THE MUTABILITY OF LAW

By George W. Goble*

Father William J. Kenealy and I have written several articles in other law journals in which we have engaged in friendly debate on the validity of the doctrine of the scholastic natural law.1 Our discussions have brought us into agreement on some aspects of the subject, but have pointed up disagreement on others. The most significant unresolved issue, I believe, is that Father Kenealy contends that there are some fundamental principles of law (moral and civil) that are “certain, immutable and universal” and that these principles are “self-evident” and “knowable,” and it is my position that it is highly probable that there are no such principles. Our discussions also have disclosed that we have attributed different meanings to such terms as “principle,” “rule” and “right,” and that this may partly account for our disagreement upon some of the matters we have discussed. Father Kenealy’s last article, Scholastic Natural Law—Professor Goble’s Dilemma, is a valuable piece of work. It states some propositions with which I can readily agree, but it leaves our main issue unresolved, and introduces some new questions that throw considerable doubt upon the validity of the scholastic-natural-law thesis.

It is the purpose of Section I of this paper to show that a part of Father Kenealy’s last article seems to concern itself primarily with words as things, rather than merely as labels, with the result that the substance of his discussion is shifted into the background and an element of confusion is introduced. Sections II to VI of this article will attempt to fortify the proposition that the strong probability is that there are no “self-evident” and “knowable” principles of moral or civil law that are “certain, immutable and universal.”

I

In my last article I had stated:

It is simply linguistic gymnastics to say in one breath that a principle is “certain, universal and immutable” or that a right is “absolute” and in the next that it is, nevertheless, subject to “qualification,” “expansion,” “contraction” or “forfeiture.” “Qualification” and “contraction” include “exception,” and an “exception” is an actual subtraction from the rule. Each exception reduces the scope of the rule by the amount of the exception, and therefore makes it apply to fewer situations. By any reasonable definition

* A.B. 1913, LL.D. 1956, Indiana Univ.; LL.B. 1915, Yale Univ. Professor of Law, Univ. of California, Hastings College of Law. Member, American Bar Association.

1 The articles in the series are Goble, Nature, Man and Law, 41 A.B.A.J. 403 (1955); Kenealy, Whose Natural Law?, 1 Catholic Lawyer 259 (1955); Goble, The Dilemma of the Natural Law, 2 Catholic Lawyer 226 (1956); Kenealy, Scholastic Natural Law—Professor Goble’s Dilemma, 3 Catholic Lawyer 22 (1957).
this is a change in the rule itself. . . . It seems to me Father Kenealy has paid a terrific price in semantics to make it possible to say that his fundamental principles are "certain, universal and immutable."  

To this Father Kenealy responded:  

This reply confuses not merely principles and rules, but both with rights. I stated that the fundamental principles of the natural law are certain, universal and immutable; but I have never so described rules or rights. A right is neither a principle nor a rule. [ital. added.] Generically a right is an individual's moral power to act, to omit, or to exact something from another. It is a legal right when that power is granted, or recognized as existing by civil law. It is a natural right when that power emanates from human nature itself i.e. from essential human personality and destiny. Obviously, then, a right may be both natural and legal. Now I said that natural rights "are absolute in the sense that they derive from human nature."  

. . . Nevertheless, I also said that natural rights which are absolute in the sense explained, are limited in scope "in the sense that they are subject to specification, qualification, expansion and contraction and even forfeiture of exercise. . . ."  

I believe this excerpt reveals serious flaws in the natural law system as advocated by Father Kenealy, and it is these flaws that have caused the misunderstanding and confusion to which Father Kenealy alludes. I shall attempt to show why this is true.  

The quoted statement and others made by Father Kenealy indicate that to him there is an inherent difference between fundamental principles, secondary principles, derivative principles, rules and rights. And especially there is a sharp and clear line between those principles which are derived from human nature, and those which are not so derived, because the first are "certain, immutable and universal" and known by natural law philosophers to be such, and the second do not possess these qualities of sanctity. And a "right" says Father Kenealy "is neither a principle nor a rule." It has different attributes. Rights, he says, are of two kinds, those "which derive" from human nature which are called natural rights and those which are not so derived. The rights which derive from human nature do not have the

---

2 Goble, 2 Catholic Lawyer 226, 231–232.  
3 Kenealy, 3 Catholic Lawyer 22, 27.  
4 "It is quite true, of course, that the classical natural law postulates some fundamental principles which are considered immediately self-evident principles of the practical reason, as certain, universal and immutable. . . . The fundamental principles of the natural law are generally divided into a primary principle and its immediate specifications, called secondary principles. . . . But when we advance from the fundamental principles we enter the field of derivative principles. . . . The derivatives do not share equally, some do not share at all in the certainty, universality and immutability of the fundamental principles." Kenealy, 1 Catholic Lawyer 259, 262, 263.  

At several places Father Kenealy refers to the fundamental principles as "universal and immutable as the human nature from which they derive," e.g., see Kenealy, op. cit. supra at 260.
qualities of the principles derived from the same source. Rather they are “absolute and inalienable” and these qualities are quite different from the qualities of “certainty, immutability and universality.” Ordinary rights do not have these exceptional qualities. Why natural law principles are “certain, immutable and universal” because they derive from human nature, but natural rights do not have those same qualities though they are derived from the same source. Father Kenealy does not explain. Nor does he explain why the latter by reason of being derived from nature have the different qualities of “absoluteness” and “inalienability.”

Then Father Kenealy speaking only of natural rights goes on to say that while they are “absolute and inalienable” they are nevertheless “limited” and are “subject to specification, qualification, explanation and even forfeiture of exercise.” Natural law principles however are not subject to these limitations and qualifications.

Now I submit that this whole formulation of principles, rules and rights, is highly artificial and full of incongruities. It sets up a purely mechanical pattern for testing and evaluating human conduct.

In the first place it is believed that there are no clear-cut distinctions between the various kinds of principles and rules that Father Kenealy sets up. They differ not in kind but only in their degree of generality and particularity. As the various values of gray between black and white, they shade into one another not sharply but imperceptibly. It is not denied that there is utility in a classification of principles and rules—indeed, some type of classification is indispensable. But it is denied that when such a classification is made it takes on a form of sanctity or inevitability which all persons must accept under penalty of being charged with misunderstanding or confusion. Principles, rules and rights are concepts, and concepts do not arrange themselves naturally into classes. The arranging is done by the mind for the sake of utility or convenience in understanding or expression. One classification may be convenient for one purpose, another classification for another purpose. The formulation therefore is tentative and transitory. The arrangement itself proves nothing.5

In the next place Father Kenealy’s distinction between rights on the one hand and principles and rules on the other is untenable. When one talks about rights he is talking about rules. A right may be said to be derived from a rule, or to be a shorthand expression of the rule itself. Father Kenealy says that the right to worship is an absolute natural right. However, having a right to worship means that one is entitled to non-interference with his wor-

5 The term “principle” is frequently used interchangeably with “general rule.” I find that most commentators on the ten commandments refer to them and similar precepts as “rules.” This usage I adopted in my previous articles. I have never heard the Golden Rule referred to as the Golden Principle.
shipping by other persons or by the State. That is a rule. It may be only moral, it may be legal, or it may be both. But in any event it is a rule. One cannot dissociate rights from rules of conduct, whether he is dealing in law or morals. The same argument is applicable if the proposition is called a principle.6

Now if natural rights are “limited in scope in the sense that they are subject to specification, qualification, expansion, and contraction” as Father Kenealy says they are, it follows that the principles or rules from which these rights are derived (or of which they are the short hand expression) are subject to the same limitations, which Father Kenealy insists they are not. For example, Father Kenealy says that the right to life is a natural right, and as such it is subject to the limitations indicated above. But, says Father Kenealy, “One person shall not unjustly kill another” is a principle, and therefore it is not subject to the above limitations. Why should the principle or the rule of which the right is a short hand expression be any the less subject to these limitations than the right? Or, on the other side, why should the right be any the less universal or immutable than the principle from which it is derived?

It is believed that Father Kenealy is here overlooking the fact that a principle or rule of conduct always deals with at least two persons, the one in whose favor it operates (the one who has the right) and the one against whom it operates (the one who is under the duty). However, it deals with only one relationship (the right-duty relationship). The principle or rule can be stated from the point of view of either person. But whichever way it is stated it means the same thing—it refers to the same relationship. The right to life may be stated thus: A person has a right that another person shall not unjustly kill him. Or thus: A person is under a duty not to unjustly kill another person. The first is as much a principle or a rule as the second. In fact they are two ways of saying the same thing.7 Yet Father Kenealy regards the two as entirely different. The first, he says, is a natural right and therefore is subject to the limitations of specification, qualification, contraction, and expansion. The second is a natural law principle and as such is not subject to these limitations. This distinction in my opinion is fallacious. If one side of a relationship created by a principle or rule of conduct is subject to limitations so is the other.8

---

6 One distinction between a legal and a moral rule is found in the applicable sanction. The sanction of a legal duty is the threat of adverse executive or judicial action. The sanction of a moral duty ranges all the way from the threat of damnation, to remorse of conscience and fear of the public's accusing finger. See Goble, The Sanction of a Duty, 37 Yale L.J. 426 (1928); Goble, Book Review, 40 Cornell L.Q. 402 (1955).

7 See Goble, Redefinition of Basic Legal Terms, 35 Colum. L. Rev. 535 (1935).

8 Some so-called rights are more accurately privileges (liberties). Nevertheless they are derived from rules or principles. If one has a privilege to do an act, that means another may
However, even if we overlook Father Kenealy’s isolationist view of natural rights, his thesis still involves contradictions. “Natural rights” he says are “absolute and inalienable” and yet he states that they are “limited” and are “subject to specification, qualification, explanation and contraction and even forfeiture of exercise.” Is it not a contradiction in terms to say that a right is “absolute” and yet it can be “qualified,” or that a right is “inalienable” and yet it can be “forfeited”? “Absolute” means freedom from limitation, restriction or qualification. But for Father Kenealy “absolute” is the opposite. He applies the term to a right which is subject to limitation, restriction or qualification. “Inalienability” means immunity from deprivation or forfeiture. But for Father Kenealy the term is applied to a right which is subject to deprivation or forfeiture.

True, it is that Father Kenealy attempts to define “absolute” in such a way as to avoid this contradiction. He says natural rights “are absolute in the sense that they derive from human nature.” But that states the source of the right not its quality. Assuming that a right is derived from human nature, the question is by virtue of being so derived what is there about it that warrants its being called “absolute.” I agree that in general one who discusses a problem may define his terms to suit himself. But when one defines black as white or night as day he runs the risk of creating confusion and of being misunderstood. What has happened here seems to me to be this. In order to sustain the venerated proposition that certain rights are absolute and inalienable, when it has become clear that they are not, the definitions of absolute and inalienable must be modified so as to admit of qualification and forfeiture. In this manner it is made possible for the illusion to be enjoyed that a changeable system is actually unchangeable. The result of this procedure, however, is that ideas are lost in a maze of confusing and contradictory terminology.

II

In my last article I stated that the primary principle of natural law, “What is good is to be done,” is tautological in that it means no more than “One ought to do what one ought to do.” Father Kenealy takes me to task for this. He says: “This is not the meaning of the primary principle. The misconception lies in the confusion of ‘good’ and ‘ought.’ There are many morally good acts which are not morally obligatory . . . . The concept of

not cause him to be penalized for doing it. Hohfeld called this the no-right-privilege relation. See HOHFEld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING ch.1 (1919).

9 Primitive men were by nature selfish, greedy, cruel, revengeful and violent. See note 17 infra. So far as I know we do not now recognize these traits as being the source of any absolute or inalienable rights.

10 Goble, 2 CATHOLIC LAWYER 226, 229 (1956).
'good' and the concept of 'obligation' should be sharply distinguished." He says, "good" means "suitable to being or nature" and "obligation" refers to "necessity to end or destiny." 11

If what Father Kenealy here says is the proper interpretation of this principle, what was his meaning when he said in his first article, "The mandatory aspect of the objective moral order is called by philosophers natural law"? [ital. added.] 12 First he states that natural law is that part of the moral order which is mandatory, then when it is pointed out that if this is true the primary principle of natural law is empty of meaning, he insists that this principle is not mandatory. If natural law is mandatory, it would certainly seem to follow that the primary principle of natural law is mandatory. While this is an incongruity not to be overlooked, I do not wish to stress it, because it does not bear materially on the main issues under discussion. I agree with Father Kenealy's last statement, rather than his first, for I believe with him that there are many good acts that are not morally obligatory, and I am glad to concede that his later interpretation of the primary principle of natural law purges it of the charge of tautology. However, the new interpretation exposes the proposition to other objections.

To the extent that the proposition deals only with "good" as something "suitable," it does not deal with the regulation of human conduct, and therefore is not useful as a guide for determining what one "ought" to do. Furthermore, since the principle makes no distinction between a "good" as something which "ought" to be done and something which is merely "suitable," it does not "specify," as Father Kenealy says it does, the principles of the decalogue, which are obligatory in character; and for the same reason, it is not a principle from which other obligatory principles can be derived.

However, my main criticism with regard to the principle, "What is good is to be done," is and was that since the meaning of the word "good" must be determined by particular acts for which it is used as a label, and these acts change from age to age, and from place to place, the meaning of the word, and consequently the meaning of the principle, itself, must change. I think it would be agreed that the word "good" has no meaning or utility except as it is related to or made to comprehend particular acts. Professor Vernon J. Bourke, in an illuminating article in the Natural Law Forum, expresses it thus:

The old formula, good should be done, evil avoided, is a rule devoid of special conditions. Such a rule is not immediately practical; no one can go out and just do good. More practical precepts are reached by observing and stating the actual conditions of voluntary action. Such a process is not an analytical deduction from the formula stated above. Only experience can

11 Kenealy, 3 Catholic Lawyer 22, 24 (1957).
12 Kenealy, 1 Catholic Lawyer 259, 260 (1955).
lead to the discovery of what is good action in the concrete. However, crude
experience is not enough to suggest immediately the patterns of right con-
duct in voluntary activity. Some hard thinking must be done . . . . Hence
this approach to law is both empirical and rational.\textsuperscript{13}

The word "good" is descriptive. Certain acts by reason of their character
or effects are put into a category and labeled "good." For example, at the
present time the category, in addition to acts demanded by the decalogue
and golden rule, would no doubt include acts of honesty, sincerity, kindness,
compassion, sacrifice, courtesy, aiding the sick and the needy. However,
20,000 years ago it is hardly likely that what man called "good" comprised
these same elements.

The label "good" among primitive peoples covered types of conduct now
regarded as evil. Among many groups human sacrifice was widespread. It
was a breach of filial duty for Eskimo children to fail to kill their parents
when they became useless because of age. Infanticide was practiced with
children who were born crippled or diseased, or even with those born during
stormy weather or during certain times of the year, or when the parents
already had a specified number of offspring. At various times and among
many groups polygamy, polyandry or complete promiscuity between the
sexes was practiced. Frequently these practices turned upon the relative
number of men and women in the group. In some tribes groups of men col-
lectively married groups of women. Monogamy was sometimes looked upon
as shameful, apparently on the theory that it was wrong for a man to have
a monopoly of one woman. In patriarchal systems wives were slaves of their
husbands. Marriage by purchase prevailed in many areas. In some places
women would sell themselves to raise money for temples and other philan-
thropic causes. Among some tribes virginity among girls was held in
contempt. Chastity was relatively a late development in society. In some
localities it was regarded as inhospitable for a host not to offer his wife or
daughter to his guest as a companion for the night, and it was an insult to
the lady if the offer was refused.\textsuperscript{14} Cannibalism was almost universal among
primitive tribes,\textsuperscript{15} and slavery was widely recognized and approved. Among
some groups parents sold their children into slavery. Mutilation of the hu-
man body, especially of the ears, nose, lips and teeth was regarded as proper,
and sometimes required even by the most advanced primitive peoples, until
as recently as 15,000 years ago.\textsuperscript{16} In many groups certain persons became

\textsuperscript{13} Bourke, Two Approaches to Natural Law, 1 NATURAL L.F. 92, 94–95 (1956).
\textsuperscript{14} I am indebted to Will Durant’s Our Oriental Heritage for the facts contained in this
paragraph. DURANT, OUR ORIENTAL HERITAGE 10–20, 35–36 (1942). See also H. G. WELLS, OUT-
LINE OF HISTORY 100–105 (1921).
\textsuperscript{15} A “great advance” was made “when the strong consented to eat the weak by due process
of law.” DURANT, op. cit. supra note 14, at 53.
\textsuperscript{16} WELLS, op. cit. supra note 14, at 104.
untouchable, or were to be shunned because they were "tabu." Trickery, deception, dishonesty, greed, cruelty and violence were not only approved of, but they were regarded as indispensable to survival.¹⁷ "Primitive man," says Durant "was cruel because he had to be."¹¹ Almost every vice that one can think of was once a virtue.¹⁹ All these practices at one time or another were among the constituent elements of "good." Resorting to them was "suitable" or required, according to the "judgments" of the men who lived with them. And if, as Father Kenealy says "true judgments do represent objective reality independently of the act which elicits them,"¹" these practices were "good" as determined by the "objective moral order" of the time. Kindness, honesty, sincerity, courtesy and especially aid to the old or sick were no part of what was "good."¹¹ Had there been a natural-law-lawyer or his counterpart in those primitive times, in all probability he would have resisted the abolition of the practice of human sacrifice, infanticide or cannibalism on the ground that the abolition would violate the requirement of doing good.

Even at the present time, in remote isolated areas there are groups of people possessing the standards of conduct of the primitives of 20,000 years ago. A recent dispatch from Luzon P.I. reported the beheading of two Christian girls by members of the fierce Ilongot tribe. It appears that in the spring of the year Ilongot men go out in search of Christian heads to present as tokens of love to their prospective brides. It is also the belief of the tribe that detached Christian heads ensure a bountiful rice harvest. Such conduct

¹⁷ "Greed, acquisitiveness, dishonesty, cruelty and violence" for many generations were useful to men for survival. Durant, op. cit. supra note 14, at 51.

¹¹ "To transmute greed into thrift, violence into argument, murder into litigation and suicide into philosophy has been part of the task of civilization." Durant, op. cit. supra note 14, at 53.

¹⁹ "Every vice was once a virtue, necessary in the struggle for existence; it became a vice only when it survived the conditions that made it indispensable. . . . It is one purpose of a moral code to adjust the unchanged—or slowly changing—impulses of human nature to the changing needs and circumstances of social life." Durant, op. cit. supra note 14, at 51.

"Through the slow magic of time, such customs, by long repetition, become a second nature in the individual; if he violates them he feels a certain fear, discomfort or shame; this is the origin of that conscience, or moral sense which Darwin chose as the most impressive distinction between animals and men." Durant, op. cit. supra note 14, at 36.

²₀ Kenealy, 3 Catholic Lawyer 22, 35 (1957).

²¹ "Morals are such customs as the group considers vital to its welfare and development." Durant, op. cit. supra note 14, at 36.

"[E]very society . . . encourages—by calling them virtues—those qualities or habits in the individual which redound to the advantage of the group, and discourages contrary qualities by calling them vices." Durant, op. cit. supra note 14, at 53, 54.

Albert Schweitzer relates that for the primitive man "the circle of solidarity" is limited to his family or tribe. When Dr. Schweitzer would ask a tribesman to render a little service to a bedridden patient in the hospital, he would consent only if the sick man belonged to the same tribe. He would yield to neither persuasion nor threat to help others. Schweitzer, The Evolution of Ethics, The Atlantic Monthly, Nov. 1958, p. 69.
is not looked upon as objectionable by the tribe, but is regarded as "good" not only for the participants but for the community.\textsuperscript{21a}

However, for most of the people of the world, 20,000 years have brought a change. During this period man has experienced an intellectual, moral and spiritual growth. What was once good is no longer good. Learning by experience, man has made new rules—has set up new standards of conduct for himself.\textsuperscript{22} New wine has been placed in old bottles. Will the term "good" comprise the same elements 20,000 years from now? If man has grown in the last 20,000 years is it now to be assumed that he has stopped growing, and that we must now freeze what we believe to be "good" for all eternity? Why should the concept of "good" of present man any more than of past man, or future man, be used as the criterion for what is to be eternal?\textsuperscript{23}

We need not go back 20,000 years to note the changes that have taken place in the concept "good." Reference may be made to comparatively recent practices with respect to slavery, witchcraft, inquisitions and genocide upheld in the name of goodness and morality. According to Toynbee,\textsuperscript{24} the world has seen no less than 26 civilizations, 16 of which flowered, withered and faded away, and each of these civilizations had its own peculiar rules of conduct and moral codes. These codes differed not only among the various civilizations but from rise to fall in the same civilization. So if "good" means what the mores says it means, or what the judgment of the men of the time believe it to be, what is "good" has not been certain, universal and immutable.

One lesson that stands out in the history of the human race is that there is no one moral principle or set of moral principles by which man has advanced from barbarism to civilization. Rather one is impressed with the great diversity in morals, standards, customs and traditions practiced by man not only from millenium to millenium, but among the various clans, tribes, groups and nations of men that were contemporaries of one another. If there is an unchangeable "objective moral order," man for many thousands of years was totally unaware of it, and was wholly uninfluenced by its existence. In view of the findings of anthropological and historical scholars, the view cannot be accepted that man progresses only if he is guided by fixed and absolute principles. It is significant in this connection that man has lived many more thousands of years without the Ten Commandments and the Golden Rule than he has with them. If there is an "objective moral order" in the sense that what is "truly" good "existed" 20,000 years ago,

\textsuperscript{21a} San Francisco Chronicle, May 15, 1959.
\textsuperscript{22} "Morals are relative and indispensable." DURANT, op. cit. supra note 14, at 48.
\textsuperscript{23} "Man, with his present brain, does not represent the end of evolution, but only an intermediate stage between the past, heavily weighed down with memories of the beast, and the future, rich in higher promise. Such is human destiny." DU NOY, HUMAN DESTINY 225 (1947).
\textsuperscript{24} TOYNBEE, 1 A STUDY OF HISTORY 378 (1946) (abridgement).
or 1,000 years ago even though it was not known by man—that is, if the “true” concept of good has never changed—there is no reason for saying that we know now, any more than we did 20,000 years ago, what the “truly” good is. And if it is claimed that by increased understanding, we are more likely to know the “good” now than 20,000 years ago, then for the same reason we would be more likely to know the “truly” good, 20,000 years hence. The consequence is that whether or not there is an “objective moral order” our present concept of “good” must always be subject to change.

It is indeed fortunate that man’s concept of “good” was not frozen 20,000 years ago, or for that matter, 1,000 years ago, after the birth of Christianity and the other great religions. We shall be equally fortunate if we do not freeze it now.

III

It is the view of some advocates of the scholastic-natural-law that unless there are immutable and universal principles of conduct there are no standards by which man can test his morality. Without such principles, it is claimed, he has no measuring rod of the good. He is like a ship without a rudder. It is said that he must recognize the immutability and universality of certain principles or flounder along with no principles at all. On this point Mr. George W. Constable says: “Is ‘the good’ a completely equivocal and essentially empty word to be applied as a subjective tag to our separate and variable personal judgments? Or is it a definable ideal with an objective essence which remains ever the same under varying applications?” The answer to both of these questions is no. It is not necessary to make a choice between immutable principles or no principles, or between absolute rights or no rights. The history of the human race, as indicated in Part II of this article shows that man has not been guided by immutable principles in his rise from barbarism to civilization. Nor on the other hand, has he been with-

---

25 Reichenbach’s observation is pertinent here. He says: “The imperative form of [each of] the rules [Ten Commandments] make it evident that it is meant that it is a command, not as a statement about matters of fact. The transformation of ethical rules into a form of knowledge seems to be a later invention. The Hebrew would have regarded it as a disparagement of the word of God to put the Ten Commandments on a par with the law of nature or a law of mathematics.” Reichenbach, The Rise of Scientific Philosophy 52 (1951).

26 Constable, The False Natural Law; Professor Goble’s Straw Man, 1 Natural L.F. 97 (1956).

27 Constable, supra note 26, at 101.

28 “It is impossible to have a knowledge of the world that has the certainty of mathematical truth; it is impossible to establish moral directives that have the impelling objectivity of mathematical, or even of empirical, truth. This is one of the truths that scientific philosophy has uncovered. The solution of the problem of absolute certainty, as well as that of the problem of constructing an ethics by analogy with knowledge, is negative; this is the modern answer to an age-old quest.” Reichenbach, op. cit. supra note 25, at 324.
out the aid of standards of personal conduct. What is shown is that he has always had goals and rules of conduct, but that, as he has advanced in understanding and gained new insights, he has modified his goals and has abandoned, revised or created new principles to fit his newly conceived purposes. His principles have been neither immutable nor "completely equivocal." They have not been "empty." They have had meaning and substance.

IV

In my last article I said:

Suppose we consider the commandment, "Thou shalt not kill." Notwithstanding the literally clear, unqualified, and unconditional statement of this injunction, one may justifiably kill another in self defense, in defense of his family, or even in defense of a stranger. . . . These are generally recognized exceptions to the mandate "Thou shalt not kill." But these exceptions are in no sense derived from the rule, as Father Kenealy seems to suggest. An exception which permits killing cannot be "derived" from a rule which says the exact opposite. Rather these exceptions come from outside the rule. They come from other rules of policy, justice or expediency.31

To this Father Kenealy replied:

I am compelled to say that this is a fantastic interpretation of a secondary principle of the natural law. It could not have been suggested by any scholastic treatise or manual. It is based upon a verbalism utterly alien to scholastic thinking. . . . The cited exceptions are not exceptions at all to the scholastic principle. . . . As a verbal formulation of the negative aspect, [of the principle] I would suggest "Thou shalt not kill or inflict bodily harm upon any human being unjustly."32

Though Father Kenealy takes strong exception to my interpretation of the commandment, it appears that his interpretation does not substantially vary from mine. The difference is only in form. While I retained the original statement of the injunction and then qualified it by exceptions (a common

29 Mr. Constable, in criticizing my article says, "How can we be so uncertain of our ends, and yet so certain of our progress?" The answer to this is that we cannot be certain of either. We can deal with such matters only in terms of probabilities. Again Mr. Constable charges me with proposing "unrestrained diversity of human activity" and asks "how is this doctrinaire tolerance to be reconciled with forceful rejection of Communist slavery. . . ." I emphatically disclaim making any such statements. My article clearly dealt only with tolerance of ideas not of action. And at no time did I say, as Mr. Constable asserts, that the "natural law system" is "evil." My belief is to the contrary. Mr. Constable's bristling certitude in attributing to me statements I did not make casts considerable doubt on the credibility of his other assertions. Apparently Mr. Constable cannot conceive of a principle being useful unless it is absolute and immutable. The calendar is neither absolute nor immutable. It is admittedly inaccurate. Does Mr. Constable believe in the Calendar? Or does he use one of his own? See Constable, 1 NATURAL L.F. 97 (1956).

31 Goble, The Dilemma of the Natural Law, 2 Catholic Lawyer 226, 230 (1956).

32 Kenealy, 3 Catholic Lawyer 22, 25 (1957).
technique of interpretation used by lawyers) he introduced the qualifying
terms in the statement itself. Though I am unable to see why my method of
interpretation would be regarded as "fantastic," I am willing to accept
Father Kenealy's revision, as an improvement over the wording of Moses
and over my own statement (though some would object to restricting the
principle to human beings). But I wonder if Father Kenealy believes that
the verbal changes he has made make the difference between a principle that
is certain, immutable and universal and one that is not. Can the insertion
of the world "unjustly" work such magic? While Father Kenealy's revision
of the phraseology of the mandate makes it inappropriate to designate modi-
fications in the form of exceptions, it does not follow that the meaning of the
principle has become immutable.

My main effort in the discussion of this point was to show that the prin-
ciple changed in meaning from time to time and place to place, and that it
was necessary to go outside the principle itself to determine its scope and
application. The substance of the principle must depend upon the conduct
to which it has reference. The meaning of "just" through the centuries has
changed in a manner similar to the change in the meaning of "good." The
facts set forth above showing the shifting content of "good" from primitive
man to modern man, and with the rise and decline of civilizations, apply
equally to "just." In fact doing what is "good" includes doing what is "just." Whether the original mandate is formulated so as to express a moral prin-
ciple by stating exceptions to it, or by inserting qualifying terms in it, the
important fact is that what is an immoral killing has changed with the
change in man's moral perception.

V

In my last article I made reference to Judge Wilkin as a neo-scholastic
natural-law lawyer. Judge Wilkin for many years has been regarded as a
leading exponent of scholastic-natural law, has written extensively on the
subject, and has lauded its principles in speech and judicial opinion. Pro-
Fessor Reuschlein, a leading authority on Jurisprudence, classifies Judge
Wilkin as a neo-scholastic-natural law lawyer. The Judge's credentials
therefore seem unimpeachable. In upholding the validity of a city ordinance,
which prohibited Negroes from using a public golf course, the Judge stated

33 Albert Schweitzer believes that, "A man is ethical only when life, as such, is sacred to
him, that of plants and animals, as that of his fellow men, and when he devotes himself help-
fully to all life that is in need of help. . . . The ethic of the relation of man to man is not some-
thing apart by itself; it is only a particular relation which results from the universal one." SCHWEITZER, OUT OF MY LIFE AND THOUGHT 126 (1953).

34 "The desire for absolute certainty may appear to us as an aim of admirable grandeur,
but the scientific philosopher must avoid the fallacy of regarding conditioned habits as postu-
lates of reason and must learn that probable knowledge is a basis solid enough to answer all
questions that can reasonably be asked." REICHENBACH, op. cit. supra note 25, at 305.
that “segregation . . . is supported by general principles of natural law.”

Now since Father Kenealy had said: “Natural law philosophers agree on the fundamental principles of the natural law,” I asked him what general principle of natural law supported segregation. Father Kenealy failed to answer the question. Rather in his latest article he put an interrogatory to me: “What fundamental principle, what principle held to be certain, universal and immutable has been relinquished by Judge Wilkin?” Fortunately, Father Kenealy himself has furnished me with the answer to this question. In his very able and searching article, “Segregation—A Challenge to the Legal Profession,” 3 The Catholic Lawyer 37 (1957) at p. 42, the good Father says: “The fundamental principles of natural law . . . are obviously incompatible with compulsory segregation.” So my answer to Father Kenealy’s question is that Judge Wilkin has relinquished those fundamental principles of natural law which Father Kenealy says are incompatible with segregation.

More to the point, however, is the fact that here we have a well-authenticated neo-scholastic natural law judge contending that natural law principles support segregation and a leading and learned neo-scholastic natural-law philosopher, Father Kenealy, asserting that natural law principles are incompatible with segregation, and at the same time both claiming that since fundamental principles of natural law are “self evident,” all natural-law philosophers are agreed upon what those principles are. There is no doubt that each of these able exponents has a large following. We thus have incompatible fundamental principles of law constituting a part of a consistent, immutable and universal system of law.

So I return to the question I put in my original article, Whose natural law is the natural law? Father Kenealy’s answer, as in all sincerity it must be, is to repudiate Judge Wilkin as a true-blue natural-law lawyer, and to adhere to his own system. Judge Wilkin’s answer in all sincerity would have to be the repudiation of Father Kenealy and to stick to his system. One would think that this incompatibility would raise a little doubt in the mind of one or the other as to whether his system was as self-evident, immutable and universal as he contends it to be, and possibly provoke him to say, “Well, I might be wrong.” But such an admission would explode the whole scholastic natural law doctrine because it has to be based upon certainty and knowability. So this is an event that is not likely to happen.

It is no answer to the above argument to say that this is a case of a reasonable difference of opinion as to what some derivative rule is or how it is to be applied (which possibility natural-law lawyers recognize). The issue

36 Kenealy, 1 Catholic Lawyer 259, 265 (1955).
here is what is the agreed upon and known fundamental principle which is certain, immutable and universal from which the rule for and against segregation is derived.

Nor is it an answer to this argument to assert that this divergence is not unlike the differences of opinion that develop among lawyers who do not support the natural law theory. This is so because they do not claim certainty, immutability and universality for their principles. They recognize the transitory and tentative character of their fundamentals and, therefore, leave room for differences of opinion, revision and modification. Scholastic-natural-law philosophers, as Father Kenealy has pointed out, recognize no such possibility.

VI

In conclusion I want to make it clear that I believe in the indispensability of moral and legal principles, that morality exerts a directional power upon law itself, and that man can liberate the constructive powers of his mind only by faith.\(^{38}\) It is likely that the principles I support do not vary substantially from those advocated by Father Kenealy.\(^{38a}\) The main difference is that he believes that fundamental principles are derived from nature and are certain, universal and immutable, whereas it seems to me highly probable that these principles are not so derived, but rather that they are the product of man’s evolution from barbarism to civilization, and that they must in the future, as they have in the past, yield from time to time to man’s deeper insight and broader understanding.\(^{39}\) The same is true of so-called “absolute” and “inalienable” rights.\(^{40}\)

\(^{38}\) I would attach much greater importance to both legal and moral principles than does Judge Jerome Frank in his *Law and the Modern Mind* (1930) and his *Courts on Trial* (1949). For an evaluation of Judge Frank’s philosophy see Goble, *Law as a Science*, 9 Ind. L.J. 294 (1934) and Book Review, 16 Mo. L. Rev. 82 (1951).


\(^{38a}\) I fully endorse the views expressed by Father Kenealy in his two excellent articles. *Segregation—A Challenge to the Legal Profession*, 3 Catholic Lawyer 37 (1957), and *Fifth Amendment Morals*, 3 Catholic Lawyer 340 (1957).

\(^{39}\) Father Kenealy was so emphatic in rejecting my contention that even fundamental principles of law should “yield to man’s broader knowledge and deeper insights” that he apparently assumed that rationality itself had been attacked and that he had to defend it. He said that “broader knowledge and deeper insights will never prove that things can be and not be at the same time... that objective reality does not exist independently of an act of the human intellect... that there is no difference between truth and error,” etc. Kenealy, 3 Catholic Lawyer 22, 35–36 (1957). But the problems under discussion do not involve the validity of these propositions which have to do with rationality itself. Why should I renounce rationality, when that is the only device available to me for presenting my case?

\(^{40}\) It is the belief of Will Durant that “Rights do not come to us from nature, which knows no right except cunning and strength; they are privileges assured to individuals by the community as advantages to the common good. Liberty is a luxury of society; the free individual is a product and a mark of civilization.” *Durant, op. cit. supra* note 14, at 29.
It is also my belief that basic principles should not be changed for light and transient causes. To provide society with the essential elements of stability and continuity, it is desirable that we continue to use principles that have proved their value until it is clear that they ought to be superseded or revised. Most changes come about slowly and imperceptibly. Growth is a continuous process of interaction of old rules and new ideals. But occasionally a major modification happens in a comparatively short time. The flowering of the ancient Greek civilization was such a time. The birth of Christianity was another.

Since by the thesis advanced in this article man not merely conforms to, but creates moral precepts and standards, this view gives him a higher degree of responsibility and a broader sweep for freedom of thought than scholastic natural law permits. By this view the significance of morality is enhanced and man is placed on a higher creative and constructive plane.