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HUMAN RIGHTS AND THE LAW*

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IN Sophocles' great drama, *Antigone*, we see a young girl standing alone before Creon, tyrant of Thebes. He asks if she dared transgress his decree. Antigone answers:

"Yea!—for not Zeus, I ween, proclaimed this thing;
Nor Justice, co-mate with the Nether Gods,
Not she ordained men such unnatural laws!
Nor deemed I that thine edict had such force,
That thou, who are but mortal, couldst o'erride
The unwritten and unswerving laws of Heaven,
Not of today and yesterday are they,
But from everlasting . . ."¹

In his opening address before the International Tribunal at Nuremberg, Justice Robert H. Jackson, after outlining the defendants' organized crimes against humanity, asked:

"Must such wrongs either be ignored or redressed in hot blood? Is there no standard in the law for a deliberate and reasoned judgment on such conduct?"

"The charter of this tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James 'under God and the law'."

* * *

Nearly twenty-five centuries separate these two pronouncements in time. They both rest on the same ultimate basis in thought. Both affirm natural law, the objective order of right and wrong binding alike on ruler and ruled. Both affirm that law ultimately rests on morals and morals on God. Ideas behind that basis of law I will endeavor to discuss.

That we deal with ideas does not make our discussion impractical. For man is above all mind. In human affairs it is mind that matters.

*Address delivered on March 19, 1946 to the Association of the Bar of the City of New York, Committee on Post Admission Legal Education, revised by the author for publication in the *FORDHAM LAW REVIEW*.

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1. SOPHOCLES, *ANTIGONE*, Scene 4, ll. 449-451.

Ideas do direct human life. All inventions are in their origin mere ideas,—ideas about reality. So are governments. It was an idea in the mind of a French corporal that produced Napoleon's empire. It was an idea burning almost alone in the mind of a German corporal that helped catapult a modern nation into Nazism. It was an idea in the mind of a few great men in the Colonies that made the precious thing we call America. For the protection of our lives, our liberties and our persons, America is primarily an idea and secondarily a sector of geography. If the same sector of geography were informed with the ideas of an oriental despotism, it would be just that and cease to be America.

Take for example the question of the right of the State to absolute control over the lives and education of its youth. We would have little difficulty in recognizing the following as an accurate statement of the Nazi idea coming from Baldur von Schirach, late head of the Nazi Youth Movement:

"As to minors, the State . . . may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them."²

The only trouble is that it was not Baldur von Schirach who said this, but the Attorney General of Oregon in the Oregon School Law case in which the question was whether a state had the right to insist that all children within its borders should attend only public schools. The same Attorney General told the Supreme Court of the United States that there was nothing for the Court to decide as the majority of the people of Oregon had already decided the issue when it voted for the law. That was his idea of law. The answer was given by the Supreme Court when it unanimously held in 1925:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."³

The parent's right to nurture and educate his own child (a natural right) thus ultimately depended on the basic concept of natural law that found lodgment in the Constitution of the United States and the informed intelligence of its judges and people. But the illustration shows the problem is not by any means a theoretical one.

2. *Pierce v. Society of Sisters*, 268 U. S. 510, 512 (1925).

3. *Id.* at 535.

If there are any who think the idea of natural law has no bearing on every-day life, I should like them to ask themselves a few questions; such as:

“What *right* do I have to life?”

or

“What *right* do I have to liberty?”

I doubt if anyone here would answer by saying:

“I have a *right* to live because the state has not as yet found it expedient to ‘liquidate’ me”,

or even

“My *right* to stay out of jail is because my lawyer could get me a writ of habeas corpus.”

If you accept natural law you have better answers. Your right to liberty is secured by the writ of habeas corpus, but was not given you by the Habeas Corpus Act. Both rights are given you by a source of law more fundamental than any party or majority, as the Declaration, made when the nation was founded, proclaimed. And government itself is created primarily to *secure*—not to *give*—such rights. But if a sufficiently influential number of your fellow-citizens can be brought to a frame of mind that denies natural right, the whole fabric of basic rights is in danger.

Ideas do matter. Especially in law, ideas are of dominant import. As Johnson told Boswell, law is a cultural study. It is as wide as human life and always rests on a philosophy of life. Therefore I think it useful, especially at this time, to recall an enduring idea of the basis of law and the intellectual defense of human rights,—an idea that has come to us from our immemorial past, but in our day has been questioned and denied to the peril of what we are and of all we possess.

What Sophocles, writing about 450 B.C., had Antigone say to Creon did not die on Antigone’s lips and only reappear on the lips of a modern jurist near the middle of the 20th Century A.D. Before Sophocles gave the idea the imperishable beauty of his own poetic form, it had been found and re-found by man; and in every intervening generation, it has persistently endured as a constant in man’s legal and moral life. Such a constant, resting on the experience of over twenty-five centuries of recorded human history, is worthy of examination by men interested in law and human rights.

“Natural Law,” says Dean Pound, “is a presupposition of one type of philoso-

phy of law—the oldest, longest continued, and most persistently enduring type, and the one with the most notable achievements to its credit in legal history.”⁴

Plato expressed the idea when he said that law was an expression not of God’s will but of God’s intellect and since our intellect is a spark of Sovereign mind, intellect should have the sole share in the making of law. In his *Republic* he confided to philosophers the highest function so they may govern according to the eternal principles of justice.

Aristotle taught that it is of man’s essence to be a free, rational, social being; that acts corresponding to man’s essential nature are good, the opposite bad, not because law makes them so but because nature does; and that law is therefore essentially reason, a rule of reason for rational beings.

Cicero, in his *De Legibus*, eloquently describes natural law as right reason:

“Of all these things respecting which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding. . . .”⁵

Cicero’s expression of this concept profoundly influenced law. To Justinian and thinkers throughout the Middle Ages *jus naturale* was a group of principles of reason and justice that men could rationally comprehend.

To Augustine eternal law was Divine Reason governing the universe and natural law a participation therein, cognizable however by human reason as the order of creation for rational creatures.

St. Thomas Aquinas, following Aristotle and all the major minds of the West, taught that law is “an ordinance of reason made for the common good”;⁶ that natural law is “divine law revealed through natural reason”:—*participatio legis aeternae in rationali creatura*; and that the need of man to conform to natural law is merely that he conform to his own nature as a rational being. The essence of his definition of law is reason.

The Mediaeval jurists and theologians, three centuries before Coke, taught that all government was subject to the principles of natural law. Gierke, in his *Political Theories of the Middle Ages*, says:

4. Pound, *The Revival of the Natural Law* (1942) 17 NOTRE DAME LAWYER 287, 289.

5. CICERO, *DE LEGIBUS*, II, IV, 10

6. 2 PEGIS, *BASIC WRITINGS OF ST. THOMAS AQUINAS* (1945) 748 *et seq.*

"Men supposed that before the State existed the *Lex Naturalis* already prevailed as an obligatory statute and that immediately or mediately from this flowed the rules of right to which the State owed even the possibility of its own rightful origin. And men also taught that the highest power on earth was subject to the rules of Natural Law. They stood above the Pope and above the Emperor, above the Ruler and above the Sovereign People, nay, above the whole Community of Mortals."⁷

Blackstone in his Commentaries, thus speaks of this same natural law:

"Man, considered as a creature, must necessarily be subject to the laws of his Creator. . . . This law of nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."⁸

Edmund Burke, rejected the artificial theories of the 18th Century and the French enlightenment as deforming rather than illustrating natural law. He accepted, however, the ethical tradition that man is determined to social and political life by his intellectual and moral nature; that government is therefore founded on the necessities of our human nature and as such expresses the mind of the authors of nature. In discussing Fox's East India Bill, Burke said:

"The rights of man—that is to say, the natural rights of mankind—are indeed sacred things; and if any public measure is proved mischievously to affect them, the objection ought to be fatal to that measure, even if no charter at all could be set up against it. If these natural rights are further affirmed and declared by express covenants, . . . they partake not only of the sanctity of the object, so secured, but of that solemn public faith itself, which secures an object of such importance. . . . The things secured by these instruments may, . . . be very fitly called the chartered rights of man."⁹

As old as man this concept of law became the formal and factual foundation of our own American system in both its origins and in its development.

In our origins the founding fathers proclaimed the source of our human rights and the basis of our law in a solemn Declaration of principles and in an organic law giving effect to those principles. This is what they said in the Declaration:

"We hold these truths to be self-evident that all men . . . are endowed by

7. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (Maitland's ed. 1922) 74 *et seq.*

8. 1 *BL. COMM.* (Chitty's ed. 1851) 40, 41.

9. III *BURKE, WORKS* 56.

their Creator with certain unalienable Rights. . . . That to secure these Rights Governments are instituted among Men deriving their just powers from the consent of the governed."

By that solemn Declaration the men who made America rooted the ultimate defense of our human rights in a divine endowment. To them that truth was "self-evident." The reference to "just" powers of government shows acceptance of natural law limitations proscribing arbitrary power in any form. They thus accepted the thought I have outlined that law is ultimately founded not in man's mere subjective ideas but in nature, that the law of human nature is from its Author, and that, therefore, man has natural rights which he does not get from the State.¹⁰

Speaking of these rights, the late Chief Judge Lehman said:

"The Constitution is misread by those who say that these rights are created by the Constitution. The men who wrote the Constitution did not doubt that these rights existed before the nation was created and are dedicated by God's word. By the Constitution these rights were placed beyond the power of government to destroy."

Discussing the Declaration and the Constitution, Thomas F. Woodlock, former Interstate Commerce Commissioner, said:

"If there is no such thing as the moral law and the only law that there is, is the law that the majority chooses to make—i.e., positive law—the word 'rights' has no meaning. A 'grant' from the government is not a right; the rights that our founders asserted in the Declaration were rights against the government, as indeed, the Bill of Rights in the Constitution specifically avers in its repetition of the words: 'Congress shall make no law—' 'Minority rights under majority rule' correctly describes the Democracy that our founders envisaged."

The Supreme Court of the United States referring to the words quoted from the Declaration has expressly held that the organic law of the land is "the body and letter," the Declaration "is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."¹¹

But it is not merely in our legal origins that natural law ideas found lodgment, but in all our essential legal development as well. American law, and especially American constitutional law, is filled with natural law ideas. The greatest American jurists followed the founders in accepting natural law as the basis of positive law.¹² Marshall, Chase,

10. WALSH, *THE EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC* (1935) *passim*.

11. *Gulf, Colorado & Santa Fe R.R. v. Ellis*, 165 U. S. 150, 160 (1897).

12. HAINES, *THE REVIVAL OF THE NATURAL LAW CONCEPTS* (1930); *cf.*, *id.* at 52, 79, *et seq.*, 166 *et seq.*

Story, Cooley, Kent, all relied on reason, natural law, and inalienable right to limit legislative power and thus protect minorities and human and property rights. The rule of reason and the idea that the makers of the Constitution never intended arbitrary power to exist in any department of government are natural law concepts. The rules of due care in negligence actions, fair competition in business relations, good faith and fiduciary relations, fair returns for public utilities, due process of law itself,—all these are applications in our positive law of natural law, the rule of reason and moral principle, of justice as the aim and end of all law.

This outline of the most enduring type of law idea indicates its unvarying characteristic: law is reason and that which is not reason should never be law. Thus natural law may be defined as the order discernible by reason according to which man should seek to fulfill his nature as man. As Jacques Maritain says, it is not "a ready-made code rolled up within the conscience of each one of us which each one of us has only to unroll and of which all men should naturally have an equal knowledge". On the contrary, he continues:

"Natural law is not a written law. Men know it with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere. The only practical knowledge all men have naturally and infallibly in common is that we must do good and avoid evil. This is the preamble and the principle of natural law; it is not the law itself. Natural law is the ensemble of things to do and not to do which follow therefrom in necessary fashion, and from the simple fact that man is man, nothing else being taken into account."¹³

But that takes into account man's essence as a free, rational and social being.

That errors are made with regard to natural law is no more an argument against its existence and validity than errors as to statutory or case law are arguments against the existence of the statute or the case or that errors in addition are arguments against arithmetic.

Herbert Spencer said that every slightest flash of light on the waves of the sunlit sea is controlled by law. Just as there is in the universe a physical order governed by physical law so there is a moral order discernible by human reason and governed by moral law. Both derive from the same source, the Author of all natural constants.

This natural law necessarily recognizes inherent rights in man, that is, things that are owed to man by the very fact that he is man, a person, that is a being possessing free will and intellect,—personality, which Aquinas says "is that which is noblest in all of nature". As man

13. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (1943) 52 *et seq.*

is bound to do what is necessary to fulfill his nature, he has by that very nature itself the right to the things essential for his end. These are the inviolable rights the Declaration refers to as "unalienable".

This concept of law teaches that political society or government is a necessity of man's nature. But it insists, as Aquinas did, that man is not ordered to political society "by reason of himself as a whole or by reason of all that is in him,"—a profound truth. It therefore denies to government the right to possess man totally.

Government is but a part of man's rich life, not its sum total. By his own nature as a free, rational and social being man has a wealth of human, cultural and spiritual values and truths that do not derive from the State nor exist merely for the State.

This natural law properly interpreted does not exclusively consist in universally inflexible rules. The 18th Century attempt to make natural law a body of detailed rules and specific precepts was in that respect as in others a caricature of the perennial concept of natural law which we are discussing. That deals with basic principles or starting points for legal reasoning. Such principles do not change but positive law applies them in statutes and variable rules safe-guarding the principles and ever seeking to conform to man's rational nature and the common good.

Nor is natural law developed apart from experience. Ethics is a practical not a speculative science. "Consonance with reason," says Aquinas, "is the formal constituent of moral action." Experience is a means of developing such consonance but that does not mean that experience is master. Reason and not history in final analysis should be the instrument of interpretation, otherwise the accomplished fact, however unjust, has the legitimacy and right of law. Experience, history, psychology, sociology, all can contribute their light; but their contributions must be finally scrutinized before the bar of reason and justice.

The objection that this idea leaves too much discretion to the judge is based on a misconception of its application. In organized states natural law is largely outside the function of the judges. It is too important to be left merely to individual judicial application. It should be incorporated, as it happily is in our own system, into the organic law and the statutes. Thus the Bill of Rights in our Constitution is substantially an example of the practical application of natural law into the law of the land. The ordinary remedy for bad law is to repeal it. But when the case is not covered by rule or precedent, the court must apply the rule of reason or natural law and our American courts have never hesitated to do so. "What really matters," says Cardozo, "is that

the judge is under a duty, within the limitations of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.”

This is the idea of law that Dean Pound calls “the oldest, longest continued and most persistently enduring.” But to realize its vital significance for our time we must contrast it with modern ideas of law that hitherto have had wide acceptance.

In one of Juvenal’s satires we see a wilful wife commanding her Roman husband to crucify a slave for no reason. When he asks why he should do so, she answers in a sentence that has become the classical expression of law as will: “*Hoc volo; sic jubeo; sit pro ratione voluntas*” (“This I will; thus I order; let my *will be* in place of reason”). What a depth of revealing meaning is packed into that little clause *sit pro ratione voluntas!* Those four words perfectly express any idea of law not based on reason but on will or force. And that, it must be admitted, is the dominant characteristic of modern ideas of law. Analytical jurisprudence, historical, sociological and pragmatic jurisprudence all repudiate natural law and inalienable right. All essentially deny objective norms of right and wrong and substitute norms determined by the dominant group, those who have the power to act. All essentially deny reason as ultimate and substitute experience, or history, the pragmatic test, what works, the functional approach, the “is” philosophy of law.

Dean Pound says of this modern legal “realism”:

“In contrast today, however, and with a mouth speaking great things, there is realism, as it boastfully calls itself, not the philosophical realism with which the mediaeval philosopher made us familiar, but a neo-realism, as Mr. Justice Cardozo called it, developed in the line and keeping up the tradition of the Sophists. It denies that there is law in the sense in which jurists had used and understood that term from the days of the classical Roman jurists. It seeks to appropriate the good will of that name to a theory which puts the emphasis upon force, that rejects reason, and regards whatever is done by officials as law because it is done officially.”¹⁴

This modern doctrine has accepted Hobbes’ concept of the State as Leviathan, the doctrine of Hegel and Nietzsche, the dogma of State omnipotence which has become the dominant and most dangerous dogma of modern legal thought.

In essence all such dogma denies law as reason and extols it as will. Now if law is based ultimately on general will instead of reason, there never can be an unjust law if the lawgiver has the power, i.e., the physical force to carry out his will. This is equally true whether the

14. Pound, *op. cit. supra*, note 4 at p. 315.

lawgiver is an individual tyrant, a group or a majority. If there be no standard of right and wrong binding alike on ruler and ruled, and no limitation on the power of the State itself over the community, law ultimately becomes mere number or physical force. The end desired by the ruler then has value if he has the means; i.e., the force, to put it into effect. That is the teaching of modern pragmatism. That is the practice of modern tyranny.

Addressing the members of the American Society of International Law in Washington, D. C. on today's need of international law, Supreme Court Justice Jackson in April, 1945 said:

"Of course there is a school of cynics in the law schools, at the bar, and on the bench who will disagree, and many thoughtless people will see no reason why courts, just like other agencies, should not be weapons of policy. It is a current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to put in legislation, or directive, or decision and backed up with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with the higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe. . . ."¹⁵

To take one example out of many, we are all aware of the inhuman decrees based not on reason but, (of all things!) on blood, race and soil enacted and enforced by the group dominant for a time not only in Germany but in almost all Continental Europe. Himmler and Hitler then had the physical force to put their desired ends into effect. They did so as other modern tyrants have done by purges, mass murders, concentration camps, deportation of millions and diabolical cruelty almost unparalleled in human history. On the basis of law as will or force such decrees were legitimate as their makers then had the power to enforce them. Assume that the physical force to carry out the desired ends continued not merely for a few terrible years but for a decade or a generation or more. Such decrees and others equally bad would be "legal" within the four walls of the tyranny then erected in Europe. On the pragmatic philosophy of law, the "is" philosophy, they would be also legitimate, however unjust in reason and inhuman in nature, since they would be done officially by officials with sufficient force to back their decrees.

If you revolt, as you do, from acceptance of that or of other legal violence of our time, it is only because, in spite of all that legal "realism"

15. Brown, *The Vitality of International Law* (1945) 39 AM. J. INT. L. 533.

has said to the contrary, you still accept in the inner recesses of your own mind the concept of natural law as the basis of human rights and of positive law. On that, man has a rational basis for the necessary distinction between lawful political authority and mere tyranny. On the basis of juridical instrumentalism there exists no such distinction.

Every philosophy of law faces the inexorable alternative:—either law is reason based on natural right or law is will based on mere force. If you rest law ultimately on will, you abandon at the outset any rational philosophy of law. Law and the courts then become mere instruments of policy to carry out the ends, whatever they may be, conceived by the lawgiver, the person or the group in power. Here we place our finger on the ultimate weakness of any philosophy of law that denies natural law and inalienable right. Cut the connection between the human intellect and objective reality and any idea of order, morally objective, disappears. In its place you have perpetually changing subjective ideas or ends with no necessary relation to any controlling reality. There is then in principle no limit to what the human mind can do in creating for itself an order of ends to be accomplished. There is then in the very concept of law no limit to what the lawgiver, the Duce, the Fuehrer, the elite, the dominant group, the majority may do if only they have the power and force to do it. "By their fruits you shall know them." Do not all the modern dictators accept the pragmatic test, what works, the "is" philosophy, the rule of the dominant group issuing imperatives not subject to any objection to norms of right and wrong? Do they not all denounce the natural law we have discussed, that places limitations on their power to possess man totally? In modern totalitarianism we see modern "realism" revealed for what it always ultimately was, despite the benevolent intentions of many of its proponents, a doctrine that leads eventually to the conclusion that might makes right. "Realism", instrumentalism and pragmatism have been exposed by the most unflinching realists, instrumentalists and pragmatists of all time. They fully accept the principle *sit pro ratione voluntas*: (let my will be in place of all reason). All experience shows that when law is thus based on will, and reason is used only as a mere instrument to further power, the lust for power is boundless.

The fifth act of Goethe's "Faust" shows the palace in "deep night,"—most fitting for what is about to happen. By the sale of his soul for power, Faust has achieved world dominion, but he is annoyed by a little dwelling of two poor old peasants, Baucis and Philemon, and their few linden trees. Faust summons Mephistopheles and tells him those old people will have to go:

"I want those linden trees for my estate. Those few trees which do not belong to me spoil for me the possession of the world!

"My mighty and unbounded will
Is broken on yon sandy hill."

Mephistopheles and his "three mighty comrades" soon report their work of destruction. Then the chorus, that significant chorus (so different from the chours in *Antigone*), sings:

"The ancient saw still rings today;
Force with willing mind obey!"

Faust has dominion of the world, but cannot tolerate two poor weak and inoffensive little persons and their few linden trees. So law, divorced from reason and natural right, begets an insatiable appetite for power. There is no limit to its demands. The world is no longer the ordered Cosmos of the created universe subject to law under God; but Chaos, the object of the demonic, unfettered will of men in power.

We have seen in our own day, and not in one place only, this living will of aggression never satisfied with dominion or territory. It does not merely mean external aggression against other states though it does mean that; but also internal aggression against the state's own subjects. The State is no longer the limited separate governing thing allowing a large area to individual liberty; it tends to become coextensive with the community in all its aspects; it finally possesses man totally. The State is merged with the community and as class, race or blood becomes the supreme end of human existence and effort.

No statutory, legal or constitutional limits to power are recognized. An independent judiciary and courts are supplanted by mere administrative boards that become weapons for implementing state policy. The sphere of liberty outside the direct control of government becomes less and less. Man must not own; the State will own for him. Man must not think; the State will think for him and to make sure of this controls every avenue of information and propaganda. Man must not be free to select his vocation in life. The State will order our whole lives. Man must not worship God; the State is sole absolute. The last and worst consequences reveal themselves inevitably where the idea had its origin, namely, in the intellectual and spiritual life of men. The final end is a sort of mass consciousness; a mechanical, inhuman, servile mass organization that tends to be destructive of human liberty and personal responsibility.

If the citizens of the State repudiate natural law, inalienable rights rooted in a divine endowment, and the primacy of the spiritual in man, do they essentially differ from the animals in any state experimental

farm? If the juridical difference is solely of state competence, the state that made the distinction may also abolish it. Experimentally and historically the more a government recedes from reason and natural law the closer it approaches to the idea of men as mere animals or even mere things. Witness, for example, the so-called mercy deaths the Nazi government inflicted on its own people, *i.e.*, those Germans whom the bureaucrat determined to kill because of alleged incurable disease. Where do you stop? In the non-natural law concept there is *ex hypothesi* no stopping place. If there is in fact no limitation in reason and in nature on state power, then the limit is whatever the ruler determines as a socially desirable objective. In the last analysis, with the limitations of natural law on civil power denied, "the service of society" means the use that one man or a few men in power make of the rest of men.

After all the progress and enlightenment of the 19th Century, would anyone believe that there would emerge in the second quarter of the 20th Century a modern power, among the foremost in modern educational theory and technological skill, that would actually proclaim blood and race and soil as the basis of law and of human rights? We are the witnesses of that historic fact. Law as mere state force released from reason and natural right will claim anything. Like Faust, its cult of power is boundless.

This is the end of law as will, whether its proponents intend it or not. Any philosophy of law that by its own inner logic tends to justify and not condemn such inhuman treatment of man must itself be inhuman. It must be so, if it denies reason that alone distinguishes man from the rest of visible creation.

In practice Nazism and Fascism, whether brown, black or red, need no refutation for any one who holds the perennial idea of law we have been discussing. He is convinced in the inner recesses of his mind that such deeds as the modern tyrants have done to man are wrong by laws as real in the moral order as the law of gravity or the Newtonian laws of motion are in the physical order. Indeed very few modern instrumentalists have such complete faith in their own doctrine as to admit its logical consequences. From the denial of natural law, and of reason as the basis of law, the conclusion that might is right follows inexorably. There is no escape from that consequence but to deny the premise that produces the consequence.

The modern skeptics who have been telling us we have no knowledge whatever of the noumenon but only of phenomena, no knowledge of substance but only of accident, no knowledge of cause but only of sequence, say that the defenders of natural law are obscurantists in

appealing ultimately to Supreme Reason and Intellect as the source of law. But why is it irrational to appeal to reason as the ultimate as well to reason as the immediate source of law? Are they alone rational, the burden of whose teaching is that life itself and the universe are meaningless? In the final analysis it is they who appeal to a dark, irrational, mystical, unlimited power that creates law by its own arbitrary will and might. This in the political and social order is the end of the doctrine that in the intellectual order asked us to believe of everything what no man in his senses would believe of any one thing that showed any evidence of purpose, order and design.

Aristotle says that the aim of tragedy is a catharsis or purifying of the soul through pity and through fear. On the stage in *Antigone*, Sophocles depicted the nemesis that follows when law is based on will and mood and not on reason and mind. At the end of the tragedy the chorus, representing the average man chastened by the catastrophe enacted before his eyes, chants the final ode:

"Wouldst thou be blest? Be wisdom thy first aim,
The wisdom that reveres high Heaven's claim."

Mankind has seen today a greater tragedy enacted not in the theatre but on the actual stage of the whole wide world. We have seen modern man with all his inventions, his scientific achievements, his technological improvements, threatened with destruction by efficiency without virtue, by law divorced from reason and moral right.

General MacArthur, Supreme Allied Commander, when he spoke from the Battleship Missouri, at the scene of the Japanese surrender, accurately diagnosed the crisis of our age and its remedy when he said:

"The problem basically is theological and involves a spiritual recrudescence and improvement of human character that will synchronize with our almost matchless advance in science, art, literature, and all the material and cultural developments of the past 2,000 years. It must be of the spirit if we are to save the flesh."

One hopeful and encouraging sign was noted by Dean Pound when he recently said that "something like a resurrection of natural law is going on the world over" and that "philosophical jurisprudence which was all but extinct fifty years ago has revived and taken the lead in the present century."¹⁶

This revival of natural law has a special meaning for us in America. A recent writer in the *American Bar Association Journal* said:

"And here we must be alert against an insidious absolutist approach. If

16. Pound, *op. cit. supra*, note 4, at p. 287.

totalitarianism comes to America it will not come with saluting, 'heiling', marching uniformed men. It will not give warning of its advance by blaring bands and flaunted banners. It will come rather like the thief at night or the pestilence that slayeth at noonday. It will overturn barriers of restraint by a process as silent and invisible and therefore perhaps as unnoticed as the erosion that destroys a rock."¹⁷

The idea that man is made for the State can find lodgment in American thought through dominance in the minds of American lawyers and judges and in public opinion of a philosophy of law that denies our intellectual heritage, that despises our American origins, and puts no limit to State power but makes the ultimate end of man the service of the State. Those supporting that idea are vocal. They are almost fanatically active. Unless those who accept the American idea of law exert themselves in defense of its intellectual foundations, that idea undefeated by attack from without may fail for lack of defense from within.

A French philosopher has said that a nation must from time to time refresh itself in the well springs of its own origins or it will perish. We should encourage further study of our own legal origins, of the men and the doctrines that made America, of the lives and works for example of John Adams, Hamilton and James Wilson (one of Washington's first appointees to the Supreme Court), whose ideas derived from natural law had so much formative influence on the making of our whole system, and of others among the greatest of our American jurists who accepted natural law principles and used them in denying arbitrary power anywhere in our system of government.

Finally it is now clear that international law must be revived as the public order of the community of nations if civilization itself is to survive. With justice gone, states are what St. Augustine called them, "great bands of robbers": "*remota justitia, quid sunt regna nisi magna latrocinia.*"

John Foster Dulles, a member of this Association, on his return from Europe last year said:

"We are emerging from six years of war, during which morality and principle have increasingly been put aside in favor of military expediency. The war has now ended, and with that ending, principle and morality must be re-established in the world. The United States ought to take a lead in that. . . . It devolves upon us to give leadership in restoring principle as a guide to conduct. If we do not do that, the world will not be worth living in. Indeed, it probably will be a world in which human beings cannot live. For we now know that this planet will, like others, become uninhabitable unless men subject their physical power to the restraints of moral law."

17. Palmer, *Hobbs, Holmes & Hitler* (1945) 31 A. B. A. J. 569.

We must inaugurate study of the relation between natural law and international law adapted to the desperate needs of our time. No merely mechanical international arrangements or pieces of paper, though we pile them as high as the Himalayas, can secure enduring international order without the acceptance by men and nations of the objective existence of right and wrong in a natural law binding on all. In the one world that we have heard so much talk about, this is the first and most essential requisite but alas! it is rarely discussed. Until such moral code is accepted by the nations, a stable basis for one world or international law does not exist. Of course, the code must be implemented by institutions. But the institutions must derive from the code and not violate its essence. *Opus justitiae pax*: peace is the fruit of justice not of mere formula seeking conferences and fragile pacts. In any event only to such moral code thus accepted can we safely surrender any part of our own sovereignty.

Goethe places upon the lips of the doubting Faust the words "In the beginning was the *deed*." Echoing this typical concept of modern pragmatic philosophy, Nazi leaders, in the early planning of their modern absolutism, said to a group of Christian thinkers: "You say in your Gospel 'In the beginning was the Word'. We are going to change all that." They referred to the opening words of the Gospel of St. John:—"In the beginning was the Word and the Word was with God and the Word was God." There the "Word" means Mind, in Greek "*Logos*" or Eternal Reason subsisting as a Person within the Godhead. Knowing this, the Nazi philosopher said "We will change all that and we will say 'In the beginning was the *deed*'". There is the ultimate source of modern pragmatism, instrumentalism, materialism. There is the "is" philosophy in its naked origins. All depends on what was "in the beginning." If it was deed and not mind and Person then, of course, as Maritain says, the mailed-fist of frightfulness appears in the end with no defense of reasoned law against it. The denial of the human person and the treatment of man as a mere thing which we have lived to see, was implicit in the denial of the divine. For without the Person there is no purpose; without the purpose there is no destiny; without the destiny there are no rights natural and inalienable—arising out of man's inviolate duty to fulfill his God-given ends.