upon the defendant is to suffer the coercion lawfully incidental to or resulting from the activity of a court where the cause is pleaded and proved. He is obliged by natural law, even though the human law should not re-enact this obligation, to use no unjust means to defeat the action against him, or to diminish the recovery to which the complainant is by just law entitled.

For greater reason, if the law authorizes no coercion against a man—his conduct gives no cause of action—he has no obligation to permit a court, moved by his moral wrongdoing alleged in a complaint or accusation, to coerce him in the matter of such conduct. Yet, in such case, his morally wrongful conduct may subject him to the obligation to submit to the naturally just coercion of his victim's reasonable self-defense or self-help.

**Moral Obligations Specified or  
Determined by Human Law and  
Discharged Thereby**

When a natural moral obligation is such that it can be performed by any one of several lines of conduct, these conduct patterns may be said to be alternatively obligatory. An example was given above, namely, in distinguishing the legal order within the moral order. A just human law is competent to limit the choice of the subject to some, or even to one, of the naturally adequate performances—such a law is said to “specify” or “determine” natural law.

When the law has done this, the subject may discharge his original obligation by a performance the law does not accept, but he cannot thus discharge his full moral duty. To fulfill the moral obligation imposed by the specifying or determining human law, he must give a legal performance. Sometimes the law itself concludes upon his choice—one cannot satisfy his full moral obligation to contribute to community needs by making gifts to charity, or even to the state, in lieu of paying just taxes. In other laws, the individual who is beneficiary of the subject’s obligation has the right to insist upon legal performance, but the subject satisfies the law if a legally inadequate performance is accepted by his obligee—e.g., a buyer may waive his right of inspection.

A just law, in specifying the mode of performing a natural obligation may exclude by prohibition some mode or modes morally adequate. A food rationing law, for example, could quite justly punish and even make invalid the act of paying a debt by surrender of rationed essentials.

Finally, a human law may forbid all of the performances to which the natural law

alternatively obliges. Such a law is, of course, equivalent to a human law which affects an obligation of natural law for whose performance only one means is available to the subject—an obligation imposed categorically and affirmatively by natural law. That problem will be discussed in the section next following; the present section will advert only to human laws which let stand or which enforce at least one of a set of performances morally adequate in natural law.

Under that limitation, human law does not conflict with higher law, for the performance required is morally adequate in natural law, and the performance human law forbids is morally optional. Given competence in the subject matter, direction to the common good, and equitableness, there appears no reason why human laws thus limited should not justly specify natural obligations which are alternative, even forbidding some performances naturally adequate.

Nor is there any difficulty in understanding that a just law may, either in general or in a given case, decline to enforce a moral obligation hitherto determined by it, or cease to forbid a morally adequate alternative performance hitherto prohibited. But where a performance morally and legally adequate has satisfied the moral obligation, the human law cannot “revive” the natural obligation. Here it can create a new obligation—not specifying an obligation alternative in natural law, for that was discharged by performance, but imposing an obligation which is warranted by the general precept of natural law requiring men to live in community and to seek there the common good.

Where two or more natural moral obligations are closely related, one must be

careful not to argue from the law's specification of means for performing one obligation that the other or others are extinguished. Thus, defamation by a lie involves the moral obligations to make the truth known and to repair material harm. Payment under a judgment for damages may fulfill the latter obligation, and leave the former outstanding because, for example, though the plaintiff could prove legal malice—the absence of privilege—he could not prove *mala fides*.

### **Moral Obligations, Imposed Categorically by Natural Law and Discharged by Human Law**

These moral obligations include those which have only one naturally adequate mode of performance, and those for whose performance only one adequate means is available to the subject.

The former are categorical negative obligations. The individual man's obligation not to take directly human life, unless in necessary repulse of unjust aggression, cannot be performed in any way but by forbearing always to do what the precept forbids. The law which directs the executioner, and the law which compels the soldier sharpshooter to kill a sleeping enemy, do not discharge those persons from the obligations of the common precept. Those laws cover cases which are not subject to the precept, for the precept does not forbid society, or its lawful agent deputed thereunto, to take the life of one who, though his aggression has ceased, had attacked society by serious crime; nor does it forbid society to kill a person who is agent of another society which is engaged in active unjust aggression, though the agent is not at this moment engaged in an aggressive act. Laws which can be shown

to prescribe or permit conduct only physically and not morally similar to conduct forbidden by a natural moral precept will stand as just if they meet the test of competency, the common good, and equitableness. But laws which prescribe or permit conduct forbidden by such a precept are in conflict with higher law, and cannot be justified by considerations of competency, common good, or equitableness. They are not law—they neither impose nor discharge moral obligations.

A law may, if it is competent, directed to the common good, and equitable, justly permit to its subject conduct contrary to an affirmative moral precept of the natural law, and may justly forbid conduct prescribed by such a precept.

The former effect is had where the law imposes a duty whose performance makes impossible the subject's performance of the natural moral duty. Such laws must be tested carefully, with particular reference to their equitableness and to the possibility that they invade the subject's necessary moral immunity. Laws which, for the sake of technical education or military training, would leave no practical opportunity for religious practice over long periods, would be unjust. Laws which, for the needs of public security, require service excluding all such opportunities in true emergencies, and some such opportunities at other times, would be just, if the needs were real and proportionate.

A law which is competent, directed to the common good, and equitable can justly forbid conduct prescribed by a categorical but affirmative natural moral duty. The considerations of individual immunity and equitableness are, again, most pertinent. National security regulations can justly forbid one to give information to another



who, without it, will suffer great harm and even perish, despite the natural obligation of charity to aid another in his extreme peril. The obligation of justice exceeds that of charity. Just law cannot forbid an individual citizen, upon whom the law has placed no special duty serving the common good, to risk his goods and his life in performance of a moral duty imposed by natural law.

#### **Human Laws Which Invalidate Acts Ab Initio**

Where an act's object, as established by higher law, is to produce an obligation and a right, the human law can prevent creation of the obligation only by preventing the act from achieving its object.

Just human law is competent, by divine commission implied in nature and expressed in revelation, to bind morally the wills of its subjects. Clearly, the law, even the law of God, cannot physically make a man will a prescribed act or physically prevent him (while his faculties are intact) from willing a forbidden act.

It is, however, the teaching of Christian moralists that the law can reach the will of its subjects more intimately than by morally binding command or prohibition. The human law, like the divine law, can reach the will of a man at the point where the will chooses to do an act whose moral object, as established by moral law, is to create rights and obligations. At that point, the law can prevent the will from effectuating the object of the act it has chosen. Thus intervening, a just human law prevents moral rights and obligations from arising out of an act whose moral object is to create them. Such a law is an invalidating law in the strict sense. In common law matters, there are few such laws

—the legal incompetency to contract, even in a lucid interval, after inquest of office found, is an example. In the matter of exercising statutory rights, even the right to vote, strictly invalidating laws are quite common.

#### **Human Laws Which Extinguish Existing Moral Obligations**

A just law can discharge an existing moral obligation, whether or not that obligation is one created by an act of the subject. Some such laws, like the law regarding rescission of infants' contracts, are described as voiding a valid act, which is a figure of speech used to suggest that the net or final situation is the same as the situation would have been if the act had been void ab initio. Whether or not the legal effects of a given voiding law are exactly the same as those of an invalidating law in the same premises, does not concern us here. Certainly the moral effects cannot be the same in every respect.

The voiding law extinguishes moral obligations which have existed for some time at least—the time elapsed between the act now voided and the present application of the law to void the act. The law cannot change, though it can ignore, past moral facts. If in the period elapsed, the person obliged has fulfilled the moral duties imposed by the act, he has acted morally or virtuously—or it may be that he has acted immorally, or that another has acted morally or immorally, in respect of the moral rights and obligations created by the act. The moral quality of such past acts cannot be changed. What the law can change is the rights and obligations now existing or which may arise in the future, and whose existence derives or will derive from the act in question.

If a moral obligation is of a sort that the human law can prevent from arising, reason suggests no cause to doubt that the law can extinguish that obligation after it has arisen.

### **Human Laws Which Make Rights Unenforceable**

When the coercive effect of a human law is terminated, there is often a practical difficulty in deciding whether obligations and rights whose performance or protection was the objective of the law are also terminated. This difficulty cannot arise, obviously, in reference to the withdrawal of the human law's coercion of obligations categorically imposed by natural law. Where the original obligation was an alternative one in natural law, several results are possible. If the sense of the specifying or determining human law was to forbid a natural alternative, that prohibition disappears when the coercion is removed. If the coercion is withdrawn with respect to all of the alternatives hitherto made legally adequate, the situation reverts to what it was originally—all the natural alternatives are morally adequate. If it is withdrawn in respect of not all, those still coerced are alone morally adequate.

Where the obligation was one imposed purely by the human law (for the common good, of course), the withdrawal of coercion removes the obligation for the future, unless there remains in the legal system some other coercion of the same obligation.

In no case does the withdrawal of coercion, by itself, have the effect of voiding rights acquired under the law. Those rights can be extinguished only by a new enactment whose effect is coercible in the legal system.

Where the extinguishing effect of the law as to acquired rights is explicit, as it is in the Negotiable Instruments Law and in the Sales Acts, there is little practical difficulty. Where there is a binding construction of the law in this sense, the difficulty is not great—we have this in the common law of adverse possession of real property. Where there is neither of these indications that the law intends to extinguish rights and obligations, and not merely to give over enforcing them, a problem may arise in the practical situation. If the possessor of personalty, for example, is given all the coercive aids which the law lends to an owner, and the owner of the same personalty is denied any aid whatever, do we need an express statute or a venerable line of judicial opinion to conclude that the law here attributes ownership to the possessor?

### **Which of These Three Effects Does the Law Intend?**

Invalidating laws work greater hardship than voiding laws, and voiding laws impose a greater burden than laws which merely deny or limit enforcement of rights. Therefore the moralists apply here the rule that burdensome laws are strictly construed. The law which is reasonably patient of more than one interpretation is construed in that sense which will impose the lesser burden. The rule can be applied, of course, only when the application of other tests has failed to make the law's meaning clear. We should note here the doctrine of the moralists that a law's effect in the realm of conscience need not be explicitly intended by the lawmaker. It is enough that he intends (in the context of these three types of law) to prevent legal obligations arising from the act, or

to extinguish legal duties and rights which have been created by the act, or to deny a remedy while leaving legal rights and obligations where they stood before this denial.

A given law may intend to prevent rights arising, or to void rights, or merely to deny them enforcement. The language of the law, its context, declarations of legislative intent, the rules of interpretation and construction, and the opinions of competent and conscientious men, well informed in the subject matter, are means of learning the law's intent.

#### **A Challenge and a Caveat**

It seems scarcely necessary to point explicitly to the challenge which natural law jurisprudence issues. It challenges the men of law to find its roots in infinite truth, to follow where truth leads, and to stand with truth against brute force, and against an intellectuality so refined that it can see no truth or at least no certain truth.

The caveat needs to be stated more explicitly. The task of assessing the justice of human law, as that of judging any moral matter in the concrete, involves serious danger of moral or intellectual arrogance. In most of these tasks, we are dealing with matters which we cannot know, through unaided human reason, with metaphysical,

mathematical, or physical certainty. We have to rely heavily upon practical or moral certainty, and this reliance involves resort to devices more or less artificial. We regard some generalities, of fact or of principle, as being "in possession," because they are the carefully gathered and interpreted data of common and prolonged human experience. Conclusions contrary to those generalities, though they have been reached by careful inquiry and though they are so clear as to enjoy some probability, may have to be set aside while the moral judgment follows the generality which is "in possession." This must be done until the contrary conclusion has been demonstrated to have the "weight of probability," or even to be probable beyond reasonable doubt, depending upon the moral interests secured by maintaining the generality in possession.

Thus, for example, any law already enacted, when its character as a just law is to be tested by one or several of the principles we have described, enjoys the favor of a generality in possession. Human laws do not, generally, violate higher law. Human lawmakers are, generally, legitimate, and generally, do not act without jurisdiction or competence. Human laws, generally, are directed to the common good, and they are, generally, equitable.

