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UNIVERSITY OF NOTRE DAME
NATURAL LAW INSTITUTE
PROCEEDINGS

VOLUME III

Edited by

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With a Foreword by

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President of the University
of Notre Dame

COLLEGE OF LAW
UNIVERSITY OF NOTRE DAME

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NATURAL LAW INSTITUTE PROCEEDINGS

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Sponsors of the University of Notre Dame
Natural Law Institute Proceedings

1947 INSTITUTE

Notre Dame Club of New York City, New York

1948 INSTITUTE

Mr. Alvin A. Gould, Cincinnati, Ohio

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FOREWORD

The papers presented during the 1949 sessions of the Third Natural Law Institute of the University of Notre Dame and reprinted in this volume have brilliantly maintained the high standards of exacting scholarship set by the preceding sessions of 1947 and 1948. They deal with the impact of the Natural Law on four great bodies of positive law. The Common Law, the Canon Law, Constitutional Law and International Law are not rubrics in some dim Code of by-gone days. They constitute major portions of human law today, the present and future development of which is of immediate concern to us all, lawyer and layman alike. The scholars whose papers appear herein show us how Natural Law lies deep at the roots of all four of these great bodies of law, how from it all four have drawn such nourishment that even today in their present stage of advanced development, it is difficult to trace back their characteristic rules without finding Natural Law originally informing them and indeed providing them with a vital principle of growth. It is not impertinent to ask whether the present and future will see that growth continued. Will it be warped and distorted by new and alien principles? In the light of such questions the papers of the 1949 sessions, while indeed looking back over the past, necessarily compel us to look forward. This is not the least of their distinctions.

These papers, moreover, again bring home to unpreju-

diced minds a point of cardinal importance. The Natural Law is not some esoteric tenet of Roman Catholic theology or even of Christian philosophy. The participants in the various sessions of the Institute have been men of various religious beliefs. Nevertheless their profound studies and their quiet reflections brought them to the Natural Law Institute of Notre Dame united in a common conviction that the Natural Law lies beyond particular credal differences. It is the great and unique possession of Man as the Child of God. The careful reader will not miss then the subtle harmony which runs through all the papers of this volume. Recognition of the Natural Law and its principles can alone bring about the realization and the proper understanding of the great ideal of the brotherhood of Man under God which a terrified world is learning to see once more, albeit still "through a glass in an obscure manner," as its last hope.

REV. JOHN J. CAVANAUGH, C.S.C.,
President of the University
of Notre Dame

INVOCATION

(Cablegram from His Holiness Pope Pius XII
to the 1949 Institute)

VATICAN CITY,
December 7, 1949

Very Reverend John J. Cavanaugh, c.s.c.,
University of Notre Dame,
Notre Dame, Indiana.

The Holy Father on the occasion of the annual reunion of the Natural Law Institute of Notre Dame University cordially imparts to all participating Paternal Apostolic Blessing in pledge of divine enlightenment in the Institute's deliberations.

(Signed) Montini, Substitute.

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INTRODUCTION

Men have invoked the Natural Law for more than twenty-two hundred years. Expressions of the concept have varied in detail. There is, nevertheless, a central core of meaning common to them all. The State is not the sole source of human rights and duties. Above it there abides an objective norm, unchanging and unchangeable, by which the moral integrity of man-made laws can and must be measured. Hebrew prophet, Greek philosopher and Roman jurist long ago envisioned such a higher law. The Christian Era saw its meaning deepened and its sanctions made complete.

In the beginning, God, acting with Supreme Intelligence, created all things according to a Divine Plan. That Plan is the Eternal Law. Man, endowed by his Creator with an immortal soul, an intellect and a free will, can ascertain the primary dictates of the Eternal Law by his own reason, apart from direct Revelation. Such dictates thus made known, together with the inferences flowing rationally from them, constitute the Natural Law. To his Creator, Man as a creature owes primary duties. Correlative to such duties he has certain rights, "unalienable" and beyond human power to impair or to destroy. The laws then which men make for men in civil society will express and supplement the Natural Law.

Knowing therefore no limitations of time or space, no boundaries based on color, race or creed, the Natural

Law is the God-given birthright of all men, everywhere, forever. From it the Spanish Catholics, Vitoria the Dominican and Suarez the Jesuit, drew the first principles upon which the Dutch Protestant, Grotius later built a modern Law of Nations. English lawyers in their contest with would-be despots appealed to the Natural Law. Following in the same tradition, American lawyers wove its doctrines into the texture of the Declaration of Independence, and for generations American law students began their studies with acknowledgment of the Eternal Law and the Natural Law as valid criteria of human laws. Such doctrines vanished from most American law schools in more recent days of Secularism, Pragmatism and Subjectivism. Jurisprudence, anciently acclaimed as the science "of things divine and human, of the just and the unjust," was ejected from its broad domain and narrowly confined to the historical or analytical study of man-made laws alone. It had no armor to offer Man in the hour of his great crisis when the Totalitarian State arose.

With the future of the Atomic Age rushing swiftly toward him, Man once again faces the concept of a State claiming unlimited power over the human personality and refusing recognition to rights and duties not created by itself. To meet the "Absolute" of the State, Man has desperate need of an "Absolute" of his own. Such an Absolute the thinkers of over twenty-two centuries found in the Natural Law. Is that doctrine the answer to Man's need today? To that question the Natural Law Institute of the College of Law of the Univer-

sity of Notre Dame dedicates itself. Humbly conscious of the noble tradition it thus carries on and fully aware of the high responsibilities entailed, the Institute invites and welcomes to participation in its undertakings, jurists and legislators, judges and lawyers, men everywhere who are concerned with human law, its nature, scope and limitations.

The Natural Law Institute, established in 1947 has then as its objects the examination of the history of the Natural Law doctrine, the clarification of its true basis and its adequate restatement in the light of modern problems. Sessions of the Institute are held each year and the proceedings are published in annual volumes of which the present volume is the Third.

The 1947 sessions were devoted to an exposition of the broad philosophical implications of the Natural Law doctrine. In 1948 the theme was the historical development of the doctrine. In 1949 four distinguished authorities discussed the relations between the Natural Law and four great departments of positive law — the Common Law, Canon Law, Constitutional Law and International Law.

The unusually large attendance at the various sessions of the 1949 Institute and the widespread interest in the Institute's objectives indicated that the Natural Law doctrine can no longer be regarded as something of historical interest only. As Mr. Arthur Krock, writing in the New York *Times,* November 29, 1949, declared:

> In the clashing succession of violent events these days, the discussion to be resumed by the Institute

> at Notre Dame may seem dull, philosophical hair-splitting, and equally unimportant. But the growth of state controls of man all over the world, including the United States, and his acceptance of the legalism which enforces them, compose an acute, present-day problem for all who are governed.

At the conclusion of the 1949 sessions the University announced the establishment of a Natural Law Library, the generous gift of Mr. Alvin A. Gould, sponsor of the 1948 and 1949 sessions of the Institute. The Library, an outgrowth of the work already undertaken at the College of Law, is designed to bring together in one place, readily accessible to scholars, the most comprehensive collection of books and materials on the Natural Law. A description of the Library is included in an appendix to this volume.

The Editor wishes to express deep appreciation to the Reverend John J. Cavanaugh, c.s.c., President of the University of Notre Dame, to Dean Clarence E. Manion of the College of Law, to Mr. Alvin A. Gould, sponsor of the Institute's sessions, to Mr. Frank A. Peluso, Student Chairman, to the faculty and student body of the College of Law and to the many, many others whose untiring efforts made possible the success of the 1949 meeting.

EDWARD F. BARRETT,

Associate Professor of Law,
University of Notre Dame,
Editor.

WILLIAM A. CASTELLINI

(1900-1950)

The University of Notre Dame in general and the Natural Law Institute of the College of Law in particular, note with deep regret the passing of Mr. William A. Castellini, Class of 1922. Mr. Castellini's sincere interest in the objectives of the Natural Law Institute and his untiring efforts in securing its successful establishment earned him the right to be called one of its founders. Although he has been taken from us, his inspiration will remain always. May he rest in peace.

NATURAL LAW AND THE COMMON LAW

Richard O'Sullivan, K.C.

(Master of the Bench, Middle Temple, London, since 1940; K.C., 1934; Member of the General Council of the Bar since 1939; Chairman, Regional Advisory and Home Office Advisory Committee, 1939-1945; Recorder of Derby, since 1938; Lecturer in Common Law at University College, and at the Inns of Court, London; Honorary Secretary of the Thomas More Society, London.)

THE NATURAL LAW AND THE COMMON LAW

THE Common Law of England and the United States is the only great system of temporal law that came out of the Christian centuries. It came out of the centuries which gave us the great English Cathedrals and Abbeys and the old Universities and the lovely parish churches of the English country-side.

The 11th and 12th centuries were throughout Europe a period of active renaissance in legal studies. The first waves of influence of this renaissance reached England with Lanfranc, the lawyer of Pavia, master of Roman Civil and Roman Canon Law, who in England was to carry all before him even when the talk was of sac and soc.

In the Anglo-Saxon time England had established a Christian tradition in law and letters. "English law," says Maitland, "has no written memorials of its heathenry. Every trace but the very faintest of the old religion has been carefully expurgated from all that is written: for all that is written passes through ecclesiastical hands." In the legislation of Ethelbert and Ine and Alfred and Cnut there is no trace of the laws and jurisprudence of Imperial Rome as distinct from the precepts and traditions of the Church. "And this inroad," says the historian, "of the Roman ecclesiastical tradition, of the system which in the course of time was organized in the

Canon Law, was the first and by no means the least important of the Norman invasions of our polity."

Even so, in the century immediately preceding the Conquest, the social and religious condition of England was backward and in some ways retrogressive. The manumissions which are found among the Anglo-Saxon Charters show the existence of slaves all through the period. The slave trade was active, the main routes being to Ireland and to Gaul. (The name of Patrick carries its own memories.) In the reign of Ethelred, the Archbishop of York denounced the practice in his homilies. Towards the end of the 11th century Wulfstan, Bishop of Worcester, who held his place right through the Conquest, protested vigorously against the slave trade that was carried on from Bristol. "The central force of old English social development," says Professor Stenton, "may be described as the process by which a peasantry composed of essentially free men, acknowledging no law below the king, gradually lost economic and personal independence." Thus it was that the Conqueror left Normandy, where there were few slaves, for a land where there were many; "where the slave was still a vendible chattel and the slave trade was flagrant."

And so, immediately after the Conquest, the mass of the English folk who cultivated the soil were slaves or serfs or villeins or otherwise of unfree condition. The Domesday Inquest asks: "How many villeins? How many slaves? How many free men? How many soke men." And so on. The slave class, which was composed of men and women who were slaves by birth, or of those

who in evil days had bowed their heads for bread, tended in the course of time to become merged in the miscellaneous class of persons who actually cultivated the soil. The cowherd, the ploughman, the cottar and their progeny were often serfs attached to the soil and sold with the soil; they were the most valuable part of the stock of the farm and their pedigrees were carefully kept.

The condition of the Church also, in the century before the Conquest, was in many ways unsatisfactory. The bishops were mostly uneducated and secularized: ecclesiastical synods and ecclesiastical law were falling into disuse; there was no separate ecclesiastical jurisdiction.

The spiritual and intellectual renaissance that came with the Conquest effected a rapid reform. The legislation of William went straight to the sources of life, and of more abundant life. Even before he demanded the personal oath and loyalty of all free men the Conqueror proclaimed that "one God shall be honoured throughout the whole of the kingdom and the Christian faith shall be kept inviolate." Again, in 1066, the Charter he gave to the City of London recognized the family, and freedom of inheritance: "I will that every child shall be his father's heir after his father's day." A man is free and knows himself to be free to the extent to which his inheritance is inviolable. It is a mark of tyranny (not unknown in our own time) to thrust men out of their inheritance.

The Episcopal laws of the Conqueror direct that "no bishop shall henceforth hold pleas in the Hundred Court, nor shall they bring forward for the judgment of laymen

any case which concerns the spiritual jurisdiction." This separate organization of temporal and spiritual courts is a distinctly Christian thing. In pre-Christian civilization there was no distinction between Church and State. Religion was an affair of groups rather than of individuals. The parallel organization in England of King's Courts and Courts Christian involves the recognition of the great Christian principle (which today is everywhere under challenge) that the moral and spiritual life of man must be beyond the power and reach of the political officers of the community. The words that John and Peter spoke in the Acts of the Apostles, "whether it be right in the sight of God to hearken unto you rather than unto God, judge ye" mark a revolution in the attitude of the individual citizen to society: the claim that man is answerable in his own mind and conscience to a Power and an Authority higher than the State. The individual moral and religious experience transcends the authority of the political society, and the Church, as embodying this spiritual experience, cannot tolerate the control of the State. In the years to come, after the bitter quarrel between Henry II and Thomas Becket, the first clause of the Magna Carta will consecrate the doctrine: That the Church in England shall be free and have all its laws in their integrity and all its privileges unimpaired.

England under the Norman and Angevin kings was in close touch with the now vivid, intellectual life of Europe. Already in 1118 the author of the *Leges Henrici I* endeavours in a rational, and even in a philosophical form,

to restate the medley of customs of Mercia and Wessex and East Anglia that make up the law of the land after the amendment by William I and by Henry I of the supposed laws of Edward the Confessor. He finds in the writings of Isidore of Seville and of the Canonist Burchard of Worms a source of general jurisprudence. The works of Burchard and of Isidore restate the teaching on Natural Law of Aristotle and of Cicero. They will be among the sources from which in the years to come the Common Law will draw its proper doctrine.

Henry II had not yet come to the throne when the *Decretum* of Gratian, the first great text-book of the Canon Law, was published. It opens with a definition of law and of natural law. "The race of mankind," says Gratian, "is ruled by two things, by natural law and custom." We are at a turning-point in the history of the law of the church; it is also a turning point in the history of English law.

In the reign of Henry II, law and literature grew up together. At the Court of Theobald of Canterbury is Bartholomew of Exeter, canonist and theologian from the schools of Paris, and John of Salisbury, who has served for some time in the Papal Chancery, and will have stern words to say to kings and tyrants. In the *Polycraticus* he affirms the existence and operation everywhere of a system of natural law, and declares that human law must not be at variance with it. If human law contradicts the natural law it is invalid and not to be enforced. At Canterbury also was Vacarius, the first professor of Roman Civil Law in England. Before the

end of the century Richard Bishop of London in the *Dialogus de Scaccario* and Hubert Walter, afterwards Archbishop of Canterbury, in the book that is called *Glanvil,* raised English law to the level of literature. *Glanvil,* newly edited for us by Professor Woodbine of Yale, is the first great text-book of the Common Law, which owes its beginnings to the reorganization of the Curia and the Kings Courts in the reign of Henry II.

With the *ratio scripta* of the Roman Civil Law and the *Decretum* before their eyes, the early common lawyers deliberately chose, on the basis of natural law and on principles of Christian freedom, to frame a new system of writs that would run in the King's name everywhere, and in time to come in the name of kingless commonwealths on the other shore of the Atlantic Ocean; and round these writs would grow an organic system of unwritten law that would be the common law of England. In face of the written law of Imperial and of Papal Rome, the man who wrote *Glanvil,* whom we take to be Hubert Walter and, after him, Henry of Bracton are at pains to argue that it is not absurd to call the laws and customs of England, though they are not written, by the name of law. It was for the good of the whole world, says Maitland, that one race stood apart from its neighbours, turned away its eyes at an early time, from the fascinating pages of the *Corpus Juris,* and made the grand experiment of a new system of writs and formulas.

Soon after the middle of the twelfth century, the Assize of Clarendon and the Assize of Northampton introduce

a Christian idea, derived from natural law, which becomes one of the leading conceptions of the Common Law. It is the conception of the *liber et legalis homo*: the free and lawful man. In the writs that we read in *Glanvil* and at a later time in Bracton, the Sheriff is regularly ordered to summon so many free and lawful men to determine a matter of fact in dispute between the parties. "Among laymen," says Maitland, "the time has already come when men of one sort, free and lawful men, can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges and are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age and, who has forfeited none of his rights by crime or sin, is the law's typical man, typical person."

In the presence of this noble conception of man, slavery ceases. At the end of the twelfth century anything that could be called slavery was extinct.

Just at this time too, an English Pope, Adrian IV, in a Decretal Letter, laid down for all Christendom the rule that "as in Jesus Christ there is neither free nor slave and the Sacraments are open to all, so also the marriage of slaves must not be prohibited; and even if the contract is made without the consent of the master (so as to be invalid according to the Roman Civil Law) the marriage is not to be dissolved or declared void in the Ecclesiastical Court." The *Decretum* of Gratian too includes a Canon which forbids the dissolution of the marriage of slaves; on the ground that, as God is the

father of all men, in things related to God the same law is binding upon all men.

At the end of the twelfth century the course of the Common Law is already set towards the making of a society of free and responsible men and women united in obedience to one law in the fellowship of a free community. The King will be below the law. The design is clear in Magna Carta of which Archbishop Stephen Langton was the architect and the common lawyers of the school of Glanvil were the clerks of works. The most famous words of the Charter embody the formula of Novel Disseisin. "No free man shall be taken or imprisoned or disseised of his free tenement . . . or outlawed or exiled or in any wise destroyed nor will we go upon him nor will we send upon him unless by the lawful judgment of his peers, and by the law of the land."

Like John of Salisbury, Stephen Langton affirmed the rule of natural law, that it is binding on Princes and Bishops alike, that there is no escape from it, that it is beyond the reach of the Pope himself, who could not dispense from it, seeing that the fabric of any form of society is bound up with it. In our constitutional history, Stephen Langton, a real English Prelate, troublesome alike to Pope and King, rightly takes his place alongside the great common lawyers; or Somers; or Burke.[1]

In the year in which the Charter was wrung from John, the Fourth Lateran Council was held. The Decrees of the Council had many repercussions in the Common

[1] As the author of what is perhaps the greatest of the Christian hymns—the *Veni Sancte Spiritus*—he has a place apart.

Law,[2] on the constitutional theory, for example, of representation and consent. "The theory of representation and the doctrine of consent are traced to an ecclesiastical origin by attributing to the Lateran Council of 1215 the motive source, to the practice of the English Church Councils from 1226 onward the precedents, and to ecclesiastical leaders the principle applied first in connection with taxes on Spiritualities that taxation demands both representation and consent. It is now shown that the feudal doctrine of consent to taxation lacked the element of representation. The Church affirming this principle *quod omnes tangit ab omnibus approbetur* linked the two practices together and so laid the foundation of the power of the Commons. Even more important was the contribution of the leaders of the Church of England, both in principle and in practice to the union of the different estates of the realm into one single *communitas regni*.[3]

Another decree of the Lateran Council imposed on individual Christians everywhere the duty of confessing their sins at least once a year and of receiving the Eucharist during the Easter time. The opening words of the Decree *Omnis utriusque sexus fidelis* are an enfranchisement to the mind.

Of the same tenor is a Proclamation issued by Hubert Walter in the year 1195, *Quod omnes homines regni Angliae pro posse suo servabunt.* Such decrees and proc-

[2] The abolition of the Ordeal caused a serious crisis in the King's Courts and on the Circuits, and hastened the advent of trial by jury.

[3] May's *Parliamentary Practice*, 1946 ed., p. 7.

lamations deepening the Christian sense of equality tended in course of time to annihilate the distinction that was still retained in Magna Carta, the distinction between the free man and the unfree man or villein, between *omnis liber homo* and *omnis homo.*

In the legislation of the 13th and 14th centuries the distinction disappears. The Statute of Winchester of Edward I lays upon every man, rich or poor alike, active duties of citizenship. Every good citizen must assist the forces of order and of government. A Statute of 5 Edward III enacts that "no man shall be attached by any accusation nor forejudged of life or limb, nor his lands, tenements, goods or chattels seized into the King's hands against the form of the Great Charter and the law of the land." Another Statute of 28 Edward III declares that "no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned nor disinherited, nor put to death, without being brought in answer by due process of law."

Coke was thus able in his day to assert that Clause 39 of the Charter (which affords protection to free men) extended also to villeins, for villeins were free against all men, save only against their lord. Even against their lord the law protected them always in life and limb. Though the villein was not 'at common law,' he was a *persona.* He had a spiritual life of his own, and was responsible before the doomsmen of the manorial court. He managed his own affairs. The lord was not answerable for his acts or his defaults; and though the lord might give him orders he was bound to obey only such

orders as were *'licita et honesta.'* In due time the King's Courts granted the villein a writ of trespass against his lord. And without the assistance of any Statute villeinage withered away and came to an end. The villein had come to be a free and lawful man. Out of slave and serf and villein the common law had created the copyholder and the yeoman.

Animated by this spirit of equality and freedom, the king's judges of the Central and Circuit Courts declared and administered the new and growing body of rational principles of the common law as opposed to the special customs and privileges of the Counties and Boroughs. As the King's Court organized itself, "slowly but surely justice done in the King's name by men who are the king's servants, becomes the most important kind of justice, reaches out into the remotest corners of the land, grasps the small affairs of small folk, as well as the great affairs of earls and barons. Above all local custom rose the custom of the King's Court: *tremendum regiae majestatis imperium.*"

The earliest Judges of the Common Law were Clerks and Laymen who were appointed to hear all the complaints of the kingdom and to do justice and right: *Ut audirent omnes regni et rectum facerent.* Acting with youthful vigor and a bold simplicity, and unhampered as they were by precedent, these men and their successors, among them Glanvil and Hubert Walter, laid the deep foundations of the Common Law. They were Christian men, — Ranulf Glanvil died on the Crusade and Hubert Walter became Archbishop of Canterbury — and they

were guided by the principles of Christian ethics and of natural law.

In the outlook of these men, and of men like Martin Patteshull and William Raleigh at a later day, there is a certain Christian sense of classlessness:

> "For all we are Christ's creatures. And of His coffers rich.
>
> And brethren of one blood. Alike beggars and earls."

Beggars and earls — and kings also. "The medieval king," says Maitland, "was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. . . . If you said that he was Christ's Vicar, you meant what you said, and you might add that he would become the servant of the devil if he declined toward tyranny. In all that I have read I have seen very little said of him that was not meant strictly and literally true of a man, of an Edward or a Henry." [4]

In the preamble to Magna Carta, King John confesses that the Charter is made and granted for the honour of God, the exaltation of Holy Church, the amendment of the kingdom, and the good of the king's soul.

And here we may recall that the ordinary man of the law, "the free and lawful man" is a layman who is of full age and who has forfeited none of his rights by crime or sin. The ordinary man of the law is related directly to the Church and to the State. The Common

[4] Law Quarterly Review, XVII, 132.

Law takes for granted the organization of Church and State as distinct and coordinate powers. According to the common Christian teaching (as Fortescue will explain to the prince in the early chapters of the *De Laudibus*) law is ineffective without grace. It is the lesson of Aquinas in the Introduction to his Treatise on Law: that God, who is the external principle moving us to good action, instructs our mind by law and assists our will by grace. The Pelagianism of the modern secular state with its multiplicity of laws and regulations will not suffice.

It is a characteristic of the Common Law that the law for great men shall become the law for all men. The law of Baron and Feme, for example, will come to be the law of husband and wife. Again, the Peace of Our Lord the King will be matched in every homestead in the land. "The house of Everyman is to him as his castle and fortress as well for defence against injury as for his repose . . . *domus sua cuique est tutissimum refugium.* The privities of husband and wife are not to be known." "The land of Everyman is in contemplation of law enclosed from others though it lie in the open field and therefore if a man do trespass, the writ of trespass shall be *quare clausum fregit.*" Within the homestead, the father will bear the rule of the family and the education of the children and the management of his own property and the administration of his own affairs. All will be in accordance with the principles of the natural law.

"The greatest and most lasting triumph of the Norman and Angevin kings," says Maitland, "was to make the

prelates of the Church their Justices: Let us imagine a man whose notion of the law and the logic of law is that displayed in the *Leges Henrici I* coming upon a glossed version of the *Decretum* or on the *Summa,* say of William of Longchamp. His whole conception of what a lawbook, what a judgment should be, of how men should state law and argue about law, must undergo a radical change. The effect produced on English law by its contact with the Romano-Canonical learning, seems immeasurable or measurable only by the distance that divides Glanvil's treatise from the *Laws of Henry I* (the distance, we are told elsewhere, between reason and unreason; between logic and caprice). "During the whole of the 12th and 13th centuries, English law was administered by the ablest, the best educated men in the realm: by the self-same men who were the Judges Ordinary of the Courts Christian. At one moment Henry III had three Bishops for his Arch-Justiciars. In Richard's reign we can see the King's Court as it sits day by day. It is often enough composed of the Archbishop of Canterbury, two other Bishops, two or three Archdeacons, two or three ordained clerks, and two or three laymen. The majority of its members might at any time be called upon to hear ecclesiastical causes and learn the lessons in law that were addressed to them in Papal Rescripts. Blackstone's picture of a nation divided into two parties 'the bishops and clergy' on one side contending for their foreign jurisprudence, 'the nobility and the laity' on the other side adhering 'with equal pertinacity' to the old Common Law is not true. It is by popish clergymen that

our old Common Law is converted from a rude mass of customs into an articulate system, and when the popish clergymen, yielding at length to the Pope's commands, no longer sit as the principal justices of the King's Court, the creative age of our medieval law is over." [5] At the beginning of the reign of Edward I the main outlines of the medieval common law will have been drawn for good. The subsequent centuries will be able to do little more than fill in the details of a scheme which is set before them as unalterable. English Law during the sixteenth and seventeenth centuries is likewise continuously developed from its medieval principles.

Even when the popish clergymen yield at length to the Pope's commands, one of them, Henry of Bracton bequeathed to the world a book *De Legibus Et Consuetudinibus Angliae* which was destined to be the text-book of the Common Law until Blackstone wrote his *Commentaries* after a lapse of five whole centuries.

Conscious of the danger that threatened through the appointment to the Chair of Justice of unlettered and ignorant men who were apt, in deciding cases, to follow their fancy rather than the authority of law, Bracton undertook a scrutiny of old decisions given by his predecessors on the Bench, and in particular his immediate masters Martin Patteshull and William Raleigh, and extracted and set in order the rules of the law that were illustrated by the old authorities.

In the introduction to his work (of which we owe the

[5] Pollock and Maitland, *History of English Law*, I. 132-3.

text again to the life-long labors of Professor Woodbine of Yale) Bracton, "a man of genius as a lawyer and of talent as a Latinist" elaborates the living principles of English medieval jurisprudence, of which his book has been called the crown and flower. He seeks his source in the *Old* and the *New Testament,* in the Councils and the Fathers of the Church, in the *Decretum* of Gratian and the *Decretals* of Gregory IX. Though he is said to be neither a legist nor a canonist, he had a current knowledge of Roman Civil and of Canon Law. He is familiar with the works of Azo of Bologna, and of John of Salisbury, from whom he borrows a characteristic passage on tyranny. He uses the writings of the Canonists, Tancred and John the Teuton and Raymond of Pennafort. (John the Teuton, author of the *Glossa Ordinaria,* was the link, so to say, in the discussions then in progress between the Canonists and the Theologians on the topic of natural law.) Raymond of Pennafort, sometime Master General of the Dominican Order, edited the *Decretals* of Gregory IX and some years afterwards suggested to a young Dominican from Aquino, the writing of the *Summa Contra Gentes.* Bracton is thus brought very close to his younger contemporary St. Thomas, whom he predeceased by only five or six years. Had he lived a little longer who can doubt that the great master of the Common Law would have had in his hands the first and most enduring Treatise on the Philosophy of Law which forms part of the *Summa Theologica.* Who can doubt that, within a little time after its first appearance, the Treatise of Aquinas on Divine and Natural and Human Law would find its way into the hands of English

lawyers who were now being organised at the Inns of Court and Chancery, as advocates and attorneys? That it did so is to my mind clear from the textbooks and the Year Books, from the writings of Fortescue and Littleton and Thomas More and Christopher St. Germain.

On an early page of his work Bracton roundly condemns servitude and slavery, as institutions contrary to the natural law. Servitude is summarily declared to be *contra naturam.* "*Est quidem servitus constitutio juris gentium qua quis dominio alieno contra naturam subjicitur.*" The Roman civil law and the *Jus Gentium* are condemned for their attitude to slavery. *In hac parte jus civile vel gentium detrahit juri naturali.* In this matter the civil law of Rome and the *jus gentium* go contrary to natural law. Manumission is rather the recognition than the gift of freedom, for freedom, which is a thing of natural law, could not be rightly taken away, though by the *jus gentium* the principle was obscured (*obfuscata*). *Jura enim naturalia sunt immutabilia.* The law of nature is immutable.

Bracton takes from Ulpian the definition of natural law: *jus naturale est quod natura omnia animalia docuit;* and, by a simple amendment (following Azo of Bologna) transforms its meaning: jus naturale est quod natura, *id est ipse Deus,* omnia animalia docuit. And he proceeds to discuss infringements of natural law in terms of moral theology. Though English law had received the tradition of Aristotle and of Cicero and the classical jurists, the Christian understanding, in the light of its proper conception of God and of creation, transforms the whole tradition and immediately carries the

discussion to a higher plane. For all his beliefs in the natural law, Aristotle was tolerant of slavery. Cicero, too, was tolerant of slavery; and likewise the Roman Civil Lawyers. All these men were tolerant of a great many things that are also repugnant to the Christian understanding of natural law. The god of Aristotle or of Cicero or of the civilian lawyers of Imperial Rome, was not the God of Hubert Walter or of Henry of Bracton. The tolerances of the Roman Civil Law and of some modern States that inherit the Civil Law tradition for ideas and institutions that run contrary to Christian conceptions of natural law have never belonged to the native tradition of the Common Law. From the beginning the Common Law has been hostile not only to slavery and such things as the practice of abortion but also to unnatural offences and the institution of the brothel or the *maison tolérée.*

And here we may remark that at the Council of Merton, when Englishmen refused to accept the principle of *legitimatio per subsequens matrimonium* it was no baron but a lawyer, an ecclesiastic, a judge, William Raleigh, the master of Bracton, who stood up for the English practice against the Roman Civil Law and the Canons of the Church and the consensus of Christendom. The hostility of the common lawyers to the rule of *legitimatio per subsequens matrimonium* is shown over the period of centuries by Glanvil and Raleigh and Bracton and Sir John Fortescue, who argues that bastards contract from their procreation a blemish (even though latent in their minds) other than that contracted

by legitimate issue, for it is the culpable and mutual lust of their parents that contrives their engendering which is not so in the lawful and chaste embraces of matrimony.

In the matter of freedom also, one may remark that Bracton is far more forthright than his younger contemporary St. Thomas Aquinas, who seems to regard the institution of slavery, as it appears in the *jus gentium,* as a thing which natural reason instituted among men; an institution appropriate not to the nature of man as such but to the condition of this or that man to whom it may be an advantage to be ruled by one more wise.

The aim of the Common Law, acting in consonance with the principles of natural law, is to make free men living in the fellowship of a free community. Bracton will announce the great constitutional principle which will sound through all the centuries and encircle the world: "The King is under God and the law."

With this principle, which is implicit in Magna Carta, Sir Edward Coke will meet the claim of the first Stuart King to rule by divine right. With these words, the President of a scarcely constitutional tribunal will condemn a second Stuart King to death. With these words, another Stuart King will be admonished in the hour of the Restoration. At Nuremberg Justice Robert Jackson of the Supreme Court of the United States will invite an International Tribunal to declare that not kings only, but rulers also, are "under God and the law."

The King is under God and the law. Bracton states the principle and finds his proof in the example of Our Lord and of Our Lady.[6] The King is under God and the

law. He is under the law of God, he is under the natural law. The will of man cannot alter the nature of things. *Voluntas hominis non potest immutare naturam.* The rules of human law cannot derogate from the divine or the natural law. There are superior rules of right which guide and limit all human law and legislation. It is teaching and the tradition of the Inns of Court.

The constitutional doctrine of Henry of Bracton was accepted and reaffirmed by Sir John Fortescue, Chief Justice, who lived and suffered during the Wars of the Roses. The most popular of the works of Fortescue, the *De Laudibus Legum Angliae,* gives a first sketch of the system of education, that was followed at the Inns of Court, which were, during all the centuries of the Middle Age, 'the University and Church Militant of the Common Law.' In the interval between the 13th and 15th centuries, the Inns appear to have assimilated and made their own the main doctrines of Aquinas in relation to law and ethics and theology. Fortescue, who seems never to have studied elsewhere than at the Inns of Court, is entirely familiar with the political and legal philosophy of St. Thomas. On the first page of his *De Monarchia,* which is the first book on the English Constitution to be written in English, he borrows from Aqui-

[6] 'Et quod sub lege esse debeato, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiae sed iustitiae ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio. Sic etiam beata dei genetrix, virgo Maria, mater domini, quae singulari priveligio supra legem fuit pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata.' Bracton (ed. Woodbine) Vol. II, p. 33.

nas the distinction between *dominium regale* and *dominium politicum et regale,* between absolute and limited monarchy. "And thai diuersen in that the first kynge mey rule his peple bi suche lawes as he makyth hym self. And therefore he mey sett uppon thaim tayles and other imposicions, such as he wol hym self, with owt thair assent. The secounde kynge may not rule his peple bi other lawes than such as thai assenten unto. And therefore he mey sett upon thaim non imposicions with owt thair owne assent."

By contrast with the kingdom of France where the King has absolute power, the kingdom of England is a limited monarchy, *dominium politicum et regale.* The day will come when a French King will assert: l'etat c'est moi. The tradition of Roman Civil Law runs easily to totalitarianism.

In addition to *De Monarchia,* Fortescue also wrote an important work *De Natura Legis Naturae* in which he makes extensive use of the writings of Aquinas and also of Aristotle and Augustine. The natural law is for him as it was for the general run of English lawyers at the turn of the 16th Century *mater et domina omnium legum humanarum,* the mother and the mistress of all human laws. The stress which Sir John Fortescue laid in all his writings upon the supreme importance of the law of God and of the law of nature was a factor in the transmission to modern times of the concept of a fundamental law to which all other laws must conform.

The precious little Dialogue of Faith and Understanding by Fortescue "bears witness to the vivid religion of a busy man of affairs — the religion of a layman — which

rings as true as the cloistered virtue of a'Kempis."

Like Fortescue, Thomas Littleton, the author of the Tenures, "the most perfect and absolute work in any human science," was also a deeply religious man. He was a member of the famous Guild of the Holy Cross at Stratford-on-Avon. (The fact appears to be overlooked in the definitive edition of Littleton's masterpiece which we owe to Eugene Wambaugh of Harvard University). Littleton also was skilled in the philosophy of the Schools and ends his Tenures with a flourish entirely in the manner of Aquinas: *lex plus laudatur quando ratione probatur.* The flourish reads like a gesture of defiance, as if Littleton were taking sides in the crucial debate that had arisen between the followers of Aquinas and the followers of Ockham; between those who held that the essence of law was reason and those who argued that the essence of law was will.

An early instance of the conflict appears in the Year Book 18-19, Edward III, where, in a dispute on an obscure point of Real Property Law, Sharshulle, J., refers to precedents and adds: "nulle ensaumple est si fort come resoun."

Thorpe (of Counsel): I think you will do as others have done in like cases; or else we do not know what the law is.

Hillary, J.: Volunté des justices.

Stonore, C. J.: Nanyl: ley est resoun.

The tension between realist and nominalist, between Thomist and Occamist, exercised the mind of Christopher St. Germain, whose Doctor and Student was to

influence English law and equity for more than two centuries. In the main the exposition follows the pattern laid down in the classical Treatise of St. Thomas. The foundations of law are laid first, in the eternal law which is the wisdom of God moving all things to a good end, and secondly in the law of nature of reasonable creatures, "the law of reason as it is commonly called by those that are learned in the law of England." The law of nature, St. Germain says, is never changeable by diversity of time or place. Against this law, prescription, statute or custom may not prevail, any alleged prescription or statute or custom brought in against it being void and against justice. St. Germain borrows from Aquinas, not directly, but indirectly through John Gerson, Chancellor of Paris. Now Gerson was a nominalist and a follower of Ockham and so we find in St. Germain a certain hesitation and an inclination in his later writing to say that the eternal law is rather the Divine Will than the Divine Wisdom ruling all things to a good end. To this argument Leibnitz will make answer: *Recht ist nicht Recht weil Gott es gewollt hat sondern weil Gott gerecht ist.*

During all the centuries before the Reformation the thought and language of the Common Lawyers followed a kind of pattern or rhythm: the law of God, the law of nature, the law of the land. It is the teaching of Henry of Bracton. It is the teaching of Sir John Fortescue. It is the rhythm of English jurisprudence that is on the lips and in the writings of statesmen and of lawyers.

In 1468 the Lord Chancellor told the assembled peers that Justice "was ground, well, and root of all prosper-

ity, peace and public rule of every realm, whereupon all the law of the world had been ground and set, which resteth in three; that is to say, the law of God, the law of nature, and the positive law."

At a later time the Speaker of the House of Commons declared that 'the laws whereby the ark of the government hath ever been steered are of three kinds, first the Common Law, grounded or drawn from the law of God, the law of nature or of reason, not mutable; the second, the positive law founded, changed and altered by and through the occasion and policies of the time; the customs and uses, practised and allowed with the time's approbation, without known beginnings.'

The judges are sworn to do equal law and justice to all the King's subjects, rich and poor. "Therefore should even a Statute be contrary to justice, according to Revelation, Nature or Reason, they may, indeed they must, nullify it." The Serjeants are sworn to give counsel according to the law, that is to say, the law of God, the law of reason and the law of the land.

The Year Books bear witness to the same order or hierarchy of laws. There is in Plowden a report of the well-known case of *Hales vs. Petit* in which the Common Bench declared that suicide (in this case the suicide of one of the King's judges) is an offense against God, against Nature and against the King.

1.) Against God, in that it is a breach of His commandment, "Thou shalt not kill" and to kill oneself, by which act he kills in presumption his own soul, is a greater offense than killing another.

2.) Against Nature; because it is contrary to the rule of self-preservation which is the principle of nature, for every living thing does by instinct of nature defend itself against destruction and then to destroy oneself is contrary to nature and a thing most horrible.

3.) Against the King in that hereby he has lost a subject . . . he being the head has lost one of his mystical members.

At the crisis of English History, one who had been Lord Chancellor, and Speaker of the House of Commons, and Reader of the Inns of Court, and practitioner in the Common Law, stood forth as the incarnation of English Law and Equity and of the Christian philosophy and theology that gave it character and energy. The life and writings of the most illustrious of the common lawyers, show that he held in all their fullness the Christian sense of human dignity and human personality, and of the sanctity of marriage, and of the necessary distribution and balance of power between the Church and State in a free community. In an age that had now grown evil, he who as a stripling had lectured on the City of God of St. Augustine before all the chief and best learned men of the City of London, and who, as we know from his long letter to Dorpius (now made available to us all by the beneficence of Princeton) and from the many passages in his writings, was deeply read in the philosophy and the theology of Aquinas, — this man was now led as a prisoner from the Tower of London to Westminster Hall, to take his trial on a charge of treason.

A statute dictated by Thomas Cromwell had de-

clared the king to be the Supreme Head on earth of the Ecclesia Anglicana. It gave the king authority to reform and redress all errors and heresies in the land. A second Statute made it treason for anyone maliciously to wish, will or desire by words or in writing to deprive the King of his dignity, title or name of his royal state.

In the first of the four counts of the Indictment it was alleged that the prisoner, being asked in the Tower, by the Secretary of State whether he "accepted and reputed the King as the Supreme Head of the Church in England," remained silent and declined to make answer (*malitiose poenitus silebat*).

To this count in the Indictment, the prisoner took exception: "Touching, I say, this challenge and accusation, I answer that for this my taciturnity and silence neither you nor your law nor any law in the world is able justly and rightly to punish me unless you may beside it lay to my charge either some word or some fact in deed."

The objection was overruled, and the pretended trial proceeded to its close on all four counts in the Indictment. After a verdict of guilty on each count had been returned, Thomas More claimed the right to speak his mind: "seeing that I see ye are determined to condemn me (God knoweth how) I will now in discharge of my conscience speak my mind plainly and freely touching my Indictment and your Statute withal."

He proceeded to argue that the Act under which he had been charged and condemned was contrary to the law of God, the law of reason and the law of the land.

"And forasmuch as this Indictment is grounded upon an Act of Parliament directly repugnant to the laws of

God and His Holy Church . . . it is therefore in law among Christian men insufficient to charge any Christian man."

The Statute was against the law of reason: "For this realm being but one member and a small part of the Church, might not make a particular law, disagreeable with the general law of the Church, no more than the City of London being but one poor member in respect of the whole realm, might make a law against an Act of Parliament to bind the whole realm."

The Statute was against the law of the land. It was "contrary to the law and Statutes of this our land, yet unrepealed, as they might evidently perceive in Magna Carta: *Quod Ecclesia Anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas.*

In the reign of Henry VIII, says Professor Holdsworth, Vinerian Professor of English Law at the University of Oxford, "It was realized that the Acts of Parliament, whether public or private, were legislative in character and the judges were obligated to admit that these acts however morally unjust must be obeyed. . . . The legislation which had deposed the Pope and made the Church an integral part of the State, had made it clear that the morality of the provisions of a law, or the reasons which induced the legislature to pass it, could not be regarded by the courts."

It was obviously difficult to assign any limits to the power of the Acts of a body which had effected changes so sweeping as those effected by the Reformation Parliament. Lord Burleigh is reported by James I to have said that he knew not what an Act of Parliament could not do

in England. When an Act of Parliament had acquired this authority, says Professor Holdsworth, the last remnants of the idea that there might be fundamental laws, which could not be changed by any person or body of persons in the State necessarily disappears.

After the Reformation, the Parliament of England was no longer bound by the laws of nature or the law of God.

In the current edition of May's *Parliamentary Practice* it is said that the Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government; but Parliament is not controlled in its discretion, and when it errs, its errors can only be corrected by itself.

In the year 1946, Sir Hartley Shawcross, K.C., M.P., Attorney General, spoke the orthodox constitutional doctrine. "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies be destroyed at birth; but it has been recognized that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, these laws will be supported and can be enforced." Parliamentary jurisprudence, one may observe, is a nice calculation of force.

The Omnipotence of Parliament is inalienable. In the official comment to the British Draft of an International Bill of Human Rights, it is plainly said that, "Proposals that the provisions of the International Bill of Human Rights should be embodied in the constitutions of States parties to the Bill, or otherwise consecrated by special constitutional guarantees, are not practicable for

all countries. Some countries like the United Kingdom, have no rigid constitution, and, as a matter of internal law, it is not possible to surround any provision with any special constitutional guarantee. No enactment can be given any greater authority than an Act of Parliament, and one Act of Parliament can repeal any other Act of Parliament." Soon after the enactment of the Statute of Westminster 1931, (which recognized the legislative autonomy of the dominions) a professor of Constitutional Law at a public lecture, in the presence and to the confusion of the Lord Chancellor, declared that the Imperial Parliament by virtue of its Omnipotence, was entitled at its pleasure to repeal the Statute at any time.

Now, though the theory (or the supposition) of the Omnipotence of Parliament was implicit in the Reformation Statutes, the process of translating this new theory into a practical rule of jurisprudence was not easy or simple. This new theory threatened the whole existence of the Common Law which had its foundation in the natural law and which was in the language of Justice Oliver Wendell Holmes, and for this reason we may think, "a far more developed, more rational and mightier body of law than the Roman."

From the first there was resistance. There was the resistance of John Fisher and Thomas More and the Carthusians. After all these had been done to death, there was in the very next year the resistance of the men who rose in the Pilgrimage of Grace, and who demanded among other things that "the Common Laws may have place as was used in the beginning of the reign." For the Common Law of medieval England was a popular

thing. "The law is the highest inheritance of the King by which he and all his subjects are now ruled, and if there were no law there would be no King and no inheritance." The words are those of an anonymous scribe in the Year Book. After an interval of centuries another scribe will say: "The Common Law is the surest and best inheritance that any subject hath, et qui perde ceo perde tout."

The publication in the Tudor and the Stuart time of successive editions of Bracton and of Fortescue and the Year Books gave new strength and courage to the resistance. But for these new editions, in the opinion of Maitland, the work which was done by Sir Edward Coke would have been impossible. In his enumeration of the kinds of law that exist in territories subject to the English Crown, Coke — who settled the last draft of the Charter of Virginia in 1606 — mentions in one breath the Law of Nature and the Common Law. There is perhaps a danger lest men may confuse and even identify these two things, the foundation and the building, since each in its separate way has reference to reason.

In *Bonham's case,* which has had a less fortunate history in England than in the United States, Coke sought to restore the idea of a fundamental law which should limit alike the Crown and Parliament. He claimed for the Judges of the Common Law the power and the duty to control Acts of Parliament and even to annul them if an Act were "against common right and reason or repugnant or impossible to be performed."

In the debate on the Petition of Right, Coke, resisting a clause which would save the sovereign power of the

King, declares: "I know that Prerogative is part of the law . . . but Sovereign Power is no parliamentary word. In my opinion it weakens Magna Carta. . . . Shall we now add it, we shall weaken the foundation of law and then the building must needs fall. Take we heed what we yield unto. Magna Carta is such a fellow that he will have no Sovereign."

And here we may recall the rule laid down at the opening of the colonial period in *Calvin's case,* that "conquered heathen countries at once lose their rights or laws by the conquest, for that they be not only against Christianity but against the law of God and of nature contained in the Decalogue." (On the other hand if an uninhabited country be discovered or planted by English subjects, all the English laws then in being which are the birthright of every subject are immediately there in force).

For a long century after Coke the idea that the law of reason, now beginning to be identified with the Common Law, could be regarded as a fundamental law, had the favour of many minds. Sir Henry Finch, in his *Nomotechnica,* which is "un description del common ley d'Angleterre," examining the law of nature and the law of reason, declares that the rules of reason are of two sorts: some are taken from 'foreign' learning; the rest are proper to the law. "Of the first sort are the principles and sound conclusions, out of the best of the very bowels of divinity, grammar, logic; also from philosophy, natural, political, economic, moral, though in our Reports and Year Books, they do not come under the same terms. Yet the things we find are the same, for the

sparks of all the sciences in the world are raked up in the ashes of the law." Natural law in the classical and Christian conception may be said to mean the sum in order of the dynamic tendencies that are proper to man as a rational being. Natural law has reference to the internal tendency or thrust of things, their *"dynamisme original."* It is rooted in the order of the world and in the conception of man as a part of that order; in a study of the inner constitution of man, of ethics and psychology and the metaphysical foundations of our being. The observation of external things reveals in nature a hierarchy of orders: the mineral, the vegetable, the animal order, each serving its own end, and at the same time subserving each higher order; and all of them serving and subserving the life of man. As the flower and the plant, unlike the mineral thing, have a principle of life and growth in them, we study the law according to which they live and grow. So, too, with animals, they have being and life and a law according to which their life is lived. So, too with man, he shares with all things the first law of all being: *perseverare in esse suo.* Everyman and every organised community of men will defend his or its existence and will be entitled to defend its existence against unjust attack. On another plane, the animal plane, *jus naturale est quod natura omnia animalia docuit, ut conjunctio maris et feminae et educatio prolis,* though, among rational beings, these things are naturally within the control of mind and conscience. Again, on the purely rational plane, there is the appetite for life in an organised society and the thrust and tendency of the mind to truth and of the will to good. And this appetite

for the good and for the true takes us beyond ourselves and beyond the community of men and beyond the State. It is "the cry of the finite for the infinite."

> "And thus I know
> this earth is not my sphere
> For I cannot so narrow me
> but that I still exceed it."

So again, Matthew Hale, in his controversy with Thomas Hobbes, stands in the ancient ways. The theory of Hobbes, with its nominalism and its scepticism, was at once fatal to the tradition of divine and natural law, and to the conception of fundamental rights that were rooted in that tradition.

At the turn of the 18th century the idea of a fundamental law was firmly asserted by Chief Justice Holt, who thought it was part of a judge's daily task "to construe and expound Acts of Parliament and adjudge them to be void." He was, you may think, a pioneer of judicial review.

In Blackstone's *Commentaries,* the old tradition which distinguishes the law of God, the law of nature and the law of the land, and which recognizes certain fundamental rights that are based on this distinction, is restated and reaffirmed. As one who cherishes the old belief in the law of God and the law of nature, Blackstone qualifies as 'absolute' the rights to life, to liberty and to property (and certain auxiliary rights) which are declared in Magna Carta, the Petition of Right, the Bill of Rights and the Act of Settlement. And he detaches himself from those who "by a figure rather too

bold," identify the Supremacy of Parliament with Parliamentary Omnipotence.

The rights that Blackstone qualifies as absolute were already familiar to residents in the Thirteen Colonies, where a period of untechnical, popular law had been followed by the slow and gradual reception of most of the rules of the Common Law.

Early in the 18th Century, in a case in Massachusetts (*Giddings vs. Brown*) which will be wlel-known to you, one Symonds, the Magistrate, after referring with respect to the works of Sir Henry Finch and of Dalton, based his judgment on the "fundamental law which God and nature had given to the people and which cannot be infringed." The right of property he holds to be such a fundamental right. In most jurisdictions it would seem that the law of God and nature at this time was looked upon as the true and fundamental law and that all temporal legislation was considered to be binding only so far as it was an expression of natural law.

In the decade immediately preceding the Declaration of Independence, some 2,500 copies of Blackstone's *Commentaries on the Law* which was for him "the best birthright and noblest inheritance of mankind" were purchased and received in the colonies of the Atlantic seaboard. James Wilson was at the time a busy practitioner and had drawn from Hooker and from Grotius, and beyond them from Fortescue and from Bracton, the traditional principles of the Common Law. "The Law of Nature," he will say, "and the law of revelation are both divine; they flow, though in different channels, from the same adorable source." Chief Justice Marshall and

Chancellor Kent, on their own acknowledgment, owed to Blackstone their vocation and their legal training.

In all these ways the tradition of the Common Law and of the philosophy that is latent in the Common Law, passed to the new States of the American Union, and to the men who sat under the new Constitution as the Justices of the Supreme Court. The Constitution of the United States was written by men who had Magna Carta and Coke on Littleton before their eyes. I shall not attempt to trace the arguments and the methods by which Marshall and Kent and Story and Taney imposed limits on the legislative power and added the substance of justice to due process of law. Let me indorse the opinion of Professor Holdsworth who says that the Supreme Court of the United States is a body of men which safeguards more effectively than any other tribunal in the world the medieval ideal of the supremacy of the law, an ideal which, one may recall, was in one way or another, common to Holt, to Coke and to Sir Thomas More. The Justices of the Supreme Court are in the authentic tradition of the Common Law and are called upon to be "the Grand Depositories of the fundamental laws" of the republic, and in a measure, of mankind.

I do not of course know whether the habit of your Justices is the habit of our old judges of the Common Law who were said by Fortescue "to sit only from eight o'clock to eleven o'clock in the forenoon, and after they have refreshed themselves, passed the rest of the day in studying the laws, reading Holy Scriptures, and otherwise in contemplation at their good pleasure, their life being more contemplative than active."

The Universities and scholars of the United States, with their constant study of the principles of the Common Law, and their critical editions of the texts of the great masters, of Glanvil, of Bracton, of Littleton, of the Year Books, are also in the authentic tradition of a law whose deepest foundations and latent principles are laid in the philosophy of Christian jurisprudence and of natural law.

At a time when the call of mankind and a great part of the efforts of the United Nations is for a restatement of the fundamental rights of human personality —and their enforcement — rights to life, to liberty, to property, and to the pursuit of happiness, there is on the lawyers and the Law Schools of the United States, a heavy responsibility, in the interests of their own people and of an attentive world, to elucidate the philosophy and the theology of the law which is their high inheritance.

The vocation of our time for a statement of the fundamental principles of law and justice has met with a splendid response at this shrine and University of Notre Dame du Lac. In the fulfillment of the work that you, Father Chairman, and Dean of the Law School have undertaken, you will naturally look for guidance and inspiration to one who is always the Mother of Good Counsel. At this time of her 'singular privilege,' and Octave may not we practitioners and professors of what is, in origin and essence, a great system of Christian jurisprudence, call her again, in hope and love, Our Lady of the Common Law.[7]

[7] The paper was read on the morrow of the Feast of the Immaculate Conception of Our Lady, 1949. The title "Our Lady of the Common Law" was used by Sir Frederick Pollock. (See Pollock-Holmes Letters, English Edition, Introduction, p. xv.)

NATURAL LAW AND CONSTITUTIONAL LAW

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THE NATURAL LAW AND CONSTITUTIONAL LAW

ANCIENT Chinese philosophers were wont to distinguish the passive and active elements of Being, called respectively *Yin* and *Yang*. If I may be permitted to employ this locution for a moment, the "yang" element of American Constitutional Law is Judicial Review, the power, and corresponding duty of a court to pass upon the validity of legislative acts in relation to a higher law which is regarded as being binding on both the legislature and the court. By the same token the "yin" element is the aforesaid higher law. Today this role is ordinarily filled by a constitutional document, the Constitution of the United States being the supreme example; but earlier, Natural Law or some derivative concept took the part of "yin." Hence the purpose of this discourse — which is to demonstrate how very large a part of its content American Constitutional Law has always owed, and still owes, to its Natural Law genesis. As the matrix of American Constitutional Law, the documentary Constitution is still, in important measure, Natural Law under the skin.

Of "Natural Law" there is no end of definitions, as a casual examination of Sir Thomas Erskine Holland's

Elements of Jurisprudence suffices to show. I venture to quote a few passages from the 13th edition: [1]

> Aristotle fully recognizes the existence of a natural as well as of a legal Justice. He mentions as an ordinary device of rhetoric the distinction which may be drawn between the written law, and "the common law" which is in accordance with Nature and immutable.
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> The Stoics were in the habit of identifying Nature with Law in the higher sense, and of opposing both of these terms to Law which is such by mere human appointment. "Justice," they say, "is by Nature and not by imposition." "It proceeds from Zeus and the common Nature."
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> The same view finds expression in the Roman lawyers. "Law," says Cicero, "is the highest reason, implanted in Nature, which commands those things which ought to be done and prohibits the reverse." "The highest law was born in all the ages before any law was written or State was formed." . . . "We are by Nature inclined to love mankind, which is the foundation of law." . . .
>
> S. Thomas Aquinas: "Participatio legis aeternae in rationali creatura lex naturalis dicitur."
>
> Grotius: "Jus naturale est dictatum rectae rationis. . . ."

For our purposes it is not essential to choose nicely among these definitions of what Cicero and St. Thomas call *lex naturalis* and Grotius terms *jus naturale*. We are concerned only with certain juristic connotations of the

[1] HOLLAND, *Elements of Jurisprudence* 32-4 (13th ed. 1924).

concept: first, that Natural Law is entitled by its intrinsic excellence to prevail over any law which rests solely on human authority; second, that Natural Law may be appealed to by human beings against injustices sanctioned by human authority.

I — *Natural Law Into Natural Rights*

In a famous passage in the *Rhetoric,* Aristotle advised advocates that when they had "no case according to the law of the land," they should "appeal to the law of nature," and, quoting from *Antigone* of Sophocles, argue that "an unjust law is not a law." [2] While this advice scarcely reveals any deep devotion on Aristotle's part to the Natural Law concept, it does evidence the short step, which even at that date existed in men's minds, between the concept and the idea of a *juridical* recourse to it. Three hundred years later we find Cicero in his *De Legibus* contrasting *"summa lex"* and *"lex scripta"; "summum jus"* and *"jus civile"; "universum jus"* and *"jus civile";* and on one occasion appealing in the Senate to *"recta ratio"* against the *"lex scripta."* [3]

It was during the Middle Ages, however, that the conception of Natural Law as a code of human rights first took on real substance and importance. This was so even on the Continent,[4] albeit institutions were lacking

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[2] *Id.* at 32 n.4.

[3] *Id.* at 33 n.6; see also, the present writer's book, CORWIN, *Liberty Against Government* 15-7 (1948), and accompanying notes.

[4] See GIERKE, *Political Theories of the Middle Ages* 80-1 (Maitland's trans. 1927).

there through which such ideas could be rendered effective practically. In England, on the other hand, this lack was supplied by the royal courts, administering the Common Law. The impregnation of the Common Law with higher law concepts proceeded rapidly in the Fourteenth Century under Edward III. Of the thirty-two royal confirmations of the Charter noted by Sir Edward Coke, fifteen occurred in this reign; and near the end of it, in 1368, to the normal form of confirmation the declaration was added by statute that any statute passed contrary to Magna Carta *"soit tenuz p'nul,"* words which seem clearly to have been addressed to the royal officials, including the judges.[5]

Here, to be sure, Magna Carta fills the role of Natural Law, but it is a Magna Carta already infused with Natural Law content, as is shown by Bracton's earlier designation of Chapter 29 as *"constitutio libertatis";* and in the Fifteenth Century the *"lex naturae"* has completely replaced "Magna Carta" in the juristic equation. This is notably so, for example, in the pages of Fortescue's famous *In Praise of the Law of England* (*De Laudibus Legum Angliae*), which was but one of many similar encomia. As Father Figgis has written of this period: [6]

> The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God

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[5] The preceding sentence is taken from CORWIN, *op. cit. supra* note 3, at 26.

[6] As quoted in CORWIN, *op. cit. supra* note 3, at 28.

> in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. The Common Law is the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations . . . Based on long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances, which owe their fleeting existence to the caprice of the King or to the pleasure of councillors, which have a merely material sanction and may be repealed at any moment.

Thus the Common Law becomes higher law, without at all losing its quality as positive law, the law of the King's courts and of the rising Inns of Court. Nor does Fortescue fail to stress its dual character. Asserting the identity of "perfect justice" with "legal justice," and the subordination of the King to the law, i.e., the law courts, he proceeds to counsel his Prince as follows: [7]

> . . . there will be no occasion for you to search into the arcana of our laws with such tedious application and study . . . It will not be convenient by severe study, or at the expense of the best of your time, to pry into nice points of law: such matters may be left to your judges . . . ; furthermore, you will pronounce judgment in the courts by others than in person, it being not customary for the Kings of England to sit in courts or pronounce judgment themselves (*proprio ore nullus regum Angilae judi-*

[7] *Id.* at 30.

> *cium proferre uses est*). I know very well the quickness of your apprehension and the forwardness of your parts; but for that expertness in the laws which is requisite for judges the studies of twenty years (*viginti annorum lucubrationes*) barely suffice.

In short, Natural Law has become a craft mystery — the mystery of Bench and Bar — what it has remained, now in greater, now in lesser measure ever since.

A century and a half later we find Lord Coke, Chief Justice of the Common Pleas, describing a scene [8] which reads like a re-enactment of that imagined by Fortescue. But to his predecessor's work of edification, Coke adds official recognition that judicial custodianship of the Common Law signifies the power and duty of the law courts to apply its measure both to the Royal Prerogative and to the power of Parliament. The latter claim appears in his famous "dictum," so-called, in *Dr. Bonham's Case*,[9] which reads: [10]

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void. . . .

And this was said, it should be noted, at the end of a

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[8] 12 Rep. 63-65, 77 Eng. Rep. 1341-1343 (1609).

[9] 8 Rep. 113b, 77 Eng. Rep. 646 (1610).

[10] *Id.*, 8 Rep. at 118a; see also Proclamations, 12 Rep. 74, 77 Eng. Rep. 1352 (1611).

century in which the thesis of Parliament's absolute power to alter and abrogate any and all laws had been asserted again and again;[11] and not only asserted but demonstrated by its part in the Tudor ecclesiastical and religious revolution.

Eighty years after *Dr. Bonham's Case,* "The great Mr. Locke" produced his second *Treatise on Civil Government,* in which the dissolution of Natural Law into the natural rights of the individual — the rights of "life, liberty and estate"— is completed through the agency of the Social Compact. Of judicial review, to be sure, Locke appears to have no inkling. He relied for the protection of the individual's inherent and inalienable rights on: first, Parliament; second, the right of revolution. Even so, Locke's contribution to both the doctrinal justification of judicial review and to the theory of its proper scope is first and last a very considerable one.

Coke and Locke are the two great names in the common Anglo-American higher law tradtion, and the contribution of each is enhanced by that of the other. Locke's version of Natural Law not only rescues Coke's version of the English constitution from a localized patois, restating it in the universal tongue of the Eighteenth Century, it also supplements it in important respects. Coke's endeavor was to put forward the historical *procedures* of the Common Law as a permanent restraint on power, and especially on the power of the English crown. Locke, in the limitations which he im-

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[11] See CORWIN, *op. cit. supra* note 3, at 32-3 and notes.

poses on legislative power, is looking rather to the security of the *substantive* rights of the individual — those rights which are implied in the basic arrangements of society at all times and in all places. While Coke extricated the notion of fundamental law from what must sooner or later have proved a fatal nebulosity, he did so at the expense of archaism. Locke, on the other hand, in cutting loose in great measure from the historical method of reasoning, opened the way to the larger issues with which American Constitutional Law has been called upon to grapple in its latest maturity.[12]

II — *Natural Law and Judicial Review*

The *fons et origo* of both the doctrine and the practice of judicial review in the United States is Coke's invocation in *Dr. Bonham's Case* of "common right and reason," which as explained by the Sixteenth Century author of *Doctor and Student,* was the term used "by them that be learned in the laws of England" in place of the term "law and nature." [13] Commended by two Lord Chief Justices, Hobart and Holt, the dictum had won repeated recognition in various legal abridgments and digests before the outbreak of the American Revolution.[14] In the early 1700's it was relied on by a British colonial law officer as affixing the stigma of invalidity to an act of the Barbadoes assembly creating paper

[12] Parts of the above paragraph are taken from CORWIN, *op. cit. supra* note 3, at 50-1.

[13] See CORWIN, *op. cit. supra* note 3, at 35; *Id.* at n.40.

[14] *Id.* at 39 n.43.

money.[15] In 1759, we encounter a casual reference by Governor Cadwalader Colden of the Province of New York to "a judicial power of declaring them [laws] void." [16]

But just as Coke had forged his celebrated dictum as a possible weapon for the struggle which he already foresaw against the divine rights pretensions of James I, so its definitive reception in this country was motivated by the rising agitation against the Mother Country. The creative first step was taken by James Otis in February, 1761, in his argument for the Boston merchants against an application by a British customs official for a general warrant authorizing him to search their cellars and warehouses for smuggled goods. An act of Parliament "against natural Equity," Otis asserted, was void. "If an Act of Parliament," he continued, "should be made in the very Words of this Petition, it would be void," and it would be the duty of the executive courts to pass it "into disuse." [17] Four years later, according to Governor Hutchinson of Massachusetts, the prevailing argument against the Stamp Act was that it was "against Magna Charta and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void," testimony which is borne out by a contemporaneous decision of a Virginia county court.[18] On the very eve of the Declaration of

[15] See II CHALMERS, *Opinions of Eminent Lawyers* 27-38 (1814).

[16] II N. Y. HIST'L SOCIETY COLLECTIONS 204; see also, CHALMERS, *Political Annals* in I N. Y. HIST'L. SOCIETY COLLECTIONS 81 (1868).

[17] Adams' report of Otis' argument in Paxton's Case, Quincy (App. I) 474 (Mass. 1761).

[18] Quincy (App. I) 519 n.18 (Mass. 1761).

Independence, Judge William Cushing, later to become one of Washington's appointees to the original bench of the Supreme Court, charged a Massachusetts jury to ignore certain acts of Parliament as "void and inoperative" and was congratulated by John Adams for doing so.[19]

And meantime, in 1772, George Mason had developed a similar argument against an act of the Virginia assembly of 1682, under which certain Indian women had been sold into slavery. The act in question, he asserted, "was originally void of itself, because contrary to natural right." [20] And, he continued: [21]

> If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth . . . All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice.

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[19] V McMaster, *History of the People of the United States* 395 (1905).

[20] Robin v. Hardaway, Jeff. 109 (Va. 1772).

[21] *Id.* at 114.

Mason concluded by citing Coke and Hobart. The court adjudged the act of 1682 repealed.[22]

Nor did the establishment of the first American constitutions cause this course of reasoning to be abandoned. To the contrary, the most eminent judges of the first period of American Constitutional Law, which comes to an end approximately with the death of Marshall in 1835, appealed freely to natural rights and the social compact as limiting legislative power, and based decisions on this ground, and the same doctrine was urged by the greatest lawyers of the period without reproach. Typical in this connection is the case of *Wilkinson v. Leland,*[23] which was decided by the Supreme Court in 1829. Attorney for the defendants in error was Daniel Webster. "If," said he, "at this period there is not a general restraint on Legislatures in favor of private rights, there is an end to private property. Though there may be no prohibition in the constitution, the Legislature is restrained . . . from acts subverting the great principles of republican liberty and of the social compact. . . . "[24] To this contention his opponent William Wirt responded thus: "Who is the sovereign . . . ? Is it not the Legislature of the State, and are not its acts effectual . . . unless they come in contact with the great principles of the social compact?"[25] The act of the Rhode Island legislature under review was upheld, but said Justice Story

[22] *Id.* at 114, 123.
[23] 2 Pet. 627, 7 L. Ed. 542 (1829).
[24] *Id.*, 2 Pet. at 646.
[25] *Id.*, 2 Pet. at 652.

speaking for the Court: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." [26] Indeed, fourteen years before this the same Court had unanimously held void, on the basis of these same principles, an act of the Virginia legislature which purported to revoke a grant of land.[27]

In short, *judicial review initially had nothing to do with a written constitution.* In point of fact, the first appearance of the idea of judicial review in this country antedated the first written constitution by at least two decades. Judicial review continued, moreover, in a relationship of semi-independence of the written constitution on the basis of "common right and reason," Natural Law, natural rights, and kindred postulates throughout the first third of the Nineteenth Century. But meantime, a competing conception of judicial review as something anchored to the *written constitution* had been in the process of formulation in answer to Blackstone's doctrine that in every State there is a *supreme, absolute power,* and that this power is vested in the *legislature.* From this angle judicial review based on "common right and reason," or on Natural Law ideas, was an impertinence, as Blackstone took pains to point out in his *Commentaries.*[28]

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[26] *Id.,* 2 Pet. at 657.

[27] Terrett v. Taylor, 9 Cranch 43, 3 L. Ed. 650 (1815).

[28] 1 Bl. Comm. *46, 91.

But suppose that the supreme will in the State was not embodied in the *legislature* and its *acts*, but in the *people at large* and their *constitution* — what conclusions would follow from this premise? In *The Federalist*, No. 78, Hamilton suggested an answer to this question, and in 1803, in *Marbury v. Madison*,[29] Chief Justice Marshall elaborated the answer: it is the duty of courts when confronted with a conflict between an act (i.e., a *statute*) of "the mere agents of the people" (that is, of the ordinary legislature) and the act of the people themselves (to wit, the constitution), to prefer the latter.

The inevitable clash between the two conceptions of judicial review was first unfolded in the case of *Calder v. Bull*,[30] decided by the Supreme Court in 1798. There it was held that the Ex Post Facto Clause of Article I, section 10 of the Constitution applied only to penal legislation and hence did not protect rights of property and contract from interference by a state legislature; but Justice Samuel Chase endeavored to soften this blow to proprietarian interests by citing the power of the state courts to enforce extra-constitutional limitations on legislative power, such as many of them were in fact already doing. Said he: [31]

> I cannot subscribe to the *omnipotence* of a *state Legislature*, or that it is *absolute and without controul;* although its authority should not be *expressly* restrained by the *constitution*, or *fundamental law*,

[29] 1 Cranch 137, 2 L. Ed. 60 (1803).
[30] 3 Dall. 386, 1 L. Ed. 648 (1798).
[31] *Id.*, 3 Dall. at 387-9.

> of the state . . . There are certain *vital* principles in our *free Republican governments,* which will determine and overrule an *apparent and flagrant* abuse of *legislative* power . . . The *genius,* the *nature,* and the *spirit* of our state governments, amount to a prohibition of *such acts of legislation;* and the *general principles of law and reason* forbid them.

To hold otherwise, it was stated, would be "political heresy, altogether inadmissible. '[32]

Chase belonged to the older generation of American lawyers and had been brought up on Coke-Littleton, having received much of his legal education in London in the Inns of Court. Alongside him on the Supreme Bench, however, sat a very different type of lawyer, one of "that brood of young lawyers," characterized by Jefferson as "ephemeral insects of the law," who had imbibed their law from Blackstone's *Commentaries.* This was James Iredell of North Carolina, who demurred strongly to Chase's natural rights doctrine. "True," said he, "some speculative jurists" had held "that a legislative act against natural justice must, in itself, be void; but the correct view, he stated, was that: [33]

> If . . . a government, composed of legislative, executive and judicial departments, were established, by a Constitution, which imposed no limits on the legislative power . . . whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power, could never interpose to

[32] *Ibid.*
[33] *Id.,* 3 Dall. at 398-9.

> pronounce it void . . . Sir William Blackstone, having put the strong case of an act of parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case, "there is no court that has power to defeat the intent of the legislature when couched in such evident . . . words. . . ."

The debate thus begun was frequently renewed in other jurisdictions; and long before the Civil War, Iredell had won the fight — but as we shall see, more in *appearance* than in *reality*. In 1868 Judge Cooley, in considering the circumstances in which a legislative enactment may be declared unconstitutional, wrote: [34]

> The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.

Yet, six years later we find the Supreme Court of the United States pronouncing a statute of the State of Kansas void on the very grounds that had been laid down in Chase's dictum. Speaking for an all but unanimous Court, Justice Miller said: [35]

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[34] COOLEY, *Constitutional Limitations* 168 (3d ed. 1874).

[35] Citizens' Savings & Loan Ass'n. v. Topeka, 20 Wall. 655, 662, 22 L. Ed. 455 (1874).

> It must be conceded that there are . . . rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

One Justice dissented, asserting that such views tended to "convert the government into a judicial despotism. '[36]

But vastly more important is the fact that in the very process of discarding the doctrine of natural rights and adherent doctrines as the basis of judicial review, the courts have contrived to throw about those rights which originally owed their protection to these doctrines the folds of the documentary constitution. In short, things are not always what they seem to be, even when they seem so most.[37] The indebtedness of the institution of judicial review and of the rights protected by it to Natural Law ideas is by no means sufficiently summed up in the glib statement that nowadays judicial review is confined to the four corners of the written constitution.

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[36] *Id.*, 20 Wall. at 669.

III — *How Natural Law Doctrines Were Used to Fill a Gap in the Written Constitution*

It is a commonplace that the doctrine of natural rights was conveyed into the American written Constitution by bills of rights, the earliest example of which was the Virginia Declaration of Rights of June 12, 1776. This commonplace is, however, only a half of the truth, and indeed the lesser half. As has been indicated, the type of judicial review which stemmed from Coke's dictum supplied a second avenue for natural rights concepts into the constitutional document. In this section I shall first illustrate this proposition with the doctrine of vested rights.

Not all the early state constitutions were accompanied by bills of rights. Moreover, the availability of such bills of rights as existed as a basis for judicial inquiry into the validity of legislative measures was sharply challenged at times. Even more important was the fact that, as it came early to be appreciated, bills of rights or no bill of rights, the early state constitutions left proprietarian interests in a very exposed position vis a vis the new popular assemblies, for which the prerogatives of the British Parliament itself were sometimes claimed.[38]

The formidable character of legislative power in these early instruments of government as regards the property

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[37] See *e.g.*, COOLEY, *op. cit. supra* note 34, at 174-6, where the principle of the separation of powers is made to do duty for Natural Law concepts.

[38] See COXE, *An Essay on Judicial Power and Unconstitutional Legislation* 223 *et seq.* (1893); V HAMILTON WORKS 116 (Lodge ed. 1904); VII *id.* at 198.

interest, was exhibited in more ways than one. In the first place, in the prevailing absence of courts of equity, legislative assemblies interfered almost at will with judicial decisions, and particularly those involving disputes over property. The case of *Calder v. Bull*,[39] mentioned earlier, affords an example of this sort of thing. The Connecticut courts, having refused to probate a certain will, were to all intents and purposes ordered to revise their decision, which they did, with the result that the heirs at law to an estate were ousted, after a year and a half of possession, by the beneficiaries of the will. A second and highly impressive proof of early state legislative power is afforded by the ferocious catalogue of legislation directed against the Tories, embracing acts of confiscation, bills of pains and penalties, even acts of attainder. One sample of such legislation came under the scrutiny of the United States Supreme Court in 1800, in the case of *Cooper v. Telfair*.[40] Said Justice Washington: "The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." [41] On this ground and one or two others, the Georgia act was sustained, although Justice Chase opined that with the Federal Constitution now in effect such an act would be clearly void; but this act was passed during the Revolution. Thirdly, with the general collapse of values early in 1780, every state legislature became a scene of vehement agitation on the part of the widespread farmer-

[39] Note 30 *supra*.
[40] 4 Dall. 14, 1 L. Ed. 721 (1800).
[41] *Id.*, 4 Dall. at 18.

debtor class in favor of paper money laws and other measures of like intent. For the first time, the property interest was confronted with "the power of numbers," and, in the majority of cases, the power of numbers triumphed.

Could the state bill of rights withstand the flood? It soon transpired that they were an utterly ineffective bulwark of private rights against state legislative power. And so the movement was launched which led to the Philadelphia Convention of 1787. That abuse by the state legislatures of their powers had been the most important single cause leading to the Convention was asserted by Madison early in the course of its deliberations, and others agreed.[42] So far as we are concerned, the most important expression of the Convention's anxiety to clip the wings of the high-flying local sovereignties is to be found in the opening paragraph of section 10 of Article I, which reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The provision which here claims attention is the prohibition of *ex post facto laws*. What did those who urged their insertion in the Constitution think these words

[42] See I FARRAND, *The Records of the Federal Convention* 48, 133-34, 255, 424, 525, 533; II *id.* at 285 (1937).

meant? Some of them, we know, thought the clause would rule out *all* "retrospective" legislation, meaning thereby legislation which operated detrimentally upon existing property rights.[43] But as we have seen in *Calder v. Bull,* the clause was confined to penal legislation, to statutes making criminal an act which was innocent when done. That the Court was thoroughly aware of the breach it was thus creating in the Constitution, the opinions of all the Justices, except that of the Blackstonian Iredell, make amply apparent; and going beyond apology, Chase sought to show how the gap could be stopped by the local judiciaries by recourse to extra-constitutional limitations, "the spirit of our free republican governments," "the social compact," considerations of "natural justice," and the like. The local judiciaries responded to the suggestion with varying degrees of alacrity, and the sum total of their efforts was one of the most fertile doctrines of American Constitutional Law, the doctrine of vested rights, the practical purport of which was that the effect of legislation on existing property rights was a *primary* test of its validity, and that by this test legislation must stop short of curtailing existing rights of ownership, at least unduly or unreasonably.[44]

But in fact, Chase's dictum only stimulated a movement already begun. Three years prior to *Calder v. Bull,* we find Justice Paterson charging a federal jury in a case involving vested rights in these words:[45]

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[43] On this point see CORWIN, *op. cit. supra* note 3, at 60-1 n.4.

[44] *Id.* at 72 *et seq.*

[45] VanHorne's Lessee v. Dorrance, 2 Dall. 304, 310, 1 L. Ed. 391 (1795).

> . . . the right of acquiring and possessing property and having it protected, is one of the natural, inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society . . . The preservation of property . . . is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law.

Indeed, a majority of the cases of judicial review after the Cokian model, referred to in Section II of this paper, involved property rights. Nor should the great name of Chancellor Kent be overlooked in this connection. First as judge, then as Chancellor in his home state, and finally as author of the famed *Commentaries,* Kent developed the doctrine's fullest possibilities and spread its influence fastest and farthest.

Yet even as Kent was vaunting private property as an instrument of God for realizing his plans for the advancement of the race, it was becoming less and less practicable to urge such considerations on American judges. The old-type Cokian judge had about disappeared — Blackstone was in the saddle in the law offices and in the court houses. What is more, with the accession of Jackson to the Presidency there took place an immense resurgence of the doctrine of popular sovereignty. Of the numerous corollaries into which the doctrine proliferated, two are relevant to our interest: first, the Constitution was an ordinance of the people, and its supremacy sprang from the fact that it embodied

their will; second, of the three departments of state government, the legislature stood nearest the people. It followed that the courts had better go slow in holding state legislative acts invalid; and that on no account must they do so except for a plain violation of the Constitution, i.e., of the people's will as there expressed.

Bench and Bar were confronted with a dilemma: either they must cast the doctrine of vested rights to the wolves or they must bring it within the sheepfold of the written Constitution. The second alternative was adopted in due course. Ultimately the doctrine found a home within the Due Process Clause, "no person shall be deprived of life, liberty, or property without due process of law." The original significance of the clause was purely procedural — nobody should be punished without a trial by jury or "writ original of the Common Law." In the revamped clause the term "due process of law" simply fades out and the clause comes to read, in effect, "no person shall be deprived of property, period." Thus was the narrow interpretation which was planted on the Ex Post Facto Clause in *Calder v. Bull* revenged in kind.[46]

This achievement was consummated in the famous case of *Wynehamer v. People*,[47] in which, in 1856, the New York Court of Appeals set aside a state-wide prohibition law as comprising, with regard to liquors in existence at the time of its going into effect, an act of destruction of property not within the power of govern-

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[46] See CORWIN, *op. cit. supra* note 3, at 84-115.
[47] 13 N. Y. (3 Kern) 378 (1856).

ment to perform "even by the forms of due process of law." An interesting feature of Judge Comstock's opinion in the case is his repudiation of all arguments against the statute sounding in Natural Law concepts, like "fundamental principles of liberty," "common reason and natural rights," and so forth. Such theories said he — squinting, one suspects, at the anti-slavery agitation — were subversive of the necessary powers of government. Furthermore, there was "no process of reasoning by which it could be demonstrated that the 'Act for the Prevention of Intemperance, Pauperism and Crime' is void, upon principles and theories outside the Constitution, which will not also, and by an easier induction, bring it in direct conflict with the Constitution itself." [48]

The expansion of the Obligation of Contracts Clause of Article I, section 10, by resort to Natural Law concepts follows a similar, though briefer course. The master craftsman was Chief Justice Marshall, and this time the infusion of the constitutional clause with Natural Law concepts was direct. The great leading case was *Fletcher v. Peck*,[49] in which, in 1810, Marshall, speaking for the Court, held that a state legislature was forbidden "either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States" [50] to rescind a previous land grant; while Justice Johnson based his concurring opinion altogether "on the reason and nature of things;

[48] *Id.* at 392.
[49] 6 Cranch 87, 3 L. Ed. 162 (1810).
[50] *Id.*, 6 Cranch at 139.

a principle which will impose laws even on the Deity." [51] It is true that when, in 1819, the doctrine of *Fletcher v. Peck* was extended to the charters of eleemosynary corporations, the Court contented itself with invoking only the Obligations Clause.[52] The dependence, however, of the holding on Natural Law premises still remains. The constitutional clause presupposes a *pre-existent* obligation to be protected. Whence, if not from Natural Law, can such an obligation descend upon a public grant?

Of the four great doctrines of American Constitutional Law which the American judiciary developed prior to the Civil War, three (the doctrine of judicial review, the substantive doctrine of due process of law, and the doctrine that the Obligation of Contracts Clause protects public contracts) are products of the infusion of the documentary Constitution with Natural Law, natural rights concepts. The fourth doctrine, that of dual federalism, was the creation of the Supreme Court at Washington under the presidency and guidance of Chief Justice Taney. It, of course, rests on different, highly political considerations. Yet even in this case, Natural Law may claim some credit if, as Thomas Hill Green argues in his *Principles of Political Obligation*,[53] the notion of sovereignty is also, in final analysis, rooted in the doctrine of Natural Law. Green, of course, was thinking of "sovereignty" as it is known to Western political

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[51] *Id.*, 6 Cranch at 143.

[52] Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819).

[53] GREEN, *Principles of Political Obligation* (1901)

thought, not the kind of sovereignty that is the offspring of Byzantine absolutism married to Marxian materialism.

IV. *The Bench and Bar Present Us With an Up-to-Date Doctrine of Natural Law*

In 1868, the Fourteenth Amendment was added to the Constitution. The first section of it reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The fifth and final section gave Congress the power "to enforce, by appropriate legislation, the provisions of this Article."

In the understanding of most people at the time, the intended beneficiaries of the Amendment were the recently emancipated freedmen, but in the very first cases to reach the Supreme Court under it, the famous *Slaughter House Cases*[54] of 1873, this assumption was sharply challenged by counsel, John Archibald Campbell of New Orleans, a former Justice of the Court. No doubt, Campbell argued, the freedmen would and should

[54] 16 Wall. 36, 21 L. Ed. 394 (1873).

derive benefit from the Amendment, but their doing so would only be incidental to the realization of its much broader purpose, that of giving legal embodiment to the principle of "laissez-faire individualism which had been held by the colonists ever since they came to this soil." [55] "What," he asked, "did the colonists and their posterity seek for and obtain by their settlement of this continent . . . ? *Freedom, free action, free enterprise — free competition.* It was in freedom they expected to find the best auspices for every kind of human success." [56]

Campbell lost his suit, by the narrow margin of five Justices to four; but he had sown an idea which, in the course of the next thirty years, imparted to judicial review a new and revolutionary extension. In 1878, the American Bar Association was founded from the *elite* of the American Bar. Organized as it was in the wake of the "barbarous" decision — as one member termed it — in *Munn v. Illinois,*[57] in which the Supreme Court had held that states were entitled by virtue of their police power to prescribe the charges of "businesses affected with a public interest," the Association, through its more eminent members, became the mouthpiece of a new constitutional philosophy which was compounded in about equal parts from the teachings of the British Manchester School of Political Economy and Herbert Spencer's highly sentimentalized version of the doctrine of evolu-

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[55] These words are from Twiss, *Lawyers and the Constitution* 53 (1942).

[56] *Id.* at 54, quoting Campbell's Brief, pp. 42-4. Emphasis supplied.

[57] 94 U. S. 113, 24 L. Ed. 77 (1876).

tion, just then becoming the intellectual vogue; plus a "booster" — in the chemical sense — from Sir Henry Maine's *Ancient Law,* first published in 1861. I refer to Maine's famous dictum that "the movement of the progressive societies has hitherto been a movement *from Status to Contract.*" [58] If hitherto, why not henceforth?

In short, the American people were presented *a new doctrine of Natural Law,* the content and purport of which appear — to take a specific example — in Professor William Graham Sumner's *What Social Classes Owe to Each Other,* which was published in 1883. I quote a passage or two: [59]

> A society based on contract is a society of free and independent men, who form ties without favor or obligation, and cooperate without cringing or intrigues. A society based on contract, gives the utmost room and chance for individual development, and for all the self-reliance and dignity of a free man . . . It follows that one man, in a free state, cannot claim help from, and cannot be charged to give help to, another.

And again:

> All institutions are to be tested by the degree to which they guarantee liberty. It is not to be admitted for a moment that liberty is a means to social ends, and that it may be impaired for major considerations. Any one who so argues has lost the

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[58] MAINE, *Ancient Law* 165 (3d Amer. ed. 1873).

[59] Extracted from MASON, *Free Government in the Making* 607-8 (1949).

> bearing and relations of all the facts and factors in a free state. He is a centre of powers to work, and of capacities to suffer. What his powers may be — whether they can carry him far or not; what his fortune may be, whether to suffer much or little — are questions of his personal destiny which he must work out and endure as he can; but for all that concerns the bearing of the society and its institutions upon that man, and upon the sum of happiness to which he can attain during his life on earth, the product of all history and all philosophy up to this time is summed up in the doctrine, that he should be left free to do the most for himself that he can, and should be guaranteed the exclusive enjoyment of all that he does . . . Social improvement is not to be won by direct effort. It is secondary and results from physical or economic improvement . . . An improvement in surgical instruments or in anesthetics really does more for those who are not well off than all the declamations of the orators and pious wishes of the reformers . . . The yearning after equality is the offspring of envy and covetousness, and there is no possible plan for satisfying that yearning which can do aught else than rob A to give to B; consequently all such plans nourish some of the meanest vices of human nature, waste capital, and overthrow civilization. . . .

It is interesting to compare this new type of Natural Law, and its tremendous exaltation of individual effort, with the ancient type, which was set forth in the texts quoted in Section I of this paper. There are two differences, the first of which approximates that between a *moral* code, addressed to the Reason, and "Natural Law"

in the sense in which that term is employed by the natural sciences. The former operates *through* men; the latter *upon* men, and altogether independently of their attitude toward it, or even of their awareness of its existence. The results of its operation would therefore be of no moral significance, except for one circumstance, the assumption, to wit, that *compliance with it — whether conscious or unconscious — forwarded Progress.* Thus, according to Maine, it was *"the progressive societies"* which had heretofore moved from *status* to *contract;* while with Spencer *progressive societies* were destined to "evolve" from the *military state* into the *industrial society* — a process not yet completed, however, or the State would have vanished. In short, the laissez-faire version of Natural Law contrived, in the end, to combine the *moral* prestige of the older concept with the *scientific* prestige of the newer.[60]

The second difference can be put more briefly, although it is perhaps the more important one. The Natural Law of Cicero, of St. Thomas, Grotius — even of Locke — always conceives of man as *in* society. The Natural Law of Spencer, Sumner, et al., sets man, the supreme product of a highly competitive struggle for existence, *above* society — an impossible station in both logic and fact.

The chief constitutional law precipitate from the new Natural Law, the doctrine of freedom of contract, con-

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[60] Parts of this paragraph are taken from CORWIN, *op. cit. supra* note 3, at 198.

firms and illustrates this fatal characteristic of it. By this doctrine, persons *sui juris* engaged in the ordinary employments were entitled to contract regarding their services without interference from government; as reciprocally were those who sought their services. Endorsed by such writers as Cooley, Tiedemann, James Coolidge Carter, J. F. Dillon, and by a growing procession of state high courts headed by those of New York, Pennsylvania, Massachusetts and Illinois, the doctrine attained culminating expression in 1905 in the famous *Bakeshop Case*.[61] There a New York statute which limited the hours of labor in bakeries to ten hours a day and sixty hours a week was set aside five justices to four as not "a fair, reasonable and appropriate exercise of the police power of the state" but "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty. . . ." [62]

How was this result reached? Very simply: it was the automatic result of the conception of an area of individual action *any* interference with which by the state put upon it a burden of justification not required in other cases. On this basis the Court came to operate a kind of "automatic" judicial review, the product of which was labelled by its critics "mechanical jurisprudence." Nor is this type of jurisprudence extinct today, as I shall now point out. Its application has merely been transferred to a different set of values and interests.

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[61] Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

[62] *Id.*, 198 U. S. at 56.

V. *Natural Law and Constitutional Law Today*

In 1925, in the now famous *Gitlow* case,[63] which involved a conviction under the New York Anti-Syndicalist Act, the Supreme Court adopted tentatively the thesis, which it had rejected earlier, that the word "liberty" in the Fourteenth Amendment adopts and makes effective against state legislatures the limitations which the First Amendment imposes upon Congress in favor of "freedom of speech and press." Then in 1940 in the *Cantwell* case,[64] the Court upset a conviction under Connecticut law of two Jehovah's Witnesses for breach of the peace on the ground that the proselyting activities of the said Witnesses did not under the circumstances constitute a "clear and present danger" to public order; and since then a majority of the Court has gone to the verge, at least, of making the "clear and present danger" formula a direct test of legislation, although in the *Gitlow* case it had rejected the rule as spurious.

And what has all this to do with Natural Law? The answer is discovered when we note the rule by which the Court professes to be guided when interpreting the word "liberty" in the Fourteenth Amendment in the light of the Bill of Rights. Not all the provisions of the latter are regarded as having been converted by the Fourteenth Amendment into restrictions on the states, but only those that are protective of the "immutable principles of jus-

[63] Gitlow v. New York, 268 U. S. 552, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

[64] Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

tice which inhere in the very idea of free government"; of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; of the "immunities . . . implicit in the concept of ordered liberty"; of principles of justice "rooted in the traditions and conscience of our people"; principles, the violation of which would be "repugnant to the conscience of mankind." [65]

This is entirely in line with the Natural Law tradition. But does it suffice to elevate the rights it deals with into a *super-constitution,* so that any law touching them is *ipso facto* "infected with presumptive invalidity"? As we have seen, this is precisely what happened in the case of "liberty of contract"; and today, "liberty of contract" thus distended "is all," as they say in Pennsylvania; and may not a like fate overtake freedom of speech, press, and religion in time if the same slide-rule methods are applied to legislation touching them? I am thinking especially of such decisions as those in *Saia v. New York,*[66] *McCollum v. Board of Education,*[67] and *Terminiello v. City of Chicago.*[68] These were very ill-considered decisions to my way of thinking, and in fact the

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[65] Louisiana v. Resweber, 329 U. S. 459, 470-72, 67 C. Ct. 374, 91 L. Ed. 422 (1947), quoting from Holden v. Hardy, 169 U. S. 366, 389, 18 S. Ct. 383, 42 L. Ed. 780 (1898); Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270 (1926); Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937); Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

[66] 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948).

[67] 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

[68] ..... U. S. ....., 69 S. Ct. 894 (1949).

first of these has already been repudiated by the Court,[69] at least four of the five Justices who were responsible for it lugubriously so assert. I contend, in short, that any patent formula or device which relieves the Justices from considering relevant, however recalcitrant facts, or which exonerates them of the characteristic judicial duty of adjusting the universal and eternal to the local and contingent, the here and the now, is to be deplored. I contend further that the "clear and present danger" rule is just such a patent formula.

How are we to assess the importance of the Natural Law concept in the development of American Constitutional Law? What it all simmers down to is essentially this: while that distinctive American institution, judicial review, is regarded today as stemming from the principle of popular sovereignty, it sprang in the first instance from "common right and reason," the equivalent with men of law in the Sixteenth Century England of "Natural Law." What is more, popular sovereignty in the last analysis is itself a derivative from the Natural Law postulate, being neither more nor less than a sort of *ad hoc* consolidation of the natural right of human beings to choose their own governing institutions.

And the indebtedness of American Constitutional Law to Natural Law, natural rights concepts for its content in the field of private rights is vital and well-nigh all-comprehensive. It is, of course, true that not all of the

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[69] The reference is to Kovacs v. Cooper, 336 U. S. 17, 69 S. Ct. 448 (1949).

corollaries that the courts have endeavored to attach to their premises have survived; and few have survived without modification. Yet it is a striking fact that while hundreds of constitutional provisions have been adopted since judicial review was established, not one has ever proposed its abolition and only very few its modification. And meantime the American states have continued to incorporate in their successive constitutions, virtually without comment, the constitutional clauses — the Due Process Clause, for example — that today incorporate the principal judicial doctrines which I have traced to Natural Law bases. It is true, as I just remarked, that some of these doctrines have become extinct and others have been qualified; but invariably these results have been achieved by judicial massage, as it were — sometimes a rather rugged massage — and not by legislative or constitutional surgery.

Not that the doctrine of Natural Law itself has escaped disturbing comment at times, even from American jurists. Frequently cited in this connection is the late Justice Holmes' discourse on "Natural Law." "It is not enough," said Justice Holmes in a characteristic passage, "for the knight of romance that you agree that his lady is a very nice girl, — if you do not admit that she is the best that God ever made, you must fight"; and the same demand, he opines, "is at the bottom of the jurist's search for criteria of absolute validity." [70]

We can readily concede that such citeria may never

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[70] HOLMES, *Collected Legal Papers* 310 (Laski ed. 1920).

be established in this far from perfect, and always changing world. Yet that admission does not necessarily discredit the search; perhaps, indeed, it makes it more necessary, as an alternative to despair. Holmes, in fact, exposes himself when he goes on to advance as an argument against Natural Law that the right to life "is sacrificed without a scruple whenever the interest of society, that is, of the predominant power of the community, is thought to demand it." [71] But the answer is plain: The right to life is more than the right to live — it is also the right to spend life for worthwhile ends; and so long as one is guaranteed a free man's part in determining what these ends are, Natural Law has *pro tanto* received institutional recognition and embodiment. But, of course, it is essential to this argument that the free man's part be kept a really vital one.

Our present interest, however, has been in Natural Law as a challenge to the notion of unlimited human authority. American Constitutional Law is the record of an attempt to implement that challenge. The record is a somewhat mixed one, but it is clear that in the judgment of the American people it has been on the whole a record of successes. May it continue to be!

[71] *Id.* at 314.

NATURAL LAW AND CANON LAW

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THE NATURAL LAW AND CANON LAW

1.—In the inquiry about Natural Law which forms the object of our discussions, we have been proceeding by what I believe a highly constructive method: approaching, as it were, in a spectral analysis the central problems connected with the concept and function of Natural Law from the various angles as presented by the specific problems existing in various given legal orders: Constitutional, Common, International Law. Most appropriately so: for the science of Natural Law, like all knowledge in the realm of practical reason, deals with human acts and cannot be construed, *more geometrico,* in an abstract, strictly speculative fashion, i.e. without the empirical data of actual human relations and social compounds. The *concept* of Natural Law, it is true, taken in its strict sense as the principles which are immediately given by the rational and social nature of man, has its own reality, "exists" in the intellectual order in the manner of Universals; yet in the practical order it can exercize a normative function as *regula et mensura* only by some relation to the contingencies of man's social existence here and now:[1] and these contingencies are many and changeable. They are the subject matter of *positive* law in all its va-

[1] Cf. J. Leclercq, *Le fondement du droit et de la société* (Leçons de droit naturel I; 3 ed. Namur-Louvain 1948) 55; H. Rommen, *The Natural Law* (St. Louis-London 1948) 187, 216.

riety and relativity, and it bespeaks the wisdom of the mediaeval schoolmen that they were satisfied with philosophizing about the essential relations of all positive law to the natural, rather than dreaming of a Natural Law which would rule human social behavior once for all as a perfect code in minute detail, and thus make all positive law superfluous by absorption; or rather than removing Natural Law to the ever unattainable, rarified spheres of a transcendental ideal. It is because of the *real,* we may even say the necessary, correlation between the natural and the positive order that a mode of inquiry which investigates the former through the data of the latter is very much of the lawyer's, not only the philosopher's concern.

2.—Because of this correlation we are entitled to speak about Natural Law and Canon Law. In doing so, we are inquiring not about the right reason of a given legal institution or set of rules concerning one partial aspect of social relations, but about the right reason of a legal order as a whole: a body of laws which considers the whole of a society and its parts, its ultimate ends, partial ends, and means, in their coherence and interconnections, and does not seek or require its justification from any other scope or form of social existence. Canon Law, the legal order of the Catholic Church, comprises the principles and rules governing the function of the Church as a social body of its own right and with regard to its specific ends, which cannot be absorbed by the ends of the body politic or of any other society. Whatever the actual relations of

Church and State in a given country — and they may be persecution, indifference, separation, privileged status, establishment, etc. — Canon Law is never a department of any other legal order, because it transcends the order of the state inasmuch as the spiritual existence of man is not part of his civic existence. This remains true even where Church government and political government coincide, as in the Papal States before 1870 and in the State of Vatican City today; or where the political government, by virtue of concordat or by encroachment, controls part of the ecclesiastical life: neither the civil law of Vatican City nor the state laws of a given country on matters ecclesiastical are Canon Law.

I — *The Church*

3.—The existence of Canon Law is a unique phenomenon in the world of laws because of the unique nature of the Church: a society of divine origin by its institution, yet human in its bearers of authority, which is a stewardship of the divine authority of Christ Himself perpetuated; ordained towards a supranatural end and yet organized in the form of a visible community with its government, legislation, courts, means of enforcement, property rights, diplomatic relations, etc.; empowered with the administration of God's graces through the instrumentality of matter and form in the sacraments, the Church is incommensurable with all other modes of social existence.

It is necessary to realize the unique character of the

Church in order to grasp the meaning of Canon Law. There has been, through all ages, the voice of those who contend that any legal order is contrary to a so-called "true" conception of Christianity. The communion of saints, they say, is an entirely spiritual fellowship of the elect, incompatible with the concept of organization, authority, law. There can be no other law but the bond of charity, no other authority but the free breathing of the Holy Spirit which guides the faithful in a holy, anarchical enthusiasm. Law, as a principle of obligation by authority, is declared contrary to love. This conception rests — it is perhaps not superfluous to repeat it — on a misunderstanding of all terms used. The notion of law is narrowed down and depreciated, because all law is here conceived as an arbitrary, voluntaristic command (in the legislator); as pertaining merely to the base world of material goods and relations (in the object); as being obeyed only in compulsion and fear (in the subject). Correspondingly, the absolute dematerialization of the concept of the Church into a mental attitude, a common feeling of spiritual union, opens up an unbridgeable chasm between religious and social existence, between the spiritual and the created world. It must ultimately lead to the denial of the unity of being, of the reality of the sacraments, and of the hypostatic union of the two natures in Christ.

On the other side, we should not forget that there is also the opposite danger of overstressing the social form at the expense of the supranatural end on which the

Church is founded. This trend may be observed, e.g., in the early Middle Ages, when parishes, abbeys, and bishoprics came more and more to be considered as objects of a quasi-feudal tenure in which the spiritual office was reduced to a mere appurtenance of the material rights of the incumbent, until the Gregorian reform restored the canonical concept of sacred offices. Or we may cite the curialism of the late Middle Ages, in which the vast apparatus of papal administration degenerated into a bureaucratic, legalistic, fiscal machinery functioning for its own material ends, and thus contributed to precipitate the great crises of the conciliar movement and the ultimate breakdown of Christian unity in the Protestant revolution.

4.—I have contrasted the excesses of spiritualism and legalism in order to make understood the complex and unique nature of Canon Law. The problem of Natural Law and Canon Law has, consequently, certain aspects which elsewhere are not found, or not found in a like manner. This is true, first, of a very fundamental question that is easily overlooked when the congenital difference of the Church's legal order from any secular legal order is not kept in mind: namely the question of how it it possible to speak of a *natural* law in an order which by its origin, first principles, and ends, belongs to the sphere of the supranatural. Is there not a serious difficulty of measuring the incommensurable? The question leads to a number of interesting observations:

(a) There is no doubt that the supranatural cannot

be explained by, or deduced from the natural. The supreme jurisdiction of the Pope as the Vicar of Christ, as well as his power to define theological truth and command its acceptance with a binding force for every Catholic conscience, are not within the grasp of natural reason. Nor is the power of bishops to confer orders; nor the fact that through the ministry of men, namely priests, sins can be forgiven; nor that there should be any difference of rights between the laity and the clergy, and within the clergy, a hierarchical gradation of (sacramental) powers of orders, or of powers of jurisdiction. And yet, the whole body of Canon Law rests on such supranatural foundations, which can be accepted by reason only when reason, in the act of faith, accepts the fact of divine revelation as the source of the constitutive law of the Church. In other words, in the law governing ecclesiastical society, there is a fundamental part, the "divine positive law," which is *beyond* natural law even as the very end of the Church, the eternal salvation of souls, is beyond the natural faculties of man. But what is beyond nature is not therefore contrary to, or destructive of nature: the identity of God the Creator and God the author of the economy of salvation precludes the possibility of any contradiction between the supranatural and the natural order. Faith is not irrational, theology does not nullify philosophy; the supranatural law presupposes, includes, and perfects the Natural Law.[2] It is no paradox, then, if we say that in the supranatural elements of the Church's

[2] St. Thomas Aquinas, *Summa theologica* 2.1 q. 99 art. 2 ad 1.

constitution the Natural Law reappears, as it were, on a higher plane and remains valid. For example, a person not having the use of reason could not become Pope; nobody can be validly ordained against his will; a confessor cannot impose the commission of a crime or the fulfillment of impossible acts as penance; there can be no sacrament of marriage between infants, etc.

(b) Upon the supranatural foundation, the law of the Church is built in detail by the proper ecclesiastical authority which, by definition, is a human agency though instituted by divine law. Ecclesiastical laws are man-made, and while ultimately ordained for the better attainment of the supranatural end of the ecclesiastical society, (hence, *sacri canones*), they are not supranatural as means towards this end. Nor are they always *directly* connected with the end of salvation. In order to fulfill its supreme mission, the Church can and must also provide for the proper functioning of the social body as such, e.g. for the lawful and honest administration of the material means she needs; for the just and orderly settlement, by forms of legal procedure, of conflicts between the members of the society; for the protection of honor and legitimate personal rights (e.g. the right to separation of bed and board; the observation of forms in the removal of pastors, etc.). Positive ecclesiastical law, therefore, in its object is not restricted to a mere filling-out of details of the divine institution (hierarchy and sacraments); but it also regulates matters that in any way are reasonably connected with the preservation of those

common and individual interests which in the *natural* order belongs to the being of the Church *as* a society.[3] All such law, like human law in general, results from historical growth under changing historical conditions: it is changeable, it may fail of its purpose, it may prove an outright mistake, or become impractical by later developments. There can be little doubt about the role which the dictates of natural reason have to play as a rule and measure in making and applying such positive ecclesiastical law.[4]

5.—Another singular aspect characteristic of Canon Law in its relation to Natural Law consists in the possibilities for the Church to realize the *unity of the moral and the legal order.* The fact that all genuine law, secular or ecclesiastical, is part of the wider realm of the moral order is not under discussion here. But it is also clear that the legal norm and the legal judgment, in that it measures the human act primarily in its external, social relevance, is narrower in its scope than the moral judgment, for which the social value of acts is only one, and not the foremost criterion. For instance, (a) the act of the will which does not manifest itself in the outer world remains beyond the reach of the legal order; (b) even an

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[3] *Contra* P. Fedele, *Discorso generale sull'ordinamento canonico* (Padua 1941); but see A. Van Hove, *Prolegomena* (Commentarium Lovaniense in Codicem iuris canonici I.1; 2 ed. Malines-Rome 1945) 45, 61 n. 3.

[4] Examples for historical change in positive laws that are destined to fill out the divine law are amply supplied in the history of papal elections; or of the form prescribed by the Church for a valid sacramental marriage. As to laws of a purely social content, one may recall the historical changes in the canonical rules of court procedure.

act or fact in the external world (and which therefore falls under the rule of the substantive law) remains practically beyond the reach of the legal order if it cannot be ascertained by sufficient evidence according to adjective law, or if it is not actionable (e.g. where the doctrine of estoppel applies); (c) legal effects may result from the mere verification of conventional formal requirements (as, e.g., in a promissory note; in judgment by default; in presumptions and fictions of law).

In such cases of discrepancy between legality and morality, the limitations of every legal order become evident. But while the power of secular society stops at this point, the Church's authority reaches beyond it. (a) It includes the authority to *teach* dogmatic and moral truth in a binding manner, which creates a true obligation for the faithful to accept the teaching—the power of magisterium, which belongs to the hierarchy — so that moral precepts may even take the form of positive law.[5] (b) It includes the power of jurisdiction over human acts in the internal sphere, the "court of conscience," of which the administration of the sacrament of penance is the foremost, but not the only application. (This power is jurisdiction not only in a figurative or analogous manner of speech. Note that valid sacramental absolution requires powers of order *and* jurisdiction, which latter is given either by law or delegated by concession from the legiti-

[5] For example, *Codex iuris canonici* (1917) canons 124, 415 § 5, 643 § 2, 892 §2, etc. (in subsequent footnotes, references to the Code of 1917 will be given by canon and number only). Cf. P. Ciprotti, *Lezioni di diritto canonico* (Padua 1943) 41, 62f.

mate authority.[6]) Now, in the confessor's power to bind and loose, the absolute measure applied is the moral norm, and while the essential effect here regards the relation between the individual and God (regardless of whether the matter of the norm is a duty towards God, self, or other men), thus transcending the legal order, it is in many respects connected with the external sphere of law: Canon Law regulates the valid exercise of internal jurisdiction; the internal forum safeguards the observation in conscience of the norms of Canon Law; absolution from, or retention of sin touches upon the baptized individual's right to the reception of all other sacraments; an obligation imposed in the internal forum (e.g., restitution of ill-gotten gains or rights) can restore the social order where the external power of law is ineffective (e.g., because of lack of proof); sacramental absolution from censures imposed judicially or by operation of law has certain effects in the external forum.[7]

Through the magisterium, and in the internal forum, wide avenues for the realization of Natural Law are opened to the Church's jurisdictional power. For, the natural *moral* law is one *(lex naturalis);* moral norms which deal with the matter of just *social* relations *(ius naturale)* are an integral part of it: the possibility of conflict between

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[6] Canon 872ff. The Pope and the Roman Cardinals hold this jurisdiction by law for the universal Church; bishops, pastors, and certain other priests, for a limited territory; and certain religious superiors, for their own subjects (can. 873).

[7] Cf. can. 2251. For the effects in the external forum of certain (non-sacramental) dispensations given in the internal forum see can. 1047.

morality and law, as it exists on all levels of the positive legal order, is cancelled on the level of the natural order. Hence, in all matters of what is morally due between man and society, the authoritative interpretation of moral truth (magisterium) includes interpretation of Natural Law; equally the overriding of all legal limitations and formalisms by the moral judgment in the court of conscience becomes application of Natural Law.

II. — *Natural Law*

6.—From all our preceding observations it becomes understandable that the problems of Natural Law have at all times been of vital interest for canonical thought. It is not by coincidence that the scholastic philosophy of the thirteenth century is largely indebted to the spadework done by the preceding generations of canonists on the doctrine of Natural Law. The opening section of the book which marks the beginning of a science of Canon Law, the *Concordia discordantium canonum* of the Bolognese monk Gratian (c. 1140 A.D.)—the book which for centuries was to remain the definitive compilation of the ancient and early mediaeval strata of Canon Law, and which for the first time subjected the immense mass of canonical legislative materials to the scientific principles of analysis and discovery—is dedicated to a discussion of natural and positive law. On the basis of his somewhat imperfect dicta the early commentators of Gratian's text probed into nearly all the aspects of the problem which were to become topical with the schoolmen: the concept

of Natural Law, the various meanings in which the term is often loosely employed; the place of Natural Law in the structure of the human mind; its contents, application, and relation to man-made law; how its immutability, universality, indispensability, and normative function are to be understood; how it operates in the fundamental data of social life, etc. The wealth of the pertinent contributions of the early canonists, especially in the century preceding St. Thomas, is to the present day far from being fully explored and analyzed, although the fact of their early leadership in the field is not unknown.[8] For the degree to which later generations of canonists (after the leadership had passed to philosophy and theology) were conversant with all the facets of the doctrine of Natural Law, every major treatise on Canon Law through the centuries bears witness.

It could, indeed, not be otherwise. The secular lawyer should not, but can, unfortunately, be forgetful of the existence of a metaphysical order of being: confiding blindly in the forces of convention, political balance and all the external props and stays of the secular order—which indeed may seem strong enough at times to make states function (though badly and aimlessly)—he may be tempted to be satisfied with the working hypothesis of

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[8] An excellent beginning of studies in this field has been made by O. Lottin, *Le droit naturel chez St. Thomas d'Aquin et ses prédécessseurs* (2 ed. Bruges 1931). A full investigation of the historical problems involved would also have to take into account the teachings of the mediaeval authors on civil law, cf. G. Onclin, "Le droit naturel chez les Romanistes des XII[e] et XIII[e] siècles," *Miscellanea moralia in honorem A. Janssen* (Louvain 1948) II, 329-37.

legal positivism and all the -isms derived from an agnostic philosophy. The canon lawyer, if he were tempted to think on such lines, or if he would consider Natural Law only as an idealistic "postulate" of his religious belief,[9] would find himself in an empty abyss, because the *Church* cannot even be *thought* without the reality of an ontological order. If natural reason does not exist, or if it is unable to form valid judgments on moral truth, then the entire supranatural order becomes either a tyrannical whim of God or a figment of the human mind; the Church, consequently, would become a social entity which exists either by irrational magic, or as a brazen lie; in either case it would have no reality *as* Church. Positivism is, therefore, *per se* impossible in Canon Law.[10]

7.—Equally impossible for Canon Law is any proposition which conceives of Natural Law in a purely "naturalistic" or "rationalistic" sense; i.e. which either supposes that human *nature* is altogether opposed to, and logically and historically antecedent to reason and social order (the theological properties of Adam's "natural" state before the Fall are not in question this theory); or that human *reason* is entirely self-determined, self-sufficient, unrelated to, or even opposed to religion. For the canonist, human

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[9] This is, surprisingly, the attitude of H. Singer, "Das Naturrecht im Codex juris canonici," *Archiv für Rechts- und Wirtschaftsphilosophie* 16 (1922-3) 206-15.

[10] The maxim sanctioned by Pope Boniface VIII, "The Roman Pontiff is considered to have all laws in the shrine of his heart" (*Liber Sextus* 1.2.1) does not imply any shade of positivism, but expresses the doctrine that the Pope always acts in full knowledge of the law; cf. F. Gillman, in *Archiv für katholisches Kirchenrecht* 92 (1912) 3-17.

nature cannot be but rational and social; and rational nature (or natural reason) in man cannot be but *created.* This statement, we must emphasize, does not require an act of supranatural faith: although it becomes inescapable in the light of faith, it remains attainable on the level of the philosophical principle of causality which admits an uncaused cause of being. Otherwise, Natural Law would not be knowable to man without faith.

The power of natural reason to form judgments in the practical order, i.e. to proceed from the "is" to the "ought" stems from the ultimate cause of reason; the act of reason (the judgment) does not make, but find what is right. Both as a cognitive principle and a normative rule and measure Natural Law refers back, therefore, to the author of the objective order of things and of the rational nature of man. In this sense we have to understand all formulations which speak of the Natural Law as "inborn," "laid into," "impressed upon" the human heart or mind; or as "participation of human reason" in the eternal law governing the Universe. Without going into details about the differentiation between the neo-Platonic-Augustinian tradition behind the notion of "imprint" and the Aristotelian-thomistic conception of "participation,"[11] we can perceive the convergence of both in their stating the *divine* origin of Natural Law; i.e. in stating Natural Law as that part or mode of divine law which, without requiring supranatural revelation, is within the ken of, or

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[11] Cf. Lottin, *op. cit.* n. 8 *supra,* 68ff.

co-natural to, human reason—a corollary to the possibility of a natural knowledge of God.

The double dichotomy, divine (natural or positive)—human ecclesiastical law, has thus become the fundamental frame, almost from the beginning of canonistic science, for describing the sum total of law governing the Church. I say, almost from the beginning: because clearness in distinguishing the natural from the supranatural divine order was not immediately achieved. In the opening sentences of Gratian's work we read that "Natural Law is what is contained in the Law [of the Old Covenant] and the Gospel: whereby each is bidden to do unto others what he wants done to himself, and forbidden to inflict upon others what he wants not to be done to himself; wherefore Christ says in the Gospel . . . " Though farther on Gratian redefines his concept and speaks of Natural Law which "begins with the beginning of rational creatures";[12] he insists that not all commandments of the Old and the New Testament are of Natural Law,[13] and differentiates somehow between the "divine laws" and the "canon of scriptures,"[14] his terminology of natural and divine laws remains always fluctuating. Only gradually did the next generations of canonists arrive at the correct interpretation: eventually they recognized that precepts of the natural moral law are included in the revelation of the Old and the New Testament not by way of reveal-

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[12] Gratian, *Decretum,* dist. 5 princ.
[13] Ibid. dist. 6 fin.
[14] Ibid. dist. 9 fin.

ing supranatural truth; i.e. that the quality of Natural Law *as* natural is not due to revelation but to reason.[15]

III — *The Function of Natural Law*

8.—Divine natural, divine positive, human ecclesiastical law: only when we proceed to determine their *functional* relation, when we leave the field of abstract definitions and enter the much more complex field of practical realizations of Natural Law *in* the juridical order, can we grasp the all-important fact that the Natural Law doctrine is not a mere theory of a static, rigid, hierarchical structure of legal orders, but a *living force* in the legal life of the Church. What does it mean, we must ask, that Natural Law (as we read in every text book) has the force of law *(viget)* in the Church; that human positive law cannot prevail against it (or else, it ceases to be law); that statutory law is to be made, interpreted, and applied in accordance with it? Both a guiding ("in-forming") and a critical function is assigned to Natural Law in such statements; and all the more one must be on guard against the idea as though Natural Law were a code of hard and fast rules, existing, as it were, on the second story of the building above the first floor of positive law. If we ask what Natural Law contains and how it is knowable; if we further ask whether the legal order of the Church

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[15] Cf. the texts quoted by Lottin, *op. cit.* 13-23; 105-111. But note that Pope Gregory IX as late as 1234 uses the term "natural law" as synonymous with "divine law," and as distinct from the dictates of reason: *Decretales* 1.4.11; cf. Van Hove, *De consuetudine* (Commentarium Lovaniense I.3; 1933) 81ff.

may more directly and eminently "bring out," or "realize" this or that aspect of Natural Law, we must always be on guard against such "positivism of Natural Law"—or else the canonist might easily be led to take the textbooks and case books of moral theology for *the* Natural Law, a sort of super-code. This is no less a danger than the opposite notion of Natural Law as a merely formal "postulate" without any material contents.[16]

The observation is age-old that in Natural Law not all judgments, or precepts, or rights are evident to the same degree. Between the absolutely good and the absolutely evil act there is the immense sphere of the "relative," the indifferent, the contingent, and the complex, where the simple statement that the act acquires its goodness or badness from its end leads only to the further question of proper ends, proper means, and how to establish a right relation in the multitude of ends, values, interests, goods, and rights. The judgment of right reason is therefore anything but a judgment of "simple reason," unless we want to restrict the subject matter of Natural Law to what is evident to children, or self-evident. Man *as* man is never in the absolute (as far as the law is concerned) but always in concrete relations. To judge whether the concrete situation is just or unjust requires always a varying number of considerations and ratiocinations, *for us* to perform. Some of these situations are given with social life as such; but we must insist that even in regard to the most fundamental, to Life itself, the Natural Law does

[16] G. Renard, *La philosophie de l'institution* (Paris 1939) 28ff.

not consist of a simple formula, "killing is bad," "not-killing is good." What about self-defense? Just war? Capital punishment? Would we not reject, e.g., a legal order as against Natural Law which excludes the right of self-defense? Both the fifth commandment and self-defense are of Natural Law; yet defense can be excessive (as in the case of a harmless aggressor; of a trifling object; of inadequate weapons); again, the excess may be caused by overwhelming fright, etc. The *ratio naturalis* consists of one all-comprehensive judgment only, but in a given case its formulation may rest on a chain of conclusions which positive law will have to express by a number of rules and exceptions. It cannot be said, e.g., that of the different treatment given by different penal codes to excess in self-defense, one or the other must be "against" Natural Law. And the more we get away from the fundamental facts and forms of life into the relations existing in highly organized society, the more the technical, conventional regulation enters into the proper determination of wrong and right. What is Natural Law in regard to the buying and selling of shares on the stock-exchange? Or to the ordination of a cleric outside his home diocese? It would be folly to expect in such situations a detailed answer from "pure" Natural Law, or to say that a given set of rules in such situations is the only possible determination of Natural Law.

The functional relation of Natural Law and positive law may perhaps be best expressed thus: the closer a legal situation or institution is to the fundamental facts of hu-

man social life, the greater becomes the *evidence* of Natural Law; the more contingencies are involved, the more must be left to positive determination of the legislator, which in itself has the value of securing social stability, whereas leaving the determination to individual reasoning would destroy the end of society as an *order*. Every honest and sincere attempt of the lawmaker to rule in a manner consistent with the end and meaning of a given institution, with the implied possibilities of a given situation for the end of society itself, is still "of" Natural Law, "within" Natural Law.[17] The "participation" of positive law in Natural Law is a participation by "non-contradiction," and also by a process of approximation, which includes the notion of perfectibility, of the openness of reason towards better reason.[18] Natural Law remains one and universal in all its infinite diversifications; but our grasp of it can grow the more we are able to express the universal by a formula which covers the particular.

9.—This differentiation of degrees of evidence of Natural Law has been expressed in many ways in the history of canonical and philosophical or theological thought. The

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[17] For instance, duress vitiates every act somehow in Natural Law. But the act may in positive law be valid and rescindible (can. 103 § 2); valid and partially rescindible (thus in Holy Orders received under duress, can. 214); or invalid (thus in matrimony, can. 1087). In delicts committed under duress, imputability may be excluded (can. 2205 § 2; 2229 § 2), diminished (can. 2205 § 3), or fully sustained (can. 2229 § 3 n.3).

[18] For instance, antecedent impotence is a marriage impediment of Natural Law; yet the Roman Church preferred till the twelfth century the "custom" according to which in this case the couple, once married, was bound to continue common life "as brother and sister."

early canonists contrasted the "precepts and prohibitions" with the mere "demonstrations" or "permissive Natural Law;" again the distinctions of necessary and convenient, mandatory and advisory, antecedent and hypothetical Natural Law are found. Such antinomies as "by Natural Law everything is common"—"by Natural Law there is property of individuals" led to a great variety of solutions: authors spoke of an original communism before the Fall versus the later division of mine and thine (here we have even Natural Law referred to a primordial "natural state"); or they referred the first proposition to the state of necessity, when all *becomes* common by Natural Law, etc.[19] All such distinctions are of great heuristic value; so is in particular the thomistic formula for Natural Law. Starting from the analogy of speculative reasoning, St. Thomas finds in Natural Law certain first principles on the level of self-evident propositions, wherefrom secondary conclusions are deducible, and so on down to those rules which are left to be determined by the legislator's prudence in positive law.[20] But one should note that St. Thomas insists that the syllogisms of practical reason are not of the same cogency as those in the speculative field. Recent French theologians have warned very appropriately against forgetting that the thomistic formula of first principles and secondary con-

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[19] Cf. the texts in Lottin, *op. cit.;* especially Huguccio (ibid. 110); also the *Glossa ordinaria* on Gratian dist. 1 c.7 v. *communis omnium.*—W. J. McDonald, "Communism in Eden?" *New Scholasticism* 20 (1946) 101-25.

[20] *Summa theol.* 2.1. q.94 art.2, q.95 art.2. The distinction is to a certain extent anticipated in St. Albert's trichotomy, essential—suppositive—particular, cf. Lottin, *op. cit.* 46, 118.

clusions was coined as a heuristic method of analogy and does not denote degrees in the *being* of Natural Law.[21]

10.—Can we deduce from such formulae as "approximation," "degrees of evidence," "principles and conclusions," etc. any guidance for the legislator and for the jurist? The following points seem to be of especial importance:

(a) the principle of caution against absolute fixations whenever the dictate of natural reason is not absolutely evident. The test of a law (of its being "informed" by, "participating" in, Natural Law) lies not in the normal cases contemplated by the lawmaker, but in the unusual, the unforeseen, the extreme possibilities. The more the law provides for the contingency of the unforeseen by a flexible rule, the closer will it be to Natural Law. Also the general maxims *(regulae juris)* which jurisprudential experience since Roman times has helped to formulate as means of guidance for interpretation of law, are never to be taken as definite fixations; they can fail in the particular case, admit of exceptions; and already the wisdom of the ancients warned that *"non ex regula ius sumatur, sed ex jure quod est regula fiat."*[22] Each rule is an abstraction and has itself a high validity as approximating natural reason, but

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[21] Cf. Lottin 103; Leclercq, *op. cit.* n. *supra,* 59-61; Renard, *op. cit.* n. 16 *supra, passim.*

[22] *Digest* 50.17.1.

precisely in its general formulation lies the danger of doing injustice to the individual, irregular contingency. The perfect balance of natural justice is not reached when the general is mistaken for the universal.

(b) the principle of finalistic, instead of formalistic thinking. The lawgiver (and the jurist as well who applies the law) has to determine his conclusions by considering the *end* of a given institution,[23] the intrinsic *"logique de l'institution"* on which he rules *(natura rerum);* and equally the end of the legal order itself, the common good. The canonist, in particular, will have to look even beyond the common good and the stability of order in ecclesiastical society, towards a supreme end, the salvation of souls.

11.—If we contemplate Canon Law in its history and as it is at present embodied in the Code of 1917, we find that the canonists' concern about making the positive serve the Natural Law is something very real. Canonical legislation has been historically leading, e.g., in assigning legal force to informal agreements which were not actionable under the forms required for contracts by the civil law; or in enforcing the right to self-determination in choosing one's spouse, as against parental domination or restrictions of status. In its utmost care to have penal

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[23] For the various interesting approaches of the twelfth-century writers on civil law in discussing this problem, see E. M. Meijers, "Le conflit entre l'équité et la loi chez les premiers glossateurs," *Tijdschrift voor Rechtsgeschiedenis* 17 (1940) 117-35.

liability never go beyond the inner moral responsibility, today the Code goes farther than the most secular legislations by considering, e.g., ignorance of law as excluding guilt, and any deficiency on the part of the will or the intellect as excusing from certain penalties.[24] The constant admonition of the Church to judges, that they impose penalties as ultimate means of making discipline respected and of effecting emendation of the recalcitrant, rather than as retribution, marks another point in which Canon Law has led the way to principles of criminal justice which by now have become the heritage of the legal civilization of the West.

We can hardly open a page in the Code without finding this concern for realizing ends that lie beyond legal formalism; for limiting the normal effects of the law to the normal cases and leaving an open margin for the cases where "urgent need," "just cause," "reasonable cause," "grave inconvenience," "spiritual danger," etc. make the rigidity of the normal rule inappropriate for its purpose. The very extent to which *dispensation* from the common law is provided for as a corrective principle in the legal order of the Church is a unique feature: again, in this field we have the significant further "valve" that in urgent cases a local authority might, without delegation, exercise rights of dispensing which belong to the Holy See alone.[25] In the same vein we find such laws as that which permits the administration of sacraments

[24] Canons 2202, 2229.

[25] Can. 81.

even by an excommunicated priest in certain cases of need.[26] We find the legal construction of supplied jurisdiction in cases of common error—i.e., where jurisdictional acts are posited by a person commonly but erroneously believed to have jurisdictional power: the ever-latent jurisdiction of the Church Universal is substituted here to convalidate the act.[27]

12.—Behind these examples we can see how strong the ecclesiastical law-giver's wish is to achieve *equity* within the canonical order, to establish the balance between generalization and individualization that characterizes the "right reason" of Natural Law. Particularly revealing is one of the rules which the Code gives to the judge in cases where he is called upon to fill a possible *lacuna* of the positive law, to substitute for the legislator: he has to proceed according to the *general principles* of law applied *with canonical equity,* i.e. tempered with the equity proper to Canon Law.[28] This is not a mere rhetorical formula but a clear statement which says: not in the general rule alone, nor in a subjective, vague individualism alone, but only in the interpenetration of two apparently contradictory principles can the judge discover what is the true law in the case—: an unusual situation, to be sure, but precise-

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[26] Can. 2261.

[27] Can. 209. On the antecedents of this rule in Roman Law, cf. F. A. Wilches, *De errore communi in iure romano et canonico* (Rome 1940).

[28] Can. 20. The rule has been amply discussed among recent authors; for the numerous problems involved see in particular Ch. Lefebvre, *Les pouvoirs du juge en droit canonique* (Paris 1938); G. Michiels, *Normae generales juris canonici* (2 ed. Paris-Tournai-Rome 1949), I, 608-25.

ly as such a guide to the "mind of the legislator." Equity as a remedial norm of natural justice for the judge in his application of the law is mentioned several times in the Code; it is generally understood as a principle of interpretation, and has historically influenced English Equity in its origins. Equity, finally, can in exceptional circumstances effect the non-application of positive law *(epikeia)*: when the latter, in a given case, would lead to defeating its own end (i.e. lead to a result *contrary* to the lawgiver's will), it becomes unreasonable and must by Natural Law cease to bind. In urgent cases, with all due caution, even the individual is allowed to solve such a conflict, i.e. to decide that the lawgiver, had he foreseen the situation, would not have included it in the general rule.

13.—We may thus say that Canon Law, by its eminently supple, flexible features, is particularly close to Natural Law. It is, however, equally true if we add: Canon Law is *also* particularly close to Natural Law because of its eminent stability and uncompromising firmness where the absolute moral truth is in question, i.e. where the highest degree of evidence of right reason has been reached and there is no longer a question of "finding" what is conformable to Natural Law, but of accepting the order of Natural Law that is known without legislative determination. The ecclesiastical lawgiver cannot change anything in the essential properties of institutions that are connatural to Man as man: in conforming to truth there is no question of "progressive" or "conservative" but only

of right or wrong stands. The position of Canon Law on the unity and indissolubility of marriage is a case in point. In the union of sexes the fundamental distinction betwen the institution of marriage and the instinct of mating, is, quite apart from revelation, the "rule and measure of reason." It is because of a rational grasp of the "logique de l'institution," of the givenness of the family as the cell of society, and not because of conservatism, that Catholic doctrine on marriage as such, and hence Canon Law, does not yield to the specious rationalism that would assimilate the contracting of marriage to any other contract that might be terminated at will (in the terms of St. Thomas, this would run counter to a first principle) or for cause (this would be against a secondary precept). There are a number of valid reasons of natural justice that demand the right to discontinue an unbearable community of bed and board: nobody has yet been able to show how in the natural order these *reasons* could cover up the desire of *passion* to replace the consummated bond by a "happier" one.

That much may be conceded that in no other field of human acts does reason have so hard a stand against the fallacious rationalizations of elementary urges, or finds itself in a greater *psychological* need of supranatural help, as in the relation betwen man and woman. Canon Law has the invaluable advantage of seeing, in the light of faith, the natural properties of marriage re-enforced and heightened, on the sacramental level, by positive divine law. The principle that revelation cannot contradict, but only perfect the natural order of creation means not only

that Natural Law continues undisrupted in the sacramental marriage (e.g. in the legitimacy of children from putative marriages; in the absolute value of the interior act of the will for the validity of the marriage consent) but also that the judgment of vulnerable, natural reason is strengthened to attain an absolute degree of knowing the dictate of Natural Law.

IV — *Natural Law Terminology in the Code of Canon Law*

14.—The interpenetration of the natural, the supranatural, and the positive order, so impressively set forth in the institution of Christian marriage, actually underlies the Code in its entirety. It is of relatively small interest where and when Natural Law is expressly *mentioned* in the Code. Since the essential foundations of Canon Law on divine (positive and natural) law is an axiomatic truth, there is, strictly speaking, no need to mention it at all in positive legislation, the more so since the Code professes at its outset[29] that rules of Natural Law and positive divine law remain valid whether expressly restated or not. It has therefore only the secondary significance of cautioning against possible misunderstandings when elsewhere it is said in particular that no custom can prevail against divine law, positive or natural;[30] that there can be no prescription (adverse possession or statute of limitations) against rights that exist by Natural Law or posi-

[29] Can. 6 n.6.

[30] Can. 27.

tive divine law;[31] or that in the matter of contracts or of settlements (in and out of court) the Church follows the secular law of the respective countries except where such law is contrary to Natural Law or positive divine law (or where Canon Law positively rules otherwise).[32] All these restrictive clauses are self-evident on the principle of "non-contradiction": man-made law ceases to be law where it would violate Natural Law, which is always understood without having to be stated. The Code does not mention, for instance, the cessation of law in the case of *epikeia.*

15.—Similarly, it is evident and needs no restatement by the legislator that ecclesiastical authority cannot *dispense* from what Natural Law prohibits. The matter is of great practical importance in regard to marriage impediments, of which some, but not all, have their origin merely in the authority of the Church to impose reasonable restrictions on the freedom to marry. The Code terms only impotence as an impediment of Natural Law, but does not use Natural Law terminology in regard to the impediment of the consummated bond nor for even the nearest degree of kindred.[33] Yet it is not the terminology of the canons which determines the character of the impediment; and while the Church has wisely reserved to the supreme magisterium (of the Pope alone or the Ecumenical Council) the power to issue an *authentic* declaration whether a given marriage impediment has its origin in

[31] Can. 1509 n.1.
[32] Can. 1529, can. 1926.

divine law (natural or positive)[34]—in this connection one may remember the disastrous consequences of Henry VIII's case—the Code is certainly far from intending to say that impotence is the *only* impediment of Natural Law.

16.—It is the same with Natural Law and the *exercise of personal rights.* What is allowed by positive law ceases to be allowed where the exercise of a right runs counter to Natural Law. Only one such case is expressly stated in the Code: when permission is granted by ecclesiastical authority to read prohibited books, the person remains bound by natural law, i.e. the natural moral obligation to avoid books which *for him* constitute a proximate spiritual danger.[35] This decision in conscience (a counterpart of *epikeia*) is mentioned by the legislator; but the same principle is understood where it is not mentioned in regard to other rights. A traveler, e.g., is not bound to observe local laws made for the territory in which he temporarily sojourns: clearly the traveler's right ceases not only where the positive common law so declares,[36] but also by Natural Law; notably, if by exercising his right he would cause genuine scandal, i.e., cause others to sin.

17.—Sometimes the legislator refers to Natural Law in order to stress the *gravity of an existing obligation,* e.g.

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[33] Canons 1068, 1069, 1076.

[34] Can. 1038.

[35] Can. 1405.

[36] Can. 14 n.2: in the case of local laws made for reasons of public order or determining the solemnities of acts.

in the statement that the right to denounce a crime to the proper ecclesiastical authorities becomes a duty of Natural Law where faith, religion, and the common good of the Church are in danger, or where, quite generally, a grave public evil threatens.[37] The emphasis on Natural Law will serve here the purpose to dispel a hesitancy that often may arise from the instinctive aversion against becoming an informer. But all other duties by which an individual is bound to act so as to avert danger to the common good are equally of Natural Law without being expressly so stated: in denial of justice, e.g., the judge violates not only the positive law of the judicial office, but Natural Law as well.

18.—Natural Law finally is mentioned twice with regard to the *acquisition of temporal goods*: the Code states that, as to the mode of acquiring property, every just title of Natural or Positive Law that is valid for others is also valid for the Church;[38] secondly, that every one who by natural or ecclesiastical law is capable of disposing of his property can make a will or gift in favor of a pious cause.[39] In the first case, the Code does not speak of the Natural Law problem of property as such, but merely adopts an old distinction current in the schools, namely that some *titles* to property would exist "by the nature of things" without any positive legislation (occupation, fruits of labor or productive property, etc.)—which does not

[37] Can. 1935 § 2.
[38] Can. 1499.
[39] Can. 1513.

mean to say that these are absolute, "indestructible" titles withdrawn from the authority of restricting legislation; the Natural Law terminology is used here simply to include every possible just mode in which every one can acquire property.[40] In the other instance, reference to the capacity by Natural Law to dispose of one's property is not meant to state an "inalienable" right of disposing by will or gift, or of having one's will executed; it is only a reference to the natural limits of the capacity to posit acts-in-law, namely the use of reason: within these limits, possible restrictions of the freedom of disposal will be considered only when they are established by Canon Law (e.g. in minors and religious) while restrictions by state laws leave the canonical validity of the disposition untouched.[41] Again, the Natural Law terminology is strictly speaking not necessary (in other contexts, where the use of reason as the basic requirement for the capacity of physical persons to legal acts is dealt with, it is not expressly termed as being of Natural Law): but in this particular instance the emphasis serves to dispel possible misunderstandings. It should be stressed, however, that in the two texts on titles of acquisition and on pious gifts, the question is *not* that of the unabridgeable, fundamental right of the Church to own and acquire temporal goods. For, this right, although it *may* be argued to some extent on a Natural Law basis, is actually founded in the positive divine institution of the Church: Natural Law can

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[40] Cf. Wernz-Vidal, *Ius canonicum* IV.2 (Rome 1935) 202.

[41] Cf. J. D. Hannan, *The Canon Law of Wills* (Washington 1934) 123ff; Wernz-Vidal, *op. cit.* 274, 824.

only show that the Church (as a human society) cannot have less property rights than other societies; the existence of her property rights as *independent* from the authority of the state goes beyond the Natural Law.[42]

19.—This rapid review of express mentions of Natural Law in the Code may suffice to formulate the following conclusion: by referring occasionally, for purposes of stress and clarification, to Natural Law principles in given contexts, the legislator does not intend to draw up a "Code of Natural Law." The references are and remain quite frankly selective. It is rather in its *fundamental* position to the philosophy of Natural Law, and in its constant effort to remain "open to" the guidance and normative force of Natural Law on every level of legislative and jurisdictional activity—be it concerned with the social or the spiritual ends of ecclesiastical society; in a word, it is in the *spirit* of the legal order of the Church that the functioning of Natural Law must be grasped. To have demonstrated that the natural, created, order of right reason is necessarily presupposed by, and persists within the unique framework of a society that rests on a supranatural foundation—this is perhaps the greatest contribution of Canon Law to the doctrine of Natural Law.

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[42] Can. 1495 § 1 speaks of "congenital right" *(ius nativum)*. Cf. J. A. Goodwine, *The Right of the Church to Acquire Property* (Washington 1941) 6ff., 28ff., 99.

NATURAL LAW AND INTERNATIONAL LAW

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NATURAL LAW AND INTERNATIONAL LAW

I AM deeply grateful for this opportunity to study with you a problem that lies at the very heart of our quest for peace.

I shall not presume to discourse on this subject as an authority on law. I speak merely as a witness to some aspects of its relation to the work in which all nations and all men of good will are now engaged — the work of establishing a just order in the world under which mankind can live in peace, freedom and security.

Together with many able and unselfish men from all over the world, I have been associated with this task continuously since the United Nations was organized in San Francisco in 1945. From the experience and the lessons of the past four years, I have drawn some conclusions which I hope will cast a little more light on the problem before us.

To my mind, the most important lesson which the work of the United Nations has taught us is the realization that we cannot have lasting peace in the world until we have established a system of just law which shall be universally accepted and applied. By just law I mean law based on reason, consonant with the essential requirements of man's nature and deriving ultimate sanction from the source of all authority, God Himself. I

reject as inimical to peace that false law which, recognizing no higher sanction than the authority of the State, has produced regimentation in lieu of order, total tyranny in lieu of freedom and class war rather than harmony and peace in human society.

It is perhaps premature to say that the nations are now fully aware of the need to make international law conform to natural law as the only basis for stability and order in modern society. We live in an age permeated with the spirit of secularism and it is not often that we find even the leaders of Christian States publicly professing their faith in the moral principles upon which the structure of the peace we are trying to build must rest. If we should examine the work of the United Nations, however, we shall find in its most significant acts and accomplishments a definite tendency to make international law conform to natural law.

The concept of peace based on just law is implicit in the United Nations Charter itself. The solemn pledge "to save succeeding generations from the scourge of war" is followed by a declaration of "faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women and of nations large and small." It is on this basis that the member States propose, in the words of the Charter, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained," and to undertake "to promote social progress and better standards of life in larger freedom."

We discern in the Charter's avowal of faith in human rights and in the dignity of the human person the Christian belief in a brotherhood of men equally precious in the eyes of God, each deserving of His justice and worthy of His love, a belief which lies at the root of all our traditions of equality among men and nations.

In Paris last December, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. The preamble of the Declaration begins with the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family as the true foundation of freedom, justice and peace in the world. The whole of this historic document is devoted to the precise definition of the rights of man which, flowing as they do from his very nature, are recognized as beyond the power of any human authority to deny, annul or violate. Of all the acts of the United Nations, the Universal Declaration of Human Rights has demonstrated most clearly the tendency about which I have already remarked, the tendency to work out a system of international law conforming as closely as possible to natural law.

It is true that the Universal Declaration of Human Rights as it now stands does not have the force of law. It is but an affirmation of the essential rights with which man has been endowed by his Creator. But the Declaration carries the signatures of forty-eight states and their approval invests it with a moral force never before acquired by any proclamation of the same nature. For the first time in history, the fundamental rights of man

have been formally recognized in a joint declaration by the great majority of the nations that make up the world community.

An International Covenant on Human Rights is now being formulated in order to give legal sanction to the principles embodied in the Declaration. When it is finally approved, the Covenant will make respect for the essential human rights legally binding upon the signatory states. A suitable machinery for implementation will then be created. Unless there is a radical change in the development of the United Nations, we may confidently look forward to seeing the Covenant become part of the growing body of international law without which we cannot hope to establish a stable and enduring peace.

The International Convention on Genocide, which was also adopted by the General Assembly last year, is a positive contribution of the first importance to international law. It will come into force ninety days after twenty states shall have ratified it. The Convention, also for the first time in history, makes genocide, one of the most heinous crimes against nature, punishable under international law. It binds the contracting states to pass the legislation necessary to give effect to its provisions and envisages trial by an international penal tribunal in case the contracting parties should agree to establish one and should accept its jurisdiction.

If there should be any dispute between states regarding the interpretation or application of any of the articles of the Convention, the International Court of Justice, itself an outgrowth of the evolving system of international law,

may act on the case at the request of any of the parties to the dispute. The Convention also provides that any of the contracting parties may bring a charge of genocide before the competent organs of the United Nations with the request that appropriate action be taken in accordance with the provisions of the Charter.

In the course of the debate on the Convention, the Assembly foresaw the increasing need of the international community for an international judicial organ which will be empowered to try certain crimes. Accordingly, it adopted a resolution instructing the International Law Commission to study the feasibility of setting up such an international judicial organ exclusively for the trial of persons charged with genocide and other crimes which may be placed under its jurisdiction by international conventions. In carrying out this task, the International Law Commission was requested by the Assembly to look into the alternative possibility of establishing a criminal chamber of the International Court of Justice. Not content with formulating the law, the Assembly has taken measures to insure its effective enforcement.

The Universal Declaration of Human Rights was approved without opposition. The International Convention on Genocide was adopted unanimously. I consider the agreement reached by the nations on these two historic acts as among the most hopeful auguries of future peace.

The contributions of the United Nations to international law extend to every important field of human activity. Last May the General Assembly adopted a con-

vention on the International Transmission of News and the Right of Correction. Last week the Assembly approved the Convention for the Suppression of the Traffic in Persons and of the Exploitation and Prostitution of Others. The Economic and Social Council and its agencies are carrying on extensive operations in the fields of health, education, trade, labor, economic development and relief of the homeless, the suffering and the needy. All these activities have been undertaken in accordance with the Charter and other international agreements that now constitute part of the law of nations.

The present session of the General Assembly has produced an unprecedented decision. Under the Charter, the power to make binding decisions on matters affecting international peace and security is granted to the Security Council alone; the General Assembly can only make recommendations. In the case of the former Italian colonies, however, the powers concerned—the United States, the Soviet Union, France and the United Kingdom — made a prior commitment to abide by the Assembly's decision. In consequence of this agreement, the Assembly's disposition of the former Italian colonies is legally binding and assumes the nature of international legislation. The Assembly resolution in 1947 recommending the partition of Palestine also acquired legal force when it was enforced by the Security Council.

The work of the Trusteeship Council is largely an attempt to help nonself-governing peoples to achieve their right to independence through a process of planned and orderly change. The recommendations of the Coun-

cil in behalf of the social, political and economic welfare of dependent peoples lack legal force but are so firmly grounded on moral principle that they command the support of the great majority of the member states of the United Nations. Although the states administering the trust territories are not under legal compulsion to carry out the Council's recommendations, they are nevertheless impelled by the force of world opinion to conform to them in practice. The right of nonself-governing peoples to freedom and self-determination is now securely established. The work of the trusteeship Council is bringing its realization steadily forward.

In its anxiety to assist the progressive development of international law and to facilitate its codification, the General Assembly in 1947 instructed the International Law Commission to prepare a Draft Declaration on the Rights and Duties of States. This Draft Declaration was presented to the Assembly during the current session and the Assembly voted to transmit it to the member States for consideration. A new draft will be prepared next year taking into account their comments, criticisms and suggestions. In formulating the Declaration submitted to the Assembly, the International Law Commission was guided by the realization that international peace and security, the primary aim of the United Nations, cannot be established except under the reign of law and justice.

This of course is not a new concept. The necessity for some kind of international law and order is as old as the nations. What is new and without precedent is the ex-

treme urgency of our need and the fact that we can no longer afford the luxury of error in our interpretation and application of just law in international relations. In the past, when the breakdown of law resulted in war among the nations, the limited power of the weapons at his disposal gave man a margin of safety. In this day of atomic bombs, bacteriological weapons and supersonic planes, that margin of safety has all but disappeared. We can no longer permit the breakdown of law without endangering our very existence.

Some time ago, in a public address, I ventured the opinion that the destructive power of modern technology has made war obsolete and is driving us, almost in spite of ourselves, to the realization that some form of Christian order may be the only salvation of our way of life. Calling to mind the development in the United Nations of a system of international law deriving from and conforming to the natural law, I remarked that we may yet find ourselves confronted by the seeming paradox of Christianity emerging as the only practical program for lasting peace and equitable order in our troubled world.

I quoted G. K. Chesterton, who, if I remember correctly, had once declared that the trouble with Christianity is not that it has failed but that it has never been tried. And I pointed out that in our search for a peace that would endure and a rule of law that would insure freedom and equality for all men and nations, we have tried nearly everything else, and, having failed, are now turning in desperation, almost unconsciously, to the neglected tenets of our Christian faith.

When we say, for instance, that peace is indivisible, we mean that such is the interdependence of nations today that war in any part of the world will, by an inevitable process of chain reaction, affect the security of even those countries which are geographically remote from the scene of battle. By the same token, freedom has no frontiers; it is co-extensive with the human race. Any attack upon the independence of any nation is a threat to the independence of all; the denial or suppression of the rights and liberties of any people diminishes the freedom of all mankind. As with peace and freedom, so with economic well-being.

This is just another way of saying that beneath its manifold diversity of race, culture and nationality, and despite the deep divisions in its ranks caused by conflicting interests, ideologies and ambitions, such is the essential solidarity, the integral, organic unity of the human family that no member may be injured without causing injury to the whole. Surely we may perceive in this awareness of the basic and inescapable oneness of the world, of the inherent and irrevocable inter-relation of men and nations, a reflection of the Christian concept of human brotherhood, an image, discerned as through a dark glass, of the Mystical Body.

This realization, as I have indicated, is implicit in the Charter and in the work of the United Nations. The entire range of United Nations activities in the economic and social fields constitutes an organized attempt to protect the rights, secure the freedoms and promote the well-being of the world as a whole. Nothing less is under-

taken because nothing less will suffice. A declaration of human rights is meaningless unless it is universal. A convention on genocide is inadequate if it does not apply to all nations. Problems of health, labor, commerce, science, culture and reconstruction may be considered in terms of national or regional requirements, but always in relation to the universal welfare. And rightly so, for in the present state of the world nothing short of justice for all nations, equality for all men and freedom for all peoples — precepts deriving directly or by implication from Christian doctrine — can save humanity from a condition of permanent conflict leading inexorably to another war.

In this sense, may we not say that the practical application of Christian teaching in international relations has become a condition for the attainment of world peace and security? And considering the power for annihilation latent in the new weapons of war, may we not go even further and say that faithful adherence to Christian doctrine and the law of God has become a *sine qua non* of the survival of mankind?

APPENDIX

APPENDIX

The Natural Law Institute Library

At the conclusion of the 1949 sessions of the Natural Law Institute, the University of Notre Dame announced that a special Library for further study and research in the field of Natural Law philosophy and jurisprudence would be established in the College of Law.

The Library is the generous gift of Mr. Alvin A. Gould, of Cincinnati, Ohio, sponsor of the 1948 and 1949 Natural Law Institutes. The Library will be located on the second floor of the College of Law building. It is planned to bring together in one place a complete and thoroughly representative collection of books and materials relating to Natural Law. This collection will thus be readily available to scholars and students who are interested in the history and meaning of the Natural Law and its adequate restatement in the light of present day problems.

Following the Natural Law Institute sessions of 1948, a Committee consisting of Professor Maurice Le Bel, Laval University, Quebec, Dr. Ernst Levy, University of Washington, Seattle, Dr. Gordon Gerould, Princeton University, Dr. Heinrich Rommen, St. Thomas College, St. Paul, and Honorable Robert N. Wilkin, Judge of the United States District Court, Cleveland, Ohio, agreed to act in an advisory capacity in the preparation of a tentative list of titles to be included in the initial collection of the Natural Law Institute Library. The list which fol-

lows has been prepared by the Committee and sent to leading American Law Schools and to distinguished authorities on the Natural Law for critical advice. It is hoped that the initial collection will be ready for use this year.

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