

The Catholic Lawyer

Volume 1
Number 2 *Volume 1, April 1955, Number 2*

Article 7

The Natural Law and the Lawyer's Search for a Philosophy of Law

Edward F. Barrett

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [Religion Law Commons](#)

This Reprint is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

"Natural Law is at the root beginnings of our Common Law and Equity. This alone may recommend its re-examination by those who in these troubled days seek an adequate philosophy of law."

Professor Barrett expressed these sentiments in the following address delivered at the Natural Law Symposium of the Catholic Lawyers Guild, Buffalo, N. Y., February 6, 1954. It is reprinted from 4 Buffalo Law Review 1 (1954) in response to numerous requests.

THE NATURAL LAW AND THE LAWYER'S SEARCH FOR A PHILOSOPHY OF LAW

EDWARD F. BARRETT*

A judge of sentient mind and heart would hardly be able to endure the responsibilities of office if he were denied the guiding influence and sustaining strength of Natural Law precepts and philosophy.

— ROBERT N. WILKIN¹

DO LAWYERS NEED a philosophy of law? What business have they with philosophy at all? Plato has no "forms for McKinney;" Aristotle doesn't annotate the Civil Practice Act; Aquinas is no substitute for Shepard. Yet a great judge has noted "the impulse of jurisprudence in these days to fling herself into the arms of philosophy for shelter and consolation."² For philosophy is at bottom one's answers to man's persistent questions *Where from? What for? Where to?* There is no Fifth Amendment immunity here. Lawyers also must answer and on their answers hangs a whole philosophy of law. Shocking, but consistent, is the philosophy of law flowing logically from Holmes' doubts whether man is significantly different from a baboon, or an idea cosmically more important than the bowels.³ Hitler's answers produced the Nazi laws against Jews; Stalin's, the system under which Cardinal Mindszenty's Communist prosecutors could murder a man's mind — *legally*.

Justice Holmes noted that our law is filled with words of moral content.⁴ The Canons of Professional Ethics speak of "honor," "con-

*Professor of Law, College of Law, University of Notre Dame.

¹Wilkin, *Natural Law in American Jurisprudence*, 2 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME 148 (1949).

²Cardozo, *Address before the New York State Bar Association*, Jan. 1932; SELECTED WRITINGS OF BENJAMIN N. CARDOZO, 8 (ed. Hall, 1947).

³2 HOLMES-POLLOCK LETTERS 22 (Howe ed. 1941); 2 *id.* at 242.

⁴HOLMES, COLLECTED LEGAL PAPERS, 168, 169, 179 (1921).

science," "moral law."⁵ Statutes and decisions abound in terms like "decency," "morality," "crimes *mala in se*," and "crimes *mala prohibita*." Judges with the office, if no longer with the title of "Chancellor" still hear prayers in Equity when "good faith" is the issue. Courts enforce rules of which these moral content words are the heart. Should such words be cut out of the body of the law in the interest of greater legal health, as Justice Holmes suggested?⁶ Judges of "sentient mind and heart," however crudely positivistic their off-the-bench excursions into philosophy in the abstract, constantly use these moral content words in deciding cases. In "fairness," "fair play" and "natural justice" Holmes as a judge found tests for determining how far constructive service can go in securing jurisdiction *in personam*.⁷

The fact is that these moral content words, if banished today as permissible *media concludendi*, return tomorrow. Philosophy alone gives them their true content, their function in the law, and thus determines whether we welcome them at the front door or smuggle them in disguised at some side entrance. Say with some that "justice" and "fairness" mean "justice" and "fairness" only according to the "dominant *mores* of the community" where invoked. Say with Chief Justice Vinson that "all concepts are relative."⁸ Should not the Nuremberg convictions then be revised? The Nazi defendants pleaded that they but followed the "dominant *mores*" of their

community and that "crime against humanity" is a *relative* concept. Or, are we to admit that at Nuremberg there was no "law" except the ancient "Vae Victis!" and no "right" but the "might" of the conquerors? Rather than end his search for a philosophy of law thus, the lawyer might well take another, perhaps a *new* look at the *old* Natural Law philosophy of law.

In a case decided a century ago in New York, Chancellor James Kent defined Natural Law:⁹

... those fit and just rules which the Creator has prescribed to man as a dependent and social being; and which are to be ascertained from the deductions of right reason though they may be more precisely known and more explicitly declared by Divine Revelation.

This "Natural Law" approach is the original American Jurisprudence. In the first sentence of the first public paper of the United States the American people appeal beyond man-made law to the "law of nature and of nature's God." They affirm as "self-evident" that God made man and in creating him endowed him with certain "unalienable rights." To make sure of their enjoyment of these rights men institute governments. The Declaration of Independence was not the work of men who thought of man as a baboon, nor did they equate in importance his reason and his entrails.

To write the first sentence of a piece of history is to tear a seamless web.¹⁰ To attribute to the creation of man by God the "unalienable" character of essential human

⁵Canons 15, 29, 32, CANONS OF PROFESSIONAL ETHICS, AMERICAN BAR ASSOCIATION.

⁶HOLMES, *op. cit. supra* note 4.

⁷McDonald v. Mabee, 243 U. S. 90, 91 (1917).

⁸Dennis et al. v. United States, 341 U. S. 494, 508 (1951).

⁹Wightman v. Wightman, 4 Johns. Ch. 343, 349 (1820).

¹⁰1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 1 (2d ed. 1952).

rights is to posit a whole philosophy of law. Cardinal Newman said that the word "God" is a "theology in itself."¹¹ It is a jurisprudence in itself as well. If God created man (to "create" is to "make out of nothing") then to God the Creator, man the creature owes his first duty. He must have therefore as the "endowment" of his divinely created nature those rights without which his primal duty to God cannot be discharged. Such rights are rooted in his nature as a created and (in Kent's words) "dependent" being. They are "natural" rights therefore, and as such, "unalienable." Man cannot give them away; no man-made authority is competent to take them from him.

"Right" and "duty" connote some law establishing them. The law establishing the "unalienable natural rights" of God's creature man, is the "law of nature and of nature's God." The expression is no logical dichotomy. The "law of nature" reflects "the law of God" — the whole plan of creation by God, the Supremely Intelligent Creator. For the conferring of "rights" implies purposeful action. Rights are conferred so that an end or objective may be achieved through their exercise. Brutes need no rights. Their achievement of the Creator's purpose as to them is a "can't help" (Holmes might say)¹² of their nature. Man is free. Divine Wisdom requires that he know the demands of the Creator upon

¹¹HARROLD, *A NEWMAN TREASURY*, p. 42 (1943). The full quotation is from the second of the nine discourses which constitute *The Idea of a University*: "The word 'God' is a Theology in itself, indivisibly one, inexhaustibly various, from the vastness and the simplicity of its meaning. Admit a God and you introduce among the subjects of your knowledge, a fact encompassing, closing in upon, absorbing, every other fact conceivable."

¹²1 HOLMES-POLLOCK LETTERS, 122 (Howe ed. 1941).

him. Thus, as Kent says, even without Divine Revelation, man's own right reason can ascertain the essentials, the first principles of his duty to his Creator. These principles and the rational inferences or corollaries flowing from them are the Natural Law. Nineteen centuries ago, St. Paul wrote of the Gentiles who, without Revelation, do the works of Revelation and thus show the Natural Law written on their hearts.¹³ Seventeen centuries after St. Paul, an English lawyer, one of the glories of our Common Law, writing still in the same Judaeo-Christian Natural Law tradition, penned this preface to his survey of English law:¹⁴

When the Supreme Being formed the universe and created matter out of nothing, he impressed certain principles upon that matter from which it can never depart and without which it would cease to be. . . . This then, is the general significance of law; a rule of action dictated by some superior being; and in those creatures that have neither the power to think nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws in their more confined sense and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct, that is the precepts by which man . . . endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior. . . . [S]ince man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. This will of his maker is called the law of nature. For as God, when he created matter and endowed it with a principle of mobility, established certain rules for the perpetual direction of

¹³Romans ii, 14-15.

¹⁴1 BLACKSTONE, *COMMENTARIES* 27-31 (Lewis ed., Philadelphia, 1771).

that motion . . . so, when he created man, and endowed him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws . . . [as] a Being of Infinite Wisdom the Creator has laid down for his creatures only such laws as were founded in those relations of Justice that existed in the nature of things antecedent to any positive precept — the eternal and immutable laws of good and evil to which the Creator Himself conforms and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions.

How is Natural Law related to man-made law? Our Declaration answers that governments are man-made devices to “secure” the “unalienable” rights of men. The word “secure” means here, as it does in the Preamble to the Constitution,¹⁵ not to “obtain” something new or previously not possessed, but to insure the safety of something already enjoyed. Thus, the right to worship God according to the dictates of conscience is not the generous gift of government. No human institution can make a gift to man of that which God has already given him before human law or government existed. It is the proper province of government to protect by human law this God-given right. The First Amendment does not “create” freedom of religion based on the dictates of conscience. It stays the restless hand of government from impairing or attempting to destroy the expression of conscience by prohibiting Congress from passing laws of the type which history sadly shows have most often made a mockery of freedom of religion. Catholic theologian and English Protestant lawyer bear

¹⁵MORLEY, *THE POWER IN THE PEOPLE*, 18-25 (1949).

witness alike that a human law contrary to Natural Law is void:

St. Thomas Aquinas says:¹⁶

The Natural Law is the rational creature’s participation of the eternal law. . . . Every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.

Sir William Blackstone says:¹⁷

This law of nature, being co-eval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority mediately or immediately from this original. . . . Upon these two foundations, the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these.

Thanks to the Ninth Amendment — quite aptly called the “Forgotten Amendment” these days — the Natural Law of philosophy explicit in the Declaration of Independence is implicit in the Constitution. The Ninth Amendment reads:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

If the word “rights” implies a law establishing them, and if the American people “retain” rights not expressed in the Constitution, nor set out in any human statutes, such “retained rights” can have no other source or origin than the Natural Law to which the Declaration appealed.

“Mere rhetoric?”

¹⁶Summa Theologica, I-II, Q. xci, a. 2; Q. xcvi, a. 2.

¹⁷1 BLACKSTONE, *COMMENTARIES* 41 (Jones ed., 1915).

In 1922 the people of Oregon by a majority vote in a *direct popular referendum* passed a law which would jail as a common criminal the parents who sent their children under sixteen years of age to a private or parochial school. In *Pierce v. Society of Sisters*,¹⁸ a unanimous United States Supreme Court declared this law unconstitutional and void as a violation of the Fourteenth Amendment. Now, neither that Amendment nor any other portion of the Constitution in so many express words guarantees the existence of parochial or private schools. True, the Fourteenth Amendment forbids any state to take a person's life, liberty or property without due process of law. Does this mean that a state cannot, in the name of what a majority of its people consider civic advancement, require that all children attend the state's own schools? Certainly when the whole people of a state by direct majority vote pass a law, it would seem that the highest measure of "democratic" due process of law has been achieved (especially if one puts a premium on "what the crowd wants").¹⁹ Presumably also the Oregon

¹⁸268 U. S. 510 (1925). Commenting on this decision in his Encyclical Letter, *Rappresentanti in Terra, The Christian Education of Youth*, Dec. 31, 1929, Pope Pius XI said: "This incontestable right of the family has at various times been recognized by nations anxious to respect the natural law in their civil enactments. Thus, to give one recent example, the Supreme Court of the United States of North America, in a decision on an important controversy, declared that it is not in the competence of the state to fix any uniform standard of education by forcing children to receive instruction exclusively in public schools, and it bases its decision on the natural law. . . ." HUSSLEIN, *SOCIAL WELLSPRINGS — EIGHTEEN ENCYCLICALS ON SOCIAL RECONSTRUCTION BY POPE PIUS XI*, 99 (1942).

¹⁹1 HOLMES-POLLOCK LETTERS, 163 (Howe ed. 1941).

School Law mirrored the "dominant *mores*" of Oregon in 1922. Nevertheless the Supreme Court held the law void. Mr. Justice Holmes whose derision of Natural Law doctrines is well known, did not dissent, however, when Mr. Justice McReynolds (bête noir of all good "liberals") spoke for the Supreme Court.²⁰

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the creature of the state. Those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.

Whence comes this "right coupled with the high duty"? If the parent's right to direct the education of his child falls beyond the pale of permissible state power expressed in man-made law, the "right" must be one "retained" by the people. It was never yielded up by them to any government (the soul of the child being God's, how can man sell it to the State?). The source of this "retained right" is the "law of nature and of nature's God." From the Ninth Amendment Natural Law philosophy streams in to illuminate the judicial task of interpreting the broad phrases of the Fourteenth.

A renaissance of Natural Law doctrines — a return to the original and authentic American philosophy of law — may yet rescue the Ninth Amendment from undeserved oblivion. The United States Supreme Court is concerned these days with the extent to which the Fourteenth Amendment makes the restrictions originally placed

²⁰268 U. S. 510, 535 (1925). (Cf. comment on the decision in 7 MARQ. L. REV. 96).

upon the Federal Government by the "Bill of Rights" likewise restrictions upon the States. Some say all the original restrictions have been thus transferred. Musty records of Congressional debates and Committee Reports ninety years old are exhumed to support this broad claim. Others make claims more limited. They question not only the historical accuracy but the political wisdom of a wholesale "transfer" of the "Bill of Rights." They point out that some of the restrictions are "less important" than others. They resort to the somewhat demagogic distinction between "human" and "property" rights (as if *all rights* are not *human* or *personal* rights *in* or *to* some "thing," some "*res*," tangible or intangible). They cite recent judicial "rearrangements" of the restrictions of the first ten amendments in some ascending (or descending) hierarchic scheme of values. We are not surprised then to see some judges taking, albeit with "faltering steps and slow," the road which leads to Natural Law,²¹ for they still speak cautiously in adjectives like "fundamental" or "basic," in phrases like "decencies of civilization."²² These are "half way houses," "lodgings for the night." They are not the journey's end of jurisprudence. The dilemma is acute. If "all concepts are relative," are there then "fundamental-relative-rights" or "relative-fundamental-rights?"²³ Does the Supreme Court thus propose to answer the lawyer's

²¹Mr. Justice Frankfurter, specially concurring in *Adamson v. California*, 332 U. S. 46 (1947); cf. Adler, *Natural Law and Positive Law*, 1 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME 92 (1949).

²²*Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353 (1913).

²³One thinks of Polonius' "pastoral-comical, historical-pastoral, tragical-historical, tragical-comical-historical-pastoral." HAMLET, II, ii. 394-396.

search for a philosophy of law? "The hungry sheep look up and are not fed."²⁴

We are told by some, however, that Natural Law doctrines come "trailing clouds," if not of "glory," at least of menacing "theology."²⁵ The invidious adjective "Catholic" is placed in front of "Natural Law," and its doctrines thus represented as a kind of "Catholic Trojan Horse" (full of Bishops, no doubt). In charity these suggestions might be called misunderstanding. American Catholic lawyers and judges will proudly accept the ennobling privilege of championing Natural Law jurisprudence. They recall that it is the original American philosophy of law. They had not thought it necessary to insist that Natural Law antedates Catholicism and even Christianity itself. They know as did the founders of this Republic, that Natural Law, by its very definition, can be no Catholic theological or philosophical monopoly. Natural Law is the God-given birthright of *all men* as the creatures of God. Thomas Aquinas and Thomas Jefferson agree. Each talks of Natural Law as the possession of man — of man as God's creature, not of man as Jew or Gentile, Catholic or Protestant, nor of man as black, white, red, yellow or brown.

Natural Law commands the sovereignty of conscience — the Latin word means "knowing with" — and dictates that for what a man "knows with" his God he shall not be challenged by human law nor punished by the State when he walks humbly with his Maker as conscience dictates. Natural Law, recognized by the Declaration of Independence and driven deep into the orig-

²⁴MILTON, LYCIDAS, 1. 125.

²⁵Gerhart, *The Doctrine of Natural Law*, 26 N. Y. U. LAW REV. 76, 119 (1951).

inal philosophy of law of the American lawyer and into the Constitution which is so much the work of his hands and brain, gives the bed-rock basis of religious freedom, just as it does for human dignity of which freedom of religion is a part. For the term "human dignity" is kicked around today until it looks like a deflated football. "Dignity" means "worthiness." Man's dignity consists in worthiness of the status attributed to him as the creature of God. The American Republic came into existence with such a concept of man's dignity, protected by Natural Law. If all this amounts to a "Trojan Horse," the "Horse" was made in America. It is big enough to hold all Americans.

Natural Law doctrine is "too vague and impractical"—this objection comes strangely from the lawyer thinking of the perfectly clear and certain rules of law appellate courts apply in 5-4 decisions. Perhaps the objection springs from confusing authentic Natural Law with perversions of it, perhaps from demanding of it therefore what it does not claim to give. Eighteenth century speculators dreamed of pre-social man living in an idyllic Golden Age, a "noble savage" happily governed only by a complete Natural Law Code. He could still retain this pristine happiness in society if human lawmakers merely entered in their statute books carbon copies of this pre-social Code. Hence the apocryphal tale of the legislative committee in French Revolutionary days ordering from the library Volume I of the Natural Law Code. This is not the Natural Law we speak of here. The legislature at Albany will seek in vain for a Natural Law section on, say, the liability of the restrictive indorser of a negotiable note.

Natural Law indeed dictates that agreements men make fairly and reasonably with each other should be kept — else the social end of man would be frustrated. It leaves to human law makers the here-and-now prudent *determination* or *specification* of this command.²⁶ Law student casebooks still reprint and lawyers still consult for its principles *Coggs v. Bernard*,²⁷ the ancestral case on bailment law decided in 1703. They do not ask of it a specific rule, expressly formulated, on, say, the liability of American Airlines as a bailee of perishable groceries.

Natural Law mandating that agreements be kept, has no quarrel with the lawmaker who by statute requires that certain kinds of contracts be in writing as a condition of enforcement, in order to lessen the dangers of perjury. The view we are taking does not make of traditional Natural Law teaching "Natural Law with a variable content." Natural Law fundamental dictates do not change. Human determinations of them, not violative of these dictates themselves, can and must change to meet the changing circumstances of developing social life. No human legislature may sanctify murder; it is free to enact a Statute of Frauds. Natural Law dictates are thus fulfilled in many ways lest one once-necessary human specification of their operation should through obsolescence injure those it was made to serve.

Natural Law then is truly "catholic" (with a small "c"). It welcomes the "analytical" jurists, the Hohfelds concerned with exacting analysis of concepts developed by man-made law. It applauds the Maitlands

²⁶McKinnon, *Natural Law and Positive Law*, 1 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME, 99, 100 (1949).

²⁷2 Ld. Raym. 909 (1704).

whose historical researches may show that what we lawyers come too easily sometimes to mistake as *a priori* rules are historical accidents. Natural Law has room for a Positivism which tests man-made rules in terms of sheer workability, for it recognizes that there are vast numbers of such rules devoid of specific moral significance. It is *indifferent* to these (as the philosophers say), except that it may counsel prudence in their making or their repeal, and except that it adds its own peculiar sanction to these rules once fairly and prudently made. Natural Law, however, will insist that none of these auxiliary juristic sciences claim solely sovereign sway and masterdom in the house of jurisprudence, for the final criterion of human law is conformity with the law of man's Creator reflected in, and revealed to man by, his reason itself.

Natural Law is at the root beginnings of our Common Law and Equity. This alone may recommend its re-examination by those who in these troubled days seek an adequate philosophy of law. From widely differing fields we cite a few examples. The oyster shell of Equity grew up around and enclosed the pearl of Natural Law. The indebtedness of "Quasi-Contract" law to Natural Law is well known. In London about 1760, Mr. Moses indorsed Mr. Jacob's note to Mr. MacFerlan who promised, nevertheless, not to sue on the indorsement. MacFerlan broke this promise, sued Moses at Common Law in the King's Bench, had judgment and collected on it. Moses then, nothing daunted, sued in the same court to get his money back. Procedure then required that the suit be brought on a theory of contract. Defense counsel pertinently asked where was MacFerlan's contract to repay. On the facts this point seemed

technically unassailable, but Lord Mansfield said:²⁸

If the defendant be under an obligation from ties of natural justice to refund, the law implies a debt and gives this action founded in the Equity of the plaintiff's case . . . to recover money which ought not in justice to be kept. In one word . . . the defendant is obliged by ties of natural justice and Equity to refund the money.

From what precedent or statute, what man-made law came this "obligation"? There was none. It helps not to say that Mansfield, incorrigible civilian, "borrowed" Roman Law. The lawyer in quest of a philosophy of law is not thus to be put off. Whence did the Roman lawyers draw the concept of "unjust enrichment"? It will not help to say that Mansfield, like the Roman lawyers resorted to the "fiction" of "implied promise." We ask *Why?* We need not go back to the *praetor* for instances of the use of "fiction" as a judicial tool or technique of justice. We seek the animating force — the *élan vital* (if you please) — behind the English judge's resort to fiction. Mansfield gives the answer. He speaks of "natural justice" as the well-spring of human justice, of "natural law" as the informing source of man-made law.

We jump two centuries — from the King's Bench in 1760 to the New York Court of Appeals in 1951 — from Equity and Quasi-Contract to Torts. In *Woods v. Lancet*,²⁹ an infant plaintiff sued for damages resulting from defendant's negligence when the plaintiff still lay in his mother's womb in the ninth month of pregnancy. Plaintiff alleged that as a result of the negligence he was born permanently crippled. The courts below had dismissed the action, relying on

²⁸*Moses v. MacFerlan*, 2 Burr. 1005, 1008 (1760).
²⁹303 N. Y. 351 (1951).

Drobner v. Peters,³⁰ decided in the Court of Appeals itself some thirty years before and holding that no such action lies. In *Woods v. Lancet*, Judge Desmond put the question: "Shall we follow *Drobner v. Peters* or shall we bring the Common Law of this state into accord with justice? I think we should make the law conform to Right."³¹ *Drobner v. Peters* was expressly overruled. The plaintiff was sent back to have his day in court. Long ago Chancellor Kent had said that "decisions which seem contrary to reason ought to be examined without fear and revised without reluctance."³² Natural Law *can* come down to cases.

Family law, "Domestic Relations" law, as we have inherited it, is almost unintelligible without an understanding of the role Natural Law has played in its development especially in the far-off days when family law was so largely administered by ecclesiastical courts.³³ Today it is no less true that if you drive Natural Law out with a pitchfork in this field, it will force its way back. Many states have today abolished the action by a wife or husband for alienation of a spouse's affections by a third party. With such a statute in the background, *Daily v. Parker*,³⁴ reached the court. Defendant's feminine charms had lured away a husband and father from his wife and minor children. The statute barred an action by the wife. The children, however, sued the defendant alleging that she had deprived

them of their right to their father's companionship, care, affection and support. The court agreed with the defendant that nowhere in our books had such an action as this been even mentioned. It nevertheless allowed the suit. A new positive right was thus expressly recognized. Was the natural right of the children the "raw material" out of which the new positive right was fashioned? In Natural Law the Common Law of our own day finds a "principle of growth."

Busy lawyers apply every day rules of long standing. There is little time and often less occasion for them to re-examine the remote historical origins of these familiar rules. It is hornbook law now that a surety can compel the debtor to "exonerate" him by paying the creditor when the debt is due.³⁵ The first reported case so holding dates from 1492. The relief was granted when a surety prayed the Chancellor, Archbishop John of Canterbury, that the debtor be compelled to do "his duty in conscience."³⁶ And nearly four hundred years later Chancellor Kent could say that "the right of exoneration stands not on contract but on natural justice," and "accords with a common sense of justice and the natural equity of mankind."³⁷ Again, hornbook blackletters say that a surety has reimbursement at Common Law from the principal whose debt he is forced to pay.³⁸ It was not always so. It was not so until *Decker v. Pope*,³⁹ in 1757 when Lord Mansfield found

³⁰232 N. Y. 220 (1921).

³¹303 N. Y. 351 (1951).

³²1 KENT, COMMENTARIES, 477 (13th ed.).

³³*Dalrymple v. Dalrymple*, 2 Hagg. Cons. 53, 63-65 (1811) (Opinion by Sir William Scott); see also SIR JAMES DALRYMPLE OF STAIR, INSTITUTES OF THE LAW OF SCOTLAND, Pt. 1, Tit. IV (1681).

³⁴152 F. (2d) 174 (7th Cir. 1945).

³⁵SIMPSON, HANDBOOK OF THE LAW OF SURETYSHIP, 198 (1950).

³⁶*Gigli v. Welby*, 1 Cal. Proc. in Ch. cxx, cited in AMES, CASES ON SURETYSHIP, 583 (1901).

³⁷*Hays v. Ward*, 4 Johns. Ch. 123, 131 (1819).

³⁸SIMPSON, *op. cit. supra* note 35, at 224.

³⁹1 Selwyn Nisi Prius 91 (1757).

a way to enforce at Common Law in the King's Bench the right of reimbursement hitherto to be had only in Chancery. When at your request I guarantee your debt to C, this is, as Mansfield said "a sufficient consideration to raise a promise in law"⁴⁰ that if I have to pay C, you will reimburse me. Judicial legislation? We are no longer shocked by that today. But what impelled the court to say that an obligation is here implied? Why is there a "sufficient consideration to raise a promise" in law when a promise in fact is lacking? "Sufficient consideration," "implied promise" "implied obligation"—all this is lawyer's "shop talk," the "articulate premises" of the decision. The "inarticulate premise" is the Natural Law dictate of restitution.

Again in the law of Suretyship when I as surety am forced to pay your debt to C, I am "subrogated" to all C's rights against you.⁴¹ Whence this rule? We are not asking merely the name of the case in the reports where it first appears, but for the rock bottom basis of "subrogation." That may be of more than academic interest when a surety whose hands are soiled comes to Equity to seek the remedy. "Natural Justice," said Kent;⁴² "the plainest principles of Natural Justice,"⁴³ said Brougham. Natural Law for these authentic voices of Equity is no mere "brooding omnipresence" in some remote theological sky. Having given birth to a basic principle of law, is Natural Law no longer to be invoked as a guide to its growth?

Time permits but one more example. From Partnership comes *Meinhard v.*

Salmon.⁴⁴ Meinhard and Salmon were partners (technically "joint adventurers," but it matters little since the rules of the game are substantially the same) in operating a business in a building leased by them. The lease was about to end and with it the joint adventure of the two. Salmon secretly secured from the landlord a renewal of the lease in his own name alone. He tried, said Judge Cardozo, "to steal a march on his comrade under the cover of the darkness and then hold the captured ground."⁴⁵ But "loyalty and comradeship are not so easily abjured." The court held that Salmon must hold the renewed lease for the benefit of Meinhard as well as for himself.⁴⁶

Joint adventurers like copartners owe to one another, while the enterprise continues, the duty of the finest loyalty. Those forms of conduct permissible in a work-a-day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not be consciously lowered by any judgment of this court.

Why this "higher standard" for "fiduciaries"? By what criterion are the "morals of the market place" excluded from the "mores" of the community which for some are the sovereign source alike of Ethics and of Law? Is it a sufficient answer to say that

⁴⁰*Ibid.*

⁴¹SIMPSON, *op. cit. supra* note 34 at 205.

⁴²*Hays v. Ward, supra* note 37.

⁴³*Hodgson v. Shaw*, 3 Myl. & K. 183, 190 (1834).

⁴⁴164 N. E. 545 (1928).

⁴⁵*id.* at 547.

⁴⁶*id.* at 546.

partners are fiduciaries? Will the lawyer in quest of a philosophy of law be put off by this demurrer? The questions drive him back to the Natural Law. "Fiduciary" is from Latin "*fiducia*." "*Fiducia*" itself is from Latin "*fides*" which in three thousand years has not yet lost its "moral content" and which Natural Law alone at last explains.

For those then who would dismiss Natural Law doctrine as an impertinent and impractical piece of piety, Judge Robert N. Wilkin, until recently Judge of the United States District Court for Northern Ohio, a judge and no theologian save in the sense that the "science of God" is as much of interest to laymen as the "science of rocks," a lawyer and no philosopher save in the sense that laymen too may seek to know the "final causes of things," has written:⁴⁷

I give this personal testimony in support of Natural Law. Ever since I became interested in the philosophy of law I have been hearing opponents of Natural Law say: It is impractical. It is idealistic. Its aims and principles are all very well for such reflective studies as Ethics and Moral Philosophy, but they have no place in the actual administration of positive law.

As a result of ten years of experience as a trial judge in a United States District Court I am convinced that such assertions are not true. In fact they are mere nonsense. The principles, standards and precepts of Natural Law are continually employed by courts as the constitutions, statutes and precedents are interpreted and applied to the ever-varying circumstances of life. They are employed also in the interpretation of wills, contracts, conduct and relationships of life. They are part of man's nature and cannot be separated from his life.

Courts continually use such tests as, What is reasonable? What is true? What is fair? What is just? They do not stop to ask Pilate's question. They are not disturbed by the intricate ratiocinations of the skeptics who think that all such concepts are merely subjective and actually unattainable. Courts are not deterred by such conceits. . . . Not only do courts actually employ the ideals and standards of Natural Law; I shall say further, that a Judge of sentient mind and heart would hardly be able to endure the responsibilities of office if he were denied the guiding influence and sustaining strength of Natural Law precepts and philosophy.

Judge Wilkin's words reaffirm the philosophy of law which breathed into Anglo-American law the soul which has for centuries sustained it. Henry de Bracton, clergyman and judge, in the first institutional treatise our law knows, wrote in the thirteenth century: "by virtue of his nature man is free and according to this slaves are free and in this respect insofar as the civil law and the *jus gentium* recognize slavery they detract from Natural Law."⁴⁸ For

⁴⁸"Taking a text from the Roman jurist Florentinus, Henry of Bracton infused into it new life and energy and declared that 'by virtue of his nature man is free.' On this principle he boldly argues that slaves are entitled to their freedom: *Sed secundum hoc servi sunt liberi*. The Roman Civil Law and the *Jus Gentium* which recognized the institution of slavery are accordingly condemned. In hac parte jus civile vel gentium detrahit juri naturali. In this matter Roman Civil Law and the *Jus Gentium* (which was the private international law of the ancient world) run counter to the natural law. In the next sentence Bracton denounces servitude as a rule of the *Jus Gentium* by which one man is subjected to the dominion of another against natural right and justice (*contra naturam*). The natural law is for him and, one may say, for all the lawyers and philosophers of his time the reflection of the divine wisdom in the mind and life of reasonable creatures, and a first principle of morals." O'SULLIVAN, *THE INHERITANCE OF THE COMMON LAW*, 12 (1950).

⁴⁷Wilkin, *op. cit. supra* note 1, at 146-147.

John Fortescue, Chief Justice of the King's Bench in the fifteenth century, "Natural Law is the mother and mistress of all human laws."⁴⁹ In the Common Pleas in 1469, Yelverton, J., addressing counsel, says: "We are to act as the canonists and civilians do when a case comes before them for which they find no law — they resort to the Law of Nature which is the ground of all laws."⁵⁰ In the piquant law — French of an old fourteenth century Year Book reporting a King's Bench case involving an obscure point of Real Property Law, Sharshulle, J. refers to precedents but adds: "Nulle ensaumple est si forte come resoun," and when counsel insists on *stare decisis* and Hilary, J. would have it that "ley est volonte des justices," Stonore, C. J. replies: "Nanyl: ley est resoun."⁵¹ Writing his Tenures at the end of the fifteenth century (and in the seventeenth century Coke will call the book "the most perfect and absolute work that ever was written in any science"⁵²), Littleton, sometime Judge of Common Pleas, concludes his work with a flourish some have compared to the style of Aquinas, "*Lex plus laudatur quando ratione probatur.*"⁵³ In 1608 Edward Coke and Francis Bacon, so often opposed, unite

in Calvin's Case,⁵⁴ in affirming the Natural Law foundations of the law of England. Said Coke, "The Law of Nature which God at the time of the creation of man infused into his heart for his preservation and direction was before any judicial or municipal law and it is immutable."⁵⁵ Said Bacon, "As the Common Law is more worthy than the statute law, so the Law of Nature is more worthy than them both. . . . Our law is grounded upon the Law of Nature."⁵⁶ The Reformation had cut many ties, but not the tie of the Natural Law tradition. Six years after Calvin's Case, Hobart, J., not knowing and not fearing that future centuries would make England's Parliament "omnicompetent," could say:⁵⁷ "A law made against natural equity, is void in itself, for the law of nature is immutable; it is the law of laws." And the "judicious" Hooker, Bishop of the Church of England, could write, (and a great American Law School still honors his words):⁵⁸

Of Law there can be no lesse acknowledged, than that her seate is the bosom of God, her voyce the harmony of the world, all things in Heaven and Earth doe her homage, the very least feeling her care, and the greatest as not exempted from her power; both angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniforme consent, admiring her as the mother of their peace and joy.

The mighty chorus swells with mighty

⁴⁹De Nat. Legis Naturae, i. c. xxix.

⁵⁰Anon., Y. B. 3 Ed. IV 9 (Mich. pl. 9), as cited in ALLEN, LAW IN THE MAKING, 186 (3d ed. 1939).

⁵¹Y. B. 18 & 19 Ed. III (1345), R. S. 376, cited in ALLEN, LAW IN THE MAKING, n. 323.

⁵²Co. Rep. 67a; 10 Co. Rep., pref. pp. xxviii-xxx; Co. Lit. 311a.

⁵³LITTLETON, TENURES, (Eng. tr. ed. Wambaugh, 1903) 341. Cf. also O'Sullivan, *The Natural Law and Common Law*, 3 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME, 30 (1950).

⁵⁴7 Rep. 1 (1608).

⁵⁵*Id.* at 12a n.

⁵⁶BACON'S WORKS, Vol. 5, 202, 225 (Spedding 2d ed. 1870).

⁵⁷*Day v. Savage*, Hob. Rep. 87 (1614).

⁵⁸*Ecclesiastical Polity*, i. c. 18 (Everyman's Lib. ed.).

voices as Locke,⁵⁹ Mansfield,⁶⁰ Blackstone,⁶¹ Burke⁶² are added in the old, and Hamilton,⁶³ Jefferson,⁶⁴ Wilson⁶⁵ and

⁵⁹“The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men’s actions must, as well as their own, and other men’s actions be conformable to the law of nature, i. e., to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.” SECOND TREATISE CONCERNING CIVIL GOVERNMENT, ch. xi. (1690).

⁶⁰*Supra* note 28.

⁶¹*Supra* note 14.

⁶²“(The people) have no right to make a law prejudicial to the whole community, even though the delinquents in making such an act should be themselves the chief sufferers by it; because it would be made against the principles of a superior law, which it is not the power of any community, or the whole race of men, to alter. I mean the will of Him who gave us our nature, and in giving impressed an invariable law upon it. It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please – or that laws can derive any authority from their institution merely, and independent of the quality of the subject-matter.” From a *Tract on the Popery Laws*, as quoted in HOFFMAN & LEVACK, *BURKE’S POLITICS*, 151, 152 (1949).

⁶³“The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself and can never be erased or obscured by mortal power.” I HAMILTON, *WORKS*, 108.

⁶⁴“[The] true office of our legislators is to declare and enforce only our natural rights and duties, and to take none of them from us. . . . Questions of natural right are triable by their conformity with the moral sense and reason of man.” (Letter to F. W. Gilmer, June 7, 1816, 10 FORD’S WRITINGS OF JEFFERSON, 32).

⁶⁵“As virtue is the business of all men, the first

Kent⁶⁶ in the new “kingless commonwealths across the seas.”⁶⁷ These voices spoke again only yesterday at Nuremberg when the Attorney General of England, successor of Coke, Sir Hartley Shawcross thundered once again in the name of an outraged humanity:⁶⁸

The warrant of no man excuseth the doing of an illegal act. Political loyalty, military obedience are excellent things, but they neither require nor do they justify the commission of patently wicked acts. There comes a point where a man must refuse to answer to his leader if he is also to answer to his conscience.

Three centuries before Sir Hartley thus answered Hitler, another English lawyer, once Lord Chancellor, answered another tyrant and his puppet judges:⁶⁹

My lords ye must understand that in things touching conscience every true and good subject is more bound to have respect to his conscience and to his soul than any other thing in all the world beside.

And when Thomas More, late Keeper of the King’s Conscience lay martyred, the “King’s good servant, but God’s first,” he had kept faith with Bracton’s “The King is under God and the Law,”⁷⁰ with the teachings of the Christian Apostles “we must obey God rather than men,”⁷¹ with

principles of it are written in their hearts, in characters so legible, that no man can pretend ignorance of them, or of his obligation to practice them.” I WILSON, *WORKS* (ed. Andrews), 111.

⁶⁶*Supra* note 9.

⁶⁷2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW*, 684 (2d ed. 1952).

⁶⁸Official British report of the Nuremberg prosecutions, 85, as cited, O’SULLIVAN, *INHERITANCE OF THE COMMON LAW*, 66.

⁶⁹As quoted in O’SULLIVAN, *INHERITANCE OF THE COMMON LAW*, 65.

⁷⁰BRACTON, f. 5b, 107; 1 POLLOCK & MAITLAND, *op. cit. supra* note 10, at 181-182.

⁷¹Acts, v., 29.

the martyred Roman lawyer Cicero's warning "to annul the Law of Nature is wholly impossible,"⁷² with the "heroine of Natural Law," Antigone who "deemed not that human laws were of such force that a mortal could override the unwritten and unfailing statutes of heaven which are not of today or yesterday but from all time."⁷³ In human reason Natural Law keeps its court and human conscience is the judge. A philosophy of law without conscience is a nullity — a court without a judge.

We live in a world once again half slave and half free, a house divided against itself in a division we fearfully concede cannot permanently endure. Yet only last year in our highest State Court and in the highest tribunal of the nation counsel argued that the word "morality" in a statute regulating the licensing of moving pictures for public and general exhibition to sophisticated age and innocent youth alike, had no "objective" meaning.⁷⁴ Judicial reaction varied. One was as follows:⁷⁵

Our Federal and State Constitutions assume that the moral code, which is part of God's order in this world exists as the substance of society. The people of this state have acted through their legislature on this assumption. We have not cast ourselves adrift from that code, nor are we so far gone in cynicism that the word "immoral" has no meaning for us.

But another was this:⁷⁶

Terms of such vague and undefined limits, however, fail to furnish the objective cri-

⁷²CICERO, PRO MILONE, as quoted, WILKIN, *ETERNAL LAWYER: A LEGAL BIOGRAPHY OF CICERO*, 225 (1947).

⁷³SOPHOCLES, *ANTIGONE*, 450-454.

⁷⁴*Commercial Pictures Corp. v. Bd. of Regents*, 305 N. Y. 336, 113 N. E. 2d 502 (1953), *rev'd* 346 U. S. 587 (1954).

⁷⁵305 N. Y. 336, 354, 113 N. E. 2d 502, 511.

⁷⁶*Id.* at 366, 113 N. E. 2d at 519.

terion necessary to insure that there shall be no interference with the exercise of rights secured by the First Amendment.

To the latter we might humbly reply. By what criterion are the "rights" guaranteed by the First Amendment made lasting and unwavering? If Natural Law provides that criterion, shall it not be consulted also, at least for the "objective" character of morality, before we pour "morality" itself forever down the subjective drain.

There are other voices. Two recent utterances give heart and hope to those who invite lawyers to reconsider the claim of Natural Law. One is from John Foster Dulles, now Secretary of State. The other is from the distinguished Hebrew scholar, Dr. Solomon Freehof of Temple Rodef Shalom, Pittsburgh, in a lecture on "The Natural Law in the Jewish Tradition"⁷⁷ at the University of Notre Dame's Natural Law Institute when representatives of the Jewish, Confucian, Buddhist, Moslem and Hindu religious traditions assembled under the presidency of the Catholic Archbishop of Los Angeles, now His Eminence James Francis Cardinal McIntyre, to bear witness to the universality of the Natural Law.

Said the Secretary of State:⁷⁸

For world peace we must recognize two principles. One is that there is a moral law and that it provides the only proper sanction for man-made laws. The other is that every human individual, as such, has dignity and worth that no man-made law, no human power can rightly desecrate. Experience shows that when men organize a society in accordance with these two basic beliefs, they can within such society, have peace with each other.

⁷⁷5 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME (1952).

⁷⁸John Foster Dulles, *Which Way to World Peace . . . Revolution or Reform*, 3 FREEDOM AND UNION 8 (Oct. 1948).

Said Rabbi Freehof:⁷⁹

(In the Jewish Tradition) the law was not a mere human contract or the product of the wilfulness of a tyrant or the confusion of some town council (but) the will of God as understood by revered scholars. . . . It was generally obeyed in pride and in love. . . .

The sources of true social order are always the same in a sprawling modern metropolis as in a tiny medieval ghetto. Police power is essential, but never quite sufficient. If a large percentage of the citizens decided to be violent, . . . the police power is helpless. The true source of order comes from within. It is conscience which makes citizens of us all.

⁷⁹5 PROCEEDINGS OF THE NATURAL LAW INSTITUTE, UNIVERSITY OF NOTRE DAME, 25-26 (1952).

. . . The scattered Jewish communities maintained law and order because the law was accepted as coming to them from "nature and nature's God." . . . In this small confined group, the (Divine-Natural Law) was practiced and attained a majesty which it could not attain elsewhere. . . .

If men believe that the law is essentially natural and God-given, then with even a minimum of police power, order will reign. If men understand the legal foundations of their own government, they are the intelligent citizenry against which no tyranny can prevail. This is the experience and the universal meaning of Divine-Natural Law in Jewish history. It was small in scope, but it applies *ubique et omnibus*, everywhere for everybody.

The Catholic Lawyers Society of Detroit recently cooperated with the Center for Human Relations of the University of Detroit to present the Third Catholic Issues Forum, a series of discussion programs on topics of current interest to lawyers and to Catholics.

Schedule of Lectures

March 22, 1955 — H-Bombs and Ethics

Leaders: Dr. Daniel L. Harmon, Chairman,
Department of Physics
Rev. A. P. Madgett, S.J.,
Department of Theology

April 5, 1955 — Problems of the Aging

Leaders: Rev. Wilbur Suedkamp,
Acting Secretary for Charities,
Archdiocese of Detroit
Rev. Hugh Dunn, S.J.,
Department of Sociology

April 19, 1955 — What Price Coexistence?

Leaders: Dr. Bernard F. Landuyt, Chairman,
Department of Economics
Dr. Francis A. Arlinghaus,
Department of History

May 3, 1955 — Patterns of History

Leaders: Mr. John J. Drolet,
Department of History
Dr. Walter H. Turner,
Department of Philosophy