

1-1-1958

Juridical Axiology in Ibero-America;Note

Luis Recasens-Siches

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Recasens-Siches, Luis, "Juridical Axiology in Ibero-America;Note" (1958). *Natural Law Forum*. Paper 32.
http://scholarship.law.nd.edu/nd_naturallaw_forum/32

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

JURIDICAL AXIOLOGY IN IBERO-AMERICA

In Latin America, as in other parts of the world, the last two decades have witnessed the development of a widespread and vigorous interest in juridical axiology. Although this article will be concerned primarily with developments during the last fifteen years, some mention will be made of earlier contributions since contemporary work is built on foundations established two or three decades ago. To the still more remote periods only brief reference will be made.

COLONIAL PERIOD

Throughout the colonial period in Latin America, the Scholastic philosophy of natural law prevailed both in written works and in university teachings. Some authors, like Tomás Mercado, a Dominican friar of the sixteenth century in Mexico, followed the Thomist line strictly.¹ Other writers tended rather to lean on the Franciscan tradition of Duns Scotus, as in the case of the Guatemalans Blas Morales and Juan Bautista Álvarez Toledo (1665-1776). Also, the ideas of the great Spanish theologians and philosophers of the sixteenth and seventeenth centuries—Francisco de Vitoria, Bartolomé Medina, Domingo de Soto, Domingo Báñez, Fernando Vázquez de Menchaca, Gabriel Vásquez, Juan de Lugo, and especially Francisco Suárez²—exercised a far-reaching influence on the philosophy of natural law in Colonial Spanish America. A good example can be found in the teachings of the Peruvian Jesuits Alonso de Peñafiel and Nicolás de Olea, among others.

During the eighteenth century, in both ecclesiastical colleges and lay circles, the teaching of natural law drew its inspiration not only from the great Scholastics but also, and sometimes very strongly, from the ideas of the European Enlightenment, as in the case of the Peruvian Professor Mariano de Vivero, the Mexican Jesuit Antonio de Peralta,³ and the Guatemalan Franciscan friar Antonio Liendo y Goicochea⁴ (1735-1814).

THE STRUGGLE FOR INDEPENDENCE

In the preparatory stages of the Wars of Independence, as well as during and after the struggle for liberation from Spain, the ideas of the classical school of natural law, those of Locke, Montesquieu, and Rousseau, and the political thought

1. Concerning colonial authors mentioned in the text, see Recaséns-Siches, *El Pensamiento Filosófico, Político, Social y Jurídico de Hispano-América*, in the joint book: DEL VECCHIO, *FILOSOFÍA DEL DERECHO*, and RECASÉNS-SICHES, *ESTUDIOS DE FILOSOFÍA DEL DERECHO*, Vol. II, U.T.E.H.A. 375 ff. (Mexico, 1946).

2. See RECASÉNS-SICHES, *LA FILOSOFÍA DEL DERECHO DE FRANCISCO SUÁREZ* (2nd ed., Mexico, 1947); and *op. cit. supra*, note 1 at 61-69.

3. PERALTA, *DISSERTATIONES SCHOLASTICAE*; and, in addition, 14 volumes on theology and jurisprudence.

4. LIENDO Y GOICOCHEA, *DE LEGIBUS*.

of the American and French Revolutions, all exercised a decisive influence on both theoretical and practical developments in Latin America.⁵

Heineccius' natural law, which to a certain extent summarized the ideas of the Continental classical school of natural law of Grotius, Althusius, Pufendorf, Thomasius, and others, was represented by the Argentine priest Gregorio Funes (1749-1829), who inaugurated a professorship of natural law at the University of Córdoba and also taught there.

Rousseau's ideas were disseminated by, *inter alia*, the Argentine Mariano Moreno,⁶ the Colombian Antonio Nariño,⁷ the Peruvian Manuel Lorenzo Vidaurre, the Venezuelans Simón Rodríguez (Simón Bolívar's teacher) and José Vargas,⁸ and the Cuban priest Felix Varela (1788-1853).

The political and legal thinking of South America's great liberator, Simón Bolívar (1783-1830), was influenced rather by Anglo-American philosophy, with its emphasis upon, and understanding of, actual historical conditions.⁹

The two fathers of Mexican independence, the priests Miguel Hidalgo (1753-1811) and José María Morelos (1765-1815), developed a philosophy consisting of a blend of Scholastic ideas and themes from the French Encyclopaedia. The same applies to Ignacio Aldama (d. 1811). In the Mexico City "Ayuntamiento," or municipal council, there took place in 1803 a heated controversy regarding the problem of national sovereignty, the outcome of which was the collapse of Viceroy Iturragaray's rule. It thus happened that the history of colonial thought ended in precisely the way it had begun; i.e., with a controversy over matters of natural law.¹⁰

FURTHER DEVELOPMENTS OF LIBERAL THOUGHT IN THE NINETEENTH CENTURY

Generally speaking, it may be said that until the beginning of the last third of the nineteenth century, liberal trends prevailed in the development of legal and political thinking. These liberal currents were represented in Mexico by José María Luis Mora¹¹ (1794-1856)—who was also influenced by utilitarianism—Juan Wenceslao Barquera (b. 1779), Friar Servando Teresa de Mier (1763-1822), Valentín Gómez Farías (1781-1858), and Benito Juárez (1806-1872). In Colombia, liberal thinking was developed mainly by Francisco Antonio Zea¹² (1770-1822) and Florentino González¹³ (1806-1875). In Central

5. On the authors mentioned in this section, see Recaséns-Siches, *op. cit. supra*, note 1.

6. MORENO, REPRESENTACIÓN DE LOS HACENDADOS Y LABRADORES (1809).

7. Nariño set up a group to cultivate the French Revolution ideas, and he became president of his country.

8. Vargas translated into Spanish ROUSSEAU'S SOCIAL CONTRACT (1809).

9. On Bolívar, see Recaséns-Siches, *op. cit. supra*, note 1 at 728-735.

10. See RAMOS, HISTORIA DE LA FILOSOFÍA EN MÉXICO (México, 1943).

11. MORA, CATECISMO POLÍTICO DE LA FEDERACIÓN MEXICANA (1835).

12. Zea edited a political review, EL CORREO DE ORINOCO (1818-1821).

13. F. González translated into Spanish John Stuart Mill's works, and wrote LECCIONES DE DERECHO CONSTITUCIONAL (1869) and LA LIBERTAD CIVIL Y EL GOBIERNO PROPIO.

America, the same direction was followed by Pedro Molina,¹⁴ José Francisco Barrundia¹⁵ (1787-1854), Miguel Larreynaga¹⁶ (1771-1845), Antonio José de Irisarri¹⁷ (1786-1868), and Lorenzo Montúfar¹⁸ (1823-1898). Outstanding in the same current in Cuba were José Agustín Caballero (1771-1835), José de la Luz y Caballero (1800-1862), and José Antonio Saco¹⁹ (1797-1864). Francisco Bilbao was one of the most prominent liberals in Chile.²⁰

Special mention is reserved for the towering figure of Andrés Bello²¹ (1781-1872). Though a native of Caracas, Venezuela, his influence covered all of South America, and was particularly felt in Chile. His legal philosophy, though marked by considerable originality, shows the influence of certain ideas of natural law, utilitarian trends, and some of the thoughts of John Stuart Mill.

We should now look at four significant figures in Argentinian political and legal thinking of the nineteenth century: Esteban Echeverría²² (1805-1851), whose social philosophy was in a certain degree suggested by some of the socialist ideas of Saint-Simon and Pierre Leroux, as well as by the liberal aspects of the works of Lerminier and Mazzini; Juan Bautista Alberdi²³ (1810-1884), who attempted to combine certain basic assumptions of natural law with some of the tendencies of juridical romanticism; Domingo Fausto Sarmiento (1811-1888), author of an original synthesis of legal and sociological thought, which reveals the influence of Tocqueville, Leroux, Guizot, Cousin, Jouffroy, Humboldt, Chateaubriand, and Villemain; and Fidel Vicente López²⁴ (1811-1903), creator of a philosophy of history in which free will and, to some extent, the doctrine of perfectibility play leading roles.

THE PREDOMINANCE OF SOCIOLOGICAL POSITIVISM

Throughout the last third of the nineteenth century and the first decade of the twentieth, positivist, evolutionist, and materialist trends prevailed in Latin American legal and social philosophy. The sociological ideas of Comte, Littré,

14. P. Molina edited two periodicals, *EL EDITOR CONSTITUCIONAL* (1820) and *EL GENIO DE LA LIBERTAD*, and wrote *MEMORIAS SOBRE LA REVOLUCIÓN EN CENTRO-AMÉRICA*.

15. Barrundia promoted the abolition of slavery and stood for freedom of the press. He left, unpublished, a translation of Milton's *Paradise Lost* and a biography of Milton.

16. Larreynaga wrote 10 volumes of *APUNTES ENCICLOPÉDICOS*.

17. Irisarri wrote *REFLEXIONES SOBRE LOS GOBIERNOS DE AMÉRICA* (1813), *SOBRE LA JUSTICIA DE LA REVOLUCIÓN EN AMÉRICA*, and successively edited many periodicals in several countries.

18. MONTÚFAR, *JURISPRUDENCIA USUAL: EL EVANGELIO Y EL SYLLABUS* (1884) and *NOCIONES DE DERECHO DE GENTES* (1893).

19. On these three Cuban thinkers, see RECASÉNS-SICHES, *op. cit. supra*, note 1 at 449 ff.

20. BILBAO, *EL ORDEN; LA LEY DE LA HISTORIA*.

21. Among Bello's numerous writings—*OBRAS COMPLETAS* (Santiago de Chile, 1881-1893)—are *FILOSOFÍA DEL DERECHO*; *PROYECTO DE CÓDIGO CIVIL DE CHILE*; and *TRATADO DE DERECHO CONSTITUCIONAL*.

22. ECHEVERRÍA, *DOGMA SOCIALISTA*.

23. ALBERDI, *FRAGMENTO PRELIMINAR AL ESTUDIO DEL DERECHO* (1837); *BASES Y PUNTO DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA* (1852); and *PEREGRINACIÓN DE LUZ DEL DÍA EN AMÉRICA*.

24. LÓPEZ, *MEMORIA SOBRE LOS RESULTADOS GENERALES CON QUE LOS PUEBLOS ANTIGUOS HAN CONTRIBUIDO A LA CIVILIZACIÓN DE LA HUMANIDAD* (1845).

Tarde, Durckheim, Worms, Darwin, Spencer, and Haeckel constituted the dominant tendencies in Latin America, but most especially in Brazil, Chile, Argentina, Cuba, and Mexico. This meant, of course, that all references to natural law were rejected a priori; it also meant that legal philosophy, as such, disappeared and was replaced by sociological studies and empirical planning.²⁵

During the four decades in which sociological positivism predominated, there were still a few thinkers who maintained intact their devotion to the axiological philosophy of law. Unfortunately, their voices were scarcely heard, their influence was minute, and their works found little or no echo. On the one hand, a tradition of natural law continued to exist among a few Catholic writers, such as the Chilean Rafael Fernández Concha²⁶ and the Cuban Mariano Aramburo²⁷ (1870-1941). On the other hand, a conception of natural law, largely inspired by the ideas of the Enlightenment, with a strong liberal trend, continued to be held by some distinguished scholars; for example, the Brazilian Tobías Barreto²⁸ (1839-1889), who, in spite of the influence of certain evolutionist trends, still professed a philosophy of free will (with Kantian overtones) and a legal axiology that was historically flexible; the Cuban José Calixto Bernal²⁹ (1804-1886), rationalistically and democratically minded; and Manuel Vicente Villarán,³⁰ of Peru, professor of natural law at the University of San Marcos in Lima. In addition to the rather weak survival of these two schools of natural law, a third must be recalled: the Krausist natural law,³¹ which, after a brilliant flowering in Spain, had some followers in Ibero-America.³² Among these were Antonio Bachiller Morales³³ (1812-1899), of Cuba, Juan José de la Garza, José María del Castillo Velasco, and Hilario Gailondo³⁴—the three of Mexico—José R. Mas,³⁵ of Bolivia, João Teodoro Xavier,³⁶ of Brazil, and José Silva Santisteban, of Peru.

EARLY REVIVALS OF IDEAS OF NATURAL LAW

Just as in Continental Europe, the renewed preoccupation with natural law began in Hispanic America with developments along the lines of Rudolf Stamm-

25. See KUNZ, *LATIN AMERICAN PHILOSOPHY OF LAW IN THE TWENTIETH CENTURY* 3-16 (New York, 1950).

26. FERNÁNDEZ CONCHA, *TRATADO DE FILOSOFÍA DEL DERECHO O DERECHO NATURAL PARA SERVIR DE INTRODUCCIÓN A LAS CIENCIAS LEGALES* (1887).

27. ARAMBURO, *FILOSOFÍA DEL DERECHO* (New York, 1924-1928).

28. BARRETO, *QUESTÕES VIGENTES DE FILOSOFIA E DE DIREITO* (Pernambuco, 1880).

29. BERNAL, *TEORÍA DE LA AUTORIDAD APLICADA A LAS NACIONES MODERNAS* (1856); *TRATADO POLÍTICO; EL DERECHO* (1877).

30. VILLARÁN, *PROGRAMA DE DERECHO NATURAL Y PRINCIPIOS GENERALES DE LEGISLACIÓN, QUESTIONES GENERALES SOBRE EL ESTADO Y EL GOBIERNO* (1935).

31. KRAUSE, *DAS SYSTEM DER RECHTSPHILOSOPHIE* (1874). Krause's principal disciples were Ahrens, Leonardi, Schliepcke, and Roeder in Germany, and Tiberghien in Belgium.

32. On the Spanish Krausist School, see RECASÉNS-SICHES, *op. cit. supra*, note 1 at 332-343.

33. BACHILLER MORALES, *ELEMENTOS DE FILOSOFÍA DEL DERECHO O CURSO DE DERECHO NATURAL* (1857).

34. These three Mexican scholars were influenced by Tiberghien.

35. MAS, *NOCIONES ELEMENTALES DE DERECHO NATURAL O FILOSOFÍA DEL DERECHO* (1879).

36. XAVIER, *TEORIA TRANSCENDENTAL DO DIREITO* (1876).

ler's legal philosophy, and also under the inspiration of Giorgio del Vecchio's works. As is well known, Stammler, who was decisively influenced by the Neo-Kantian School of Marburg, drew up a doctrine of natural law with variable content. He held that, whereas the idea of justice is only one, absolutely valid, universal, and unchangeable, the social realities that must be ordered and shaped by that idea of justice are many and variable. Therefore, according to Stammler, while the idea of justice is absolute, there is an almost infinite number of patterns of "just law," according to actual historical conditions, which are different in each situation, in each social reality, and in each epoch. Giorgio del Vecchio, who was to some extent influenced by Fichte's philosophy, but also by the Scholastic doctrine of *jus naturae*, created a philosophy of the normative principles of human nature as a basis for natural law and accomplished a most fruitful analysis of the idea of justice.

These views of Stammler and Del Vecchio were accepted as foundations by some Ibero-American scholars, who first sought to overcome the positivist negation and to restore the philosophy of natural law, or juridical axiology. In Argentina, Stammler's doctrines inspired the legal philosophy of Enrique Martínez Paz³⁷ (1882-1950), a professor at the University of Córdoba, and Alberto J. Rodríguez³⁸ (1894-1937), a professor at the University of Buenos Aires. The teachings of another professor at the latter university and at the same time, Mario Sáenz,³⁹ were a sort of personal re-elaboration of the theories of Del Vecchio. In Cuba, Pablo Desvernine attempted to build a new approach to Stammler's Neo-Kantian natural law. Later this same trend was followed, in certain respects, by Emilio Fernández Camus⁴⁰ and Antonio Sánchez Bustamante y Montoro,⁴¹ professors at the University of Havana, although the latter raised some objections to the interpretation given by Stammler to Kant's transcendental method as applied to legal philosophy. Also partly influenced by Stammler was the work of the Mexican professor, Juan José Bremer, who, in addition, attempted to go further towards what he called an integral theory of law. Not particularly concerned with law, but rather primarily with general axiology and ethics, are some outstanding works written by the Mexican professor Francisco Larroyo,⁴² who has drawn up a somewhat individual elaboration of Neo-Kantian idealism, influenced not only by the Marburg current, but also and more vigorously by the Baden

37. MARTÍNEZ PAZ, *SISTEMA DE FILOSOFÍA DEL DERECHO* (1932).

38. RODRÍGUEZ, *EL CONCEPTO DE LA FILOSOFÍA DEL DERECHO* (1927); *LA JUSTICIA* (1932); *EL PRESENTE Y EL PORVENIR DE LA FILOSOFÍA DEL DERECHO*; *LA FILOSOFÍA DEL DERECHO DE STAMMLER*; RECASÉNS-SICHES Y LOS "TEMAS" DE LA FILOSOFÍA DEL DERECHO (1939).

39. SÁENZ, *FILOSOFÍA DEL DERECHO* (1927); *LA POSICIÓN DIDÁCTICA DE LA FILOSOFÍA DEL DERECHO EN LA ENSEÑANZA UNIVERSITARIA Y EN LA VIDA* (1930).

40. FERNÁNDEZ CAMUS, *FILOSOFÍA JURÍDICA CONTEMPORÁNEA* (1932); *LECCIONES DE FILOSOFÍA DEL DERECHO* (1945).

41. SÁNCHEZ BUSTAMANTE Y MONTORO, *STAMMLER: ENSAYO DE VALORACIÓN* (1931); *NUEVAS POSICIONES EN LA FILOSOFÍA DEL DERECHO* (1933); *TEORÍA GENERAL DEL DERECHO* (1939).

42. LARROYO, *LOS PRINCIPIOS DE LA ÉTICA SOCIAL: CONCEPTO, AXIOLOGÍA Y REALIZACIÓN DE LA MORALIDAD* (1937); *LA FILOSOFÍA DE LOS VALORES* (1936); *EXPOSICIÓN Y CRÍTICA DEL PERSONALISMO ESPIRITUALISTA DE NUESTRO TIEMPO* (1941).

School (Windelband and Natorp). The work of Guillermo Héctor Rodríguez,⁴³ also a Mexican professor, is concerned with developing a legal philosophy on the basis of the ideas of Hermann Cohen. Some account of the work of Juan Manuel Terán Mata, who initially was inspired by Neo-Kantianism, will be given later in this article.

NEO-SCHOLASTIC NATURAL LAW BETWEEN 1920 AND 1945

Neo-Scholastic philosophy of law in Ibero-America has developed along two lines, sometimes related to one another. The first is based upon a thorough study of classical texts—something which did not happen in the nineteenth century. The second constitutes an attempt at renewal through contact with twentieth century philosophies. Some Neo-Thomist writers welcome the new philosophical tendencies, particularly phenomenology, Scheler's axiology, and even some trends of Catholic existentialism. Most Neo-Scholastic writers follow Thomist lines, although there are some who seek inspiration in Saint Augustine.

Among those in Argentina who have been concerned with Neo-Thomist philosophy of law, particular mention should be made of the following: Tomás D. Casares,⁴⁴ Octavio N. Derisi,⁴⁵ Ismael Quiles, S.J.,⁴⁶ Faustino Legón,⁴⁷ Eduardo M. Lustosa,⁴⁸ Manuel Río,⁴⁹ and, perhaps most important of all, Alfredo Fragueiro.⁵⁰ Taking as his point of departure the most dynamic thoughts of Scholastic legal philosophy, Fragueiro has devised a natural law of progressive content, which, starting from the individual conscience, looks to God as its true foundation and source. Natural law is a continuous and progressive rational activity which sets up goals and chooses appropriate means, insofar as it develops and increases the individual's potential. Fragueiro has also contributed a doctrine of freedom, in which he differentiates between essential freedom, belonging to any individual insofar as he is aware of his own individuality, and real freedom, belonging to the concrete personality insofar as the latter has achieved some development of its personality. Only he is really free who has succeeded in ruling his own conduct. The same principles must be applied to communities: a community is free only if the spiritual prevails over the material. True democracy presupposes actual freedom, founded upon spiritual development. In the present crisis of our culture we need to assert the primacy of the spiritual: a purely

43. RODRÍGUEZ, *FUNDAMENTACIÓN DE LA JURISPRUDENCIA COMO CIENCIA EXACTA* (1937); *ÉTICA COMO JURISPRUDENCIA: PUNTO DE PARTIDA Y PIEDRA DE TOQUE DE LA ÉTICA* (1947).

44. CASARES, *EL DERECHO Y LA JUSTICIA* (1935).

45. DERISI, *FUNDAMENTOS METAFÍSICOS DEL ORDEN MORAL* (1940).

46. QUILES, *LA PERSONA HUMANA* (1942).

47. LEGÓN, *AFIRMACIONES DE ORTODOXIA Y POLÍTICA* (1930).

48. LUSTOSA, *CONCEPTO CRISTIANO DEL ESTADO* (1938).

49. RÍO, *PERSPECTIVAS ACTUALES DEL DERECHO NATURAL* (1939); *LAS ESPECIES DEL SABER JURÍDICO* (1943); *ESTUDIO DE LA LIBERTAD HUMANA: ANTHROPOS Y ANAKÉ* (1955).

50. FRAGUEIRO, *DEMOCRACIA Y ORDEN POLÍTICO* (1930); *EL DERECHO NATURAL EN LA OBRA DE F. GÉNY* (1931); *LIBERTAD Y AUTORIDAD* (1933); *JACQUES MARITAIN* (1937); *DERECHO NATURAL DE CONTENIDO PROGRESIVO* (1939); *CIVILIZACIÓN Y CULTURA* (1944); *LA LIBERTAD EN RELACIÓN A LA PERSONA Y A LA PERSONALIDAD* (1944).

technical civilization is possible, but culture without religious faith is impossible.

In Mexico, Neo-Scholastic philosophy of law has developed more and more brilliantly. Though he is not himself a jurist, Oswaldo Robles⁵¹ has been the central figure in the Neo-Scholastic philosophical movement in Mexico. Without any exclusivism and in an open-minded way, Ignacio Bravo Betancourt (1875-1944), in his teaching on legal philosophy at the National University of Mexico, strongly favored Neo-Thomist trends. Daniel Kuri Breña,⁵² who has completed an analysis of the idea of the common good, has made important contributions to Neo-Thomist legal, social, and political philosophy. The Neo-Thomist current is followed by many other Mexican legal thinkers, among them Manuel Ullua Ortiz,⁵³ Gabriel García Rojas,⁵⁴ Héctor González Uribe,⁵⁵ Alfonso Zahar Vergara,⁵⁶ and David Casares Nicolín.⁵⁷

Antonio Gómez Robledo,⁵⁸ an outstanding figure in Mexican Neo-Scholasticism, in spite of being substantially a Neo-Thomist, has been strongly influenced by Saint Augustine and by the great Spanish masters of the golden age.

A vigorous Augustinian trend is perceptible in several works of José Fuentes Mares,⁵⁹ Dean of the University of Chihuahua Law School, who produced some excellent studies on several subjects of legal and political philosophy and has firmly opposed Kantian philosophy.

The most prominent leader of Neo-Scholastic philosophy of law in Mexico, however, is Rafael Preciado Hernández. Very important also are the contributions of José M. Gallegos Rocafull and of Francisco González Díaz Lombardo. An account of the works of these three authors will be given here in the part devoted to the description of the recent developments of Neo-Scholasticism.

During this period, and within the Neo-Scholastic current, mention must be made of Francisco Vives⁶⁰ and Eduardo Hamilton,⁶¹ both of Chile; Carracciolo Parra León⁶² and Juan Francisco Quijano,⁶³ both of Venezuela; Pedro María

51. ROBLES, *EL TOMISMO VIVIENTE* (1937); *ESQUEMA DE ANTROPOLOGÍA FILOSÓFICA* (1942); *PROPEDEÚTICA FILOSÓFICA* (1943).

52. KURI BREÑA, *LA ESENCIA DEL DERECHO Y LOS VALORES JURÍDICOS* (1939); *HOMBRE Y POLÍTICA: ENSAYO SOBRE FILOSOFÍA SOCIAL* (1942).

53. ULLUA ORTIZ, *NOTAS EN TORNO DEL DERECHO NATURAL* (1943).

54. GARCÍA ROJAS, *SOBRE LA INDEFINICIÓN DEL DERECHO* (1938).

55. GONZÁLEZ URIBE, *INTRODUCCIÓN A LA TEORÍA DEL ESTADO*.

56. ZAHAR VERGARA, *LA FILOSOFÍA DE LA LEY SEGÚN DOMINGO SOTO* (1947).

57. CASARES NICOLÍN, *DERECHOS DEL HOMBRE Y DERECHOS DEL GRUPO* (1942).

58. GÓMEZ ROBLEDO, *POLÍTICA DE VITORIA* (1940); *CRISTIANISMO Y FILOSOFÍA EN LA EXPERIENCIA AGUSTINIANA* (1942); *EL ORÍGEN DEL PODER POLÍTICO SEGÚN FRANCISCO SUÁREZ* (1948).

59. FUENTES MARES, *LA NOCIÓN AGUSTINIANA DE LA GUERRA Y DE LA PAZ* (1941); *MEDITACIONES SOBRE LA LIBERTAD* (1941); *APUNTES PARA UNA IDEA DEL DERECHO COMO SUPERESTRUCTURA DE LA NATURALEZA* (1942); *LA NOCIÓN DE LEY NATURAL* (1942); *LEY, SOCIEDAD Y POLÍTICA: ENSAYO PARA UNA VALORACIÓN DE LA DOCTRINA DE SAN AGUSTÍN* (1943); KANT, *FILÓSOFO DEL ESTADO MODERNO* (1944).

60. VIVES, *FILOSOFÍA DEL DERECHO* (2nd ed., 1941).

61. HAMILTON, *FAMILIA Y ESTADO* (1933).

62. PARRA LEÓN, *FILOSOFÍA UNIVERSITARIA*.

63. QUIJANO, *CONCLUSIONES JURÍDICAS DE LA ACADEMIA, EL LICEO Y LA ESCOLÁSTICA* (1916).

Carreño,⁶⁴ of Colombia, who considers that the philosophy of law should include an introduction to natural law; José Alejandro Bermúdez,⁶⁵ also of Colombia, who vigorously attacks the Hegelian and Marxian deification of the state, and defends the human ideals of wisdom, justice, and charity, as embodied in Catholicism; and Manuel Vicente Villarán,⁶⁶ a great liberal from Peru, who succeeds in synthesizing Christian principles with modern trends, looking towards social justice.

The most outstanding Neo-Scholastic thinker in this period in Brazil is Alceu Amoroso de Lima, who writes under the pen name of Tristão de Athayde⁶⁷: his thought first derived from Spencer and to some extent from Nietzsche, but later was decisively influenced by Jacques Maritain's philosophy.

Jackson de Figueiredo, also of Brazil, who started from evolutionist positivism and underwent a transitory phase of Neo-Kantianism,⁶⁸ finally became fully converted to Catholicism. His political and legal philosophy is not, however, inspired by Thomist ideas, but principally by the most reactionary thinking close to the opinions of the writers of "L'Action Française" (Maurras, etc.). This last period of his philosophy is authoritarian, and against democracy and freedom.

RECENT DEVELOPMENTS OF NATURAL LAW ON NEO-THOMIST AND PHENOMENOLOGICAL FOUNDATIONS

Rafael Preciado Hernández (b. 1908),⁶⁹ one of the several professors of legal philosophy at the National University of Mexico, is considered today the outstanding Ibero-American Neo-Thomist in this field. Within this current he shows a great flexibility in assimilating many of the contributions of modern and contemporary philosophy. Commenting upon his principal work, Josef L. Kunz has stated:^{69a}

This book, while Neo-Thomistic in an orthodox way, is, nevertheless, a modern book. The author takes into critical consideration not only all the modern philosophies of law to which he is opposed; he is also influenced by modern Neo-Thomistic thinkers, particularly French, such as Maritain and Garrigou-Lagrange, by modern philosophers such as Scheler, by modern Catholic jurists such as Corts Grau, Gény, Le Fur, Dabin, and, particularly, by the French Institutional School (Renard, Delos). The book is modern in its repudiation of the "classical natural law," in the restriction of the contents of natural law, in its opposition to a dualism of and rivalry between a natural and a positive legal order, in the insistence on the basically ethical

64. CARREÑO, *ÉTICA Y DERECHO INDIVIDUAL* (1909); *FILOSOFÍA DEL DERECHO* (1929).

65. BERMÚDEZ, *FILOSOFÍA Y DERECHO* (1937).

66. VILLARÁN, *PROGRAMA DE DERECHO NATURAL Y PRINCIPIOS GENERALES DE LA LEGISLACIÓN* (1896); *CUESTIONES GENERALES SOBRE EL ESTADO Y EL GOBIERNO* (1935).

67. TRISTÃO DE ATHAYDE, *INTRODUÇÃO AO DIREITO MODERNO* (1933).

68. FIGUEIREDO, *PASCAL Y LA INQUIETUD MODERNA; ALGUNAS REFLEXIONES SOBRE LA FILOSOFÍA DE FARIÁS BRITO*.

69. PRECIADO HERNÁNDEZ, *LECCIONES DE FILOSOFÍA DEL DERECHO* (Mexico, 1947).

69a. *Latin-American Philosophy of Law in the Twentieth Century*, 24 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 283, 318 (1949).

character of the so-called natural law, in the author's longing for an "integral" philosophy of law. The book, finally, illustrates the nearness, in modern philosophy of law, between Neo-Thomistic philosophy of law and philosophers of law who do not belong to the Neo-Thomistic School.

Preciado Hernández emphasizes that legal philosophy has a threefold mission: for legal science; for social life and political tasks; and for the professional jurist. A correct philosophy of law contributes decisively to the improvement of the legal order, of society, and of the men who compose it.

The author thinks that for methodological reasons law must be studied from three different viewpoints: logical, phenomenological, and deontological. None of these three viewpoints, however, provide us with a correct idea of law, because law possesses these three dimensions: logical, factual, and ethical. Law is not simply a bare technique, but a very special method for applying supreme principles of men's living together in society. These supreme principles lend dignity to a positive legal order and bind it ethically to the universal order of God.

Like most contemporary legal philosophers, Preciado Hernández differentiates between religious norms, which impose obligations of justice for the sake of our fellow men and society, and moral norms, tending toward the improvement of man, individually considered, for his personal good, for his own sanctity. Is it possible to speak of a Christian legal philosophy? On the one hand, from a historical point of view, the answer is yes. On the other hand, the basic ideas of dignity, equality, and liberty, which actually were made clear by Christianity, can be attained and justified by purely rational methods.

Man is characterized by free will, whose formal object is the pursuit of the good. As to the problem of hierarchy among the various "*bona*" and values, and among the ends of human conduct, Preciado Hernández sustains the primacy of the spiritual over the corporeal. In addition, we must admit that within the spiritual realm, those values basic to the person's morality are higher than other values which function only as a means (utilitarian) to their attainment.

The good is not something independent of the being, but is a notion inherent in the being; i.e., the good is the being in relation to its final cause, the being insofar as it makes its potentialities actual. Man, like all other created beings, has an inherent end, which he tends to realize: he tends to better himself, to improve himself, to realize all his potentialities. Among all the values to be realized by man, moral good has primacy over pleasurable and utilitarian values, because man is intelligent and free, and is able to perfect or degrade himself.

There are three basic juridical values: the common good, justice, and legal security.

Preciado Hernández regards the common good as a complex notion. First of all, it means the treasure of human values which have been accumulated by a certain society and which can be distributed among individuals. It also means what is common, and not possessed by individuals before they are integrated in a community. It is, in this sense, something specifically societal, something to be thought of in connection with social order, law, authority, political organization, national unity, social peace.

The author defines justice in the traditional way, as harmony or proportionality which refers to that which is due to everyone.

Legal security involves the idea of a legal order that is just and effective. Consequently, there can be no opposition between legal security, justice, and the common good.

Natural law, according to Preciado Hernández, is neither merely our feeling for justice, nor an ideal code. Natural law is the overall set of rational criteria and principles—supreme, evident, universal—which preside and rule over a truly human organization of human life and give it inherent finality, according to the ontological requirements of man. Consequently, natural law provides the basis for selecting the technical rules and institutions that enable man to achieve that finality within a concrete society. But Preciado Hernández rejects Renard's idea of natural law as a mere set of criteria for orientation which lead to a progressive content. He believes that natural law, though it is not a code consisting of universal and invariable norms, includes the supreme criteria that must regulate social existence, as well as the principles which are necessary to organize human living together on the basis of man's nature—rational, free, and social.

Agustín Basave Fernández del Valle,⁷⁰ a young professor at the University of Nuevo León (Monterrey, Mexico), has already proved to be an outstanding and original thinker. Deeply influenced by the tradition of Christian philosophy, he has also drawn much inspiration from twentieth century ideas. He has succeeded in bringing about an original metaphysical doctrine of man, a philosophical anthropology, which to a certain extent may be considered as a new form of Catholic existentialism connected with some Augustinian and Thomist thoughts. To live is to feel the contingency and misery of our spirit in its earthly condition and to anticipate the plenitude of subsistence in the path toward God. The emotions of anguish and hope are inseparable. This psychological dichotomy has a corresponding dichotomy in the ontological field: metaphysical helplessness, or abandon, on the one hand, and substantial plenitude, on the other. These two dimensions combine into a sort of counterpoint. In the *ens-contingens* which man is, there is one perspective toward nothingness, and another toward the absolute. On this theme Basave elaborates a new metaphysics of human life, which cannot be summarized here because it includes many philosophical subtleties incapable of being expressed in a concise form. Basave has also contributed a philosophical theory of the state—fundamentals of political philosophy—which, in addition to a series of philosophical analyses and definitions (of the state, its components, its structure, its government, etc.), offers some basic concepts of legal philosophy of Thomist inspiration. He believes in natural law, conceived as a set of rules prescribed by God for man, which are knowable by human reason and consistent with human nature. The rules enunciate, regulate, and delimit man's free activity, insofar as it is necessary for harmoniously attaining the individual and collective ends in social life.

The existence of natural law is demonstrated, according to Basave, by three

70. BASAVE FERNÁNDEZ DEL VALLE, *TEORÍA DEL ESTADO: FUNDAMENTOS DE LA FILOSOFÍA POLÍTICA* (Mexico, 1955); *FILOSOFÍA DEL HOMBRE* (Mexico, 1957).

arguments: psychological, or furnished by inner experience; historical, as testified by a belief which is constant among all peoples and throughout all times; and rational, insofar as natural law is absolutely necessary for human society, because otherwise positive law would lack any force of obligation. Though the principles of natural law are immutable, Basave, following 'Suárez' doctrine, holds that their application to diverse social conditions engenders, as consequences, different norms. The state in its legislation is bound to obey the principles of natural law. The state must recognize, define, and implement natural law, specifying the consequences to which it gives rise when applied to concrete situations. The authority of the state must appraise and evaluate the concrete reality which conditions the legal regulation, as well as take into account the requirements of the common good. These prudent judgments, however, must develop within the framework of natural law. Basave holds a personalist doctrine: law, state, and authority must always be in the service of the human person. Man has a free will. Authority, which of course is necessary, must be a means to protect and regulate freedom. Liberty, however, does not imply the legal right to act according to one's whim, but to be free to do what one ought to do. The state must never interfere with fundamental rights of man, which are the instrument for complying with man's ends, or with any form of legitimate spontaneity of individuals or of groups.

Mention must also be made of the young professor Francisco González Díaz Lombardo⁷¹ (National University of Mexico, Mexico City), who in his work develops a legal philosophy oriented in both Neo-Thomist sources and twentieth century ideas. He outlines an integral philosophy of law, which comprises juridical epistemology; speculative philosophy or ontology of juristics, including a juridical *Weltanschauung*, a juridical anthropology, a juridical theology, a juridical philosophy of history, and a philosophy of legal history; and a practical philosophy of law, which deals with legal values and purposes. Security, common good, and justice are the fundamental values for the law. The author, while following the traditional Thomist line, has benefited from some contemporary philosophies.

Father José Gallegos Rocafull,⁷² professor at the School of Philosophy of the National University of Mexico, has contributed several first-rate studies on the political, social, and legal doctrines of the great Spanish theologians and philosophers of the golden centuries.

In Chile natural law doctrine is represented by several scholars. Maximo Pacheco Gómez,⁷³ a brilliant professor of jurisprudence at the University of Chile (Santiago) who has been influenced in his teachings by the ideas of Giorgio del Vecchio and this writer, has made an important contribution to Catholic political

71. GONZÁLEZ DÍAZ LOMBARDO, INTRODUCCIÓN A LOS PROBLEMAS DE LA FILOSOFÍA DEL DERECHO (Mexico, 1956); CONSIDERACIONES GENERALES SOBRE LA DIMENSIÓN HISTÓRICA DEL DERECHO (Mexico, 1956).

72. GALLEGOS ROCAFULL, EL HOMBRE Y EL MUNDO DE LOS TEÓLOGOS ESPAÑOLES DE LOS SIGLOS DE ORO (Mexico, 1946); LA DOCTRINA POLÍTICA DEL P. FRANCISCO SUÁREZ (Mexico, 1948).

73. PACHECO GÓMEZ, POLÍTICA, ECONOMÍA Y CRISTIANISMO (Santiago, 1947); INTRODUCCIÓN AL ESTUDIO DE LAS CIENCIAS JURÍDICAS Y SOCIALES (Santiago, 1951).

philosophy. Another professor of the same university, Jorge Iván Hubner Gallo,⁷⁴ adheres to the Neo-Scholastic natural law, as developed by Cathrein and Rommen. Mention must be made also of the following professors of legal philosophy at the Catholic University of Chile (Santiago): Julio Philippi Izquierdo⁷⁵ (1872-1954), Carlos Domínguez Casanueva, and Rafael Hernández Samaniego. Mention must be made also of Jaime Ross⁷⁶ and of Julio Ruiz Bourgeois, a Christian existentialist.

Outstanding in the philosophy of law is Father Luis Negrón Dubuc, Dean of the Law School of the University of Los Andes (Mérida, Venezuela). Though basically a follower of the best and most flexible tradition of natural law, he has been deeply influenced by twentieth century legal philosophies.

At the present time in Cuba, Neo-Thomist legal philosophy is represented by two judges. One of them, Miguel F. Márquez,⁷⁷ has contributed several first-rate studies on various themes, among them Christian humanism as the basic value criterion for politics and laws; the axiological requirements of the human person, as inspiration for the developments of the law; the social function of property; legality and justice; and the sense of liberty according to St. Thomas. The other judge mentioned above, Juan José Expósito Casasús,⁷⁸ an enthusiastic disciple of Mariano de Aramburo, has written on some subjects of legal philosophy. He thinks that the concept of law is essentially bound to the idea of justice. Natural law pertains to the realm of conceptual ideality and guides human relations toward the common good and justice.

Very important is the contribution of Cayetano Betancur,⁷⁹ Colombian professor, who, substantially a follower of Neo-Thomist trends, is, however, strongly influenced by some contemporary philosophers, especially by Husserl's phenomenology and Scheler's theory of values, to the point that he considers the latter as the philosopher of our time richest in ideas and suggestions. Recently, Betancur has written a valuable *Introduction to the Science of Law*, in which he announces that a new spirit will develop in the world toward a better embodiment of Christian humanism, seeking for an effective solution to the problems of social co-existence.

Professor Abel Naranjo Villegas,⁸⁰ also of Colombia, follows a similar line. He harmonizes the principal ideas of Aristotelian-Thomist philosophy with some

74. HUBNER GALLO, *MANUAL DE INTRODUCCIÓN A LAS CIENCIAS JURÍDICAS Y SOCIALES* (Santiago, 1952); *MANUAL DE FILOSOFÍA DEL DERECHO* (Santiago, 1954).

75. PHILIPPI IZQUIERDO, *LA TEORÍA DE LA INSTITUCIÓN* (Santiago, 1942).

76. ROSS, *BASES PARA UNA FILOSOFÍA DE LA LEY* (Santiago, 1945).

77. MÁRQUEZ, *LA FILOSOFÍA DEL DERECHO DE HOY* (Havana, 1939); *EL HUMANISMO CRISTIANO* (Havana, 1941); *TRABAJO Y PROPIEDAD* (Havana, 1947); *BIOGRAFÍA DE LA LIBERTAD: EL SENTIDO DE LA LIBERTAD EN STO. TOMÁS DE AQUINO* (Havana, 1955).

78. CASASÚS, *FUNDAMENTO, ORIGEN Y DESARROLLO DE LA IDEA DEL DERECHO NATURAL* (Havana, 1941); *RELACIONES Y DIFERENCIAS ENTRE DERECHO Y MORAL* (Havana, 1944).

79. BETANCUR, *ENSAYO DE UNA FILOSOFÍA DEL DERECHO* (Nedellín, 1937); *INTRODUCCIÓN A LA CIENCIA DEL DERECHO* (Bogotá, 1953); *SOCIOLOGÍA DE LA AUTENTICIDAD Y DE LA SIMULACIÓN, SEGUIDA DE OTROS ENSAYOS* (Bogotá, 1955).

80. NARANJO VILLEGAS, *FILOSOFÍA DEL DERECHO* (Bogotá, 1947); *ILUSTRACIÓN Y VALORACIÓN* (Bogotá, 1952).

trends of the twentieth century, especially with some doctrines of Max Scheler. Though he approves of several of Scheler's theses, he warns of the danger of establishing a pure axiological theory without looking for a metaphysical foundation, which must be rooted in the real being, such as it was understood by Aristotle and St. Thomas. Betancur stands for an axiological humanistic personalism.

Rafael Carrillo,⁸¹ another Colombian professor, shows a vigorous influence of contemporary German philosophy—from Husserl, through Scheler and Hartmann, to Heidegger. In the field of legal philosophy he has gone far beyond the limits of Kelsen's pure theory of law; he has demonstrated that Kelsen's "basic norm" needs a further foundation and justification in a realm of values.

On the other hand, Jaime Vélez Sáenz,⁸² also a Colombian professor, has contributed a criticism of the theory of value of Scheler and Hartmann. The fact and the meaning of value can be fully understood only in the light of the "real relationships," which appear when things enter into mutual contact in the field of existence. The value of an ethical action consists of the relationship of coherence, or concordance, "between the content of such action and the objective situation." Values always presuppose objective relationships between various beings: accordance, harmony, agreement, concordance, complement, consonance, etc.

Carlos Azcárate y Rosell,⁸³ a Cuban judge, has contributed a series of studies on legal philosophy, among them one on juridical axiology in which he stands for a humanistic (personalist) thesis and develops its consequences for judicial practice.

Emilio Menéndez,⁸⁴ a justice of the Cuban Supreme Court, has written several important studies of legal philosophy. Some of them are devoted to juridical axiology in which he offers a development of value considerations, inspired by a sort of democratic humanism, and presents new perspectives for future developments of the law.

Fernando Álvarez Tabío,⁸⁵ also a Cuban judge, has written at least two interesting studies, one on human rights, the other on the relationship between justice and legal security.

Lino Rodríguez Arias Bustamante,⁸⁶ a professor of private law and jurisprudence at the University of Panama, combines the spirit of Christian ideals with several ideas of twentieth century philosophies. In some of his works he aims at harmonizing the law with the requirements of present social conditions. He emphasizes that man is always, and necessarily, a member of legal communities, which, while imposing upon him many obligations, enable him to develop his potentialities, and, consequently, to increase his real freedom.

81. CARRILLO, AMBIENTE AXIOLÓGICO DE LA TEORÍA PURA DEL DERECHO (Bogotá, 1947).

82. Vélez Sáenz, *Ontology of Values*, submitted to the Fifth Inter-American Congress of Philosophy, Washington, D. C., July, 1957.

83. AZCÁRATE Y ROSELL, ESTUDIOS DE FILOSOFÍA DEL DERECHO (Havana, 1940).

84. MENÉNDEZ, EL NUEVO DERECHO (Havana, 1946).

85. ALVÁREZ TABÍO, LEGALIDAD Y JUSTICIA (Havana, 1952).

86. RODRÍGUEZ ARIAS BUSTAMANTE, LA OBLIGACIÓN NATURAL: NUEVAS APORTACIONES A LA TEORÍA COMUNITARIA DEL DERECHO (Madrid, 1953); EL ABUSO DEL DERECHO (Mexico, 1955).

Juan Bautista Lavalle,⁸⁷ formerly professor of legal philosophy at the University of San Marcos, Perú, at first was sympathetic to the theories of Vanni. Later, however, he evolved toward a flexible philosophy of natural law. If there were no objective axiology, he says, then state and law would lack any true foundation.

Jose León Barandiarán,⁸⁸ the president of this university and an outstanding professor of private law, also gives courses on jurisprudence in which he develops an axiological doctrine. Mention should be made also of the Peruvian professor, Mario Alzamora Valdés, who, in his teachings of legal philosophy at the University of San Marcos, expounds a juridical axiology strongly influenced by Del Vecchio and by this writer.

Also to be noted is the contribution made to legal philosophy by Francisco Miró Quesada,⁸⁹ professor at the University of San Marcos. He is famous principally for his work in the field of formal logic of the law. As to problems of values, he tends to an objectivistic doctrine.

Very rich in important ideas are the numerous contributions made to legal theory and philosophy by Rafael Rojina Villegas,⁹⁰ a professor at the National University of Mexico and a justice of the Mexican Supreme Court.

LUIS RECASÉNS-SICHES' CONTRIBUTION TO JURIDICAL AXIOLOGY

Luis Recaséns-Siches⁹¹ (b. 1903), author of this article, a professor at the National University of Mexico, though he highly esteems the Scholastic natural law doctrine—especially Suárez' elaboration and the modern views of Renard—and has taken some inspiration from these sources, is not himself a Neo-Thomist. His views in general philosophy were shaped mainly under the direct influence of the great Spanish philosopher José Ortega y Gasset, along the line of the so-called "metaphysics of vital reason," a ratio-vitalistic philosophy of life—a sort of existentialism, not pessimistic or nihilistic, but optimistic and full of hope, which is quite compatible with Christian faith.

In my writings on legal philosophy I have dealt not only with axiological problems but also with questions of general theory of law, which I construct on

87. LAVALLE, *FILOSOFÍA DEL DERECHO* (1914); *FILOSOFÍA DEL DERECHO Y DOCENCIA JURÍDICA* (Lima, 1939).

88. LÉON BARANDIARÁN, *EL DERECHO Y EL ARTE* (1940); ABRAHAM LINCOLN, *CAMPEÓN DE LA JUSTICIA* (1941).

89. MIRÓ QUESADA, *CURSO DE MORAL* (Lima, 1940); *LÓGICA JURÍDICA* (Lima, 1956).

90. ROJINA VILLEGAS, *INTRODUCCIÓN Y TEORÍA FUNDAMENTAL DEL DERECHO Y DEL ESTADO* (Mexico, 1944); *TEORÍA JURÍDICA DE LA CONDUCTA* (Mexico, 1947); *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* (1949).

91. RECASÉNS-SICHES, *VIDA HUMANA, SOCIEDAD Y DERECHO* (1st ed., Mexico, 1940; 3rd ed., 1952); *Human Life, Society, and Law*, included in *LATIN AMERICAN LEGAL PHILOSOPHY* (Twentieth Century Legal Philosophy Series, Harvard University Press, 1948); *ESTUDIOS DE FILOSOFÍA DEL DERECHO* (3rd ed., U.T.E.H.A., Mexico, 1946); *NUOVA FILOSOFÍA DE LA INTERPRETACION DEL DERECHO* (Fondo de Cultura Economica, Mexico, 1956); *Ideas and Historical Conditioning in the Realization of Juridical Values*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND* (Oxford University Press, New York, 1947).

an ontological basis: law—human or positive law—belongs to the realm of objectivated human life, a better name for the ontological definition of culture. It is a human and, consequently, historic product, which constitutes a *normative* form of a *collective* character. Thus, law consists of a complex of meanings of a teleological structure, with a normative form, and intentionally directed toward certain values. The concrete contents of these meanings, however, are historical: the human interpretation of certain values, conditioned by the particular situation. This normative form of life is not individual, but collective, abstract, functional.

I distinguish, first, between law and morals. Morals evaluate conduct from the absolute viewpoint of man's supreme end, of the individual's authentic destiny. Law, on the other hand, is concerned with a person's conduct from the standpoint of its effects on other persons and purports merely to organize social coexistence and cooperation, being not the intimate conscience but the external web in which human interrelations develop. Whereas morals require freedom for their fulfillment, law may be imposed forcibly.

Secondly, I distinguish between law and the rules of social behavior (conventions). The rules of social behavior, though they have the status of norms and most frequently are provided with sanctions, can never be enforced. Law, however, is essentially characterized by its capability of enforcing in an inexorable manner the proper performance of conduct, or a substitute sanction provided in the norm itself.

Thirdly, I distinguish between law and arbitrariness. Whereas arbitrary mandate is one which is not founded on a general principle, applicable to all analogous cases, but responds to a simple *because*, to a caprice or whim, legal mandate is founded on objective norms or criteria which have validity for all similar cases.

I maintain that if justice and the other highest juridical values are indeed the axiological criteria which should form the basic inspiration of the law, and under which this must be judged, the law, positive or human, is engendered by the need for some certainty and security in social relations. Nevertheless, there is an illusion in exaggerating certainty and security, for these can be attained only to a relative extent.

As to juridical axiology, or valuation, I have sought to establish a sound foundation for it that will withstand critical examination. To this purpose, I have emphasized the necessity for proceeding with due order.

The very first problem consists in asking whether the search for juridical values does or does not make sense, whether all that can be said upon the problems of social life is contained in historic, positive norms, or if, on the other hand, it is possible to pass judgment on these problems from a viewpoint distinct from positive law. The answer is definitely yes; the search for juridical values has meaning. The analysis of the essential meaning of the law proves that the positivist negation contains an inherent absurdity. Positive law is a pattern of conduct of a normative character; a normative form, or norm, means that among various factual possibilities of conduct there are some that are *chosen* over the others. Such possibilities of behavior are chosen over the others because they are *preferred*, and this preference is founded upon a *valuation*. Although the norm

of positive law emanates from the mandate of an existent power, it cannot be in any manner understood as a mere fact; it is rather a human fact, and, as such, has meaning or significance. This meaning basically consists in the reference to a value. Or, to put it another way, the normativity of positive law would have no meaning if it did not refer to a value judgment, which is what inspires it. Social conduct is regulated in a certain way because it is believed that this is better than other possible regulations. Of course it may be that sometimes positive law fails in its intent, but, even when this happens, the intent to convert values into reality is inherent in the law. It is matter then of a good intention that has failed of its purpose, but as intention it exists essentially as a meaning of the norm. By this it is demonstrated that if there did not exist something above the bare reality of the positive norms, those same positive norms could neither exist nor finally be understood. Thus, it may be affirmed categorically that there are criteria of value capable of orienting—and consequently of judging—positive law, because otherwise positive law could not exist. Now, since positive law does exist, we must accept, therefore, the existence of criteria with which to evaluate juristics. This argument in justification of juridical axiology has the advantage over other arguments that it is neutral, namely, that it does not imply the previous admission of other philosophical assumptions, and, consequently, it is fully valid against the positivist attitude. I do not reject other reasons to justify juridical axiology, such as for example, the reference to God, to a realm of values, etc. I think, however, that my argument, which leaves out any reference to philosophic doctrine extrinsic to this matter, has a wider scope than any other, and thus is better fitted to refute positivist or skeptical negation.

The second problem which follows is to determine whether the basis of juridical axiology is empirical, or whether, on the contrary, it has necessarily to be *a priori*. Radical empiricism applied to the problem of legal valuation is tantamount to a skeptical negation. This radical empiricism has already been refuted by the justification of juridical axiology and the need for it. There are, however, other issues of juridical empiricism, which in spite of the desire to limit knowledge to the sources of experience, have maintained the possibility of establishing a system of values based upon experience (e.g., Herbert Spencer, Adolf Merkel). These attempts result not only in an error but also in an absurdity. The world of pure phenomena, without adding to it anything that is not natural phenomena, can never furnish a criterion of preference or valuation; for from the exclusive angle of the science of nature, what we call health is as natural as what we call sickness, since both are facts which have their respective causes. To distinguish between health and sickness, we must compare certain data of experience with certain ideas of value and purpose. Empiricism cannot provide any basis for valuation. It is important to notice that this conclusion simply means that the *root* or *primary foundation* of all axiology is an *a priori*, but does not in any way signify that value judgments as to law exclude other ingredients of an empirical origin. It is obvious that to judge a historical law, or to elaborate a juridical program, pure ideas of values are not sufficient. It is necessary that these valuing criteria should be combined with the experience of the realities to which the law or the legal program is related.

After it has been shown that the basis of juridical valuation is an *a priori*, we have to ask what class of *a priori* it is: whether it is a subjective *a priori* or an objective one. I reject axiological subjectivism (Meinong, Ehrenfels, Loening, etc.) on the basis of the arguments given by Husserl against psychologism, and also on the basis of some of the reasons developed by Max Scheler and Nicolai Hartmann for justifying the objectivity of values. Though I reject psychologistic subjectivism, I do not, however, go so far as the thesis of abstract objectivity, but hold that the objectivity of values, which are mere projections of mental mechanisms or reactions, is immanent in human life. Values are objectively valid meanings, but they are meaningful to us only within the realm of human life. Values are not created by man; rather, man has to recognize values. Moreover, the significance of values is related to human existence. It could be said that God thinks of those values as being objectively valid, but man only within the realm of human life and not as abstract entities unrelated to human creatures.

In addition, it is necessary to go further: values, which are objective, yet only meaningful within human life—within the context of human existence—are furthermore related to the context of concrete situations.

The last statement helps us to approach and solve the problem of the historicity of juridical ideals. This is the most crucial problem with which legal philosophy has been dealing throughout its development for twenty-four centuries. On the one hand, we find values, which are objective, *a priori* ideas. On the other hand, we find history, with a great variety of regimes and institutions, distributed in space and time. This variety and this change are not only a testimony of many different facts, but they also bring with them normative demands for diversification in every given situation and at every concrete stage. Is there any method for harmoniously reconciling what *a priori* criteria demand with what the concrete circumstances of every time and place require? This is the question concerning not merely the historicity of law, which is a factual datum, but also historicity of juridical ideals, a problem of legal philosophy, of juridical axiology. As to this problem, I have learned much from the Thomist doctrine, re-elaborated by Suárez. I think, however, that nowadays it is possible to obtain a more accurate insight into this question, thanks to several new developments in twentieth century philosophy, e.g., metaphysics of human life, ontological analysis of man's historical condition, and phenomenological exploration of the plurality of values, vocational and situational. At first sight, it may seem that it is a question of harmoniously uniting two elements of a very different character: *a priori* ideas of necessary validity, with empirical facts, with diverse, unstable, contingent circumstances. The problem, however, does not consist of this, but of something else: the problem is to unite the materialization of the normative consequences of values with the concrete characteristics of each historical situation where those consequences must be realized. It is a problem of realization, of materialization. Now, since values are realized in human life, and since human life is essentially historical, the realization of values must also be historical. This writer has outlined five justified sources of historicity for ideal programs of law. Four of these sources are derived from the conditions of realization, and the fifth is based on a diversity of concrete values.

The first source of historicity for juridical ideals is the fact that social reality is diverse and changing. The matter in which, with which, and for which, the requirements of the juridical values must be realized is different in every case. The diversity and the change of social matter affect the realization of juridical values, and will account for different norms according to each situation. At first sight this consideration seems to coincide with some thought of Scholasticism (St. Thomas and Suárez), or with Stammler's doctrine as well. There certainly is a similarity between these two theories and mine. I am concerned, however, with the problem of fulfilling value requirements in human life, and, in addition, I stress the fact that those values are not all necessarily formal; many of them actually have a concrete content.

The second source of historicity for juridical ideals consists in the diversity of obstacles which in each situation must be overcome in order to materialize the requirements of value in such situation—obstacles which frequently explain and justify the means chosen, that is, the various institutions which are shaped.

The third source of historicity consists in the lessons drawn from practical experience, from trial and error, as to the adequacy of the means to materialize a value in a concrete situation.

The fourth source consists in the priorities raised by the gradations of urgency of the social needs which each historical situation brings up. Men cannot realize everything at one and the same time.

The fifth source of historicity does not derive from problems of realization or efficacy, but has its origin in the multiplicity of values which may be relevant to the law. Values, although they have an objective worth, contain in themselves the references to the concrete situations to which they are intrinsically related, and for which they give rise to specific norms. There certainly are ethical and juridical values which refer to the universal human, and, therefore, engender ideal norms of general application for all men and for all societies. There are, however, other values which also have objective worth and contain in their very core particular reference to the situation of a person, a nation, or a historical condition. There is a common, generic moral that includes all men and constitutes the indispensable minimum for all. Yet, in addition, there is a series of vocational and situational morals—for each person, for each condition—which does not contradict or lessen the general moral, but which complements it. The same applies to the juridical field: corresponding to the multiplicity of the national and supranational types, and to the variety of historical conditions, there is a multiplicity of particular programs. There are, of course, general juridical values which give rise to universal ideal norms, valid for all collectivities, for all times, and for all situations. Nevertheless, in addition there are particular values, corresponding to the multiplicity of historical conditions, of the national and supranational types, which engender particular norms for each community and each situation.

This writer has drawn attention to the fact that in analyzing the problem of justice we are confronted by a baffling paradox. On the one hand, a review of all doctrines on justice proves that there is a basic identity throughout all the schools: the idea of justice as a pattern of harmony, of proportional equality, as

a harmonious means of exchange and distribution in human interrelations, either between individuals, or between the individuals and the community; or, in other terms, to give each one his own or what is due to him. On the other hand, it is a well-known fact that controversies on the problems of justice have been, and still are, most ardent. It so happens, however, that the task of establishing equality between what one gives and what one receives, and of attaining proportionality in the division of benefits, functions, and public offices, as well as of public duties or burdens, presupposes criteria for the measurement or appraisal of the realities which must be equalized or harmonized. The mere idea of equality, proportionality, or harmony does not provide us with any criterion of measurement, does not give us the practical principle by which to determine this proportional or harmonious equality. It does not show us what is the viewpoint from which equalization should be considered. It is not sufficient to say *equality* or *proportion*. Equality in what? Equality from what standpoint? And how? What are the relevant facts to be taken as the basis for proportion or harmony? Nor is it sufficient to say that each one must be given "his own," "his due," because this principle does not define what ought to be considered as particularly one's own, or one's due. Agreement exists that equal things or situations should be treated in an equal way, and unequal things or situations should be treated differently, according to their diversities. Agreement also exists that persons who are equals should be treated in an equal manner, and those who are unequal should be treated differently, according to their diverse merits. But at one and the same time disagreement exists as to the viewpoints for appraising both equalities and inequalities. This is the problem: to investigate the values relevant to harmonization or proportional equalization, or to clarify what is due to each one.

Consequently, the very core of the problem of justice consists in determining the values which must be taken into account by the state and the law. It consists, moreover, in determining the means of judgment which justice assumes or implies. It consists, finally, in ascertaining the rules of hierarchy among such values, i.e., investigating what values have priority over others, as well as formulating the mutual interrelationships among these values. It is according to the values relevant to the political organization and to the law, and according to the hierarchical relations among these values, that harmony—equivalence and proportionality—must be established in interindividual relations, as well as between the individual and the state.

First of all, attention must be given to the values by which, always and necessarily, the law must be inspired, such as dignity and liberty of the individual, values which give rise to ideal norms of a general scope, applicable to everyone, and to every case and situation.

In the second place, we should state which values, although very high in the axiological hierarchy, must not be related to the law or to the political organization—such as values connected with sanctity, religious faith, and moral purity—because these values can be realized only by the individual's free and voluntary decision, and never by compulsion.

In the third place, we must investigate what other values, in which cases, and

under what conditions, might be, or should be, taken into account in the shaping of the law. For example, on some occasions the law will have to draw inspiration from viewpoints founded upon scientific values, when attempting to set up a department of health or to draw up a health statute.

Still, the principal problem consists in clarifying the relationships of hierarchy among the values relevant to the making of just law.

The principal problem involved in this theme is to know what is the human person's value in relation to the other values which can be taken into consideration by the law. The question is whether the individual human person must be taken as a mere means to the service of the state (*transpersonalism*), or whether, on the contrary, the state and the law, like all other cultural products, must be appraised only as means to the service of the individual (*humanism* or *personalism*). This means finding the respective rank or hierarchy among the various values in relation to the various substrata in which each kind of value materializes: whether the highest values are those which are shaped in social and political institutions or other cultural products, or whether, on the contrary, the highest values are those which can be embodied only in the spiritual person by his free conduct, having priority over all the other values which materialize in social and political organizations and in culture.

I have provided reasons, strictly philosophical, to prove that *humanism* or *personalism* is the only correct doctrine. It should be noticed that no doubt is cast upon the fact that the state, like all other social institutions, must embody in itself very important values. This is taken for granted. The question here formulated is concerned with something else: whether values which materialize in the state are its own, exclusively pertaining to the political organization, or, on the contrary, are only relative values, which function as conditions, as means for the individuals, in order that human beings may comply with the values which must be fulfilled in their own personal conscience.

The philosophical reasons which I give to justify *humanism* or *personalism* are the following:

1) Although idealism has been superseded, one of its views survives as a firm truth, namely, the basic fact that my individual consciousness constitutes the center, support, and proof of all other realities. I am not simply a thing among other things, for at least I am the witness of all the other realities in the universe. Actually the components of my world are objectively real. Nevertheless, the individual consciousness acts as a selective sieve, and as an organizing perspective, of the ingredients of my world. Out of the infinity of components which make up reality, the person takes a certain number, whose form and content fit the structure of his mind and the texture of his interests and preferences, and with these ingredients he builds up his world. The perspective created by man is inescapable and necessary. The world *necessarily* appears as a correlative of the self, as *my world*.

2) Human life—which consists of the copresence of the subject with his objects, of the self with his world, of my world with me, as inseparable, correlative elements in a reciprocal relation of dependence—is the first base or point of departure of philosophy. Moreover, it is also the fundamental reality, that is, the

reality within the frame of which occur all other realities, the reality to which all the other realities are related. Therefore, human life, or existence, must be given priority in a view of the universe, since, whether we like it or not, human existence is necessarily its foundation and center. Consequently, the realization of values is meaningful within and for human life.

3) It should be remembered that the authentic or genuine human life is always an individual's life. In fact, society is not an entity in and for itself, with an existence apart from that of the individual men who form it. Society is not a subsistent reality. The only substantive realities are the men who compose society.

4) Culture, as the outcome of a longing for, or purpose to, the fulfillment of values—goodness, justice, truth, beauty, utility, power, wealth, etc.—has meaning only for man, who does not possess these values in full measure, and who, nevertheless, feels the need of exerting himself to their conquest. Therefore, culture cannot be meaningfully predicated of unconscious nature or of God, who is by essence absolute Wisdom and Truth, Total Good, Supreme Justice, Infinite Power; nor has it meaning for animals, which, though they lack intellectual knowledge, moral virtue, artistic vocation, are not aware of these deficiencies, and do not feel any need of, or yearning for, such values. Thus, culture appears as having full meaning only for man, as a human function.

5) In the axiological hierarchy, those values that are to be fulfilled within the individual conscience, namely, moral values, and those that lift the individual spirit, have a rank higher than values that are to be materialized in things such as works of art, tools, etc., higher also than values to be embodied in social institutions, including nation, state, and law. Objectivated culture—art, science, technology, economy, law, government, etc.—has meaning and justification solely as a means to man's service, instrumental for man's spiritual improvement. Culture's functions must consist in uplifting the mind, refining the sentiments, and improving the conduct. Furthermore, the individual person is a free being. Society and the state must recognize the individual's moral autonomy and never treat him merely as a part of the social whole. A member of society, the individual is at the same time superior to society, because he is a person, which society can never be.

Recognition of this point is not tantamount at all to an attitude of individual selfishness or any lack of social responsibility. This principle—of the higher rank of individual values—does not preclude the maxim which gives priority to the common good over the individual interests. On the contrary, the above principle must be complemented with the maxim which rules that private interest must surrender to the common good. Between these two principles there is no incompatibility, because the common good must be understood principally as the satisfaction of the greatest proportion of interests of all persons as far as it is possible, with the least sacrifice, the least friction and the least waste—to use the words of Roscoe Pound. In addition, common good also includes those general conditions which facilitate the best satisfaction of those interests. Still, it is true that among all human interests, the first rank must be given to those interests which seek to bring about the realization of values that can be embodied only in the individual by his free decision.

I recently published a book, *A New Philosophy of Legal Interpretation*, in which I emphasize four points: (1) Positive law does not consist of logical truths, to be treated by purely logical methods of drawing consequences from the rules by syllogistic deduction, but rather of *human purposes* historically conditioned. A legal rule is a *means* chosen to bring about certain effects in a social situation, precisely those effects which are considered as just and adequate in a certain time and place. (2) The legal order does not consist solely of general rules, but also of individualized norms—judicial decisions and administrative resolutions. Decisions are the only juridical norms that are perfect, for they are the only norms which can be compulsorily enforced. (3) The judicial function, as well as administrative action, is always *creative*. These do not consist in mere *application* or development of the content of the general rule, but add determinations which are not included in the general rule. (4) In the light of the three foregoing considerations, it becomes clear that traditional logic (of such as Aristotle, Bacon, and John Stuart Mill), which is the pure logic of the rational (mathematics), has little application to judicial decisions or to lawmaking. There is, however, another province of logic, different from the pure logic of the *rational*, namely, the logic of the *reasonable*, which is concerned with human action. This new material logic of the *reasonable*, which I have begun to explore, has, among others, the following characteristics: (a) It is conditioned by the concrete social reality in which it operates. (b) It is a process which includes extensive use of concrete value judgments. (c) It is determined by reasons of adequacy, between social reality and values; between values and ends (valuable ends); between ends and concrete conditions (ends susceptible of being carried out); between ends and means as to the fitness of the means; between ends and means as to the ethical rightness of the latter; and between ends and means as to the efficacy of the means. In addition, the logic of the reasonable is oriented also by the lessons drawn from vital and historical experience, individual and social, from trial and error.

THE PERSPECTIVISM AND DOCTRINE OF VALUE OF GARCÍA MÁYNEZ

Eduardo García Máynez,⁹² a professor of jurisprudence at the National University of Mexico, one of the outstanding legal thinkers in Ibero-America, has made many contributions to the general theory of law, among them a particularly clear definition of liberty as a legal right: that is, legal liberty consists in a person's right, subject to legal order, to exercise or not to exercise certain of his rights. In addition, García Máynez is one of the most successful pioneers in exploring the new domain of formal logic and ontology of juristics, so much so that his work in this field has become world famous and is considered as a model. He is also

92. GARCÍA MÁYNEZ, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* (6th ed., Mexico, 1956); *LA DEFINICIÓN DEL DERECHO: ENSAYO DE PERSPECTIVISMO JURÍDICO* (Mexico, 1951); *LOS PRINCIPIOS DE LA ONTOLOGÍA FORMAL DEL DERECHO Y SU EXPRESIÓN SIMBÓLICA* (Mexico, 1953); *LÓGICA DEL JUICIO JURÍDICO* (Mexico, 1955).

Director of the Institute of Philosophy of the same university and has done considerable work in the realm of general philosophy, especially in ethics. In the field of values he has done some research, chiefly inspired by the school of Scheler and Hartmann, in which he has developed a juridical axiology. Moreover, García Máñez has contributed a new approach to the problem of the definition of law. If we look at all the definitions which have been given to law, we shall realize that those definitions do not refer to one and the same object, but must be classified in three groups, because among those definitions reference is made to three different objects, namely: *formally valid law*, the law which is valid within a positive legal order and according to that same order; *natural law*, i.e., just law, intrinsically or inherently valid law, law which realizes value requirements; and *efficacious law*, law which is effectively observed and complied with, real law from a sociological viewpoint.

Then García Máñez analyzes the various types of legal rules which may exist by taking into account these three different approaches and combining them. The three definitions of the law concur in those rules which are formally valid, ethically justified, and, in addition, really efficacious. There are, however, six other types of rules, in each of which one or two of those characteristics are lacking. It must be noted that natural law is by itself neither formally valid law (state law) nor effective law (norms actually fulfilled). However, García Máñez proposes a theory, which, beyond classic natural law theory and beyond positivism—both formalistic (Kelsen) and sociological—may bridge the three different meanings of the word “law,” or, to be more accurate, the three different objects meant by this word. There is a dialectical relation between the idea of a just order (complying with the requirements of natural law) and the idea of a social organization, which alone is authorized to formulate and apply the rules of law. The making of positive law is axiologically determined by ideal principles. Law in force in modern civilized nations is to a large extent “jusnaturalistic gold, which the state has coined as legal tender.” Moreover, it should be noted that there is no incompatibility among the three definitions of law, because it is possible that one and the same rule be formally valid, just, and effective. As a matter of fact, this case is the “desideratum.” What sometimes prevents the concurrence of these three attributes (formal validity, justice, and efficacy) is the fact of the limitations of the evaluating conscience. The aim to realize values in a certain given historical situation leads to the setting up of a political organization of society. It so happens, however, that when such an organization has been established, it claims a monopoly in the making and application of the law. This condition is responsible for the fact that the criterion of formal validity is substituted for the criterion of material justice. This divergency is resolved when the three criteria happen to concur in one and the same legal rule. The efficacy of the juridical ideal in a certain historical situation may be considered also as the fulfillment of a teleological relationship, in which the “purpose” is constituted by this ideal, in which the “means” is constituted by the legal organization of society, and in which the realization of the purpose is identical with the legal system in force.

García Máñez applies the axiological objectivism of Scheler and Hartmann to juridical values. Values are a priori and objective ideas. In addition, values

are principles which imply the condition of possibility for ethical phenomena. Man's ethos is neither a conceptual structure nor an "essence." Therefore, values must transcend the borders of their conceptual being, in order to be introduced into the real field of human activity. For this reason, values, which basically are ideas, act, in addition, as principles within the real conscience that evaluates. Thus, values may become determining factors in judgments of approval or disapproval, as well as in judgments of attribution and responsibility. Values, however, lack the power to act by themselves, to introduce themselves into the actual realm of conduct. They need a factual agency, which, recognizing their ideal requirements, converts them into action.

The fact that juridical values are objectively valid does not preclude the condition that juridical values possess various forms of relativity. It must be noted that relativity does not mean relativism. The latter implies that values depend on the changing opinion of men, whereas the former, relativity, merely means that the value content is referred to certain real conditions which are variable. According to García Máynez, the various relativity forms of juridical values may be classified into three groups: (1) *Relativity to persons*. First of all, juridical values are relative to man. Second, they are relative to men, bilaterally connected. (2) *Relativity to concrete situations*. This relativity arises from, and is conditioned by, certain specific facts which determine the obligation for realizing certain juridical values. Natural law is varied and changing, not because values change, but because the matter in which values must be embodied is variable. (3) *Relativity to space and time*. Whereas values in themselves are *not in space* and *not in time*, the normative requirements flowing from them are *conditioned* by both space and time.

García Máynez considers juridical security as a functional value, i.e., as instrumental, as belonging to the category of means. The substantive value is justice. As to the problem of whether individual or collective values must have the primacy, García Máynez rejects both collectivism and individualism, because each one is purely unilateral. On the one hand, the community, which is only an abstraction, must recognize that the individual, as a person, is superior to society; and furthermore the community must realize that it can assert itself only through the individuals. Yet we must understand that the individual can realize himself only within society, using the cultural legacy and benefiting from his fellow men's help. The antagonism between individual and collective values can be solved only by finding a formula for harmonizing the conflicting values. We must understand that above the selfish individual values and the collective values there is another set of values—the values of man's moral personality. The principle of "neither the individual nor the community, but society based upon justice" has the following consequences: (1) A legal rule which encroaches upon the rights which man has as a moral person may never be justified. (2) All men are equal as to the inherent dignity of the human person; moreover, fundamental rights are equal for all men. (3) Personality, on the other hand, is a legitimate source of inequality, as each person has different abilities. Consequently, each person must undertake the functions and responsibilities for which he is especially qualified, and each person must be given according to his own merits. Justice

requires equal protection of fundamental rights for everyone, and further requires a harmonious structure among the different capabilities and responsibilities of individuals, who, being equal as to personal dignity, are, however, unequal as to their abilities.

THE PHENOMENOLOGICAL PROLEGOMENA
OF JUAN LLAMBÍAS DE AZEVEDO

Juan Llambías de Azevedo,⁹³ a professor of jurisprudence at the University of Montevideo, Uruguay, is one of the leading philosophers in the Spanish-speaking world. His contribution, though deeply influenced by Husserl's phenomenology as well as by the school of Scheler and Hartmann, is strongly original. In his principal systematic work, up to now—an introduction to philosophy of law—he deals with the following five problems: (1) *The essence of positive law*, which, as a collective object, is defined as a bilateral and retributive system of rules proposed by man to regulate the social conduct of a group of men as a means for realizing the values of the community. (2) *The essence of the single legal rules*, being such rules classified into two groups: rules which establish an obligation and rules which establish a power. The author clarifies a series of axioms concerning the relationships between these two kinds of rules. (3) *The real and actual existence of law*, which consists in its "validity," i.e., in the condition of "being in force." Validity is the form in which law exists. The author distinguishes between *positivity* and *validity*. Positivity means an essential note of the law: to have been "posited," made by man. Validity is something more than positivity. It is not identical with efficacy, although law cannot be valid without a minimum of efficacy. Validity is normativity "in force." (4) *Ontology of the law*, the place of the law in the general sphere of objects. The author classifies the objects of the universe from the viewpoint of temporal existence. There are nontemporal, immutable objects, which are what they are, and how they are, permanently, e.g., essences, numbers, geometrical figures. On the other hand, some objects begin and end; they have a development in a non-reversible direction; they stand in time. Temporal or real objects are subclassified into the following categories: (a) *temporal objects in space* (corporeal); (b) *temporal objects without space*, psychological (perceiving, thinking, valuing, etc.); and (c) *spiritual objects*, or contents—thoughts, judgments, all the contents of art, science, ethics, etc.—as distinguished from the psychological acts in which they are given, manifesting themselves in objectively outlined forms. Law is a temporal object, noncorporeal, nonpsychological, spiritual. (5) *Juridical axiology*, belonging to the field which Llambías de Azevedo calls "aporetics of the law"—the field of the philosophical problems raised by positive laws.

In his introduction to juridical axiology, Llambías de Azevedo considers two basic problems: (1) What is the content of the law in relation to the content of

93. LLAMBÍAS DE AZEVEDO, *EIDÉTICA Y APORÉTICA DEL DERECHO: PROLEGÓMENOS A LA FILOSOFÍA DEL DERECHO* (Buenos Aires, 1940); *EL SENTIDO DEL DERECHO PARA LA VIDA HUMANA* (Buenos Aires, 1943); *LA OBJETIVIDAD DE LOS VALORES ANTE LA FILOSOFÍA DE LA EXISTENCIA* (Rev. de la Fac. de Humanidades, Montevideo, 1952).

values? (2) What *should* be the content of the law in relation to the content of values? Positive law is a mediation between the values of the community and human conduct. To some extent values are realized in the juridical norms. But man, in making law, must be guided by those same values. Then, we meet the problem of whether the making of positive law is justified or not. It is justified, because the normative essence of the law implies that man does not always realize spontaneously or docilely. This is true not only in respect to the regulated men; the same deviation may affect the regulator. The problem, then, is: who ought to be those who dictate the law, in order that the law dictated should be adequate for the values of the community? In what conditions must the lawmakers be placed, what qualities must they have, in order to prevent deviation from their true end, in order that the law may be just? Thus, what is sought is the political equivalent of the values of the community, especially the political equivalent of justice: the question of the ideal community, and of its form of government. Llambías de Azevedo thinks that values are objective essences, having an internal, axiological order, a hierarchic structure. Juridical values are inferior to religious, moral, and logical values; but they are superior to the values of biological life and to economic and technological values.

COSSIO'S EGEOLOGICAL SCHOOL: ITS FOLLOWERS AND ITS CRITICS

The Argentine professor, Carlos Cossio,⁹⁴ is responsible for a new legal philosophy that he calls the "egological theory of law," which has gained several adherents in his country, as well as in other South-American countries. The point of departure of Cossio's first thinking was Neo-Kantian legal philosophy (Stammler and Kelsen). Later on, he received the influence of phenomenology, Heidegger's existentialism, and various other trends. Cossio's theory is an attempt to go beyond Kelsen without abandoning him. Philosophy of law has the following tasks: juridical ontology; formal juridical logic; and transcendental juridical logic. Law is a cultural object, and, therefore, unlike conceptual and real objects, it is not neutral in respect to values. Cultural objects must be grasped by an empirical dialectic method, the method of comprehension. Cultural objects are classified into two categories: (1) *Objects of the world* (objectivated products of man's activity); and (2) *Egological objects*, i.e., human action, in which human conduct, as such, is articulated. Law is an "egological object," is *living human life*, is conduct; it is human conduct in its intersubjective interference: as obligation, as legal right, as violation, or as application of a sanction (implementation,

94. COSSIO, *EL PROBLEMA DE LA COERCIÓN JURÍDICA Y SU ESTADO ACTUAL* (Buenos Aires, 1937); *LA PLENITUD DEL ORDENAMIENTO JURÍDICO, Y LA INTERPRETACIÓN JUDICIAL DE LA LEY* (Buenos Aires, 1939); *EL SUBSTRATO FILOSÓFICO DE LOS MÉTODOS INTERPRETATIVOS* (Santa Fe, 1940); *LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO* (Santa Fe, 1941); *CIENCIA E INTERPRETACIÓN* (Buenos Aires, 1944); *LA TEORÍA EGOLÓGICA DEL DERECHO* (Buenos Aires, 1944); *EL DERECHO EN EL DERECHO JUDICIAL, PANORAMA DE LA TEORÍA EGOLÓGICA DEL DERECHO* (Buenos Aires, 1949); *TEORÍA DE LA VERDAD JURÍDICA* (Buenos Aires, 1954).

or penalty). The science of law is the science of juridical experience. Since human conduct cannot be neutral to values, legal science must concern itself with juridical evaluation. Cossio does not, however, think that law is a mediation between values and human conduct. On the contrary, he thinks that values are immanent in the law; valuation is a component of the law, in addition to the logical-formal components and to the contingent-material ingredients of the law. Legal values are positive values, values inherent in the concrete positive law; they are *data given* to the jurist in the positive law. Nevertheless, Cossio admits there is the possibility of bringing up another different problem of value at a higher level, at a level above the positive values materialized in a concrete positive law, namely, the problem of a pure juridical axiology, which consists in inquiring whether the actual ideals of a positive legal system do correspond to the "true ideals," or do not. This problem, however, does not primarily interest the jurist as such; it is a problem of metaphysics concerning the theme of an objective realm of values. Anyway, there exists an undeniable fact: sometimes man rebels against the law in force, for the sake of justice. Cossio has recently published a series of studies which contain further analyses of values.

Cossio's ideas have exercised a strong and widespread influence throughout Ibero-America, and especially in his country. Among the numerous scholars deeply influenced by the philosophy of Cossio, the following must be mentioned: Enrique R. Aftalión,⁹⁵ who first followed some trends of Del Vecchio and Stammeler, and in addition has contributed some original ideas; Carlos García Olano and José M. Vilanova, co-authors with Aftalión of an excellent book on jurisprudence;⁹⁶ Ernesto E. Borga,⁹⁷ who has written two works of high quality; Federico Llovet;⁹⁸ Julio Cueto Rúa,⁹⁹ a brilliant visiting professor at Southern Methodist University, Dallas, Texas; Mario Alberto Copello;¹⁰⁰ J. Francisco Linares;¹⁰¹ and Juan Ramírez Gronda.¹⁰² In addition, mention should be made of two of Cossio's disciples who have applied the "egological theory of law" to particular problems of law: Laureano Landaburu,¹⁰³ who produced an interesting study on crime as "structure" (in the sense of Dilthey); and Lorenzo Cornelli, author of an important book, *Time and Law*.

95. AFTALIÓN, *TEORÍA DE LA INSTITUCIÓN: UN ENSAYO DE SOCIOLOGÍA Y FILOSOFÍA JURÍDICAS* (Buenos Aires, 1935); *CRÍTICA DEL SABER DE LOS JURISTAS* (Buenos Aires, 1951); *INTRODUCCIÓN AL DERECHO* (with the cooperation of F. GARCÍA OLANO and JOSÉ VILANOVA) (Buenos Aires, 1956).

96. See Note 95. VILANOVA, *VIGENCIA Y VALIDEZ DEL DERECHO* (Santa Fe, 1952); *IDEA Y REALIDAD DEL DERECHO NATURAL* (Buenos Aires, 1952); *EL DERECHO COMO OBJETO CULTURAL* (1953).

97. BORGÁ, *PRINCIPIOS MATERIALES DEL CONOCIMIENTO JURÍDICO* (1943); *CIENCIA JURÍDICA O JURISPRUDENCIA TÉCNICA* (Buenos Aires, 1943).

98. LLOVET, *LA LÓGICA JURÍDICA Y LA INTERPRETACIÓN DE LA LEY* (Santa Fe, 1942).

99. CUETO RÚA, *LA RESPONSABILIDAD DE LAS PERSONAS JURÍDICAS* (1945); *EL ABUSO DEL DERECHO*.

100. COPELLO, *LA SANCIÓN Y EL PREMIO EN EL DERECHO* (Buenos Aires, 1945).

101. LINARES, *LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO DE CARLOS COSSIO; EL DERECHO NATURAL Y SU INVOCACIÓN EN LA JURISPRUDENCIA*.

102. RAMÍREZ GRONDA, *DICCIONARIO JURÍDICO* (Buenos Aires, 1942).

103. LANDABURU, *La Justicia y otros Valores Jurídicos*, *BOL. DE LA BIBL. DEL CONGRESO NACIONAL; El Delito como Estructura*, *REV. DE DRO. PENAL* (Buenos Aires, 1954).

Ambrosio Gioja,¹⁰⁴ a professor of philosophy of law at the University of Buenos Aires, was earlier a direct and close collaborator of Cossio. In the last few years, however, he has thoroughly accomplished a critical analysis of Cossio's "egological theory" and has considerably deviated from it. His doctoral thesis is an interesting investigation of the metaphysical foundation of the law in Kant. Another study deals with the "architectonic" aspects of Kelsen's pure theory of law. In further writings, as well as in his teaching, he has made outstanding contributions to the foundations of legal science and to the phenomenological analysis of both the legal rule and the legal order, taking as a foundation certain ideas of Husserl. Gioja has also devoted some attention to values, following a humanistic trend.

Genaro R. Carrió and Reno Entelmann were followers of Cassio's school, but later they evolved toward a critical attitude to "egologism," and have made some new contributions oriented toward the new developments of Gioja. Manuel Herrera Figueroa¹⁰⁵ in his early publications was much influenced by Cossio, but later he turned to classic sources in his studies on values and justice.

Rafael Pizzani,¹⁰⁶ formerly president of the University of Caracas, though to some extent influenced by Cossio, formulated serious objections to the "egological theory." He has made some other contributions to several themes of jurisprudence.

Among the objectors to Cossio's interpretation of Kelsen, Jaime Perriault¹⁰⁷ is one of the most effective.

OTHER SOUTH-AMERICAN CONTRIBUTIONS TO JURIDICAL AXIOLOGY

Francisco Romero¹⁰⁸ (universities of Buenos Aires and La Plata), undoubtedly the highest ranking philosopher in South America, is not a jurist himself. However, his outstanding works, especially those concerned with values and philosophical anthropology, furnish some sound foundations for juridical axiology. In addition, he has in his studies dealt with several basic problems of society, politics, and law, in a most inspiring manner.

Risieri Frondizi,¹⁰⁹ a professor at the same universities, has presented new

104. Gioja, *El Postulado Jurídico y su Naturaleza Sintética a priori*, REV. DEL COLEG. DE ABOGADOS (Buenos Aires, 1954); *¿Corresponde Incluir en el Plan de Estudios de la Escuela de Abogacía Materias Filosóficas?* (*Ibid.*, 1954).

105. HERRERA FIGUEROA, *ACERCA DE LA CONDUCTA JURÍDICA* (Buenos Aires, 1952); *EN TORNO A LA FILOSOFÍA DE LOS VALORES* (Tucumán, 1952); *JUSTICIA Y SENTIDO* (Tucumán, 1955).

106. PIZZANI, *PRINCIPIOS GENERALES DEL DERECHO* (Caracas, 1941); *REPAROS A LA TEORÍA EGOLÓGICA* (Santiago de Chile, 1951).

107. In several articles published in *LA LEY* (Buenos Aires, 1949).

108. ROMERO, *FILOSOFÍA CONTEMPORÁNEA* (Buenos Aires, 1941); *PAPELES PARA UNA FILOSOFÍA* (Buenos Aires, 1945); *TEORÍA DEL HOMBRE* (Buenos Aires, 1952); *ESTUDIOS DE HISTORIA DE LAS IDEAS* (Buenos Aires, 1953); *SOBRE LA FILOSOFÍA Y AMÉRICA* (Buenos Aires, 1953).

109. FRONDIZI, *SUBSTANCIA Y FUNCIÓN EN EL PROBLEMA DEL YO* (Buenos Aires, 1952); and the papers on values submitted to the Fourth and Fifth Inter-American Congresses of Philosophy, held respectively in Santiago de Chile (July, 1956) and Washington, D. C. (July, 1957).

axiological perspectives which I deem to be an important advancement in the philosophy of values.

Sebastian Soler,¹¹⁰ prominent Argentine scholar, is famous for both his studies in the field of penal law and his outstanding contributions to legal philosophy. The latter comprise, among others, essays dealing with the faith in the law, the individualized norm, the present crisis in relation to law and politics, and the juridical values. As to juridical values, Soler, going beyond both objectivism and psychological subjectivism, recalls the reservations made by Aristotle when he differentiated between theoretical and practical rationality; and, along this line, he distinguishes between moral values and social evaluations in force. Juridical values belong to the latter category. Legal valuations are felt as social crystallizations, above the individual, embodied in principles and rules which are objectively materialized. Recognition of the law as a system of objective rules involves the very destiny of man, for man can develop himself satisfactorily only within the frame of a legal system which protects his basic freedom, in a manner both certain and secure. Soler stands for the values of man's fundamental rights and freedoms, as well as for democracy. He thinks of these ideals as of a rather dynamic task of progressive realization and readaptation. Legal security provides man with a wide area in which he may become more and more free. Man's right to freedom is based upon his inherent dignity, and upon the very structure of his life. Freedom will thrive as far as it is freedom under the laws, so that there be no space for arbitrariness.

Juan José Bruera,¹¹¹ a distinguished professor at the School of Philosophy of the University of Rosario, Argentina, has written excellent studies on jurisprudence. He has analyzed the historical, political, and axiological roots of the legal rule. In his contribution to juridical axiology, Bruera has gone beyond the relativist attitude and tends toward a transcendental spirituality. He has also contributed an outstanding book on causality from the viewpoint of legal philosophy, in which he emphasizes the far-reaching scope which freedom has for the law.

Angela Romera, a woman who is a brilliant professor at the University of Santa Fe, Argentina, has written many critical comments on themes of legal philosophy which are really inspiring.

Martin T. Ruiz Moreno,¹¹² a professor of jurisprudence at the University of Buenos Aires, is the author of important works in the field of philosophy of law. Among his various studies there are some fine analyses of the different types of foundations for political and legal axiology.

110. LA FE EN EL DERECHO Y OTROS ENSAYOS (Buenos Aires, 1956).

111. BRUERA, EL CONCEPTO FILOSÓFICO-JURÍDICO DE CAUSALIDAD (Buenos Aires, 1944); ESTUDIOS DE FILOSOFÍA DEL DERECHO (Rosario, 1950); FILOSOFÍA DE LA PAZ (Buenos Aires, 1953).

112. RUIZ MERENO, POSICIÓN CULTURAL DE LAS ORIENTACIONES POLÍTICAS (Buenos Aires, 1942); FILOSOFÍA DEL DERECHO: TEORÍA GENERAL E HISTORIA DE LAS DOCTRINAS (Buenos Aires, 1944); INTRODUCCIÓN A LA LÓGICA JURÍDICA DE LEE J. LOEVINGER (Buenos Aires, 1954).

Jorge Millas,¹¹³ general philosopher and also legal thinker, a professor at the University of Chile (Santiago), has made some important contributions to juridical doctrine. In one of his studies, he has shown that beyond pure legal duty, which is established by positive law and its concomitant sanction, a philosophical question arises about the primary foundation for the obligatoriness of the law as a whole, for the obligation to obey the rules of the system of positive law. This primary foundation must be an axiological judgment. The "basic norm" (in Kelsen's terms) must be supported by an axiological imperative.

Luis Eduardo Nieto Arteta,¹¹⁴ Colombian scholar who died a few years ago, wrote many important studies on legal philosophy. He was mainly influenced by Kelsen, Husserl, and Cossio, but contributed original ideas, especially in the field of logic and ontology of the law.

Genaro Salinas Quiroga,¹¹⁵ a professor at the University of Nuevo León (Monterrey, Mexico), has written a book in which, under the influence of certain ideas of this writer, he makes new contributions to legal philosophy.

Antonio Machado Neto¹¹⁶ (University of Bahía, Brazil), who has also been influenced by José Ortega y Gasset, has made important contributions to legal philosophy. In addition, he has developed a sociology of natural law wherein he clarifies the influence that various historic situations have exercised on the different doctrines of natural law. He analyzes the situation in which natural law acted as an *ideology* to preserve actual conditions, and the other situations in which natural law rather assumed the role of a *utopia* with a revolutionary purpose. This sociological study of the real frames of natural law does not prevent Machado Neto from upholding, at a philosophical level, the legitimacy of juridical axiology along the lines that I have developed.

Mention should also be made of the contributions of the following professors: Rodrigo Facio (San José, Costa Rica); Santiago I. Rompani (Montevideo, Uruguay); Anibal Bascuñán¹¹⁷ and Benjamin Cid, both of Santiago de Chile; Rolando Merino Reyes (Concepción, Chile); Rafael García Rosquellas (Sucre, Bolivia), who develops an interpretation of the actual evaluations in which positive law is inspired; and Vicente Terán (Potosí, Bolivia), whose thinking develops along contemporary lines.¹¹⁸

113. Millas, *Sobre los Fundamentos Reales del Orden Lógico-Formal del Derecho*, paper submitted to the Fourth Inter-American Congress of Philosophy (Santiago, 1956).

114. NIETO ARTETA, *LOGICA, FENOMENOLOGÍA Y FORMALISMO JURÍDICO (HACIA UNA EPISTEMOLOGÍA DIALÉCTICA)* (1937); RECASÉNS-SICHES Y LA FILOSOFÍA DEL DERECHO (1940); KANT, STAMMLER Y KELSEN (1939); LA SOCIOLOGÍA Y LOS VALORES JURÍDICOS (1939); EL HOMBRE, LA VIDA, LA CULTURA Y EL DERECHO (1941); LA INTERPRETACIÓN EXACTA DE LA TEORÍA PURA DEL DERECHO (1942); LA LÓGICA JURÍDICA Y LA REFLEXIÓN TRASCENDENTAL (1943); PROBLEMAS DE LA LÓGICA DEL DEBER SER Y PROBLEMAS DE LA ONTOLOGÍA JURÍDICA (1947).

115. SALINAS QUIROGA, *LAS NUEVAS RUTAS DEL DERECHO* (Monterrey, Mexico, 1942).

116. NETO, *SOCIEDADE E DIREITO NA PERSPECTIVA DA RAZÃO VITAL* (Bahía, 1957); *SOCIOLOGIA DO DIREITO NATURAL* (Bahía, 1957).

117. FACIO, *LECCIONES DE FILOSOFÍA DEL DERECHO* (San José, C.R., 1944); ROMPANI, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* (Montevideo, 1944); BASCUÑÁN, *INTRODUCCIÓN AL ESTUDIO DE LAS CIENCIAS JURÍDICAS Y SOCIALES* (Santiago, Chile, 1953).

118. GARCÍA ROSQUELLAS, *BASES PARA UNA TEORÍA INTEGRAL DEL DERECHO* (Sucre, 1943); TERÁN, *TEMAS PARA UNA INTRODUCCIÓN A LA CIENCIA DEL DERECHO* (1944).

JURIDICAL AXIOLOGY ON THE BASIS OF A PHILOSOPHY
OF CULTURE, MORE OR LESS RELATIVIST.

Juan Manuel Terán Mata,¹¹⁹ a professor at the National University of Mexico, began his philosophical thinking on the law under a strong influence of Neo-Kantianism (especially of the school of Windelband and Rickert). Later on, however, his thinking has included, to some extent, certain aspects of the sociology of knowledge, along the line of Mannheim, though still keeping some basic Neo-Kantian premises. Legal philosophy, in his view, purports to present a universal and rational view of the law, and it deals with three problems: (1) *Logic and ontology of the law*: concept of law, which includes also determination of the reality of the law, because a reality is exhausted in its concept. (2) *Juridical axiology*. (3) *Realization of the law*, i.e., how human law orients itself toward the compliance with its ends and values (fundamentals of legal technique). Terán Mata regards the law as having a cultural content with coercive normativity.

Juridical axiology—which is a part of ethics, and provides the criteria for politics—tries to ascertain what is good for a certain social group. On the one hand, Terán Mata rejects any attempt to find an absolute and permanent natural law, because such a scheme would preclude historical evolution. On the other hand, he also rejects axiological subjectivism, because it is absurd: justice, common good, order, security in social relations cannot be explained or established from a subjective viewpoint. Values, including the legal ones, are objective. But he does not think that values are certain qualities which *per se* may reside in things. On the contrary, he thinks that values are teleological or finalistic relationships. For example, a certain action is just, not considering it isolated, but as far as it is referred to another action or situation. Values are relative modes of reference. Outside a finalist function there is no value. Every value is a form of functional relationship. Philosophy of law seeks the last fundamentals for legal evaluation, which consist of the rational and unifying determination of the variable historic positions. Terán Mata thinks there is something correct in the endeavor to find a natural law, namely, the search for certain permanent bases which enable us to comprehend the historic variations in a unitarian form. This endeavor toward universality is right. However, such universal principles, rational and abstract, do not provide us with adequate criteria for solving particular cases. They could perhaps furnish only the inspiration for making general rules of positive law. Finally, Terán Mata, strongly influenced by Mannheim's theory on ideologies, thinks that it is not possible to establish a system of absolute values and principles for social life. At the bottom of every theory there exists a historic play of interests and wants. It is true that men,

119. TERÁN MATA, ESTUDIO FILOSÓFICO SOBRE LOS VALORES JURÍDICOS (Mexico, 1939); LA IDEA DE LA JUSTICIA Y EL PRINCIPIO DE LA SEGURIDAD JURÍDICA (Mexico, 1941); FILOSOFÍA DEL DERECHO (Mexico, 1952); LA IDEA DE LA VIDA EN EL PENSAMIENTO ESPAÑOL (Mexico, 1953).

when thinking of justice, have always endeavored to attain an equilibrium among the interests playing in social coexistence. It so happens, however, that the idea of justice, as an ideology, has always accepted different value contents.

José Delgado Ocando,¹²⁰ a young professor of jurisprudence at the University of Zulia, Maracaibo, Venezuela, has written an excellent book on the philosophy of law. The elucidation of juridical values implies a comparison between the evaluation chosen by the lawmaker and our own valuation, the latter being not a positive valuation but an ideal one, i.e., a metaempirical pattern. On the one hand, Delgado Ocando, in agreement with Cossio, thinks that *positive* valuations are an intrinsic component of man made law. On the other hand, Delgado Ocando, though admitting a critical re-evaluation from a philosophical viewpoint, professes a sort of cultural relativism, which, he says, is not tantamount to skepticism. Values are correlative to realities. The critical analysis of the positive norms seeks to clarify the authentic social reality. Such a clarification will show the genuinely human and set aside the fictitious appearances of ideologies and symbols.

Jurisprudence on the basis of a philosophy of culture, more or less relativist, is brilliantly flourishing in Brazil nowadays, especially under the influence of Miguel Reale, one of the leading thinkers in Latin America at the present. Before giving a summary of his outstanding work, the author of this article considers it suitable to make a brief reference to some earlier developments in Brazilian philosophy of law.

Philosophy of law in Brazil has a long and brilliant tradition. Among the thinkers of the nineteenth and early twentieth centuries, special mention must be made of five figures: Tobías Barreto, Sylvio Romero, Fariás Brito, Clovis Bevilacqua, and Francisco Pontes de Miranda. The influence of Comtean positivism in Brazil was very strong in the nineteenth century, in both academic and political life. Nevertheless, these five legal thinkers went much beyond the limits of positivism, and, under the influence of other currents, especially German, built up original philosophies of law. Tobías Barreto¹²¹ (1839-1889) takes certain Kantian premises as an epistemological point of departure, and also as ethical foundation. He develops his legal doctrine, however, on the basis of a philosophy of culture along evolutionist trends. Whereas he rejects rigid natural law, he stands for the idea of a natural pattern for the law, conditioned by culture. Sylvio Romero¹²² (b. 1851), to a certain extent antipositivist, was, nevertheless, deeply influenced by Kant and by Spencer, and was an enthusiastic follower of Jhering. Spencer's evolutionism is for him only a rejuvenated Neo-Kantianism. With Kant, he admits free will; and, with Spencer, sociological conditioning. Fariás Brito¹²³ (1862-1917), an original adherent of evolutionism, became later a representative of religious faith and mysticism. His last philosophy is influenced both by Thomism and by Leibnitz. Clovis Bevilacqua¹²⁴ (1859-1944), who is considered one of the greatest jurists in the Western Hemisphere, also wrote on

120. DELGADO OCANDO, *LECCIONES DE FILOSOFÍA DEL DERECHO* (Maracaibo, 1957).

121. BARRETO, *QUESTÕES VIGENTES DE FILOSOFIA E DE DIREITO* (Pernambuco, 1888).

122. ROMERO, *ENSAIO DE FILOSOFIA DO DIREITO* (2nd ed., Rio de Janeiro, 1908).

123. BRITO, *BASE FISICA DO ESPIRITU* (1912); *O MUNDO INTERIOR* (1914).

124. BEVILAQUA, *JURISTAS FILOSOFOS* (Bahía, 1897); *ESTUDOS JURIDICOS*.

the philosophy of law. Though for a long time he was sympathetic to evolutionism, he became strongly influenced by Jhering, and finally leaned toward Stammler's "natural law with variable content." Francisco Pontes de Miranda¹²⁵ (b. 1892) has kept closer to sociological positivism, though influenced by some of Nietzsche's leitmotifs. In addition to these five legal philosophers, another should be recalled: Pedro Lessa,¹²⁶ whose work is close to empirical sociologism.

Miguel Reale,¹²⁷ a professor at the University of São Paulo, doubtless one of the most prominent legal thinkers of Latin America, is responsible for what he calls "the tri-dimensional theory of law." Law is a historico-cultural reality, which essentially possesses three dimensions, each one of which is a necessary element of juridical experience: *fact*, *value*, and *norm*. Law is a *spiritual fact*, in which, and by which, *values* are historically embodied in the form of a *normative* structure that establishes an order among intersubjective relations between individuals, as well as between the individual and the community. These three dimensions are reciprocally bound together in such a manner that it is impossible to separate any one from the other two. It is certainly possible, and it is even most advisable, to undertake three different philosophical studies of the law. Each one of them should analyze the law primarily from one of these three viewpoints. Thus, philosophic knowledge of the law as *value* gives rise to a *juridical deontology*; the philosophical analysis of the law as *fact* develops an insight into the law as a *cultural phenomenon*; and consideration of the law as *norm* produces a *juridical epistemology*. Nevertheless, there is no possibility of an absolute separation among these three dimensions, because each one of them necessarily includes a reference to the other two. Any legal *norm* includes a reference to a *factual situation*, as well as a reference to *values*. Any legal *fact* involves references to *norms* and to *values*. All legal *values* are necessarily related to the *factual situation* in which they must be materialized and point toward the *normative* instrument through which they have to be realized.

The first theme of the juridical axiology deals with the problem of the relationship between value, obligation, and purpose. A purpose is a value that is set up and recognized as a motive for conduct. Values are the ultimate ends, those which cannot further be taken as mere means. Values are the basis for ends or purposes. Axiology is the foundation of teleology. While Reale agrees with Nicolai Hartmann as to the distinction between the absolute oughtness of values and their positive or present obligation, he disagrees with him on two points. Reale does not think that values are mere ideas. Nor does he think that there can be values indifferent to existence, to reality, because every value manifests itself through history, renewing itself constantly. Values manifest themselves in the concrete reality of man, who is the only reality in which ontology and axiology merge. Man is only insofar as he is subject to an obligation; and

125. PONTES DE MIRANDA, INTRODUÇÃO A POLITICA CIENTIFICA; SISTEMA DA CIENCIA POSITIVA DO DIREITO.

126. LESSA, ESTUDOS DE FILOSOFIA DO DIREITO (2nd ed., São Paulo, 1916).

127. REALE, TEORIA DO DIREITO E DO ESTADO (São Paulo, 1940); FUNDAMENTOS DO DIREITO (São Paulo, 1940); FILOSOFIA DO DIREITO (São Paulo, 1953); HORIZONTES DO DIREITO E DA HISTORIA (São Paulo, 1956).

he is subject to an obligation only insofar as *he is what he is*. Value, obligation, and purpose are steps in the unity of a process, which, in spite of many zigzags, always conforms to the ideal of adequation between reality and value.

Values are perceived, says Reale, through a process of an emotional character. Therefore, values cannot be entirely reduced to rational formulae. There is, however, something rational in the field of values, insofar as values function as support for ends, which are rationally fixed; and, moreover, there is rationality also in the relationship between ends and means. Values are the possibility that I can act insofar as I have chosen them as ends of my acting. And values are the possibilities which the historical environment offers me through my consciousness of this environment. Consequently, values are variable. Yet values have a relative objectivity, which is guaranteed by the very structure of both consciousness and environment. The fact that Reale deems values to be variable does not mean that he is a skeptic or a relativist, because he considers the human person as the possibility of choosing values, as the "source-value." There is a change in the content of values, because there is change in the basic possibilities which mind, in its historic development, offers to knowledge and will. Throughout and beneath all this change, however, there is a permanent metaphysical necessity: the metaphysical necessity of a value, which, even having a variable content, makes it possible for the other values to coexist within the historical environment determined by these values. Justice, the ultimate goal of the law, is precisely that value whose function consists in making possible the orderly realization of other values.

Paulo Dorado de Gusmão,¹²⁸ a brilliant young professor at the University of Brazil (Rio de Janeiro), develops a legal doctrine on the basis of a philosophy of culture. He views culture as a man-built world related to values. The law is a part of culture, and, therefore, it changes according to the change of cultural values. There is not a single form of expression for juridical values, since they can be defined only with reference to certain historic conditions. But all the expressions of juridical values can be reduced to two basic values: justice and legal security. Justice is variable in accordance with social change, whereas legal security is more stable, because it always requires order, peace, authority, efficacy, and guarantees. In addition to the juridical values, there are other goods which can be taken as contents for the law: social, individual, and cultural goods. Conflicts may arise among these different values. Such conflicts must be solved by the specific juridical values, whose function precisely consists in establishing an order and hierarchy among the goods protected by the law.

A legal theory also on the ground of a relativist philosophy of culture is developed by Wilson de Souza Campos Batalha,¹²⁹ a judge in São Paulo; and a similar doctrine, which lays particular stress on the economic factors, is pre-

128. GUSMÃO, CURSO DE FILOSOFIA DO DIREITO (Rio de Janeiro, 1950); O PENSAMENTO JURIDICO CONTEMPORANEO (São Paulo, 1955); INTRODUÇÃO A CIENCIA DO DIREITO (São Paulo, 1956); *Derecho como Cultura*, REV. FAC. DE FIL. Y LET. TUCUMÁN (1956); MANUAL DE DIREITO CONSTITUCIONAL (Rio de Janeiro, 1957).

129. BATALHA, DIRETRIZES DE FILOSOFIA JURIDICA (Rio de Janeiro, 1951).

sented by Hermes Lima,¹³⁰ a professor of jurisprudence at the University of Brazil (Rio de Janeiro).

The contribution of Renato Cirell Czerna¹³¹ (São Paulo) shows a certain influence of the historicism of Croce and Gentile. Though laying stress upon the historical character of justice, he thinks that justice also possesses an absolute dimension. Thus, the main problem consists in clarifying how justice can be historical and absolute at one and the same time.

Praiseworthy mention must be made also of other Brazilian legal thinkers: Goffredo Telles,¹³² who takes as foundation Bergson's theory of free will; Luiz Washington Vita,¹³³ author of some excellent studies; Theofilo Cavalcanti (Filho),¹³⁴ Nelson de Sousa Sampaio,¹³⁵ Pinto Ferreira,¹³⁶ and A. Machado Pauperio,¹³⁷ the four of them especially concerned with the philosophy of public law and political science; Mario Lins,¹³⁸ particularly devoted to the sociological aspect; and Alipio Silveira¹³⁹ and Zecchi Abrahao,¹⁴⁰ both authors of important studies on legal interpretation.

LUIS RECASÉNS-SICHES

130. LIMA, MATERIAL PARA UN CONCEITO DO DIREITO (Rio de Janeiro, 1933); INTRODUÇÃO A CIENCIA DO DIREITO (5th ed., Rio de Janeiro, 1954).

131. CZERNA, A JUSTIÇA COMO HISTORIA (São Paulo, 1952); FILOSOFIA COMO CONCEITO E COMO HISTORIA (São Paulo, 1950).

132. TELLES, A CRIAÇÃO DO DIREITO (São Paulo, 1953).

133. VITA, TEMAS E PERFIS (São Bernardo do Campo, 1957).

134. CAVALCANTI, PRESUPOSTOS FILOSOFICO-JURIDICOS DA REVISÃO CONSTITUCIONAL (São Paulo, 1952).

135. SAMPAIO, IDEOLOGIA E CIENCIA POLITICA (Bahía, 1953).

136. FERREIRA, NOVOS RUMBOS DO DIREITO PUBLICO (Recife, 1937).

137. PAUPERIO, TEORIA GERAL DO ESTADO (Rio de Janeiro, 1955).

138. LINS, THE SOCIOLOGICAL FOUNDATIONS OF LAW (Rio de Janeiro, 1952).

139. SILVEIRA, LA INTERPRETACIÓN DE LAS LEYES FRENTE A LOS RÉGIMENES POLÍTICOS (1941); CONCEPTO Y FUNCIONES DE LA EQUIDAD FRENTE AL DERECHO POSITIVO (1943).

140. ABRAHAO, DA METODOLOGIA HERMENEUTICA (Coiania, 1957).