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On Teaching Natural Law

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ON TEACHING NATURAL LAW *

DAVID F. FORTE **

In the autumn of my last year at Columbia Law School, I found myself competing with many bright young people for a federal clerkship. One promising opportunity centered on a position which became available with a judge in the Southern District of New York. But because of an abundance of applicants, the judge had determined that his current clerk should screen the likely candidates first.

At seven p. m. on the appointed day, I arrived at the judge's chambers and met his late-working clerk. We exchanged pleasantries, cleared away a small valley in the mountains of paper on his desk, and sat down. After we reviewed my background, he explained what working conditions were with the judge. He also pointed out what qualities the judge was looking for in a clerk.

"He's particularly interested in people who can write," the clerk told me. "Do you have any writing samples which you can leave with the judge?"

"I have a few articles which have been published," I offered. "But I am most pleased with a paper I recently finished on the Supreme Court."

"The Supreme Court?" he said, interested. "That might be worthwhile looking at. Do you have a copy with you?"

"Yes," I said, reaching into my briefcase. "It's a case by case analysis done from an unusual angle." I pulled out the fifty-page manuscript and proudly placed it before the clerk.

Looking at the title, "Natural Law and the Supreme Court," he furrowed his brow slightly, and then raised his eyes to stare at me squarely. "What's 'natural law'?" he asked.¹

A few weeks later, Charles Wyzanski, Senior United States District Judge, spoke at Columbia Law School.² As a Federal District Judge in Massachusetts, Judge Wyzanski had developed a notable reputation for decisions carefully directed towards desirable social policies. But in his address, he begged for something larger than social tinkering. He asked for wisdom.

"In spite of all the talk," the judge declared, "I think it fair to say that in all the great law schools, there is virtually no feeling that they are schools of jurisprudence, as distinguished from schools of law." They provide people with technical training "in particular narrow grooves, and what is offered in connection with jurisprudence butters no parsnips."

* This article arose from work originally done in the Graduate Seminar on Legal Education at Columbia School of Law, taught by Professors Walter Gellhorn and R. Randall Edwards, for whose guidance I am immensely grateful.

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¹ I did not get the clerkship.

² Sulzbacher Memorial Lecture No. 3, November 12, 1975 (unpublished lecture on file in the Dean's office at Columbia Law School).

Certainly this problem has been noted before. Yet recent suggestions for reform in legal education have pushed the curriculum towards more specialized and practical training and less towards a normative jurisprudential ethic. Judge Wyzanski's malaise centered not only on the law schools, but on the practicing bar and the judiciary as well. The country, he regretted, is barren of "sages of the law" the likes of Hughes, Holmes, Brandeis, Cardozo, Stone, and Hand. Instead, we have developed technical specialists in the law, those whose very training precludes them from seeing the larger work which the law is about. Even an awareness of the "social" ramifications in the law is not enough, the judge suggested.

In this era of the near ubiquitous acceptance of the principles of legal realism, Judge Wyzanski called for a dramatic turnabout.

Most of my generation, and presumably of the current law school generation, have been taught to despise natural law. In my period of time, we read Mr. Justice Holmes, and his denigration of natural law became part of our fundamental way of looking at things. And we quite understood when in witty phrases in the Supreme Court of the United States, he spoke about the omnibrooding presence as a non-existent factor But was he really right?

Natural law, Wyzanski suggests, is the best vehicle to carry a higher moral sense into the training of lawyers, the policy decisions of those practicing law, and the judgments of the bench. He marvels at Lord Mansfield who, though working in the circumscribed area allotted to judges in England, nonetheless infused the entire law of quasi-contract "with the principles of public policy and of natural justice."

Instead of structuring an academic environment conducive to such principled creativity, Judge Wyzanski asserted, we provide a legal education which is technically proficient but morally stunting to law students. To those students present at this address, the judge gave a mournful diagnosis.

I daresay that ninety-nine percent of you will spend your lives far away from the major questions of natural justice and natural law. And yet, never to have glimpsed what is the compass, never to have understood what is the nature of the legal system in its relation to deeper values is to leave you shortchanged with respect for life.

He charged the law schools with the responsibility of providing a deeper moral sense through greater attention to the natural law.

Judge Wyzanski's prescription will be hard to fill. To begin with, natural law remains an unfavored philosophy in most American law schools.³ Indeed, as he noted, jurisprudence itself is not a favored topic. Secondly, and more importantly, we have had very little experience in teaching natural law in this country. Even assuming the desirability of a greater emphasis on natural law in our law schools, it is doubtful whether we would know how to do it. A brief look at the history of some of our law schools illustrates the problem.

Columbia University is itself an instructive example. Throughout its experience with the teaching of law, it has managed to remain virtually un-

³ The weakness of its history can be detected in Ehrenzweig, *The Teaching of Jurisprudence in the United States*, 4 *J. Legal Educ.* 117 (1951).

touched by the three natural law eras in American legal history: (1) the denouement of Enlightenment natural law in the late eighteenth and early nineteenth centuries, (2) the laissez-faire natural law of the late nineteenth century, (3) and the natural law "revival" after World War II.

Promising early brushes with natural law teaching were never brought to fulfillment. In December 1773, King's College (Columbia's maiden name) elected John Vardill, a soon-to-be-ordained Anglican clergyman, as Fellow and Professor of Natural Law. It seems, however, that the title may simply have been honorary as there is no record that Vardill ever lectured at the College. In fact, he permanently emigrated to England scarcely three months after his appointment.⁴ A 1784 proposal to establish a faculty of law including a Professor of the Law of Nature and Nations also proved abortive.⁵

In 1794, James Kent was appointed Columbia's first professor of law. The future Chancellor, who would later develop the natural right of property in his works and decisions, paid little attention to the subject in his first series of lectures. He concentrated instead on general and comparative constitutional history.⁶

Over sixty years later, in 1857, a plan for a law school at Columbia finally took shape. The courses were to be Modern History, Political Economy, the Principles of Natural and International Law, Civil and Common Law, and the study of Cicero, Plato, and Aristotle.⁷ But when the law school began a year later, a much more pragmatic orientation was revealed. Led by Professor Theodore W. Dwight, the law courses were directed towards legal practice, "with a special emphasis on real estate law."⁸ The only course possibly dealing with natural law was that of "Moral Philosophy," taught by Professor Charles Murray Nairne, borrowed by the law school from Columbia College.⁹ But it is doubtful whether there was much legal content to

⁴ J. Goebel, *A History of the School of Law, Columbia University* 8 (1955). King's College, however, apparently offered a course in Moral Philosophy in 1762, A. Reed, *Training for the Public Profession of the Law* 133 n. 2 (1921), while the following year, senior students had to study Grotius and Pufendorf. *Id.*, at 114.

⁵ J. Goebel, *supra* note 4, at 9. A. Reed, *supra* note 4 at 120. However, early professorships at other colleges—The College of William and Mary, Brown College, Dartmouth College, Philadelphia College, and later at the University of Virginia—were in "Natural Law" and allied subjects. J. Goebel, *supra* note 4 at 188 n. 3, 120, 122. Meanwhile at Yale, President Stiles gave law lectures on Vattel and Montesquieu. A. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 26 (1967).

⁶ Kent's reappointment in the 1820's also resulted in a series of general lectures on the law. J. Goebel, *supra* note 4 at 16, 20. Meanwhile, the famous Litchfield School in the early 1800's concentrated solely on professional education. A. Sutherland, *supra* note 5 at 29.

⁷ J. Goebel, *supra* note 4 at 28.

⁸ Announcement, *Columbia University School of Law, 1859* [hereinafter cited as Announcement, with applicable year]. In light of the practical training offered at Columbia and other law schools, the New York State Legislature in 1860 granted automatic admission to the bar to graduates of law schools located within the state. Announcement, 1862-1863.

⁹ By 1869, Nairne had become Professor of the Ethics of Jurisprudence on the law faculty. Announcement, 1869. But his teaching duties were broad. He even instructed in English Literature in the College. *Acta Columbiana*, June 7, 1882. A. Reed, *supra* note 4 at 159 n. 1.

Nairne's instruction. His extant lecture notes reveal a transcendentalist bent, but with no legal implications at all.¹⁰ As the years passed, the popularity of his course decreased rapidly.¹¹ Professor Dwight's extensive lectures also reveal little concern for natural law.¹²

In 1878, the law school restructured itself on an explicit historical and comparative approach, but natural law continued to be absent from the curriculum.¹³ Finally, when the case method was introduced in 1891, concepts of pre-existing norms became even less relevant.

By the time that jurisprudence entered the Columbia curriculum, the allied schools of legal positivism, sociological jurisprudence, analytical jurisprudence, and legal realism were in their heyday. A 1939 course in jurisprudence (required for third-year students) was taught by Edwin Patterson and Karl Llewellyn.¹⁴ Both men, particularly Llewellyn, were legal philosophers of the first order, and neither had much time for the outdated notions of natural law. The text used in the course devoted eighty-seven of its 1100-odd pages to natural law, confining itself to a selection of readings from well-known philosophers of that school.¹⁵

Until recently, that approach has varied little in the jurisprudence courses at Columbia. But in the last two years, there has been some modification of the internal structure of the course on jurisprudence. A more topical approach has taken the place of the comparative "schools" method. The course now includes topics such as judicial decision-making, positivism, natural law, civil disobedience, justice, and self-regarding acts. The section on natural law is, however, self-contained and principles derived therefrom are not applied across the board in the consideration of other topics. No published text is used, but the students are assigned natural law selections from Aquinas, Locke, Fuller, Pope Paul VI, and a few cases.¹⁶

¹⁰ See Nairne, *The Just Place and Proportion of the Several Studies Commonly Comprised in a Subgraduate Course of Instruction, Lecture to the City University of New York (now New York University), 187?* (pamphlet in the Columbian Archives, Columbia University); and *The Heavens*, a handwritten and undated lecture on philosophy and astronomy, Columbian Archives.

¹¹ A. Reed, *supra* note 4 at 159 n. 1.

¹² See *Lectures Delivered by Professor Theodore W. Dwight, 1872-1874* (lecture notes of Samuel Greenbaum on file at Columbia Law Library).

¹³ Announcement, 1878-1879.

¹⁴ Announcement, 1939-1940. Patterson had begun the course in 1925 as a graduate seminar with John Dewey. Jones, *Edwin Wilhite Patterson: Man and Ideas*, 57 *Colum.L.Rev.* 607 (1957). Although Patterson later wrote commentaries on natural law, see Patterson, *A Pragmatist Looks at Natural Law and Natural Rights* 48 (A. Harding ed. 1955), and edited the writings of Jean Dabin, Jones, *supra* at 610, Patterson never forsook his positivist tenets. His major theoretical work, *Jurisprudence: Men and Ideas of the Law* (1953), was pragmatic to the core, and as such was subjected to critical review by Lon Fuller. See his *American Legal Philosophy at Mid-Century*, 6 *J.Legal Educ.* 457 (1954).

¹⁵ The text was J. Hall, *Readings in Jurisprudence* (1936). Though this book does not show it, Hall has sympathetic leanings towards natural law and believes it has beneficially affected ideas of human rights in the United States. See J. Hall, *Living Law of Democratic Society* (1972).

¹⁶ The mimeographed materials replace Lloyd, *Introduction to Jurisprudence* (3d ed. 1972), which was strongly oriented to the positivist viewpoint. Conversation with

Harvard's history shows a somewhat different experience. The establishment of Harvard Law School preceded Columbia's by four decades, yet at first it too lacked serious instruction in natural law, despite its temporal proximity to the Enlightenment natural law era.¹⁷ In 1816, Harvard's first Professor of Law, Chief Justice Isaac Parker, gave seventeen or eighteen lectures on law.¹⁸ One of the lectures was centered on natural law, but Parker's limited academic abilities and practical bent prevented this single attempt from developing further. In fact, at Parker's own behest, Harvard established its law school the very next year and dedicated it to the training of men in the practical application of the law. An additional professor, Asahel Stearns, was appointed to help fulfill the task.¹⁹

The practical bent to Harvard's legal education continued after Stearns' and Parker's departure in 1828, when they were requested to leave to make way for more prestigious men. Joseph Story was a scholar neither unfamiliar with, nor unfriendly to natural law principles.²⁰ Yet when he joined the Harvard Law School faculty in 1829, he was specifically restricted to teaching law "equally in force in all branches of our Federal Republic," or by "state law useful in more states than one." By this instruction, Harvard hoped to establish itself as a national law school, steeping its students in the practical application of the law. The irrepressible Story, however, still counted the Law of Nature as one of the five federal subjects to be covered.²¹ But this aspect of Story's pedagogy soon fell by the way as the technical study of judicial decision grew, eventually culminating in Langdell's case method.²²

In the early part of this century, however, even while Langdell's case method was in full flower, Harvard offered a course in jurisprudence to its fourth year (or graduate) students.²³ Among other things, the course covered "the province of the written and unwritten law."²⁴ Taught by Joseph Beale, the course was taken over by Roscoe Pound in 1917.²⁵ Though renowned as

Professor Kent Greenawalt, Columbia School of Law, November 3, 1976. See also, Columbia U.Bull., 1975-1976, at 43-44.

¹⁷ However, Harvard College's library catalogue listed books under the rubric of *Jus Naturale et Politicum*, A. Sutherland, *supra* note 5 at 68, while a course was being offered in "Natural Philosophy." A. Reed, *supra* note 4 at 136.

¹⁸ A. Sutherland, *supra* note 5 at 52.

¹⁹ *Id.* at 54.

²⁰ See his opinion in *La Jeune Eugenie*, 26 Fed.Cas. 832 (No. 15,555) (C.C.D.Mass. 1882), and his Aristotelian sense of natural law for the first edition of the *Encyclopedia Americana*. See Hogan, *Joseph Story's Essay on "Natural Law"*, 34 Ore.L. Rev. 88 (1955).

²¹ Brandeis, *The Harvard Law School*, 1 The Green Bag 10, 14 (1889). Story also enthusiastically supported a proposed program of legal studies at the University of Maryland which included a major subject of "Moral and Political Philosophy." A. Reed, *supra* note 4 at 124.

²² A. Reed, *supra* note 4 at 146.

²³ Harvard was typically bucking the tide. An 1891 survey of American law schools indicated that only fifteen out of sixty-one had any jurisprudential offering. J. Goebel, *supra* note 3 at 122.

²⁴ Official Register of Harvard University, the Law School, 1911-1912, at 8 [hereinafter cited as Law School Register, with applicable year].

²⁵ Law School Register, 1917-1918, at 8.

the founder of the school of sociological jurisprudence, Pound was not an unsympathetic critic of natural law.²⁶ Indeed, as the years passed (particularly after 1933 when the course was moved to the third year),²⁷ Pound paid more classroom attention to natural law.²⁸

After World War II, there was a revival of natural law thinking among jurists.²⁹ At Harvard, Lon Fuller took over Pound's course in 1948 and directed it towards the consideration of principles such as "the perceived common need (or 'natural law'), legitimated power (or sovereignty), adjudication, and contract (or exchange.)"³⁰ At the same time, Karl Llewellyn arrived from Columbia and taught a course on jurisprudence of his own, stressing "the crafts of the law in their living application."³¹ But the following year, Fuller was left alone with his own course (shifted to the second year).

Lon Fuller had little patience with those, like Kelsen, who thought that natural law was an "irrational" concept. "Jurisprudence must start with justice," Fuller proclaimed.³² Through courses like his own, he urged

that a rust solvent be applied to the gates of inquiry that have stood closed for more than a century, that these gates—the gates that lead to ethical philosophy and even to what some would call metaphysics—be swung wide again.³³

Although Lon Fuller is probably the most distinguished modern American advocate of natural law, he forbore from importing natural law concepts wholesale into his course on jurisprudence.³⁴ He recommended that his students read in advance Cardozo, *THE NATURE OF THE JUDICIAL PROCESS*,³⁵ and Pound's, *AN INTRODUCTION TO THE PHILOSOPHY*

²⁶ See R. Pound, *The Formative Era in American Law* (1938).

²⁷ *Law School Register*, 1933-1934, at 9.

²⁸ At least as evidenced by his final examination questions. See *Papers Used at the Examinations in Law Held at Harvard University, 1924-1925*, at 87 [hereinafter cited as *Examinations*, with applicable years]. *Id.* 1928-1929, at 123; *id.* 1931-1932, at 135; *id.* 1933-1934, at 92; *id.* 1937-1938, at 96; *id.* 1938-1939, at 98; *id.* 1940-1941, at 106-107; *id.* 1942-1943, unpagged.

²⁹ The revival took place in European legal theory earlier, but reached its strength on this side of the Atlantic only after the war. See W. Friedmann, *Legal Theory*, 90 *et seq.* (rev. 4th ed. 1960); Messner, *The Postwar Natural Law Revival and its Outcome*, 4 *Nat.L.F.* 101 (1959). Key works of the "revival" are H. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (1947); A. Passetin d'Entreves, *The Case for Natural Law Re-Examined* (1956); J. Wu, *Fountain of Justice: A Study in the Natural Law* (1955).

³⁰ *Law School Register*, 1948-1949, at 28.

³¹ *Id.*

³² Fuller, *The Places and Uses of Jurisprudence in the Law School Curriculum*, 1 *J.Legal Educ.* 495, 495 (1949).

³³ Fuller, *On Teaching Law*, 3 *Stan.L.Rev.* 35, 47 (1950).

³⁴ Only in the 1960's did he more intensively pursue his own views and theories, and only in graduate seminars. See *Law School Register*, 1963-1964, at 69-70.

³⁵ B. Cardozo, *The Nature of the Judicial Process* (1921).

PHY OF LAW.³⁶ Even his own edited course readings approached jurisprudence in a cosmopolitan fashion.³⁷

The book is nothing like the smorgasbord of natural law and other philosophical selections which is the typical fare in most jurisprudence readers. Fuller prefers a much more focussed approach to central problems in legal theory. He uses his famous imaginary cases as a means to illustrate differing jurisprudential analyses. His own "interstitial" view of natural law is woven in amongst other philosophical threads in the fictional opinions. Thus, when the student is confronted with a problem in the administration of justice, he is encouraged to consider natural law—not as an outdated concept—but as one of many justifiable means to reach a solution.

The text is unique in the limited number of selections, and their length.³⁸ Fuller teaches by use of the problem method coupled with an intense textual analysis of a few representative writers. It is a demanding method, and forces the student to engage in serious philosophical speculation. Fuller intentionally sacrifices the breadth of a survey approach in favor of gaining more analytical depth. Similarly, his examinations reveal no inherent natural law bias, but demand conceptual clarity of the student in facing jurisprudential issues.³⁹

Thus, to the extent Fuller taught natural law, he did so as a conceptually relevant means (among others) to investigate legal norms. In this, he differed from most courses on jurisprudence which relegate natural law to the status of a museum piece not even possessing much nostalgia value. At the same time, it should be noted that Fuller did not conduct the course as an intense study of natural norms *qua* themselves. He clearly felt it his obligation to teach in a larger framework.

In contrast, Notre Dame Law School has been one institution in the country which has sought to teach natural law directly. Moreover, because it is in the Scholastic tradition, Notre Dame regards natural law as part of its Christian heritage, and it has, in theory at least, sought to impregnate the entire legal curriculum with natural law norms.⁴⁰

³⁶ R. Pound, *An Introduction to the Philosophy of Law* (1922).

³⁷ See L. Fuller, *The Problems of Jurisprudence, A Selection of Readings Supplemented by Comments Prepared by the Editor* (temp. ed. 1949). Fuller hoped to revise this text for final publication but he never fulfilled that intention. He put his natural law principles into print elsewhere. See for example *Law in Quest of Itself* (1966) and *Anatomy of the Law* (1968).

³⁸ *Id.* Fuller's textual readings (placed after his problem cases) contain lengthy selections from Aristotle, Austin, Gray, Holmes (in fact, the section on positivism is the longest in the book), Maines, Bentham, Mill, and pieces on Hofeldian analysis. Fuller concludes with a brief essay on his own conceptions.

³⁹ He particularly liked to test his students on issues of legal semantics. See *Examinations 1950-1951*, at 21-24 (on "order"); *id.* 1951-1952, at 22 (on "law and morality"); *id.* 1952-1953, at 18 (on "law as fact and as value"); *id.* 1959-1960, at 30-31 (on "arbitrariness"); *id.* 1961-1962, at 22 (on "problems of meaning"). Other examinations concentrated on positivism. *Id.* 1953-1954, at 14; *id.* 1957-1958, at 38.

⁴⁰ A biographer from the law school has written that the institution "has from the beginning aimed to integrate the teaching of positive law with a natural law philosophy . . ." P. Moore, *A Century of Law at Notre Dame* 99 (1969).

Nonetheless, in its early years, Notre Dame's course of studies bore little difference from its secular brothers in the Eastern United States.⁴¹ In fact, jurisprudence in general and natural law in particular were absent from the curriculum until just before World War II, when a course in jurisprudence "having for its purpose the direct integration of law and philosophy" was introduced.⁴² At the same time, the school's law journal, the *Notre Dame Lawyer*, published many Scholastic pieces.

Only after World War II did Notre Dame seriously take up the cause of natural law. Aided by a special endowment, the law school established the Natural Law Institute in 1947. For its first five years, the Institute held convocations on natural law and published its proceedings.⁴³ Beginning in 1952, the Institute changed its policy and began publishing the *Natural Law Forum* which has since been the vehicle for some of the best jurisprudential writing in America. (In the 1970's, the name was changed to the *American Journal of Jurisprudence*, perhaps emblematic of the decline of the natural law revival.)

In 1951, official organs of the law school proclaimed the vitality of natural law and declared that Notre Dame had been its champion since its founding in 1869.⁴⁴ Notwithstanding the dubious history, the new curriculum felt the effect. First year students were required to take "Fundamental Law," a course which sought to reveal "(t)he moral origin of the common law and the development of the rights of the individual against the government, based on Blackstone's Commentaries and early English and American cases."⁴⁵ The theme of the course suggested that there was a congruence between Thomistic and Lockean natural law, not necessarily a self-evident proposition.⁴⁶ The reliance on Blackstone is also curious, for his *Commentaries* undercut many of the natural law principles of Coke and his American disciples.⁴⁷

⁴¹ See Feeney, *Do American Catholic Law Schools Have a Distinctive Philosophy of Education?* 25 *Notre Dame Law* 647 (1959); Brown, *Jurisprudential Aims of Church Law Schools in the United States: A Survey*, 13 *Notre Dame Law* 163 (1938). First-year subjects were listed as Political Economy, Principles of Legislation, Introduction to the Study of Roman Law, Institutes of Justinian, Common Law of England, Public and Private Law, Principles of Obligation, Criminal Law and Procedure, and Medical Jurisprudence. Second Year courses were Constitutional Law of the United States, Principles of Civil Jurisprudence, Jurisprudence of the United States, The Law of Contracts, Practice at Law and Equity, and Evidence. Moore, *supra* note 40 at 99.

⁴² *Notre Dame Alumnus*, March, 1941, at 13, quoted in Moore, *supra* note 40 at 99.

⁴³ University of Notre Dame Natural Law Institute Proceedings, vols. I-V (1947, 1948, 1949, 1950, 1951).

⁴⁴ University of Notre Dame Bulletin of Information, the College of Law 1951-1952, at 18 [hereinafter cited as Bulletin, with applicable years].

⁴⁵ *Id.* at 12.

⁴⁶ The Bulletin, 1951-1952, stated: "The College of Law thus carries on the basic Natural Law philosophy of the American Founding Fathers and seeks not merely to set forth the abstract concepts of the Natural Law but also to correlate them with the various courses of the Positive Law." *Id.* at 18.

⁴⁷ See Manion, *The Founding Fathers and Natural Law*, 35 *A.B.A.J.* 461, 462 (1949); W. Friedmann, *supra* note 29 at 84; Finnis, *Blackstone's Theoretical Intentions*, 12 *Nat.L.F.* 163 (1967); Lucas, *Ex Parte Sir William Blackstone, Plagiarist!': a Note on Blackstone and the Natural Law*, 7 *Am.J.Legal Hist.* 142 (1963).

There was also a required second year course on Legal Ethics, in which students were acquainted with "the norm of morality as applicable to legal principles; the basic principles of the natural law; the nature and dignity of the legal profession; the obligations and rights of judges and lawyers."⁴⁸ At the same time a two-semester elective on Jurisprudence was taught by Anton-Hermann Chroust, a European scholar sympathetic with Pound's school of sociological jurisprudence.

In 1953, the new cause took on a harsher tone. The law school abolished all electives and initiated year-end cumulative examinations. Stridently moving against the trend of law school education, Dean O'Meara declared, "[H]ereafter the faculty rather than the students will decide what courses are best calculated to prepare a man for the practice of law."⁴⁹ In contrast, Lon Fuller had earlier argued,

In my opinion, the only discipline we should see in law school is that which sets the student's mind free, not that which makes it comfortable within a framework imposed on it from outside.⁵⁰

In Notre Dame's stricter scheme, courses underwent a restructuring. Fundamental Law and Legal Ethics were replaced respectively by a more historical Introduction to Law and History of the Legal Profession (both becoming first year courses).⁵¹ But in the second year, students took a two-semester Natural Law Seminar, taught by Father Theodore Hesburgh. The Course was designed to have students contend with "actual, down-to-earth, here-and-now problems in the light of the Natural Law."⁵² The central readings in the course were taken from St. Thomas' TREATISE ON LAW, and the students were expected to use it to examine "important modern legal and social problems."⁵³

By the mid-1960's, Notre Dame had declared itself the champion of a legal tradition "in opposition to two major schools of jurisprudence, the sociological and the analytical."⁵⁴ As the embodiment of the alternative, Notre Dame intended to pervade all its courses with a sense of morality and the principles of justice that define the nature of law. It is not clear how morally Catholic the curriculum became, but the College of Law did continue its natural law and jurisprudential offerings, though confining them to one semester apiece in the second and third years.

⁴⁸ Bulletin, 1951-1952, at 13. The standard of conduct required of Catholic lawyers and judges in divorce and separation cases was also discussed. *Id.*

⁴⁹ O'Meara, *Legal Education at Notre Dame*, 28 Notre Dame Law. 447, 453 (1953).

⁵⁰ Fuller, *supra* note 33 at 38.

⁵¹ The latter taught by Chroust. Bulletin, 1953-1954, at 15-16, 24. He used as his text R. Pound, *The Lawyer From Antiquity to Modern Times* (1953). Bulletin, 1955-1956, at 20.

⁵² O'Meara, *supra* note 49 at 449. O'Meara was attempting to synthesize his own policy of training practical lawyers with Notre Dame's expanding interest in the theoretical reaches of the natural law.

⁵³ Bulletin, 1955-1956, at 23.

⁵⁴ Law at Notre Dame, 3-4 (undated pamphlet at Columbia Law Library).

The natural law offering became more of a course on human rights,⁵⁵ while the course on jurisprudence retained the same format but in a compressed version.⁵⁶ The instructors of the separate courses, Professors Robert Rodes and Thomas Broden, used a jointly edited set of materials.⁵⁷

Rodes' course on Natural Law concentrated on cases which helped highlight the instructor's own version of natural law. Rodes holds that natural law is the value-laden telos of positive law systems, and not a pre-existing high standard by which positive laws are confronted and judged.⁵⁸ As such it seems Aristotelian as modified by Pound. He used relatively few philosophical sources in his course, but with some references to Jacques Maritain. Primarily, Rodes made use of cases, as problem situations, and grouped them into various categories of analysis. His objective was to have the students analyze the humanitarian values immanent in the cases.

By the end of the decade, third year electives had reappeared at Notre Dame. The second year course on Natural Law was renamed Jurisprudence, though Rodes continued to devote one half of the course to natural law. The third year course on Jurisprudence was replaced by an elective seminar in Modern American Jurisprudence.⁵⁹

In 1970, Notre Dame's newly designed *Bulletin* made no mention of natural law as a guiding principle, but Rodes continued to teach the jurisprudence course in fundamentally the same fashion. At the same time, Charles Rice, a strong advocate of traditional natural law values, joined the faculty.⁶⁰ After teaching a number of courses in various fields, Rice designed a seminar in Natural Law Jurisprudence which began in the Spring semester of 1976.

Rice has his students analyze positive law and contrast it to what Rice calls the "realist" view, namely that there is an objective moral order. Though his seminar discusses problems such as civil disobedience, abortion, and euthanasia, it is primarily an exercise in philosophical investigation. Basically, Rice pits A. J. Ayer and Hans Kelsen against St. Thomas Aquinas.⁶¹

Rodes' approach is a rough facsimile of Fuller's: the use of cases to help analyze issues from a particular conception of natural law, though his course seems both less integrated and less cosmopolitan than Fuller's was. Rice, on the other hand, sets up positivism as a standard to be analyzed and criticized, with Thomistic natural law as the alternative solution. His approach is thus

⁵⁵ "An inquiry into the demands made on the legal system by the inherent characteristics of the human person, and the ways in which those demands have been met in Anglo-American law." *Bulletin*, 1964-1965, at 29.

⁵⁶ *Id.* at 33.

⁵⁷ *Jurisprudence: Cases and Materials on the Legal Process and Natural Law*, T. Broden and R. Rodes eds., 1964 (unpublished).

⁵⁸ Conversation with Professor Robert Rodes, December 13, 1975.

⁵⁹ *Bulletin*, 1969-1970, at 36, 44.

⁶⁰ *Bulletin*, 1970-1971, at 37.

⁶¹ Rice's syllabus, however, touches on many more writers as well, e. g. Kant, Austin, Holmes, Dewey, Hobbes, Locke, Fuller, d'Entreves, and Pound. Syllabus for Natural Law Jurisprudence, 1976 (unpublished course syllabus at Notre Dame Law School). For a suggestion to teach natural law in precisely the same method of reasoning as used by St. Thomas, see Constable, *What Does Natural Law Jurisprudence Offer?* 4 *Cath.U.L.Rev.* 1 (1954).

a mirror image of that used in most jurisprudence courses, where the natural law component is put forward as the earlier mode of juristic reasoning in order to pave the way for the more highly refined but practical theories of the positivist school.

As the examples of Columbia, Harvard, and Notre Dame show, the American tradition in teaching natural law has not been particularly strong despite some recent innovative experiments. Most law schools which teach jurisprudence follow the traditional pattern of placing natural law in a comparative or topical setting.⁶² Some Catholic schools emphasize a "law and morality" approach.⁶³

⁶² As indicated by the recent course descriptions in the following law school bulletins: U. of Akron Bull., 1974-1975, at 20; Albany Law School Announcement, 1975-1976, at 35; American U.Bull., 1976-1977, at 69; Arizona State Bull., 1974-1976, at 14; U. of Arizona Bull., 1974-1976, at 25; Boston U.Bull., 1976-1977, at 43; Brigham Young U.Bull., 1975-1976, at 25; Brooklyn Law School Bull., 1974-1975, at 32; U. of California at Hastings Announcement, 1975-1977, at 39; U. of California at Los Angeles Announcement, 1973-1974, at 32; Case Western Reserve U.Bull., 1975-1976, at 26; Catholic U. Announcement, 1975-1976, at 28; Chase College of Law Bull. (N.Ky.St.College), 1975-1976, at 41; U. of Chicago Announcement, 1973-1974, at 36; U. of Colorado Bull., 1976-1977, at 16; U. of Conn. Bull., 1975-1976, at 38; Cooley 1977 Annual 32; U. of Dayton Bull., 1974-1975, unpagged; U. of Denver Bull., 1974-1976, at 21; Dickinson School of Law Bull., 1976-1977, at 21; Duke U. Bull., 1975-1976, at 47; Duquesne U. School of Law, 1976-1977, at 21; Emory Bull., 1975-1976, at 32; Florida State U. College of Law, 1975-1976, at 26; Fordham U. Bull., 1974-1975, at 48; Golden Gate U. Bull., 1976-1977, at 23; Gonzaga School of Law Catalog, 1975-1976, at 61; George Washington U. Bull., 1973-1974, at 53; Hostra U. Bull., 1974-1975, at 29; U. of Idaho Announcement, 1974-1975, at 26; Indiana U. Bull. (Law School at Indianapolis) 1976-1977, at 26; College of Law, U. of Iowa, 1975-1976, 1976-1977, at 409; U. of Kansas Bull., 1976-1977, at 529; Lewis and Clark Law School/Northwestern School of Law Catalog, 1975-1976, at 35; U. of Louisville Bull., 1975-1976, at 39; L.S.U. Law Center Bull., 1976-1977, at 35; Mississippi College Bull., 1976-1977, at 34; Bull. of U. of Mississippi, 1976, at 25; U. of Missouri at Kansas City Bull., 1975-1976, at 30; U. of Montana Bull., 1974-1975, at 33; New York Law School, 1974-1975, at 30; New York University Bull., 1974-1975, at 98; U. of New Mexico Bull., 1973-1974, at 33; U. of North Carolina Record, 1976-1977, at 43; Bull. of North Carolina Central U., 1975-1976, at 22; U. of North Dakota Bull., 1976-1978, at 45; Ohio Northern U. Bull., 1975-1976, at 33; Ohio State U. Bull., 1974-1975, 1975-1976, at 26. Pepperdine U. Bull., 1975-1976, at 56; U. of Puget Sound Bull., 1976-1977, at 32; U. of Richmond Bull., 1976-1977, at 38; Rutgers University, The State University of New Jersey, 1974-1975, at 25; St. Johns U. Bull., 1972-1973, at 49; St. Mary's U. Bull., 1974-1975, at 44; U. of South Dakota Bull., 1976-1977, at 22; Bull. of U. of Southern California, 1974-1975, at 68; Southern U. & A. & M. College Bull., 1976-1977, at 20; Stanford U. Bull., 1975-1976, at 33; Vanderbilt U. School of Law, 1976-1977, at 50; Villanova U. Bull., 1976-1977, at 43; Record of U. of Virginia, 1976-1977, at 78; William Mitchell College of Law Bull., 1974-1975, at 9A.

Some law schools seem to emphasize a particular philosophy in their jurisprudence courses. See Antioch School of Law Catalog, 1975, at 51 (sociological jurisprudence); U. of Arkansas Catalog, 1974-1975, at 29 (sociological jurisprudence); U. of California at Davis Announcement, 1976-1977 at 25 (sociological jurisprudence); U. of Chicago Announcement, 1973-1974, at 29 (sociological jurisprudence); Detroit College of Law Announcement, 1976-1977, at 31 (legal realism); Florida State U. College of Law, 1975-1976, at 27 (legal realism); U. of Georgia Bull., 1973, at 29 (sociological jurisprudence); Indiana U. Bull. (School of Law at Bloomington) 1976-1977, at 28 (sociological jurisprudence); Mercer U. Bull., 1973, at 31 (sociological jurisprudence); U. of Minnesota Bull., 1974-1976, at 28 (legal realism); New York U. Announcement,

⁶³ See note 63 on page 424.

Outside of Notre Dame, only a few law schools give natural law specialized treatment. At Yale, Charles M. Gray, Research Assistant and Lecturer in Law and History, offers a joint law-history course on The Natural Law Tradition. It is a survey course which investigates natural law in classical and medieval times, and in its seventeenth century flowering. Gray requires that his students undertake a "close reading of original sources."⁶⁴ A similar survey course on the history of natural law is given at Loyola University School of Law at New Orleans.⁶⁵

Are the courses at Notre Dame and Yale indicative of the kind of trend Judge Wyzanski is calling for? If so, it cannot be much beyond the embryonic stage. Even though some hold that the practicalities of legal realism are inadequate guides for the legal craftsman, that jurisprudential ethic is not likely to be jettisoned in the foreseeable future. Rather, what may occur will be a slowly expanding search for some normative parameters within which technical proficiency can be bracketed.

The process, however, is not necessarily automatic. Take, for example, the development of Judge Wyzanski's own position. Early in the 1950's, Wyzanski followed the image of the skeptical Holmes, declaring that the "ethical test of the judge is not whether his judgments run parallel to the judgments of a moralist. . . ." ⁶⁶ Within a few years, however, he shied away from legal realism, evincing the hope that "law not merely should be a technique for setting strife on the basis of all the relevant facts, but also should mold men and teach a scale of values," ⁶⁷ although he continued to

1974-1975, at 101 (analytical jurisprudence); Northwestern U.School of Law, 1975-1976, at 41 (legal realism); Ohio State U.Bull., 1974-1975, 1975-1976, at 31 ("decision-making" jurisprudence); Oklahoma City School of Law Catalog, 1976-1977, at 22 (sociological jurisprudence); Willamette U.Catalog, 1976-1977, at 19 (sociological school).

Since the departure of Lon Fuller, the jurisprudence courses at Harvard Law School have varied according to the particular philosophies of the instructors. Conversation with Professor Unger, Harvard Law School, November 1, 1976; See Law School Register, 1975-1976, at 134, 141. Fuller himself objected to jurisprudence courses being taught simply as the reflection of the instructor's individual point of view. Fuller, *supra* note 32 at 502, although there was much of Fuller's own conceptions in his course. Michigan Law School's course in Legal Philosophy similarly confesses that it will "vary greatly from semester to semester, not merely in time allocation, but in subject matter." U. of Michigan Bull., 1975-1976, at 53.

⁶³ See Boston College Bull., 1975-1976, at 19; DePaul U.Bull., 1975-1976, at 30 (at DePaul, the bulk of a topical course centers on natural law conceptions, *id.*); Georgetown U.Bull., 1975-1976, at 51, 55; Loyola U. of Chicago Bull., 1975-1976, at 57. See also the Problems in the Philosophy of Law Course at Brigham Young's J. Reuben Clark Law School, Brigham Young U.Bull., 1976-1977, at 27; the Law, Language, and Ethics course at Northeastern Law School, Northeastern U.Catalogue, 1974-1976, at 37; the Jurisprudence course at Stanford, Stanford U.Bull., 1975-1976, at 41.

⁶⁴ Yale U.Bull., 1975-1976, at 67.

⁶⁵ Loyola U.Bull., 1974-1975, at 44. The University of California at Berkeley Law School offers a special jurisprudence seminar on the nature of life in the legal system. U. of California at Berkeley, Boalt Hall, 1975, at 28.

⁶⁶ Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv.L.Rev. 128 (1952).

⁶⁷ Wyzanski, *Process and Pattern: The Search for Standards in the Law*, 30 Ind. L.J. 133 (1955).

doubt whether natural law could help the judge facing concrete cases.⁶⁸ By 1959, Wyzanski began evincing a cautious but still skeptical attraction towards the modern natural law revival.

Shall we find [moral values] in natural law? I watch with interest the efforts in this direction of Professors Wilber Katz and Richard McKeon of the University of Chicago and of Professor Lon Fuller of Harvard. I wish them well. But I hope for little.⁶⁹

Nonetheless, a few years later, Wyzanski imported something akin to "the right of natural reason" into the establishment clause of the First Amendment. In finding that the Selective Service Act unconstitutionally discriminated against those conscientious objectors who were non-religious, he held that exemption from military service must be extended to those men ". . . who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings."⁷⁰ Finally, by the time of his retirement from the Massachusetts District Court, he had come full circle to urge natural law on judges, attorneys, and law schools alike.⁷¹

Yet despite the fact that Wyzanski admires those jurists, like Lord Mansfield, whose decisions were guided by natural law, there are dangers in an imprudent use of "right reason." One federal district judge, Robert N. Wilkins, declared in 1949,

A judge of sentient mind and heart would hardly be able to endure the responsibilities of office if he were denied the guiding influence and sustaining strength of Natural Law precepts and philosophy.⁷²

Yet this same judge later decided that segregation was not only constitutional, but was also supported by natural law.⁷³

If there are limits to a judge's reliance on natural law as a code, there are necessarily similar restrictions on its usefulness to lawyers. A number of views have been put forward linking natural law to the practice of administrative law,⁷⁴ bankruptcy,⁷⁵ immigration,⁷⁶ tax,⁷⁷ and criminal law.⁷⁸ One

⁶⁸ *Id.* at 141.

⁶⁹ Wyzanski, *History and Law*, 26 U.Chi.L.Rev. 237, 242 (1959). Katz had been speculating on how natural law might resolve fundamental issues in criminal law, such as the problem of retribution and reformation. Katz, *Natural Law and Human Nature*, 3 U.Chi.L.School Record 1 (1954), reprinted in 1 Cath.Law. 70, 73 (1955).

⁷⁰ U. S. v. Sisson, 297 F.Supp. 902, 911 (D.Mass.1969).

⁷¹ Sulzbacher Memorial Lecture, *supra* note 2.

⁷² *Natural Law in American Jurisprudence*, in II University of Notre Dame Institute of Natural Law Proceedings 148 (1949).

⁷³ Hayes v. Crutcher, 108 F.Supp. 582, 585 (D.Tenn.1952).

⁷⁴ See Schwartz, *Administrative Procedure and Natural Law*, 28 Notre Dame Law. 169 (1953).

⁷⁵ See Burke, *The Lawyers*, in *The Natural Law and the Legal Profession*, 65 *et seq.* (1949).

⁷⁶ See *Morality Under Naturalization and Immigration Acts*, 1 De Paul L.Rev. 125 (1951).

⁷⁷ See Land, *Tax Obligations According to Natural Law*, 4 St. Louis U. L. J. 129 (1956); Peters, *Tax Law and Natural Law*, 26 Notre Dame Law. 29 (1950).

⁷⁸ See Katz, *supra* note 69.

commentator believes natural law can provide (and indeed has provided) specific guidance to solve problems of law from fairness at trial to basic rights and obligations.⁷⁹ However, a perceptive note written on the topic concludes that a practice of law based on natural law will yield decisional results little different from those derived from other current American legal theories. The author does suggest, however, that natural law can at least provide some parameters and a coherence to the kaleidoscopic problems in an attorney's practice.⁸⁰

In point of fact, those who urge natural law instruction in the law schools do so, not for its immediate practical benefits, but for the moral sense and direction it gives to the law, its practitioners, and to society. It is this sense which led men such as Pound to decry the moral nihilism of positivism.

[A]bsolute ideals of justice have made for free government, and sceptical ideas of justice have gone with autocracy. . . . If the idea is absolute, those who wield the force of politically organised society are not. Sceptical realism puts nothing above the ruler or the ruling body.⁸¹

And it is this same sense to which Lord Radcliffe (a guiding light for Wyzanski) turns for perhaps the most elegant defense of natural law instruction.

[W]e cannot learn law by learning law It is not strong enough in itself to be a philosophy in itself. It must still stand rooted in that great tradition of *humana civilitas* from which have grown the institutions of the Western liberal world. Cut it away from that tradition, no matter for how good a reason, and it will lose what sustains its life.

We must never, then, lose touch with the idea of Natural Law or give up the belief that all positive law bears some relation to it. . . . But the principle of Natural Law was never intended primarily for lawyers. It was the product of the moralist, the theologian, and the philosopher, and their teachings were aimed at everyone, not at any special class or calling. . . . We are all implicated, if we accept the principle of Natural Law at all. We are all committed.

To what then are we committed? We are asked to believe that man is by nature a rational and social being. We are asked to believe that the growth of each individual towards responsibility and the freedom to choose the best that he can discern is a purpose which must never be conditioned by or made subservient to other purposes. We are asked to believe that there is at all times and in all ways an ideal fitness of things which corresponds to those beliefs and that by ourselves and working with others we are bound to do what we can to see that this fitness prevails in human affairs.⁸²

⁷⁹ See Barrett, *The Natural Law and the Lawyer's Search for a Philosophy of Law*, 4 Buffalo L.Rev. 1 (1954).

⁸⁰ *Natural Law for Today's Lawyer*, 9 Stan.L.Rev. 455, 514 (1957).

⁸¹ R. Pound, *Social Control Through Law* 18, 29 (1942) quoted in Friedmann, *supra* note 29 at 306. This may also account for Pound's renewed interest in natural law towards the end of his life. See Pound, *The Idea of a Universal Law*, 1 U.C.L.A. L.Rev. 7 (1953), *Natural Natural Law and Positive Natural Law*, 5 Nat.L.F. 70 (1960).

⁸² *The Law and Its Compass* 92-95 (1960).

There remains the practical issue of how natural law should be taught. As the American experience indicates, there are a number of endemic problems. We find it difficult, for example, to be neutral about natural law. Most law professors will clearly identify themselves as natural lawyers or not, the greater proportion not. Very few remain uncertain, or uncertain enough to be exploratory.⁸³

A fortiori, it is unlikely that any institution is so committed to the moral imperatives of natural law that it will pervade its entire curriculum with natural law values. Not even Notre Dame completely succeeded in its proposed metamorphosis. But as a topic within the law school curriculum, natural law can remind the student of the kinds of values which have been the hallmark of Western legal history. At the minimum, it can provide a new theme to the standard run of courses. At best, it can give the student a sense of the transcendence of law.

But how best to teach the subject? One option is to expand the time devoted to natural law in the traditional offering of jurisprudence. In law teaching, however, time is finite. Of necessity the consideration of other valuable legal theories would have to be constricted. It is difficult to measure the extent to which other jurisprudential schools can be justifiably elbowed aside.

A second option is the specialized treatment of natural law within a separate course or seminar. This allows for a wider choice in approach. The subject can be taught in a "horizontal" survey fashion, as is done at Yale; more "vertically" in an analytical format, or in a topical manner as prefer Professor Rice and Rodes respectively.

A constant danger of the survey approach is that the breadth gained may be paid for by a less intensive analysis. Indeed, the whole point of a natural law course is to give the student a depth of knowledge about the subject. It should not be a substitute for a college level humanities course. As a mentor of mine remarked, "You need not begin a law school course as though it were the students' initial exposure to things of the intellect."⁸⁴

An analytical or topical method seems more appropriate in a law school setting, particularly in view of the intellectual skills which a student will have developed by his second or third year. An analytical course, however, forces upon the instructor a necessity of choice: what theory of natural law, which writers to emphasize? The dilemma lies in the fact that natural law is not a unitary tradition. Positivists never fail to remind us of that truth. Not only are these fundamental divergencies between the philosophers of the school, but natural law has itself been the object of abuse by those with parochial interests. Justice Holmes could not but be skeptical of a philosophy which raised Spencer's *Social Statics* to the level of a categorical imperative.

Nonetheless, there exists a mainstream natural law tradition in Western thought which holds that the very authoritativeness of law contains intrinsic

⁸³ An earlier essay indicates that jurisprudence teaching in Britain is dominated by positivists also. Graveson, *The Teaching of Jurisprudence in England and Wales*, 4 J.Legal Educ. 127 (1951).

⁸⁴ Letter to writer from Professor Walter Gellhorn, January 5, 1975.

limits which are defined by the nature of man and his reason. This is the tradition to which Judge Wyzanski and Lord Radcliffe harken.

The tradition may have had differing emphases in different contexts. But the principle remains. Its umbrella is broad enough to cover a large number of variations so that the study of one or a few will not be distortive to the subject.

In view of present structure of law school education, and in light of the nature of the subject, it seems that a separate course or seminar on natural law is the most effective option. Whether in terms of a survey or of an analytical approach, such an offer can, if properly structured, help the student grasp the normative underpinnings of the law, to the benefit of himself, his law school, and his craft.

APPENDIX—SOURCE MATERIALS

In the necessary choices a prospective natural law teacher must make, some comfort can be had in the knowledge that there is a large amount of legal materials at hand for his use. This appendix contains a selection of sources which can be drawn upon. Though far from exhaustive, it gives an indication of what is available in historic and comparative sources, in comparative law areas, in international law, and in case decisions.

Historic Sources

No matter which emphasis an instructor chooses in the teaching of natural law, he may wish, either by lecture or by readings, to give a brief historic overview of the development of natural law. Good examples of such readings are in H. Maine, *ANCIENT LAW*, chs. 3, 4 (1861); W. Friedmann, *LEGAL THEORY* pt. 2 (1944); J. Jones, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW*, ch. 4 (1940); F. Pollock, "*The History of the Laws of Nature*," in *ESSAYS IN THE LAW* (1922); Passerin d'Entreves, *NATURAL LAW: AN HISTORICAL SURVEY* (1965); Rommen, *THE NATURAL LAW, A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* (1947). The last two books would need to be condensed for student readings.

Other more specialized surveys can be found in J. Barbeyrac, *AN HISTORICAL AND CRITICAL ACCOUNT OF THE SCIENCE OF MORALITY, AND THE PROGRESS IT HAS MADE IN THE WORLD, FROM THE EARLIEST TIMES DOWN TO THE PUBLICATION OF PUFFENDORF, OF THE LAW AND [sic] NATURE OF NATIONS* (1729); M. Collins, *SOME MODERN CONCEPTIONS OF NATURAL LAW* (1920); Forbes, *The Greek View of Law*, 64 *Jurid. Rev.* 214 (1952); O. Gierke, *NATURAL LAW AND THE THEORY OF SOCIETY* (E. Barker transl. 1934); R. Grant, *MIRACLE AND NATURAL LAW IN GRAECO-ROMAN AND EARLY CHRISTIAN THOUGHT* (1952); Goble, *The Dilemma of Natural Law*, 17 *Cath. Law* 26 (1971). Hudson, *Scholasticism, The Law of Nature, and the Bill of Rights*, 38 *U. Det. L. J.* 279 (1961); Kunkel, *Legal Thought in Greece and Rome*, 65 *Jurid. Rev.* 1 (1953); Lavery, *The Greeks Had a Name for it—Logic*, 37 *Chi. B. Rec.* 387 (1966); Lumb, *Scholastic Doctrine of Natural Law*, 2 *Melbourne U. L. Rev.* 205 (1959); M. Macklem, *THE ANATOMY*

OF THE WORLD RELATIONS BETWEEN NATURAL AND MORAL LAW FROM DONNE TO POPE (1958); E. Mayers, SOME MODERN THEORIES OF NATURAL LAW (Columbia University Thesis 1956); Neil, *Natural Law as a Living Force in History*, 26 Tenn. L.Rev. 19 (1958); J. Newman, CONSCIENCE VERSUS LAW: REFLECTIONS ON THE EVOLUTION OF NATURAL LAW (1971); W. Robson, CIVILIZATION AND THE GROWTH OF LAW (1935); Rommen, *Natural Law in the Renaissance Period*, 24 Notre Dame Law. 460 (1949); Y. Simon, THE TRADITION OF NATURAL LAW (1967); Stanley, *The Greek Conception of Law and its Later Influence*, 28 Can.B.R. 367 (1950); L. Strauss, NATURAL RIGHT AND HISTORY (1953).

Philosophic Sources

Normally, a teacher of natural law will include representative examples of natural law thinking. If the instructor prefers an intense analytical approach of only one or two variants, some sort of annotated list describing major natural law writers and their views should be made available to the student. The listing can be organized alphabetically, historically, or conceptually.

A traditional historical classification is as follows:

Ancient Theories:

Sophocles, ANTIGONE
 Heraclitus, *Fragments*, ON NATURE
 Plato, THE LAWS
 Aristotle, NICHOMACHEAN ETHICS
 Cicero, DE RE PUBLICA
 Seneca, QUAESTIONES NATURALES
 The Stoics
 Ulpian, DIGEST
 Gaius, DIGEST
 Justinian, INSTITUTES

Medieval:

St. Ambrose, EXEGETICAL TREATISES
 St. Augustine, CITY OF GOD, REPLY TO FAUSTUS THE MANICHAEN
 St. Isadore of Seville, ETYMOLOGIAE
 St. John Chrysostom, various works

Scholastic:

Gratian, DECRETUM GRATIANUM (1148)
 John of Salisbury, POLICRATICUS (1154-1159)
 Albertus Magnus, SUMMA DE CREATURIS
 St. Thomas Aquinas, TREATISE ON LAWS, SUMMA THEOLOGICA (1267-1273)
 Fortescue, DE NATURA LEGIS NATURAE (C. 1450)
 Bracton, DE LEGIBUS ET CONSUECUNDIBUS ANGLIAE (publ. 1569)
 Duns Scotus, OPUS OXINIENSE
 William of Ockham, various works
 Hooker, OF THE LAWES OF ECCLESIASTICALL POLITIE (1599)

Classical:

- Vitoria, DE BELLO ET DE INDIS (1532)
 Gentili, DE JURE BELLI (1598)
 Suarez, TREATISE ON LAW AND GOD THE LAW GIVER
 (1612)
 Grotius, DE JURE BELLI ET PACIS (1623-1625)
 Selden, MARE CLAUSUM SEU DE DOMINIS MARIS (1635)
 Hobbes, DE CIVE (1651)
 Pufendorf, DE JURE NATURAE ET GENTIUM (1672)
 Burlamaqui, THE PRINCIPLES OF NATURAL AND PO-
 LITICAL LAW (1747)
 Montesquieu, ESPIRIT DES LOIS (1748)
 Vattel, DROIT DES GENS (1758)
 Rousseau, SOCIAL CONTRACT (1762)
 Blackstone, COMMENTARIES (1765-1769)
 Burke, REFLECTIONS ON THE REVOLUTION IN
 FRANCE (1790)
 Ahrens, COUR DE DROIT NATUREL (1839)
 Lorimer, INSTITUTES OF LAW (1872)

Rationalist:

- Leibniz, ESSAIS DE THEODICEE (1710), PRINCIPLES OF
 NATURE AND GRACE (1714)
 Wolff, IUS NATURAE METHODO SCIENTIFICA PER-
 TRACTUM (c. 1719)
 Kant, CRITIQUE OF PURE REASON (1781), CRITIQUE
 OF PRACTICAL REASON (1788)
 Fichte, GRUNLACE DES NATURRECHTS (1796)

Modern:

- Spencer, SOCIAL STATUS (1850)
 Castberg, PROBLEMS OF LEGAL PHILOSOPHY (1893)
 Green, LECTURES OF THE PRINCIPLES OF POLITICAL
 OBLIGATION (1895)
 Stammler, THEORY OF JUSTICE (1902)
 Schler, FORMALISMUS IN DER ETHIK UND DIE MA-
 TERIALE WERTETHIK (1913)
 Geny, SCIENCE ET TECHNIQUE EN DROIT PRIVE POSI-
 TIF (1913-1924)
 Duguit, THEORY OF OBJECTIVE LAW ANTERIOR TO
 THE STATE (c. 1917)
 Del Vecchio, FORMAL BASES OF LAW (1921)
 Hartmann, ETHIK (1926)
 Bonnard, MELANGERS HAURIUO (1928)
 Renard, L'INSTITUTION (1933)
 Fuller, THE LAW IN QUEST OF ITSELF (1940)
 Van der Heydte, VOM WESEN DES NATURRECHTS
 Delos, DIALECTICS OF WAR AND PEACE (1950)
 Coing, GRUNZUGE DES RECHTSPHILOSOPHIE (1950)
 Radbruch, RECHTSPHILOSOPHIE (1950)
 Messner, NATURRECHT IST EXISTENZORDNUNG (1956)

Neo-Scholastic:

- Cathrein, *RÉCHT NATURECHT, UND POSITIVES RECHT* (1909)
 Le Fur, *LES GRANDS PROBLEMES DU DROIT* (1937)
 Maritain, *THE RIGHTS OF MAN AND NATURAL LAW* (1943), *MAN AND THE STATE* (1951)
 Dabin, *THEORIE GENERALE DU DROIT* (1944)
 Brunner, *JUSTICE AND THE SOCIAL ORDER* (1945)
 Rommen, *NATURAL LAW* (1947)
 Wu, *FOUNTAIN OF JUSTICE* (1955)

The list, of course, is far from complete, but it gives some indication of the range of philosophers in the natural law tradition. Categorization becomes a problem for within each historic era, there are antithetical points of view on issues of fundamental importance among the natural law philosophers. Similarly, writers of a later age are frequently followers of earlier seminal figures. For different categorizations, see B. Wright, *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT*, 333 *et seq.* (1931), and E. Wolf, *DAS PROBLEM DER NATURECHTSLEHRE* (1955) in Brecht, *The Problem of Natural Law*, 3 *Natural L.F.* 193 (1958).

There are many helpful studies of individual philosophers. See: *Platonic Minos and the Classical Theory of International Law*, 14 *Am.J.Juris* 105 (1969); Kelsen, *Plato and the Doctrine of Natural Law*, 14 *Vand.L.Rev.* 23 (1960); J. Maguire, *PLATO'S THEORY OF NATURAL LAW* (1947) J. Wild, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (1953); Chroust, *The Fundamental Ideas in St. Augustine's Philosophy of Law*, 18 *Am.J.Juris.* 57 (1973); Chroust, *St. Augustine's Philosophical Theory of Law*, 25 *Notre Dame Law.* 286 (1950); Shellen, *Aristotle on Natural Theory of Law*, 4 *Natural L.F.* 72 (1959); Oakley, *Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition*, 6 *Natural L.F.* 65 (1961); Nielsen, *Examination of the Thomistic Theory of Natural Law*, 4 *Natural L.F.* 72 (1959); Fay, *Toward A Thomistic-Anthropological View of the Evolution of Obligation*, 7 *Natural L.F.* 38 (1962); Grisez, *First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2*, 10 *Natural L.F.* 168 (1965); Petrowitz, *A New Look at the Natural Law of St. Thomas Aquinas*, 41 *Denver L.C.J.* 306 (1964); Gelinas, *Ius and Lex in Thomas Aquinas*, 15 *Am.J.Juris.* 154 (1970); Chroust and Afeldt, *The Problem of Private Property According to St. Thomas Aquinas*, 34 *Marq.L.Rev.* 151 (1950-51); Rooney, *Philosophy of Natural Law of St. Thomas Aquinas*, 2 *Catholic Law.* 22 (1956); Bourke, *Natural Law, Thomism—and Professor Nielsen*, 5 *Natural L.F.* 112 (1960); R. Armstrong, *PRIMARY AND SECONDARY PRECEPTS IN THOMISTIC NATURAL LAW TEACHING*; F. Wildolph, *LEVIATHAN AND NATURAL LAW* (1951); Capestany, *Four Dimensions of Natural Law in Suarez: Objectivity—Knowledge—Essence—and Obligation*, 16 *Catholic Law.* 58 (1970); G. van der Molen, *ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW: HIS LIFE, WORK AND TIME* (2d rev. ed. 1968); Windass, *The Tradition of Suarez*, *Wiseman Rev.* (1963, summer); H. Vreeland, *HUGO GROTIUS, THE FA-*

THE OF THE MODERN SCIENCE OF INTERNATIONAL LAW (1917); Chroust, *Hugo Grotius and the Scholastic Natural Law Tradition*, 17, *The New Scholasticism* 116 (1943); Dumbauld, *Grotius' Introduction to the Jurisprudence of Holland*, 2 *J. Public L.* 112 (1953); Dumbauld, *Grotius' Defence of the Lawful Government of Holland*, 3 *J. Public L.* 192 (1954); Crowe, *Eccentric Seventeenth-Century Witness to the Natural Law: John Selden (1584-1654)*, 12 *Natural L.F.* 184 (1967); Ruddy, *Vattel's Concept of International Law*, 4 *Tex.Int.L.Forum* 383 (1968); R. Cox, LOCKE ON WAR AND PEACE (1960); L. Krieger, THE POLITICS OF DISCRETION: PUFENDORF AND THE ACCEPTANCE OF NATURAL LAW (1965); Oakley & Urdang, *Locke, Natural Law and God*, 11 *Natural L.F.* 92 (1966); Byrne, *The Basis of the Natural Law in Locke's Philosophy*, 10 *Catholic Law*. 55 (1964); M. Waddicor, MONTESQUIEU AND THE PHILOSOPHY OF NATURAL LAW (1970); L. Strauss, NATURAL RIGHT AND HISTORY (1958); B. Wilkins, THE PROBLEM OF BURKE'S POLITICAL PHILOSOPHY (1967); P. Stanlis, EDMUND BURKE AND THE NATURAL LAW (1958); Finnis, *Blackstone's Theoretical Intentions*, 12 *Natural L.F.* 163 (1967); Palms, *The Natural Law Philosophy of Lon L. Fuller*, 11 *Catholic Law*. 94 (1965); Sturm, *Lon Fuller's Multidimensional Natural Law Theory*, 18 *Stan.L.Rev.* 612 (1966); Breckinridge, *Legal Positivism and the Natural Law: The Controversy Between Professor Hart and Professor Fuller*, 18 *Vand.L.Rev.* 945 (1965); The Nagel-Fuller debate in 3 *Natural L.F.* 68ff (1958); Millhollin, *The Natural Moral Law of Jean Dabin*, 15 *Am.J.Juris.* 116 (1970); Stanlis, *Dr. Wu and Justice Holmes: A Reappraisal on Natural Law*, 18 *U.Det.L.J.* 249 (1955).

Of course, writers are liable to find natural law lurking everywhere even in the writings of the classical positivists. See Murphy, *Austinian Natural Law*, 39 *U.Det.L.J.* 650 (1962); Bentham's "An Introduction to Principles of Morals and Legislation." *Analytical Jurisprudence or Another Natural Law Theory?* 16 *Mercer L.Rev.* 433 (1965).

Nonetheless, it is evident that with the vast amount of primary and commentary sources on natural law writers, students would have no difficulty in finding and researching individual topics in depth.

Comparative Sources:

Research in natural law in other legal systems has been increasing in recent years. Although the quantity of work does not compare to the output of critical analyses of philosophic sources, nevertheless, comparative natural law jurisprudence is rapidly reaching a state of proficiency and breadth. The results indicate that natural law is not a form of legal thinking confined to the West. See for example University of Notre Dame, *Natural Law Institute Proceedings* (1951) in which essays are included detailing Natural law traditions in Jewish, Islamic, Hindu, Buddhist, and Chinese law. See also, Gluckman, *Natural Justice in Africa*, 9 *Natural L.F.* 25 (1964); Anan, *Some Trends of Legal Thought and Natural Law Study in Japan*, 7 *Natural L.F.* 109 (1962); Caplan, *Making of "Natural Justice" in British Africa: An Exercise in Comparative Law*, 13 *J.Pub.L.* 120 (1964); McBride, *Marxism and Natural Law*, 15 *Am.J.Juris.* 127 (1970); Pascual, *Natural Law and Philippine Supreme Court*, 19 *Law J.* 51 (1954).

Among Western legal systems, the most serious natural law investigations have centered on post-war Germany and the manner in which German courts have made use of natural law principles. Bodenheimer, *Significant Developments in German Legal Philosophy Since 1945*, 3 Am.J.Comp.L. 379 (1954); Cohn, *German Legal Science Today*, 2 Int. and Comp.L.Q. 169 (1953); Rommen, *Natural Law in the Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 Natural L.F. 1 (1959); von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 Natural L.F. 106 (1959); von der Heydte, *Natural Law Tendencies in Contemporary German Jurisprudence*, 1 Natural L.F. 115 (1956); Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 Va.L.Rev. 1 (1956).

Natural Law in other Western systems can be seen in Dietz, *Natural Law in the Modern European Constitutions*, 1 Natural L.F. 73 (1965); Fasso, *Natural Law in Italy in the Past Ten Years*, 1 Natural L.F. 122 (1956); They, *Ten Years of the Philosophy of Law in France*, 1 Natural L.F. 104 (1956); Baudouin, *Ordre Public et les bonnes Moeurs en Droit Prive*, 13 Rev. du B. 381 (1953). The natural law tradition in English law is outlined in the works of Maine, Pollock, and Corwin, as well as in the values still present in equity and natural justice (procedural due process). Harbrecht, *Equity of Equities*, 40 U.Det.L.J. 439 (1963). The same tradition continues in Canada (as well as other Commonwealth countries). Mullan, *Fairness: The New Natural Justice*, 25 U.Toronto L.J. 281 (1974). Lastly, it should be recalled that European writers have been in the forefront of recent philosophical investigations of natural law.

International Sources

The natural law basis for international norms can be found in the allied concept of the Roman *ius gentium*, the Augustinian notion of the just war, the Church imposed rules of conduct among the Christian princes in the Middle Ages, and most importantly, the writings of the natural law philosophers in the scholastic, classical, and rationalist schools. Today, concepts such *ius cogens*, and "general principles of law" have a natural law connection. But thoroughgoing analyses of international law from a natural law perspective are not common in contemporary writings. However, the most thorough work is also the most recent: E. Midgely, *THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS* (1975). It is an extensive analysis of international concepts from a Scholastic point of view. The book concentrates almost entirely on international law theory from 1500 to the present and includes a large section on modern Catholic doctrine. Other recent works are G. Benkert, *THE THOMISTIC CONCEPTION OF AN INTERNATIONAL SOCIETY* (1942); O'Connell, *Natural Law and the International Community*, 5 Catholic Law 207 (1959); P. Remec, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL* (1960); Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 Fordham L.Rev. 243 (1950); Seiter, *Revision of the United Nations Charter: A Natural Law Approach*, 4 De Paul L.Rev. 123 (1955); Wright, *Natural-Law Thinking in the Modern Science of International Law*, 55 Am.J.Int'l L. 951 (1961). A classical study by L. Sturzo, *THE INTER-*

NATIONAL COMMUNITY AND THE RIGHT OF WAR (1929) has been influential in European thought as well as works by J. Leclercq, *viz.*, *LECONS DE DROIT NATUREL* (rev. ed. 1947); *La Communauté Internationale Devant le Droit Naturel*, Politeia (Fribourg) 152 (1950); *A SHRINKING WORLD* (1963). Finally, renewed interest has been sparked by the legacy of the Nuremberg trials. The literature runs off in all directions of human rights, the conduct of war, and nuclear strategy. Good basic sources are U. N. WAR CRIMES COMMISSION LAW REPORTS (1950), and R. Woetzel, *THE NUREMBURG TRIALS IN INTERNATIONAL LAW WITH A POSTLUDE ON THE EICHMANN CASE*, (rev. ed. 1962). See also, Brown, *Natural Law as the Moral Basis of International Justice*, 8 Loyola L.Rev. 59 (1955-56).

Case Sources

This section outlines the kinds of decisions which have had a connection with natural law in United States Courts. Avoided here are those issues which tangentially, or through various legal mutations have arisen from natural law values to current "due process" or "equal protection" doctrines. Eighteenth century natural law norms permeate our entire political system and it would be hard to draw the line. Instead, what are included are cases which make specific mention, albeit normally in dictum, of the concept of natural law, natural justice, natural right, right reason, or some other analogous term.

For historic and comparative reference, the classic English cases which upheld the validity of natural law over positive enactments are *Calvin's Case*, 77 Eng.Rep. 377 (K.B. 1607); *Dr. Bonham's Case*, 77 Eng.Rep. 646 (K.B. 1610); and *Day v. Savadge*, 80 Eng.Rep. 235 (K.B. 1614). The Mansfield case which brought natural law values directly into the common law is *Moses v. Macferlan*, 97 Eng.Rep. 676 (K.B. 1760). Except for the limited scope of natural justice, natural law decisions in British courts today are virtually non-existent. The many German cases on point are discussed in the articles by Rommen and von Hippel, in 4 Natural L.F. 1 and 106 (1959).

Numerous articles have been written on natural law and the American Supreme Court. The quality of textual analysis varies, but useful cases are discussed in: Bayne, *The Supreme Court and Natural Law*, 1 De Paul L.Rev. 216 (1952); Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 Notre Dame Law. 9 (1939); Carroll, *Natural Law and Freedom of Communication Under the Fourteenth Amendment*, 42 Notre Dame Law. 219 (1966); Curtis, *A Natural Law for Today and the Supreme Court as its Prophet*, 39 Boston U.L.Rev. 1 (1959); Haines, *The Law of Nature in State and Federal Decisions*, 25 Yale L.J. 617 (1916); Sternberg, *Natural Law in American Jurisprudence*, 13 Notre Dame Law. 89 (1938); B. Wright, *AMERICAN INTERPRETATIONS OF NATURAL LAW* (1931); Haines, *The Law of Nature in State and Federal Decisions*, 25 Yale L.J. 617 (1926).

It is far more difficult to find collections of state cases or even lower federal cases. The following is a selection of citations demonstrating the extent of this resource.

Many cases contain language to the effect that laws contrary to natural law are void, irrespective of the Constitution: *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, 22 S.W.2d 993 (1929); *Lothrop v.*

Stedman, 15 F.Cas. 992 (No. 8519) (C.C.D.Conn.1875); Ham v. McClaws, 1 Bay. 93 (S.C.1789); Thomas v. Reid, 142 Okla. 38, 285 P. 92 (1930); Quesinberry v. Hull, 159 Va. 270, 165 S.E. 382 (1932); Council of Town of Farmville v. Walker, 101 Va. 323, 43 S.E. 558 (1903); Cedar Rapids Engineering Co. v. Haenelt, 68 Misc.2d 206, 326 N.Y.S.2d 653 (1971); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (Ct.App.1951); Wightman v. Wightman, 4 Johns Ch. 343 (N.Y.1820); Schlothan v. Einstoss, 17 Alaska 253 (1957). Issue unresolved: People v. Gallagher, 4 Mich. 244 (1856). Cases denying judiciary power to hold statute void because of natural law: Commonwealth v. McCloskey, 2 Rawle 369 (Pa.1830); Minge v. Gilmour, 17 Fed.Cas. 440 (No. 9631) (C.C.D.N.C.1798); Forsythe v. City of Hammond, 68 F. 774 (C.C.D.Ind.1895); Hopkins v. Kissinger, 31 Ohio App. 229, 166 N.E. 916 (1928); Burrows v. Delta, 106 Mich. 582, 64 N.W. 501 (1895); Rio Grande Co. v. Darke, 50 Utah 114, 167 P. 241 (1917); Gulf C. & S. E. Ry. v. Ellis, 18 S.W. 723 (Tex.1892); State v. Peel Splint Coal Co., 36 W.Va. 802, 15 S.E. 1000 (1892).

Many state courts have suggested that natural rights pre-exist society and are not conferred by the Constitution. Byers v. Sun Savings Bank, 41 Okla. 728, 139 P. 948 (1914); Borden v. State, 11 Ark. 519 (1847); State v. Powers, 51 N.J.L. 432, 17 A. 969 (1889); International Ass'n of Machinists v. Street, 215 Ga. 27, 108 S.E.2d 796 (1959); City of Dallas v. Mitchell, 245 S.W. 944 (Tex.Civ.App.1922); In re Gogabashvele's Estate, 195 Cal.App. 2d 503, 16 Cal.Rptr. 77 (4th Dist.1961); Sowers v. Ohio Civil Rights Comm'n, 20 Ohio Misc. 115, 252 N.E.2d 463 (C.P.1969); Gatewood v. Matthews, 403 S.W.2d 716 (Ky.Ct.App.1966); Quinn v. Buchanan 298 S.W.2d 413 (Mo.1957); Screws v. U. S., 140 F.2d 662 (5th Cir. 1944). *Contra*: Koelfgen v. Jackson, 355 F.Supp. 243 (D.C.Minn.1972).

Occasionally, early state decisions adopted an explicit Thomistic view of natural law. Sodero v. Sodero, 56 N.Y.S.2d 823 (Sup.Ct.1945); Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (Sup.Ct. of Apps.1895). On the other hand, a California Court stated that natural law and the common law were of totally different origin. Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886). Yet, some state courts have acknowledged the natural law component to the law of equity. Kempsey v. Maginnis, 2 Mich. N.P. 49 (1871); Ralli v. Societa Anonimadi Navigazione, 222 F. 994 (S.D.N.Y.1915); Hedges v. Lysek, 84 S.2d 28 (Fla.1955); First National Bank v. Bryn Mawr Beach Bldg. Corp., 365 Ill. 409, 6 N.E.2d 654 (1937); Lamb v. Butler, 198 Va. 509, 95 S.E.2d 239 (1956); Atchison, T. & S. F. Ry. v. Andrews, 338 Ill. App. 552, 88 N.E.2d 364 (1949).

Most state courts which recognize natural rights nonetheless find them relative to the needs of society. Few find them absolute. Conlon v. Marshall, 185 Misc. 638, 59 N.Y.S.2d 52 (Sup.Ct.1945); Ex parte Smith, 231 Mo. 111, 132 S.W. 607 (1910); State ex rel. Lipps v. City of Cape Girardeau, 507 S.W.2d 376 (Mo.1974); State v. Levitt, 246 Ind. 275, 203 N.E.2d 821 (1965); State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

Some confusion results from the recent free use of the term "fundamental rights" by the courts. See, for example, Smith v. Fair, 363 F.Supp. 1021 (N.D. Ohio 1973); Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973). Sometimes fundamental seems to mean "inherent" or "intrinsic." State courts

have followed the lead of *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Other times, the court indicates it means simply an important societal right. *State v. Nugent*, 125 N.J.Super. 528, 312 A.2d 158 (1973).

The most interesting aspect of state cases lies in the attempts to define specific natural rights and natural laws. Education was deemed to be a natural right in *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971). Voting is clearly not a natural right, say all. *Ex parte Bullen*, 236 Ala. 56, 181 So. 498 (1938); *Mason v. State*, 58 Ohio St. 30, 50 N.E. 6 (1898); *Wilson v. Gonzales*, 44 N.M. 599, 106 P.2d 1093 (1940); *Russell v. State*, 171 Ind. 623, 87 N.E. 13 (1909); *Fink v. Kern*, 176 Misc. 114, 26 N.Y.S.2d 891 (Sup.Ct.1941).

The right to work has been held a natural right, *State v. Gardner*, 58 Ohio St. 599, 51 N.E. 136 (1898), but, alas, not to be a lawyer, *State ex rel. Mackintosh v. Rossman*, 53 Wash. 1, 101 P. 357 (1909); *Ayres v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905 (1942). In addition, seniority rights and the right to join a union are natural rights. *Fine v. Pratt*, 150 S.W.2d 308 (Tex.Civ. App.1941). Early courts stated that there was a natural right to property. *In re Reed's Guardianship*, 173 Wis. 628, 182 N.W. 329 (1921); *Young v. City of Gurdon*, 169 Ark. 399, 275 S.W. 890 (1925). Later decisions remain friendly to the general principle, *New York State Comm'n Against Discrimination v. Pelham Hall Apartments*, 10 Misc.2d 334, 170 N.Y.S.2d 750 (Sup. Ct.1958); *In re Guardianship of Colliton*, 41 Wis. 487, 164 N.W.2d 480 (1969), but has not prevented restrictions against selling intoxicating liquors, *Hann v. Fitzgerald*, 342 Mo. 1166, 119 S.W.2d 808 (1938); *State ex rel. Billado v. Wheelock*, 114 Vt. 350, 45 A.2d 430 (1946). Nor does it prevent loan controls. *Beneficial Finance Co. v. Daloisio*, 90 N.J.Super. 80, 216 A.2d 253 (1966).

Self-defense is a natural right, *Railroad Comm'n of Ohio v. Hocking Valley Ry.*, 82 Ohio St. 25, 91 N.E. 865 (1910), as is autonomy, *Stull v. School Bd. of Western Beaver Jr.-Sr. H. S.*, 459 F.2d 339 (3d Cir. 1972). But this does not include the natural right to make a will as one wants, nor does it guarantee inheritance to those who claim it as a "natural right." *Howe v. Howe's Ex'rs.*, 287 Ky. 756, 155 S.W.2d 196 (Ct.App.1941); *Cole v. Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915); *In re Lewis' Estate*, 160 Ore. 486, 85 P.2d 1032 (1938); *In re Sherwood's Estate*, 122 Wash. 648, 211 P. 734 (1922); *Earle v. Indiana Nat. Bank*, 246 Ind. 251, 204 N.E.2d 652 (1965). There have been unusual holdings, however, which indicate a natural right to make a will, and a natural right of certain relatives to a reasonable consideration (though the two principles are in contradiction). *Nunnemacher v. State*, 129 Wis. 190, 108 N.W. 627 (1906), *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N.W. 372 (1903).

Courts are generally freer to determine what are *not* natural rights than what are. Foreign corporations may be restricted in their business dealings, *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 38 S.W. 85 (1896). One has no natural right to be a plumber. *Ex parte Smith*, 231 Mo. 111, 132 S.W. 607 (1910). It is not against natural law to be taxed. *Booth v. Town of Woodbury*, 32 Conn. 118 (1864). In fact, one's own natural rights can be taxed. *Singer Sewing Machine Co. v. N. J. Unemployment Compensation Comm'n.*,

128 N.J.L. 611, 27 A.2d 889 (1942). There is a natural right of travel, *Gow v. Bingham*, 57 Misc.Rep. 66, 107 N.Y.S. 1011 (Sup.Ct.1907). But involuntary trespass is not a protected natural right. *State v. Shevlin Carpenter Co.*, 99 Minn. 158, 108 N.W. 935 (1906).

Finally, certain natural rights come and go. Earlier in the century, the right of contract was natural and beyond the powers of government. *St. Louis Southwestern Ry. v. Griffin*, 106 Tex. 477, 171 S.W. 703 (1914). Today, the natural rights tend to be more intimate. For example, there is the inherent right of good reputation, if deserved. *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C.Cir. 1966). And *see* the Supreme Court's characterization of marriage in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The new emphasis on the right of privacy has a long pedigree in natural law decisions. From 1905 to the present, natural law has been invoked to protect certain intimate activities of citizens. *See Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *State v. Schwarcz*, 123 N.J. Super. 482, 303 A.2d 610 (1973).

The amount and variety of cases on natural law in state court and lower federal court decisions demonstrates that natural law has constantly cropped up as a judicial plant, sometimes to grow, usually to be pruned. But the cases also show that judges have not been, on the whole, rigorously exposed to natural law jurisprudence, its breadth and its shortcomings.

With the materials at hand which this appendix has listed, an instructor can better sort and choose from all categories, so as to concentrate more effectively, on those aspects of natural law legal theory and practice which he deems valuable for his students.