

THE FOUNDATIONS OF NATURAL LAW

The Foundations of Natural Law

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CONTENTS: This thesis is a study of the various appeals that have been made to provide a foundation for a natural-law theory and a critical examination of the problems attendant upon these appeals. Although an outline of this study is given in detail in the introduction, I should like to point out the purpose and what I feel to be the significance of this study. Most societies which pride themselves on having a mature legal system have witnessed the inadequacy of a positivist approach to the law. Because of this, we witness the search for a foundation or critical standard for our human enactments which is stable and beyond the reach of human interference. With the revival of interest in natural law, it is important to be aware of how proponents and critics have dealt with the view in the past in order to avoid problems and ensure an acceptable view for the present. In the final chapter of this study, I have suggested an approach for today which appears to overcome most of the major stumbling-blocks of past attempts to provide a sound natural-law theory and which, I suggest, is a good beginning from which to develop a full legal theory.

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INTRODUCTION

The notion of 'natural law' which, as we shall see, has worn a myriad of guises, has been discussed, propounded and criticized for more than two thousand years. The philosophy of law generally involves the attempt to understand the essence or nature of law, whence law is said to gain its obligatory character and the differences denoted by such pairs of opposites as 'right' and 'wrong' and 'justice' and 'injustice'. Theories put forth under the name 'natural law' have been definite attempts to deal with these issues.

Natural-law theories must be placed within their proper context to avoid the mistaken assumption that they are proposed to answer all questions which may arise in the legal sphere. proposals concerning the nature of law and its concomitant problems; in particular, those espoused by natural-law theorists, constitute a moral much more than a legal system. In fact, much of the criticism and ill repute associated with natural law derives from the fact that its opponents and even many of its proponents judge its efficacy on its ability to generate a comprehensive legal order out of its initial and fundamental principles. In fact, however, the main goal of most natural-law theorists has been to find a point of contact or a bridge between morality and the law.

What has been the catalyst for this constant search

for a point of intersection? There have been a variety of suggestions from both defenders and critics. Jamieson, whose view will be elaborated in Part Two, proposes that the notion of "natural law is a rhetorical warrant, not a self-evident or empirically demonstrated premise."¹ Ms. Jamieson further suggests the psychological utility of natural law. She concludes that "man's recurring attempt to isolate and define the basic ordering principles which govern the moral and physical universe testifies to a deeply felt psychological need to believe that such an underlying order exists....Belief in natural law satisfies this need."²

The more dominant view, and the one more likely to receive historical corroboration, is that man has looked for something, now generally classified as natural law, to provide justification for the existence and obligatory force of positive law - not just a 'phantom law' fulfilling a psychological need in man, but something actually existing (in a broad sense of the term) - which makes our calling a law unjust or void valid. As Strauss points out, our ability to describe a law or decision as unjust "implies that there is a standard of right and wrong independent of and higher than positive right; a standard with reference to which we are able to judge positive

¹K.M. Jamieson, "Natural Law as Warrant", Philosophy and Rhetoric, 6, 1973, p.242n.

²Jamieson, pp. 239-240.

right."³ Furthermore, this standard cannot simply be the ideal of one's society or group, for "the mere fact that we can raise the question of the worth of the ideal of our society shows that there is something in man not altogether in slavery to his society."⁴ That there is a basic unwillingness on the part of judges, juries and the society at large in a mature legal system to effectuate laws which appear 'unjust' or 'unconscionable' suggests a belief (functioning at least in practice) that positive laws must conform to some sort of fundamental moral standard.

H.A. Rommen begins his book, The Natural Law, with the following remark: "Just as wonder, according to Aristotle, lies at the beginning of philosophy, so, too, is it found at the beginning of the doctrine of natural law"⁵ Rommen is discussing the primitive origin of the search for a higher standard of justice or appeal. He notes, as do many other historians of natural law, that this idea emerges when a society or group, aware of their own history and/or other cultures, realizes that their laws are not only changing with time but also are different from those of other peoples. Up until then, all laws were

³L. Strauss, Natural Right and History, (Chicago: University of Chicago Press, 1953), p. 6.

⁴Strauss, p. 6.

⁵H.A. Rommen, The Natural Law, trans. T.R. Hanley, (U.S.A.: B. Herder Book Co., 1947), p. 3.

thought to be unchangeable and, being undifferentiated from religious norms,⁶ of divine origin. But noting the vast variety and variableness of the laws of the land, a distinction was made between what was divine and what was pure human enactment. From this arose the problem, grappled by natural-law theorists for centuries: In what sense are human laws normative and how are they binding?

Most natural-law theorists⁷ turned to a discussion of justice, which they felt could be a useful tool by which to criticize and formulate adequate human laws. It was the dictates of this overriding concept which were seen to be disclosed to man in the principles of the natural law. Positive law was considered 'just' when it accorded with these principles. With this one can better understand the above claim that natural-law theory is more of a moral theory. In fact, it provides the foundation for a natural ethics distinct from any Christian or revealed system (though not necessarily in opposition).

Before introducing the various appeals which have been made to provide a foundation for a natural-law view, it is beneficial if one considers, at best superficially in this context, the various aspects of a natural-law

⁶ 'Religion' and 'divine' are here to be understood in a broad sense including everything from the pre-Socratic view to that of the Roman Catholic Church.

⁷ This title is applied to all thinkers who have followed this basic train of thought, although such men as Plato and Socrates did not, themselves, use the term explicitly.

approach to justice. As d'Entrèves notes, there is an "indefeasible movement of the human mind which impels it towards the notion of an eternal and immutable justice.... This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe, from the Being of God and the reason of man."⁸ Although this appeal results in various forms of natural-law theory, there are a few basic aspects which remain relatively stable. One such aspect is that the individual is seen within a framework of norms which are not man-made but binding on man nevertheless.

In general, judgements concerning what is or is not just need not involve explication of any attendant norms. It should be noted, though, that any sort of justification for these judgements will at least imply some normative standard. On the other hand, natural-law assertions are immediately in the form of normative statements, the contents of which are seen as formulated independently of the subjects of the norm. That is, the natural-law framework of justice is out of reach of human arbitrariness and caprice. It is this transcendence which allows the natural-law theorist to conclude that the contents of the

⁸A.P.d'Entrèves, Natural Law, (London: Hutchinson's University Press, 1951), p.8. (As I propose to show, the three areas from which he suggests that the ultimate law proceeds separate or join together in a variety of ways to result in several different forms of natural-law theories.)

natural law are objective and universal. Even views which suggest a certain degree of variability maintain that the core or source of natural-law criteria is unchangeable.

The moral principles which refer to the activities of law-making and law-applying make up the ideal of justice, although there are many views as to what exactly is involved materially in this ideal (which is seen as the reason for the validity of the law). As one example, I shall cite the view of justice proposed by John Rawls, as it is supported by Charles Fried, who argues for its compatibility with natural law. Fried states that the "full concept of justice requires recognition not only of the equality of all human persons but of their equal right to equal liberty in the pursuit of their interests."⁹ Aristotle's notion of the mean between extremes and Plato's harmony and proper functioning of parts in connection with the whole are equally familiar answers to the question: 'What is justice?'

Whatever the view of justice, the question to be dealt with is how are these moral principles of the natural law to be ascertained? It should be noted that the appeals used throughout history as foundations for

⁹C. Fried, "Natural Law and the Concept of Justice", Ethics, 74, 1963-64, p. 237.

natural law may be widely influenced by the time and place or the current ideology of the particular group or society. That this is more prevalent in natural law theory than in some other subject areas "is traceable principally to the fact that natural law, though a difficult philosophical problem, is also a subject of direct, intense, daily and tragic interest to all sorts of people whose philosophic tools may well be primitive."¹⁰ Furthermore, a philosophy free from historical and ideological influences would require a degree of detachment from one's surroundings which seems humanly impossible.

There are many examples of history playing a major role in influencing not only natural-law theories but also philosophical systems in general. Nevertheless, the basic factor in natural law - an appeal to something 'higher' than positive law - has been consistent throughout. Two contrasting examples are those of the schoolmen and the majority of modern natural-law theorists. The rigid social structure at the time of the former is mirrored in their absolute and fixed ideal. The more modern theories reflect the general scepticism towards absolutes and emphasize the possibility of change. Natural law has

¹⁰Y.R.Simon, The Tradition of Natural Law, (New York: Fordham University Press, 1965), p.13.

been both individualistic and authoritarian, religious and secular, conservative and progressive as well as a higher existent law invalidating positive laws inconsistent with it or simply an ideal to which the positive law ought to strive to correspond.

These variations are in general seen to accord with specific historical situations. A progressive or innovative role is played by natural law when the authority of an existing power is on the brink of collapse by either internal or external forces or is in need of an overhaul to keep abreast of the times. When society is on an even keel the natural law is often propounded to assist in the maintenance of the status quo. But, as Simon points out, often even "the relevant particularities of the historical treatment are best understood by being traced to the ideology of the place and time."¹¹ He goes on to describe an ideology as "a system of propositions which, though indistinguishable from statements about facts and essences, actually refer not so much to any real state of affairs as to aspirations of a society or some definite group at a certain time in its evolution."¹²

— ¹¹Simon, p. 16.

— ¹²Simon, p. 17.

Although an ideology has only the appearance of philosophy and universal truth, it need not be at variance with objective truth and may help (though history has shown that it often hinders) in directing the choice of questions or problems to be studied. As was seen above, an ideology may serve to direct the natural-law theorist to a search for a justification of either criticism or approval of what is occurring in the society at that time and, in particular, to a realization that such a standard proves more satisfactory if it is detached from those occurrences and is not dependent on the threat of force alone. That is, the search is directed to something 'given', out of the reach of human whim and the fluctuations of the temporal experiences of man (something 'natural').

Generally, societies come to realize that stability and long-term acceptance of and obedience to its laws and policies require a justification enabling individuals to see that their interests are not jeopardized by social obligations and that rights and duties are coincident. One such system which has maintained itself for more than two thousand years is that of natural law. With the study of law and the familiarity with alien legal systems, the Greeks and Romans distinguished pure power from justice and denied the automatic validity of the laws of their state. From these beginnings, the natural law was channelled in several directions. Nevertheless;

these philosophers all recognize that there are duties or obligations which are other than, and independent of, those that are brought into being by explicit legislative action. A second respect in which they all agree is in thinking that the positive law is to be judged in the light of its correspondence to law in this primary sense and that the duty to obey the positive law rests, wholly or in part, on the derivation of the latter from the law of nature. 13

Even this outline cannot be adhered to stringently if some theorists are to be included under the heading 'Natural Law'.

Thus we can see that the view coined as the theory of natural law undergoes changes with the advancement of thought, the increase of experience, the general occurrences of the time period and with the influence of prevailing ideologies. Each 'new' view retains portions of its ancestors which the theorist feels are relevant to the situation at hand and makes adjustments in those areas where the explication appears inadequate. With this sort of 'give and take' situation it is difficult to make any sort of elucidating classifications. Indeed, any sort of definite grouping will appear rather arbitrary and inaccurate considering that, for the most part, each theory ought to be seen as on the borderline of several classi-

¹³P.A.Olafson, ed. Society, Law and Morality, (New Jersey: Prentice-Hall, Inc., 1961), p.19.

fications.

Nevertheless, a study of the historical development of natural law suggests that there are several basic appeals which have been emphasized by various theorists in order to give a stable foundation to a natural law which transcends human enactments. That is, when arguing against the immutability and absolute authority of positive law by an appeal to a higher or natural law, a source for the latter must be found which is itself stable and able to dictate a binding normative system by which to judge the former. Without such a foundation the appeal to natural law would be both philosophically untenable and practically or legally irrelevant.

The classifications to follow are an attempt to delimit in some useful way the major appeals taken throughout the more than two thousand year history of natural law. As mentioned, these classifications are not definitive but will serve to highlight the major thrust of the appeal in the various theories mentioned. Although the major or 'ultimate' appeal will thus be emphasized, the use made of other appeals will be referred to where clarity and coherence demand.

The four broad categories of appeals made in order to provide a foundation for an ultimate normative system which have recurred most frequently are appeals to (1) nature, (2) reason, (3) the Divine and (4) the human

individual. The breadth of these categories carries with it a certain vagueness, but a look at some theories which appear to fall within their scope will clarify to some extent the notions involved as well as outlining the finer differences often obscured between these appeals.

A chapter will be devoted to the exemplification of each appeal, but a brief and cursory outline should prove useful at this point in order to clarify the direction to be taken in this study. The first appeal to be discussed is that of nature - generally considered the most primitive and chronologically the first sort of appeal to an ultimate given to establish some sort of normative standard which could reasonably, in retrospect, be classified as natural law. This appeal generally revolves around speculation on the physical universe. Observing the harmony and order of the recurring phenomena in nature, the early Greeks proposed that something analogous was needed to assure the security of society - a part of that natural order. The habit of obedience or the threat of force by the sovereign will was insufficient to secure a stable and organized society. The notion of justice first arose "as a kind of metaphysical, cosmological principle regulating the operation of the forces of nature on the elements of the universe, securing balance

and harmony among them all."¹⁴ "Justice", bound up with a teleological view of the universe at large and its components considered individually, was used to distinguish laws which were just by nature or, as will be elucidated in Chapter One, in their idea were distinguished from and used as an ultimate standard for the justness or validity of human enactments and institutions. As will be seen in the discussions of Plato and Aristotle and other exemplars of this appeal, nature became 'idealized' as a source of objective standards of value and was thus a guide to action.

The second broad classification is that of the appeal to reason. As will be seen, reason is appealed to in the majority of natural-law theories though in a variety of ways. As a separate division, reason is here understood not merely as the essential quality of man or as that faculty by which man is able to deduce the natural laws from their ultimate source but rather as the essential feature of the cosmos as a whole. Typified by the Stoic view, this appeal emphasizes man's capacity to share in the universal harmony of nature.¹⁵ Natural law, through

¹⁴J. Stone, Human Law and Human Justice, (Stanford: Stanford University Press, 1965), p. 11.

¹⁵An overlapping with the first category is easily seen here but, as will be pointed out further in Chapter Two, the greater emphasis on reason justifies its inclusion as a separate appeal.

this appeal, is given a universal rational foundation, reason being seen as the immanent principle guiding the universe with the natural law (again having a normative connotation) as its expression for man. The objective standards of truth and justice (the content of the natural law) were seen as revealed to man through 'right reason'.¹⁶

The third classification has been broadly entitled the appeal to the divine. It should be noted that prior to man's relative subduing of nature, the latter was generally given a numinous and sacral meaning. But it is generally agreed that at this time there was no distinction made between nature and convention and thus any appeal to the divine cannot be seen as forming a basis for a natural-law theory. Nature itself or the reasoning principle or law or fate controlling the universe is often referred to as divine. This should be seen, for the purposes of this study at least, as an extended use of such terminology. What shall be understood as divine in this context - exemplified by the Roman Catholic view of natural law - is the notion of a God, some authoritative figure (not necessarily in an anthropomorphic sense) who stands above nature in general and man and who maintains the order and design of the universe and issues the ideal norms in the form of a natural law.

¹⁶ It should be noted here that problems arising in the various views will be dealt with in the relevant chapters.

Reason here may be seen as a gift from God enabling man to see and to understand God's plans and dictates. Unlike the second classification, though, there is no special or necessary role for reason consistently emphasized for, as St. Paul suggests, these dictates are "written in their hearts [the heathens], their conscience also bearing witness."¹⁷ Aquinas, generally considered as the father of the Roman Catholic view, emphasizes a rational foundation for natural law and embarks on a study of human nature to discover the values inherent in it. Nevertheless, the natural law forms part of the divine law and his ultimate appeal for justification of the former lies with God, and thus Aquinas' view will be elaborated upon in the third chapter as an exemplar of the appeal to the Divine.

Finally, the fourth broad category - that of the human individual - includes several major and basically unrelated trends in the history of natural law. In the seventeenth and eighteenth century formulations of the natural law, reason is often emphasized and may be the ultimate appeal in the sense of being the essence of human nature. As will be shown in Chapter Four, this

¹⁷Romans 2:15, King James Version, (London: Cambridge University Press).

is often mistakenly generalized as the ultimate appeal in this period whereas in truth there are several views of what comprises the essence of man (the ultimate appeal). Reason is often seen as no more than the faculty used to deduce laws from this essence. The seventeenth and eighteenth century theories, more accurately characterized as theories of natural rights than of natural law, are generally based on an analysis of the immanent purposes and goals in the individual. The natural rights theory was more a protest measure than a critical standard for positive laws and lost its power when those rights were granted.

Many of the theories reviving natural law in the twentieth century also emphasize a study of what is essential in human nature though it should be noted that man is viewed both as an individual and as a member of society with the greater emphasis appearing to fall on the social nature of man. It will be seen that the general scepticism of modern man about static ideals influences the approach and provides a more satisfactory use of the appeal to human nature than that employed by the seventeenth and eighteenth century theorists.

The road to a satisfactory and stable natural law theory has not been without setbacks and the second part of this study will concern itself, partly, with several opposing trends established to account for the

obligatoriness of positive enactments. The voluntarist tradition, often viewed as a type of natural-law theory, attempts to vindicate the primacy of the will over the intellect. It will be seen that this shift of emphasis creates major changes in the notion of law and its basis which may lead to many unsatisfactory and even devastating results.

The second attack to be discussed is that coming from the Hegelians and the historical school of law generally. Notice will be taken concerning what view of natural law they feel that they have defeated and whether this attack is adequate to undercut natural-law theories in general.

The remaining bulk of Part Two will concern itself with a more philosophical rather than historical emphasis, elucidating in greater detail the basic problems encountered by natural-law theorists and how they are criticized by their opponents. This combination of the historical and the philosophical is, as noted by d'Entrèves, the best way to "study the vitality of natural law and its claim to have served the cause of humanity well."¹⁸ A discussion of the major philosophical problems involved - the problem of the relation of facts and values or law and morals, the ambiguities in concepts

¹⁸d'Entrèves, p.12.

used, the problem of universals and the source of obligation - should help us to see if an appeal to a higher standard is justified and, further, which appeal (or combination) proves most satisfactory. The view generally seen as at the opposite pole to the natural-law theorists - legal positivism - will be mentioned throughout the discussion of these problems eliminating the need for a separate chapter devoted to it alone.

Finally, Part Three of this study will form a conclusion with some speculation on the future path needed to be taken by natural-law proponents if the theory is to prove useful and satisfactory for modern society. An attempt will be made to classify the general trends in natural-law theorizing into two very broad approaches which are able to include within their bounds a variety of appeals. With this reduction of the great mass of material concerning natural law, it will be easier to speculate upon which approach in general and, possibly, which appeal in particular has the best chance for future development and for being employed as a critical standard with which one can combat the arbitrariness possible in any legal system.

PART ONE

CHAPTER ONE THE APPEAL TO NATURE

As was mentioned in the introductory remarks, the appeal to nature finds its initial source in man's observance of the harmony and order in the recurring phenomena of nature. This was seen as an ideal to which man and society - parts of this nature - ought to strive as well as an ultimate appeal by which one could approve or criticize what was proposed in human enactments generally.

The Greek philosopher - the first in the Western tradition to speculate to any degree on an analogous order in man - saw the ordering principle in nature as a 'jus naturale'; 'jus' (rather than 'lex') because it was a law which could be discovered or perceived by man, but not man-made, and 'naturale' because it was an ordinance of nature and thus beyond the reach of human whim and arbitrariness. Thus they saw law as essentially for the purpose of unifying and coordinating the cosmos and, in turn, for the benefit of the individuals making up that cosmos.

Taking up a teleological view of the universe, the Greeks (and other supporters of this view) saw this 'jus naturale' as inherent in all things as well as in the cosmos as a whole, giving to each entity a definite end or ultimate purpose which it is constantly striving to attain. This law is like a tendency within an entity working towards fulfillment and, since nature was regarded in a normative light, the completion of that tendency is good, its privation evil.

Although norms and moral laws are emphasized to a far greater extent in the discussion of man since he has the capacity to apprehend and reason about his essential nature and the best means to attain its fulfillment, it should nevertheless be noted that nature in general was seen as a source of norms. For example, the Pythagoreans saw number as providing not only a description of relationships in the universe but also a basis for conduct - a prescription as to how men ought to act individually and in political organization. "For instance, they explained justice as a certain property of number, soul and mind as another such, the 'decisive moment' as another, and they gave the same interpretation to virtually everything else as well."¹⁹ Further, "the degree to which the harmonious music of the soul is realized determines the direction of its destiny and what other bodily sojourns it must undergo before it has purified itself ... [and] may become one with the great cosmic harmony which is the ultimate destiny of all existence."²⁰ The appeal to nature as the source of dictates for man's action as well as the teleological normative framework in which the appeal is set is evident from the above passages.

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From Aristotle *Metaphysica* 985b 22 in Wheelwright, P. (ed) *The Presocratics*, (New York; The Odyssey Press, Inc., 1966), p.213

20

Wheelwright, P., p. 210

Heraclitus as well suggests that men ought to seek to conform in both individual and social life to the law which guides the universe. He states that "wisdom is the foremost virtue, and wisdom consists in speaking the truth, and in lending an ear to nature and acting according to her They who would speak with intelligence must hold fast to the (wisdom that is) common to all, as a city holds fast to its law, and even more strongly. For all human laws are fed by one divine law."²¹ Once again the prescriptive framework is apparent - virtue (wisdom) is following the dictates of nature. Although mentioned in the introduction, it should be emphasized once again that reference to the 'divine' in works such as these should be understood in a cosmological sense, as an inherent law or fate maintaining the order and harmony of the universe rather than as some supernatural entity.

The investigation of law and justice embarked upon by Socrates and Plato was instigated by the Sophistic challenges that justice as an aspect of man-made law was either a rationalization of interest or merely a conventional restraint of 'natural impulses.' Further, the realization that the Peloponnesian war had been caused by internal weaknesses of the city-state led Plato on a search for a more stable framework for law and political organization. Once again an appeal was made to the harmonious ordering of nature because the doubt cast upon the

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Quoted in H.A. Rommen, The Natural Law, p. 4.

binding force of legal enactments was not assuaged by saying that the laws were originally set out by wise men and had now become customary nor by the suggestion that the obligatory nature of law was a concomitant of general agreement by the populace.

The Sophists, directing attention to state and human relations, drew a sharp cleavage between 'physis' or the processes of nature and 'nomos', the man-made laws governing the Greek city-state. In Sophocles' Antigone, Antigone replies to the charge of wilfully disobeying the King's order by burying her brother, that there is a higher law of nature, which overrules positive enactment, which she must both respect and obey. In defence of the charge she states: "Nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but for all time, and no man knows when they were first put forth."²² Thus nature, for the Sophists, was controlled by inexorable laws to be followed by all.. But it was the wide rift between this and positive law which was troublesome for Plato and Socrates who desired a more permanent basis for the latter as well. Thus they turned to a study of justice in general to discover a more concrete definition of it (as is evident in such dialogues as the Republic) as well as a study of the relation of justice and higher law to positive human enactments.

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Quoted in Haines, C.G. The Revival of Natural Law Concepts (Boston; Harvard University Press, 1930) p.5

For the Sophists justice was analyzed purely in terms of social and individual interests or instinctual or psychological human traits.²³ In order to bridge the rift (mentioned above) which this view created, it was necessary to develop a substantive ethical system founded upon an objectively verifiable theory of values. This was accomplished through the appeal to nature and the founding upon this of a system now coined as natural moral law.²⁴ As J.L. Adams has noted in his study on this period, "with Socrates, then, both the nonethical view of 'nature' and the sharp antithesis between 'physis' and 'nomos' were rejected. What is truly good is, even for Socrates, inherent in the actual nature of things; even 'nomos', at its best, is therefore rooted in 'physis', and the antithesis exploited by the Sophists is on its way to being resolved in a law of nature."²⁵ It was thus the teleological view of the cosmos, described earlier, and the view of 'good' based upon this which provided Socrates, Plato and Aristotle with the objective standard of values they desired.

Each entity and the cosmos as a whole were seen as possessing some inborn or inherent quality tending towards fulfillment or perfection. It is this tendency which is the natural law of its being. Thus natural law is viewed in an organic rather than a

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This rather individualistic view set the scene for later natural law theories as well as for the denial of any ultimate foundation for law - legal positivism

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I add the word moral here simply to contrast it with the use of 'natural law' made by the Sophists - the amoral and inexorable processes of nature.

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Adams, J.L. "The Law of Nature in Greco-Roman Thought," Journal of Religion 25, 1945, p. 104

mechanistic sense. That is, the universe was seen as governed by definite and comprehensible laws with each individual entity and the laws governing its being considered as a part of the living whole though also a complete unit in itself. The law was immanent in the whole and its parts. From this tendency is derived the supreme principle of oughtness for all entities, though in particular for man who has the reasoning capacity to comprehend his essence and choose the best path for its realization. This supreme principle is simply - become your essential being! Thus the inherent nature of things becomes the final arbiter in matters of moral behaviour.

A look at how this view is employed by Plato in several of his dialogues will help clarify it to some extent and provide finer details to this basic outline. Since Plato's aim is to elevate nature from the sphere of contingent facts to that of supreme and absolute values, the two notions of teleology and justice must be seen as working together. For although justice is primarily an ethical principle for human behaviour, it is also the virtue of all things. In the Republic the notion that there is an innate quality or tendency in every entity is suggested when Socrates states that "there is a specific virtue or excellence of everything for which a specific work or function is appointed." (353b)²⁶

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For further reference to inherent capacities, see also Phaedrus 271A, and Republic 495A

Each entity possesses a certain nature which determines it to a certain function. Justice on a general level is that state of affairs where each entity is performing its specific function well without obstruction by or interference with other entities. The analogy of nature for human affairs is clearly evident - the primary emphasis in this view of justice is on order or harmony.²⁷ Further, at Laws 903B the Athenian states that "he who provides for the world has disposed all things with a view to the preservation and perfection of the whole ... the purpose of all that happens is what we have said, to win bliss for the life of the whole." Thus the virtue or excellence of each individual entity is that which it can suffer or do, dependent upon its essential nature, in contributing to the general good. It should also be noted that at an individual level as well what can be done to realize this inherent tendency is considered good while what obstructs actualization is seen as evil.

One further example is found at Cratylus 387A where it is clearly seen that nature carries with it its own norms which serve as a guide to human actions. Socrates notes that "actions are also done according to their proper nature, and not according to our opinion of them. In cutting, for example, we do not cut as we please, and with any chance instrument,

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I suggest that this is a 'general' statement for the more detailed account of the harmonious hierarchy of reason, will and appetite and the further application of this to political organization will not be dealt with. But this is not of particular relevance to the point being emphasized; that is, the notion of order and the realization of inherent tendencies.

but we cut with the proper instrument only, and according to the natural process of cutting, and the natural process is right and will succeed, but any other will fail and be of no use at all." Although the example is not of a moral nature, it does suggest that the laws guiding our actions are not a matter of convention alone, but rather, find their source and ultimate appeal in the essential nature, that limits the entities involved in the situation. Nor is convention of this natural law left to be dealt with solely in terms of positive precepts. At Laws 716A the Athenian states that "God²⁸ ... travels according to His nature in a straight line towards the accomplishment of His end. Justice always accompanies Him and is the punisher of those who fall short of the divine law." In particular, Plato discusses throughout the Laws the distortions and diseases which may befall the soul for disobedience.

Since it is the appeal to nature which is of interest to us here, it is unfeasible to go into the details of Plato's philosophy. Nevertheless, his doctrine of Ideas must be mentioned as it is the Ideas which form not only the objective world of values but also the link to the real world and, in particular for this study, to positive law. Plato's view is basically an objective idealism, the

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Once again it must be emphasized that 'God' is not to be limited in this context to the notion typified by the Roman Catholic view.

things of this world gaining reality only to the extent to which they participate in the being of the eternal Ideas which can be seen as perfect exemplars of the entities in the phenomenal world. In the situation of interest to us here - that of law-making - the natural law or perfect exemplar of law becomes the measure and criterion for making, praising and criticizing human enactments. If the latter are 'good copies' they are then to be judged as just and legally binding.

There is some ambiguity in Plato's account which should be mentioned in passing. In the introduction it was noted that the natural law could be seen as invalidating positive laws which are shown to be inconsistent with its dictates or as simply an ideal to which the positive law ought to strive to attain. In light of the fact that generally a natural-law theory is set out to provide a stable foundation by which to judge positive law and to enable it to have a justifiable obligatory nature, it seems that the latter view is more of a theory concerning ideal justice than a theory of natural law proper. It is clear from the passages from the dialogues cited above that Plato, in his appeal to inherent principles in nature imposing obligations upon men, was formulating a natural-law theory. Nevertheless, Socrates' argument for obedience to laws generally considered unjust in the Crito, as well as the constant references

to laws as 'second-best' in Plato's final work, the Laws (e.g., 875D), suggests that the natural law is an ideal which we ought to strive to copy - an ideal 'laid up in heaven' which does not invalidate the actual laws which fail to reflect its dictates.

Aristotle as well takes a teleological view of nature and appeals to nature for the ultimate foundation for values and for a measure of positive enactments. Although in many areas Aristotle criticizes Plato, the thrust of his appeal is similar to Plato's and need not be dealt with at great length. Nevertheless, some differences will be pointed out.

Aristotle is not strictly discussing natural law but rather what is just in itself or just by nature. A lengthy quotation from his Nicomachean Ethics will explicitly point out the essential aspects of what is just in itself and the differences between this and positive enactment:

Of political justice part is natural, part legal, - natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, e.g., that a prisoner's ransom shall be a mina, . . . Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force, while they see change in the things recognized as just. . . . The things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which

is everywhere by nature the best. Of things just and lawful each is related as the universal to its particulars; for the things that are done are many but of them each is one, since it is universal. 29

Thus we see, similar to Plato's view, that Aristotle takes that which is just by nature to be one, universal and anterior to positive laws in the sense that the natural law is that from which the positive laws must originate or be in harmony with if they are to be considered just at all. Although Aristotle alludes to such notions as virtue being the resultant of good habits (NE, Bk.11, 1103) or as simply a mean between extremes (1107-1109) and that ethical choice is a matter of insight and prudence (1142, 1181), the above quotation and those cited in footnote 29 certainly suggest a belief in a natural law. But, as in Plato, no explicit attempt to elaborate its dictates is forwarded other than the principle of oughtness - realize your essential being! Nor is there any clear suggestion that the natural law ought always to invalidate those positive laws which are inconsistent with it.

The difference between the two accounts is that

²⁹Aristotle, Nicomachean Ethics, book V, Chp.7, 1134^b13-1135^a4. (For further discussions on this topic, see also Rhetoric, Book 1, Chp.13, 1363^a, 1373^b, 1375^a-b.)

for Aristotle the Idea becomes a 'universalia in re', informing the formless matter and giving actuality to the individual. Nevertheless, the ideal is in a latent state and the principle of oughtness is still to bring this essence to its full realization.

Before discussing the problems confronting a teleological approach and the appeal to nature as a whole, a few other similarities to Plato's account should be noted which highlight this appeal. At NE 1106^a22, Aristotle notes that, as is the case for all things, "the virtue of man" is that "incipient active tendency by which a man becomes good and by which he performs his function well." Further, although a normative stance is taken concerning all of nature and its tendential processes, man, with his special capacities, is bound, as was seen in Plato's account, by something more specifically characterized as a moral dictate. Aristotle notes in his Metaphysics, at 1075^a19, that the "more mature members of nature's household [having an] understanding of what is required of them, are bound by the moral law." Finally, for both theorists it is reason which sets man apart from nature's other entities and allows him to have an understanding of his essential nature and to make a choice to perform or not to perform those actions which will ensure the fulfillment of that essential nature.

One criticism suggested by C. Ryan is that there is an ambiguity in the appeal to nature.³⁰ Although the ambiguousness of concepts has constantly plagued the notion of natural law and will be discussed more fully in the second part of this work, it should be noted here that Ryan's criticism against our understanding of the Greek view is not devastating for their appeal. He suggests that it is possible that the appeal to nature may in fact be no more than an appeal to 'blind, compelling instinct', making the natural law not ethically superior to convention but simply "naturally ineluctable".³¹ However, from what has been noted in both Plato's and Aristotle's accounts, it seems that, for human beings at least, considering their reasoning capacity, the fulfillment of their essential tendencies is far from a matter of blind impulse. Rather, the application of the terms 'virtue' and 'good' to the realization of essences in other entities must be seen as an extended use of these notions. Furthermore, the argument that this view leaves no place for human

³⁰C. Ryan, "The Traditional Concept of Natural Law - An Interpretation", in I. Evans, ed., Light on The Natural Law, (Baltimore: Helicon Press, 1965), pp. 13-37.

³¹Ryan, p. 15.

freedom must be rejected since, if fulfillment is not a matter of blind impulse, the choice of following the 'best' path is still left up to the individual. This is particularly evident in the Laws where the emphasis on preambulatory remarks and education is for the very purpose of maintaining the individual as an autonomous moral agent.

Finally, there have been major criticisms advanced against the teleological viewpoint in general suggesting, for instance, that it involves the projection of our own moral whims onto the simple facticity of natural occurrences. This approach precisely does appeal to the facts of nature. Thus the norms are founded on facts and what is considered 'good' for any particular entity will depend on the nature of that entity in the sense that what is good for 'x' is what promotes the realization of the essence of 'x'. The more complete our knowledge of the essence with which we are dealing, the better able we will be to determine the actions to ensure its realization and to comprehend its proper end. Whether it is acceptable to call this end or realization 'good' in a normative sense and thus bridge the gap between the descriptive and the prescriptive will be discussed later.

John Wild sets out five basic doctrines characteristic

of the teleological view³²; (1) The world is an order of divergent tendencies on the whole supporting one another; (2) Each separate entity has an essential structure characteristic of all members of its class; (3) It is the structure which determines the essential tendencies common in that class; (4) The realization of these tendencies requires that a general dynamic pattern be followed - known as the natural law. The natural law is thus based on a real structure and is enforced by inexorable natural sanctions; (5) It follows from this that good and evil are existential categories, the former connoting the active realization of the essential tendency, the latter its frustration. Wild, supporting his view with textual references, shows that both Plato and Aristotle advocate such a view. Further, Wild concludes that "if change is really a primary datum, then tendency must be recognized as a basic ontological fact having nothing to do with the projection of subjective purpose or teleology in the ordinary sense of the word"³³; that is, in the sense maintained by the criticism commented upon in the paragraph immediately above.

³²J. Wild, Plato's Modern Enemies and the Theory of Natural Law, (Chicago: University of Chicago Press, 1953), p. 132. (It should not be assumed that the teleological view is limited to the natural-law theory based on the appeal to nature although here it finds a great deal of emphasis.)

³³Wild, p. 75.

The criticism that proponents of the teleological view simply project their own moral whims onto nature has one of its sources in many of the modern defenders of teleology who, in actuality, apply the term only to man resulting in a mere humanism. The effect on natural law is that it is then seen as no more than a system of rules for the proper adjudication and administration of legislation.

Kelsen, who purports to deny such a view, criticizes Wild suggesting that the notion of 'tendency' "in science, can only mean the probable cause of future change in observed phenomena."³⁴ As was noted in Wild's account, if a tendency is deprived of what it 'requires' for its completion, evil results. But, on this scientific account of 'tendency', a cause cannot meaningfully be said to 'require' anything. Thus Kelsen concludes that the normal course of change is being given an unwarranted 'prescriptive' account.

Theoretically, Kelsen's argument may appear valid. Nevertheless, we need not accept his 'scientific' account of the term 'tendency' and even he, at a practical level, admits that a 'well-developed' (or what the Greeks might have called 'good') acorn will result in a

³⁴H.Kelsen, What is Justice? (U.S.A.: University of California Press, 1971), p.175.

tall and sturdy oak tree. Perhaps an appeal to the view of the common man is justified in this context since it encourages us not to close the door on the possibility of a thoroughly adequate and convincing argument for bridging the gulf between facts and values.

Nevertheless, these problems attendant upon the appeal to nature have left the view with very few supporters although the study of what is essential in man as a basis for an appeal has been taken up by many later theorists. As will be seen in a later chapter, many modern theorists have embarked on such a search in order to give some authoritative basis for following a certain course of conduct - to realize our essential nature - and to obey the laws of the land. Earlier than this the Stoics seized upon reason as an important factor in founding the natural law.

CHAPTER TWO THE APPEAL TO REASON

As was noted in the introduction, reason has been appealed to in the majority of natural-law theories though in different ways and with varying degrees of emphasis. Thus many theories may appear to belong to this section at least to some extent. Nevertheless, the point of making this a separate appeal is that, in this case, reason is seen in a different light - neither simply the faculty in man allowing him to deduce the natural-law dictates from some 'ultimate source', nor merely the essence of man. Rather, reason is here viewed as the essential feature of the cosmos as a whole. Thus an appeal of this sort is closely akin to that of the appeal to nature, the difference being the unique emphasis on reason.

The Stoics, a school of thinkers founded by Zeno (350-260 B.C.), saw the concept of 'nature' as the focal point of their philosophical system. The indwelling law or fate maintaining the order and harmony in the universe pervades the whole of its realm and is identified, in a pantheistic manner, with God. But this God or immanent principle (Zeus) is reason and its expression is seen as the natural law. Thus the natural law is a rational order governing the active tendencies (once again a teleological view of the universe) of cosmic

matter without which the latter would fall into chaos.

For Zeno and the Stoics, all men participate in the 'Logos' to the extent that they develop their 'God given' gift of reason. "This law is found in the rational interrelations of things, in the rational system of logical norms found in human reason, and in reason itself, which is the universal bond of all who submit to it."³⁵ Thus they were appealing to a universal rational foundation. Taking as their point of departure the Cynic's lack of concern for the maintenance of the city-state, they propounded a fundamental equality among men setting their sights on the day of universal brotherhood. This first great cosmopolitan philosophy of western thought had an important influence on the later evolution of natural law.

As was seen in the discussion of the appeal to nature, the natural law was given not only ontological but also normative status. The dictates of natural law were seen in terms of moral duties and a man seeking to become virtuous must conform himself to this law.

"Cleanthes is said to have taught that virtue is living agreeably to nature in the right exercise of reason, which he held to consist in the selection of things

³⁵Adams, p.109.

in accordance with nature"³⁶, virtue being seen as identical with right action. In the 'Hymn to Zeus' it is noted that man may spurn the divine gift of reason (having reason of his own - being his distinguishing feature setting him apart from other entities in nature) "and lead a wicked life, or he may be guided by reason to God's universal law and accordingly lead a life of righteousness."³⁷ As was seen in the discussion of the appeal to nature, the notion of an autonomous moral agent is incorporated into this appeal as well. It may be noted in passing that 'happiness' is the result of the attainment of a life in accordance with nature and it is the correct knowledge of the basis of ethics and the unity of this with conduct which forms the ideal of the sage.

Since human reason is seen as an emanation of the all-pervasive cosmic reason, it is concluded that "man has an inborn notion of right and wrong and law in its very essence rests not upon the arbitrary will of the ruler but upon nature and innate ideas of man's moral nature."³⁸ The problem being dealt with here is how we

³⁶H.C.Horowitz, "The Stoic Synthesis of the Idea of Natural Law in Man", Journal of the History of Ideas, 35, 1974, p. 4.

³⁷Horowitz, p. 4.

³⁸R.N.Wilkin, "Cicero and Law of Nature", in A.L.Harding, ed., Origins of the Natural Law Tradition, (New York: Kennikat Press, 1971), p. 15.

come to know this natural law and its moral dictates. It was generally stated by the Stoics that these empirical standards of truth, justice and goodness were revealed to man through 'right reason according to nature'. By appealing to the sage as the one in possession of right reason, the Stoics were criticized in that the notion of natural law was no more than a facade for the attempt to promote one's self-interest. To avoid such criticism, the doctrine that all men possess the capacity to participate in 'divine' reason, as forwarded by Panaetius (185-110 B.C.) and others, turned the emphasis to the notion of 'innate ideas'.

As Rommen points out, for the Stoics there is an intelligence or reason common to us all and emanating from the 'Logos' or universal Reason which "makes things known to us. Honorable actions are ascribed by us to virtue, and dishonorable actions to vice and only a madman would conclude that these judgements are matters of opinion, and not fixed by nature."³⁹ But it is necessary to look briefly at Stoic epistemology to see exactly what is meant by 'innate ideas'.

There is some uncertainty amongst the Stoics as to whether sense knowledge or rational knowledge is the

³⁹Rommen, pp. 23-24.

proper criterion for truth. This is clearly brought out in the following passage by Aetius:

The Stoics say: When a man is born, the ruling part of the soul [mind] is like a sheet of paper suitable for writing. On this he writes off each single thought That which comes through the senses is the first thing written down. . . . But of thoughts, (ennoiai) some arise naturally in the ways already mentioned, without technical skill, while others come by our teaching and conscious effort. These latter are called thoughts only (ennoiai) but the others are also termed preconceptions (prolepsis). Now reason (logos), because of which we are rational, is said to have received all its preconceptions by the time a child is seven years old. And a notion is an image of the mind of a rational living being - for when the image strikes a rational soul, then it is called a notion, taking its name from that of mind. . . .⁴⁰

Those thoughts which 'arise naturally in the ways already mentioned' are those which naturally develop as the result of an accumulation of sense impressions in the mind. Generally by about seven years of age there is an adequate accumulation to instigate the appearance of preconceptions or those common notions which "arise in the spontaneous reasoning of all men."⁴¹ These notions arise by nature; that is, without formal instruction, one such notion being the idea of 'goodness'.

⁴⁰Horowitz, p.6.

⁴¹Horowitz, p.7.

It is these common notions which are referred to as innate ideas; not ideas fully developed and conscious at birth - the theory of innate ideas attacked by Locke:

It is an established opinion amongst some men, that there are in the understanding certain innate principles; some primary notions, 'koinai ennoiai', characters, as it were, stamped upon the mind of man; which the soul receives in its very being and brings into the world with it. 42

For the Stoics the mind with its gift of reason is pre-disposed to certain ideas which, with the aid of sense experience and the development of our reason, will become conscious. In a Greek fragment, this notion is brought out concerning virtue. "By nature, we are all born with the seeds of virtue... We must develop them with learning virtue."⁴³ It is in fact to this more moderate theory of innate ideas which Locke subscribes, as suggested by the following passage from his Preface to the Second Edition of his Essay Concerning Human Understanding:

...there are certain propositions which, though the soul from the beginning, when a man is born, does not know yet, by assistance from the outward sense, and the help of some previous cultivations,

⁴²J. Locke, An Essay Concerning Human Understanding, A.C. Frazer, ed., (Oxford: Oxford University Press, 1894), p. 37.

⁴³In Horowitz, p. 12.

it may afterwards come either self-evidently or with a demonstrable necessity, 44
to know the truth of....

Thus the notions of the good, the just, etc., are known to all men through these 'common notions', the implication being that the natural law - the experience of the 'Logos' or Reason - is revealed to man because of human reason - an emanation of this 'Logos'.

Further, it is implied that these common notions actually exist and are observable in men. Since many of these common notions involve normative concepts, it is then acknowledged that norms exist in the same way and the gulf between facts and values has been bridged. But observation of the world shows us that all men are not agreed upon what is involved in these concepts. Epictetus and others stress the fact that these notions must be developed, but they are often obscured by false opinions. The rift between facts and values is once again opened. For, who decides what course development should take and what is to be considered false opinions? The problem of whether the definitions of these normative concepts are no more than subjective opinions has not been resolved. The appeal to reason as that which governs the universe and as that of which human reason is an emanation has been questioned by sceptics and pessimists for centuries and possibly especially so in these modern times. The

⁴⁴ Locke, Preface to Second Edition, xxiii.

whole notion of teleology versus chance or blind necessity is still in debate. As suggested in the previous Chapter, we have as yet to arrive at a definitive answer. The almost total reification of Reason as the ultimate appeal is left unexplained and is given a dubious status. It is possible that the Christian teachings were influenced by this appeal and noting its problems saw a simple solution - the reason is in the mind of God.

The Roman version of this appeal will be dealt with but briefly since Cicero - its main exponent - for the most part simply popularized the Stoic account. This lengthy passage from Cicero is useful for it clearly sets out his view and its similarities to his predecessors':

There is in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey the law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely

God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true Nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment. 45

Further, in connection with the concept of innate ideas or common notions, he states:

...these gregarious impulses are, so to speak, the seeds [of social virtue] nor can any other source be found for the remaining virtues or, indeed, for the commonwealth itself. 46

Thus it is evident that Cicero adopted the Stoic appeal to reason in an attempt to combat the problems and meet the responsibilities concomitant upon Rome's military and commercial expansion. As Wilkin points out, "the philosophic basis which Greek thought furnished for the universality of the principles of the 'ius gentium' [the law of nations] served in all departments of the law as a strong support of rationalism against traditionalism and of ethical as opposed to strictly legal principles."⁴⁷

⁴⁵Cicero, *De Re Publica*, III, xxii. (It should be noted that the reference to God is to the 'Logos' or Reason pervading the universe.), trans. C. Keyes, (Cambridge: Loeb Classical Library, 1961).

⁴⁶Cicero, *De Legibus*, XXVI, 41. trans. C. Keyes, (Cambridge: Loeb Classical Library, 1961).

⁴⁷Wilkin, p. 14.

It is precisely this connection with the 'ius gentium' which results in a distortion of the natural law and its ultimate appeal to reason as espoused by the Stoics. With the coming together of many peoples under Roman rule it was noticed that these various societies held certain principles in common. These common elements appeared to be identical with the dictates of the natural law derived from metaphysical and ethical reflection. In practice the 'natural law' was the 'ius gentium', the general principles of justice, goodness and reason being developed empirically from case work. This began prior to the importation to Rome of the Stoic view about the second century, B.C.

It should be noted that even Cicero placed his more philosophical notions in a conservative framework, appealing to the natural law to justify existing legislation morally and, although in the above quotations from Cicero it was seen that 'To invalidate this law by human legislation is never morally right', there is no explicit statement that such a law would be annulled. (Institutions, such as slavery, contrary to natural law, still appeared justifiable and legal.) Nevertheless, as several studies have shown, "although civil law was not seen as wholly subordinated to natural law, the latter was a useful concept for the interpretation and develop-

ment of the law."⁴⁸ For example, the opinions of jurists (natural law concepts being used most extensively in juristic reasoning) depended, for their claim to have authority, upon their reasonableness and natural law concepts were, to a large extent, responsible for the growth of humanitarian and egalitarian ideas which did occur in this period of the Roman Empire. As d'Entrèves notes, the real significance of the natural law was that, as a "complete and harmonious system of law...it was able to exert an influence impossible if still a philosophical abstraction"⁴⁹ as it had appeared in the Stoics' account. This evolution of the Stoic view into a more practical notion led to subtle changes in the concept of common notions and thus the criterion for the validity of normative concepts. In essence, this leads to a rejection of the actual ultimate appeal to the reasoning capacity in man and thus to the 'Logos' of which the former is an emanation. It should be noted, before quoting from Cicero and Seneca on this matter, that they appear to believe that they are arguing the same point as the Stoics. Cicero supports the theory that there is a basic intelligence imprinted on the minds of all

⁴⁸F.E.Sigmund, Natural Law in Political Thought, (Mass: Winthrop Publishers, Inc., 1971), p.26.

⁴⁹d'Entrèves, p.31.

man. He goes on to say that "true law or right reason applies to all men and that on every matter the consensus of all peoples is to be regarded as the law of nature."⁵⁰

Seneca states a similar view in his Epistles: "...in our eyes the fact that all men agree upon something is proof of its truth....I make the most of general beliefs..."⁵¹ This argument for the validity of particular definitions of such concepts as justice based on 'consensus gentium' shows the subtle shift to a more practical basis. Although apparently employed to prove the existence of innate ideas of natural law and, ultimately, its origin in Reason, the natural law becomes, in the hands of the jurists and magistrates involved with the problems of practical affairs, a theory of truth (of a definition of a concept) by consensus. This emphasis on the 'ius gentium' and truth by consensus becomes the prototype for several theories which argue for a natural law with a variable content.

One final problem should be mentioned briefly before turning to a study of the appeal to the Divine. The natural law was used as a measure by which to criticize human enactments (although, as has been noted, it was rarely used to invalidate the latter). Nevertheless, the use of this version of the natural law as a critical

⁵⁰in Horowitz, p. 8. (My emphasis.)

⁵¹in Horowitz, pp. 7-8.

standard is of dubious validity. Once the natural law has been identified with the law of nations (simply those laws common amongst the various peoples) it cannot be rightfully used to criticize other laws within the various legal systems. It would seem that a satisfactory standard by which to measure and appraise laws must not be itself entangled within that system of laws. Once again, that more than one group accepts a certain law does not mean that this law is or ought to be of universal status and is therefore a suitable tool by which to distinguish the just and the unjust among other laws which may not enjoy universal acceptance. A more ultimate appeal detached from the temporal fluctuations of our experience is needed. This is what the Stoics were striving for, though we have noted the problems of their account. For the most part, the next appeal is an attempt to give the Stoic appeal to reason a more stable foundation.

CHAPTER THREE THE APPEAL TO THE DIVINE

The appeal to the divine is typified by the medieval conception of natural law, but it has had other followers throughout the centuries. Because of the great number of exponents, differing in their own subtle ways, it is necessary to select quotations from only a few theories which show the approach simply and clearly. The material concerning this appeal must also be prefaced by the remark that this study does not propose to give a detailed account of the philosophies of those authors mentioned. Rather, the purpose is to highlight this particular attempt to provide a stable and ultimate foundation for a natural-law theory. It is hoped that the quotations and explicative remarks to follow will bring out what is involved in this appeal as well as showing that it has by no means always been used in the same way (for better or worse for the founding of natural law) throughout its long history.

As has been mentioned several times in this work, the appeal to the divine has been used in several ways. For the Greeks, Stoics and Romans the appeal to an ultimate foundation for their natural law was to 'the divine' and many references to God can be found throughout their works. But in these cases the divine was an in-

dwelling law or fate in nature, whether seen simply as nature as for the Greeks or specifically spoken of as Reason as was the case in both the Roman and Stoic views.

The reason for separating these from the thinkers to be mentioned in this account - in particular, St. Augustine and St. Thomas Aquinas - is that God or the divine for the latter is no longer the 'anima mundi' of the earlier philosophers. Rather, He is a divine law-giver, the source of natural law and is 'supernatural'; that is, beyond nature. It should be noted that although this appeal is generally typified by Roman Catholic views, it need not be tied to any particular theology. For example, Blackstone did not accept Catholic theology but did believe in a divine personal law-giver known by reason. Buchanan gives a fairly accurate though general summary of the change:

Logos became the mind of God, the exemplar of creation. The Word became the Second Person of the Trinity. As immanent, it was providence, the government of the world. But the residue was still natural law, very much in the created world and therefore accessible to human or natural reason.... The Logos that was understood as the essence of Roman natural law is here distinguished from it and clearly becomes divine law, the law of heaven, the exemplar of natural law.

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⁵²S. Buchanan, Rediscovering Natural Law, (California: The Fund for the Republic, Inc., 1962), pp. 24-26. (It should be noted that for the earlier canonists natural law and divine law were identified; for example, by Gratian.)

Thus the ultimate appeal is now truly ultimate in the sense of being detached from the phenomenal world. Rather than making the indwelling law of the world -- Logos -- the ultimate appeal, it too is seen simply for what it is; that is, a law. Coherence, clearness and force are given to the entire system of law by seeing the latter as divine law and further postulating a divine law-giver.

Divine law was also seen as those laws received by men through Revelation and in the early stages of Christianity the emphasis was placed on this divine or supernatural law. As was mentioned earlier in the introduction, with the emphasis on the supernatural law and its reception via revelation, it was necessary, to prove the universality of such a law, to suggest a means by which the heathen as well could be introduced to the dictates of God. St. John Chrysostom and St. Paul both argue that the law is known to the heathen because it is inscribed on their hearts. St. Paul states it in the following way:

For when the Gentiles, which have not the law [of Sinai], do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the while accusing or else excusing one another, In the day when God shall judge the secrets of men by Jesus Christ according to my gospel.

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⁵³Romans 2:14-16.

In this argument the emphasis is on direct moral intuition with no special role for reason or any explicit relation to the essence of man. Problems arose with this view for there is little one can say, by way of argument, against laws which the heathen follows which appear contradictory to those in the Decalogue. If, via moral intuition, he does not receive the latter, the argument for them must be based on a theology in which he does not believe.

Upon realizing the inadequacy of a strictly theological approach and accepting the notion that reason and faith were but two sides of the same coin, the Schoolmen turned to the task of coordinating revelatory law with a natural law which could be accepted by unaided reason. With this, one sees the development of systems of ethics and jurisprudence and less emphasis on simply declaring the truths of faith. They realized that a complete emphasis on revelation, maintaining that sin had so corrupted human reason as to make it of no use, "separated religion from the common experiences of mankind and led it into sectarian channels....Can Christians believe that God created a world with no order; that man in the divine image has no capacity to understand himself and the universal requirements of his nature; that religion in general is wholly discontinuous with

authentic moral virtue?"⁵⁴ Thus the natural law found a place in Christian teaching - that part of the divine law pertaining to man alone which could be known to man by means of his God-given gift of reason, though reinforced and confirmed by faith.

St. Augustine (d. 430) attempted such a conjunction of faith and reason. The eternal law and truth are identical with the reason of God according to whose laws even the inner life and external activity of God proceed. That is, although Augustine sees the divine law as based on God's will as well, it is in no way arbitrary but rather follows a rational course, the tension between the two in man being resolved by love. Thus the divine law can be known to man by both faith and reason.

The natural law - the rules according to which man, as rational free beings, ought to live - speaks to all men, however corrupt, if still capable of rational thought. Augustine states that "all men are conscious to some extent of moral standards and laws; even the ungodly ...rightly blame and rightly praise many things in the conduct of man."⁵⁵ Thus we see Augustine turning away

⁵⁴W.G.Katz, Natural Law and Human Nature, (New York: The National Council, 1961), pp. 22-23.

⁵⁵Augustine, De Trinitate, 14, 15, 21. in Copleston, F. A History of Philosophy, Vol. 2, Pt. 1, (New York: Image Books, Doubleday and Co., Inc., 1962), p. 93.

from a strict dependence on Revelation.

The excerpt to follow is taken from Augustine's Confessions. The similarities to Cicero's discussion of the differences between the natural law and custom are evident as well as the source from whence comes the former:

Nor knew I that true inward righteousness which judgeth not according to custom, but out of the most rightful law of God Almighty, whereby the ways of places and times were disposed according to those times and places; itself meantime being the same always and everywhere, not one thing in one place and another in another; [14]...Still I saw not how that righteousness which good and holy men obeyed, did far more excellently and sublimely contain in one all those things which God commanded, and in no part varied; although in varying times it prescribed not everything at once but apportioned and enjoined what was fit for each... [15] But when God commands a thing to be done against the customs or compact of any people, though it were never by them done heretofore, it is to be done; and if intermitted, it is to be restored, and if never ordained, is now to be ordained. 56

Natural law, as seen as a law ordained by God for man, is to have absolute validity and authority over any customs or positive laws of the society. The claim of its universality is also affirmed in the above quotation.

Nevertheless, two things stand out in the above two passages which suggest that reason is not given the place of importance and validity it was supposedly to

⁵⁶ Augustine, Confessions, Book II, paragraphs 13-15.

be granted. In the first quotation, Augustine uses the rather ambiguous term 'conscious'. Again, in the second passage, he uses the rather unclear phrase 'the inward righteousness'. Further passages show that Augustine, like St. Paul, is speaking about a moral law inscribed on the hearts of men. As Copleston points out, the natural law is not to be found in man's mind which is mutable, nor in his character which is "ex hypothesi unjust"⁵⁷. Rather, men "see the moral rules 'in the book of that light which is called Truth'...which [is] impressed in the heart of man 'as the impression of a ring passes into the wax, yet does not leave the ring'."⁵⁸ Thus the moral dictates for man are impressed on their hearts by God, although, because of the Fall, they are, in varying degrees, blind to the law. In fact, Aquinas emphasizes the free will of man far more than his reason, for it is the former which gives man the power to believe in God and thus receive the grace needed to follow the moral dictates. Natural law was of secondary importance. It was through faith that true justice was revealed to man and with faith, once again the emphasis was put on Revelation, and the rift between religion and everyday existence widened. The Fall denied man the means by

⁵⁷Copleston, p.98.

⁵⁸Copleston, p.98. (Single quotation marks bracket those passages quoted from Augustine, De Trinitate, 14, 15.)

which to attain any sort of perfection without the direct help of God. Even then, what man could achieve in the secular sphere was meagre in comparison to what was open to him if he followed the religious road to heaven. As Augustine notes, "what but smoke and vanity is the glory of the Earthly City compared to the glory of the Heavenly?"⁵⁹ The natural law was neither a primary nor an accurate source of God's commands.

With Aquinas (1225-1274) the natural law - still part of the eternal law - became a viable and useful concept for man, providing a rational and just basis for social and political institutions. In response to the challenge to Roman Catholic faith posed by the reintroduction of the Aristotelian texts into Western Europe at the beginning of the Thirteenth Century, Aquinas formulated a more reasonable view than those of his predecessors. Natural law was still to find its ultimate appeal in God, but through a study of the nature of man, it was to be argued that he was capable of discovering the proper moral dictates to follow and therefore achieve some perfection in this world. The emphasis away from faith is well summarized by Maritain in the following passage:

For Christian thinkers nature comes from God and the unwritten law comes from the eternal law which is creative wisdom itself
But belief in human nature and in the

⁵⁹ in d'Entreves, p. 37.

freedom of the human being is in itself sufficient to convince us there is an unwritten law as real in the moral realm as the laws of growth and senescence in the physical. 60

In the Summa Theologica Pt.I-II,qu.90-97, Aquinas outlines such a view, harmonizing human and Christian values and emphasizing both the perfectability of man and the power and dignity of his reason.

Aquinas' approach to the natural law is both empirical and intellectualistic. Beginning with man's ordinary sense experience in the phenomenal world, man then uses his reason to discern the norms of human conduct. Relations and actions deemed 'suitable' or 'unsuitable', 'good' or 'bad' have their source ultimately in the creator of the universe - God. But it is unnecessary to have a special communication from the divine Creator to know this. (It should be noted in passing that this is in direct contrast to the intuitive, voluntaristic approach of Occam and others, to be discussed in Part Two of this study.)

Nevertheless, it should be understood that the notion of man's perfectability and the uses of reason and faith are not totally different from those put forth by Augustine. The philosopher (or capable men

⁶⁰J.Maritain, The Rights of Man and Natural Law, trans, D.C.Anson, (New York: Charles Scribner's Sons, 1947), pp.61-62.

in general) uses his reason to deduce the principles to follow here on earth, this reasoning capacity and the principles discovered both being God's creations. The truths of the theologian are revealed to him or deducible from principles revealed to him from the divine Creator. Some truths (such as the existence of God) may be arrived at by either method, although Aquinas points out that the same man may not arrive at these truths in both ways. Furthermore, there is a limitation on what may be known via the reasoning method. Man may use his senses and intellect to observe and to reason about human nature and arrive at a system of natural ethics, but this method stops short of man's ultimate and supernatural destiny - an end which transcends man's natural powers. Thus Aquinas states, "Since man is destined to the end of eternal beatitude, which exceeds the capacity of the human natural faculty, it was necessary that besides the natural law and the human law he should also be directed to his end by a divinely given law."⁶¹ Further, it is noted that even those dictates man should be capable of arriving at by using his rational capacities are often obscured by the influences of his passions, the lack of time or concern and

⁶¹ Aquinas, Summa Theologica, IaIIe, 91.4

the insufficient development of this God-given faculty. Aquinas is propounding a view generally regarded as Christian humanism; that is, grace perfects nature.

A brief outline of the four types of law in Aquinas' scheme should clarify the above statement. The 'eternal law' is basically the plan in God's intellect expressing the order of all things to their ends. Thus everything participates in this law to the extent that it contains an orientation to its own end.⁶² The 'divinely given law', mentioned in the passage from the Summa Theologica, quoted immediately above, refers to God's direct revelations to man through Christ and the Scriptures. Here we see grace perfecting nature. The divine law affirms those laws man has discovered using his reason as well as those that he could have but has not as yet discovered. These are the precepts of the 'natural law' - that part of the eternal law which applies to man. Further, the divine law adds precepts which could not be known by reason alone - those directing us to our ultimate destiny. Finally, we have the 'human law' - the application to specific circumstances of the precepts of the natural law. Thus we see that the natural law and human reason are not given the full task of delimiting the moral dictates by which man ought to conduct his life. The divine is

⁶² This will be elaborated upon in the discussion of Aquinas' adoption of the Aristotelian teleological viewpoint.

the ultimate source of our natural laws and our reasoning capacities are a divine gift. Further it is the divine Creator who provides the authoritative basis for our obedience to the natural law.

Taking from Aristotle the teleological view of the universe, Aquinas sees the essence of things (placed there by God) as not only the proximate efficient cause of an entity but also its end. As the end, it entails an oughtness - realize your essential being! Since goodness is what all things strive for, the realization and whatever leads to it are considered good. Thus we see the essential unity of being and oughtness, of being and goodness. This is given a firmer foundation through the appeal to the divine, since the essence is placed within the entity by God and it is part of God's plan that the entity should strive for the realization of its essence. Since the divine Lawgiver only dictates what is good it follows that to strive consciously for the realization of one's essential being, as man does, is good. The plan to follow in this realization if not forcibly imposed as an alien pattern upon man but is discovered by our reason as it studies nature and the order evident in it. As was noted before, in this study of nature a large part is left to the five senses and Aquinas notes that "what pertains to moral

science is known mostly through experience."⁶³ Our essence and our proper end are evident to us through observation of and reasoning about our natural inclinations, the latter being derivatives of our essence.

It is practical reason which discovers the dictates of the moral law and just as speculative reason begins with certain principles not got by the reasoning method itself, so too does the practical reason begin with such a principle - good is to be done and evil avoided. This, Aquinas states, is arrived at through 'synderesis':

In order to make this clear we must observe that, as we said above, man's act of reasoning, since it is a kind of movement, proceeds from the understanding of certain things - namely, those which are naturally known without any investigation on the part of reason, as from an immovable principle, - and ends also at the understanding, since by means of those principles naturally known we judge of those things which we have discovered by reasoning. Now it is clear that, as the speculative reason reasons about speculative things, so the practical reason reasons about practical things. Therefore we must have bestowed on us by nature not only speculative principles but also practical principles. Now the first speculative principles bestowed on us by nature do not belong to a special power [like reason], but to a special habit which is called the understanding of principles, as the philosopher explains. And so also the first practical principles, bestowed on us by nature, do not belong to a special power but to a special natural habit, which we call synderesis. And so synderesis is said to stir up to good and to murmur at evil, since through first principles we proceed to discover, and judge of what we have discovered. 64

⁶³Aquinas, Ethics I, 3.

⁶⁴Aquinas, Summa Theologica, Pt. I, 79.12

Thus the natural law begins with the precept that good is that which all things seek after, a principle considered to be self-evident, as is the principle of contradiction in logic. It is a habit within us which naturally 'stirs us to good and murmurs at evil'. This habit is implanted in us by God, our Creator, and functions naturally within us whether we discover it by reason or not. Once reason formulates it into the definite principle - good is to be done and evil avoided - the reason, along with information from experience, goes on to deduce the other natural laws which follow from this. Thus the appeal to God gives a firm foundation for our reasoning, ensuring that we seek the good by placing that 'habit' in us from the very start.

'Synderesis' is seen as a natural disposition to good or virtue in man which allows us to grasp this most general principle of the natural law. O'Connor notes that this precept is "innate but the information about the material in which these principles are exemplified is dependent like all human information on sensory experience . The principles serve as the major premise of the practical syllogism. Reason supplies the minor premise."⁶⁵ Finally, conscience is the application of the facts to the particular situation. For example, the

⁶⁵D.J.O'Connor, Aquinas on Natural Law, (London: Macmillan and Co., Ltd., 1967), p.42.

major premise is 'good is to be done and evil avoided'. Reason, with the use of information supplied by the senses, may conclude, as a minor premise that stealing is evil. Therefore, it ought to be avoided. Conscience is the application of the above to a particular case; that is, whether it is an action which will be avoided as it ought to be. Human law results when we make this application to specific situations. Error may occur in the minor premise since we are using a fallible human faculty - reason. This explains disagreements which arise as to the various precepts of the natural law.

Erich Fechner, in criticizing Aquinas, states that "a philosopher should not cover up the fact that he is caught in a philosophical 'cul de sac' by seeking a theological exit. Revelation is not a source of philosophical knowledge. Therefore any appeal to incontrovertible religious truths means the end of philosophy."⁶⁶ But, as was noted earlier, Aquinas stated that certain truths, such as the existence of God, could be proved philosophically; that is, by reason, as well as theologically - via revelation. Further, if one takes the view of 'synderesis' suggested above - that it is a natural habit in man to seek the good - one need not explicitly accept his arguments for the existence of God.

⁶⁶in Luijpen, w.A. Phenomenology of Natural Law, (Pa: Duquesne University Press, 1967), p.90.

Aquinas has provided a view of natural law satisfactory to both the believer and the sceptic. The question of its usefulness and validity has not been, as yet, definitively answered in the negative as is verified by the fact that it is this view that is enjoying a revival today. It is evident that the metaphysical theistic foundation does not threaten its rational character, but rather ensures it against the capriciousness of those who want to cast reason and necessity aside, a move which often ends in arid and unsatisfactory attempts to provide for justice as is often seen in the common law's blind dependence upon precedent.

Most men agree, at least in practice, that the world is not functioning on the principle of blind chance. The Greeks and Stoics attempted to explain the source of the order and it is only on the basis of some ordering principle that a natural-law theory may be founded. But an appeal to nature as an analogy and the appeal to Reason as the Logos left the foundation of natural law in something of a state of limbo, lacking a truly authoritative basis. Making an appeal to the divine - not necessarily God, but something beyond nature - gives the natural law a foundation which is not itself caught up in that order. As was seen earlier, the nature metaphor, as used by the Greeks, raised the natural-law principles to a place above convention and gave them an

air of finality, inevitability and immutability. As man's knowledge increases, so does his ability to control nature - at least to some small extent. With the concomitant decrease in the mystery and authority of nature, our view of the natural law as having a stable foundation beyond man's manipulation begins to fall into question. Reason also failed to provide a stalwart groundwork for natural-law principles since two systems of reasoning could arrive at opposing principles with no means of reconciliation. As Aquinas suggests, man's reason is able to arrive at the principles, and nature is a testimony to God's work, but the appeal is beyond both (though it need not be determined definitively what exactly this 'God' is). Though man may come to control nature to an even larger extent, the source of these natural-law precepts is still beyond his regulation. If reasoning systems reach a stalemate, we need not stop there. Either one system is correct or another yet to be employed. The standard by which to judge the systems is not one of the systems themselves but something beyond all of them - 'God'. Whether this 'God' is real in the sense in which we define it is not necessarily crucial to the credibility of this view. The point is that the appeal is beyond human determination.

The Christian appeal to the divine as a Provident Creator who created man in his image and who gave man

the ability to ascertain the principles of natural law, allows man to see himself as something more than another part of the determined machine we call nature.. This is more so on this view than the two discussed previously. He is able to view himself as an autonomous moral agent and accept or reject the concomitant responsibilities. As d'Entrèves points out, it allows for a "recognition and defence of human personality... based on the Christian view of the supreme value of the individual soul."⁶⁷ To avoid moral and social malaise and to create an harmonious life, this sort of recognition and responsibility is required. Finally, without this sort of recognition, one wonders if there can be any convincing and valid meaning to such notions as justice, goodness or evil.

⁶⁷d'Entrèves, p.45.

CHAPTER FOUR THE APPEAL TO HUMAN NATURE

The appeal to human nature can probably be seen as by far the major appeal throughout the history of natural law. As was evident in the previous three approaches, human nature and the discovery of what is the essence of man played a highly significant role. Nevertheless, in these previous theories, the final appeal went beyond man to something of which man was only a part or an image.

In this section, the appeal goes no further than to the discovery of what is essential in man. But there are widely disparate views as to what it is that makes man what he is as well as variations in the directions taken after the essence is agreed upon. Some theorists may accept a teleological view of the universe as a whole. Nevertheless, this view is not relevant to the formulation of their natural-law theory. Nor is there any need to appeal ultimately to God. Man's reason (regardless of its origin) is a sufficient faculty to speculate on man's essential being and to infer from it the moral dictates, as well as the more scientific rules, to follow to maintain that being. In some cases ✓ reason is seen as the essence of man and thus is also the ultimate appeal as well as man's most useful tool.

The philosophers of the Seventeenth and Eighteenth Centuries were the first wave of natural-law theorists to appeal solely to human nature or, more specifically in their case, to the human individual. Grotius (1583-1645) and others, following the Reformation, argued that the natural law would have force even if there was no God. Placing his emphasis on natural rights, he stated that these rights of man were the dictates "of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it moral turpitude or moral necessity and consequently that such act is forbidden or commanded by God, the author of nature."⁶⁸ Although Grotius himself did not deny the existence of God (he argued that this could not be conceded without the utmost wickedness), his arguments led to the development of a view emphasizing the autonomy of abstract reason. Coupled with the separation of the eternal law and the natural law, this view led to the ethical rationalism of individualistic natural law.

On the rationalist view of natural law, it was argued that from a few basic and self-evident principles one could deduce a complete system of moral norms for man. Unlike the previous appeal to the divine, man's consciousness of right and wrong, order and justice was not

⁶⁸ in Haines, p. 13.

seen as a gift dependent upon a relationship with God. As will be pointed out, it is arguable that the theory exposed and supposedly defeated by the legal positivists of the Nineteenth Century was this approach which stressed the subject as 'cogito' and not, as they believed, natural-law theories in general.

In order to arrive at these self-evident principles concerning the nature of man, it was necessary to construct a hypothetical state of nature where man is stripped of the trappings (whether harmful or beneficial) provided by society. As was noted in the passage by Grotius, the emphasis was on natural rights - such as the right to property - rather than on natural law. That is, the emphasis was on finding out those things which belonged to man naturally because of what he is, rather than on discovering those laws of action or behaviour which man ought to follow in order to fulfill his essence. On this view the individual is seen full-grown in the hypothetical state of nature - full-grown in the sense of having a fully realized essence. He then enters civil society by means of a social contract which contains the provision that these rights will be recognized and guaranteed protection.

In the arguments put forth by Hobbes, Locke, Montesquieu and Rousseau, one sees a shift from the approaches previously looked at. Their inquiries concentrate on

man as he is and how the political and legal system should be developed in order to protect and compliment his essential being. The final goal of man and even the reason for protecting his rights is no longer to realize his nature for it is present and fully developed from the beginning. It is a given - the starting point or foundation of their politico-legal theory. Although the nature of this essence, the protection and enrichment of which provides the final goal for which to strive, varies among the Seventeenth and Eighteenth Century theorists, the following passage from Burlamqui brings out what appears to be the predominant view:

The desire for happiness is then as essential to man as reason itself;...For to reason means to calculate, and to take account, weighing everything, in order to ascertain on which side the advantage lies. It is thus a contradiction to suppose a reasonable being who could be detached from his interests, or be indifferent concerning his own happiness. 69

By stressing an end toward which man is to strive, the approach does not appear to differ significantly from previous views which argued that man ought to realize his essential being by following the dictates of the natural law, whatever their source. But in this case the end - happiness - is not attained in order to fulfill or realize one's essence and the natural law is no more than a utilitarian means by which to pursue the happiness

⁶⁹in Stone, p. 74.

that our reasoning capacity has calculated ought to be pursued. Since it is natural for man to strive for happiness or, for example, as Hobbes argued, to seek pleasure and avoid pain, it ought to be a guaranteed right - not something we ought to strive for to fulfill our essential nature as men.

This view, though propounded by many theorists, has been generally classified as Lockean and hailed as the basis of the modern liberal democratic theory of legality as, for example, in the United States. Locke, following the line of thought suggested by Burlamqui, argues that the state is nothing but a utilitarian product of individual self-interest based on rational principles as a means to ensure those rights inherent in man which could not be adequately protected in the state of nature. Natural law, in one sense, is a symbol for the group of natural rights which stem from self-interest, the ultimate end being happiness. The emphasis is on a causal and empirical view of the nature of man, observing his characteristic traits and studying the causal laws that determine or influence his nature. From the results of this study, reason deduces those rights which are natural to this entity and the consequent duties of others:

...we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man....

But though this be a state of liberty,

yet it is not a state of licence...The state of nature has a law of Nature to govern it, which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.... 70

Reason is the law of nature which exists solely to secure man's natural rights stemming from certain qualities inherent in him. By following its dictates we will ensure the protection of the essence of man, already present and developed in each individual. It is in order to guarantee this protection that reason guides us into the social contract and the formation of civil society. Civil society is created to ensure the perfect preservation of these rights; that is, it is to overcome, on Locke's view at least, the problem of "each being his own judge" - a problem in the state of nature since "all have equal power to execute the law."⁷¹

Von Leyden, in a criticism of Locke's view, notes his problematic passage from "the factual statement that man possess reason to the conclusion that reason is his essential characteristic and hence to the assumption that reason leads to the discovery of moral truths and, if properly employed, to the discovery of the same set

⁷⁰Locke, J. "An Essay Concerning the True Original Extent and End of Civil Government", in The Great Ideas, H.J.Adler, ed., Vol.35, (Chicago: Encyclopaedia Britannica, Inc., 1952), pp.25-26.

⁷¹Locke, p.26.

of moral truths; that is, natural law."⁷² In fact, as the evolution of civil society is outlined with its political and legal structures, it is evident that it is no longer identical with the natural law and begins to clash with the original principles. In the end Locke turns increasingly away from reason to Christianity as a source of authority for obedience to the natural law. Unlike Hobbes' more positivistic command theory, later expanded into the positivism of Austin, Locke felt the need to justify what we see as legal in terms of our shared values rather than in terms of power but his approach failed to provide a secure basis for obedience, one of the main weaknesses of his initial theory appearing to be the overconfidence in the subject as 'cogito'. The inner consistency of law and reason was felt to be, in the last analysis, insufficient. Further, there are certain assumptions (based supposedly on his initial evaluations of the state of man) which are questionable. Two such assumptions are the statements that man's ultimate goal is happiness and that man desires to retain the 'rights' naturally belonging to him in the state of nature. One wonders, when the emphasis is placed on such 'rights' as property, whether an ideal civil state has been pictured first then argued back into the state of nature

⁷²Von Leyden, W. "John Locke and Natural Law", Philosophy 31, 1956, p.28.

as a natural right in order to secure these ideals. The suggestion is particularly convincing in light of the goal of many of these theorists to hold in check the absolutist tendencies of the monarch.

Although the view has been praised and followed as a means to secure for men some of life's amenities and to give some justification for the political community, it fails to answer the recurring question of the relationship of the law to our values and to provide a reason for obedience to the positive law and a standard by which to criticize and evaluate it.

Rousseau (1712-78) makes a rather unique use of the social contract and natural rights theory in an attempt to rehabilitate society morally and to provide a standard for and a source of obedience to the positive law. Reason may aid man in coming to an understanding of the 'natural' morality but this in turn must be guided by conscience. As the Vicor in Emile states, "apart from conscience, man finds nothing but the sad privilege of wandering from one error to another by the help of an unbridled understanding and a reason which knows no principle."⁷³ For Rousseau, any declaration of a natural right is meaningless unless grounded upon some instinctive need of the human heart (conscience). It is in this way primarily, rather than via reason, that we arrive at

⁷³in Sigmund, p. 120.

what is right and wrong. Again in Emile, Rousseau states: "What I feel to be right is right, what I feel to be wrong is wrong...It is only when we haggle with conscience that we have recourse to the subtleties of argument."⁷⁴ It is clear that Rousseau is propounding that intuition is the mode by which we come to know what is right and wrong. In light of this, the external authority of the sovereign and the collective will can be seen as nothing but the projection of one's internal morality.

In one sense, Rousseau's view, though only outlined here in skeletal form, can be seen as approaching the real problem of justification of obedience to the legal system, unlike many other theorists who in the end concentrated on modes of securing obedience. But this approach encounters the same difficulties as the moral intuitionists', discussed in the chapter on the appeal to the divine. It cannot provide a stable source of 'natural laws' or moral dictates on anything but a purely individual basis which is insufficient as a foundation for a society's legal system.

Further, the anti-intellectualism of Rousseau's account, combined with his doctrine of the supremacy of a sovereign and collective will, provided an easy transition

⁷⁴J.J. Rousseau, Emile, trans. B. Foxly, (London: Everyman's Library, 1978), p. 249.

to the belief that law is command. The theory accommodated itself easily to a totalitarian democracy or dictatorship (though this, of course, was not Rousseau's objective). As Olafson points out, "It is the political writings of J.J.Rousseau that mark the real break with the natural law tradition, and they do so in a particularly interesting way, since Rousseau was himself still caught up with many of the assumptions of the natural law view."⁷⁵

As a final comment on this particular view, one should note that, as the search for a means to protect rights thought to be inherent in man was emphasized, one witnessed a concomitant decrease in the importance of discovering the ultimate source of natural laws to guide our conduct. As mentioned in the discussion of Locke's views, it appears that reason was used to found rights which were desired in the civil society. Rather than being maintained as a critical standard by which to judge positive laws, the 'rational natural law' was abandoned once the desired rights were guaranteed in positive law. One wonders if the natural law was no more than a convenient tool of protest used by those who desired changes in their society (though one cannot deny the importance of the beneficial changes they secured).

Finally, the social aspect of the nature of man was, to a large extent, overshadowed by the emphasis on individual rights. Though not necessarily the objective of many of the theorists at the time, the general result

⁷⁵Olafson, p.11.

was that the natural law was no longer seen as a guide for man to live together harmoniously - a guide beyond the reach of man's whims. The notion of moral dictates was, for many, swept aside in the desire to secure certain individual rights - that is, the emphasis was on rights and not their attendant moral responsibilities.

Nevertheless, the appeal to the human individual or, as it has been classified, the appeal to human nature, is not limited to the view which stressed certain natural rights flowing from that nature. To a large extent it is this view which is enjoying a revival today but in the form of a concentration on a more empirical study of man actually existing and functioning in and through experience and history. Basically the approach may be seen as a reference back to the Thomistic notion of studying the nature of man though; in the various appeals to be discussed here, the appeal will only go back to man rather than, ultimately, to God.

The unsatisfactory nature of positivism was clearly displayed to the world when the fantastic decrees of Hitler were written into the statute books after the Nazi revolution. On the legal positivist position (the Austinian view that law is command and devoid of any interference from morality) these laws could be subjected to no rational criticism, even when such criticism was backed by observable fact. The search for a natural law by which to judge positive enactments was reinstated.

Nevertheless, in view of the scientific relativism prevalent today, most theorists have turned away from an absolutist position to a search for a creative or evolutionary ideal by which to formulate and criticize the positive law. Coupled with this is a belief in the progress and dignity of mankind.

Lon Fuller, who stresses a multi-dimensional natural law, can be seen as supporting a quasi-idealism. He notes the great relativity of ideals **as** the consequence of our thought working on ever-changing sociological phenomena. His arguments for the inseparability of facts and values, when applied to purposive behaviour, will be dealt with in Part Two of this study. Nevertheless, it is important to note that Fuller, who appears to be formulating a natural-law theory, actually argues for something less than a natural law. Thus, only a cursory outline of his view will be given.

According to Fuller, the central aim of the natural law is to search for the precepts of social order which will enable men to attain a harmonious and satisfying life together. This search must forever remain open and unshackled. . Denying the reality of any eternal immutable higher law axioms, he asserts "the reality of a process that may be called the collaborative articulation

of shared purposes."⁷⁶ He suggests that the natural law be replaced by 'eunomics' - this theory or study of good order and workable arrangements. . Nevertheless, his view does share an affinity to natural law theories in that it looks to the nature of man for the rules by which man ought to guide his life.

Leclercq, characteristic of many of the natural law theorists, also places the ultimate appeal in the nature of man. He agrees with Fuller that there should be freedom to search continually for a more adequate understanding of that nature. But, like the traditional theorists, he argues that something more permanent is needed and is available than a natural law with a variable content or a relative ideal.

Leclercq, in his study of human nature, distinguishes "what is required by nature (e.g., some skin colour) and what is permitted by it (e.g., black skin)."⁷⁷ He concludes that "what can change may be conformable to natural law but it cannot be a demand of natural law."⁷⁸ He suggests that the reason for the natural law appearing to have variable content is because we often speak of "the' natural law when we mean 'the knowledge we have of natural law and this changes."⁷⁹

⁷⁶L. Fuller, "Human Purpose and Natural Law", Journal of Philosophy 53, 1956, p.702.

⁷⁷Leclercq, J. "Natural Law the Unknown", Natural Law Forum 7, 1962, p.1.

⁷⁸Leclercq, p.2.

⁷⁹Leclercq, p.3.

Like Fuller and most theorists concerned with the troubles of our time, Leclercq believes that the natural law contains the rules for social health - the rules concerning how men ought to interact with each other. As we learn more about human nature, the content of the natural law will develop and it will guide us in acting more effectively. Like any growing science, the fact that it encounters modifications and disagreements along the way does not detract from the validity or usefulness of the appeal. Comparing these rules of social health to medical science, he points out that "we need the same certitude in curing the human body. But medicine has always been practiced, being based on what was known and being perfected gradually with the advance of knowledge."⁸⁰

Although the appeal is to what is essential in human nature, the claims are far more modest than those of theorists who declare that man is capable of grasping the true essence in its entirety immediately - either via some sort of intuition or through our reasoning powers. Because of this, the theory does not fall prey to the argument that if there was such an essence known to us in such a way, then why is there such great disagreement as to what the essence is? This is a more reasonable approach - there is no reason why man's fallibility and

⁸⁰Leclercq, p. 4.

the weaknesses of his faculties should be less evident in this field than in any other.

Leclercq argues that there is evidence of such a nature upon which we may found the natural law. He states that this common nature will involve some common characteristics proper to all men. It is generally agreed - if not in theory, then at least in practice - that there are such common features and the use of the term 'borderline', when discussing some men who seem to lack some human characteristics, suggests that we have a fair idea of what man is. Since the natural law is seen here as concerned with the social nature of man, if there is such a nature, then its demands should be seen everywhere men are found. M. Mead, in her anthropological studies, has discerned certain cultural characteristics common to all existing and recorded societies. She suggests that these "cultural constancies are probably the reason for their survival."⁸¹ Mead concludes that the "natural law might thus be defined as those rules of behaviour which had developed from a human species-specific capacity to ethicalize."⁸² The reference to

⁸¹ M. Mead, "Some Anthropological Considerations Concerning Natural Law", Natural Law Forum 6, 1961, p. 52.

⁸² Mead, p. 54.

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'species-specific' makes it evident that the ultimate appeal is to human nature and, although the definition may seem rather vague at present, it does direct us to a more thorough investigation of what is involved in such a capacity.

Just to emphasize how widespread this approach to natural law has become, it is interesting to note that even existentialist views involve a study of the nature of man. R. Niebuhr agrees with Sartre that there is no explaining of things by reference to a fixed and given human nature. He states that there are "no fixed structures of nature or reason or history which man does not transcend by virtue of his spiritual freedom."⁸³ Nevertheless, man's entirely dynamic and limitless freedom may be seen as a common characteristic (an essence in an extended use of the term) upon which to build a stable system of natural laws. This is in fact what Niebuhr does. He concludes that love is the law of life, his reason being that only this "takes fully into account the dimension of freedom or self-transcendence"⁸⁴ in man. Both the theological and the secular existentialist position can be seen to appeal to man for an ultimate foundation of their system of moral dictates (natural laws).

⁸³in Ramsay, P. Nine Modern Moralists, (New Jersey: Prentice-Hall Inc., 1962), p.113.

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As I hope to show in Part Two of this study, it is this more modern approach which seems to give new life to natural law and to ensure its usefulness in the future. But, as was noted earlier, a well-rounded view may straddle various appeals to different degrees.

This review of the various appeals used throughout the long history of natural law should make it clear that any opponents or theorists making general criticisms on certain aspects of the natural law must be careful to distinguish which particular approach they are criticizing. This was suggested as a problem surrounding the 'defeat' of natural law by the positivists of the Nineteenth Century. What they had successfully waged battle against was the Seventeenth and Eighteenth Century theories of natural rights. This, it was suggested, was a questionable theory of natural law and in fact, as in the case of Rousseau, was a theory against it. The attempt to abstract man into a hypothetical state of nature and then intuit his essential being or end did not prove to be a fruitful support for natural law.

Other attacks upon the natural law come from the voluntarists and the historical school. Moreover, there are arguments against any such approach to facts and values and to the concept of obligation as understood by natural-law theorists.

PART TWO

CHAPTER FIVE OPPONENTS

Natural-law theories have been an object of attack and criticism throughout their two thousand year history, with different schools of thought and individuals aiming their disapproval against one of the specific approaches discussed in Part One. It should be noted that these criticisms are worthwhile, but they are far from devastating to natural-law theories and, at the same time, are themselves subject to criticism.

The major attack within the framework of the appeal to the divine came from the voluntarists who sought to vindicate the primacy of the will over the intellect. The argument was levelled against the Thomistic view which emphasized reason as the bridge between man and God, allowing for the possibility of human insight into the moral dictates of God's intellect. Otto von Guericke describes the opposing medieval theories in the following way:

The older view [Thomistic] which is more especially that of the Realists, explained the Lex Naturalis as an intellectual act independent of will - as a mere lex indicativa, in which God was not lawgiver but a teacher working by means of Reason - in

short, as the dictates of reason as to what is right, grounded in the Being of God, but unalterable even by Him....The opposite proposition, proceeding from pure nominalism, saw in the Law of Nature a mere divine command, which was right and binding merely because God was the lawgiver. 85

For Ockham and other members of the voluntarist tradition, moral laws or ethical values had no other foundation but the will of God which imposes them. Thus natural law was seen merely in terms of a command. In this sense it became nothing but positive law. Law became a matter of "pure will without any foundation in reality or in the essential nature of things,"⁸⁶ clearly in direct contradiction to the Thomistic emphasis on the essences of man and other natural entities. Again this view sides with the positivist tradition which repudiates any effort to know the essences of things as irrelevant in the legal sphere. It was but one short step from the divine law-giver to the positivist emphasis on the sovereign or earthly law-maker.

The Franciscan, John Duns Scotus (1265-1308), was the first major figure to propound a voluntarist position and "though it is untrue that Scotus made the whole moral law to depend on the arbitrary choice of the divine will, it can hardly be denied that the elements of volun-

⁸⁵Wm. Oakley, P. "Medieval Theories of Natural Law: Wm. of Ockham and the Significance of the Voluntarist Tradition", Natural Law Forum 6, 1961, p. 66.

⁸⁶d'Entreves, p. 69.

tarism in his philosophy helped to prepare the way for the authoritarianism of Ockham."⁸⁷ Scotus does allow for some usefulness of both divine and human reason.

According to Scotus, for an act to be morally right, ✓
three conditions must hold: (1) the act must be free for "an act is neither praiseworthy nor blameworthy unless it proceeds from the free will;"⁸⁸ (2) it must be objectively good; that is, it must have an object which is conformable to right reason (only the love of God can be seen as good on this condition alone); and (3) the act must be performed with the right intention. Thus we see that proceeding from the free will is a necessary though not a sufficient condition for an act to be morally right. Nevertheless, Scotus still gives primacy to the will in the making of a truly free decision or genuinely moral act.

As concerns the source of the natural moral law, Scotus maintained that "the divine will is the cause of good, and so by the fact that He wills something it is good."⁸⁹ But for Scotus, this does not imply that the law is a matter of divine arbitrary decree. For both God and man, the intellect influences the will and cognition precedes volition. The content of the natural law proceeds

⁸⁷Copleston, Vol. 2, Pt. 2., p. 203.

⁸⁸in Copleston, Vol. 2, Pt. 2, p. 268.

⁸⁹in Copleston, Vol. 2, Pt. 2, p. 270.

from the divine intellect which "perceives the acts which are in conformity with human nature." For Scotus, it is the divine will which furnishes the obligatoriness of the natural law, for "to command pertains only to the appetite or will."⁹⁰ The references to the divine intellect and human nature clearly suggest that Scotus' position is not as contradictory to Thomism as is often maintained.

The Decalogue, forming the content of the natural law, is divided into two tables. The first two laws are seen by Scotus as self-evident principles, the validity of which man can discern with his reasoning abilities. These, he suggests, are not subject to divine dispensation, "not because He is subject to them but because they are ultimately founded on His Nature."⁹¹ It is in connection with the second table, which God can dispense, that Scotus differs from the Thomists. The latter maintained that in neither case was dispensation allowed, for the entire Decalogue followed, either directly or indirectly, from primary principles.

For Scotus, to love God was the first practical principle and it was addressed to the will. All other norms were contingent creations of the divine will -

⁹⁰in Copleston, Vol. 2, Pt. 2., p. 270.

⁹¹in Copleston, Vol. 2, Pt. 2., p. 270.

divine positive law. Wm. of Ockham (1290-1349), taking a more radical voluntarist position, eliminated this last natural-law precept, a step which led the way to pure moral positivism.

Ockham divides the rules of conduct into a three-tiered hierarchy: (1) universal rules of conduct dictated by natural reason and always binding (natural law); (2) rules which would be accepted as reasonable, in a society governed by natural equity, without any positive law; and, (3) rules arrived at by deduction from the precepts of natural law. These latter are subject to change by positive enactment. It should be noted, before considering his view of the source and ultimate appeal of this law of nature (the first type of law in the hierarchy), that he does not indicate how these universals are known to men who, according to his nominalism, can only perceive similarities amongst individual things and apply to them a common general name. It may be that principles inherent in one's nature are known through some sort of direct intuition, but this is left unexplained.

As to the ultimate source of this law, Ockham places all the emphasis on God's will. The fact that God does not ordinarily alter the natural law does not mean that it is not in His power to do so. The natural law is not grounded in the Being of God (as was argued by Scotus for at least the first two Commandments) but is simply

a series of divine commands.

Ockham is justified in describing the natural law as absolute and immutable on the basis of his distinction "between the ordinary power of God, by which God has actually established a moral order, and the absolute power of God, whereby God could order the opposites of the acts which He has, in fact, forbidden."⁹² Natural law is unalterable in connection with the ordinary power of God, but not with His absolute power for this would be a limit to God's free creative activity.

That nature is so ordered that we can use our reasoning capacity to see moral imperatives within it, and that the precepts we discover coincide with those dictated by God is all arranged for and demanded by the divine will. Ockham states that "it is rather by the very fact that the divine will wishes it that right reason dictates what is to be willed."⁹³ Thus even the work of reason as a guide to what is willed (acknowledged by Scotus) is in the final analysis, for Ockham, a matter of decree.

Despite Ockham's continued belief in the existence of natural law, his theory, in fact, resulted in a denial of it. As Rommen points out, "sin no longer

⁹²Oakley, p.71.

⁹³in Oakley, p.70.

contains any intrinsic element of immorality, or what is unjust, any inner element of injustice; it is an external offence against the will of God."⁹⁴ All oughtness rests on God's absolute will and since transgressions are external offences; that is, nothing in the act making it essentially right or wrong, even obedience to God becomes a matter of positive law. The voluntarist phase encouraged legal positivism through its shift from the notion of law as immanent to the doctrine of imposed law. There is no basis for natural law in this latter view.

Before leaving the attack on natural law by the voluntarist tradition, one should note some of the issues invoked in the battle between the intellect and the will. Accepting a general ontological order, this "order becomes, in relation to man endowed with reason and free will, the moral order."⁹⁵ This order, independent of the appeal we make to ground natural law, is generally agreed to be not the product of human reason but an objective order. Nor is it a product of the human will in general. But, if one accepts the proposition of the will being the greater faculty and yet cannot find arguments sufficient enough to support the existence of

⁹⁴Rommen, p. 59.

⁹⁵Rommen, p. 175.

God, then "nothing is left as the source of norms but the concrete will of the earthly lawmaker."⁹⁶ Yet, as we have seen in history, with the enactments of Hitler for example, people react with abhorrence to this notion, the experience appearing to be the result of a natural feeling as to what is just or unjust. This certainly would suggest that moral norms enjoy a more objective reality than that attributed to them on a theory giving primacy to the will.

A look at our conception of a mature legal system (bearing in mind our own values and premises) should convince us that there ought to be more to it than sovereign command. Getting beyond the simple behaviouristic view (which has tried to assert itself in all facets of life including social institutions) which sees all conduct as a matter of stimulus and response and which rejects the concept of mind and consciousness, we must:

determine whether by the law of the land we primarily mean a rule worked out rationally, which always should be entirely reasonable and which falls short of its nature as it fails to achieve complete reasonableness, or an act which holds because it is born of sovereign will and which needs no other grounds to hold.

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⁹⁶Rommen, p. 176.

⁹⁷Simon, p. 61.

Considering the increase in the number of psychologists in the West criticizing the shallow, one-sidedness of behaviourism, one may conclude that the first alternative is quickly gaining supremacy. Further, as mentioned in the introduction to this study, the very fact that we call a law 'unjust' suggests that there is more involved than arbitrary decree. The suggestion that a law may fall short of its nature implies some sort of standard by which to judge positive enactments. This is provided by the natural law.

Many other schools of thought have attacked the natural law tradition, some like the voluntarists, directing their criticism against a particular appeal, others attempting to defeat certain aspects of natural-law theories in general. The legal offshoot of the romantic movement of the Eighteenth and early Nineteenth Centuries was the historical school of law. Like natural-law adherents, they felt that the formal legal precepts of a society could not, by themselves, administer justice. But, rather than finding the source of such precepts in the natural law, they emphasized the habits and customs of the people.

Von Savigny (1779-1861), a proponent of this view, stated that the law was the general will of those living together in a society. Thus, the law was as variable from one people to another as was language.

In this interaction of people in a particular group, customary law was the first type of rule structure to emerge and it replaced morals as the standard of justice and the source of law. The other two types of legal precept recognized (both seen as derivatives of custom) were: (1) statute law which was formulated through the custom of judicial decision, and (2) the science of law, made up of doctrinal writings and scientific discussion of legal precepts. The universal ideal was customary law not formulated by jurists but 'discovered' by historical study. Nor can it "be derived from unsubstantial principles by a process of abstraction and rationalist deduction since it has but one principle - the obscure depths of the National spirit."⁹⁸ This criticism against the deduction of laws from 'unsubstantial principles' is devastating for the rather dubious doctrine of natural rights, since proponents of this view begin with a 'hypothetical' state of nature. But it fails to undermine the natural-law theory as outlined in various ways throughout this study.

For Savigny, the highest principles of positive law were: "one must obey the public authorities"⁹⁹ and decide whether there is something beyond positive law placing a

⁹⁸Rommen, p.117.

⁹⁹in Rommen, p:113.

limit on this obedience. This is a matter of ethics rather than natural law and "everyone according to his conscience will judge for himself before God what stand he should take on this matter."¹⁰⁰ Still, he maintained that one could not call upon ethics in order to oppose the positive law.

This notion of tracing the law back to the spirit of the people was given a metaphysical foundation by Hegel (1770-1831) who traced it back farther to the Absolute or Idea realizing itself in and through spirit. For Hegel, law was the unfolding of the idea of right, legal history being a record of this process. No abstract precepts were to dictate this unfolding but rather the actual existing state. Thus we see a complete reversal of the relationship of the ideal to the real held by natural-law theorists. As with the historical school, the state was seen as the ethical whole completely replacing any doctrine of natural law. The source of this notion can be seen to be Rousseau's theory of the general will. As was noted earlier, this doctrine provided an easy transition to the notion that law is command. One wonders, then, whether such concepts as absolutes unfolding and basing law on the spirit and customs of the people do anything more than cover up the rather objectionable

¹⁰⁰ in Rommen, p. 118.

position that the legally valid is just what the sovereign commands - the same problem as was noted against voluntarism.

Pound points out that the historical school saw the law as obligatory "because of its intrinsic force as an expression of a principle of action discovered by human experience and that experience was significant because it involved the realization of an idea."¹⁰¹ The basic presupposition behind this view appears to be that whatever is, is right. Considering the many errors of judgment and the revisions made and still needed in the legal sphere, the necessity of a critical standard by which to judge whatever is (instead of the principle that whatever is, is right) is evident. One often cited example in opposition to this rather simplistic view is our natural abhorrence to one of the longest existing customs in our history - slavery. The reply that it is right when it is in use and wrong when it has been abolished - a view which seems to follow, is hardly an adequate answer. Often the question arises as to the rightness or wrongness of an act when it is in fact being carried out. The notion that things change as the idea unfolds does not solve our immediate quandry.

¹⁰¹R. Pound, Law and Morals, 2nd ed., (Chapel Hill: The University of North Carolina Press, 1926), p. 18

Finally, one should note a problem concerning Hegelian philosophy and historicism in general. On this view, "all human thoughts and beliefs are historical and therefore deservedly destined to perish."¹⁰² To be consistent, one must assume, therefore, that belief in historicism itself can only claim temporary validity. Thus, the historical school can only argue that it is pronouncing the absolute truth by "inconsistently exempting itself from its own verdict"¹⁰³, which is what it appears to be doing.

¹⁰²Strauss, p. 10.

¹⁰³Strauss, p. 10.

CHAPTER SIX AMBIGUITIES

Ambiguities and misunderstandings concerning what is meant by individual terms such as 'law' and 'nature' as well as different views about natural law and its functions, result in a wide variety of theories and arguments (at cross-purposes) among proponents and critics. As was seen in the discussion of the various appeals to ultimate foundations for natural law, there is, to a large extent, a common aim, but it may mean a variety of things. As d'Entrèves points out, critics often emphasize the differences among natural-law theorists as the major argument "for the sceptical denial of natural law as one of the great deceptions of ethics."¹⁰⁴

One must take into consideration the many problems involved in the approaches discussed in Part One and the variable meanings of the terms used, as well as the fallibility of man and his power to discern exactly what it is that should be understood by the term 'natural law'. Nevertheless, this study hopes to show that the validity of the aim remains intact and that there is "still no ground for repudiating the essence of the principle nor

¹⁰⁴d'Entrèves, p. 12.

for justifying taking the nominalist position and denying that there are substantial elements of agreement in the direction the definition has taken."¹⁰⁵ That is to say, that there is something beyond the positive law which is stable and beyond human manipulation which forms a basis of first principles and a critical standard by which to develop and judge human enactments.

Generally, the term 'nature' has been used to contrast the natural law with convention or positive enactments. But nature itself has been understood in many ways: "the rational, the divine, the distinctively human, the normally operating, the frequently recurring, the primitive, the elements not subject to human artifice or control, the self-evident and the non-historical."¹⁰⁶ Further, those various denotations may aim to refer to both what is and what ought to be. As seen in this list, 'nature' or 'natural' may be used to describe a non-human, human or super-human order. It may refer to a physical or logical order of necessity or an order of freedom (e.g., the existentialist view of R. Niebuhr discussed in Chapter Four). The problem which often results is that several meanings are used at once without discrimination.

¹⁰⁵J.L. Adams, "The Natural Law: Some General Considerations", Journal of Religion 25, 1945, p.95.

¹⁰⁶Sigmund, p. IX.

As was seen in Part One, one of the most predominant meanings was that 'natural law' was 'natural' in the sense of being based - either mediately or immediately - on the essential nature of man; that is, the appeal to human nature. But this too has been given a variety of interpretations which lead, if not to misunderstandings, at least to different views of what is involved in the natural law. The emphasis may be placed on man's reasoning capacity, through the use of which he is able to become aware of his essence, (that is, that which distinguishes man from everything else and which is a necessary attribute for any object which is to be classified as a man) and the duties and goals consequent upon this nature. As was noted earlier, reason is not always seen as the essence and whether or not man is seen as created in the image of God will have repercussions in the conclusions concerning his duties and ultimate destiny.

Further, the essence of man may be interpreted as a universal propensity to perceive the same values as those which give significance to human existence. This need not be a product of our reason. As seen in the discussion of Augustine, the emphasis is often on conscience, making this perception of value a matter of moral intuition. The main problem with this approach is the absence of any convincing argument when our 'intuitions' conflict.

What is essential to man may be arrived at through an empirical study of its manifestations in law and custom or what still belongs to man when the latter are stripped away and man is conceived in a hypothetical state of nature. This approach was taken by natural rights theorists, such as Locke, and by others in the Seventeenth and Eighteenth Centuries, for example, Hobbes and Rousseau. The attendant problems were noted in Part One of this study.

For St. Augustine and other theologians of the Middle Ages, the emphasis on the fall of man resulted in a view of human nature as comprised of those capacities which have been depraved to various degrees and which require the Grace of God for redemption. This view denied man the capacity for self-perfection or realization of his essence without faith in the Redeemer.

In the discussion of the Greek position, it was noted that the teleological view of nature was not restricted to man. Rather, the tendency to self-realization was inherent in all natural entities and the natural law was seen as that law or fate guiding all of nature towards its realization. Nevertheless, because man, with capacities which are more refined and complex than those of the rest of nature, is able to comprehend his possibilities and make conscious choices concerning the path to take toward their realization, the natural

law becomes more distinctly a natural moral law. Nevertheless, it has been argued that what was actually meant by the contrast between nature and convention at this stage was "what we would think of nowadays as blind, compelling instinct contrasted to the cooler calculation of human reason."¹⁰⁷ Thus, the natural law mentioned by Antigone would not be seen as ethically superior, but it would be followed because it was naturally ineluctable. Nevertheless, as was pointed out in Part One, the emphasis, placed by the Greeks, on such concepts as justice and the good, implies that a distinction was made between instinctual necessity and moral oughtness. But, it should be noted that some theorists such as Ulpian in the Middle Ages saw natural law as similar to the idea of animal instinct.¹⁰⁸

Nevertheless, the main trends of natural-law theories have expressed, either explicitly or implicitly, the view that "there exists in nature and/or human nature, a rational order which can provide intelligible value-statements independently of human will, that are universal in application, unchangeable in ultimate content and morally obligatory on mankind."¹⁰⁹ Thus the aim is to

¹⁰⁷ Ryan, pp. 14-15.

¹⁰⁸ Ryan, p. 15.

¹⁰⁹ Sigmund, p. viii. (my emphasis)

arrive at some objective standard which can prescribe actions for man. However, the existence of such objective values is in no way incompatible with maintaining the freedom and choice of an autonomous moral agent. For, although these standards may prescribe certain actions, it is still a matter of individual choice whether or not to heed the prescriptions.

Thus it is evident that the notion of natural law in the ethical and legal sphere is essentially different from that of the law of nature in science. The similarity of the term, as well as the notion of teleology being often applied in both spheres, frequently results in a confusion between or identification of the two. But one can understand the analogy to 'nature' in discussing natural law. Just as the law of gravity is a rule governing a reality which escapes our control, so too is the search for natural law a "quest after an immutable standard or pattern, independent of choice and carrying conviction."¹¹⁰ The metaphor is able to impress upon us the finality and inevitability of such a law - two characteristics easier to understand in the scientific than in the ethical sphere.

The concept of 'law' has likewise taken on a variety of meanings in the context of natural law. Roscoe Pound has formulated a list of twelve such uses and, although not all of them have been discussed in this study and

¹¹⁰d'Entrèves, p. 11.

some may seem questionable as meanings for natural law, they are all attempts to give some ultimate basis of law which cannot be subject to human will or caprice. It is hoped that the list and examples to follow will serve to clarify the subtle differences in the term 'law' when used by the various theorists;¹¹¹

(1) Divinely ordained rules for human action as, for example, the Decalogue which formed the bulk of the natural law in the appeal to the divine.

(2) Law as comprised of age old customs which, because of their longevity, have shown themselves to be acceptable to the Gods. It should be noted that this formed a large part of Greek law as is evidenced in Plato's Laws.

(3) The recorded wisdom of wise men of old who have learned the safe or divinely approved course for human action. This view is closely related to the one immediately above.

(4) A philosophically discovered system of principles which express the nature of things and to which, therefore, man ought to conform his conduct. This aspect of law looms large in the entire history of natural law;

¹¹¹R. Pound, An Introduction to the Philosophy of Law, (New Haven: Yale University Press, 1922), pp. 26-30. (The following list will be a paraphrase of that given by Pound although the examples will be drawn from previous discussion.)

e.g., the Greek teleological view of the universe and the consequent prescription - realize your essential nature. This is also evident in the modern studies, discussed in Chapter Four, of what is essential and ought to be maintained or realized in man.

(5) The body of ascertainments and declarations of an eternal and immutable order. This is, basically, a variation of the fourth type of 'law'.

(6) The idea of law as a body of agreements of men in politically organized society as to their relations with each other. An example of this could be Lon Fuller's notion of 'eunomics'.

(7) Law as a reflection of the divine reason governing the universe. Aquinas' view of law follows these lines. Because of man's reasoning capacity - made in the image of God - the divine dictates are addressed to man in the form of an 'ought' which can be identified as law. To the rest of creation the dictates are in the form of a 'must'; that is, it is a matter of blind or instinctual necessity.

(8) A body of commands of the sovereign authority. As was noted in Chapter Five, this is basically the view, or at least the result of the view, put forth by the voluntarists. Law becomes a matter of command when primacy is given to the will over the reason. Further, in the final analysis, this forms the sole source of law.

in the Hobbesian state and later in Austin's theory.

(9) A system of precepts discovered by human experience whereby the individual human will may realize the most complete freedom possible consistently with the like freedom of will of others. This follows from the concept of justice put forth by John Rawls and supported by Charles Fried - that justice involves (with some qualifications) the "equal right to the most extensive liberty compatible with a like liberty for all."¹¹² Fried goes on to argue that, from this, the concept of justice may be elaborated to include the terms by which "persons may impose constraints on each other without denying their own or any other person's free or rational nature."¹¹³ Thus he concludes that this concept of justice is not only compatible with but is "implicit in the natural law which defines human nature as free and rational."¹¹⁴

(10) Law as the external life of man measured by reason. That is, law is seen as the reasoned out list of external actions suitable for man to perform. Law, in this sense, does not propose to guide the internal life of man, just his outward activity.

(11) Laws of the dominant class functioning for the time

¹¹²Fried, p. 239.

¹¹³Fried, p. 252.

¹¹⁴Fried, p. 252.

being to further their own interest. The economic interpretation is prevalent today in Marxian literature. It may, though, find an ancient counterpart in the view of justice propounded by Thrasymachus in Plato's Republic - "justice is the interest of the stronger party" (344C).

(12) The final type of law listed by Pound is law "made up of dictates of economic or social laws with respect to the conduct of men in society, discovered by observation, expressed in precepts worked out through human experience of what would and would not work in the administration of justice."¹¹⁵

With all these various meanings in mind, it is easy to see the possibilities open for misunderstanding and opponents arguing at cross-purposes. Natural law has been set forth as a theological, a philosophical, a moral, a legal, a political and even an economic concept, often including several meanings together. Nevertheless, from what has been mentioned in this study thus far, it is evident that natural law, in any strict sense of the term, must have a prescriptive sense, emphasizing the universality of ethical standards. As a criterion by which to formulate and to judge positive enactments, it must involve what 'ought' to be in contrast to what

¹¹⁵Pound, An Introduction to the Philosophy of Morals, p. 30.

'is'. Concern for such principles is inevitable for any society which refuses to identify the ideal with the actual and accept all the attendant results of this identification.

This refusal brings us back to the problem of the primacy of the will or of reason. Since this was discussed in connection with the voluntarist tradition, a brief mention of it here will suffice. As was mentioned earlier, it is generally accepted that human action follows, ideally, a rational course. This suggests that the rules for such action flow from the reason though the action itself may be initiated and carried out by the will which, following the rules of reason, will be reasonable as well. "But if the will is held to enjoy primacy, it is also held to be free from reason."¹¹⁶ Simon concludes that the "most adequate way to convey the rationality of law may be to say that such a will is lawless."¹¹⁷ This is certainly a conclusion which few would care to accept and since it follows from giving primacy to the will, this primacy must be rejected as well.

Another misunderstanding arises because of the failure to see natural law as part of the field of ethics rather than the legal sphere in the narrower sense. That it

¹¹⁶Simon, p. 80.

¹¹⁷Simon, p. 80.

belongs properly to the former should be evident from the discussion that has preceded thus far. The question arises as to whether the standard by which to judge and criticize positive law need be outside of the system of positive law itself. One may argue that one law, for example, a law which has proven its usefulness through time, may be used to criticize or judge a new law being considered for addition to the system. But natural law is a prescription concerning all laws in the positive system based on some ethical principle such as that man ought to realize his essential being. This is not just another positive law concerning some sort of specific conduct. Nevertheless, it need not be considered as 'alongside' of or 'above' positive law (once again this remains at the level of legality) but rather as something at the heart of all proper positive laws concerning their possibility and obligatoriness.

It is in this sense of giving binding power to positive enactments that the natural law may be seen as antecedent to the former. As Simon points out, "if there is no idea of an antecedent law, the reason why positive law ought to be obeyed is entirely contained in the constraints possessed by civil society. Law becomes a hypothetic system, e.g., If I don't want to be punished, then I had better do X."¹¹⁸ Law once

¹¹⁸ Simon, p. 116.

again must be conceived of as the commands of the sovereign authority and obedience becomes a matter of physical constraint. But, as was noted in the introduction of this study, it makes sense to question the justness of an enactment, which implies that justice is not equivalent to positive law; that is, that there is justice prior to positive law and that some things are just by nature. These are the content of natural law and the measure for positive law which gains its binding power through its agreement with the former.

In conjunction with the above problem arises the false notion that the natural law is to be seen as above the positive law and that all positive enactments which violate its precepts are invalid. Once again, we can imagine a law which we naturally feel is unjust and possibly so abhorrent that we must disobey it. In a sense it is true that the natural law, as a guide for positive law, dictates the validity of the latter. Nevertheless, few natural-law theorists see the natural law as dictating disobedience except in extreme cases. Rather, the natural law is a 'guide' in the ordinary sense of the word - providing direction and counsel. Furthermore, obedience to the positive law is generally seen as a duty prescribed by the natural law. This does not mitigate the supremacy and prescriptive ultimacy of the natural law. The natural law still shows us what we 'ought' to do.

Man may not realize what it prescribes, or when he does, he may be unable to change the laws immediately because of human weakness or disagreements. As Socrates suggests in the Crito (50A-D), in many cases the man who realizes what the law ought to be must strive through discussion and reasoning with his fellows to change the laws, while still obeying the less adequate ones.

One further misunderstanding arises concerning what is meant by 'universal'. In the appeal to human nature, natural-law theorists attempt to discover the one in the many; that is, the common element or elements amongst the variety of individuals in the world - they search for man's essence. Again the search for the natural law is an attempt to find the one in the many - those moral dictates which apply to all men everywhere as distinguished from those laws peculiar to one society or group.

Legal positivists generally regard any allegedly universal attribute of man as one which is not empirically determinable. Kelsen states, in this connection, that:

the judgement that a definite human behaviour or a social institution is 'natural' means in truth only that the behaviour or the social institution is in conformity with a presupposed norm based on a subjective value judgement of a particular writer.

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¹¹⁹ Kelsen, p. 151.

Further, in a series of books between 1910 and 1950, Levy-Bruhl ¹²⁰ attempted to prove that no common characteristics exist among men (except possibly a tendency to cook their food). Overall, the attempt met with little support and, as mentioned earlier, our application of the term 'borderline' suggests that we have a fairly good idea of what it means to be human (though we may have difficulty explicating it as yet).

By 'universal' we mean some factor common to all men distinguishing them from other entities. We need not be thinking of a Platonic archetype. (This notion has caused problems in modern times for the natural law because of the prevalence of relativism.) As used by logicians, the term is ambiguous for it may mean a genus or a set. In this case we cannot mean the latter. "Only in the former can 'man' be predicated of Socrates for a set cannot be predicated of any of its parts."¹²¹ As was seen in Chapter Four, some modern natural-law theorists use the term 'universal' but not in the sense of a static attribute. This gives rise to the problems mentioned in that chapter. Leclercq appears to have a more suitable answer - it is our knowledge of the attribute which may vary; not the attribute itself.

¹²⁰ in Mead, p. 5.

¹²¹ Simon, p. 7.

The universal moral law again need not be a Platonic archetype but rather a law common to all peoples or one which ought to be common in light of the attributes universal among men. As Mead has concluded from her anthropological researches, there is a "certain number of cultural constancies which appear to be dependent on species-specific characteristics and are probably the reason for the survival of the species."¹²² She further suggests that the maintaining of these is socio-cultural rather than instinctive, suggesting that it is a matter of choice rather than blind necessity. Her proof for this is that these various principles, such as the taboo against incest, break down during periods of cultural collapse.¹²³

But, as P.Ekka points out, this does not prove that moral obligation is a matter of societal dictates. It simply "shows that men best develop their moral sense and habit in society."¹²⁴ If it were otherwise, the universality would be nothing but a matter of coincidence. Ekka concludes, considering the constancy of such principles, that one "could consider every precept

¹²²Mead, p. 52.

¹²³Mead, p. 52.

¹²⁴P. Ekka, "Anthropology and the Idea of Universal Moral Law", in I. Evans ed., Light on the Natural Law, (Baltimore: Helicon Press, 1965), p. 104.

of the traditionally held natural law as the most human precept possible in an ideal situation or rather as the ideal in regard to which actual achievements remain open, even when that ideal is not clearly formulated."¹²⁵ On this view, then, the universality of the natural law is derived from those characteristics of men which are universal; that is, which go to define the essence of man.

Nevertheless, even though the characteristics which are universal in man may suggest certain actions which would help maintain or, on a teleological view, fulfill this essence, one may still question the moral obligatoriness attached to such rules of conduct. This problem brings up the whole question of the relation of facts and values - the major stumbling block for natural-law theorists.

These three areas of misunderstanding - concerning the definition or meaning of nature, law and human nature or universality - have been problematic for both proponents of a natural-law theory and those attempting to defeat it. This study has attempted, in the divisions used in Part One, to distinguish the uses of such terms; for example, the use of 'nature' by the Greeks. One must further pay close attention to which approach, if any, the critic is actually attacking.

¹²⁵ Ekka, p. 123.

For, as mentioned several times, it is often the case that proponents and critics are arguing at cross-purposes or that it is wrongly concluded that natural-law theories in general have been defeated by a particular attack.

CHAPTER SEVEN FACTS AND VALUES

In general, natural law philosophy asserts that;

there is in fact an objective moral order within the range of human intelligence, to which human societies are bound in conscience to conform, and upon which the peace and happiness of personal, national and international life depend.¹²⁶

Because of the importance and pervasiveness of this moral order, to which all men ought to conform, the natural law theory goes on to assert that law is a part of ethics giving a definite normative expression to moral or ethical principles. Furthermore, these principles are related to law in general as its foundation. The natural law claims to be the point of intersection between law and morality - the model or standard on which all laws depend and from which they derive their obligatory character.

At the end of the Eighteenth Century and the beginning of the Nineteenth Century, there was an attempt to make law and morals identical. Instead of distinguishing what 'ought to be' from 'what is', the former being an ideal to strive for in

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d'Entrèves, p.125.

actuality, jurists began to consider 'what is' "an authentic pronouncement on natural law."¹²⁷ The next step was a break with ethics altogether. The analytical jurists or positivists began to analyse the material from legal experience and formulate a pure science of law which would be wholly self-sufficient. They allowed only a few exceptional cases where contact with morals was allowed; e.g., cases where ill-defined legal precepts made genuine interpretation necessary - here moral aspects of the case could possibly be brought to bear.

The analytical jurists opposed any moralization of the law which they felt contradicted the evidence of legal experience. The natural law was seen as the outcome of the old mistaken "conviction that the purpose of the law was to make men not only obedient but also virtuous."¹²⁸ The analytical jurists clearly demarcated the spheres according to subject matter and application. The sphere of morality is concerned with the thoughts and feelings motivating men. In the attempt to correct individual characters, their principles have to be applied relative to the circumstances and the person involved. The law, on the other hand, is concerned with 'external morality' or the acts themselves and attempts to

¹²⁷R. Pound, Law and Morals, p. 33¹²⁸

d'Entrèves, p. 83

secure peace in inter-personal, national and international relations. Legal rules must be of general and absolute application leaving "nothing in doubt with respect to the lawfulness or unlawfulness of a course of conduct."¹²⁹

But the analytical jurist carried the separation too far. It is true that acceptance of or agreement with a certain moral principle does not imply that it should be immediately formulated as a legal rule. Nevertheless, these principles play an important role in decision-making and are directly involved in many areas which fall within the ambit of legal precepts. For example, the preservation of human life may be seen as a natural law and as involved at the positive-law level with such things as speed limits and other driving regulations.

The separation of law and morals was also supported by moralists who opposed any sort of legal valuation in the ethical sphere. The total legalization of morals was an attempt to give to morality such a code-like precision that "in passing judgement on the moral quality of action we simply pronounce upon the conformity of that action to a legal pattern."¹³⁰ From this one goes on to the identification of a moral principle with a legal rule the nonconformity to which is subject to legal sanction.

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R. Pound, Law and Morals, p. 70

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d'Entreves, p.83

But morality cannot be subjected completely to codification. Ethics embraces the total activity of man in all his uniqueness as an individual personality. Law or codes are unable to penetrate so deeply. Because of their universal application they can attend only to those aspects which are common to all men. Furthermore, the next step involving sanctions and coercive measures to ensure obedience, strips moral decisions of their 'moral' nature for all intents and purposes, for it is not possible to distinguish whether an act was done because in his conscience the agent knew it was right or because the agent wanted to avoid punishment. There is a difference between a law-abiding citizen and a virtuous man of principle. There is also a certain sphere of morality where legal constraints are totally inappropriate. It is hard to imagine a meaningful law with attendant penalties that people should be benevolent, modest or merciful. Here the decision is more appropriately left to the good judgement of the individual (although the threat of punishment may be used within the institution of morality during the period of moral training).

Still, although the two spheres can, to a certain extent, be demarcated (e.g., law as social, external and enforceable by coercion; morals as individual, internal and a matter of voluntary duty), no clear cut distinction can be maintained. Natural law theorists can be credited with insisting upon the close association of the two spheres while still noting the differences. Morality is not 'just' a matter for the

individual, and the narrow view of law as purely social is unacceptable. Coercive sanctions cannot be reasonably maintained as the sole reason or cause of obedience to the law if men are to be seen as more than a herd of animals and more than what is proposed on the behaviorists' account mentioned earlier. The fact that we do question the justness of our laws suggests we are doing more than responding to stimuli. Our values play a major role in this questioning.

It is most strikingly in the area of obedience or obligation to obedience that the intersection of law and morals comes into play. As was discussed earlier, law, to be maintained and respected, in a mature legal system must have a firmer foundation than being merely the command of the law-giver which is obeyed for the sole motive to avoid punishment. D'Entrèves notes the importance of natural law in this matter in the following passage:

any analysis of the relationship between law and morals must lead to the recognition that there is a difference between legal and moral obligation, a difference that does not necessarily entail separation. There must be a name for the relationships between the two, for the principle that spans the chasm that divides them, thus bringing law and morals into harmony ... this is one of the essential meanings in which the term 'natural law' has been used through the ages. It is a convenient name for indicating the ground of obligation of law, which alone can ensure that the law itself is obeyed not only propter iram but propter conscientiam. And it is a no less convenient name for indicating the limits of the obligatoriness of the law, the crucial point; on it depends whether the injunction of the law is more than

mere coercion.¹³¹

The dictates of the natural law are acts that are good in themselves and therefore ought to be pursued even though no positive law lays this down explicitly. Positive laws which follow from or are in agreement with these dictates gain their obligatory character from such agreement and not from the coercive measures attendant upon disobedience.

Although it is generally agreed that morality and law do intersect to some significant degree, the challenge to natural law has by no means been sufficiently answered. In the opening quotation by d'Entrèves, he noted that natural law theorists asserted the existence of an objective moral order. That is, these moral dictates are not a matter of subjective preference as to what is right or wrong, nor even a matter of rational argument as to what ought to be the case in view of the circumstances at hand. Rather, it is understood that these values exist (in some sense of the word which needs elaboration) and that they are 'found' in reality, not formulated. Thus passage is made from the indicative to the imperative mood.

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d'Entrèves, "A Re-interpretation of Natural Law Ethics", Natural Law Forum 1, 1956, p. 27

Hume is one of the more noted opponents of the passage from facts to values. He states:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs: when of a sudden I am surprised to find that instead of the usual copulations of positions, 'is', and 'is not', I meet with no proposition that is not connected with an 'ought', or an 'ought not'. This change is imperceptible; but it is, however, of last consequence. For as this 'ought', or 'ought not' expresses some new relation or affirmation, it is necessary that it should be observed and explained, and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others which are entirely different from it. 132

For Hume there is a difference in kind between statements of what is and what ought to be and it is impossible to derive conclusions about the latter from what is the case.

In close agreement with Hume is the position of the legal positivists. A sharp is/ought dichotomy is maintained in order to purify the law of what Kelsen calls 'wish-law'. But this divorce from any definite ethical goal results, at best, in a sterile law against which there can be no arguments for change by those who feel that the law is unjust and ought to be invalidated.

To establish any sort of change or give meaning to a change

in law or in any other sphere, reference must be made to some constant. "Any ideal to govern facts of conduct must be more simple, uniform and constant than the existential facts themselves."¹³³ Nevertheless, Cohen, who has been characterized as a 'relative idealist', maintains that the ideals or standards cannot be in an altogether separate realm. Rather, they are universals or abstract predicates of the existential facts and therefore closely related to them.

But the natural-law theorists do not want to maintain that the moral values are no more than repeatable abstract qualities. They exist in a more fundamental sense. Lon Fuller states that a strict is/ought dichotomy needs modifications when applied to purposive behavior wherein lies the essential meaning of a legal rule. He states that "when we accept the full consequences that flow from a view which treats human action as goal-directed, the relation between fact and value assumes an aspect entirely different from that implied in the alleged 'truism' that from what 'is' nothing whatever follows as to what 'ought' to be."¹³⁴ It is in this situation that fact and value merge. The fact involved is not a static datum but is a

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Cohen, M.R. in Brown, B.F. (ed.), The Natural Law Reader, (New York: Oceana Publications, 1960), p. 181.

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Fuller, L., p. 697.

reaching toward some definite objective. This 'fact' can only be understood, therefore, in terms of that reaching, and is at once a fact and a standard for judging facts.

Man's nature is composed of a complex set of interrelated and interacting purposes. Natural law, as was noted earlier, looks to man's nature (though it need not be the ultimate appeal) for a standard by which to pass ethical judgements. On Fuller's view, it is from a study of human purposes that we get our moral dictates. He criticizes Kelsen and other legal positivists for trying to deal with such purposive arrangements as if they had no objective.

Fuller introduces the example of a boy trying to open a clam. He states that "if I can predict that the boy's attempt to open it by pressing it between his hands will soon be given up, it is because I know that this is not a 'good' way to open clams; judged in the light of the boy's purpose, it lacks 'value'."¹³⁵ Valuation depends on the purpose (or a complexity of purpose) of the action. That I can understand the final intention of the action though possibly only perceiving that link in the chain being pursued at that moment, is explained in terms "of our shared human nature, a nature that in both of us

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Fuller, p. 698.

is at all times incomplete and in the process of development."¹³⁶

In light of the boy's purpose (opening the clam), his action (pressing it between his hands) is not good, or, in other words, it lacks value. One may then make the statement; 'The boy ought' to use a knife, instead of pressing the clam between his hands, to open it.' But this certainly is a functional or efficiency sense of the word 'ought' devoid of any moral signification. In other words, if the boy wants to open the clam, he is more likely to be successful by using a knife.

To see if a moral ought may, in fact, be derived from our purposes, another example is needed. Suppose the boy is walking along the beach in search for clams and he comes upon an ant-hill. The boy subsequently changes his path and does not trample the hill. On Fuller's view, to understand the action we have to know the boy's purpose. This is discovered to be the fact that the boy believes that insects ought not to be killed. Although this appears to involve the moral sense of ought it, in fact, tells us simply what the boy believes (the fact) and nothing about what ought to be the case. A further valuation of the boy's ought-statement is needed and this is not provided for in Fuller's account.

Stone suggests that the merger of facts and values on

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Fuller, p. 700

Fuller's view:

can only yield functions and transmutations of actual human purposes, as ends and means clarify themselves in the unfolding process of reciprocal testing. These are part of the facts of social life which bear upon the law, and the study of them and their interactions is strictly not a normative or evaluating activity but rather part of the sociological inquiries concerning the relations of law and society.¹³⁷

That Fuller attempts such a merger suggests an implicit commitment to natural law. But what results is more consistent with his explicit denial of ultimate ends and external immutable higher law axioms and their replacement by 'economics' - the search for good order and workable arrangements. This descriptive socio-psychological approach must be clearly distinguished from the natural law theory of immanent moral values. Stone concludes that it is:

a non sequitur, if not a contradiction, to deny that economics can say anything decisive about ultimate ends and then also to assert that men's efforts to explain and justify their decisions will generally pull those decisions towards goodness by whatever standards of ultimate goodness there are and that the common law must work itself pure from case to case towards a more perfect realization of equity rather than inequity.¹³⁸

Fuller's approach has proven to be a poor reply to Hume's criticisms.

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Stone, p. 223.

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Stone, p. 225.

John Wild's view differs from Fuller's, although the latter suggests that they are similar. By natural law, Wild understands "a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion."¹³⁹ It is the notion of completion, from Wild's teleological viewpoint, that gives rise to the merger of facts and values. "Finite existence is characterized by tendencies towards fulfillment and completion ... The realization of these tendencies is always good, their frustration evil."¹⁴⁰ These tendencies, when rationally understood and not twisted or distorted by appetite, constitute the moral law (though it should be noted that it is those actions which are universally required for the living of human life that form the standard of natural law. Incidental acts are considered good only if they promote the realization of these essential needs.) Thus the norms guiding human conduct have their basis in facts: the good for, or what ought to be done by, any entity depends on the nature of that entity; that is, the tendencies to be realized.

What is the existential status of values and norms? The assertion that they are "human constructions conflicts with the concrete evidence of such experiences as obligations, justification and guilt which clearly indicate that values and norms have a

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Wild, p. 64.

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Wild, p. 67. (This teleological viewpoint has been discussed earlier so it need not be further elaborated here.)

real foundation independent of human interest or decree."¹⁴¹

In contrast to this, Wild propounds a 'realistic' thesis which has five basic doctrines characteristic of it:

1) The world is an order of divergent tendencies which on the whole support one another.

2) Each individual entity is marked by an essential structure which it shares in common with other members of the species.

3) This structure determines certain basic existential tendencies that are also common to the species.

4) If these tendencies are to be realized without distortion and frustration, they must follow a general dynamic pattern. This pattern is what is meant by natural law. It is grounded on real structure and is enforced by inexorable natural sanctions.

5) Good and evil are existential categories. It is good for an entity to exist in a condition of active realization. If its basic tendencies are hampered and frustrated, it exists in an evil condition.¹⁴²

According to Wild, these five ontological principles, when applied to man, entail three moral doctrines which he says are characteristic of the realistic thesis he is propounding: (1) the moral law is founded on the specific nature of man and his essential tendencies; (2) human nature is incomplete or tendential; Actions to ensure fulfillment must be governed by rules of universal application - virtues; (3) human good is the existential fulfillment of the human individual in the areas of both common and

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Wild, p. 106

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Wild, p. 132

peculiar characteristics.¹⁴³ This, in brief outline, is Wild's 'dynamic' natural-law theory.

Wild's view seems satisfactory if we understand value as 'grounded' on the fact of an actual tendency, common in man, towards realization, together with a common recognition of this tendency. But his further statement that value and disvalue are "empirical facts",¹⁴⁴ requires further clarification.

Wild states that existence requires completion and that any action promoting this completion is good. But, as Kelsen points out, "the statement that if something is completed it is good, if it is not completed, it is evil, is tautological for in the concept of 'completion' the value of good and in that of 'privation' the disvalue of evil is already implied."¹⁴⁵ As Kelsen goes on to point out, entities may be seen as tending toward both life and death. Thus the norm that life ought to be preserved and promoted cannot be seen as a fact in reality but a presupposition of Wild's natural law theory. Kelsen concludes that the:

judgement that a living entity is in a sound state may, indeed, refer to a mere fact, the fact that the vital functions of this entity are not impeded. If this judgement implies the idea that the sound or healthy state is good,

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Wild, p. 108-109.

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Wild, p. 211.

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Kelsen, p. 180-181.

it assumes the character of a value judgement, and such value judgement is possible only if the judging subject presupposes a norm requiring that this sound state ought to be.¹⁴⁶

In other words, value, for the positivist, arises from a sentient being performing a value-endowing act.

Nevertheless, Kelsen's opposition may be seen to presuppose this positivistic view of value - a view which the natural law theorists need not accept. What reason 'discovers' to be involved in the nature of man is what they mean by value. Furthermore, that this rests upon a conclusion of the speculative intellect is not necessarily fatal to the view, for most positions on ultimate matters rest either explicitly or implicitly on some metaphysic. For Wild, 'nature' embraces 'ex hypothesi' both its actual condition and what it requires for self-fulfillment. As d'Entrèves concludes, "even if ultimate values depend on belief, this does not exclude their being rationally argued."¹⁴⁷

According to natural law theory, the natural laws are thought to be logically dependent upon the world's having certain general features. For example, if cruelty is prohibited it is because of such features of men as the fact that they can and do suffer. Thus we may say that the principle 'cruelty is wrong' is true. But it

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Kelsen, p. 183.

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In B. Hamilton, "Some arguments Against Natural Law Theories", Evans, I., ed., p. 52.

must be pointed out that the principle is not 'necessarily' true. The implications of the above statement may differ in various circumstances and, as Rommen points out, the natural law does not give us a precise code to follow.¹⁴⁸

Nevertheless a belief in natural law is a belief in value cognitivism and further intense study can enable us to know what ought to be done in particular concrete situations:

we come to know the social good, the values, the laws, and the norms clearly and precisely by organizing our experiences, completing our analyses, interrelating our reflections, and systematizing our speculations, in the attempt to know what it is we always are and always need. Few of us persist in the effort to achieve such knowledge, but all of us adventure enough in that direction to make it possible to say that natural law, its conditions, and its demands are known to some degree by almost all.¹⁴⁹

In the area of legal rules even the positivists are bound to leave some room for values though usually not explicitly. This is especially so in the area of judicial discretion where the rules do not cover the situation yet the judge is able to exercise that discretion. Somehow values are embedded in the law or at least used to critically judge it and this cannot be explained by simply eliminating values from one's legal theory, such as Hart's qualified positivism.

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Rommen, p. 226.

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Weiss, P., "The Nature and Locus of Natural Law", Journal of Philosophy 53, 1956, p. 721.

Closely associated with this problem of the relationship between facts and values is the issue of obligation. Although mentioned throughout this Chapter, further elucidation of the arguments, though in summary form, will help to tie in the loose ends which may remain concerning the natural law connection of 'is' and 'ought'.

Even if it is accepted that norms regulating human behavior can be deduced from nature, the question still arises as to why men ought to obey these norms. As was noted earlier, Kelsen states that the natural law provides no answer without making implicit presuppositions. The presupposition that men ought to obey the commands of nature "cannot be accepted by a theory of positive law for the reason that it is impossible to deduce from nature norms regulating human behavior because norms are the expression of a will and nature has no will."¹⁵⁰ From this position, it is also impossible to deduce the validity and obligatoriness of the positive law - Kelsen's main concern.

The position of the positivists with respect to the obligatory nature of the law can only be the following;

the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis of the coercive order

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Kelsen, p. 258

established on its basis and actually obeyed and applied by those whose behavior it regulates is to be considered as a valid order binding upon these individuals if the relations among these individuals are to be interpreted as legal duties, legal rights and legal responsibilities, and not mere power relations; and if it shall be possible to distinguish between what is legally right and wrong and especially between legitimate and illegitimate use of force.¹⁵¹

But Kelsen's view results in the following circularity: the obligatoriness of the law depends on the existence of the basic norm and the norm itself is explained by the obligatoriness of the law. Further, one wonders whether even the 'Pure Theory of Law' was unable to avoid the natural law demand for ultimate justification. The answer appears to be no in light of Kelsen's proposal of a basic norm.

As was noted earlier in this study, with the denial of any antecedent law, the only reason remaining for obedience to the positive law must lie in the constraints imposed by the society whatever the reason for their imposition and the punishment consequent upon disobedience. Further, the confession that it makes sense to ask whether a law imposed by the civil authority is just or unjust, implies that there is some standard of justice independent of human enactment. Natural law proposes that there are some things 'right by nature', that is, right in virtue of what things are. The knowledge we have of the nature of things and,

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Kelsen, p. 262.

subsequently, what is right by nature, is progressive and therefore our disagreements at this time concerning what is naturally right, in no way repudiates the above claim - an argument often put forth by natural law critics.

Other critics suggest that this search for what is just by nature is a product of man's psychological need for security.

The appeal continues because in natural law we find:

affirmation that freedom and moral choice are not incompatible with the existence of objective values in man and society, that human existence is meaningful, that human beings possess equal dignity and rights, and that political and legal forms are more than the product of arbitrary will and should be justified in human terms.¹⁵²

Although man is as yet unsuccessful in proving the truth or falsity of the above statements it is beliefs and values such as these that have given man the desire to continue the search for such proof and, for the most part, balk at the thought of meaningless robot-like existence. Further, "man's recurring attempt to isolate and define the basic ordering principles which govern the moral and physical universe testifies to a deeply felt psychological need to believe that such an underlying order exists."¹⁵³

K. Jamieson goes on to point out that the natural law -

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Sigmund, p. IX-X.

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Jamieson, p. 239.

neither self-evident nor empirically demonstrable - functions as a rhetorical device - "a first premise, assumed to be true, and is seen as the warrant for the conclusion advanced by the rhetor."¹⁵⁴ But Jamieson plays on the disagreements among theorists to prove her point that the natural law is no more than a rhetorical warrant. As was mentioned earlier, if one accepts the view that knowledge in this area is progressing, her argument does not carry the weight she attributes to it. It is odd that in other sciences there is not this expectation of immediate and complete knowledge. It may be that the natural law under consideration is still tainted by the Seventeenth Century and Eighteenth Century view that the natural 'rights' of man may be clearly intuited immediately. A more reasonable approach, which has not been defeated by these arguments, is the modest claims of such men as Rommen and Leclercq, mentioned earlier, who are leading the natural revival of today. Leclercq sees the natural laws as having a variable content in the sense that, as rules of social health, they vary as our knowledge becomes more complete and refined.

For these natural-law theorists, what the law ought to be comes to be known by us through this knowledge. They are not making, as is often argued, an impossible leap from what is to what ought to be, but attempting to go behind what is to find

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Jamieson, p. 235

not only the basis of what is but also the basis of change. The simplest justification for this search is the fact that we can say, in the legal sphere, that 'what is' is wrong or unjust, that we allow an area of judicial discretion even in civil law countries which is not governed by the rules set down by man in positive enactments and that we see that it is in this area of 'hard cases' that we find the greatest progress towards a mature legal system. It is in this area that the positivists have yet to eliminate values or defeat the belief in natural law and one reason for the revival of natural law theories is the aridity and stagnation that have been shown to result from complete adherence to their views.

PART THREE

CONCLUSION

Many theories have been mentioned throughout this study for the purpose of highlighting the subtle differences among views all going by the same name - natural-law theories. Further, I have attempted to show what exactly it was that opponents were criticizing. Finally, I have claimed that some answers to the problems facing natural-law theories in general, for example, the relation of 'is' and 'ought', are better and prove more profitable than others.

The purpose of these concluding remarks is to classify this myriad of views into two broad approaches which shall be called 'intuitionist' and 'naturalistic'. This will be elaborated here, although the major merits and defects have been pointed out in the body of this study. The view which appears to be most advantageous to bring about a revival of natural law will be suggested along with modifications to make it acceptable in light of contemporary thinking.

Like Job in Biblical times, man in the Twentieth Century has come to realize that a relativistic stance in the political and moral sphere will not suffice.

Not only is there a psychological feeling of social and moral malaise, but also, theorists have pointed out the problems of relativism and the inability of this stance to resolve conflicts between views. There must be some stable and objective values by which to judge, argue and criticize the positions taken by various individuals and nations. Although technology, especially in the communications media, has reduced the size of the world, one feels that we are growing rapidly apart. There is a need for some sort of bedrock principles or values which can form the moral glue to bring us back together.

As Carnes points out:

when the chips are down, when we have come to an issue which lies at the very foundation of the civil order, we are driven to search for a justification of our beliefs and actions which lies deeper than mere preference or inclination and which is not accountable for in a relativistic, subjectivistic, positivistic framework.

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It is this justification which the natural law can provide and, once discovered and properly formulated by men, this law can go great lengths in reducing the general lack of understanding and harmony in the modern world.

The strength of natural law, throughout the centuries, has been reduced because of less adequate offshoots being

¹⁵⁵J.R.Carnes, "Whether There is a Natural Law", Ethics 77, 1967, p.128.

identified with the theory as a whole. As was noted in the discussion of opponents to the natural law, most complaints were levied against the natural rights theorists of the Seventeenth and Eighteenth Centuries. It was suggested in that chapter that this was a rather distinct form of natural law and not properly so called at all (or, at least not, for the most part, similar to the main stream of natural-law theories). What have been, in general, the two main avenues taken by 'natural-law' theorists?

The following explicative remarks should be prefaced with the observation that although some theorists are more illustrative of one approach than another, it should be evident from what has been said of their views (particularly in Part One) that many use both to formulate their theories of natural law. Thus examples of one approach may have certain aspects which appear to support the opposite view.

The first approach - intuitionist - is basically an appeal to revelation to find the natural law, although this may take a variety of forms; for example, moral conscience, 'right reason', and self-evidence. In other words, it is maintained that the natural-law rules or precepts are received by man via some sort of immediate inspiration (in a loose sense of the term). In many cases, as is evidenced by the reference to moral conscience, these rules are seen to be of divine origin. An example of this would be the view given by St. Augustine and

St. Paul which stresses both moral conscience and right-reason giving the major importance to the former.

Generally when this approach is taken, it is believed that a detailed set of precepts is conveyed to man ready to be applied in judging human actions and enactments. In other cases rules are immediately deducible from a self-evident or divinely revealed first principle. Hobbes, although he straddles both approaches, may be seen as an exemplar of this deductive method. From his first law of nature or 'general rule of reason' - "that every man ought to endeavour peace, as far as he has hope of attaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war"¹⁵⁶ - he deduces eighteen others, all detailed and applicable to specific situations. Nevertheless, although he feels that they are easily deducible from this first premise, these specific rules have been the subject of controversy for centuries.

Other theorists stressing religious inspiration have suggested that, although the set of rules may be 'deduced', our reason may often fall into error (our faculties having been weakened by sin). Nevertheless, the correct deductions will be corroborated by the Holy Scriptures in

¹⁵⁶Hobbes, Leviathan, p.110

which the same rules, as conceived by Revelation, have been written down.

As was seen in the discussion of the Seventeenth and Eighteenth Century theorists, many adherents to the intuitionist approach began their studies by stripping man of society's trappings and placing him in a 'state of nature'. Locke and Rousseau, two men discussed in this study, saw this state as idyllic. They arrived at this state by stripping man of those things they saw as contingent upon the formation of civil society. Once this state was reached, the natural laws could be easily discerned. For Locke it was a simple matter of consulting one's reason; for Rousseau the laws were revealed in the instinctive needs of the human heart (conscience).

The Kantian study of the preconditions of human moral actions may also be seen as belonging to this approach. Man has a certain sense of moral duty or may even be seen as endowed with certain rules of conduct 'a priori'. In fact, Kant's whole study is carried out without reference to any empirical study of man resulting in a vacuous and purely formal natural law.

In all these 'intuitionist' variations, there is no reference to man as he is found existing and functioning in society and in and through history. Nor is there any study of nature in general as was seen in the views of those adopting a teleological framework. But there is

little need for this if one maintains that the rules are received by means other than empirical study.

The main stumbling block for natural law is the disagreements among proponents. As was noted earlier, there are no arguments which can be brought forth on an intuitionist account to confirm the truth of some 'insights' and the falsity of others. Further, corroboration by the Scriptures holds little weight in a rational argument, for the information contained therein was either received via intuition or is not empirically verifiable.

Finally, with the intuitionist approach there is the possibility of overemphasizing an ideal while losing contact with reality. Often, what is 'intuited' or 'self-evident' are rules or precepts which the author himself would like to see functioning in his own society. This has been pointed out earlier in the discussion of Locke and what he sees as 'self-evident' in the state of nature.

The second approach has been called 'naturalistic'. Here, no claim is made for divine revelation (though God may still be seen as the ultimate source of the natural law) nor is there any reference to a state of nature. The natural laws are claimed to be empirically true in the sense that they are discovered through a study of human nature or through the understanding of oneself as a person with all the attendant attributes.

Finally, they may be seen as empirically true because, as universal rules of conduct, they are encountered and articulated through a study of man in his environment and the universal goals and aims which are found in this situation. Based largely on a teleological view of the world (man at least), it is concluded that, considering the essence of man and what is required for its fulfillment, some activities are more appropriate than others in certain circumstances and therefore 'ought' to be carried out.

This type of study was discussed in reference to the Greeks, the Stoics, Aquinas and such modern natural-law revivalists as Leclercq. For the latter, on the basis of a study of man (continuously being refined and perfected), one can formulate natural laws of social health which will secure a harmonious life among men. As Carnes points out, it is no argument against this point of view "to say that if the state of the world and the condition of man were different, the fundamental norms would be different."¹⁵⁷ Critics using this argument generally conclude that there is, therefore, no such thing as natural law. But these authors state that

¹⁵⁷Carnes, p.128.

"it is precisely the state of the world and the condition of man that make norms what they are."¹⁵⁸ Thus although the norms are discovered and not man-made, there is the possibility of variation if the circumstances are themselves different.

On this approach, human actions are divided into two categories. There are certain forms of behaviour which are carried out automatically (e.g., digestion). These are akin to all actions of animals and other natural entities which have not man's ability to understand a rule and freely conform to it. This ability applies to the second category or voluntary actions and the rules in this case may be disobeyed. It is in this sphere that natural moral laws function.

Through the study of man's voluntary actions, the proponents of this approach attempt to articulate the natural law in the form of some general moral maxim (such as Aquinas' 'good ought to be done and evil avoided') devoid of specific content. As was noted earlier, we are not supplied with a set of rules with code-like precision. Nor can a code be deduced from this general maxim in the way claimed by proponents of the intuitionist approach. Rather, one arrives at the rules for what one

¹⁵⁸Carnes, p.128.

ought to do through reasoning, always taking into account the principle moral precept. It is the discovery and clarification of this precept which becomes the major task of the modern natural law theorist though many, such as Rommen, understand it to be the dictate to realize one's essential being. (This, it may seem, is a return to the very first natural-law theories of the ancient Greeks but, as noted in Part One, the ultimate foundation of the appeal makes the analysis very different.) Rommen, following this approach (though seeing the divine as the ultimate appeal) concludes that "normative science requires a more disciplined and penetrating study, one which perpetually adjusts itself to the being and end of man and rests upon experience and compassions, than do the theoretical sciences."¹⁵⁹

It is this latter approach which has proved itself successful against the attacks of opponents and in providing a suitable explanation for the merger of facts and values. This is clearly evidenced in the discussions in the body of this study. On this approach the search for the proper modes of human behaviour is neverending, for "natural law properly understood does not deal with the nature of man in a timeless vacuum but with human beings operating

¹⁵⁹Rommen, p. 217.

in and through history, where they are always found."¹⁶⁰
The basic point is that as our knowledge of the nature of man increases, we are better able to make explicit the natural laws which can guide us to the optimum fulfillment of that nature. Although the actual precepts of the natural law may vary according to the circumstances, the major premise remains - that man ought to act in such a way as to fulfill or compliment his essential nature. Once the above premise has been discovered and clearly formulated in our minds, we are no longer left to wander aimlessly, dependent for our guides to action on some human authority or on our own whim. Now, it is up to us to make a conscious choice as to which path to follow. It is clear, I suggest, from the practical experiences of most mature legal systems - from the fact that regardless of the completeness of their codes they still are compelled to leave room for judicial discretion which is not ruled by human enactments, that regardless of any theory of law they profess to follow that they still find the need to criticize and judge man-made laws on value-bases which are ill-defined and, for the most part, subjective and from the fact that there are a great many similarities amongst legal systems which

¹⁶⁰ Cogley, J. ed., Natural Law and Modern Society, (Ohio: The World Publishing Co., 1966), p. 24.

are surely more than coincidence - that the positivist theory of law has proven itself to be inadequate. It is because of the realization of this fact that the natural law is enjoying a revival today - which makes the need for a study of what the theory has meant before and the attendant problems more imperative.

J.C.Murray has pointed out several of the major attacks levied against the natural law. It is interesting to note that none of these invalidate the approach now under review. This is so clearly evident that very few comments upon these criticisms will accompany the following list. The charges are: (1) Abstractionism - "as if it disregarded experience and undertook to pull all its precepts like so many rabbits out of the metaphysical hat of an abstract human essence."¹⁶¹ (2) Intuitionism - "as if it maintained that all natural law precepts were somehow self-evident." It is obvious that this criticism applies directly to the first approach. (3) Legalism - "as if it proclaimed a detailed code of particularized do's and don't's, nicely drawn up with the aid of logic alone, absolutely normative in all possible circumstances, ready for automatic application, whatever the factual situation may be." Again this applies only to the first

¹⁶¹J.C.Murray, "Natural Law and the Public Consensus", in Cogley, p.68. (The following quotations will be from this work, pp.68-69.

approach. (4) Immobilism - "as if its concept of an immutable human nature and an unchanging structure of human ends required it to deny the historicity of human existence and forbade it to recognize the virtualities of human freedom." (5) Biological - "as if it confuses the 'primordial' in a biological sense, with the 'natural'." This misunderstanding was noted in the discussion of ambiguities. As was pointed out at that time, the emphasis on such concepts as goodness, justice and moral choice implies that there was no confusion with or identification of the natural in this sphere with the biological features of man, which, for the most part, function automatically. Furthermore, as is seen in many of Plato's dialogues, the effort was made to deny man's biological tendencies the status of 'primordial', reserving this name for the rational soul. In the Laws, Plato states that it is the soul which is primordial. The soul is identified "with the primal becoming and movement of all that is, has been, or shall be, and of all their contraries, seeing it has disclosed itself as the universal cause of all change and motion." (896a) (6) Objectivist - here the natural law is criticized "for its supposed neglect of the values of the human person and its deafness to the resonances of intersubjectivity." Because the natural law studies those aspects of man which are common to the species, it must not deny the uniqueness of each individual repre-

sentations of that species. This is one of the reasons why this second approach denies the possibility of a ready-made code of action. Each decision concerning what man ought to do must take into consideration the circumstances and the individuals involved. As Murray concludes, the natural law simply proposes "to give a philosophical account of the moral experience of humanity and to lay down a charter of humanism."¹⁶² It does not proclaim infallibility in all its decisions, although through further study of man it hopes to correct most of our errors. Nor does it want to promote a belief in situation ethics. There are certain general principles which have an objective basis in the nature of man. If we choose to follow the natural law and promote what is essential in man, then there are certain precepts and guidelines we must follow.

Man has made great progress this last century in the scientific and technological spheres. Yet, in the ethical realm, which ought to give direction to all our actions, we have been held back and stifled by the arid supremacy of positivism. One wonders if there is anything which is right or good in itself - without reference to a law-giver or pure theory of law. As was noted at the beginning of

¹⁶²Murray, in Cogley, p.70.

this chapter, man both psychologically needs and has rationally argued for such absolute validity for his laws and morals.

Natural law - that is, the more modest second approach - gives us the guidelines to follow in both intersubjective and international relations. It provides a standard by which to judge and criticize human enactments, yet is flexible enough to give us direction in changing circumstances. Perhaps this view does fulfill a psychological need, but, as this study has tried to show, it does much more. It provides us with a means to discover the natural laws and formally articulate them and put them into use. As has been mentioned, the positivist approach has proven to be less than adequate in setting out a stable foundation for our legal system and, in light of this, even those legal systems which profess to adhere to the view leave room for opinions and guides to conduct which are not found in the codes of man. On the view outlined here, it may be argued convincingly that such natural laws exist to give meaning and a firm foundation and basis for criticism of our positive enactments. As Clyde Kluckhohn asks, "Is there not a presumptive likelihood that these moral principles somehow correspond to inevitabilities, given the nature of the human organism and of the human situation?"¹⁶³ Thus the natural law provides us with an

¹⁶³in Bodenheimer, *E. Jurisprudence*, (Cambridge: Harvard University Press, 1962), p.190.

answer to and a way out of the malaise affecting man today - a malaise caused by the inability to articulate the values and guides to conduct which ground our human enactments.

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