

1945

The Moral Law

Rev. Robert I. Gannon, S.J.

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



Part of the [Law Commons](#)

Recommended Citation

Rev. Robert I. Gannon, S.J., *The Moral Law*, 14 Fordham L. Rev. 1 (1945).

Available at: <https://ir.lawnet.fordham.edu/flr/vol14/iss1/1>

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.

FORDHAM LAW REVIEW

VOLUME XIV
1945

302 BROADWAY
NEW YORK 7
1945

Copyright 1945
By Fordham University
Printed in U. S. A.

TABLE OF LEADING ARTICLES—AUTHORS

GANNON, REV. ROBERT I., S.J., <i>The Moral Law</i>	1
KEEFE, EUGENE J., <i>Validity of Releases Executed under Mistake of Fact</i> ..	135
KENNEDY, WALTER B., <i>Portrait of the New Supreme Court II</i>	8
KILKENNY, VICTOR S., <i>McKelvey on Evidence—A Review</i>	37
LYNCH, STEWART. <i>Prosecuting Loan Sharks under the Mail Fraud Statute</i> ..	150
TIMASHEFF, N. S., <i>Legal Aspects of the Grant of Three Seats to Russia in the United Nations Charter</i>	180
WHITE, WILLIAM R., <i>Income Taxes on Beneficiaries of Pension and Profit- Sharing Plans</i>	165

TABLE OF LEADING ARTICLES—TITLES

INCOME TAXES ON BENEFICIARIES OF PENSION AND PROFIT-SHARING PLANS. <i>William R. White</i>	165
LEGAL ASPECTS OF THE GRANT OF THREE SEATS TO RUSSIA IN THE UNITED NATIONS CHARTER. <i>N. S. Timasheff</i>	180
MCKELVEY ON EVIDENCE—A REVIEW. <i>Victor S. Kilkenny</i>	37
PORTRAIT OF THE NEW SUPREME COURT II. <i>Walter B. Kennedy</i>	8
PROSECUTING LOAN SHARKS UNDER THE MAIL FRAUD STATUTE. <i>Stewart Lynch</i>	150
THE MORAL LAW. <i>Rev. Robert I. Gannon, S.J.</i>	1
VALIDITY OF RELEASES EXECUTED UNDER MISTAKE OF FACT. <i>Eugene J. Keefe</i>	135

TABLE OF BOOK REVIEWS—AUTHORS

BERGE: <i>Cartels Challenge to a Free World.</i> <i>James V. Hayes</i>	133
BOURKE: <i>Thomistic Bibliography: 1920-1940.</i> <i>Godfrey Schmidt</i>	268
DE ZULEUTA: <i>The Roman Law of Sale, a book note.</i> <i>George W. Bacon</i>	171
HAINES: <i>The Role of the Supreme Court in American Government and Politics 1789-1835.</i> <i>Walter B. Kennedy</i>	130
HAYNES: <i>Selection and Tenure of Judges.</i> <i>Glenn R. Winters</i>	269
HUDSON: <i>International Tribunals, Past and Future.</i> <i>Frederic R. Coudert</i> ..	258
PEPPER: <i>Philadelphia Lawyer: An Autobiography.</i> <i>Hamilton Vreeland, Jr.</i> ...	127
RHYNE: <i>Municipalities and the Law in Action.</i> <i>Julius Isaacs</i>	264
VREELAND: <i>Twilight of Individual Liberty.</i> <i>Edwin A. Falk</i>	261
WARREN: <i>Schouler Divorce Manual, a book note.</i> <i>Frederick L. Kane</i>	173

INDEX—DIGEST

Page references in bold type are to Leading Articles; in plain type to Comments, Recent Decisions, Book Reviews and Book Notes.

ADMINISTRATIVE LAW

See *Selective Training and Service Act,
National Labor Relations Act*
Administrative power to compel pro-
duction of records 243-244

ADVERSE POSSESSION

Entry by mistake
Essential elements 220
Hostility 220-221

Necessity of intent to claim adversely 220-222
Statute of limitations 221-222
Effect of offer to purchase by adverse
possessor 222-223

AGENCY

Independent contractor 255

ALIEN

Schneiderman v. United States 17-18

ASSAULT

Effect on provocation on liability 95-96

BIOGRAPHYSee *Legal Biography***BREACH OF PROMISE**

Common Law Actions for 224-225

Effect of Article 2-A New York Civil Practice Act

Actions for money damages barred by 223

History of 224-225

Liberally construed 225-227

Actions for fraud

barred 226

permitted 226

Recovery of specific property 227

CARTELS

Cartels, Challenge to a Free World by Wendell Berge, a book review 133-134

CONFLICT OF LAWSSee *Domestic Relations*

Applicability of state statutes in federal courts 229-233

Diversity of citizenship 230-231

Divorce, extraterritorial effect 245-249

N. Y. Gen. Corp. Law Sec. 61-b, procedural or substantive? 229-231

Support order, extraterritorial effect 248, 249

CONSTITUTIONAL LAW

Administrative level within Russian Government

Union Commissariats 185

Union-republican commissariats

185-186

Republican commissariats 186-187

Administrative power to compel production of records 243-244

Constitutional amendment in Russia in 1944, changes effected thereby 187-190

Definition of 223-224

Distinction between dual nature of American federal government and three level Russian government compared 184-185

Due process 234-239

Involuntary confession 234-239

Full faith and credit clause 245-249

Legislative power to require licensing of vendors 242-243

Mobility of 10

Privilege against self-incrimination 105, 106, 239-244

Supreme Court review of state criminal convictions 234-239

CORPORATIONS

Corporate entity, disregard of 122-123

N. Y. Gen. Corp. Law Sec. 61-b 229, 233

CRIMINAL LAWSee *Constitutional Law*

Defense of restoration, N. Y. Penal Law Sec. 1307 111-114

First degree murder 234-239

Involuntary confession 234-239

Larceny, intent 234-239

DAMAGES

Allegation of special damage in action for disparagement of property 117

Effect of provocation in assault 96-97

DIVORCE

Consensual personal appearance 248

Extraterritorial effect 245-249

New York law on 247-249

Warren: Schouler Divorce Manual, a book note 272

DOMESTIC RELATIONS

Common-law marriage 98-99

Common-law marriage entered into between citizens of New York in common law jurisdiction, validity thereof 99-101

Divorce, extraterritorial effect 245-249

Support order 248-249

EQUITY

Fraud, exorbitant interest rates 161

Rescission of release for mistake of fact 135-149

EVIDENCE

Admissions 42-43

Best evidence rule 51

Bodily exhibition of an accused 107-109

Burden of proof 41

Character 46

Confessions 43-45

Examination of witnesses 50

Hearsay 48

Immunity in Compulsory Testimony

Act 241

as broad as privilege against self

incrimination 241

Involuntary confessions 234-239

Judicial notice 39-40

McKelvey on Evidence, a review 37-53

Opinion 46-47

Parole evidence rule 52

Pictorial evidence 52

Presumptions 41-42

Privilege against self-incrimination

49, 105-109, 239-244

availability to individual 240-242

availability to corporations 240-242

Prosecutor's summation; less weight

than evidence adduced on trial 239

Questions of law and fact 40-41

Relevancy 39, 45

Witnesses 48-49

Writings 51-52

FAIR LABOR STANDARDS ACT

Releases under 149

FRAUDSee *Usury*

Fraudulent representations 160-161

Mail Fraud Statute, prosecuting loan sharks 150-164, 157

Usury, a fraud 161-163

G.I. BILL OF RIGHTSSee *Selective Training and Service Act***GIFTS**

Definition of 251-252

Prizes, income or gift 249-252

INCOME TAX

Benefits taxable upon distribution 167

Gifts, prizes 249-252

Gross income, prizes 249-252

On beneficiaries of pension and profit-sharing plans 165-179

Payments

periodic taxed as annuities 167

lump sum, taxed as long-term gains 168

Tax on benefits 174-179

benefits, death of employee 177-179

long-term capital gains requirements 176-177

separation from service payments 176-177

Tax on life insurance 168-174

calculation of amount applies for insurance 171-174

excess premium, taxable to employee 174

life insurance costs, when taxable 169-171

INTERNAL REVENUESee *Income Tax, Taxation***INTERNATIONAL LAW**

Hudson: International Tribunals, Past and Future, a book review 258-260

Legal status of Russian republics as compared to other sovereign members of United Nations 181-190

Powers exercisable in International Relations by Russian constituent republics 187

Right to membership in United Nations of Soviet Republics 180-190

United Nations Charter 180, 181, 190, 260
legal aspects of grant of three seats to Russia in 180-190**INTERNATIONAL RELATIONS**

Council chapter 56-59

Court chapter 55-56

The Dumbarton Oaks Proposals 55-59

INTERSTATE COMMERCE

Insurance as 11-12, 18-19

JUDICIAL ADMINISTRATION

Haynes: Selection and Tenure of Judges, a book review 269-271

JURISPRUDENCESee *Legal Philosophy*

The Moral Law 1-7

LABOR LAWSee *Selective Service and Training Act***LAW SCHOOLS**

Influence on courts 26

Modern patriotism in 7

Realism in 23

Storm over 21-23

LEGAL BIBLIOGRAPHY

Bourke: Thomistic Bibliography, a book review 268-269

LEGAL BIOGRAPHY

Pepper: Philadelphia Lawyer, a book review 127-130

LEGAL PHILOSOPHY

A tribute to Mr. Justice Sutherland 123-124

Anticipatory reversals 33-34

Legal liberalism as affected by externals subjective aspects 192-194

objective aspects 194-195

Legal liberalism as evidenced by number of dissents within Supreme Court 194

Legal realism 4-5, 23-27, 31-32, 35-37

Maintenance of legal dignity 196-197

Plea for traditional formalism 195-196

The Moral Law 1-7

Vreeland: Twilight of Individual Liberty, a book review 261-264

MILITARY LAWSee *Selective Training and Service Act***MUNICIPAL LAW**

Rhyne: Municipalities and the Law in Action, a book review 264-267

NATIONAL LABOR RELATIONS**ACT**

Court's power to review decisions of Board concerning employer utterances 80-82

Effect on reemployment rights under Selective Training and Service Act 203

Employer utterances condemned by Labor Board 63-70

advice regarding labor unions 67-68

derogatory utterances against unions and union members 64-65

non-coercive utterances with anti-union background 69-70

threats coercive on face 63-64

National Labor Relations Board's views on employer's utterances 61-63

Prior restraint 82-85

Significance of constitutional privilege of free speech	79-80	SELECTIVE TRAINING AND SERVICE ACT	
Speech which may be prohibited	85-89	See <i>Unions</i>	
The meaning of restraint, coercion and interference by employers under the Act	78-79	Constitutionality	210-211
Virginia Electric & American Tube Bending decisions	70-77	Court procedures under	215-218
NEGLIGENCE		Director of Selective Service	198-200
Negligence statements, necessity of relationship	118	Federal and state employment	212
PATENTS		Persons eligible under	200-201
Right of courts to infringe on patent rights	92-94	Purpose	198
PEACE		Time limit to apply	204-206
The Moral Law	1-7	Unions	213-215
PROCEDURE		SHERMAN ANTI-TRUST ACT	
Distinction between habeas corpus and appellate review	101-102	Application to patent monopolies	92-94
What constitutes sufficiency of an indictment	103-104	SOCIAL SECURITY ACT	
PROPERTY		Employer-employee relationship at common law	252-253
See <i>Taxation</i>		under the act	253-257
REAL PROPERTY		Individuals covered by	252-257
See <i>Adverse Possession</i>		Legal relationship test	254
RELEASES		STATUTES	
Failure to read instrument	137-138	<i>English:</i>	
Federal seamen's case	147-148	Marriage Act of 1753	98
Executed under mistake of fact	135-149	Statute of Monopolies	91
Mistake as to contents of instrument	139-140	<i>Federal:</i>	
Mistake as to nature of instrument	139-140	Clayton Act	91-93
Mistake as to nature of instrument	136-138	Compulsory Testimony Act of 1893	240-242, 244
Mistake of fact leading to signing instrument	140-148	Emergency Price Control Act of 1942	240, 241, 243, 244
as to extent of injuries	140-148	Sec. 205(e)	239
as to present condition	141-142	Fair Labor Standard Act	256
as to prospective condition	141-142	Sec. 203(g)	257
New York test	144-148	Federal Employers' Liability Act	257
Present seriousness of known injury	142-144	Federal Safety Appliance Act	257
unknown potentialities of known injuries	142-144	Internal Revenue Code	
Reformation	136	Sec. 22(a)	119, 250
Statutory control over releases	148-149	Sec. 22(b)(2)	167
Fair Labor Standards Act	149	Sec. 22(b)(2)-2	168
of infants	148	Sec. 22(b)(3)	251
of death claims	148	Sec. 23(a)	168
N. Y. Civ. Prac. Act. Sec. 112f	149	Sec. 23(h)	250
N. Y. Minimum Wage Standards for Women and Minors	149	Sec. 23(p)	165
Workmen's Compensation Acts	149	Sec. 112(b)(6)	126-127
RESCISSION		Sec. 113(a)(15)	127
See <i>Releases</i>		Sec. 117	168, 175
SALES		Sec. 147	168
de Zuleuta: Roman Law of Sales, a book note	271-272	Sec. 162	250
		Sec. 182	120
		Sec. 165(a)	165, 166, 167, 170, 171, 176
		Sec. 165(b)	165, 167, 174
		Sec. 165(c)	165, 167, 171
		Mail Fraud Statute	157-159, 161-164
		Merchant Marine Act (Jones)	232
		National Industrial Recovery Act	78
		National Labor Relations Act	203, 256
		29 U. S. C. Sec. 151-166	60
		29 U. S. C. Sec. 157	61
		29 U. S. C. Sec. 158(i)	60, 77
		29 U. S. C. Sec. 158(3)(4)	62

29 U. S. C. Sec. 158(4)	63	Sec. 349	49
29 U. S. C. Sec. 160(a) (b) (c) (e)	69	Sec. 351	49
29 U. S. C. Sec. 160(e) (f)	80	Sec. 352	49
29 U. S. C. Sec. 160 (a-e)	82	Sec. 372	48
Patent Act of 1790	91-92	Sec. 1116	227
Railway Labor Act	79	Code of Crim. Proc.	
44 Stat. 577 Sec. 2(3)	78	Ch. III-A	103
45 U. S. C. Sec. 152	78	Sec. 295 (g-i)	103
Regulations		Sec. 395	43, 44
Licensing Order No. 1, Title 32	243	Sec. 398a	48
Treasury Regulation 90	254, 255	Sec. 445	102
Treasury Regulation 91	254	Sec. 528	236
Treasury Regulation 111,		Domestic Relations Law Sec. 8	101
Sec. 29.22(a)-3	167	Sec. 11	100
Treasury Regulation 111,		General Corporations Law Sec. 61-b	229-233
Sec. 29.22(b) (1)-1	175, 178	General Municipal Law Sec. 50-b	125
Treasury Regulation 111,		Labor Law	
Sec. 29.22(b) (2)-5	167	Sec. 512	149
Treasury Regulation 111,		Sec. 513	149
Sec. 29.23(p)-1	168	Sec. 550-566	149
Treasury Regulation 111,		Penal Law	
Sec. 29.165-6	167, 168, 172, 174, 175	Sec. 42	55
Treasury Regulation 111,		Sec. 246	55
Sec. 29.165-7	167	Sec. 270-b	138
I. T. 1651	250	Sec. 816	41
I. T. 1667	250	Sec. 1293-A	112
I. T. 3756	252	Sec. 1307	109, 111-113
Revenue Act of 1942	162, 165, 166, 251	Rules Civ. Proc.	
Second War Powers Act	241	Rule 294	148
Selective Training and Service Act of		Statutes	
1940	197-218	Sec. 301	112
Service Extension Act of 1941	200	Surrogates Court Act	
Sherman Anti-Trust Act	91-93	Sec. 122	249
Social Security Act	165, 252-258	Sec. 213	249
The Lever Act	243	Tax Law	
Wagner Act	59-90, 256	Sec. 365(5)	179
States:		Vehicle & Traffic Law Sec. 59	52
California		Workmen's Compensation Law	
Civil Code Sec. 1542	141	Sec. 32	149
Penal Code Sec. 512	111-113	Sec. 33	149
Penal Code Sec. 513	111-113	North Carolina	
Delaware		Code Ann. Sec. 4342	246
Revenue Code, Sec. 1, ch. 77	154	Oklahoma	
Revenue Code, Sec. 152, ch. 100	154	Stat. Ann. Sec. 1461	113
New Jersey S. A.		Texas	
2:97-4, 11	49	Ann. Stat.	
2:98-28	40	Art. 5510	221
14:3-15	233	Penal Code	
New York		Art. 1424	113
City		Constitution:	
Admin. Code Sec. B-15-16.0	45	Russian, 1871	189
State		1923	181-182
Civil Practice Act		1936	181, 183, 184
Art. 2-A	223, 225, 228	Amendment of 1944	
Sec. 61-a	224, 227	181, 183, 186, 187, 188	
Sec. 61-b	224	Art. 13	182
Sec. 61-h	225	Art. 14(a) (g)	187
Sec. 334-a	40	Art. 17	183, 184
Sec. 343-a	50		
Sec. 346	49		

Art. 18	183, 187	Stare Decisis	1, 5, 6, 8-21, 23-36
Art. 19	184	Table of decisions (1938-1942)	9
Art. 20	184	Haines: The Role of the Supreme Court in American Government and Politics 1789-1835, a book review	130-132
Art. 57-63	183	Vreeland: Twilight of Individual Lib- erty, a book review	261-263
Art. 60	187		
Art. 64	185		
Art. 75	185		
Art. 76	186, 188	TAXATION	
Art. 77	185	See <i>Income Tax</i>	
Art. 78	185	Assignment of income or property	119-121
Art. 79	185		
Art. 79-88	183	TORTS	
Art. 83	185	See <i>Assault, Statutory Interpretation</i>	
Art. 87	186, 188	Distinction between	114-116
Art. 126	181	Disparagement of property and unfair competition	114-116
Art. 146	181		
United States		UNIONS	
Art. I, Sec. 8, cl. 16	184	Members seniority affected by veterans	206-210, 213-214
Art. I, Sec. 10, cl. 3	183	Membership not required for veterans	214-215
Art. IV, Sec. 4	183		
Art. VI, Sec. 2	184	USURY	
Art. VIII	91	Hazard agreements	160
Amend. I	59	Insurance charges	152, 158-160
Amend. IV	241	Legal lenders distinguished	151
Amend. V	105, 210, 235, 240, 243	Prosecuting automobile loan sharks	150-164
Amend. VI	210	Type of scheme used	153-155, 157
Amend. X	182	Usury a fraud	161-163
Amend. XIV	234, 235, 237	Usury laws ineffective	151-152, 157-160
New York Art. I, Sec. 2	110	VETERANS	
Art. I, Sec. 3	49	See <i>Selective Training and Service Act</i>	
Art. I, Sec. 6	102, 107		
STATUTORY INTERPRETATION		WAR	
Interpretation of Sec. 50-b of Gen. Mun. Law	124-126	The Moral Law	1-7
SUPREME COURT OF THE UNITED STATES		WAIVER	
See <i>Legal Philosophy</i>		Privilege against self-incrimination	106-109
Anticipatory Reversals	33-34	WITNESSES	
Judicial Legislation	34-35	Self-incrimination	105-109, 239-244
Portrait of New Supreme Court II	8-36		

TABLE OF CASES

Adams v. Tanner	32	Barry v. Lewis	138, 145, 146, 147
Addison v. Holly Hill Farm Prod. Inc.	124	Belotti v. Bickhardt	220
Advance Music Corp. v. American Tobacco Co.	114	Bernadine v. City of New York	126
Aiken v. Roberts	137	Bluefields Steamship Co. v. United Fruit Co.	129
Allen v. State	105	Boyd v. Bell	226
Allen Mfg. Co. v. Smith	116	Bowles v. Amato	240
American Lecithins Co. v. Warfield Co.	93	Brady v. Atlantic Works	92
Anderson v. Abbott	35	Bridges v. California	87, 88
Andie v. Kaplan	224	Edward G. Budd Manufacturing Co. v. National Labor Relations Board	73, 74, 75, 84
Ashcraft v. Tennessee	236, 237, 238	Carson v. Watts	251
B. B. Chemical Co. v. Ellis	93	Carter v. Carter Coal Co.	129
Barker v. Conley	138	Commissioner of Internal Revenue v. Montgomery	119

- Dartmouth College Case 131
 Davis v. Davis 248
 Deputy v. Du Pont 129
 Dominicus v. U. S. Casualty Co. ... 139
 Douglass v. City of New York ..124, 125
 Durland v. United States 161
 Erie R. Co. v. Tompkins229, 230
 Esenwein v. Commonwealth of Pennsylvania 249
 Farrington v. Harlem Savings Bank
 144, 146, 147
 Fasluo v. United States 162
 Federal Club v. National League .. 129
 Feeney v. Young 52
 Finkelstein v. Naihhaus 95
 Fishgold v. Sullivan Dry Dock and
 Repair Corp.209, 210
 Fletcher v. Peck 131
 Ford Motor Cases 77
 Frick v. Pennsylvania 129
 Glanzer v. Shepard 118
 Gibbons v. Ogden 131
 Gompers v. Bucks Stove & Range Co. 84
 Gould v. John Hancock Mutual
 Life Insurance Co. 137
 Grace v. Magruder 252
 Grasso v. Charles M. Crowhurst ... 204
 Guaranty Trust Co. of New York
 v. York229, 230
 Hall v. Union Light, Heat & Power
 Co.210, 216
 Hemmerschmidt v. United States .. 162
 Hartford-Empire Glass Co. v.
 United States91, 93, 94
 Helvering v. American Dental Co. ... 251
 Horman v. United States 162
 In re Walker's Estate 213
 Josephson v. Dry Dock Savings In-
 stitution223, 224
 Kay v. General Cable Corp...207, 211, 217
 Kelly v. City of New York 137
 Kiff v. Youmans 97
 Kirksey v. Kirksey 251
 Landau v. Hertz Drivurself Station
 Inc.138, 145, 146, 147
 Long v. Hicks 125
 Lucas v. Earl 119
 Lynch v. Figgs 137
 Lyons v. Oklahoma237, 238
 MacKnight v. Fed. Life Ins. Co. ... 125
 McDermott v. Commissioner of In-
 ternal Revenue 249
 McIsaac v. McMurray 143
 Mack v. Albee Press, Inc. ... 145, 146, 147
 Malinski v. People of the State of
 New York 234
 Marbury v. Madison 131
 Marlin Fire Arms Co. v. Shields ... 115
 Matter of Lindgren 248
 Martin v. Hunter's Lessee 131
 McCulloch v. Maryland 132
 Meyers v. United States 129
 Moline Properties Inc. v. Commis-
 sioner 122
 Morris v. Baird 223
 Morton Salt Co. v. Suppiger Co. ... 93
 Moses v. Carver 137
 Murray v. La Guardia 265
 Nann v. Raimist 116
 National Labor Relations Board v.
 American Tube Bending Co.
 72, 73, 75, 79
 National Labor Relations Board v.
 Hearst Publications, Inc. 256
 National Labor Relations Board v.
 M. E. Blatt Co.74, 75
 National Labor Relations Board v.
 Brown-Brockmeyer Co. 77
 National Labor Relations Board v.
 Jones & Loughlin Steel Corp. 81
 National Labor Relations Board v.
 Luxuray, Inc. 70
 National Labor Relations Board v.
 Trojan Powder Co. 80
 National Labor Relations Board v.
 Virginia Electric & Power Co.
 70, 71, 72, 73-74, 75, 76, 77, 79, 83, 88
 Near v. Minnesota83, 84
 Newman v. Southern Kraft Corpo-
 ration 96
 New York & R. Cement Co. v.
 Coplay Cement Co. 117
 New York Life Insurance Company
 v. Deer Lodge County 18
 Norton v. United States 162
 Oakes v. H. Weil Baking Co. 96
 Paul v. Virginia 18
 People v. Bogdanoff 103
 People ex rel. Prince v. Brophy ... 104
 People v. Kaye 109
 People v. Lamphere 126
 People ex rel. Wachowicz v. Martin 101
 People v. McDonald 125
 People v. Miles102, 103
 People v. Shears 112
 Perkins v. Endicott Johnson Corp... 33
 Peters v. Gillund 219
 Pierce v. Commissioner177, 178, 179
 Pimpinello v. Swift 137
 Ponthieu v. Coco 95

Poti v. New England Road Machinery Co.	144	The I'm Alone Case	129
Radio City Music Hall v. United States	257	Thomas v. Collins ...	59, 60, 81, 85, 87, 88
Randall v. Ridgley	96	Thornhill v. Alabama	86
Rector, etc. St. James Church v. City of New York	145, 146, 147	Tipper v. Northern Pacific Ry. .	199, 205
Regina v. Trebilcock	109, 110	Tri-Lakes Steamship Company v. Commissioner of Internal Revenue	126
Reliance Manufacturing Co. v. National Labor Relations Board ...	75, 76	Trojan Powder Company v. National Labor Relations Board	73
Robinson v. Rupert	97	Ulrich v. Schwarz	97
Rodgers v. United States	242	United States v. Buckner	158, 162
Russell v. Todd	229, 230	United States v. Butler	129, 130
Salzman v. London Coat of Boston, Inc.	202, 218	United States v. George Otis Smith	129
Sant v. Continental Life Ins. Co. of St. Louis	125	United States v. Groves	158, 162
Schenck v. United States	84, 85	United States v. L. Cohen Grocery Co.	210
Schenfeld v. Hochman	138	United States v. Merriam	252
Schneiderman v. United States	17, 18	United States v. Motion Picture Patents Co.	93
Peter J. Schweitzer, Inc. v. National Labor Relations Board	75, 80	United States v. South-Eastern Underwriters Assoc.	11, 18, 30, 124
Shea v. Shea	98	United States v. Univas Lens Co. ...	93
Shielcrawt v. Moffett	232, 233	United States v. Vogue ..	255, 256, 257
Snyder v. Snyder	226	Weiss v. United States	158
Spears Dairy v. Bohrer	125	Whipple v. Brown Bros.	138
Standard Oil Co. of New Jersey v. United States	92	Williams v. North Carolina ..	245, 272
Stimson Mill Co. v. Commissioner .	126	Williams v. United States	257, 258
Sulkowski v. Szweczyk	226	Wilson v. United States	242, 244
		Witherstine v. Employers' Liability Assurance Corp.	125
		Yehle v. New York Central R.R. Co.	146, 147

FORDHAM LAW REVIEW

VOLUME XIV

MARCH, 1945

NUMBER 1

THE MORAL LAW

BY REV. ROBERT I. GANNON, S.J.†

IF I followed the counsel of one of my legal advisers who wanted me to talk on *stare decisis* tonight, I should feel like one who would rise to give a travelogue on Tibet or Afghanistan and should suddenly see Marco Polo in the audience.

If, however, I pick the subject of the Vanishing Absolute, everybody will say "Why, that is just exactly what a college president would think of. He can wander all over the lot and never get away from his subject."

The extraordinary thing is that in some mysterious way the Vanishing Absolute may get around in time to the *stare decisis*.

Only a few days ago I was taking dinner at the University Club. Several who are here tonight I daresay were there at the time because I was completely surrounded, Sir Gerald, by potential K. C.'s; silk was all over the room. At this dinner we had a distinguished historian who gave an interesting talk on the approaching peace. He made a comparison between Vienna and Versailles, between 1815 and 1919, and the comparison ran something like this:

Vienna was a peace made by hard-headed statesmen in which they erected a very delicate balance of power. Versailles was a peace that could be called an ideological peace because in spite of the fact that here in America we felt that the French Tiger and the little Father of the Black and Tans had been the authors of the Versailles peace, he contended nevertheless that it was a Wilsonian peace; that it was shot through with Wilsonian ideology, self-determination of nations and all that sort of thing. He went on to point out that Vienna, with its very delicate balance of power, which everyone thought a breath could shatter, lasted for 100 years, and this ideological peace that was founded on such eternal things as self-determination, began to crack in two years and in twenty years lay in fragments.

He drew the conclusion that if we are to have a peace after this war it has to be a peace of very hard-headed common sense, in which all the participants at the peace treaty will check their ideologies in the coat-

†President, Fordham University.

Address delivered at the Annual Dinner of the New York State Bar Association, Waldorf-Astoria Hotel, New York City, January 20, 1945.

somebody is going to hit upon a plan for connecting digestion with cerebration. If they do, we shall then award our degrees not on the basis of credit points but on the number of vitamins consumed. So that, for instance, a million vitamin A and a million vitamin B, Bachelor of Arts! An indefinite number of each, together with an original cartoon, Doctor of Philosophy! But if that is proposed, I assure you it will be taken up with the greatest gravity—especially in our Halls of Confusion. I refer, of course, to our normal schools.

Some believe that the latest is the best because it is the latest. They tell us times are changing; off with the old and on with the new! Instead of saying to themselves that this is a time when everything is smashing all around us, to sit tight and hold onto our hats until we see how the wind is blowing; this is a time, above all, when we should be conservatives in the best sense, in the etymological sense of the word "conservare"; that we should, in other words, draw together all the precious golden fragments that our ancestors have left us. Instead of that, they want to slough off everything as fast as it becomes outmoded in the popular taste. They want our education to keep pace with our civilization and to decline as rapidly.

If they see, for instance, that people tend to be less logical than they used to be, the obvious thing to do, of course, is to drop logic from the college curriculum. In other words, they tend to regard education like the stage, as a mirror of civilization. Now we know—and it is an old story with all of us—that education is like religion. It is supposed to form society, not to reflect it.

To you gentlemen, scribes and doctors of the Law of Israel I would say "*Qui potest capere, Capiat.*" The same lack of absolutes that is making a universal, a lasting peace difficult if not impossible, the same lack of absolutes that is undermining American education is also undermining the American courts.

Some day I hope a very clever person will write a book comparing our two master underminers. They are two of the most charming, intelligent and thoroughly virtuous characters that we have had in America in the last two generations. They are two illustrious men for whom their disciples would willingly die: Professor John Dewey and Justice Oliver Wendell Holmes.

We began our legal life as a nation with the conviction that there were inalienable rights that came not from the state but from a moral power, an absolute, that was superior to us and superior to our state, that could regulate the sovereignty of the state and regulate our liberty; that that moral power had promulgated a law, another absolute, a norm that could test the validity as well as the expediency of state legislation.

optimist as one who believes that the fate of the Atlantic Charter is uncertain.

Now this tendency away from the absolute is found not only in international affairs. It is a familiar phenomenon to us in education and to you in the law. There is that same inclination to desert the absolute in what we sometimes refer to as *The American Philosophy of Education*, an extraordinary product that is manufactured here in New York but distributed nationally. It has had phenomenal success. Three-quarters of our superintendents of education, and at least half of our educators have been exposed to it if not steeped in it. When analyzed, it proves to be a curious mixture of exaggerated experimentalism, pragmatism and socialism. Strange as it may seem, the first is the most dangerous of the three, because in education, when we cut off the past, we become the playthings of intellectual violence. Of course, a certain amount of prudent experimentation is essential for scholarship, essential for progress. But to scrap the past, to show the contempt that we do for 25,000 years of human experience, that, gentlemen, is fatal. The damage has already been perfectly appalling. We need the past. We need it dreadfully and never more than at a time when the present itself is being blown to shreds. For every civilization is 90 per cent heirlooms and lessons and memories.

Isn't it amazing that such an obvious thing should be anathema to so many of our contemporaries? As Jacques Maritain has put it, "We have killed our past and lost its sense of values. We have lost all confidence in ourselves and have gained no confidence in authority." Hilaire Belloc, of course, was saying the same thing for years about the breaking of our religious continuity in the sixteenth and seventeenth centuries. And now Abraham Flexner, the grand old man of education, has called our attention to the fact that our education has been reduced to a meaningless flux because we have broken with the past. So that from kindergarten to graduate school we are trying something new every day—and this motion without direction is what we call in the United States progress, and what they call in Great Britain progress. Yesterday's theory has to be discarded today because the only reason it was adopted yesterday was because it was yesterday's.

Just before the war broke out, that bad boy of English letters, who must be very much amused at times to find himself taken so seriously, H. G. Wells, was addressing the British Association for the Advancement of Science, and gave his own theory of education. It seemed that the ideal way to educate children and adolescents was to feed them on carefully graded lumps—taken from his own "Outline of History" at eight shillings the volume—and after the war I feel perfectly sure that

somebody is going to hit upon a plan for connecting digestion with cerebration. If they do, we shall then award our degrees not on the basis of credit points but on the number of vitamins consumed. So that, for instance, a million vitamin A and a million vitamin B, Bachelor of Arts! An indefinite number of each, together with an original cartoon, Doctor of Philosophy! But if that is proposed, I assure you it will be taken up with the greatest gravity—especially in our Halls of Confusion. I refer, of course, to our normal schools.

Some believe that the latest is the best because it is the latest. They tell us times are changing; off with the old and on with the new! Instead of saying to themselves that this is a time when everything is smashing all around us, to sit tight and hold onto our hats until we see how the wind is blowing; this is a time, above all, when we should be conservatives in the best sense, in the etymological sense of the word "conservare"; that we should, in other words, draw together all the precious golden fragments that our ancestors have left us. Instead of that, they want to slough off everything as fast as it becomes outmoded in the popular taste. They want our education to keep pace with our civilization and to decline as rapidly.

If they see, for instance, that people tend to be less logical than they used to be, the obvious thing to do, of course, is to drop logic from the college curriculum. In other words, they tend to regard education like the stage, as a mirror of civilization. Now we know—and it is an old story with all of us—that education is like religion. It is supposed to form society, not to reflect it.

To you gentlemen, scribes and doctors of the Law of Israel I would say "*Qui potest capere, Capiat.*" The same lack of absolutes that is making a universal, a lasting peace difficult if not impossible, the same lack of absolutes that is undermining American education is also undermining the American courts.

Some day I hope a very clever person will write a book comparing our two master underminers. They are two of the most charming, intelligent and thoroughly virtuous characters that we have had in America in the last two generations. They are two illustrious men for whom their disciples would willingly die: Professor John Dewey and Justice Oliver Wendell Holmes.

We began our legal life as a nation with the conviction that there were inalienable rights that came not from the state but from a moral power, an absolute, that was superior to us and superior to our state, that could regulate the sovereignty of the state and regulate our liberty; that that moral power had promulgated a law, another absolute, a norm that could test the validity as well as the expediency of state legislation.

It is interesting to note two very definite tides that are in motion today in opposite directions. One tide is made up of the peoples and the leaders of the United States of America and the British Commonwealth of Nations. That tide is steadily tending towards the moral law, towards the natural law.

Running counter to it we find a number of our universities, especially those with normal schools and law schools; we find many of our courts and all of the totalitarian powers verging away from the moral law, away from the natural law. In all of this latter group we find a common contempt for absolutes and a common enthusiasm for exaggerated experimentalism and pragmatism. Of course, it would be bad enough if our schools of jurisprudence were merely irrational. It would be bad enough if we merely had to deal with behaviorists and experimentalists who make laws the individual output of the courts, divorced from principles and precedents, and based on a formula which denies the natural law, ignores the common law and the fundamental doctrine of *stare decisis*, and makes the judicial process a combination of brainstorm, impact of behavior, environmental urge and gastronomical impulses wherein the judicial decision is arrived at not by using the cerebellum as much as the duodenum.

It would be bad enough if law were merely a glorified merger of emotion, whim and hunch, announced today and changed tomorrow. But we could still take comfort in the fact that such a philosophy of law would not attract a superior type of men. Superior men, however, are very much attracted by pragmatism. That is why pragmatic schools are more dangerous than the others. They produce the same fluctuation, the same uncertainty but they flatter the ablest men who like to think themselves realistic and self-sufficient. That is why so many of our leading jurists today are legal pragmatists.

Does that mean that they are unprincipled men? Well, certainly one who knows as little about the laws of libel as I do would never state as much in public. But I think we can say in all safety that between pragmatism and expediency the difference is a hairline. And expediency is recognized everywhere as the death of principle. Moreover, the whole tendency of pragmatism is towards social chaos. It is alarming enough to see the *stare decisis* and the common law on their way out in the United States, and to realize they are not as secure in England as they used to be, even though a recent writer in the *Modern Law Review*, an English journal somewhat left of President Roosevelt's fourth administration describes common law as "An immortal old lady, always half asleep, but not quite oblivious, never too torpid to lift an antique eyelid at the slightest symptom of disorder." It is alarming because attacks

on the *stare decisis* and the common law give an ignorant man in the street, like myself, the feeling that there is no certainty in the law and hence no obligation on my part. "*Lex dubia non obligat*," as we poor defendants always say.

Moreover, what is to become of that sterner maxim so universally applied by your honors when we poor defendants are dragged before you "*ignorantia juris non excusat*." But certainly if ignorance of the law is no excuse, how can that be charged against us if the law is changing so fast that the court stenographer cannot keep up with it. More disturbing still is the feeling I get that my rights are not permanent any more; they are not inalienable.

Chief Justice Cardozo in his book on legal essays, "The Growth of the Law," gave this as a basic aphorism: "Law must be stable and yet it cannot stand still." The United States Supreme Court has been functioning of late under a new formula, "Law must not stand still long enough to become stable." We cannot forget the stinging accusation of Justice Roberts who said a few months ago that the course of judicial decisions in the Supreme Court in recent years was reminiscent of a railroad excursion ticket: "Good for the day only."

But if the modernist attack on the *stare decisis* and precedents of the Common Law makes me feel that my rights are not permanent any more, their attack on the natural law makes me feel that I have no rights at all, that there is no God; no absolute, there is no moral law. All law and all morality are merely man-made, and that is good totalitarian doctrine. It means that, as in Germany and in Soviet Russia today, law and equity are the same thing. Legality is morality, and in consequence we have the distressing conflict of law with laws, and the dreadful spectacle of petty politicians legislating against human nature. The situation, of course, is critical but not absolutely hopeless. As we read our history we know that in the past disintegration of various kinds has always begun in the minds of an influential group—sometimes a very small influential group. Well, integration can then begin the same way. This tendency can be checked if enough influential people want it badly enough to do something about it.

Our international problem may still possibly be solved if the English-speaking world, acting as a unit—and may God grant that we have common sense enough to act as a unit—denying ourselves the luxury of a family quarrel, will go to the peace table with a clear idea of what can and cannot be checked in the coatroom. Clearly some of our democratic ideology can be checked, can be postponed until another day. It isn't absolutely essential that all the Vassar graduates in Indo-China receive the secret ballot at once. Neither is it necessary that Philip

Murray establish at once the closed shop in Somaliland or in the Belgian Congo.

If only we can go into the peace conference with one thing clear in our minds, though we may be the only ones at the table who understand what it means, namely, that the United States of America and the British Commonwealth of Nations must defend to the end something far more important than the Common Law, which has been such a link between us all these years; that we must defend to the end the moral law as it has been understood by our common ancestors for 2000 years.

Our educational problem is not being neglected meanwhile. There are several groups that are working against the tide, notably the Association of Church Related Colleges, Catholic, Protestant and Jew. As for our legal problem, at least as far as New York is concerned, some progress could be made if just the men in this room were sincerely convinced that to defend the Absolute in our law schools and courtrooms is the highest form of modern patriotism.