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John C. H. Wu

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The Natural Law and Our Common Law

Cover Page Footnote
Address at Symposium held by the Guild of Catholic Lawyers of New York City, December 5, 1953, revised and amplified by the author for publication in the Fordham Law Review. In preparing this address the author wishes to acknowledge the assistance given him by Monsignor John L. McNulty and Father Thomas Reardon. Professor of Law, Seton Hall University School of Law.
SOME prominent English and American jurists have spoken of the Common Law in terms of "Our Lady." In fact, Justice Cardozo and Sir Frederick Pollock have used the beautiful expression "Our Lady of the Common Law." I do not know whether either of them fully realized the implications of this title. To a Catholic, it is likely to suggest the image of Our Lady holding tenderly the Divine Infant in her arms. If the Common Law is Our Lady, then the Natural Law is the Divine Infant that she holds in her embrace. In appearance, it is Our Lady who holds the Divine Infant. In reality, it is the Divine Infant who holds Our Lady. We know that the Divine Infant is none other than the Word, Who "was in the beginning with God." But it is easier for us to seek Him in the arms of Our Lady. This gives you an idea of how I am going to approach the subject which has been, for some mysterious reason, assigned to me: "The Natural Law and Our Common Law."

To speak plainly, my method will be empirical and historical. At least, I shall start from the full-blooded experience of the Common Law. We may mount higher and higher until we attain a transcendental vision of the Natural Law or even of the Eternal Law. But our starting point must be a juridical experience.

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† Professor of Law, Seton Hall University School of Law.

1. Justice Cardozo used "Our Lady of the Common Law" as the title of an address delivered in 1928 to the first graduating class of the Law School of St. John's University. See Selected Writings of Benjamin Nathan Cardozo 87 et seq. (Hall's ed. 1947). As to Pollock's use of the same expression, see Pollock-Holmes Letters XV Introd. (English ed. 1941).


3. Theoretically, man can arrive at the notion of the natural law by following the light of natural reason, with which he is endowed by God. Plato, Aristotle and Cicero had expounded the doctrine of natural law with varying degrees of perfection. Confucianism had attained to a vision of the natural law which comes even nearer to that of the Christians. This is no place to write about Confucianism. Let one quotation from the Confucian classic The Golden Mean suffice: "What is ordained by Heaven is called essential nature. Conformity to the essential nature is called the natural law. The refinement of the natural law is called culture." This vaguely corresponds to the Thomistic rhythm of eternal, natural and human law.

In the journals of Matthew Ricci I have come across this interesting statement: "Copies of the Commandments were printed in Chinese and given out to all who asked for them. Many who received them said they would live in the future according to these commandments,
In comparing the Common Law to Our Lady, I am, of course, thinking of it at its best, not at its worst. Similarly, in comparing the Natural Law to the Word Incarnate, I am aware that Our Lord enters into humanity not as an Idea but as a Living Person.

There can be no denying that the Common Law has one advantage over all other systems of law: it was Christian from the very beginning of its history. In connection with the laws of Ethelbert, which saw the light around 600 A.D., Maitland writes, "Germanic law has no written memorials of the days of its heathenry. Every trace, but the very faintest, of the old religion has been carefully expurgated from all that is written, for all that is written passes under ecclesiastical hands. Thus we may guess that a new force is already beginning to transfigure the whole sum and substance of barbaric law, before that law speaks the first words that we can hear." 4

Some decades before the laws of Ethelbert, Emperor Justinian had promulgated his magnificent Corpus Juris Civiles explicitly "In the name of Our Lord Jesus Christ." Roman Law had reached its perfection, when English law was just beginning to prattle like a baby. No one could have foreseen that the latter was destined, in the centuries to come, to grow into a more glorious system of law than its predecessor. Justice Holmes was not boasting when he said that "Our law has reached broader and more profound generalizations than the Roman law, and at the same time far surpasses it in the detail with which it has been worked out." 5

No doubt, there are many causes for this superiority; but, in my humble opinion, the most important is that while the Roman Law was a death-bed convert to Christianity, the Common Law was a cradle Christian. In preparing this paper, I have gone to the very origins, and have been thrilled to find that many sages of the Common Law are also Saints of the Church. King Ethelbert is a Saint, and it is well known that up to the

because as they claimed, they were in such accord with the voice of conscience and with the natural law. Their reverence for the Christian law increased with their admiration for it." See China in the Sixteenth Century: The Journals of Matthew Ricci: 1583-1610, 155 Transl. from the Latin by Louis J. Gallagher, S.J. (Random House, 1953).

Christianity is, of course, more than a mere authoritative publication of the natural law; but it comprehends it and confirms it by revelation. As O.W. Holmes, Jr. wrote in a note to Kent's Commentaries on American Law "... it is from the sanction which revelation gives to natural law, that we must expect the gradual increase of the respect paid to justice between nations. Christianity reveals to us a general system of morality, but the application to the details of practice is left to be discovered by human reason." 4 n.a (12th ed.) The Common Law received its natural-law ingredients mostly from Christianity. Therefore, it would be entirely unhistorical to treat the present subject apart from the influence of Christianity.

5. Holmes, Collected Legal Papers 156 (1920).
days of Henry VIII, a light was always kept lighted before his tomb. It was St. Theodore who planted the Christian law of marriage on the soil of England. Edward the Confessor was noted not only for his laws but for his just administration, which caused him to reign in the hearts of the people. His selfless devotion to the welfare of the people made them love his law and government. He has been described as "a man by choice devoted to God, living the life of an angel in the administration of his kingdom, and therefore directed by Him." 

"The laws and customs of good King Edward" became a household word for all the succeeding generations. His life illustrates the truth that "love therefore is the fulfilment of the law." My impression is that the Common Law was not only founded on justice, but, what is more important, rooted in grace. It gradually assimilated the principles of natural law, not as an abstract theory, but as vital practical rules of human conduct. The leaven worked slowly, but steadily.

After the Norman Conquest, holy and learned clergymen like Lanfranc, St. Thomas à Becket, John of Salisbury, and many others continued to infuse natural-law principles into the Common Law. It may be said that Canon Law was the nurse and tutor of the Common Law. The very name "Common Law" was derived from the "ius commune" of the canonists. It was not until the twelfth century that the name began to be used by the lawyers, to denote not so much the general custom of the realm as the custom and judicial tradition of the king's court. Thus, the predominantly judicial origin of the Common Law was clear from its beginning.

As you know, "legal memory" of the Common Law goes back only as far as the coronation of Richard I, September 3, 1189. Let us take a look at that age. Pollock and Maitland tell us:

"English law was administered by the ablest, the best educated, men in the realm; nor only that, it was administered by the selfsame men who were 'the judges ordinary' of the church's courts, men who were bound to be, at least in some measure, learned in the canon law. At one moment Henry had three bishops for his archjusticiars. The climax is reached in Richard's reign. We can then see the king's court as it sits day by day. Often enough it was composed of the archbishop of Canterbury, two other bishops, two or three archdeacons, two or three ordained clerks who were going to be bishops and but two or three laymen. The majority of its members might at any time be called upon to hear ecclesiastical causes and learn the lessons in law that were addressed to them in papal rescripts."  

To Pollock and Maitland, "Blackstone's picture of a nation divided
into two parties, 'the bishops and clergy' on the one side contending for their foreign jurisprudence, 'the nobility and the laity' on the other side adhering 'with equal pertinacity to the old common law' is not true." On the contrary, "It is by 'popish clergymen' that our English common law is converted from a rude mass of customs into an articulate system, and when the 'popish clergymen,' yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the creative age of our medieval law is over." 12

We need not enter into the history of the Magna Carta. I shall content myself with reproducing two of its provisions which are of especial importance for our present theme. From Chapter I: "First, we have granted to God, and by this our present charter have confirmed for us and our heirs for ever, that the English Church shall be free and shall have her rights and liberties, whole and inviolable." The other provision is from Chapter 29: "No freeman shall be taken or imprisoned or disseised of his free tenement, liberties or free customs, or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor send upon him, unless by the lawful judgment of his peers, or by the law of the land. To none will we sell, deny, or delay right or justice."

But I cannot dismiss the Magna Carta without a mention of Cardinal Stephen Langton, Archbishop of Canterbury, who was actually the soul of the whole movement.13 To me it is not without significance that the father of the Magna Carta was also the author of the magnificent hymn to the Holy Ghost, *Veni Sancte Spiritus.* 14 The same Spirit that inspired that hymn motivated and energized, on a lower plane, the movement which was crowned by the Magna Carta; and I think that the same Spirit has enlivened the Common Law by breathing into it the liberalizing influence of natural justice and equity.

If the clergymen had merely converted a rude mass of customs into an articulate system, it would, indeed, have been an admirable intellectual achievement, but the system would not have acquired the vitality at which all students of the Common Law have marvilled. My own surmise is that the vitality of the Common Law is due to the leaven of the Spirit. The clergymen did more than produce a vessel of barren clay; they started a living tradition.

The reign of Henry III (1216-72) is, to my mind, the most important period of the history of the Common Law. As Pollock and Maitland have

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12. Id. at 133.
14. Id. at 47-48. After looking into the evidences and weighing them carefully, Powicke says that "there appears to be no doubt that he, and not King Robert of France or Pope Innocent III, was the author of one of the greatest hymns, the *Veni Sancte Spiritus.*"
observed, “At the end of that period most of the main outlines of our medieval law have been drawn for good and all; the subsequent centuries will be able to do little more than to fill in the details of a scheme which is set before them as unalterable.” It was the age in which the “Father of the Common Law,” Bracton, flourished. Like all men of supreme achievement, he was born at the right time. The law had grown for many centuries past, and was ready to send up its bulbs. There was an abundance of material waiting for a man of genius to galvanize it into a living system. His treatise De Legibus et Consuetudinibus Angliae “is the crown and flower of English medieval jurisprudence.”

He drew from many sources, but his native wit organized them into a harmonious whole. He learned his Roman Civil Law from Azo of Bologna; he absorbed his Canon Law principles from Gratian’s Decretum and the Decretals of Gregory IX. The Roman law gave him the method of treating his native materials and filling their gaps. He wove a doctrine out of the plea rolls, and dealt with the judgments of Pateshull and Raleigh just as Azo had dealt with the opinions of the Roman jurisconsults and the later glosses. Like a true Englishman, he introduced the use of cases in presenting the law. In his Note Book, he had collected no less than two thousand cases; and in his Treatise he made use of five hundred. Of course, he did not arrive at the doctrine of stare decisis; but there is no denying the fact that he was the first to hit upon the idea of developing the law by the method of analogy. Similar facts should lead to similar decisions. “Si tamen similia evenerint, per simile judicentur, cum bona sit occasio a similibus procedere ad similia.” He veritably discovered a new method of studying juridical realities and solving actual problems of law, a method which has its roots in the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of resorting to abstract conceptions. This concrete way of looking at the law springs from the Anglo-Saxon frame of mind and finds in it a fertile soil. This is why his seminal thought has grown into a magnificent tree in course of time; and this is why he may properly be called the father of the Common Law.

A word must be said also of the system of writs, which Bracton helped to develop, though he did not invent them. This emphasis on procedure and remedies is, again, typical of the practical sense of the Anglo-Saxons. In this respect, they are really more akin to the Romans than to the modern Romanists. They are too Roman to receive wholesale the

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15. I Pollock and Maitland, op. cit. supra note 9, at 174.
16. Id. at 206.
17. Maitland, Bracton and Azo (Selden Society, 1894) passim.
19. Ehrlich has brought out some of the analogies between English law and Roman law,
Corpus Juris of an ancient age. As Maitland and Pollock have put it, "more Roman than the Romanists," they "made the grand experiment of a new formulary system. . . . Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children." 20

In yet another sense is Bracton the father of the Common Law. As we have already seen, the Common Law is a cradle Christian; but it was not until the thirteenth century that the Christian element of the Common Law came to some sort of maturity. Bracton, with his extraordinary power of assimilation, succeeded in formulating a truly Christian philosophy of law.

His greatness lies not so much in originality as in the fact that he sums up all that was best in the legal and political philosophy of his time. In expounding the coronation oath, he says that the King must pledge himself to three things—first, that he will do what lies in his power to secure for the Church of God and all Christian people true peace in his time; second, that he will forbid all rapine and wrong-doing among all classes of people; third, in all his judgments he will promote equity and mercy as he hopes for mercy from a clement and merciful God. 21 In fact, according to Bracton, the king is instituted and elected for the very purpose of doing justice to all. The king is God's vicar and minister on earth, and it is his duty to distinguish right from wrong, the equitable from the inequitable, that his subjects may live honestly, that no man should injure another, and that each may receive his due and make his reasonable contribution in return. 22 If the king does justice, he is a minister of God; if he does injustice, he becomes an agent of the devil. He is above his people, but he

"As in Rome, so in England, the material law was chiefly the law of several actions (actiones)." See Fundamental Principles of the Sociology of Law 275 (Moll's Transl. Harvard, 1936). These actions are the channels in which the principles of justice and natural law are made to flow. While the channels are constructed by what Coke calls "artificial reason and judgment of the law," the principles are derived from "the natural reason." The former are mutable, while the latter are immutable.

20. 2 Pollock and Maitland, History of English Law 674 (2d ed. 1923). It should be noted that the "new formulary system"—the system of writs—differs from the old in that while the formula in the Roman law concludes the proceeding before the court, the writ opens it. But the procedural emphasis is the same.


22. Bracton, op. cit. supra note 18, at 107. It is noteworthy that Bracton supplements the threefold precept of law, which he takes from Justinian, by adding "recta contributione reddatur." Thus, justice does not consist in merely receiving one's due, but also in making one's proper contribution.
is under God and under the Law, for it is the Law that makes him King. On this point, I would like to introduce a passage, which I have translated with the help of Father Edward Synan:

"The king himself, however, ought not to be under man but under God, and under the Law because the Law makes the king. Therefore, let the king render back to the Law what the Law gives to him, namely, dominion and power; for there is no king where will, and not Law, wield dominion. That as a vicar of God he ought to be under the Law is clearly shown by the example of Jesus Christ whose place he takes on earth. For although there lay open to God, for the salvation of the human race, many ways and means beyond our telling, His true mercy chose this way especially for destroying the work of the devil: He used, not the force of His power, but the counsel of His justice. Thus He was willing to be under the Law 'that He might redeem those who were under the Law.' For He was unwilling to use power, but judgment. Thus also the blessed parent of God, the Virgin Mary, mother of the Lord, who by a unique privilege was above the Law, for the sake of giving an example of humility did not recoil from following lawful ordinances. The king should act likewise, lest his power remain unbridled." 23

"There is no king where will, and not the Law, wields dominion." Here the idea of the supremacy of Law is formulated in the clearest terms. The essence of Law is not will and force, but judgment and counsel of justice. In another passage he declares: *Iuris enim prudentia agnoscit, et justitia tribuit cuique suum est. Item justitia virtus est, iuris prudentia scientia est.* 24 This may be rendered as: "The prudence of law perceives, and justice renders to each what is his due. For justice is a virtue, and prudence of law is a science." This is the true sense of jurisprudence; and yet some modern positivists wish to exclude justice from jurisprudence. This would be juris-imprudence rather than jurisprudence.

Justice Edward S. Dore, in his admirable address on "Human Rights and the Law," has said some words which bear out perfectly the point that Bracton was driving at:

"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!' 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." 25

In the *Year Books* of Edward III there is a very interesting dialogue bearing on the nature of law. The counsel in his argument was saying that the judges should do as others had done in similar cases, "otherwise we should not know what the law is." Justice Hillary interrupted him by

23. Bracton, op. cit. supra note 18, at 5 b.
24. Id. at 36.
25. 15 Ford. L. Rev. 11 (1946). The importance of this article has been pointed out by Messner in his Social Ethics: Natural Law in the Modern World 240 (Doherty's transl. 1949).
saying, "The will of the judges." Chief Justice Stonore responded, "No, law is reason." 26

Of course, both will and reason enter into the making of a law. Will is not to be despised, because it is given by God to man and belongs to his spiritual nature. As St. Thomas has said, "All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason." 27 In other words, "in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason." 28

It is to the credit of Bracton that, although he apparently did not have the chance of reading St. Thomas' Treatise on Law, his ideas came very close to his. His definition of law is embodied in a passage which is as follows:

"Now let us see what is law; and we should know that law is the common precept of prudent men in council, the coercive prohibition of offenses which are committed intentionally or by ignorance, the impartial bulwark of the common interests. Also God is the author of justice, because justice is in the Creator. And accordingly, rightness and law (ius et lex) signify the same thing, and while in the widest sense everything that can be read is called law, strictly it signifies just sanction, enjoining what is fair and decent and forbidding the contrary." 29 As Dr. Miriam T. Rooney has justly remarked, Bracton's definition of law and principles of sanction "are a masterly synthesis of what had gone on before his time in the development of the common law and in the growth of Christian thought." 30

His influence on later jurists such as Coke, Holt and Blackstone, and on some of our contemporaries has been salutary and profound.

Bracton's contributions to "case law" and to the idea of supremacy of law are contributions not only to the Common Law but also to the philosophy of the Natural Law. In his book, The Spirit of the Common Law, Roscoe Pound has pointed out that the two most salient characteristics of the Common Law are the doctrine of precedents and the doctrine of the supremacy of law. He has further pointed out that there is a common element in these two doctrines, that is, reason.

"The same spirit is behind each. The doctrine of precedents means that causes are to be judged by principles reached inductively from the judicial experience of the past, not by deduction from rules established arbitrarily by the sovereign will. In other

27. Summa Theologica 1a, IIae, Q. 97, a. 3, in corp.
28. Id. at Q. 90, a. 1, ad 3.
words, reason, not arbitrary will, is to be the ultimate ground of decision. The doctrine
of the supremacy of law is reducible to the same idea. It is a doctrine that the sover-
eign and all its agencies are bound to act upon principles, not according to arbitrary
will; are obliged to follow reason instead of being free to follow caprice. Both represent
the Germanic idea of law as a quest for the justice and truth of the Creator. The
common-law doctrine is one of reason applied to experience.”

In this Dean Pound has shown a very keen insight into the spirit of the
Common Law. My only reservation is that he did not seem at the time of
his writing to have an adequate knowledge of the Scholasticism of the
thirteenth century to trace this spirit to the true source.

In fact, both the idea of supremacy of law and the practical, concrete
way of dealing with cases, which are so characteristic of the Common
Law, came from the wisdom of the Catholic Church. The modern specu-
lative, rationalistic philosophies of Natural Law are aberrations from the
highroad of the scholastic tradition. In this connection, I cannot resist the
urge to quote some very sensible words from one of the contemporary
authorities on Canon Law, Professor Stephan Kuttner:

“...The science of Natural Law, like all knowledge in the realm of practical reason,
deals with human acts and cannot be construed, more geometrico, in an abstract,
speculative fashion, i.e., without the empirical data of actual human relations and
social compounds. The concept of Natural Law, it is true, taken in its strict sense as
the principles which are immediately given by the rational and social nature of man,
has its own reality, 'exists' in the intellectual order in the manner of Universals; yet
in the practical order it can exercise a normative function as regula et mensura only by
some relation to the contingencies of man's social existence here and now; and these
contingencies are many and changeable. They are the subject matter of positive law
in all its variety and relativity, and it bespeaks the wisdom of medieval schoolmen that
they are satisfied with philosophizing about the essential relations of all positive law
to the natural, rather than dreaming of a Natural Law which would rule human social
behavior once for all as a perfect code in minute detail, and thus make all positive law
superfluous by absorption; or rather than removing Natural Law to the ever unattain-
able rarefied sphere of a transcendental ideal.”

should be read together with his later lectures on “The Church in Legal History,” delivered
at the Catholic University of America in 1939, and published in Jubilee Law Lectures in the
same year.

32. The Natural Law and Canon Law, in 3 Natural Law Institute Proceedings 1949
85 (Notre Dame, 1950). I do not quite see eye-to-eye with Prof. Kuttner where he says that
the concept of the Natural Law “exists” merely “in the intellectual order in the manner of
Universals.” Being derived from the eternal law, which is in the Mind of God, I should
think that the natural law is rooted in the Reason and the Will of God and therefore possesses
a higher degree of reality than the words of Kuttner would seem to indicate. But I am on
all fours with his criticism of the speculative philosophers of Natural Law, who have pro-
ceeded more geometrico. A typical instance is Samuel Pufendorf’s Elementa jurisprudentiae
universalis, where, as Coleman Philipson has aptly pointed out, he “adopts the Euclidean
method, and professes to establish certain conclusions by the strict process of mathematical
demonstration.” See Great Jurists of the World 310 (Boston, 1914). The great difference
This describes the method of St. Thomas. It describes also the method of Bracton and, therefore, the Common Law tradition. It is most regrettable that practically all of the seventeenth, eighteenth and nineteenth century philosophers of Natural Law departed from this great tradition. They proceeded *more geometrico*; they wove whole systems of so-called Natural Law just as a spider would weave a net out of its own belly. To mention a few, Hobbes, Spinoza, Locke, Pufendorf, Christian Wolff, Thomasius, Burlamaqui, Kant, Hegel, and even Bentham with his felicific calculus, all belong to the speculative group. Many of the nineteenth century judges in America abused the name of Natural Law by identifying it with their individualistic bias. One of them even erected his irrational racial prejudice to the dignity of Natural Law.

Shortly after the death of Bracton appeared the *Year Books*. The earliest of them came out in 1292. They were produced by the lawyers who had been organized in the Inns of Court and Chancery. These Inns were virtually centers of legal study, which carried on and further strengthened the tradition of the Common Law as a system of case law. Although the fourteenth century is not adorned by outstanding legal luminaries, its anonymous contribution to the continuity of the legal system is not to be slighted. In the fifteenth century came Littleton and Fortescue. I shall not enter into Littleton’s classic work on *Tenures*, except to say that it marks a milestone in the law of real property. John Fortescue, as a declared disciple of St. Thomas Aquinas, was opposed to the Roman precept: *Quod principi placuit legis habet vigorem* (whatever pleases the sovereign has the force of law). He maintains that “a king of England...
cannot, at his pleasure, make any changes in the laws of the land, for he rules by a government which is not only regal, but political. He can only make such changes with the consent of the people. For him, the natural law, as revealed in the Old Testament and in the Gospel, is supreme. "For no edict or action of a king, even if it has arisen politickly, hath ever escaped the vengeance of divine punishment, if it hath proceeded from him against the rule of Nature's Law." 

In fact, the legal philosophy of the fifteenth century is still deeply Christian. In 1468, for instance, the Chancellor told the House of Lords that "justice was ground, well and root of all prosperity, peace and public rule of every realm, whereupon all the laws of the world had been ground and set, which resteth in three; that is to say, the law of God, the law of Nature, and positive law." In a Year Book of the reign of Henry VI is found the significant remark that "the law is the highest inheritance which the King has; for by the law he and all his subjects are ruled, and if there was no law, there would be no King and no inheritance." This again reminds us of Bracton.

At the opening of the sixteenth century, there arose a very interesting case, The Prior of Castleacre v. The Dean of St. Stephens. A priory had been dissolved and its property vested in the Crown by an Act of Parliament. The question in that case was, did the Crown thereby become "parson" of the church? If he did, he would be entitled to tithes. The Court of Common Pleas was unanimous in holding that the King did not become parson. In the words of Chief Justice Frowicke, "I have not seen that any temporal man can be parson without the agreement of the supreme head." The supreme head was of course the Pope. Justice Kingsmill likewise said, "The act of Parliament cannot make the king to be parson, for we through our law cannot make any temporal man to have spiritual jurisdiction; for nothing can do that except the supreme head." So Justice Fisher: "And the king cannot be parson by this act of Parliament, nor can any temporal man through this act be called parson." Not a single dissenting voice appears on record. Who could have expected then that in twenty-eight years' time an Act of Parliament was to transfer the title of "Supreme Head" to Henry VIII? That Act was not only contrary to the law of God and the law of Nature, but to the Common Law itself.

It was under that Act that Thomas More, the most illustrious sage and
saint of the Common Law, was indicted for and convicted of treason. A servile Parliament and a servile Court conspired with a lawless tyrant to murder a just man. The glorious martyrdom of St. Thomas More is too well-known to call for a detailed treatment. All that I want to say is that the Common Law itself suffered in his death a fatal wound, from which it has not recovered even now, at least, in England. It does not take a Catholic lawyer to see this. Maitland, who was neither a Catholic nor an Anglican, has this to say:

"... in 1535, the year in which More was done to death, the Year Books come to an end; in other words the great stream of Law Reports that has been flowing for near two centuries and a half, ever since the days of Edward I, become discontinuous and then runs dry. The exact significance of this ominous event has never yet been fully explored, but ominous it surely is. Some words that fell from Edmund Burke occur to us: 'to put an end to the Reports is to put an end to the law of England.'"

In the Prologue to his excellent biography of Thomas More, R. W. Chambers, another non-Catholic, has written: "This book attempts to depict More not only as a martyr (which he was) but also as a great European statesman; More's far-sighted outlook was neglected amid the selfish despotisms of his age; yet his words, his acts, and his sufferings were consistently, throughout life, based upon principles which have survived him. More was killed, but these principles must, in the end, triumph. If they do not, the civilization of Europe is doomed." What are these principles? Chambers quotes the words of one of the greatest Catholic lawyers of contemporary England, Richard O'Sullivan, K. C.: "The life and death of Thomas More are witness to the principle of limitation of the power of the King or of Parliament, and the writings and the judgments of a constellation of Catholic and non-Catholic historians and lawyers in our own time have led to a reaffirmation of the principles of Natural and Divine Law for which he lived and died."

About Henry VIII, Maitland has written: "If Henry were minded to be 'the Pope, the whole Pope, and something more than the Pope;' he might trust the civilians to place the triple and every other crown upon his head. . . . The Civilian would, if he were true to his Code and his Novels, find his ideas realized when and only when the Church had become a department of State." In other words, they might have identified law with the will of the sovereign. *Quod principi placuit legis habet vigorem.*

But the fact is that scholastic philosophy of law was too deeply rooted
in the English soil to be entirely uprooted. Shakespeare, for instance, seems to know his Common Law and Natural Law pretty well. He knows the psychological reason of case law. He makes Portia say:

"There is no power in Venice
Can alter a decree established:
Twill be recorded for a precedent;
And many an error by the same example
Will rush into the state." 46

He knows the importance of tempering the rigors of law with equity:

"And earthy power doth then show likest God's
When mercy seasons justice." 47

He knows the importance of observing degree, proportion, form and order, which to him are objective standards of right and wrong, because they have an ontological basis:

"Take but degree away, untune that string,
And, hark, what discord follows; each thing meets
In mere opugnancy: the bounded waters
Should lift their bosoms higher than the shores,
And make a sop of all this solid globe:
Strength should be lord of imbecility,
And the rude son should strike his father dead:
Force should be right; or rather, right and wrong,
Between whose endless jar justice resides,
Should lose their names, and so should justice too.
Then everything includes itself in power,
Power into will, will into appetite;
And appetite, a universal wolf,
So doubly seconded with will and power,
Must make perforce a universal prey,
And last eat up himself." 48

46. Merchant of Venice, Act IV, Scene 1.
47. Ibid.
48. Troilus and Cressida, Act I, Scene 3. On the religious faith of Shakespeare, see Mutschmann and Wentrorsdorf, Shakespeare and Catholicism (Sheed and Ward, 1952). There can be no question about the soundness of Shakespeare's philosophy of the natural law. Let me quote one more passage:

It is great sin to swear unto a sin,
But greater sin to keep a sinful oath.
Who can be bound by any solemn vow
To do a murderous deed, to rob a man,
To force a spotless virgin's chastity,
To reave the orphan of his patrimony,
To wring the widow from her custom'd right,
And for no other reason for this wrong,
But that he was bound by a solemn oath. (2 Henry VI, Act V, Scene 1)
This leads us to Sir Edward Coke, of whom Holdsworth has said: "What Shakespeare has been to literature, . . . Coke has been to the public and private law of England." At a time when political speculation was tending to exalt a sovereign person or body above the law, Coke had the insight and the courage to resort to the law of God and the law of nature, thus preserving the medieval idea of the supremacy of the law. In Calvin's Case, he declared that "the law of nature is part of the law of England," that "the law of nature was before any judicial or municipal law," and that "the law of nature is immutable." He identified the law of nature with lex aeterna. He said, "The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex aeterna, the moral law, called also the law of nature. And by this law written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world." Again, in Dr. Bonham's Case, he laid down the principle of judicial review: "And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudged to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." This seminal thought did not sprout in England, but, as we shall see, it was later transplanted in America and burst into flowers.

But even in England, this doctrine of judicial review of Parliamentary acts found some later echoes. In the case of Day v. Savadge, where Chief Justice Hobart declared that "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself; for Jura naturae sunt immutabilia, and they are leges legum." The influence of Bracton on Hobart and Coke is manifest.

In fact, in his struggle with King James I, Coke cited Bracton as an

51. 8 Co. Rep. 113 b, 77 Eng. Rep. 646 (K.B. 1610). See Plunknett, Bonham's Case and Judicial Review, 40 Harvard Law Review 30 (1927). The influence of Coke upon American jurists has been tremendous. Even as late as 1831, in Bank of State v. Cooper, Justice Green declared, "There are eternal principles of justice which no government has a right to disregard. . . . Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. 'The common law,' says Lord Coke, 'adjudgeth a statute so far void,'" 2 Yerg. 599, at 603 (Tenn.) Thus, judicial review was not only based on the Constitution, but on what Corwin has called "a Higher Law."
52. Hobart 85 (K.B. 1614).
authority. He maintained in the presence of the king that by the law of England the king in person could not judge any cause, and that all cases, civil and criminal, were to be determined in some court of justice according to the law and custom of the realm. Natural reason dictates that the adjudication of legal controversies should resort to "artificial" reason. Natural law must be supplemented by human law, for art perfects nature; and this too is a precept of the natural law.

The momentous encounter between Coke and King James furnishes much food for thought. We will let Coke tell his own story.

"A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did not belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason but by artificial the reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects: and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.*"

This is perfectly in line with the Confucian philosophy that human nature is ordained by God, that accordance with this nature is called the natural law, and that the cultivation and refinement of the natural law is called culture. It is also in line with the Thomistic position that while there is necessity in the general principles of natural law, the remoter conclusions and the particular determinations of the natural law are a matter for human law, which, as Coke has pointed out, must depend upon experience and study, and which must vary according to the conditions of mankind and circumstances of the time. In fact, St. Thomas envisions the eternal law, the natural law and the human law as a continuous series. He even holds that the natural law can be changed by way of addition. It grows by recognizing new values emerging in the process of civilization.

For Coke too, the law of God, the law of nature or reason, and the law of the land form a continuous series. For him the common law is a tree rooted firmly in God and nature, and growing into an evergreen. No one seems to know the spirit of the common law more intimately than

54. See note 3 supra. Art is continuous with nature.
55. See, for instance, on the modern recognition of the right of privacy, Patterson, Jurisprudence: Men and Ideas of the Law 374 (Foundation Press, 1953).
Coke. It is not for nothing that Maitland calls him "the incarnate common law." 58

The idea of Coke that the king and even Parliament are under God and under the law, is a tough idea. Even as late as the eighteenth century, we find Lord Holt supporting Coke's ideas in the case of City of London v. Wood; 57 "And what my Lord Coke says in Dr. Bonham's Case in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party. . . ." He says further that, though an act of parliament may do certain things that "look pretty odd," yet obviously there are limits. For example, it "may not make adultery lawful."

In R. v. Knollys, 58 Holt held that the House of Lords could not extend its privilege at its will. In Ashby v. White et al., 59 and Paty's Case, 60 he denied a similar claim by the House of Commons. Yes, there are things which even Parliament could not do. It is significant that the decision of Ashby v. White et al., was followed in 1839 in the case of Stockdale v. Hansard. 61

In view of this, it is, indeed, strange to hear a judge of the Court of Common Pleas declare in 1871: "It was once said,—I think in Hobart,—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists." 62 I do not question the particular judgment in that case. It might have been reached on some other grounds. But when you hear a judge speak in such a servile tone, you have reason to fear that the Common Law is beginning to lose its soul.

57. 12 Mod. 669, 687, 688 (K.B. 1701).
58. 1 Ld. Raym. 10 (K.B. 1695).
59. 2 Ld. Raym. 938, 3 Ld. Raym. 320 (K.B. 1703). This case was relied upon as an authority by Justice Holmes in Nixon v. Hearndon, 273 U.S. 536 (1927) for holding that private damage caused by political action may be recovered in a suit at law. This is but one instance to show the tenacity of the common-law tradition.
60. 2 Ld. Raym. 1105 (K.B. 1705).
61. 9 A. & E. 1 (K.B. 1839).
Now to return to Holt. Steeped in the spirit of the Common Law, Holt had the greatest respect for the dignity and liberty of the human person. In several cases, he held no one could be a slave on the English soil. He said in one case that "By the common law no man can have a property in another. . . ." In another case he declared that "as soon as a negro comes to England he is free; and one may be a villein in England, but not a slave." 64

In many of his decisions one senses a sweet reasonableness so characteristic of the Common Law. For instance, in the case of Blankard v. Galdy, 65 he distinguished settled colonies from conquered colonies. In the settled colonies "all laws in force in England are in force there. . . ." On the other hand, in the conquered colonies, "the laws of England do not take place there, until declared so by the conqueror. . . ." If a pagan country is conquered, "their laws by conquest do not entirely cease, but only such as are against the law of God; and . . . in such cases, where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity." This consideration for the habits and customs of a people is one of the greatest qualities that the Common Law had assimilated from the mellow and moderate wisdom of the Scholastics, whose philosophy of Natural Law leaves a large room for diversities.

In the world of practical lawyers, the best-known case that Holt decided is Coggs v. Bernard. 66 In that case, as you will remember, Lord Holt, relying on the authority of Bracton, distinguished no less than six kinds of bailments, and tried, with the patience of a scholar and discernment of an artist, to determine the degree of care which the bailee in each category should exercise. This case has jurisprudential significance, for here you see the judicial process at work; you see how the mind of the judge reacts toward different situations, you see a most delicate and sensitive scale telling how much care is required in each case and the corresponding degree of negligence for holding the bailee liable. In some situations the utmost care is required, and therefore the slightest negligence is sufficient to constitute a ground for liability. In other cases, fairness requires a slight degree of care, and therefore only gross negligence on the part of the bailee would make him liable. In still other situations, where ordinary care seems to be called for, ordinary negligence is enough. Of course, there is no finality about this classification. In fact, Justice Story 67 has

65. 2 Salk. 411 (1694).
66. 2 Ld. Raym. 909 (K.B. 1704).
67. Story, Commentaries on Bailments 5-7 (5th ed. 1851).
reduced the bailments into three categories, namely, those for the benefit of the bailor, those for the benefit of the bailee, and those for mutual benefit; and he has rationalized further the degrees of care and negligence appropriate to each class. But what I am interested in bringing out is that this is the modality of our Common Law, very much similar to that of the Roman Law in its formative and creative days, before it was codified. Our Lady, the Common Law, is a patient and kindly housewife who knows how to make, stitch by stitch, a seamless tunic for you to wear.

Of course, legal distinctions are seldom matters of black and white. As you know, gross negligence may amount to intentional wrong, and great intentional wrong may merge into malice. In the words of Ulpian, *Magna negligentia culpa est, magna culpa dolus est.* The possibility of a great danger is equivalent to the probability of a small one. And then we must remember that law is not an exact science; and we are not required to weigh the consequences of our actions "with as much exactness as an apothecary would drugs on his scales." On the whole, all that we are required to do is to exercise the reasonable judgment of an ordinary prudent man.

The Common Law is full of fringes and penumbra; full of shades and nuances; this is what makes it so human, so attractive, and so natural. In the enchanted garden of Common Law, there are many shady groves which cheer your heart and refresh your spirit at the same time that they lure you on to new vistas. It is not a closed garden, but one which is continuous with the wild fields, hills and rivers on one side, and leads to the streets and market-places on the other. At first you feel all but lost in the labyrinthine ways and paths; you want to discover some design but you find none. But daily saunterings in the garden familiarize you gradually with the genie of the place, the atmosphere, the ever-changing moods of the garden, with the inevitable result that you are more and more fascinated by it. You begin to divine a certain vague design, but the element of surprise is never lacking, because it seems to change with the weather and assumes a new aspect upon the advent of every new season. Perhaps you find some traces of human designing here and there, but you are not able to tell exactly where nature ends and art begins. You do not find a general design, except perhaps the design of nature or of a mysterious Providence. What you find is not logical consistency arrived at once for all, but an endless series of organic adaptations which must be renewed every day.

68. Dig. 50, 16, 226.
69. See Sikes v. Commonwealth, 304 Ky. 429, 200 S. W.2d 956 (1947). There Commissioner Stanley quotes these words. He also writes, "Man-made law is not blind to human nature; at least self-preservation."
The Common Law is not a closed system but an open system. In its golden days, the winds blow into it from heaven. In its days of expansion, the winds blow in from the oceans, as is the case in the age of Mansfield.

Lord Mansfield was perhaps the most dynamic personality that ever adorned the English bench. I do not regard him as a first-rate legal scholar or philosopher. But he was a man full of practical common sense and profound moral intuitions, with sufficient grounding in the humanities to quote from Cicero. He hardly seems to distinguish the *ius gentium* from the *ius naturale* any more than Gaius did. But for his practical purposes, *ius gentium* was good enough to be natural law. Anyway, the cosmopolitan usages and customs of the international merchants were nearer to the law of nature than the local laws of a single country. In *Luke et al. v. Lyde*, which involved a claim for freight, he declared that "the maritime law is not the law of a particular country, but the general law of nations. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et ajud omnes gentes et omni tempore una eademque lex obtinebit.*" Nowhere was his Scotch common sense and native wit more clearly shown than in his creation of Mercantile Special Juries. As Lord Campbell has told us, "Lord Mansfield reared a body of special jurymen at Guildhall, who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in Court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided." When the law keeps its eyes open to the realities of life, it becomes fruitful. By adopting and applying the *ius gentium* Lord Mansfield added a new mansion to the Common Law, which is a house of many mansions. While theoretically he seems to have confused the idea of natural law with the international usages of trade, yet he was acting in the spirit of the natural law, for one of the precepts of natural law is precisely that human law should adapt itself constantly to the changing conditions of human civilization. A system of law that does not advance falls back.

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70. Gaius, Institutes, 1, 1.
71. 2 Burr. 887 (K.B. 1759).
72. The quotation is from Cicero, De Re Publica. See Keyes's translation in Loeb Classical Library 211 (Putnam, 1928).
73. 3 Campbell's, Lives of the Lord Chief Justices II. 407, note.
74. No doubt, it is a fixed principle that all laws are ordained to the common good. But the idea of the common good grows in the course of history. See, for instance, what Chief Justice Vanderbilt has written about the "successive goals" of American jurisprudence from the pioneer days to the present. Law and Government in the Development of the American Way of Life 19 (Wisconsin, 1951). As St. Thomas has said, "It seems natural to
His decisions on quasi-contracts have an even closer bearing upon the law of nature. In *Moses v. Macferlan*,\(^7\) which was an action of *indebitatus assumpsit* to recover six pounds which the defendant got and kept from the plaintiff "iniquitously," Lord Mansfield laid down a great principle. "This kind of equitable action," he said, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty although it could not have been recovered from him by any course of law." In other words, such an action would not lie where "the defendant may retain it with a safe conscience, though by positive law he was barred from recovering." But it does lie for "money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. . . . *In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*"

Lord Mansfield was in the great tradition of the Common Law. He knew how to extend existing forms of action to new situations when "natural justice and equity" called for it. The Common Law is tough, but it is also elastic. This is the secret of its vitality and its capacity for growth. But in the nineteenth century, under the influence of Bentham and Austin, many English judges looked more and more to Parliament as the sole maker of the law, and, while they still considered themselves bound by the old precedents, they did not dare to create a new precedent. In the meantime, they no longer thought in terms of "the law of God, the law of nature, and the law of the land." For them there was no higher law than the positive law. They no longer saw eye to eye with Thomas More, Christopher St. Germain, Coke, Holt and Mansfield. Their mentality was akin to that of John Austin, to whom the idea of natural law and natural rights was a joke, and who could write: "A sacred or inalienable right is truly and indeed invaluable; for seeing that it means nothing, there is nothing with which it can be measured."\(^7\)

human reason to advance from the imperfect to the perfect." (Summa Theologica Ia Iae, Q. 97, a. 1, in corp). We may add that human reason advances in two ways: first, in recognizing new values emerging in the process of civilization; secondly, in inventing new means for implementing the values. But in no case must it act against the fundamental principles of the natural law.

75. 2 Burr. 1005 (K.B. 1760).
In the present century, positivism seems to have reached its climax with some of the English judges. In 1913, Lord Justice Hamilton, referring to Moses v. Macferlan, said, "Whatever may have been the case 146 years ago, we are not free . . . to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'" 77 In 1923, Lord Justice Scrutton declared that "the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought." 78

It is to be hoped that this extreme positivism is only a temporary setback to the Law of Nature and to the equitable spirit which is the very soul of the Common Law. But one can have a glimpse of the modern judicial temper in England from the thoughtful words of C. K. Allen: "Charles Dickens did not exaggerate the desolation which the cold hand of the old Court of Chancery could spread among those who came to it 'for the love of God and in the way of charity.' All that is gone, and we breathe again a healthy atmosphere; but even today it is not in a spirit of cynicism, but of cold truth, that a modern Chancery Judge is able to say, 'This Court is not a Court of conscience.' Our scepticism of 'conscience' is commensurate with our veneration for prescriptive formula; perhaps both need to find a more tolerant basis of coexistence." 79

A prophet is not without honor except in his own country. It cheers my heart to see that the spirit of Lord Mansfield has found a congenial home in this country. The seeds which he sowed in the field of quasi-contracts and unjust enrichment were transplanted in this new home of the Common Law, and have grown into a lovely tree called "Restitution," which may be taken as a symbol of the restoration of the Common Law to its original vigor. The American Law Institute has produced a restatement on Restitution. Professors Seavey and Scott of Harvard, in a joint article on the subject, after enumerating seven types of situations in which a constructive trust is imposed, come to this conclusion: "In all these situations there is one common element, namely, that a person who holds the title to property would be unjustly enriched at the expense of another if he were permitted to retain it. He is therefore chargeable as constructive trustee of the property." 79a The whole idea was beautifully expressed in the classic opinion of Judge Cardozo in Beatty v. Guggenheim Exploration Co. 80 where he said, "When property has been acquired in such circumstances that the holder of the legal title may not in good

78. Holt v. Markham, 1 K.B. 504, 513 (1923).
79a. 213 L.Q. Rev. 29, 45 (1938).
conscience retain the beneficial interest, equity converts him into a trustee.”

In his admirable article, “The Development of American Law and Its Deviation from the English Law,” 81 Dean Pound has remarked with a justifiable pride, “. . . the widest departure of American law from English law is in the constitutional law. But in this departure Americans have been thoroughly English. We have continued and developed the doctrine of the English common-law courts from the Middle Ages to the seventeenth century, where England, having in 1688 substituted parliamentary absolutism for the royal absolutism claimed by the Stuarts, departed from the doctrine of the common-law lawyers.” 82 This is quite true. But it must not be imagined that all modern judges in England have been alienated entirely from the common-law rhythm of the law of God, the law of Nature, and the law of the land. So far as the power of judicial review of Parliamentary Acts is concerned, they have officially repudiated the overriding authority of the natural law. But where the question of the validity of Parliamentary Act is not involved, the natural law, couched in such terms as “natural justice and equity,” “just and reasonable,” or in some other garbs, has assumed the humbler role of a supplementary source, for filling the gaps of the positive law. 83 For instance, in Cooper v. Wandsworth Board of Works 84 Justice Byles announced that “although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.” It seems that through the power of interpreting the court still exercises a de facto, if not de jure, control over the statutes. 86 In the recent case of Sir Lindsay Parkinson & Co. v. Commissioner of Works, 88 the Court of Appeal refused to interpret in a literal manner a provision which on its face allowed the defendants to call on the plaintiffs for an unlimited amount of work although the sum to be paid in remuneration was fixed at a precise and limited sum. Lord Justice Asquith said, “Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other.” 87

81. 67 L.Q. Rev. 49 (1951).
82. Id. at 59.
84. 14 C.B.N.S. 194 (1868).
86. 2 K.B. 632 (1949).
87. Id. at 662.
This reminds me of my former teacher Rudolf Stammler who maintained that no man should be subjected to the arbitrary will of another, and that a legal demand can only be maintained in a manner that the obligor may still remain his own neighbor. Now, Stammler was a Neo-Kantian, who sincerely thought his principles of justice to be universally valid; but he did not believe in the natural law. My present attitude toward Stammler's philosophy of law and justice, and toward the views of all other jurists who are idealistically but not ontologically minded, is very much the same as that of Gilson toward Kantism, when he said, "Perhaps Kant's ethics are but a Christian ethic cut loose from the Christian metaphysic that justifies it, the still imposing ruins of a temple with undermined foundations." It is in family law that the English judges still keep more or less intact the common-law tradition of the natural law. In a case involving the right of a parent to the custody of the child, Lord Justice Bowen actually used the term "natural law." He said, "Now the Court must never forget, and will never forget, first of all, the rights of family life, which are sacred." Then, speaking of the welfare of the child, he said, "It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice. . . ." In a more recent case of a similar nature, Lord Justice Slesser makes two citations from St. Thomas's *Summa Theologica*. One is IIa IIae Q. 10, a. 12, where St. Thomas says, "It is against natural justice if a child before coming to the use of reason were to be taken away from its parents' custody, or anything done to it against its parents' wish because the child is enfolded in the care of its parents, which is like a spiritual womb." The other is III Q. 68, a. 10, where St. Thomas says that if the children "have not yet the use of free-will, according to the natural law they are under the care of their parents as long as they cannot look after themselves." It is not only what the Common Law does, but what it does not do, that makes it the tender mother of the people, a mother who is wise enough to wink at the minor faults and frailties of her children, a mother who knows the importance of not being fussy. Lord Atkin's opinion in *Balfour*

91. Ibid.
92. There is a good biographical sketch of Sir Henry Slesser in Hoehn, Catholic Authors 537 (Newark, 1952).
v. Balfour,92 is a good illustration of this quality: "The common law does not regulate the form of agreements between spouses (living in amity). Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold Courts. . . . The parties themselves are advocates, judges, Courts, Sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted." Although natural law is not mentioned, yet I think it is in accordance with it, because it is precisely one of the conclusions of the natural law that human law should know its own limits. As The Book of Proverbs has it, "He that violently bloweth his nose, bringeth out blood." 94

Even outside the family law, the law of nature is not altogether banned. For instance, in 1768, in an appeal from a decision of Lord Mansfield, a unanimous judgment of the Court of Exchequer said: "The law of Nature is the law of God. . . . we mean to bottom this judgment upon the law of God, the principles of reason, morality, and the common law. . . ." 95 It is interesting to note how the Court bundles all the terms together, as though they meant the same thing. This seems to be characteristic of the mentality of the English judges.96 But their hearts are in the right place. They are practical, and they do not care much for names. After all, so they think,

"What's in a name? That which we call a rose
By any other name would smell as sweet." 97

It is in the same spirit that Justice Farwell declared in Bradford v. Ferrand,98 that "the conception of aequum et bonum and the rights flowing therefrom which are included in the ius naturale underlie a great part of English Common Law; although it is not usual to find 'the law of nature' or 'natural law' referred to in so many words in English cases."

The Common Law is too deeply rooted in Christianity to be cut loose

93. 2 K.B. 571, 579 (1919).
94. Proverbs, 30:33.
96. Laski has described the English mind as one which "is full of real insights, can never concentrate on any subject, never argue about it abstractly, is always driven to the use of a concrete illustration, is rarely logical and about eight times out of ten patently in the right." Howe, Holmes-Laski Letters 303 (Harvard, 1953). This is borne out by many of the typical sayings one comes across in English decisions and other writings. For instance, "Ratiocination is good, but common sense is necessary." (Evatt J. in R. v. Connare, 61 C.L.R. 620). Sir Thomas Browne: "States are not governed by ergotisms. Many have ruled well, who could not perhaps define a commonwealth. . . . When natural logic prevails not, artificial logic too often faileth." (Christian Morals, Works of Sir Thomas Browne, Bohn's ed., iii, 111).
97. This does not make Shakespeare a nominalist, for he is not dealing with the universals.
98. 2 Ch. D. 655, 662 (1902).
entirely from the natural-law tradition. It has a noble idea of man, of the human person. It sets the highest value on human life and human liberty, on the rational and social nature of man. It has not worked out an explicit scale of values; but if we look at it as a whole, we should see that it sets a much higher value on the interests of personality than on the interests of substance. For instance, in *Scaramanga v. Stamp*, a case in maritime law, Lord Justice Brett said that "it is contrary to public policy that a ship should not deviate in order to save life: for a vessel to go out of her course with that object is not a violation for the contract that she should proceed direct to the port for which she is bound." In his opinion, Chief Justice Cockburn said that if deviation of a ship were for the sole purpose of saving property, it would not be thus privileged but would entail all the usual consequences of deviation. Then he goes on to do some bit of sound philosophizing:

"The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity. . . . To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential consideration as to injurious consequences which may result to a ship or cargo from the needed aid. . . . Goods' owners must be taken . . . as acquiescing in the universal practice of the maritime world prompted as it is by the inherent instinct of human nature and founded on the common interest of all who are exposed to the perils of the sea." 100

Here we hear the very voice of the Common Law. It is a judgment just and reasonable and ordained to the common good. It is consonant with the scholastic philosophy of law.

"Laws," said St. Thomas, "are laid down for human acts dealing with singular and contingent matters which have infinite variations. To make a rule fit every case is impossible." 101 This has been borne out by the juridical experience of all countries, whether they depend mainly on legislation or on case law. As Allen has pointed out, "even at this day when so many permutations and combinations have been considered and recorded, cases 'of first impression' are by no means uncommon in the courts. In such cases, the judge would fail in his duty to do justice, if he were to dismiss the action on the ground that the law is silent and that the remedy lies with the legislature. Such an attitude is not in line with the common-law tradition. But to what must the judges turn for guidance?" Allen's answer is "To those principles of reason, morality, and social utility which are the fountain-head not only of English law but of all law. The judge is not embarrassed by the absence of 'authority' in clear cases of this

99. 5 C.P.D. 298 (1880). See an interesting article by Richard O'Sullivan on A Scale of Values in the Common Law, 1 Mod. L. Rev. 27 (1938).
100. Id. at 304.
kind, for no authority is needed for the affirmation of the very essence of law.” 102 From the modern cases that he cites to substantiate this statement, one may safely conclude that, although the law of nature is deprived of its metaphysical or ontological basis in England, so that it is no longer held to have any power of invalidating a positive law as in the days of Bracton and of Coke, yet it still holds the residuary power of complementing it. Driven out from the front door, it has returned by the back door. Even in this age of positivism, there can be no way of uprooting the law of Nature so long as man remains man. Practically in all modern codes, natural law is admitted as one of the sources of the law. I need only give one sample:

“In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.” 103

III

Now we shall consider how the Common Law in its new home has treated the Natural Law. It does not take deep study to discover that the Natural Law has received a much warmer reception in America than in any other country in the world. The truth is that the vitality of the natural-law tradition depends ultimately upon religion, and no one could ever take religion more seriously and earnestly than the Puritans and their compatriots who founded this Nation. To them “the laws of nature and of nature's God” were no fancy, nor even mere ideals; they were absolutely real, infinitely more real than any human laws. Nor were they indulging in rhetoric when they declared, “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, that among these are Life, Liberty and the pursuit of Happiness.” They meant exactly what they said. They were generous, sincere, freedom-loving and God-fearing people. They saw these truths so clearly and felt so deeply about them that they were more than willing to stake their lives upon them. Even in the late 1830s, Alexis de Tocqueville could truthfully testify:

“In the United States the sovereign authority is religious, and consequently hypocrisy must be common; but there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America; and there can be no greater proof of its utility, and of its conformity to human nature, than that its influence is most powerfully felt over the most enlightened and free nation of the earth.” 104

The formative days of American jurisprudence are reminiscent of the

104. De Tocqueville, Democracy in America 332 (1848).
great days of the Magna Carta, and also of the later struggles of Coke for
the supremacy of the Law of Nature over man-made laws. Coke's efforts
had been frustrated in England, but his influence on American lawyers of
the eighteenth century was immense. Before the Declaration of Inde-
pendence, all that the colonists wanted was to be the inheritors of the
Common Law, the Common Law as Coke and the older jurists understood
it. In his pamphlet on The Right of the Inhabitants of Maryland to the
Benefit of the English Laws, published in the 1760s, Daniel Dulaney,
Attorney-General of Maryland, argued for the right of the Americans to
the natural and legal liberties, privileges, and rights of Englishmen in the
realm. But what is of special bearing on our theme is the way Dulaney
conceived of the Common Law. According to him, the Common Law
"takes in the Law of Nature, the Law of Reason, and the revealed Law
of God." 105 These are equally binding, at all times, in all places, and to
all persons. Besides these universal principles, the Common Law also
embodies such usages and customs as have been experimentally found to
suit the order and engagements of society, and to contain nothing incon-
sistent with honesty, decency, and good manners. 106 These, he said, have
obtained the force of law by consent and long use. This conception of the
Common Law is in the grand tradition of Bracton and Coke.

The religious foundations of law are brought out even more clearly and
forcibly in the writings of the famous Boston lawyer, James Otis. I want
to quote a passage which seems to me to be the cornerstone of the ortho-
dox American philosophy of natural law.

"To say the parliament is absolute and arbitrary, is a contradiction. The parliament
cannot make 2 and 2, 5: Omnipotency cannot do it. The supreme power in a state, is
jus dicere only:—jus dare, strictly speaking, belongs alone to God. Parliaments are in
case to declare what is for the good of the whole; but it is not the declaration of
parliament that makes it so: There must be in every instance, a higher authority, viz.
GOD. Should an act of parliament be against any of His natural laws, which are
immutably true, their declaration would be contrary to eternal truth, equity and justice,
and consequently void: and so it would be adjudged by the parliament itself, when
convinced of their mistake." 107

When you hear people talk with such clear vision and true conviction,
you feel that the world is beginning again. Like Adam and Eve, they were
so close to God. So was Jefferson who said that "the God who gave us
life gave us liberty at the same time." 108 So was John Adams when he
wrote: "I would ask, by what law the parliament has authority over
America? By the law of God, in the Old and New Testament, it has none;

105. See Wright, American Interpretations of Natural Law 59 (Harvard, 1931).
106. Ibid.
108. 1 Writings 447 (Ford. ed.).
by the common law of England, it has none. . . .” 109 So was Alexander Hamilton, who wrote: “The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity Itself, and can never be erased or obscured by mortal power.” 110

It must be pointed out that, although these great men drew their inspiration mainly from the Bible and the Common Law, they also absorbed to a degree some rationalistic ideas from such authors as John Locke, Grotius, Pufendorf, Rousseau, Montesquieu, and Burlamaqui. They were not too well acquainted with the scholastic tradition. Due, no doubt, to their historical situation, they were inclined to think more of the natural liberties and rights of man than of the Natural Law and natural duties. They talked more about the individual rights than about the common good. Perhaps, in their time, the very establishment and maintenance of individual freedom constituted the chief part of the common good. As Blackstone had put it, “the public good is in nothing more essentially interested than in the protection of every individual’s private rights.” 111

Nothing shows the soundness of the Founding Fathers more clearly than in their use of the phrase “life, liberty and the pursuit of happiness.” In spite of the influence of John Locke on them, they did not adopt the Lockeian rhythm of “lives, liberties and estates.” As Bishop Sheen has pointed out in his Philosophy of Religion, it was Jefferson who caused the words “pursuit of happiness” to be substituted for the word “property” emphasized by Samuel Adams, who was a follower of Locke. Property may be one element of happiness, but it is not all.

When some of the later judges came to identify “happiness” with “property,” they actually departed from the spirit of an overwhelming majority of the early Americans. Justice Brewer was right in maintaining that the Constitution should be read in the light of the Declaration of Independence, 112 but I doubt very much whether his reading of the Declaration was right, when he spoke of the inalienable rights in terms of “the sacredness of life, of liberty, and of property.” 113

Property is a natural right, but there is a hierarchy of values even among natural rights. Important as it is, it does not belong to the same

109. See Wright, op. cit. supra note 105, at 88.
110. Id. at 90-91.
112. Justice Brewer rightly asserted that 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.” Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 160 (1897).
113. See Charles Grove Haine’s criticism of Brewer’s extreme individualism in his article The History of the Due Process of Law After the Civil War, included in 1 Selected Essays on Constitutional Law 268, 295-6 (Foundation Press, 1938).
level as life and liberty. Life and liberty are ends in themselves, while property is only an instrumental value. I think many of the erroneous decisions rendered by the Supreme Court of United States in the last quarter of the nineteenth century and the first decades of the present century can be traced to an over-emphasis on the rights of property at the expense of the personal rights of men and the legitimate demands of the common good. Many of such decisions have been overruled by the same Court.

Nothing is so fascinating as to follow the fortunes of the natural-law philosophy in this country. Its chief glory lies in its confirmation of the idea that there is a Higher Law than positive laws. In its early days, the American philosophy of the Natural Law did not separate itself from religion, and became the rock on which a true democracy was built. The genuine tradition of the Natural Law is essentially theistic and democratic. As Cardinal Spellman has said, “The role of religion in a democracy is crystal clear from a consideration of the basic meaning of Democracy. The prime function of Democracy, which distinguishes it from and elevates it above every other form of government, is its regard and concern for the dignity and the rights of the individual, inalienable rights derived from the natural law. . . . This great natural law, antecedent to all human enactment and contrivance, is the only foundation on which the structure of Democracy can rest secure. For not by mutual consent or by covenant, not by warrant or state grant are these rights established. They are the gifts of God and the bestowal of God.” So long as we remember this, there is no danger of abusing the concept of Natural Law for justifying a materialistic individualism; because we know that God who gave us liberty gave us also reason and a supernatural destiny. In other words, we receive our natural rights together with our natural duties, such as the love of God and of our neighbor.

But the fact is that many judges of the last century imbibed Natural Law through the speculative and rationalistic philosophers of the eighteenth century who treated the natural law as if it were geometry. If the English judges of the last century were too timid to assert the supremacy

114. According to St. Thomas, private property is a natural right, but, unlike the natural rights of life, liberty and family integrity, which are derived from the very nature of things, ownership is justified by “a judgment of consequences,” and requires adjustment by the human reason. “Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason.” Summa Theologica IIIa Hae, Q. 66, A.2, ad 1.
117. Christ Himself has taught us that upon these two duties hang all the laws. Matt., 22:34-39; Mark, 12:28-34.
and absoluteness of even the primary precepts of the natural law, the American judges were too bold in exalting matters of opinion to the pedestal of the Natural Law and even in erecting their prejudices into immutable precepts. Thus, they fell into a barren conceptualism and a mechanical jurisprudence.

None of the judges of the last century was, to my knowledge, acquainted with the Thomistic distinction between speculative reason and practical reason. According to St. Thomas, physical sciences belong to speculative reason, while law belongs to practical reason. Speculative reason deals with necessary things, which cannot be otherwise than they are, and therefore there is necessity alike in its universal principles and in its particular conclusions. Practical reason, on the other hand, deals with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the less necessity we find. Human laws cannot, in the nature of things, have the unerring quality of scientifically demonstrated conclusions. Not every rule need possess final infallibility and certainty; as much as is possible in its class is enough. For instance, it is a precept of natural law that we should do justice, and that justice consists in giving each one his due. This is an immutable and necessary principle. But, as St. Thomas says, "The obligation of observing justice is indeed perpetual. But the determination of those things that are just, according to human or Divine institution, must needs be different, according to the different states of mankind." It must also be remembered that law is essentially an ordinance of reason directed to the common good. It is a teleological, not a mechanical science. It must be rational, but not rationalistic.

The Rationalists, being cut loose from the sound tradition of Scholasticism, vied with each other in weaving out from their own bellies complete systems of natural law from the general principles to the minutest details. They relied too much on the human reason. Paradoxical as it may seem, it was the juridical rationalism of the eighteenth century that gave birth to the juridical positivism of the nineteenth. The former believed in the ability of human reason to work out a complete code. The legislators in some European countries took the hint, and attempted to carry the teach-

119. Id. at Q. 91, A.3 ad 3.
120. Id. at Q. 104, A.3 ad 1.
121. The best characterization of the rationalistic attitude is found in the words of Leo XIII: "The fundamental doctrine of Rationalism is the supremacy of the human reason, which, refusing due submission to the divine and eternal reason, proclaims its own independence, and constitutes itself the supreme principle and source and judge of truth." The Great Encyclical Letters of Pope Leo XIII 145 (Benziger, 1903).
ing into practice. They were convinced that "a body of enacted rules might be made so complete and so perfect that the judge would have only to select the one made in advance for the case in hand. . . ." 122 The code of Frederick the Great was drawn up on this theory. The intention was to provide for all contingencies with such careful minuteness that no possible doubt could arise in the future. As Schuster says:

"This stereotyping of the law was in accordance with the doctrine of the law of nature according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could therefore be laid down once for all, so as to be available for any possible combination of circumstances." 123

In America, this rationalistic conception exercised a deep influence. Although there was no Code, the judges conceived of the Common Law as "a brooding omnipresence in the sky," rather than as a tree that has to grow from season to season. Every case, however novel and complicated, was, in theory, covered by the Common Law, and therefore there could only be one logical decision to each case. 124 It was against this kind of mentality that Justice Holmes revolted. He said, "I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement inevitably would come. . . . But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds. . . ." 125 In this he was right, because he was speaking of the decision of concrete cases, which depend upon human determinations of the natural law, and these, according to St. Thomas, can seldom, if ever, claim absolute certainty. But when Holmes made a wholesale denial of the Natural Law, he fell into Charybdis in shunning Scylla. It is a pity that he never studied St. Thomas. If he had, he probably would not have thrown out the baby with the bath water.

But I must point out an ironic situation in modern American jurisprudence. As one studies the cases on social legislation, one will find that as a general rule the judges who used the name of natural law have ren-

123. Ibid.
124. The historical school in England and America regarded the Common Law as a self-sufficient organism. For them the early rudimentary origins of the law "contain, potentially, all the forms in which the law has subsequently exhibited itself." This is the idea of Sir Henry Maine. See Ancient Law, Chapter 1 (1930). In America, James C. Carter and many judges were influenced by this idea. To them, judges never make law but find it. They declare what is already there, at least, potentially. For a fair estimate of Carter see Aronson, The Juridical Evolutionism of James C. Carter, 10 U. of Toronto L.J. 1 (1953).
dered wrong decisions, while the judges who were sceptical of the natural law have reached results which coincide with conclusions of the two great Encyclicals: *Rerum Novarum* and *Quadragesimo Anno*. What could be the reason of this strange phenomenon? The reason seems manifold. In the first place, the economic doctrine of *laissez-faire* while it might have served the purpose and needs of a particular age and therefore was historically justifiable to a certain extent, can never be regarded as an immutable precept of the Natural Law. It certainly helped to develop the marvelous industrial civilization of America, but in the meantime industrial civilization has brought with it new problems unknown to the days of handicrafts. New situations require new measures of law to regulate them: but most of the judges knew only the old law and old legal theories, which they had identified with the Natural Law. In the second place, their conception of justice was inadequate. They knew only one form of justice, namely, commutative justice: they did not seem to know distributive justice. Usually, only commutative justice is involved in the decision of cases. It is not for the judge to go out of his way to administer distributive justice, which is principally the job of the legislator. But the fault of the conservative judges in those days of transition lay in their unwarranted and arbitrary interference with the legislators simply because that form of justice was new to them.

Let us take one instance. In *Ives v. South Buffalo R. R.*, the Court invalidated the New York Workmen’s Compensation Act of 1910. Judge Werner said, “One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another.” Judge Cullen added, “It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault.”

126. Some of the Catholic judges do not seem to have so much as peeped into these immortal documents, which embody the social teachings of the Church. On the other hand, the sociologically-minded judges have arrived at practically identical conclusions independently, thinking that they are making new contributions. But only a true Christian philosophy of law can steer safely between the Scylla of individualism and the Charybdis of socialism. On this point, read Gilby, *Between Community and Society* (Longman’s, 1953); O’Connor, *The Supreme Court and Labor* (Washington, 1932); Masse, S.J., *Economic Liberalism and Free Enterprise* (America Press, 1944).


128. 201 N.Y. 271, 293, 318, 94 N.E. 431, 439, 449 (1911).
Justice Pitney takes a much sounder view in a similar case. He views industry as a cooperative enterprise between employer and employee.

"Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support. . . . This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. . . . It is plain that, on grounds of natural justice, it is not unreasonable for the state . . . to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon the injured employee or his dependents."

Finally, he points out that liability without fault is not a novelty in the Common Law. That there should be no liability without fault is a sound general rule. But as St. Thomas says, Laws are laid down for human acts dealing with singular and contingent matters which can have infinite variations. To make a rule to fit every case is impossible. Furthermore, as Justice Brandeis says, some laws attempt to enforce individual justice, while other laws attempt to do social justice. They have different fields of application.

Perhaps, the most important and difficult problem of jurisprudence is how to strike the golden mean between individual interests and social interests, how to transcend both individualism and collectivism. It is most significant that Dean Pound who was among the first to protest against the abuses of the dogma of liberty of contract, should have recently uttered a warning against what Josserand calls "contractual dirigism." "May we not have faith that [the common-law] tradition will have continued strength to resist the effects of economic unification of the world and losing sight of the individual in the general bigness of things, and the tendency of the service State to become omnicompetent and totalitarian, and so to secure to the English-speaking world the liberty which it has

always claimed as its birthright." But in order to keep the Common-
Law tradition, we have, as a first step, to pass through a spiritual renais-
sance and go back to the great tradition of Coke, of St. Thomas More, and of Bracton. Finally, we must have a clear grasp of the Scholastic idea of
the common good, which lay at the basis of the Common Law from its
very beginning.

The common good does not mean merely the collective good of the
State. It includes that, but above all it embraces all the personal goods
common to men as men. In order to minister to these goods, the law must
recognize and protect the fundamental rights of the person, which Pius
XII has enumerated as follows:

"... the right to maintain and develop physical, intellectual, moral life, and in
particular the right to a religious training and education; the right to worship God,
both in private and public, including the right to engage in religious works of charity;
the right, in principle, to marriage and to the attainment of the purpose of marriage,
the right to wedded society and home life; the right to work as an indispensable means
for the maintenance of family life; the right to the free choice of a state of life, and
therefore of the priestly and religious state; the right to the use of material goods, subject
to its duties and social limitations."

It will be seen that this list of fundamental rights of man is comprehen-
sive enough to cover the three main heads of inalienable rights—life,
liberty and the pursuit of happiness.

It is worthy of note that in connection with "the right to the use of
material goods," the Holy Father hastens to add the words "subject to its
duties and social limitations." Material goods have never been regarded
by the Church or by any true Christian as ends in themselves, but only
a means to the higher ends. It is with regard to material goods that St.
Thomas said that "The common good takes precedence over the private
good, if it be of the same genus; but it may be that the private good is
better generically." On the other hand, strictly personal rights, such
as the right to worship God, should never be interfered with by the State
in the name of the common good, for the simple reason that it belongs to
a higher order than the temporal interests with which the State has to do.

The Holy Father has also said, "The original and essential purpose of
social life is to preserve, develop, and perfect the human person."

134. Id. at 66. See also Constable, What Does Natural Law Jurisprudence Offer? 4
135. See Maritain, The Person and the Common Good (Scribners, 1947).
136. The Rights of Man, Christmas Broadcast, 1942, transl. by Canon G. D. Smith,
included in Selected Letters and Addresses of Pius XII 290 (Catholic Truth Society, London,
1949).
137. Summa Theologica IIa, IIae, Q. 152, A.4 ad 3.
Religion and ethics contribute directly to the realization of this purpose. Human law works toward this end in a less direct way; but, in the words of the Holy Father, it can and should effectively contribute toward “the permanent realization of the common good” by providing for “... those external conditions which are needful to citizens as a whole for the development of their qualities and the fulfilment of their duties in every sphere of life, material, intellectual, and religious.”

Law is made for man, not man for law. So, ultimately the end of man is the end of law. Now what is the end of man? As St. Thomas views it, it is threefold: the practice of virtues, friendship between man and man, and the enjoyment of God. “The end of human life and society is God.”

The contribution of law toward this end is twofold. Positively, it is most effective in the procuring of those external conditions as are conducive to the end. Negatively, it must leave man free to pursue the threefold end, which constitutes his proper happiness.

Bishop John J. Wright describes the common good as “the mutual bond of all who love the good, the true and the beautiful; who seek good things, not evil; who seek the private good of persons and the collective good of the State, but the good of both in and under and through the Supreme Good which is God.” This holds good both for ethics and for jurisprudence. Justice Roger J. Kiley, speaking from the point of view of human law, has said, “Temporal happiness in a well governed community is not man’s final end. Human Law does not presume to take man to his final end. It aims at a subordinate end, a peaceful and orderly community in which men by living virtuously may be happy and thus strive for perfect happiness with God in a life hereafter.”

All human laws must be ordained to the love of God and love of our neighbor. Judging by this standard, I honestly do not find much to criticize in the present conditions of the American Common Law. Even the advent of the “service State” does not seem to interfere with our freedom arbitrarily, provided that both the government and the people remember that the servant must never turn into a master. The greatest problem in the America of today is not that we are not free enough, but how to fill that freedom with spiritual and cultural values and thus turn it into the liberty of the children of God. Man is made in the image of God, and we lawyers have a special way of resembling Him. To resemble the Father, we should cultivate Justice; to resemble the Son, we should follow the

139. Id. at 282.
140. Summa Theologica Ia, Iae, Q. 100, A. 6, in corp.
Law of Nature; and to resemble the Holy Ghost, we should practise Equity.\(^{143}\)

143. In a paper on "Law and the Spirit," Richard Kehoe, O.P., has said, "What should urge a Catholic, then, to urge the doctrine of Natural Law should not be any notion that on its basis an order of life can be founded in which believers and non-believers can live happily together, secluded from Spiritual and Supernatural issues, but the conception of Nature, with all its laws, as being the sphere within which the Supernatural must work, as providing the Body which the Spirit must inform." O'Sullivan, Under God and the Law 94-95 (Newman Press, 1949). Any Christian who talks about the Natural Law apart from Christianity is in danger of falling into the pit of rationalism. Man's natural reason suffices to know the Natural Law, but it takes grace to make it effective in the human world. As the great historian Lord Acton has observed, "It was left for Christianity . . . to animate the old truths. . . . The only thing Socrates could do in the way of a protest against tyranny was to die for his convictions. The Stoics could only advise the wise man to hold aloof from politics and keep faith with the unwritten law in his heart. But when Christ said, 'Render unto Caesar the things that are Caesar's, and unto God the things that are God's,' he gave to the State a legitimacy it had never before enjoyed, and set bounds to it that it had never yet acknowledged. And He not only delivered the precept but also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church." Quoted in Fremantle, Christian Conversation: Catholic Thought for Every Day in the Year (Stephen Daye Press, 1953).