

1943

## Law Reviews "As Usual"?: A War Program

Walter B. Kennedy

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Walter B. Kennedy, *Law Reviews "As Usual"?: A War Program*, 12 Fordham L. Rev. 50 (1943).

Available at: <https://ir.lawnet.fordham.edu/flr/vol12/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Law Reviews "As Usual"?: A War Program

### Cover Page Footnote

Professor of Law, Fordham University, School of Law

# LAW REVIEWS "AS USUAL"?

## *A War Program*

WALTER B. KENNEDY†

TODAY, America is contesting to the death a political and legal philosophy which is alien to American traditions. Crushing idealism and exalting opportunism, smothering the rights of the individual and substituting the rule of might for the rule of law—this is the world crisis which confronts our citizenry as they go forth to defend our institutions. In this global war, which threatens Western civilization, what is the task of the law reviews of America? Certain it is that the somewhat hackneyed, albeit useful, phrase "as usual" is out for the duration—in government, in business, in industry and in the life of the individual.

But what about Law Reviews "as usual"? Does it suffice in these trying times to scan the pages of law reports for pivotal cases, border-line controversies and pretty problems arising out of wartime conditions? Should we be content to probe the current output of the courts and come forth in Jack-Horner fashion with a few jural plums on the doctrine of impossibility of performance in time of war, the definition of frozen funds or the subtleties of sugar rationing? Certain it is that these bread and butter problems deserve, and will receive, adequate treatment in the pages of our law journals. But this admittedly important coverage of current problems should not be the sole function of American law reviews in time of war. When Christian-Judaic civilization is tottering<sup>1</sup> and the Four Freedoms are temporarily immersed in a welter of ruthless slaughter and complete submersion of the inalienable rights of man, the calm and prosaic discussion of governmental decrees, contractual problems, or statutory interpretations, however necessary, does not constitute the single objective of legal periodicals dedicated to the constructive criticism and improvement of law in general.

The weekly periodical, *America*, framed the issue in the following words:

*"The reign of law is the great question, and it is challenged now as never before in all recorded time. The Totalitarians in an overwhelming onslaught of death-*

---

† Professor of Law, Fordham University, School of Law.

1. Gannon, *What Are We Really Fighting?* (1942) 11 *FORDHAM L. REV.* 249; LEHMAN, *THE INFLUENCE OF JUDGE CARDOZO ON THE COMMON LAW* (1942) (First Annual Benjamin N. Cardozo Lecture, delivered October 28, 1941, before the Association of the Bar of the City of New York); Mackay, *Needed: Great Faith to Match Great Faith*, *N. Y. Times Magazine*, Sept. 20, 1942, p. 3, 31.

dealing armament have proclaimed a new right: the right of force, of arbitrary wilful force, the right of the strong to subjugate the rest of men. With defiance they reject the idea of a Divine source and sanction for law."<sup>2</sup>

This is the time for frank and fearless analysis of self and society, of governments and legal institutions. To the men of the law a particular and weighty task is imperatively tendered:<sup>3</sup> it is in order for law review editors and lawyers, for jurists and law students, to reflect upon the course of law in the past, to assay its status in the present and to forecast the future of law in the new world to come. It is not an overstatement to assert, in the words of *America*, that the reign of law "is challenged now as never before in all recorded time."

Surely one objective of law periodicals should be to review once more the origin and source of all law—and of American law in particular—and to ask whether we have, consciously or unconsciously, departed from the juristic faith of the founders of our country, whether we are faced with a breakdown or collapse of the ancient doctrines and classical concepts of law. If there is visible any appreciable departure from the settled principles of our formative era, it behooves us to reflect upon the merits or demerits of the old order and to compare them with the juristic substitutes which have gradually infiltrated into the legal order of America in more recent years.

### *Law in Early America*

It is appropriate and timely, when our thoughts go back to Lexington and Valley Forge as symbols of the sterling courage of our forebears, to reflect upon their elemental beliefs and ideologies in the domain of law. If we seek today to emulate their valor and to match their sacrifices in defense of our rights and liberties, it may be well to reconsider what those liberties and rights were conceived to be, from whence they came, their origin and their content.

---

2. *The Vocation of Law* (1942) 47 *AMERICA* 714. (Italics inserted.)

3. "Are lawyers non-essential?" is the question asked by the American Bar Association Journal and the editor replies:

"Undisturbed by all unfounded aspersions, the lawyer can be relied upon to do all within his powers of body and mind, to hasten the advent of Victory, and when force and arbitrary power have been defeated and when laws are to be devised and interpreted and administered for reconstructing a world based again on liberty and justice, the lawyers of this and every other land will play their distinguished and useful part." (1942) 28 A. B. A. J. 827.

Herein and elsewhere, we find proof in word and deed that the Bench and Bar of America are giving tangible proof that the generalization, *Silent leges inter arma* is not to be distorted into a maxim which connotes the complete submersion of law in wartime. See Llewellyn, *The Crafts of Law Re-valued* (1942) 28 A. B. A. J. 801.

What were *they* fighting for? What are *we* fighting to preserve? Long since forgotten is the demonstrable fact that American law was founded upon the belief in Divine Law. It is well to recall that our political and legal institutions, in the minds of our founders, traced back to God. An immortal sentence of the Declaration of Independence deserves to be lifted once more out of our copybooks: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights. . . ." These words were not the rhetorical effusions of early jurisprudential stylists. They meant just what they said: that the individual is endowed with certain natural and unalienable rights which belong to him because of his origin, nature and ultimate end. Then follows in the Declaration of Independence a clear statement of the part government plays in the protection of these natural rights: "That to secure these rights, Governments are instituted among men." Governments exist then, not to *create*, but to *secure* these unalienable rights given to men by the Creator.

It should be carefully noted that the quoted passages from the Declaration of Independence were not isolated pronouncements of the origin of government or of the rights of man. These formal statements find abundant support in colonial and post-colonial records. The full sweep of historical research reinforces the facial expression of the Declaration of Independence in its recognition of Divine authority and power as the true Fountainhead of law. Colonial documents<sup>4</sup> and political pamphlets<sup>5</sup> of

---

4. See the Mayflower Compact (1620); The Fundamental Orders of Connecticut (1639); the Mecklenburg Declaration of Independence (1779): Collected in 43 HARVARD CLASSICS (1910).

A Resolution, adopted by the House of Representatives of Massachusetts on October 29, 1765, reiterated the current belief in the doctrine of natural rights in the following words: "Resolved, That the inhabitants of this Province are unalienably entitled to those essential rights in common with all men: and that no law of society can, consistent with the law of God and nature, divest them of those rights." Reprinted in WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931) 72.

For a complete documentation of the many instances wherein the colonists expressed their reliance upon Divine law and the doctrine of inalienable rights, see RYAN AND MILLAR, THE STATE AND THE CHURCH (1922) *passim*; WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931) ch. 1-4; HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930) ch. 3-4. In a recent volume, Professor Wright states that the colonists "placed sole reliance upon the 'Laws of Nature and of Nature's God.'" WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942) 11. See, Mackay, *supra* note 1 at 31: "Apart from faith in God, American history has no meaning. In this faith our institutions were created, our laws enacted and our liberties secured"; Gannon and Lehman, *supra* note 1; *infra* note 27.

5. Winthrop, Deputy Governor of the Commonwealth of Massachusetts, traced the power of government to God in the following words: "Arbitrary Government is where a

these times give clear and repeated expression to the same theories of government: That the state exists for the individual, not the individual for the state; and that the citizen derives his basic rights not from the state but from the Creator. Our modern scholars, however critical they may be of the validity or permanency of the doctrines of natural law and natural rights, freely accept the historical accuracy of the conclusion that such concepts of law were widely held at the very beginning of our national existence.<sup>6</sup>

Suffice it to say that the foregoing fragments of legal and extra-legal lore sum up to a pioneer philosophy of law in America which recognizes the Fatherhood of God and the Brotherhood of Man, which conceives of government as an agency established to insure the protection of God-given rights. A simple formula, but one which, sad to recall, has long since been abandoned in the world about, and in our own fair land as well.

### *Law in Our Time*

For a generation and more, the fashion has been to divorce all eternal and natural law from positive law.<sup>7</sup> More legalistically stated, any attempted joinder of God and law has been followed by a dogmatic decree of *annulment* pronounced by our learned philosophers and law men who

people have men set over them, without their choice or allowance; who have power to govern them, and judge their causes without a rule.

"God only hath this prerogative; whose sovereignty is absolute, and whose will is a perfect rule, and reason itself; so as for man to usurp such authority, is tyranny, and impiety." WINTHROP, *ARBITRARY GOVERNMENT DESCRIBED* (1644), reprinted in 43 *HARVARD CLASSICS* (1910) 90. See Guthrie, *American Philosophical Past and Present*, *PHASES OF AMERICAN CULTURE* (1942) 37-50; Parsons, *Philosophical Factors in the Integration of American Culture*, *id.* at 15-24.

The importance of religion and morality in the structure of government was emphasized by President Washington in his Farewell Address: "Of all the dispositions and habits, which lead to political prosperity, Religion, and Morality are indispensable supports. . . . Observe good faith and justice towards all Nations. Cultivate peace and harmony with all.—Religion and Morality enjoin this conduct; and can it be, that good policy does not equally enjoin it?—*It will be worthy of a free, enlightened, and, at no distant period, a great nation, to give to mankind the magnanimous and too novel example of a People always guided by an exalted justice and benevolence.*" Washington, Farewell Address (1796), reprinted in (1910) 43 *HARVARD CLASSICS* 250, 260, 261. (Italics inserted.)

6. HAINES, *supra* note 4; WRIGHT, *supra* note 4; Corwin, *The Higher Law Background of American Constitutional Law* (1928-1929) 42 *HARV. L. REV.* 149, 365.

7. HOLMES, *Natural Law*, *COLLECTED LEGAL PAPERS* (1921) 310; POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922) 97-99; FRANK, *The Religious Interpretation* (1930) *LAW AND THE MODERN MIND*, ch. XVIII; *cf.* Kennedy, *Pragmatism As a Philosophy of Law* (1925) 9 *MARQUETTE L. REV.* 63.

proclaim that any reference to God in the fabrication or evaluation of law is null and void *ab initio*.

Beginning at least with the advent of pragmatic jurisprudence with its super-standards of clashing claims and wants, rather than of rights and duties, with its down-to-earth test of "results and consequences" and its ouster of the inalienable rights of man, followed by legal realism with its rejection—in whole<sup>8</sup> or in part—of the belief in "a government of laws" and the substitution of "a government of men", the blackout of a "higher law" inevitably followed. All mention of God in relation to legal problems was taboo. If proof is needed, one may read again the recent works and writings of American jurisprudential scholars and legal philosophers. The deepest reflections and "credos" of our most distinguished jurists reveal all too clearly that they hold, seemingly without the formality or necessity of positive proof, the postulate that there is no place, proximate or remote, for God in the law.<sup>9</sup>

Whenever they deem it necessary to refer back to the era when the simple men of former times placed reliance upon Divine guidance in the legal order, they dismiss it as a curious revival of Aristotelean or Platonic mythology, indorsed and developed by the Christian philosophers of the Middle Ages—an outmoded mysticism which flamed forth momentarily in the writings of the forefathers in the early years of the American State,<sup>10</sup> but was gradually shadowed and long since blanketed by the glorious discovery that man was potent enough to shape his own destiny, that Science is King and that its Kingdom embraces the making and evaluating of all laws. In fine, our legal philosophers contend that man is capable of guiding his own course through life without any norms or standards derived from the Divine order, without any durable principles to weigh or estimate the quality of the output by legislature or courts.

But what is the nature of man in the new legal order? Surely this imperious individual ought to be able to frame a mechanistic Utopia, now

---

8. BINGHAM, Co-author, *MY PHILOSOPHY OF LAW* (1941) 16: "Let us banish from our professional tenets the absurd dogma 'a government of laws and not of men'. It has a meaning, concealed rather than expressed, and a use in practical politics, but there is no place for it in legal science." RODELL, *WOE UNTO YOU, LAWYERS!* (1939) *passim*. Cf. FRANK, *IF MEN WERE ANGELS* (1942) ch. 1.

9. *MY PHILOSOPHY OF LAW* (1941). In this volume fifteen leading legal scholars set forth their "credos" of law without any affirmative approval of eternal or natural law.

10. For proof of the close relation between medieval philosophy and the democratic theory of government, see RYAN AND MILLAR, *supra* note 4, *passim*. Holdsworth pays a warm tribute to the contribution of medieval thinkers in furthering the doctrine of the supremacy of right, legal and moral, in both public and private law. HOLDSWORTH, *2 HISTORY OF ENGLISH LAW* (1927) 132-133.

that he alone is empowered to control his universe, divorced from the sterile dogma of a God-head. But man, who emerges from the test tubes and retorts of juristic laboratories, is indeed a queer creature: His reason has been dissected and found wanting, his free will frozen into muscular behavior, his legal and judicial actions determined in goodly degree not by reason, impartial judgment or justice, but by hunches, environment, prejudice and even gastronomical disturbances.<sup>11</sup> This is the mighty man who is assigned to the task of planning a New World in the Law. Not able to determine or to govern his own individual actions, he is invited to determine and to govern the Scientific Olympus blue-printed by legal realists.

One last step remains to be noted in the descent of traditional law, a step inevitable and logical, but a step which shocked even the pioneers of pragmatic reform when it was first taken by the outriders of surrealism. If positive law, fabricated entirely by man, is in fact a mixture of mere claims and wants, power and force, if man himself is a chemical conglomeration of muscular motivations and environmental impulses—a "cosmic ganglion," in the words of the great Holmes—why perpetuate the legal fiction we call positive, human law? Why not frankly admit that the entire structure of man-made law rests upon empty concepts and meaningless rules of no value or reality?

The questions are not rhetorical; they have been answered. "I used to say," says America's leading realist, ". . . that truth is the majority vote of that nation that can lick all others."<sup>12</sup> Hence might, not right, determines "truth". "Every tribe needs its totem and its fetish and the Constitution is ours."<sup>13</sup> So states Max Lerner, and Thurman Arnold adds: "The language of the Constitution is immaterial since it represents current myths and folklore rather than rules."<sup>14</sup> Thus our organic law is reduced to the proportions of a modernized totem pole upon which to hang current myths anent a "higher law". It remained for neo-realists to take the last step. They boldly contend that Law, *all* Law, should be completely abandoned.<sup>15</sup> Representing the advance guard of the critics of traditional

11. Kennedy, *Psychologism in the Law* (1940) 29 GEO. L. J. 139.

12. HOLMES, *Natural Law*, COLLECTED LEGAL PAPERS (1921) 310. See Ford, *The Fundamentals of Holmes' Juristic Philosophy* (1942) 11 FORDHAM L. REV. 255.

13. Lerner, *Constitution and Court As Symbols* (1937) 46 YALE L. J. 1290, 1294.

14. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 29.

15. RODELL, *WOE UNTO YOU, LAWYERS!* (1939). The extent of Professor Rodell's dismissal of the Law is clearly expressed in the following passage: "What is ever to be done about the fact that our business, our government, even our private lives, are supervised and run according to a scheme of contradictory and nonsensical principles built of inherently



law, paying warm tribute to their pragmatic and realist mentors, they cynically reject the very law which man himself proudly proclaims that he alone has made.

Thus the cycle of God-less law comes to an end. First, no eternal law, then no natural law, next no constitutional law—and now no positive law, no law at all! Here in brief is the time table of modern jurisprudence with its central *motif* of Law without God.<sup>15a</sup>

The span of years from Holmes, the father of American legal realism, to the advocates of "no-law", embraces but a single generation. Within that brief span, American jurisprudence has nose-dived through the successive stages of optimistic pragmatism, temperate skepticism, helpless cynicism to utter despair of rule by law.

This is the jurisprudential chaos which faces us as we enter a World War dedicated to the retention or recapture of the Four Freedoms and the implementation of the Atlantic Charter.

One fact is patent: America today rejects the philosophy of force, the "law" of dictators founded upon racial supremacy or imperial dynasty, the submersion of the individuality of man in the might of the Totalitarian State. Here, in all its practical and naked workings is visible the God-less State, the death of the rights of man. Witness the full sweep of their political pragmatism: "Results and consequences" determine the truth and validity of human action; the "good" act is one which works! Tested

---

meaningless abstractions? What is to be done about the fact that we are all slaves to the hocus-pocus of The Law—and to those who practice the hocus-pocus, the lawyers?

"There is only one answer. The answer is to get rid of all lawyers and throw The Law with a capital L out of the system of laws. It is to do away entirely with both the magicians and their magic and run our civilization according to practical and comprehensible rules, dedicated to non-legal justice, to common-or-garden fairness that the ordinary man can understand, in the regulation of human affairs." (p. 249). See also McDougal, *Fuller v. The American Legal Realists: An Intervention* (1941) 50 YALE L. J. 827. For a current estimate of the effects of realist nihilism, see Ayres, Book Review (1942) 51 YALE L. J. 881.

15a. While it is not within the province of this paper to examine the matter fully, it is submitted that there is a striking parallel between the degrees of various realists' rejection of *traditional law* and the degrees of such realists' opposition to any concept of a *higher law*. One can generally grade the extent of a realist's antagonism to Anglo-American legal traditions by noting the extent of his expressed antagonism to eternal or natural law, and to moral or ethical values. The more pronounced his cynicism or skepticism of durable legal rules and principles, the more sweeping and pessimistic will be his appraisal of *a priori* concepts, norms and standards derived from eternal or natural law; or reached by man's reason.

The scholastic position that there is a marked relationship between "law-less" law and "God-less law" deserves more attention than it has received from non-scholastic anti-realists. The writer has developed this thesis briefly and inadequately in *MY PHILOSOPHY OF LAW* (1941) 145.

thus, who can deny that totalitarian blitzkrieg, weighed in the scales of drab materialism or scientism, has established itself and is "good"—for the present at least. Is it necessary to add that America rejects the Golden Rule of the Axis powers, that successful slaughter spells "truth"?

### *Rebirth of Idealism*

Out of the ruins of World War II, out of the what's-the-use cynicism of recent years in philosophical and jurisprudential circles, there is emerging a sudden realization that our future course calls for a reconsideration of fundamental values, a revaluation of our patterns of living, a reassessment of our legal relations. Sensate culture, as Sorokin tells us,<sup>16</sup> is exhausted; modern irrationalism has filed a petition in bankruptcy; pragmatism has betrayed us and has been indicted; realism is not real enough to hold back the inherent nature and yearnings of man.

A pronounced return to spiritual values in the political and legal orders is evidenced in current literature. Russell W. Davenport in an article appearing in *Fortune* magazine argues for a return to the discarded spiritual values—a recognition "of an ultimate relationship between the human and the divine".<sup>17</sup> John Alexander Mackay, President of Princeton Theological Seminary, says: "To reinterpret the motto on the copper penny is our contemporary task. Dare we repeat seriously the words 'In God We Trust'?"<sup>18</sup> Professor Hocking holds no brief for medievalism, but he asserts that Man in his obsession with science has forgotten his soul, has forgotten God.<sup>19</sup> Dean Pound no longer emphasizes the weighing of claims and wants as the end of law. Submerged is his pragmatic test of the 20's. He now says: "But some part of the path of the juristic thought of tomorrow is already apparent. It seems to be *toward an ideal of cooperation rather than one of competitive self-assertion.*"<sup>20</sup> The stated objective of the brotherhood of man takes priority over his old formula that man seeks to acquire the world and that the main function of law is to soften the clashes which are present in such endeavor. He also pleads for a reconsideration of the elements that make up the man of principle. "Claims and wants" are quite docile today in competition with the inherent "rights and duties" of mankind. Jerome Frank contends that good government calls for "decent, honest, God-fearing

---

16. SOROKIN, *MAN AND SOCIETY IN CALAMITY* (1942).

17. Davenport, *This Would Be Victory* (1941) 24 *FORTUNE* 45.

18. Mackay, *supra* note 1.

19. HOCKING, *WHAT MAN CAN MAKE OF MAN* (1942).

20. POUND, *SOCIAL CONTROL THROUGH LAW* (1942) 126-127. (Italics inserted.)

men".<sup>21</sup> Llewellyn writes on the Good, the True and the Beautiful in the Law.<sup>22</sup>

These are typical indications which permit us to take heart and affirm that juristic idealism is on the upswing. From variant sources, including scholars who formerly stressed the pragmatic or realistic viewpoints of the law, come recognitions that the concept of law calls for something more than a bundle of claims and wants, hunches and stimuli, behavior patterns and totem poles.

Natural law is also returning in jurisprudential discussion and is awarded a place long since denied in the halls of modern jurisprudence.<sup>23</sup> Why not? Surely a concept which dates back to the Greek and Roman eras, formed the core of *philosophia perennis* in the Middle Ages, was dominant in the days of our forefathers,<sup>24</sup> has an unbroken reign and inherent worth which enables it to survive the criticism of modern jurists or the death sentence pronounced by a distinguished jurist.<sup>25</sup>

To return to our initial question: Law Reviews "as usual"? We submit that the answer is "No". These are not normal times. "The reign of law . . . is challenged now as never before in all recorded time."<sup>26</sup> Let us then, with due recognition of our responsibility to review current developments of municipal law, accept the ruthless challenge to the reign of law. Let us do our part in preserving the heritage of law in America—and aiding in its preservation throughout the world. This battle for law must be won not alone on the far-flung battle fields, but on the home front as well.

*"Statesman, prelate and judge, Protestant, Catholic and Jew are united in the conviction that the inalienable rights of the individual, formulated*

21. FRANK, IF MEN WERE ANGELS (1942) 13.

22. Llewellyn, *On The Good, The True, The Beautiful, In The Law* (1942) 9 U. OF CHI. L. REV. 224. The idealist may also applaud Professor Llewellyn's reminder that "technique without ideals is a menace", and his further observation that of late lawyers have lost the broad vision of right and justice of the early Bench and Bar in the narrow pursuit of the interests of a particular client or class. Llewellyn, *The Crafts of Law Re-valued* (1942) 28 A. B. A. J. 801, 803; Frank, J., dis. op. in *U. S. v. St. Pierre*, decided Dec. 15, 1942, ad. op., pp. 363-364, — F. (2d) — (C. C. A. 2d, 1942).

23. Pound, *The Revival of Natural Law* (1942) 17 NOTRE DAME LAWYER 287. Fuller, *Reason and Fiat in Case Law* (Second Annual Benjamin N. Cardozo Lecture, delivered October 27, 1942 at the Association of the Bar, New York, reprinted in N. Y. L. J. October 28, 29, 30, 1942.)

24. *Supra*, notes 1-7.

25. Holmes, *op. cit. supra*, note 7.

26. *Supra*, note 2.

*and assured by our law, rest upon a foundation eternal and immutable because it is divine. There lies America's unity.*"<sup>27</sup>

## NOTE

Since the above article was written, Pope Pius XII's Christmas Message has been broadcasted to the world. Herein the Holy Pontiff develops *inter alia* the juridical order of society and urges the rebirth of fundamental principles of law. The importance of Pope Pius XII's address and its obvious relationship to the above article are evident. Pertinent parts of the official translation are appended:

"The origin and the primary scope of social life is the conservation, development and perfection of the human person, helping him to realize accurately the demand and values of religion and culture set by the Creator to every man and to all mankind, both in the whole and in its natural ramifications. . . ."

*"From the juridic order as willed by God, flows man's inalienable right to juridical security, and by this very fact to a definite sphere of rights immune from all arbitrary attack. . . ."*<sup>28</sup>

"The juridical order has . . . the high and difficult scope of insuring harmonious relations both between individuals and between societies, and within these. This scope will be reached if legislators will abstain from following those perilous theories and practices, so harmful to communities and to their spirit of union, which derive their origin and promulgation from false postulates.

*Among such postulates we must count the juridical positivism which attributes a deceptive majesty to the setting up of purely human laws, and which leaves the way open for a fateful divorce of law from morality.*<sup>29</sup>

There is, besides, the conception which claims for particular nations, or races, or classes the juridical instinct as the final imperative and the norm from which there is no appeal. Finally, there are those various theories which, differing among themselves, and deriving from opposite ideologies, agree in considering the State or a group which represents it, as an absolute and supreme entity, exempt from control and from criticism even when its theoretical and practical postulates result in and offend by

---

27. LEHMAN, *THE INFLUENCE OF JUDGE CARDOZO ON THE COMMON LAW*, (1942) 33 (First Annual Benjamin N. Cardozo Lecture, delivered October 28, 1941, before the Association of the Bar of the City of New York).

28. Italics inserted. The striking similarity of Pope Pius XII's definition of the juridic order and the classic statements of our forefathers is worth noting. See *supra*, pp. 51-53.

29. See *supra*, pp. 53-56.

their open denial of essential tenets of the human and Christian conscience.

Any one who considers with an open and penetrating mind the vital connection between social order and a genuine juridical order will realize at once the urgent need of a return to a conception of law which is spiritual and ethical, serious and profound, vivified by the warmth of true humanity and illumined by the splendor of the Christian faith which bids us seek in the juridical order an outward refraction of the social order willed by God, a luminous product of the spirit of man which is in turn the image of the spirit of God. . . ."

"The relations of man to man, of the individual to society, to authority, to civil duties, the relations of society and of authority to the individual should be placed on a firm juridic footing and be guarded, when the need arises, by the authority of the courts. This supposes:

Firstly: A tribunal and a judge who take their directions from a clearly formulated and defined right;

Secondly: Clear juridical norms which may not be overturned by unwarranted appeals to a supposed popular sentiment or by merely utilitarian considerations; and

Thirdly: The recognition of the principle that even the State and the functionaries and organizations dependent on it are obliged to repair and to withdraw measures which are harmful to the liberty, property, honor, progress or health of the individuals. . . ."

"What is this world war, with all its attendant circumstances, whether they be remote or proximate causes, its progress and material, legal and moral effects—what is it but the crumbling process, not expected, perhaps, by the thoughtless, but seen and deprecated by those whose gaze penetrated into the realities of a social order which, behind a deceptive exterior or the mask of conventional shibboleths, hid its mortal weakness and its unbridled lust for gain and power?<sup>30</sup>

That which in peacetime lay coiled up, broke loose at the outbreak of war in a sad succession of acts at variance with the human and Christian sense.

International agreements to make war less inhuman by confining it to the combatants, to regulate the procedure of occupation and the imprisonment of the conquered, remained in various places a dead letter; and who can see the end of this progressive demoralization of the people; who can wish to watch impotently this disastrous progress?

Should they not rather, over the ruins of a social order which has given

---

30. See *supra*, pp. 56-57.

such tragic proof of its ineptitude as a factor for the good of the people, gather together the hearts of all those who are magnanimous and upright in the solemn vow not to rest until in all peoples and all nations of the earth a vast legion shall be formed of those handfuls of men who, bent on bringing back society to its center of gravity, which is the law of God, aspire to the service of the human person and of his common life ennobled in God? . . .<sup>31</sup>

---

31. See *supra*, pp. 57-59.

# FORDHAM LAW REVIEW

*Published in January, May and November*

---

---

VOLUME XII

JANUARY, 1943

NUMBER 1

---

---

*Subscription price, \$2.00 a year*

*Single issue, 75 cents*

---

---

Edited by the Students of the Fordham Law School

## EDITORIAL BOARD

EDWIN J. FITZGERALD  
*Editor-in-Chief*

STANLEY S. GREEN  
*Comment Editor*

MARJORIE A. QUINN  
*Decisions Editor*

WILLIAM R. DISTASIO  
*Legislation Editor*

AGNES C. O'BRIEN  
*Associate Comment Editor*

J. KENNETH CAMPBELL  
*Obiter Dicta Editor*

WILLIAM I. BERTSCHE  
*Associate Legislation Editor*

MILDRED MCGINITY  
*Book Review Editor*

JOHN H. HANRAHAN, JR.  
*Business Manager*

## Associate Editors

WILLIAM A. CARROLL  
EILEEN A. COLLIGAN  
SHIRLEY A. EHMAN  
LEONARD FELDMAN  
FREDERICK H. FREY,

J. GERARD HARGOUS  
WILLIAM F. KENNEDY  
JAMES A. KILDUFF  
PETER J. MARTIN  
JANET MONES

HELEN M. PALADINO  
FRANCIS P. POMAR  
HENRY A. STETLER, JR.  
JAMES S. TOMLINSON  
WERNER H. VON ROSENSTIEL

---

## *Serving with the armed forces of the United States*

FRANCIS X. CLAIR  
WILLIAM F. GAVIN  
RICHARD L. NEWMAN

---

WALTER B. KENNEDY  
FRANCIS X. CONWAY  
*Faculty Advisers*

---

Editorial and General Offices, Woolworth Building, New York

---

---

## CONTRIBUTORS TO THIS ISSUE

- JOHN T. LOUGHRAN, LL.B., 1911, LL.D., 1925, Fordham University; LL.D., 1935, St. John's University. Lecturer in Law, 1912-1915, Associate Professor of Law, 1915-1916, Professor of Law, 1916-1930, Fordham University, School of Law. Justice of the Supreme Court of New York, 1931-1934. Judge of the Court of Appeals of New York, 1934 to date. Author of *CASES ON EVIDENCE* (1926). Co-author of *KEENER'S CASES ON CONTRACTS* (2d ed., 1914). Author of: *The True Presumption of Death in New York* (1915) 2 *FORDHAM L. REV.* 1; *The Common Carrier of Goods: Its Liability in New York* (1916) 2 *FORDHAM L. REV.* 111; *Pain v. Packard* (1917) 3 *FORDHAM L. REV.* 35.
- JOSEPH B. LYNCH, A.B., 1913, LL.B., 1916, LL.D., 1942, Fordham University. Member of the New York Bar. Author of *Losses Resulting from Stock Becoming Worthless—Deductibility under Federal Income Tax Laws* (1939) 8 *FORDHAM L. REV.* 199; *The "Charities" Provisions of the Internal Revenue Code* (1941) 10 *FORDHAM L. REV.* 234.
- WALTER B. KENNEDY, A.B., 1906, A.M., 1912, Holy Cross College; LL.B., 1909, Harvard University, School of Law. Member of the New York, Massachusetts and District of Columbia Bars. Professor of Law, Fordham University, School of Law, 1923 to date. Author of *CASES ON PERSONAL PROPERTY* (1932); *Garnishment of Intangible Debts in New York* (1926) 35 *YALE L. J.* 689; *The New Deal in the Law* (1934) 68 *U. S. L. REV.* 533, 2 *U. S. L. WEEK* 41; *Realism, What Next?* (1938) 7 *FORDHAM L. REV.* 203; co-author, *MY PHILOSOPHY OF LAW* (1941); and other articles in law reviews.