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THE CASE FOR NATURAL LAW RE-EXAMINED

A. P. d'Entrèves

THE LECTURES printed in the following pages were delivered at the University of Notre Dame on October 9 and 10, 1954, at the invitation of the President and the Dean of the Law School. Their purpose was to initiate a discussion about the use and scope of a journal of natural law studies. That they should appear in the first issue of this journal is a generous reward and a great honor for the lecturer. I have made no substantial alteration of the text: I wish my talks to read as they were given. The introductory lecture is omitted at my request. A very few words will suffice to explain my line of approach and my intentions.

The case for natural law is not an easy one to put clearly and convincingly. It must needs appear in a different light according to the angle in time or in place from which it is looked at. In England, for a number of reasons, that case has never been a popular one.¹ At the time when I was preparing these lectures I happened to ask an eminent scholar for his views on the debate about natural law that was taking place in the *Canadian Bar Review*. Professor Goodhart is no declared enemy of "old-fashioned" jurisprudence. As will appear from these lectures, I believe that we see eye to eye on many important issues. But his comment was not very encouraging. "I have a suspicion," he wrote, "that the various disputants are arguing about different things. Once you are in agreement concerning your basic premise, then it is probable that logical reasoning will lead you to the same conclusion; but the real difficulty lies in finding a common basic premise. A person who believes in a Divine Being and a future world will have one premise, while a person who is an agnostic will have another. As reasonable men, they will probably differ concerning the conclusions which they will eventually reach, having started from different premises."

These lectures are an attempt to resolve the difficulty indicated by Professor Goodhart. They take their start from the opposite end to his; they leave "premises" as much as possible out of discussion. Dean O'Meara's letter of invitation contained one suggestion which I found particularly to my

1. "It is surprising to find how small a contribution to English jurisprudence in these years has been made by writers in the natural law tradition": Hart, *Philosophy of Law and Jurisprudence in Britain (1945-1952)*, 2 AM. J. COMP. L. 355, 362 (1953). For the famous phrase, in *Anglia minus curatur de iure naturali quam in aliqua regione de mundo*, see my *MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT* (1939), c. v and vi.

taste and particularly helpful: that we should turn to natural law for an "illumination of problems" rather than for a "blueprint of detailed solutions." It so happened that in an essay published some years ago² I had tried to show that natural law can shed light on a number of problems. The nature of law, the relationship between legal and moral obligation, the necessity of referring positive law to some ideal standard: on each of these problems I believed, and still believe, that natural law has a word to say, that, indeed, natural law is perhaps nothing other than a name for the right answer. I concluded that the best way for reassessing the case for natural law was to reassess the value of that answer.

If I borrowed my division from an old book, I have done my best not to borrow anything else besides it. This time my concern was with the present rather than with the past; I hope that I may have poured some new wine into my old bottles. It is one of my happiest recollections of Notre Dame that I actually met there many of the authors whose views I was about to discuss in these lectures; the others I had only just left behind, my daily companions at Oxford. My intention was to start a friendly discussion among friends. I must acknowledge an equal debt to those with whom I agree and to those with whom I differ.

I. THE PROBLEMS OF THE NATURE OF LAW: THE CONTRIBUTION OF NATURAL LAW THINKING

THE FIRST PROBLEM is that of the nature, or the essence, or, if you prefer to put it even more simply, of the definition of law—and of what natural law has to contribute to the age-long controversy centering around it.

Surely the old problem is not as dead as it looks. Even in quite recent days and in very respectable quarters it is still chosen as a subject for academic discussion at the highest level. It seems to me, in fact, highly significant that only last year the new Oxford professor of jurisprudence—Professor Herbert Hart—should have chosen it as the subject of his inaugural lecture.³ This lecture is a clear indication that there is no objection for the modern jurist to start, as of old, from the beginning, viz., from the old problem of the nature of law and of its definition.

On the first page of Professor Hart's lecture we read the following: "The perplexities I propose to discuss are voiced in those questions of analytical jurisprudence which are usually characterized as requests for definitions:

2. NATURAL LAW (1951).

3. HART, DEFINITION AND THEORY IN JURISPRUDENCE (1953) (an inaugural lecture delivered before the University of Oxford on 30 May 1953).

What is law? What is a state? What is a right? What is possession? I choose this topic because it seems to me that the common mode of definition is ill-adapted to the law and has complicated its exposition." In the next two paragraphs Professor Hart adds: "... compared with most ordinary words these legal words are in different ways anomalous." They "... do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words."

I have taken the liberty of quoting from Professor Hart's inaugural lecture in order to prove my point that discussion of the definition or essence of law is not so out of fashion as is usually believed. I am of course well aware that there are some remarkable novelties in the manner in which the discussion is approached. The philosophy prevalent in many Anglo-Saxon universities—and of which Oxford has become the stronghold in recent years—is one that is mainly occupied with the analysis of language. Strange and alien and in some ways parochial as this particular brand of philosophy appears to me, I have no doubt that its methods, and indeed even its temper, can in many ways prove peculiarly relevant to legal studies and to jurisprudence; and I shall presently return to some of Professor Hart's most striking and interesting suggestions. For the time being I trust that I am not misreading his words if I take them as evidence that *de legum natura* still animates the mind of the legal philosopher. Nor do I think that the legal philosopher should be at all annoyed if I remind him that this is a question with a very long and very respectable history behind it. Any acquaintance with the history of jurisprudence reveals that all through the ages the problem of defining what law is has almost constantly been in the mind of the jurist. If authority is needed on this point, Professor Rommen's admirable book provides ample evidence that the problem of the nature of law was in fact part and parcel of past discussions about the law of nature.⁴

Surely the old discussion *utrum lex sit actus intellectus seu voluntatis* was more than a Scholastic quibble. But surely natural law implied a particular answer. Natural law thinking implies a certain attitude towards the problems of the definition of law. Wherever that attitude can be traced, we may be almost sure that natural law has had its say; we may even be justified in using "natural law" as a provisional heading. In the discussion whether law is an *actus intellectus* or an *actus voluntatis*, natural law theorists have always and invariably sided with the first part of the alternative.

I think that this conclusion applies not only to the medieval Schoolmen, but also to the modern "secularized" theory of the law of nature. Both Gro-

4. ROMMEN, *THE NATURAL LAW* (1947).

tius and Locke certainly accepted the view that the essence of law is not will but reason. So did, unless I am mistaken, the Fathers of the American Constitution. There are, of course, some notorious exceptions. Hobbes, the best known among them, with all his talk about the law of nature, is really outside that tradition of natural law still so much alive in the Declaration of Independence. Hobbes is in fact the forerunner and founder of that theory of law which has ignored natural law altogether. That theory has come to be known by a name which is usually taken to express the "modern" attitude towards the problem of law: the theory of "legal positivism." It is an ambiguous name: I shall use it here for that line of thought which rejects any quest after the reason or justification of the law, and which no doubt, in the old discussion whether the essence of law is reason or will, would have sided in favor of the second part of the alternative. As the basic, almost scriptural text for that theory, I would choose the following passage from Hobbes: "And first it is manifest that Law in general is not Counsel but Command, nor a Command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him."⁵

From Hobbes to Austin and from Austin to the present-day "positivist": the line seems as continuous and unbroken as it is from Cicero to the Founding Fathers. Yet the continuity of certain lines of thought should not blind us to the differences which may and do separate one age from another. I am not sure that modern legal theory, with all its insistence on "positivism," would still stand, without many qualifications, by Hobbes' definition of law as the command of the sovereign. I have an impression, in other words, that contemporary legal thought, though still terming itself "positivist," has, on the whole, abandoned the will-theory of law and is groping for some new and more satisfactory definition. Actually every treatise on jurisprudence nowadays seems to contain a preliminary section devoted primarily to showing that the identification of law with command is not an adequate explanation of legal phenomena.

I should not be surprised if that doctrine had long been abandoned in England. It has always seemed to me a strange paradox that both Austin and Hobbes should have maintained their full right of citizenship across the Channel. But it is not for me to say whether Hobbes' and Austin's theory of law can be reconciled with the common law tradition. What seems to me even more significant is that the will-theory of law should be losing ground on the continent of Europe, where it does seem after all infinitely better adapted than in England to the actual facts of legal experience. Here indeed the old tradition of Roman law has played a large part in foster-

5. *LEVIATHAN* 26.

ing the notion that law is the expression of a sovereign will, whether of the prince or of the people. And that tradition has also undoubtedly concurred in fostering the growth of highly centralized States, in which one single authority gradually absorbed all the functions of lawmaking, and stripped society of what Montesquieu called "les corps intermédiaires": a process which Tocqueville has admirably described in his book *L'Ancien Régime et la Révolution*, where he shows it at work long before the French Revolution proclaimed the dogma of the one and indivisible sovereignty of the people.

The reasons for this abandonment have become commonplaces of modern jurisprudence. The will-theory of law, it is pointed out, does not provide an adequate explanation of certain important aspects of legal experience. It does not, for example, explain the nature of constitutional law. The laws of a constitution, whether written or unwritten, are not commanded; they are accepted. They have no "sanction" in the normal sense of the word; nor can such sanctions be said to exist even in those constitutions providing a mechanism for the control of the constitution itself, for *quis custodiet custodes?* Nor can insurrection as the "last resort"—as the right of the people to rebel against arbitrary rule—be properly called the sanction of the constitution. Surely no modern constitution embodies any recognition of such a right. In short, the will- and sanction-theory of law simply will not work with constitutional law, and, as Professor Goodhart puts it very well, "an interpretation of law which leaves out constitutional law seems . . . clearly inadequate." I think all modern students of jurisprudence would agree on this point.

I need hardly mention the other classic example of the inadequacy of the will-theory of law, viz., the case of international law. It is clearly impossible to consider international law as law in the terms of the Hobbesian or Austinian definition. There is no sovereign power to command; "sanctions" there may be, but no proper system of coercion, unless we construe war itself as the sanction of international law. This has been done, but it does seem a curious way of conceiving the sanction of law as consisting in its own destruction. It may of course be objected that the whole question is merely a matter of definition:⁶ the point, however, is that if we want to understand international law as law we must give a definition of law in which the current notion of command and of sanction are left out altogether.

Finally—as I have already pointed out—I must leave it to you to decide to what extent the will-theory of law is a stumbling block in the Anglo-Saxon approach to the legal problem. Here I can only refer to a recent article which has made a deep impression on me, as an indication of American awareness

6. See Professor Glanville Williams' article, *International Law and the Controversy Concerning the Word Law*, 1945 BRIT. Y. B. INT'L. L. 146.

of the same problems worrying us on the continent of Europe.⁷ Professor Lon Fuller's criticism of the "predictive" theory of law—the theory enunciated in Holmes' famous dictum about "the prophecies of what the courts will do in fact"—only confirms me in my conviction that, if the will-theory of law has been found inadequate even by Continental lawyers brought up in the tradition of centralized sovereignty, it could hardly fail to be found so "in the jurisdictions of the common law." Professor Fuller's vindication of "the antinomy of reason and fiat that runs throughout the law" is certainly one of the most interesting and most recent instances of the dissatisfaction of the jurist with the attempt at "stating law purely in terms of power relations without reference to its ethical bases."

At this point I must make it perfectly clear that, in my view, the defeat or abandonment of the will-theory of law is not necessarily an indication of a return to natural law thinking. I can think of new and more subtle forms of legal positivism in which the emphasis on will, power, sanction or command which characterized Hobbes' or Austin's approach is no longer essential. In fact, it is characteristic of the modern approach to the problem of law to discard the notion of will from that of law altogether.

The first and foremost instance I would like to quote in this connection is that of Kelsen's "pure theory of law." I am well aware that Kelsen's theory can be interpreted in many different ways; and I am quite willing to concede that, as a "sanction theory" of law, it can, in some way, be linked to the traditional "positivist" approach to law—to the notion that law is the command of the sovereign. But if we look at the case a little more closely we can easily see that things are not quite so simple and that in Kelsen himself, and more clearly in that Kelsenian school flourishing on the Continent in recent decades, there is ample indication that the pure theory of law tends to be an entirely formal construction of the legal order in which the element of will—in fact every consideration of the "content" of the law—can and must be entirely eliminated. The moment in fact that we conceive of the legal order as a construction in degrees—a *Stufenbau*, as Kelsen puts it—in which every legal proposition derives its validity from the step that precedes it; the moment, in other words, we conceive the whole legal system as merely a system of reciprocal coherence and implication—that moment indeed we shall have no need or use for a "will" to set as it were the whole system in motion. We are in fact bound to recognize that the very notion of a "will" or a "sovereign" is nothing other than a "personification" and an illusion.

Actually, to the Kelsenian, "sovereignty" is no more than the primary assumption necessary and sufficient for the understanding and the coherent

7. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

interpretation of a given legal order. The choice of that assumption is a mere matter of convention; though, once the choice is made, the validity of every and each legal proposition will derive from it. There is no intrinsic legal value which a rule can claim apart from the system; in fact, there is no law except "positive" law. Natural law holds no brief with Kelsen and his followers.

I turn now to another, quite different approach to the problem of the nature of law which provides a good illustration of what I have called the "positivist" attitude in modern legal thinking. Here again the emphasis is no longer on will or command. Yet there is no indication that the abandonment of the will-theory of law should point towards a revival of natural law thinking. The kind of approach of which I am speaking strikes me as particularly fashionable among present-day English legal and political theorists. It is based on an analogy which seems to have a special appeal to the English—the analogy between law and the "rules of a game." Actually—though I am not aware that any of my Oxford friends who make use of the analogy ever refer to their direct antecedent—the analogy can clearly be traced back to the father of legal positivism himself. In his *Questions concerning Liberty, Necessity and Chance*, Hobbes says at one point: "In the same manner as men in playing turn up trump, and as in playing their game their morality consisteth in not renouncing, so in our civil conversation our morality is all contained in not disobeying of the laws." This analogy must have pleased Hobbes a lot, for he makes use of it also in the *Leviathan*. Most clearly, and in his own unforgettable way, he repeats it in *A Dialogue of the Common Law*: "For such authority [of defining final punishments] is to trump in card playing, save that in matter of government when nothing else is turned up, clubs are trumps."⁸ Hobbes was indeed a great writer; he knew how to coin a phrase, and to hit a nail on the head.

Let us turn now to some English writers talking about law and the rules of the game. Professor Hart—I quote again from his recent inaugural lecture—remarks: "The language involved in the enunciation and application of rules constitutes a special segment of human discourse with special features which lead to confusion if neglected. Of this type of discourse the law is one very complex example, and sometimes to see its features we need to look away from the law to simpler cases which in spite of many differences share these features. The economist or the scientist often uses a simple model with which to understand the complex, and this can be done for the law. So in what follows I shall use as a simple analogy the rules of a game which at many vital points have the same puzzling logical structure as rules of law."

8. HOBBS, 5 WORKS 194 (Molesworth ed. 1841); 6 *id.* at 122.

Since Professor Hart is an Englishman, we should not be surprised if the game to which he refers is a typical English game, one whose rules are little known beyond English shores—I mean cricket. Personally, I have always considered that there are three things difficult for a foreigner to understand about England. The first is the working of the British Constitution: that can be learned with patient application and sound work. The second is the peculiar essence of the Church of England: that too can be understood with the exercise of some charity and good will. But the real stumbling block for a foreigner is the rules of cricket: they, to be sure, must be learned from early childhood on an English village green. So I cannot help feeling that it is not quite fair on the part of our English friends to force an analogy upon us which we foreigners can hardly be expected to follow in all its delicate and intricate detail. Nevertheless, even without such knowledge of detail, I think it is not altogether impossible to assess what the analogy really amounts to. Let me cite one further quotation from another recent Oxford book.

I am taking this second quotation from a small but provocative book which provides a good insight into what is going on within the walls of my old university. Its author, Mr. T. D. Weldon, shows himself well acquainted with those new philosophical methods to which I referred at the beginning of this lecture. The full title of the book is *The Vocabulary of Politics. An Enquiry into the Use and Abuse of Language in the Making of Political Theories*.⁹ Mr. Weldon is a political philosopher who has a particular gift for bringing out with the utmost clarity (and perhaps with a tinge of boyish perversity) the full implications of a certain line of thought. Here is, on page 57, what he has to say on the point at issue:

"Let us . . . ask what it means to say that someone has a right to do something. . . . The simple answer which is also the correct one is 'Because there is a law in this country to that effect.' But this, though correct, is liable to be misleading as will appear shortly. To answer the question fully, one would have to set out fully the whole complicated process by which laws are made and enforced in Great Britain and the way in which legislators themselves are elected. This would be tedious and not many people are competent to do it. Such elaborate elucidations are always boring and usually quite unnecessary. Suppose however the objector goes on to say 'Even if it is the law, I don't see why I should obey it.' The only further comment possible is 'Well, this is Great Britain, isn't it?'"

"The position indeed is exactly parallel to that of the cricketer who asks 'Why should I obey the umpire? What right has he to give me out?' One can answer only by expounding the rules of cricket, the position of the M.C.C.,

9. Penguin Books. First published in 1953.

and so on. Beyond that there is nothing to be done except to say 'This is a game of cricket, isn't it?'

"I believe that this is the answer and the complete answer to 'What does it mean to say that A has a right to do X?' "

Mr. Weldon's manner is certainly challenging. Yet I do not think that I am very far off the mark in saying that the analogy of the game, which is so much in vogue among British legal and political philosophers, does ultimately imply the conclusions which Mr. Weldon in the present passage lays down so cogently and neatly. And the question is how to deal with this new and subtle presentation of the positivist case, where law itself, though no longer conceived in the old terms of power relations, is irretrievably and finally severed from any kind of ethical basis.

It should not prove too difficult to point out what is wrong with the analogy between law and the rules of a game. For one thing, I am not sure that we can take that analogy at its face value. As Professor Fuller has pointed out in *The Law in Quest of Itself*,¹⁰ this doctrine which purports to be positive, unemotional, matter-of-fact, is in fact itself steeped in a romantic, emotional aura. On closer inspection, the "game theory" of law can well appear as "a quite legitimate attempt to rally to the support of positivism the sporting instinct which takes pride in knowing and observing the rules of the game." How true is this remark, and how easily one could sustain it from the personal experience of professed skeptics who are clearly intensely loyal and "moral" men! And we have after all Hobbes' own authority for speaking of a "morality" of the game itself.

But there are, I believe, stronger and more decisive objections to the purely positivistic approach to law as the rules of a game. For indeed this approach seems to forget that the main difference between law and the rules of a game is that the rules of a game are freely chosen and submitted to. We are free to play cricket; we are indeed—those of us who have not been born and bred in England—free to ignore its rules; and nobody can ever oblige us to learn them. But we are not free to ignore or to disregard the laws of the land to which we belong or in which we have made our abode. Hobbes' words, once again, are our great reminders: "save that in matter of government when nothing else is turned up, clubs are trumps." If we want at all costs to stick to the analogy between law and the rules of a game, let us admit that it is a peculiar game which we are asked to play, and one which has little to do with the placid setting of a sunny English afternoon.

Finally—and this really leads me to the next subject which I would like to broach—it is not only a question that "clubs are trumps" in matter of gov-

10. At 105 (1940).

ernment and that therefore we cannot honestly conceive the legal order as equivalent to the rules of an ordinary game. It is not only a question of choosing the game; it is a question of deciding on its merits. Surely a man who plays cricket or plays a game of cards may have his own views about the rules he is observing. He may find them enjoyable or boring, fit for their purpose or needlessly complicated. Nevertheless he need not depart, while he is playing the game, from a detached and noncommittal attitude about the "goodness" or "badness" of the rules as they are. He may keep himself emotionally quite unmoved by that problem, bent, as he probably is, merely on passing time or building up his health or showing his prowess. But I defy anyone to assume and maintain the same noncommittal and phlegmatic attitude concerning the body of laws which condition his entire life and possibility of acting. I firmly believe that it is very difficult, if not quite impossible, to conceive our compliance with law as merely compliance with certain conventional rules whose ultimate justification lies in the mere fact of their existence. I do not think, in other words, that the answer: "This is Great Britain, isn't it?" is quite akin to the answer: "This is cricket, isn't it?"

Let me try to make my point somewhat more convincing with the aid of another quotation. You will see that the passage is not quite irrelevant to the analogy between law and the rules of a game. In his famous novel, *La Chartreuse de Parme*, the French writer Stendhal tells us the story of the education of a young Italian, Fabrizio del Dongo, in an utterly corrupt society. Fabrizio, the scion of a noble and influential North-Italian family, had dreamt of adventure and glory in the wake of Napoleon. In the gloomy, oppressive atmosphere of Restoration Italy no career is left open to an ambitious young man except one in the Church. This is what Fabrizio's powerful friends and protectors, Count Mosca and the Duchess Sanseverina, have planned for him; and here are the words of advice of the Duchess to Fabrizio, who is about to enter a seminary.

"Le comte, quit connaît bien l'Italie actuelle, m'a chargé d'une idée pour toi. Crois ou ne crois pas à ce qu'on t'enseignera, *mais ne fais jamais aucune objection*. Figure-toi qu'on t'enseigne les règles du jeu de whist: est-ce que tu ferais des objections aux règles du whist?"

"The Count, who knows the conditions of present-day Italy well, has given me a suggestion for you. Believe or disbelieve all the things you will be taught: *but never raise any objections against them*. Imagine that they teach you the rules of whist. Would you make any objections to the rules of whist?"

To learn the rules of ecclesiastical life as if they were the rules of whist! It needed Stendhal's cynical turn of mind to conceive such an analogy. Yet I do not think there is a lesser degree of cynicism in the analogy between law

and the rules of a game. Surely such rules as involve grave and vital issues about the whole pattern and purpose of our life cannot be indifferently "believed" or "disbelieved." Not only do we know very well when and how to "raise objections" about them, but it may well be that if we shrug our shoulders and treat them as mere matters of convention we may prove to be bad citizens—just as Stendhal leaves us in no doubt that his hero turned out a bad priest. No less than the choice of an ecclesiastical career for the young Fabrizio, our compliance with the law involves the acceptance of certain "values" as obligatory and final. Actually, I am not sure that an assertion of this kind of value is not contained in that very answer "This is Great Britain, isn't it," which only by a great distortion can be considered akin to the answer "This is cricket" or "This is whist." For my part, I cannot bring myself to believe that being a good citizen of the United Kingdom entails the same obligations as being a good cricketer; and the trouble with the "game theory," as well as with the "pure theory of law," is that neither seems to provide an answer to that problem of obligation which used to be the very core of old-fashioned jurisprudence—if you like, of age-old natural law.

Now this old-fashioned and outmoded jurisprudence had developed several devices which did help to approach the problem of the essence of law in a different way altogether. It taught us, to begin with, to distinguish in every legal proposition two aspects: the "form" and the "content." Hence it proceeded to distinguish and classify laws according to these two aspects, and taught that there may be laws that are "formally" perfect and yet "substantially" inadequate, and others that are "substantially" laws and yet "formally" imperfect. Incidentally, I would like to point out that some of these distinctions have survived in our Continental lawbooks, where they have nothing more to do with the problem of "obligation" which was the main concern of natural law theorists.

It is precisely this distinction between the form and the content of the law—whatever its merits—that both the "game theory" and the "pure theory of law" seem to overlook. I would venture to say that, as "formal" interpretations of the law, both are, in their own way, unexceptionable. Actually we owe them both one great and important result: the elimination of the element of will which played such an important part in the early formulation of legal positivism. Their basic assumption is not the imposition of a will on other wills, the command of a sovereign, the power to coerce; it is merely the "formal" coherence of the system—if you like, the "fair play" which is the condition for the game being a proper game. They have indeed opened up new avenues for the understanding of the true nature of legal rules: "reason," not "will," is the essence of law; but "reason" means here simply noncontradic-

tion and possibility of logical deduction and construction.

Nevertheless, with regard to the "content" of the law, these theories clearly indicate the drawbacks of their "positivism," or—it might be better to say—their "agnosticism." Just as Kelsen assures us that there is no system of law not to be understood and construed according to the principles of the *Stufenbau* and the "basic norm," and just as the choice of the "basic norm" is merely a matter of hypothesis, so does the "game theory" leave us entirely indifferent to the kind of game that is played. Nor does it tell us why on earth we should choose to play it. In other words both theories totally disregard the "content" of the rules and the law, for it is obviously only by looking at that content that a judgment can be passed on their "goodness" or "badness."

If I am not mistaken, one of the essential characteristics of old-time natural law was the stress laid on the *vis directiva* of law as distinguished from its *vis coactiva*. It was the *vis directiva*—the moral content of the law—that ultimately decided about the "obligatoriness" of the legal precept. There is no denying that to the modern man a doctrine such as this smacks of "medievalism." Yet whether we like it or not, the problem of legal obligation does not seem to be properly solved by the positivist approach; and I cannot help being struck by the fact that it seems to have cropped up again, almost with a vengeance, in modern jurisprudence. I am thinking here especially of one striking piece of evidence of which I shall make great use in my next lecture. But I might as well indicate at this point why, in my mind, Professor Goodhart's recent lectures—*English Law and the Moral Law*—are also important with regard to the problem we have so far been discussing.¹¹

Professor Goodhart's starting point is very much the same as I have taken in this lecture. His argument is the normal argument followed in every treatment of the basic problems of jurisprudence, the usual survey and criticism of the many and different definitions of law that have come down to us through the ages. Better and more forcibly than I may hope to have done myself in my short introductory remarks, Professor Goodhart points out the inadequacy of the "force theory" of law; the importance of his argument appears most strikingly in his conclusion. We cannot hope to understand anything about the law unless we first try and divest ourselves of the view of the law with which the "force theory" has made us too long familiar. "Coercion" and "obligation" are widely different terms; their interrelation is a very different one from what is ordinarily assumed: "it is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion." Hence the key to the science of jurisprudence is

11. GOODHART, *ENGLISH LAW AND THE MORAL LAW* (1953) (Hamlyn Lectures, 4th ser., 1952).

not, as Austin believed, in the word *command*, but in the word *obligation*. Indeed, an entirely new definition of law can be proposed: "I should define law as any rule of human conduct which is recognized as being obligatory."

Here then is a definition of law which I gladly set down at the end of this lecture, since it affords unexpected and authoritative support to the main idea that inspired it. I hope that I have made it sufficiently clear that my purpose in this lecture was not merely to confute the "force theory" of law: this has been done many times, and I would only have repeated commonplace arguments. My purpose was to show the inadequacy of the "formal" approach to the problem of law, an approach forgetting that the predominant feature of law is neither enforcement, nor regularity, nor fair play, but obligation. But the problem of obligation is not and cannot be a merely legal problem: by this I mean that it is not a problem that can be answered by pointing at the mere existence of law as a fact—a rule that can be enforced by sanctions or that must be obeyed for the sake of the game. It is, in fact, a "moral" problem: a problem that refers us to judgments about "good" and "bad," to decisions on basic issues that involve our whole life. And this is where Professor Goodhart's approach indicates the correct line which we ought to follow: indeed he himself does pay homage—though a halfhearted one—to the case for natural law. Once again I would like to quote from him—and this will be my final quotation.

"I hope to show in [these] lectures"—writes Professor Goodhart—[that] our moral conclusions are of basic importance in the formation of our law. In a static period when both law and morals are accepted as more or less fixed it will not be so necessary to analyze our moral concepts, but when our State law is changing it is then necessary for us to seek for a true interpretation of the moral law with which it is so closely associated. I believe that the so-called revival of 'natural law' thinking at the present time is merely an expression of this point of view. It is because we recognize that law cannot be explained in terms of force that we seek to find the moral law which tends to give it its strength."

Professor Goodhart believes that "as the classic phrase 'law of nature' is so highly charged with emotion and has meant so many different things at various times in history . . . it is preferable to speak of moral law instead." I shall not take issue with him on this point and at this stage. For the importance of what he concedes seems far greater than that of what he denies. There are good reasons for re-examining the case of a doctrine which, but for the name, has constantly advocated the very notion which Professor Goodhart extols: viz., that the problem of law is not a mere problem of definition; that the *vis directiva* is as important an element of law as its *vis coactiva*; that the

ultimate question with the law is a question of obligation; that, in one word, there is a close and indissoluble interrelation between law and morals.

II. THE RELATIONSHIP BETWEEN LAW AND MORALS: THE VALUE OF THE NATURAL LAW APPROACH

I DEVOTED MY FIRST lecture to the problem of the nature of law, and to a brief survey of some aspects of modern legal theory which seems to indicate a rehabilitation of, if not actually a return to, notions and trends of thought familiar to natural law jurisprudence. In my opinion, two points are particularly striking and significant in that connection: the first is the almost general abandonment of the will-theory of law; the second is the notion that "obligatoriness" is the distinguishing feature of law over and against other rules of conduct.

I would like to take my start in this lecture from Professor Goodhart's contention that, if "it is the sense of obligation which gives the rule its legal character . . . the relationship between law and morals is of the utmost importance." I suggest that Professor Goodhart's recent re-examination of the relationship between law and morals may provide us with a most welcome opportunity for assessing the value of the natural law approach to this very old problem.

Professor Goodhart's main argument in his discussion of the relationship between English law and the moral law can be summed up as follows. Morality has played a particularly important part in the development of the common law. Actually, English law and the moral law are not only closely intertwined; they are rarely in conflict. The type of moral law which has had most influence in English law is one "based on reason, divorced from other authority"—"a pragmatic natural law and not one based on general principles expressed in authoritative sources."

It seems to me that three separate questions can be raised with regard to Professor Goodhart's argument. The first question is: is his conception of the moral (natural) law acceptable? The second: is his statement about the harmony between English law and the moral law accurate? The third: is his theory of the relationship between a given system of law and the moral law valid only for English law, or for all legal systems?

I shall leave the first question unanswered for the time being. It will be the subject of my next two lectures. I do not think it is at all useful to discuss what "type" of natural or moral law can provide the ground of obligatoriness of positive law before ascertaining what is the precise relationship between

the one and the other. But I may as well say forthwith that a "pragmatic" natural law—whatever its merits with regard to the ultimate foundation of English law may prove to be—seems a contradiction in terms. Surely if natural or moral law must provide the ground for the obligation of positive law, we must assume that its validity is an absolute one and not one to be estimated (I am taking this definition from the Oxford Dictionary, *sub* "pragmatism") "solely by its practical bearing upon human interests."

The second question is one which I am rather hesitant to discuss at all, for it seems a question for the English rather than for ourselves to ask and to answer. I can only say that Professor Goodhart's claim that English law is substantially in harmony with moral law and the law of nature, carries a very great authority. And I would like to add, for the sake of fairness, that there is little or no smugness in the manner in which Professor Goodhart puts forward that claim, and that he himself points out, very straightforwardly, cases in which the harmony is far from complete.

It would be out of place to list such cases here: some actually add a little touch of humor to the treatment of so grave a subject. For instance, Professor Goodhart remarks—on p. 114—that "our present death duties are against the law of nature." But there is one point where—as Lord Justice Denning noted in an excellent broadcast review of Professor Goodhart's lectures¹²—his treatment of the problem cannot fail to appear strangely incomplete, as if he himself had shrunk from facing the full implications of the standpoint he takes with regard to the relationship between law and morals. It is the ultimate issue of constitutional law, where Professor Goodhart's "philosophy" leads to conclusions which—as Lord Justice Denning points out—are basically at variance with the English doctrine that "parliament can do anything it pleases except make man a woman." It is not enough to list the "basic principles which parliament recognizes as binding upon it and conversely which the people regard as binding upon parliament." Neither is it enough to say that it is "unthinkable" that parliament should disregard these principles—granting arbitrary powers to one man, extending its life indefinitely, abolishing freedom of speech or the independence of the judiciary. "It may be inconceivable, but what"—Lord Justice Denning asks—"would happen if parliament did it? . . . The answer of Dr. Goodhart would be, I fancy, that such questions can never arise, but I do not think that is a satisfactory answer. The only proper answer, consistent with his philosophy, would be that any such action by parliament would be unconstitutional and invalid. This may be the right view, but it is a view which has not been heard in England for more than three

12. Lord Justice Denning, *English Law and the Moral Law*, The Listener, February 25, 1954, pp. 332-33.

hundred years. . . ." Three hundred years is a fair computation. I take it that to Lord Justice Denning Professor Goodhart's "philosophy," if argued out to its ultimate consequences, would bring us straight back to the heyday of natural law. I cannot think of a greater tribute to the vitality of that old doctrine.

But the third question which I have ventured to raise with regard to Professor Goodhart's treatment of law and morals calls for most serious attention. Professor Goodhart believes—and I am sure every believer in natural law would agree with him on this point—that the moral foundation of law is what provides law itself with its "obligatoriness." But he is careful to make this assertion merely with regard to English law, and indeed he goes so far as to say that this recognition that "there is a vast difference between obedience to force and obedience to law" is "the greatest contribution which [England] has made to the civilization of the world." He believes "that in no other country in the world is this obligation [of the rule of law against arbitrary command] recognized more clearly than in England, and that the strength of the law is in large part based on this." This is indeed very pleasing and encouraging, and no doubt it is also historically accurate and true. It would be grossly unfair to read in Professor Goodhart's words an example of British self-righteousness: I need hardly remind you that he is not an Englishman but an American. But the question is: does this notion of the moral obligation of law hold good only for England, or does it apply to other countries as well? In other words, does the relationship between law and morals appear in a different light if we look at it from England or from the Continent? Personally, I would be inclined to answer this question in the affirmative, and I shall presently give my reasons for doing so. Professor Goodhart himself seems to indicate that this is the case, and once again I shall take the liberty of quoting from his book—this time from a lengthy footnote on page 21.

Professor Goodhart refers here to the views of a well-known German legal philosopher, Rudolf Stammler, and to the Neo-Kantian theory of law as an external regulation of human conduct—from which it follows that the inclinations, motives or personal opinions of the person that conforms to the law, as internal processes, are entirely immaterial. Here is Professor Goodhart's comment on this theory: "It is remarkable to find a legal philosopher accepting the view that it is immaterial whether a person submits out of respect for the law or out of fear. All those who live under the common law may reflect with some pride that Anglo-American history is in large part meaningless unless the distinction between the two is realized." This time I am inclined to wonder whether Professor Goodhart is not a little bit too complacent about the Anglo-American heritage. This, however, is a question for

the historian to answer, and indeed for everyone of you to assess in the light of an experience which I have not the privilege to share. My point is a different one: it is that the doctrine which Professor Goodhart rejects seems to have—and not from the historical angle only—some good grounds which cannot and must not be overlooked.

The distinction between “externality” and “internality,” and the recognition in the former character of the distinguishing mark of legal experience proper, was notoriously developed into a complete theory by the Neo-Kantian school. But its direct antecedent is Kant’s distinction between legality and morality, his definition of legality as the possibility of external coercion, from which it follows that law as such can entail only external obligation, while moral behavior involves motive, and thus the relevance of those internal processes which are irrelevant to the coerciveness of law.

I have always wondered whether Kant’s distinction is not, in some ways, a restatement, in strict philosophical terms, of an experience which is deeply rooted in the tradition of Western man. I have always been reminded, in this connection, of a passage from St. Paul familiar to all Christians, which enjoins us to respect authority not only for fear but for conscience’ sake: *Subditi estote non solum propter iram sed etiam propter conscientiam* (Rom. 13, 5). Surely this passage seems to endorse that very notion which Professor Goodhart finds strange and startling: does it not state clearly that there are two possible ways of being subject to authority, and of conforming to the law, and that obedience for conscience’ sake — that is, out of a feeling of the obligatoriness of the law itself — is a religious or moral duty, and not strictly speaking a legal one? Actually I believe the recognition that law as such does not entail the same kind of obligation as a moral imperative runs through the whole of our European history. Still it is significant that it should have been resorted to and developed into new and unheard-of consequences only at a certain moment in that history—in fact at the very time of Continental absolutism, when men became aware that even though the law of the State has the highest compulsory power, it must and cannot fail to stop short before the inviolable shrine of man’s conscience, which no coercion can bind. It is indeed very important to notice that the demand for a clear and sharp demarcation between law and morals arises in the seventeenth century, at the end of a long period of religious strife and social insecurity, when the modern Leviathan comes forward, saying as it were: “I am going to give you the peace and security for which you crave, provided you obey my laws. But I am asking nothing more from you except the mere fact of obedience. Your religion, your Churches proclaim *da mihi animas cetera tolle*. I shall take the *cetera* and leave *animas* free, for I am not concerned with anything else than

outward conformity." It is on an assumption of this kind, if I am not mistaken, that the modern, secular State came into being in Europe. Looking at it historically, we must admit that the doctrine of the "externality" of law has some justification.

But we can, if we like, also look in other directions. The problem of the distinction between legal and moral obligation was far from being unknown to medieval jurists and philosophers. I find, for instance, that two points are made by St. Thomas Aquinas in his discussion of the law, which have a close bearing on the problem under discussion. One is the existence of purely "penal" laws, viz., of laws which do not oblige in conscience to what the law commands, but only to the payment of the penalty in case of violation: "external" laws, laws which we obey *propter iram*, to which we submit for fear of the sanction; laws which have no moral obligatoriness. This problem has caused much ink to flow: note the excellent treatment of it in Fr. Davitt's book, *The Nature of Law*, published in 1951.

But there is another aspect of the same problem discussed by the Schoolmen—and well worth mentioning were it only to show that the old natural law theory has had something to say about problems which seem to us so modern and burning. It is the question discussed by St. Thomas as he examines how far the law actually can go in turning men to the path of virtue. This is, as it were, the reverse of the problem of the purely penal law. If we accept—as no doubt any natural law theorist is bound to do in the end—Professor Goodhart's contention that law obliges not merely because of fear but because of its intrinsic obligatoriness—if, in other words, we maintain that law has a moral content, a *vis directiva* besides its *vis coactiva*—are we not really asking the law to make men virtuous? But can we really maintain that law can do so? Can morality be enacted? Now St. Thomas appears to be extremely sensitive to this problem, and in the *Summa Theologica*¹³ he points out—in fact he admits—that though law can enforce virtuous actions, it cannot secure the execution of these actions *eo modo quo virtuosus operatur*. Bad men will conform to the law without, by their action, becoming virtuous.

The gist of my argument is this. Professor Goodhart is certainly right in saying that it is not immaterial whether laws are obeyed out of respect or out of fear. He may well be right in maintaining that in no country in the world is the moral obligation of law recognized more clearly than in England; and if this be the case we may well congratulate the English on that score. But the coincidence in Anglo-Saxon countries of moral and legal obligation does not prove that this is always the case. There may be other types of societies where the moral obligatoriness of the law is not recognized, or not felt with the same

13. I^a II^{ae}, 96, 3, ad 2um.

degree of intensity. Yet such societies are held together by laws—purely “penal” laws if you like—but sufficient and adequate to ensure peace and order. Out of this recognition that legal and moral obligation do not always coincide the necessity has sprung of drawing the line between respect and fear, between submission to the law *propter iram* and *propter conscientiam*, in fact of distinguishing between legality and morality. It is a very long way from St. Thomas to Kant: still there is a link between them in their effort to understand the essence of legal experience. There is no doubt a very great difference in the way in which they conceive the relationship between law and morals; but they are substantially in agreement in conceiving morals and law as two different spheres, and in recognizing the limits of law as an essentially external regulation.

This recognition of the limits of law and of the possibility that law may be obeyed merely out of fear, which makes the “motives” immaterial, is what, if I am not mistaken, your great jurist Holmes called “the bad man theory of law.” But, to be sure, the “bad man” theory of law is very often nothing but the consequence of bad government. And I would suggest that if Continental nations have developed that theory which shocks Professor Goodhart so deeply, the reason is that they have not always been very happy in their political experience. Bad governments breed fear, not respect for the law; this has unfortunately been the case all too often on the continent of Europe. I would not like this judgment to be taken too literally. We have had, after all, some good governments. We have some now. But I think that the “bad man” notion of law is, on the whole, the attitude prevailing on the Continent; and with my long experience of life in Great Britain, and my much shorter experience of life here in the United States, I have noticed many times that when it comes to the point of discussing the problem of the obligation of law there is a fundamental difference in attitude between you and us. It lies in this: that you will never really persuade a Continental that there is some deep, inherent moral duty to obey the law; obey it he will, but if he can find a loophole, he will use it.

I do not want to over-idealize the English. I am quite sure that they too do not always find moral relish in obeying their laws, and I doubt that finding a loophole they may not be tempted to use it. But, on the whole, the Anglo-Saxons are undoubtedly a law-abiding people. On the whole, they obey *propter conscientiam* and not only *propter iram*: while to the average Continental, law is never much more than a necessary nuisance, an external regulation which must be observed to avoid the worst, but certainly not for the sake of a joyful conscience. This attitude is not necessarily an attitude of lawlessness or anarchy. I have heard this point made only too often on the other

side of the Channel: let me assure you that not all the Latins are black-marketers or racketeers. But there is no escaping the fact that our attitude to law is on the whole a different attitude from yours; it is an attitude which has probably been bred by a long experience of self-defense against the encroachments of the State, and also perhaps by a different experience of social and corporate life, by the age-long difference and contrast of political and religious bonds, by the very fact of belonging, as it were by birthright, to a society different from the "State," a society like the Church which claims the supreme control of "conscience," and openly proclaims against the State *da mihi animas cetera tolle*.

I am not sure that this long digression succeeds in justifying the view which Professor Goodhart considers untenable, viz., in showing that there is some element of truth, and that there certainly are some good historical grounds, in stressing "externality" as the distinguishing mark of legal experience. I need not add that, when it comes to the point of defining the relationship between law as an external regulation of conduct and morals as a consideration of motives and internal processes I am—and cannot fail to be—entirely on Professor Goodhart's side. In fact, I do not think that any believer in natural law could disagree with him on that score. Law may or may not be obeyed for the sake of its obligatoriness. But there is only one ground for the obligation of the law, and this is a moral ground. In discussing the relationship between English law and the moral law Professor Goodhart has collected his evidence and built up his case from a particularly happy experience: the experience of a nation where, in fact, positive and moral law broadly coincide, and the obligatoriness of the law is admitted and recognized clearly and without discussion. It is what I would call the case of the "good society": for it is only in a good society that there is no divorce between morals and law and that men obey not out of fear but out of conviction. Let us then say that the "good society" is the goal which lawgivers and politicians should set themselves, the condition of things in which, as Aristotle put it, the "good man" is also a "good citizen." The problem is, can the good society be attained, and if so, by what means? This is, of course, no longer a legal but a political program; but I have an impression that a political assumption underlies Professor Goodhart's presentation of England as the good society. Is it not ultimately because of the adoption of the democratic principle that, in Anglo-Saxon countries, the harmony of positive and moral law has had the best chance to survive? Democracy seems indeed the modern answer to the problem of ensuring that laws be obeyed not only out of fear but out of conviction, insofar as it implies the consent of the governed to government itself. This, at any rate, seems to me the strongest argument that has ever been put

forward in favor of democracy, and it is the argument that was first developed in Rousseau's *Contrat Social*.

The mention of Rousseau's name may well seem strange in a discussion of natural law theory. And yet that name is a landmark not only in modern political theory, but in legal theory as well. For it is Rousseau who outlined the case for democracy as the "good society" precisely on the ground that only by means of the democratic principle can legal and moral obligation be brought to coincide. Once again I would like to go back to a few fundamental texts, and to take the argument, so to speak, straight from the horse's mouth. My first text is from the *Social Contract*, Book I, Chapter 6, where Rousseau states that the fundamental problem of politics is to find "a form of association . . . in which each, while uniting himself with all, may still obey himself alone, and remain as free as before." The second passage, from Book I, Chapter 8, reads as follows: "We might, over and above all this, add, to what man acquires in the civil state, moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty."

Surely these two striking passages are familiar to anyone who has done some reading in political theory. They are striking and familiar not only because Rousseau, like Hobbes, is a very great writer; indeed, the whole eighth chapter of the first book of the *Contrat Social* is one that is not easy to forget, for in it Rousseau describes, in an almost religious language, what happens when man, having entered the social contract, becomes a citizen, thus acquiring the full dignity of mankind. It is like a rebirth, a radical transformation; and I think, for my part, that those writers are perfectly justified who, pointing out that Rousseau was a son of Calvinist Geneva, have remarked that there is something almost Calvinistic in this idea of a rebirth, of the new man, the new Adam, being made by entering civil society. Truly, what Rousseau does here is to endow democracy with a moral and religious halo, because for Rousseau the good society is only the one which can ensure that man, in obeying the law, obeys himself according to the democratic principle. Hence only in democracy can moral and legal obligation coincide, and obedience to the law fulfill a moral duty. Whether we like it or not, Rousseau remains the supreme prophet and theorist of modern democracy.

Of course, when we think of Rousseau, we cannot help thinking, and rightly, of all that comes with him and after him. As Dr. Berlin reminded us in his brilliant lectures over the B.B.C.,¹⁴ this prophet of freedom turned out to be "the most sinister and most formidable enemy of liberty in the whole history of modern thought." With Rousseau comes the idea that freedom

14. FREEDOM AND ITS BETRAYAL; SIX LECTURES, B. B. C. THIRD PROGRAM, 1952.

lies in obedience, in fact that men can be forced to be free. After Rousseau we soon drift away from true democracy; in fact we drift, via the Hegelian State, straight towards the doctrine of totalitarianism.

But let us cherish no delusion about the totalitarian State. I have myself lived in one for twenty years, and I think I got to know their techniques long before reading George Orwell's *1984*. Totalitarian States claim to be the "good society." They claim to be the good society because they maintain that, by belonging to them, the individual leads *the* good life, that, in other words, by finding in the State his "real self," his true moral nature, man will cease to obey out of fear, but obey out of conscience and full conviction. It is here, I believe, that we must find the root of that equivocation of the word "democracy" that rends the modern world.

Rousseau's definition of democracy as the good society thus appears a landmark as well as a warning. It provides the strongest argument in favor of democracy, indicating that, by means of the democratic principle, the cleavage between legal and moral obligation can be overcome, inasmuch as that principle will ensure that the laws express a prevailing moral conviction. But it also indicates the dangers that lie at hand, and perhaps even the reason why democracy can run amok and turn into the worst kind of tyranny. Rousseau's "general will," which is always right, is the prototype of the modern tyrant.

I do not think that we in the West can have much use for that sort of democracy. We ought to remember that the Western idea of democracy has sprung from a different seed and grown under different auspices. Indeed, it is precisely at this point that we are made aware of the impact on us of the old natural law thinking. Natural law, with its necessary counterpart of natural rights, has left a lasting mark on our way of conceiving the bond of political obligation. For one thing, it has taught us to conceive politics as a method rather than an end, and to conceive democracy itself as the best method so far devised to realize certain ends, from which alone the "good life" will follow. But it has also taught us not to assume without reservations that the "general will" is always right, and that the prevailing moral convictions of a given society are not yet a proof of their absolute value. Natural law is indeed an answer to the problem stated by Rousseau, the problem of reconciling moral and legal obligation, obedience out of fear and for conscience' sake. But it is a very different answer from that given by Rousseau, for it states that only through the recognition of certain supreme values can the law of the State be something other than a mere coercive imposition. Only when the rights of man are secured can democracy be a true democracy.

Surely it is neither smugness nor pride to say that this has been the case

with Western democracies. Great indeed is the debt of the modern world to such countries as Britain and the United States, where, through the happy medium of democracy, and not without bitter strife and relentless struggle, the harmony has been secured between the general will and the rights of man, between the rule of law and the respect for the highest values of freedom and morality. But let their present success not blind us, nor make us forget the blood and tears it has cost to achieve it, nor the danger which is always at hand of its being disrupted and destroyed. Suppose it did happen. Suppose one of the instances outlined by Lord Justice Denning actually took place. Have they not taken place in other countries, and within our memory? What then? Surely it would be in keeping with the democratic principle—the supremacy of the general will—to accept even the abolition of democracy, and to do like the Roman Senators whom Tacitus describes as running into servitude. But there can also be another answer, inspired by a view which, as Lord Justice Denning pointed out, has not been heard for a long time—at least in England. And yet we ourselves have seen in our generation brave men and women taking that view: men and women who, rather than submit to injustice and tyranny, took the bitter road into exile, or actually staked their lives for the sake of the cause of humanity. Shall we say that good old natural law took its revenge? I would prefer to frame my conclusions more cautiously.

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 relationship between the two, for the principle that spans the chasm that divides them, thus bringing law and morals into harmony. I have suggested elsewhere¹⁵ that this is one of the meanings, 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.

Let me then turn back for a moment and survey our progress so far. If we have not yet found a definition of natural law, we have at any rate come across a number of things which seem to be implied in natural law thinking. We have found that law is no mere command, no arbitrary choice, for it involves a problem of obligation; we have found that it is impossible to understand this problem of obligation without examining the relationship between

15. In the conclusion of *NATURAL LAW* (1951).

law and morals; and I have just suggested that, to express the "point of intersection" between law and morals, our benighted forbears had a name, natural law. And yet I doubt that natural law thinkers, old and new, would rest content with a definition of natural law as nothing but a name for the moral foundation of law, as nothing but the attempt to explain law in terms not of force or convention, but of obligation. They would, I surmise, consider such a definition as inadequate, and I think they would be right. For the most important feature of natural law is to stress not only the existence of a problem, but actually to provide an answer to it. Natural law theorists would point out that not all solutions of the problem of law and morals are equally valid, and that, if it were a matter merely of explaining the obligatoriness of the law, Rousseau's general will can do that very well. They would emphatically assert that the only valid ground of legal obligation is given by a Law—an unwritten law, an ideal law—to which we can and must refer as the model or standard on which all laws depend and from which they derive their obligation.

We are thus brought to the third, and perhaps the most important, of the three characteristics of natural law thinking, the one to which I propose to devote my last two lectures. Needless to say, I shall endeavor to approach this last and most awkward side of my subject with the same caution I have practiced so far. I hope you will bear me no grudge for doing so. There are, after all, many mansions in the House of the Father; and if all natural law theorists agree on the existence of the ideal law, they have differed, and are bound to differ, in the manner of conceiving and defining it. We must therefore examine these differences with an open mind: this, at any rate, is my own personal conviction, and it is based not only on my own misgivings, but on the belief, which I have stressed from the start, that our purpose here is to find a common ground of understanding, and not to hoist a banner or to put forward a "blueprint" of ready-made solutions.

In brief, then, what I propose to do is to examine how, in different times and in different ways, the ideal law has been conceived and defined. In my mind, these conceptions and definitions seem to fall, roughly, under three main types or headings. These are and must be purely provisional headings. I think in fact that the moment we start classifying "types" or "patterns of thought" we run the risk of killing the very thing we are studying. But in very rough outline it seems that the notion of natural law has been, and can be, worked out in three different directions. The first is that of the ideal or natural law as a kind of "technology"; the second I would call the notion of natural law as an "ontology"; and the third might perhaps best be described as a "deontology."

I am well aware that both classification and headings are open to criticism. I can only say that I am ready to accept any criticism on that score. I shall do my best, not to justify them, but to explain what I actually mean by them. I shall try to approach each of these different versions of the age-old problem of natural law with fairness and sympathy, though I shall not conceal my preference for that version which, in the predicament of our times, seems to me likely to assure the greatest possibility of understanding and agreement.

III. THE KNOWLEDGE OF AN IDEAL LAW: THE CHALLENGE OF NATURAL LAW THEORIES

MY TASK in the last two lectures is the examination of the various types or headings under which the attempts to define natural law—as the ideal or standard by which all laws can be valued and on which their obligation depends—may be classified. Before beginning this examination, and before even trying to explain if not to justify my headings, one point, which is a common mark of all and each of such attempts, calls for attention.

There is no denying that the very assertion of the existence and possibility of knowledge of an ideal law is the most serious challenge which natural law theory offers modern thought. Natural law is a stumbling block, indeed perhaps a scandal to the modern: and the reason, so we are told, is that the distinction between “fact” and “value,” the opposition, in other words, between what *is* and what *ought to be*, has become, after Kant, the cornerstone of modern ethics. Kant’s doctrine of the “autonomy of the will” is usually taken to mark the end of the natural law tradition.

I do not propose to discuss this view at this stage, a view which—to my mind at any rate—is subject to many reservations. But I would like to point out that if we want to go back to the real source of the distinction between “fact” and “value,” if we want to have before our eyes—as we have on some other occasions—a clear and downright statement of the case, we can do no better than turn to a passage from Hume: “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 propositions, *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 the 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 unconceivable, how this new relation can be a deduction from others, which are entirely different from it."¹⁶

I doubt that the main objection to natural law thinking could be put forward with more clarity and cogency than in this classic statement. It is the objection to what in the language of the modern semanticists is called the passage from the indicative to the imperative mood, an objection, one must admit, based on a perfectly accurate description of what natural law theorists are ultimately after. Rather than countering the objection forthwith, I am inclined to accept the description, and indeed enlarge it so far as to venture a new definition of natural law as the attempt to bridge the chasm between *is* and *ought*, between "fact" and "value." The classification I have proposed is in fact nothing other than the story of these different attempts: it remains to see to what extent they have been and can hope to be successful.

One first attempt is that of conceiving natural law as a "technology." This is an ugly word, which has gained undue popularity. This is what makes me specially reluctant to use it. But I have my reasons for doing so. Technology, according to the *Oxford Dictionary*, means "science of the industrial arts." But I do not think that I am forcing that meaning unduly by suggesting that it is a convenient name for indicating the knowledge of the rules of a particular art or craft (τέχνη)—the "know-how," as the phrase now goes. And I believe that to many jurists, old and new, natural law was just this: the knowledge of the right rule, of the correct solution to a given problem in law, the answer that lies "in the nature of things," and which it is only a matter of finding and applying in order to have good laws.

Such at any rate—unless I am grossly mistaken—seems to have been in its broadest sense the Roman conception of natural law, on the importance of which I need hardly linger. Right at the beginning of the *Digest* we find the jurist Celsus defining law—*jus*—as *ars boni et aequi*. Surely, an "art" has its rules. Surely, therefore, there must be some means, some instrument for finding out the *bonum et aequum*. *Jus naturale* was that instrument. I am well aware of the ambiguities of the texts that have been handed down to us by Justinian. They are, and always will be, a matter of controversy. Of late, the most authoritative interpreters have warned us against the mistake of conceiving the Roman notion of *jus naturale* as a philosophical construction. They draw a sharp line between the sweeping generalizations of such writers as Cicero and Seneca, and the "professional constructions" of the lawyers who are included in Justinian's book. *Jus naturale* was to these lawyers not a com-

16. TREATISE OF HUMAN NATURE, bk. III ("Of Morals"), pt. I, § 1.

plete and ready-made system of rules, but essentially a means of interpretation, almost, as it were, the "trick of the trade" which they resorted to and used in a masterly fashion. In shaping a body of laws which would apply to the whole civilized world they had no abstract theories in mind, but aimed at the workable and practical.

If we consider and compare the several definitions of natural law which are contained in the first section of the *Digest* we undoubtedly find many contradictions.¹⁷ But these contradictions, however puzzling, are comparatively much less important than the fundamental agreement on one point, viz., on the view that there is no problem in law that cannot be solved, provided the *constans et perpetua voluntas* is there, *jus suum cuique tribuere*. "What natural reason dictates to all men," "what nature has taught all animals"—this is what the jurist and the lawgiver must keep in mind if they are to do their job well and construct a system that may prove *semper bonum et aequum*.

Clearly, this is not a philosophical proposition. It looks much rather like the "science of an art" according to the definition in the *Oxford Dictionary*. I cannot help being reminded, in connection with this Roman notion of natural law, of what seems to me a modern version of the same conception. I am thinking of Professor Fuller's assertion of the existence of a "natural order" underlying group life, which it is the task of the judge—and the lawgiver—to discover.¹⁸ I would almost be tempted to apply to the Roman notion of natural law his remark, that there is "nothing mystical" about it, that our attitude in approaching this kind of natural law is not "that of one doing obeisance before an altar, but more like that of a cook trying to find the secret of a flaky pie crust, or of an engineer trying to devise a means of bridging a ravine." I rather like to think of the Roman lawyers as cooks and engineers. The pie they cooked and the bridge they built were certainly remarkably good if they proved so successful all through the ages. Their "technology" was excellent. They did find the best working law for long centuries.

I would hardly dare to press my parallel much further. Yet, in another place, Professor Fuller provides me with some additional proof of what I have called the "technological" approach to our problem.¹⁹ "Because of the confusions invited by the term 'natural law'" he has recently recommended a new name for the field of study which natural law used to cover; and he suggests the term "eunomics" for "the science, theory or study of good order and workable arrangements." "Eunomics," Professor Fuller assures us, "in-

17. I have discussed these contradictions at length in chapter one of my *NATURAL LAW*.

18. Fuller, *supra* note 7.

19. *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457 (1954).

volves no commitment to 'ultimate ends.' Its primary concern "is with the means aspect of the means-end relation." I surmise that one of the tasks of "eunomics" would be to discover the "natural laws of social order" as the best working laws in view of the particular ends of a given society.

Now Professor Fuller's theory provides me with the best definition of what I have called the technological notion of natural law. But it also provides me with the main objection which I would move against that notion. In plain, everyday language, the objection is that the "best working" law is not necessarily the "best" law. But that objection can also be put in more philosophical idiom by recalling the capital distinction between "technical" and "categorical" imperatives, a distinction which, to my mind, could hardly be more pertinent than in this case. The distinction is the one which Kant makes in the *Foundations of the Metaphysics of Morals*, sect. 2: "All imperatives command either hypothetically or categorically. The former present the practical necessity of a possible action as a means to achieving something else which one desires (or which one may possibly desire). The categorical imperative would be one which presented an action as of itself objectively necessary, without regard to any other end." Subsequently, Kant distinguishes hypothetical imperatives as "technical" (belonging to art), and "pragmatic" (belonging to welfare).

If anything, both the *jus naturale* of the Roman lawyers and Professor Fuller's "natural law of the social order" are hypothetical or technical imperatives in the Kantian sense. They are hypothetical inasmuch as they are means to an end, and technical insofar as they pertain to an "art"—though if one chose to call them "pragmatic" according to Kant's definition this would not alter their "hypothetical" character. If there were any doubts about it, here is an illustration given by Professor Fuller which clearly indicates the "technical" character of the law which, to him as to the Romans, lies in the *natura rei*. Suppose a man wants to assemble an engine: he can obviously do so only if he knows the proper rules of his job. There is no doubt that one such rule (and probably one only) exists. My comment would be that the finding out of this rule has nothing to do with the decision to do the job: our man could very well give up his attempts to assemble the engine and turn to some more congenial occupation. To determine the means for an end is a quite different matter from ascertaining the "objective necessity" of the end itself: in other words, there is no warrant for turning a technical (hypothetical) imperative into a categorical one.

To conceive natural law as a "technology" is not to help us solve our problem of obligation. There is no intention to belittle its value and use; indeed these may be great within proper limits. By the help of *jus naturale* the Ro-

man jurists worked out a system of laws which fitted men's needs for many centuries. And the modern lawgiver must keep the "nature of things" in mind, if he wants his laws to be fitting and efficient. I guess this is what is meant by saying—in the current jargon—that laws must conform to the existing "sociological requirements." The penalty for disregarding such requirements may be a heavy one. "Lawgivers are normally fairly sensible and therefore avoid imposing laws . . . which can be obeyed only by a wide departure from normal or probable behaviour. . . . Sometimes they go wrong on this (as the legislators of the United States did with the 18th Amendment)—and then there is trouble. Rationing and restrictions always breed black markets. But . . . lawgivers do not have to act sensibly nor do they have to consider exclusively the interests of their own social group. There is a statistical probability that they will do so, but to suppose that there is any necessity in all this is simply to become confused about the logical grammar of 'law'."

Once again I have quoted from Mr. Weldon's little book.²⁰ I think his rather caustic remarks bring out very neatly the point I have been trying to make. There is no proper link between "statistical probability" and moral obligation. The penalty for disregarding the "nature of things" or the "sociological requirements" does not provide any ground for asserting the absolute validity of the rules or laws deduced from them. Actually such laws are nothing more than statements of facts, even though cloaked in an "ought" proposition—as when we say: "if you want to accelerate you ought to press the pedal." It is a delusion to think that they can provide that bridge between the *is* and the *ought*, between "facts" and "values" which we are seeking.

With all its great credentials—which it would be blindness to deny—natural law as a technology does not provide the answer to our problem. Or, if it does so, it is only by assuming an end as the only right end to pursue, by surreptitiously introducing a "value" behind the "fact," and discarding the "hypothetical" for a "categorical" imperative. Personally, I am not sure that the Roman lawyers did not after all do something of the sort, and I am quite willing to admit that, if this were proved to be so, my strictures on the *jus naturale* would no longer be valid. But in that case we would probably have to subsume the Roman theory of natural law into that second category of natural law thinking to which I am now turning.

I shall devote the remainder of this lecture to examining this second type—if I may call it so—of natural law theory. I must say at once that this second type seems by far the most solidly grounded. The reservations which I shall have to make about it are not so much reservations on its philosophical basis, which is a very strong one; they are inspired by the very difficulty it

20. THE VOCABULARY OF POLITICS 67 (1953).

presents for the common man, as well as by some serious misgivings about its supposed implications.

The second type has a name, a name which it deliberately gives itself. So this time I need not spend many words to justify my terminology. It is the ontological conception of natural law—the doctrine of natural law as an “ontology” (*ὄν, ὄντος* — what is). With regard to the problem of bridging the chasm between *is* and *ought*, between “fact” and “values,” this doctrine would appear to seize the bull by its horns, and to reply to Hume’s challenge: there is no such chasm; your distinction is a wrong one. The ontological approach welds together being and oughtness, and maintains that the very notion of natural law stands and falls on that identification. This point is so important that I would like to clarify and emphasize it with the help of two quotations.

My first quotation comes from Professor Rommen. “The natural law . . . depends on the science of being, on metaphysics. Hence every attempt to establish the natural law must start from the fundamental relation of being and oughtness, of the real and the good.” From Professor Wild I am selecting the following sentence: “All genuine natural law philosophy . . . must be unreservedly ontological in character. It must be concerned with the nature of existence in general, for it is only in the light of such basic analysis that the moral structure of human life can be more clearly understood.”²¹ The fact that two thinkers approaching the problem from different angles agree so completely on this point seems to me particularly eloquent. Professor Rommen has a further and important remark: “The idea of natural law obtains general acceptance only in the periods when metaphysics, queen of the sciences, is dominant. It recedes or suffers an eclipse, on the other hand, when being . . . and oughtness, morality and law, are separated, when the essence of things and their ontological order are viewed as unknowable.”²²

This last contention seems indeed to have very wide implications. It might be taken to mean that the very notion of natural law is an indication of “metaphysical” thinking. Thus it would open up some very interesting lines of research on the “metaphysics” underlying some “modern” conceptions of natural law—such as the conceptions of natural law which were so prominent and indeed so effective in the seventeenth and the eighteenth century. But this is clearly not what Professor Rommen has in mind, for to him there is one system, and one system only, which bases natural law on the “ontological order of things”—and this is the system of Thomist philosophy. There is no denying that St. Thomas Aquinas’ doctrine of natural law still represents

21. PLATO’S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 172 (1953).

22. Both quotations from Rommen in this paragraph are from THE NATURAL LAW 161 (1947).

the most carefully thought out presentation of the ontological view, the most complete and thoroughgoing development both of its assumptions and of its implications.

I do not think that I need spend many words on the merits of St. Thomas' doctrine of natural law. Personally, I would like to stress that in the eyes of the historian that doctrine is the embodiment of a great tradition, the tradition that proceeds from Greek and Roman thought and is welded to Christianity. In my view a further merit of the Thomist conception of natural law is that it does not reject that technical notion of natural law which the Roman lawyers had emphasized. On the contrary, it makes the largest possible use of it; it is just because St. Thomas was well trained in the law that his natural law has an eminently practical and realistic cast.

It is, beyond that, an almost unique example of closely knit philosophical argumentation. Its basis—in Professor Rommen's words—is a "conception of an order of reality" established in its essence by God's wisdom, and proceeding in its existence from God's will. It therefore provides an answer to each and every problem touched upon in this discussion: the relationship between reason and will in law, as well as the relationship between moral and legal obligation. In fact, if natural law is to be defined as the bridge between *is* and *ought*, between facts and values, St. Thomas' definition of it stands out for its cogency and conciseness: *lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura*. In the general "order of reality" man participates because he is a rational being, and hence has the possibility of attaining a knowledge of it. That knowledge thus becomes the condition and the source of all laws pertaining to men: "being themselves made participators in Providence itself, in that they control their own actions and the actions of others."²³

So brief a summary can hardly do justice to St. Thomas' theory of natural law. For my part I have tried to do it justice on another occasion,²⁴ and my purpose here is merely to recall it as a perfect illustration of the "ontological" approach to our problem. Henceforward I shall willfully assume the role of the *advocatus diaboli*, trying to lay bare the reasons which make for its unpopularity outside a restricted circle of orthodox Thomists. I am still arguing on the assumption that we are here to find a common ground for our case. I still have Professor Goodhart's remark in mind, that "the real difficulty lies in finding a common basic premise."

Now it seems to me that in our divided world the first and most serious stumbling block to the Thomist conception of natural law lies precisely in its premise, in that metaphysical premise which both Professor Rommen and

23. S. THEOL., I^a II^{ae}, 91, 2, concl.

24. NATURAL LAW (1951), c. ii.

Professor Wild tell us is essential to the proper construction of natural law. It is the premise of a divine order of the world, which St. Thomas recalls at the very beginning of his theory of law, and from which he infers, with unimpeachable logic, the most detailed and specified consequences: *supposito quod mundus divina providentia regatur, ut in Primo habitum est.*²⁵ Once that premise is granted, the whole majestic edifice of laws can be established on it: eternal law, the natural law, human and divine laws, all are ultimately based on and justified through the existence of a supreme, benevolent Being. In the words of a great English writer, who was also a good Thomist: "Of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world."

I have described this premise of the belief in God and in God's action in the world as a stumbling block. I need hardly add that I would not like to see my words misinterpreted. To be sure, such a belief, far from being a stumbling block to the Christian, is in fact the very essence of his faith. Yet even on this point, as we all well know, Christians have been, and perhaps still are divided. I had my good reasons for taking my last quotation from a Protestant writer, Richard Hooker. Protestant theology has not always been friendly towards the idea of natural law. Thomist natural law is only too often considered to be the exclusive preserve of Roman Catholics. There are, however, encouraging signs that such prejudices are gradually being overcome and the way paved for better understanding among Christians.

In a recent book on the *Law and the Laws*²⁶ Dr. Nathaniel Micklem, Principal of Mansfield College, the Congregational Hall of Oxford, frankly recognizes that there was a break in the natural law tradition at the time of the Reformation. He points out that natural law plays very little part in Protestant theology, at least in the theology of the early reformers. But he remarks, "if the reformers were more pessimistic than the medieval Church they doubted neither that there is a law of nature nor that we may have cognizance of it, *nec tamen extincta est penitus notitia naturalis de Deo* (Melancton)." Actually, Dr. Micklem concludes, the view that natural law commands—that there is an intimate connection between nature, reason and law—"is no fanciful or esoteric theological speculation but a reminder of the *philosophia perennis* significant alike to jurisprudence and theology."

The last remark undoubtedly shows how very far a modern Protestant theologian can go towards paying homage to the Thomist conception of the law of nature. But the world is not peopled only by Catholics and Protestants.

25. S. THEOL., I^a II^{ae}, 91, 1, concl.

26. MICKLEM, *LAW AND THE LAWS*, BEING THE MARGINAL COMMENTS OF A THEOLOGIAN (1952).

The modern student of law need not necessarily be a Christian. In fact, lawyers have never had a very good reputation on that score: *Juristen böse Christen!* For the agnostic jurist of the present day, and perhaps indeed for the modern man who lives in a "de-christianized world," it will be very difficult to accept the notion of natural law, if that acceptance is made conditional on the acceptance of the metaphysical premise: *supposito quod mundus divina providentia regatur*. This, to my mind, is the first difficulty for the "ontological" theory of natural law—a difficulty which may not be a difficulty at all if we simply take the line: "Well, this is natural law. Take it or leave it." But we are here to find, if possible, a way of making the argument for natural law acceptable also to people who do not share our own premises.

The second objection is a more practical one. I have spoken of *Juristen* as *böse Christen*. Since I can well expect that such a description might not only cause offense but sound grossly exaggerated, let me try to define their attitude in more general terms as the attitude of men who, having to do with the everyday life and practice of the law, have little time for metaphysical cogitations. It might therefore happen that they accept the "ontological" notion of natural law because of their religious beliefs, as an essential part of Christian ethics, yet without probing into the problem more deeply; or else that they may have some slight feeling of impatience or embarrassment at being constantly reminded of the necessity of a philosophical and metaphysical training. I am not inventing this objection just for the sake of the argument. A discussion has lately taken place in Italy among Catholic lawyers on the subject of natural law.²⁷ In reading the reports of that frank and very interesting discussion I think that the feelings I have described can be clearly detected. I would like to quote from the important contribution of Father Joseph Delos, O.P., to the discussion.

Father Delos takes his start from the general idea that inspired the discussion, the idea that there must be "a principle which provides the condition *sine qua non* of positive law." "Certainly," he says, "this is our common thought. I am taking this agreement into account in order to ask one further question. How are we lawyers to find and to clarify that principle?"

"Let me explain my question: the theologian studies and works out that principle, he knows its origin and assesses its value; but we are not theologians. The philosopher does the same: but we are not philosophers. We are lawyers, and this means that we are addicted to a particular science which has an object of its own: the rule of positive law. Is there no way, no method which we can call our own? I believe there is; and thus that 'principle which pro-

27. The outcome of that discussion was published in a volume entitled *DIRITTO NATURALE VIOENTE (Quaderni di Justitia, I, 1951)*.

vides the condition *sine qua non* of positive law' may in turn be explored by the theologian, by the philosopher—be he a moralist or a metaphysician—and by the jurist as well, each of them doing his job with the method that is proper to his own discipline; and this third manner—that of the jurist—of presenting a truth that is essentially one, will not fail to be an enrichment of human knowledge. Let me add that for many lawyers this will be the main way—for some indeed the only way—of satisfying their intellectual needs.”²⁸

I have cited this passage at length because it seems to me in many ways of great significance. If a theologian and a philosopher of Father Delos' calibre declares *nous ne sommes pas des théologiens, nous ne sommes pas des philosophes*, this can surely not be taken merely as a profession of modesty. It rather means that, *qua* jurist, he feels that he must as it were divest himself of his quality, of his capacity as a theologian or a philosopher, and that he must do so in order to make his position equal to that of the jurist, and understandable to him. There is, there must be *un chemin, une méthode* proper to the jurist—and different from that of the metaphysician and the theologian. For my part, I cannot help reading Father Delos' words as a healthy reminder that it is better not to drive too many metaphysical nails into the jurist's head in our presentation of the case for natural law. Surely that case can be made without running the risk that, in refusing the “metaphysical premise,” he may refuse natural law as well, thus throwing away the baby with the bath water.

The points I have raised so far are less objections than subjects of meditation. Now I must limit myself to a very brief mention of one or two further points which I think can be raised—and are often raised with regard to the ontological approach to natural law. One of them is the mistake of stressing its deductive possibilities too much, and thus turning it into the “blueprint of detailed solutions” against which Dean O'Meara so rightly warns us. This is precisely the mistake Mr. Constable makes—and I hope he will not take my comment ill—in his recent essay, *What does Natural Law Jurisprudence Of-*

28. “Je prends acte de cet accord pour poser la question: Comment, nous juristes, allons-nous faire pour trouver et élucider ce principe?

“Je précise le sens de la question: le théologien recherche et trouve ce principe, il en connaît l'origine et il en expose la valeur; mais nous ne sommes pas des théologiens. Le philosophe agit de même: mais nous ne sommes pas des philosophes. Nous sommes juristes, c'est à dire que nous sommes adonnés à une science particulière qui a son objet: la règle de droit positive. N'y a-t-il point un chemin, une méthode, qui nous soient propres? Je le pense; et ainsi, le principe qui est la condition *sine qua non* de la validité du droit positif pourra être présenté tour à tour par le théologien, par le philosophe moraliste et métaphysicien, par le juriste enfin—chacun travaillant selon la méthode propre à la discipline qui est sienne; et cette troisième présentation—celle du juriste—d'une vérité essentiellement une, sera un enrichissement pour la connaissance humaine. J'ajoute que pour beaucoup de juristes, ce sera même la principale—pour certains même, la manière unique—de satisfaire à leurs exigences intellectuelles.”

fer?²⁹ Mr. Constable believes that, from a Thomist notion of natural law, based on the idea of "order," there can be inferred the idea of an "organic community," based on the idea of "service," "guided"—I am quoting his words—by "some persons or groups of persons" having "a clear insight into the nature of goodness."

I can only register quite frankly and openly my dissent from such views, and declare that if these were the implications of natural law, personally I would find it impossible to accept them. If not indeed of Plato's Republic, Mr. Constable's "organic community" seems to me to smack of that "corporativist" idea against which no lesser authority than Professor Maritain has warned us in his admirable essay, *The Rights of Man and Natural Law*, where he denounced it as one of the "temptations" deriving "from old concepts formerly in favor in certain Christian circles."³⁰

Let us be quite chary in drawing conclusions from "natural law" which might turn into a highly controversial political program. Let us not forget that the "organic theory of society" has in recent days been a welcome excuse for the suppression of individual freedom. Let us, above all, practice a healthy distrust of any "persons or groups" who claim to have "a clear insight into the nature of goodness."

With these last two points, we have come to the crux of the problem. The ontological theory of natural law is a great and impressive construction. But it does not seem to take into sufficient account those aspects of natural law that have become the lasting inheritance of modern man. With its insistence on the objective notion of "order" and law, it tends to disregard or to belittle the importance of the subjective notion of a claim and a right. In one word, it does not adequately stress that idea of "natural rights" which has become part and parcel of modern civilization. "We hold . . . that all men . . . are endowed by their Creator with certain unalienable Rights." Americans, after all, have proclaimed this doctrine to the world, and have inserted it in the *Declaration of Independence*.

No doubt the "ontologist" may point out that there is no "right" without "law," and that the very notion of a subjective claim presupposes that of an objective order. And he will be perfectly justified in doing so, and this is where the ontological argument is indeed unassailable. But I seriously doubt that he can find any clear assertion of the claim—of "natural rights"—in his sources, whether in Plato or in St. Thomas Aquinas. This claim is in fact a modern development of "natural law," and for a recognition of "natural rights" the time was not ripe either in classical days or in the Middle Ages.

29. 4 CATH. U. L. REV. 1 (1954).

30. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 54-55 (1944).

The same reservation should be made, I believe, with regard to the "clear insight into the nature of goodness," that is, to the authoritative interpretation of natural law which seems implied in the ontological position. Quite apart from the fact that an undue stress on the possibility of such authoritative interpretation runs the risk of converting natural law into a new kind of positivism, it is quite clear that such a notion can only be a further stumbling block to the modern. I sincerely hope that I will not be accused of conceding too much to some recent attacks on the revival of natural law as a cloak for the introduction of "authoritarian systems."³¹ If those shafts are aimed at the Church, I would like to say that they miss the mark insofar as the *magisterium* of the Church, which Catholics accept in the interpretation of moral truths, is after all based itself on a free acceptance. But the fact remains that, if the recognition of a "natural order of things" is linked to the idea of an authoritative interpretation through the Church or any given society, the revival of natural law will automatically rule out all those *qui foris sunt*, who do not belong to that society. Surely this is not what the conveners of this meeting had in mind. I propose to examine in my concluding lecture the possibilities of hope left for us in that revival.

IV. VALUE JUDGMENTS AND THE NATURAL LAW

IF BOTH natural law as a technology and natural law as an ontology are open to objections and encounter difficulties, is there a way of presenting the case for natural law in a manner which might—even if it did not ensure general acceptance—at least make that notion less obnoxious to the modern world at large? To avoid misgivings, I might as well begin by saying that, if I borrow the name for the third kind of approach to natural law from the founder of utilitarianism, this should not be taken to mean that I am a follower of Bentham and pleading a merely utilitarian approach to our problem. It just happens that the word "deontology" (τὸ δέον — that which is binding) seems to provide one of those convenient labels which must, however, always be used with necessary caution.

Can we agree, at least, on certain things that are binding? The problem is all here, in this very plain, simple question.

In order to develop my argument, I am going back first of all to the image of the "bridge"—the bridge between fact and value, between what *is* and what *ought to be*. This time I am taking my text from an author who, though

31. Such as can be found, for example, in Mr. E. C. Gerhart's pamphlet, *AMERICAN LIBERTY AND NATURAL LAW* (1952) and in his letter to the editor, 32 *CAN. B. REV.* 477 (1954).

not very widely known in Anglo-Saxon countries, has of late been the subject of some very admirable work here in America. He is a fellow-countryman of mine, and his name is dear to all Italians.

At the beginning of his *Scienza Nuova* Giambattista Vico has a remark which seems important for the problem we are discussing. This remark is put forward in the form of two "axioms" or *Degnità*—the fundamental exposition of principles by which Vico prefaces his study of history and philosophy. I shall quote them here in the English translation which has recently been made of his work by two American scholars.

Degnità CXI: "The certitude of laws is an obscurity of judgment, backed only by authority, so that we find them harsh in application, yet are obliged to apply them by their certitude. In good Latin *certum* means 'particularized,' or, as the schools say, 'individuated'; so that, in over-elegant Latin, *certum* and *commune* are opposed to each other."

Degnità CXIII: "The truth of the laws is a certain light and splendor with which natural reason illuminates them; so that jurisconsults are often in the habit of saying *verum est* for *aequum est*."

I am quite ready to grant that the two passages I have quoted are far from being easy to interpret.³² But, to put it briefly, Vico's idea seems to be that in every law one can find an element which he calls the *certum* (the element of authority), and an element which he calls the *verum* (the element of "truth," which is discovered by "reason"). *Certum* and *verum*, authority and reason, are the two facets of the law, two aspects of the same thing, two different angles from which all law can be considered. Sometimes the *certum* may obscure the *verum*, authority takes the place of judgment, and laws are obeyed only because of their "certitude." But there is no law which, illuminated by the light of reason, does not reveal an element of *verum*, the "truth" which it contains, like a soft kernel within the hard shell of authority that enfolds it: though it may happen that this very authority is the value of the law, that "certitude" is itself a valuable guarantee against the disrupt-

32. In order better to illustrate Vico's conception of natural law and its relevance to the point here under discussion, I would like to quote from a recent and excellent book on the Italian philosopher by Dr. A. R. Caponigri, of the University of Notre Dame: "In its most immediate and concrete sense, the natural law is [to Vico] the mediation between the truth and the certitude, the concreteness and the universality of the law. . . . The 'certum' and the 'verum,' which natural law seeks to mediate, are dimensions, not of single laws, but of the total process of law." "The natural law he understood to be, not that transcendent and unenacted normative law, allegedly implied in the concept of 'human nature,' but the movement of the process of the historical formation of the structures of positive law towards an immanent ideality." ". . . the universality of the natural law consists, not in the fact that in all times and in identical places identical positive law should prevail, but that in all the forms of positive law, despite the diversity of material circumstances which dictate the immediate force of the law, the same ideal principle is at work." CAPONIGRI, *TIME AND IDEA. THE THEORY OF HISTORY IN GIAMBATTISTA VICO* 38, 68, 116 (1953).

ing forces of anarchy, so as to justify the old Roman adage *dura lex sed lex*—which Vico would like to read: *lex dura est sed certa est*.

I believe that these ideas can shed some light on the problem which we are discussing, that they do constitute a new approach to the question of the bridge between *is* and *ought*, between facts and values. For indeed, insofar as every law is a compound of *certum* and *verum*, every law is in itself a bridge over that chasm—or at any rate an attempt at bridging it. For every law is no doubt a factual proposition, inasmuch as it is a particular authoritative statement. But it is also and at the same time—insofar as it aims at a particular end, and is not a senseless imposition—a statement about “values.”

I have until now used, or tried to use, the word “value” with the utmost discretion. As I am well aware of its invidious meaning, I have put that word under a safety belt of inverted commas. But now I find that I can do no better than use that word to describe what I have in mind. Perhaps I can give it force by an example.

Take the difference between the common law and continental law in the matter of testaments. Surely it does make a difference to the father of a family if, according to the common law, he is free to dispose of his entire estate or, according to the *Code Napoléon* and to the codes that have been modelled on it, he is not allowed to do so because a portion of his estate is reserved—“earmarked” as it were—for his offspring. But surely the difference between the two systems is not merely a difference of “fact,” a difference between the wording of the codes or the rules which courts will enforce in the different countries. Something else is at stake, as will be clearly shown by the reaction of any Latin *paterfamilias* when he is first told that an English father may disinherit his children and leave all his property to a charitable institution. Even though my Latin *paterfamilias* may not go so far as to say that such a practice would be against “natural law,” he would certainly have strong feelings about such a patent disregard of what he considers the unity of the family and the rightful expectations of children. Is it going too far to suggest that such an example as this clearly indicates that the law embodies certain “values”: in this particular case a particular notion of the comparative claims of family duty and individual freedom?

I have chosen my example at random. What I want considered is this idea: it is possible in each and every legal proposition to ascertain the “value” it contains—even down to traffic regulations if you please, since there can be no doubt about the “value” they protect, that of our own personal safety. I know full well the ambiguity of the word “value” which I am using in this context; I would be quite willing to use a different word if I could think of a better one. My point is of far greater relevance, and far more controversial:

for it amounts to nothing less than admitting that we have gone all this long way to find the ground of obligation of law without realizing that this ground does not lie outside, but within the law itself, that it must be sought in the interplay of the *verum* and the *certum*, in the ideal principle which is at work in every law despite the material circumstances that engross it. For each and every law is indeed nothing other than a "normative translation" of a particular value: we must try and break the shell in order to get to the kernel. And if a particular rule will not yield an answer to our quest, it is to the general system of which that rule is a part that we must turn, and we will no doubt find it.

Let me try to put this same argument in another way. I have already referred to Kelsen's "pure theory of law," and I think we would all agree that Kelsen strives at a construction and interpretation of law entirely agnostic as far as "values" are concerned. Every legal order can, according to Kelsen, be construed as a *Stufenbau*, a system of rules which derive their validity one from the other, until we come to the "basic norm" which is the condition of validity of them all, and makes the whole system into a coherent pattern. When I think of Kelsen's pure theory of law I am always reminded of a passage in *Alice in Wonderland*, and of Alice's reply to the King of Hearts. "At this moment the King, who had been for some time busily writing in his notebook, called out 'Silence!' and read out from his book 'Rule Forty-two. *All Persons more than a mile high to leave the Court.*'—Everybody looked at Alice.—'I'm not a mile high,' said Alice.—'You are,' said the King.—'Nearly two miles high,' added the Queen.—'Well, I shan't go, at any rate,' said Alice: 'besides, that's not a regular rule. You invented it just now.'—'It's the oldest rule in the book,' said the King.—'Then it ought to be Number One,' said Alice."

Briefly, the point I am trying to make is this. The ultimate ground of validity of the law, the *verum* of laws as distinct from their *certum*, the *Grundnorm* of Kelsen, the *Rule Number One* of Alice—they are not "facts," but "values." I said in my little book on *Natural Law* that Kelsen's "pure theory of law" can be used to show the Achilles' heel of positivism. I do not propose to repeat my argument here. But I would like to say that Kelsen's insistence on the purely hypothetical character of the *Grundnorm* can deceive nobody. Inasmuch as that hypothesis has to be endorsed by a fact, Kelsen's refined form of positivism shows its real face, the reduction of law to a mere expression of force—and even this is an assertion of "value." There have been indeed—and there always will be—political philosophies based on the assumption that force is the ultimate ground of obligation. But such philosophies, by the very fact that they glorify force, cannot avoid attributing to it an ethical

value. Hobbes' *Leviathan* will free men from fear; indeed "not renouncing" trumps can have its "morality." We have only to look around to convince ourselves that to a very large number of people *is* right. But I wonder how many of us actually take the trouble to point out to such people the revealing admission contained in the use of the word "right" in this context.

So much for the *verum* and the *certum* of the law and for the presence of a value judgment in every legal proposition. I have been very agreeably surprised to come across some interesting work lately done in this country on lines singularly akin to the one I have been indicating. I refer to Professor McDougal's program of "value clarification." I believe as he does that there is a new and fascinating line of enquiry open to jurisprudence. My only difference with Professor McDougal is, that while he seems to think of the "values" underlying a given legal proposition or a given legal order as "preferences," as "goals," as "objects of decision," I would plead that they should also and foremost be considered and studied as "grounds of obligation." In fact, I believe that it is here the notion of natural law as a "deontology" can, if at all, find its justification: for the problem of natural law is to me essentially that of the intersection between the legal proposition and the value that underlies it, the ascertainment of the element of obligation that makes us feel we are obeying the law not merely because of its "certitude,"—to use Vico's expression again—but because of the element of "truth" it contains, a truth carrying conviction. The difficulty of course is to persuade ourselves that such "values" are "objective qualities" in the law itself and not mere subjective or emotional reactions on our part, devoid of any universality.

To make this point more clear I am relying upon a quotation from a contemporary Oxford and (recently) Cambridge author, one of those writers with the rare gift of presenting deep thoughts gracefully as well as convincingly. In one of his essays on the Christian predicament which have won him a deserved reputation among all those who are seriously interested in religious and ethical problems, Professor C. S. Lewis has drawn attention to the importance of value judgment in education. *The Abolition of Man*³³ is really concerned with the study of literature, but I think that what he has to say is not without importance also in the field of jurisprudence.

Mr. Lewis takes his start from the well-known story of Coleridge at the waterfall. "You remember that there were two tourists present: that one called it 'sublime' and the other 'pretty,' and that Coleridge mentally endorsed the first judgment and rejected the second with disgust." According to Mr. Lewis, the modern trend in literary criticism is to accept Coleridge's anecdote merely as an illustration of "personal" or "subjective" reactions. He quotes from an

33. Riddle Memorial Lectures, University of Durham (1943).

elementary textbook for English schoolboys where the authors comment in the following way: "When the man said *That is sublime*, he appeared to be making a remark about the waterfall. . . . Actually . . . he was not making a remark about the waterfall, but a remark about his own feelings. What he was saying was really *I have feelings associated in my mind with the word 'sublime,'* or shortly, *I have sublime feelings.*"

Mr. Lewis has no quarrel with what would seem to me the rather high expectations placed on the intelligence of schoolboys: his quarrel is with the philosophical position implied in such comment, a position which he believes is not only dangerous for schoolboys, but wrong for the teachers themselves. In fact, he believes that such a position—the modern position with regard not only to literary appreciation, but to all value judgments—constitute a break with what has been for all times the normal approach to any assessment of what does and what does not deserve appreciation and approval.

"Until quite modern times all teachers and even all men believed the universe to be such that certain emotional reactions on our part could be either congruous or incongruous to it—believed, in fact, that objects did not merely receive but could *merit*, our approval or disapproval, our reverence, or our contempt. The reason why Coleridge agreed with the tourist who called the cataract sublime and disagreed with the one who called it pretty was of course that he believed inanimate nature to be such that certain responses could be more 'just' or 'ordinate' or 'appropriate' to it than others. And he believed (correctly) that the tourist thought the same. The man who called the cataract sublime was not intending simply to describe his own emotions about it: he was also claiming that the object was one which *merited* those emotions. But for this claim there would be nothing to agree or disagree about. To disagree with *This is pretty*, if those words simply described the lady's feelings, would be absurd: if she had said *I feel sick* Coleridge would hardly have replied *No, I feel quite well.*"

This rather lengthy quotation will, I hope, throw some light upon what I had in mind when speaking of "values" as "grounds of obligations," and of the problem of natural law as the problem of ascertaining where these grounds ultimately lie. For my part, I believe that in every human society, in fact in "human nature" itself, there are certain ultimate standards or values which determine approval or disapproval, assent or dissent; and I believe that it is these same values that determine our judgment as to whether a law is "just" or "unjust": in other words—to use a very ancient language that seems perfectly appropriate at this point—whether we are bound in conscience to obey it or not. To ascertain such values may be thought a modest—or an immodest—undertaking. Yet I think that, failing all other ways, such an un-

dertaking is well worth attempting, and may even in the end lead us to a much greater amount of agreement than we might expect. Personally, I am quite willing to accept Mr. McDougal's "tabulation" of the values which correspond to "our present-day democratic preferences for a peaceful world"³⁴ as a very near approximation of the values I have in mind. Surely it is only his modesty as a field worker, his concern with a purely "scientific" presentation of the case, that prevents Professor McDougal from seeing such values not only as resulting from our "democratic preferences," but as corresponding for a very large part to what *semper et ubique* has been thought *bonum et aequum*. In fact, they are in many points reminiscent of what our benighted forbears would have called "natural law."

I shall devote the last part of this lecture to a number of grave and serious objections which I know can be made to my presentation of the case.

I can see my first objector addressing me, more or less, thus: "You have, in your last lecture, expressed your misgivings about the ontological theory of natural law, a theory which purported to offer a rational justification of the ultimate values on which the obligation of the law depends. You now come forward and tell us about the existence of such values. If you do not think that they are demonstrable, does this mean that you ask us to accept them by faith?"

This is a current objection to natural law thinking. I referred at the beginning of these lectures to the discussion which has taken place in the *Canadian Bar Review* on the subject of natural law. I find that this sort of objection is the one which Professor Friedmann uses in his contribution to the discussion: a very formidable and closely knit argument against natural law.³⁵ Actually, Professor Friedmann had already worded that objection very briefly and clearly in the Preface to the first edition of his well-known book, *Legal Theory* (1944): "ultimate values must be believed, they cannot be proved."

My answer to this objection would be that the alternative between reason and faith is a wrong alternative. The answer can be provided in terms which are well known in the history of Christian thought. Surely the progress of the mind is twofold, and the *intellectus quaerens fidem* has its counterpart in the *fides quaerens intellectum*. Surely in making my reservations about the adequacy of the "ontological argument" to meet the predicament of our time, I never intended ruling it out as one of the best and most pertinent ways for grounding "natural law" on a rational basis. I suggest that we keep an open mind for all the arguments to be brought forward confirming our beliefs. To

34. *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L. J. 915, 916 (1952).

35. 31 CAN. B. REV. 1074 (1953).

conceive of natural law as a deontology is not in any way to exclude the possibility of rational argumentation. We may agree on the result, and yet differ on the method: but what matters is the agreement. In fact, far from rejecting the old philosophy of "the Right and the Good," we may well welcome its support and believe in our heart of hearts that the time has come for a more charitable assessment of its merits. But why should we not be equally charitable about the help we may get from other quarters? Does not the sociologist, the anthropologist, the student of comparative jurisprudence—to mention only some aspects of the present "scientific" trend which has in many eyes taken the place of old philosophy—also provide us at times with conclusions confirming our "deontology"? If in the end we should find that our disagreements are smaller than we expected, is not this all we can ask in our present predicament? I shall let the matter rest here, since all I wanted to stress was merely the point that if "ultimate values" are believed, there is no necessary exclusion of their being rationally argued.

Another objection I can well foresee: the objection of historical relativism. This is a strong objection, one which a man like myself, born and bred in the historical tradition of the Italian idealist school, cannot avoid being painfully aware of.

Certainly, it is very difficult not to be shaken by the doubt that our "values" and "value judgments" may not be historically conditioned, since they may change and actually have changed according to time and circumstances, and hence are relative to these and possess no absoluteness whatever. To this objection I would like to answer with the words of Professor Strauss in his remarkable book on *Natural Rights and History*, where, in the first chapter, he deals at length with the question of the relativity of values, and hence of natural law (or natural right, as he calls it with the terminology current on the Continent).

"One cannot understand the meaning of the attack on natural right in the name of history before one has realized the utter irrelevance of this argument. . . . Some of the greatest natural right teachers have argued that, precisely if natural right is rational, its discovery presupposes the cultivation of reason; and therefore natural right will not be known universally. . . . In other words, by proving that there is no principle of justice that has not been denied somewhere or at some time, one has not yet proved that any given denial was justified or reasonable."³⁶ Briefly, this is the main answer ready for the objections of the historical relativist.

I therefore turn to a third objection to the assertion of "values," viz., that their claim to absoluteness is dangerous and can only lead to fanaticism or to

36. STRAUSS, *NATURAL RIGHTS AND HISTORY* 9 (1953).

pharisaism. This objection is very clearly worded in Professor Friedmann's contribution to the *Canadian Bar Review*. "Since the days of the Greek philosophers," he writes, "hundreds of natural law philosophers, great and small, failed to establish values of natural law which, on closer analysis, do not assert one political faith or another. . . . It is an immortal merit of the 'awesome influence' of Holmes and of those he inspired . . . who have discovered the inherent nebulousness or hypocrisy of formulas which, under the guise of natural law principles, advocate a particular political philosophy."

So very serious an accusation may well induce us to watch our steps. But none are in a better position to face that accusation than we of the modern world, the members of a free and democratic society. Surely anyone professing belief in the existence of certain ultimate values constituting the ultimate ground of our allegiance to the law or the system of law under which we live, will be careful not to make this statement in any way justifying the accusation of fanaticism or hypocrisy. I think the answer to Professor Friedmann's objection is a profession of humility and sincerity on our part, as well as a better awareness of the principles that inspired the growth of our Western civilization. "I beseech ye, in the bowels of Christ, think that ye may be mistaken." The words which Cromwell addressed to the Scots on the eve of the battle of Dunbar still echo in our heart, and we know that they have shaped our way of life and made a free society possible. But must the respect for other people's beliefs necessarily make ours insecure and irrelevant? Surely when an issue is really great, men must take sides; and they never hesitate to do so. Let me note a case which has remained deeply impressed in my memory.

Some years before the War—it must have been, I think, in the middle thirties—the Oxford Union voted with a large majority a resolution to the effect that "this House" would under no circumstances fight for its King and country. Boys will be boys, and perhaps those young men only thought at the time of causing some little scandal. But, in those years, such words were echoed round the world, and made capital of by Fascist and Nazi propaganda. Here was a good illustration of the decadence of Britain and British youth, soon to be conquered by the Master Race. Yet not many years had passed when that very youth was called upon to make the last stand, and I have little doubt that a large number of those same young men who had moved and voted that fateful resolution gave their lives for their King and their country. This is what I mean by knowing what the real values are, and by acting accordingly. I think we ought never to forget that the original meaning of "martyr" is "witness."

Having re-examined the case for natural law my only conclusion is that the case still stands on its merits. I have left the door open for further discus-

sion and also, if you like, for further definition. Should we really decide to draw up the list of "ultimate values," I would for my part try to remember the old adage, *omnis definitio in jure periculosa*. But there is a final point. If my reading of historical evidence is correct, the doctrine of natural law has always represented a minimum of agreement. Such was the Roman theory of *jus naturale*, expressing the basic principles on which the different peoples and races composing the Roman commonwealth could be united by a common bond of law and human fellowship. Such was the medieval, Scholastic theory of *lex naturalis*: is there anything more gratifying about the theory than the fact of its being devised to bring together Christians and heathens? I need not remind you of the famous passage in St. Thomas Aquinas³⁷ where he clearly asserts the Christian duty to respect the laws and the authority of the infidels, because "divine law, which is a law of grace, does not abolish human law which is founded on natural reason." But—perhaps most important of all for us who live in a divided world and are beginning to despair of the possibility of ever overcoming our divisions—such was the great historical significance of the revival of natural law that took place at the beginning of our era. After decades of bitter and fruitless controversy, suddenly the writers of opposite camps seem to discover the possibility of talking a common language. Hooker borrows wholesale from St. Thomas, Grotius pays tribute to the great Spanish schoolmen. Natural law is here the indication that the age of "ideological" strife has passed, and that an agreement has been reached on the matter of ultimate principles. We must keep this in mind in view of Professor Friedmann's accusation of intolerance. History shows that the recourse to natural law was the sign of an earnest desire for mutual understanding.

It is this desire for mutual understanding that I would plead if ever we attempt to list the "ultimate values." I would plead that we focus our attention on what unites us rather than on what separates us. Personally, I would recommend that we take into account all that has enriched the conscience of the modern man and goes to make his great, unparalleled heritage. Surely Christians have the right to stress the part which the Gospel—as a great Christian writer of my country once put it—has played in "revealing man to man." Of their Christian inheritance the Western nations may well be proud, for it has served them well in the course of their history. "The closeness with which English law approaches the moral law"—writes Lord Justice Denning—"is, I believe, due to the fact that it has been moulded for centuries by judges who have been brought up in the Christian faith. The precepts of religion, consciously or unconsciously, have been their guide in the administration of jus-

37. S. THEOL., II^a II^{ae}, 10, 10.

tice." No wonder that in England the bond of legal obligation is felt so strongly.

On the other hand I cannot help feeling that Christians ought at times to be reminded that smugness and pride are not Christian virtues. The values by which we live and on which our world rests are not exclusively Christian values. We ought to be aware that something has happened to the modern world, which, whether we like it or not, we have to take into account: what Maritain, always so sensitive to these problems, has called the "secularization" of Christian values. These secularized values have become the common coin, the accepted currency, of a composite and no longer entirely Christian society.

However composite and in itself divided, that society has a sufficiently marked physiognomy for us to recognize it as our own—and to cherish it. Why then should we be chary of proclaiming our faith in it and of inscribing its great principles on our banner? Many warning voices have lately reminded us of the dangers of the hour: one raised not so long ago by George F. Kennan, has not passed unnoticed, I can assure you.³⁸ Another great American personality has admirably defined the predicament of our time: Learned Hand on his eightieth birthday has expressed better than I could ever hope to do, what I think are the hopes and the fears of our generation.

"Today we stand at bay, with all those conventions challenged that have for so long saved us from 'the intolerable labor of thought.' The slogans we live by: 'democracy,' 'the Common Man,' 'Natural Law,' 'Inherent Rights of man,' 'the Bill of Rights,' 'the Constitution'—the whole paraphernalia of our eighteenth century inheritance—all must now make good their claims against the furious repudiation of powerful and relentless enemies. We are in the distressing position of all who find their axioms doubted: axioms which, like all axioms, are so self-evident that any show of dissidence outrages our morals, and paralyzes our minds. And we have responded as men generally respond to such provocation: for the most part we seem able to think of nothing better than repression; we seek to extirpate the heresies and wreak vengeance on the heretics. . . . Happily there are a substantial number who see that, not only when they were first announced, but as they still persist, the doctrines that so frightened us constitute a faith, which we must match with a faith, held with equal ardor and conviction. So we are repeatedly assured, and rightly assured: but what we much less often observe is that, in making use of our faith as a defense, we may be in danger of destroying its foundation and abandoning its postulates."

38. I am referring to G. F. Kennan's address at a University of Notre Dame Convocation marking the dedication of the I. A. O'Shaughnessy Hall of Liberal and Fine Arts, May 15, 1953. The address was rebroadcast by the B. B. C. Third Program, and printed in *The Listener*, July 16, 1953, pp. 93-94.

These are wonderful words, which we might do well to remember. Perhaps it is not a question of high-sounding proclamations after all, but merely of an awareness of our predicament and of a firm resolve to face it with a brave heart but also with simple, unassuming humility. It is no use inscribing such principles on our banners unless we are prepared to undertake also the modest everyday work which is required in order to make them living and guiding. Above all we must be aware of the peril which Judge Hand pointed out, lest in making recourse to our faith as a defense, we destroy its foundations and abandon its postulates.

This, then, is the predicament in which we stand today, and unless I am greatly mistaken, I think that it is this predicament which our forbears used to call by a name, and by one name only: the defense of "natural law" against the forces that try to submerge it. More fortunate than we are, many of them lived in days when the conflict between natural and positive law, between reason and force, between ideals and reality were less pronounced or apparent. Yet they clearly indicated the way to be followed in case that conflict should break out, the way, at any rate, which alone can ensure the respect of the basic values making life worth living. "Natural law" still has something to teach us about the defense of these values at all levels of human existence, from the level of the single individual man to that of the world at large.

Actually, the predicament of the individual man is perhaps less terrible than is usually believed; for old Mother Conscience still does her job well, and surely men never lack a clear knowledge of right and wrong when they are cornered and have to make basic decisions. I have mentioned the story of the Oxford undergraduates; I would have many other poignant stories to tell from the dark recent days, of men who did not dodge the issue. Let us hope never to see such days again, never to have to withstand "positive law" because of its blatant violation of "natural justice." Men bear witness by their deeds, whether they obey the laws or disobey them. When obedience is no longer "for conscience' sake" then alone can we surmise that the twilight of "values" has set in, and that the reign of force has taken the place of the rule of reason.

Far more serious and difficult is the predicament of those who are responsible for group, rather than for individual, decisions. Well may we pray for "those who are in office," that their mind be clear and their judgment enlightened. This is how His Holiness Pius XII, in an address to the first Convention of Catholic Italian lawyers, outlined the rules that should guide a judge in his application of the law and in his attitude towards it.³⁹

"(1) With regard to any judgment, the principle must be that the judge

39. This address was printed in the volume *DIRITTO NATURALE VIGENTE*, *supra* note 27.

cannot avoid the responsibility of his decision by attributing it entirely to the law or to the lawgiver. No doubt, the latter bears the main responsibility for the effect of the law. But the judge, in applying the law to the particular case, is a concurrent cause, and therefore shares the responsibility for those effects.

"(2) The judge can never with any of his decisions oblige anyone to some action which is intrinsically immoral,—that is, contrary to the laws of God or the Church.

"(3) He can in no way explicitly acknowledge and approve an unjust law, nor pronounce a penal sentence that may imply such an approval.

"(4) Nevertheless, not any and every application of an unjust law implies such an acknowledgment and approval. There are cases when the judge can—and sometimes even must—let the unjust law have its course, when this is the only way to avoid a greater evil."

Except for the reference to "the laws of God or the Church," I do not think that any decent man, even supposing he is a complete agnostic, would take exception to such rules. The difficulty lies in following them.

As for the predicament of the world at large, let us be perfectly clear that natural law is no cut and dried solution, no infallible cure for all our troubles. Here indeed the problem is not even that of a conflict between natural and positive law, but that of the absence of a legal order altogether. International law, as things stand today, is a good target for the shafts of the skeptic. But, as Professor Goodhart puts it very well, the weakness of international law is not due to the lack of enforcement, but "to the absence of an international moral sense." These words can only mean: that what matters is first to "instaurer" or restore the "international moral sense." The possibility of agreeing on the "rules of the game" and of abiding by them will follow as a logical consequence. Surely this is where "natural law" may have a word to say, especially if we take it, as I have tried to, as a minimum of agreement on principles.

A more apt conclusion to these lectures I could not find than by using the words with which the President of Notre Dame summarized the gist of a discussion which took place here not long ago, when representatives of different faiths and creeds met together to examine the same problem which we have met to reconsider now. If indeed it can be shown that there is some agreement not only between the different traditions of our Western world, but between the great cultures of the East and the West, then surely there is reason to believe that, as Father Hesburgh put it, natural law may provide that "common ground where we can begin to draw all men, everywhere, together in a unity that reflects what is common to human beings as human beings."