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### Books Reviewed

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## BOOKS REVIEWED

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CAUSATION IN THE LAW. By H. L. A. Hart and A. M. Honoré. Oxford: The Clarendon Press, 1959. Pp. xxxii, 454. 55s.

In this work Professor H. L. A. Hart, well known in Britain and America for his work in legal and moral philosophy, has collaborated with A. M. Honoré in a careful and comprehensive study of causality in legal theory and practice. The authors have worked on the subject a number of years, earlier versions of some parts having appeared in joint articles in the *Law Quarterly Review* (1956).

The authors have two main aims: (1) to explain our ordinary "common sense notions" of causality and show how these notions are widely used in law, and (2) to examine and criticize a "whole trend in legal thought" concerning causality, especially influential in the United States, which seeks to clarify and simplify the concept of causality. The two aims are closely related. In explaining ordinary notions of causality and showing their use in law the authors are (in part) trying to answer the objection that traditional ways of thinking about causality are hopelessly obscure or otherwise inadequate, and must be drastically revised. And in criticizing the modern theories the authors are trying to show that these theories blur or ignore important principles and distinctions embedded in our ordinary ways of thinking and recognized by courts. This is not to say that the authors completely reject the modern theories in favor of any traditional theory of causality. They agree that much of the legal discussion of causality in the past has been "clouded over by metaphor." And in some ways they consider the modern theories a real advance. (In the following discussion I will try to show how far the authors go in admitting one basic clarification urged by the modern theorists, namely, the "bifurcation" of causal issues into factual and normative questions.) But in general spirit the work is conservative and cautionary, confident that common-sense notions (properly understood) can guide legal decisions, and suspicious of attempts to revise these notions radically in favor of allegedly scientific theories.

In the following discussion I shall try, first, to summarize the argument of the book. Secondly, I shall consider some problems in the authors' analysis of ordinary causal concepts. And third, I shall comment on the criticism of the recent (American) theories of causality.

### 1

Part I ("The Analysis of Causal Concepts") opens with a critical discussion of the analysis of causality in Hume and Mill (ch. 1), moves on to a discussion of ordinary concepts of causality and responsibility (ch. 2 and 3), and

discusses critically the modern theories. The central purpose of this Part is to analyze ordinary notions of causality; these are contrasted, on the one hand, with the philosophical theories of Hume and Mill, and on the other hand with the modern theories.

The authors begin, in Ch. 1, by asking why lawyers have found the "philosophical discussion of causation" unhelpful. And the answer is, roughly stated, that philosophers traditionally have been concerned with causality in science, largely ignoring problems of causality in practical and moral contexts. To be sure, in examining philosophical theories of causality the authors consider only Hume and John Stuart Mill — in part, of course, because of their very great influence in modern philosophical discussions of causality, but also, perhaps, because the authors feel that a helpful philosophical discussion of causality is to be found, if at all, in empiricist philosophers such as Hume and Mill. One could argue, indeed, that if a philosophical theory of causality is to be helpful to lawyers it must be an empirical theory to this extent: it must define "causality" in such a way that statements asserting a causal relation can be supported or refuted by ordinary factual evidence. Presumably the problem of causality in the law is, in part, the problem of picking out the cause from among all the antecedents of an event: to be useful, a theory must give guidance to this process. It goes without saying that theories such as that of Leibniz, who held that "in metaphysical rigor" there are no causes at all but only concomitants, or F. H. Bradley's theory that the notion of causality is self-contradictory, are irrelevant to law. A more interesting case is Kant's theory of causality. For Kant, causality is strictly a scientific concept, applicable exclusively to physical processes. Hence, as the authors point out in a later section, German legal theorists attempting to use the Kantian theory are forced into a curious position, namely, that "in considering whether a human actor has caused harm only the actor's physical movements may be regarded as relevant, not his state of mind: once it is found that such movements were the cause of harm the question whether the act was deliberate, mistaken, or accidental is relevant only to the question of fault or *mens rea*."<sup>1</sup> But even as applied to physical processes, Kant's theory does little to guide particular causal investigations.

The authors praise Hume and Mill for having "swept away much lumber" traditionally encumbering the notion of causality, such as the notion of "unobservable forces or powers," and for having noticed that there is an intimate connection between particular causal judgments and generalizations asserting an invariable sequence. And Mill, in particular, is commended for noticing the ordinary distinction between the cause and other factors which are merely "necessary conditions." Mill's analysis is given a sympathetic treatment but criticized on several counts. The two most important objections are the following. (1) Mill (following Hume) was justified in stressing the rôle of generalizations asserting regular sequence; in many cases when we say that A caused B, part of our meaning is that events like A have invariably been followed by events like B. When we say that the sun warmed the stone — that this is a case of *propter hoc* and not simply *post hoc* — part of our meaning is that invariably in our ex-

1. HART and HONORÉ, CAUSATION IN THE LAW 385 (1959).

perience bodies exposed to heat become warmer. But Mill overstated the case; there is a type of causation where generalizations do not play this rôle. These are cases of "interpersonal transactions" as the authors call them, cases where we say that a person caused another to act in a certain way by persuasion, threat, inducement, etc. Suppose A threatens to shoot B unless B gives over his money, which B then does. We should say that A made B give over his money, but in saying this we do not mean that in similar cases B, or anyone else, invariably gives up his money. (2) Mill (again following Hume and the traditional philosophical discussion of causality) concentrates on "explanatory contexts" where, given an event, our search for the cause is a search for some unknown factor. But this ignores the "attributive inquiries" frequent in law — contexts where we know all the factors and in a sense clearly understand how an event happened, but are puzzled as to whether this or that factor is the cause. (This distinction prefigures the authors' later discussion of the "bifurcation" of causal questions.)

In Ch. 2 the authors attempt a kind of reversal in the analysis of causality by treating everyday human actions as the starting point; the "central" or "basic" meaning of causality is found not in the language of science or in the demands of metaphysical rigor, but in the everyday language in which people are said to "push, pull, bend, twist, break, injure" things and other persons. From this basic meaning others are derived by analogy or metaphor. Two of these derived meanings are especially relevant to law: (1) "causing" in the sense of inducing, persuading, threatening, etc., someone to act, and (2) "causing" in the sense of providing or failing to provide an opportunity, as in causing a loss by carelessly leaving the door unlocked and thus allowing a theft to occur, or causing loss to a manufacturer by failing to deliver the machinery as promised. In Ch. 3 the authors embark on a discussion of responsibility and raise the important question of how we set limits to the consequences of an act, limits beyond which we no longer consider the agent as the cause and hence as responsible.

Chapter 4 introduces the modern theory, held in the most radical form by Leon Green. As the authors describe it this theory asserts that the question "Did A cause B?" means (if it is clear) two things: (1) would B have happened if A had not acted as he did? (the *sine qua non* test) and (2) should A be held responsible or liable for B? The first question is considered to be a straightforward factual question, while the second is considered to be a "policy" question to be decided by appeal to legal policy, justice, or expediency. With exceptions (including Green himself) those who hold the theory agree that the only factual question is whether the alleged cause was a necessary condition; there is considerable difference about how the "policy decision" assigning responsibility or liability is to be made. But the essence of the position is that the traditional approach fails to distinguish clearly the question of fact from policy decision in the discussion of causality.

Chapter 5 is an extremely close and subtle discussion of the *sine qua non* test. The authors claim to have shown that the notion of a causally relevant factor is logically independent of the notion of a condition *sine qua non*; the argument is difficult and appeals to anomalous cases where causal concepts seem to break down altogether. But the chapter does succeed in pointing out im-

portant if minute shades of meaning in the notion of necessary condition, which "hide behind the apparently simple idea of condition *sine qua non*."

Part II is a discussion of the actual use of ordinary causal concepts in common law: in tort and especially torts of negligence (ch. 6-10), in contract (ch. 11), and in criminal law (ch. 12-14). Chapter 15 is a rather brief and inconclusive discussion of evidence and procedure. The double aim of the book clearly appears in this Part: in showing how common-sense principles are used in law the authors are refuting the claim that all principles beyond the necessary condition test are based on nothing but legal or moral policy. Thus, in Ch. 6, the authors show that A is not considered to have caused a harm even though his action was a necessary condition, if between A's action and the harm there are intervening factors such as a voluntary act of another person, or a coincidence, or an abnormal event. If A carelessly runs into and injures B, and B while being taken to the hospital happens to be fatally injured in a collision between the ambulance and an automobile driven by C, we would not ordinarily think that A killed B or caused his death. And acceptance of this principle in law is not a matter of legal or moral policy but a recognition of how we actually think about causality. Chapter 7 similarly shows how intervening factors "negative" causal connection in cases of inducement and providing opportunities. Chapter 8 is a discussion of concurrent causes and contributory negligence. Chapters 9 and 10 contain, again, a criticism of the modern theory. Chapter 9 criticizes (1) the "foreseeability test" according to which a person is liable for all and only those consequences of his action which could have been foreseen, and (2) the "risk theory" according to which one is responsible for all and only those consequences of an (illegal) act which the law forbidding that act was intended to prevent. Chapter 10 criticizes the view that assignment of responsibility should be based on the social or moral consequences involved. The authors do not deny that some principles governing assignment of responsibility do reflect broad social and moral policy, but deny that all principles are of this kind. Chapter 11 demonstrates the use of common-sense principles in contract. Chapters 12, 13, and 14 show the use of these principles in criminal law, "interpersonal transactions" and punishment.

Part III is a brief discussion of recent European theories, sharing with the American theories the aim of replacing traditional notions with a more precise and "scientific" theory. Chapter 16 discusses the "theory of conditions," a version of the *sine qua non* test. Chapter 17 discusses the "adequacy theory" according to which a necessary condition is also a cause if it also "significantly increased the probability" of the consequence. Both theories are criticized on grounds that they cannot reasonably be applied without admitting the common-sense principles outlined in Parts I and II.

## 2

The authors' analysis of common-sense causal notions is presented as a means to an end — the end of explaining and clarifying causal principles in the law. But it can also be interpreted as a philosophical theory of causality, at least in the sense that it suggests a solution to traditional philosophic problems about

causality. Considered in the latter way some problems arise. And these problems can be seen by considering the following sentences, at the beginning of the authors' analysis:

So we cause one thing to move by striking it with another, glass to break by throwing stones, injuries by blows, things to get hot by putting them on fires. . . . Cases of this exceedingly simple type are not only those where the expressions cause and effect have their most obvious application; they are also *paradigms* for the understanding of the causal language used of very different types of case.<sup>2</sup>

In saying that these familiar events are "paradigms" of causality the authors appear to have two things in mind: (1) the (in some sense) original meaning of "causing" is illustrated by these simple cases, and other cases which are more or less similar are spoken of as cases of causality by metaphorical or analogical extension; and (2) the *meaning* of "causing" is given by pointing to these simple cases, so that it would (in some sense) be logically contradictory to deny that these or any similar simple cases are really instances of causality. I shall discuss each of these two points in turn.

1) The basic case of causality is said to be the case in which a human being intervenes in the normal course of things to produce a desired result — lighting a fire, cutting down a tree, etc. Other uses of causal language (including, apparently, its use in science) are derived by metaphor or analogy. If this is a claim about the etymology of "cause" and related words, the authors might be right. (The ordinary English word "cause" derives from the Medieval Latin *causa*, a technical term in philosophy and law, but the Latin *causa* could of course have been used originally in the authors' "basic" sense.) But etymologies by themselves do nothing to show whether a *present* usage is literal or figurative. It is certainly true that the ordinary word "cynical" was originally derived by metaphor from its (originally) literal meaning; it does not follow that human beings are now called "cynical" only in a metaphorical or analogical sense. If the authors are claiming that as presently used causal language only applies literally to familiar cases of human interventions in the normal course of things, the claim is doubtful. Are we using analogical or metaphorical language when we say that tides are caused by the gravitational attraction of the moon, or that floods are caused by rain? In any case the authors have failed to explain the difference between literal and figurative language; it is not obvious that causal language is only used literally in the familiar kind of human action mentioned above. The point has some philosophical importance: the authors seem to hold, for example, that the notions of "force" or "power" apply literally only to the motions of our own bodies. This could be interpreted as a way of saying that we never directly experience force or power in nature. The authors' appeal to literal versus figurative language could thus be interpreted as a way of confirming the Humean attack on causality, conceived as a kind of force or compulsion observed to exist in nature — or, more accurately, as a version of Locke's theory that we get our idea of "active power" from our experience that "barely by willing it . . . we can move the parts of our bodies which were before at

2. *Id.* at 27. (*Paradigms* italicized by present reviewer.)

rest."<sup>3</sup> The difficulty in the authors' appeal to figurative versus literal use is that it is not at all immediately obvious that when we say, e.g., "the force of the wind blew the tree down" we are using metaphor or analogy. The claim that we are seems an inference from the view that we do not literally see bodies exercising force or power.

2) The "paradigm case argument" is often used in contemporary philosophy in the following way: in reply to the skeptic who doubts whether an expression E applies to anything at all, or who thinks that it is self-contradictory to call something a case of E, it is argued that there are (paradigm) cases which we refer to in teaching the meaning of E, or would cite if asked to explain what we mean by E. Thus, the skeptic who claims that we never know for certain whether any empirical statement is true, or who thinks that "knowing for certain that an empirical statement is true" is self-contradictory, has been refuted by showing that we explain the meaning of the expression "knowing for certain that an empirical statement is true" by mentioning such familiar cases as "knowing for certain" that I locked the door before leaving, or that so-and-so is married. The basic point is that when expressions are explained and learned ostensively, by showing instances, it is contradictory to suppose that these expressions do not, or could not, refer to anything at all. It is not contradictory to suppose that we do not know for certain whether so-and-so is married; it would be contradictory to suppose that we never know anything for certain, using "knowing for certain" in its ordinary sense.

The authors do not use the paradigm case argument, as I have crudely described it. But the appeal to familiar cases of human actions as paradigms of causality does suggest such an argument. Suppose one were to argue (following Kant) that experience alone can never show that one event is caused by another — experience can only show that an event has been followed by another, and is usually, even invariably, followed by that event, but cannot show that a causal relation exists. For (the argument might run) to say that "A causes B" is to say that A is necessarily followed by B; the fact that A is invariably followed by B might be *evidence* that a causal relation holds, but is not all we mean by saying there is a causal relation. For (the argument concludes) it is not contradictory to suppose that by coincidence, or pre-established harmony, B always does follow A, but is not caused by A. Two conclusions might be drawn from this argument: (1) that since all our knowledge is based on experience we do not in fact know whether any causal relations exist (Hume's position in his more skeptical moments); or (2) that causality as distinct from invariable sequence is an a priori concept, not derived from experience at all (Kant's own position).

The authors' reply to the argument sketched above would seem to be that the meaning of *propter hoc* as distinct from *post hoc* is explained by mentioning the "basic" cases of causality in contrast with events we should ordinarily call coincidental. This is not to say that any given instance of causality we produce might not turn out to be a coincidence, or a prearranged harmony. The crucial point is that the basic cases are the kind of cases we would use if asked

3. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, edited by A. C. Fraser, Vol. 1, p. 313 (1959).

to explain the meaning of "causality," and in such a case we would not retract our claim that a causal relation exists unless we have some special reason for doing so (and it is no reason when the skeptic supposes that every alleged case of causality is mere coincidence, on grounds that it is never self-contradictory to assert that any particular sequence is merely coincidental). Thus, the authors reason as follows:

It is perfectly legitimate to say that A's blow caused B's nose to bleed and to feel confidence in the truth of his statement, though we could not formulate or would have very little confidence in a generalization purporting to specify conditions under which blows are invariably followed by bleeding from the nose. Yet even at this simple level where the cause is our own deliberate intervention *propter hoc* is recognized to be different from *post hoc*. It is possible that just at the moment A struck, B independently ruptured a blood-vessel; experience may alert us to such possibilities, and science teach us how to recognize them. Yet this would be a remarkable coincidence and there is a presumption, which is normally fulfilled (but rebuttable), that when we deliberately intervene in nature to bring about effects which in fact supervene, no other explanation of their occurrence is to be found. Hence to make this type of causal statement is justified if there is no ground for believing this normally fulfilled presumption not to hold good. It is, however, a feature of this, as of other types of empirical statement, that exceptionally they are not vindicated in the result and have to be withdrawn.<sup>4</sup>

Thus the authors hold that in order to (significantly) rebut the claim of causality in a basic case we must bring out further facts of the case showing it to be a coincidence or the result of prearrangement. Every particular case is open to rebuttal in this way; it does not follow that we never do or can know whether there are any causes (just as our claim to know any particular fact for certain can be refuted, although the skeptic's claim that nothing is known for certain is logically false).

Is this a convincing argument? The obvious objection is that it fails to account for the notion of necessity which seems to be a part of the ordinary notion of causality. When we say that A's blow caused B's nose to bleed we seem to commit ourselves to the notion that the blow "could not but be followed" by the injury, and that a blow given in exactly these circumstances "must" always be followed by the injury. The authors seem prepared to admit part of this objection; they are prepared to admit that when we claim A caused B we commit ourselves to explain cases where A was not followed by B. But this is not to say that in order to justify a claim that A caused B we must first show that A's are always and necessarily followed by B. When we claim that death was caused by a certain injury we are committed to an explanation of why injuries of that type are sometimes not fatal, e.g., by showing how the accompanying circumstances were different. But we are not required to show what would be practically impossible, namely, that there never was or could be a case where exactly that injury in exactly those circumstances was not fatal. And in this view the authors seem clearly right. The authors have, in short, shown what it means to be justified in making a causal claim. But it is not clear that they

4. *Op. cit. supra* note 1, at 29-30.



have explained the meaning of such claims. To show what are ordinarily considered adequate or sufficient grounds for saying "A caused B" is one thing; to show what is meant by causality is a different thing. At least it is not obvious these things are the same; insofar as they are different the authors seem not to have explained the meaning of causality in its familiar use.

## 3

The modern theory, discussed and criticized throughout the book, is described in a general and preliminary way as follows:

. . . according to the theory under discussion, once it has been settled that no harm would have occurred without a wrongful act, there is no further causal question remaining for the courts to discuss. The only question is what limits the courts *ought* to impose on the wrongdoer's liability, and no answer is to be found to this question by thinking about the meaning or meanings of causation.<sup>5</sup>

The authors are by no means wholly critical of this theory. (One of the outstanding characteristics of the book is scrupulous care and fairness, as in distinguishing different versions of the theory.) They find two important advances in the modern view. The first is that it emphasizes the point that

. . . very often consideration of the purpose of a legal rule will show that certain kinds of harm alleged to have been caused by a breach of the rule are altogether outside its scope, since it is obvious that the rule is not concerned to give protection against that sort of harm.<sup>6</sup>

In this way, "scholastic discussions may often . . . be intelligibly avoided." Second, and more important, the authors hold that the "bifurcation" of causal issues has "utility and clarifying force." For, according to the authors, there is a kind of bifurcation:

. . . the central and most common form of causal relation has two different aspects which correspond roughly with the two halves of the bifurcated question. The first is that a cause is *in some sense* necessary for the production of the consequence; the second is that the cause of an event is in some way distinguishable from other factors which are, in the same sense, necessary.

These two aspects of causation, even if they cannot be crudely opposed as 'factual' and 'non-factual', are of a very different character. They occasion different kinds of doubts and difficulties, and different kinds of criteria are used in their resolution.<sup>7</sup>

Concerning the first aspect of causality the authors are roughly in agreement with the modern theory: the cause must be a necessary condition, and this is a relatively straightforward question to be decided by evidence. The disagreement chiefly concerns the second aspect, where the problem is to pick out the cause from among the necessary conditions or to decide when the "chain of

5. *Id.* at 3.

6. *Id.* at 103.

7. *Id.* at 104-105.

causation is broken." For the authors these questions are decidable by vague but serviceable common-sense principles; according to the modern theory they are decidable only by legal, social, or moral policy. In defense of their view the authors argue, clearly and convincingly, that the modern theory blurs an important distinction in the vague notion of "policy" (just as the appeal to the *sine qua non* test is said to blur distinctions). Some limitations on responsibility clearly are mere policy: thus in England a man is not guilty of murder if the victim does not die within a year and a day; in the state of New York a person who carelessly starts a fire is liable only for the first of several houses destroyed by the fire. Here the law as it were draws a line beyond which the consequences of an act are no longer to be considered as caused by that act. And the line is drawn in the interests of society; it does not exist in our ordinary causal notions. But contrast with this the principle of *nova causa interveniens* according to which, e.g., A would not be said to have caused B's death if A carelessly injures B, and on the way to the hospital B is struck by lightning and killed. Here the legal principle simply recognizes our common-sense notions.

But suppose we admit the distinction between "policy" and common-sense limitations of responsibility; could we not still argue that all principles of causality (beyond the necessary condition test) simply reflect our ordinary moral judgments? Thus, in cases such as the above, it could be argued that when we say that A's act was not the cause of B's death we are expressing our moral conviction that a man *ought not* to be held responsible for consequences of his acts which only come about through an additional coincidence. The authors' answer is roughly as follows: in large part our ordinary moral judgments are based on notions of causality, in the obvious sense that we do not blame anyone for something he did not cause. To say that someone is to blame often presupposes that his act was the cause; guilt or blameworthiness cannot therefore be part of what is meant by saying his act was the cause. This argument is illustrated with the following example:

A throws a lighted cigarette into the bracken which catches fire. B, just as the flames are about to flicker out, deliberately pours petrol on them. The fire spreads and burns down the forest. A's action, whether or not he intended the forest fire, was not the cause of the fire: B's was.<sup>8</sup>

Here, according to the authors, the causal question is settled quite independently of any moral judgment. If we judge according to motives they may be equally guilty, yet we would still say that B's action was the cause. If we judged by the results, we might indeed decide that B was more guilty than A. But this judgment would be based on the notion that in some sense the forest fire belonged to B rather than to A: the moral judgment does not make the causal differentiation but rather "presupposes it."

The argument sketched above is subtle and powerful. Still, one might make the rejoinder that the causal principles on which we base moral judgments are themselves the result of moral experience. It might be that the causal notions we use have been adopted for broadly moral or social reasons, such as the

8. *Id.* at 69.

undesirable results of holding a person liable for consequences of his acts which are partly due to coincidence. In a previous essay Hart was ready to admit this possibility:

No doubt we have come to employ the criteria we do employ because among other things, in the long run, and on the whole not for the wretched individual in the dock but for 'society', assigning responsibility in the way we do assign it tends to check crime and encourage virtue; and the social historian may be able to show that our criteria slowly alter with experience of the reformatory or deterrent results obtained by applying them.<sup>9</sup>

This is not inconsistent with anything in the present book; if the authors do accept it they partly accept the division of causal questions into factual and normative issues. But this should not be used to obscure differences between the authors and the modern theories they so thoroughly assess and criticize.

In conclusion, I would like to mention a feature of the book ignored in the previous discussion: the careful discussion of hundreds of legal cases in demonstrating the use of ordinary causal notions in law. The cases are conveniently listed at the beginning of the book, along with a list of abbreviations. Discussion of actual cases takes up a major part of the book, and in discussing more general questions this review has perhaps given a distorted picture. The great contribution of the book is the combination of legal scholarship with the sharp tools of philosophic analysis; the combination is rare, and this work is a model of how fruitful it can be.

ROGER HANCOCK

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9. H. L. A. Hart, *The Ascription of Responsibility and Rights*, in *ESSAYS ON LOGIC AND LANGUAGE* 166 (ed. by Antony Flew, Oxford, 1951).

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NATURAL LAW AND EUROPEAN UNITY. By Giorgio del Vecchio. Milan: Angeli, 1958. Pp. xxii, 316. 3000 lire.

This work of Giorgio del Vecchio initiates a new collection under the direction of the "International University for Social Studies." The collection or series is dedicated to the theme of "The New Europe and International Politics." This work is prefaced by a presentation by Rev. F. A. Morlion, illustrating the aim of his "University" in relation to the problems of European integration. These aims are pursued through the "Institutes" of the University, the "Institute of Law and International Politics," and the "Institute for European Studies." Morlion's presentation is followed by an introduction by Alcide di Gasperi on the labor movements and Europe. This introduction develops the argument that the working man is directly interested in the fate of Europe because industrial production and the well-being of the working classes require the unification of political forces and improved social and political conditions. These same thoughts were developed by this lamented statesman during the academic session of the University on November 29, 1952, at which time the "Institute for

European Studies" was inaugurated. Di Gasperi's own contribution to the unity of Europe, finally, is the subject of a sober and cogent examination by Kurt Adenauer.

Del Vecchio's book is divided into two parts. The first of these carries the title "The Perennial Philosophy and Natural Law." The second part, touching on more specific matters of politics and international organization, is entitled "Internationalism, Cosmopolitanism and Europeanism." It is evident, however, that an intimate bond unites the two parts: the logical cord which relates the principles to particular developments and the norms and directives for constructive action. Père Morlion characterizes this as "applications" of the principles of natural law. He compares this to the approach of Professor Edwin Corwin, of Princeton University, who was among the prime movers of these "Institutes" and who has given such great evidence of his close relation to contemporary philosophical activity in Italy.

Del Vecchio's own thought on the problem of law is already well known. He distinguishes within law a logical form and historical content; neither of these, however, exhausts juridical reality or the quality of law. While they give law its meaning, they do not specify its value: for the human conscience, confronted by juridical determinations, whether in the formal or the historical sense, feels the necessity of evaluating them with reference to an ideal measure and a higher criterion. This constitutes a content of law which goes beyond the property of historicity, political character, and efficiency. It is precisely this higher criterion that raises the familiar content of law to a supreme content.

To state the same concept in another way: law is not only and exclusively positive; beyond positive law, there is another law which we may call natural, which, always in the forms of law, and for this reason always truly law, measures and evaluates positive law. The consequence is that positivity is not the necessary mark or character of law and that positivity is something which intervenes to define, but never completely defines, the whole of juridical experience circumscribed as it is by the form of law and involving historical and ideal content.

All these considerations form the presupposition of Del Vecchio's investigations and are well known to those who have studied his works, which are among the most carefully thought out in our time. While, in Italy, in the first half of the present century, philosophical speculation was under the influences of neo-Hegelianism, whether idealistic or actualistic (the philosophies of Croce and Gentile), Del Vecchio remained constant to the neo-Kantian theses of law as a logical category which made it possible for him to develop further the concept of law in the sense of value or law as the imposition of nature. As a matter of fact, law, which is clearly for him a value, when it becomes positive, becomes identical with the fact, or act, and, as such, forces fresh reference back to a value. There is nothing unusual about this thesis: the same reality can take form in two successive perspectives. Value can become a fact and the condition of further value.

This characterization of Del Vecchio is the most exact. Del Vecchio was not an idealist in the neo-Hegelian sense. He never reduced value to fact and did not renounce natural, or rational, or ideal law (however it may be named) in favor of positive law. He was always an idealist, however, in the sense that

for him fact was one thing and value another and value prevails even though given the lie by facts. Also for him, natural law has a superior reality which no one can deny, but in its own order and in the historical demands for which it also provides.

This new book by Del Vecchio has the great merit of clarifying all these considerations through developments and determinations of the highest importance. As it is now our obligation to delineate these it appears to us that they may be summarized in a larger proposition: the more decisive importance now attributed by him to the person. We would not like to be misunderstood. He has always vindicated the role of the person in juridical experience. He has always taken the position that the affirmation of one's own personality and the recognition of the personality of the other, establishes a bond and a transsubjective relation by which, at the same time, a certain respect is at once demanded and given. Nevertheless, there is here a question of emphasis. Now Del Vecchio's emphasis is upon the individual who is the subject of law.

It is the individual who participates in the sensible world but still is capable of raising himself to the supersensible order, both with respect to knowledge and to action. The fact is that the person transcends his own conditions and his own characteristics, tending toward the absolute; hence there arises a complex of criteria or principles of knowledge and action. The result is that that form and the maxims which are related to it are bound to an essential nature, human nature, which both posits and clarifies them. Philosophy has no other office, positing the important question of human nature, than to clarify man to himself. It should clarify human nature to man in his forms and in his maxims, and law is a form and a complex of essential maxims which history develops but does not create, actualizes but presupposes.

For this reason, Del Vecchio speaks of a "principle of law" as an elementary and fundamental expression. It is precisely the affirmation of the person in his intrinsic capacity of self-determination, by means of which the person elevates himself above the order of phenomena. For this reason the person has infinite value. Anyone who has before his eyes the Rosminian problematic cannot fail to recognize in this portion the affinity of the theses of the great Italian thinker with the ideas of neo-Kantianism, of which Del Vecchio is a most fertile interpreter. This is a happy marriage indeed, and no extrinsic juxtaposition.

There follow important consequences with respect both to the will and to sociality. The will in law is not, as it is customary to say, ambulatory and arbitrary, but rather it encounters necessary limits; that is to say, it must develop itself according to intrinsic exigencies and within precise limits. It cannot do everything; it can do only that which is demanded by its essence, which finally is nothing but human nature.

And it is with relation to sociality that Del Vecchio draws the most coherent consequences of the affirmation of the person. It is not true that sociality constitutes the person, as some schools maintain; rather the contrary is the truth in the sense that the person is higher than all social entities. There is no doubt that the individual develops within those entities, refining and re-enforcing himself. But there is a part of it, an aspect of it, which is not absorbed by an

association, exactly as there are rights of the person which no society, however great it be (not even the State), can dispose.

The problem is brought to focus in the State. Del Vecchio has never been a Hegelian, has never come to the point of asserting the primacy of the State, but rather has always tenaciously confined it to its proper orbit of action. While not denying the value of the State (for it, like all social entities, undoubtedly has value) he denies to it the status of the highest value. That value is the person, and it may be added, not so much in itself, but rather by reason of the divine impulse which it bears within itself. From a speculative point of view, the State, if it is rationally and legitimately established, presupposes natural rights in all individuals who make it up and who, with their will legally expressed, condition and direct its action.

From this it follows that Del Vecchio is opposed not only to the exaltations of the so-called "ethical state" in the Hegelian sense, but even more to every substantialization of the state. He explicitly opposes that legalistic (administrative) excess which can be derived from that substantialization, the idea today so widely accepted, that law can and ought, by itself, to regulate all human actions. Law, he says, is certainly necessary, but not all-sufficient. As a rule of action it provides certain limits. Action within these limits is controlled by individual action and individual conscience.

It may appear that we are here confronted by a complex of propositions of exclusively theoretical value, but Del Vecchio peremptorily demonstrates its fecundity, not only as providing points of view, windows upon the historical world. It also provides principles, criteria, and definitions to help solve the conflicts and difficulties of the contemporary world. And this is evident. It may be said that the primacy of the person necessitates a complex of fundamental, essential or, if one prefers, natural rights of man and that when these are translated into positive and constitutional forms, and assimilated by constitutions and statutes, a righteous state inevitably results. This is relevant to the problem of world peace. Only States which take their inspiration from the principle of liberty, which are based on the acceptance of the primacy of the person, are able to enter into a system of international relations and accept a precise premise of common life and suitable rules of co-existence. The problem of international organization, and also of international peace — or as usually said, international security — is therefore intimately bound up with the indicated system and by precise stages connects itself with the primacy of the person and the natural rights which flow from that primacy.

In our opinion, Del Vecchio's present task is the definition of international law. And international law would cease to exist if the community of states were more abstract in character and would become not law *inter gentes*, but internal state law. Actually it exists effectively insofar as states are distinct and agree among themselves. In this way, the problems of the will reappear. Del Vecchio denies that the will which presides over the formation of international law can be arbitrary, that the international order of law can be a mere complex of norms arbitrarily consented to by the states. Like individuals, states must will, and in willing must act in accordance with the intrinsic demands of their

rational nature, and ultimately according to the essence of man and within precise limits. There are, in a word, superior norms such as the acceptance of sociality; respect for other states, if not in fact recognition of them as a matter of duty (insofar as they respond to certain prerequisites); loyalty to pacts entered into.

This is not to say that Del Vecchio has resolved the problem of international law, the problem which he underlines and to which he brings a notable contribution. In a word, it appears to us that he does not adhere to the so-called institutional doctrine and even less to the doctrine that holds that there is, as a matter of fact, an international community as a superior entity from which the states derive rights and duties. Rather, he places his trust in the role of the will in the sense that, not being unlimited but in fact subjected to an intrinsic necessity, it is the source of norms and rules for international relations which are intrinsically necessary to its action and others which are logically developed from these.

Nevertheless, Del Vecchio shows how to draw consequences from these premises. The rule of sociality enables him to have confidence in integrative processes. The historic prevalence of rational elements over other elements in the process of the evolution of law permits him to have confidence in the fruitful idea of peace, if not to believe in the definitive triumph over the fact of war. There is no question of generic formulations; rather we shall say that, as the problems become more and more specific, the method of Del Vecchio shows itself to be more and more competent, because it goes back to principles, bases itself upon them, and makes evident their historical fruitfulness. Above all, he insists upon European federation on the basis of the most favorable conditions and he makes an appeal to religious ideals and speculative thought with particular reference to the contributions of Italians — Dante, Cattaneo, and Mazzini — who have spoken on this matter.

We believe that Del Vecchio's new book furnishes us, therefore, not only a confirmation of all that the author has always coherently maintained, but also a clarification of some new aspects of his thought. In particular, the book appears notable in what it has to say about the so-called "right of solitude." By this term is meant the explicit acceptance of the primacy of the person in the order of right and law. Society itself is a consequence of the person, not only in that it depends on the person (we may say that the person is diffusive) but also in that it posits the very conditions of the person's development. This of course is the very opposite of maintaining that society constitutes the person.

These ideas are not new in Del Vecchio's thinking. It is enough to recall an early work of his, *Right and Human Personality in the History of Thought* (1904). But in this book we see the person in the closest possible link with right, as the principle of right transcending society itself.

With respect to the term "right of solitude" we would prefer to call it the "right to be and to be effective as a person," "the right to be assumed and to be effective as a principle" in itself and hence with respect to all without exclusion, since every right, even if fundamental, carries with it correlative exigences of recognition and respect. This point of view is essential to the defini-

tion of a methodical process which clearly places itself beyond objectivism and which receives light (it appears to us) from the Rosminian theory, if not from contemporary phenomenology. For in phenomenology, is not the concern to rediscover and to reach the intact basis of the essence, and is right not the most profound essence of the person? This question is intended to demonstrate at least how by diverse routes thought converges on one center, the person, whose primacy is the basis of all.

FELICE BATTAGLIA

(Translated by A. ROBERT CAPONIGRI)

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**FREEDOM OF SPEECH IN THE WEST.** By Frede Castberg. Oslo: Oslo University Press & New York: Oceana Publications, Inc., 1960. Pp. xiii, 475. \$7.50.

This book was written for the purpose of offering a comparative study of freedom of speech in three Western countries: France, the United States, and the Federal Republic of Germany. The author explains that these three countries were selected because problems relating to the scope and limits of free speech have become highly acute in their legal systems in recent years. The treatment of the subject by the author is not confined to the constitutional issues pertaining to the area of inquiry, but also includes a discussion of relevant legislative enactments and the practices of administrative organs. Furthermore, for each of the three countries dealt with, the analysis of the contemporary law is preceded by a detailed and informative historical introduction.

The general approach of the author is factual and descriptive rather than evaluative and critical. Professor Castberg seeks to acquaint his readers with the legislative, administrative, and judicial aspects of free speech protection in the countries mentioned and, as a Norwegian scholar looking beyond the borders of his homeland with interested detachment, keeps on the whole a neutral attitude towards the legal solutions adopted by these foreign legal systems. Once in a while, however, he sheds his neutralist reserve and states his own opinion or reaction, and when this happens it is always a rewarding experience for the reader.

With respect to France, for example, Castberg voices his apprehension that, in spite of a certain moderation practiced by the present government in the past, the freedom of expression in the political realm is in serious jeopardy. There is justified fear, he states, of a political trend in the direction of dictatorship. The recent criminal proceedings and administrative sanctions directed against French sympathizers with the cause of the Algerian rebels — events which took place after the publication of the book — would tend to lend support to his forebodings. The threat to free speech, he points out, is enhanced by the broad sweep of powers which the Chief Executive may wield in case of emergency under Art. 16, par. 1 of the 1958 Constitution, which reads as follows:

If there is a serious and immediate threat to the institutions of the Republic,



the nation's independence, its territorial integrity, or the fulfillment of its international undertakings, and the constitutional machinery of government breaks down, the President of the Republic takes the measures that the situation demands, after officially consulting the Prime Minister and the President of the Houses and of the Constitutional Council. (p. 39)

With reference to First Amendment developments in the United States, Castberg, who inclines to the belief that constitutional guarantees of free speech should be accorded a wide and generous scope by the courts, offers among others the following comment:

The permanent conflict between East and West, the Berlin crisis and the Korean War, numerous cases of Communist espionage and in general the widespread fear of Communism have combined to create in the United States, especially in the years around 1950, an atmosphere which was anything but favourable to political freedom of speech. (p. 412)

It is his opinion that a state should show tolerance even to those who wish to abolish tolerance, although he would not extend this principle to the point where revolutionary activity has reached the stage of preparation for violence.

It follows logically from Castberg's position that he is not favorably disposed toward the provisions of the West German Constitution of 1949 which deny freedom of speech to the enemies of the existing order and prohibit the formation of parties "whose aim it is to impair or abolish the free and democratic constitutional order." (Art. 21, Sec. 2, as transl. by reviewer) On the other hand, he approves vigorously the view taken by the German courts that the fundamental rights of the citizen, to the extent that they are guaranteed by the legal order, are not rooted in utilitarian considerations but in the essential dignity of man. To him freedom of speech has a suprapositive character, and he seeks to anchor it in basic elements of justice and the nature of man. In his own words, "the individual possesses a natural right to express his views and have access to all possible information." (p. 424) The individualistic viewpoint, he points out, has just as great a claim to recognition as the social consideration that free discussion is necessary for the effective operation of a democracy. "There is no reason to place the individual's right to a free expression of his opinion in a different class from that of other human rights which it would be very far-fetched to base on the grounds of social utility." (p. 424)

The chief value of the work for American lawyers and legal scholars lies perhaps in the discussion of free speech problems in France and Germany, two countries which have faced difficulties in this area similar to our own. As far as coverage of constitutional and legislative developments in the United States is concerned, the author has done a painstaking job of bringing together a great deal of valuable material. The intricacies and perplexities of our constitutional law are such, however, that without a minute dissection of the numerous fine and subtle distinctions found in our Supreme Court analysis of First Amendment problems the picture must necessarily remain fragmentary. A detailed and comprehensive exegesis of Supreme Court adjudications in this field was not within the objectives of the author and would have burst the bounds of the volume.

To the readers of this journal, the personal views of a legal-philosophical character briefly expressed by the author at the end of his work will be particularly interesting. They differ sharply from the temper of skeptical realism still prevailing in the Scandinavian countries and contain a substantial element of juridical idealism. (A more elaborate statement of the author's philosophical position will be found in his *Problems of Legal Philosophy*.<sup>1</sup>) The hope might perhaps be expressed that Castberg will in a future book give us a more comprehensive account of his own free speech philosophy than he has seen fit to present in the volume at hand.

EDGAR BODENHEIMER

1. 2nd ed., Oslo: Oslo University Press, 1957.

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THE NATURAL LAW READER. Edited by Brendan F. Brown. New York City: Oceana Publishers, 1960. Pp. x, 229. \$3.50.

This is a handy collection of some well-known references to natural law. In the space of 239 small pages (including preface and introduction) it sweeps from Plato to Jerome Hall, with brief passages from the writings of many of the luminaries in between. Aristotle, Cicero, Aquinas, St. Germain, Suarez, Blackstone, Del Vecchio, Morris Cohen, and Lon Fuller are included. Augustine, Gratian, the Schoolmen, and Edmond Cahn (who allegedly rejects natural law) are also represented but through secondary sources. Emerging from this collection is the familiar general picture of natural law as a higher standard based on man's nature as known by reason. There is the usual emphasis on the requirement that, to be valid, positive law must conform to natural law and that the basic principles of natural law are immutable but their application varies with time, place, and circumstances. The variety of selections bulwarks the well-known fact that natural law means different things to different persons. Dr. Brown's two major classifications are scholastic natural law and non-scholastic natural law, with the latter subdivided into neo-Kantian absolutism, transcendental idealism; ethical rationalism, relative idealism; and sociological rationalism, quasi-idealism. While I might personally prefer a different organization — one emphasizing the relation of natural law to legal institutions, legal processes, and legal problems — Brown's epistemological categories demonstrate that the house of natural law has many mansions.

This brief book is designed to provide basic data about natural law. It covers some widely discussed natural law topics: its recent revival, its relation to positive law, and its claimed superiority to "positivism" as a philosophy of law. It does not purport to deal extensively with the many deeper and more difficult problems concerning natural law so as to answer such questions as these: Are there absolutes? Can finite man know God's Law? Is man able to know truth by reason? How is natural law known by reason? (Brief passages presenting Professor Lon Fuller's creative thinking about the "direction-giving quality of purposive facts," the coalescence of the "is" and the "ought," provide the

deepest penetration into this problem.) Who decides the content of natural law? Why is there disagreement as to its content? What is the relation of natural law and theology? How do history, the social sciences, and psychology contribute to the knowledge of natural law (as Brown asserts on p. 156)? Of what value is natural law? What contribution, if any, can it make to the legislative, judicial, and administrative processes? Precisely how can solutions to concrete problems be based upon the broad generalizations of natural law? (A good portion of the book, pp. 108-171, relates natural law to positive law and as much as asserts that natural law can solve concrete problems, but there is no demonstration of how this is done.) Why is there a moral obligation to obey positive law? Is it right for a person to disobey a positive law he believes to be contrary to natural law? What role has natural law played historically — liberator or oppressor? What are natural rights? Are they subject to state regulation? Is the community interest necessarily superior to the interest of the individual person? And so on.

The selections relating natural law to positive law cover a broad field: international law, constitutional law, contracts, torts, family law, property law, criminal law, corporations, equity, and seven court cases.<sup>1</sup> This relation is most completely elaborated in the family law section as Brown argues that monogamy is the form of marriage which makes possible the most complete fulfillment of natural law duties. However, because of limitations of space the relationship of natural law to most of the positive law categories is necessarily sketchy. In some instances (e.g., property law, 139-140; criminal law, 140-141) space permits nothing more than the assertion of the relationship.

This book does not purport to offer selections from large numbers of writers on natural law. Therefore no good purpose would be served by listing the many significant persons who are not represented. Furthermore any collection is bound to omit some personal favorites. However, I should think selections from Martineau's pregnant twentieth century natural law thinking would be a must.

I have a *bête noire* which must be trotted out finally. It concerns the alleged conflict between the legal philosophies of natural law and positivism and the assertion that there is a well-developed school of legal philosophy known as positivism which teaches that might makes right and that law and the state are not subject to independent moral evaluation. It is my position that this alleged school of positivism is a straw man existing only in the minds of its righteous attackers.<sup>2</sup> At points Brown appears to fall into this heresy, particu-

1. *West Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943); *Minersville School District v. Gobitis* 310 U.S. 586 (1940); *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937); *Adkins v. the Children's Hospital* 261 U.S. 525 (1923); *Olleff v. Hodapp* 195 N.E. 838 (Ohio 1935); *Everet v. Williams* (1725) in 9 L.Q. Rev. 197 (1893); and *Northwestern Bands of Shoshone Indians v. U.S.* 324 U.S. 335 (1945).

2. While unorthodox, this position is far from unique. Recent articles condemning the typical view of legal positivism are: Jenkins, *The Matchmaker or Toward a Synthesis of Legal Idealism and Positivism*, 12 JOURNAL OF LEGAL EDUCATION 1 (1959); Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VANDERBILT LAW REVIEW 117 (1960); Lumb, *Natural Law and Legal Positivism*, 11 JOURNAL OF LEGAL EDUCATION 503 (1959); and, refuting the popular accusation that legal positivism teaches that judges do not and should not make law, Morison, *Some Myth about Positivism*, 68 YALE LAW JOURNAL 212 (1958).

larly in his comments on Austin. However, his observations about Holmes and Kelsen generally avoid this and are quite perspicacious.

I am amazed how many scholars, who should know better, glibly condemn the straw man of legal positivism. At the same time I am surprised how many scholars, who should know better, glibly condemn what could be called the straw man of natural law, i.e., the view of natural law as a complete code of detailed and allegedly immutable laws to be imposed on every community in the world. Brown's collection could correct the error of those who would make of natural law such a detailed code and it is available for the enlightenment of those who would criticize this as the only, or even a respectable, view of natural law.

THOMAS BRODEN, JR.

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THE RESPONSIBILITY OF THE ARTIST. By Jacques Maritain. New York: Charles Scribner's Sons, 1960. Pp. 120. \$2.95.

These six lectures delivered at Princeton consider the distinction between human art and prudence, the first making what is good for the effect, the second doing what is good for the cause, and then, after pausing on the notion of art for art's sake, indicate the artist's responsibility for the good life with respect both to others and to himself. One legacy of the romantic movement has been that the esthetic object — or rather event, since men could not pick up their moorings with a philosophical realism — stands out by itself away from the stream of larger purposes. For nearly forty years, ever since the publication of *Art and Scholasticism*, of which a new translation is expected and will be welcomed, Professor Maritain has offered a steady resistance to this diffused Bohemianism.

All the same he has never gone to the other extreme of an excessive moralism, which would tame art and test it by its role as a social improver. He responds to the remark of Degas, "a painting is a thing which requires as much cunning, rascality and viciousness as the perpetration of a crime," for he recognizes that art is engaged with an end within itself, not a means, and therefore calls for complete devotion. He allows also for what Gide meant by saying that the artist's function is not to provide food, but intoxication, though he hesitates to class morality as a branch of esthetics — which indeed it is, if its deliberations are charged with a motion from the premoral condition of being created to the postmoral vision of God.

What he does is to maintain that there are two realms — art and morality. But he is no exponent of any "double-truth theory," for he seeks to relate them, if only by providing the protocol of extrinsic and indirect subordination. He leaves the impression sometimes that his thought is more subtle than his idiom which sometimes draws divisions instead of distinctions. Although he recognizes with St. Thomas the coincidence of more than one total cause in a single situation, he is inclined to tease out different essences into as many different layers. He is not an ethical formalist, and yet the moral order is perhaps somewhat drastically lifted out of the ontological order. Art and morals are left associated, to use a historical

analogy, rather in terms of Confederate than of Federal theory. Nevertheless there can be no charge of a flat scholasticism against an author so gifted with insights deriving as much from sympathy as from judgment. Indeed his main argument takes the artist as a man in the round. A pure artist would be a monster, and the same could be said of a mere moralist.

THOMAS GILBY

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THE RULE OF LAW AND JUDGMENT. By Kotaro Tanaka. Tokyo: Yuhikaku, 1960. Pp. 694. Y. 1600.

This book, containing twenty papers by the former Chief Justice of the Supreme Court of Japan (1950-60), is, according to the words of its author, "the final balance-sheet of the observations and reflections which have been made in the past ten years on the meaning of the Rule of Law and the essence of trial." (Preface) The book is divided into two parts. The first part deals with a general theory of the Rule of Law and the mission of the judge, whereas in the second part the author discusses urgent and important judiciary problems in present Japan, such as the promptness of trial, maintenance of court order, and countermeasure against frivolous appeals. A rather extensive article on the history and activities of the American Bar Association, and the Proceeding of 16th General Meeting of the Study-Committee of the Constitution appear at the end as appendix.

First, how does the author conceive the Rule of Law, and what is, in his view, its theoretical foundation?

The author notes that the meaning and principles of the Rule of Law are products of political history, being closely tied with political conditions peculiar to each state. Thus, the conception of the Rule of Law in England differs from that in the United States. A general meaning of the Rule of Law seems to be well summarized in the resolution of the Triad Committee of the Court, the Office of Public Prosecution and the Attorneys' Association, advising the institution of Law Day in Japan: "The protection of the basic rights of the individual person by law and the establishment of social order by law." (p. 252)

A law is different from any mores or ethical norms in that, in many cases, it is coercible and is often accompanied by coercive power. A law is not merely a doctrine that declares what is just, but also is a power or force that realizes justice. Hence, the Rule of Law implies that a law must be able to ensure its observance by those to whom it is addressed, and to overcome any attempt to transgress it. Thus, force is at the service of law, is a means to the latter. In any constitutional state (*Rechtsstaat*), no such force as is opposed to law is allowed to exist. All private powers or forces are, so to speak, exacted by and concentrated in the state, and made to serve law. (p. 264)

A law in itself, on the other hand, is not a force, but is opposed to the latter, just as oughtness is opposed to fact. Now, the law must protect not only the society from an arbitrary will and power of the individual, but also individual persons from the power of the state. The next inevitable question, then, is the relationship between the law and the state. Is the state subject to some

law? If it is not, its power will tend to become arbitrary, and the human rights will be exposed to a constant threat. (p. 269)

Here, as the author points out, the Austinian conception of the law as a command of the sovereign is of no avail; for, from this viewpoint, the restriction of the state by law is a self-contradiction. It may be argued that the state is subject to a self-restriction. But the self-restriction is not a true restriction. Again, the so-called check-and-balance theory, since it is of the nature of political theory and does not belong properly to the field of legal philosophy, cannot be considered as the adequate theoretical foundation of the principle of the Rule of Law.

The real theoretical foundation of the Rule of Law, the priority of law over the state, according to the author, is the existence of some higher norms which transcend and bind the state. The power of judicial review would lack its ultimate theoretical justification without the acknowledgment of this higher law. For the power of judicial review, which means that all three branches of government are subject to the constitution, implies that the state recognizes in the constitution made by itself certain principles which transcend the state itself. Ordinarily, the legal basis for the power of judicial review is sought in the supreme law clause. (Art. 98)\* But what, in the final analysis, makes the constitution the supreme law of the land? It is the fact that the constitution guarantees basic human rights. In other words, what makes the constitution the supreme law of the land is some supraconstitutional source. Thus, legal positivism is inadequate in explaining theoretically the Rule of Law. The true theoretical foundation for the Rule of Law, therefore, can be provided by natural law jurisprudence. (p. 271)

The next main theme of the book concerns a significant difference between the new constitution and the old Meiji constitution from the viewpoint of the Rule of Law.

The new constitution, according to the author, contains an extremely bold and frank expression of natural law ideas. (p. 13) This can be seen in the preamble and the articles concerning the basic human rights (especially Arts. 11, 13). The most remarkable in this respect is a statement in the preamble. After stating the principle of democracy (the sovereignty of the people, the spirit of international cooperation, and the respect for the basic human rights), and declaring that the constitution is founded upon this universal principle of mankind, it states: "We [the People of Japan] reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith." This passage is almost identical with Art. 98, except that the latter does not contain the word "constitutions." Another interesting sidelight is that in the draft submitted by the government to the constitutional diet, the preamble did not include the word "constitutions." It was inserted there by the motion of the lower house. Its presence, as the author points out, makes a great difference. This statement is a clear acknowledgment of natural law, inasmuch as it declares that the constitution, even when it is duly enacted, is void and to be rejected if it violates the higher law. This indisputable recognition of natural

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\* These "Art." references are to articles of the Japanese Constitution.—Ed.

law by the new constitution is in itself a genuine progress from the viewpoint of the Rule of Law.

Secondly, the new constitution elevates the status of the judiciary and secures its independence. It gives the supreme court the power of reviewing the constitutionality of laws and ordinances. It also gives the supreme court the authority to make court rules. Moreover, the whole system of the court is not subjected to the Minister of Justice, but is left to its self-government. These changes mean certainly a definite progress from the viewpoint of the Rule of Law, insofar as the judiciary is directly responsible for the establishment of law and order, which is the first condition for any democratic society. (p. 213)

Such embodiment of natural law in the constitution signifies, according to the author, a true progress of law. For progress in law is inconceivable without taking into account the essence and ethical destiny of man. Progress of law may be said to be measured by the gradual realization of true humanism in the realm of positive law. Consequently, a law which is based on human nature itself, namely natural law, is the guiding principle of this progress. Hence, progress of law consists basically of a gradual positivization of natural law.

Thus the author acknowledges — and commends the fact — that the new constitution has reached forward to the ideal of the Rule of Law. What about the society, then, to which this constitution is to be applied, and what are the problems that beset courts in their efforts towards the realization of the Rule of Law? Here the author's view is far from optimistic. In his judgment the present social condition of Japan from the viewpoint of the Rule of Law is almost as backward as the international community at large. (p. 268)

What are the causes of the present deplorable situation? First, there is a general trend of distrust of law as well as a weakening of law-abiding spirit. This is a reaction caused by the fact that frequent violations of basic human rights and freedoms by the militaristic government of the prewar period were made in the name of law. Again, the people, lacking proper political and civil training, tended to abuse the rights and freedoms accorded them by the new constitution. Then, the marked weakening of the state authority added to these factors in producing an anarchistic tendency. (pp. 250, 268) The second major cause is the rise of a revolutionary force with an international background, which is opposed to both the state and the law. This Marxism-inspired force strives to paralyze the normal functioning of the state in the field of the administration of justice, labor, and education. Spokesmen for this force criticize openly, through mass media, judicial decisions, stage mass demonstrations in order to influence trials, threaten the judges, and turn the court into a theatre for political play by disorderly conduct. In a word, there is a tendency to justify any exercise of force and place it above the law. Unfortunately, there has not appeared any strong criticism or protest in the form of public opinion against this tendency. (p. 268)

It can easily be seen that the most urgent problem in Japan today is to replace the rule of force by the Rule of Law. First of all, there is a need to enlighten the people regarding the fact that law and freedom are not opposed to each other, but rather freedom is preserved and protected by the law. Law

and order are the most important conditions of the welfare of the people; and respect for and determination to uphold them are the barometer, so to speak, whereby the development of democracy in a given society is to be measured. (pp. 135, 184, 213)

Next, what can be done about the ideological conflict under the new constitution? It has been pointed out that, according to the author's view, the new constitution, in acknowledging natural law, takes a definite stand as to its philosophy. It rejects anarchism and affirms the natural law basis of family, nation and state on the one hand, and condemns the state absolutism and emphasizes the dignity of the human person on the other. (p. 13) What can be done, then, regarding those people who subscribe to such ideologies as are opposed to the philosophy and political ideas of the constitution? Should the policy of thought-control be adopted, or should all ideas or thoughts, including those that deny the constitution itself and avow to destroy it, be allowed? (p. 25)

One solution is to declare that although every individual is free to hold any ideology whatsoever within himself, once it is expressed externally it is subject to control by the state, from the viewpoint of the proper exercise of rights and freedoms and of public welfare. This solution, however, is insufficient. It does not penetrate to the core of the problem. (p. 26)

First of all, it must be noted that the fact that the new constitution does not punish anarchists, Fascists, or Communists because of their ideology, does not mean that it approves these ideologies. According to the author, the constitution is not neutral or indifferent with respect to social philosophy. On the contrary, it is unwaveringly committed to certain political ideas, and it is, so to speak, fully convinced of the validity of these ideas. (p. 25)

The author emphasizes the difference between political liberalism and what he terms "philosophical liberalism." The former, unlike Fascism and totalitarianism, recognizes the freedom of thought and religion. The latter implies a negation of absolute truth, leaving the question of truth to the subjective choice of each individual. While the former kind of liberalism is necessarily required by every democratic society, the latter must be rejected. In fact, political tolerance is not incompatible with philosophical intolerance, but rather requires the latter. For, while the right of every man to form his own thought is fully guaranteed constitutionally or politically, not every idea or theory has the equal right to exist philosophically, but only those which can stand the test of objective reason. Under the new constitution, the rule or virtue of political tolerance must be adhered to under all circumstances. On the other hand, the truth of political ideas must be pursued in an objective and uncompromising manner. When we succeed in living in the spirit of political tolerance and of philosophical intolerance to the utmost, we might, the author suggests, be able to overcome the ideological conflict which is at the bottom of the present social unrest. (p. 30)

Now, what are the problems and tasks that confront the court from the viewpoint of the realization of the Rule of Law?

Above all, the author maintains, it is necessary to establish and exalt the prestige or dignity of the court and of judicial decisions. To use his expression,



the prestige of the court is a symbol of the Rule of Law. The dignity or authority in question is not attributed to the person of the judge, but is due to the special matter with which he is concerned — the administration of justice. As the work of a judge involves both that of a historian (recognition of facts) and jurist (interpretation and application of law), he rightly enjoys independence and freedom similar to that of a university professor. The so-called independence of the judiciary is to be understood in a similar manner. In this connection, the author discusses extensively the analogy and distinction between the judiciary and the educational function or authority. (pp. 5, 7, 11, 12-14, 15, 156)

Thus, the prestige and the independence of the court are necessary for the proper exercise of its functions. As the constitution states, judges must be protected so that they can be "independent in the exercise of their conscience," and that they shall be "bound only by this constitution and the laws." (Art. 76) This independence includes not only the independence from the absolute power of the state, but also from the pressure of political parties, unions, journalists, and public opinion.

This leads to another principal subject matter of this book, the problem of criticism of judicial decisions. Here the author is not referring to the criticism of judgments in general by specialists, but only to the criticism by the non-specialist of the decision in a case which is still pending in the higher court, and moreover to the criticism concerning the finding of facts only. Is it permissible, the author asks, to assert through books and mass-circulation periodicals the innocence of those defendants who were found guilty in the lower court, and to organize mass movements, thus stirring up in the mind of people the feeling that the decision was wrong, and making them to expect that the higher court will reverse the decision? The author's answer is an unqualified "No."

Those who justify such criticism appeal to the freedom of speech. To this, the author answers that this freedom is not absolute, but is subject to the limitation from the viewpoint of public welfare. As the exercise of this freedom in the present case seriously injures the normal functioning of the court, by blocking the discovery of truth, it must be restricted. The critic might still object, by claiming that he can prevent the innocent from being punished. To this, the author replies that if such criticism and pressure become a general practice, instead of eliminating the error of trials, they will tend to weaken the present system of courts, which is a product of many centuries' experience of mankind, and prepare the way for "people's trial" and lynch method. In short, such criticism ignores the due process of law. If such out-of-court criticism and pressure influence the judges, they are harmful, because they threaten the independence of the judiciary and make fair trial impossible. If they do not succeed in exerting such influence, then they are useless. That there is no clear indication of protest by public opinion against such criticism, agitation, or mass movement — which tend to undermine the Rule of Law — shows the immaturity of democracy in Japan.

Another notable discussion in this book is that of speeding up judicial proceedings. As "justice delayed is justice denied," swiftness constitutes one part of a fair administration of justice. The author names the frivolous appeal as one major cause for the delay of judicial proceedings, and suggests some solu-

tions. (p. 225) Again, the so-called court struggle (that is, to exploit the court for the purpose of political propaganda and demonstration by leftists) is another cause that is detrimental to a fair and speedy administration of justice. This tactic based on the Marxist ideology of class struggle has no place, according to the author, in any democratic, constitutional state. (p. 337)

Finally, the author notes that the main stage for the Rule of Law has shifted from the national to the international society. The basic condition for a lasting world peace, longed for by all peoples of the world, is legal order, that is, the establishment of a supranational legal system (world law) and its effective enforcement. But, the author adds, the world law must aim, not merely to end all wars and anarchism, but to realize freedom, justice, and welfare for all men, especially to guarantee the basic human rights. This is a demand of natural law. If the latter aim is not realized, the forthcoming world peace will not be the one we desire. It is only natural that we, the people of Japan, who have experienced the disaster of wars and the terror of nuclear weapons, wish to have peace first and at any cost; but the kind of peace which is to come is no less vital than the peace itself. (p. 276)

The foregoing is only a summary review of some of the dominant themes in the present work. The author's style is clear, forceful, and laconic. In view of the present trend of jurisprudence in Japan, which shows a considerable impact of legal positivism, the theory of the Rule of Law expounded here will inevitably draw many vigorous objections and criticisms. Natural law jurisprudence, owing mainly to the work of the author, has earned respect and attention in the academic world of legal science in this country. It is, however, still a fraction as a school of thought. But even those who disagree with the author will be forced to accept his analysis of the present critical condition of law and order, and will not fail to feel the weight his arguments carry. Then, it is up to them to offer alternative theories to give effect to the Rule of Law. Thus, this book stands as a challenge to all responsible students of law, and provides a chance for a sober reflection and meditation to all who have a genuine interest in the future of democracy in Japan.

BERNARD RYOSUKE INAGAKI

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AN ENQUIRY INTO GOODNESS. By F. E. Sparshott. The University of Chicago Press & The University of Toronto Press, 1958. Pp. xiv, 304. \$5.50.

Sparshott's proclaimed intention in this book is to provide an analysis of the word "good." Here are some quotations to give an impression of how Sparshott construes analysis.

It is in fact impossible to devise ways of answering questions about the nature of goodness that are not also ways of answering questions about how the word "good" is used. (p. 50)

To speak of the "nature of goodness" is therefore to carry on the discussion in a field in which it cannot be finally settled, since if it becomes serious it must at once resolve itself into a discussion of meanings. For these reasons

we shall speak of the meaning of "good" rather than of the nature of goodness. (p. 50)

If, in fact, the concept of goodness cannot be explained in terms of what people mean when they speak of goodness, and hence in terms of how the word "good" is used . . . , one is at a loss for a way of explaining it. (p. 51) . . . I seem to myself to be giving an objective report on the meaning and use of the word "good" among those with whom I have intercourse of any kind. (p. 78)

What was required was not to ascribe to the word ["good"] a precise meaning but to state with precision what kinds of imprecision are to be encountered in its use in everyday thought and speech. . . . It is the chief (and only important) contention of this book that the ambiguities and imprecisions of everyday speech must be carefully preserved by the philosopher; for they are the "soft spots," the tender places of moral thought, and the best way to reach a clear understanding of moral conflicts and disputes may be to point up these ambiguities. (pp. 8-9)

These positive sketches of analytic tactics, however, are contradicted by other things Sparshott says. Of such a formula as the one presenting his analysis of "good" he says that it "has to be invented, not discovered." (p. 61) In the same vein, we find: "If then an analysis stands by itself, it must be interpreted as a covertly legislative activity, creating what it purports to discover." (p. 75) And again, in the very last section of the book, Sparshott says: "either the formula is a declaration of intention, or it is a sociological report: either it implies that the author means to take this way of interpreting the word 'good,' or it is a factual account of how the word is used." (p. 291) Sparshott declares that he is doing neither of these things. What, then, is he doing? "If it is true that those who use such words as 'good' do so (when they are speaking carefully) in the way herein *described* [my italics], and if it is true that such a word is the logically fundamental one in the evaluations made by those who use it . . . " (p. 293) again reverts to the description of analysis as sketched in the initial list of quotations. But one cannot (logically) be *describing* how a word is used, what is meant by those who use it, and also be *inventing* or covertly *legislating*. In this instance, one can describe only what is at hand, and what is at hand one cannot invent or legislate into existence. Thus, as regards what it is that Sparshott thinks he is doing when he is doing analysis, I must confess that I am completely baffled.

But a philosopher's theory of his practice may be worse than his practice. Let us, then, turn to the formula setting forth Sparshott's analysis of goodness: "To say that X is good is to say that it is such as to satisfy the wants of the person or persons concerned." (p. 122) He calls this a "formula" to distinguish it from a definition. The reason for not calling it a "definition" is that "Although . . . our formula might well be called a definition . . . its function as an integral part of an argument of which it forms neither a premise nor the conclusion makes that appellation inappropriate." (p. 59) This seems to imply that a necessary condition for a definition is that it be a premise or the conclusion of an argument, if it functions "as an integral part of an argument" at all. This is unwarranted. We may invoke a definition in the course of an argument

which cannot go on because our interlocutor fails to understand an expression and we would say, in such a case, that we provided the needed definition so that the argument could be continued. Here the definition invoked functions neither as a premise nor as the conclusion; and as Sparshott does not state precisely what functioning "as an integral part of an argument" means, the definition invoked may be said to be so functioning. There is, thus, no credible reason given for not regarding the formula as a definition. On the contrary, certain remarks Sparshott makes give us warrant to take it so. "It is . . . rather less my intention to provide a form of words which can be substituted for 'good' than to provide a means of interpreting particular statements in which the word is used." (p. 123) What can this mean except to provide a means of explaining the meaning of particular sentences in which the word "good" is used? And if that, then what more is needed to call the formula a definition?

Sparshott tries to defend himself against the charge that his formula may be an instance of the "naturalistic fallacy." According to him, to commit the "naturalistic fallacy" is to maintain that the same expression is at one and the same time analytic and synthetic. In terms of G. E. Moore's discussion of it, which is the frame of reference, there is more to the "naturalistic fallacy" than that. I shall return to that after I examine Sparshott's defense against his committing the naturalistic fallacy in *this* sense.

The defense on p. 216-17 comes to this. The formula, being an analysis, must be analytic. That it is can be seen readily if we ask: Is "That which is such as to satisfy the wants of the person(s) concerned is good" a significant proposition? (Informally) "The answer, surely, is 'No.' The material in Sections 6 and 7.225 should have demonstrated that no such proposition is needed to explain why the fact that a thing is 'such as to . . . ' is often, if not usually, a reason for choosing or preferring or recommending it; and such use of such propositions is the main object of Moore's attack. Formally, the use of the words 'to say that . . . is to say that . . . ' . . . shows, the proposition under consideration is not a significant one because one cannot speak of 'the wants of the person(s) concerned' in *abstracto*."

Now to begin with, the "informal" and "formal" considerations do not support each other, because "significant" in its first occurrence means "synthetic" while in its second occurrence it means "meaningful." Insofar as the point at issue is the "syntheticity" of the proposition under consideration, the "formal" defense fails, being an *ignoratio elenchi*. The "informal" defense fares no better. Moore's "open question" is devastating here. Is that which is such as to satisfy the wants of the person(s) concerned after all good? Even granting Sparshott that "the wants" which a good thing "satisfies are more important, or more pronounced, than those which it fails to satisfy" (p. 132), is it senseless to ask if such wants are good? What if they were the wants of a society of people whose one big joy in life was to inflict excruciating suffering on the animals within their power? As the question is open, Sparshott's formula is synthetic and not, therefore, an analysis.

Nor is this the end of the matter. The "naturalistic fallacy" of treating the same propositions as analytic and synthetic is a consequence, as Moore shows,

of defending moral principles by appeal to definitions of moral or evaluative words. Moore gives two different descriptions of what he considers to be the (root) naturalistic fallacy. In one passage he says that it consists in trying to define goodness at all. In another he describes it as the fallacy of defining "good" which is not the name of a "natural object" in terms of any "natural object" whatever. Everyone, Moore included, agrees that Moore never gave a satisfactory account of what "natural properties" or objects are. But he gave examples, and every one of them could be shown to fail, by the "open question" technique, as correct *definiens* of "good." And, as I think I have shown above, Sparshott's *definiens* is one of these "natural" and inadequate ones. I would agree with Sparshott if he were to say that Moore has failed to prove that "good" cannot in principle be defined in some terms which, on examination, would exhibit essential similarities to the sorts of examples as he gives of "natural" objects or properties. The "open question" technique presupposes that an appeal to ordinary discourse will always settle such a question as: Is a statement of the form "X is A but not good" self-contradictory? But I suspect that ordinary discourse is not that definite on all such questions. I can think of possibilities which the "open question" technique cannot dispose of as easily as it does of Sparshott's formula. One such is the Dewey-like "construction" of goodness in terms of the capacity of objects which are such as to sustain the approval, preference, liking, desire, etc., of those who have fully intelligent and accurate comprehension of the nature of their scientifically determinable and imaginatively explorable qualities and relations. If all this can be truly said of an object, is it still an open question whether or not it is good? Sparshott correctly suggests that a good test of an adequate analysis of "good" is to challenge those who demur to say what more they require. Applying this test to his formula does not save it. But Moore would have, I think, a much harder time with the above formulation of the Dewey-like analysis. Yet it is one which has all the earmarks of a "naturalistic definition."

In the immediately preceding, I have tried to suggest some of the subtleties in Moore's analytic ethics, subtleties which Sparshott misses in the main. And this is typical of the inadequate way in which he treats other recent and contemporary writers in ethics, e.g., R. B. Perry, Charles Stevenson, R. M. Hare. These sections of the book are virtually valueless to sophisticated philosophers who have studied the literature, and they should be avoided by the uninitiated, except under the tutelage of an able teacher who can set the record straight.

On the positive side, if we can forget some of Sparshott's unfunny puns ("They simply vanish into thin Ayer," p. 9) and patronizing slurs on master-philosophers (e.g., on Moore, p. 101), his style is smooth and free of philosophical jargon. The book is the product of copious and wide reading, ranging from technical philosophy to social psychology and anthropology to linguistics. Tucked away here and there in the discursive style are clear and illuminating observations. And his discussions of the relation of goodness to duty, obligation and "ought," and the distinctions he points to in the ways in which "duty," "ought," and "obligation" are used are sound. This is a serious even if not altogether successful book.

DESEGREGATION AND THE LAW. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr. New Brunswick, N. J.: Rutgers University Press, 1957. Pp. xiv, 333. \$5.00.

Experience since 1954, when the Supreme Court handed down its decision in *Brown v. Board of Education*,<sup>1</sup> has not provided cause to doubt the accuracy of Blaustein and Ferguson's appraisal that it "was the most important legal decision of the twentieth century, and it may well have been the most important legal decision ever rendered by an American Court." (p. ix) Nor has the usefulness of their book been seriously diminished by reason of the notorious events that have occurred since the date of publication.

It is not an exhaustive or definitive treatment of the problems involved in the Court's decision. The authors disclaim attempting anything so ambitious. Indeed they state at the outset that the decision "will remain a constant source of comment and discussion as long as there is law and as long as there are lawyers." (p. ix)

The authors' concern is primarily and almost exclusively with those aspects of the *School Segregation Cases* that are of professional interest to lawyers. The very heart of the matter from the point of view of the profession is succinctly stated by means of the question: Was the Court's "holding a proper exercise of judicial power?" (p. 71) To approach this question intelligently one must have some knowledge not only of American Constitutional history but also of legal doctrine and theory. These requisites are afforded the reader in intelligible and interesting fashion. The authors explain, for example, the old controversy concerning the judicial function, that is, whether the judges merely declare the law as they find it or whether they make the law. They condemn the notion that the law is merely what the judges say it is and hold to the orthodox view that the Constitution is law, as statutes are, and not merely "sources of law." However, the Constitution when invoked in the course of Constitutional decision cannot in every case be applied mechanically. The great clauses require interpretation. These trite but important ideas are developed in clear language and in such a way as to hold the reader's attention. Opposing views are fairly stated. It would not be too great an exaggeration to say that most of the book consists of matters tending to result in an affirmative answer to the question above. Historical materials concerning the adoption of the Fourteenth Amendment and the course of judicial decision take up several chapters in the book, and an entire chapter is devoted to biographical information with respect to the Justices of the Supreme Court who were concerned in the *School Segregation Cases*. The historical evidence concerning segregation in the schools both before and after the adoption of the Fourteenth Amendment is candidly set forth.

The entire tone of the book is one of reasonableness and sincerity backed up by sound learning. The relevant facts are related in detail. The documentation is impressive.

Almost any intelligent person would find the book profitable reading. There

1. 347 U.S. 483, 74 Sup. Ct. 686, 98 L.Ed. 873 (1954).

is meat enough even for the technician or specialist, but the style and content are suitable for the general reading public. To this reviewer this book seems like an excellent introduction to the study of constitutional law. The law student or other interested person coming for the first time to the reading and studying of decisions of the Supreme Court would find many difficult matters explained in such a clear way at the outset of his studies that it would make the sequel more readily understandable and vastly more interesting, even truly enjoyable.

The authors are to be congratulated on the accomplishment of a difficult undertaking. Here the reader can find in readily usable form those matters essential to the understanding of the historic decision of 1954.

ROGER PAUL PETERS

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THREE TRADITIONS OF MORAL THOUGHT. By Dorothea Krook. Cambridge: University Press, 1959. Pp. xiii, 355. \$5.50.

The objectives of this book, as described in the introduction by the author, are twofold. Her chief emphasis is on the nature of the moral life and a historical interpretation of English moral thought as founded upon it. Ancillary to this purpose, the author attempts to show how the skills of literary criticism may be usefully applied to philosophic thought.

The main thesis is developed around three specific categories in interpreting moral experience: the Platonic-Christian, or religious; the Utilitarian, or secular; and the Humanist, or modern religious viewpoint. Professor Krook clearly distinguishes between the Platonic-Christian views of Plato and St. Paul and, what she describes as Utilitarian, the ideas of Aristotle, Hobbes, and Hume. The divergencies of the groups are many; however, the central distinction is drawn from their different interpretations of the nature and significance of love as a factor in the moral life. Thus, she divides the moralists into two groups. In the one group are those who conceive of love as an inherent force in moral experience and "in man's capacity to be transformed by love as an intrinsic constituent of human nature." (p. 2) Among those moralists who have given love a dominant role in moral experience are Plato, St. Paul, and St. Augustine. In the opposite group are moralists who do not believe in the reality of love as essential to the nature of morality. This secular view, stemming from Aristotle, is projected into English moral philosophy by utilitarian moral concepts. The latter concepts, which deny the power of love as a constituent element in moral life, are illustrated by Hobbes and Hume.

The Humanist is in accord with the great virtues that Christ taught for the salvation of mankind: charity or loving kindness; humility; unselfish service to society; readiness to forgive those who have wronged us; power to renounce pleasure for the sake of the good, and power to endure suffering where there is no alternative to achieve the good; and, especially, conviction that love is possessed of the power to transcend the tragic disabilities which are inherent in humanity. In brief, the Humanist subscribes, with a conviction equal to that of

the Christian, to the three great Christian virtues, faith, hope, and charity: faith in the redemptive power of love and in the capacity of man to be redeemed by love; hope for the final salvation of the world by love; charity as the universal method by which faith and hope are fortified and implemented.

Incident to this, the Humanist accepts the Christian and Platonic view of man's moral nature. He recognizes, as do the religious moralists, a divisive element in man, making for a "higher" and a "lower" self, and views morality as the unceasing effort of the "higher" to absorb and change the "lower." The "lower" embraces the evil impulses in man—impulses which take the form of fear, vanity, and greed; the "higher" encompasses the power of love which is capable of overpowering and transcending the bad. T. S. Eliot's formula, expressive of both the Humanist and the Catholic viewpoints, is cited in respect to the moral life: they have "high—indeed, absolute—ideals and moderate expectations." (p. 5)

These are some of the elements of affinity between the Humanist and the religious or Platonic-Christian thinker. However, the Humanist accepts a secular viewpoint which is out of harmony with religion, denying the reality or the essentiality of a supernatural force to achieve a system of values of which love is supreme. The Humanist conceives of this scheme of values as being solely projected within human society, their validity and efficacy being established through human experience.

But this philosophy transcends naturalistic or scientific Humanism as well as the hortatory pronouncements of the Cambridge Humanists relating to kindness and good manners. Krook identifies Humanism as "religious"—a broadened meaning—since she claims for it a redemptive role. In her discussions of John Stuart Mill, Matthew Arnold, F. H. Bradley, and D. H. Lawrence, the author attempts to identify those aspects of their Humanistic philosophies which have religious overtones.

As in all matters of preferences, one could debate the wisdom of the selection of philosophers made by the author. The book does appear to be too heavily weighted with English thought; especially noticeable is the absence of any discussion of Kant and Hegel. In my opinion, a book on moral thought which omits the latter philosophers fails of its original purpose.

Of equal concern to me is the initial association of Christian thinking with Plato, dissociating Christianity from the influences of Aristotelian thought. Might not one justifiably inquire, whence came Aquinas's philosophy? Is it not grounded on an understanding of the nature of man, as viewed by Aristotle, rather than derived from the idealistic pronouncements of Plato?

One cannot separate the contents of the book from its didactic purpose. The volume, as the author admits, reduces "the philosophical framework to a rather skeletal affair," (p. viii) since it is intended to serve the study needs of literary students rather than philosophy majors. Hence, the book is fashioned in simple exposition and summation and lacks diacritical analysis. The result is that the volume is given to rote information and mere demonstration. It is my opinion that the true objectives of a philosophy course—self-discovery and self-development—are lost in this book, since it does not require independent analysis nor



does it offer the student the challenge of representative original source materials.

The subordinate purpose of the book relates to the literary aspects of philosophical writing. Krook expresses the view that the literary elements of a philosopher's product are of major significance. Here is included the use of imagery, fable, rhetorical expressions and other poetic forms. Of even more importance is style. Good style in philosophical writing is a recognizable attribute. Hume's elegance, Plato's dramatic intensity, and Hobbes's metaphorical vivacity reflect more than agreeable ornament. The author claims for style an important function in the illumination of a doctrine, reflecting the same skills which are exercised in the reading of poetry and other literature.

Thus, Krook holds that there is a common base for poetry and philosophy when both are seen as reflecting creative imagination. In this setting, the common elements of poetry and philosophy are easily discerned. A philosophical system, according to the author, provides an interpretation of reality, as does a poem, a play, or a novel—a vision of man's potentiality. The philosopher's view is necessarily individualistic and subjective. Hobbes's *Leviathan* is conceived of as his reflections on human life, even as *King Lear* is of Shakespeare's. Plato's views of human experience are as intimately revealed through the Socratic argument in the *Gorgias* or the *Republic* as Blake's, Hopkins's or Yeats's are expressed in their poetry by concrete imagery and rousing cadence. On the other hand, the author acknowledges that a comparison of philosophical doctrine and literary artistry reveals disparities between the disciplines. A distinction between a work of philosophy and a work of poetry can be drawn by alluding to the substance of the philosophy to which no literary reference need be made. This is especially true of those philosophical systems which embody a scheme of definitions and distinctions. The latter are usually expressed in technical or scientific language and possess no literary characteristics. Under the most rigorous philosophical system there is no more literary identity than is found in the symbolic language of a mathematical system.

A further distinction between poetry and philosophy relates to the details of the systems. The salient elements of poetry are described as imagery and musical rhythm. Philosophy, on the other hand, pertains to arguments or ratiocinations. This difference creates the most fundamental distinction between them—the so-called "concreteness" of poetry on the one hand and the "abstractness" of philosophy on the other. Poetry concerns itself with life in the concrete. In contrast, philosophy evokes abstract generalizations *about* life, and is not devoted to the details *of* life. Poetry stems from the basic criteria of vividness and intensity, which are responsive to the quality of life, whereas philosophy is measured by the comprehensiveness and the coherency of its system of abstractions.

Krook identifies these distinctions, yet does not view them as absolute and irreducible. Poets, like Shakespeare and T. S. Eliot, are given to ratiocination; and philosophers, such as Hobbes and F. H. Bradley, have fused their ratiocination with imagery. In addition, the polarity between the concrete and the abstract is not always complete, for the products of some poets and philosophers may reflect a coalescence. Great poets are admired not only for the vividness and the intensity with which they view life, but also for their depth of insight, their fullness of understanding, and the significance with which they identify

reality. In these men, as Coleridge says, the capacity to generalize the particulars of experience forms an ultimate in the quest of true wisdom. (p. 16)

So also, in contradistinction to the ordinary philosophers, the best thinkers possess a recognizable sense of the qualities of things. Like the inspired poets, their efforts refute all attempts to distinguish between the abstractness of philosophy and the concreteness of poetry. As the author suggests, "When such a philosopher sets out his system of abstractions, this sense of the concrete quality of life lingers about it like a fragrance, recalling to us—even, in its own implicit and indirect way, recreating for us—that immediate sense of life which the philosophic passion for abstraction has been powerless to exorcise." (p. 17)

The use of the expositive method limits the pedagogical achievements of the secondary objective of the book, since students are not afforded an opportunity to review representative original source materials and to draw independent judgments as to characteristics of the writings. The samplings are too few and too brief to provide bases for judgment.

If the ultimate purpose of a collegiate text on philosophy is to train students to think, I believe that this book's demonstrative organization and conclusive content fail in this regard.

ERVIN H. POLLACK

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THE ANATOMY OF THE WORLD. RELATIONS BETWEEN NATURAL AND MORAL LAW FROM DONNE TO POPE. By Michael Macklem. Minneapolis: The University of Minnesota Press, 1958. Pp. x, 139. \$3.50.

Many intellectual currents run together in the main stream of natural law thinking, and the historian of ideas who would single out a particular idea from a complex tradition must understand how he is foreshortening or simplifying or reducing. What is involved is not only the interest and importance of individual questions but also their relationship. A historian of ideas, as Cassirer has taught us,

knows that the water which the river carries with it changes only very slowly. The same ideas are always appearing again and again, and are maintained for centuries. The force and the tenacity of tradition can hardly be overestimated. From this point of view we must acknowledge that there is nothing new under the sun. But the historian of ideas is not asking primarily what the *substance* is of particular ideas. What he is studying — or should be studying — is less the *content* of ideas than their *dynamics*. To continue the figure, we could say that he is not trying to analyze the drops of water in the river, but that he is seeking to measure its width and depth and to ascertain the force and velocity of the the current. . . .<sup>1</sup>

It is all of these factors which the historian of ideas must consider, for especially in the complex flux of the Renaissance the dynamics of traditional ideas indeed

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1. Ernst Cassirer, *Some Remarks on the Question of the Originality of the Renaissance*, 4 JOURNAL OF THE HISTORY OF IDEAS 55 (1943). The river metaphor, it may be noted, was used in the Renaissance as early as Petrarch's "On His Own Ignorance." See THE RENAISSANCE PHILOSOPHY OF MAN 120 (ed. by E. Cassirer et al., 1945).

often is changed. In a modest book — too slender perhaps to encompass its multidimensional subject, yet a book which has not received from legal historians and students of the natural law the attention it merits — Dr. Macklem studies ideas concerning the world and natural law which dominated English literary imagination during the seventeenth and early eighteenth centuries.

What is involved in all of these patterns of ideas concerning the world, nature, and evil, he writes in his concluding chapter,<sup>2</sup> is a definition of moral and physical evil. For John Donne, working out of the medieval view of the world as a theater of sin, corrupt in the Fall of Man, both moral and material evil are the result of original sin. Disorder originated in original sin: in the Fall, an act of disobedience to divine law, the moral estate of man was committed to disorder; and natural disorder originated in the curse of Adam, by which the disorder of sin was introduced into the earth. (Genesis 3:17-19) Profusely developed in and illustrated by the vernacular literature of the seventeenth century, this belief is represented in epic proportion in Milton's *Paradise Lost*. And this tradition of belief was given elaborate and conclusive rationalization by Thomas Burnet in his famous treatise on the *Sacred Theory of the Earth*, the first two books of which were published in Latin in 1681 and in English in 1684. This work reformulates the accepted doctrine that the fallen earth is the natural estate of sin, and Burnet carries his theory into a kind of theological geology. In him the sacred theory of the earth is given its final form: "In its unfallen state, there was 'not a wrinkle, scar or fracture' in the form of the earth; in its fallen state, there is no 'proportion of parts that is referable to any design' respecting either 'use or beauty.'" (p. 8)

There were many replies to Burnet, and in Appendix I Macklem gives a short-title checklist of more than thirty items between 1681 and 1700, pamphlets and treatises which hammered out a refutation of Burnet on the Flood and also built a new theory of the earth and of moral law. The ostensible issue in all of these exchanges, Macklem writes, was a theory of the Flood, but the real issue was a theory and conception of the earth:

Burnet's theory of the Flood had rationalized the traditional conception of the earth as the natural estate of sin. The replies to Burnet rationalized a new conception of the earth as a product of the causal wisdom of God. The argument between these two conceptions was not, essentially, one of fact or logic but one of assumptions. The replies to the *Sacred Theory* are important not only because they indicate the nature of the new premisses but also because they show how unacceptable, by 1700, Burnet's premisses were. The new assumptions required a new interpretation of the curse. They implied that the effects of the Fall were confined to the moral estate and, accordingly, that the curse did not extend to "the changing of the principles of nature," in Hakewill's phrase, "in the earth it selfe." They led, as the evidence clearly indicates, to the belief that the earth is representative not of the disorder of original sin but of the order of divine law. (p. 37)

The implications for the way that early eighteenth century man viewed himself and his relationship to the natural order were profound, and these are well

2. Which I largely follow for this résumé, though I have also drawn from earlier sections of his book.

viewed in Pope's imaginative constructs. The poetic center of Pope's *Essay on Man*, Macklem concludes:

is the belief, developed during the seventeenth century and persisting into the middle of the nineteenth, that

The gen'ral ORDER, since the whole began,  
Is kept in Nature, and is kept in Man.

The idea of disorder illustrated in Donne contained the controlling principles of Christian belief, the sin of Adam and the redemption of Adam in Christ. The idea of order illustrated in Pope contained the controlling principles of the pattern of belief in which it is supposed that man is redeemed not in Christ but in Adam. (p. 93)

To return to our figure of the river: the historian of ideas must chart his directions and sources with utmost care, and he may not ignore possible sources. Therefore, one may well question Macklem's failure to consider to what extent an optimistic view was already developing in medieval physics and theological discussions, and one may well feel uneasy about a work that confronts such a question as this without a glance at St. Augustine's commentaries on the Creation and Fall (which continued to be read well past Milton's day<sup>3</sup>) and with no mention of Calvin's "total depravity of man," a force which produced numerous cross-currents and new dynamics.

There was of course a wealth of medieval commentary on the Fall, and all of this is embraced by a single footnote (p. 103) which states that "discussion of these ambiguities has been omitted here since they are treated at length in the unpublished manuscript of the Messenger Lectures delivered by Marjorie Nicolson at Cornell University in 1948" — but surely one who addresses himself to such a problem assumes the responsibility of himself indicating differences of emphasis and opinion among the patristic and medieval exegetes. No one who has tracked a single idea through the many volumes of the *Patrologia Latina*, or who has followed the fortunes of a single work like the Book of *Genesis* among its commentators, will be willing to accept the implication that there is but one tradition of medieval commentary. Thus Macklem's report that before the time of Donne the view that all physical evil was caused by sin was

3. For Augustine on Creation see CHRISTOPHER J. O'TOOLE, C.S.C., *THE PHILOSOPHY OF CREATION IN THE WRITINGS OF ST. AUGUSTINE* (1944).

Milton is treated altogether too summarily, and no discussion of relations between natural and moral law from Donne to Pope can be complete without an extensive study of Milton, who is important not only by virtue of his achievements in poetry and prose but also by reason of his influence on the Revolutionary Settlement of 1688 and the subsequent triumph of Whig theory — and of course his uninterrupted influence upon English letters: see G. F. SENSABAUGH, *THAT GRAND WHIG MILTON* (1952).

For further study of Milton's knowledge of science and of cosmology, see first the sound investigation by KESTER SVENDSEN in *MILTON AND SCIENCE* (1956) and the earlier exploration of cosmology (criticized by Svendsen) by GRANT MCCOLLEY, *PARADISE LOST: AN ACCOUNT OF ITS GROWTH AND MAJOR ORIGINS* (1940).

For Milton's place in the tradition of treatments of the creation and the fall, see Sister MARY CORCORAN, *MILTON'S PARADISE WITH REFERENCE TO THE HEXAMERAL BACKGROUND* (1945), and ARNOLD WILLIAMS, *THE COMMON EXPOSITOR* (1948); the traditional Neo-Latin, Italian, and other versions of the creation are conveniently brought together by WATSON KIRKCONNELL in *THE CELESTIAL CYCLE* (1952).

in point of fact not held by all Christians: St. Thomas Aquinas for one maintained that physical evil was indirectly willed by God.

Further, one expects a discussion of the root ideas of natural law and *natura*. A history of ideas approach that begins in reduction does not inspire confidence. For certainly none of Donne's precursors on the anatomy of the world would have developed his thought only on the scriptural account of the Fall. What of the Thomistic definition of natural law in the *Summa Theologica* (1a 2ae, Q 91, art. 1 & 2), and other treatments in related quaestiones? *Ubi Dante, ubi canonista?* we may well ask.<sup>4</sup>

The immutability of natural law was presented in Gratian's *Decretum* as a fundamental and unimpeachable principle, Ullmann declares, and the canonists saw the papal authority as endowed with certain unique powers to dispense the natural law. Surely the ideal of papal plenitude of power must be considered in viewing the medieval anatomy of the world.<sup>5</sup> Moreover, as d'Entrèves writes, "the relation between law and morals is the crux of all natural law theory,"<sup>6</sup> and the very enunciation of natural law is a moral proposition.

When we begin with Donne's anatomy of the world in Macklem's analysis, our attention is called to his commemoration of the death of Elizabeth Drury "in an elaborate and moving elegy. The poem is an anatomy not only of man but also of the world, including within its poetic range the state of man, the earth, and the heavens." (p. 3)

Shee, shee is dead; shee's dead: when thou knowest this,  
Thou knowest how poore a trifling thing man is.

But to a Renaissance mind with its sense of corresponding planes, more is involved:

When thou knowst this,  
Thou knowst how lame a cripple this world is.

And so, finally, the death of Elizabeth Drury signifies a disorder in the heavens:

4. Inasmuch as Macklem has been criticized for not presenting his own documentation, it would seem to devolve upon the critic to indicate the main lines of pertinent scholarship, besides the broad sweeps of Carlyle, Gierke, Pollock, McIlwain, *et al.* For St. Thomas: O. LOTTIN, *LE DROIT NATUREL CHEZ SAINT THOMAS D'AQUIN ET SES PRÉDÉCESSEURS* (1931); A. P. D'ENTRÈVES, ed., *SELECTED POLITICAL WRITINGS* (1948); O. SCHILLING, *DIE STAATS- UND SOZIALLEHRE DES HL. THOMAS VON AQUIN* (1923). See the bibliography by PAUL WYSER, O.P., *DER THOMISMUS* (Bern, 1951 — no. 15/16 in *Bibliographische Einführungen in das Studium der Philosophie*, hrsgb. I. M. Bochenski, O.P.). For the Canonists on natural law, see W. ULLMANN, *MEDIEVAL PAPALISM* (1948), and its valuable bibliography of mss., together with the important modifications of Alfons M. Stickler, *Concerning the Political Theories of the Medieval Canonists*, 7 *TRADITIO* 450-63 (1949-51). For Dante, see generally d'Entrèves and Ullmann, works cited; F. ERCOLE, *IL PENSIERO POLITICO DI DANTE*, 2 vols. (Milan, 1927-8); D'ENTRÈVES, *DANTE AS A POLITICAL THINKER* (Oxford, 1952). See further B. Tierney, *Some Recent Works on the Political Theories of the Medieval Canonists*, 10 *TRADITIO* 594-625 (1954).

5. W. ULLMANN, *MEDIEVAL PAPALISM* 50 and ch. iv. See *DECRETUM GRATIANA* (Paris, 1601), *Distinctiones I c. 7* — translated by E. Lewis in 1 *MEDIEVAL POLITICAL IDEAS* 33 (New York, 1954) — and further M. Villey, *Le Droit Naturel chez Gratien*, 3 *STUDIA GRATIANA* 85-99 (1954).

6. A. P. D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 80 (London, 1951).

The Element of fire is quite put out . . .

'Tis all in peeces, all cohaerence gone;  
All just supply, and all Relation. . . .

Yet one of the temptations that beset historians of ideas is to take all statements as univocal, and the point has been well taken that Donne, after all, "used these words in an inflated hyperbolic poem intended, among other things, to flatter the bourgeois-minded parents of a dead girl. It is unwise," Professor Patrick concludes, "to base the history of ideas on eulogistic statements made in poems about the deceased."<sup>7</sup>

One must praise the author of this modest book for the generally accurate reporting of those on whom he has based his findings, and *The Anatomy of the World* is most challenging — perhaps more to students of the natural law tradition who have been prone to a separation of that tradition from the larger cultural streams than to the student of literature, though any Renaissance scholar will soon feel the omission of writings in Latin not only in theology and philosophy but also in scientific matters: for Latin continued to be the usual scientific and philosophic medium through the seventeenth century. And clearly there was a radical change in the conception of the world; eighteenth century optimism was the result of a complex transmutation of traditional theology-physics.

But one may expect more from a historian of ideas: one expects to know the width and depth of the river and the force and velocity of its current. Returning to Cassirer we may summarize by recalling his conclusion that what characterized and distinguished the Renaissance was

the new *relation* in which individuals place themselves toward the world and the form of community which they establish between themselves and the world. They see themselves facing an altered conception of the physical and intellectual universe, and it is this conception that imposes upon them a new intellectual and moral demand, which requires of them an inner transformation, a *reformatio* and *regeneratio*.<sup>8</sup>

The altered conception of the universe we are given by Macklem, and one movement of the alteration is well documented; but we are not given anything like a sharply focused or permanent picture of the inner transformation.<sup>9</sup>

R. J. SCHOECK

7. J. Max Patrick in 18 SEVENTEENTH-CENTURY NEWS 7 (Spring 1960).

8. Cassirer, *Wahrheitsbegriff und Wahrheitsproblem bei Galilei*, 62 SCIENTIA 122 (1937). Cf. SCHILP, *PHILOSOPHY OF CASSIRER* 726.

9. One must point to Robert Ornstein's perceptive study of *Donne, Montaigne, and Natural Law*, 55 JOURNAL OF ENGLISH AND GERMANIC PHILOLOGY 213 (1956), for a discussion of the natural law in Donne that carries us farther than Macklem's study; and one may look to Eusden's study for much valuable material as well as for an example of *Methodenlehre*: John D. Eusden, *Natural Law and Covenant Theology in New England, 1620-1670*, 5 NATURAL LAW FORUM 1-30 (1960).

WERNER JAEGER'S *HUMANISM AND THEOLOGY* (Milwaukee, 1943) seems not to have been known by the author; one ought also to cite Jacques Maritain's important Aquinas Lecture *St. Thomas and the Problem of Evil* (Milwaukee, 1942), together with the close study by Anton C. Pegis of *Summa Theologica* 1, 44, 1-2 in 8 MEDIAEVAL STUDIES 159-68 (1946).

THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE. By F.S.C. Northrop. Boston & Toronto: Little, Brown and Co., 1959. Pp. xvi, 331. \$6.00.

Professor Northrop's book deserves careful reading. Although it consists largely of articles previously published in philosophical or legal periodicals, it can be considered a new book. This is due not only to a few new studies included among the old ones, but especially to the fact that through systematization and reordering Northrop's scholarly production of recent years is now seen in perspective, and its unity of purpose can be grasped under the overwhelming variety of interests.

I am not going to use much space in attempting even a simple *excursus* upon all that the author says. There are many stimulating observations, plenty of new or newly expressed ideas on matters legal; but a book review cannot cover the whole field the book does. I concern myself instead with pointing out some features of the book and some ideas which I believe are important to both a philosopher and a lawyer, and are, as one would expect, interesting even for those who do not agree with Northrop—interesting at least as a document of the kind of problems that a particularly acute and attentive writer on jurisprudence feels himself faced with.

First of all, some remarks about "experience" are required. "Experience" is what the book is concerned with. "Experience" is treated, not as a label for a field of inquiry, but as a problem. It is a long time since lawyers have been told that "the life of law" has always been (not logic but) experience. Since then, some lawyers have been only too happy, in their philosophical intervals, with generalities about law being experience; and "experience" has many times been employed, not as a tool for finding, stating, or discussing problems, but as a tool for avoiding them. "Experience" was not treated as being itself a problem, but as a verbal device. This is not Northrop's line. The author emphasizes that in his view "experience" is resorted to in order to show how the problems of a jurisprudential theory do arise at the very beginning, that is, at the very moment in which the field of the theory is to be determined. The adoption of such an uncommitted word as "experience" to name a field of inquiry is not the result of an attempt to avoid general problems; because, the author says, experience is "an ambiguous word," which is itself as much a test of theory as "a product of theory." (p. ix)

The problematization of the notion of experience is the core of Northrop's theory; and it is also the point where perhaps difficulties arise. As I understand Northrop, the "experience" a legal philosopher is confronted with is "complex" because of two sets of facts. First, as we cannot help considering experience as a product of theory, we are confronted with a "pluralistic" experience as a result of the pluralism of theories (p. ix); the pluralism of theories is, in turn, conditioned by a plurality of the cultures which are, in the modern world, in contact with one another; cultural and theoretical clashes account for the complexity of experience. Second, experience is "complex" insofar as it is conceived as an ethical and legal, i.e., a "normative," experience; it is complex because "were one to use a merely empirical, descriptive approach . . . one's method would leave one with merely a description for an 'is.' Yet it is the very nature of

normative experience that it requires one to pass judgment upon what is." (p. ix) It is complex, in other words, because it requires, according to Northrop, two modes of discourse—the indicative and the imperative—to be described. The philosopher of "normative experience" is confronted therefore with an empirical as well as with a theoretical "complexity." The essays collected in the book under discussion are to be seen as an inquiry into these (different) complexities. (p. xi-xii) Ch. II-XIV are mainly concerned with *describing* the empirical "complexity." Ch. XV-XXII are mainly concerned with *resolving* the theoretical difficulty, and they provide Northrop's theory of normative experience. But the description of the empirical "complexity" and the resolution of the theoretical one always overlap and get in each other's way, as Northrop is trying to show a solidarity between the two "complexities" [insofar as] "since legal experience is complex . . . we must expect . . . to be led to a theory and method of law which is complex also." (p. 5)

The most interesting parts of Northrop's perspective are those in which he points out the reasons why philosophical research into the "fundamental" problems of law should be given a place in the curriculum of American law schools. On the one hand, in Ch. III (previously printed as an article in the present periodical<sup>1</sup>) the author makes the following points. First, no technical study of rules of law alone can give an account of the effective operation of law within a given society, as is shown by the fact that the very same body of rules allows for different decisions to be passed upon the very same issues, according to the prevailing legal philosophy and the prevailing ethical and legal axioms of the judges. Second, many legal terms are not names for objects which can be ostensibly determined, but are "indeterminate symbols," i.e., symbols whose meaning is ascertainable only within a context in which they perform a propositional function; and the contexts are indeterminate until their socio-philosophical background is grasped. On the other hand, philosophical assumptions and philosophical backgrounds are subject to change in time, and they are different cultural areas. When a lawyer is to work within a single cultural area, within a single society, and in a period of no important philosophical and ideological change, there is no direct need for a law school curriculum to provide anything more than technical tools; but this is not the case nowadays, as we live in a time of change, in which there is a shift of political focus from Western Europe to Asia. (ch. II)

The point of departure of Northrop's analysis is therefore a relativistic one. An inquiry into the fundamentals of legal theory is required (not always and for everybody, but) for the law schools which are "to train men competently in a nation which is one of the two major powers" (p. 14) and which are to train foreign students having a different background. Legal knowledge must clarify basic assumptions because they vary in space and time. Such a departure could simply serve a pragmatic purpose within the frame of a relativistic and culturalistic viewpoint. It could suggest courses in comparative history of legal ideas, especially for foreign students and for those who enter diplomacy and public administration. For Northrop it is, however, not so. Whereas in Ch. II philosophical background

1. *Philosophical Issues in Contemporary Law*, 2 NATURAL LAW FORUM 41 (1957).



is taken into account for the purpose of explaining how legal cultures are different, in Ch. III philosophical background is taken into account in its capacity as a tool for judging law; in other words, in Northrop's view, the philosophical background of a legal culture is both something which can be ascertained and a criterion for judging or evaluating the law.

Here the reader could be puzzled because, according to Northrop, the failure of sociological jurisprudence is due to its attempt to use an "is" (the way things happen to be) as a criterion for an "ought" (the way things ought to be). (ch. III) One is induced to think that this could be applied also to Northrop's culturalistic approach. The fact is, however, that Northrop's solution is not represented by a merely culturalistic-sociological approach, but by a natural law culturalistic approach. Different cultures are not relevant as such, but as particular instances of a natural law formula which constitutes Northrop's basic assumption.

It is necessary to point out three of Northrop's basic assumptions. First of all, there is a nonculturalistic definition of law. "Law" is not deemed to be simply a word which is connected with a set of historical usages, and whose meaning can be different according to the various usages, to time, to space, to the purposes of the one who employs the word, and to the different contexts in which it appears. We are given a "real" definition of law. Law, once and for all, is "an ordering of human beings with respect to one another and to nature." (p. 11) Let us not be induced to believe that it is simply a formula without content. It is not. It assumes many things to be true, as, for instance, that "law" is connected with "order." And not simply with order, but with ordering, i.e., an order which is the result of conscious human action or effort. Then it is not directly a natural, in the sense of physical, order: if it is an ordering of "human beings," then, it is assumed that there is a difference between the behavior of men and that of, say, other mammals. Again, the ordering must be achieved with respect to nature; it is not directly natural, yet there is such a thing as nature. And so on. True enough, Northrop points out that "nature" is a changing concept, and he is "culturalistic" again when he points out the existence of different views as to nature in different cultures; but he is not such a culturalist as to conclude that there are as many "natures" as "cultures." No, there is something which is "nature" and which is not merely a noun plus a set of conventions as to the translation of nouns of other languages into that noun. There are different conceptions, but of the same *thing*. Actually, there is even a different degree of trueness in the different conceptions. This is the second assumption of Northrop's. We are given a formula of *good* law, which is phrased in terms of truth. Good law is such a law which orders "in the light of a true, and as far as possible complete, knowledge of what men and nature are." (p. 11) The third assumption is that good law, as a question of truth, is to be reached by philosophical reflection upon the fundamental problems of law and that the *majority* will be likely to agree on the truth; we are told that "the failure of research in legal and moral philosophy to provide a more adequate philosophy upon which a majority of men can agree, may be fatal not merely for democracy, but for any ordered society, domestic or international." (p. 18)

If we take into account these axioms of Northrop's, then we are able to understand his position. Northrop thinks that we should consider what the main cultural solutions of the philosophical problems of law are, not in order to state the relativity of the very concept of law and of the very concept of justice, but to formulate and elaborate a new philosophy of law, i.e., a new theory of ordering men with respect to one another and to nature which could (a) be adapted to our "atomic age" (p. 8-14) and (b) be agreed upon by people of different cultures because of its taking into account the different cultural conceptions of justice. (p. 14-19; ch. XII, XIII, XVI)

If it is so, Northrop's theory of the "complex" legal and ethical experience presents itself as a theory of a natural law with a variable content. Law ought to conform to a formula, and the formula is endowed with binding value; it is an "ought" formula. But an "ought" may be either true or false. Value judgments are, according to Northrop, cognitive. In particular, a formula of natural law, i.e., a philosophy of law (in Northrop's words) is true if it is true to (a) our "atomic age" and (b) to the different cultures which, being in contact and therefore constituting a world unity in our times, have to be all taken account of, and (c) if consent to it is general. The point about cognitiveness of value judgments (or, as the author says, "normative statements") is, of course, the very core of any natural law theory, and is expressly stated throughout the book (especially in the preface; see also ch. I, II, XVI, XIX-XXI).

The point of departure of the last-mentioned thesis is to be seen, as is very often the case with Northrop, in his consciousness of some difficulty which faces the researcher in particular inquiries, namely, the fact that when we examine linguistic contexts, we are likely to find that evaluative or normative contexts entail a description (if not they would be meaningless, the object being indeterminate). This very difficulty is denied by some. Others argue that there is a circularity between modes of discourse, and only a pragmatic approach is meaningful. Others, like Northrop, believe that normativity and descriptivity, "is" and "ought," are interrelated. I am of course not taking a position with respect to the question.

A question which might be useful and interesting to examine concerns the features of Northrop's culturalistic approach. As it has been pointed out, the law of the future should, according to Northrop, take into account different cultural perspectives, i.e., the values of different cultures. On this account this law will be agreed upon by a "majority." Some problems do arise.

Here, again, we must observe that the point of departure of Northrop is a consideration of methodological problems involved in particular inquiries. The author refers to a number of sociological inquiries which have pointed out how a description of societies different from ours cannot be accurate if they are given in terms of concepts which are meaningful and relevant within our society, but are nonexistent within the society studied. This happens especially when the object of study is a primitive and comparatively insulated community. Northrop refers to well-known studies on American Indian societies. Another instance could be the description of the archaic Roman society, where one is liable to get into

difficulties and misunderstandings if one is to explain in terms of "law" or "*droit*" or "*Recht*" or "*diritto*" some adverbial or (perhaps) adjectival functions as "*ius est*" or "*fas est*." But, as often happens to Northrop, the consciousness of methodological problems is merged in a broad philosophical perspective; and the methodological problem of the ethnology and sociology of primitive communities is viewed in the light of a speculative tradition which is altogether different from the perspective of one engaged in field research; it is viewed in the light of a perspective which is similar to that of some philosophies of culture and of history.

Although this aspect of Northrop's thinking is represented principally by previous works of his, as *The Meeting of East and West* (1946), this line of thought is brought forward in the volume we are here concerned with. Northrop produces a classification of cultural systems which has a major subdivision—West and East—and lesser subdivisions, as, within the Western system, the Latin, the Roman Catholic, the American, and so on. These broad systems are more similar to the broad subdivisions of, say, a Toynbee or a Spengler than to any reference-classification of any field-ethnologist. If one tries to imagine why Northrop thinks that there is an affinity between the recognition of a terminological-cultural problem of the ethnologist (whose perspective is as often as not a relativistic one) and the adoption of a philosophy of culture (the basis of which is only too often a "holistic" conception of history), one is induced to think that the reason lies in the fact that Northrop assumes the methodological difficulty of the ethnologist to be a philosophical difficulty. When Northrop refers to the terminology of a primitive culture (the Navaho Indian studied by Clyde Kluckhohn) he points out that there is "a complete philosophy" implicit in it. (p. 59) This is very true, but in a particular acceptance of the word "philosophy": that acceptance in which philosophy means the outlook implicit in a language or—which turns out to be just the same thing—in that way of life of which the language is the expression. Now, if we return to the broad groupings and say that there is one Eastern and one Western philosophy, or even an American, a Roman Catholic, a Latin, a Mexican "philosophy," we say something vaguer and more difficult to test, because these groupings are certainly less "organic" than a primitive tribe; but we are also going to use "philosophy" in a rather different acceptance if we proceed to identify the Roman Catholic cultural system with Thomas Aquinas and the Anglo-Saxon cultural system with Locke, as sometimes Northrop seems to be doing. The "philosophy of the Navaho Indians" could be interpreted as a name for a pattern of behavior, language being included in behavior; the "philosophy of Thomas Aquinas" could not be interpreted that way. Now, a reader of Northrop's book might be inclined to feel that Northrop believes that there is a correspondence between a philosophy in the acceptance of which the Thomistic philosophy of Roman Catholics is a philosophy, and a pattern of behavior as the expression of an outlook (or in Northrop's words, the living law of a cultural system). If it is so, then this could explain the rather "illuministic" attitude of Northrop in stating the importance of formulating a new philosophy of law, adapted to the new era: the formulation of a new philosophy will in his opinion directly affect the behavior of people

living in different cultural systems, and will grant them finally an effective legal order; this is highly important as (we are told) "in most of the nations throughout Asia, Africa, Latin America and Continental Europe there is at present not merely no effective international law, but also an ineffective domestic law." (p. 17-18) But if it is so, Northrop's position seems to me, on this particular point, highly controversial.

I have selected only a few points which, in my opinion, are interesting and call for particular discussion. But, as I stressed in the opening sentences, the whole book deserves to be read by anyone interested in jurisprudence.

GIOVANNI TARELLO

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RAMUS: METHOD, AND THE DECAY OF DIALOGUE. By Walter J. Ong, S.J. Cambridge: Harvard University Press, 1958. Pp. xx, 408. \$10.00.

Fr. Ong criticizes a certain book on Ramus as "conceived without any sense of the real movement of intellectual history," and this is certainly a very important standard to be met by any writer on this subject. Pierre de la Ramée (1515-72), beginning to publish in 1543, and later Regius Professor of Eloquence and Philosophy at Paris, was on any estimate a major influence in the shaping of pedagogy and humanistic thinking in the immediately postmedieval period. Indeed, Ong would say that the use of the word "shape" in such a connection is thoroughly Ramist. One of his main theses is that Ramus inherited from Rudolph Agricola (ob. 1485) — who had found it in scholastic logical tradition — a pronounced spatializing, quantifying, mathematicizing tendency, which he isolated and enhanced. In this notable respect he sees Ramus as a homogeneous developer of scholastic logic — an ironic outcome, if the belief is justified, for one who saw himself as a revolutionary leader of reform.

The evidence adduced for this thesis is not very impressive, and it seems hard to find any better. Opportunities provided by increased mastery of the printed page certainly made possible new techniques of illustration, but these by themselves do not necessarily constitute any novel or even increased geometrization of the subject matter. As the author very well knows, the square of opposition and the Porphyrian tree had hundreds of years of manuscript tradition; so had the Pons Asinorum, which goes back at least to Philoponus, perhaps even to Alexander of Aphrodisias. The more elaborate presentation of such things shows growing mastery in the printing shop, but involves no new moment in the history of logic. It was never suggested until quite recent times that such diagrammatic displays of logical doctrine might be viewed as geometrical models of it. Similarly the tabular records of Faber Stapulensis are only in some very remote sense a step on the way to an algebraic treatment; their function is mnemonic rather than directly intellectual. All this belongs to the domain of visual aids, but not — as is abundantly clear with Murner's logical card game

— to that of quantification in a properly logical sense. And the same is evidently true of Ramus's dichotomized charts. It further appears that as the sixteenth century wore on, the older logical diagrams became less rather than more elaborate, degenerating almost out of existence, while the newer ones were soon forgotten. De Canaye's unique curvilinear version of the Pons Asinorum (1589) was perhaps the last seriously considered presentation of this venerable object. But while some lesson in the history of culture might be drawn from its form, it would be absurd to load it with any logical significance.

On the other hand the author is of course perfectly correct in finding in the medieval treatises on the properties of terms some few examples from the area now known as quantification theory. But where do these treatises come in the writings of the Valla-Agricola-Ramus tradition? They were in fact deliberately jettisoned, originally in the name of humanistic elegance and the requirements of courtly eloquence. By the end of the sixteenth century Thomas Oliver (1605) could write with justice that *Syllogismorum inanis species ubique fere invaluit*.<sup>1</sup> How preposterously *inanis* may be gauged from the typical remark of Titelmans (1502-37): *Difficile foret inexercitatis adolescentum ingenii statim quolibet proposito syllogismo dinoscere, ultra secundum veritatem sit maior aut minor (praemissa)*.<sup>2</sup> It was not only the younger set who might find themselves in difficulties over that; greybeards, too, could flounder in the void, as witness Contarini's letter on the fourth figure to Oddus de Oddis (before 1542).

The mention of mnemonics and adolescents brings us to an aspect of Ramus's work where the author appears to be on much surer ground. His stress of the youthfulness of medieval and renaissance students of logic is excellent. The elementary character of the many handbooks of the sixteenth (as also of the seventeenth) century bears witness to preoccupation with the needs of the most elementary classwork. But the undoubted fact raises a deep problem of cultural history. Why did the later Middle Ages produce so many logicians' logicians, whereas the race becomes extinct in Ramus's century? Some remarks on Agricola may hold part of the answer:

Agricola's effect . . . has been to create a general complacency about what can well be styled a residual logic or dialectic. The medieval logical "technicalities" have been set aside in favor of the approach of the enlightened amateur, who was interested in logic in terms of psychology, miscellaneous metaphysical detail, practical pedagogy, and eloquence. . . . By being made "practical," all logic has now become a kind of rhetoric. (p. 125)

This is very perceptive, even if the following sentence, to the effect that the Agricolan development "is not an anti-Aristotelian phenomenon in any sense except perhaps in spirit," leaves one gasping.

The view of pedagogy, that it should spare the beginner technicalities, implicit in that development, should not escape attention. It is a view which led Valla, the Adam of the Ramist tradition, to argue against the admissibility of the third figure of syllogism on the ground that women and children are never heard to

1. The empty form of syllogism is almost everywhere discredited. [Ed.]

2. It would be difficult for an untrained youth on being presented with a syllogism to tell at once which is the major or the minor premise. [Ed.]

argue like that. Seen against that background, Ramus's glorification of a natural, prescientific logic becomes manifest as the foundation of a movement that was intellectually retrograde. A natural logic, like a natural law, is not automatically self-validating. Insofar as these are purely descriptive concepts, they have only the value of that degree of cultivation of nature which they describe. Ramus was prepared to find nature but little cultivated, and to till the ground very little more. The "Arts" world showed itself ready to go along with him for two centuries at least, so far as logic was concerned; and it is remarkable that this book, so rich in many kinds of erudition, should contrive to spare us even the reduced technicalities of Ramus's syllogistic.

Ivo THOMAS

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**WORLD LEGAL ORDER — POSSIBLE CONTRIBUTIONS BY THE PEOPLE OF THE UNITED STATES.** By Wallace McClure. Chapel Hill: The University of North Carolina Press, 1960. Pp. xvi, 366. \$7.50.

This is an excellent book which has long been needed. In a persuasive and well documented study, Mr. McClure points out not only the importance, but also the necessity, of establishing a solid world order based on sound principles of mutual respect of nations and obedience to international obligations if the human race is to survive in this era of nuclear bombs, I.C.B.M.'s, and sputniks. Special emphasis is laid by the author on the situation in the United States and the contribution which the American people should bring to the cause of a better world.

The main thesis of the book is not new and has been stated many times by enlightened jurists and leaders in foreign countries and here: there is a unity of the legal system in the world. Just as municipal ordinances must conform to state law, the latter cannot be repugnant to the federal legal order, and the laws of every state, be it unitary or federal, should comply with the principles of the law of nations. But many of the author's arguments are novel. His analysis of many American and international cases is keen and deep, and his recommendations and conclusions are worthy of utmost attention.

McClure first gives an interesting history of the American attitude toward international treaties. He points out that the Framers were fully aware of the international responsibilities of the United States, and never intended that treaties be invalidated by courts on the ground of inconsistency with a later statute. The Constitution itself directed the courts to enforce all treaties made under the authority of the United States, without any exception. "To assert that the Constitution . . . requires or permits national infidelity to higher-level law is to do violence alike to the history and the hardly deniable mandate of that admirable instrument."<sup>1</sup>

And, at the very beginning of the existence of the Union, the courts properly understood their duties in this respect. A treaty was given precedence over a Virginia statute in the early case of *Ware v. Hylton*,<sup>2</sup> and a few years later,

1. WALLACE MCCLURE, *WORLD LEGAL ORDER* 46 (1960).

2. *Ware v. Hylton*, 3 U.S. 199 (1796).

an act of Congress was held to have been invalidated by a treaty with France in *United States v. Schooner "Peggy."*<sup>3</sup>

An "era of international responsibility"<sup>4</sup> followed, with the notable exception of the case of *Foster and Elam v. Neilson*.<sup>5</sup> In that case the Supreme Court denied effect to a treaty with Spain by understanding incorrectly that one of its provisions required Congress to implement the treaty by a statute before it could be enforced. Although in 1840 the Supreme Court expressly repudiated the *Foster* case,<sup>6</sup> the unfortunate theory of "non-self-executing treaties" was born. This gave rise to the era of the "judicial violation of treaty obligation,"<sup>7</sup> culminating in the "Chinese Exclusion Case,"<sup>8</sup> in which "violent emotion replace[d] reason,"<sup>9</sup> and a congressional statute in derogation of a treaty with China was given full effect by the Supreme Court. It is unfortunate that Congress violated international obligations, and still worse, that the Court complied by asserting that a treaty can "be repealed or modified at the pleasure of Congress."<sup>10</sup> On this point the author comments:

An ironic touch is in the language the Supreme Court of the United States used about the Chinese laborers of the time, who were said to have "loose notions . . . of the obligation of an oath." Can it be honestly maintained that the Supreme Court of the United States itself possessed any but "loose notions" of the obligation of a treaty?<sup>11</sup>

Such an approach seems to have founded the fallacious theory "of inalienable supremacy of national over international law — necessarily a denial of international law — or else to be an assertion that national power is supreme over law in international affairs."<sup>12</sup>

In Justice Bradley's dissenting opinion in the *Cherokee Tobacco* case he suggested that there should be a mitigation of the harshness of the doctrine that where a treaty and an act of Congress are in conflict the more recent will be given effect.<sup>13</sup> He asserted that a treaty should be invalidated only if Congress clearly indicated its intention that it should be so; otherwise, provisions of a treaty anterior to a statute and inconsistent with it should prevail. This approach was the forerunner of a more enlightened twentieth century view towards international obligations of the United States. Thus, in *Ex parte Toscano*<sup>14</sup> a federal district court gave effect to the multilateral Hague Convention of 1907 as against the contention that it was a "non-self-executing" treaty, implying that even though Congress may regulate the method of giving effect to an international act, the executive branch of the government should enforce it in absence of a statute implementing it. The same should be said about the judicial branch.

3. *United States v. Schooner "Peggy,"* 5 U.S. 103 (1801).

4. *McCLURE, op. cit. supra* note 1, at 67.

5. *Foster and Elam v. Neilson*, 27 U.S. 253 (1829).

6. In *Pollard v. Kibbe*, 39 U.S. 353 (1840).

7. *McCLURE, op. cit. supra* note 1, at 71.

8. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

9. *McCLURE, op. cit. supra* note 1, at 81.

10. *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

11. *McCLURE, op. cit. supra* note 1, at 83.

12. *Id.* at 93.

13. *The Cherokee Tobacco*, 78 U.S. 616 (1871).

14. *Ex parte Toscano*, 208 F. 938 (1913).

After a few other cases, the Supreme Court decided *Cook v. United States*,<sup>15</sup> in which Bradley's dissent became good law, the Court saying that a "treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." In another well-reasoned case, *Missouri v. Holland*,<sup>16</sup> the Court sustained the validity of the Secretary of Agriculture regulations giving effect to a treaty with Canada as against the contention that the subject matter of the treaty and of the regulations was not delegated by the Constitution to the United States.

In those decisions the author sees a "tendency . . . toward a fade-out of the anachronism of supposed legal equality of treaties and statutes and toward the general acknowledgment of treaties as higher-level law."<sup>17</sup> The author emphasizes the principle of "pacta sunt servanda" which should be the basis of every system of law, be it municipal or international, and asserts that

in declaring treaties, constitutionally valid statutes, and the Constitution itself to be the "supreme law of the land," without specifying which should be accounted first, the Constitution presupposes the primacy of treaties should there be lack of harmony among the three kinds of law.<sup>18</sup>

McClure continues:

International acts are made jointly by two or more, sometimes by nearly all, nations. Such acts cannot in the nature of things be superseded by an act of one of the joint enactors . . . For a national constitution to assert the supremacy of national legislation over international legislation would be to assert an insupportable contradiction. . . .<sup>19</sup>

The author suggests that the "later in date" theory has no support either in reason or in the Constitution, and that

to clarify their own constitutional-legal situation in this respect either by decision of their courts reinterpreting the present constitutional provision or by formal constitutional amendment proclaiming the higher level of treaties over statutes would seem to be the appropriate first contribution by the people of the United States — achievable wholly on their own motion — toward the strengthening of world legal order.<sup>20</sup>

But treaties are not the only source of international obligations of the United States. The great bulk of the law of nations is customary international law, or the "common law of nations."<sup>21</sup> It has been recognized as "the law of the land," but it, even more easily than treaties, may be abrogated by Congress.

The author points out how improper this approach is. The very fact that the United States and other nations have an independent existence is in part due to the fact that the rules of international law permit it. Therefore,

15. *Cook v. United States*, 288 U.S. 102 (1933).

16. *Missouri v. Holland*, 252 U.S. 416 (1920).

17. McClure, *op. cit. supra* note 1, at 125.

18. *Id.* at 133.

19. *Id.* at 134.

20. *Id.* at 134.

21. *Id.* at 143.



the national Constitution cannot in any realistic sense be final or supreme so far as the legal government of the United States or any other nation-state is concerned; but, accurately posited, the Constitution is an instrument existing under the community law of nations . . . 22

Mr. Justice Black's assertion that the United States is only "a creature of the Constitution"<sup>23</sup> has a "fanciful nature."<sup>24</sup> McClure cites<sup>25</sup> Brierly's statement that the doctrine of sovereignty, as it came to be understood, developed into a tool of "international anarchy."<sup>26</sup> The author could have expanded on the disastrousness of this concept, used and misused not only by independent countries, but also by members of federal states;<sup>27</sup> but he chose not to do so probably because many other scholars have administered heavy blows to the idea of sovereignty in recent years.<sup>28</sup> As one of the mottoes of his study, however, McClure selected the words of the Preamble to the Constitution of the Islamic Republic of Pakistan of 1956 that "sovereignty . . . belongs to Allah Almighty alone . . ." It can be added that the Pakistani Constitution (since then repealed) was not the only one taking this stand.<sup>29</sup>

The United States Supreme Court explicitly recognized that the government of this country derives certain powers directly from the law of nations,<sup>30</sup> which at the end of the eighteenth century was "closely connected" with the concept of natural law, constituting the background of the Declaration of Independence.<sup>31</sup> This approach was nothing new. Huig de Groot (Hugo Grotius), the father of modern international law, used the law of nature in the beginning of the seventeenth century "as a basis for the acceptance of a [new] law governing the relations between states."<sup>32</sup> And the very title of the most important treatise by the great legal scholar Emmerich de Vattel, whose influence on the members of the Constitutional Convention of 1787 was obvious, was the following: *Le Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite & aux affaires des Nations & des Souverains*.<sup>33</sup> In the course of his monumental work, Vattel explained:

Under the conviction of the little reliance that can be placed upon the natural obligations of political bodies and upon the mutual duties which

22. *Id.* at 177.

23. In *Reid v. Covert*, 354 U.S. 1 (1957).

24. McClure, *op. cit. supra* note 1, at 178.

25. *Ibid.*

26. JAMES L. BRIERLY, *THE LAW OF NATIONS* 46 (5th ed., Oxford, 1955).

27. W. J. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY — A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANIZATION OF COURTS IN FEDERAL STATES* 21-25 (1959).

28. See, e.g., GEORGES SCHELLE, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PUBLIC* (1944); MAREK KOROWICZ, *LA SOUVERAINETÉ DES ETATS ET L'AVENIR DU DROIT INTERNATIONAL* (1945); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* (1949).

29. Sec. 1 of the Constitution of the Union of South Africa: "The people of the Union acknowledge the sovereignty and guidance of Almighty God." See WAGNER, *op. cit. supra* note 27, at 25.

30. McClure, *op. cit. supra* note 1, at 182.

31. *Id.* at 178.

32. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 367 (1953), cited by McClure at 21.

33. *THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW APPLIED TO THE BEHAVIOR AND THE AFFAIRS OF NATIONS AND SOVEREIGNS* (1758).

their moral personality imposes upon them, the more prudent Nations seek to obtain through treaties that help and those benefits which would be secured to them by the natural law were that law not rendered ineffective by the mischievous designs of dishonest statesmen.<sup>34</sup>

The author himself states that "the unfolding concept of the universal law of nature has been one of the most fruitful . . .," for in international law more than in any other field of law, "philosophers . . . have sought to clarify the idea that an all-pervading natural law exists applicable to particular situations, which all reasonable men will discover and admit a compulsion to abide by as well as to utilize for the betterment of mankind."<sup>35</sup>

From all these considerations it follows that "international law, not national law must be enforced by the courts in cases wherein they cannot be reconciled," and that national courts should "find possible a decision that both treaties and what clearly is international customary law must prevail over any kind of national law and that for national governments the supreme constitution is the supravening law of nations."<sup>36</sup>

According to this approach, national constitutions must be treated as "integral parts of world legal order."<sup>37</sup> And happily, the modern basic laws of some countries recognize the precedence of international law over their own municipal legal system and are pledged to observe its mandates.<sup>38</sup>

In the light of these developments and the fact that a modern state, with ever-increasing intercourse with other states, has a much larger area of matters to regulate by international arrangements than previously, the efforts to amend the United States Constitution on the pattern of the Bricker Amendment is a sad example of the anachronistic state of mind of many American senators and of part of public opinion. "There is insuperable difficulty in finding any logic in the proposition that the law of one nation is superior to the law of more than one."<sup>39</sup> And the suggestion that the treaty-making power is subject to the limitations of the Tenth Amendment and if so, should be exercised, in some cases, only with consent by each of the fifty states, would result in reducing the power to "incompetence."<sup>40</sup>

It would signify a retrogression to the manner of thinking of some 200 years ago, before the Fathers framed the Constitution. It would render the United States a cripple in the field of international relations, and would mean to the world that the country enters the path of isolationism and distrust of international cooperation.<sup>41</sup>

In the last part of his book, McClure analyzes the legal structure of the

34. Vattel, Book II, ch. XII, par. 1, cited by McClure at 48.

35. McClure, *op. cit. supra* note 1, at 19.

36. *Id.* at 191.

37. *Id.* at 192 (in the title of Chapter 8).

38. The French Constitution of 1946 (McClure at 192) and of 1958 (*id.* at 131); the Dutch Constitution, as amended in 1953 (*id.* at 193); Constitutions of some German Laender (*id.* at 197); the Italian and Japanese Constitutions (*id.* at 198).

39. McClure, *op. cit. supra* note 1, at 201.

40. *Id.* at 203.

41. Wagner on the Bricker Amendment, in *THE BRICKER AMENDMENT — VIEWS OF DEANS AND PROFESSORS OF LAW* 104 (1957).

world community. After a sketchy treatment of legislation in the community of nations,<sup>42</sup> he passes to adjudication of disputes. After describing the essential functions of the International Court of Justice, the author discusses the Nürnberg and other postwar trials by international tribunals and the European Economic Community Court, the competence of which "includes the review of decisions of national courts interpreting Community Treaties."<sup>43</sup> A longer discussion is devoted to law enforcement in the community of nations, and particularly to the Korean and the Suez crises.

In his final observations about the United Nations, McClure points out that instead of being an instrument of national policy, the world organization should be its objective. Unfortunately, some nations shortsightedly undermine some of the most uncontroversial principles of organized international life. As far as the United States is concerned, the most shocking example is the reservations that the Senate deemed proper to impose upon the acceptance by the United States of the compulsory jurisdiction of the International Court of Justice. They either lack purpose<sup>44</sup> or discredit this country's fidelity to the rule of law in international relations. The ill-famed reservation<sup>45</sup> providing that the United States withdraws from the jurisdiction of the Court "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America," is strikingly contrary to the "axiom of all law, emphatically of Anglo-American law, that a litigant must not be the judge of his or its own case, . . . [and] is utterly repugnant to . . . national jurisprudence [of the United States]."<sup>46</sup> This attitude "may be compared to the assumption of a State of the United States of the right to decide whether some litigation raised only state law questions, or involved federal law, to the exclusion of the federal courts."<sup>47</sup>

Another striking example of the pernicious American attitude in this matter was a clear violation of an arbitration and conciliation treaty with Switzerland by declining to submit a dispute to arbitration, in accordance with a Swiss request in 1957, under the excuse that the matter was within the domestic jurisdiction of the United States.<sup>48</sup> The author's hope that the approach of the United States to international adjudication will change is substantiated by some recent trends in public opinion, and particularly, President Eisenhower's promise of a "reexamination of our own relation to the International Court of Justice,"<sup>49</sup> and Senator Humphrey's resolution to change the terms of the United States accedence to the International Court.<sup>50</sup>

The failure of the United States to live up to what may be expected of the leader of the free world may clearly be seen in the fact that we did not ratify some apparently noncontroversial international conventions which were accepted

42. *Op. cit. supra* note 1, at 212-16.

43. *Id.* at 232.

44. *Id.* at 272.

45. The so-called "Connally Amendment."

46. McCLURE, *op. cit. supra* note 1, at 274.

47. Wagner, *Is a Compulsory Adjudication of International Legal Disputes Possible?*, 47 NORTHWESTERN UNIVERSITY LAW REVIEW 27, 37 (1952).

48. McCLURE, *op. cit. supra* note 1, at 278-81.

49. *Id.* at 282.

50. *Id.* at 283.

by many other nations. One of these is the Convention on Privileges and Immunities, dealing with the diplomatic status of the Secretary-General and the Assistant Secretaries-General of the United Nations, and with the rights of all officials and employees of the Organization.<sup>51</sup> The fact that the seat of the United Nations is in New York makes it clearly imperative that the United States should do its best to facilitate the work of international employees. It should be mentioned that difficulties in obtaining American visas for persons having some lawful business in the United Nations, which are made by American authorities on the ground of "very doubtful needs of national security," were "very far out of accord with a policy of upbuilding the United Nations"<sup>52</sup> and could hardly contribute to the increase of the prestige of the United States.

But the most scandalous failure of the United States is that of nonratifying the Convention on Genocide, which is "defined as certain stated acts committed with intent to destroy a national, ethical, racial, or religious group in whole or in part."<sup>53</sup> On this point, the author has the following comments:

It was the outstanding savagery of World War II; at the very least its outlawry by enacted supranational law and at most its reduction and prevention through punishment would seem one of the minimum prerequisites of a satisfactory world legal order. Yet the people of the United States failed to compel their Senate to make the wholly costless gesture of their participation in it, an omission symbolic of the shortsightedness of their policy concerning the United Nations and of the fruitfulness of their contribution if that policy were regenerated.<sup>54</sup>

Why did this happen?

Although a representative of the Department of Justice testified at Senate hearings that the crime of genocide . . . never had been committed in the United States . . . , hence, that the treaty would not result in any kind of governmental action within the United States, certain persons have chosen the view that it was an instrument for altering the balance of power between the federal government and the governments of the states and to oppose it as such . . .<sup>55</sup>

Passing to the role of the United States President with respect to the United Nations, McClure has two interesting suggestions. One is that the President should lead the United States delegation to the international organization, and be present at some of its sessions, whenever it would be possible.<sup>56</sup> This recommendation was made before the spectacular United Nations session in the fall of 1960, which was attended by the heads of most of the nations. The second suggestion is to include in the delegation two members of each house of Congress,<sup>57</sup> so as to enable American legislators to participate in the process of international legislation.

51. *Id.* at 225.

52. *Id.* at 290.

53. *Id.* at 291.

54. *Id.* at 292.

55. *Id.* at 291.

56. *Id.* at 296-297.

57. *Id.* at 299.

Summing up, McClure restates which "United States politico-judicial doctrines become untenable — if, indeed, they ever possessed any validity either in law or logic,"<sup>58</sup> and recommends action that should be taken by the people of the United States.<sup>59</sup> In the conclusion, entitled "Human Civilization and the Law," the author points out that the last spectacular inventions have "revealed humanity in new splendor and in new degradation."<sup>60</sup> He goes on to say:

The sublime expression of the human intellect . . . is mocked by the unprecedented brute-cruelty of the first utilization of atomic energy and by the adolescent vanity and jealousy of men more concerned about the particular spot where the first man-made space explorer happened to be launched than about appreciation of its magnificence as a human achievement. Herein lies cause for somber reflection for the future, for such abuse of man's achievement leaves no assurance that he will muster the wisdom to use his new-found knowledge for the welfare of all peoples rather than for all-inclusive genocide.<sup>61</sup>

In this situation, the only hope for a better future of mankind is to improve and enforce international law, law being . . . "an expression of human self-control."<sup>62</sup> One of the most important functions of the law is "the protection of civilization."<sup>63</sup> And with the achievements of humanity we are enjoying, McClure hopes that man will be reasonable enough to avoid destruction. It could be added that after both the First and the Second World War, two distinct trends appeared in the life of the nations: one, to assure independence of each nation with respect to any other single one; and another trend, to submit all nations to the authority and control of the international community.<sup>64</sup> Even if this development may be arrested or even turned back in some areas of the globe, it may be expected that in the long run it will progress towards the final and absolute recognition of order in the life of nations. And this international legal order

is significant only as part of a universal legal order which comprises also all the national legal orders . . . the international legal order determines the territorial, personal, and temporal spheres of validity of the national legal orders, thus making possible the coexistence of a multitude of states . . .<sup>65</sup>

Unity of internal and international law was emphasized also by many other legal scholars, among whom Scelle was outstanding. For him, both "dissolve . . . in a unified Law of Society."<sup>66</sup> In the light of these theories, the United

58. *Id.* at 294.

59. *Id.* at 305.

60. *Id.* at 309.

61. *Ibid.*

62. *Id.* at 310.

63. *Id.* at 325.

64. WAGNER, *LES LIBERTÉS DE L'AIR* 163 (1948).

65. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 403 (1952), cited by McClure at 22.

66. SCELLE, *PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE*, I, 32ff. (1932-34), cited by McClure at 24.

States doctrine of the "suprasupreme Constitution"<sup>67</sup> is devoid of any logical basis.

McClure's book should be read by legal scholars, politicians, students, and particularly by judges, senators, and statesmen responsible for the conduct of international affairs of the United States. The use of the book is facilitated by a table of cases, a table of international legislation and constitutions and an index, which is incomplete but helpful (8 pages). A 10-page bibliography is also annexed.

W. J. WAGNER

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67. McClure, *op cit. supra* note 1, at 43.

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PATTERNS OF ETHICS IN AMERICA TODAY. Edited by F. Ernest Johnson. New York: Harper & Brothers, 1960. Pp. 167. \$3.00.

An outstanding problem in American pluralistic society is that those holding varying philosophies make little effort to understand one another. The same observation holds for the varying religions and theologies and the varying power groups such as labor and farm and management. Of course, some of those in one group will readily give answers for the deepest problems of any other group: labor easily handles management's problems, and vice versa; and at the drop of the hat either or both will show the farmer the way out of his bafflement. But really to know another group's position and its strong points and its real difficulties — this is uncommon.

Happily we have several instances of dissident groups coming together for serious conference. The attempt is to intercommunicate and to understand, and (we hope) at least then to allow for the other position. Most notable in this regard is the "dialogue" being engaged in by the several faiths or religions, and the most successful of these efforts to date, we believe, have been three: the conference called by the Fund for the Republic under the title Religion in a Free Society (published in paperback, 1958, by Meridian as *Religion in America*); the interfaith meetings now for several years in the Boston area; and of course the National Conference of Christians and Jews, formed in the first place to try to overcome the misunderstanding — to say nothing of the lack of good will — and the consequent intolerance so obvious in the 1928 political campaign. We have much evidence that the "dialogue," if less crucially needed than a generation ago, is badly needed and will continue to be badly needed in American society. In passing we remark that urban renewal and redevelopment programs are going to depend absolutely on interfaith understanding and cooperation; and these are going to be hard to secure.

Teamed with those three is the series of conferences that have been held over several years at the Institute for Religious and Social Studies of the Jewish Theological Seminary of America. *Patterns of Ethics* consists of lectures given at the Institute. In 1959 the Institute brought together leaders of various faiths who spoke on moral norms as seen by the philosophy and theology each represented.

Each also indicated how his group applies its norms to some of the immediate moral problems of American society.

In the work under review most interesting is the wide spread of sets of rules the various faiths state for human conduct. People have to use some kind of principle to guide their conduct. It should be simple to find a guiding principle or to elaborate one. Yet as soon as people begin to think about the subject, they discover it is a troublesome problem.

In a way the Jewish spokesman and the Catholic and the Protestant are in agreement on the source of the rule or guide to conduct. For all three the source is God. Their theory is that God has spoken and given them an obvious rule. Most Biblical of the three is the Jew. He says that all flows from the center of man's sacredness, and this itself flows from the word that man is created in God's image. Given this sacred character, man is entitled to many values: to freedom, to justice, to peace and security. The Catholic agrees completely, though he adds that man's claim to freedom, justice, and peace can be established on the grounds of man's nature and being as man. This is (we claim) an Aristotelian doctrine, and is expressed in engaging terms by many of those who, especially since the advent of Hitler, have been concerned with the formulation and development of a natural law philosophy; e.g., Gustav Radbruch, and Lon Fuller, and Jacques Maritain. American Protestants such as Reinhold Niebuhr, John Bennett, and Paul Ramsey, finding themselves in difficulty because the Bible does not tell us what to do in the most complicated social and international relations, have been paying some tribute to Maritain's word that man's nature, nothing else being taken into account, forms a basic rule of conduct.

In the present work, the Protestant seems inexperienced and ill at ease in the discussion of philosophical principles. Really, he had at the start put all his eggs in the one basket of justification by faith. Now, although Protestants and others in the Occident have been much influenced by this kind of individualistic and laissez faire standard for judging good and evil, we doubt that the best Protestant philosophers of today would agree with it. This chapter fails to demonstrate how justification by faith can serve as a norm of conduct.

The fourth faith is the secularist or neutralist, and its norm with applications is expressed by the administrative leader of the New York Society for Ethical Culture. This man begins remarkably well by clearing the ground: ethics is said to be the principles of right living, and these are said not to be a matter of taste or preference, or language or the emotions. "Ethical culture believes in the universality of a basic ethical principle of life." (p. 80) Later he weakens his position by saying that the common ground for coming together in the Ethical Culture Movement is a commitment to live ever more ethically. But what does this mean? The author suggests that "The validity of an ethical universal is to be determined by the consequences to which it leads." (p. 77) Which consequences — good ones or bad ones? Pragmatism leaves that question in the air. On some matters of application, this Ethical Culture leader appears to be out of touch with practices common in church-state relations in America. He says that the community "as organized in the state has no right to use public funds to help parochial or private schools, in whatever way or under whatever guise."

(p. 100) This position ignores the fact that state funds are employed to provide books and transportation for parochial school students, and federal tax money is being spent without discrimination to help private and parochial as well as public high schools improve the teaching of mathematics, sciences, and modern languages. The decision of the federal Supreme Court in the Louisiana textbook case included the significant nondiscrimination principle.

It is not surprising that the statement of norms or the application of them is difficult. The authors of these studies were not trying for consensus, but are closer to consensus on the basic norm than they give any hint of guessing. The Jew speaks of honoring man as the image of God; the Catholic says that man's nature itself, objectively and adequately seen, is basic; and the Ethical Culturist speaks impressively about concern for the enrichment of personality. These statements seem to go together, and might make a good starting point for further study.

Some of the most penetrating remarks are made in the supplementary and off the record chapter. In this, the dean of social ethics in Boston University's school of theology gives a reason why a study of common ground on norms is so difficult even to begin:

Much contemporary theological ethics not only grounds itself in a revelation given only to the group or its founder, but specifically disclaims the authority of a more general revelation or natural moral law. When the general moral law is recognized, it is accorded a secondary and subordinate place. The primary and even ultimate status is accorded to the theological claims of the particular religious body. In effect, this tends to mean social exclusiveness. What is common to all or even to several religions is given a lower status. (p. 146)

Precisely on basic norms of conduct — and not at once on their applications — we would like to see strong representatives of the four positions — Jewish, Catholic, Protestant, and secularist — continually discussing how close to one another they can really be. Neither the aim nor the effect need be consensus, but understanding.

LEO R. WARD

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OUR PUBLIC LIFE. By Paul Weiss. Bloomington: Indiana University Press, 1959. Pp. 256. \$4.50.

This is an easily read and easily understood book and is for that reason quite deceptive. For like much "wisdom" literature it depends for its impact, which is considerable, on the wisdom the reader brings to the reading. A strange quality of serenity and consolation — the political counterpart of Thomas Merton — pervades the book. In one sense it is fatalistic, oriental, stoical, and static — in the sense of timelessness.

A mysterious thing happens to a profound philosopher when, after years of study and meditation, he finally perceives truth with sharpness and clarity. It is in part a mystical experience. But to him, it is also a concrete and empirical



entity that he grasps. He realizes that others may not have experienced the same perceptions. He can even detect the stages of inquiry in the writings of others which appear to indicate an author may be on the right track — on the brink of the discovery-perception experience. If such a philosopher has a systematic bent he may work and study to arrange his perceptions into a system of truths. And if he feels some measure of success has crowned his efforts he is almost certain to feel an obligation to present the results of his findings to others: to describe the forms of truth. For of course language being what it is, only the forms of truth can be communicated, not the intrinsic experience. This is what Professor Weiss has done. For anyone who has made some of the same discoveries, his work will appear clean and brilliant. For anyone who has not, it will appear aphoristic and impressionistic.

Weiss calls his book a

systematic speculative account of the nature and need for such important groups as society, state, culture and civilization. . . . An approach in terms of abstract and general considerations, untainted by the biases and details which happen to prevail or be dominant for a time. . . . Few concrete illustrations and little reference to pertinent applications [are offered]. If the reader will provide these himself, however, I believe that much of what is offered as theory will be found to be of some value for the understanding of what he and others are and do, and what they would like to achieve. (pp. 9-10)

I believe this is an accurate statement. For my own part I have come to the reading and study of the book with a different background from that of the author — a background in the social sciences and especially political theory. As the years have passed I have found myself gradually sloughing off much of the positivist baggage of my early training and coming to a perception of what I believe to be truths — truths which in the past could only be marshalled under the speculative umbrella traditionally known as natural law. Weiss has done just the opposite. Starting from speculative and philosophic foundations he has steadily over the years concerned himself more and more with the problems traditional to the social sciences. His approach was always the natural law approach — and the present book is primarily an expression of natural law for contemporary conditions. And yet this natural law treatise by a speculative philosopher does not conflict with what I believe to be the theoretical implications of the major findings of the contemporary social sciences. For the social scientist who will ponder the book there comes gradually a "shock of recognition." It comes with reluctance, and perhaps against the will and desire of the social scientist. On first picking up the book he hopes, perhaps, that it will be simply another philosophic treatise he can easily put aside. But this is not so. I feel in the work of Weiss a gathering together and an articulation of some of the inarticulate assumptions which are implicit in the social theory of the future.

Weiss asks: "how is it that men come to be part of public groups . . . what ought to occur if they are to move out of inferior into better states of affairs,

to cultures, and then to civilization?" (p. 17) He uses, he says, a dialectical mode of construction to produce an ideal model. He contrasts this method with four other possible methods: the genetic, the empirical, the analytical, and the paradigmatic. These, he says, have long dominated the study of political thought.

The proposition is that the genetic method cannot produce an ethic (an ought). The empirical must presuppose what it studies: society, state, culture, etc. In "essence," he says, the analytic must presuppose a standard of relevance. The paradigmatic is analogical, taking its forms and models from nonpolitical sources and applying them to politics.

It is not completely true that the genetic method cannot produce an ethic. What it cannot produce is an absolute ethic. But it can, and it must, produce a functional ethic. Perhaps a functional ethic is not sufficient for Weiss. If so, I am somewhat disappointed, though sympathetic. I would regard this impatience with functional ethics as a lingering god-nostalgia which remains in the philosophic baggage he still carries with him. Human cultures have produced functional ethics. Indeed, it is not possible for there to be a human culture without a functional ethic. And human cultures have produced them genetically. They have projected ideal-typical images (in myths or cosmologies) from their functioning cultural institutions, and then seeing these ideal-typical images as abstract systems they have applied them as standards of judgments for the cultural institutions from which the projection process started. This is the way men have produced natural laws. Because they have been unaware of the genetic nature of the process they have tended to visit characteristics of absoluteness and generality on the ethics genetically produced. What men have done nonrationally (in the form of myth systems and heavenly orders) can also be done rationally and self-consciously in the form of functional abstract models — naturalistic natural law systems, so to speak. It is my own feeling that this is precisely what Weiss has done, and it is an achievement I applaud.

It is true that the empirical method presupposes what it studies. This is the gravest charge that can be levied against Aristotle. It is the feature that renders Aristotelian approaches to social and cultural problems static. It is the feature that discredits teleological approaches in general.

Furthermore, it seems legitimate to suggest that the analytic method presupposes a standard of relevance. That is, it presupposes the validity of having absolute standards of relevance, and this, I take it, is the same thing.

Weiss's charge against the paradigmatic method seems to me unwarranted. Or rather, it is warranted only on an assumption similar to what Weiss has rejected in rejecting the analytic method. The fact that a model is analogical may have nothing to say about its applicability to fields other than that from which it was drawn. Indeed, cultures seem to "work" in paradigmatic patterns: the protestant ethic is not capitalism; it is what capitalism would be if it were a religion, and so on.

Weiss's dialectical method "attempts to determine what must be the case if a thought or fact is to be completed. . . . Beginning with something em-

pirically observed or known to be true, it tries to show what else must be acknowledged and added to the initial material so as to make it part of an excellent whole." (pp. 20-21) This yields a "model," and the model becomes a guide and it carries obligation. The method

supposes nothing more than that men move from society, state and culture and then to civilization for the sake of stabilizing, equalizing, and universalizing the results of socially habituated ways of acting in relation to one another. . . . It offers a technique for anticipating and punctuating the outcome of man's persistent drive to achieve a satisfying and enriching public existence. What it achieves formally is not only what might conceivably be achieved in fact, but what would answer to what man in fact persistently seeks and really needs. (p. 22)

This is not really so distinct a departure as it claims to be. Indeed, it is not characteristically different from the genetic method as interpreted above. Taking the above description of the genetic method, the so-called dialectical method can be termed an abstract description of the process through which men might rationally and self-consciously produce natural laws for themselves. But having stated it this way — and this way of statement seems to me implicit in Weiss's own description — the possibility of producing an ethic with absoluteness and generality is foreclosed. All that can be produced is a functional ethic. If the craftsmanship is sound, however, as Weiss's most certainly is, the result could not be in conflict with what the best social theory would produce. Indeed, Weiss's method is reminiscent of the work in social theory associated with the school of Talcott Parsons. When Parsonian theorists write of the "functional prerequisites to a social system" they are engaging in the same quest as is Weiss. There is no *a priori* foundation for concluding that the two approaches should not come to the same conclusions. However, one qualification must be made. Perhaps it is a fundamental criticism of the book — one cannot be certain from what is furnished us.

Weiss cannot but maintain that at any given time and for any given moment more than one potential future is implicit in any given culture. This means that the concept of "civilization" cannot be monistic. If it is, Weiss has committed the error he has correctly attributed to empirical approaches. It is merely that he has hypostatized an empirical future "civilization" and stated what in theory must be done to get from here to there. But the "there" — the hypostatized civilization — is itself static and determining. This could be true — could be a possible theory — if it were possible to defend theoretical determinism: if it were possible to argue that at any given moment there is only one best theoretical solution (one best "natural law" solution) to the problems of a culture. I do not believe this position can be defended. If it cannot, then neither is it possible to defend the concept of one best future civilization.

The reason it is impossible to defend the notion of one best natural law solution for any given cultural situation is that "cultural facts" — the "things" of which cultures are made — are inherently ambiguous. For example, it would have been possible for England to have achieved her industrial revolution through

mercantilist rather than capitalist forms. Karl Polanyi has written a very interesting book (*The Great Transformation*) which takes this possibility for its implicit assumption. Moreover, there is good reason for arguing that had industrialization taken mercantilist rather than capitalist forms the possible solutions to the contemporary cultural problems of the West (the possible "natural laws") would be much easier to visualize and to achieve.

This does not mean that today there is only one best cultural solution to our problems — any more than this was so in the seventeenth century. In the twentieth as well as in the seventeenth century more than "one best" future cultures "are" theoretically potential and possible. Their implicit norms (their functional "natural laws") would make up more than one natural law system. But in this case the obligation attributed to any possible natural law system must be functional rather than absolute. This brings us back to the dilemma with which we started.

If Weiss wants his concept of civilization to be determining and to provide an absolute ethic, he must accept the theoretical determinism that this implies and at the same time he must accept the violence it does to cultural facts. If not, he must work on the level of more than one possible functional ethic for any given cultural situation and the naturalistic interpretation of natural law this implies.

HARVEY WHEELER

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EDMUND BURKE AND THE NATURAL LAW. By Peter J. Stanlis. Ann Arbor: The University of Michigan Press, 1958. Pp. xiii, 311. \$5.75.

Most readers of this journal are presumably aware of two connected doctrines, one philosophical and one educational. The philosophical doctrine asserts that there is a unity, at least of method, between the natural sciences and the social sciences. The educational doctrine calls for greater movement across those artificial frontiers of the various disciplines which have resulted from pedagogical wars and peace treaties. The present work invokes both these doctrines. A professor of English has written a book of more than three hundred pages on a great literary figure,<sup>1</sup> with less than fifty words devoted to the style of writing.<sup>2</sup> His subject matter is Burke's political philosophy, which may be epitomized by saying that the principles of social control must not be divorced from the facts of social life. This did not make him an opponent of natural law; on the con-

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1. Much of what Burke wrote is in his speeches. He is often described as an orator, and his orations had contemporary as well as later influence. But they emptied the House of Commons: they appeal to the eye and the mind more than to the ear and the heart. Lawyers are, of course, accustomed to spoken writing: in England the ritual of reading written judgments is still practiced.

2. STANLIS, EDMUND BURKE AND THE NATURAL LAW 229. Where no other reference is given, a page reference is to the work being reviewed. References to quotations from Burke are given as they are presented by the author. He does not, however, provide a complete bibliography of Burke's own writings, with the result that one cannot be certain of the edition he uses for his quotations.

trary, he was a supporter, the unity of the natural and the social sciences being part of the age-old tradition of natural law.

The author appears to have had two main purposes in view in writing this book. The major part of the book is devoted to a demonstration of where Burke stands in relation to the theory of natural law: this is the significance of the title. The thesis formulated in the nineteenth century proclaimed Burke as an opponent of natural law beliefs: this was based on his empirical approach to political and social affairs. The author controverts this thesis. He shows that Burke was a steadfast supporter of the "classical" natural law theory—a theory calling for an empirical approach to the solution of particular problems. Earlier commentators, says our author,

sensed the validity and profundity of his answers to man's eternal problems concerning the uses of power, the rule of law, and the moral and prudent means of achieving good order, civil liberty, and social justice, [but they] did not recognize the vital element of the Natural Law in Burke's political philosophy.<sup>3</sup>

The other purpose of the author, to the statement of which little space is given, but which is implicit throughout the book, has coordinate stature by reason of its importance. The author maintains the "vocation" of the present age for the theory of natural law. Even many supporters of its many doctrines may have thought that the greatest achievements have lain in the past, and that the theory no longer has any vital significance. Maine thought that natural law died in giving birth to international law. Our author himself says "with the triumph of the American and French revolutions the Natural Law at once achieved its greatest practical significance in modern affairs, and lost its hold upon the minds of men."<sup>4</sup> But he has no doubt of the contemporary need for the theory or of its further victories: "If the commonwealth of Christian Europe is to survive and form the ethical norms of civilization throughout the world, all men but particularly Americans will have to learn the great lessons of Burke's political philosophy." One of these lessons is that Burke teaches us the vital role played in human affairs by the classical natural law theory.

It is, of course, a commonplace that the term "natural law" covers many different doctrines. The difference between "classical" natural law and later versions has already been made by saying that Burke supported the "classical" doctrine. An analysis of what the differences are between the various theories is, of course, involved in the exposition of Burke's attitude. It is also involved in that revival of natural law theory which has been so marked a feature of juristic thought throughout this country. The revival began in Europe and spread to the United States.<sup>5</sup> Signs of more widespread acceptance of the theory in the United Kingdom exist, and it is noteworthy that in his address to the American Bar Association in 1957 the Lord Chancellor of Great Britain declared his adherence to the view that the common law demonstrated the validity of

3. *Id.* at 247.

4. *Id.* at 13.

5. The titles of the following works are significant in this respect: Charmont, *La Renaissance du Droit Naturel* (1910); Haines, *Revival of Natural Law Concepts* (1930).

natural law beliefs.<sup>6</sup> The account which modern natural law lawyers give of the failure of the nineteenth century criticism is accepted by Professor Stanlis. The assault of the positivists was concentrated on the doctrines of natural law expounded in the seventeenth and eighteenth centuries by writers like Wolff and Pufendorf and the proponents of natural rights. These doctrines, however, diverged in essential respects from older doctrines of natural law, and in particular from those of Aristotle and St. Thomas, which are regarded as forming the "classical" natural law. The positivist criticism, insofar as it had validity, was directed to the divergences of the later theories. Thus the classical natural law emerged unscathed from the fire of the nineteenth century. It is not so much that, in Gilson's phrase, natural law once again buried its undertakers,<sup>7</sup> but that the nineteenth century writers of the obituary notices mistook the identity of the corpse.<sup>8</sup> Later writers have sought to exclude the nineteenth century's victim from the family of natural law by calling it "ideal" law.<sup>9</sup> But in the nineteenth century "ideal law" was mistaken for natural law. Burke's criticism of the natural doctrine of his age was concerned with its abstract and absolute character, i.e., its "ideal law" characteristics. Not only is this criticism logically consistent with support of classical natural law doctrine, but, as our author shows, express support for the classical doctrine is to be found widespread throughout Burke's writings. It was the positivism of his commentators which led to their regarding him as an opponent instead of a supporter of natural law.

6. Referring to the doctrine of the law of nature as "one of the noblest conceptions in the history of jurisprudence," the Lord Chancellor added: "Our two nations socially and legally are highly evolved, and the law of nature is so firmly embedded in our jurisprudence that it only occasionally shows above the surface." *The Times* (London), July 25, 1957.

7. Viscount Kilmuir in his address to the American Bar Association quoted Horace for this thesis: *Naturam expelles furca, tamen usque recurret*.

8. Rommen points out that the victim of the nineteenth century had been the aggressor who disparaged the traditional doctrine. "From the time of Pufendorf fun began to be poked at the 'fancies of the Scholastics.' From here on, an anti-Aristotelian nominalism became, expressly or tacitly, the basis of philosophy . . . Indeed the same failure to understand tradition then led the nineteenth century to assume that, by refuting this natural law doctrine of the seventeenth and eighteenth centuries, it had overthrown the natural law with its philosophical tradition of over two thousand years." *THE NATURAL LAW* 82 (transl. Hanley, 1947).

9. "Pour les philosophes du xviii<sup>e</sup> siècle le substantif 'droit' avait la même signification dans les deux expressions 'droit positif' et 'droit naturel,' savoir un système complet des normes destinées à régler les rapports sociaux . . . la notion d'un droit idéal est parfaitement plausible; seulement, ce n'est pas le droit naturel." RENARD, *LE DROIT, L'ORDRE ET LA RAISON* 134 (1927). In this brilliant, but not widely known, work Renard ascribes the distinction between natural law and ideal law to Gény. Even in the first edition (1899) of his *Méthode d'Interprétation*, Gény describes the error of the schools of the 17th and 18th centuries. "Portant de l'idée de la puissance absolue de la raison humaine, par découvrir, dans leurs principes comme dans leurs détails, les lois assignées à notre nature, l'École du Droit naturel prétendait constituer, par les seules forces de la pensée, un système complet de droit absolu, immuable, immédiatement et universellement applicable, que le législateur n'eût qu'à mettre en formules." (p. 474) But he calls the writers "L'École du Droit naturel." He acknowledges for this account his indebtedness to Stammler. In the latter's *Rechtsphilosophie* (1921), this notion of a detailed blueprint of laws ready for enactment, elaborated by pure reason, is described as *Idealrecht* and condemned as fallacious. "Es ist wohl versucht worden gegenüber dem geschichtlich gewordenen Recht . . . ein vollkommenes Gesetzbuch mit Gültigkeit für alle Völker und Zeiten auszuführen. Das ist unmöglich." (Art. 4)

As a background to his examination of Burke, Stanlis provides an introductory sketch of natural law theory. This account is derived from recent Catholic writers, and presents the "classical" natural law in a theological garb with dogmatic and rigid principles. The result is to obscure the basic distinction between "ideal law" and natural law, and to present a doctrine to which it is doubtful whether Burke would subscribe. Yet in his commentary on Burke's writings our author correctly states the basic distinction between the absoluteness of ideal laws and the flexibility of the natural law to which Burke subscribes. The classical natural law insists on full operation being given to human experience and refuses to attribute "divine" authority to the results of human reason. But before a fuller examination is given of natural law theory it is advisable to deal first with our author's full examination of Burke's contribution to legal philosophy.

It was to be borne in mind that Burke did not set out to expound a philosophy of law in abstract systematic fashion.<sup>10</sup> He did reflect deeply on the problems of government, but his views are expressed in relation to the political issues of his time. It is in the course of "propaganda" about the American and the French Revolution, and about the conditions which led to the Irish Rebellion of 1798, that he expresses his opinions about natural law and natural rights. Nevertheless our author is able to demonstrate their coherence as deriving from a consistent philosophy. That Burke favored the American and Irish "rebels," but came to oppose those who seized political power in France, is to be explained, not by the fact that Irish and Americans fought to throw off an "alien" yoke while the French Revolution had no such element, but by reference to the principles of government espoused by those who rebelled.<sup>11</sup> It is indeed this consideration of general principles in relation to specific practical affairs and his insistence that sound principles take account of changing circumstances which are Burke's distinction as a philosopher, and which have led many mistakenly to characterize him as an empiricist.<sup>12</sup> These doctrines are, however, not only consistent with natural law, but mark Burke as a supporter of that theory. Both Plato and Aristotle insist on the impossibility of dealing with political matters without taking all the circumstances into account.<sup>13</sup>

It is perhaps the absence of any work specifically entitled as one on phi-

10. His *Reflections on the French Revolution* is, of course, the nearest approach to a treatise on political theory.

11. The unsuccessful rebellion of 1798 inspired another member of Trinity College, Dublin (Burke's college), James Kells Ingram, to write the poem, called by its first line, "Who fears to speak of ninety-eight." Undergraduates of Trinity interrupted the recitation of the poem by interjecting at the end of that first line: "The author!" Burke sympathized with the opening stages of the French Revolution, but his change of attitude was in no way due to a timid lapse into conventionality.

12. Thus HALÈVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 103 (Beacon ed.): "To sum up, Burke's political philosophy is an empiricism." Halèvy makes Burke's conservatism logically dependent on his empiricism: "This essentially empirical and therefore conservative political philosophy." (p. 159) A "philosophy of experience" is made one which asserts: "the duration whether of an idea or an institution, its mere persistence through time, is a presumption in favour of that idea or institution."

13. It is, of course, John Wild who has stressed so much Plato's attitude as that of the "practical philosopher." *PLATO'S THEORY OF MAN* 11. He emphasizes the "synthetic practical nature of Plato's approach" by elaborating Plato's distinction between what we now call "technology" and "technique." Philosophical understanding does not separate

losophy of law (or employing one of the many synonyms of that phrase) which has led to the exclusion of Burke from the list of jurists dealt with by expositors on legal philosophy. Neither Berolzheimer in *The World's Legal Philosophies* nor Stone in his encyclopedic *Province and Function of Law* deals with Burke. He is ignored by Austin, and in Maine's few references he is regarded as a rhetorician. Allen in a short statement presents the "orthodox" view of Burke as an empiricist and traditionalist. He is regarded as the leader of a revolt against rationalism, one who "anticipates the historical school of the nineteenth century."<sup>14</sup> Gurvitch likewise says in a description, which the present work seeks to correct, "The reaction of the nineteenth century against natural law formulae is traceable ultimately to Edmund Burke."<sup>15</sup> Considering myself as a representative sample, I say that the ordinary British lawyer would think of Burke, despite his political association with Fox, as the philosopher of conservatism: not the new English "conservatism" which has assumed the liberal doctrine of the limited authority of the state, confining its powers to the maintenance of order and the protection of property, but the older theory which accepted the Aristotelian doctrine that the end of the state is the promotion of the good life. Indeed, Burke's own statement to this effect is one which "everybody knows":<sup>16</sup> "Society is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all arts; a partnership in every virtue and in all perfection."<sup>17</sup> The English academic lawyer is also acquainted with Burke's panegyric about the study of law, and I must confess to misquoting it in the form "Law is . . . the first and noblest of human sciences: a science which does more to quicken and invigorate the understanding than all other kinds of learning put together."<sup>18</sup>

It is to the political scientists that one must turn for a discussion of Burke's views and a recognition of his importance. But political science is today dominated by positivism,<sup>19</sup> and its writers have generally mistaken the significance

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the theoretical from the practical. The handling of practical details in a blind and routine fashion is an "empiricism" to be avoided. On the other hand, "empeiria" is essential: "The way to guiding knowledge is through practice or direct experience with the matter itself." *Id.* at 52. Theory must be integrated with practice. The philosopher-king would not need laws, because these might limit him in his consideration of all the circumstances.

14. LAW IN THE MAKING 14 (1st ed., 1927).

15. STANLIS 5. In the first article directly on natural law in the *Modern Law Review* there is no reference to Burke. Chloros, *What is Natural Law*, 21 MODERN LAW REVIEW 609 (1958).

16. "Everyone knows" also Burke's repudiation of the view that a member of parliament is but a delegate elected to express the views of his electors. (Expressed in his address to his Bristol constituents)

17. The passage from which the above is an extract is set out at length at p. 72 and at p. 207. On the latter occasion Stanlis says the passage has been much misunderstood, since some commentators have regarded it as showing Burke's adherence to a "social contract" doctrine. This, however, is not the only passage which may be cited as showing Burke's support for some "social contract." See HALÉVY, *op. cit. supra* note 12, at 158.

18. The passage is quoted correctly at p. 35. I have suppressed (law is) "one of" (the first) and the conclusion, "But it is not apt to open and liberate the mind exactly in the same proportion."

19. Bernard Crick seeks to demonstrate this for the United States in his *AMERICAN SCIENCE OF POLITICS* (1959), but it is also true for the United Kingdom, though here "scientism" may not be so widespread.



of his views. A representative is Sabine, author of perhaps the most widely read undergraduate textbook on both sides of the Atlantic, viz., *A History of Political Theory*. He portrays Burke as a disciple of Hume, denying "that social institutions depend on reason and nature, and far more than Hume he reversed the scheme of values implied by the system of natural law."<sup>20</sup> Our author traces this assessment of Burke back to his earliest expositors, Buckle and Morley, who saw him as an advocate of expediency and utility. As has already been stated, the aim of the present work is to re-assess Burke's views, and to present him as one who fully accepted "the sovereignty of natural law."<sup>21</sup>

It is not possible for me to summarize adequately the elaborate argument of Stanlis. He examines Burke's views from many aspects, and supports his contentions by a great many quotations. I shall not follow the plan of his treatment. Instead I posit three main theses as underlying Burke's adherence to a theory of natural law, and I shall endeavor to show his support of these propositions. I shall not, however, consider the many problems involved in an evaluation of the validity of the propositions. The theses are as follows:

1) There are objective principles for the government of societies which ought to be observed by those who have political authority. A corollary to this is that the laws of a state are not justified solely by the authority of the lawmakers: it is the nature of human societies, not the will of the sovereign, which justifies the action of those possessed of power. There is an assumption, of course, that the concepts of "ought" and "justify" are meaningful.

2) The principles of government are to be discerned by reason reflecting on experience of the nature of men in society. An alternative formulation is that the principles are not the product of quasi-mathematical intuition: such intuition creates but speculative hypotheses; and however much their authors claim that they are rational, they remain dogmatic abstractions. There are, of course, problems about the nature of reason.

3) The principles of government are not simple prescriptions which can be applied to the determination of human affairs *more geometrico*; in their application they call for that prudence which requires human judgment as to the effect of the multiplicity of circumstances on the operation of principles. This proposition involves perhaps more philosophic problems than the others, extending to the character of scientific laws and metaphysical doctrines, involving considerations like the distinction between "pragmatism" and utility.<sup>22</sup> It is hoped, however, that a discussion which does not consider all those problems will not be too obscure.

The third proposition merits the fuller consideration, quite apart from the philosophical involvement. It is the doctrine which perhaps most clearly serves as a criterion for distinguishing the classical natural law from the eighteenth

20. GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 614 (New York, 1937). (STANLIS 34)

21. This phrase is the title of the last chapter.

22. The theories of Körner (in *CONCEPTUAL THINKING*) about the nature of rules and metaphysical and scientific directives based on his doctrine of "interpretative levels" seem particularly relevant. The theories cannot, however, be simply stated: the book is a tightly knit argument involving many new original ideas. The chapters which deal with moral rules and metaphysical directives (ch. 29 and 30) cannot be detached from the rest of the book.

century ideal law. It is the proposition which is most fully elaborated by Burke. It is his insistence on prudence which has probably led to the misstatement that his belief was in expediency and utility. But comment on the first two propositions is also called for.

The first proposition asserts the objectivity of principles. This is to be distinguished from the assertion of the universal acceptance of principles. But the assertion that there are principles universally applicable does imply belief in the objectivity of principles. Burke would not have accepted the relativism thus described by Robert Bridges:

Ask what is reasonable! See how time and clime  
conform mind more than body in their environment;  
what then and there was Reason, is here and now absurd;<sup>23</sup>

for Burke's own view was more objective:

Against this geographical morality [by which the duties of men are not to be governed by their relations to one another but by climates] I do protest . . . the laws of morality are the same everywhere; and actions that are stamped with the character of speculation, extortion, oppression, and barbarity in England, are so in Asia, and the world over.<sup>24</sup>

He rejects the positivism to be found in some versions of the imperative theory of law.<sup>25</sup> This is what he says in condemnation of the misgovernment of Ireland:

It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness, of human society than the position that any body of men have a right to make what laws they please; or that laws can derive any authority from their institution merely and independent of the quality of the subject-matter.<sup>26</sup>

Applied to the judicial process the doctrine of the first proposition produces this noteworthy statement of the declaratory theory:

If the judgment makes the law, and not the law directs the judgment,

23. *The Testament of Beauty*, lines 465-7. The conformity of varying detailed rules and particular institutions with common principles is explained by Burke's third proposition. The explanation goes back, of course, to Book V of the *Nicomachean Ethics*.

24. *Speech Against Warren Hastings*, in 4 *SPEECHES* 34 (STANLIS 63).

25. Insofar as Austin was merely setting out characteristics by which "rules" could be recognized as being "laws" (i.e., providing an ostensible definition in Bassin's use of that phrase, in *DAVID HUME* 133, Penguin ed.), he is not a positivist. Rommen explains thus: [According to moderate positivism] "law is not something pertaining to reason, but mere actual will in the psychological sense. It does not depend upon the essential being of things or upon the nature of the case, which L. von Baer, following here the Anglo-Saxon judicial tradition designated as the basis of law." *THE NATURAL LAW* 129 (St. Louis, 1947). Stanlis shows that Burke was much influenced through his study of English law by the "Anglo-Saxon judicial tradition." Austin, of course, was a utilitarian influenced, however, by Hobbes's views that "authority" was justified as serving the ideal of peace and order, and laws as ensuring certainty.

26. *Tract on Popery Laws* 21 (STANLIS 43).

it is impossible that there should be such a thing as an illegal judgment given . . . [this] is to corrupt judicature into legislature.<sup>27</sup>

The second of Burke's theses, viz., that principles are to be derived by reflection on experience, underlies much of his attack on the "natural rights" doctrine of his age. This he regarded as based on arbitrary fancy, not grounded on human nature. He was not an opponent of the "real rights" of man, but of what he called the "pretended rights."<sup>28</sup> These latter, he said, were created by abstract "human reasonings," not tested by the facts of "human nature," facts which were not, in his view, in accord with a Procrustean doctrine of equal rights. "Government was . . . not to furnish out a spectacle of uniformity, to gratify the schemes of visionary politicians."<sup>29</sup> "Abstract principles of natural right . . . annihilated . . . natural rights."<sup>30</sup> The real natural rights were derived from reason tested by experience.

I do not vilify theory and speculation — no, because that would be to vilify reason itself . . . No, whenever I speak against theory, I mean always a weak, erroneous, . . . or imperfect theory; and one of the ways of discovering that it is a false theory is by comparing it with practice.<sup>31</sup>

But experience points to relations which have objective existence. Burke emphasised the existence of duties as well as rights, and the following passage deals with the reality of duties. The first proposition that principles of government have objective existence is linked with the second, which says that it is man's reason and not his fancy which discerns those principles. They may be hypotheses, but they are not, as some moderns would have it, mere "postulates."

We have obligations to mankind at large, which . . . arise from the relation of man to man, and the relation of man to God, which relations are not matters of choice . . . The instincts which give rise to this mysterious process of nature are not of our making. But out of physical causes, unknown to us, perhaps unknowable, arise moral duties, which, as we are able perfectly to comprehend, we are bound indispensably to perform.<sup>32</sup>

Just as the first thesis is linked with the second, so is the second linked with the third. The principles of government have to be tested by experience, and

27. 1 *SPEECHES* 78 (STANLIS 52). Burke was speaking in the debate on Wilkes's right to be admitted to the House of Commons on election despite the existence of a conviction. The House of Commons in such a situation was, in Burke's view, a judicial assembly. (It has no independent lawmaking powers, being but a branch of the legislature.) Stanlis, however, sees in Burke's speech an expression of the view that even when sitting as a legislative body Parliament ought to proceed in accordance with "principles of law," conceived as being "the ethical code of Natural Law."

28. "Far am I from denying theory . . . or from withholding in practice . . . the *real* rights of men." "The pretended rights of man . . . cannot be the rights of the people." (STANLIS 130)

29. *Letter to the Sheriffs of Bristol* 29 (STANLIS 105). The theme was the abstraction of the "unity of empire" on which it was sought to found identical institutions for all parts of the empire.

30. 3 *SPEECHES* 476 (STANLIS 131).

31. 3 *SPEECHES* 48 (STANLIS 103).

32. *New to the Old Whigs* 79 (STANLIS 78).

they have no vitality in isolation from the problems of human life to which they have to be applied. If they are considered in isolation from social realities "their abstract perfection is their practical defect."<sup>33</sup> Principles indeed exist, must be sought for, and held to: "without the light of sound well-understood principles, all reasoning in politics, as in everything else, would be a confused jumble of particular facts and details, without a means of drawing out any sort of theoretical or practical conclusion." But inherent in sound principles is a flexibility to provide for their effective operation: the function of principles is to be applied to varying circumstances. Burke emphasizes again and again the need to consider different circumstances: "the statesman has a number of circumstances to combine with those general ideas. . . . Circumstances are infinite, are infinitely combined; are variable and transient; he who does not take them into account is not erroneous but stark mad."<sup>34</sup> It is for this reason, as Aristotle pointed out long ago, that uniformity of principles is consistent with many different political institutions, the "diversity of forms" as Burke terms it. "These metaphysical rights entering into common life, like rays of light which pierce into a dense medium, are by the laws of nature refracted from their straight line."<sup>35</sup> And "social and civil freedom, like all other things in common life, are variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstance of every community."<sup>36</sup> Burke is aware of the two variables which are involved in the handling of practical affairs. On the one hand, there are the different environments of societies, such as their climates and natural resources, their created wealth and institutions; on the other hand, there are, in addition to the qualities common to all men, the varying characteristics of different men.<sup>37</sup>

It was our duty . . . to conform our government to the character and circumstances of the several people who composed this mighty and strangely diversified mass. I never was wild enough to conceive that one method would serve for the whole; that the natives of Hindostan and those of Virginia could be ordered in the same manner.<sup>38</sup>

The legislators . . . had to do with men, and they were obliged to study human nature. They had to do with citizens, and they were obliged to study the effects of those habits which are communicated by the circumstances of civil life. . . . thence arose many diversities amongst men, according to their birth, their education, their professions, the period of their lives, their residence in towns or in the country, their several ways of acquiring and of fixing property . . . all of which rendered them as it were so many different species of animals . . . [they] attended to the different kinds of citizens, and combined them into one commonwealth.<sup>39</sup>

33. REFLECTIONS ON THE FRENCH REVOLUTION 332 (STANLIS 107).

34. 4 SPEECHES 55 (STANLIS 109). The immediately preceding quotation is from this same source and page.

35. REFLECTIONS ON THE FRENCH REVOLUTION 334 (STANLIS 76).

36. *Letter to the Sheriffs of Bristol* 25 (STANLIS 106).

37. Stanlis describes as the "touchstone" of all Burke's political theory the following test: "does it suit his nature in general? does it omit his nature as modified by his habits?" 3 SPEECHES 48 (STANLIS 103).

38. *Letter to the Sheriffs of Bristol* 27 (STANLIS 105).

39. REFLECTIONS ON THE FRENCH REVOLUTION 454 (STANLIS 107, 108).

It is not surprising that Burke presents no clear analysis of the manner in which principles are related to circumstances. He insists on a distinction between mathematical principles and political principles.

The lines of morality are not like ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence. Prudence is not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.<sup>40</sup>

Political principles are not applied by mere processes of deductive logic like those of mathematics. "In politics the most fallacious of all things was geometrical demonstration."<sup>41</sup> The thought behind this appears to be that political principles in their formulation appear as abstract propositions, which in their abstraction are capable of application to varieties of particulars. This is, of course, the character of mathematical propositions: Pythagoras demonstrated that the proposition about the square on the hypotenuse did not apply only to the well-known triangles with sides in the ratio of 3 : 4 : 5 used in practical building, but to right-angled triangles of all ratios. Euclid's theorems apply to figures of all sizes and shapes, without any modifications or exceptions. But when political principles come to be applied to actual affairs then Burke appears to say account has to be taken of factors not contained in the principles: account has to be taken of prudence which operates *ab extra*, and which is superior to the principles, for it controls their application.

A fuller examination of Burke's writings shows, however, that he is not committed to such a view. Indeed he presents the contrary view of regarding true political principles as embodying in themselves a reference to varying circumstances. It is the false principles on which pretended natural rights are founded which are expressed in unconditional and infeasible form:<sup>42</sup> they are described as "metaphysical abstractions" concerned with "metaphysical liberty and necessity." On the contrary, Burke affirms "Nothing universal can be rationally affirmed on any moral or political subject. Pure metaphysical abstraction does not belong to these matters."<sup>43</sup> Thus, while Burke always supports freedom as a proper object of government, "The extreme of liberty (which is its real perfection) obtains nowhere, nor ought to obtain anywhere." If there were no restraints on liberty a common-sense view of human nature suggests that the exercise of freedom for social impulses would be imperiled by the

40. *New to the Old Whigs* 16 (STANLIS 115).

41. REFLECTIONS ON THE FRENCH REVOLUTION 444 (STANLIS 76).

42. Hart in his essay on *Ascription of Responsibility and Rights* has shown the importance of adequate consideration being given to the nature of what he calls "defeasible concepts." In law there are many situations in which certain factors give rise to particular legal relations *unless* other unspecified factors are present. For example, an exchange of promises gives rise to a contract *unless* there is fraud or illegality or some other circumstance recognized as entitling the court to refuse to enforce a promise. In Hart's apt language, the notion of a contract is a defeasible concept. As he points out, defeasible concepts exist outside the law. LOGIC AND LANGUAGE 147 *et seq.* (First Series, ed. Flew).

43. *New to the Old Whigs* 16 (STANLIS 115).

license afforded to anti-social impulses. Thus Burke avers: "Liberty . . . must be limited in order to be possessed,"<sup>44</sup> and again, "In a sense the restraints on men, as well as their liberties, are to be reckoned among their rights."<sup>45</sup> Any absolute right, whether of kings of subjects, may do social harm: real rights are not absolute.

You can hardly state to me a case, to which legislature is the most confessedly competent, in which, if the rules of benignity and prudence are not observed, the most mischievous and oppressive things may not be done. So that after all, it is a moral and virtuous discretion, and not any abstract theory of right, which keeps governments faithful to their ends.<sup>46</sup>

The point is that wise principles are so formulated that those who apply them have constantly in mind the policy to be served by them, which may be frustrated by mechanical application to varying circumstances. The formulation of a principle may for the sake of convenience or simplicity be in unconditional terms, but those who come to apply such a principle will seek for the implied conditions: this is no more than the Aristotelian doctrine restated by St. Paul when he said "The letter killeth but the spirit giveth life." As our author points out,<sup>47</sup> Burke's thought is essentially similar to St. Thomas's doctrine of "determinatio." Indeed St. Thomas himself uses the notion of prudence, under the name of *sapientia*.

According to St. Thomas the utility of principles which are not of universal application lies in their application to "the majority of cases." But how is one to determine which is the ordinary and which the exceptional case? Must one go all the way with Holmes when he said "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle

44. *Letter to the Sheriffs of Bristol* 30 (STANLIS 106). The immediately preceding quotation is from the same source and page.

45. REFLECTIONS ON THE FRENCH REVOLUTION 333 (STANLIS 107).

46. 4 SPEECHES 55 (STANLIS 115).

The nature and operation of rules which are not absolute in their application have recently been the subject of fuller study by logicians and philosophers. Ross discusses them under the terminology of "prima facie duties." *THE RIGHT AND THE GOOD* 19 *et seq.* Edel calls them "phrase rules." *ETHICAL JUDGMENT* 42 *et seq.* Toulmin deals with them in connection with the theories of probability, and his distinction between "analytical" and "substantial" arguments. *THE USES OF ARGUMENT* 141 *et seq.* Toulmin's work is devoted to the theme that logicians have universally looked at all reasoning *more geometrico*, and that legal reasoning furnishes a more useful basis for the logical examination of the actual reasoning employed in human affairs.

47. STANLIS 114. He draws attention to the distinction between speculative and practical reason drawn by Aristotle and adopted by St. Thomas, and says "in contingent matters and details there can be no general or necessary laws." The Thomistic language of "determinatio" is used in *Summa Theologica* (Prima Secundæ Qu. 95. 2) in connection with the derivation of human law from natural law. But the same idea is used in Qu. 94. 4 in the application of natural law to particular cases. In considering the relation of principles of natural law to human behavior it must, of course, be remembered that they are prescriptive not descriptive. The existence of uniform principles of natural law is not controverted by differences in human practices (i) because of the doctrine of *determinatio* quoted by Stanlis. "The determination of those things that are just must needs be different according to the differing states of mankind"; (ii) because practices may be in breach of the principles of natural law. That people ought not to drink alcohol is not controverted by the fact that they do: indeed the "proof" of the normative proposition may be based on the observation of the empiric practice.

than any articulate major premise"?<sup>48</sup> His term "judgment" on which decision depends is equivalent to Burke's "prudence." Are both to be equated with "intuition," and opposed in consequence to "reason"? This certainly would contradict the first two theses which I have submitted Burke upheld. The solution I have suggested above in terms of policy directives needs much more refinement. Perhaps that analysis may come by considering not pure mathematics but physics; confusion between the two is common though it was stigmatized by St. Thomas as "a sin against the intellect." Nor, of course, should engineering be neglected, particularly when regard is had to the slogan of "social engineering." The physicist and the engineer may use mathematical models, but their principles do not neglect the varying conditions of the real world. The laws of motion in a frictionless model are not the principles of motion in the real world where friction exists. Motion on an inclined plane, to take a simple case, is based on "principles" of gravity and friction. The engineer may be able to compute the resultant of forces which he knows but he must use "prudence" in dealing with situations where precise knowledge is wanting. The lawyer is required to use prudence because of the existence of competing principles<sup>49</sup> and because he must proceed qualitatively in the absence of the precise quantitative relations which are so often available to the physical technologist.<sup>50</sup>

48. *Lochner v. U.S.* 198 U.S. 45 at 76.

49. In the light of the knowledge of competing principles we may obtain fuller understanding of Burke's statement: "But as the liberties and the restrictions vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule." *REFLECTIONS ON THE FRENCH REVOLUTION* 333 (STANLIS 107).

Liberties are not absolute, because the principles that give rise to them have so to be framed as not to contradict the principles which give rise to the restrictions; and vice versa. The principle of freedom of contract has to be stated so as to allow scope for the operation of the principle that laws bind without consent. The principle of freedom of action has to be stated so as to allow scope for the operation of the principle that persons who suffer harm may receive compensation. Difficulties of formulating principles fully are paralleled by difficulties of decision in particular cases where principles appear to compete with each other for application. It may be possible to articulate the major premises, and yet still have to decide whether a premise of liberty or a premise of restriction applies. Folk wisdom provides us with many examples of principles couched in unconditional forms so that they appear to be in competition at least in borderline cases. "Look before you leap" is apparently contradicted by "He who hesitates is lost." But the real problem is to decide in a particular case how much looking amounts to hesitation. "Many hands make light work" is not contradicted by "Too many cooks spoil the broth." The question is obviously, What is "too many"? But even were the adjective "too" omitted, there would always remain the general problems of whether the cost of additional labor (in all its aspects, not merely those of wages) is balanced by extra productivity, and at what stage additional labor lowers productivity.

50. In many crafts problems of where to draw the line are solved by "prudence." We may take the homely example of the cook who decides by "judgment or intuition" how much salt will enrich the flavor and not spoil it. But, of course, quantitative recipes are being replaced by scientific formulas: the modern housewife uses a specified weight, not a pinch of salt. In the chemical industry precise conditions are prescribed for many operations. But even in manufacturing processes there are many situations where there are so many variables and unknowns that precise calculation is impossible: the judgment of the skilled worker is still required as well as the computer of the scientist. In the social sciences we operate, perhaps of necessity, with situations where there is great complexity and little exact knowledge of modes of interaction. We are compelled to act with prudence. But this is not a duty imposed *ab extra* on the operation of principles. It is a necessity arising from limitations of human knowledge and the requirement of human decision which is written into a fully formulated principle.

The three theses which have been discussed are adequate to establish Burke's adherence to a belief in natural law. But they serve as an introduction also to many controversies which have been associated with that phrase. There are diverse theories which have been called by that name whose very existence has led to a denial of the central thesis of all "properly" called theories of natural law, viz., that there are objective principles of government. Instead of the various theories being regarded as different attempts to attain the objectivity of the principles, different approximations thereto, they have been considered as being essentially but historically conditioned ideologies.<sup>51</sup> The existence of a "classical" natural law theory associated with Aristotle and St. Thomas<sup>52</sup> opposed to an ideal law theory of the seventeenth and eighteenth centuries has already been considered to some extent. Some further attention needs to be given to the differences between the classical and later theories; the account previously given has ignored other versions which our author in places tends to support. Again, in recent years, the doctrine has been asserted both by opponents and supporters of natural law, that acceptance of natural law involves belief in the permeation of the rules and processes of positive law by principles of natural law.<sup>53</sup> While it is not appropriate to enlarge upon this debate in this review, it is worthwhile

51. Pound has asserted that what "in practice . . . usually goes by the name of natural law, is an idealised version of the positive law of the time and place." This he would have us call "positive natural law." See *Natural Natural Law and Positive Natural Law*, 68 *LAW QUARTERLY REVIEW* 330 (1952). Such "positive natural law" is clearly but an ideology. Pound, however, both in this essay and more clearly in his *Introduction to the Philosophy of Law*, asserts that the juristic theories of "natural natural law" are but responses to the problems of the time and place when and where they are formulated. This doctrine is one aspect of a nineteenth century reaction of "history" to "philosophy" which has been thus summarized by Croce:

historical thought has played a nasty trick on this respectable transcendental philosophy . . . the trick of turning it into history by interpreting all its concepts, doctrines, disputes, and even its disconsolate skeptical renunciations, as historical facts and affirmations, which arise out of certain requirements, and were thus partly satisfied and partly unsatisfied. *HISTORY AS THE STORY OF LIBERTY* 35.

It may be noted that this relativism is not inconsistent with objectivity. The needs of time and place, the requirements of historical conditions, are not subjective fantasies of the theorist: they are the particular circumstances to which the classical natural law theory requires that full consideration should be given.

52. Stanis in one place (p. 7) tells us "the most profound and all-inclusive statements of the Natural Law are probably those of Cicero and St. Thomas Aquinas. Cicero supplied the touchstone for the classical conception of Natural Law: St. Thomas supplied it for the Scholastics." This appears to me to attach undue importance to Cicero. He is not generally regarded as a creative thinker, but as an expositor of Greek Stoic thought modified by Platonic influence. (Stoic thought, of course, itself followed after Plato.) The origins of natural law thinking surely lie in the early Greek philosophers. The basis is the Socratic doctrine that there can be objective knowledge of justice. This is developed by Plato, and, of course, by Aristotle, who is the supreme authority for St. Thomas. Aristotle himself purports largely to expound established theory. A major part of the task undertaken by St. Thomas is the systematization of Aristotelian thought and its reconciliation with Christian doctrine.

It should also be noted that St. Thomas was not generally regarded as the dominant scholastic philosopher until the nineteenth century. The scholastic philosophers had important differences. Stanis writes usually as if God's reason and God's will need not be distinguished; but while St. Thomas emphasized reason, Scotus emphasized will.

53. It is now a commonplace of realistic description of legal systems to note how widespread is the operation of ethical ideas. Many of the rules themselves direct the employ-



to consider Burke's position in relation to it. Finally, some attention must be given to what may be considered a central issue. The principles of government, says the second proposition suggested as underlying Burke's views, are obtained by "reason reflecting on experience." What is the nature of this process? What are the conclusions which are reached by it? Have we any assurances that we have thereby attained "eternal, unchangeable and universal" principles?<sup>54</sup>

The doctrine supported by our author as to the difference between the classical natural law and "modern" thought is professedly derived from the works of Leo Strauss.<sup>55</sup> Hobbes's philosophy, we are told, is the great dividing line between medieval and modern secular thought: his revolutionary break with the past, his destruction of the primacy of "law" or "reason" in favor of "power" or "will," is the fountain head of revolutionary social thought.<sup>56</sup> The result was to produce a natural law creating rights reflecting the wills of selfish men seeking as much arbitrary power as they could attain, derived from men's private reason divorced from any theistic support, and dependent only on mathematical logic. It may be doubted, however, whether the revolution is quite as widespread as

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ment of such ideas through the use of ethical terms: the Rules of the Supreme Court of England often require the judge to do what is "just," and, as Pollock has observed, the words "just" and "justice" have not lost their ethical connotation even in a technical context. Even where the rules are not phrased in ethical language the nature of application very often compels the judge to exercise a discretion, and here his ethical notions may determine his choice. Again, "gaps in the law" require the formulation of a new legal rule, and a legislative process necessarily provides scope for ethics. Where statutes are ambiguously drawn there is a conceded gap, for the judge may have to select an interpretation which conforms to his notion of justice. (The dominant practice in England, however, permits this to be done only after it is discovered that the ambiguity cannot be resolved by recourse to the intention of Parliament.) Moreover, there is general agreement that large sections of the rules of positive law are just, and in the language of Justinian "consist of precepts belonging to natural law." INSTITUTES I.I. 4.

But granted this, it does not follow that there is not a basic conceptual distinction between the "is" and the "ought." Certainly "classical natural law" does not accord with Fuller's account of natural law as "the view which denies the possibility of a rigid separation of the *is* and the *ought*, and which tolerates a confusion of them in legal discussion." LAW IN QUEST OF ITSELF 5. One of the functions of classical natural law is to criticize the ideas of justice actually utilized in the administration of justice. There can be no marriage between the *is* and the *ought* unifying them. The language of a temporary divorce between the "is" and the "ought," used by Llewellyn and McDougal, may be misleading. 50 YALE LAW JOURNAL 535. On the other hand, I do not accept the exaggerated conclusions drawn from what appears to me a triviality, viz., Hume's doctrine that the conclusion of the traditional analytical syllogism cannot contain an "ought" if none was found in the premises. Nevertheless, the establishment of an ethical proposition may involve the demonstration of facts. See also *infra* notes 74 and 76.

54. It is worth stressing that the problem here posed is whether there are immutable principles from which varying rules may be derived by a process of "determination." It was only the eighteenth century rationalists who thought that detailed rules, valid for all time and places, could be deduced with certitude from basic principles. Chloros's opening sentence in his article, *What is Natural Law*, 21 MODERN LAW REVIEW 609, may be misleading. He says: "The traditional view of natural law is that it is a body of immutable rules superior to positive law," but he does not make any distinction in the article between "principles" and "rules." Thomistic natural law distinguishes between first principles and secondary derivations therefrom. Only the first principles are claimed to have universality.

55. STANLIS 16.

56. *Id.* at 17.

is suggested: whether all the writers of the "ideal law" school accepted all these notions, and whether the classical writers present a complete antithesis to them.

A difference between "natural law" and "natural rights" may be no more than one of language and aspect. Whereas "laws" are concerned with abstract possibilities of application, "rights" are concerned with the application of legal propositions to specific individuals. A law which forbids any person to inflict harm on any other person gives John Doe a right not to be injured.<sup>57</sup> The Bill of Rights derives as much from classical natural law as from later writing. If there be a substantial difference it must be found in the nature of the contents of the laws and rights.<sup>58</sup> Here, too, the view sometimes put forward that natural law looked to the common good, as appears in the Thomistic definition,<sup>59</sup> while natural rights are concerned with the welfare of individuals, is an inadequate distinction. The classical writers were well aware that the common good is the good of individuals, and the modern writers are aware that the welfare of individuals depends on limitation of individual claims in order to assure the good of all. The difference is again largely one of aspects: both are found in classical theory. There is, of course, a change of emphasis from the "rights of governments" to the "rights of citizens." But Jefferson, as well as Hamilton, recognizes both.

The view of natural law and natural right as merely the recognition of a balance which arises in a struggle for power between government and citizen, and between man and man, as represented in the approach of Machiavelli and Hobbes, is, of course, opposed to classical theory, which adopts the Aristotelian view of man as both a rational and a social animal. But Grotius founded his theory on a social appetite, and the writings of Pufendorf and Wolff, of Locke and Rousseau, are not easily reconciled with Hobbes's doctrine of a war of all against all. The rejection of "natural law" by the nineteenth century was not a rejection merely of Hobbes's theory of human nature. Indeed the Hobbesian view of man's egoism, the nominalism with which Stanlis connects it,<sup>60</sup> the empiricist philosophy of Locke which he sees as fundamentally similar to that of Hobbes,<sup>61</sup> were all developed in the century which produced the economics of laissez faire, Darwin's *Origin of Species*, with its theory of a struggle for existence, and the new science of sociology.

57. This is surely the essence of the theory of "rights" expounded by Hart in his inaugural lecture. *Definition and Theory in Jurisprudence*, 70 LAW QUARTERLY REVIEW 37 (1954).

58. Hobbes, however, says: "Right consisteth in liberty to do, or to forbear: whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty." D'Entrèves (NATURAL LAW, p. 59) arrives at the generalization that the modern theory of natural law was not, properly speaking, a theory of law at all. It was a theory of rights. It is going far to suggest that lawyers before Hohfeld were unaware of the link between rights and duties, or lost sight of the way in which *jus* (droit subjectif) depended on *lex* (droit objectif).

59. "*Rationis ordinatio ad bonum commune.*"

60. "Historically, the foundations of Hobbes's individual 'natural rights' are to be found in nominalism." (STANLIS 17)

61. "The fundamental similarity between Locke and Hobbes is their common empirical theory of knowledge and mechanistic conception of human nature." STANLIS 21. Stanlis accepts Strauss's doctrine that "Locke deviated considerably from the traditional natural law teaching and followed the lead given by Hobbes." *Id.* at 21.

Nor is an antithesis between "reason" and "will" convincing — unless "will" be regarded as the equivalent of "arbitrium," of mere power. Reason and will were in traditional psychology parts of the "psyche," and the good will was subject to reason: indeed "practical reason" was the reason which controlled the will. Both "reason" and "will" were known to classical natural law. Moreover, an opposition between reason and will antedates the eighteenth century, and is to be found among the scholastics. The social qualities of man, according to Scotus, result from man's will having a *nisus affectionis*. Divine Law, according to Scotus, is an emanation of Divine Will. Long before Hobbes there was already the debate as to how far God's will was tied to the nature of things. Mohammedan teaching produced the doctrine that justice is what it is because God so willed it. Were He to will the reverse, this would be just.

It needs, however, no recourse to Scotus or Calvin to show that the classical natural law of reason was not a consequence of theistic doctrine. The views of our author on this subject<sup>62</sup> are surely a contradiction of the basic character of natural law, and fail to recognize the Thomistic distinction between divine law and natural law. The distinction of what is just by nature and just by convention was sufficient for Aristotle to show the existence of natural law "which bound all men" and of "various positive laws and customs" which are "the product of man's reason and will."<sup>63</sup> Yet our author appears to base the universality of natural law on the fact that "Natural Law came from God." A uniform reason in man, as was the teaching of Plato and Aristotle, or uniformity in nature, as was the teaching of the Stoics, can produce a natural law "independent of theological presuppositions."<sup>64</sup> If man's reason, or a cosmic nature, be regarded as theistic conceptions, then the difference between humanism and pantheism (*Deus sive Natura*) on the one hand, and theism on the other, is gone. St. Thomas regarded reason as a gift of God, and for him the *lex aeterna* embraced all forms of law. But he drew a clear distinction between divine law, in which God has directly revealed his wishes for their conduct to men, and natural law, where man must elaborate the rules of conduct for himself. St. Thomas set himself the task of showing that the natural law of the pagans was consistent with divine law. A belief in natural law was not inconsistent with faith in Christian doctrines; and the divine law justified and supplied a basis for belief in natural law. The divine law also served as a means of verifying the fallible working of human reason.<sup>65</sup> Nevertheless, since divine law did not provide a

62. "Natural Law came from God and bound all men." STANLIS 7. "Until the time of Hobbes the tradition of Natural Law had been essentially theistic. The natural rights introduced by Hobbes and popularized by Locke exalted man's private reason and will above any eternal and unchangeable divine law." *Id.* at 23. "Every philosopher from Aristotle to Hooker had posited as the basis of his faith in Natural Law a belief in God's being and beneficence. Grotius was the first modern to say . . . that Natural Law would be valid even if God did not exist." *Id.* at 23.

63. STANLIS 7.

64. "Grotius . . . proved that it was possible to build up a theory of laws independent of theological presuppositions." D'ENTRÈVES, NATURAL LAW 12. But he continues: "The natural law which they elaborated was entirely 'secular.' They sharply divided what the Schoolmen had taken great pains to reconcile." But reconciliation of different doctrines shows their consistency not their identity.

65. In his commentaries on Burke, Stanlis presents him as accepting my version of the

complete code of conduct, much of social life fell to be regulated by principles of natural law.

What is, perhaps, common to Hobbes and Grotius and the members of the "ideal law" school is the belief in a "mathematical" natural law, "wherein the whole body of the law was deduced by inexorable logic from eternally true first principles derived from an analysis of human reason itself."<sup>66</sup> It is this "deductive, arrogant, or naively romantic . . . doctrine of rationalism which attempted to set up detailed norms deduced from reason and valid for all men and all times,"<sup>67</sup> which is the characteristic differentiating the ideal law school from the earlier classical natural law. The derivation of rules from the classical natural law is by application to varying circumstances, and thus the classical theory is one of "nature with changing and progressive application."<sup>68</sup> It is a prescription for rule-making, not a catalogue of rules.<sup>69</sup>

There is a division among the theories of natural law which is perhaps of even greater importance than that between the classical and the "ideal" versions of natural law. They are both alike in being "normative and deontological" in their character: in prescribing what ought to be the law and not describing what is the law. Indeed it was their critics who misrepresented them as historical and empirical theories about positive law. It was to the will of the legislator and to the conscience of the citizen, and not to the judge or administrator as mere executants of positive law, that the precepts of these systems of natural law were directed. Natural law and positive law, strictly speaking, never conflicted, though they might prescribe different courses of action which could loosely be described as conflict. The legislator could violate a precept of natural law by his enactment of positive law, and by ellipsis the rule of positive law may be said to violate natural law. Stanlis speaks in this sense when he says that one of the basic

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Thomistic relationship between natural law and divine law. "Through 'right reason' and free will, even without the special grace of divine revelation, every man was capable of obeying the imperative ethical norms of the Natural Law." STANLIS 17. "When the Natural Law was perceived only by individual reason, unaided by corporate religion, there was a danger that men would construct a false antithesis between reason and faith, between works and contemplation and man and God." *Id.* at 180. This presents Burke as not merely accepting the claim of the Church to interpret divine law so as to see whether it confirms a suggested principle of natural law, but supporting the claim of the Church to say what is truly natural law within the sphere of morals as opposed to faith.

66. This is the description given by Thomas A. Cowan to Wolff's *Jus Natura* (THE AMERICAN JURISPRUDENCE READER, p. 211). He traces this "mathematical" outlook back to Descartes, and Spinoza's *Ethics More Geometrico*. Stanlis, following Strauss, favors Hobbes: "Hobbes rejected traditional law because it was not based upon infallible mathematics." (p. 25) D'Entrèves traces it to Grotius: "Mathematics . . . provides the new methodological assumption which Grotius prides himself on having introduced into the study of law." NATURAL LAW 53.

67. ROMMEN, THE NATURAL LAW 228.

68. This is preferred by Rommen (NATURAL LAW 229, n. 25) to Stammeler's "natural law with a changing content" and Renard's "natural law with a progressive content." But both Stammeler and Renard agree with the character of the process of derivation.

69. The nature of the prescription is discussed when the "principles" are further considered. Maritain reduces it to the first of St. Thomas's "first principles." "Natural Law is not a written law. Men know it with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere . . . the only practical knowledge all men have naturally and infallibly in common is that we must do good and avoid evil." Quoted in ROMMEN, THE NATURAL LAW 227, n. 18.

principles of natural law theory "until the time of Hobbes" was that "no positive law or social convention was morally valid if it violated the Natural Law."<sup>70</sup> But it is its *moral* validity which is here categorized. The rule of positive law retains its empiric character, and its validity according to its own criteria of validity, notwithstanding the "conflict" with natural law.<sup>71</sup> Thus the affirmation of the doctrine that a rule of positive law was valid notwithstanding its "violation" of natural law did not constitute a rejection of natural law. Nor is the pursuit of the study of legal history or legal sociology necessarily inconsistent with acceptance of natural law. But the assertion that "values" are to be found only within historically given systems of positive law, and are to be obtained by mere "descriptive generalization,"<sup>72</sup> without distinction between the "just" and the "unjust," is, of course, a denial of natural law, and is the basis of much of the nineteenth century reaction. The accounts of history which saw actual governments as being based on nothing but force and lawlessness and denied the reality of all else, are but extreme views of essentially the same doctrine.<sup>73</sup>

The twentieth century produced its own repudiation of natural law. The nineteenth century form of positivism was empirical or historical: the later century asserted a "logical" positivism. Hume had emphasized the "logical" distinction between the categories of "ought" and "is," and had stated the logical impossibility of establishing "ought" propositions from premises which consisted in "is" propositions. When to Hume's logic was added the doctrine that only statements capable of empirical verification were "meaningful," a new basis for the repudiation of natural law was established. A number of replies to this attack are possible. Hume left open the problem of the valid establishment of "ought" propositions, and also the problem of the exact relation between "is" and "ought" propositions.<sup>74</sup> The verification theory calls for examination of its concept of

70. STANLIS 7.

71. An important Thomistic doctrine of the moral duty of a citizen to obey "unjust" rules of positive law is often overlooked. St. Thomas says that a rule of positive law is morally binding, notwithstanding conflict with natural law, if disobedience would jeopardize the system of positive law, producing public disorder and impeding obedience to just positive laws. On the other hand, a positive law which requires disobedience to divine law is never binding on the conscience.

72. This is designedly a vague term used to avoid detailed consideration of the problem of distinguishing between, in Stammler's language, the "idea" and the "concept," between Kant's transcendental presuppositions and secondary scientific generalizations. In one sense, everything exists in nature and is nature, cancer and the Bay of Naples, the unjust and the just.

73. "Law . . . does not tell us what ought to be, but is merely an indication of how far the power, the material and psychological power, of the ruling class extends. The law indicates what the sociological situation is. This is the extreme form of materialist jurisprudence. In this view law is neither the reason nor the will: it is but the line of demarcation of the relations of social power. Therefore real force, whether physical or psychical, is of necessity the essential role of law. Law is merely what is actually enforced, not what is enforceable. Jurisprudence is an inept expression, handed down from a metaphysico-theological age, for the materialist sociology of purely experimental science that tells how the power pattern of the groups within a society stands at the moment in the struggle for the machinery of political control." ROMMEN, *THE NATURAL LAW* 127-8.

74. Hume's teaching is that no number of descriptive propositions entails a value proposition. This is admittedly so at the level of the formal argument of the analytical syllogism. It is, however, a triviality to observe that if a value concept is "logically" of a different type from empirical concepts one cannot proceed from facts to values. But the analysis

"meaningful." But one reply was to deny that there was a valid conceptual distinction between the "is" and the "ought," and, indeed, to assert that such a denial was the essence of a belief in natural law.<sup>75</sup> What results is a theory of natural law which is a theory of history, a theory which instead of reducing philosophy to history with Croce, elevates history to philosophy with Hegel. It would appear, however, that the doctrine of Fuller<sup>76</sup> is limited to the character of legal institutions. It is within them that *what ought to be* is said to have actual existence. Society without law could be conceived; but in fact law exists, and in truth "law" involves what ought to be. The institutions of society, which are usually termed "legal," cannot be accurately described in terms of mere force and power: the ordinary legal process — and, above all, the judicial process — is no mere mechanical application of authoritatively established precepts, but constantly requires reference to ideas of what ought to be law. The existence of bare power *fiats* is not, however, denied. Fuller is no Blackstonian optimist whom every prospect of the castle of law pleases, who equates all what is with what ought to be. The result appears to be that under the different terminology<sup>77</sup> of distinguishing "power" from "law," we have the older concept of distinguishing what is from what ought to be.

For Burke the word "law" signified institutions that conformed to some moral requirements: and he used the word with that signification in order to support his own theory of government. "Law and arbitrary power are at eternal hostility . . . He that would substitute will in the place of law is a public enemy to the

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of the nature of a value concept may yield a connection with "facts." See also *supra* note 53.

75. Cf. the Thomistic doctrine that it is a sin against the intellect to confuse the mathematical, the physical, and the metaphysical.

76. In the well-known passage in *THE LAW IN QUEST OF ITSELF*, Fuller says: "Natural law . . . is the view which denies the possibility of a rigid separation of the *is* and the *ought*, and which tolerates a confusion of them in legal discussion." (p. 5) It is, of course, grammatically possible that the words "in legal discussion" do not qualify the clause preceding the comma. But the other interpretation (which permits the possibility of a separation in discussion of matters other than law, e.g., in the field of logic) is also possible. It is more consistent with Fuller's examination of American Legal Realism in Lecture II of his book. Indeed the employment of the language of *is* and *ought* surely presupposes the acceptance of a *conceptual* distinction between "is" and "ought." "Is" and "ought" are conceptually outside the permitted degrees of matrimonial relations: the temporary divorce, suggested by Llewellyn and McDougal, is not possible. That which logic has put asunder no realist or naturalist can join together. See also *supra* note 53.

77. I do not wish to minimize the importance of precise terminology. The discussions about natural law are often carried on with the use of words which are at any rate, potentially ambiguous. The same word "law" is used not only for natural law and positive law, but also for the abstract concept unifying and characterizing the rules and principles of positive law, and for the particular rules themselves. The same words are used to signify the different kinds of "existence" of natural law and positive law propositions and practices. The same word, "validity," is used for both conformity to natural law and conformity to positive law. Thus confusion does sometimes arise between a theory of justice and a theory of law, between the characteristics of ideals and the characteristics of empirical phenomena. But terminological devices do not solve all problems. What are the characteristics of particular governmental situations is not decided by terminology. No doubt with proper definitions the phrases "law" and "good law" may be used to refer to the same objects. For propaganda purposes there are advantages and disadvantages in either terminology.

world."<sup>78</sup> Moreover, he did not merely assert that "law" was to be found under the British constitution, which he so often praised. On the contrary, "law" was a universal phenomenon. In his speech against Warren Hastings he denied that arbitrary power could be justified under some other "legal" system.

Let him fly where he will—from law to law—law, thank God, meets him everywhere—arbitrary power cannot secure him against law; and I would as soon have him tried on the Koran, or any other eastern code of laws, as on the common law of this kingdom.<sup>79</sup>

But he is quite aware that actual rules and institutions may not conform to what he considers to be "truly" law. He does not consider that the principles of "law," of "good rules," are to be discovered by a mere examination of the historically given rules and institutions. The principles of good government are not for him sociological generalizations. When Warren Hastings sought to justify himself by saying he acted in accordance with the standards of other Indian rulers, Burke rebutted the defense by saying:

Men . . . are to conform their practice to principles, and not to derive their principles from the wicked, corrupt, and abominable practices of any man whatever. Where is the man that ever before dared to mention the practice of all the villains, of all the notorious depredators, as his justification?<sup>80</sup>

Elsewhere he stated:

My principles enable me to form my judgment upon men and actions in history, just as they do in common life, and are not formed out of events or characters, either present or past. History is a preceptor of prudence, not of principles. The principles of true politics are those of morality enlarged.<sup>81</sup>

We cannot expect from Burke any philosophical analysis showing how the principles of morality are derived. This, nevertheless, remains the major problem for our age and, doubtless, for succeeding ages. Before, however, we examine this for ourselves, some consideration may be given to the relation between "law" and "morals" suggested by the last quotation. The reference to "morality enlarged" has a Platonic echo; justice is identical with virtue in general, the

78. 4 SPEECHES 374 (STANLIS 63).

79. *Id.* at 366 (STANLIS 64). It will be noted that Burke uses "law" in two senses: in the first place, to refer to actual rules in force, irrespective of their moral quality; in the second place, to refer to rules which are derived from reason rather than will. Ordinary language, it would appear, uses the word "law" both in the sense recommended by Hart and in the sense recommended by Fuller, in that stimulating exchange between them in the *Harvard Law Review*, Vol. 71. Insofar as "law" is used in the more morally neutral sense, men are not tempted to equate actual social institutions with good law. Insofar as "law" is used in the more morally qualified sense, men may be more ready, through doubt as to the application of the word, to inquire whether particular institutions are morally justified. Would the uniform adoption of one usage rather than another have led more Germans to resist Hitler? (Incidentally, how many people refused to call Hitler's regime one of "law"?)

80. 4 SPEECHES 357 (STANLIS 62).

81. 1 CORRESPONDENCE 331. (STANLIS 176). Stanlis uses this quotation in an argument which concludes with the statement that Burke believed "Ultimately, the acceptance of Natural Law and belief in man's capability to fulfill its ethical norms is an act of religious faith." (STANLIS 176)

justice of the state is but the justice of the individual soul enlarged, and laws are the teachers of virtue. Bentham, too, equates principles of law with those of morality: he who could assert a distinction would suggest one arithmetic for large numbers and another for small numbers.<sup>82</sup> But Bentham's "felicific calculus" required the evil attendant upon every rule of law to be taken into account, so that every rule of morality is not paralleled by a legal rule. Traditional natural law recognized the distinction asserted by Aristotle between moral rules of conduct for the individual as such, and legal rules of conduct for the individual as a citizen. Natural law was but a branch of morality, consisting in those moral principles pertaining to social life and capable of practical implementation as governmental institutions, as means of social control. Burke certainly accepted this doctrine through his concept of prudence. His recognition of the limited scope of laws as contrasted with morals is shown in these words:

Manners are of more importance than laws. Upon them, in a great measure, the laws depend. The law touches us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in.<sup>83</sup>

It is no doubt possible from an examination of Burke's writings to discover what are the various specific principles to which he subscribed as being those of morality enlarged and adapted to the processes of government. This is a task, however, which our author does not perform. His consideration of Burke's view of human nature is directed to its more general characteristics of being moral and rational, which the classical natural law assumed it to be, rather than egoistic and aggressive, as it is depicted in the accounts of Hobbes and his followers. He does not tell us how far Burke's views corresponded with St. Thomas's account of the more specific qualities of human nature on which he founded those precepts of natural law which gave effect to the logically prior principle that good was to be done and evil avoided. Nor does he examine the philosophical problems

82. Bentham, it is true, speaks not of "law" but of "politics," but he identifies politics with government and law. His own words are worth quoting in full:

Those who, for the sake of accommodation, are willing to distinguish between politics and morals, to assign utility as the principle of one, and justice as the foundation of the other announce nothing but confused ideas. The only difference between politics and morals is, that one directs the operation of governments, and the other the actions of individuals; but their object is common; it is happiness. That which is politically good cannot be morally bad, unless we suppose that the rules of authority, true for large numbers, are false for small ones. *THEORY OF LEGISLATION* 16. (transl. Hildwith)

83. *LETTERS ON A REGICIDE PEACE* 208 (STANLIS 223). The reference is to *mores*, actual practice, rather than to *mos*, ethical principle. The contrast is between custom and law rather than morals and law. But the limited scope of law is assumed as in the poet's couplet:

Of all the ills that human hearts endure

How small the part that laws can cause or cure.

It is because most theories of natural law accept the doctrine that it is concerned not with morality in general but only that part capable of institutional implementation that I would not accept Goodhart's recommendation in his valuable Hamlyn lectures that the phrase "natural law" should be replaced by "moral law." *ENGLISH LAW AND MORAL LAW* 30.



associated with Burke's assumption of a distinction between "wicked, abominable and corrupt practices" and other presumably beneficial practices.

As I have indicated before, the method of arriving at principles of natural law and the criteria for their validity form the central issue of our debate about natural law today. There are not wanting jurists who term themselves opponents of natural law, and yet are ardent critics of aspects of existing law and advocates of its reform. They do not consider their views as being no more than subjective sentiments of personal approval or disapproval. But they are not prepared to accept propositions which have been advanced as principles of natural law as correct and unchangeable. There is, indeed, a vital problem whether belief in natural law involves acceptance of specific principles as incontrovertible dogma. A belief in the existence of objective, immutable principles of the just ordering of social relations, so far from entailing a belief that some specific set of propositions represents those principles, requires examination of those propositions. However much a particular author seeks to discover objective principles and endeavors to demonstrate that he has ascertained them, he may yet be subject to human error. How is error to be minimized?

The answer of natural law theories has been the reliance on reason as opposed to emotion or will. The concept of reason, as well as the principles allegedly based on reason, must be subject to that "free and open scrutiny" which Kant said that reason required to be given to religion and law.<sup>84</sup> The merit of reason as opposed to emotion lies in its universal quality in contrast to the particularism of emotion. Reason judges one situation in relation to others, and its technique of an order of propositions serves the purpose of assuring that a comprehensive set of relations is considered. The schemes of both classical natural law and rationalist ideal law provide a *system* of principles for the evaluation of legal rules which obviate dependence on isolated and desultory invocations of sentiment. The coherence of principles and their derived propositions which evaluate particular rules, support the elimination of error from individual judgment, though they do not provide a guarantee of correspondence with some objective order. Consistency of conclusions with premises, and of premises with each other, may be demonstrated by logical reasoning, but this method is inappropriate for ultimate premises. But here, too, the superiority of "reason" may lie in its wider range. The reaction of an individual to particular circumstances unintegrated into the totality of his own personality and his reactions to other situations, and not related to the existence of other selves and their reactions, may be designated as a mere "emotional" response, as opposed to the reaction of a human self in all its aspects with full consciousness of other selves. It may be that the test of a value judgment is derived from the latter kind of reaction. It would be dogmatism to assert that it is dogmatism to accept the conclusions of a judgment "purged of

84. KANT, *CRITIQUE OF PURE REASON* Preface. The reference is to the well-known passage in the Preface to the First Edition where Kant said law would lose its claim to obedience if it were based solely on authority. The mainspring of Kant's production of his *Critiques* of reason is to subject reason itself to criticism. This is specifically stated in the Preface to the Second Edition of the *CRITIQUE OF PURE REASON*: "Our opposition is to *dogmatism* . . . the dogmatical procedure of pure reason, *without a previous criticism of its own powers.*"

prejudice." Certainly many have claimed that there are propositions which are self-evident to reason.

On the other hand, many assert that the principles which appear as self-evident statements of reason are but ideologies of a time and place. Pound has set forth as a major task of jurisprudence the elucidation of jural postulates which are but statements in ideal form of the generalizations derived from observation of the specific civilizations of the time and place. He has seen the various theories of natural law as themselves arising from the needs of time and place.<sup>85</sup> Others, though they consider the principles of natural law as not necessarily so tied to particular institutions, nevertheless consider them but as postulates having no authority or validity higher than that of subjective moral sentiment. The classical natural law, however, sought to derive its propositions from a total judgment which considered the entirety of experience. It was able to discern uniformities because it discovered that some modes of experience were closely related to life and happiness, to rich variety and harmony, while others were related to decay and misery, to monotony and discord. Its exponents felt impelled to distinguish these modes of experience as desirable and repelling, to be promoted and to be repressed. Thus they framed principles for doing good and avoiding evil. It may be that the judgment thus involved is that of "moral sentiment." But it has close parallels with that attitude of the human spirit which has so far reached its highest attainment\* in the physical sciences, the "scientific" attitude of objective truth. It may be claimed for St. Thomas that he was not only the first Whig but the first social scientist.

The physical scientist assumes that there is an objective order sustaining the multiplicity of changing phenomena in which he participates through his bodily sensations, enlarged in their operation by his created instruments and techniques. By patient consideration of experience and experiment he accepts primary principles which through further experience and experiment yield general, but less comprehensive, uniformities. In all this he uses "reason" through imaginative formulation of possibilities, logical elaboration through mathematical manipulation of consequences of those possibilities, and examination of the conformity of his "laws" to the phenomena of his experience and experiment. The laws he thus discovers and creates are but hypotheses, which remain open to falsification by new evidence or further consideration of old evidence or argument. The "applied scientist" seeking to control or exploit the natural resources of our physical environment through human effort converts the descriptive laws of the "pure scientist" into prescriptive statements. But his prescription must often take account not only of scientifically established laws but also of more empirically formed hypotheses dealing with features of the matter he handles which are still beyond the scope of the scientist. Both scientific and empiric hypotheses are complex in their nature, requiring judgment in relation to the particular situations dealt with by the applied scientist.

So, too, the natural law lawyer relies on principles of an objective order for humanity which require prudence in their conversion into more specific pre-

85. See *supra* note 51.

scriptive laws for social control. If he be a theist, he assumes that this objective order exists because it is created by God, whose Nature or Will ordains and sustains a cosmos and not a chaos. If he be a pantheist, then this objective order, extending not only through humanity but beyond it to the universe in which it is maintained, is his God. If he be an atheist, it exists because it is a heuristic necessity required by the nature of man's mind or existing because it exists. The principles of this objective order are the uniformities of man's thinking and feeling and doing that he seeks to discern. And for this purpose he employs the same "reason" of imagination and logic and observation that forms the scientific attitude. The principles which he both propounds and applies are thus hypotheses or postulates in the sense that "laws" of the physical scientist are so: they do not seek to relate to a subjective framework or to particular states, but to an objective order, universal and eternal. They are, nevertheless, conditioned by the range of experience considered, by the fallibility of the reasoning employed. The "social scientist" of today may rightly modify the doctrines of Aristotle or St. Thomas; but this is so because he employs a wider range of experience, a deeper examination of the logic of the discussion, than was available to them. In view of the infancy of the social sciences we may well hesitate before rejecting old and substituting new hypotheses. On the other hand, we may, both in the spirit of social science and natural law, prefer the "principles" of Marx or Lenin, of Pareto or Toynbee, if they also be treated as hypotheses, to be confirmed or rejected by new thinking and further experience.

The range of experience to be considered in arriving at basic principles extended in classical natural law to all aspects of man's life, though, as has been seen, their content and operation took into account the limitations required for governmental implementation. Stammler advocates that the principles for the ordering of social life are to be derived from consideration of legal institutions.<sup>86</sup> They, of course, form an important element of experience, particularly within the sphere of determination of the possibilities of implementation of social ideals by legal means. Doubtless Stammler's doctrine involves consideration of legal institutions within their social framework, for he held that law embraces all aspects of social life. Nevertheless the formulation appears narrowing, and may appear to others as legal monopoly. But restrictive practice in dealing with experience does not contradict the assumption of an objective ordering of all experience: that order appears in all parts. It *may* be discerned within legal institutions as the character of gold may be ascertained from one specimen.<sup>87</sup>

86. "The judgment concerning the objective justice of a certain legal content must not be brought in from outside, but must be derived solely from the immanent unity of the law itself. Just law must, therefore, neither be constituted outside of the content of positive law, nor must another discipline be brought in as a criterion." *THEORY OF JUSTICE* 38 (trans. Husik).

87. Cf. Holland's criticism of the term "particular jurisprudence." "It may mean: a science derived from an observation of the laws of one country only. If so, the particularity attaches, not to the science itself, which is the same science whencesoever derived, but to the source whence the materials for it are gained. A science of law might undoubtedly be constructed from a knowledge of the law of England alone, as a science of geology might be, and in great part was, constructed from an observation of the strata in England only . . . Principles of Geology elaborated from the observation of England alone hold

But restrictive practices do contradict the doctrine that postulated principles are hypotheses to be tested by every aspect of experience. Lawyers must cooperate with all other social scientists in the development of a natural law which bases itself on "social science": the latter phrase is but a noun of collection for the various social sciences. Nor should we disregard the labors of those, who, though they may disdain or not aspire to the epithet of social scientist, yet examine and describe human nature, pursuing their inquiries and proclaiming their opinions under the banner of the humanities. Foolish, also, should we be to neglect the "insights" of a Shakespeare or a Goethe, a Dostoevsky or a Dickens. The literature of the world is a great storehouse of knowledge of human nature.<sup>88</sup> Too often, however, the adherents of other disciplines have thought that they may dispense with the cooperation of lawyers, and many neglect legal philosophy. The work under review, however, is an example of the different attitude which now appears to be developing. Every lawyer concerned with the relation between law and justice is greatly indebted to our author, who has conceived it to be part of his task as a professor of English to enable us to see more truly the character of the judgments, both profound and circumspect, expressed by a philosophic statesman about the aims and achievements of law. Were all students imbued with the spirit of the author and of his hero, law would indeed be the first and noblest of the human sciences, quickening and invigorating the understanding, liberating the mind from mechanical adherence to prejudice and convention, and opening it to the wider perspectives and the higher ideals of the human spirit.

J. L. MONTROSE

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good all over the globe, in so far as the same substances and forces are everywhere present; and the principles of Jurisprudence, if arrived at entirely from English data, could be true if applied to the particular laws of any other community of human beings; assuming them to resemble in essentials the human beings who inhabit England." *JURISPRUDENCE* 10 (13th ed.).

88. Compare, however, Jerome Hall's pertinent comments to be found in his *PRINCIPLES OF CRIMINAL LAW* 564: "Literature, however suggestive, is not social science."

