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### Book Review

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has negligently injured an unborn child. As to such cases we express no opinion.

In deciding the principal case, the Minnesota court relies heavily upon the oft-quoted dissenting opinion of Justice Boggs in *Allaire v. St. Luke's Hospital*, *supra*, wherein the argument is advanced that when a child becomes viable and capable of living apart from the mother, "it is but to deny a palpable fact to argue that there is but one life and that the life of the mother." As was said above, the factor of viability would seem to be controlling in those jurisdictions where relief will be granted.

No attempt was made to answer the arguments *ad horrendum* of the earlier cases, the court obviously feeling that where a wrong was done, the proximate cause of which was the negligence of another, neither a legal fiction denying existence before birth, nor time-honored verbal phrases about multiplicity of suits and fraudulent claims, should deprive the party who has been wronged of his remedy. By insisting that the infant be capable of living apart from the mother, the possibility of spurious claims is reduced and there is less difficulty in proving that defendant's negligent conduct was the proximate cause of the injury or death.

Hence it would seem to be still firmly established that before the foetus is viable, there can be no "person" in the eyes of the law; but when, as stated in *Bonbrest et al. v. Kotz et al.*, 65 F. Supp. 138, 142 (W. D. Pa. 1946), the child:

. . . manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable *now* of being ushered into the visible world . . . ,

a small, but apparently growing number of jurisdictions will look beyond hoary precedents and legal fictions in order to allow recovery for those infants wrongfully killed or injured prior to birth.

*William B. Wombacher*

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## BOOK REVIEWS

**THE CASE OF GENERAL YAMASHITA.** By A. Frank Reel.<sup>1</sup> Chicago: University of Chicago Press, 1949. Pp. vi, 324. \$4.00.—This is a book that should be required reading for every American. Interesting in the extreme, the book tells the complete story of the trial of General Yamashita as seen by a lawyer who was a member of the defense counsel for his trial at Manila in late 1945. The author considers Yamashita's arrest and arraignment, the choice of the military com-

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<sup>1</sup> Member of the Massachusetts, New York, and Wisconsin Bars, Member of the defense counsel for General Yamashita.

mission and the type of men involved, and the selection of the defense staff. It presents a virtual play-by-play account of the trial disclosing its completely unjudicial approach, the unseemly haste, the entire disregard for the rules of evidence and legal ethics generally, all of which led to the final verdict—guilty. “There was no finding of any order, any knowledge, any condonation on General Yamashita’s part. Crimes had been committed by his troops, and he had ‘failed’ to provide effective control. That was all. He was to hang.”

Then follows probably the most interesting part of this far from dull book—the details of the appeals through to the Supreme Court. Mr. Reel gives to his presentation of routine motions a “human interest” that is truly remarkable. Emotionalism is present, of course, but even with allowances for that, the author’s presentation is far better than good.

Certainly the book tells a story that needs to be told, that we, as Americans interested in our country’s welfare, should know. If America has “come of age,” then she can exhibit her maturity by admitting errors, among them the errors of Manila and Nuremberg. The inescapable conclusion must be that Yamashita was the victim of an overwhelming desire for revenge—a “not so judicial” lynching.

Attorneys generally will applaud the author’s statements which so sincerely and truthfully mirror the code of the true lawyer: unselfish devotion to the interests of his clients, a passionate striving after justice and fair play.

As to what the case of Yamashita might mean in the future, one of Mr. Reel’s closing paragraphs is worthy of quotation:<sup>2</sup>

There are those who say that the execution of Yamashita because he was in command of troops who committed atrocities is a good thing. In the next war, they argue, commanding generals will take more care to see to it that their troops behave decently. But in the next war the results may be quite to the contrary, because the wary commander will have to concentrate on winning at all costs. For Yamashita was not hanged because he was in command of troops who committed atrocities. He was hanged because he was in command of troops who committed atrocities on the losing side.

There, but for the grace of a victory, hangs General MacArthur.

An appendix contains the texts of the Supreme Court’s opinion in the case of *In re Yamashita*,<sup>3</sup> written by Chief Justice Stone, together with the dissenting opinions of Associate Justices Murphy and Rutledge.

*Paul C. Bartholomew\**

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<sup>2</sup> Text, at 245.

<sup>3</sup> 327 U. S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946).

\*Professor of Political Science, University of Notre Dame.

COURTS ON TRIAL: Myth and Reality in American Justice. By Jerome Frank.<sup>1</sup> Princeton, New Jersey: Princeton University Press, 1949. Pp. xii, 441. \$5.00.—Every once in a while a book on law and the administration of justice appears in which the author, with thought provoking insight and analysis, penetrates the formalism with which the legal profession has managed to encumber itself over the generations.<sup>2</sup> Such a work is Judge Frank's latest in his long line of books written for both lawyers and the laity. *Courts on Trial* has one basic purpose and, in spite of Judge Frank's frequent meanderings on the side paths of irrelevancies, that purpose is carried out with extraordinary lucidity and persuasive conviction. Simply stated, Judge Frank is concerned with the application of law on the trial court level, or on the level of "courthouse government," as he euphemistically phrases it. In short, this book is, first of all, an examination of the grave deficiencies which infect trial court justice, both judge-made and jury-made; and secondly, an advocacy of how this justice may be improved. *Courts on Trial* is a book which should be read by every judge, lawyer, law student, law professor, and indeed by every citizen interested in intelligent government on the local level. Moreover, devotees of particular legal philosophies, be they of the analytical, sociological, or philosophical schools, should take time off from metaphysical stargazing or sociological earth-digging and take a look at what really happens when legal rules have to be applied to concrete cases, with mere men in charge of the legal dice.

All our lives we concern ourselves with the origin, change, truth, efficacy, utility, justice or nonsense of particular legal rules. But any legal rule, good, bad or indifferent, that is nullified by a prejudiced jury or hung jury trial judge in a particular case is of no value to the litigant who is unsuccessful in having the rule applied to his fact situation. Judge Frank expresses the possibility of this discrepancy in particular cases between legal rules and their application with the formula:  $R(\text{Rule}) \times SF(\text{Subjective Facts, i.e., facts as found by the jury or trial court}) = D(\text{Decision})$ . Since over ninety percent of trial court decisions are never appealed, and of those appealed the great majority are affirmed by the appellate courts, the importance of the fact-finding techniques on the trial court level as an integral factor in the administration of law (and, we hope, of justice) cannot be over emphasized.  $R \times SF = D$  should warrant examination by those who preach the gospel of certainty in the law.<sup>3</sup> On the

1 Judge, United States Court of Appeals for the Second Circuit.

2 Some recent examples of such literary sword thrusts at legal complacency and superstition are: ARNOLD, *SYMBOLS OF GOVERNMENT* (1935); CURTIS, *LIONS UNDER THE THRONE* (1947); FRANK, *LAW AND THE MODERN MIND* (1930).

3 It is interesting to note that those who complain constantly of the alleged unpredictability of our legal rules (due, they say, to the twin agencies of administrative law and a politically conscious Supreme Court) rarely, if ever, concern

whole, legal rules, even with the necessary adjustment of them by the courts and legislatures over the last eighteen years, have remained fairly predictable (at least by those lawyers who have taken the time to examine them and not rest alone with emotional polemics against the Supreme Court).

Unfortunately, we cannot assert this same certainty or predictability of trial court law, that is, the decisions in particular cases. On the level of "courthouse government" we are a long way from the ideal of a "government of laws." We have instead "government by men," both judges and juries. The jury system, which once performed a great service for Anglo-Saxon liberty in resisting the encroachments of a royal tyranny, has now run afoul of human discretion, arbitrariness, unpredictability, and downright stupidity. As Judge Frank says, we need only pick up any good book on trial court practice to see illustrated how the clever advocates of our profession approach the enigma that is the jury. The vagaries of the jury in deciding cases on the basis of which lawyer they like the best, whether the defendant was a rich corporation, or the defendant a drinking man, etc., confound analysis.

The trial court judge is in a better position than the jury. More experienced and dispassionate, he is more reliable in discerning truth from error. But still the double refraction of the facts remains to plague us: first, the facts as the witnesses relate them, and then the facts as the trial court (or jury) finds them. The possibilities and permutations of error, mistake, perjury, prejudice (conscious or unconscious), forgetfulness, exaggeration, distortion, vagueness, *ad infinitum*, which inhere in this finding of facts (that are twice removed from their original existence as facts), present a tremendous challenge to those who would like the law to be "scientific," or at least logical.

However, it is not surprising that the results of lawsuits, or as Judge Frank suggests, "fact-suits," are dependent on the antiquated fact-finding techniques of our legal system, since, on the trial court level, a lawsuit is still one of "trial by combat." As Judge Frank puts it, we still place our faith in a "fight theory" of fact-finding rather than a "truth theory" thereof. *Laissez-faire*, Darwin, Spencer et al., have had the same profound effect on our trial techniques of judicial administration as they have had on our legal rules, political principles, and economic axioms. We have not, perhaps, advanced as far as we might have imagined from the dim day when a man's guilt

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themselves with the tremendous uncertainty and injustice which is part and parcel of trial court decisions. One may speculate if it is really uncertainty or injustice with which they are concerned, rather than the failure of the present federal appellate judiciary to follow their former role as defenders of the particular economic faith espoused by those who complain. One might almost say that those who worship "rule-certainty" at the expense of justice, strangely enough are unconcerned about "fact-uncertainty" at the expense of justice.

or innocence depended on his reactions to a forced plunge into a vat of steaming oil. True, a litigant's fate is not now in the "laps of the gods," but in the laps of the jury. To many a disappointed litigant it may be a distinction without a difference.

Judge Frank, after pointing out the great weakness in the probatory value of our present fact-finding techniques, proves, however, that he is not just a carping critic by suggesting some fundamental reforms to improve the trial court process and thus increase the probabilities that justice will be done in a greater number of cases. His reforms include many that already have received some acceptance, such as the increased use of the special verdict, pre-trial discovery procedure, judge conducted examination of witnesses, use of special juries, and judicial reliance on expert fact-finders. More extreme suggestions, but nevertheless worthy of extended consideration, are those which call for psychiatric examination of witnesses, and for impartial court assistants to help unearth and present evidence in civil cases. These "evidence helpers" would go a long way in breaking down the "fight theory" and the collective suppression of relevant evidence which is so often the result of it. For the impecunious litigant, Judge Frank would extend the use of the free legal aid clinic, so that a man's success in a lawsuit would not depend on the size of his pocketbook. Nor does the trial court judge himself escape inclusion on Judge Frank's reform list. He would be required to publish, wherever feasible, the reasons for his decision, and could sit with the appellate court in certain cases to inform them concerning his findings of fact. However, Judge Frank admits that there is little that can be done to peer beyond the "gestalt" reaction, or "hunch," that is the basis for the trial judge's finding of facts. Over and above all these suggestions, however, is Judge Frank's bold proposal that we abolish the jury trial in civil cases. Constitutional difficulties perhaps reduce the possibility of the achievement of this last proposal. However, the ingenious additional suggestion that we record jury room deliberations is particularly provocative, and merits more serious consideration than might at first appear.

Tied in with all of these proposals which the author has made with reference to improving the fact-finding processes of our law, is a fine discussion of the necessity for reform in the field of legal education. If we are going to attack the trial court problem clinically, we need clinically trained lawyers to lead us. So Judge Frank would revamp the legal curriculum to help bridge the vast chasm which now exists between law school theory and lawyer practice. Drafting of real legal instruments, student visitations to the courts, legal aid work, and actual student participation in lawsuits and law work,<sup>4</sup> are all necessary

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<sup>4</sup> Even the American Bar Association sees the merits of reform in this direction. See, e.g., Silver, *Law Students and The Law: "Experience-Employment" in Legal Education*, 35 A.B.A.J. 991 (1949).

in the field of legal education if the more fundamental reform of our trial courts is ever to become more than an illusion.

We can say of this book that it strips away the robe of awe and mystery with which some of our chicken-hearted legalists like to surround the law, that supposedly dehumanized concept to which we all pay homage. The people have a right to find out how their legal system operates. We owe it to them not to keep such knowledge on a *sub rosa* plane. The courts and the juries belong to the people. The latter have a right to have it brought to their attention that flesh and blood human beings are the necessary media through which justice is dispensed. They have a right, too, to know wherein the defects of such a system lie, in order that these defects may be eliminated as far as possible, not so much to achieve a "government of laws and not of men," but to achieve justice in action rather than have it remain merely a symbol at the entrance to the county courthouse. To some Judge Frank may appear to be a heretic of the school of the "Non-Absolute."<sup>5</sup> To this reviewer he looms as a man whose tremendous energies and scholarship are devoted to the successful application, in every case possible, of the greatest human "absolute" of all—"justice." *Courts on Trial* points the way to the achievement of this goal.

Alfred L. Scanlan\*

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LAW AND THE EXECUTIVE IN BRITAIN: A Comparative Study. By Bernard Schwartz.<sup>1</sup> New York City: New York University Press, 1949. Pp. viii, 388. \$5.50.—This book presents a comparative study of the growth and development of administrative law in the United States and Britain. The comparison is certainly a timely one, and has been prepared by one who has a keen insight into the problem and who has used painstaking effort to present a comprehensive and unpartisan viewpoint upon a subject of ever increasing interest to the legal profession. *Law and the Executive in Britain* should appeal also to those outside the field of law, because fundamentally it is concerned with the preservation of liberty. As the author points out, exponents of the "realist" school of jurisprudence hold that whatever is done officially is law. This is the "rule of men." The author emphasizes the fallacy in this conception of law by recalling the words of Aristotle:<sup>2</sup>

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<sup>5</sup> See Barrett, *Confession and Avoidance?—Reflections on Rereading Judge Frank's Law And The Modern Mind*, 24 NOTRE DAME LAWYER 447 (1949).

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<sup>1</sup> Instructor of Law, New York University.

<sup>2</sup> Text, at 1.

He who bids the law rule, bids God and reason rule, but he who bids man rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best of men. Therefore the law is reason free from desire.

The Soviet jurists assume that they have the answer: "If there are no conflicting interests [private property rights] to be adjusted there is no need of law."<sup>3</sup>

*Law and the Executive in Britain* is a treatise dealing with the restraints placed on the exercise of administrative powers by two great nations who still maintain that liberty is worth preserving. Law and administration are complementary, not competing, elements of social control. The concept of the rule of law presupposes that there are certain legal principles above the State, and the State that infringes upon them is on the road to becoming a power-State.

The author points out that the number of activities related to public needs is ever growing, and as a consequence the number of public services increases; it is a transition from the laissez-faire to the public service state. To carry out these public service functions, the state has been given a monopoly of power, and this power presents a great danger to liberty. An administrative agency is created to accomplish certain purposes. It is naturally biased towards those objectives which coincide with its own point of view; therein lies the need of judicial control over administrative excesses.

In the chapter on Delegated Legislation, the *Schechter* case,<sup>4</sup> which held invalid the delegation of powers under the National Industrial Recovery Act, is well analyzed. The report of the Committee on Ministers' Powers, the British counterpart of our Attorney General's Committee on Administrative Procedure, is shown to have arrived at conclusions akin to the *Schechter* decision by strongly urging limitations to eliminate the British tendency toward a "blank-check" type of delegated powers. Interesting is the quoted comment of an M. P. on a proposed delegation of power:<sup>5</sup>

Indeed, if only Moses could have known this technique, he would never have committed himself to anything so precise, and occasionally so inconvenient as the Ten Commandments. When he came down from Mount Sinai he would have taken powers to make regulations.

In discussing administrative justice, Mr. Schwartz traces the modern tendency toward reversion to "justice without law," which tolerates, as the determinative factor, the will or discretion of the executive dispenser and the principle of executive finality, so repugnant to common law concepts of governmental power. The wholesome and refreshing view of the author is illustrated by his words:<sup>6</sup>

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<sup>3</sup> Text, at 7, 8.

<sup>4</sup> 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 570 (1935).

<sup>5</sup> Text, at 42.

<sup>6</sup> Text, at 87.



Any Executive decision that determines private rights and obligations should be rendered according to the rules of "natural justice" and be subject to judicial review, regardless of whether it be considered as "judicial," "quasi-judicial," or "administrative."

Mr. Schwartz emphasizes, in the chapter on Judicial Control, the judicial technique of keeping abreast of the times by deriving principles inductively from the judicial experience of the past — a disciplined judicial discretion, exercised on the basis of reason, not arbitrary will. Dean Pound is aptly quoted: "The infusion of morals into the law through the development of equity was not an achievement of legislation, it was the work of courts." <sup>7</sup>

The need of a check on administrative powers by judicial control is clearly outlined in the discussion of *ultra vires* where the author says: "One of the limitations of administrative expertness is a tendency to see no further than its immediate goal and to carry out its policy even at the risk of impinging upon other and more important social policies." <sup>8</sup> Here the need of the courts is shown in assessing the relative interests involved. The means of excluding judicial control by the "conclusive evidence" clause is discussed at length.

Inevitably in a study of this kind "Natural Justice" is discussed; here a separate chapter is devoted to it. It is explained that in this country principles of Natural Justice are protected by the concept of due process, a constitutional safeguard. In Britain, the courts have endeavored to safeguard such principles through the concept of Natural Justice itself. The author quotes the British Committee on Ministers' Powers: "However much a Minister in exercising such functions may depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against 'natural justice'." <sup>9</sup> Some of the requirements of Natural Justice, such as notice, the opportunity of being heard, and due inquiry are mentioned at this point. Noteworthy are the words of a British judge: "It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based." <sup>10</sup> The right to a hearing, being an essential element of Natural Justice, is no less a requirement of English administrative procedure than it is under the due process concept in this country. In this chapter the author also discusses the bias of administrative officials who are required to make decisions, a proper bias to be sure, but a bias nonetheless real—the predilection of the executive toward the policy to which he is committed (what Dean Landis has called "psychological interest"), which may be even more compelling than pecuniary inter-

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<sup>7</sup> Text, at 149.

<sup>8</sup> Text, at 169.

<sup>9</sup> Text, at 212.

<sup>10</sup> Text, at 215.

est. The language of the Attorney General's Committee is cited: "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."<sup>11</sup> In discussing the *Stevenage* case<sup>12</sup> arising under the British New Towns Act, 1946, the author quite properly says: "The rule against bias requires an approach to the dispute at hand with an open mind; but how can the Minister maintain the required impartiality when the order he is called upon to judge has in fact been prepared by himself?"<sup>13</sup>

The scope of judicial review and the distinction between review of law and of fact is discussed in a separate chapter. The author discusses the distinction between the "substantial evidence" rule of this country and the "no-evidence" rule in vogue in Britain. The final chapter pertains to the exercise of executive powers in the emergency of war, illustrating how much further Britain went than the United States in granting uncontrolled war powers to the executive. The famous English case of *Liversidge v. Anderson*,<sup>14</sup> which was an action by one detained, against the Secretary of State for damages for false imprisonment, is competently analyzed. There the House of Lords decided that reasonable cause for detention is not for the court's review, that the decision of the Secretary of State is a matter of executive discretion and beyond control of the courts. The author doubts that an English court would decide the question so broadly except under the pressure of war emergency. *Yakus v. United States*<sup>15</sup> is discussed as an example of the extent to which normal doctrine in this country will yield in time of war. That case involved the validity of the Emergency Price Control Act and seemed to Justice Roberts (dissenting) to overrule the *Schechter* decision. The author believes that the distinction can be found in the existence of the war emergency. Many Americans will probably be surprised at the author's reference to the unprecedented assumption by President Lincoln of summary powers, in effect amounting to complete executive control over the war effort, until legislative approval could be obtained. When Congress met vast new powers were conferred on the Chief Executive which were characterized by a British observer as: "more arbitrary power than any Englishman since Oliver Cromwell."<sup>16</sup>

Mr. Schwartz has made a noteworthy contribution to a field of law that is extremely controversial and perplexing. The practitioner whose work brings him in close contact with administrative boards (and this includes nearly everyone nowadays) will find this volume an indis-

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<sup>11</sup> Text, at 268.

<sup>12</sup> [1948] A. C. 87 (1947).

<sup>13</sup> Text, at 274.

<sup>14</sup> [1942] A. C. 206 (1941).

<sup>15</sup> 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

<sup>16</sup> Text, at 350.

pensible aid in helping him to comprehend the exercise of what may at times seem to be arbitrary power. Administrative functions will no doubt increase in the future. May we hope that they will develop in an orderly fashion without perverting the principles of what some may call due process and others may call Natural Justice.

*Harold P. Burke\**

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NATURAL LAW INSTITUTE PROCEEDINGS 1948. Volume II. Edited by Alfred L. Scanlan.<sup>1</sup> Notre Dame, Indiana: College of Law, University of Notre Dame, 1949. Pp. 149. \$2.00.—For decades the decline of the Natural Law philosophy as a strong influence on American legal thought has been deplored by many. Little of a constructive nature has been done to loosen the grip of Materialism, Pragmatism and Relativism. To restore the Natural Law to the almost universally accepted position it once occupied is an undertaking demanding the highest intellectual effort. Occasional lectures and fugitive essays are not enough. The Natural Law must be freed of academic cobwebs, cleared of the misunderstandings attached to it, restated, re-examined and re-evaluated in the light of pressing modern problems. It must be rescued from the misconception that it is somehow or other a peculiarly Catholic or even Christian possession. It must present to a skeptical world its credentials as the birthright of all men everywhere, regardless of race, creed or color. There must then come a generation of lawyers who will argue from "Natural Law" briefs with as little sense of diffidence as they now argue from the famous "Brandeis" briefs. We must have judges who will not rest content with silent dissent when their brethren forget or ignore the principles of the Natural Law.

To such a "second spring" or "Renaissance" of Natural Law the Natural Law Institute of the College of Law of the University of Notre Dame is dedicated. Modestly inaugurated in 1947, the Institute is now a permanent establishment. Only recently it has been announced that the Institute will soon have its own Natural Law Library initiated by the Alvin A. Gould Collection of Books and Materials on Natural Law, the generous gift of Mr. Gould, sponsor of the 1948, 1949 and 1950 sessions of the Institute. These constructive efforts have placed the Natural Law Institute of the College of Law in the very forefront of the current Renaissance of Natural Law jurisprudence in the United States. The University has envisioned the Natural Law Institute as a focal point of Natural Law

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studies, with continuous research shedding a steady light upon the manifold relations of the Natural Law to the legal, social, ethical and economic problems of modern man. Meanwhile the publication of the annual proceedings of the Institute continues. We have now before us the second volume containing five lectures presented at the 1948 sessions. Attractively printed and carefully edited, the 1948 volume is a worthy successor to its predecessor of 1947. The scholarship evidenced by it is a pledge that as the succeeding volumes accumulate they will constitute a veritable Natural Law Library in themselves, indispensable alike to the enthusiastic proponent of Natural Law jurisprudence and to its unconvinced opponents.

The 1948 sessions of the Institute were intended to present the development of the Natural Law concept during various periods of its long record. Dr. Maurice Le Bel, of Laval University, Quebec, set forth the history of the Natural Law during the Greek period. Dr. Ernst Levy of the University of Washington School of Law traces its course through Roman times. The sharpening of the concept by the Medieval Scholastics is the subject of a paper by Dr. Gordon H. Gerould, of Princeton University. Dr. Heinrich Rommen, of St. Thomas College, discusses the Natural Law in the Renaissance period. Judge Robert N. Wilkin, of Cleveland, Ohio, concludes with a lecture on the status of the Natural Law in American jurisprudence.

The tone of the lectures is scholarly and objective. This, however, does not chill the warm enthusiasm for the Natural Law quite common to them all. Perhaps it is Judge Wilkin's quotation from the noted French philosopher, Etienne Gilson: "The Natural Law always buries its undertakers," which best summarizes the central impression which the reader will gather from the lectures as a whole. The time period covered by the five lectures runs across more than twenty-three centuries. The Natural Law concept is shown to have had its ups and downs, its confusions and misunderstandings. Yet through them all there runs the common conviction that there is beyond Man and beyond the State, an eternal and immutable law or standard of justice from which come rights and duties beyond any human power to impair or destroy. Dr. Le Bel recalls for us Sophocles' heroine Antigone appealing to the eternal laws of heaven against the force-backed decrees of the tyrant Kreon. More than two thousand years later, Thomas Jefferson, writing the Declaration of Independence, appeals to "the laws of Nature and of Nature's God" against the might of the British Empire. The Natural Law is Man's birthright. Although he may forget or ignore it, in the end he will return to it, especially in his hours of crisis when he stands alone against a State or Government demanding from him the unquestioning surrender of rights which it has not created and therefore cannot destroy.

Dr. Levy's brilliant paper admirably presents the sometimes confused strivings of Roman jurists and philosophers to attain to a clear concept of a Law superior to the State. Dr. Gerould shows how the Medieval Scholastics, working in the Christian dispensation, sharpened and defined the concept. It was Aquinas who saw the Natural Law as the participation by man through his own reason in the Eternal Law and thus provided the triumphant keystone for the arch. Dr. Rommen finds in the Sixteenth-Seventeenth Century Renaissance of Scholasticism, championed by such men as Vittoria, Suarez and Bellarmine, the restatement of the Natural Law for a new world quite different in its external circumstances from the world which St. Thomas had known almost four centuries before. The modern Nation-State had arisen; the age of Colonial Empires had come; the "Empire" of the Middle Ages was now but a shadow. National rivalries and dynastic struggles, the rebirth of Absolutism, required an International Law. The genius of Suarez took the Natural Law of Aquinas and from it built the foundations for a new *Jus inter Gentes*. It is not too much to say that from the men of this Scholastic Renaissance, the Natural Law as a potent factor in jurisprudence entered modern thought. Once again there was a return to Natural Law. An age-old concept was found capable of a modern content.

Dr. Rommen's reference to the Nuremberg trials provokes extended discussion. Much has been written heretofore on the dilemma of the prosecution at Nuremberg. Was the basis of the indictment against the Nazi war criminals to be found solely in positive International Law as it existed when the alleged crimes were committed? For years Legal Positivism had held the field in International Law. The Natural Law had been rejected as too vague and unreliable. Positivists pinned their hopes to Kellogg-Briand pacts and similar treaties, often "honored more in the breach than in the observance" by the victors as well as by the vanquished in World War II. Legal subtlety was strained to the utmost to find a positive basis for the great indictment. To this day it has left many unconvinced. Was the basis to be found merely in the decrees of the victorious powers setting up the tribunal? What then of the *ex post facto* rule—for the crimes charged had been committed, many of them long before the decrees. If the accused were punished under such decrees, would it not be said then that they suffered not because they violated a law, but because they lost a war? Gone then would be the halo of high morality with which the trials were to be surrounded. Should the prosecution then turn back again to the Natural Law to find therein the true and solid basis for the charges against the defendants? To do so would mean the embarrassed relinquishment of Legal Positivism. Dr. Rommen points out that Suarez had three hundred years ago developed the contention that the *ex post facto* defense failed where the crimes charged were against Natural Law. How the prose-

cution at Nuremberg met the dilemma must be left to others to determine. The problem emphasizes the "naturalness" of a return by Man to Natural Law concepts at a time when positive law for all its strength is failing him.

The 1948 lectures in their style and in their content have truly that beauty and eloquence which true scholarship inevitably produces. He that runs may indeed not read them with ease. They are for the judge, the lawyer, the philosopher and the thoughtful layman who will take them down again and again from his shelves whenever he considers, as he cannot fail to do, the perennial question "What is Law?"

*Edward F. Barrett\**

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### BOOKS RECEIVED

- AMERICAN GOVERNMENT UNDER THE CONSTITUTION. By Paul C. Bartholomew. Dubuque, Iowa: Wm. C. Brown Company, 1949. Pp. viii, 369. \$3.25.
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