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The Case for "Higher Law"*

JOHN WARWICK MONTGOMERY**

Cardozo's essay on "Law and Literature"¹ and Harvard jurist Lon Fuller's imaginary cases in the mythical jurisdiction of Newgarth² offer adequate precedent for beginning with a fable.

Once upon a time a hare of philosophical temperament invited a politically oriented fox to dinner. During the entrée the hare presented an interesting argument on the relativity of all law and morals, stressing that each beast, in the final analysis, has a right to his own legal system. The fox did not find this argument entirely convincing on the intellectual level, but was much im-

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1. Cardozo, *Law and Literature*, 39 COLUM. L. REV. 119 (1939).

2. L. FULLER, THE PROBLEMS OF JURISPRUDENCE *passim* (1949). See also Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

pressed with it practically. For dessert he ate the rabbit: lapin à la crème.

Moral: One's philosophical viewpoint can be of immense practical consequence, especially when the stakes (steaks?) are high.

I. THE NEED

First contact with the *Code of Professional Responsibility* of the American Bar Association³ is a moving experience; here is a document reflecting genuine concern to hold high the ethical standards of a great profession. Closer perusal of the *Code*, however, elicits a sense of growing disquiet. Not that the standards are wrong, but what precisely do they *mean* at the points of fundamental ethical commitment? "A lawyer . . . should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct."⁴ To question such affirmations would seem, on one level, as sacrilegious as doubting Motherhood or the Flag; but is this not precisely their danger? They use the right words, but they do not define them; they continually beg the question. Who, specifically, is to set the standards of "temperance" and "dignity," and who is to say what conduct is indeed "morally reprehensible"? The practical consequences of such vagueness are most serious. A recent and penetrating analysis of "Law Schools and Ethics" points out that the profession's standards do not, for example, make plain whether a lawyer *need not* or *must not* "do for his client that which the lawyer thinks is unfair, unconscionable, or over-reaching, even if lawful."⁵

Throughout the *Code* emphasis is placed upon conduct which shall deserve the approval of peers. "[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction."⁶ Here the dubious assumption is made that

3. The CODE was adopted by the House of Delegates of the ABA on August 12, 1976, to become effective on January 1, 1970; it was amended on February 24, 1970. The CODE enlarges upon and officially replaces the ABA's CANONS OF PROFESSIONAL ETHICS, adopted in 1908 and subsequently amended.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5.

5. M.L. Schwartz, *Law Schools and Ethics*, CHRONICLE OF HIGHER EDUCATION 20 (Dec. 9, 1974); cf. ABA CANONS OF PROFESSIONAL ETHICS No. 15: The attorney "must obey his own conscience and not that of his client." See also *id.* No. 18. But what value system is to inform the attorney's conscience? "[N]o client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety." *Id.* No. 24; cf. *id.* No. 44. "Illiberal" by what criterion? "Honor" and "propriety" by whose definition?

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY Preamble. See also ABA CANONS OF PROFESSIONAL ETHICS No. 32.

society will somehow maintain that undefined high standard of which the *Code* speaks. The real possibility is never faced that standards—even the standards of an entire society—can decline or disappear. Interestingly enough, the *Uniform Commercial Code* (hardly a document replete with philosophical insights) displays uncomfortable awareness of this grim possibility. In the official comment relating to course of dealing and usage of trade we read: "[T]he anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard."⁷ The Watergate tragedy is an appalling example of the ease with which societal standards can in fact deteriorate—and it is noteworthy that this occurred in an Administration relying more than any previous one on the services of lawyers and the legally trained.

How precisely correct was the judgment of the Supreme Court in a case of personal influence upon public officials exactly one hundred years before Watergate:

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. *Spirit of Laws*, 17. . . .

. . . .
If the instances [of selling influence to procure privately advantageous legislation] were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand.⁸

When public morals decay and the times degenerate, of what consequence is society's approval or reputation for ethical action? If all Cretans are liars, is it a compliment to be praised by a Cretan? And in such a situation, what is the individual or collective conscience necessarily worth? Conscience is environmentally conditioned, and the morals of the time will influence what is regarded as conscionable or unconscionable. Among cannibals, one feels guilty for not cleaning his plate.

The problem of establishing sound ethical standards in the legal profession and the wider problem of which this is but one aspect—that of finding ethical norms for the evaluation of positive law in general—becomes immensely more acute when we see to-

7. U.C.C. § 1-205, Comment 6.

8. *Trist v. Child*, 88 U.S. (21 Wall.) 441 (1874) (Swayne, J.).

tal societies operating with legal and ethical values directly opposed to our own. Solzhenitsyn, in *The Gulag Archipelago*, eloquently and passionately condemns the dehumanization of the individual in the juridical "sewage disposal system" of today's Russia,⁹ and his argument has been documented *ad nauseam* by others.¹⁰ Yet none of this impresses the Marxist-Leninist jurist-prudent, who simply quotes Lenin's fundamental rule of socialist legal philosophy: "We have no more private law, for with us all has become public law."¹¹ In the temporary "dictatorship of the proletariat" prior to the onset of the idyllic classless (communist) society, the law exists pragmatically as an instrument of socialist policy;¹² and following Lenin's ethic that the end justifies the means,¹³ the disregard of due process and the consequent miseries of political defendants and prisoners under the Soviet legal system are straightforwardly justified as furthering state interests.

Or consider National Socialist legal operations in the Germany of the 1930s and 1940s. After observing the situation in Nazi Germany at firsthand, Dr. William Burdick of the University of Kansas Law Faculty wrote in 1939:

It is a necessary part of the machinery of dictatorships that the law and the courts shall be subservient to the ruler. In 1933, it was officially declared in Germany that the final authority as to the principles of the State and the law is the National Socialistic German Workers' Party; that no other political party could be formed; and that the Fuehrer should make its laws. Does this declaration differ in principle from the decree of Soviet Russia stating that the "Socialist Conscience" shall be the final arbiter? Today, in Germany all judges are not only appointed by the present government but they are also subject to dismissal by arbitrary power. As a result, all Hebrew judges, of which there was a considerable number, many of them being Germany's ablest jurists, have been dismissed from all the courts. Moreover, this "purge" has not been limited to the judicial profession, it has been extended to the lawyers also. In 1933, the former German Bar Association was dissolved, and a National Socialist Lawyers Society was established in its place. All its members must be of German blood, and by official decree a person is not considered to be of German blood if his parents or grand-parents have Jewish blood in their veins. It was further decreed that all public officials of non-Aryan descent should be retired. This included judges, lawyers, counsellors in administrative law, consultants on cases in the labor courts, court officials, and candidates in training for the judicial or legal professions. In 1933, twenty-seven

9. A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 1918-1956 pt. 1 (1974); cf. A. SOLZHENITSYN: *CRITICAL ESSAYS AND DOCUMENTARY MATERIALS* (1973).

10. *E.g.*, INTERNATIONAL COMMISSION OF JURISTS, *JUSTICE ENSLAVED: A COLLECTION OF DOCUMENTS ON THE ABUSE OF JUSTICE FOR POLITICAL ENDS* (1955).

11. See LENIN *et al.*, *Soviet Legal Philosophy passim* in 51 20TH CENTURY LEGAL PHILOSOPHY SER. (1951); cf. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 157-58 (1968) [hereinafter cited as R. DAVID & J. BRIERLEY].

12. See J.W. MONTGOMERY, *THE SHAPE OF THE PAST* 74, 80, 217 (1963).

13. Cf. J. FLETCHER & J.W. MONTGOMERY, *SITUATION ETHICS: TRUE OR FALSE* 79, 82, 83 (1972).

percent of all the lawyers in Berlin were of Jewish blood. Their citizenship has been taken away and with it their right to vote. No additional Jewish lawyers can be trained, because all Jews are now excluded from the German universities.¹⁴

As we are well aware, the sufferings of the legal profession in Germany were paralleled at every level of the society, and in the apocalyptic holocaust of the Third Reich six million Jews perished.

After the Nazi defeat the blood of these victims cried out for justice; war crimes trials were an inevitability. But what standard was to be used at Nuremberg to judge the accused leaders of the Nazi regime? When the Charter of the Tribunal, which had been drawn up by the victors, was used by the prosecution, the defendants very logically complained that they were being tried under *ex post facto* laws; and some authorities in the field of international law have severely criticized the allied judges on the same ground.¹⁵ The most telling defense offered by the accused was that they had simply followed orders or made decisions within the framework of their own legal system, in complete consistency with it, and that they therefore could not rightly be condemned because they deviated from the alien value system of their conquerors. Faced with this argument, Robert H. Jackson, Chief Counsel for the United States at the trials, was compelled to appeal to permanent values, to moral standards transcending the life styles of particular societies—in a word, to a "law beyond the law" of individual nations, whether victor or vanquished.

It is common to think of our own time as standing at the apex of civilization, from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be "progress." The reality is that in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first. These two-score years in this twentieth century will be recorded in the book of years as one of the most bloody in all annals. Two World Wars have left a legacy of dead which number more than all the armies engaged in any war that made ancient or medieval history. No half-century ever witnessed slaughter on such a scale, such cruelties and inhumanities, such wholesale deportations of peoples into slavery, such annihilations of minorities. The terror of Torquemada pales before the Nazi inquisition. These deeds are the overshadowing historical facts by which generations to come will remember this decade. If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to

14. W.L. BURDICK, *THE BENCH AND BAR OF OTHER LANDS* 422 (1939).

15. E.g., G.A. Finch, *The Nuremberg Trials & International Law*, 41 AM. J. INT'L L. 20 (1947); E. Borchard, *International Law and International Organization*, 41 AM. J. INT'L L. 106 (1947); cf. R. WORMSER, *THE STORY OF THE LAW* 557 (rev. ed. 1962).

say that this twentieth century may yet succeed in bringing the doom of civilization.

Goaded by these facts, we have moved to redress the blight on the record of our era. . . .

. . . at this stage of the proceedings, I shall rest upon the law of these crimes as laid down in the Charter. . . .

In interpreting the Charter, however, we should not overlook the unique and emergent character of this body as an International Military Tribunal. It is no part of the constitutional mechanism of internal justice of any of the Signatory nations. . . . As an International Military Tribunal, it rises above the provincial and transient and seeks guidance not only from International Law but also from the basic principles of jurisprudence which are assumptions of civilization¹⁶

Thus have the horrors of our recent history forced us to recognize the puerile inadequacy of tying ultimate legal standards to the mores of a particular society, even if that society is our own. To "redress the blight on the record of our era" demands nothing less than a recovery of those "basic principles of jurisprudence which are assumptions of civilization."

II. THE DILEMMA

But where are the basic principles of "higher law" to be found, and how are they to be identified and justified? Voilà, the great dilemma: for however much our world cries out for absolute standards of rightness, they seem forever beyond our grasp. Like Ponce de León's *ciudad de oro*, the permanent legal norms for which we search appear always to lie on the other side of the next mountain.

And yet, every day, in every court of the land, decisions are handed down in reliance on "larger," "higher" principles which do not themselves derive from precedent. H. L. A. Hart correctly observes that "because precedents can logically be subsumed under an indefinite number of general rules, the identification of *the* rule for which a precedent is an authority cannot be settled by an appeal to logic."¹⁷ The same point is made in detail by A. W. B. Simpson, through analysis of the leading English tort liability case of *Rylands v. Fletcher*¹⁸ (*held*: one is liable at his peril for the natural and probable consequences of the escape of any potentially dangerous thing which he has brought upon his land) and its qualification in *Nichols v. Marsland*¹⁹ (*held*: defendant

16. Jackson, *Closing Address in the Nuremberg Trial*, 19 PROCEEDINGS IN THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 397 (1948). For valuable bibliographical references on the Nuremberg trial, see W. BISHOP, INTERNATIONAL LAW 996, 1016-18 (3d ed. 1962).

17. Hart, *Philosophy of Law, Problems of*, 6 ENCYCLOPEDIA OF PHILOSOPHY 264, 270 (1967).

18. L.R. 3 H.L. 330 (1868).

19. 2 Ex. D. 1 (1876).

not liable, since an extraordinary rain caused his reservoir to overflow and flood plaintiff's land).

[W]hen, for example, the case of *Nichols v. Marsland* was distinguished from *Rylands v. Fletcher* upon the ground that the escape was caused by an act of God, the court's acceptance of this distinction did involve some recognition of some justificatory principle of morality, justice, social policy or common sense which was external to the law, and this will generally be found to be the case when law is made. For though the making of law may be justified by legal rules which permit the making of law by this or that person upon this or that occasion, the content of the law which is so made requires a different type of justification.²⁰

But what is this "different type of justification"? We have just seen that the precedents of the case law do not necessarily yield it. As Bartley, C. J., argued in reversing a *nisi pruis* decision based on a well established rule of accord and satisfaction in the law of contracts: "When we consider the thousands of cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application, we can appreciate the remark of Chancellor Kent, in his Commentaries, that 'Even a series of decisions are not always evidence of what the law is.'"²¹ Professor Corbin of Yale, who includes this case in his standard text, *Cases on the Law of Contracts*, appends to Bartley's opinion this question for the student: "A precedent seems not to be conclusive. What is?"²² What, indeed?

Equity lawyers have tended to locate the "higher law" within the sphere of chancery; yet legal history plainly shows that courts of equity, though they have often corrected the rigidities and injustices of the law courts, are subject to parallel arteriosclerosis.²³ The legislatively minded and the devotees of the continental Civil Law tradition see statutes as the modern way to introduce justice into the fusty tradition created by anachronistic case law; but statutory injustice and stupidity are at least as manifest as the evils of bad precedent. (One thinks of a Kansas statute that changed the meaning of π from 3.1416 to an even 3, and another that declared: "When two trains approach each other at a crossing, they shall both come to a full stop, and neither shall start up

20. Simpson, *The "Ratio Decidendi" of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE (FIRST SER.) 148, 175 (2d ed. A.G. Guest 1968).

21. *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334 (1856).

22. A. CORBIN, *CASES ON THE LAW OF CONTRACTS* 916 (3d ed. 1947).

23. Cf. A.V. DICEY, *LAW & PUBLIC OPINION IN ENGLAND DURING THE 19TH CENTURY* 375-82 (2d ed. 1914, reissued 1962).

until the other has gone."²⁴)

Other jurists have attempted to penetrate behind case law, equity, and statute to some fundamental notion capable of supplying the needed permanent criterion of legal worth: Volansky, operating in the French tradition, suggests the jural concept of "good faith,"²⁵ much in the spirit of our *Uniform Commercial Code*, which places central emphasis on this same concept.²⁶ Lord Radcliffe, in his 1960 Rosenthal Lectures, after admitting that "you cannot hope to get Natural Law in at the front door," tries to get it in at the back by way of the principle of "public interest" or "public policy."²⁷ Yet like the ABA *Code's* notions of "temperance," "dignity," and "the respect of society," these concepts remain vague and undefined—open to all possibilities of definition and redefinition by the society of the moment. What standard of justice would the concept of "good faith" offer in a Marxist-Leninist culture, where the end is held to justify the means? Would we be satisfied with the justice of "public policy" under National Socialism? In point of fact, such maximally generalized legal notions are like the chameleon: they take their color from the societal pattern and are incapable of arresting degeneracy in the society at large or in the legal sphere in particular.

To compound the difficulty in the search for "higher law," some of the most influential jurists and philosophers of our time have concluded that a solution to this problem is impossible in principle. H. L. A. Hart, after perceptively distinguishing between the "primary rules" of social obligation and the "secondary rules" by which a structure of positive law is created, identifies the ultimate secondary rule as the "rule of recognition"—the criterion by which law is recognized to be such in a society. When the question is raised as to the validity of a given society's rule of recognition (*e.g.*, we might think of Nazi Germany's refusal to recognize Jews as persons deserving of legal rights), Hart answers:

We only need the word "validity", and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use

24. J.A. DUNCAN, *THE STRANGEST CASES ON RECORD* 183-84 (1940); *cf.* B. WAREE, *CURIOSITES JUDICIAIRES* 385-98 (1859).

25. A. VOLANSKY, *ESSAI D'UNE DEFINITION EXPRESSIVE DUE DROIT BASEE SUR L'IDEE DE BONNE FOI* (1930).

26. See U.C.C. §§ 1-203, 2-209, Comment 2, 2-305, Comment 6, 2-306, Comment 1, 2-309, Comment 5, etc.

27. LORD RADCLIFFE, *The Law & Its Compass*, in 1960 ROSENTHAL LECTURES, NW. U. SCH. OF L. 33, 57 (1961).

in this way.²⁸

Thus, each society's ultimate legal foundations are uncriticizable, since any criticism could only come from another society whose rules of recognition have no more absolute validity than those of the society being criticized.

Hans Kelsen argues in a similar vein that each legal system is a hierarchial structure (*Stufenbau*), grounded in a basic norm (*Grundnorm*). This basic norm gives coherence to the plurality of legal principles in the system and keeps it from disintegration. But the question as to the ultimate validity of the *Grundnorm* is unanswerable.

It is of the greatest importance to be aware of the fact that there is not only one moral or political system, but at different times and within different societies several very different moral and political systems are considered to be valid by the men living under these normative systems. These systems actually came into existence by custom, or by commands of outstanding personalities like Moses, Jesus or Mohammed. If men believe that these personalities are inspired by a transcendental, supernatural—that is a divine authority—the moral or political system has a religious character. It is especially in this case when the moral or political system is supposed to be of divine origin that the values constituted by it are considered to be absolute. If, however, the fact is taken into consideration that there are, there were and probably always will be several different moral and political systems actually presupposed to be valid within different societies, the values constituted by these systems can be considered to be only of a relative character; then the judgment that a definite government or a definite legal order is just can be pronounced only with reference to one of the several different political and moral systems, and then the same behavior or the same governmental activity or the same legal order may with reference to another moral or political system be considered as morally bad or as politically unjust.²⁹

The implications of such a viewpoint are patently horrifying (Nuremberg trials are ruled out in principle and the foxes of this world can eat the rabbits as a regular diet), but the logical problems in establishing absolute legal norms are equally formidable. How exactly can a given society or a given individual transcend the values of the culture so as to arrive at standards of absolute worth? In the 19th century, Søren Kierkegaard, the father of modern existentialism, rightly castigated and ridiculed the

28. H.L.A. HART, THE CONCEPT OF LAW 105-06 (1965); cf. *Symposium: The Philosophy of H.L.A. Hart*, 35 U. CHI. L. REV. 1 (1967); *Philosophies du droit anglaises et américaines*, 15 ARCHIVES DE PHILOSOPHIE DU DROIT 113, 179 (1970).

29. Lecture delivered by Hans Kelsen at the University of California, Nov. 20, 1962 (tape at Boalt Hall Library); cf. R.G. Decker, *The Secularization of Anglo-American Law: 1800-1970*, in 49 THOUGHT 280, 292-93, 297 (1974); A.S. DE BUSTAMANTE Y MONTORO, *Kelsenism*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND 43 (P. Sayre ed. 1947).

pretentious philosophical idealism of Hegel; was it conceivable, he asked, that one man should be able to disengage himself from the human predicament—shed his own skin—to the point of seeing the World Spirit of Reason carry the human race dialectically to perfect freedom? Hegel had asserted that history would pass through four “world-historical” epochs, concluding with the “Germanic”; his perspective here turned out to be the product of the rising German nationalism of his time, not a judgment of universal validity.³⁰ But who—whether idealistic Hegelian, materialistic Marxist, or realistic jurist—could see all of history so as to establish its total meaning, or survey and sift the universe of values so as to declare absolute legal and moral principle? As humorist and lay “philosopher” Woody Allen succinctly put it: “Can we actually ‘know’ the universe? My God, it’s hard enough finding your way around in Chinatown.”³¹

Contemporary analytical philosophers, though lacking in Woody Allen’s pungency of expression, have made the same point with logical rigor. Wittgenstein, in his famed *Tractatus*, argued that our societal and personal limits as human beings forever keep us from producing absolute philosophies that are indeed absolute: “The sense of the world must lie outside the world. . . . And so it is impossible for there to be propositions of ethics. Ethics is transcendental.”³² Metaphorically expanding on this theme in his posthumously published “Lecture on Ethics,” Wittgenstein says: “[W]e cannot write a scientific book, the subject matter of which could be intrinsically sublime and above all other subject matters. I can only describe my feeling by the metaphor, that, if a man could write a book on Ethics which really was a book on Ethics, this book would, with an explosion, destroy all the other books in the world.”³³

To arrive at absolute legal standards, one would have to disengage himself from the world and its limited standards and go “outside the world” to a “transcendental” realm of values. Only there could the “intrinsically sublime” hornbook be found. To be sure, this is entirely in accord with common sense. Water does not rise above its own level; why should we think that absolute legal norms will arise from relativistic human situations? Archimedes said that if he were given a lever long enough and a fulcrum outside the world he could move it. Quite right; but all depends on a fulcrum *outside* the world. The very expressions “*higher law*” and “*law beyond the law*” are suggestive of this, for

30. See J.W. MONTGOMERY, WHERE IS HISTORY GOING? 15-36 (1969).

31. W. Allen, *My Philosophy*, THE NEW YORKER, Dec. 27, 1969, at 25.

32. L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS §§ 6.41-6.421 (1971).

33. Wittgenstein, *Lecture on Ethics*, 74 PHIL. REV. 3, 7 (1965).

they employ transcendental qualifiers.³⁴ The essential first step in the quest for absolute legal norms is the recognition that—however much we need them and want them—we will never find them by building jurisprudential towers of Babel.

Rousseau, who did not generally display such philosophical perception, formulated the dilemma with stark accuracy in his description of the work of the legislator:

In order to discover the rules of society best suited to nations, a superior intelligence beholding all the passions of men without experiencing any of them would be needed. This intelligence would have to be wholly unrelated to our nature, while knowing it through and through; its happiness would have to be independent of us, and yet ready to occupy itself with ours; and lastly, it would have, in the march of time, to look forward to a distant glory, and, working in one century, to be able to enjoy in the next. It would take gods to give men laws. . . .³⁵

III. THE SOLUTION

The traditional answer to the cruel dilemma of desperately needing "higher law" yet not being humanly capable of creating it, is Natural Law theory. The essence of this theory, which held sway from classical Greek times to the French Revolution and which is experiencing a significant revival today,³⁶ is that absolute ethical standards and fundamental legal rightness are implanted in the human situation and can be discovered as the common elements in the moral codes and positive legislation of all men and cultures. Such Natural Law was formerly regarded as a product and evidence of God's hand in the world. In the words of Cicero: "I find that it has been the opinion of the wisest men that Law is not a product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom in command and prohibition. Thus, they have been accustomed to say that Law is the primal and ultimate mind of God

34. Cf. I.T. RAMSEY, *RELIGIOUS LANGUAGE passim* (1957).

35. J.J. ROUSSEAU, *CONTRAT SOCIAL* bk. 2, ch. 7 (1762).

36. "The revival of natural-law doctrines is one of the most interesting features of current legal thought." Golding, *Philosophy of Law, History of*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY* 254, 263 (P. Edwards ed. 1967). Cf. J. CHARMONT, *LA RENAISSANCE DU DROIT NATUREL* (2d ed. 1927); C.G. HAINES, *The Revival of Natural Law Concepts*, 4 *HARV. STUDIES IN JURIS.* (reprint ed. 1965) [hereinafter cited as C.G. HAINES]; J. COGLEY, R.M. HUTCHINS *et al.*, *NATURAL LAW AND MODERN SOCIETY* (1966); F. CASTBERG, *LA PHILOSOPHIE DU DROIT* (1970). For a detailed expression of traditional Natural Law theory, see TH. JOUFFROY, *COURS DE DROIT NATUREL* (5th ed. 1876).

. . . ."³⁷

But what precisely is the "something eternal" in the laws of mankind, and how is it to be distinguished from the merely human, temporal, and ephemeral? This is a question of cardinal importance, for unless a clear distinction can be made it will obviously be impossible to criticize any given positive law on the basis of something more fundamental: what is considered "eternal" may turn out to be no more than "temporal" and thus subject to the same difficulties as what is being criticized.

Here is the crux of the problem in all Natural Law thinking. If the Natural Law is stated in typically classic terms—for example, in the formula of the Justinian Code, "Honeste vivere, neminem laedere, suum cuique tribuere" (live honestly, harm no one, give to each his own)³⁸—it is, as Harvard's C. J. Friedrich observes, so "imprecise" that it does little more than to underscore the need for "some kind of equity."³⁹ When attempts have been made to specify the Natural Law in more concrete terms, the results have been either a listing of ethical and legal principles common to diverse cultures⁴⁰ (entailing the fallacious assumption, known as the "naturalistic fallacy," that what is universal is necessarily right) or an attribution of eternal value to positions, such as the Roman Catholic condemnation of "unnatural" methods of birth control, that are highly disputable.⁴¹

The most sophisticated of current Natural Law thinkers—those influenced by the analytical movement in philosophy—have been able to identify certain fundamental, trans-cultural ethical and legal demands imposed upon us by our humanity. L. H. Perkins argues, for example:

The use of language implies a commitment as much as life in society does—a commitment to communicate, i.e., to use that language in a way that others may understand if they too are users of that language; i.e., to use that language properly. Thus, James has an obligation to follow through on that promise he made to Smith, and so does an anarchist who opposes the whole institution of promising—the obligation is built into the language, which is built into the institution, and the institution is built into nature by the fact that man is a political, i.e., an institutional, animal. . . .⁴²

The reasoning here is impeccable, but it does not go beyond the most general obligations (truth-telling, keeping pro-

37. M.T. CICERO, *DE LEGIBUS* bk. 2, ch. 4.

38. Cf. A. D'ENTREVES, *NATURAL LAW* 22 (2d ed. 1970).

39. C.J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 33 (2d ed. 1963).

40. A useful list is provided in C.S. LEWIS, *THE ABOLITION OF MAN* 51 (1947).

41. Cf. J.W. Montgomery, *How to Decide the Birth Control Question*, in *BIRTH CONTROL AND THE CHRISTIAN* 575 (W. Spitzer & C. Saylor ed. 1969).

42. Perkins, *Natural Law in Contemporary Analytic Philosophy*, 17 *AM. J. JURIS.* 111, 118 (1972).

mises)—obligations of a heuristic or necessitarian character that are incapable of fleshing out the skeleton of Natural Law.⁴³ Specifically, what *kind* of contractual obligations should be enforced at law? Promises by cannibals, based on adequate consideration, to clean their plates? It should give pause that the vague expression of the *Digest*, "Give to each his own," was inscribed in German translation (*Jedem das seine*) on the metal doors leading into Buchenwald.⁴⁴

In the Preface to his classic, *The Revival of Natural Law Concepts*, Haines singles out this vagueness as the prime characteristic of Natural Law theories: "Carlyle, in speaking of the views of the Roman jurists on natural law, doubted whether any of the lawyers had very clear conceptions upon the matter. As a matter of fact all theories of natural law have a singular vagueness"⁴⁵ Is there any way of overcoming this fatal flaw? Considerable aid in solving the problem comes from the approach taken by a law-trained first century theologian in his confrontation with Stoic philosophers. The Stoics had provided the basic formulation of Roman Natural Law theory and it was from them that the great classical thinkers (Cicero, Seneca, *et al.*) derived their views on the subject.⁴⁶ Thus, it is most instructive to observe an early corrective to the vagueness of these views.

[C]ertain Epicurean and Stoic philosophers encountered [Paul at Athens]. And some said, What will this babblers say? Others said, He seems to be setting forth strange gods—for he had been preaching Jesus and the resurrection to them. And they took him to the Areopagus, saying, May we know what this new doctrine is of which you are speaking? . . .

Then Paul stood at the center of the Areopagus and said, You men of Athens, I note that in all things you are too superstitious. For as I passed by and beheld your devotions, I found an altar with this inscription: TO THE UNKNOWN GOD. Whom therefore you ignorantly worship I declare to you. . . . [T]he times of this ignorance God winked at, but now commands all men everywhere to repent, for he has appointed a day when he will judge the world in righteousness by the Man whom he has ordained, and he has given assurance of it to all in that he has raised him from the dead.⁴⁷

43. Cf. G. Del Vecchio's argument that veracity constitutes a juridical obligation. G. DEL VECCHIO, *LA JUSTICE—LA VERITE: ESSAIS DE PHILOSOPHIE JURIDIQUE ET MORALE* 173, 195, 231 (1955).

44. Personal observation of the author.

45. C.G. HAINES, *supra* note 36, at vii.

46. See T.E. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 33 (13th ed. 1924); cf. E. ZELLER, *OUTLINES OF THE HISTORY OF GREEK PHILOSOPHY* 209, 266 (13th ed. 1931); E. ZELLER, *STOICS, EPICUREANS, AND SCEPTICS* (1870).

47. *Acts* 17:18-19, 22-23, 30-31. It is noteworthy that in verse 28 Paul quotes

It is the conviction of the Apostle that natural religion—man's search for ultimate values—is correct as far as it goes, but it does not go far enough. This search arrives at some notion of ultimacy, but its content is "unknown"—and would always have remained unknown if God in his mercy had not specifically revealed himself in the biblical history of salvation which culminates in the death and resurrection of Jesus Christ. "Whom therefore you ignorantly worship I declare to you." As applied to the issue of legal values, the vague generalities of Natural Law are made concrete and visible through a specific scriptural revelation of the divine will for man:

ὅτι ὁ νόμος διὰ Μωϋσέως ἐδόθη, ἡ χάρις καὶ ἡ ἀλήθεια διὰ Ἰησοῦ Χριστοῦ ἐγένετο.

(The law was given through Moses; grace and truth came through Jesus Christ.)⁴⁸ Wittgenstein's "intrinsically sublime" book of ethics actually exists; Archimedes' fulcrum outside the world is a reality, so the world of human values can in fact be moved;⁴⁹ Rousseau's "superior intelligence" as legislator is not a mere ideal—and instead of being coldly "unrelated to our nature" and without "experience of the passions of men," God himself entered our midst, was "like us yet without sin,"⁵⁰ and imparted to us the true nature and fulfillment of eternal law.

But why should such a stupendous claim be accepted? And what about competing claims to divinely revealed law, such as that of the Moslems?⁵¹ Admittedly, and students of the law ought to be the first to recognize it, to make a claim is hardly to prove a case; in the realm of ultimate values no less than in the sphere of legal issues competing claims must be arbitrated by factual evidence. It is precisely at this evidential point that the biblical revelation stands vindicated in comparison with all other such claims.⁵² Doubtless this is why so many great legal scholars have been prominent apologists—defenders—of the biblical "higher law." Space forbids an analysis of their arguments here except

Stoic philosophical poetry; the reference is almost certainly to Cleanthes' "Hymn to Zeus"—text in *ESSENTIAL WORKS OF STOICISM* 51 (M. Hadas ed. 1965).

48. *John* 1:17.

49. *Cf. Acts* 17:6, where the early preachers of the gospel are referred to by their opponents as "these who have turned the world upside down."

50. *Hebrews* 4:15.

51. R. DAVID & J. BRIERLEY, *supra* note 11, at 386: "... Muslim jurists and theologians have built up a complete and detailed law on the basis of divine revelation [the Koran]—the law of an ideal society which one day will be established in a world entirely subject to Islamic religion."

52. See Montgomery, *The Apologetic Approach of Muhammad Ali and Its Implications for Christian Apologetics*, 51 *MUSLIM WORLD* 111 (1961) reprinted with corrections in MONTGOMERY, *FAITH FOUNDED ON FACT* 81-99 (1978).

for a brief mention of especially noteworthy examples:⁵³ Hugo Grotius, the "father of international law," whose *De veritate religionis Christianae* (On the Truth of the Christian Religion) (1627) stressed the reliability of the Gospel accounts of Jesus' life; Simon Greenleaf, Royall Professor of Law at Harvard and the greatest American authority on Common Law evidence in the 19th century, whose *Testimony of the Evangelists*⁵⁴ establishes the New Testament as documentary evidence acceptable to the courts—admissible and competent relative to its substantive claims concerning Jesus' person and work; J. N. D. Anderson, currently Professor of Oriental Laws and Director of the Institute of Advanced Legal Studies in the University of London, whose *Christianity: The Witness of History* and *The Evidence for the Resurrection*⁵⁵ demonstrate the facticity of Jesus' resurrection from the dead, and with it the truth of his claim to be no less than God incarnate and the soundness of his declarations that the Old Testament law derives from God himself and faithfully reflects the divine will.

When analyzed by the most rigorous standards of historical scholarship and by the most exacting canons of legal evidence, the accounts of Jesus in the New Testament are found to be the very opposite of hearsay; they are primary-source records produced by eyewitnesses.⁵⁶ "We have not followed cunningly devised myths," the writers consistently maintain, "when we made known to you the power and coming of our Lord Jesus Christ, but were eyewitnesses of his majesty."⁵⁷ If testimony is worth anything—and our entire legal operation is nothing without it—then the case for biblically revealed "higher law" is established not merely by the preponderance of evidence required in civil actions but to "a moral certainty, to the exclusion of all reasonable doubt."⁵⁸ The test was well stated by Shaw, C. J., in the classic case of *Commonwealth v. Webster*: "[T]he circumstances taken as

53. For other important examples, together with detailed discussion of the arguments briefly mentioned here, see J.W. MONTGOMERY, *JURISPRUDENCE: A BOOK OF READINGS passim* (1974).

54. Available in reprint ed. from the Baker Book House, Grand Rapids, Mich.

55. These works can be obtained from, respectively, Tyndale Press, 39 Bedford Sq., London, Eng. and Inter-Varsity Press, Downers Grove, Ill.

56. J.W. MONTGOMERY, *HISTORY & CHRISTIANITY* (1970); Montgomery, *Legal Reasoning & Christian Apologetics*, *CHRISTIANITY TODAY*, (Feb. 14, 1975):

57. 2 *Peter* 1:16.

58. The classic formulation of T. STARKIE: 1 *LAW OF EVIDENCE* 478 (2d ed. n.p. 1833) (1st ed. n.p. n.d.); Cf. WIGMORE, *TREATISE ON EVIDENCE* § 2497. See also J.

a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.”⁵⁹ How precise is the application of this test to the evidential case for “higher law” offered by the apostolic company? Jesus “through the Holy Spirit gave commandments to the apostles whom he had chosen—to whom also he showed himself alive after his passion by many infallible proofs”⁶⁰

IV. BENEFITS TO THE PRODIGAL LAWYER

If revelational “higher law” can indeed be established as a permanent arbiter of the positive law, two questions remain: first, what are its benefits? and, second, why has modern man—and the modern lawyer in particular—departed from it?

The benefits of an explicit, divine standard of justice ramify through all areas of human life. We shall mention here four of the principal advantages of the biblical “higher law.”

(1) *An explicit, non-question-begging standard of absolute justice is provided, by which the evil laws of sinful men and of sinful societies can be evaluated and corrected.* No longer is one at the mercy of the vague and undefined idealism of professional codes or Natural Law theories, whose terminology (“honesty,” “dignity,” “temperance”) can be twisted in virtually any direction. No longer is one caught in the vice of societal standards—which can (and do) deteriorate under the pressures of modern life. Why should Jews and Blacks and members of other minority groups receive equal protection under the law? Why was Nazi racism juridically damnable? Not because of our current American social values—since these have no more permanence or absolute validity than those of other peoples—but because God almighty has declared once and for all that He has “made of one blood all nations of men to dwell on all the face of the earth” and that “there is neither Jew nor Greek, there is neither bond nor free.”⁶¹ Thus is human equality and legal standing regardless of race or color established on the rock of “higher law,” above the shifting sands of cultural change. Thomas Mann has magnificently captured the wonder and inestimable value of such revealed law:

[A]ll the people came before Moses that he might give them what he had

GAMBIER, *MORAL EVIDENCE* (3d ed. n.p. 1824) (1st ed. n.p. n.d.); A. BUCKNILL, *THE NATURE OF EVIDENCE* (1953).

59. *Commonwealth v. Webster*, 59 Mass. (5 Cus.) 295, 52 Am. Dec. 711 (1850).

60. *Acts* 1:1-3. The scope of the present essay does not permit a comprehensive statement of the evidential case for the Christian truth-claim, and the reader is therefore urged to consult the specialized works on this subject cited in the immediately preceding footnotes.

61. *Acts* 17:26; *Galatians* 3:28.

brought: the message of Jahwe from the mountain, the tables with the decalogue.

"Take them, O blood of my father," he said, "and keep them holy in God's tent. But that which they say, that keep holy yourselves in doing and in leaving undone. For it is the brief and binding, the condensed will of God, the bed-rock of all good behaviour and breeding, and God wrote it in the stone with my little graving tool—the Alpha and Omega of human decency. . . ."62

(2) *Biblically revealed "higher law" offers the only reliable guide to personal and national health, and thus to the preservation of individual and corporate life.* The clear pattern throughout Scripture is that those who do God's will live and those who flaunt his commands perish. The "thousand-year Reich" that idolatrously arrogated divine functions to itself and ignored God's revealed law perished in a generation, "and great was the fall of it." Blessed is the nation whose God is the Lord, and only those nations and individuals who seek first God's kingdom and righteousness will survive the pressures of a sinful world. "Higher law" is needed not only for sound legal decision, but for the very preservation of the legal system itself; flaunting God's law means the simultaneous collapse of society and of the positive law that cements it together. Again, hear Thomas Mann's Moses:

"But cursed be the man who stands up and says: '[God's Commandments] are good no longer.' Cursed be he who teaches you: 'Up and be free of them, lie, steal, and slay, whore, dishonour father and mother and give them to the knife, and you shall praise my name because I proclaim freedom to you.' Cursed be he who sets up a calf and says: 'There is your God. To its honour do all this, and lead a new dance about it.' Your God will be very strong; on a golden chair will he sit and pass for the wisest because he knows the ways of the human heart are evil from youth upwards. But that will be all that he knows; and he who only knows that is as stupid as the night is black, and better it were for him had he never been born. For he knows not of the bond between God and man, which none can break, neither man nor God, for it is inviolate. Blood will flow in streams because of his black stupidity, so that the red pales from the cheek of mankind, but there is no help, for the base must be cut down. And I will lift up My foot, saith the Lord, and tread him into the mire—to the bottom of the earth will I tread the blasphemer, an hundred and twelve fathoms deep, and man and beast shall make a bend around the spot where I trod him in, and the birds of the air high in their flight shall swerve that they fly not over it. And whosoever names his name shall spit towards the four quarters of the earth, and wipe his mouth and say 'God save us all!' that the earth may be again the earth—a vale of troubles, but not a sink of iniquity. Say Amen to that!" And

all
the

62. THOMAS MANN, *THE TABLES OF THE LAW* 61-62 (H.T. Lowe-Porter trans. 1945).

people
said
Amen.⁶³

(3) *Together with the revealed law, Scripture imparts gospel, thereby offering not only perfect standards but also merciful help for a fallen race that continually violates them.* Classical theology distinguishes three “uses” of the law set forth in the Bible:⁶⁴ the “political use” (law as the fundament of society, in the sense in which we have just been discussing it), the “didactic use” (law as a guide for the spiritual growth of the believer), and the “pedagogical use” (the law as “schoolmaster to bring us to Christ, that we might be justified by faith”⁶⁵). This “pedagogical use,” which Luther regarded as primary, is the law’s function to show us how far short we fall, as individuals and as nations, from the perfect standard of God’s will. Perhaps we have not literally violated the commandments against adultery or murder, but Jesus tells us in the Sermon on the Mount that lust or hatred are the spiritual equivalents of such acts;⁶⁶ and “whoever shall keep the whole law, and yet offend in one point, is guilty of all.”⁶⁷ Thus, “all have sinned and come short of the glory of God.”⁶⁸ But here the gospel of God’s free grace in Christ enters the picture: He came to earth for us, took our guilt on Himself, died to free us from the death we deserved, and offers restoration to all who come to Him in faith.⁶⁹ Luther drove this truth home in characteristically powerful words:

[T]his is the proper and absolute use of the law: by lightning, by tempest, and by the sound of the trumpet (as on Mount Sinai) to terrify, and by thundering to beat down and rend in pieces that beast which is called man’s opinion of his own righteousness. Therefore said God by Jeremiah the prophet: “My Word is a hammer, breaking rocks.” For as long as the opinion of his own righteousness abides in man, so long there abides also incomprehensible pride, presumption, security, hatred of God, contempt of his grace and mercy, ignorance of the promises and of Christ.⁷⁰

Biblically revealed law thus destroys our self-image as just and

63. *Id.* at 62-63.

64. See MONTGOMERY, *The Law’s Third Use, THE SUICIDE OF CHRISTIAN THEOLOGY* 423 (1970).

65. *Galatians* 3:24. The Greek word translated “schoolmaster” in the King James version (παιδαγωγός: *paedagogos*) referred not to the teacher himself but to the slave whose responsibility it was to take the pupil to the teacher.

66. *Matthew* 5:17 *ff.*

67. *James* 2:10; *cf. Matthew* 5:48.

68. *Romans* 3:23.

69. *John* 3:16; *Romans* 5:6-8, 6:23; *Ephesians* 2:8-9.

70. M. LUTHER, *In Epistolam S. Pauli ad Galatas commentarius* (1531), in 40 WA [the standard, critical WEIMARER AUSGABE of the Reformer’s writings] pt. 1 at 485. For an English translation of Luther’s great *Galatians Commentary*, see P.S. Watson’s rev. (1956) of the Middleton ed. (cited passage at 299); see also M. LUTHER, *SELECTIONS* 141 (J. Dillenberger ed. 1961). *Cf.* C.F.W. WATHER, *THE PROPER DISTINCTION BETWEEN LAW AND GOSPEL passim* (1928).

righteous persons and forces us to rely on God's mercy in Christ. It gives us a true picture of ourselves, and teaches us not only justice but also mercy. Needless to say, these lessons are fundamental to the personal growth and maturity of men in general, and of members of the legal profession in particular. Without learning them, can the jurist ever pray, as all jurists should: "[N]ot a single time in rendering judgment have I forgotten that I am a poor human creature, a slave of error, that not a single time in sentencing a man has my conscience not been disturbed, trembling before an office which ultimately can belong to none but thee, O Lord"?⁷¹

(4) *In the face of the inadequacies and failures of even the best of human justice, biblical revelation assures us of a Last Judgment, where perfect justice shall be rendered.* The entertaining volume "*Pie-Powder, Being Dust from the Law Courts*," written anonymously by J. A. Foote, K.C., contains the following anecdote:

There stands in the market-place of one of our Wessex towns a memorial cross—not, indeed, ancient, and scarcely beautiful, but bearing an inscription which is still read at assize time with wonder and rustic awe. It tells how one Ruth Pierce, of Potterne, did in the year 1753 combine with three others to buy a sack of wheat, each contributing her share of the price. When the money was collected a deficiency appeared, and each woman protested that she had paid her full share, Ruth, in particular, declaring that if she spoke untruly she wished that God might strike her dead. Thereupon it is recorded that she instantly fell lifeless to the ground, and the money was found hidden in her right hand. The inscription adds that this signal judgment of the Almighty was commemorated by the direction of the Mayor and Aldermen for the instruction of posterity. . . .

. . . So have I, when passing from the market cross of Devizes to the Assize Courts hard by, reflected how much more easily justice would be administered if all perjury were cut as short as that of ill-fated Ruth.⁷²

But "ill-fated Ruth" is hardly a common phenomenon, however we explain it. "Justice is not only to be done; it is manifestly to be done"; yet, as a matter of fact, it is often not done, manifestly or otherwise. John Chipman Gray records the viewpoint, which has occurred to all of us at one time or another, that it is "an absurdity to say that the Law of a great nation means the opinions of half-a-dozen old gentlemen, some of them, conceivably, of very

71. P. CALAMANDREI, EULOGY OF JUDGES 101 (1942).

72. J.A. FOOTE, "PIE POWDER," BEING DUST FROM THE LAW COURTS, COLLECTED AND RECOLLECTED ON THE WESTERN CIRCUIT BY A CIRCUIT TRAMP 213-14 (1911, reprinted 1967).

limited intelligence.”⁷³ Our legal systems suffer from the fallibility of the sinful human situation: absurdities are made law; guilty men go free; innocent men are punished. But Holy Scripture promises a Last Assize, when “there is nothing covered that shall not be revealed, neither hid that shall not be known.”⁷⁴ The Judge on that Day will be at the same time omniscient and just, and the ambiguities and failures of human justice through history will be rectified. Thus, the biblically revealed conception of “higher law” offers eschatological hope: the promise that justice is not in the final analysis sound and fury, signifying nothing.⁷⁵ Scripture uses legal imagery to describe that Day, and stresses that the only hope for the individual or nation before the bar of eternal justice will be the services of the divine Advocate—Jesus Christ—whose death alone can free men from their sins.⁷⁶ His services are available free, through faith. Every attorney should therefore ponder, while he has the opportunity, the eternal implications of that well-known aphorism: “The accused who acts as his own lawyer has a fool for a client.”

Legal philosophy in modern times, however, has very largely played the fool. In the terms of our introductory fable, it has created the conditions for its own destruction: the jurisprudential rabbit, by opting for moral relativity, has made himself a ready dish for the opportunist foxes of the contemporary world of Realpolitik.

And how did this sad state of affairs come about? It has been well said that in the 18th century the Bible was killed (by unwarranted destructive criticism, as in Paine’s *Age of Reason*); in the 19th century God was killed (Nietzsche’s “death of God” and the substitution of the *Ueberschensch*, the Superman, who “transvalues all values”); and in our 20th century Man has been killed (in the most destructive wars in history). This degeneration is not accidental; each step logically follows from what has preceded: the loss of the Bible leads to the loss of God, for in the Bible God is most clearly revealed; the loss of God leaves Man at the naked mercy of his fellows, where might makes right.

A precisely parallel deterioration can be charted in the history of jurisprudence:

73. J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 84 (2d ed. 1921, reprinted 1963).

74. *Luke* 12:2-3.

75. See K. HEIM, *JESUS THE WORLD’S PERFECTER: THE ATONEMENT AND THE RENEWAL OF THE WORLD* pt. 3 (1959); J.P. MARTIN, *THE LAST JUDGEMENT* (1963); and especially M. BARTH, *ACQUITTAL BY RESURRECTION* ch. 4 (1964).

76. 1 *John* 2:1; *Romans* 14:10-12; *Phillipians* 2:10.

	<u>In General</u>	<u>In Jurisprudence</u>
18th century	BIBLE	REVEALED LAW
19th century	DESTRUCTION OF: GOD	NATURAL LAW
20th century	MAN	POSITIVE LAW

To the end of the Reformation period, jurists grounded positive law and natural law in biblical revelation—where the clearest expression of God's revealed will for men could be found. During the 18th century, efforts were made by Deists and others to separate Natural Law from the Bible and to rely on "natural rights" alone as the basis of human society and positive law.⁷⁷ But by the 19th century a Natural Law independent of Scripture had become so vague that it was readily replaced by "legal realism," positivism, and other relativistic approaches. Then, in our time, came the inevitable holocaust: if law is indeed relative, it can be twisted in a totalitarian, revolutionary or anarchical manner according to the desires of those in power, and becomes no more than a tool of the party for effecting social change according to whatever definition of social value or dysvalue happens to be theirs.⁷⁸ George Orwell's *1984* appears on the horizon, as does the Antichrist of Scripture, significantly denominated *ὁ ἀνομος*—"The Lawless One."⁷⁹

Like Western man in general, the modern jurist made the fundamental error two centuries ago of thinking that human values could be sustained apart from God's revelation of Himself in Holy Scripture. An attempt was made to live off of the inherited moral capital of the Bible after dispensing with it. Eventually daddy's money ran out, and the modern lawyer now finds himself

77. Fortunately, our Founding Fathers (with the prominent exception of Jefferson) did not consciously attempt to cut themselves off from their revelational roots. See E.S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* *passim* (1955). In developing their views of "inalienable rights" and social contract they followed not the deistic sentimentalist Rousseau but John Locke, whose Christian beliefs were so firm that he wrote an apologetic on *The Reasonableness of Christianity*; cf. C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF IDEAS* (rev. ed. 1942). Jefferson's antipathy to Blackstone may well relate not only to the latter's political but also to his religious conservatism; see Waterman, *Thomas Jefferson and Blackstone's Commentaries in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 451, 472-73 (D.H. Flaherty ed. 1969).

78. Cf. RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (J. Black ed. 1971).

79. 2 *Thessalonians* 2:8.

in a far country “filling his belly with the husks that the swine did eat.”⁸⁰ But—*Deo gratias!*—the lights in the Father’s house are still burning, and a return to the “higher law” of Scripture is open to all. The prodigal lawyer need only “come to himself,” arise and go to his Father, saying to him: “Father, I have sinned against heaven, and before thee.” The promise is that he will be received with compassion: for this my jurisprudential son was dead, and is alive again; he was lost, and is found.

80. *Luke* 15:16 *ff.*