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NATURAL LAW has been defined as "the rule of conduct which is prescribed to us by the Creator in the constitution of the nature with which He has endowed us." [1] This definition points to the source of the law; it purports to tell not only what the law is objectively in itself, but also where it comes from, namely, the Creator. According to another definition, it is "a rule of action mandatory in form, which reason itself reveals as established and promulgated by the Author of nature and imposed upon all men." [2] This definition is subject to the same criticism as the other: It includes a reference to the source of the law; in addition it includes a refence to the manner in which it is revealed to us. Now in considering objectively what a thing is in itself, it may be of the utmost importance to know where it came from and the manner in which it is revealed to us. But it would be helpful to clear thinking if these matters were discussed separately and excluded from the definition. If then we take these two definitions as correct statements and eliminate from them the references to the source of the law and the manner of its revela-

1 9 CATHOLIC ENCYCLOPEDIA 76.
2 FRANCIS P. LEBUFFE, S. J., OUTLINES OF PURE JURISPRUDENCE 33.

tion, we may perhaps express the same idea by defining the natural law as the rule of conduct which man must observe in order to act in accordance with his nature. It easily follows from this that wherever we find human nature, we find the natural law. "The discriminating norm," says Professor Fox, "is human nature itself objectively considered. It is the book in which is written the text of the law and the classification of human actions into good and bad." [3] Reading in this text book, we find that there are certain things, such as murder, robbery, theft, lying, which are everywhere regarded as wrong, irrespective of any positive enactment. They violate the concept of justice which, as between man and man, requires us to give to everyone what is due to him, *i. e.*, what is rightfully his. "Justitia est virtus suum cuique tribuens." [4]

From very ancient times until quite recently, this broad principle of right and wrong was everywhere recognized as the presupposition and foundation of every legal system. Sophocles, in his drama Oedipus Rex, tells us of "laws that in the highest heaven had their birth; they were not made by the race of mortal men, nor shall oblivion ever put them to sleep, for the power of God is mighty in them and groweth not old." So also Cicero, in his oration Pro Milone, speaks of a law which was never written, which was never taught, and which we never learned by reading, but which was drawn from nature herself; in which we have never been instructed, but for which we were made; which was never created by man's institution, but with which we are all imbued. Much to the same effect is the dictum of Blackstone, who, writing in 1765, began his commentaries as follows:

"Man, considered as a creature, must necessarily be subject to the laws of his Creator. This will of his Maker is called the Law of Nature. This Law of Nature, being coeval with mankind and dedicated 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

3 9 CATHOLIC ENCYCLOPEDIA 77.

4 VIKTOR CATHREIN, S. J., RECHT, NATURRECHT UND POSITIVES RECHT 51; 16 MICH. L. REV. 306.

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."

Coming from the ancient Greeks and Romans, scientifically elaborated and referred to its true source by the philosophers of the Middle Ages, adopted and consistently maintained by the great lawyers of early England, this notion of a higher law antecedent and superior to all human legislation found its way into American jurisprudence and has played a very important part in the development of our law. It is true that the influence of the natural law today is not so apparent as it was in the earlier days when the foundations of our law were being laid. Professor M. Taylor, writing in 1891 and referring to the "time honored doctrine of natural right or natural law," says:

"When one reminds himself that for nearly twenty-two centuries this doctrine had practically universal acceptance, that it was the creed of Plato, Aristotle, Cicero, Marcus Aurelius, Gaius, Augustine, Aquinas, Grotius, Locke, and Kant, its present forlorn state is somewhat noteworthy." [5]

I am convinced, however, that as far as the actual practice of American courts is concerned, this disregard of the natural law is more apparent than real. It is the purpose of the present article to consider its influence in American judicial decisions in order to determine whether within that field the natural law is really so "forlorn" as Professor Taylor's comment indicates.

In determining the place of the natural law in the American legal system, three situations must be carefully distinguished: cases in which there is no applicable statute; cases in which the applicable is in conflict with the constitution; and cases in which the applicable statute is consistent with the constitution but in conflict with the natural law. Let us consider these three cases in the order named.

Where there is no applicable statute, the case must be decided according to the common law. But where, in any case

[5] TAYLOR, THE LAW OF NATURE 1.

of first impression, can the court find the common law? The sole basis of the decision in such a case is a broad and indefinite concept of justice. It is the court's sense of what is just and reasonable under the circumstances. The proposition of law for which the case stands is merely a rule which, to the mind of the judge, seems fair and right.[6] Since judges are fallible, it may of course happen in some instances that the particular proposition of law laid down as the basis of the decision may not be a logical conclusion from the natural law or a sound application of its principle, but even in these instances the natural law furnishes the only possible explanation of how the rule of the case comes to be regarded as a rule of *law, i. e.,* a rule with as much binding force as any positive enactment. Only in this way can we satisfactorily explain how the concepts of reasonable price and reasonable time have become the most familiar elements of our contract law. And take, for instance, the law of quasi-contracts. Is there any single rule in the whole field of the substantive law on this subject which is anything else than an expression of the natural law? Or take the doctrine of unjust enrichment with all its ramifications. Is it anything else than a multifarious application of the principle of *suum cuique*? And what is it but the simple requirement of commutative justice which the American Law Institute has put into Section 90 of its Restatement? Is there indeed any contractual obligation which is not traceable to the requirement of the natural law expressed in that simple Latin maxim, *pacta sunt servanda*? In the field of torts, the test of what a reasonable man would do under the circumstances governs our modern law of negligence. And where did the courts get this test? From no other source than the natural law. In the field of equity, the courts, by applying the broad principles of justice, have not laid down in any positive enactment, but have developed the doctrine of estoppel in pais into, the "most powerful and flexible instrument to be found in any system of civil jurispru-

6 Wicker v. Jones, 159 N. C. 102, 74 S. E. 801 (1912).

dence."[7] In the field of property law, there is the striking statement of Justice Farwell, who, in determining the rights of riparian owners, said:

"I have come to the conclusion that *jus naturae* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *jus naturale* of the Roman law. English law is, of course, quite independent of the Roman law, but the conception of *aequum et bonum* and the rights flowing therefrom which are included in *jus naturale* underlie a great part of the English common law; although it is not usual to find the natural law referred in so many words in English cases. . . . I am therefore not introducing any novel principle if I regard *jus naturae,* on which the right to running water rests, as meaning that which is *aequum et bonum* between upper and lower proprietors."[8]

It is to be observed that according to the whole theory of the common law, the court in these cases of first impression does not exercise a "legislative choice among a number of possible rules." On the contrary, it chooses a rule which it regards as having a "compulsory authority, not possessed by its possible alternatives." It proceeds upon the theory that the rule which it applies for the first time is already contained implicitly in the general principle of right and wrong. This idea of law as an inductive science is well stated by W. G. Hammond. His original work is not available to me, but so important is the subject and so fine is Hammond's elaboration of the idea that I venture to quote it at length from the illuminating article by Professor Dickinson:

"The belief in a common law of which all precedents and decided cases are merely the evidence and exposition cannot be a delusion or a fiction so long maintained. Unless we are willing to surrender entirely the belief that there is a divine order in the moral as well as the physical constitution of this world, we cannot assume that all the principles upon which the cases of first impression have been decided for centuries were the creation of the judges who wrote the particular opinions. Nor can we say that our English and American judges have *made* the law which they expounded, unless we are willing to admit that the whole course of their jurisprudence for at least six centuries has been an unjust government of litigants by rules that did not exist when

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7 2 MICH. L. REV. 159.

8 Bradford Corporation v. Farrand, 86 L. T. 497 (1902).

they entered into the transactions adjudged. The new view that they were really making law while they professed only to expound it, seems to me to rest entirely upon the assumption that all law must necessarily be legislation — a rule or rules promulgated before hand in writing by some earthly sovereign whom the people are bound to obey. The old doctrine rested on the assumption that there were fixed principles of jural as well as moral right which every man was bound to obey and which every magistrate was bound to recognize and enforce to the best of his knowledge and ability." [9]

It seems clear, therefore, that in cases where there is no applicable statute, the court must and does recognize the binding force of the natural law. This, I think, is the reason for the peculiar tenacity of the common law. "There is something about it," says Roscoe Pound, "that commends it to men of diverse lands and races; where it once goes, it stays." [10]

But suppose the case calls for the application of a statute. Of course, if the validity of the statute is not in any way questioned, the court can only apply it as written. But where its constitutionality is challenged, an issue is raised on which the natural law may have a most important bearing. In this class of cases, one of the principal avenues by which the natural law finds its way into American jurisprudence is the doctrine of vested rights.

This doctrine was first brought within the purview of constitutional law by Justice Patterson in 1795. Charging the jury in a well-known case, he declared:

"The right of acquiring and possessing property and having it protected is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: It is necessary to their subsistence and correspondent to their natural wants and desires." [11]

It is quite obvious from this statement that the doctrine of vested rights does not rest upon any positive enactment, but upon the theory that every person has certain absolute and inalienable rights and that the purpose of adopting the con-

9 Dickinson, *The Law Behind the Law* (1929) 29 COL. L. REV. 113, 117.
10 Pound, *Do We Need a Philosophy Law?* (1905) 5 COL. L. REV. 339.
11 Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310 (1795).

stitution was, not to create and confer them, but to protect and preserve them. Under this theory these rights are inalienably vested in every person merely by virtue of his character of a human being under an eternal and universal law. The due process clause, for instance, is simply one of the constitutional guaranties by which these vested rights are protected. When the validity of a statute is attacked as violating that clause, the court must determine whether the alleged right is one of the vested rights, a question which it must determine independently of any positive enactment. Certainly the constitution itself furnishes no criterion for the determination of this question. Justice Chase's elaboration of this doctrine [12] led to Chancellor Kent's classic statement of it [13] three years later when he used the doctrine of vested rights to prevent a New York statute from having a retrospective effect. Somewhat later [14] he used it again as a basis for his decision that in exercising its right of eminent domain, the state owes compensation to the owner of property taken, even in the absence of any constitutional provision to that effect.

Thus this doctrine of vested rights, in the hands of Chancellor Kent and his successors in New York, operated to place important limitations on the state's power of eminent domain and also on its police power. This "constrictive effect" of the doctrine, as Professor Corwin calls it,[15] is contrasted with its "expansive effect" on the constitutional guaranty against impairing the obligation of a contract. Thus the natural law, through the doctrine of vested rights, has found a secure and enduring place in our legal system, as a rule of constitutional construction.

As a matter of legal philosophy, however, the question as to judicial recognition of the natural law would be presented

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12 Calder v. Bull, 3 Dall. 386 (1798).

13 Dash v. Van Kleek, 7 Johns. 478, 4 N. Y. Com. L. R. 391 (1811).

14 Gardner v. Newburg, 2 Johns. Ch. 162 (1819).

15 Corwin, *Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 377.

in its most acute form in the third case mentioned: Where the statute is entirely consistent with the constitution, but in conflict with the natural law. What would the court do in a case like that? Would it endeavor to find some higher law, some law reason or nature, independently of the constitution, on which to base its decision?

It is remarkable that in this situation the judges of the Supreme Court have proceeded upon two distinct theories and that at a very early date these theories were brought into close juxtaposition in the same case.[16] Justice Chase thought that the legislature was limited by the natural law, a view which he expressed in the oft-quoted language:

> "I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control, although its authority should not be restrained by the constitution or the fundamental law of the state. . . . There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as, to authorize manifest injustice by positive law, or to take away that security for personal liberty and private property, for the protection of which the government was established."

All this is in the same spirit in which Chancellor Coke quoted Bracton's dictum to James I that the King ruled *sub Deo et lege.*

Justice Iredell, on the other hand, declared in the same case that if no limitation were imposed on the legislature by the constitution, then whatever "it chose to enact would be lawfully enacted and the judicial power would never interpose to pronounce it void. It is true that some speculative jurists have held that a legislative act against natural justice must in itself be void; but I cannot think that under such a government, any court of Justice would possess power to declare it so."

If we glance superficially at the cases decided since these views were expressed in 1798, it would seem that Iredell's

16 Calder v. Bull, 3 Dall. 386 (1798).

view has prevailed; but if we look more closely we find that the theory of Justice Chase has had by far the greater influence in directing the course of judicial decision. There are numerous declarations such as that of Justice Chase, recognizing the superiority of the natural law. Our American positivists usually insist that such declarations are mere *obiter dicta*; but the doctrine that there are extra-constitutional limitations cannot be disposed of in this summary fashion. The notion that there are fundamental and inalienable rights which antedate government and furnish the main reason for its existence permeates the whole field of constitutional law. References to such inherent limitations are so interwoven with the *ratio deridendi* in many cases that they must be regarded as one of the controlling grounds for the decision. This is especially true of the cases decided before 1880. Thus, Chief Justice Marshall, in *Fletcher v. Peck*,[17] explains the reason for his decision as follows:

"It is then the unanimous opinion of the Court that in this case, the estate having passed into the hands of a purchaser for a valuable consideration without notice, the state of Georgia was restrained either by *the general principles which are common to our free institutions* or by the particular provisions of the constitution of the United States from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

So, too, in a case[18] decided five years later, Justice Story, in holding that a grant or title to land by the legislature is irrevocable, based his decision on fundamental law and natural justice. After the natural law had gained a foothold in American jurisprudence, a number of cases[19] arose in which it was even more clearly indicated as the basis of the decision. The great defender of this doctrine was Justice Field, whose statement in *Butchers' Union, etc., Co. v. Crescent*

17 6 Cranch 87 (1810).

18 Ferrett v. Taylor, 9 Cranch 43 (1815).

19 Darcy v. Ketchum, 11 How. 165 (1850); Webster v. Reid, 11 How. 437 (1850); Pennoyer v. Neff, 95 U. S. 714 (1877); Hays v. Pacific Mail, 17 How. 596 (1854); St. Louis v. Ferry Co., 11 Wall. 423 (1870); Cole v. La Grange, 113 U. S. 1 (1884).

City, etc., Co.[20] has become the classic presentation of the theory. In that case he declared:

"I can not believe that what is termed in the Declaration of Independence a God-given and inalienable right can be thus ruthlessly taken from the citizen or that there can be any abridgment of the right except by regulations affecting alike all persons of the same age, sex and condition. . . . The right to follow the common occupations of life is an inalienable right which was formulated as such under the phrase 'pursuit of happiness.' . . . To deny it, is to invade one of the fundamental privileges of the citizen contrary not only to the common right but also to the express provision of the constitution."

It is true there has always been a vigorous objection to the natural law as a basis for judicial decision and since the *Cole* case[21] the Supreme Court has never relied upon this doctrine alone. But this eclipse is only apparent, not real. It is due, not so much to the vigorous dissents, but more especially to the adoption of the Fourteenth Amendment, by which a fundamental principle of the natural law was made a part of the constitution.

Since 1880 the courts have quite generally interpreted the constitution as making the same requirements as the natural law. This indicates that the hypothetical case now under discussion, where the statute conflicts with the natural law but not with the constitution is one which must appear to present day judges as purely imaginary. The Court has so infused the natural law into its theories of constitutional construction that whenever the Court finds a statute in conflict with the natural law (or what it would call the "Higher Law" or the "Law of Reason" or the "Unwritten Constitution") then it always concludes, as Justice Field did, that the statute is in conflict with the constitution.

This tendency to identify constitutional requirements with those of the natural law is well exemplified in the history of sterilization legislation. From a superficial reading of these decisions, a person might conclude that the natural law is to-

20 111 U. S. 746, 756 (1883).
21 *Op. cit. supra* note 19.

tally ignored. And yet in every one of these cases, in determining whether the statute conflicts with the Constitution, the court is necessarily guided by some rule or proposition not laid down in any positive enactment. As in the cases of first impression under the common law, the court must evolve some rule out of its own inner consciousness as to what is fair and reasonable. In other words, it must endeavor to deduce some rule from the principle of *suum cuique*. The Constitution, for instance, forbids cruel and unusual punishment; it forbids class legislation; it forbids other things when done without due process. These are the constitutional prohibitions that have been invoked against the sterilization statutes. Now, how can the court determine the meaning of these provisions without considering the requirements of natural justice? If the punishment inflicted in any particular case does not violate the requirement of natural justice, then it is neither cruel nor unusual within the meaning of the Constitution. And the converse is equally true. The Court thus makes the natural law, or the rule deductible from the principle of *suum cuique,* the criterion of constitutionality. Obviously, any court proceeding on such a theory could not logically hold that a statute was in conflict with the natural law, but consistent with the Constitution; it would hold either that the statute was consistent with both or in conflict with both. There is no case in which the language of the court can be understood to say in effect: "This statute contradicts the Higher Law; it contradicts the Law of Reason; but it is consistent with the Constitution." No court has ever entertained such an opinion.

Of course, it should always be remembered that there may be differences of opinion. When the court says that a certain statute is or is not in conflict with the Constitution, other men learned in the law may have a different opinion. So also when the court says in effect that a certain statute is or is not in conflict with the higher law, other competent persons may have strong convictions to the contrary. In other words,

while the court's opinion is authoritative, it may be logically unsound. Here again the sterilization statute furnishes the best example.

In conclusion, it may be said that the natural law finds a place in American jurisprudence as a basis for judicial decision in cases of first impression under the common law and as a guiding principle in the construction of constitutional limitations.

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