

# The Catholic Lawyer

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

Article 8

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March 2016

## American Liberty and "Natural Law"

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### Recommended Citation

George W. Constable, B.A., LL.B. (1955) "American Liberty and "Natural Law"," *The Catholic Lawyer*. Vol. 1 : No. 2 , Article 8.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol1/iss2/8>

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## BOOK REVIEWS

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AMERICAN LIBERTY AND "NATURAL LAW": by *Eugene C. Gerhart*. The Beacon Press, Boston, 1953. Pp. xi, 212. \$3.00.

*Reviewed by*

GEORGE W. CONSTABLE, B.A., LL.B.\*

The thesis of this book is that there are two theories of natural law: the American theory, derived principally from Locke, supporting freedom and democracy, and the Catholic one, derived from the Popes, supporting ecclesiastical authoritarianism. This thesis is developed systematically by the author who studs his text with copious citations and quotations. The whole book from jacket to contents is framed in a context that suggests that papal teachings are against the grain of the American tradition.

Mr. Gerhart leaves open the question of whether there is a natural law, sometimes seeming to say there is and sometimes seeming to say there is not. The phrase "natural law" is placed in quotation marks in the title. What interests Mr. Gerhart is, *who interprets* the natural law for us. Who is to be its spokesman? The ostensible reason this concerns him — and in this he probably articulates the fears of many men of good will interested in natural law — is that a priestly hierarchy will capture the natural law movement and will arrogate to itself the role of interpreter.

The author gets at his point by way of a series of chapters illustrating generally and historically that natural law is an elusive concept with many meanings and uses. This leads to the conclusion that natural law can not only support democratic liberties; it

can also serve as a useful mystique for a smooth imposition of authoritarian leadership. Having made this point, he proceeds to suggest that the Church adopts it for the latter purpose, setting herself up as the sole rightful interpreter of natural law. This established to his satisfaction, he then indicates that as such interpreter, the Church hierarchy would impose an authoritarian tradition hostile to the American democratic tradition in four areas: freedom of the State from the Church interference, freedom of religion, freedom of expression, and popular sovereignty. From the conclusion that natural law can support either of these "opposed" traditions, he draws the moral that first principles should be carefully checked and frequently re-examined, that logic and philosophy are sterile and that Holmes' pragmatic, skeptical approach is justified. He closes with a plea for tolerance, democracy and moderate "English" liberty as against ecclesiastical authoritarianism.

One should not, however, leap to the conclusion that here is a legal Blanshard.<sup>1</sup> There are many commendable things in the author's approach: a very evident sincerity, an earnest concern for freedom of thought, a desire to buttress every conclusion with facts, an appreciation of the necessity of

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<sup>1</sup> See Blanshard, *American Freedom and Catholic Power* (1949); *Communism, Democracy and Catholic Power* (1951).

starting from correct first premises, and a horror of ecclesiastical interference in *purely* secular territory. Nevertheless, what Mr. Gerhart has done is to write one of those books, which like the books of old on the movement of the heavenly bodies based on the concept of a flat stationary earth, would never have been written if a prime fact had been known. He has made a very simple and obvious error that permeates his basic message. Confusing the *divine* (or revealed) law with the *natural* law, he misapplies to the latter the Catholic claim that the Church is the sole rightful interpreter of the former. In other words, he conceives that scholastic natural law theory holds that the Church is the final, supreme and infallible enunciator of what the natural law is.

Every Catholic lawyer trained in natural law knows enough not to take seriously Mr. Gerhart's thesis. The attitude of such a lawyer is more likely to be one of searching for the soft spot in the argument, the entrance point of the mistake. This is to be found in two small phrases on page 92 that Mr. Gerhart gratuitously and unjustifiably slides into a key conclusion:

That in case of conflict between natural law, *as interpreted by the church*, and any statute, court decision, or system of law, the latter, *if it does not conform to the church's view* of the natural law, "is inherently vitiated." (Emphasis added).

Nothing in his citations or previous text justifies the italicized clauses, yet it is his central point. Of course, the teaching is the precise opposite. One need only turn to the chief architects of scholastic tradition, Aristotle, and St. Thomas, to see that according to Catholic teaching natural law is determined by the authority of reason working upon the data of experience, in particular

the experience of human nature.<sup>2</sup> From an analysis of the basic springs of human action, *i.e.*, the will and intellect, the scholastics conclude that there is written into our nature a precept, good should be done and evil avoided, good being identified with the being that is suitable to a natural inclination. From this precept flow all other natural law precepts as well as the influence of these precepts upon the positive law. Neither St. Thomas nor other Catholic teachers suggest that natural law gives to clergymen, *qua* clergymen, the right of interpretation or that it vests authority in the hierarchy to rule society. Mr. Gerhart cites nothing contrary to this. The most that can be shown is that the Church claims that its infallible teaching power given by Christ extends "to all and only" those truths of natural law which are necessary that the data of revelation be faithfully guarded. In other words, the apostolic authority claimed to be given by Christ to the Church to interpret the Divine Law transcends the authority of reason given by God to all men to interpret natural law. This is far from Mr. Gerhart's thesis that natural law supports authoritar-

<sup>2</sup> Summa Theologica I<sup>a</sup>-II<sup>a</sup>, q. 91, a. 2: ". . . thus implying that the *light of natural reason*, whereby we discern what is good and what is evil, which is the function of natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law." (Italics supplied). I<sup>a</sup>-II<sup>a</sup>, q. 94, a. 2: ". . . Consequently the first principle in the practical reason is one founded on the notion of good, viz., that *good is that which all things seek after*. Hence this is the first precept of law, that *good is to be done and pursued and evil is to be avoided*. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to precepts of the natural law as something to be done or avoided." In general, see Summa Theologica I<sup>a</sup>-II<sup>a</sup>, q. 94.

ianism, ecclesiastical or otherwise.

This is not the only error that Mr. Gerhart has made. In his development of the supposed antagonism between the papal views and the traditional American views, for the purpose of pointing up the alleged cleavage, he misses the central truth that the Church takes a moderate position on liberty offensive alike to doctrinaire liberals and doctrinaire political authoritarians. But there is nothing undemocratic about the view that power in the first instance stems from God and not the people. It was the Creator not the people who endowed us with inalienable rights. It is perfectly consistent with papal doctrine that governmental authority may reside to a large extent in the people, as coming from God. We know that factually the power of the government is not wholly a matter of the consent of the people. The Constitution was adopted by a very limited group of voters. Not everyone votes even today, nor does an individual have a practical opportunity to reject the Constitution. Furthermore, it was found desirable to protect minorities against the will of the majority. Again the separation of Church and State, as far as political power is concerned, is perfectly consistent with the actual cooperation that takes place; for example having chaplains in the Army, or saying prayers in schools, or recognizing Christian holidays such as Sunday. Similarly, this seems a poor time to insist that the American tradition calls for absolute liberty of expression as against the papal teachings of certain natural limits thereon. After all we are forbidding, with overwhelming popular approval, the teaching of false Communist doctrines; and there has always been censorship of obscenity and immorality, prohibitions upon inciting to riot and laws against slander. Was it not

Holmes who said "No one has a right to cry 'Fire!' in a crowded theatre"? Does Mr. Gerhart maintain that these limitations on liberty depend on majority decision? Unfortunately, it is the fate of middle-of-the-road points of view to be attacked from both sides. In times past, many dictators and kings have attacked the Church for opposing slavery and tyranny in Europe!<sup>3</sup>

The book is marred by much naivete. He refers to "this remarkable" doctrine of original sin<sup>4</sup> and states that it was designed to "freeze the Christian Church in a position of authority;"<sup>5</sup> he seems to think it necessary to cite an authority to prove that Catholics still accept the doctrine of original sin; he cites Cahn's humorous (or silly) hypothesis that the Jesuits desire to move for Holmes' canonization; he implies that the hierarchy puts authority ahead of truth in contrast to Holmes (as if the search for truth might not lead us to the authority of scriptural revelation); and he indicates that believers in Christian truth are timid and credulous whereas the critical, agnostic inquirer is courageous.<sup>6</sup>

There is also much apparent contradiction and equivocation in the argument. Holmes' dogmatic skepticism is admired and yet it is said he did not make a dogma of his skepticism. Mr. Gerhart criticizes the papal ideas on the reasonable limits of liberty, yet praises moderate English liberty.<sup>7</sup>

<sup>3</sup> For example, the attacks of King James I of England on the natural law political philosophy of Suarez and Bellarmine. See *Political Works of James I passim* (McIlwain ed. 1918).

<sup>4</sup> Gerhart, *American Liberty and "Natural Law"* 182 (1953).

<sup>5</sup> *Id.* at 80.

<sup>6</sup> *Id.* at 152.

<sup>7</sup> As if the scholastic tradition, stemming from St. Thomas and working through Bracton, Fortescue and the whole common law tradition, had not been a great influence in the development of "English liberty."

He cites persons and texts in justification of his views when that same person in other texts would not justify him.<sup>8</sup>

One of the most philosophically naive premises of this book is that one can dodge the question of the existence of natural law and still reach an intelligible conclusion about who is to interpret it. But the words spoken must tell us of the speaker. In the case of Mr. Gerhart, he hears the word of freedom. Yet it is manifestly impossible to erect a firm foundation for inalienable individual freedom unless one goes into a realm transcending individual or mass preferences and desires. In other words, rights must be founded on a purpose above human purpose, *i.e.*, that of the Creator. So states the Declaration of Independence and so state the Popes. It is not a question of choosing authority *over* truth, but of choosing the authority *for* truth. Who knows truth? Who can tell what is right? Mr. Gerhart recognizes that one has to rely on someone's judgment; and he is too sensible to say that everyone is his own proper judge or that a majority judgment is *per se* true or right. Where does this leave him? In the shifting sands of tolerance, experiment, search; that is to say, as far as forming a necessary judgement is concerned, *nowhere*. Challenge him to state the basis for the right to popular rule or to individual freedom and he would probably duck behind some mere paraphrase of the very thing to be proven and thereby retain his one-sided concept of authoritarianism. But one must sooner or later be driven to acknowledge that truth and right give their own authority to those who can supply a coherent, experimentally verified account of them — quite indepen-

<sup>8</sup> For example, Leo XIII, in his encyclical *Libertas* (1888), makes ample room for a moderate liberty and makes clear that democracy is legitimate.

dent of whether they are a majority or a minority, governors or citizens, priests or laity. So in the matter of natural law one must be driven to admit the interpretative authority of those who demonstrate in the field of ethics, an accuracy of observation and a cogency of logical induction.

On that basis, all men of good will and competent intellect can take up the struggle to develop what is right and what wrong. If Catholics are wrong on any given issue, let the error be shown: but why abuse the scholastic tradition as "authoritarian." If in the fields of war, colonialism, international law, revolution, the authority of government, social policy and elsewhere, errors can be pointed out, let that be done — but do not attack the whole idea of a transcendental law because of possible mistakes of detailed application.

The average law student of the natural law movement will probably be sad at this book. It will pain him to see the wonderful revival of interest in natural law become involved in a religious controversy just when it would rescue society from the dominant positivism of which the logical result is either chaos or despotism. At the very time when thoughtful men are searching for a rational anchorage to secure individual rights against the impositions of arbitrary human will (whether of the masses, of the few or of one), here comes a book which sows the seeds of suspicion against the arch-supporter and exponent of the natural law position.

Yet on reflection there may be a happy fruit to be expected from such books as these. When reasonable, competent men — and Mr. Gerhart is one — air their differences, we can hope for a new and deeper understanding of the truth that is acceptable to both. And underlying Mr. Gerhart's

vision is the general truth that the American-Lockean-Jeffersonian tradition is long on freedom, whereas the Catholic-Aristotelian-Aquinas tradition is long on duty. The former speaks most typically in terms of Bills of Rights, the dignity of the individual, and popular self-government; the latter in terms of doing good and avoiding evil, seeking virtue and perfection and complying with the will of God. Both traditions are valid, both are good, and each would be wanting in wholeness were it to exclude the other. In Washington's day, the need was for a legal basis of wresting freedom from the political, economic and religious autocracies of Europe. In our day the need is for a legal basis of combining this freedom with a generally beneficial social order. The collectivisms of both right and left, *i.e.*, Fascism, Nazism and Communism, are examples of what happens when there is an attempt to satisfy the need to order society for the general welfare when there is no sound philosophy for preserving the basis of the freedoms gained in the past.

The need of the day is precisely for a legal theory that gives due place to both liberty and duty. And that is where the scholastic natural law tradition can draw on the democratic tradition and where the democratic tradition can be saved by the scholastic tradition. Catholic Americans can admit without harm to their cause that many proponents of the scholastic tradition tended not only to give implicit rather than explicit attention to the doctrines of political liberty (including St. Thomas himself) but also to obscure when they were speaking under the apostolic and scriptural authority and when under the authority of natural law. On the other hand, non-Catholic Americans like Mr. Gerhart can readily

admit that our basic charters, the Declaration of Independence, the Constitution and the Bill of Rights, are mostly rights and few duties, and that social idealism working through statutory and common law has had to struggle to fill the gap.

It is up to Catholics to redouble their efforts to show how great a place Aquinas and his philosophical descendants have made for freedom. But it is up to the Gerharts to do a little studying and acknowledge that the scholastic natural law system is truly a system that has reason — intellectual perception — working from observation of human nature and its context, as its sole interpreter; and that it distinctly eschews blind faith in scripture or in a hierarchy as a valid source of its precepts or as a basis for an authorized governmental power.

On final estimate, then, it is well that the religious issue has been specifically raised. How else can one learn that there can be no legal "ought" binding men not to encroach upon one another's self-determination unless there is a purpose in the universe that transcends each man's self-determined purpose? There can be no rights without duties; no refuge from human tyrannies without homage to God. Freedom is seated in religion: it is the *Creator* — not fickle men — who endows man with inalienable rights. This does not mean *revealed* religion, rather *rational* religion — the faith that reason can erect from its inquiry into the facts and from its logical reflections derived therefrom.

This is where the supporters of Holmes, like Mr. Gerhart, miss the point about the unhappy consequences of that great jurist's philosophy. They do not understand the reason for the criticism. Mr. Gerhart touches on the reason briefly, only to dismiss it with

an inapposite citation from a skeptic.<sup>9</sup> Yet the critics of Holmes, too, have often made a mistake. Not a little harm has been done to the natural law estimate of Holmes and particularly the scholastic natural law estimate by the claim that if one eliminates God one is driven logically to totalitarianism. The fact is, one is left in the quicksands of two general alternatives, granted there is no discernible Divine Purpose: the alternative that every intention is right insofar as it can effectuate itself and the alternative that every intention is right insofar as

it does not conflict with any other intention. One line of thought leads to the despotisms of simple power, the other to anarchies of individualism. The latter was perhaps more characteristic of Holmes than the former, although he vacillated between the two.

Scholastic natural law purports to save us from this hopeless social schizophrenia built upon agnostic jurisprudence. It is to a deepened integration of liberty and order, of right and duty, of getting and giving, upon a religious basis, that we must look for the happy results of Mr. Gerhart's work.