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NATURAL LAW – AN UNCHANGING STANDARD?

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A FEATURE ASSOCIATED with the traditional doctrine of natural law is its unchanging form. In the nineteenth century this feature was criticized by members of the historical and sociological schools who denied the existence of absolute rules of human nature. This criticism led certain legal philosophers to propound a theory of "natural law with a variable content" – a theory which seemed to deprive the natural law doctrine of its primary claim to validity.

It seems that it would be useful to examine the writings of the leading representatives of the traditional school of natural law – Aquinas and Suárez – in order to see to what extent they were aware of the problem of "change." In other words our task will be to ascertain whether the traditional doctrine takes account of the variables which are to be found in any system of rules or institutions.

Aquinas' discussion of the feature of change is to be found in the fourth and fifth articles of Question ninety four of the *Summa Theologica*. In the fifth article he makes the statement that change can be understood in two ways, as an addition and as a diminution. In the case of addition, natural law can be changed because "many things for the benefit of human life have been added over and above the natural law,

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both by divine law and by human law." But as far as diminution is concerned:

> the natural law is altogether unchangeable in its first principles: but in its secondary principles which as we have said, are certain detailed proximate conclusions drawn from the first principles, natural law is the standard of rectitude in most cases. But it may be changed in some particular cases of rare occurrence through some special cases hindering the observance of such precepts as stated above.[1]

The example which he gives of this type of change is the oft-quoted one of the deposit. In the majority of cases it is right and proper to return what one has received as a deposit, but in certain cases it may not be right and proper, for example, if the deposit would be used for some evil purpose.

In the *De Legibus,* Suárez discusses the twofold change and remarks that the change which takes place when something is added to the natural law by human law is not "true" change, "since addition does not constitute a change when the law is left in its entirety," but rather, there takes place "a perfecting or extension."[2] In this he is nearer the point. As we shall see later, the natural law cannot be regarded as complete in the sense that its operation is completely specified. Indeed, on the one hand, its precepts are in need of interpretation and exposition and, on the other hand, its precepts are not sufficient to deal with every problem which may arise. Consequently, it is inaccurate to speak of natural law as being *added to* by positive law, for no change takes place in the natural law when a positive law is enacted. For the natural law itself is not changed. The addition which the positive law makes is in the realm of positive law and not of ethical principles.

What concerns us in this section is the question of interpretation. Indeed the whole question of "diminution" of the natural law must be studied in the light of this question, for it seems that when the Schoolmen use the phrase they are not thinking of the precepts of the natural law as being *abolished* but as being *narrowed down* by interpretation to fulfill the needs of classes of cases which do not seem to be rightly subsumed under the general principles.

When Aquinas refers to the fundamental precepts of the natural law as being generally valid but failing *in paucioribus* this, at first sight, seems to deny a fundamental tenet of the natural law thesis, *viz.,* that it sets up an unchanging standard. How can we say that the precepts are *sometimes* changed?

It may be of interest to note Suárez's approach to the problem. He makes a distinction between "intrinsic" and "extrinsic" change. In no part, does he give a complete explanation of these terms, but the examples which he uses are illuminating. An intrinsic change, he says, takes place when a father ceases to occupy the status on the event of his death; an extrinsic change when a father ceases to occupy that status on the death of his son.[3] Using this model, he goes on to show under what conditions the natural law may be said to be changed. There exists, he says, a vital relationship between the precepts of the natural law and the subject-matter to which they re-

[1] AQUINAS, SUMMA THEOLOGICA I-II, q.94, art. 5.

[2] See SUAREZ, DE LEGIBUS, bk. 2, ch. 13 *passim* [hereinafter cited as DE LEGIBUS].

[3] *Id.* at § 6.

late. A precept is usually framed in respect to the existence of a number of circumstances which are quite common, and easily recognized, and not of other circumstances.[4] For example, the precept prohibiting killing presupposes circumstances involving the commission of an act leading to the death of another, but does not extend to circumstances where an act is performed in self-defense.[5]

Suárez is evidently thinking of the precepts in a way which endows them with a certain openness,[6] although this openness is confined within certain limits, for he says:

> Since in its own set terms the natural law has been written not upon tablets nor upon parchments but in the minds of men it is not always formulated in the mind according to those general or indefinite terms in which we quote it when speaking. For example the law concerning the return of a deposit, in so far as it is natural, is mentally conceived, not in such simple and absolute terms, but with limitations and circumspection, for reason dictates that a deposit should be returned to one who seeks it *rightfully* and *reasonably,* or in cases involving no objection based upon just defence, whether of the State, of oneself, or of an innocent person. Yet this law is quoted simply in the following terms: A deposit must be returned; because the rest is implied, nor is it possible to make in the shape of a law humanly drawn up a complete statement of all the points involved.[7]

It is in this way that Suárez explains Aquinas' statement that the precepts of the natural law may change. A precept cannot change intrinsically, *e.g.,* the principle proscribing theft is never abolished, but it may change extrinsically, in so far as it is framed in respect of the existence of certain features and not of others.

Understood in this way, the precepts of the natural law are associated with a certain degree of flexibility. The Schoolmen speak of the precepts as being inapplicable *in paucioribus.* Usually, the conditions to which they relate are of a salient kind (theft: taking the property of another; adultery: having intercourse with another's wife) but in certain cases the precepts may be inapplicable (*e.g.,* is it theft to take the property of another in a case of necessity or with some other adequate justification?).

The question remains, however, as to the way in which we determine whether a precept will be applicable or not. Suárez suggests that it can only be the result of interpretation applied to the various conditions which arise from time to time.[8] He lists the common examples of killing, and the taking of property which belongs to another, and says that the former does not cover acts of self-defense, the latter taking in cases of necessity. The criteria which he puts forward for determining whether or not the precepts apply to the exceptional

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[4] *Ibid.*

[5] *Id.* at § 5.

[6] The same phenomenon is found in positive law. See Hart, *The Ascription of Responsibility and Rights,* ESSAYS IN LOGIC AND LANGUAGE 145 (Flew ed. 1951).

[7] DE LEGIBUS bk. 2, ch. 13 § 5.

[8] *Id.* at ch. 16 § 6. He distinguishes interpretation from equity, and states that equity is not applicable to the natural law as such, because equity is in effect an emendation of the will of the legislator, and the Will of God cannot be emended. See DE LEGIBUS bk. 2, ch. 16 §§ 7, 9, 10. But it may be applicable to positive law which contains natural law. This distinction is very much bound up with his belief in natural law as preceptive divine law. For the purposes of our analysis we will assume that involved in interpretation is the application of equity.

circumstances are *justice* and *charity*.[9] The question to ask in the case of theft would be: "Is it just, proper or in accordance with charity to take in this type of case?" However, he goes on to explain that the category of theft does not cover cases of taking in extreme necessity because such a taking is:

> not a matter having to do with what is absolutely in another's possession since in such type of cases all things are common property, *nor* is it a case in which the owner is reasonably unwilling to part with his property.[10]

In this passage there is posed a two-sided solution: the factual criteria of the concept of theft are no longer present – on the assumption that in such cases property becomes common – and the moral turpitude of the action is lacking. According to his conception of a moral precept or category, two elements are always present which specify the quality of the action: factual criteria and moral goodness or turpitude. Theft, for example, pertains to the acquisition of what belongs to another, but this alone is insufficient to endow the precept with moral significance. The taking must be a *wrongful* one. Not all takings are wrongful, for some are excused on the basis of the presence of other criteria. And the same is true of the killing, as shown in the murder example previously mentioned.

On the other hand, can we say that the category of theft does not apply to a case of taking in extreme necessity, not only because such a taking seems just, but also because the factual criteria themselves are changed in the light of the moral evaluation of the circumstances? At first sight, the answer seems clear. The factual criteria have not changed, that is to say, there is still acquisition of property from another person. It seems to be a mere fiction to say that in this situation the property becomes common.

It is necessary for us to re-examine the phrases "factual criteria" and "moral goodness." Certainly they were closely related in the Schoolmen's minds. In my opinion while they may be logically distinguished in examining the structure of the moral precept, they are fused in so far that the moral precept is the subject-matter of an individual's moral judgment. In the mind of a particular individual such a judgment would be framed in this way: "Taking the property of another is wrong where A, B, and C circumstances are present but not where D circumstance is present." Where in fact D circumstance is present, the taking is held to be justified, not as the Schoolmen's language indicates, because property becomes common in cases of extreme need, *but because another principle has to be taken into account.* We can only retain the Schoolmen's language in this context if, as is likely, they meant that in so far as a moral evaluation (as distinct from a factual determination) was concerned, property had become common.

Neither Aquinas nor Suárez in this context give us any criteria for determining whether an exception is permitted beyond saying that, if it is right and proper in the circumstances, then the exception is justified. It seems that what they have in mind is the "conflict-of-duties" situation. *More than* one precept may be applicable to the situation in question. It is true that one must not steal, but one must live, and situ-

[9] DE LEGIBUS bk. 2, ch. 16 § 7.
[10] *Id.* at § 11.

ations will arise when not only the principle proscribing theft, but also the principle which protects human life must be considered. If, as in the necessity example, the latter principle is applied, what we are doing is working out in detail a reconciliation between the different precepts in cases where the features may be subsumed under one or other principle, and we are also emphasizing the higher value. In doing this, we do not jettison the principle proscribing theft; we retain it. At this stage, a further decision has to be made, *viz.*, which of the principles is to be esteemed as the more important?[11]

It would have been more enlightening if Suárez had approached the problem from this angle. His emphasis on interpretation should have led him to consider the conflict-of-duties situation, but he was averted from this, preferring rather to employ a fiction to explain the inapplicability of precepts in the exceptional cases. However, his discussion has at least shown that the difficulty in asserting that natural law constitutes an unchanging standard can be obviated, if it is realized what the Schoolmen meant when they used the word "change" to explain the phenomenon which has been discussed in these pages. Indeed, it might be better to desist from using the word "change" in order to explain the phenomenon. Instead, we might say that the precepts of the natural law do not conclusively determine the cases to which they apply but are prima facie precepts, the ranking of which, in the event of conflict, lies in the evaluational hierarchy of the rules themselves.

At the beginning of this article, the two ways in which the Schoolmen believed that natural law could change were set out. It will be recalled that Aquinas spoke of useful things being added to the natural law by positive law, and we had a few words to say on this question.[12]

In actual fact, Aquinas experiences much difficulty in accommodating this concept of utility to the previously outlined features of the natural law. Indeed, his whole discussion revolves around a perennial question which is associated with the concept of the *ius gentium,* and more particularly with the institutions of private property and slavery. If nature endows man with full dominion over his liberty and the fruits of the earth, how can one explain the existence of institutions (seemingly of a permanent nature) which interfere with this blissful state? Not only that, but are there not also customs of positive law (such as prescription) which circumscribe the *status naturae?*

The Augustinian school, which found favour with Duns Scotus and William of Occam, had propounded a theory which seemed to take away the very foundation of the natural law as a continuing body of rules. This School inclined to the view that human nature could be considered both in its *status innocentiae* and in its fallen state: the *lex naturalis* endured in the former state, the *ius gentium* in the latter. Such an interpretation, of course, presents a definite picture of mankind: once upon a time a perfect idyllic state existed where freedom abounded, where there was no coercion and where man would *share* the

[11] *Cf.*, L. G. Miller, *Rules and Exceptions,* vol. 66, ETHICS 262 (1956).

[12] *Id.* at 1-2.

fruits of the earth. Such a state had been radically affected through man turning to evil. Bound now by positive institutions, his liberty is often denied him and the fruits of the earth have been divided.[13]

Aquinas approaches the question in a different manner. He distinguishes between a preceptive form of natural law and a permissive form. Natural law prescribes that one must perform or abstain from performing certain actions, but it also permits or recognizes as valid certain other things which benefit mankind.[14] Suárez mentions a third category: where the natural law merely favours a certain state of affairs.[15]

The question remains: what is the relationship between the *ius gentium* and natural law? If natural law permits common ownership, while the institution of private property has been introduced by the *ius gentium,* can it be said that the natural law is changed or is in conflict with the *ius gentium?* The answer to this question depends on the status which one attributes to the *ius gentium.*

Aquinas' treatment of the *ius gentium* is not at all satisfactory. He wavers between the opinion which regards the *ius gentium* as those precepts which are common to man alone, and the opinion which associates the *ius gentium* with the natural law as a collection of remote conclusions dependent on an existing *status quo.*[16] In article 4 of Q. 95, Pt. I-II, he compares the various ways in which positive law is derived from the law and distinguishes the *ius gentium (conclusio)* from the *ius civile (determinatio):*

> to the law of nations belongs those things which are derived from the law of nature, as conclusions from premises, such as just buyings and sellings, and the like, without which men cannot live together and these are part of the law of nature, since man is a social animal. But those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides what is best for itself.

However, in another place he switches to Ulpian's definition, according to which the *ius gentium* is equated with that part of the natural law which is common to man only, although at the same time he asserts that the *ius gentium* is grounded on some type of utility.[17] In these two articles at least three meanings are given to the concept: 1) that it is the social part of the natural law, 2) that it is the natural law in so far as that is common to man alone, 3) that it consists of rules based on utility.

To the reader, it may seem as if there are a number of distinctions which do not give any precise standard by which he may judge the *ius gentium.* Let us try to see why Aquinas emphasizes the features mentioned above. In the first place, it seems, he was drawing attention to the development of social institutions which enabled men to live harmoniously together. At the same time he was troubled by the "naturalistic" view (which was closely associated with a picture of an original state of innocence) according to which a body, not so much of rules, but of rights, existed at

[13] VILLEY, LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DE DROIT 142-43 (1957).

[14] SUMMA THEOLOGICA, I-II, q. 94, art. 5, ad 3.

[15] DE LEGIBUS bk. 2, ch. 14 § 6. He speaks of a state of affairs which has its foundation in a *conditione naturali,* for example, that a son should inherit from a father who dies intestate, and the practice of giving credence to two witnesses.

[16] SENN, DE LA JUSTICE ET DU DROIT 58 (1927).

[17] SUMMA THEOLOGICA, II-II, q. 57, art. 3.

some time or other, but had given way to the harsh realities of social intercourse and even conflict when there was a need for the reconciliation and limitation of these rights. Finally in attributing to the *ius gentium* the status of rather remote conclusions he was drawing attention to the simplicity of the original *status naturae* as compared with the complicated system of rules to which social intercourse had given rise.

It is only when we turn to the discussion of the *ius gentium* in the *De Legibus* of Suárez that we find a sustained attempt to get rid of these ambiguities and to give an autonomous status to the *ius gentium*. Suárez blatantly refuses to accept the notion, implicit in certain parts of Aquinas' discussion, of a dualistic natural law. We cannot, he says, conceive of man outside of social intercourse. Laws and rules, rights *and* duties, are therefore necessary to enable him to live in peace and justice with his neighbour.[18] There was no need to set up a secondary natural law to deal with the "social" question and consequently no need to consider the *ius gentium* to be the result of a complicated deductive process. What was important was to consider man and society as they presented themselves to the observer.[19]

In saying this, Suárez hit upon two very important features. He was aware that society had the capacity to develop and had developed, and he recognized the importance of various institutions based on a certain utility which facilitated the intercourse of the members of any society. Such institutions, however, did not have an absolute character; their status and existence was the outcome of social recognition rather than of the demands of nature.[20] Once established, they did have a certain degree of continuity. They were distinguished from what was the subject-matter of civil law on the ground that they were not instituted by one nation but by most nations by mutual imitation.[21]

Among the examples which Suárez gives to demonstarte the existence of the *ius gentium* are institutions which pertain to the law of the state (such as prescription) and institutions which pertain to intercourse between nations, the *ius inter gentes* (such as the right to wage a just war).[22] Aquinas had paid attention only to the former type and had no conception of a *ius inter gentes* because he was thinking in terms of the Holy Roman Empire. By the seventeenth century the Empire was no longer the universal institution it had been. The era of the national state had arrived. Suárez is one of the first to recognize this second type of *ius gentium* and even to attribute to it a closer relationship with natural law than the former type.

> Communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association. . . . For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was more feasible because the matters

[18] See DE LEGIBUS, bk. 2, ch. 17 § 9.

[19] *Ibid.* For a discussion of Suárez's treatment of *ius gentium* see BARCIA TRELLES, LES THEOLOGIENS ESPAGNOLS DU XVI SIÈCLE ET L'ÉCOLE MODERN DU DROIT INTERNATIONAL. ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS, VOL. I, p. 441-71 (1933).

[20] DE LEGIBUS bk. 2, ch. 19 §2.

[21] *Id.* at § 6.

[22] *Id.* at § 8.

> found within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that while this derivation may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature, and universally acceptable for its own sake.[23]

On the other hand, the first type of *ius gentium* embodied precepts which did not have for their immediate end the harmonious fellowship of nations but were directed to the internal organization of state. Nevertheless, says Suárez:

> they are of such a nature that, in the possession of similar usages or laws, almost all nations agree with one another; or at least they resemble one another, at times in a general manner, and at times specifically, so to speak.[24]

It is clear that this type of *ius gentium* is in no way founded upon something which has always existed. It is the product of historical development and must be seen in this light. And yet Suárez asserts that, once these customs are established, natural law would seem to incline to their recognition as benefiting the existing state of mankind. But this does not imply any permanence, for circumstances might change and a new rule develop. Nor does this imply *moral* rectitude in the precepts of the *ius gentium*.[25] The one qualification is that the *ius inter gentes* is more permanent in that it requires the consent of nearly all nations before it can be changed.[26]

Suárez's approach would seem to obviate the problem which disturbed the minds of earlier writers, namely, the growth and development of society. By rejecting the distinction between a primary and a secondary natural law, an individual and a social natural law, a natural law based on inclination and a natural law based on intricate deduction, he has paved the way for an approach to the natural law and the *ius gentium* which preserves their autonomous characteristics. Based on custom and utility, the *ius gentium* has no longer an absolute character; it is the product of historical development, even though it is true to say that looked at from the point of view of its usefulness to a present state of society it is approved by the natural law.

There remains one further issue to discuss. Suárez does speak of natural law as being changed by the *ius gentium* in so far as the *ius gentium* introduces a change in the subject matter of the natural law.[27]

The context of this assertion is his discussion of common ownership and liberty. Aquinas had offered the opinion that slavery (and private property) was a beneficent institution which had a semi-permanent status. In one article, for example, he had said:

> Considered absolutely, the fact that this particular man should be a slave rather than another man, is based, not on natural rea-

[23] *Id.* at § 9. BARCIA TRELLES, *op. cit. supra* note 19, at 462-69.

[24] DE LEGIBUS bk. 2, ch. 19 § 10. Contract, for example, in its general aspect, is an institution which is found in the legal systems of most nations, but it differs in so far as its form or detail is concerned within these nations.

[25] DE LEGIBUS bk. 2, ch. 20 § 7. Suárez mentions as an example of a common custom the toleration of prostitutes. *Ibid.*

[26] *Id.* at §8. The institution of the just war may give way to a compulsory system of arbitration. See BARCIA TRELLES, *op. cit. supra* note 19, at 470-71.

[27] DE LEGIBUS bk. 2, ch. 14 § 12.

> son, but on some resultant utility, in that it is useful to this man to be ruled by a wiser man, and the latter to be helped by the former. . . . Wherefore, slavery, which belongs to the right of nations, is natural in the second way, but not in the first.[28]

Suárez, of course, draws the line between what is useful and what is natural. Accordingly, it might have been expected that he would explain slavery on the ground that it was merely a useful custom which need not necessarily be justified by recourse to reason which Aquinas attributes to it. However, he seems to approach the problem in a different way.

It will be recalled that he mentioned a permissive or concessive form of the natural law. Common ownership and liberty he says, must be understood as part of the natural law in this way.

> With respect to these things, the natural law lays down no precept enjoining that they should remain in this state, rather does it leave the matter to the management of men, such management to accord with the demands of reason.

It is thus permissible, he says, for men to introduce rules and institutions of their own making to regulate the exercise of those things which natural law permits.[29]

It seems to us that Suárez is here making a distinction between natural law and natural rights.[30] Indeed in the very opening of his discussion of the *ius gentium* he makes a distinction between *ius utile* and *ius legale*. The former he points out has to do with a faculty or right of doing something.[31] It is not until he faces the liberty and common ownership questions that he reverts to this distinction. The natural law of dominion, he says, has conferred on man the power over his liberty, but in so far as man thereby has a claim to the enjoyment of something, nothing is said of the conditions under which the right may be exercised.[32] The natural law of dominion is different from preceptive natural law, continues Suárez, in that "it consists of a certain fact, that is, a certain condition or habitual relation of things."[33] Such a condition might change, as distinct from the precepts of the nature which may never change. Natural law protected common ownership while property was held in common. When property was divided the *ius naturale utile* was to that extent modified.[34] As far as slavery was concerned, this was not even an institution of the *ius gentium:* it was merely a part of positive penal law. Consequently, liberty was still positively part of the natural law.[35]

The fundamental position is that the *ius gentium* may detract from the plenitude resident in natural rights. Perhaps we could say that Suárez was on the brink of recognizing the whole question of natural rights and their dependence on an ordered system of relationships (*e.g.,* restriction of liberty of one in the interest of all). This

[28] SUMMA THEOLOGICA, II-II, q. 57, art. 3, ad 2.

[29] DE LEGIBUS bk. 2, ch. 14 § 6.

[30] See Rommen, *The Natural Law in the Renaissance Period,* 24 NOTRE DAME LAW. 460, 483-89 (1948-49). GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES. 81-82 (1938).

[31] DE LEGIBUS bk. 2, ch. 17 §2. "Jus enim interdum significat moralem facultatem ad rem aliquam, vel in re, sive sit verum domenum, sive aliqua participatia ejus, quod est proprium objectum justitiae." *Ibid.*

[32] Suárez uses the word *ius* here interchangeably with *facultas* and *actio.*

[33] DE LEGIBUS bk. 2, ch. 14 §§16, 17, 18.

[34] The right of private property came into existence.

[35] DE LEGIBUS bk. 2, ch. 18 §9. It is clear that

would lead to the question of natural rights and positive rights.

However, he speaks of natural rights only in the context of liberty and property.[36] Could it not be said that natural rights are also existent as far as the other precepts of the natural law are concerned? If natural law forbids murder, ought not we to recognize a right to life? In one part of his work, Suárez admits that prescription and concession are related. But he does not carry this thought to completion. If indeed we assert that other precepts of the natural law are connected with rights, it would seem that such rights also would be subject to limitation.

It seems that even if we do admit the full category of natural rights, the problem of "change" or of circumscription can be tackled in the same way as we tackled preceptive natural law – on the collision of duties pattern. In many cases there will be no question of the non-recognition of these rights. The right to life invariably subsists. In a few cases one or other of these rights *may* not be applicable in the circumstances. The felon is deprived of his liberty, because the community has the right to be protected from his actions. In such cases, a decision has to be made as to which right is to be accorded superiority. It is precisely this decision which the *ius gentium* and, ultimately, positive law makes.

[36] However Suárez hints at "right to life." "Nam etiam natura dedit homini vitam quoad ejus ac possessionem." DE LEGIBUS bk. 2, ch. 14 §18.

Suárez is adverse to attributing to slavery the status of a universal custom.

PUNISHMENT IN A FREE SOCIETY

(Continued)

aid, withdrawal of recognition, or other diplomatic action in the name of humanitarian intercession. On October 14, 1946, the Holy See, finding the Archbishop "arbitrarily arrested and unjustly sentenced," excommunicated "all those who have contributed physically or morally toward the consummation" of this crime.[48]

In a free society, the interests of preventing crime and protecting fundamental rights are entirely compatible. A criminal who remains at large in the community arouses alarm proportionate to the outrageousness of his crimes. An unfair criminal trial can arouse no less alarm. Such a proceeding threatens the liberty of every potential defendant, a class that embraces the entire community. The criminal trial in a free society must continue to convict the guilty and acquit the innocent, but it must do so within a framework of fairness to the accused.

[48] N. Y. Times, Oct. 15, 1946, p. 1. col. 2.