

## STATUS OF NATURAL LAW IN AMERICAN JURISPRUDENCE\*

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THE noted French philosopher, Etienne Gilson, has said truly: "The natural law always buries its undertakers."<sup>1</sup> It now seems that we are witnessing the obsequies of the Natural-Law morticians of our day. And our feelings are expressed by the words of the United States senator who was asked if he expected to attend the last rites for a national character of his day: "No," he said, "I am not going to the funeral, but I approve of it."

The French philosopher's observation was based upon the fact that history reveals man's necessity to return to Natural Law concepts whenever they have been abandoned. Man is forced again and again to return to the "Natural Law way of thinking" because it is an expression of his moral nature. There are principles applicable to man's moral nature which are referred to as laws just as there are principles referred to as laws of his physical nature. The main thesis of this discussion is that we are now in one of those periods when the circumstances of life again force men to accept the principles of Natural Moral Law.

Any lawyer whose professional career began during the first ten years of the present century and who is still alive and able to note the trends of current thought, has

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<sup>1</sup> HEINRICH A. ROMMEN, *THE NATURAL LAW* 242 (1948).

witnessed two great changes in the philosophy of jurisprudence. When he came to the bar, Coke, Blackstone, Kent, Story, Minor, and Cooley were still respected sources of legal learning, and the Natural Law philosophy of the Founding Fathers was unquestioned. But during the ensuing thirty years there was a great shift from those authorities and that philosophy to what has come to be known as modern positivism or realism. And now within the last eight or ten years there are unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism, and very definite indications of a revival of Natural Law philosophy.

It is of course impossible to set exact dates or clearly define the boundaries of trends in thought or philosophy. Changes come about gradually, they are never complete. There is always the remnant, the modicum, who adhere to the former course in spite of popular deflections. The boundaries of eras and trends are not clear cut; they feather out. But the general effects of the great trends are nevertheless quite apparent.

### *Positivism*

It is unnecessary to trace in detail the extent or effect of positivism during the early decades of this century. That has been well done by Dean Pound, Mr. Ben Palmer, Mr. Harold McKinnon, Mrs. C. P. Ives, and others. As Mr. McKinnon says:

This teaching nullifies the Declaration of Independence, the preamble of the Constitution and the Bill of Rights. It nullifies twenty-five hundred years of progress in political and legal theory and re-enacts in the present age some of the worst political and

legal errors of ancient times. It is indistinguishable, in its origin and its logical effect, from philosophies which characterized lands against which we have just fought the bloodiest war in history.<sup>2</sup>

### *At Home*

In this country positivism tended to discredit the judicial function and over-emphasize the importance of administrative procedure. The fiat rule of administrative boards was substituted quite extensively for legal procedure of courts.<sup>3</sup> Precedent was disregarded, balance of powers was scoffed at, and the Constitution was openly flouted.

This all came about in a very subtle and indirect way. There was no open or frontal attack, and the overwhelming majority of the legal profession never knew that there was a movement against the basic principles of our jurisprudence until they discovered that all their arguments based on inalienable rights, Natural Law, or the Constitution, were being laughed at by public administrators. The champions of modern Positivism, the self-styled Realists, proceeded mainly by innuendo and cynicism. Inspired by the pragmatism of Professor John Dewey and the skepticism of Justice Oliver Wendell Holmes, they arrogated a disdain for Natural Law and discredited all claims of natural right. It then gradually became their habit to assume, as some said, that "most of the best

<sup>2</sup> Harold R. McKinnon, *The Higher Law*, an address delivered before the conference of Federal Judges of the Ninth Circuit at San Francisco, Sept. 3, 1946. Published by the Gillik Press, Berkeley, Calif., 1946. 33 A.B.A.J. 966 (1947).

<sup>3</sup> JOSEPH C. HUTCHESON, *NEW INSTRUMENTS OF PUBLIC POWER* (California Bar Association, 1946).

thinkers on politics (meaning themselves) of the present day will agree that there is no such thing as a natural right," and that "modern scholars (again themselves) have totally abandoned natural law." One student was told in open class by his law professor that he should never again mention Natural Law, that its concepts were unattainable, antiquated, discredited, and dead as the dodo.

All the younger officers of the Ship of State during the 1930's and early 1940's were men who had been subjected to this modern sophistry during the impressionable years of their education. The older men, it seems, were intimidated by the oncoming intelligentsia; they were afraid to defend the Natural-Law concepts of right and truth and justice lest they be thought puritans, prudes, or old-fashioned. This attitude of skepticism, cynicism, and negation toward the moral and ideal concepts of Natural Law philosophy found a very congenial climate of opinion in the intense scientism, materialism, and secularism which followed World War I.

The critical problems of our national life today have come directly from this materialistic and positivist attitude toward life and law. When the ethical and moral content of our philosophy was abandoned, men felt free to assert without restraint their novel theories and their personal and class selfishness, avarice and greed. As a result of the disrespect for courts and the judicial process there followed a corresponding neglect of the common interest and public welfare. The sole aim in life of most men was profits or wages, and the affairs of government were abandoned to policy amateurs or to self-seeking

politicians who bartered and traded for self-aggrandizement and success of party, bloc, or union. Disputes between the great monopolies of employers and unions led to strikes which paralyzed the economic life of the country. Agents of government merely pampered and pandered instead of enforcing the established principles of law which for centuries had protected the community interest. At a time when our national power reached its maximum strength in the world it seemed to be disintegrating at home.

### *Effect on Judiciary*

The clearest evidence of this disintegration was revealed in the Supreme Court. The number of reversals and dissents exceeded all previous records. The upward sweep of dissents from the year 1910 to 1946 ranged from thirteen per cent to sixty-four per cent.<sup>4</sup> Landmark decisions in constitutional law were overruled with alarming celerity. The constitutional balance of powers was frequently ignored, in accordance with positivist theory, and the legislative function was usurped in order to overrule long-established principles and promulgate the Court's idea of what the "trend and policy" of law should be. The decisions of the Court were not supported by any uniformity of reasoning even by the justices who agreed on decisions. There was no integrating science of law because the fundamental and coordinating principles of our jurisprudence and constitutionalism had been discredited and abandoned. Decisions and opinions were

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<sup>4</sup> Ben W. Palmer, *Dissents and Overrulings: A Study of Developments in the Supreme Court*, 34 A.B.A.J. 554 (July 1948).

improvised according to the predilections of the various justices. Informed observers seemed to hear again the critical words of Cicero as he watched the disintegration of the Roman Republic:

All confidence was banished from the Forum, not by the stroke of any new calamity, but by the general suspicion entertained of the courts of justice, and by the disorder into which they had fallen, and by the constant reversal of previous decisions.<sup>5</sup>

The chief purpose of the law is to habituate that conduct which conserves the public good. When therefore the law loses its certainty and no reliance can be placed in judicial decisions, the law ceases to perform its function. Furthermore, the characteristic of our jurisprudence, which had distinguished it from the systems of law in those countries with which we had gone to war, was its devotion to reason. When judicial decisions departed from precedent and were based upon the mere prepossessions of judges, they lost the distinctive character of Anglo-American jurisprudence and took on a similitude to the arbitrary or fiat rule of totalitarian governments. It was therefore not without reason that some commentators remarked that what we had fought for abroad we had lost at home.

### *Abroad*

The effects of this materialistic and positivist attitude toward life and law were not confined to our country. It had a world-wide effect. It is now generally recognized that one of the influences that brought about the revival

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<sup>5</sup> CICERO, DE LEGE AGRARIA, Oratio II, 3, Fin.

of the positivist philosophy of law in modern times was the assertion of extreme nationalism which followed the break-up of the Holy Roman Empire into separate states.<sup>6</sup> The arbitrary demands of independent states against one another and the fiat rule of such states within their own boundaries could not be justified by the principles of Natural Law. As always, the assertion of arbitrary will was found to be at variance with the moral and ethical ideals of the Law of Nature. The classical philosophers, the Roman jurisconsults, the Scholastic writers, and the great authorities on international law, such as Suarez and Grotius, were therefore abandoned. The champions of statism adopted those principles which soon found expression in the teachings and practices of Machiavelli and later were exemplified in the Fascism of Mussolini and the *Realpolitik* of Hitler. Such theories of government are responsible for the sordid history of power politics and international anarchy which led quite naturally to the two world wars and the fateful climax that now confronts the world.

### *Effect on Peace*

When the victors in World War II assembled at San Francisco to form some organization for world affairs they disregarded the proposal of China and several other states to establish a government upon universal and fundamental principles of justice and resorted instead to the old hoax of a tenuous and tentative balance of power among independent sovereign nations. The inadequacy

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<sup>6</sup> ROMMEN, *op. cit.*, *supra* note 1, at 128; William Seagle, MEN OF LAW 113-114 (1947); Irving Babbitt, DEMOCRACY AND LEADERSHIP 37, 42, 53 (1939).

of such an organization became apparent two months later when the first atom bomb fell on Hiroshima. The insufficiency of UNO to maintain peace and security in the world has been demonstrated daily by subsequent international events. Now of course United Nations Organization is a step in the right direction and must have our full support in the good that it has done and is doing, but it is to be regretted that it did not establish juridical order at the beginning instead of a balance of powers.

The war was fought for human rights and human dignity, but the victors failed to affirm and assert the eternal principles upon which such rights and dignity depend. On the contrary, they adopted and acted upon the false theories of the nations which they had vanquished. They built the United Nations upon the impossible and immoral doctrine of national sovereignty in international affairs and ignored the universal and eternal principles of Natural Law which had been expounded and exemplified by the great philosophers and jurists for twenty-five hundred years.

It is one of the great tragedies of human history that when this nation came to its apex of power and exerted a force and influence which no other nation had ever possessed, it deserted the basic philosophy of its Founding Fathers,<sup>7</sup> abandoned the principles upon which its legal institutions were built, and insisted not on constitutionalism and the rule of law, but on the veto power for the assertion of arbitrary will. In demanding the right of veto

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<sup>7</sup> Clarence Manion, *The Natural Law Philosophy of the Founding Fathers*, Natural Law Institute, University of Notre Dame, 1947, *THE PROCEEDINGS OF THE NATURAL LAW INSTITUTE*, Vol. I (1949).



it abandoned the states that represented our ideals of government and united with the U.S.S.R., which is the very antithesis of our form of government and our system of jurisprudence.

The struggle of nations for ascendance has by a process of elimination now been brought to a final contest between two great world powers. The juxtaposition of these two great powers, with the attendant rivalry, suspicion, and friction, makes a final world struggle inevitable, if they continue to trust in the might of their own armaments. If the disaster of a third world war is to be averted, the U.S.S.R. and the U.S.A. must acknowledge the impossibility of national sovereignty in international affairs and then unite in an effort to establish juridical order for the world.

### *Revival of Natural Law*

Thus we see that our most critical problems at home and abroad stem directly from the materialistic or positivist philosophy of law and government which had become so prevalent in the twentieth century. But, as already stated, when the effects of this modern sophistry began to appear, there also appeared some definite signs of a counter-movement, a return to Natural Law philosophy. Here again our limitations forbid a detailed account of the trend. But a few of the indisputable signs of a renaissance should be noted.

In 1930 The Harvard University Press published the doctoral thesis of Charles Grove Haines, entitled, *The Revival of Natural Law Concepts*.<sup>8</sup> The expansion of

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<sup>8</sup> CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930).

such revival since the publication of that book is indicated by the book's growing reputation and the ever-increasing references to it. In June 1942 *The Notre Dame Lawyer* published "The Revival of Natural Law," by Roscoe Pound. This was a publication of four lectures delivered at the College of Law, and in the first paragraph Dean Pound said that in the present century there had been "a revival of what was called juridical idealism, a revival of philosophical jurisprudence, and as it soon came to be called, a revival of natural law."

Dean Pound has been a powerful influence in such revival, because he, like the jurists of Scotland, Italy, and the Catholic faculties whom he mentions, never followed the deflections from Natural Law philosophy which began in the latter part of the nineteenth century. His lectures, books, and articles in the legal magazines continuously and vigorously opposed "the skeptical realism," "the give-it-up political and legal philosophy" of the day, and championed that philosophy which gives us "faith that we can do things and so enables us to do things."

In November 1941 the *Texas Law Review* published a devastating criticism of the positivist philosophy of law. It was written by Moses J. Aronson, Editor of the *Journal of Social Philosophy and Jurisprudence*.<sup>9</sup> A reprint had wide circulation. Its significant title was *The Swan-Song of Legal Realism*. It pointed out that the error of the self-styled *realists* lay in their failure to accept thought, feelings, and prevalent moral intuitions as part of experience. In that regard they are not realists. By rejecting funda-

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<sup>9</sup> Moses J. Aronson, *Book Review*, 20 *TEX. L. REV.* 118 (1941). Reprinted entitled *The Swan-Song of Legal Realism*.

mental insights of human nature, the natural and empirical reality of ideals and standards, they create an illusory theory of realism and a distorted conception of law. The processes that express the synthetical function of our sensibility and understanding, for that very reason, possess the validity of laws of nature, if we mean by nature the totality of phenomena.

This renaissance of Natural Law is revealed more recently in such publications (illustrative but not exhaustive) as:

#### *Magazine Articles*

"Defense Against Leviathan," by Ben W. Palmer.<sup>10</sup>

"The Higher Law," by Harold R. McKinnon.<sup>11</sup>

"Law and Philosophy," by Harold R. McKinnon.<sup>12</sup>

"Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty," by Wendell Phillips Dodge, Jr.<sup>13</sup>

The articles on Dissents and Reversals in the U. S. Supreme Court appearing serially and currently in the American Bar Association Journal, and the accompanying editorials.<sup>14</sup>

#### *Books*

*The American Philosophy of Law*, by LeBuffe and Hayes.<sup>15</sup>

10 Ben W. Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946).

11 McKinnon, *op. cit. supra* note 2.

12 HAROLD R. MCKINNON, *LAW AND PHILOSOPHY*, Canadian Bar Review, August-September, 1948 (reprint).

13 Wendell Phillips Dodge, Jr., *Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty*, 33 A.B.A.J. 1013 (October 1947).

14 34 A.B.A.J. 554, 584 *et seq.* (1948).

15 FRANCIS P. LEBUFFE and JAMES V. HAYES, *THE AMERICAN PHILOSOPHY OF LAW* (1947).

*The Natural Law*, by Heinrich A. Rommen.<sup>16</sup>

*Liberty Against Government* (Chapter II — Roman and English Origins), by Edward S. Corwin.<sup>17</sup>

And last, but not least, The Natural Law Institutes of the University of Notre Dame. These Institutes and the addresses which they sponsored and published have had a direct, stimulating, and constructive force which can hardly be over-estimated.

This renewal of interest in Natural Law philosophy is now being evidenced by citations and references in opinions of the courts and juristic writings. Moreover, the efforts of the United Nations and other agencies to promulgate a Bill of Rights for the world have necessarily called forth appeals to Natural Law philosophy and citations to juristic authorities on Natural Law. The arguments in the Nuremberg trials and the writings in defense of such proceedings also contain references to Natural Law concepts and the juristic writings that support a universal law.

### *Public Opinion*

This revival of Natural Law is supported, moreover, by a change in the climate of public opinion. The intense materialism, scientism, and secularism which favored the positivist philosophy has lost much of its assurance and arrogance since the last war. The bigotry of scientists has abated. From observations in the laboratory and observatory the universe had been growing increasingly mysterious. The great physicists, like Jeans, Millikan and Eddington, recognized a plan and order which did not

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<sup>16</sup> ROMMEN, *op. cit. supra* note 1.

<sup>17</sup> EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

exclude God. And the great geologist, Dr. Alfred Church Lane, said shortly before his death that "There are definite signs of God's plan in the story of the earth as recorded in Geology. . . . Belief in God is necessary to the progress of humanity."<sup>18</sup>

When Dr. Einstein and the nuclear scientists themselves began to cry out for the assertion of moral force to save the world from the destructive agencies which science had released, leaders of thought in all fields of endeavor began again to consider the source of man's moral power. The confession of science, made at the time of its own greatest achievement, that it was unable to save mankind from disaster, revived a general concern for those ideals and beliefs which had sustained man's faith and hope in times past.

This shift in public opinion from material to moral considerations was evidenced also in education. Sir Richard Livingston of the University of Oxford voiced the dissatisfaction of many teachers when he said:

If you want a description of our age, here is one. The civilization of means without ends; rich in means beyond any other epoch, and almost beyond human needs; squandering and misusing them, because it has no overruling ideal: an ample body with a meagre soul.

The same feeling was voiced by a schoolman of this country,<sup>19</sup> who said that when we consider the crisis of Western civilization, the possibilities of doom and disaster, we cannot escape the feeling of Arnold that the world

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<sup>18</sup> Alfred Church Lane, *My Faith*, American Weekly, July 18, 1948.

<sup>19</sup> J. Fred Waring, *The Alumni Record*. Hudson, Ohio, Spring 1948.

Hath really neither joy, nor love, nor light  
Nor certitude, nor peace, nor help for pain;  
And we are here as on a darkling plain  
Swept with confused alarms of struggle and flight  
Where ignorant armies clash by night.

Such feelings by schoolmen could not be ignored. Educational surveys were instituted by various agencies, including the President of the United States, and the aims and methods of teaching were re-examined. As a result we now hear schoolmen declare that

Citizenship should be grounded in morality that flows from religion, alert to the problems of the day and ready to translate the ethical ideals of religion and democracy into the realities of common life.

And we hear the dean of a state university law school proclaim "the democratic ideal, of which the Christian ethic of sympathy is a religious expression."

In the field of general literature there has been a noticeable trend away from the cynics and skeptics, who derided and scoffed so popularly during the nineteen-twenties, toward an increasing interest in mysticism and religion.<sup>20</sup> Philosophy and religion have gained respectability with the sophisticates, and such works as Toynbee's *Christian Philosophy of History*, Lecomte des Nouey's *Human Destiny*, and *The Road to Reason*, and Liebman's *Peace of Mind* have become best sellers.

Well-informed observers now testify to a general religious awakening. It does not evidence itself in the form of the old-time emotional revival, but appears in such movements as the effort of merchants and manufacturers

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<sup>20</sup> Editorial, 34 A.B.A.J. 1119 (December 1948).

for Christian Ethics in Business. As stated by C. A. Arlington:

"The brotherhood of mankind" is now an article of faith with many who reject the doctrine on which alone it securely rests, the Christian ideal is accepted by many who deny its creed, and what are called the Christian virtues are honored by many who do not know them to be divine.<sup>21</sup>

Such activity can hardly be called *religious* in the true sense of the word. But it does emphasize the moral significance of life and give practical effect to the teaching of religion. We realize this when we read in an influential magazine the statement of a great teacher of economics that "the basis of all 'sensible and feasible' economic policies is *moral rather than economic*."<sup>22</sup> The best exemplification of the practical application of a religious principle is found in the doctrine of trusteeship which is now accepted and implemented by the United Nations. Such concern for backward and unfortunate people is but Christian charity applied to international affairs. Charity and service are substituted for imperialism and exploitation in international relations.

When we read the recent address of Mr. John Foster Dulles, advisor on our bi-partisan foreign policy, we recognize how nearly complete is our return to Natural Law. Speaking on the possibilities of peace in the world, he said:

Two great principles are here involved. One is rec-

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<sup>21</sup> C. A. ARLINGTON, *EUROPE, A PERSONAL AND POLITICAL SURVEY* (1948).

<sup>22</sup> William A. Orton, *Business and Ethics*, *Fortune*, October 1948, p. 118.

ognition that there is a moral law and that it provides the only proper sanction for man-made laws. The other principle 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.<sup>23</sup>

Those two principles are the very pith and marrow of Natural Law.

### *Cycle of Natural Law*

Thus it comes to pass that we witness the repetition again of a cycle of history of Natural Law. Our generation has seen what Dr. Rommen refers to as the Age of Individualism and Rationalism, the Victory of Positivism, and now the Reappearance of Natural Law. The very force of circumstances, the tragic and fateful crisis that confronts us, compel us, if we are to save humanity from violence and degradation, to turn again to those principles of life which differentiate men from the brutes. And as Macneile Dixon has said, "If there is anything at all to distinguish man from the brutes, it is his very singular faith in absolute and eternal values."

Twenty-five hundred years ago Plato in his discussion of the Laws introduced the doctrine of an ideal law which resulted from the divine ordering of the cosmos. The Stoics developed this idea into the doctrine of a universal law binding all rational beings into a world community. A cosmic law should have cosmic validity, and as a result

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<sup>23</sup> John Foster Dulles, *Which Way to World Peace . . . Revolution or Reform* 3 FREEDOM AND UNION 8 (October 1948).



all mankind should participate in a sphere of rights and duties that transcend political boundaries.<sup>24</sup> To the Roman jurists this became the Law of Nature; i.e., the natural law of man's moral nature, or Natural Moral Law. It was accepted by the Church Fathers because it was consonant with Christian teaching. And through them it came to the Scholastic philosophers of the Middle Ages, who welded it and implemented it into constitutionalism, the theory of government limited by law. That is the source and essence of Western civilization and the very foundation of our own national life.<sup>25</sup>

But the history of Natural Law has not been so direct and smooth as that brief summary would indicate. It has suffered the slings and arrows of misfortune. It has been misused and abused. Like all doctrines that exercise restraint and make for righteousness, it has been opposed by the perversity and evil tendency which is inherent in human nature. Moreover it has been misrepresented by its over-zealous adherents, and then scoffed at by skeptics and cynics. It has been erroneously referred to as support for many false doctrines. Autocracy, vested interests, and reaction have been especially prone to use it as a shield for imperialism. As a result, many have opposed it who should have opposed only its abuse.

But in spite of all opposition, and the numerous periods of neglect and decline, Natural Law comes again into ascendancy, because it is based on man's rational and social nature and the moral order of life. As Emerson said:

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<sup>24</sup> Glenn R. Morrow, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 43 (1948).

<sup>25</sup> ROBERT N. WILKIN, *THE JUDICIAL FUNCTION AND INDUSTRIAL AND INTERNATIONAL DISPUTES* 28-33, 36 (1948); Manion, *op. cit. supra* note 7.

The intuition of the moral sentiment is an insight of the perfection of the laws of the soul. These laws execute themselves.<sup>25a</sup>

And so in our day, at the very time when the positivists were proclaiming their exact science of law, and the modern skeptics, like the sophists of old, were denying all possibility of truth or justice, and the teachers of the intelligentsia were proclaiming the death of Natural Law, an inexorable destiny impels us to recognize it as the controlling factor in our political life and our only hope for peace and security. Our present experience brings back to us the conclusions of the Stoic philosophers, the Roman juriconsults, and the Church Fathers. And so again the Natural Law returns to bury its undertakers.

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Before I conclude I should like to make two general observations: (1) On constitutionalism, and (2) on the practice of courts.

(1) *Constitutionalism*

Constitutionalism is the true implementation of Natural Law, but it is threatened today by a too far swing toward absolute or unrestrained democracy.

Every normal man is subject to two conflicting impulses. One prompts him to do as he pleases. The other prompts him to do as he ought. One produces conduct that is willful, capricious, arbitrary. The other produces conduct that is reasonable, conscionable, just.

These conflicting impulses are present not only in every individual but in every aggregation of individuals, includ-

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<sup>25a</sup> R. W. Emerson, Address, Divinity College, MISCELLANIES 118 (Houghton, Mifflin & Co. 1882).

ing nations and states. But the impulse to willful and arbitrary conduct becomes stronger in those who exercise the power of government. And, as already stated, the development of extreme nationalism has tended to encourage and defend the exercise of autocratic power, because the selfish tribal instinct is stronger in men than their ethical judgment. Human history is largely the story of conflict between arbitrary wills. And the history of political evolution is the story of what von Jhering referred to as "The struggle for law"; that is, the effort to bring the arbitrary will under the control of reason and ethical judgment.

The culture or civilization of a man or a nation may be measured by the degree to which arbitrary conduct has been brought into rational control. "The wise man does what ought to be done." The supreme accomplishment for control of government is constitutionalism. That is the great achievement of Western civilization. It provides a government not of men but of law, as distinguished from the absolutism or despotism of Eastern civilization. Just as man has found it necessary to have some fixed standards and principles to control his arbitrary will, so the state has need of some permanent principles, embodied in a constitution, which set bounds to its arbitrary impulses as expressed in government or the popular will at a particular moment.

The theory of government-subject-to-law was known to Greek philosophers and Roman jurisconsults. Cicero dealt with the idea in the Commonwealth. But it was never implemented and made effective until the Middle Ages. Prior to that time there was no independent

agency, no permanent judiciary, to give effect to the law and restrain the arbitrary power of governmental agents.

When men of the Church brought humanity up out of the Dark Ages they became ministers of state and for hundreds of years served as justiciars of the law.<sup>26</sup> They were educated in the canon law of the Church and the civil law of Rome. Their training therefore embraced both Christian ethic and Natural Law. They examined the theory of the state and the function of government in the light of the teaching of a universal church. It was therefore natural for them to hold that "the King is under no man but under God and the law." That statement by Bracton, a priest and judge, and quoted so effectively by Coke, Chief Justice, became the cornerstone of constitutionalism.

The clerical judges were able to make their theories effective because of their independent and secure positions as officers of the church and because of their consecration to the service. When church and state became separated and men of the church ceased to fill the judicial offices, the legal profession had been so impressed by their standards that it carried on the same traditions, just as the judges assumed the priestly robes.

Thus we see that constitutionalism, the essence of Western civilization, is dependent on two things:

1. The Natural Law theory of a higher law to which government itself is subject, and
2. Independent courts, presided over by men of learning who are consecrated to judicial service, with

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<sup>26</sup> WILKIN, *op. cit. supra* note 25, at 12 *et. seq.*

authority to restrain abuse of power and arbitrary conduct.

But history teaches that it is the tendency of those who oppose autocracy to arrogate to themselves the same arbitrary power when they become entrusted with the authority of government. Thus when Parliament won its struggle against the Crown, it substituted a form of Parliamentary absolutism to replace the absolute sovereignty of the king. That was the cause of the revolt of the American colonies. The founders of the American republic then based their government squarely on Natural Law and provided independent courts for the protection of the inalienable rights which such law recognizes.

But the people were given the power to choose their representatives in government, and now we see a tendency to enlarge that power into a form of popular absolutism, "the dictatorship of the proletariat." The populace is impatient of any legal restraint, and "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Flattered by demagogic references to "the sovereign people," the voters are led to believe that they are absolute sovereigns and that their arbitrary will must prevail. But insofar as that takes place, constitutionalism disintegrates,<sup>27</sup> and, as Madison said:

In a democracy, where a multitude of people exercise in person the legislative function, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious

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<sup>27</sup> CORWIN, *op. cit. supra* note 17, at 181, 182.

intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. (p. 309)

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. (p. 300)<sup>28</sup>

It is apparent that our peace and security are endangered today by an erroneous conception of sovereignty. It affects both our domestic and foreign affairs. It is wrong because the claim of absolute sovereignty contravenes the fundamental principles of Natural Law, i.e., the concept of a higher law binding on all men and on government itself. As Professors McIlwain and Corwin have said, sovereignty is historically a legal concept and implies legal limitation in its very statement.<sup>29</sup> It can not absolve men or nations from the obligation to be guided by reason rather than arbitrary will.

We can not maintain our free institutions at home or extend them to the world by the assertion of absolute sovereignty and arbitrary will. If freedom and human dignity are to be preserved, we must preserve constitutionalism and the Natural Law, upon which it was founded. As Mark Ethridge says, "We are the trustees of both the ideological and physical forces of Western civilization . . ."

## (2) *Practice in Courts*

Now in closing, if I may be indulged, I should like to take advantage of this opportunity to give some personal

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<sup>28</sup> THE FEDERALIST 300, 309 (G. P. Putnam's Sons, 1889).

<sup>29</sup> CORWIN, *op. cit. supra* note 17, at 188.

testimony in support of Natural Law. Ever since I became interested in the philosophy of law I have been hearing the opponents of Natural Law say:

It is impractical. It is idealistic. Its aims and principles are 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. They believe that "Thinking is very far from knowing." They act upon the admonition of Ruskin that if we "would only just *look* at a thing instead of thinking what it must be like, or *do* a thing instead of thinking it cannot be done, we should all get on far better."

In order to illustrate the attitude of courts toward the assertions of the skeptics, Dean Pound has developed the analogy to the attitude of civil engineers toward the the-

ories of the higher mathematicians. In spite of the discrediting effect of relativity upon the axioms of geometry, he points out that surveyors continue to use those axioms to meet the needs of men for highways, railroads, and bridges. So courts rely on the thoughts and beliefs of common men and give to words their generally accepted meaning, in confidence that in such matters "the children of this world are in their generation wiser than the children of light."

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.

And so the summation of all my study and experience brings me to agreement with the statement of Professor McIlwain that Cicero's words defining Natural Law are "among the most memorable in political literature":

There is in fact a true law — namely, right reason — which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the Senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule at



Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.<sup>30</sup>

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<sup>30</sup> WILKIN, *ETERNAL LAWYER: A LEGAL BIOGRAPHY OF CICERO* 225 (1947).

