The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System

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Mr. Chairman, and Fellow Workers in the field of Catholic Legal Education: I am very grateful for this opportunity to discuss a matter in which I have long been interested, for I believe it is of the utmost importance for the cause of Catholic legal education. I refer to the necessity of producing a large and ever increasing literature which will show the great extent to which the Anglo-American Common law has already implemented the natural law, and why it should continue to do so in the future. When this literature becomes available, it is bound to exert a profoundly beneficial influence upon the direction of the legal order in our society, and help to guarantee the future security of fundamental human rights.

Two aspects of the problem of producing this literature, namely, the men and the method, may be considered, apart from the aspect of corporate scholarship. I am concerned with a general demonstration of the affirmative and constructive method, which should be followed. It should be largely historical, comparative and inductive, to be most effective against the methods of those scholars who have sought to demolish confidence in the practical efficacy of a philosophy of natural law.

Contributions to this literature will be made by jurists who are familiar with both law and scholastic philosophy. Certain Catholic legal educators, particularly Father Lucey, have articulated the need of persuading a few, select scholars, especially trained in this philosophy and in the moral sciences, therefore, to undertake the study of law. These scholars would become members of the faculties of Catholic Law Schools and advise others on the Faculty, how the philosophy of natural law might be best introduced into the various courses. The advice, so given, would ultimately be reduced to the form of books and articles available for all.

*An address delivered by Dr. Brendan F. Brown, Dean of the School of Law of The Catholic University of America, before the Annual Conference of Jesuit Law Schools of the United States, held December 29, 1953, on the Campus of Loyola University, Chicago, Illinois. Professor James A. Doyle, Dean of the School of Law of The Creighton University, and President of the Conference for 1953, was Chairman.
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This plan of obtaining the men might be reversed by inducing certain able and interested lawyers to study scholastic philosophy.

The possibilities of the hitherto emphasized abstract and destructive approach, which attacked the limitations and excesses of legal philosophies, on the moral level, opposed to the scholastic notion of natural law, have been temporarily exhausted. The negative method is, of course, useful, but it must now be supplemented by a more legalistic consideration of the issues. It is as important to show what the norms of the natural law offer and have offered, in the field of jurisprudence, or applied legal philosophy, for the establishment of traditional ways of solving moral conflicts, as it is to stress the absurdities of the philosophical premises of our adversaries.

The chief problem of every legal order, regardless of the degree of maturity and irrespective of the character of the surrounding political and social organizations, is to ascertain, from a priori assumptions, the remedies which will be allowed when specific fact patterns arise. These assumptions may be a matter of political or military compulsion, to be followed, even though the personnel of that order disagrees with their wisdom or justice. Again these assumptions may be the result of a free and deliberate choice by those entrusted with the operation of that order, or of a subconscious motivation. But in any event, the measure of these assumptions must be physical or moral, and the legal order is under the necessity of making the one or the other principally controlling.

According to objective natural law, the persons included in a particular relationship must be considered as reasoning and free-willing entities, who, because of their very nature and of a divine purpose, are subject to the authority of a higher law, which they perceive, at least in general. A juridical doctrine, such as that of consideration in contracts, or of liability without fault in torts, is just, whether viewed from the position of the individual or of society, only insofar as it implements the logical derivatives of the natural law. A doctrine may ignore these derivatives, or it may give the greatest possible expression to them, consistent with the limits of effective legal action, or it may undergo historical evolution from one extreme to the other.

The Anglo-American Common law doctrine of consideration did conform to a philosophy of natural law, but only imperfectly and haltingly. The blight which had fallen on the Common law in virtue of that strange phenomenon of the fourteenth century, making the writ the starting point by severing it from the moral order, and enshrining the mechanical and analytical criterion of stare decisis, affected all its doctrines, including that of consideration. Yet, in the first decade of the seventeenth
century, the Common law took the revolutionary step in *Slade's Case,*\(^2\) of irrevocably treating the individuals involved in a transaction of sale as human beings with the capacity to will freely, and with the obligation to exercise their will so as to assume responsibility. Hence *Slade's Case* may be evaluated as a long delayed response to that dictate of the natural law which prescribes that the will-factor must be related to every just juridical arrangement. The volitional element was thus given recognition by the action of *Indebitatus Assumpsit.*

But evidence of the reason-factor, also required by the natural law, was limited by the Common law to proof of an exchange of something for something, in a materialistic sense, (i.e.) consideration. It was considered *reasonable* by the Common law to enforce only those agreements which were based upon consideration. This identification of reasonableness with consideration was due to raising the specific fact situation in *Slade's Case* to the level of an exclusive universal. But it was only accidental that this case involved a sale, and that it was the action of *Indebitatus Assumpsit,* which was broadened by the inclusion of the consensual element. Legal elements derived from the law of procedure, debt and sales obscured the necessary factor of reason in the Common law doctrine of consideration. But that doctrine was an imperfect attempt to follow a requirement of the natural law, although the Common law was not concerned with moral obligation as such.

Long before *Slade's Case,* however, while the Common law was still struggling to evolve a law of contracts from the delictual writs and actions, the ecclesiastical Chancellors had formulated a law of contracts based on the idea of *causa,* as elaborated by the Canon law. This idea, which the Roman law used to express the element of reason in willed obligations, had made possible the specific performance of certain types of agreements in Chancery. The moral test of enforcement of certain kinds of agreements was more reasonable than the principally mechanical criterion of consideration. In the beginning, Chancery followed the conception of Canonical *causa,* which was the reason which the law considered as sufficient for the creation of a legally enforceable agreement. But ultimately, the structure of the doctrine of consideration in Chancery became similar to that of the Common law, with lessening emphasis upon the philosophy of natural law. That philosophy was later vindicated, however, even though under the disguise of fiction and doubtful logic, by the numerous modifications of the Common law doctrine of consideration, and by arbitrarily expanding the sphere of contract law so as to make it include such equitable concepts as those of unilateral contract, promissory estoppel, and injurious reliance.

\(^2\)4 Coke 92b, 76 Eng. Rep. 1074 (1602).
The law of torts is one of the most normative in the curriculum, highly dependent upon the natural law. But even the greatest authorities on tort law have tended to camouflage its moral content by the use of subtle terms and definitions in texts and case-books, indoctrinating students with a preference for the amoral approach. Thus they have emphasized the word “interests”, in the presentation of the law of torts, as contrasted with “rights” and “equities”. The word “interests”, which the Sociological and Realist Schools of Jurisprudence introduced to supersede “rights” and “equities” as descriptive of the most fundamental substratum with which the legal order is concerned, stresses the psychological and materialistic claims and appetites of man regarded as a non-moral entity.

By their definition of a tort, even such eminent authorities as the late Dean Wigmore and Professor Kocourek have contributed willingly or unwillingly to the obscurity of the ethical premise upon which the law of torts rests. Thus Dean Wigmore has defined a tort as the violation of an irrecusable nexus, (i.e.) a relationship which may not be denied or rejected. But he does not disclose the reason, which causes the law to impose an inescapable duty. Nor does Professor Kocourek, who has described a tort in terms of physical science, as the breach of an unpolarized private duty, explain the cause of this obligation. These authorities do not correlate their definitions with the historical fact that the English Common law began, and continued for centuries, to enforce duties in the field of delict because they resulted from an objective natural law.

The development of the law of torts from the actions of trespass and trespass on the case assumes jurisprudential significance, when these actions are appraised as attempts to carry into effect the natural law. Originally, these two actions were merely crude and perhaps subconscious efforts to do this, doctrinally stressing the physical differences of certain fact-situations, (i.e.) whether the injury was direct or indirect. Although considerable time was required before it was recognized that the direct injury remedied by the action of trespass constituted a distinct category because of the will-factor involved, and that the indirect injury covered by the action of trespass on the case was actionable because it was the result of negligence, or conduct contrary to right reason, however unintentional, nevertheless, these two actions sought to redress moral wrongs under the natural law. The law of torts began to assume its modern appearance, however, only after the specific sources of human culpability, according to that law, namely will and reason, began to be related to trespass and trespass on the case.

The doctrine of “liability without fault” responds to a natural law critique in the determination of its proper limits. In the stage of all primitive law, including the English, there is legal liability without moral fault, because of the predominantly materialistic, impersonal and objective
attitude of the positive law toward the damage or loss in question, which is connected only with the proximate cause. Slowly but surely, as the social need of integrating law and morals is realized and satisfied, by the infiltration of the persuasive norms of the natural law into the thought processes of judges and legislators, legal liability becomes identified more and more with the moral fault of the individual. This takes place in an era which is primarily concerned with private, as distinguished from public and social, rights and duties and continues until the sociological period is reached.

Some authorities on the law of torts contend that there was a return to the old formula of liability without fault, in this sociological period, as exemplified by the case of *Rylands v. Fletcher,* and the enactment of such statutes as the Workmen's Compensation Acts. The impression may be left with the student that the law of torts lost its moral and natural law content when this occurred, if the change is presented as an adoption of the principle of a balancing of the social interest against that of the individual, and of the intrinsic absolute value of the social solidarity, apart from the members of society, as advocated by certain sociological jurists. It is important that this change be interpreted as an extension of the concept of justice from commutative to social, rather than as a shift from the doctrine of liability only if there is moral fault to that of liability without fault. Justification of the change must be sought in the balancing of equities or moral interests, and in the support of the social claim, given by the natural law. Thus in the instance of the Workmen's Compensation Acts, it is a question of social justice, not simply whether the rich employer should be compelled to pay, since he is the one best able to do so.

The standard of the reasonable man, which has enabled judges and law-makers to introduce into the law of torts numerous ethical principles, supplied a criterion which was objective, and in ultimate analysis, absolute and immutable. The reasonable man, so indispensable for the creation of tort law, affords an objective measure of moral and legal conduct, unlike the subjective tests, furnished by the individual conscience, which were advanced by certain post-Reformational theories of natural law. In this respect, the criterion of the reasonable man conforms to the idea of natural law, as understood by Stoic and Scholastic. Conformity may also be found in the absolute and immutable character of the test of the reasonable man, which is derived from intrinsic reasonableness, not from human will, or economic utility.

The development of tort law may be traced roughly in terms of the expanding application of the natural law which attaches moral culpability to unjustified interference with the morally free will, and to behavior

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8 L. R. 3 H. L. 330 (1868).
contrary to that of a reasonable man. The emergence of such torts as duress, deceit and fraud evidenced the efforts of tort law to make actionable the overcoming of another's morally free will by force, or the hampering of its operation by the suppression or twisting of essential facts. As soon as the ethical consequences of motive were accepted by the legal order, a new series of torts arose, grounded on the mental factor of purpose, such as the tort of malicious prosecution.

The doctrine of negligence was modified by that of contributory negligence. The basis of this limiting doctrine was the survival of a mechanical test of legal liability, which arose in the primitive era of the law of torts, namely, proximate cause. This survival was advantageous, from the evidentiary point of view, for trial by jury. But it had the unavoidable effect of affording legal immunity, in certain situations, to unreasonable or morally culpable conduct, otherwise regarded as actionable.

The unique and hybrid juridical institution of contributory negligence invites contrast with the doctrine of comparative negligence, prevailing in the law of a few of the States of the Union, and in legal systems, derived from the Roman. This contrast is manifest with regard to the difference of method which the respective doctrines follow in assessing legal liability, when both plaintiff and defendant are negligent. But it is not so clear as to which is more expressive of the objectives of the natural law. It would appear, however, that the doctrine of comparative negligence was the more moral of the two doctrines, and hence more sensitive to the demands of the natural law. This is not to say, however, that the doctrine of contributory negligence is not an expression of the natural law, but only that it is a less perfect expression.

The juster and more socially useful and beneficial positive law, whether it related to the assumed obligation of contract, or to the imposed duty of tort, was made by the Chancellors, not by the Common law judges. This was so because moralists and legal philosophers were, by training and temperament, more skillful in choosing legal forms for channeling the natural law into the arena of judicial decision, than analytical jurists, whose vision did not extend beyond the positive law. It is a truism which not even the most anti-natural law type of jurist can deny, in the face of historical evidence, that the Anglo-American law of torts would have been inadequate for the solution of complex social problems, had not the Court of Chancery applied norms more just than those of the Common law. It is well known that Chancery asserted its jurisdiction in cases of moral wrongdoing, which were not regarded as tortious by the Common law judges. It emphasized the ethical approach, acting in personam by injunction in the field of torts, as well as in that of contracts. It cognized damage over and above mere monetary loss.
The principles of property law, embodied in the decisions of the Chancellors, were logical extensions of the philosophy of St. Thomas Aquinas, as expressed in his *Summa Theologica*, wherein he upheld the right of private property and its just exercise on both utilitarian and idealistic grounds. Chancery supplemented the Common law of real property with numerous devices to provide greater recognition of the inalienable right of each individual in society to acquire, retain, and transfer a reasonable amount of property. Thus it allowed married women certain property rights in land, denied by the Common law at one time, because of the fiction of the unity of marriage and the amoral absorption of the personality of the wife into that unity, represented only by the husband. Sensitive to the natural law, Chancery corrected this situation by recognizing the ownership of land by married women when made equitable by the vesting of the legal estate in trustees.

The device of trustees to preserve contingent remainders was allowed by the Chancellors to mitigate some of the rigorous consequences of the idea of seisin, which played a commanding role in the English land law. A contingent remainder lapsed unless the condition, upon which it depended, was met before or at the immediate termination of the life estate, simply because the Common law would not permit any abeyance of the seisin. It would not tolerate such abeyance, despite injustice to the remainderman, for it was feudally important to know who had the seisin, or possession of an estate of freehold, since it was he who owed the duty of rendering the appropriate services to the over-lord.

The Common law always presumed the existence of the right of private property in land, however much it restricted that right to certain classes of persons, and interfered with its reasonable exercise by arbitrary and artificial notions. But the natural law origin of that right was not at first the concern of the Common law, tending to follow the social pattern of the age, which made the ownership of land a reward for the performance of military services. In keeping with this social pattern, was the dominance of the concept of physical power, or possession, as the factual, as well as the legal, indicia of ownership of real property. But with almost the same inexorableness as Hegel's idea, realizing itself in the formation of positive law, the concept of scholastic natural law worked changes in the English land law, which bear striking resemblances to those wrought by the Stoic version of natural law in the *Jus Civile*, coinciding with the period of the strict Roman law. Unlike the Hegelian hypothesis, however, the inevitability of the transforming authority of the natural law was not the product of some mystical force, which overpowered the human will. It was rather the result of the competence of the human intellect to know the existence of a directive and regulatory program, consonant with the nature of man, and the purpose of the Force which created him.
It was the effect of the pressure of reason inducing the human will, at least in the long run, to act in accordance with that program.

The recognition of the individual's right to personal property, by the English Common law, was delayed by an over-emphasis upon real property, resulting from feudal notions. But eventually a law of personal property sprang up, inspired by the Roman law, devoid of those feudal, political and economic objectives, which had tended to obfuscate the natural law principle that the right of private property inhered in the human personality, and should be coextensive with all the members of every community with equality of enforcement. Bracton, the noted ecclesiastical jurist of the thirteenth century, has been credited with the authorship of a considerable part of the law of personal property in England, inserting relevant materials, borrowed from the Roman law, into the interstices and lacunae of the English law, which his researches into that law disclosed.

The numerous restrictions which have been placed by law upon the exercise of the right of private property, beginning in the United States, the latter part of the nineteenth century, are compatible with the premise that scholastic philosophy does not ordain the preservation of any particular property status quo. These restrictions, exemplified by the growth of administrative law and the establishment of the great federal commissions, as well as by the limitations placed upon the individual in the matter of acquiring, using and disposing of property, may be scholastically interpreted as efforts by the legal order to compel the property owner to fulfill his moral obligations towards others in the societal relationship. These obligations are rooted in the natural law, which has always been alert to the sociological implications of private property. Any other justification of the socialization of private property, which has taken place within recent years, may conceivably open the door to theories, counseling the serious impairment, or even the destruction, of the right to such property.

A philosophy of natural law, through the media of Admiralty, Canon and Roman laws, produced the essential characteristics of the law of agency in England. Mariners, citizens of the world, and hence free to follow the dictates of natural law in the selection of juridical institutions, wrote the Rhodian Sea Law, the genesis of the law of Admiralty. The Rhodian Sea Law contained the rudiments of a law of agency, pertaining to both contracts and torts. This law was incorporated into the Digest, constituting part of the Corpus Juris Civilis of Justinian, the great legal monument of the sixth century, A.D. The example of the Canon law, which had borrowed the Roman concept of agency, and applied it to the conduct of the affairs of religious corporations, such as monasteries and convents, supplied experience for the construction of an English law of
agency. It is true, of course, that, in England, the idea of representation was fitted into the feudal survival of status, found first in the relation of master and slave, and thereafter, in that of lord and vassal, lord and serf, and lastly, master and servant.

The Anglo-American criminal law rests upon an assumed moral order which may be historically demonstrated to be scholastic. It emerged as a distinct category of delict with the gradual recognition of offenses against the social interest. This moral order was, at first, clothed with customary law, later with judicial positive law, and finally with legislation, which defined various classes of crime and prescribed specific punishments. In its evolutionary quest for progressively greater effectuation of this moral order, the lode star of the English criminal law was social justice, transcending the concept of merely commutative justice, referable to the commission of certain offenses, which grossly exceeded the injustice of those wrongs, now known as civil, and hence called for social punishment.

But punishment does not make crime, nor does the extent of the punishment determine the gravity of the crime, although that may be the impression left with students of criminal law by the common definition of a felony, as an offense punishable by death or by imprisonment in the penitentiary, and of a misdemeanor as an act, calling for lesser punishment. It is the duty of the scholastic teacher to insist that these definitions reflect the position of the analytical, not the natural law, School of Jurisprudence, and that they conceal the true essence of crime.

Punishment is rather the consequence of crime, inflicted by the State for a variety of reasons. Support for the deterrent, preventive, and vindicative theories of punishment, advanced by legal philosophers and criminologists, may be discovered in the logical implications of the natural law. In some respects the theory of such criminologists as Beccaria, who taught that the punishment should fit the criminal, not the crime, resembles the medicinal function of punishment, expressed in the phrase, "poena medicinalis," and advocated by the proponents of scholastic natural law. But these proponents do not favor the relaxation or abolition of criminal punishment on the theory that criminals are principally the victims of birth and environment, which render the culprit morally and legally unaccountable. The punishment inflicted upon the criminal, however, should be regarded partly in the nature of a penance, intended to strengthen his character by bringing home the gravity of the offense, and affording him a chance to reform, consistent with the right and duty of society to protect itself.

Although physical force does not determine the justice of the principles upon which the penal order rests, nevertheless, it is essential for the administration of criminal justice. The natural law is not physically self-
executing. Sometimes it must be enforced by superior might against those who are ready to resort to physical force to subvert its norms, or to substitute false values of human conduct in its place. This is true of both the national and the international penal orders.

A consideration of the Anglo-American law of criminal procedure, from the point of view of natural law, yields significant results. Ecclesiastical intervention by the Lateran Council, in 1215, on the side of natural law philosophy, outlawed the crude and primitive modes of trial by ordeal, which had appeared in England, before 1066 A.D. These non-rational modes of determining innocence or criminal guilt were misguided appeals to the supernatural, not asking for Divine wisdom, but presumptuously, calling upon God for a miracle, as evidence of the innocence of the accused. The action of the Lateran Council enabled the rational mode of trial by jury to prevail over the non-rational methods with which it had been forced to compete for centuries.

Insofar as trial by jury was a rational means of determining facts for use in the judicial process, it was appropriate for the purpose of applying the natural law. But it should not be regarded per se as the most appropriate. This may be attested by the results of the administration of justice, both criminal and civil, under the Canon and Military law, and, at one time, under the inquisitional procedure of the European continent. But the institution of trial by jury, however modified, will most likely long survive in Anglo-American society, not because it is the most accurate means of ascertaining facts, but because of the widespread conviction that any other arrangement would endanger constitutional rights and liberties, originating in the natural law, according to the traditional American political philosophy.

A unitary, rather than a preclusive, type of pleading and procedure would seem to be best adapted to the realization of the aims of the natural law, since it seeks the presentation of all the factual and jural issues of a controversy in one judicial action, with a final determination affecting all parties involved. Chancery pleading and practice, like the Roman adjective law, in its third or libellary stage, were essentially unitary in character. Common law pleading and practice were at first highly preclusive, as was Roman procedure in its first two stages, (i.e.) the legis actio and the formulary. But in each of these two systems of law, the movement was from the preclusive to the unitary type. The latter produced the model to which statutes finally conformed in the institution of procedural reform.

The course on Constitutional law makes available a fertile field for the consideration of the scholastic conception of society, the state and government, and their relation to the legal order under the Constitution, intended as a bulwark against the invasion of the rights of the individual
by the sovereign. The Constitution of the United States is neither objective natural law, nor a mere algebraic equation, describing an equilibrium of economic pressures and political compromises. But it is a manifestation of objective natural law in the same sense as were the Magna Charta and the American Declaration of Independence.

It was not until the time of Henry VIII, in the sixteenth century, and thereafter, that the philosophy of force, relative to the ascertainment of the legitimate limits of state action, was given currency in England. This philosophy was formally elaborated in the analytical or imperative theory of Hobbes. In English and American constitutional theory, this philosophy competed for acceptance with the older English conception of the nature and function of the state, which had been in accord with the state-limitation doctrine of scholastic philosophy.

Thus far the philosophy of force has prevailed in English constitutional theory. A Parliamentary Bill of Attainder may today be unjust, but never illegal. The test of the juridicity of a statute or enactment of Parliament is to be found in the will and physical power of the sovereign, not in the sphere of morals.

But the philosophy of an objective natural law has been accepted, for the most part, in American constitutional theory, as manifested by the doctrine of judicial supremacy. This doctrine upholds the opinions expressed in Bonham's Case, and Calvin's Case, that an act of a legislature which is contrary to the natural law does not have the force of law, although it may have the appearance of such. As far back as the American Declaration of Independence, however, the philosophy of an objective natural law was obliged to compete with belief in the moral supremacy of the authority of the people, as expressed in their highest legislative assembly. That Declaration simultaneously asserted the natural law principle of self evident, inalienable rights, springing from an immutable, objective order of morality, and the subjective proposition that governments derive their just powers from the consent of the governed. For the scholastic jurist, the foundation of the natural law is not the will of a majority of the people at any particular time, although there is a reliable, but rebuttable, presumption that the will of the people, freely expressed, with a knowledge of the facts, is the voice of God.

A considerable analytical influence appears in most treatises on the law of Corporations. The view presented in these treatises is that a corporation is a fiction, and that only the State has the right to originate this fiction. The fiction theory of the corporation exalts the absolute sovereignty of the State and ignores the natural law right of association,

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which precedes the State. This theory may be invoked to justify the State's seizure of the corporation's property, as ownerless, should the State erase the fiction.

The fiction theory of the corporation is contradicted by the scholastic view which is that the corporation is a metaphysical entity, and that the State does not create the underlying moral personality, which is incorporated, as it were, by the natural law, but only gives it legal recognition, and determines, in a reasonable manner, the scope of its operation. The essence of a corporation results from the natural law right of association, and from the metaphysical and conceptual relation of the persons, who form the corporation, to the central entity.

It was the influence of natural law thinking, which corrected the original conception of a mortgage, as an outright conveyance of the full ownership of land, to be forfeited upon failure to pay a sum of money at a future split second of time. The Court of Chancery, applying moral principles, obtained jurisdiction over the mortgage by preventing injustices arising from failure to pay the money at the specific time, caused by accident, mistake, *vis major*, or Act of God. The course of development of the device of the mortgage was determined by natural law, which communicated the idea that the true purpose of a mortgage was to provide security for a debt. The mortgaged property thus became simply collateral, or a means to an end. The mortgagee no longer owned the land, subject to a condition subsequent, but either held legal title to the property as a quasi-trustee, or had a lien on the land to the extent of the debt.

The Law Merchant is of special concern and interest for the natural law jurist, because he finds, therein, an historical vindication of the capacity of men, when freed from totemism and taboo, and from the inhibiting effect of provincial environments, to create just customary law inspired by natural law, for the authoritative settlement of disputes. The formation of legal categories, new even to the Roman law, resulting from the invention and the use of bills and notes and from the idea of negotiability, by merchants, who were cosmopolitans, evidenced the creative power of a notion like *bona fides* taken from the natural law. The Law Merchant supports the thesis that custom may have the force of law, as a means of social discipline, although it does not rest on the will of the political sovereign, but on objective standards of reason.

It is well known that the moral content in the subject of "Equity" and its historical natural law foundation have been progressively concealed for many years by some teachers and authors. Much evidence attests this fact. Thus the name of the subject was changed from "Equity Jurisprudence" to "Equity". Less and less attention was paid to the maxims, (i.e.) moral generalizations, reflecting the spirit of ethical ideal-
ism. Lords Nottingham, Hardwicke and Eldon were hailed as the greatest of the Chancellors, because they were chiefly responsible for the transference of moral principles into positive rule. Finally, within the past few years, some of the "prestige" law schools have abolished "Equity" as a separate course.

It is the duty of the scholastic jurist to resist this trend and make specific efforts to expose its Realist implications. If this is not done, the law student will be denied his educational birthright, which includes the knowledge that the equity administered in the English Court of Chancery was not emotion, nor the changing moral conscience of the time and place, nor the caprice of the Chancellor, but rather that body of transcendental principles of right and wrong, existing in the metaphysical order, which may be identified as natural law.

Once "Equity" began to be taught merely as a body of rules, even though presented historically, the way was being prepared for its eventual banishment from the curriculum. The ensemble, as such, of the conclusions reached by judges, exercising equitable powers, can never be the sum total of "Equity". Hence the perennial discussion, which was continued for many years in round tables of the Association of American Law Schools, as to whether "Equity" has become decadent, has only a limited significance, (i.e.) whether its positive rules are still reasonably responsive to the standards of the natural law.

Extrinsic or transcendental equity has provided ideals which have been transfused into the empty categories of "due process," equal protection of the laws, and the like, of the Federal Constitution, and made possible the development of American Constitutional law. It has produced norms for the interpretation of ambiguous statutes. It has been indispensable in all those fields, wherein justice is administered without law. It has been employed in effecting settlements by mediation and arbitration, and adjudicating issues in administrative tribunals. It is the only medium of international social control in the absence of developed juridical institutions in the world order.

Intrinsic equity, or the casuistic application of transcendental equity in the judicial, administrative, or legislative process, historically followed the employment of fictions as a means of modifying or abolishing old law, and creating new law. The equitable method produced new law, with no fictional changing of the facts, by reliance on certain principles, which dominated the choice of the major premise by the law-maker, because of their internal reasonableness. Intrinsic equity may be expelled from a legal system, for a while, but the history of both Roman and English law shows that when this happens, it becomes necessary eventually to construct a new court for the restoration of applied equity.
The time limitations placed on this paper prevent me from subjecting other segments of the Anglo-American positive law to a scholastic critique. But the method which I have endeavored to demonstrate may be applied effectively to the remainder, so as to disclose how social utility made it pragmatically imperative for law-makers to shape the principal institutions in the Anglo-American legal system in accordance with the philosophy of an objective natural law, although the experience of centuries was sometimes required to induce action in this respect.

May the time come soon when the scholastic interpretation of legal history will take its rightful place, in the libraries and class-rooms of the world, commanding the respect and admiration of scholars everywhere, and facilitating the task of the church law school, to train not only worthy ministers of justice, but also molders of the legal order.